WORKING PAPERS

OF THE

NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS

(Established by Congress in Public Law 89-801)

VOLUME I

Relating to
Chapters 1-13
of the
Study Draft
of a new
Federal Criminal Code

July 1970

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THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS

VOLUME I

Relating

to

Chapters 1 to 13
(Sections 101 to 1381)

of the

STUDY DRAFT

of a new

FEDERAL CRIMINAL CODE

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PREFACE

This is one of two volumes containing materials used by the National Commission on Reform of Federal Criminal Laws in drafting its Study Draft of a new Federal Criminal Code, published on June 17, 1970. These materials consist of the consultants' reports and staff memoranda which served as a basis for statutory provisions submitted to the Commission and its Advisory Committee for discussion, and, in addition, staff notes which deal with issues raised at those discussions or considered subsequently. It is tentatively planned that a third volume of Working Papers will be published containing additional materials relevant to the Commission's Final Report and, possibly, a comprehensive index to all three volumes.

The reader should remain alert to the fact that the Study Draft provisions continued to evolve after the point in time when the consultants' reports and staff memoranda were prepared; and, accordingly, the Study Draft provisions may on occasion differ markedly from the original proposals. Footnotes to the reports and memoranda preceded by asterisks call attention to the differences and otherwise update the material.

July 1, 1970

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Statement of Emanuel Celler, Chairman, The House Judiciary Committee

The National Commission on Reform of Federal Criminal Laws was established by Congress in 1966 to undertake a complete review and to recommend revision of the federal criminal laws. The legislation establishing the Commission (P.L. 89–801, 80 Stat. 1516) originated in the House Judiciary Committee (H. Rept. 1891). The membership of the Commission includes a bipartisan array of Congressmen, each of whom is also a member of the House Judiciary Committee: Robert W. Kastenmeier (D.-Wis.) [Chairman of Sub committee No. 3 on revision of the laws], Abner J. Mikva (D.-Ill.) and Richard H. Poff (R.-Va.) who was elected Vice Chairman of the Commission by his fellow Commission members. The Congress has demonstrated its confidence in the Commission by granting the Commision an additional year within which to complete its report, increasing its authorization for funding and appropriating funds for its operations to the extent of its authorization (P.L. 91–39, 93 Stat. 44). This confidence has been vindicated by the Commission's publication well in advance of its Final Report, and after numerous Commission discussion meetings, of a Study Draft of a new Federal Criminal Code.

The Commission's Working Papers to date, comprising two volumes, are herewith published by the House Judiciary Committee. The Working Papers contain comprehensive reviews of many aspects of the present law and detail the legal bases and policy foundations for the Study Draft provisions and for alternative formulations. These volumes promise to be a source of enduring value to the entire Committee membership and staff in its legislative consideration of the Commission's Final Report. I am pleased to note that the Commission has purchased copies of the Working Papers for distribution commensurate with its extensive circulation of the Study Draft and that the Superintendent of Documents has ample copies for sale. This will stimulate incisive comment upon the Study Draft provisions of which the Committee will ultimately be the beneficiary in insuring our citizens a comprehensive, rational and modern Federal criminal law.

EMANUEL CELLER,
Chairman, The House Judiciary Committee.

July 10, 1970.

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COMMENT

on

SECTIONS 101 AND 102
(Schwartz; January 2, 1968)

1. *Title; Citation (Section 101).*—This provision seeks to reflect both the requirements of the present structure of the United States Code, which is divided into separate titles dealing with particular subjects, and the desirability of a short "code" name for the criminal laws.

Title 18, like the other 49 titles of the United States Code, presently has a descriptive designation: "Crimes and Criminal Procedure." The change recommended here—"Crime and Corrections"—will be a more accurate designation, since the title will include provisions dealing with treatment of offenders. The word "crime" in the singular serves to describe both the definitions of substantive crimes and the provisions regarding criminal procedure to be included in the title. This designation preserves the alphabetical sequence of the title designations, starting with Title 7. Title 18 falls between "Copyrights" (Title 17) and "Customs Duties" (Title 19).

The short name, provided here as an optional form of citation, is common, if not universal, in State bodies of criminal law, and is always found in recent revisions.[1] For nearly 40 years in this century, from the revision in 1909 to the revision in 1948, the main body of Federal criminal law was known as the "Criminal Code." [2] The advantages of having a short name including the word "Code" are twofold: It is conducive to easy reference by laymen to whom "titles" and "sections" are a mystery, and it underscores the fact that the criminal laws are now comprehensive and integrated.

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[1] The names of some of the recent proposed and enacted revisions are as follows: "*Criminal Code*"—PROPOSED DEL. CRIM. CODE § 1 (Final Draft 1967); ILL. REV. STAT. c. 38, § 1–1 (1965); MICH. REV. CRIM. CODE § 101 (Final Draft 1967); MINN. STAT. ANN. § 609.01 (1963); WIS. STAT. ANN. § 939.01 (1958); "*Crimes Code*"—PROPOSED CRIM. CODE FOR PA. § 101 (1967); "*Penal Code*"—PROPOSED CONN. PEN. CODE § 1.00 (Comm. Rep. 1967); "*Penal Law*"—N.Y. REV. PEN. LAW § 1.00 (McKinney 1967). The full name of the Model Penal Code is "*Penal and Correctional Code.*" MODEL PENAL CODE § 1.01(1) (P.O.D. 1962).

[2] There was no provision in the Act of March 4, 1909, c. 321 (35 Stat. 1088) which revised the criminal laws, that gave it the title "*Criminal Code.*" However, that phrase was used in the margin of the authorized version published by the Government Printing Office alongside the enacting clause as well as in the index. The authorized versions of subsequent amendments also contained this designation in the margin and in the index. In the 1926 compilation of the United States Code, the semiofficial name "Criminal Code" was carried forward not only as part of the designation of Title 18 but also in the text where section numbers of the "*Criminal Code*" were set forth, as applicable, in parenthesis after the section number of Title 18, *e.g.*, § 1 (*Criminal Code*, section 1). The revision of 1909 was still being referred to as the "*Criminal Code of 1909*" when the revision of 1948 was undertaken. *See, e.g.*, H.R. REP. No. 304, 80th Cong., 1st Sess. 1 (1947) ("The starting point in this revision was the Criminal Code of 1909.").

In describing the collection of Federal laws dealing with a particular subject, however, use of the title word "Code" is presently the exception rather than the rule. This has been true at least since 1926, when the United States Code, embracing nearly all Federal laws, was compiled and divided by subject into its 50 titles with descriptive designations. Only Title 26, which contains the revenue laws is currently called a Code. Not only is Title 26 entitled "Internal Revenue Code," but also there is authorization for it to be cited as the "Internal Revenue Code." [3]

In the 1926 compilation of the United States Code, Title 18 was designated "Criminal Code and Criminal Procedure." It included the Criminal Code of 1909 as well as other criminal provisions subsequently enacted. After giving thought to the question of whether to continue the name "Criminal Code," the 1948 revisers changed the Title 18 designation to "Crimes and Criminal Procedure." According to Dr. Charles J. Zinn, Law Revision Counsel of the U.S. House of Representatives Judiciary Committee, the revisers rejected the word "Code," not only for Title 18 but also in the revision of Title 28, then known as the "Judicial Code," in order to maintain and strengthen the concept of a single Code of all Federal laws. In their view, the advantages in calling the criminal laws a "Criminal Code" or "Penal Code" applied equally to all the other titles. Calling each title a Code would undercut the notion of one United States Code. (State practice is not regarded as relevant because the States do not refer to their entire compilations of law as Codes.)

The 1948 policy has been applied in other revisions. For example, in the proposed revision of Title 35 some thought was given to naming it the "Patent Code," but ultimately this notion was rejected. Dr. Zinn reports that those who seek to maintain the 1948 policy hope that the Internal Revenue Code, for which an exception was made partly because of its 1939 enactment as a Code, will remain the only exception. In their view, violations of the Federal criminal laws should continue to be referred to only as violations of Title 18 of the United States Code, rather than as violations of the Federal Criminal or Penal Code.

It can be argued, however, that the criminal laws deserve to be bracketed with the tax laws as an exception because, in addition to their history as a Code, they are more likely to be referred to with frequency by laymen—in the news media as well as in law enforcement circles—than other bodies of Federal law.

"Criminal Code"—the name formerly used in the Federal system—was favored in most of the recent State revisions.[4] "Penal Code" or

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[3] Curiously, the Act of Aug. 16, 1954, c. 736 (68A Stat. 3) is given the heading "*Internal Revenue Title*," although the enacting clause provides, in paragraph (a)(1), that the Act may be cited as the "*Internal Revenue Code of 1954*." Reference to the year of enactment distinguishes it from the 1939 revision, which, according to paragraph (a)(2), is to be cited as the "*Internal Revenue Code of 1939*." It should be noted, however, that the Internal Revenue Code of 1954 is not positive law, so that its place as one of the Titles in the UNITED STATES CODE is only prima facie evidence of the law and there is no authority for citing it as "26 U.S.C. § —." It was enacted in such a fashion, however, that the section numbers of Title 26 are identical with those of the Code as it is embodied, as positive law, in the Statutes at Large.

[4] *See* note 1, *supra*.

"Penal and Correctional Code" might be preferred over "Criminal Code" because of the double meaning of "criminal," which embraces both the act and the offender. Other possibilities are "Crimes Code," "Crimes and Criminal Procedure Code," "Criminal Justice Code," and "Crimes, Procedure and Corrections Code."*

2. *General Purposes (Section 102).*—This section is based on statements of purpose which appear in recent and proposed penal Codes.[5] The fundamental purposes—prevention of crime and promotion of public safety—are spelled out in the opening declaration and other objectives, including protection against oppressive or arbitrary official action then are set forth in subsections (a) through (f). No single goal is given overriding importance; the section recognizes that at every stage in social control of crime, from legislation to parole of individual prisoners, wisdom calls for a balancing of the different goals. For example, discouraging the commission of a certain type of offense—that is, the goal of deterrence—might call for imposition of punishment even though the particular offender needs no confinement from the point of view of rehabilitation.

The proposed section is basically an amalgamation of the New York and Illinois provisions, which in turn drew from section 1.02 of the American Law Institute's Model Penal Code. The following comments ignore minor verbal differences among the sources cited.

The purpose of proscription of conduct which unjustifiably causes or threatens personal or public harm appears in all three of these sources.[6] It embodies the preventive philosophy of the proposed Federal Criminal Code and in addition makes it clear that not all harmful behavior is subject to the penal law. Criminal conduct must be unjustifiable and inexcusable; justifications and excuses will be spelled out in other sections of the proposed new Code. There are many sanctions besides penal law for encouraging or coercing people to behave properly. The civil law serves this purpose, in part, when it compels persons to compensate others for injuries done. Pecuniary penalties without criminal prosecution and conviction, for example, for tax frauds, serve the same purpose. License suspensions, as under motor vehicle laws, have the same function. The criminal law ought, in general, to be reserved for misbehavior which falls not merely below but substantially below norms of behavior which are generally respected in the community and which cannot be effectively policed by less onerous penalties. Because of this necessary conservation in the use of criminal sanctions, the penal law should never be regarded as drawing the definitive line between proper and improper behavior. Much that is improper is not made criminal, but left to other legal remedies and to nonlegal influences in society such as education, religion, and custom.

Subsection (a) appears in substance in the New York Revised Penal Law and in the proposed Delaware Criminal Code. In addition to

*Subsection (2) of section 101 was added after this comment was written.

[5] *E.g.*, N.Y. REV. PEN. LAW § 1.05 (McKinney 1967); ILL. REV. CRIM. CODE § 1–2 (1961); PROPOSED CRIM. CODE FOR PA. § 105 (1967).

[6] *See also* PROPOSED CONN. PEN. CODE § 1.05 (Comm. Rep. 1967); PROPOSED DEL. CRIM. CODE § 5 (Final Draft 1967); MICH. REV. CRIM. CODE § 105 (Final Draft 1967); PROPOSED CRIM. CODE FOR PA. § 105 (1967). These provisions all contain a list of purposes which are either the same, or similar to, those proposed here. Section 609.01 of the Minnesota Criminal Code of 1963 also states purposes which are, in concept, similar.

stating the goal of promoting public safety, it delineates the primary means of achieving that goal, namely deterrence,[7] rehabilitation,[8] and confinement of demonstrably dangerous offenders. This covers ground dealt with in somewhat different language in the Illinois Criminal Code, the proposed Crimes Code for Pennsylvania, and the Model Penal Code references to rehabilitation and to "public" control of persons whose conduct indicates they are disposed to commit crimes.

Subsection (b) restates the commonly listed goal of defining offenses so as to warn the public of what is punishable. The formulation here differs from that in our main sources in two minor respects. We combine two separately stated clauses dealing respectively with "fair warning" and "definition of offenses," taking the position that definition of offenses is not an ultimate goal, but a means of giving "fair warning." This is the conventional rationale of the constitutional requirement of definition to avoid invalidation on the grounds that the penal law is too vague. In addition, we posit another purpose for defining in advance both offenses and authorized punishment: "to limit official discretion in punishment." This is linked to the "principle of legality," that is, the principle that officials should have power to punish only within bounds previously defined by the legislature.[9]

Subsections (c),[10] (d)* and (e) derive from the Illinois Code, but essentially similar provisions appear in other recent and proposed Criminal Codes. Subsection (f), dealing with the Federal interest in law enforcement, is, of course, unique. This is a subject which will be discussed at length in a separate paper and constitutes a signal, with such modification as may be necessary, for whatever treatment of the matter the Commission recommends.

Statements of purpose or legislative policy are common in Federal legislation, and would be useful in the proposed Federal Criminal Code. It has a general educational value for judges, prosecutors, defense counsel and others involved in administering the law, reminding them not to be governed exclusively by one or another consideration when the legislature has declared that a group of aims expresses the total penal policy. This fosters complete and balanced exploration of every aspect of the particular case under consideration.

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[7] One court commented on the purpose of deterrence as follows: "At least one purpose of the penal law is to express a formal social condemnation of forbidden conduct, and buttress that condemnation by sanctions calculated to prevent that which is forbidden." *Sauer* v. *United States*, 241 F.2d 640, 648 (9th Cir.), *cert. denied*, 354 U.S. 940 (1957).

[8] The goal of rehabilitation was stated by the Supreme Court as follows: "Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." *Williams* v. *New York*, 337 U.S. 241, 248 (1949).

[9] *See* Extended Note A, General Purposes—Principal of Legality, for further comments on the necessity of fair warning and the principle of legality.

[10] With respect to individualization of sentences, the Supreme Court has stated as follows: "Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime [citation omitted]. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." *Williams* v. *New York*, 337 U.S. 241, 247 (1949).

*The corresponding subsection of the tentative draft used "fault" in place of "guilt." The latter has been substituted in the Study Draft as being of more familiar and settled meaning; the substitution assures that no confusion of civil and criminal tests for liability is intended.

3. *Code to be Fairly Construed; Strict Construction Rule Inapplicable.**—This section is a modification, in form only, of comparable sections found in the Criminal Codes of California, Louisiana, New York, and others.[11]

The section would repeal for the Federal system the artificial rule of "strict construction." Under this rule the court takes the narrowest possible view of the language used by Congress in a penal statute. This results occasionally in acquittal of offenders who were clearly within the letter and spirit of the law.[12] A more serious result is that Federal criminal law has been made intolerably cumbersome, as the legislative draftsman has sought to anticipate every possible narrow construction. We can make the Federal criminal law simpler and clearer if we do not have to talk an artificial language.

A strict construction rule had greater merit in former times when the main responsibility for formulating English criminal law lay in the judiciary as a matter of common law. In those circumstances legislation could be regarded as an exceptional intrusion into the main body of judge-made law. There was no systematic Code. But when the legislature has assumed responsibility for a comprehensive, integrated Criminal Code, it is not appropriate for the courts to presume that only the least possible alteration of a body of nonstatutory law was intended.[13]

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*This section has been eliminated in The Study Draft. See Staff Note, "Strict Construction Rule," *infra*.

[11] CAL. PEN. CODE § 4 (West 1957); LA. REV. STAT. § 14.3 (1950); N.Y. REV. PEN. LAW. § 5 (McKinney 1967). *See also* MODEL PENAL CODE § 1.02(3) (P.O.D. 1962); ARIZ. REV. STAT. ANN. § 1–211 (1956); PROPOSED DEL. CRIM. CODE § 6 (Final Draft 1967); MICH. REV. CRIM. CODE § 115 (Final Draft 1967); MINN. STAT. ANN. § 610.03 (1963); MONT. REV. STAT. § 94–101 (1947); NEV. REV. STAT. § 193.030 (1967); PROPOSED CRIM. CODE FOR PA. § 106 (1967); N.D. CENTURY CODE §12–01–01 (1960); S.D. COMP. LAWS § 22–1–1 (1967); UTAH CODE ANN. § 76–1–2 (1951).

[12] In *McBoyle* v. *United States*, 283 U.S. 25 (1931), the Supreme Court held that an airplane was not a motor vehicle, and one could not be prosecuted under the National Motor Vehicle Theft Act for stealing it. Writing for the Court, Mr. Justice Holmes stated: "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used." 283 U.S. at 27. For further comments on the rule of strict construction, *see* Extended Note B, Code to be Construed Fairly—Strict Construction.

[13] Dean Pound has pointed out that statutory declaration of criminal laws was the means used in the United States to avoid the possibility that a court, construing an uncodified common law, might declare acts criminal which were not clearly criminal at the time they were performed. But to make enactment of a statutory Code of criminal law effective, the statutes should be reasonably, not narrowly, interpreted. "During the whole of the last half of the nineteenth century legislation was distrusted both by jurists and by practising lawyers, and, as the substantive criminal law is chiefly in the form of statutes, the effect was not good. It was difficult to make improvements in the definition of old crimes because, no matter how carefully they were re-defined, the courts were likely to say the statute meant no more than to declare the preexisting law and hence keep to the traditional limits. When new crimes had to be defined, the tendency was to refer them to the analogy of some offense known to the common law,

Repeal of the strict construction rule is not an invitation to vague definition of offenses which leave it to the discretion of judges whether conduct should or should not be penalized. Not only must the "fair import of [the] terms" cover the alleged misbehavior; but also, under the draft, the statute must be construed so that is gives "fair warning." This is consistent with the Federal constitutional requirement and with the "principle of legality" which is the cornerstone of all nonauthoritarian penal systems. This is the principle that punishment is authorized only for conduct which has previously been proscribed.[14]

EXTENDED NOTE A

GENERAL PURPOSES—PRINCIPLE OF LEGALITY

The principle that no person can be criminally punished except by judicial process and unless the acts for which he is punished were clearly forbidden prior to the time he committed them is fundamental in American law. Article I, section 9 of the Constitution states: "No Bill of Attainder or ex post facto Law shall be passed." Further, it violates due process to punish a person for violation of penal laws which are vaguely worded. This constitutional requirement has variously been stated as follows:

> The 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. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. (*United States* v. *Harriss*, 347 U.S. 612, 617 (1954));
>
> A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. (*Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340 (1952));
>
> The language [of the statute] conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution re-

and to interpret the new legislation to that model. Thus, the relatively narrow limits of seventeenth- and eighteenth-century offenses were likely to be imposed on statutory attempts to deal with nineteenth-century criminality. The criminal law was made narrow and unresponsive to its problems by this mode of treating the only agency of improvement. The civil side of the law could and did grow by judicial decision. But almost at the outset we feared judicial development of the criminal law. The relation of the criminal law to politics, the bad experience of the first colonists with common-law misdemeanors as defined for political and religious dissenters, the over-zealous conduct of federalist judges during the rise of Jefferson's party led to a settled requirement of legislation for the definition of crimes and development of punitive justice. Yet legislation was hampered by the doctrine that it was presumably declaratory, and by the disinclination of courts and lawyers to give to penal statutes any wider application than the letter required. It was a common-law maxim of statutory interpretation that penal statutes were to be strictly construed." POUND, CRIMINAL JUSTICE IN AMERICA 143–144 (1930).

[14] *See* Extended Note A, "General Purposes—Principle of Legality."

quires no more. (*United States* v. *Petrillo*, 332 U.S. 1, 8 (1947)).

The "principle of legality" is commonly expressed by statute in code nations. France, for example, a code country par excellence, has the following provision in its Penal Code:

> No violation, no misdemeanor, no felony can be punished by punishments not provided by law prior to their commission. (ARTICLE 4, FRENCH PENAL CODE, published in AMERICAN SERIES OF FOREIGN PENAL CODES at 15 (Mueller ed. 1960)).

Repudiation of such fundamental principles of law has been a hallmark of 20th-century totalitarian regimes. Criminal Codes of the various Soviet Socialist Republics originally provided:

> If a socially dangerous act is not directly specified in the Code, the basis and limits of punishment for it shall be determined by applying the sections of the Code which specify crimes of a kind closely resembling the act.

Technically called "the application of penal clauses by analogy," the same kind of criminal provision was found in Nazi Germany. *See* GSOVSKI, REFORM OF CRIMINAL LAW IN THE SOVIET UNION (Library of Congress 1960), and GSOVSKI, THE STATUTORY CRIMINAL LAW OF GERMANY (Library of Congress 1947).

Under these schemes of law, one's present acts were always subject to the possibility that they might later be declared antisocial. There were no reasonable guides to social conduct. One lived among his countrymen in constant terror. "Comrade Ivanov . . . was shot last night, in execution of an administrative decision." KOESTLER, DARKNESS AT NOON 162 (1941). That was all one needed to know about the law.

The Nazi laws were terminated only by the defeat of Germany. But the leaders of post-Stalin Russia, those who survived their system of "law," made their own judgment of them. In 1958 a new declaration of Principles of Criminal Law expressly did away with the crimes-by-analogy doctrine and further stated: "Criminal punishment may be imposed only by a court sentence" (Sec. 3) and "no one may be declared guilty of committing a crime and be subjected to punishment except by a court sentence" (Sec. 7). GSOVSKI, REFORM OF CRIMINAL LAW IN THE SOVIET UNION, *supra*.

Leading articles and treatises discussing the principle of legality include: Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936); J. Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165 (1937); Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4 (1936); Weidenbaum, *Liberal Thought and Undefined Crimes*, 19 J. SOC. COMP. LEG. 90 (3d ser. 1937); Glaser, *Nullum Crimen Sine Lege*, 24 J. COMP. LEG & INT'L L. 29 (3d ser. 1942); GLUECK, THE NUREMBERG TRIAL AND AGGRESSIVE WAR (1946); PATON, A TEXTBOOK OF JURISPRUDENCE 372–373 (1946); HALL, GENERAL PRINCIPLES OF CRIMINAL LAW, 19–41 (1947); SOLMOND, JURISPRUDENCE 164–165 (10th ed. Williams 1947); Elliott, *Nulla Poena Sine Lege*, 1 JURID. REV. 22 (1956).

Extended Note B

Code to be construed fairly—strict construction

The rule of strict construction has ancient roots. Chief Justice Marshall stated, in *United States* v. *Wiltberger* (5 Wheat) 76, 95–96, (1820):

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. . . . The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.

Succinctly stated, the "rule" is that:

> A criminal statute must be strictly construed. Ambiguities in criminal statutes should not be resolved so as to embrace offenses not clearly within the law. The facts charged and proved must bring the defendant plainly and unmistakably within the statute. (*Farmer* v. *United States*, 128 F.2d 970, 972 (10th Cir. 1942)).

In *Farmer*, the court held that the defendant's failure to pay a liquor tax at the time the liability accrued could not be punished under a statute penalizing "willful" failure to pay the liquor tax; the defendant should have been given until the end of the month to pay it. Another example of strict statutory construction is *Prussian* v. *United States*, 282 U.S. 675 (1931), where the Court held forging the endorsement of a payee's name on a government draft does not constitute forgery of an "obligation of the United States."

But the narrow construction doctrine has not been an absolute "rule." Courts have not frustrated the application of a statute when narrow construction of its words leads to patently unreasonable results. The "rule" was early qualified.

> The object in construing penal, as well as other statutes, is to ascertain the legislative intent. . . . The words must not be narrowed to the exclusion of what the Legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. (*United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385 (1867)).

Thus though the Comptroller of the United States did not himself directly examine the records of the individual banks, he was deemed to be an "agent appointed to examine the affairs of [a] . . . bank," within the meaning of a statute forbidding the making of false reports to such an "agent." *United States* v. *Corbett*, 215 U.S. 233 (1909). Under a statute punishing one who "makes" a false record entry, a

teller was properly convicted for withholding slips which caused an improper entry to be made. *United States* v. *Giles*, 300 U.S. 41 (1937). And, though paper in possession of the defendants was not the same type of paper as used by the Treasury, its possession was forbidden under a statute proscribing possession of "similar" paper if the paper so closely resembled Treasury paper that it could be used for counterfeiting purposes. *United States* v. *Rayner*, 302 U.S. 540 (1938).

Staff Note

STRICT CONSTRUCTION RULE

The Tentative Draft contained a section which read:

> This Code shall be construed according to the fair import of its terms, to promote justice and effect the purposes stated in section 102. The rule that a penal statute is to be strictly construed does not apply to this Code.

The requirement of construction to effect the purposes stated has been retained in the opening declaration of section 102 of the Study Draft; the substance of the provisions requiring construction (a) according to the fair import of terms and (b) to promote justice has been incorporated in the restatement of the opening declaration and the objectives listed in the subsections of section 102. The purpose of the change is to make clear that arbitrary application of the strict construction rule is disavowed, while not explicitly abrogating the rule. The concerns militating against an explicit repudiation of the rule include the following: (a) it might be read to permit an improper delegation of authority to define crime to the judiciary; (b) it might be read to obviate the necessity for the sort of precision in the drafting of criminal legislation which should, particularly for a new Code, be sought; and (c) it might result in an increase in the number of undesirable and unnecessary constitutional confrontations. The desirable portions of the rule (for example, its prohibition against conviction for conduct not previously proscribed) have been retained in the restatement of section 102.

COMMENT
on
PROOF AND PRESUMPTIONS: SECTION 103
(G. Abrams, Schwartz; December 2, 1968)

1. *Introduction.*—This section sets forth the proof patterns that are warranted in the Federal criminal law. It supplies a uniform vocabulary and analytical framework for the consideration of problems likely to recur in the enactment of the new Federal Code. General guidelines are provided for employment of (a) a presumption, (b) a defense as to which the defendant has the burden of coming forward with some evidence, (c) an affirmative defense, *i.e.*, one as to which the defendant has the burden of persuasion, and (d) a prima facie case regulation. There are no comparable provisions in the existing Federal Code, although statutes deal variously with the concepts involved in connection with particular offenses.

2. *Proof Beyond Reasonable Doubt (Subsection (1)).*—This subsection imposes the normal reasonable doubt burden on the government. The burden is required by the due process clause of the U.S. Constitution [1] though the constitutional limits here involved are not unyielding. Exceptions to the reasonable doubt requirement, such as affirmative defenses [2] and presumptions,[3] have been deemed valid under certain circumstances. These are considered in the paragraphs that follow. It is recommended that, by legislative enactment, recognition be given to the importance of the reasonable doubt requirement to the just administration of the Federal criminal law. Witnesses may and often do err in their recollections; and criminal sanctions are so severe that they should not be imposed unless guilt is a near certainty.[4]

No attempt is made to define reasonable doubt even though it is probably the most influential portion of a jury charge.[5] It is so difficult

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[1] *See Leland* v. *Oregon*, 343 U.S. 790, 802, 803 (1952) (dissenting opinion); *Virgin Islands* v. *Lake*, 362 F.2d 770, 774 (3rd Cir. 1966); *Virgin Islands* v. *Torres*, 161 F. Supp. 699 (D. Vir. Is. 1958).

[2] *See Leland* v. *Oregon*, 343 U.S. 790 (1952), which involved a constitutional challenge to a defense on which the defendant had the burden of persuasion. There seems to have been little questioning of the constitutionality of a defense on which the defendant only has the burden of coming forward.

[3] The due process limitations on the use of presumptions have been set forth by the Supreme Court in several important cases. *United States* v. *Romano*, 382 U.S. 136 (1965); *United States* v. *Gainey*, 380 U.S. 63 (1965); *United States* v. *Tot*, 319 U.S. 463 (1943). For a discussion of these cases, *see* Extended Note, Presumptions and notes 64–68 and accompanying text, *infra*.

[4] *See* Goldstein, *The State and the Accused, Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960).

[5] Judge Jerome H. Frank has suggested that jurors are likely to scrutinize the reasonable doubt instruction and pay little attention to the technical definition of the crime. *See United States* v. *Farina*, 184 F. 2d 18 ((2d Cir.) (dissenting opinion), *cert. denied*, 340 U.S. 875 (1950).

to speak with assurance on the validity of a particular definition,[6] that it seemed best to leave the matter to the courts.[7]

The draft makes no specific recommendation with regard to a legal standard of sufficiency of evidence.[8] The problem is left to the courts for judicial treatment.[9] A test of sufficiency should relate to the ultimate burden of persuasion; that is, in a criminal case the evidence should support a finding of each element beyond a reasonable doubt. Most courts are in substantial accord with this view; [10] and we rely on the Supreme Court ultimately to establish the proposition for all Federal courts. This seems particularly likely since the general requirement is phrased in terms of "proof" of each element beyond a reasonable doubt.

"Element of offense" is defined to include the "forbidden conduct, required culpability, and the non-existence of excuse, justification, or other defense relating to culpability."* This definition is not based on abstract considerations. Rather, it reflects the pragmatic judgment that the prosecution, with little exception, should carry the burden of persuasion on issues relating to culpability.

No recommendation is made at this time with respect to the allocation of the burden of proof on the issues of jurisdiction, venue, and the statute of limitations.** These issues are designated elements by the Model Penal Code.[11] The procedural treatment of each will be specifically dealt with in later reports which also will discuss the

[6] *See, e.g.*, the variety of ways courts presently charge on the concept. DISTRICT OF COLUMBIA CRIMINAL JURY INSTRUCTIONS No. 8 (1966); SEVENTH CIRCUIT JUDICIAL CONFERENCE COMMITTEE ON JURY INSTRUCTIONS, JURY INSTRUCTIONS IN FEDERAL CRIMINAL CASES 37 (1965); MATHES & DEVITT, FEDERAL JURY PRACTICE AND INSTRUCTIONS 83 (1965).

[7] The Model Penal Code is in accord with this position. *See* MODEL PENAL CODE, § 1.13, Comment at 109 (Tent. Draft No. 4, 1955).

[8] The Model Penal Code takes a similar position. *See* MODEL PENAL CODE Art. 1, § 1.12(1) (P.O.D. 1962).

[9] This is not to say, however, that a test of sufficiency is unimportant. The criterion of sufficiency guides the court in the exercise of one of its principal powers over the trial. Though precision cannot be obtained under any general standard, the statement of the rule reflects substantial policy considerations. *See* Goldstein, *The State and The Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960).

[10] *See Curley* v. *United States*, 160 F. 2d 229 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947); *Isbell* v. *United States*, 227 F. 788 (8th Cir. 1915). The prime exception is the rule of the Second Circuit. That court provides that the civil test of sufficiency—whether there is substantial evidence to support the verdict—also applies in criminal cases. *United States* v *Masiello*, 235 F.2d 279 (2d Cir.), *cert. denied*, 352 U.S. 882 (1956); *United States* v. *Castro*, 228 F.2d 807 (2d Cir.), *cert. denied*, 351 U.S. 940 (1956). This standard seems improper. Society imposes the reasonable doubt burden because criminal cases differ from civil cases. The concept should be incorporated in the sufficiency test. Assumedly, there are some cases in which the evidence would support a verdict by the preponderance of the evidence but not beyond a reasonable doubt. In such a circumstance, it would be indefensible to sustain a conviction. *Compare* PROPOSED N.Y. CRIM. PROC. LAW §§ 35.10, 35.20 (1967).

*This was the formulation in the tentative draft. The provision as revised in the Study Draft expands on the concepts implicit in the tentative draft and rephrases them to comport with other Study Draft sections. Thus, for example, the addition of the phrase "attendant circumstances" makes clear that factors which, although not truly "conduct," are nevertheless required to be proved the requirement that the person bribed be a "public servant," for example, or that the espionage take place in time of war.

**The last sentence of subsection (1) was added after this comment was written. Limitation is now denominated a defense. See section 701.

[11] *See* MODEL PENAL CODE § 1.13(9)(d)–(e) (P.O.D. 1962).

substantive problems in the respective areas.[12] Analytically, the procedural treatment of these issues raises several basic problems: (a) whether the distinction between "facts that establish the criminality of the defendant's conduct and facts that satisfy procedural requirements" [13] justifies only the placing of a burden of persuasion by a preponderance of the evidence on the government; and (b) whether it is appropriate for the matters to be decided by the court rather than the jury.[14]

The Supreme Court has emphasized the significance of the presumption of innocence in assuring a defendant a fair trial.[15] The draft

[12] The cases are divided on the question of what burden the government should carry with respect to venue. In several circuits venue need only be proved by a preponderance of the evidence. *Hill* v. *United States*, 285 F.2d 754 (9th Cir. 1960), *cert. denied* 365 U.S. 873 (1961); *Holdridge* v. *United States*, 282 F.2d 302 (8th Cir. 1960); *Dean* v. *United States*, 246 F.2d 335 (8th Cir. 1957). On the other hand, several courts have stated that venue must be proved in the same manner as any other material allegation of the indictment. *United States* v. *Budge*, 359 F.2d 732 (7th Cir. 1966); *United States* v. *Provoo*, 215 F.2d 531 (2d Cir. 1954).

Generally, the government has been required to prove jurisdiction beyond a reasonable doubt. See *generally* SEVENTH CIRCUIT JUDICIAL CONFERENCE, *supra* note 6 (1945); MATHES & DEVITT, FEDERAL JURY PRACTICE AND INSTRUCTIONS (1965). Jurisdiction has been defined statutorily as part of the crime; and, indeed, questions of culpability and jurisdiction have often been interrelated. *E.g.*, 18 U.S.C. § 1341. It is contemplated that the proposed new Code will take a different approach to jurisdictional bases. *See* Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW AND CONTEMP. PROB. 64, 80 (1948).

Under existing law, the burden of proof beyond a reasonable doubt has been placed on the prosecution with respect to the issue of the statute of limitations. *See United States* v. *Borelli*, 336 F.2d 376, 385 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965). Some of the courts have talked in terms of "burden of proof" but, assumedly, this means beyond a reasonable doubt. *See Az Din* v. *United States*, 232 F.2d 283 (9th Cir.), *cert. denied*, 352 U.S. 827 (1956); *United States* v. *Dierker*, 164 F. Supp. 304 (W.D. Pa. 1958). In *Az Din*, *supra*, the court spoke in terms of burden of proof, but relied on *Buhler* v. *United States*, 33 F.2d 382, 385 (9th Cir. 1929), in which the statement of the government's burden explicitly included the reasonable doubt requirement. *Compare United States* v. *Haromic*, 125 F. Supp. 128 (W.D. Pa. 1954).

[13] MODEL PENAL CODE § 1.13, Comment (Tent. Draft No. 4, 1955).

[14] Generally, these questions have been resolved as part of the general issue. *United States* v. *Borelli*, 336 F.2d 376, 385 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965) (statute of limitations); *Weaver* v. *United States*, 298 F.2d 496 (5th Cir. 1962) (venue); *Dean* v. *United States*, 246 F.2d 335 (8th Cir. 1957) (venue). However, since venue, jurisdiction, and the statute of limitations relate only to whether the court can hear the case and not to criminality, it may be argued that these questions are appropriately for the court.

[15] In *Deutch* v. *United States*, 367 U.S. 456, 471 (1961), the Supreme 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).

The significance of the presumption is also demonstrated by the variety of situations in which it has been invoked to protect a defendant. A trial judge's order that others refrain from calling the defendant "Mr." as other witnesses were addressed was adjudged a violation of the presumption. *Armstead* v. *United States*, 347 F.2d 806 (D.C. Cir. 1965) (supervisory opinion). Similarly, a trial judge's personal knowledge of the defendant's extensive moonshining activities dictated the assignment of another trial judge at a retrial so that the defendant could get the full benefit of his presumption of innocence. *United States* v. *Campbell*, 316 F.2d 7 (4th Cir. 1963). In discussing allocation of burdens on a particular issue, one court has held that a burden may not be shifted to the

continues that emphasis. It also makes several recommendations to clarify the concept, to extend it to the entire criminal proceeding, to educate the courts to the importance of the "presumption" and to encourage and define jury charges in the area.

The word "assumed" is substituted for the word "presumed." This is done because the "presumption of innocence" is not a presumption as the term is commonly used. The inference that the concept suggests—people charged with crime are more likely to be innocent than not—does not accord with the actual facts.[16] This recommendation is in agreement with the Model Penal Code.[17]

The word "accused" is substituted for "defendant." The purpose of the recommendation is to insure that the accused receives full benefit of assumed innocence through all stages of the proceedings. Though the application of the concept has not been considered extensively in relation to pretrial and preindictment situations, available existing law supports the proposal. On motions for discovery, the prosecution frequently has argued that the defendant is not entitled to information because it is already within his knowledge and control. This argument, it has been held, is contrary to the presumption of innocence.[18] Similarly, the Supreme Court has suggested that unless the right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.[19]

The clause "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" is recommended in order to educate courts and others to the major significance of the concept and to define jury instructions in this area. Standard jury instructions use less detailed language in explaining the presumption of innocence.[20] It is believed that a charge along the lines of the proposal is more likely to dispel the cloud of suspicion hanging over the accused, to dispel the jurors' notion that where there is smoke there is fire.[21]

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defendant if it involves undue hardship and thus jeopardizes the presumption of innocence. *Communist Party* v. *United States*, 331 F.2d 807 (D.C. Cir.), *cert. denied*, 377 U.S. 968 (1964).

[16] *See* McCORMICK, EVIDENCE 647–648 (1954).

[17] The Model Penal Code provides "In the absence of . . . proof [beyond a reasonable doubt], the innocence of the defendant is assumed." MODEL PENAL CODE § 1.12(1) (P.O.D. 1962). *Accord*, PROPOSED CRIM. CODE FOR PA. § 1.14(a) (1967).

[18] *E.g.*, *United States* v. *Smith*, 16 F.R.D. 372 (W.D. Mo. 1954).

[19] *Stack* v. *Boyle*, 342 U.S. 1 (1951).

[20] A typical jury charge is as follows: "Every defendant in a criminal case is presumed to be innocent. This presumption of innocence remains with the defendant throughout the trial unless and until he is proven guilty beyond a reasonable doubt." CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA No. 8 (1966). *Compare* MATHES & DEVITT, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 8.01 (1965).

Some trial judges, in explaining the presumption, have admonished the jury that it is not a provision to protect the guilty and help the guilty escape punishment. Such a charge has been uniformly held to constitute error. *Reynolds* v. *United States*, 238 F.2d 460 (9th Cir. 1956); *Gamūa* v. *United States*, 146 F.2d 372 (5th Cir. 1944). *But see United States* v. *Farina*, 184 F.2d 18 (2d Cir.), *cert. denied*, 340 U.S. 875 (1950). These courts reason that the presumption is intended to protect innocent and guilty alike from being convicted on insufficient evidence.

[21] This is the essential value of the presumption of innocence: to direct the jury to decide the case solely on the evidence. *See* 9 WIGMORE, EVIDENCE § 2511 at 407 (3d ed. 1940). At one time, the Supreme Court held that the presumption of innocence was evidence from which the jury could find a reasonable doubt. *Coffin*

3. *Defenses (Subsection (2)).*—Subsection (2) provides for the establishment of defenses. This designation means that, as to a particular issue, the burden of raising it is shifted to the defendant; but that once the issue is raised, the burden of persuasion beyond a reasonable doubt is on the prosecution. It is contemplated that most matters of excuse and justification will be designated defenses; occasionally, however, the burden of persuasion will be shifted to the defendant as provided in subsection (3).

The term "affirmative defense" could be used, rather than the word "defense," [22] to refer to defenses as to which the defendant has the burden of coming forward. This would have the advantage of suggesting that generally the issue is not to be considered until it is affirmatively raised; it would also distinguish the type of defense contemplated from the term "defense" as it is commonly used with respect to such matters as alibi,[23] which raises analytical problems that differ from those covered by the proposed subsection. To the extent that the term "affirmative defense" implies that a burden greater than that of merely raising an issue is shifted to the defendant, however, it would be confusing to apply it to the type of defense contemplated. In addition, it would be cumbersome as a matter of drafting to use a term such as "defense to be proved by a preponderance of the evidence" each time that type of defense is referred to. Hence the term "affirmative defense" is used to refer to defenses as to which the burden of persuasion is cast upon the defendant (subsection (3)).

Under subsection (2) a defense may be raised by "evidence sufficient to raise a reasonable doubt on the issue." The phrase is used to give guidance to the courts as to the amount of evidence (government's [24] or defendant's) required to raise a defense. As a general standard, it conveys the idea that the amount required for raising the issue is related to the prosecution's ultimate burden of persuasion. In this respect, the draft differs from existing law. For example, the Federal courts have used the following standards in deciding whether a defense has been raised: evidence that "fairly" raises the issue; [25] slight evidence; [26] and some evidence but more than a mere scintilla.[27] It is believed that the proposed standard states the true consideration and is therefore preferable to the formulations employed by the courts.[28]

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v. *United States*, 156 U.S. 432, 460 (1895). Subsequently, the *Coffin* case was overruled. *Holt* v. *United States*, 218 U.S. 245 (1910); *Agnew* v. *United States*, 165 U.S. 36 (1897). The Court reasoned that the presumption was only a caution to consider the case solely on the evidence. The lower courts have followed *Holt* and *Agnew*. *Harrell* v. *United States*, 220 F.2d 516 (5th Cir. 1955); *United States* v. *Nimerick*, 118 F.2d 464 (2d Cir.), *cert. denied*, 313 U.S. 592 (1941).

[22] *Compare* N.Y. REV. PEN. LAW § 25.00 (McKinney 1967); PROPOSED CRIM. CODE FOR PA. § 114(a)(1) (1967).

[23] An alibi "defense" is nothing more than a denial of the crime by reason of being elsewhere when it was committed. *See Stump v. Bennett*, 398 F.2d 111 (8th Cir.), *cert. denied*, 393 U.S. 1001 (1968) (shift of burden of persuasion to the defendant on the issue violates the due process clause).

[24] Defense may enter the case through the government's evidence. This occurs frequently in practice.

[25] *See Notaro* v. *United States*, 363 F.2d 169 (9th Cir. 1966).

[26] *See Howard* v. *United States*, 232 F.2d 274 (5th Cir. 1956).

[27] *See Kadis* v. *United States*, 373 F.2d 370 (1st Cir. 1967).

[28] *See* MODEL PENAL CODE, § 1.13, Comment, at 109 (Tent. Draft No. 4, 1955). The Model Penal Code reflects the view that evidence sufficient to raise a reasonable doubt should be all that is required, leaving it to the courts to develop the

The defense is a modification of the proof beyond a reasonable doubt requirement. Under existing law such issues as self defense [29] (justification) and duress [30] have been treated as matters of defense.[31] It is believed that such allocations of proof are valid; and it is contemplated that they will be continued by the proposed Code.

To state that matters of excuse and justification will be designated defenses does not solve all difficulties. The remaining problem is to distinguish fairly between issues that should be part of the statutory definition of the crime and defenses of excuse and/or justification. Here there is no clear automatic line; all of these issues involve culpability. One factor frequently cited in support of shifting the burden of adducing evidence to the defendant is the difficulty of the prosecution proving a negative.[32] But, this contention is not sound. Often, the prosecution proves a negative as part of a statutory crime and encounters no problems.[33] From time to time the courts have suggested that if a proviso or exception is part of the clause defining the crime, then the prosecution must negate the matter in its case-in-chief. But, if the exception is distinctive of the defining clause, the "burden of proof" is on the defendant to bring himself within the exception.[34] This grammatical method fails to identify the true reasons for allocating a burden to the defendant.

The initial burden is allocated to the prosecution because of the belief that the defendant should not have to lift a hand until the government has produced solid evidence of the alleged crime.[35] Some issues are then treated as matters of excuse and justification. Such a decision depends on the following factors:

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rule. *Id.* However, the wide variety of standards presently used by the courts suggests the need for guidance.

[29] *Frank* v. *United States*, 42 F.2d 623 (9th Cir. 1930).

[30] *See Johnson* v. *United States*. 291 F.2d 150 (8th Cir.), *cert. denied*, 368 U.S. 880 (1961).

[31] *See generally* McCORMACK. EVIDENCE 683–685 (1954) ; 9 WIGMORE, EVIDENCE § 2512 (3d ed. 1940).

[32] *See United States* v. *Fleischman*, 339 U.S. 349, 360–363 (1950) ; *Sauvain* v. *United States*, 31 F.2d 732 (8th Cir. 1929).

[33] Consider, for example, the frequent prosecutions for failure to file an income tax return. *See* 26 U.S.C. § 7203.

[34] This was suggested by the Supreme Court in the 19th century. *United States* v. *Britton*, 107 U.S. 655 (1883) ; *United States* v. *Cook*, 84 U.S. (17 Wall.) 168 (1872). Three Circuits have followed this approach. *United States* v. *Holmes*, 187 F.2d 222 (7th Cir.), *cert. denied*, 341 U.S. 948 (1951) ; 7 *Fifths Old Grand-Dad Whiskey* v. *United States*, 158 F.2d 34 (10th Cir. 1946), *cert. denied*, 330 U.S. 828 (1947) ; *United States* v. *Krepper*, 159 F.2d 958 (3d Cir. 1946), *cert. denied*, 330 U.S. 824 (1947). Several courts have modified the rule to the extent of stating that the defendant only has the burden of coming forward with respect to the issue. *United States* v. *Fabrizio*, 193 F. Supp. 446 (D. Del. 1961) ; *United States* v. *Alaimo*, 191 F. Supp. 625 (M.D. Pa. 1961), *aff'd*, 297 F.2d 604 (3d Cir. 1961), *cert. denied*, 369 U.S. 817 (1962). The D.C. Circuit has rejected the technique; the court has suggested that the same criteria for allocating burdens generally apply to statutory exceptions and provisos. *Williams* v. *United States*, 138 F.2d 81 (D.C. Cir. 1943). *See Peckham* v. *United States*, 210 F.2d 693 (D.C. Cir. 1953) (following *Williams*), *cert. denied*, 350 U.S. 912 (1955). In *Williams*, the court established two tests for whether an exception should be treated as a matter of justification: (1) is the act in itself, without the exception, ordinarily dangerous or one which involves moral turpitude; if so then the defendant should justify; and (2) is the evidence peculiarly accesible to the defendant.

[35] This is a corollary of the reasonable doubt requirement and the presumption of innocence.

(a) *The need to narrow issues.*—If it were the prosecutor's burden to negate all possibly relevant issues in its case-in-chief, trials would become unwieldy and inefficient. This might, in turn, severely hamper enforcement of the criminal law.

(b) *Peculiar accessibility of evidence to the defendant.*—This would seem to be a dominant factor.[36] It would be indefensible to shift a burden to the defendant if he did not have access to the evidence. It would be highly questionable to make such a shift if the evidence were equally available to the parties as generally the prosecution has highly superior resources to find and produce evidence.

(c) *Probabilities of the factual basis for the defense.*—In some situations the defendant claims that he is in a highly uncommon category; for example, that he was legally insane [37] at the time of the offense or that he held an unreasonable belief in justifying circumstances [38] (excuse). The factual improbability of a contention offers some basis for shifting a burden to the defendant on the issue.

4. *Affirmative Defenses; Burden of Persuasion on the Defendant (Subsection (3)).*—This subsection establishes as affirmative defenses, defenses as to which the defendant has the burden of persuasion by a preponderance of the evidence, as distinguished from defenses as to which the burden of raising the issue is shifted to the defendant but the burden of proof beyond a reasonable doubt remains with the prosecution. The recommendation finds support in the Model Penal Code,[39] the New York Revised Penal Law [40] and several proposed State statutes.[41]

Rarely will the burden of persuasion be allocated to the defendant. There is one type of case in which this action seems appropriate. Such a proof allocation may provide an effective means of reconciling divergent views on substantive issues that may arise in areas in which Congress may make or has made acts criminal on the basis of strict liability.

For example, proposed section 1648 (1) places the burden of proof by a preponderance of the evidence on a defendant who claims he reasonably believed that a sexually abused child was over the age of consent. This is a reconciliation of two views: (a) for the protection of minor children, sexual abuse offenses should be a matter of strict liability and (b) given the physical maturity of many teenagers it is unduly harsh to hold a defendant criminally liable for all consensual sexual relations with minors. It is also contemplated that the affirmative defense may be used appropriately in the narcotics area. For ex-

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[36] This was emphasized by the Supreme Court in *Morrison* v. *California*, 291 U.S. 82 (1934), and has been frequently cited with approval. *E.g.*, *United States* v. *Fleischman*, 339 U.S. 349 (1950).

[37] *See Davis* v. *United States*, 160 U.S. 469 (1895).

[38] *See* proposed section 609 of the Code, in chapter 6.

[39] The Model Penal Code provides that the reasonable doubt requirement does not "apply to any defense which the Code or another statute plainly requires the defendant to prove by a preponderance of evidence." MODEL PENAL CODE § 1.12 (2) (b) (P.O.D. 1962).

[40] The New York Revised Penal Law provides "When a defense declared by statute to be an 'affirmative defense' is raised at trial, the defendant has the burden of establishing such defense by a preponderance of the evidence." N.Y. REV. PEN. LAW § 25.00(2) (McKinney 1967).

[41] *See* PROPOSED DEL. CRIM. CODE § 203 (Final Draft 1967), PROPOSED REV. CRIM. CODE FOR PA. § 114(a)(2) (1967). *But see* MICH. REV. CRIM. CODE § 645 (Final Draft 1967).

ample, some legislators may oppose making possession of narcotics an offense because it is believed the user of drugs should not be treated as a criminal. However, others might argue that it is necessary to make possession a crime in order to prosecute effectively narcotic drug sellers. One fair compromise might be to make possession of drugs a crime but afford the defendant the affirmative defense that he shall be acquitted if he proves by a preponderance of the evidence that he was in possession of drugs for his own consumption.

There is some precedent in existing Federal law for allocating the burden of persuasion to the defendant. Section 79z–3 of Title 15, which deals with public utility holding companies, and section 80a–48 of Title 15, which deals with investment companies, each make willful violations of their subchapters or any rule, regulation or order thereunder criminal, but provide that "no person shall be convicted . . . for the violation of any rule, regulation or order if he proves that he had no actual knowledge of such rule, regulation, or order." These provisions seem to rest on the following considerations:

(a) In this type of regulatory area, it would be unfair to treat a defendant as a criminal if he has no actual knowledge of the criminality of his conduct.

(b) It would be very difficult for the prosecution to prove knowledge in its case-in-chief since the evidence relevant to the issue is especially within the control of the defendant.[42]

Allocation of the burden of persuasion to the defendant raises substantial constitutional questions. The courts have dealt neither extensively with the problem in general nor specifically with reference to the variety of cases in which we intend to use this kind of proof device. *Leland* v. *Oregon*[43] held that a State statute that required the defendant to establish insanity beyond a reasonable doubt by the vote of 10 jurors did not violate ordered liberty concepts. But the precedent is hardly on firm theoretical ground, as the ordered liberty approach seems to have fallen by the wayside.[44] However, *Leland* does

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[42] Several other statutes seem to shift the burden of persuasion to the defendant. Both section 188m (relating to the importation of opium) and section 516 (dealing with the manufacture of narcotic drugs) of Title 21 provide that it is not necessary to negative any relevant statutory exemptions in an indictment and that "the burden of proof of any such exemption shall be upon the person claiming its benefit." It is doubtful that a shifting of the burden of persuasion in all the cases to which the above sections apply is warranted. Allocation of the burden of persuasion should be made on a very specific, issue by issue basis.

Section 7208(4)(B) of Title 26 makes it unlawful to knowingly and without lawful excuse possess any washed, restored, or altered stamp which has been removed from any vellum, parchment, paper, package, *etc.* and provides that the burden of proof of such excuse is on the accused. Chapter 8 of Title 7 regulates the interstate transportation and importation of nursery products. Certain sections make carriers of such products liable to criminal penalties. But section 163 provides that no common carrier shall be deemed to violate the pertinent provisions "on proof that such carrier did not knowingly receive for transportation or transport" such nursery stock.

[43] 343 U.S. 790 (1952).

[44] *See generally* Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957).

suggest that the constitutionality of a defense on which the defendant has the burden of persuasion is measured under a broad, due process standard. Thus, the ultimate question is whether the allocation of proof is reasonable. In an appropriate case it should be possible to make a strong showing of legality. If such an affirmative defense is an integral part of a reasonable legislative solution to a difficult problem, and the evidence on the matter is particularly within the control of the defendant, it is submitted that due process standards are met.[45]

5. *Presumptions (Subsection (4)).*[46]—The term "presumption" has been used in three main ways in the Federal criminal law. In one class of cases, "presumptions" have been used solely as a means of allocating a burden to the defendant on a particular issue. This is an inappropriate use of the concept because burdens can be allocated directly without invoking a presumption.[47] In the proposed new Code, if it is decided that the defendant should have a burden on a matter, the shift will be made explicitly by designating the issue a defense or an affirmative defense, or by plainly providing that the defendant has the burden of persuasion. Therefore, for example, the existing presumption of sanity will be replaced by the Code's specific allocation of proof on the defense of insanity.[48] Similarly, the existing presumption of continuance of conspiracy will be replaced by the Code's explicit allocation of proof on the defense of withdrawal.[49]

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[45] By way of comparison, it should be noted that the main, if not sole, test of legality of a presumption is its "rational connection." *See* Extended Note, Presumptions, and notes 64–68 and accompanying text, *infra*.

[46] In these comments, and those dealing with prima facie regulations, particular statutes are cited as examples for purposes of analysis. Existing law is not exhaustively discussed. However, attached to this report is a comprehensive chart (Appendix) listing statutory presumptions, prima facie regulations and other similar procedural devices.

[47] *See* MODEL PENAL CODE § 1.13, Comment at 115 (Tent. Draft No. 4, 1955). *Accord*, PROPOSED DEL. CRIM. CODE § 203 (Final Draft 1967); PROPOSE CRIM. CODE FOR PA. § 114(2) (1967).

[48] In *Davis* v. *United States*, 160 U.S. 469, 486–487 (1895), the Supreme Court stated:

> [T]he law presumes that everyone charged with a crime is sane, and thus supplies in the first instance the required proof of capacity to commit crime. . . . [T]he accused is bound to produce some evidence that will impair or weaken the force of the legal presumption in favor of sanity. But to hold that such presumption must absolutely control the jury until it is overthrown or impaired by evidence sufficient to establish the fact of insanity beyond all reasonable doubt or to the reasonable satisfaction of the jury, is in effect to require him to establish his innocence, by proving that he is not guilty of the crime charged.

The above-quoted statement involves nothing more than an allocation of the burden of coming forward to the defendant on the issue of insanity. The implied rationale is that as a matter of probabilities it is unlikely that a defendant is legally insane.

[49] Frequently, a defendant claims by virtue of a cessation of his activity that he has withdrawn from the conspiracy. Here, courts have referred to the presumption of continuance. *See United States* v. *Borelli*, 336 F.2d 376 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965). Logically, this reference should be nothing more than another way of saying that the defendant has the burden

In another class of cases, a presumption is employed to accomplish a substantive result that could be achieved directly by a properly drafted statute. This too is an improper use of the concept. Thus, the Code will not establish conclusive presumptions which are nothing more than substantive rules of law.[50] The current kidnapping presumption that interstate transportation is rebuttably established by failure to release a victim within 24 hours after he has been kidnapped can be replaced by a statute to the effect that the Federal Bureau of Investigation shall aid local authorities in the investigation of kidnapping cases. Similarly, a prima facie case provision (discussed in the comments to subsection (5)) should not be used as a substitute for a substantive statute. For example, section 659 of Title 18 provides that removal of goods from an interstate pipeline is prima facie evidence of the interstate character of the goods. The intent of Congress here appears to be to bring all robberies from interstate pipelines within Federal jurisdiction. Rather than accomplishing this result through the use of a proof device, Congress could simply make any theft from such a pipeline a Federal crime.

Finally, in a very broad class of cases, "presumption" has been employed to refer to proof of one fact that is an element of a crime, the presumed fact, by establishing another fact, the basic fact. It is in this sense that the Code adopts the concept.[51] But, it is contemplated that a presumption will be enacted only in a specific type of case. Use of the procedural device is appropriate when Congress on the basis of special expertise and amassed empirical evidence [52] decides that certain facts

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of coming forward on the issue of withdrawal and that ordinarily cessation of activity is insufficient to raise the defenses. For, a defendant in a conspiracy can be held only for that part of the conspiracy to which he agrees and assents. The statute of limitations runs from the time when the agreement terminates. *Hyde* v. *United States*, 225 U.S. 347 (1912); *United States* v. *Borelli*, 336 F.2d 376 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965). When that occurs depends on an analysis of the agreement, and not on a theoretical presumption. If the defendant claims he withdrew before the termination date contemplated by the agreement, then it may be sound to place the burden of adducing evidence on the defendant.

[50] Consider, for example, section 77b (3) of Title 15 (Securities Act of 1933, as amended). It provides that "[A]ny security given or delivered with, or as a bonus on account of, any purchase of securities or other thing" is "conclusively presumed to constitute a part of the subject of such purchase and to have been offered and sold for value." It could be redrafted to provide simply that any security delivered with or on account of any purchase constitutes part of the purchase and is deemed to have been offered and sold for value.

[51] *See generally*, McCORMICK, EVIDENCE 639–72 (1954); Note, *Statutory Criminal Presumptions: Judicial Sleight of Hand*, 53 VA. L. REV. 702 (1967).

[52] In *United States* v. *Gainey*, 380 U.S. 63 (1965), the Court suggested that in empirical matters "not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." 380 U.S. at 67. However, the Court still reviews the constitutionality of the presumption under the rational connection test. *Compare United States* v. *Gainey*, 380 U.S. 63 (1965), *with United States* v. *Romano*, 382 U.S. 136 (1965).

are strong evidence of a crime and that these facts should be given proof significance to assist the government in prosecuting the crime.

The proposed presumption has two procedural consequences: (a) submission of the case to the jury "unless the evidence as a whole clearly negatives the presumed fact" and (b) a required instruction to the jury. These effects are necessary to accomplish the goals of enacting the procedural device: Aiding the prosecution in important areas of law enforcement basically by easing the government's burden in proving an element not easily susceptible of proof [53] or by easing the government's burden when relevant evidence is within the control of the defendant.[54] The important and distinctive feature of the presumption is the mandatory jury charge.[55] Unless the jurors are told of the value of the basic facts, which by hypothesis is not readily apparent to them, they may acquit when conviction is justified. Cases in which the inferences should be apparent to the jury, but in which Congress desires to assist the prosecution, are suitable only for prima facie case regulation (*see* comments to subsection (5)).

Some existing Federal statutes use the presumption concept correctly, some use it incorrectly, and some fail to employ the device when its use is appropriate. These cases are worthy of consideration.

An example of the type of statute contemplated by the subsection is Title 26, section 5601(b)(2). It provides that presence at the site of an illegal still unless the defendant explains satisfactorily to the jury [56] is sufficient evidence to authorize the conviction for unlawfully engaging [57] in the operation of the still. The presumption was enacted because the government was encountering difficulty in proving this type of case. It rests on accumulated empirical evidence that illegal stills operate in secrecy; only employees are allowed on the premises. The statute aids the government since the explanation of why the defendant was on the premises is within his control.

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[53] *See, e.g.*, Sandler, *The Statutory Presumption in Federal Narcotics Prosecutions*, 57 J. CRIM. L. & P. S. 7 (1966).

[54] Consider, for example, Title 26, section 7491. If a defendant has complied with the narcotic laws, it should be quite easy to produce the required order forms. It might be very costly and time consuming for the prosecution to search official files for the order forms.

[55] By comparison, most Federal statutes do not explicitly require a jury instruction. *See* Appendix, *infra*.

[56] The language of the presumption, though not explicitly, seems to require a jury instruction; and it apparently is the practice to make one. *See United States* v. *Gainey*, 380 U.S. 63 (1965). The narcotics presumption, which is phrased in the same manner as section 5601(b)(2), is, according to this writer's experience, invariably explained to the jury.

[57] 26 U.S.C. § 5601(a)(4). The crime described is a very broad one by reason of 18 U.S.C. § 2, the aiding and abetting provision.

In section 892 of Title 18, Congress enacted a prima facie case provision when it would seem that a presumption was warranted and necessary. Section 892 provides in part that a prima facie case[58] of extortionate extension of credit is established by showing that the loan was usurious and at the time of its extension the debtor reasonably believed that the creditor had the reputation for using extortionate means to collect. The enactment appears to be based on expert knowledge of the loan sharking rackets. Its intent is to aid the prosecution in establishing the extortion which is difficult to prove except in the unlikely situation where the defendant expressly makes a threat. Yet, unless the inference is explained to the jury, the statute may not have its intended effect.

The common law rule that possession of recently stolen goods is prima facie evidence of knowledge that the goods were stolen covers the type of case that seems suitable for a presumption.[59] It is possible that the application of the rule should be limited by the type of goods involved,[60] the class of people from whom the goods are received,[61] and the class of people who receive the goods.[62] Nevertheless, what is necessary to the development of a fair rule is a study of methods of distribution of stolen goods. Enactment of such a rule would aid the government in meeting its difficult burden of proving state of mind.

Examples of unsuitable application of the concept are the narcotics and marihuana presumptions.[63] In part, it provides that possession of a narcotic drug is sufficient evidence to authorize conviction for the crimes of receipt, sale, concealment, purchase, or facilitating the transportation, sale, or concealment unless the defendant explains to the satisfaction of the jury. For the most part, the inference of crimes arising from possession of drugs is clear, apparent, and uncontroversial. Delivery of an instruction to the jury is unnecessary and unwise. If the instruction exerts influence on the jury, as one guesses it does, the presumption effectively makes possession the crime. This was not the intent of Congress.

If properly used, we anticipate no constitutional difficulties with the proposed presumption.[64] Due process standards allow the Congress

[58] The statute neither requires nor prohibits a jury instruction.

[59] *E.g.*, *United States* v. *Anost*, 356 F.2d 413 (7th Cir. 1966); *United States* v. *Minieri*, 303 F.2d 550 (2d Cir. 1961), *cert. denied*, 371 U.S. 847 (1962). If the jury finds possession, it may still reject the inference of knowledge. *Id.* The permissive nature of the inference is emphasized by the care with which the jury is charged. It is error to instruct the jury that recent possession gives rise to a "presumption" as, according to some courts, the word carries a connotation that the jury is obliged to find knowledge if it finds recent possession. *United States* v. *Sherman*, 171 F.2d 619 (2d Cir. 1948), *cert. denied*, 337 U.S. 931 (1949). *Barfield* v. *United States*, 229 F.2d 936 (5th Cir. 1956). Similarly, it is error to charge the jury that the defendant has the burden of explaining recent possession. *United States* v. *Lefkowitz*, 284 F.2d 310 (2d Cir. 1960).

[60] *See* ARIZ. REV. STAT. ANN. § 13–621B (1969); MONT. REV. STAT. ANN. § 94–2721 (1947).

[61] California limits its recent possession presumption to when the property is received from one under 18. CAL. PEN. CODE ANN. § 496 (Deering, 1961).

[62] *See* N.Y. REV. PEN. LAW § 165.55(2) (McKinney 1967).

[63] 21 U.S.C. § 174; 26 U.S.C. § 176a.

[64] *See generally* MCCORMICK, EVIDENCE 654–662 (1954); Note, *Constitutionality of Rebuttable Statutory Presumptions*, 55 COLUM. L. REV. 527 (1955).

only to accord a presumption a procedural effect that is consonant with the presumption's natural probative value. It is contemplated, therefore, that presumptions will be enacted only when the basic facts are highly persuasive of the presumed fact. (*See* Extended Note, Presumptions, *infra*).

It has been argued that statutory presumptions are unconstitutional because by requiring submission of a case to the jury, they interfere with the trial judge's control of the case which is guaranteed by the due process clause.[65] This contention was left unanswered by the Supreme Court in *United States* v. *Gainey*.[66] However, there are substantial arguments to support the constitutionality of such a regulation. Congress has both the power to define crimes and to provide procedural rules for the courts. It does not seem to be an undue extension of these powers for Congress to state that a case is sufficient. Moreover, prior to applying a presumption, the courts normally will review its constitutionality. If it is upheld, this means the court agrees with the congressional assessment of the evidence and the statute should be applied.

It has also been contended that an instruction that permits the jury to convict on the basis of a presumption interferes with the right to a jury trial.[67] However, such a charge is tantamount to an instruction of law and/or a comment on the evidence. Enactment of such a provision would seem well within the congressional power to provide procedural rules for the courts.[68]

Under subsection (4)(a), submission of the issue of the existence of the presumed fact to the jury is warranted if the prosecution adduces "sufficient evidence" of the facts that give rise to the presumption. This formulation of the government's burden of coming forward differs from the Model Penal Code[69] which requires only "evidence." A concept of sufficiency is explicitly included in this proposal in order to educate the courts to the importance of analyzing the evidence to determine whether it will support a finding of the basic fact.

Subsection (4)(a) further provides that submission of the issue of the presumed fact to the jury is warranted "unless the evidence as a whole clearly negatives the presumed fact." This clause covers the occasional case in which the evidence so negates the existence of the presumed fact that a directed verdict is justified. The formulation is taken from the Model Penal Code.[70] The consultant prefers the

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[65] This view constituted a portion of Justice Black's dissent in *Gainey*, 380 U.S. at 76.

[66] The argument was avoided by the majority's strained construction of section 5601(b)(2). It reasoned that if presence was the only evidence in the case the statute neither required the judge to submit the case to the jury nor precluded directing a verdict, 380 U.S. at 68.

[67] *See*, 380 U.S. at 87 (Black, J. dissenting).

[68] It has been asserted that presumptions violate the privilege against self incrimination because if the defendant does not take the stand to refute the presumption his chances for acquittal are reduced. *See*, 380 U.S. at 87 (Black, J. dissenting). However, this is true of any case-in-chief introduced by the prosecution, and this is not the type of compulsion to which the privilege logically applies. *See* McCormick, Evidence 662 (1954). The contention was rejected in *Yee Hem* v. *United States*, 268 U.S. 178 (1925).

[69] *See* Model Penal Code § 1.12(5)(a) (P.O.D., 1962).

[70] *Id.*

phrase "unless the court is satisfied that the evidence as a whole clearly precludes a finding of the presumed fact beyond a reasonable doubt," because this standard takes into account the ultimate burden of persuasion.

Subsection (4)(b), the required jury instruction, is a careful reconciliation of the prosecution's and the defendant's interests. The court first charges that "the evidence as a whole must establish the presumed fact beyond a reasonable doubt." This clause directs the jury's attention to all the evidence so that the presumption is not given undue weight. In accord with existing law,[71] the jury is instructed in the language of a permissive presumption; it is free to accept or reject the legislative inference. This takes account of the constitutional right to trial by jury and the importance of the jury as an independent, viable institution in the administration of the criminal law. On the other hand, the jury is instructed that it may find the presumed fact "on the basis of the presumption alone, since the law regards the facts giving rise to the presumption as strong evidence of the fact presumed." This portion of the charge departs from existing law only in the use of the words "strong evidence," [72] and is adopted to emphasize the nature of the legislative finding and to promote the rationality of jury verdicts.[73]

6. *Prima Facie Case* (*Subsection* (5)).—There are a number of existing Federal criminal statutes that designate certain facts a prima facie case without providing for any other procedural consequence.[74] The subsection recognizes the validity of this type of proof device and establishes guidelines for its adoption in the Code.

Use of the prima facie regulation will be limited. Its enactment is appropriate in cases in which there is actual or potential judicial disagreement as to the sufficiency of a recurring factual pattern for submission to the jury. Congressional resolution of such problems is

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[71] Most statutes establish permissive inferences. *See* Appendix, *infra*.

[72] This is derived from an alternate proposal favored at one time, by the reporter for the Model Penal Code. MODEL PENAL CODE § 1.13, Comment at 116 (Tent. Draft No. 4, 1955).

The recommendation does not include the phrase "unless the defendant explains to the jury" in order to avoid self incrimination problems. Such a charge might be construed as an unlawful comment on the defendant's failure to testify: and the better practice would seem not to make such an instruction. *See United States* v. *Gainey*, 380 U.S. 63 (1965).

[73] It is important to note that the proposed presumption does not shift the burden of coming forward to the defendant. There is some support for enacting such a presumption. MODEL PENAL CODE § 1.13, Comment at 116 (Tent. Draft No. 4, 1955). However, it would seem that cases in which a burden should be shifted to the defendant are covered by defenses and affirmative defenses. Use of the presumption that shifts the burden of coming forward might be appropriate in regulatory areas. It is possible to legislate that the prosecution must prove knowledge of the pertinent regulation, but also, to provide that people working within the field are presumed to know or to be negligent in not knowing the relevant regulation. This approach was not taken because it would be essentially inconsistent with the proposed Code's view of strict liability.

[74] *See* Appendix, *infra*.

both reasonable and helpful to the prosecution.[75] Prima facie case designations will be employed only in important areas of law enforcement so that the viability of the Federal courts will not be impaired. Since they will be enacted only when the basic facts are highly probative of the questions in issue, no constitutional problems are anticipated.

As we have suggested, a prima facie regulation differs from a presumption in that the former is based on an evaluation of normal inferences without the benefit of special empirical evidence. It is for this reason that an explanation to the jury of the congressional view of the probative value of a prima facie case designation is not warranted. The foundation of our jury system is the firm belief in the ability of laymen to find truth. A deviation from the system should not be made unless there is justification. When a legislative judgment is not based on special expertise or empirical evidence, it should not be substituted for that of the juror's in the particular case.

To demonstrate exactly the anticipated use of the prima facie regulation, it is worthwhile to analyze some existing statutes. Sections 491 and 659 of Title 18 use the concept inappropriately. Section 491 provides that prior warning by authorities to a manufacturer of "slugs" that his product is being used fraudulently shows knowledge or reason to believe that the "slugs" are being so used. Section 659 states that a waybill or other shipping document that indicates origin and destination is prima facie evidence of the place from which and to which the shipment was made. The inferences involved in both of these statutes are so clearly compelled that their codification seems unecessary.

An example of a valid prima facie regulation is in Title 18, section 42(c). It provides, in part, that presence in a vessel or conveyance of a substantial ratio of dead, crippled, diseased, or starving wild animals or birds is prima facie evidence of importation under inhumane conditions. Even without special knowledge, the Congress might appropriately act in this case.[76] Because of the difficulty of defining "inhumanity," and because some judges may place undue weight on other possible causes of the events (storms, for example), there might be disagreement as to the sufficiency of evidence showing only the condition of the animals. The actual facts are likely to be within the control of the defendant.

Another Federal criminal statute[77] requires the filing of a certain report and provides that an official statement that the required report cannot be located in the files presumably establishes that the defendant failed to file. This type of case is suitable for congressional resolution through enactment of a prima facie case regulation. Even though the inference is clear, some judges might not recognize it because of the possibility that the agency involved lost the document. Moreover, if the defendant has filed, in most cases it will be quite easy for him to establish that fact.

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[75] Since a prima facie regulation warrants submission of the case to the jury, a fortiori it warrants a finding of probable cause to arrest or search as the case may be. It is believed that commissioners and judges should give these statutes weight when passing on the validity of a search or seizure.

[76] Part of the legislative decision would, of course, rest on the severity of law enforcement problems in the area.

[77] 18 U.S.C. § 2424(b).

Extended Note

PRESUMPTIONS

The rational connection test was established by the Supreme Court in *Tot* v. *United States*, 319 U.S. 463 (1943). The Court stated:

> [A] statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. (319 U.S. at 467–468.)

The *Tot* rule was approved in *United States* v. *Gainey*, 380 U.S. 63 (1965), and *United States* v. *Romano*, 382 U.S. 131 (1965). Rational connection can be analyzed only in terms of the procedural effect Congress accords a particular statute. For example, if Congress said proof of fact X will be some evidence of fact Y, but according to the judiciary fact X was not relevant to fact Y, then the statute would be unconstitutional. Similarly, if Congress declares proof of fact X to establish, prima facie, crime Y, and according to the judiciary fact X does not prima facie establish crime Y that statute too would be unconstitutional, even if fact X was probative of crime Y. This is demonstrated by the *Gainey* and *Romano* cases. In *Gainey*, the Court upheld the constitutionality of the presumption (26 U.S.C. § 5601(b)(2)) that presence of the defendant at an illegal distilling operation was sufficient evidence to authorize conviction of carrying on or being engaged in the operation. However, presence at the site of the illegal still was deemed constitutionally insufficient, in *Romano*, to authorize the conviction of possession, custody or control of an unregistered still (26 U.S.C. § 5601(b)(1)) even though it is relevant to establishing such possession, custody or control.

There are intimations in *Tot* that even if a presumption is rational it may be unconstitutional if it imposes an undue hardship on the defendant. Hardship seems to involve a situation in which the defendant cannot effectively refute the presumption. *See* Note, 53 Va. L. Rev. 702, 713–715 (1967)). This concept would be relevant in a constitutional inquiry only in a limited number of cases. If the court holds that a statutory presumption is clearly rational, there is no reason to reach the hardship question. In such a case, there is a strong chain of circumstantial evidence, be it with or without the statutory presumption. Even if the evidence tending to establish the presumed fact were more accessible to the government than the defendant, the due process clause would not prevent the prosecution from proving its case as it chooses. If, however, the presumption is only arguably rational, and it imposes a hardship on the defendant, then the latter factor might tilt the constitutional balance against the legislation.

APPENDIX

STATUTORY PRESUMPTIONS, PRIMA FACIE REGULATIONS, AND SIMILAR PROOF DEVICES

In the chart that follows are statutes that provide that proof of specified facts has a procedural effect in establishing an element of a crime. Although the chart deals mainly with laws applicable in Federal criminal prosecutions, other statutes that are relevant in such areas as forfeiture actions and court martial proceedings are also included for purposes of comparison.

The first column of the chart, headed "Statute," contains a synopsis of the statute or statutes involved. The second column—"Operative language"—is a list of the phrases Congress used to describe the procedural effect of each provision. The third column contains descriptions of each basic fact. In the final column, the inferences arising from proof of the respective basic facts are detailed. When possible, statutory language was used; however, in order to create a useful chart, it was frequently necessary to paraphrase.

There are a total of 61 provisions listed. They are applicable as follows: (1) 53 specifically apply to designated crimes; (2) eight set up rules of evidence for broad classes of crimes, embezzlement, for example; (3) one applies in a court martial proceeding and two others are part of statutes prohibitive of conduct by members of the armed services but which do not carry penalties; and (4) 18 apply in various types of forfeiture proceedings and actions by the government for fines.

With respect to laws applicable in criminal prosecutions, 28 are prima facie regulations as the term is used in this proposal. The laws do nothing more than state that proof of certain facts establishes a prima facie case; there is no required jury instruction. Congress in 10 provisions uses the following phrase (or language comparable thereto): "sufficient evidence to convict unless the defendant explains to the satisfaction of the jury." In practice, these statutes (the narcotics presumption, for example) have been explained to the jury and are similar, therefore, to the proposed presumption. Many other procedural phrases appear in these laws (such as "rebuttable presumption" and "presumed unless the contrary is shown"); but it is unclear how these various statutes have been treated by the courts.

Statute	Operative language	Basic fact	Inference
8 U.S.C. § 1284, requires persons in charge of vessels or aircraft arriving in the United States from outside the United States to detain an alien crewman until he has been inspected by an immigration officer and until a conditional landing permit has been granted such alien crewman and to deport the crewman if ordered to do so by an immigration officer. Each violation can result in a $1,000 payment to the customs officials.	Prima facie evidence	That an alien crewman did not appear upon the outgoing manifest on the vessel or aircraft on which he arrived for the United States from abroad or was not reported as a deserter.	Failure to detain or deport.
8 U.S.C. § 1321, requires every person bringing an alien to or providing a means for an alien to come to the United States to prevent the landing of such alien in the United States at a port of entry other than one designated by the Attorney General or immigration officers. Failure to comply makes the person liable for a penalty imposed by the Attorney General of $1,000 etc.	do	Alien's failure to present himself at the time and place designated by immigration officers.	Alien having landed at a time and place other than designated by the immigration officers.
10 U.S.C. § 923a, makes anyone under the jurisdiction of the Armed Forces subject to court martial for the passing, altering, etc., of checks, drafts, etc., knowing that there are insufficient funds to cover the instrument in order to procure things of value with intent to defraud or for the payment of any past due obligation or for any other purpose with intent to deceive.	do	The making, drawing, uttering, or delivering by the maker or drawer of a check, etc., payment of which is refused because of insufficient funds of the maker or drawer and failure to pay the amount due within 5 days after receiving notice.	Intent to defraud or deceive and knowledge of insufficient funds.
10[1] U.S.C. § 9836, prohibits an enlisted member of the Air Force from selling, bartering, giving, etc., equipment furnished him by the United States to any person other than a member of the Air Force or an officer of the United States, authorized to receive it (no penalty).	do	Possession of such property by a person who is not a member of the Air Force or an officer of the United States.	Violation of the section.
13 U.S.C. § 224, makes it unlawful to refuse or neglect, when requested by authorized officials, to answer completely and correctly to the best of one's knowledge, all questions relating to his business, etc., submitted in connection with a census or schedule (penalty, $500 or 60 days; $10,000 or 1 year for willful violation).	do	Under 13 U.S.C. § 241, if there is a request for information pursuant to taking the census by registered mail or telegram, than the return receipt or other receipt is prima facie evidence.	An official request in any prosecution under the section.
15 U.S.C. § 77(b), part of the Securities Act of 1933, is a definitional section. The Act may be enforced criminally (15 U.S.C. § 77yyy).	Conclusively presumed	Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing.	Constitutes a part of the subject of such purchase and to have been offered and sold for value.
15 U.S.C. § 80a-18 makes it unlawful for any registered closed-end company to issue or sell senior securities except under certain circumstances. Subsec. (g) deals with the meaning of senior securities in relation to loans. For penalties see 15 U.S.C. § 80a-48.	Presumed. Any such presumption may be rebutted by evidence.	A loan if it is repaid within 60 days and is not extended or renewed.	Presumed to be for temporary purchases; otherwise it shall be presumed not to be for temporary purposes.
15 U.S.C. § 376 requires any person who sells cigarettes for profit in interstate commerce, into a State that taxes the sale or use of such cigarettes, other than a distributor licensed or located in such State (1) to file a statement with State authorities setting forth his name, etc., and (2) file with State authorities an invoice of each shipment. (Failure to comply may be penalized under 377 by $1,000 and/or 6 months).	Presumptive evidence	If a person ships or delivers for shipment cigarettes into a State in which such person has filed a statement with the tobacco tax administration.	(1) Such cigarettes were sold for profit and (2) that the shipment was to other than a local distributor.
15 U.S.C. § 1281 makes unlawful the willful destruction of property moving in interstate or foreign commerce when transported by a commercial or contract carrier. (Penalty, $5,000 and/or 10 years).	Prima facie evidence	Waybill or a similar shipping document of property in question which indicates origin and destination.	The place from which and to which said property was moving.

[1] 10 U.S.C. § 4836 contains a similar provision with respect to the Army.

Statute	Operative language	Basic fact	Inference
16 U.S.C. § 408(k) prohibits all hunting, killing, capturing, etc., of wild birds or animals in the Isle Royale National Park except dangerous animals when it is necessary to prevent them from destroying human lives or inflicting personal injury. Also, it is a crime to receive such animals for transportation with knowledge or reason to believe that they were killed or taken contrary to the provisions of the section or pertinent regulations (penalty 6 months and/or $500).	Prima facie evidence	Under 16 U.S.C. § 408(k) [1], possession within the park of the dead bodies or any part thereof of any wild bird or animal.	Violation of §§ 408(i), 408(k) or 408(l).
16 U.S.C. § 408(l) provides for forfeiture of property used in hunting, etc., in the Isle Royale National Park.			
16 U.S.C. §§ 781, 783 makes it unlawful for people subject to the jurisdiction of the United States to take or catch in the waters of the Gulf of Mexico or Straits of Florida any commercial sponges less than 5 inches in maximum diameter or to land, deliver, cure, offer for sale or possess in the U.S. jurisdiction (fine of $500 which is a lien against the vessel involved).	do	Under 16 U.S.C. § 782, presence of sponges of a diameter of less than 5 inches on any boat of the United States engaged in sponging in the Gulf of Mexico or the Straits of Florida or possession of such sponges sold or delivered by such vessels.	Violation of said statute.
18 U.S.C. § 42(c) makes it unlawful to import certain birds or animals into the United States under inhumane or unhealthful conditions (penalty, $500 and/or 6 months).	do	Presence in a vessel or conveyance of a substantial ratio of dead, crippled, diseased or starving wild animals or birds.	Violation of the section.
18 U.S.C. § 45, makes it unlawful to possess, detain, kill, etc. homing pigeons owned by the United States or marked "USA" or "USN" (penalty $100 and/or 6 months).	do	Possession or detention of any such pigeon without giving immediate notice by registered mail to the nearest military or naval authorities.	do.
18 U.S.C. § 491 makes it unlawful for whoever manufactures, sells, etc. slugs and the like similar to U.S. money with knowledge or reason to believe that the slugs will be used fradulently or to obtain things of value (penalty $100 and/or 1 year).	May be shown by proof	Prior warning by authorities that the defendant's slugs are being used fraudulently or to obtain things of value.	Knowledge or reason to believe that the slugs are so used.
18 U.S.C. § 545 prohibits, in part, knowingly and willfully, with intent to defraud the United States, smuggling or clandestinely introducing into the United States, merchandise that should have been invoiced and fraudulently and knowingly importing or bringing into the United States merchandise contrary to law or receiving, buying, selling, facilitating the transportation, etc. of such merchandise after importation knowing the same to be brought into the United States contrary to law. (Penalty, $10,000 and/or 5 years).	Proof . . . unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction.	Possession of such goods	Violation of the section.
18 U.S.C. § 659 makes it unlawful for anyone to steal, obstruct, carry away, etc., goods moving in interstate or foreign commerce, and to possess such goods knowing they were stolen. (Penalty $500 and/or 10 years or $1,000 and/or 1 year for goods worth less than $100).	Prima facie evidence	(A.) Waybill or other shipping document which indicates origin and destination; (B.) Removal of property from a pipeline which extends interstate.	(A.) Place from which and to which shipment was made; (B.) Interstate character of the shipment of property.
18 U.S.C. § 892 prohibits extortionate extension of credit (penalties $10,000 and/or 20 years).	do	That the extension of credit was unenforceable by civil process, that the extension of credit was made at a rate in excess of 45 percent a year, that at the time of the extension the debtor owed the creditor more than $100 in interest and the debtor reasonably believed that the creditor previously had collected extensions of credit by extortionate means or had the reputation of using extortionate means to collect credit.	That the extension of credit was extortionate.
18 U.S.C. § 1201, makes it unlawful to transport in interstate or foreign commerce a person who has been kidnapped, abducted, confined, unlawfully seized, etc. (penalty, up to life imprisonment).	Rebuttable presumption	Failure to release the victim within 24 hours after he has been kidnapped, abducted, etc.	That the person has been transported in interstate or foreign commerce.

Statute	Operative language	Basic fact	Inference
18 U.S.C. § 1465 makes it unlawful to transport in interstate or foreign commerce lewd, obscene, etc., materials, books, films, pamphlets, etc., for the purpose of sale or distribution (penalty $5,000 and/or 5 years).	Presumption, but such presumption shall be rebuttable.	Transportation of 2 or more copies of 1 publication or article or a combined total of 5 of any such publications or articles.	That such publications and articles are intended for sale or distribution.
18 U.S.C. § 2424 requires anyone who maintains an alien woman in a house for prostitution or other immoral purposes within 3 years after her entrance into the United States from certain countries to file a detailed statement to the Commissioner of Immigration. Failure to file the statement within 30 days after the commencement of keeping the woman is a crime punishable by $2,000 and/or 2 years.	Presumed unless the person proves otherwise.	If the required statement is not on file with the Commissioner of Immigration and Naturalization.	That the person failed to file the statement.
18 U.S.C. § 3487 is an evidentiary section dealing generally with embezzlement prosecutions.	Prima facie evidence.....	The refusal of any person charged with the safekeeping of the public money to pay any draft, etc., drawn upon him by the General Accounting Office or to transfer upon legal requirement of any authorized officer.	Embezzlement.
18 U.S.C. § 3488 is an evidentiary section which relates to 18 U.S.C. § 1154.....	do.....	Possession by a person of intoxicating liquors in Indian country where the introduction is prohibited.	Unlawful introduction.
18 U.S.C. § 3497 is an evidentiary section relating to embezzlement prosecutions..	Sufficient evidence, prima facie .	A transcript from the books and proceedings of the General Accounting Office.	A balance against the defendant.
19 U.S.C. § 1587 provides for forfeiture of certain goods destined to the U.S.A. and subject to U.S. duties when found in ships subject to the jurisdiction of the U.S. Customs Officials and which are boarded and examined by customs officials.	It shall be presumed.....	Any merchandise the importation of which into the United States is prohibited or alcoholic liquors which are found on said ships.	Destined for the United States.
21 U.S.C. § 174 makes unlawful the importation of any narcotic drug into the United States, and the receipt, sale, concealment, purchase, facilitating the transportation, sale or concealment of such drugs, knowing them to have been brought into the United States contrary to the law, and conspiracy so to do (penalty, 1st offense 5-20 years and/or $20,000; 2d offense, 10-40 years and/or $20,000).	Sufficient evidence to authorize conviction unless the defendant explains to the satisfaction of the jury.	Possession of the narcotic drug.....	Any of the aforementioned crimes.
21 U.S.C. § 176a is basically the same as above but deals strictly with marihuana (penalty, same as § 174).	.....do.....	.....do.....	do.
21 U.S.C. § 176b makes unlawful the sale by a person over 18 of heroin which was unlawfully brought into the United States or otherwise brought into the United States to a person under 18 (penalty, 10 years—life or death if the jury so directs and/or $20,000).	Sufficient proof unless the defendant explains to the satisfaction of the jury.	Heroin in his possession.....	That the heroin was unlawfully imported into the United States or otherwise brought into the United States.
21 U.S.C. §§ 180, 181 prohibits importation of opium into the United States except with the approval of the Commissioner of Narcotics.	Shall be presumed and the burden of proof shall be on the claimant or the accused to rebut such presumption.	Smoking opium or opium prepared for smoking found within the United States.	Importation of the opium contrary to law.
21 U.S.C. § 188m is an evidentiary section that relates to §§ 188-188n.....	Presumed . . . and the burden of proof shall be on the defendant to rebut such presumption.	Absence of the production of an appropriate license by the defendant.	Not to have been duly licensed in accordance with said sections.
21 U.S.C. § 516 is an evidentiary section relating to the chapter dealing with the manufacture of narcotic drugs.	.....do.....	Absence of proof by the person that he is the duly authorized holder of an appropriate license or quota issued under the chapter.	That he is not the holder of such license or quota.
26 U.S.C. § 4704 makes unlawful the purchase, sale, dispensing and distribution of narcotic drugs except in the original stamped package or from the original stamped package (felony; see 26 U.S.C. § 7237 (a) for penalties).	Prima facie evidence.....	Possession of narcotic drugs absent the appropriate tax-paid stamps.	Violation of the section.

Statute	Operative language	Basic fact	Inference
26 U.S.C. §§ 4721, 4722, 4724(a) require people who import, manufacture, produce, compound, and sell, dispense, and give away narcotic drugs to pay a special tax and register with the Secretary of the Treasury. Failure to do so is a felony. (See 26 U.S.C. § 7237 for penalties.)	.....do.....	Under 26 U.S.C. § 4723 possession of any original stamped package containing narcotic drugs by a person not registered and who has not paid the special tax.	Liability to such special tax.
26 U.S.C. § 4724(c) also makes it unlawful to possess narcotic drugs without having registered and paid the special tax (felony; see 26 U.S.C. § 7237 for penalties).	Presumptive evidence; burden of proof of any exemption is on the defendant.	Under 26 U.S.C. § 4724(c) possession or control of narcotic drugs.	Violation of this section and sections 4724(a), 4721 and 4722.
26 U.S.C. § 5601(a)(1) makes unlawful possession, custody or control of any still or distilling apparatus not registered as required by law (penalty 5 years and/or $10,000).	Sufficient evidence to authorize conviction unless the defendant explains to the satisfaction of the jury.	Under § 5602(b)(1), [2] Presence at the site of a still or distilling apparatus which is unregistered.	Sufficient evidence to authorize conviction.
29 U.S.C. § 5601(a)(4) makes unlawful engaging in the business of distilling or rectifying without giving bond (penalty 5 years and/or $10,000).	.....do.....	Under § 5602(b)(2) presence at the site of a still or distilling appratus which is unregistered.	do
26 U.S.C. § 5601(a)(7) makes unlawful the making of mash, wort, etc., except in a lawfully designated plant (penalty 5 years and/or $10,000).	.....do.....	Under § 5602(b)(3) presence at the site of a still or distilling apparatus which is unregistered.	do
26 U.S.C. § 5601(a)(8) makes unlawful production of distilled spirits unless one is a distiller authorized by law (penalty $10,000 and/or 5 years).	.....do.....	Under § 5602(b)(4) presence at the site of a still or distilling apparatus which is unregistered.	do
26 U.S.C. § 5681 provides that people engaged in distilling, warehousing, rectifying and bottling of distilled spirits and every wholesale dealer in liquor who fails to post the sign required by law (and people who work on such premises) are guilty of a crime (penalty $1,000 and/or 1 year).	.....do.....	Presence at the aforementioned premises.....	Crime of working on aforementioned premises.
26 U.S.C. § 5691 makes it unlawful for any person carrying on the business of a brewer, wholesale dealer, rectifier in liquors, retail dealer in liquors, wholesale or retail dealer in beer, limited retail dealer, or manufacturer of stills knowingly to fail to pay the special tax (penalty $5,000 and/or 2 years).	Presumptive evidence may be overcome by evidence satisfactorily showing the contrary.	Sale or offer for sale of distilled spirits, wines or beer in quantities of 20 wine gallons or more to the same person at the same time.	Engaged in the business of wholesale dealer in aforementioned products.
26 U.S.C. § 7491 is an evidentiary section relating to 4753 and 4742 of Title 26, criminal statutes requiring registration and order forms with respect to the transfer of marihuana.	In the absence of the production of evidence by the defendant, he shall be presumed.	Failure of the defendant to produce evidence of compliance with sections 4753 and 4742 of Title 26 which require registration and order forms.	Not to have complied.
29 U.S.C. § 215 makes unlawful the shipment or transportation of goods in commerce, or intended shipment or transportation, if with respect to the production of such goods an employee was employed in violation of sections 206 and 207 of Title 29 (penalty $10,000 and/or 6 months but imprisonment is authorized only for a second offense).	Prima facie evidence.....	Proof that any employee was employed within 90 days prior to the shipment or sale of such goods in commerce.	That the employee was engaged in the production of such goods.
36 U.S.C. § 3501 makes unlawful the embezzlement and misappropriation by guardians and caretakers of monies paid by the Veterans Administration to the beneficiaries involved (penalty 5 years and/or $2,000).	Sufficient evidence prima facie..	Willful neglect or refusal to make and file proper accountings or reports concerning such money and property as required by law.	Embezzlement or misappropriation.
46 U.S.C. § 319 provides that certain ships subject to the jurisdiction of the United States shall be forfeited if the ships have on board foreign merchandise if appropriate duties have not been paid.	Prima facie evidence.....	Marks, labels, brands, or stamps indicative of foreign origin upon or accompanying such merchandise.	Foreign origin of such merchandise.
47 U.S.C. § 412 of the Radio Communications Act which is enforceable by criminal penalities establishes the following evidentiary rule:	.....do.....	Public records kept and preserved by the F.C.C.....	Evidence of what the records purport to be.
49 U.S.C. § 1017, part of the Interstate Commerce Act which is enforceable by criminal penalties—establishes the following evidentiary rule: 50 U.S.C. App.	.....do.....	Public records filed by freight forwarders with the I.C.C.	do.
§ 462 prohibits anyone subject to the jurisdiction of the Selective Service Act from using any certificates issued under the provisions of the act for purposes of false identification or representation (penalty $10,000 and/or 5 years).	Sufficient evidence to establish . . . unless the defendant explains to the satisfaction of the jury.	Possession of any certificate not duly issued to the defendant.	Intent to use such certificate for purposes of false identification or representation.

[1] There are at least 12 similar statutes dealing with other national parks: 16 U.S.C. § 404c-3 et seq.; § 403h-3 *et seq.*; § 403c-3 et seq.; § 395c et seq.; § 204(c) et seq.; § 198(c) et seq.; § 170 et seq.; § 127 et seq.; § 117(c) et seq.; § 98 et seq.; § 62 et seq.; § 26 et seq.

[2] Declared unconstitutional in United States v. Romano, 382 U.S. 131 (1965).

STAFF NOTE

Leary v. *United States*

On May 19, 1969, the U.S. Supreme Court held, in *Leary* v. *United States* (395 U.S. 6), that the presumption established by 21 U.S.C. § 176a that knowledge of importation may be inferred from posession of marihuana and that such possession may authorize conviction unless the defendant explains to the contrary—must be regarded as arbitrary or irrational, since, the Court found, it cannot be said with substantial assurance that the presumed fact (knowledge of importation) is more likely than not to flow from the proved fact (possession) on which it is made to depend. The holding so stated is analagous to the rule of the Court of Appeals for the Second Circuit to the effect that the civil standard for sufficiency of evidence (whether there is substantial evidence to support the verdict) applies in criminal cases. (*See* cases cited in comment on section 103, at note 10.) The draft rejects the rule of the Second Circuit and relates the standard for sufficiency to the ultimate burden of persuasion—proof beyond a reasonable doubt. The Supreme Court did not reach the question whether a presumption which passes muster on the more likely than not test must also meet the reasonable doubt test, if proof of the crime charged or an essential element thereof depends upon its use (*see* note 64 in the Court's opinion). The draft resolves that issue in favor of the requirement that the reasonable doubt standard must also be met.

CONSULTANT'S REPORT
on
JURISDICTION: CHAPTER 2
(N. Abrams; January 4, 1968)

I. Introduction

Federal law enforcement serves a number of different functions in our Federal system. It performs some of the usual tasks of any law enforcement system, such as protecting the institutions and operations of the government against criminal activity. But it does not have the basic responsibility for the day-to-day maintenance of order in the society. Historically that role in this country has been assigned to local law enforcement. Federal law enforcement, however, has assisted and supplemented local authorities in the performance of that basic responsibility. Thus the Federal criminal laws do encompass conduct that poses no threat to Federal institutions or operations or to anything for which the Federal government has any special responsibility. And the same conduct is also, to one extent or another, also the subject of State criminal sanctions. Professor Louis B. Schwartz in his article *Federal Criminal Jurisdiction and Prosecutors' Discretion*,[1] described this as Federal auxiliary criminal jurisdiction—auxiliary, that is, to State law enforcement.

In any comprehensive reform of the Federal criminal laws, a significant issue peculiar to Federal law that must be dealt with at the outset is how to define the scope of Federal criminal jurisdiction. The purpose of this memorandum is to provide necessary background for dealing with that and related issues. Major emphasis will be given to the most difficult aspect of the jurisdictional issue: How is the auxiliary law enforcement role of the Federal government to be handled in the drafting of jurisdictional provisions?

There are at least two dimensions to the problem of describing the scope of Federal criminal jurisdiction. First, how is the jurisdictional issue to be treated as a matter of statutory drafting? Second, how is the exercise of a defined statutory jurisdiction, if its full scope is not to be used, to be regulated in practice? Various alternatives for dealing with the first issue are discussed in part III of this memorandum. Part II contains material useful as background. Part IV describes the kinds of factors that are relevant in deciding whether in particular cases to exercise the statutory jurisdiction, and various mechanisms for ensuring that such factors are given proper consideration. Finally, in part V, possibilities for supplementing and assisting local law enforcement by means other than the exercise of Federal criminal jurisdiction are discussed.*

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[1] Law & Contemp. Prob. 64 (1948) [hereinafter cited as Schwartz].

*See the Staff Note to this consultant's report for a discussion of the general approach of the Study Draft to the questions posed; decisions as to the matter discussed in parts III and IV of the report are noted in staff footnotes. The Study Draft commentary to sections 201–213 discusses the proposals in detail.

II. The Auxiliary Enforcement Role of the Federal Government

A. *Historical Perspective*

Viewed from an historical perspective, there has been a steady growth in Federal auxiliary criminal jurisdiction. The mail fraud statute (18 U.S.C. § 1341) was first enacted in 1889[2]; the Mann Act (18 U.S.C. § 2421) in 1910; the Dyer Act, which deals with interstate transportation of stolen vehicles (18 U.S.C. § 2312) in 1919; the kidnapping provision (18 U.S.C. § 1201) in 1932; bank robbery of a Federally-connected bank (18 U.S.C. § 2113) and the first so-called anti-racketeering provision became Federal offenses in 1934. The trend has been continuing. New antigambling provisions were enacted in 1961 (18 U.S.C. §§ 1081, 1953) and in 1964 (18 U.S.C. § 224). And, in the most recent session of Congress, there was under consideration a bill to make it a Federal offense to "travel . . . in . . . commerce . . . with intent to . . . incite a riot" (H.R. 421).

Whether all of these various provisions and others may properly be treated as creating auxiliary offenses is open to argument. It depends upon precisely how that concept is defined. Generally, if there is no special Federal interest or Federal responsibility for the subject matter, an auxiliary offense is involved. As treated in this memorandum, most, but not all, offenses that rely on commerce or commerce-connected activity as a jurisdictional base fall within the auxiliary classification. But there will always be offenses that are difficult to classify, particularly those that involve other jurisdictional bases. Bank robbery, for example, is treated here as an auxiliary offense although an argument can be made that the offense is designed to protect a particular Federal interest—namely, funds that are Federally-insured or otherwise Federally-connected. The Federal interest is rather insubstantial, however, and the crime, therefore, is dealt with here as being primarily a means of supplementing State law enforcement in the robbery field.

Often, enactment of a new auxiliary offense has resulted from a cause célèbre—such as the Lindbergh kidnapping—or because of a particular law enforcement problem then current—witness the Federal anti-riot proposal. When a serious law enforcement problem of nationwide scope arises, Congress frequently reacts with one of its most readily available tools—creation of a new penal offense. It has done so despite the fact that Congress—or at least many Members of Congress—suffer from a conflict of attitudes in this area. On the one hand, there is the understandable desire to do something about a crime problem and to do so on a nationwide basis. On the other hand, there is an obvious reluctance to extend Federal law enforcement authority to the point where it begins to usurp local law enforcement.

It is fair to say that the creation of many of the auxiliary offenses has often been a response to problems of the moment. The present contours of this category of Federal criminal jurisdiction—both in the statutes and in actual operation—are not the result of any well thought through, consistently applied policy of what role the Federal

[2] The original mail fraud section was a fascinating bit of statutory drafting. It referred to schemes to obtain money "by what is commonly called the 'sawdust swindle', . . . or by dealing . . . in what is commonly called 'green articles', . . . 'United States goods', 'green cigars'. . . ."

government ought to play in aid of local law enforcement. That role is rather difficult to define.

For preliminary discussion purposes only, it may be helpful to conceive two extreme theoretical models of what that role might be. The first model might involve a total abolition of Federal auxiliary criminal jurisdiction. Under this model, conduct covered by the Dyer Act, the mail fraud and bank robbery statutes, the Mann Act and similar offenses would not constitute violations of Federal criminal law. Such conduct in every instance would still be subject to criminal sanctions, but only under State law. (In many cases, of course, the conduct involved might be violative of the criminal laws of more than one State.) Under this model, Federal criminal sanctions would be reserved for so-called true Federal crimes, offenses defining conduct that does or threatens injury to Federal institutions or operations.

The second theoretical model would be located at the extreme opposite end of the spectrum of Federal involvement in aiding State and local law enforcement. Under this model, *all* conduct that is traditionally made criminal under State law would constitute a violation of Federal law. The most extreme and theoretical versions of this model would not even require any of the traditional Federal jurisdictional pegs. (It might be thought that the absence of such a jurisdictional peg would make such criminal statutes unconstitutional.) Although the issue of constitutionality is not of immediate concern here, modern developments in constitutional case law offer at least some arguments in favor of the constitutionality of such an approach.[3] Under such an approach, State criminal laws might be expected to wither away over the long haul.

Clearly, both extreme approaches are objectionable and they are described here for discussion purposes only. It is inconceivable today that all Federal auxiliary crimes would be abolished. These offenses have been on the books for too long a period to permit a return of the status of Federal criminal law to what it was in the 19th century. Moreover, in the main, the auxiliary enforcement jurisdiction of the Federal government serves a useful and necessary function in the overall enforcement of the law in this nation. Nor is the other extreme any more palatable. Plenary Federal criminal jurisdiction would carry with it general Federal police power and a truly national police force. The concomitant centralization of law enforcement authority in Washington would clearly be unacceptable. That this would inevitably follow from such an approach to Federal auxiliary criminal jurisdiction indicates the important dimensions of this issue. Ultimately, the question of what the Federal role ought to be in this area goes to the heart of our Federal system and the relative parts to be played by the Federal and State governments.

Viewed historically, the trend in this area may be described as a movement from the type of system described under the first model toward that described in the second. At this point in history, we may have reached what amounts to an intermediate position between the two models. There seems little doubt that, given a choice of systems, we should opt for some such middle ground. That is to say—there ought to be some form of substantial Federal auxiliary criminal juris-

[3] *See, e.g., Katzenbach* v. *Morgan*, 384 U.S. 641 (1966).

diction. But restraint should be exercised in order to ensure that the jurisdiction remains fairly limited in scope.

Concluding, however, that the Federal auxiliary enforcement role is to be limited in scope does not, of itself, advance discussion very far, although it may help to put the overall problem in perspective. It does suggest, however, that the *primary* responsibility for law enforcement involving matters traditionally within the scope of State law enforcement—such offenses as homicide, theft, assault, fraud, sex offenses and the like—should continue to remain in the hands of local authorities; and that the Federal auxiliary role should be limited to categories of cases in which some *special* justification for Federal assistance exists.

B. *Present Scope*

A question that arises with respect to each of the alternative approaches to the Federal criminal jurisdiction issue discussed in part III, *infra*, is: What impact will the particular alternative have on the scope of Federal jurisdiction as it exists under present law? By way of background to consideration of that issue in connection with the various alternatives, I propose here to sketch in very general terms the present extent of Federal criminal jurisdiction, again with particular emphasis on its auxiliary aspects.

In his 1948 article, Professor Schwartz summarized the jurisdictional bases in then-current use as follows: [4]

> (1) use of the mails; (2) use of means of interstate commerce; (3) "affecting" commerce; (4) interstate transportation (a) of the victim, (b) of the proceeds, (c) of the criminal himself; (4) radio broadcasting; (5) status of the offender as a Federal employee; (6) status of the offender as an employee of an interstate carrier; (7) use of facilities of national securities exchanges; (8) Federal ownership or custody of the property; (9) ownership or custody of the property by institutions licensed by the Federal government or under its protection. The list can, of course, be extended almost indefinitely with crimes resting on the tax, war, and other powers of Congress.

Since 1948, new offenses have been enacted, but the basic reliance on the above-summarized jurisdictional bases has continued, although sometimes new legislation has involved imaginative adaptations of traditional formulae.

Federal criminal jurisdiction may be considered to have attained its present scope in a number of different ways. *First, it now touches at least indirectly upon practically all types of substantive criminal activity.* There is practically no offense within the purview of local law that does not become a Federal crime if some distinctive Federal involvement happens to be present. Homicide, burglary, robbery, rape, kidnapping, forgery, fraud, obscenity, various type of sex offenses and more are all made criminal by present Federal law where there is some Federal link such as travel or transportation in interstate commerce or occurrence on a so-called Federal enclave. As noted, this substantive reach has been extended in recent years—although almost always with the requirement that there be such a traditional, distinctive Federal

[4] Schwartz, *supra* note 1.

connection. Thus, in 1961, Congress enacted section 1081 of Title 18, proscribing the interstate transmission of betting information by a wire communication facility, and section 1953 prohibiting interstate transportation of materials relating to bookmaking. And in 1964, section 224 was enacted, making it a Federal offense to carry into effect a scheme in commerce to influence by bribery any sporting contest. "Scheme in commerce" is defined as "any scheme effectuated in whole or in part through the use in interstate of foreign commerce of any facility for transportation or communication." The bases for invoking Federal criminal prosecution against substantive gambling offenses and related activities were thereby significantly extended—albeit consistently with the use of traditional jurisdictional pegs.

The logical limit of the use of such traditional jurisdictional bases as travel, transportation or communication in commerce has almost been reached in section 1952 of Title 18, enacted in 1961. That section provides:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on or facilitate the promotion, management, establishment or carrying on of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States. . . .

The impact on this section potentially is, perhaps already is, enormous. The traditional jurisdictional peg involving commerce is comprehensively described in terms of travel in commerce or the use of any facility in commerce including the mails. Telephone, telegraph, radio, television and the like would appear to be covered. (*See also* the similar broad formula, "scheme in commerce," of section 224, discussed *supra*.) Secondly, the list of offenses constituting unlawful activity is very extensive, although not exhaustive.

A case recently in the news illustrates the broad reach of the statute. James Marcus, among others, was recently indicted in the Southern District of New York for conspiring to violate section 1952. The defendant, at the time in charge of the New York City Department of Water Supply, Gas and Electricity, was charged with having received a kickback or bribe in connection with the awarding of an emergency contract for the cleaning of a reservoir. Federal jurisdiction was based upon the fact of travel in interstate commerce and the

use of the telephone to make calls between Greenwich, Connecticut and New York City with intent to promote the unlawful activity involved. What might be viewed as an ordinary State bribery case was thus transformed into a Federal prosecution by the fact that incidentally, perhaps fortuitously, use of the telephone and the crossing of State lines was involved. I do not mean to suggest that the case was not an appropriate one for Federal prosecution. Indeed, the fact that a local official was involved gives the case overtones that may have made it difficult or at least awkward for local investigation and prosecution to occur. Under a rational exercise of Federal prosecutorial discretion it thus may have been a peculiarly appropriate case for Federal intervention. The fact remains, however, that the existence of Federal jurisdiction to prosecute was based upon a fortuitous occurrence, the use of the telephone. Moreover, that jurisdiction exists wherever such a telephone call occurs in connection with any bribery or extortion, whether or not it has the unusual overtones of the *Marcus* case.

Section 1952 provides an unusually broad reach based upon the traditional jurisdictional pegs used and the number of offenses to which they are applicable. It suggests how the use of the interstate travel, transportation and communication pegs might someday similarly be extended to practically any local offense. Such an approach has already been used in a different manner in the fugitive felon provision—section 1073 of Title 18, which makes it a Federal offense to travel in interstate commerce to avoid prosecution for any "felony under the laws of the place from which the fugitive flees."

The second way in which Federal criminal jurisdiction has been significantly expanded in modern times is by the incorporation into the criminal statutes of jurisdictional bases looser or less specific than use of interstate communications facilities, travel or transportation in interstate commerce and the like.

The most significant illustration of this type of expansion is section 1951 of Title 18. It makes it a Federal offense to "in any way or degree obstruct . . . delay . . . or affect . . . commerce . . . by robbery or extortion. . . ." This provision is undoubtedly aimed at and has been principally used in practice against racketeers who by extortion extract kickbacks and the like from business firms and labor organizations. The actual reach of the section, however, is potentially enormous. The language arguably makes a Federal crime of any extortion or any robbery "affecting" an enterprise "in commerce." As that phrase has been defined in other areas,[5] it could include practically all businesses except those of purely local operation. The use of the concept of "affecting commerce" in a Title 18 penal provision arguably could be relied upon to extend to Federal criminal law enforcement the scope of jurisdiction that attaches to other Federal regulatory legislation based upon a similar formula. In section 1951, Congress has used a jurisdictional formula which, if interpreted broadly and extended to all substantive offenses, would at least come close to being an exhaustive use of the Federal constitutional power over crime. Thus far, such a jurisdictional peg has been used in Title 18 only once and then only with respect to the substantive offenses of robbery and extortion.

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[5] *See, e.g.*, the public accommodations section of the 1964 Civil Rights Act, 42 U.S.C. § 2000a.

And in practice, the particular offense has not been charged as extensively as it possibly might have been. The use of such a jurisdictional peg, however, illustrates how broad an auxiliary impact the law of Federal crimes, as it appears on the statute books, already may have.

Another illustration is section 2113 of Title 18, which deals with bank robbery and crimes incidental thereto. That section makes it a Federal offense to rob any bank that is a member bank of the Federal Reserve System, is organized or operates under the laws of the United States, or the deposits of which are insured by the Federal Deposit Insurance Corporation. It also covers any Federal Savings and Loan Association, any Federal Credit Union as elsewhere defined and certain other savings institutions. Not only is robbery of such institutions made a Federal offense, but any entry with intent to commit any felony "affecting" such an institution where that felony also violates a statute of the United States, theft of any money or property from the institution, recepit of money or property stolen from such an institution, and assault or homicide committed incidental to the previously described offenses are covered by this section. In view of the extent to which banking institutions today are covered by Federal insurance or otherwise have one of the indicated Federal connections, the effect of this provision is to make practically *all* bank robbery and a variety of crimes incidental thereto the subject of Federal prosecution. Indeed, as a practical matter, the Federal government today carries the laboring oar nationally in the investigation and prosecution of bank robberies.

These few examples indicate the expansiveness of the present reach of the Federal criminal law—at least on the statute books. They are only illustrative; the examples can be multiplied several times over. It seems clear even from only a few examples that an exhaustive review of all Federal offenses would reveal that Federal criminal law, as it now stands, has a coverage that is much broader in its potential impact than most would assume.

III. The Federal Jurisdiction Formula—Drafting Problems

The drafting of a formula or formulae describing the extent of criminal jurisdiction is a task peculiar to the reform of Federal penal law. The task not only is unique to the drafting of a Federal Criminal Code but is also central to that effort. As discussed above, the content of the formula is related to the very basic question of what type of role the Federal government will play in the panoply of law enforcement activities in the nation. At the very least, its content will set the outer limits of that role. Knowing the form the jurisdictional formula will take is also essential to the drafting and organization of the rest of the Code. A single generally applicable formula or a series of general formulae, for exampe, will permit a different approach to the drafting of the descriptions of the undesirable conduct that comprise the various substantive offenses and may affect the manner in which the Code is organized.

A. *The Present Approach*

Under present law, the basis for exercise of Federal jurisdiction in connection with each Federal crime is expressed in the particular statutory description defining the offense. Thus, the definition of each

Federal offense contains language referrable to some exercise of Federal power. Where some special Federal interest is involved, the jurisdictional element in the offense may be, for example, the fact that a Federal official is involved,[6] or the fact that a postage stamp is involved,[7] or that the offense occurred within a Federal enclave.[8]

The present drafting approach to the jurisdictional question, incorporating a particular jurisdictional peg into each offense description, has certain advantages and disadvantages. They are listed and discussed below:

(1) *Disadvantages*

(a) *The present approach tends to multiply jurisdictional bases for Federal law enforcement intervention in a haphazard fashion.*—There is no doubt that the present pattern of jurisdictional pegs is a crazy quilt. It has grown haphazardly throughout the fitful history of the development of Federal criminal law. Each time the need for a new offense has been seen, a jurisdictional basis has had to be chosen. Usually an existing peg has been used; sometimes a new peg has been adopted.

It would be possible to adhere to the present approach and insert some rationality and order into it in a general revision of the Federal criminal laws. It is easier to do this in a single, comprehensive overhaul of all of the criminal statutes. The danger of haphazard development, though it would undoubtedly be lessened, would still remain for the future: each time a new offense is suggested, the question would be raised as to which jurisdictional peg to use in the description of the offense.

(b) *The present approach tends to leave irrational gaps and inconsistencies in the applicability of Federal criminal laws.*—This point is related to and emerges from the haphazard development of the particular jurisdictional pegs. Professor Schwartz made the point in his 1948 article as follows:[9]

> The central government will move against fraudulent schemes if the defendant 'for the purpose of executing such scheme' uses the mails in minutely specified particular ways. But if the culprit eschews the mails and carries out his scheme by interstate telephone, he is exclusively in the hands of state authorities, unless perchance the scheme involves securities or use of a 'facility of a national securities exchange.' Our national disapproval of lotteries finds expression in . . . [section 1302], punishing not the use of the mails in furtherance of lottery schemes, as in the mail fraud statute, but only the mailing of specific kinds of lottery material and advertisements. This is supplemented by . . . [section 1303], which makes the actor's status as a postal employee the basis of a general prohibition against his engaging in the sale of lottery tickets. Radio broadcasting of lottery information is a Federal mis-

[6] *See, e.g.*, 18 U.S.C. § 1114, which deals with the killing of specified Federal officials engaged in the performance of their official duties.

[7] *See, e.g.*, 18 U.S.C. § 501, dealing with stamp forgery.

[8] *See. e.g.*, 18 U.S.C. § 113, covering assault within the special maritime and territorial jurisdiction of the United States.

[9] Schwartz, *supra*, note 1.

> demeanor. Importation or interstate transportation of the same material is a felony. But it is apparently lawful from a national standpoint to transmit lottery information by interstate telephone or telegraph. Sellers of revolvers, forbidden to mail these weapons, mark their sales catalogues, 'Must be shipped by express.'

Obviously, it makes little sense to distinguish between the criminality of the use of the mails and the use of the telephone where such communications facilities are used to advance a fraudulent scheme. It makes even less sense when it is observed that the transmittal in interstate commerce—whether by mail, telephone or otherwise—of an extortion or kidnap communication is covered by Federal sanction. This is not to say, however, that every failure by Congress to exhaust available jurisdiction bases for Federal intervention with respect to undesirable conduct should be reversed. Treatment of fraud by telephone like fraud by mail does not involve a significant extension of Federal law. Exhaustive use of all possible jurisdictional bases would. The point is treated in more detail, *infra*.

Again, in a single comprehensive overhaul of the penal law, it should be possible—whatever drafting approach is taken—to minimize these problems of gaps and inconsistencies.

In the drafting of each provision, it would be examined for purposes of determining which jurisdictional peg(s) to use, and gaps and inconsistencies such as those noted above could be removed. Again, however, under the present approach, the problem might possibly reappear in the future in some form in connection with the promulgation of new offenses.

(c) *The present approach has led to odd discrepancies in the language used to describe essentially similar jurisdictional pegs. These discrepancies, in turn, have led to differences in the application of Federal laws that are difficult to justify.*—The mail fraud statute proscribes any mailing in furtherance of a scheme to defraud, while the Federal lottery proscriptions only make criminal the mailing of specific kinds of lottery material and advertisements. The mail fraud provision in a prolixity of verbiage describes the use of the mails required to trigger a Federal violation as "plac(ing) . . . in any post office or authorized depository for mail matter, any matter or thing whatever to be delivered by the Post Office Department, or tak(ing) or receiv(ing) . . . therefrom any such matter or thing, or knowingly caus(ing) . . . to be delivered by mail." The lottery statute more simply aims at one who "deposits in the mail, or sends or delivers by mail." Similar differences exist in the language used to describe the interstate commerce jurisdictional peg. Thus, section 1821 of Title 18, which deals with the transportation of dentures, proscribes the use of any instrumentality of interstate commerce "for the purpose of sending or bringing" the proscribed items. Section 1462, dealing with transportation of obscene matter, speaks in terms of "knowing use of any express company or other common carrier for carriage in interstate or foreign commerce." A separate clause bans the knowing taking "from such express company or other common carrier."

These differences again have resulted in large measure from the ad hoc, piecemeal growth of this branch of Federal criminal law. Different draftsmen at different times have used different words—

sometimes with the desire to effect a different coverage and sometimes only inadvertently doing so. The problem can be handled as part of the present codification project. It offers an opportunity to take a fresh look at all of these jurisdictional formulae and to establish once and for all common language consistently applied. A minimal treatment of the jurisdictional formula issue would accomplish at least this much.

(d) *The present approach tends to make the jurisdictional element a central feature of each offense. This has led to many undesirable side effects.*—Inclusion of the jurisdictional peg as an element of the offense has led the courts to treat it as any other element would be treated. Professor Schwartz has stated:[10]

> [A]ttention and controversy (have tended) to focus on the jurisdictional problem rather than the substantive issues of criminality. . . . Courts find themselves talking nonsense like the oft-repeated declaration that the use of the mails is the "gist" of the offense of mail fraud. . . .

The jurisdictional element, by itself, is not a proper index of criminality nor, for that matter, does it involve undersirable conduct. Transportation in interstate commerce, use of the mails and similar pegs are in themselves neutral activities. Nevertheless, in any Federal prosecution under the present approach, there is often a large concentration on this element of the defendant's conduct. The prosecutor is required to be as concerned about proving the fact of mailing in a mail fraud prosecution as he is about proof of the existence of the fraudulent scheme or the requisite mental state.

The inclusion of the jurisdiction peg as an element of the offense has discouraged the possibility of treating this aspect of the offense differently from other elements—for example, by lessening the burden of proof on the issue. This is not, however, an inevitable consequence of the present approach. Each offense could have its own jurisdictional element, and a general provision of the Criminal Code could provide for a lessened burden of proof or other special treatment of this element.

Other substantive difficulties have arisen as a result of the incorporation of the jurisdictional element into the offense. Courts, on occasion, have treated the multiple occurrence of the jurisdictional element as a basis for multiple prosecutions. The question has also often arisen as to what mental state in respect to the jurisdictional element is required for conviction. Must the defendant have known of the transportation in commerce?[11]

Again, none of these difficulties are inevitable consequences of the present approach although they have largely flowed from it. They could be specially dealt with under a revised Code that adopted the present approach.

(e) *The present approach makes the general drafting problems of the proposed Federal Criminal Code more difficult than they would be under other approaches to be described hereafter.*—It would simplify

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[10] Schwartz, *supra* note 1.

[11] *Compare United States* v. *Tannuzzo*, 174 F.2d 177 (2d Cir. 1949), *and United States* v. *Sherman*, 171 F.2d 619 (2d Cir. 1948), *with Wilkerson* v. *United States*, 41 F.2d 654 (7th Cir. 1930).

the drafting of the proposed Criminal Code if, as discussed *infra*, the present approach were abandoned and a single or several generally applicable jurisdictional provision(s) were formulated. In the drafting of the specific substantive provisions, attention could then be focused on the description of the undesirable conduct itself; it would not be diverted, in connection with each offense, into the jurisdictional question. The task of drafting the substantive provisions would tend to be more similar to the work done in recent years in revising various State Penal Codes and the learning developed in connection with those efforts would be more directly useful. (There will, of course, still be many crimes of peculiarly Federal concern in a Federal Penal Code.) Moreover, it would be easier by the formulation of general jurisdiction provision(s) to focus on the jurisdictional issues more intelligently. The applicability of the jurisdictional element to each offense could still be seen, but it would more readily be viewed as part of a larger whole. Such an approach would automatically eliminate gaps and inconsistencies and make easier the formulation of provisions establishing special treatment for the jurisdictional issue. All of these things could also be done under the present approach, but they are easier to do and more likely to be done under other approaches.

(2) *Advantages*

Despite the foregoing impressive catalogue of specific disadvantages, the present approach is not without any redeeming features. As discussed earlier, it is contemplated that the Federal government will continue to play a limited prosecutorial role in the auxiliary offense area. In some ways, the present approach tends to help maintain the limited quality of that Federal role.

Since each offense incorporates its own jurisdictional limitation, by its nature it tends to result in a withholding of much criminal conduct from the scope of Federal criminal authority. It is true, as discussed above, that even under the present approach, there has been a substantial increase in the applicability of the Federal criminal process. Assuming that many of the present irrational gaps and inconsistencies under the present approach were eliminated, there would be a still further increase. Nevertheless, by focusing on the jurisdictional question in connection with each individual offense, an emphasis on the limited criminal authority of the Federal government is maintained. Stated another way, the present approach can be defended on the ground that it helps to maintain a *tone* of limited Federal authority.

B. *Alternative Approaches*

There are several other approaches that might be taken in the drafting of the jurisdictional formula or formulae. A description of these principal alternatives and a discussion of the advantages and disadvantages of each is set forth below:

(1) *A Variation on the Present Approach*

As indicated, gaps and inconsistencies could be eliminated even if the present method—incorporation of the jurisdictional peg into each substantive offense provision—were retained. There have been limited attempts to do this in recent years. Thus section 1403 of Title 18, enacted in 1956, relies on the use of a "communication facility" as part of the basis for Federal jurisdiction over narcotics offenses. "Communication

facility" is defined as "any and all public and private instrumentalities used or useful in the transmission of writings, signs, signals, pictures, and sounds of all kinds by mail, telephone, wire, radio, or other means of communication." The section thus avoids the error of limiting the jurisdictional peg only to the mails or other particular communication device.[12]

Even this approach, however, still makes the jurisdictional peg a central element of the offense with the difficulties, described above, that that approach creates. A variation on the present approach that would avoid this problem would tie the jurisdictional peg to each substantive offense but as a separate subsection and not as part of the definition of the offense itself. Under this approach, an offense similar to the offense presently defined in section 1952 might take the following form:

> (a) Whoever, within the Federal jurisdiction, engages in (1) a business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or prostitution offenses . . . or extortion, bribery or arson . . . shall be fined . . . or imprisoned. . . .
>
> (b) For purposes of this section, Federal jurisdiction exists where in connection with any of the activities described in subsection (a), there occurs travel in interstate or foreign commerce or use of any facility in interstate or foreign commerce with intent to. . . .

The change from the present approach may be a small one, but it should be effective to avoid the treatment of the jurisdictional feature as "the gist of the offense." *

(2) *A General Formula Approach—Several Formulae*

Instead of incorporating the jurisdictional basis for each offense into the definition of the offense itself, several general formulae could be drafted to which groups of offenses would be referable. This is one version of a general formula approach to the jurisdictional issue—a proposal first made by Professor Schwartz in very general terms in 1948:[13] "The jurisdictional features necessary to give Federal authorities power to act should be brought together in a comprehensive definition of some phrase like 'within the Federal jurisdiction'."

Such an approach has numerous particular advantages, most of which have been previously touched upon since each would offset a disadvantage of the approach taken under present law. Thus, a general formula approach would automatically eliminate gaps and inconsistencies. It could be used to eliminate the defining of offenses in terms of the jurisdictional element, thus deemphasizing the focus on jurisdiction as an element of the offense and making easier specialized treatment of that aspect of the offense, if that is deemed desirable. It would simplify the basic drafting effort and make it possible to separate the difficult task of defining the substantive offenses from the articulation of the jurisdictional bases for Federal intervention. Finally, it would

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[12] *See also* 18 U.S.C. §§ 1952, 224.

*The essence of this approach is reflected in the Study Draft. Proscription of conduct appears in a form similar to that found in State Codes. A separate subsection defines the jurisdictional base (or bases) for each offense: in many cases that subsection merely refers to the bases listed in section 201, the "catalogue" of commonly used jurisdictional bases for the Code.

[13] Schwartz, *supra* note 1.

simplify the ordering of the work and the organization of the Code itself.

Several general formulae, each of which would apply traditional jurisdictional pegs to a different chapter of the Code, would eliminate the present gaps and inconsistencies in the scope of Federal authority without effecting a *wholesale* enlargement of Federal jurisdiction. Necessarily, however, some enlargement of the presently existing Federal law enforcement jurisdiction would occur even though only traditional jurisdictional bases for Federal intervention were used. The extent of the enlargement will be discussed in more detail below.

It is easier to illustrate the operation of the type of general formulae that might be developed by suggesting particular language for the various formulae. The following language (not intended as a finished draft) illustrates how several such general formulae might apply to different chapters of the Code:

> (1)(a) For purposes of this chapter, unless otherwise expressly provided, an offense shall be deemed committed within the Federal jurisdiction if a participant in the offense for the purpose of accomplishing, or as part of the commission of the offense—
>
> (1) traveled in commerce,
>
> (2) transported in commerce—
>
> (i) the victim of the offense,
>
> (ii) the proceeds of the offense, or
>
> (iii) a weapon or other instrumentality of commission of the offense,
>
> (3) used the mails,
>
> (4) used any communications facilities,
>
> (b)(1) As used in this section, "commerce" means....
>
> (2) As used in this section, "communication facilities" mean radio, television, telegraph, telephone or other means of wire or wireless communication that are part of an interstate network.

Such a general formula would be limited to the chapter of the Code dealing with those auxiliary offenses for which the justification for exercise of Federal authority is the existence of activity in commerce or related thereto. The principle of selection here is that facilities of commerce are being used in connection with criminal activity although there is no threat as such to those facilities. Jurisdiction over conduct that threatens or does injury to a Federal facility or a commerce facility for which the Federal government has special responsibility such as railroad cars and the like would be covered in another formula. Thus, thefts from commerce—for example, from railroad cars or other instrumentalities of commerce—would be dealt with in a separate chapter and under another formula. I have chosen this as a reasonable principle of selection, supplemented by others discussed *infra*, but other principles of selection might be used. The question of what content to put in each jurisdictional formula is like the choice of how to slice the pie. There are always a number of ways to do it.

This formula assumes an organization of the Code more or less along the lines proposed in Professor Schwartz' Tentative Outline of

the Code Reform Project, dated August 10, 1967.* Under that Outline, this formula would be applied to those offenses grouped in its Chapter 208, under the heading "Abuse of Federal-Jurisdictional Facilities for Criminal Purposes." Under a several-formula approach, the formulae used, of course, are tied to the organization of the Code and the allocation of subject matter between the several chapters. The several-formula approach assumes that the Code may have several provisions dealing with similar crimes—for example, a fraud crime applicable to Federal employees; another applicable to auxiliary law enforcement purposes, *etc.*

The formula described would eliminate most jurisdictional gaps and inconsistencies in connection with offenses to which it applies. It uses as a model, but also extends the type of comprehensive approach used in section 1952 of Title 18, where the jurisdictional basis is set forth as: "Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail. . . ."

It does not exhaust the possibilities for listing Federal facilities that might be used incidentally to the commission of an offense. For example, consistent with the principle of selection described above, the use of Federal Reserve and Federally-insured banking systems might be included as a subcategory in this formula. Thus, if as part of fraudulent scheme the victim was required to deposit money in such a banking institution the offense would be covered by Federal authority if such a clause were included. I have not included such a clause, nor have I attempted to prepare an exhaustive list of such auxiliary pegs. The point regarding the operation of the formula is made even if the terms of this rough draft are not exhaustive. If the list were indeed exhaustive, it would enlarge Federal jurisdiction to a much greater extent and would pose much larger issues. Theoretically, for example, Federal jurisdiction could be based upon the fact that money printed by the United States government was used in the criminal transaction. The line must be drawn somewhere. For present purposes, I use a more or less traditional listing of bases.

The formula as presented would, however, insofar as gaps are being eliminated, result in some extension of Federal jurisdiction. Whereas under present law mailing of lottery tickets or radio broadcasting of lottery information triggers Federal involvement,[14] if a telephone or television broadcast or other form of communication is used, there is no Federal jurisdiction. The formula described would eliminate such discrepancies in coverage. Such extensions of Federal authority, in the main, would be relatively minor, and some have already been accomplished by specific legislation. Thus section 1341 of Title 18, which bases Federal jurisdiction on the use of the mails for the purpose of executing a fraudulent scheme, was supplemented 15 years ago by section 1343 which makes it a Federal offense to use wire, radio or television communication for a similar purpose.

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*The approach of the Study Draft differs in this respect from the "general formula" approach described by the consultant in that the Code is not organized in the manner contemplated by the Outline cited. Rather, all crimes of a particular type are defined in one chapter, and jurisdiction to prosecute the various kinds of crime is sorted out in subsections of the chapter.

[14] 18 U.S.C. §§ 1302, 1304.

In connection with some offenses, the extension might be considered somewhat greater. Thus under the present law relating to kidnapping, Federal jurisdiction is only involved if the victim is transported in interstate commerce (18 U.S.C. § 1201) or the ransom demand is transmitted in interstate commerce or through the mails. Under the tentative formula, kidnapping could be a subject of Federal jurisdiction if in connection with the offense the kidnapper himself traveled in commerce or the ransom proceeds were transported in commerce or the kidnapper used the mails or communication facilities in connection with the commission of the offense although not necessarily to transmit the ransom demand.

The basic jurisdictional pegs used in the formula are all derived from existing law. One peg now in use has not been included, however. The "affecting commerce" language of section 1951 has been omitted on the ground that if generally applied through the medium of a general formula, it would have too enlarging an effect on the scope of Federal authority. Thus if "affecting commerce" is given the interpretation it receives in other areas, most business establishments—with the exception of those of a purely local nature—might be included on the theory of being "in commerce." Offenses affecting them—burglary of a supermarket or of a clothing store—conceivably could become a Federal crime if the substantive offense is included in this part of the Code. This is not to say that this phrase should not be utilized at all. Its use can be limited to specific offenses. The language of the general formula contains the "unless otherwise expressly provided" clause that would permit both extensions of, as well as limitations of, jurisdiction by specific provision.*

The formula as drafted in this Report contains language indicating that the jurisdictional bases must have been used "for the purpose of accomplishing, or as part of the commission of the offense." Some language of this sort is necessary, though the precise form of words remains to be drafted since otherwise the formula would sweep too broadly. Use of such a clause insures that there is a sufficient nexus between the jurisdictional peg and the criminal conduct. It permits definition of the crime in terms of the undesirable conduct without regard to the jurisdictional question. Typical offenses in this part of the Code might take the following forms:

> (1) Whoever, within the Federal jurisdiction, kidnaps for purpose of ransom or attempts to extort ransom money. . . .
>
> (2) Whoever, within the Federal jurisdiction, obtains money by fraudulent means. . . .
>
> (3) Whoever, within the Federal jurisdiction, engages in a business enterprise involving gambling. . . .

The phrase "within the Federal jurisdiction" might be omitted from each substantive section, provided that a general provision specified that only such offenses as were committed within that jurisdiction as defined in the general formula were subject to Federal prosecution. The point is a minor drafting one. If each section does not contain the

* The "affecting commerce" base appears in the catalogue of bases in section 201 of the Study Draft. It applies to such Code offenses as robbery and extortion, for which "affecting commerce" jurisdiction presently exists under 18 U.S.C. § 1951.

phrase, it can be argued that there could be a misleading and undesirable *appearance* of a broadening of jurisdiction. On the other hand, it is obviously more economical, as a matter of drafting, to make the formula apply by force of a general provision only.

Additional formulae along the same lines as No. (1) above, could be drafted as follows:

> (2) For purposes of this Part, unless otherwise expressly provided, an offense shall be deemed committed within the Federal jurisdiction if as a result of or in the course of the commission of the offense injury was done or was intended to be done to—
>
> (a) an instrumentality of interstate commerce including railroad cars, trucks, airplanes, and other vehicles operating in interstate commerce;
>
> (b) a Federal Reserve bank, banking institution insured by the Federal Deposit Insurance Corporation. . . .
>
> (c) an agency of the Federal government or Federal property;
>
> (d) a Federal official, employee, or agent engaged in the performance of his duties.
>
> (3) (a) For purposes of this Part, unless otherwise expressly provided, an offense shall be deemed committed within the Federal jurisdiction if it was committed within the special maritime and territorial jurisdiction of the United States;
>
> (b) Special maritime and territorial jurisdiction of the United States means. . . . (*see*, for example, the definition 18 U.S.C. § 7).
>
> (4) For purposes of this Part, unless otherwise expressly provided, an offense shall be deemed committed within the Federal jurisdiction if it was committed by—
>
> (a) a Federal official, employee or agent in connection with his employment;
>
> (b) a person who in connection with the commission of an offense impersonates an official, employee or agent described in subsection (a) of this section.

The foregoing formulae follow the same pattern as the first (No. (1)). Traditional pegs are being used, and again the effect would be to broaden somewhat the scope of Federal authority while eliminating gaps and inconsistencies. The categories listed under each heading could, of course, be extended or limited.

These four general formulae together comprise a fairly comprehensive, though not exhaustive, approach to Federal criminal jurisdiction. Summarized, they would base Federal jurisdiction on the fact that: (a) Federal or Federally-connected facilities *were used in* the commission of the offense; (b) harm *was done to* Federal or Federally-connected facilities or institutions; (c) the offense *took place on* Federal property or property for which the government had special responsibility; or (d) the offense *was committed by* Federal personnel or those impersonating Federal personnel. (Some of the choices made are arguable. For example, the impersonation may be viewed as doing *harm to* Federal authority and could therefore be covered under (b)

above. The issue will be settled in connection with the substantive treatment of that subject.) To the extent that there are other jurisdictional bases that do not fit under one of the foregoing headings, another general formula could be prepared, or the problem could be dealt with by specific provisions.

(3) *A General Formula Approach—A Single Formula of Fairly-Limited Scope*

It would be preferable to be able to combine the foregoing series of formulae into a single general formula using the same type of traditional pegs. There is no inherent reason why this cannot be done. From the foregoing, it can be seen that there is a large amount of repetition of language, and just as a matter of form, the various formulae could be combined.

The principal advantage of a single formula approach is that it may make it possible to avoid repeating the same offense in different parts of the Code. For example, it would be preferable if there were only one fraud provision in the Code. There is a chance, however, that it will be desirable to have several provisions on a subject like fraud. It may be that one would want a provision for Federal employees that is different from the one used for auxiliary enforcement purposes. At this point, it can be seen that questions of the formula approach, organization of the Code, and the substantive content of many provisions are closely intertwined.

The advantage of an approach using several formulae is that the application of each formula can more easily be limited to a given chapter of the Code. The offenses to which a particular jurisdictional peg is to be applicable can thereby be designated more readily. For example, the range of offenses to be covered when committed *on* property for which the Federal government has special responsibility perhaps should be much greater than the offenses within the scope of Federal jurisdiction where Federally-connected facilities *are used.* Of course the same result can probably be accomplished, though perhaps more awkwardly, by the use of a general formula combined with limitations or exclusions incorporated into particular substantive offense provisions.

Stated another way, a single general formula of limited scope may operate to enlarge jurisdiction to a greater extent than several formulae, each of which is applicable only to a particular chapter of the Code. This greater increase in Federal authority can, however, be avoided by incorporating express limitations into particular provisions.

The alternatives described in the preceding three subsections can be seen as variations on the same theme. Each would use essentially the same traditional pegs and apply them to particular offenses. The application to particular offenses is accomplished, however, in three different ways—by individual incorporation into each particular offense; by several general formulae, each applicable to a different chapter of the Code; or by a single formula of general but limited application.

(4) *A General Formula Approach—A Single Formula Broad in Scope.*

The formulae previously described use only traditional jurisdictional pegs cast in more or less traditional terms. For purposes of contrast,

it may be useful to examine briefly an approach that, were it adopted, would extend Federal criminal authority much further. Suppose the general formula took the following form:

> Federal criminal jurisdiction exists if—
>
> (i) Federal facilities were employed at any stage of the offense;
>
> (ii) the Federal government or any of its agencies, property, personnel, functions, or interests was harmed or imperiled by the behavior;
>
> (iii) the offense occurred in Federal territory;
>
> (iv) the offense occurred on a vessel . . .;
>
> (v) the offense infringed upon a Federal statutory or constitutional right;
>
> (vi) by reason of any other circumstance in the case Federal prosecution would be constitutionally permissible.[15]

On its face, it is clear that such a formula, particularly if subsection (vi) is included, sets forth a jurisdictional principle about as broad as any that can be conceived. First, it takes the traditional pegs—*e.g.*, use of the facilities of interstate commerce, injury to a Federally-connected institution such as a bank, *etc.*—and casts them in extremely broad and general terms, *e.g.*. employment of "Federal facilities" or harm to "interests" of the Federal government. Secondly, it adds as general bases for exercise of Federal jurisdiction whether any Federal statutory or constitutional right was infringed or Federal prosecution would be constitutionally permissible on any other basis.

What impact would such a jurisdictional approach have in enlarging the present state of Federal criminal jurisdiction? A few illustrations may be helpful. At present many local offenses—gambling, prostitution, theft, etc.—may be Federally cognizable if interstate travel or transportation or the use of interstate communications facilities is involved. Such a specific jurisdictional basis must be present before Federal prosecution can occur. Under this general formula, it would seem that any such offense, indeed any offense covered by the substantive provisions of the Code, could be deemed a violation of the Federal law if, for example, there was present some "effect on commerce." Under 18 U.S.C. § 1201, transportation of a kidnap victim in interstate commerce is made a Federal offense. Under this general formula—particularly subsection (ii), a kidnapping of any employee of the Federal government—though otherwise local in nature—might be Federally cognizable. Similarly, under 18 U.S.C. §§ 111 and 1114, assaulting certain Federal officials engaged in the performance of their official duties is a Federal crime; under the instant general provision, assaults against all Federal personnel whether or not engaged in official duties might be covered. Indeed, under the general formula, harming officers of Federally insured banks might be included.

The impact of this general formula can be described in more general terms. At present, each Federal offense has its own jurisdictional peg—in most cases fairly limited in scope. Certain offenses—*e.g.*, 18 U.S.C. § 1951—have a somewhat broader jurisdictional basis. This formula would make the jurisdictional basis of broadest possible scope—whatever that is—applicable to every substantive offense de-

[15] This tentative language was formulated by Professor Schwartz as a focus of discussion on the subject of jurisdiction.

scribed in the proposed Code. Without going through the innumerable possible examples, it becomes clear that as broad as Federal criminal jurisdiction presently is, adoption of a general formula of the type described would greatly enlarge that authority.

The point is made even more forcefully by consideration of subsection (vi) of the general formula under discussion. That provision would extend the reach of Federal prosecutorial jurisdiction to the fullest extent which the Constitution permits to the Federal government. It is abundantly clear that in the present state of the law, Congress has not exercised anywhere near its full constitutional authority in creating Federal crimes. The general formula under discussion would, by its very terms, do just that.

Examination of this general formula may be viewed as a useful, though academic, exercise. For it both demonstrates how far it would be possible to go in extending Federal criminal jurisdiction and accordingly, how far from that point are the alternative proposals previously described.

IV. Regulating an Enlarged Federal Criminal Jurisdiction

Even under present law Federal investigators do not investigate and Federal prosecutors do not prosecute the full range of criminal activity that falls within the scope of Federal criminal jurisdiction. Nowhere is this more true than in connection with the auxiliary offense category. Under all of the alternative proposals for dealing with the jurisdiction issue, there would be some enlargement of Federal authority. Such enlargement of jurisdiction may itself create pressure for Federal agencies to play a larger role in the overall law enforcement of the nation. Whether it does or not, the problem of how a broad Federal criminal jurisdiction can be intelligently limited in practice merits careful consideration.

The problem has two dimensions: What kinds of factors justify Federal involvement in particular cases? What kinds of mechanisms are available to insure that the proper factors are taken into consideration?

At the outset, it may be helpful to sketch briefly the practical dimensions of the Federal law enforcement system onto which any controls would be grafted. The chief prosecutorial arms of the Federal government are the 94 United States Attorneys and their staffs in the 94 Federal Judicial Districts. Located in Washington in the Department of Justice is the Criminal Division, at present comprising approximately 150 lawyers, about 60 of whom work in the organized crime field. In theory, the Criminal Division, representing the Attorney General, is a type of central headquarters for the entire Federal prosecutorial operation. In practice, the Division promulgates numerous general policies and performs some type of review function in connection with most categories of prosecution. Various actions with respect to different types of prosecutions must be approved or at least communicated to the Division. The Division also functions as an important resource to Assistant United States Attorneys in the field. It provides advice and research and specialized manpower on an ad hoc basis to assist with particular cases. It is difficult for Washington to exercise tight control over United States

Attorneys in the field, many of whom exercise some degree of autonomy and independence. An example of a failure to adhere to departmental policy (most do not get into judicial opinions) is found in *Redmond* v. *United States*,[16] a prosecution based upon private consensual correspondence involving obscene material (18 U.S.C. § 1461) brought by a United States Attorney in Tennessee. The Department ultimately did exercise control. The case was aborted before the Supreme Court because it violated a policy earlier promulgated from Washington.

Another relevant aspect of the Federal law enforcement system is the diversity and multiplicity of investigatory agencies that are involved. Over 20 different agencies feed cases into the prosecutorial mill. Although they cooperate and coordinate, and their agents in the field work closely with United States Attorneys, each again in many ways has a measure of autonomy.

Any system of controls that attempts to limit the exercise in practice of a broad statutory authority to prosecute must take account of the fact that the Federal prosecutorial system is a far-flung operation and that Federal investigatory agencies are numerous and diverse.

A. *Justification for Invoking Federal Auxiliary Jurisdiction**

The task of articulating criteria to guide the exercise of prosecutorial discretion—State or Federal—is one of the most difficult and challenging in the field of criminal law. Experienced prosecutors will tell you "it can't be done." The problem is made even more complex when an additional dimension is added to the discretionary choice to be made—should the matter be prosecuted in the State or Federal court? A few simplified examples will illustrate the variety of different types of factors that may, as a matter of theory, justify Federal involvement in an auxiliary offense context.

There are cases where, because of the multi-State contacts involved, it is impracticable for local authorities to investigate the matter. Suppose, for example, that a large-scale car theft ring having many of the elements of a commercial enterprise is in operation. Cars are being stolen in several States and brought to a central garage where they are stripped or repainted for shipment to still other States for sale. The FBI with field offices and agents scattered throughout the country is in a peculiarly good position to investigate the matter. Local authorities in any single State would find it difficult, if not impossible, to investigate anything other than that aspect of the operation that occurs in their locale.

Federal *investigation* need not of course inevitably lead to Federal *prosecution*. Federal agents might "make" the case, then turn over their files to State officials, and be available to testify when necessary in the State prosecution. But Federal prosecution in such cases seems

[16] 384 U.S. 264 (1966).

*Section 207 of the Study Draft provides for the exercise of discretionary restraint in Federal law enforcement agencies in cases in which there is concurrent jurisdiction but there is no substantial Federal interest. Circumstances giving rise to such a Federal interest are specified in the section and provision is made for the Attorney General to promulgate additional guidelines for the exercise of discretion. Note that the section provides that questions arising thereunder are nonlitigable.

easier and generally more appropriate.* First, Federal prosecutors and investigatory personnel will often have cooperated closely in the development of the case. Secondly, it is somewhat easier for the Federal government to bring all the accused persons scattered throughout the various districts together in a single trial by way of Federal removal proceedings. Local authorities could also do this via State extradition, but it is a somewhat more cumbersome procedure. The other alternative would be to have several prosecutions, each located in a different jurisdiction. Thirdly, a local prosecutor would have difficulty in gathering all of the needed witnesses from other States. In most States, there are procedures available to summon out-of-State witnesses (*see infra*, part V), but these, too, are rather cumbersome. In contrast, the Federal prosecutor has available an easily executed nationwide subpoena power.[17] Finally, if the offense were to be prosecuted locally in a single prosecution, which local jurisdiction would assume the burden? If that type of issue arises on the Federal level, it can, at least, be settled in Washington.

The case to be made for both Federal investigation and prosecution in connection with the above example is very persuasive. For purposes of contrast, however, assume different facts involving a similar offense, *i.e.*, the Dyer Act, and again multi-State contacts. Suppose that a single car thief steals a car in New York and drives it to Chicago, passing enroute through New Jersey, Pennsylvania, Ohio and Indiana. There is clearly a jurisdictional basis for Federal prosecution, but the case to be made therefor is not nearly as persuasive. There is no peculiarly Federal investigative function to be performed by Federal agents. The "wanted" information can as easily be transmitted from New York to other local authorities as to Federal authorities.

Unless Federal agents are more efficient or energetic about such cases it is just as easy for local police to perform the investigation and apprehension function. There is no doubt, however, that in many areas, Federal agents are more energetic and effective. This is apparently true, for example, in the bank robbery field. This greater effectiveness of Federal law enforcement undoubtedly furnishes some general pressure for enlarging Federal investigatory and prosecutorial operations. Federal agents begin to handle some types of crimes just because they do the job better, and local police begin to defer and abdicate their function for this same reason.

Once the lone car thief is apprehended, there is some limited advantage in Federal *prosecution* since vital witnesses are likely to be located in both New York and Chicago—for example: the owner of the car; someone who saw the thief drive off; the apprehending officer; someone else in Chicago who can connect the thief with the car. Also, Illinois where the defendant was arrested, may have little interest in prosecuting the thief. Its only contact with him and the offense is that he was apprehended there. It has only slightly more interest in prosecution of this defendant than does New Jersey or Pennsylvania or

* Under Study Draft section 207 such circumstances could amount to a "substantial Federal interest," but if effective nonfederal prosecution could be had, the section authorizes discontinuance of the Federal action and directs the Federal authorities to cooperate with State and local agencies, by making available evidence already gathered and otherwise.

[17] Rule 17(e), FED R. CRIM. P.

Ohio or Indiana. New York should have more interest in the matter, but to prosecute, it would have to extradite the defendant and deal with the witness problem.

Federal investigation and prosecution of what is essentially a local offense may also be appropriate where the case involves corruption of local government or, for some other reason, a breakdown of local law enforcement.* The charge itself, for example, may involve corruption of local governmental officials. As illustrated by the *Marcus* prosecution, discussed *supra*, jurisdictional bases for Federal prosecution in such cases will often be available. And Federal investigation and prosecution may be desirable because local law enforcement may find it difficult or awkward to proceed since local officials are involved. Federal intervention in such cases is justified by the same type of reasoning that might lead a State governor to send a special prosecutor to a local county to prosecute a case of local corruption.

Local corruption may be the justification for Federal involvement in other ways. Even though those to be criminally charged may not themselves be local officials and there may be no evidence usable in court to proceed against local officials, there may be concern that the offenders will be able to corrupt local officials and thus block local prosecution. This is a more speculative basis for Federal prosecution since it may depend on mere suspicion rather than the nature of the charge, the position of the accused or other such factors. But it is difficult to reject it as an adequate justification, particularly where such suspicions are strong.

Local law enforcement may break down because of reasons other than corruption. A local official may be incompetent or local police or prosecutorial operations may be inadequately staffed. Or there may be an unwillingness to prosecute certain types of cases because of the attitudes of the local community. An example of the latter category would seem to be those Federal prosecutions where there has been violence against civil rights workers, and local law enforcement has not moved against the law violators.** The principle upon which Federal intervention is justified here would seem to be simply a logical extension of those cases where Federal involvement is based upon corruption or breakdown in local law enforcement from other causes. Justification for Federal intervention may also be derived, however, from the Federal government's special responsibility for eliminating unconstitutional discrimination from the society. Prosecutions of this type usually involve crimes of violence—assault, kidnapping and homicide, for example. Absent some commerce-connected activity or occurrence on a Federal enclave, not usually present in these cases, there are very few charges available for the Federal prosecutor to use under existing law. Thus where the underlying conduct involves homicide, the Federal charge may involve conspiracy to injure any citizen in the free exercise of any right secured to him by the Constitution under 18 U.S.C. § 241, for which the maximum penalty is 10 years' imprisonment. There is an odd quality about such cases since both the

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*The Study Draft provides that such circumstances give rise to a "substantial Federal interest." (section 207)

**Section 207 provides that there is a substantial Federal interest "where Federal intervention is necessary to protect civil rights."

nature of the charge and the possible penalty bear little resemblance to the usual charge and penalty for conduct of the type involved.* Available statutory charges could perhaps be made more specific and the penalties increased accordingly. It is probably desirable to follow the pattern set by present section 241 and treat this by special provision rather than under any type of general jurisdictional formula. The problem would remain of how to limit Federal intervention to those instances where it is particularly justified.

An area in which the Federal investigatory and prosecutorial arms have become more active in recent years is that of organized crime. Multiple justifications for Federal involvement in this area can be articulated. The criminal activities involved—*e.g.*, gambling, narcotics, prostitution, and loansharking—frequently have an interstate dimension. Indeed, implicit in the assumption that there is organized crime, a Mafia or a syndicate is that criminal operations in different cities are not only highly organized within the local jurisdiction but connected somehow to related operations in other parts of the country. Federal intervention can thus be justified on the ground that Federal investigation is easier and more practicable, as in the case of the car theft ring, discussed *supra*. Stated another way, the crimes perpetuated by organized criminal operations frequently have an interstate aspect that otherwise justifies Federal involvement. A second justification is that to succeed organized crime usually requires the corruption of local officials. This previously discussed justification for Federal involvement thus may be present here. Finally justification can be found in the general argument that organized crime poses a crime threat to the society on a national scale, that the States have insufficient resources or capabilities to cope with the problem and that therefore highly trained Federal investigative and prosecutorial personnel must fill the gap.

A general justification for Federal involvement in the organized crime field can thus easily be articulated. The difficulty is that specific jurisdictional bases for particular prosecutions must be found, too. Where the criminal conduct falls into an existing Federal crime category, for example, an interstate white slave transportation, there is no problem. But sometimes the conduct involved does not fall into an existing category. To deal with this problem the tendency has been to expand the reach of Federal criminal authority by provisions such as 18 U.S.C. § 1952. Every time Federal jurisdiction is thus expanded, however, another category of cases is created where the difficult choice must be made whether Federal intervention is justified in the particular instance.

The foregoing focuses on the theoretical justifications for Federal investigation and prosecution. There are some practical sides to the problem that merit mention. Federal investigatory practices may follow many different patterns. There may, for example, be a specific complaint or occurrence that suggests a Federal violation and precipitates investigation by Federal agents. But in some areas—particularly in connection with organized crime—investigation may tend

* Note that a homicide committed in the course of denying another the free exercise of his civil rights under chapter 15 of the Study Draft would be punishable as a Federal homicide under proposed section 1601, pursuant to section 201(b), the "piggyback" jurisdictional provision.

to focus generally on particular individuals. Such investigation may produce evidence of criminal violations, both local and Federal. Once evidence of a Federal violation has been developed, one would anticipate a tendency to use the material so developed and initiate a Federal prosecution—although, on the facts, the case may not be one that is particularly appropriate for Federal intervention, according to a theoretical analysis. A recent memorandum prepared by the FBI describing how it exercises its investigative jurisdiction in connection with gambling is helpful:

> With regard to gambling, it should be noted that all gambling violations fall within the jurisdiction of local law enforcement agencies and only those violations involving some type of interstate activity come within the investigative jurisdiction of the FBI. . . . The basic aim of the Federal anti-gambling statutes is to deny to racketeers and gamblers facilities in interstate commerce for communication and travel which would seriously hamper the rapid flow of information, interstate travel, and movement of funds upon which the gambling empire depends for its very existence.
>
> In those instances where FBI investigations prove that no interstate activity exists, the facts relative to local gambling violations are disseminated to local authorities. In many instances, our Agents have signed affidavits for issuance of state search warrants in order to enable local authorities to raid and arrest gamblers.
>
> The criterion as to whether Federal gambling violations exist is dependent upon development of sufficient, admissible evidence indicating that interstate travel or an interstate communication facility is being used in connection with a gambling enterprise.

A second practical aspect of the problem is the fact that how a broad Federal criminal jurisdiction is exercised in practice will inevitably be determined in part by how manpower resources are allocated and how specialized personnel become in particular fields. The existence of a special bank robbery investigative force and a very large staff working exclusively on organized crime matters, for example, in practice conditions the number of prosecutions brought in these areas—whatever theory of Federal intervention is followed. On the other hand, devotion of specialized manpower to particular areas itself represents a judgment as to the types of matters where Federal involvement is particularly appropriate—although it is not a judgment relating to the facts of a particular case.

Finally, another recent memorandum from the FBI suggests miscellaneous other factors that in practice determine whether a Federal prosecution is brought in a case where there is clearly Federal jurisdiction.

> With respect to Dyer Act, National Stolen Property Act, thefts from interstate shipments and impersonation violations, declinations rendered by United States Attorneys are frequently based on the subject being charged with a more severe local crime.

* * * * * * *

Additionally, United States Attorneys particularly in Dyer Act, National Stolen Property Act, thefts from interstate shipments and impersonation violations, have declined Federal prosecution in less aggravated cases due to crowded court conditions and/or the shortage of Assistant United States Attorneys.

It has also been observed there is a recent trend by United States Attorneys and/or Federal courts to arbitrarily decline Federal prosecution in favor of handling by local or military courts.

Even from the foregoing brief discussion, it should be apparent that it is probably not feasible to describe in any *really precise and specific form* the types of factors that should determine, in the context of a particular auxiliary offense, whether Federal prosecution should be undertaken. If this were possible, these factors could be incorporated into the statutory definition of Federal jurisdiction—as a legislative limitation on that jurisdiction. But the factors involved are too complex and too diverse for treatment in this form. The best that can be hoped for probably is to articulate criteria in a more generalized form that will function as guidelines for, and not as limitations on, the exercise of Federal jurisdiction.

B. *Methods of Control*

The most efficient method for setting limits on the Federal government's auxiliary law enforcement role would be to incorporate those limits into the statutes themselves as limitations on Federal authority. Such an approach would build into the system certain important attributes. It would insure that the criteria of limitation were available in a form that was clearly communicated to those who investigate and prosecute. And the courts would see to it that the statutory limitations were being followed.

If it is not feasible to incorporate such limitations into the statutes, other methods must be devised that will insure that the appropriate criteria are being communicated to personnel in the field; determine whether the criteria are being followed in practice—by some routinized feedback mechanism, perhaps; and provide for some system to enforce adherence to the criteria. In the following paragraphs some of the possible mechanisms of control—and some of their general advantages and disadvantages—are briefly reviewed:

(1) *The Limitation of Resources*

It is not clear that the fact that the law enforcement resources of the Federal government are limited provides a very useful control mechanism. Undoubtedly, the relatively small number of Federal law enforcement agents and prosecutorial staff (limited at least in comparison to local law enforcement personnel and the size of the overall crime problem in the nation) impose a limitation on how extensive a use can be made of an enlarged Federal criminal jurisdiction. But the fact of limited resources provides no guidance as to how those resources are to be used. Moreover, absent criteria of limitation clearly set forth, the fact of an enlarged statutory jurisdiction may create a pressure for increasing resources.

(2) *Internal Policy Controls*

At present, the Criminal Division issues to the United States Attorneys, in various forms, statements of policy to guide the exercise of prosecutorial discretion. With appropriate refinements, this method of control is available for use in controlling the exercise of jurisdiction. Whatever jurisdictional formula approach is taken, this method of policy control can be a vital link in the Federal prosecutorial operation.

Too heavy a reliance on this method to control an enlarged Federal authority would, however, probably be misplaced. Under present practice, such departmental policy is generally not made public although it occasionally comes to light as a result of decisions such as *Redmond*, *supra*, or other actions. (For example, Attorney General Rogers did publish as a press release a significant policy statement generally barring Federal prosecutions that are based on conduct that was the subject of prior State prosecutions.) Limitations on the exercise of jurisdiction that were not published would not be very reassuring to Congress or the public. The absence of publication permits easy change of the general policy and makes deviations in particular cases more possible. As the present system operates, there is no routinized feedback mechanism and few methods to ensure adherence are available. Undoubtedly, this internal system can be improved. One such improvement would lead to the mechanism discussed immediately below.

(3) *Administrative Regulations Promulgated by the Attorney General* *

The traditional or typical way to limit a large discretion delegated by the legislature to an administrative agency is for that agency to promulgate administrative regulations. Such regulations if promulgated by the Attorney General to limit an enlarged auxiliary prosecutorial authority would closely resemble the internal policy statements discussed above, with some differences, however. The fact of promulgation in quasi-legislative form inevitably leads to more careful, specific draftsmanship. Publication in this form would communicate to the Congress and the public in reliable form just what limitations the Department of Justice is setting on itself in its law enforcement role.

The use of administrative regulations for this purpose has some limitations. Again, there is no routinized feedback system. Presumably, United States Attorneys in the field will adhere to such formally promulgated statements of policy, but they prosecute thousands of cases each year and some deviations are likely to occur. Sanctions generally available to the Attorney General to enforce compliance by United States Attorneys with regulations and policy are diverse. United States Attorneys' appointments are for 5-year periods. It would be unusual for a United States Attorney to fly in the face of a specific, clearly applicable policy issued by his nominal superior. But if there is any room for doubt about the applicability of the policy in the particular case, disputes can and have arisen. There is no formal, readily available method for resolving such conflicts. When they do arise, they are somehow resolved on an ad hoc basis. The fact of publication may itself supply part of the need here. Defendants particu-

See note, p. 52, *supra*.

larly could be expected to inform Washington that a prosecution of them fails to comply with departmental policy. Reliance on defendants for this purpose raises, however, another issue—the extent to which defendants can claim the benefit of the policy issued in the form of regulations.

The most effective system for insuring compliance with such regulations would be to permit litigation on the question of their applicability.* The obvious possibility would be to permit defendants to raise the issue. Permitting them to do so would build into the system as effective a method as possible for insuring compliance with the regulations.

Permitting defendants to litigate the issue has many disadvantages, however. Arguably, it permits litigation on an issue—*e.g.*, exercise of prosecutor's discretion—that traditionally has been outside the purview of the courts. It permits the courts to become involved in what may be deemed an issue inappropriate for judicial resolution—*i.e.*, how Federal resources can be used most efficiently and effectively. It would give defendants the benefit of regulations not intended for their protection but rather only to allocate Federal law enforcement resources in the auxiliary enforcement area—to avoid too enlarged an exercise of law enforcement authority by the Federal government. It would inject additional issues into criminal prosecutions already heavily burdened by complexities. Permitting defendants to litigate would, insofar as the regulations become embroiled in litigious controversy, also lead to delays and confusion in their implementation. Finally, if the regulations are in quasi-legislative form and if defendants are permitted to litigate their applicability, there is little advantage gained by promulgating limitations on the exercise of an expanded jurisdiction in this form. They may as well be incorporated into the statute itself.

There are counter-arguments to be made in favor of permitting litigation by defendants. Even if not intended for their benefit, this would not be the first instance in which a party was permitted to litigate a regulation not intended as such for his benefit. (The problem comes up in connection with statutory standing provisions framed in terms of "adverse effect" or "aggrievement.") Moreover, an argument can even be made that defendants should be considered the beneficiaries of policies that limit the power of the Federal government to prosecute them. Such an argument may be more or less persuasive depending on the content of the particular policy.

Whatever conclusion is reached on the question of whether, if administrative regulations are heavily relied upon as a control device, defendants should be allowed to litigate their meaning, it should be kept in mind that the courts conceivably could intervene anyway, although it is unlikely if appropriate steps are taken to forestall the possibility. Express statutory provisions barring judicial consideration of particular issues have on occasion been disregarded—*e.g.*, where the issue involved had a constitutional dimension—but this is unlikely to occur.

To illustrate the problem in a context where there is no such statutory language precluding judicial review, consider the decision in *Red-*

*Section 207 would not make litigable any guidelines promulgated thereunder by the Attorney General.

mond, mentioned *supra*, where the government on its own motion raised the fact that the instant prosecution violated an internal prosecutorial policy and moved in the Supreme Court to dismiss below on this ground. What will a trial court do now when a defendant moves to dismiss a prosecution on the ground that the *Redmond* policy has been violated? What would a trial court do if the motion to dismiss were based upon an alleged violation of the Rogers no-multiple-State-Federal prosecution policy, mentioned above?

It should be noted that such issues have generally not arisen in the past because few such policies have been made public. The Rogers press release, the disclosure in *Redmond* v. *United States*, and the Attorney General's regulations on publicity are among the few published indications of departmental criminal prosecution policy. The use generally of published administrative regulations for this purpose, such as the Federal Register or Code of Federal Regulations, would thus constitute a marked departure in practice for the Department of Justice.

[One final note on this issue. If there is a concern in Congress that too large a discretion is being delegated to the Attorney General under a general formula approach, promulgation of administrative regulations to limit that discretion will probably not allay that concern unless Congress sees the regulations in advance. An alternative possibility would be to establish a mechanism whereby the administrative regulations promulgated go into effect only after a specified period and only if Congress does not meanwhile disapprove.]

(4) *Other Legislative Controls*

(a) *Declarations of policy.*—One suggestion is that Congress formulate general policy goals, particularly regarding the auxiliary enforcement dimension of Federal prosecutorial authority—probably at the beginning of the Code. Administrative regulations such as those described above might be formulated to implement these more generally stated statutory policy statements.

Such general legislative policy statements no doubt are useful and desirable. They will set the tone of the planned Federal role. Indeed the entire legislative history of the proposed Code will also serve this function. The significance of such materials should not be over-estimated, however. If framed in general terms, they provide no specific guidance; they set a tone only. Moreover, unlike specific statutory limitations or even general policy statements that are closely related to specific statutory provisions, such general policy declarations would have no specific effective sanction behind them, or policing effect.

(b) *Appropriations and amending powers.*—Congress, of course, always has an overriding power to control how legislation is implemented through its power over appropriations—in other words, the resources with which to prosecute—and its power to amend legislation. It is sometimes a difficult power to exercise, however. First there are usual complexities of the legislative and appropriations process itself. Secondly, it is a shotgun when a rifle might be more appropriate; it is difficult to use the power over appropriations to control the minutiae of Federal law enforcement policy.

(c) *Statutory control mechanisms.*—There are a variety of different statutory approaches that might be used to establish mechanisms or procedures for dealing with the auxiliary enforcement role.

One suggested approach would require that a specific judgment must be made—the judgment function could be assigned to the investigating agency, the United States Attorney involved or the Attorney General, or the concurrence of more than one might be required—that State prosecution would not be an effective alternative. Such a judgment might be required in all cases, or in individual cases falling into specified categories. Or Congress might mandate that the Attorney General specify classes of cases in which, treating them as a class, State law enforcement would be an effective alternative. Insofar as such a judgment is required in the individual case, it is not clear that this is not already being done. A statutory requirement to this effect would, however, *insure* that such a judgment would be made, by whom, and in terms that favor State prosecution as a first choice. If the Attorney General can in fact clearly specify *classes* of cases where, across the board, State prosecution would be an effective alternative, a case may be made for excluding such classes from the scope of Federal criminal authority.*

A second type of approach—much more complex and farreaching in its implications—would involve State and local prosecutors in the decision-making process. It is submitted that, at this time, the possibilities under such an approach do not present practicable alternatives. They are likely to create more problems than they would solve. In the interest of a comprehensive presentation and in view of the chance that my judgment on the matter is erroneous, these possibilities are briefly described here. At the very least, discussion of some of these mechanisms will suggest some of the special complexities of the State-Federal relationship in the law enforcement field.

A procedure might, for example, be set up, for certain categories of cases, that would require as a precondition for Federal prosecution that some showing be made that the State is unable to prosecute. Such a showing might be limited merely to the requirement that the local prosecutor must request Federal prosecution or a further requirement that the State must demonstrate inability to pursue the prosecution itself. If the major concern here is the possibility of Federal usurpation of State law enforcement responsibility, a request requirement should suffice. If the concern is that the States would take advantage to evade responsibility, a requirement that there be some showing of inability would be preferable. Such a request or demonstration-of-inability-to-prosecute provision could be attached to particular offenses, could be generally applicable to so-called auxiliary offenses, or could be made applicable to selected categories of auxiliary offenses. Such provisions could, for example, be made applicable only to offenses where the Federal interest in prosecution is deemed slight or where State concern about possible Federal usurpation is great.

Either a request or demonstration of inability provision would raise a host of problems, some of which are set forth below:

Who must make the request? Suppose, for example, an offense has been committed in more than one county or more than one State. Must all the concerned local prosecutors submit such requests? To whom

* Note that Study Draft section 207 authorizes but does not require Federal authorities to decline or discontinue the exercise of jurisdiction in matters which "can effectively be prosecuted by nonfederal agencies" (and as to which there is no substantial Federal interest.)

must the request be submitted? The United States Attorney or the Department of Justice? What is the effect of such a request? Can the United States Attorney or the Department of Justice still refuse to prosecute? Is the State or local prosecutor estopped from prosecuting once he has submitted such a request—whether or not it is acted upon? What is the effect of a Federal prosecution where the request required by statute is not made? Should the defendant be entitled to the benefit of a failure to comply with such a statutory requirement? If a demonstration of inability is required, in what form must it be made? To whom? What standard of proof is required? Is some type of hearing on the issue available? What other general administrative burdens would either a request or demonstration provision impose on law enforcement? Particularly, how much delay would it inject into the process of initiating prosecutions?

There is a requirement imposed by certain Department of Justice internal policy memoranda that State request or consultation with State officials in connection with certain limited categories of offenses must precede the initiation of Federal prosecution. The approach described here in effect would broaden the applicability of such requirements and impose it by statute.

A request or demonstration provision may in actual practice simply evolve into a statutory requirement that State and Federal officials consult before the Federal government initiates a prosecution for an auxiliary offense. Since such consultation occurs anyway in many instances, imposing such a requirement by statute would not have a large impact. It would tend to make the fact of such consultation more visible and to emphasize the special nature of auxiliary Federal criminal jurisdiction.

The mechanism described above would not work at all where the justification for Federal intervention is the local prosecutor's unwillingness to prosecute. The State official could bar Federal as well as State prosecution simply by not making a request. An alternative mechanism to deal with such cases might require a Federal prosecutor to give first option to prosecute to the State official. If he failed to take up that option—whether because of inability or unwillingness—the Federal government would be free to prosecute. Such an approach would protect against Federal usurpation; it would not, by itself, guard against undue State reliance on the Federal government handling the criminal prosecution function.

V. Conclusion: Other Methods of Supplementing Local Law Enforcement

From all of the foregoing, it should be apparent that Federal auxiliary criminal jurisdiction is simply a method by which the Federal government chooses to aid local law enforcement. But it is surely not the only means. Other methods are already in use. Indeed, looking to all of the diverse forms such supplementation takes, the Federal government is engaged in a local law enforcement aid program of great magnitude. Thus the Law Enforcement Assistance Act of 1968 [18] bolsters local law enforcement by direct financial aid rather than by the use of Federal personnel and institutions. Other more indirect

[18] 42 U.S.C. § 3701 et seq.

means are also being used. Federal agencies, such as the FBI, already are heavily involved in the training of local police personnel. Local police avail themselves of such Federal aids as the FBI fingerprint identification files and the new NCIC information links.

These various aids to local law enforcement are usually viewed in terms of helping local law enforcement agencies to keep up or ahead of their own problems. They could also be viewed as a means for reducing the necessity for a bolstering of local law enforcement by Federal investigation and prosecution. To illustrate the point, suppose, for a moment, that the Federal government desired to unburden itself of its prosecution load in, let us say, Dyer Act cases and turn them over to local government. Disregard at this point the practical difficulties that local prosecutors would have in trying such cases. Would local prosecutors be willing voluntarily to assume the burden of prosecution? I assume that they would not. Suppose, however, they were encouraged to do so by Federal grants geared somehow to the additional expenditure of law enforcement resources that such prosecutions would entail. I am not seriously proposing such a plan, although I do not consider it outside the realm of possibility. I use it only to illustrate the point that Federal assistance can take forms other than investigation and prosecution and that one of those alternative forms of aid—money grants—might possibly be used as a means to direct prosecutions into the State courts.

The Federal legislative power may also be exercised in other ways. As discussed above, it often may be difficult for a local prosecutor to try a case, such as a Dyer Act prosecution, because of the problems of obtaining witnesses from another State. Should Congress establish by Federal statute a procedure giving a local prosecutor the same ready capability for subpoenaing a witness from another part of the country that a United States Attorney has under rule 17 of the Federal Rules? Whether this is desirable is open to argument. The possibility of abuses of such a statutory authority by local prosecutors may be deemed great. To avoid such abuses it would be necessary to provide adequate procedural protections. Not only might these make the use of such a statute particularly cumbersome, but the statute would probably then not accomplish much beyond what is already available under existing law.

Forty-six States have enacted, in some form, the Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Procedings. That Act provides in pertinent part:

> § 2. Summoning Witnesses in this State to Testify in Another State.—If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies under the seal of such court that there is a criminal prosecution pending in such court, . . . that a person being within this state is a material witness in such prosecution, . . . and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.

> If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution . . . and that the laws of the state in which the prosecution is pending . . . will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending. . . .
>
> If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of 10 cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and five dollars for each day, that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

This Act thus requires reciprocity in the requesting State and a determination based upon a hearing that the witness is material and necessary and that it will not cause undue hardship to cause him to attend. The constitutionality of the Act has been upheld by the Supreme Court.[19] It has also been held not to involve an interstate compact,[20] which is another device by which the States might accomplish a similar result. The Constitution, of course, precludes the making of such compacts without congressional consent.[21] But there is already on the Federal statute books a consent provision generally authorizing interstate compacts in the field of law enforcement. Section 112, Title 4 of the United States Code, provides:

> (a) The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts. . . .

If by Federal legislation, the procedures for obtaining out-of-State witnesses in State proceedings could be made less cumbersome than under the Uniform Act, without opening the door to serious abuses such legislation would be desirable. This is one more illustration of how another type of Federal legislative action might be used to supplement local law enforcement.

Another approach to the problem of supplementation relates to the incarceration function of the criminal process. Federal conviction usually means incarceration in a Federal institution. The President's Commission on Law Enforcement and the Administration of Criminal Justice recently made some detailed recommendations on the subject that suggest again the variety of approaches that may be taken:

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[19] *New York* v. *O'Neill*, 359 U.S. 1 (1959).
[20] *In re Saperstein*, 30 N.J. Super. 373, 104 A.2d 842 (1954).
[21] U.S. CONST. art. I, § 10.

The large majority of Federal offenders could have been prosecuted in State courts and committed to State correctional systems. Many of these State systems are at present inferior to Federal facilities and resources. But State and local programs of good quality have a number of advantages over Federal correctional programs. As far as institutional treatment is concerned, the Federal system is generally handicapped by the distance of its facilities from the home communities of their inmates. Handling the offender closer to home provides more opportunity for maintaining family and community ties; it facilitates reintegration into community life. . . .

A large proportion of Federal juvenile offenders, for example, are Dyer Act violators, convicted of transporting stolen automobiles across State lines. Many Dyer Act cases today are persistent offenders, and for some of these, who need long-term custody or high security, Federal correctional treatment is sensible. It is important to screen and classify carefully this heterogeneous group to separate these persons from less dangerous offenders whose needs may be no different from those of most juvenile offenders. Federal authorities already have announced a goal of diverting as many juveniles offenders as possible to State authorities. This objective is generally consistent with the position stated above and should be implemented thoroughly. . . .

In most cases it would be more feasible to develop a process of post-sentencing diversion, such as contracts for service, in instances of transfer from the Federal to State or local systems. This is the only possible process in cases where there is no concurrent jurisdiction.

Of course, if the programs of local institutions are inferior in quality to those of the Federal system, this reasoning loses its appeal. All too often the inferiority of State and local corrections is apparent. The diversion of Federal offenders into State channels therefore must be accompanied by vigorous efforts to upgrade the quality of State and local correctional programming. Funds saved through reducing direct services of the Federal Government could of course help contribute toward Federal aid to improve State and local corrections.

On the other hand, some offenders with special needs who are now in State and local facilities could be managed more effectively in Federal facilities. One such group is career criminals, offenders whose involvement in criminal activities is deliberate, profit-seeking, professional. Individuals in this group commonly have a long history of criminal activity, intimate relationships with criminal or delinquency associates, and deep alienation from society and its laws and authority. The Federal prison system, with its efficiently operated, custodially secure network of institutions, is much better prepared to provide long-term confinement for such individuals than are most States. . . .

The foregoing is not intended as an exhaustive list of alternative approaches. It is meant to suggest merely that questions relating to Federal auxiliary criminal jurisdiction should be seen as part of a

much larger picture of Federal supplementation of local law enforcement.

One of the crucial, though not necessarily decisive, factors in weighing alternatives in this area should be their relative costs. Determining the cost of operation of the Federal criminal system in gross terms is itself a complicated task. Such costs include, for example, that of operating criminal investigatory agencies; those parts of the United States Attorneys' offices and the Justice Department involved in criminal work; the Criminal Justice Act; the criminal side of the Federal district and appellate courts; and the Federal prison and parole system. Breaking down these figures to determine the cost of Federal auxiliary jurisdiction is somewhat more difficult. And assessing the overall cost of enforcing a particular auxiliary offense—such as bank robbery—is still more complex.

Even if such an accurate cost analysis is too difficult to make at this time, assessments can be made in rough terms. For example, how much time in gross terms FBI agents spend on bank robbery investigations can be determined. The number of bank robbery prosecutions brought each year is readily available. This figure compared with the total criminal case load of the United States Attorneys' offices can be used to derive a rough estimate of the costs of such prosecutions. Finally, statistics are available on the number of convicted bank robbers in Federal prisons. The cost of maintaining them should be determinable. The cost to the Federal government in rough terms of Federal enforcement of 18 U.S.C. § 2113 thus should be capable of determination.

Such figures would be useful in evaluating the desirability of the various approaches to the problem of supplementing local law enforcement. I do not advocate that the choices be made only on the basis of cost, but it is a relevant factor. A cost analysis approach, if used more frequently, might put the problem of Federal supplementation of local law enforcement into a whole new perspective.

Staff Note
on
Jurisdiction: Sections 201–213

(Schwartz; October 23, 1969)

The possibility of consolidating into a single comprehensive "jurisdictional base" every conceivable Federal hold on criminal activity, from use of the mails, "affecting commerce" or even "involving Federal currency" has been explored. Such a scheme might establish technical Federal jurisdiction over virtually every offense committed in the country. Restraint in the exercise of such all-embracing jurisdiction could be imposed by congressional declaration and executive implementation of a *policy* against exercising jurisdiction if no significant Federal concern appeared. That plan had much to commend it, inasmuch as the mere involvement of a letter or telephone call tells us nothing about the existence of a genuine Federal concern with what may be a trivial local fraud or extortion, and it does not go far beyond some recent extensions of Federal criminal jurisdiction. *E.g.*, 18 U.S.C.

§§ 1951 and 1952 (a wide range of State offenses where interstate travel occurs or interstate commerce is affected); 21 U.S.C. § 360a (dangerous drugs, whether or not in Federal commerce, on ground that intermingling of Federal and local commerce requires total control); 18 U.S.C. § 891 *et seq.* (extortionate credit transactions, also whether or not in Federal commerce, on ground that even intrastate transactions directly affect commerce and frustrate bankruptcy laws). However, the more conservative course has been taken in proposed sections 201 through 213, defining Federal jurisdiction separately with respect to each offense and avoiding drastic alterations of the scope of the Federal reach.

In general, the plan here offered is to provide a "catalogue" of Federal jurisdictional bases in proposed section 201. Which items in the catalogue will be associated with particular offenses will then be determined by explicit cross-reference in sections relating to individual offenses.

Of course, many offenses will have "built-in jurisdictional bases", *i.e.*, the very terms of the offense refer to the Federal government or federally regulated facilities, so that no cross-reference to the catalogue in section 201 will be required. This will generally be true of offenses directed against the Federal government itself, *e.g.*, treason, perjury, impersonating a Federal officer. It will also be true of provisions banning the use of Federal facilities to defeat State policies on which the central government is essentially neutral, *e.g.*, transporting of liquor into dry States.

MEMORANDUM
on
EXTRATERRITORIAL JURISDICTION: SECTION 208
(Agata; May 5, 1970)

1. INTRODUCTION

Determining when conduct engaged in outside the territorial limits of the United States can or should be treated as violations of Federal criminal law and hence subject to prosecution in domestic Federal courts has raised perplexing issues under the general rubric, "extraterritorial crime" or "extraterritorial jurisdiction." [1] The very paucity of cases and the silence of most Federal statutes on the issue contribute to the difficulty of formulating a basis for deciding specific cases.

Resolving issues of extraterritorial jurisdiction requires determinations of constitutional dimensions as well as statutory construction. In addressing specific cases, the courts have been concerned primarily with statutory construction, *i.e.*, does the statute embrace conduct engaged in outside the United States? [2] It is only recently that Federal courts have addressed themselves to constitutional issues concerning the *power* to encompass such conduct.[3]

2. CONSTITUTIONAL ISSUES

The decisions are remarkably devoid of efforts to identify specific provisions of the Constitution which support the creation of extraterritorial crime. One district court case [4] has been found which relied on the power "to define and punish . . . offenses against the Law of Nations" (U.S. Const., Art. I, sec. 8, cl. 10) and the Constitutional provision authorizing Congress to designate places for trials of crimes committed outside any State (U.S. Const., Art. III, sec. 2, cl. 3).

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[1] *See*, Research in International Law, Harvard Law School, AM. J. INT'L L. 437 (Supp. July 1935), [hereinafter cited as *Harvard Research*], for an in-depth study of the international law aspects of criminal law jurisdiction. Note that we are not here concerned with the issue of extraterritorial courts. For elucidation of this distinction, see *The SS. Lotus*, P.C.I.J., Ser. A, No. 10, 11 Hudson, World Court Reports 20, quoted in *United States* v. *Rodriguez*, 182 F. Supp. 479, 489–90 (S.D. Cal. 1960).

[2] *E.g.*, *United States* v. *Bowman*, 260 U.S. 94 (1922).

[3] *E.g.*, *United States* v. *Rodriguez*, 182 F.Supp. 479 (S.D. Cal. 1960) *aff'd. sub nom. Rocha* v. *United States*, 288 F.2d 545 (9th Cir. 1961); *United States* v. *Pizzarusso*, 388 F.2d 8 (2d Cir. 1968); *United States* v. *Baker*, 136 F. Supp. 546 (S.D. N.Y. 1955).

[4] *United States* v. *Rodriguez*, note 3, *supra*, dealt with a violation of immigration laws. The court explicitly precluded reliance on Art. I. sec. 8, clauses 4 and 18, of the Constitution, the authority to legislate concerning naturalization and the "necessary and proper" clauses, respectively.

The Ninth Circuit, in affirming the district court's decision, did not "think it necessary to search the Constitution to find specific authorization for such jurisdiction." [5] *United States* v. *Pizzarusso* [6] found a constitutional basis for exercise of the protective jurisdiction in Art. I, sec. 8 of the Constitution, the "necessary and proper clause", applied to the "Congressional power over the conduct of foreign relations". The basic approach of the courts has been either to assert or assume constitutional power.[7] Aside from the two instances just discussed, the courts have spoken of national power to assert jurisdiction over extraterritorial crime primarily in terms of the generally recognized international law bases of jurisdiction. It must be recognized that most of the cases have involved subject matter over which Congress would clearly have power such as immigration,[8] treason [9] smuggling [10] or fraud against the government.[11] Hence, the question of power to reach extraterritorial crime could be resolved as incident to the power to deal with the general subject without need to specify further because the Constitution speaks in terms of subject matter jurisdiction and states no limit with respect to the territorial jurisdiction which may be asserted. Thus, finding power over the subject matter (immigration), one court stated: [12]

> From the body of international law, the Congress may pick and choose whatever recognized principle of international jurisdiction is necessary to accomplish the purpose sought by the legislation.

It is difficult to state the basis and function of references to international law [13] when deciding issues of constitutional power, but judicial discussions of the constitutional issues are characterized by extensive references to international law bases of extraterritorial jurisdiction. It is uncertain whether, on the one hand, these international law principles of extraterritorial crime define the only power which may be exercised by the United States or on the other hand, whether Congress may rely on any or all of these international law principles. Probably, definitive answers to these questions have been unnecessary for the decision in a specific case.[14] By like token, no attempt is made to answer these questions in this memorandum because the extent of extraterritorial jurisdiction created by Study Draft § 208, for the most part does not go beyond current law, and the exceptions do not press currently recognized constitutional limits.

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[5] *Rocha* v. *United States*, 288 F.2d 545, 549 (9th Cir. 1961), citing as did *Rodriguez*, note 3, *supra*, *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 315 (1936).

[6] 388 F.2d 8, 10 (2d Cir. 1968).

[7] See cases cited and discussed in *United States* v. *Rodriguez*, note 3, *supra*, at 492–94, and *United States* v. *Pizzarusso*, note 3, *supra*, at 11.

[8] *E.g.*, *Chin Bick Wah* v. *United States*, 245 F.2d 274 (9th Cir.) *cert. den.* 355 U.S. 870 (1957).

[9] *E.g.*, *United States* v. *Chandler*, 72 F.Supp. 230 (D.C. Mass 1947).

[10] *E.g.*, *Marin* v. *United States*, 352 F.2d 174 (5th Cir. 1965).

[11] *United States* v. *Bowman*, 260 U.S. 94 (1922).

[12] *United States* v. *Rodriguez*, note 3, *supra*, at 491.

[13] *Cf. United States* v. *Pizzarusso*, note 3, *supra* at 10.

[14] *But see United States* v. *Bowman*, note 3, *supra*, at 98: "The necessary locus . . . depends . . . upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations."

3. STATUTORY CONSTRUCTION

Although there are no general extraterritorial jurisdictional provisions in current law, Congress has not been uniformly silent concerning the locus of the offense: *e.g.*, 18 U.S.C. § 2381, concerning treason, provides that the offense may be committed "within the United States or elsewhere"; the general murder statute is limited to offenses committed "within the special maritime and territorial jurisdiction of the United States" (18 U.S.C. § 1111(b)); still other provisions, describe the locus of the conduct as "on the high seas" (18 U.S.C. § 1651, piracy) or "upon the high seas or other waters within the admiralty and maritime jurisdiction of the United States" (18 U.S.C. § 1659, attack to plunder a vessel). The assertion of power over extraterritorial crime generally has been upheld both when the statute dealt with the issue expressly or where it was implied.[15] The major problem has been that because even the *ad hoc* legislative approach of expressly dealing with the locus of the offense has not been utilized with respect to matters like immigration and smuggling where the issue of extraterritorial jurisdiction has arisen with greater frequency than with respect to those statutes where Congress has dealt expressly with the problem, the courts have had the task of determining, without legislative guidance, whether or not and to what extent the statute has extraterritorial effect.

In construing a statute on the issue of extraterritorial jurisdiction, as in determining constitutionality, courts have referred to international law principles, and as with the constitutional issues, the municipal and international law principles are intermingled. For example, in *United States* v. *Bowman*, without the precision on which a complete theory can be based, the Supreme Court dealt with the jurisdictional issue in a case involving U.S. citizens and an alien who defrauded the United States in Brazil and on the high seas:[16]

> We have in this case a question of statutory construction. The necessary locus, when not specially defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations. Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement, and frauds of all kinds, which affect the peace and good order of the community must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard.

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[15] *E.g.*, *United States* v. *Baker*, note 3, *supra*, appears to be the only case denying extraterritorial power over aliens. *United States* v. *Bowman*, note 11, *supra*, asserts broad power over citizens and reserves decision with respect to aliens.

[16] *United States* v. *Bowman*, note 3, *supra*, at 97–99.

> But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated especially if committed by its own citizens, officers, or agents. Some such offenses can only be committed within the territorial jurisdiction of the government because of the local acts required to constitute them. Others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.

Study Draft § 208, by explicitly stating the jurisdictional base, eliminates the need to *infer* the jurisdiction "from the nature of the offense". In addition to making explicit what at most is implicit in current law, section 208 fills some gaps in current law, such as covering civilians accompanying the armed forces abroad (§ 208(f)). Before turning to section 208, a brief examination of the international criminal law principles will be useful.

4. INTERNATIONAL LAW BASES FOR CRIMINAL JURISDICTION

The basic principles of criminal jurisdiction in international law, relied upon in recent Federal judicial decisions, have been well stated:[17]

> These five general principles are: first, the territorial principle, determining jurisdiction by reference to the place where the offence is committed; second, the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offence; third, the protective principle determining jurisdiction by reference to the national interest injured by the offence; fourth, the universality principle, determining jurisdiction by reference to the person committing the offence; and fifth, the passive personality principle, determining jurisdiction by reference to the nationality or national character of the person injured by the offence.

In summary, the practical significance of which principle is relied on for asserting jurisdiction over extraterritorial conduct relates to the nature of the offense, whether or not any conduct or harm within the territory of the United States need occur or be contemplated and whether the defendant is an alien or a national. Thus, citizens could presumably be prosecuted for any conduct abroad regardless of the

[17] *Harvard Research* at 445. *See Rivard* v. *United States*, 375 F.2d 882, 885 (5th Cir.) *cert. denied*, 389 U.S. 884 (1967); *United States* v. *Pizzarusso*, 388 F.2d 8, 10 (2d Cir. 1968); *Rocha* v. *United States*, 288 F.2d 545, 549 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961). These five general principles have varying degrees of acceptance, with the first (territorial), being universally accepted.

nature of the offense or its effect within United States territory, by reliance on the nationality principle. Aliens could also be subject to prosecution for any criminal conduct committed abroad if the "objective" territorial basis for judisdiction were satisfied, *i.e.*, conspiracy, attempt, *etc.* (§ 208(d)). Whether aliens are otherwise subject to extraterritorial jurisdiction depends on the nature of the offense if the protective or universality principle is relied on or the status of the victim in the case of the passive personality principle.

The United States has relied on all of these principles as does Study Draft § 208, despite some dicta and one holding that United States power is limited to territorial and nationality jurisdiction [18] and possibly the universality jurisdiction over piracy. One recent district court case would deny United States jurisdiction over aliens for offenses committed outside its territory,[19] but this is a largely discredited limitation [20] which in similar cases has been rejected by reliance on the protective principle of jurisdiction.[21] In addition, each of the other bases for extraterritorial crime has been judicially or legislatively recognized. *United States* v. *Bowman* [22] relied on the nationality principle to deal with citizens who commit crimes abroad. Smuggling violations have resulted in convictions of aliens and citizens [23] on the basis of a corollary to the territorial principle, the "objective" territorial principle, which permits prosecution for extraterritorial attempts or conspiracies to commit a crime within the United States, or where the principal offense is committed in part within and without or wholly within the United States.[24] The piracy provision (18 U.S.C. § 1651) recognizes the "universality" principle [25] and the passive personality jurisdictional peg, based on the nationality of the victim, is recognized in 18 U.S.C. § 1653.

5. STUDY DRAFT § 208

§ 208(a): Presidential assassination.—18 U.S.C. § 1751, concerning presidential assassination, kidnapping and assault, is silent on the issue of territorial jurisdiction. Subsection (a) of section 208 explicitly as-

[18] *See* discussion in *United States* v. *Baker*, and rebuttal in other cases cited in note 3, *supra*. Territorial jurisdiction (constructive) has been held to include United States registered vessels, *United States* v. *Bowman*, note 11, *supra*, and by stretching the concept, United States consulates. *See United States* v. *Archer*, 51 F. Supp. 708 (S.D. Cal. 1943). *Cf. United States* v. *Pizzarusso*, note 3, *supra*, at 11, n. 7, and *United States* v. *Rodriguez*, note 3, *supra*, at 492.

[19] *United States* v. *Baker*, note 3, *supra*.

[20] *Cf. Harvard Research* at 556: "The contention advanced by certain Anglo-American writers that jurisdiction over aliens is restricted to those within the territory and to pirates appears to be the result of a tendency to equate the exercise of jurisdiction undertaken in a particular State with competence as determined by international law. . . . It is believed that most of the objections to the protective principle may be overcome by agreement on certain limitations with respect to the acts of aliens which may be denounced as criminal and by the general acceptance of certain safeguards."

[21] *Rocha* v. *United States* and *United States* v. *Pizzarusso*, note 3, *supra*.

[22] Note 11, *supra*. Also see 18 U.S.C. § 1652 (citizens as pirates).

[23] *Marin* v. *United States*, note 10, *supra*.

[24] *See United States* v. *Pizzarusso*, note 3, *supra*, for extended explanation of difference between "objective" territorial and protective jurisdictions.

[25] Piracy is covered by Study Draft § 201(*l*).

serts extraterritorial jurisdiction over such conduct. It would apply to all persons, including aliens. Coverage of aliens can be based on the protective jurisdiction, with the section reflecting a legislative determination that the safety of the nation and the proper function of government is inextricably tied up with the safety of the President. Arguably, it could be based on the passive personality doctrine, as well, *i.e.* the nationality of the victim, but, absent treaty, this doctrine is subject to doubts concerning its acceptability as a jurisdictional base and is broader than necessary to support the actual purpose of § 208(a).

§ *208(b): Treason, espionage and sabotage.*—Existing law expressly covers treason committed anywhere, but is silent with respect to the territorial jurisdiction over espionage or sabotage. Clearly the nationality principle would support § 208(b) which is limited to United States nationals. An issue presented is whether by invoking the protective principle, jurisdiction should be asserted over aliens who commit espionage or sabotage against the United States abroad. Traditionally the United States and Great Britain have refused to take this step.[26]

This may well be an instance in which the foreign nation in whose territory the offense is committed may have no interest in prosecuting the offense; in fact, where espionage against the United States is involved, the conduct may not constitute an offense in the foreign nation. On the other hand, even if § 208(b) is not expanded to include aliens, an alien could be subject to United States law if he engaged in espionage or sabotage abroad and came under § 208(d) (object or effect within the United States) or if he was abroad as a United States public servant under § 208(f).

§§ *208 (c) and (e): Counterfeiting, false statements, immigration and smuggling.*—These subsections carry forward, on the basis of protective jurisdiction, coverage of existing law consequent upon judicial construction of current statutes which are silent on the subject.[27] Similar conduct, such as bribery and obstruction of governmental functions could be considered for inclusion here. The protective jurisdiction, of course, covers aliens, and extraterritorial extension of physical obstruction of governmental functions (§ 1301) to cover aliens, raises policy questions concerning proof and whether or not the potentially minor nature of the conduct is such that we would want to cover aliens acting

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[26] *Harvard Research*, 546, which also notes that this "is not conclusive evidence that they deem the exercise of such a competence contrary to international law." *Compare, Scarbeck* v. *United States*, 317 F.2d 546 (D.C. Cir. 1963), conviction of United States diplomat for communicating classified information to foreign government in Poland in violation of 50 U.S.C. § 783(b), in which the extraterritorial crime issue was not raised. It could have been sustained on the nationality principle if Scarbeck was a citizen, but its limitation to public servants suggests the protective principle and reliance on this principle would be required if § 783(c), dealing with recipients of such information, is intended to cover alien recipients of such information abroad. Note that we are not concerned with whether extradition would be available in such cases, but only if such aliens could be tried where jurisdiction is acquired.

[27] Counterfeiting is expressly covered in *Harvard Research*, at 440: "A State has jurisdiction with respect to any crime committed outside its territory by an alien which consists of falsification or counterfeiting, or an uttering of falsified copies or counterfeits, of the seals, currency, instruments of credit, stamps, passports, or public documents, issued by that State or under its authority."

in their own country. The latter objection is not available if coverage were limited to United States nationals. Although the need for such extension is not pressing, a logical case can be made in its behalf. Extending bribery to nationals is less of a problem; note that extraterritorial bribetaking by public officials would be covered under § 208 (f). Coverage of bribery by aliens abroad could raise difficult questions with respect to nations in which unauthorized payments to public officials is a societal characteristic.

It should be kept in mind that invoking the protective jurisdiction means that the crime is completed by conduct abroad without any direct effect, conduct or harm within the United States. This is to be contrasted with the jurisdiction created by § 208(d) (attempt, conspiracy, etc.) which will cover all offenses, including bribery and obstruction of government functions.

§ 208(d): Conspiracy, attempt, etc.—This subsection invokes the "objective" territorial jurisdiction. Current statutes have been construed to cover such conduct and subsection (d) assures, without the need to rely on canons of construction, that an extraterritorial conspiracy, attempt or solicitation to commit any offense within the United States or engaging outside the United States in any Federal crime committed in whole or in part within the United States is a crime punishable by the United States.

§ 208(f): United States diplomats abroad; persons accompanying armed forces.—This subsection fills two gaps in current law:

(1) It assures that a diplomat who enjoys immunity from prosecution abroad can be prosecuted in the United States for offenses committed abroad; it also covers members of his household.

(2) It fills the gap created by Supreme Court decisions nullifying the power to try by court-martial persons accompanying the armed forces abroad [28] or civilians who committed offenses while members of the armed forces,[29] by making such persons amenable to trial in civilian Federal courts.

The suggestion in *Toth* [30] that the eliminating of court-martial jurisdiction could be legislatively remedied by providing for civilian court jurisdiction serves to support the proposed coverage of all public servants as well as persons accompanying them abroad. The proposal covers aliens, as well as United States nationals.[31]

§ 208(g): Jurisdiction conferred by treaty.—This section generalizes the basis for 18 U.S.C. § 1653, which makes jurisdiction for

[28] *Kinsella* v. *Singleton*, 361 U.S. 234 (1960).
[29] *Toth* v. *Quarles*, 350 U.S. 11 (1955).
[30] *Toth* v. *Quarles*, note 29, *supra*, at 21.
[31] *Cf. Harvard Research*, 539.

ARTICLE 6. PERSONS ASSIMILATED TO NATIONALS

A State has jurisdiction with respect to any crime committed outside its territory,

(*a*) By an alien in connection with the discharge of a public function which he was engaged to perform for that State; or

(*b*) By an alien while engaged as one of the personnel of a ship or aircraft having the national character of that State.

Cf. Approach in *United States* v. *Archer*, note 18, *supra*, that consulate is United States territory.

specified crimes against United States nationals dependent upon the existence of a treaty.

§ *208(h) : United States national committing or as victim of offense outside jurisdiction of any nation.*—This provision is based on the nationality principle and the universality and passive personality principles and covers offenses in such places as Antarctica.[32]

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[32] *Harvard Research* at 440–41: "A State has jurisdiction with respect to any crime committed outside its territory by an alien: * * * (c) When committed in a place not subject to the authority of any State, if the crime was committed to the injury of the State assuming jurisdiction, or of one of its nationals, or of a corporation or juristic person having its national character."

COMMENT

on

ASSIMILATED OFFENSES: SECTION 209
(Abrams; October 24, 1969)

Introductory Staff Note

The Consultant's Report covers assimilated offenses,* *i.e.*, offenses which are not defined by Federal law but which can nevertheless be Federally prosecuted when committed on Federal enclaves (park lands, buildings, military bases) on the basis of their being offenses in the State surrounding the enclaves. Except for grading of assimilated offenses, the consultant's proposals and section 209 of the Study Draft differ only with respect to the extent to which they attempt to codify existing decisional law. Professor Abrams' proposals are based upon such a codification.

The grading proposal in section 209 of the Study Draft limits the maximum Federal penalty for commission of an assimilated offense to what the new Code provides for Class A misdemeanors, regardless of whether the State penalty is higher. Its purpose is both to place in the Congress the responsibility for determining all serious Federal offenses and to minimize the consequences of the wholesale purchase of not only grossly disparate existing State laws but also whatever State legislatures may do in the future. This is the only substantial departure in the draft from existing law.

Whether or not the penalty limitation was justified before now, it is clearly so in the context of the reform effort undertaken in the Study Draft, where all serious crimes are defined, even if their principal application will be in enclaves. But there are some State offenses which frequently have serious penalties, which are not now defined in Federal law, and which are regarded as inappropriate to include in the new Code. Two, bigamy and incest, largely define when it is unlawful for persons to live together as man and wife. A third, abortion, is a highly controversial matter, and the law is in great flux. The principal Federal concern is that Federal enclaves do not become havens for these crimes. The misdemeanor penalty afforded in section 209 should provide sufficient deterrence for this purpose.

*There is some confusion as to whether the crimes referred to in this comment should be called assimilat*ive* or assimilat*ed*. The Act of Congress which established the principle in Federal law was called the Assimilat*ive* Crimes Act; and the consultant adopts that usage. It seems, however, that while the Act which incorporated those crimes into Federal law would be an assimilat*ive* Act, the crimes themselves are assimilat*ed*; and we propose the latter usage for the new Code.

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A Proposed Draft of an Assimilative Crimes Provision

§ 1. A person who engages in conduct on an enclave which if engaged in within the jurisdiction of the State in which the enclave is located would be punishable as an offense under the law of the State then in force is guilty of a Federal offense and subject to a similar penalty. Provided, however, that no person shall be guilty of an offense under this section where:

(a) another Federal penal statute or administrative regulation, designed to protect interests similar to those protected by the relevant law of the State, is applicable to such conduct; or

(b) prosecution under this section would be inconsistent with Federal policy. Such policy may be derived from the Constitution, treaties, Federal statutes, administrative regulations or applicable legal precedents; or

(c) prosecution under this section would be inconsistent with the policy of the State in which the enclave is located.

§ 2. The law of the State applied under this section shall:

(a) include all State penal law whether derived from statutes, administrative regulations or judicial decisions; and

(b) be interpreted in accordance with the decisions of the courts of the State.

§ 3. In prosecutions under this section, all matters of procedure shall be determined according to Federal law. For purposes of this section, the following shall be deemed matters of procedure:

(a) admissibility of evidence;

(b) rules of pleading;

(c) statutes of limitation; and

(d) all other matters not relating to the definition of the offense, or the applicable penalty.

[Alternative § 3. In prosecutions under this section, State law shall be applicable in determining:

(a) the definition of the offense;

(b) the applicable penalty; and

(c) all other legal issues arising in the prosecution concerning which there is no relevant Federal law.]

I. GENERAL BACKGROUND

A. INTRODUCTION

Section 7 of Title 18, United States Code, defines places that fall within the "special maritime and territorial jurisdiction of the United States." Other provisions of Title 18 define specific offenses that become Federal crimes when committed within that jurisdiction. For example, section 81 makes it a Federal crime to commit arson within the special maritime and territorial jurisdiction; sections 113 and 114 deal with assault and maiming; sections 661 and 662 treat larceny and receiving stolen property; various homicide offenses are covered in sections 1111–1113; sex offenses are in sections 2031–2032; and robbery is in section 2111.

Section 13 of Title 18, the so-called Assimilative Crimes Act, provides as follows:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

This section thus deals with conduct not covered by a specific Federal criminal statute that occurs within the special maritime and territorial jurisdiction and also occurs within the territorial limits of a State, territory, possession or district. For such conduct, section 13 incorporates by reference the State criminal law that would be applicable if the conduct had not occurred on the Federal enclave and makes it applicable as Federal criminal law. The result is that on Federal enclaves that are physically located within the borders of a State, there are two possible sources of Federal crimes—specific Federal provisions or, where there are no such provisions, State criminal law made applicable by force of section 13. The latter category of crime is generally referred to as an assimilated crime—*viz.*, State criminal law is assimilated into Federal law.

Federal crimes whose Federal connection is based upon the place of commission may be contrasted with other forms of Federal criminal jurisdiction. There is a large category of Federal crimes that may fairly be described as nonterritorial in nature; they are not Federal crimes because of *where* they occur but rather because some other type of Federal interest is affected—*e.g.*, protection of the integrity of Federal currency, or of Federal officers performing their duties, or because it provides a useful adjunct to State law enforcement. (*See generally*, Consultant's Report on Jurisdiction.) Federal crimes may also be based, however, on the place where the criminal activity occurs. Here there are several categories. Where the activity occurs in a place covered by 18 U.S.C. § 7 but outside the borders of any State, it is a Federal crime only if made criminal by a specific Federal statute. If the conduct occurs on a section 7 location within a State, either a specific Federal provision or 18 U.S.C. § 13 may be applicable.

Other types of comparisons may be made. Federal nonterritorial criminal jurisdiction may be exclusive, where congressional action has pre-empted the field, or, as is more often the case, concurrent where the conduct involved may be the subject of either Federal or State prosecution. Federal territorial criminal jurisdiction is exclusive where the conduct occurs outside the boundaries of any State. Where the Federal enclave is located within a State, Federal criminal jurisdiction may be exclusive if Federal authority over the enclave is exclusive, or concurrent, if the State retains such authority. Finally, in some cases the State may even have exclusive criminal jurisdiction in a Federal enclave located within its borders.

The focus of this memorandum is on the operation of 18 U.S.C. § 13—the assimilative crime issue. The operation of that section depends on such diverse elements as the scope of section 7 and the types of enclaves included thereunder, the character of Federal and State jurisdiction over these enclaves, the type of law enforcement authority

available in the enclaves and the range of offenses covered by specific Federal statute. Consequently these matters, too, are treated herein in some detail.

B. TYPES OF ENCLAVES

A peculiarity of the "special maritime and territorial jurisdiction of the United States," and particularly of the assimilative crimes aspect of that jurisdiction, is that it includes a multitude of different types of physical locations within its scope—each with its own characteristics. Places as different as cemeteries, parkways, military reservations, post offices, national parks, and housing projects are included. These places may differ markedly in such features as the geographic area involved and the number and kinds of activities of the Federal personnel on the enclave. Such differences may be significant for law enforcement purposes since they may affect both the types of crimes normally committed in the area and the practical aspects of policing the location by Federal or State authorities.

In normal course, one would expect a different range of criminal activity that might fall into the assimilative crime category, for example, in a national park, than would be anticipated, let us say, in a United States Post Office. Similarly, the practical problem of local police assuming some enforcement jurisdiction on a parkway would be quite different, for example, from their assumption of policing responsibility in a military reservation. Despite such differences in types of criminal activity and policing problems, the traditional approach has been to lump these very different types of places together under one heading and to utilize a minimal legislative approach that can be applied easily to all of them.

Indian reservations also qualify as Federal enclaves under this section 13. The Assimilative Crimes Act has been held to apply to Indian reservations unless the matter is covered by special Federal provisions or by treaty. *United States* v. *Sosseur*, 181 F. 2d 873 (7th Cir. 1950). The special problems of law enforcement on such reservations are not within the scope of this memorandum.

C. THE JURISDICTIONAL STATUS OF FEDERALLY OWNED PROPERTIES

The jurisdictional status of each Federally owned property depends on a large number of variables: *e.g.*, whether the Attorney General has approved title to the land; whether the State by a general statute has consented to the Federal acquisition of the property; whether the Federal government by legislative or executive action has indicated nonacceptance of the State-profferred jurisdiction; whether the property was acquired by the Federal government prior to the enactment of a State consent statute; or whether the State has modified its general consent statute by a cession statute ceding a measure of jurisdiction to the Federal government but reserving some authority for itself. No attempt will be made here to wade through all of the legal intricacies that determine the status of a particular property.

A careful, 2-volume study was done in 1956 by the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States dealing with all of the various aspects of the juris-

dictional status of Federal lands (hereinafter described as the Committee's Report). What is of particular significance here as developed in the Committee's Report is that there are at least 4 major jurisdictional categories into which a Federally owned property may fall: (1) exclusive legislative jurisdiction, where the Federal government exclusively possesses all of the authority of the State—legislative, executive and judicial—over the property in question; (2) concurrent legislative jurisdiction, where both the Federal and State governments concurrently exercise the same authority; (3) partial legislative jurisdiction, where the Federal government possesses some but not all of the State's authority; and (4) proprietorial interest only, where the Federal government possesses none of the State's legislative authority over the property in question but is essentially only a landowner. Significant issues relating to criminal prosecution under Federal law may hinge on which of these four jurisdictional statuses applies to the property on which the criminal conduct occurs.

Section 13 refers to crimes committed "within or upon" any places provided in section 7. This reference to section 7 would seem directed primarily [1] to places described in section 7(3), namely:

> (3) Any lands reserved or acquired for the use of the United States, and under the *exclusive* or *concurrent* jurisdiction thereof, *or* any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building. [Emphasis added.]

The reference in section 7(3) to "any place purchased or otherwise acquired . . . by consent of the legislature of the State. . . ." would seem also to refer to lands over which the Federal government has exclusive legislative jurisdiction under the Constitution (*See* Article I § 8, cl. 17.)

Section 13 is thus operative in cases where (1) the Federal government generally has exclusive jurisdiction; (2) the Federal and relevant State governments generally have concurrent jurisdiction; and (3) the Federal government's partial jurisdiction (as used in the Committee's Report) results in exclusive or concurrent Federal jurisdiction over some or all criminal matters. Indeed the Committee's Report indicated that "the Assimilative Crimes Act . . . which by its terms is applicable to areas under exclusive or concurrent jurisdiction, in the *usual case* is applicable in areas here defined as under partial jurisdiction." [2] (Emphasis added.) If Federal ownership does not carry with it either exclusive or concurrent legislative jurisdiction, the State government alone has criminal law authority and both section 7(3) and section 13 would be inapplicable.

As pointed out by the Committee, in instances where the Federal government has exclusive legislative jurisdiction, "law enforcement

[1] The argument that is applicable solely to section 7(3) places is discussed in note, *The Federal Assimilative Crimes Act*, 70 HARV. L. REV. 685, 686 (1957) [hereinafter cited as 70 HARV. L. REV.]. *Cf. United States* v. *Gill*, 204 F.2d 740 (7th Cir.), *cert. denied*, 346 U.S. 825 (1953).

[2] U.S. INTERDEP'TL COMM. FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES: REPORT 14 (1956–57) [hereinafter cited as COMM. REP.].

must, of course, be supplied by the Federal government since the State law being inapplicable within the enclave, local policemen and other law-enforcement agencies do not have authority nor do the State courts have criminal jurisdiction over offenses committed within the reservation."[3] Where both governments exercise concurrent jurisdiction, "State criminal laws are, of course, [also] applicable in the area for enforcement by the State."[4] Indeed, in such cases the same State law may be applicable whether prosecution is undertaken by the State or the Federal government, assuming the offense comes within the scope of the Assimilative Crimes Act. Where the situation involves partial jurisdiction, the extent of Federal and State law enforcement authority will vary according to the particular terms of the reservation of authority by the State.

The result is that the applicability of the Assimilative Crimes Act and, for that matter, those other numerous specific provisions of the Federal Criminal Code that depend on the special maritime and territorial provision, vary from Federal property to property depending on its jurisdictional status. The applicability of State criminal law depends on the same variations. And whether Federal or State law enforcement agencies or both can exercise authority within the property is tied to the same factor.

The result is a terrible hodgepodge of legal situations relating to the administration and enforcement of the criminal law on the enclave. It would no doubt be very desirable to remove the enormous discrepancies between the jurisdictional status of various Federal properties for purposes of making Federal criminal law administration on the enclaves more uniform and consistent throughout the country. Some such discrepancies may, of course, be necessary because of local variations from place to place, but it is difficult to believe that such variations justify the existing differences between exclusive, concurrent, partial, and no Federal legislative jurisdiction. These discrepancies raise complexities of interpretation that make criminal law issues turn on such abstruse subjects as the year in which the property was acquired by the Federal government; whether a State statute consenting to Federal jurisdiction was in effect at the time; and whether a State cession statute or Federal retrocession statute was applicable to the property. Again, of course, the problems created by the varying jurisdictional status of Federal properties are not limited to those involving assimilative crimes but may exist wherever the application of the special maritime and territorial jurisdiction formula is involved.

Discrepancies in jurisdictional status cannot be eliminated by modifying the section 7 formula. Section 7(3) could be limited to apply only to exclusive jurisdiction properties or only to concurrent jurisdictional properties. Both changes would be undesirable. The former would return the law to what it was prior to 1940 when special maritime and territorial jurisdiction applied only to exclusive jurisdiction enclaves and open the door to decisions such as *United States* v. *Tully*, 140 F. 899 (C.C.D. Mont. 1905) where the defendant's State conviction of murder was reversed on the ground that the homicide had occurred on property within exclusive Federal jurisdiction whereupon in a subsequent Federal prosecution, the court found that the Federal

[3] *Id.* at 17.
[4] *Id.* at 20.

government had no jurisdiction. The latter would leave the bulk of present Federal properties completely outside the scope of the special maritime and territorial jurisdiction formula. Nor is it possible simply by amending that formula to extend its application to properties that are not otherwise within the legislative jurisdiction of the Federal government, either generally or as to criminal law matters. If a property is not within the legislative jurisdiction of the United States, action other than simply amending Title 18 would be required to bring it within that jurisdiction. Changes in the jurisdictional status of many Federal properties, though desirable, cannot be effected through the vehicle of Title 18 only or even through legislative action by the Federal government alone. The problem is much larger.[5]

Consequently, the existing varying jurisdictional status of Federal properties for present purposes have to be taken as a given—not subject to change for the present—and this, of course, will affect any possible proposals for reallocating law enforcement responsibility in the enclaves.

D. LAW ENFORCEMENT IN THE ENCLAVES AND PROSECUTORIAL DISCRETION

Some sense of the practical aspects of law enforcement in the various enclaves can be gained from the following quote from the Committee's Report:[6]

> In the matter of law enforcement more difficult legal and practical questions are raised. From the reports received by the Committee it would appear that many agencies have encountered serious problems, which often have not been recognized, in this field in areas of exclusive or partial legislative jurisdiction. The problem is most acute in the enforcement of traffic regulations and "municipal ordinance type" regulations governing the conduct of civilians. Although specific authority exists for certain agencies (*e.g.*, General Services Administration and the National Park Service of the Department of the Interior) to establish rules and regulations to govern the land areas under their management and to attach penalties for the breach of such rules and regulations, and authority also exists for these agencies to confer on certain of their personnel arrest powers in excess of those enjoyed by private citizens (General Services Administration only if the United States exercises exclusive or concurrent jurisdiction over the area involved), this authority has provided no panacea. Despite the fact that General Services Administration may extend its regulations to land under the management of other agencies and provide guard forces for such areas at the request of these agencies, for reasons which have

[5] A question may also be raised whether, even if feasible, it would be desirable to effect changes in legislative jurisdiction involving the criminal law area without comprehensively dealing with the multitude of matters that hinge on the legislative status of a Federal property—such as voting rights, taxation, municipal services and the like. My own present judgment is that criminal law administration is sufficiently important to single out for special treatment but the issue is debatable. In any event, it appears at this time to be an academic question only.

[6] COMM. REP., *supra* note 2.

already been discussed it has been impossible for all agencies of the Federal government to avail themselves of the statutory provisions mentioned. As to civilians, therefore, Federal enforcement measures for traffic and similar regulations are limited often to such nonpenal actions as ejection of the offender from the Federal area, revocation of Federal driving or entrance permit, or discharge (if an employee).

Where serious crimes are committed in areas of exclusive Federal jurisdiction, generally the full services of the Federal Bureau of Investigation, the United States Attorney, and the United States district court are available for the detection and prosecution of the offenders. On the other hand, in the case of misdemeanors or other less serious crimes, there is generally no adequate Federal machinery for bringing the offenders to justice. If there is a United States commissioner reasonably available, there is generally no official corresponding to town constable or municipal policeman. Some Federal installations, judging by their replies to questionnaire B, have attempted to solve this problem by authorizing local or State police to enforce State or local traffic and parking regulations and municipal ordinances within Federal areas of exclusive or partial legislative jurisdiction. The possible consequences of such obviously extra-legal measures are a matter of serious concern to the Committee.

The Assimilative Crimes Act, of course, is only invoked when a Federal prosecutor decides to rely upon it as a basis for prosecution. Its use is thus subject to the usual elements involved in the exercise of a Federal prosecutor's discretion. Appropriate exercise of this discretion serves as one form of check to prevent the harmful or absurd results of incorporation of inappropriate State penal legislation. The point is further discussed, *infra*.

Availability of the possibility of an assimilative crime prosecution also may serve to give the prosecutor additional flexibility in his choice of charges. The point is illustrated by the following excerpt from Kaplan, *The Prosecutorial Discretion—A Comment*, 60 Nw. U.L. Rev. 174, 189–190 (1965):

> In one type of case, however, the choice between prosecution for too serious an offense or for none at all was evaded in an especially ingenious way. For some years, there had been many instances where applicants for Christmas or other temporary employment with the postal service had falsely denied a record of arrests. Technically, this is a violation of the False Statements Act, a felony carrying the same penalty as perjury—up to five years' imprisonment. Prosecution for this crime, however, seemed unduly harsh, especially when the accused, although previously arrested for drunkenness or vagrancy, had never been convicted of any serious offense and was merely attempting to gain honest work for himself—even if for the first time. On the other hand, this type of offense had become so common as to constitute a nuisance to the postal authorities, who requested that the law be enforced. Nor could the assistant deny prosecution on the ground that conviction would be uncertain, since in almost every case the

accused had made a complete statement admitting every element of the crime. For some years what had been done was to select the two or three worst offenders—those having the longest and most serious arrest records—and to prosecute them for the felony. However, although they invariably pleaded guilty, this was not felt to be satisfactory. Not only did the great majority of the offenders escape prosecution completely, but the judges and the press on various occasions had complained about those few prosecutions which were initiated. The thrust of these complaints was twofold. First, that this type of prosecution, even in small numbers, was placing an undue burden on the courts, and second, that severe criminal sanctions were completely inappropriate in what, insofar as the arrests were for drunkenness and vagrancy, was really a public health problem. Finally, an ingenious assistant worked out a method—of somewhat dubious legality—whereby as many offenders as desired could be prosecuted for a far less serious offense. He discovered that the California Business and Professions Code made it a petty offense to misrepresent one's qualifications for employment. Since the criminal act was committed in the Post Office—that is, on a Federal reservation—he reasoned that it came under the Assimilated Crimes Act and was hence punishable as a Federal crime. Moreover, the punishment provided by the California statute was so light that the cases could be brought before the United States Commissioner, who could deal with large numbers of this type of offense by imposing relatively summary and light sentences. As a result, in the first year the Assimilated Crimes Act was used, the number of prosecutions rose from fewer than 5 to more than 90, and everyone agreed that these matters were being disposed of far more simply and rationally than previously.

E. HISTORICAL PERSPECTIVE

(1) *The Scope of Assimilative Crimes Authority.*—The scope of assimilative crimes authority has in one respect diminished and, in another, increased over the years. On the one hand, the applicability of the "special maritime and territorial jurisdiction" has increased dramatically in recent years by virtue of tremendous increases in Federal land acquisitions that occurred in the 1930's. As of about 1955 the Federal government owned more than 21 percent of the continental United States. An inventory report issued by the General Services Administration indicated that some 30 million acres of land were under the exclusive or concurrent legislative jurisdiction of the United States as of June 30, 1962. As a result of this expansion in Federal landholdings, the impact of the Assimilative Crimes Act as well as specific Federal offenses whose applicability is dependent on the "maritime and territorial jurisdiction" have been significantly increased.

On the other hand, the applicability of State law through the Assimilative Crimes Act depends on the absence of any relevant "enactment of Congress." To the extent that the conduct is dealt with by

a specific provision of the Federal Criminal Code, the Assimilative Crimes Act is inapplicable. Over the years, there has been a significant increase in specific Federal substantive crimes provisions applicable on Federal properties, either by virtue of the special maritime and territorial jurisdiction or through some other specific jurisdictional peg. As the Supreme Court noted in *United States* v. *Sharpnack*:[7]

> Congress has recognized a slowly increasing number of federal crimes in the field of major offenses by enacting for the enclaves specific criminal statutes which have defined those crimes and, to that extent, have excluded the state laws from that field.

This increase in specific criminal provisions and the corresponding reduction in the applicability of section 13 raises a question whether we have reached a point where assimilative crimes jurisdiction has been reduced to the point where it is no longer of sufficient importance to be continued, particularly in view of the complexities that attach in connection with its invocation. Questions regarding the continued vitality of section 13 will be discussed *infra*.

The reported cases indicate that crimes that have in fact been prosecuted under section 13 in recent years have included some serious offenses such as burglary and possession of burglary tools,[8] incest,[9] sodomy,[10] embezzlement,[11] possession of a concealable firearm,[12] and such lesser offenses as speeding,[13] disorderly conduct,[14] bookmaking,[15] drunk driving,[16] game law violations.[17] and public exhibition of obscene photographs.[18]

Regrettably, no separate statistics are apparently kept on assimilative crimes prosecutions nor, for that matter, are separate statistics kept on the number of criminal prosecutions arising on lands within the special maritime and territorial jurisdiction. The relative paucity of reported assimilative crimes cases suggests, however, that it is not presently a major category of Federal prosecution.

(2) *Legislative Reenactments of the Assimilative Crimes Act.*—The Assimilative Crimes Act was first enacted by Congress in 1825 (4 Stat. 115). Some eight reenactments of the Act have occurred down to the present day: 1866 (14 Stat. 13): 1874 (R.S. 5391); 1898 (c. 576, § 2. 30 Stat. 717): 1909 (c. 321, § 229, 35 Stat. 1145): 1933 (c. 85, 48 Stat. 152): 1935 (c. 284, 49 Stat. 394); 1940 (c. 241, 54 Stat. 234): and the latest action adopting section 13 of Title 18, 1948 (c. 645, 62 Stat. 686).

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[7] 355 U.S. 286, 289 (1958).
[8] *Blakely* v. *United States*, 249 F. 2d 235 (5th Cir. 1957); *Clark* v. *United States*, 267 F. 2d 99 (4th Cir. 1959).
[9] *United States* v. *Davis*, 148 F. Supp. 478 (D. N.D.1957).
[10] *United States* v. *Gill*, 204 F. 2d 740 (7th Cir.), *cert. denied*, 346 U.S. 825 (1953).
[11] *United States* v. *Beall*, 126 F. Supp. 363 (N.D. Cal. 1954).
[12] *United States* v. *Cooper*, 143 F. Supp. 76 (N.D. Cal. 1956).
[13] *United States* v. *Dreos*, 156 F. Supp. 200 (D. Md. 1957).
[14] *United States* v. *Jones*, 244 F. Supp. 181 (S.D.N.Y. 1965), *aff'd*, 365 F. 2d 675(2d Cir. 1966).
[15] *United States* v. *Casserino*, 189 F. Supp. 288 (E.D.N.Y. 1960).
[16] *Kay* v. *United States*, 255 F. 2d 476 (4th Cir.), *cert. denied*, 358 U.S. 825 (1958).
[17] *United States* v. *Dowden*, 139 F. Supp. 781 (W.D. La. 1956).
[18] *United States* v. *Au Young*, 142 F. Supp. 666 (D. Hawaii 1956).

These frequent reenactments have occurred at least in part because of early decisions interpreting the 1825 Act. In *United States* v. *Paul*, 31 U.S. (6 Pet.) 141 (1832), Chief Justice Marshall construed the Act to mean that criminal laws promulgated by the State *after* the enactment of the Assimilative Crimes Act were not incorporated into Federal law under the Act. Consequently it was necessary to reenact the Act with some regularity to keep it current in some measure with State law. In a similar decision, *United States* v. *Barney*, 24 F. Cas. 1011 (No. 14,524) (C.C. S.D. N.Y. 1866), a lower Federal court ruled that the 1825 Act applied only to places under the jurisdiction of the United States at the time the Act was passed. The problem raised by the *Barney* case was remedied by the 1866 reenactment which extended application of the Act to "any place which has been *or shall hereafter be ceded*" to the United States (emphasis added). The 1866 Act also provided that "no subsequent repeal of any such State law shall affect any prosecution" for such an offense in a Federal court. But it was not until the 1948 reenactment that it was provided by Congress in section 13 that the State law incorporated by reference was that "in force at the time of such act or omission," thus legislatively overruling the *Paul* decision. The constitutionality of that clause was upheld in the landmark decision in *United States* v. *Sharpnack*, 355 U.S. 286 (1958). To the objection that the incorporation of State law not in existence at the time of the enactment of the Federal adopting legislation was an unconstitutional delegation of Congress' legislative authority, the Court stated:

> Having the power to assimilate the State laws, Congress obviously has like power to renew such assimilation annually or daily in order to keep the laws in the enclaves current with those in the States. That being so, we conclude that Congress is within its constitutional powers and legislative discretion when, after 123 years of experience with the policy of conformity, it enacts that policy in its most complete and accurate form. Rather than being a delegation by Congress of its legislative authority to the States, it is a deliberate continuing adoption by Congress for Federal enclaves of such unpreempted offenses and punishments as shall have been already put in effect by the respective States for their own government. Congress retains power to exclude a particular State law from the assimilative effect of the Act. This procedure is a practical accommodation of the mechanics of the legislative functions of State and Nation in the field of police power where it is especially appropriate to make the Federal regulation of local conduct conform to that already established by the State. (355 U.S. at 293–294.)

The *Sharpnack* case thus finally and definitely settled *one* of the more difficult recurring problems in applying the Assimilative Crimes Act.

II. Comments on the Proposed Draft of an Assimilative Crimes Provision

A. Introduction

Several basic issues relating to the Assimilative Crimes Act must be resolved at the outset of any drafting effort. The first and most

important is whether the assimilative crime approach itself is to be continued in a revised Federal Criminal Code. This crucial question is discussed in part III, *infra*. In the proposed draft, the assumption is made that this basic approach will be retained in the new Code. Making this assumption, certain important drafting questions still remain.

An initial major question facing the draftsman in this area is whether it is possible to develop in statutory form a principle for distinguishing between "good" or modern State penal law that should be subject to incorporation and that which should not be. As Professor Schwartz has put the matter, "Considering the backwardness of the penal law in many states, there must be some grotesque consequences of this wholesale incorporation of state law." Not surprisingly, no single such principle has been discovered. Nevertheless, existing judicially developed doctrines in the assimilative crimes area do provide some guidance on how to deal legislatively with this basic question.

Assimilative crimes prosecutions, of course, present the usual panoply of substantive criminal law problems. In addition, they may involve the type of jurisdictional issues discussed *supra*, part I–C. Finally, they often involve other questions peculiar to the assimilative crimes area—such as, under what circumstances is State criminal law not subject to incorporation? Such issues have both a temporal aspect (*viz.*, incorporation of State law as of what time—although, as indicated, that type of problem has been largely put to rest by statutory amendment and the decision of the Supreme Court in *United States* v. *Sharpnack*, *supra*), and a dimension that resembles choice-of-law issues in the conflict of laws area (*e.g.*, is State law that is contrary to Federal policy subject to incorporation?).

These latter issues tend to be fairly complex, and solutions are difficult to capture in the form of statutory language. Until now, the issues have been treated by the courts on a case-by-case basis and the doctrines are still evolving. Even reference to the cases is not always helpful since there have not been a sufficient number of decisions on many of the issues to provide a full doctrinal development.

A significant issue for the Commission is whether to insert language in the assimilative crimes section of the proposed new Code that will provide some further guidance to the courts and parties on these choice-of-law questions that may arise in an assimilative crimes prosecution. The issue is a difficult one. On the one hand, it would be useful to the courts, prosecutors, and particularly, defendants, to have some additional guidance in this area. Indeed, there seems little excuse for not attempting by statute to remove, insofar as possible, the additional legal uncertainties and complexities that attach in an assimilative crimes prosecution. On the other hand, however, there is a serious question whether any attempt at providing statutory guidance can do much more than restate in statutory form the accepted judicially developed doctrines. Absent a need to overturn any such judicial doctrine, it may be questioned whether the drafting effort is worth the candle. The effort seems even more wasteful in view of the fact that the overall significance of the assimilative crimes provision will be reduced by an expected increase in the number of specific statutory offenses.

The issue then is whether to attempt to legislate fairly detailed technical provisions for a relatively narrow problem area that is destined to grow still more narrow. The alternative is to retain the basic limited form of section 13 adding only appropriate changes for clarification and stylistic purposes. On balance, it seems preferable to attempt to clarify by specific language the significant interpretative issues that typically arise in assimilative crimes prosecutions.

B. COMMENTS ON A PROPOSED DRAFT OF AN ASSIMILATIVE CRIMES PROVISION*

(1) *In General.*—The basic language of present section 13 has been recast and simplified to make the section clearer and easier to read, but the essential elements of that section have been retained. Some particular word changes are commented upon immediately below.

(2) *Section 1: "Enclave."*—The term "enclave" is here used as a substitute for the phrase in the present section 13 "places now existing or hereafter reserved or acquired as provided in section 7 of this title" and the description of those places in section 7(3). A revised description of these places presently covered under section 7 remains to be drafted. Meanwhile "enclave" is used only as a temporary shorthand way of describing Federally owned locations throughout the country.

(3) *Section 1: "Then in Force."*—The phrase is the equivalent of the phrase in present section 13, "in force at the time of. . . ." As previously discussed *supra*, the constitutionality of incorporating by reference State criminal law not in existence at the time of the enactment of the assimilative crimes provision was established in *United States* v. *Sharpnack*.

(4) *Section 1(a): "Another Federal Penal Statute . . . Is Applicable to Such Conduct."*—The present Assimilative Crimes Act uses the clause "although not made punishable by any enactment of Congress" and is intended to make the incorporation of State penal law conditional on the fact that the conduct has not been made criminal by a specific Federal statute. Although the present language of section 13 could be read as incorporating State law whether or not made punishable by Federal law, it seems clear that this was not the intention of the draftsman. *See* 70 HARV. L. REV., *supra* note 10, at 691n.48:

> Since the committee report on the 1948 Act indicates that, except where specified, only minor wording changes were made. H.R. REP. No. 304, 80th Cong., 1st Sess. A8 (1947), the language of the present act should be read as the equivalent of the language in the 1940 act which provided that a crime is assimilated "which is not made penal by any laws of Congress," Act of June 6, 1940, c. 241, 54 Stat. 234.

If Congress has also proscribed the conduct and attached criminal sanctions, it would seem to make no sense to incorporate State criminal provisions. The quoted language in the draft is designed to accomplish this result. However, some problems of application of this clause may arise.

(5) *Section 1(a): "Or Administrative Regulation."*—The present statute appears to incorporate State law only where no "enactment

*The text of the consultant's draft statute appears at 78, *supra*.

of Congress" makes the conduct criminal. The same results should obtain where a regulatory provision promulgated by a Federal administrative agency applies criminal sanctions to the conduct involved. Indeed an argument may also be made under this heading that Federal regulations that apply civil sanctions to the conduct should also bar incorporation of State law, but that issue may also be treated through the doctrine discussed *infra*, that incorporation will be barred where prevailing Federal policy so dictates.

If the conduct is subject to criminal sanction under Federal law in whatever form—statute or administrative regulations—apart from the Assimilative Crimes Act, no good reason appears why State law should be assimilated. The only possible argument is that State statutory law should be given precedence over "mere" Federal administrative regulations. The argument would seem to fall of its own weight.

The precise issue involved here apparently has not been litigated. (The converse question—whether State administrative regulations are to be assimilated—is discussed *infra*.) The desired result may be reached under the existing statute by construing "enactment" broadly or by construing it to include the statute that authorizes the Federal agency to promulgate regulations and proscribes criminal sanctions for their violation. The proposed assimilative crimes provision has been drafted, however, so as to make it clear that Federal administrative regulations may bar assimilation.

(6) *Section 1(a): "Designed to Protect Interests Similar to Those Protected by the Relevant Laws of the State."*—The same conduct may be the subject of several different offense categories. The fact that the conduct constitutes only a larceny under Federal law, for example, might be deemed sufficient under the present statute to bar incorporation of State law that also makes the conduct a burglary,[19] since section 13 requires that before State law is incorporated the conduct be not made punishable by "*any* enactment" of Congress. It has been argued, however, that because of "the fact that burglary creates dangers not always present in a larceny, the creation of the Federal crime of larceny should not be viewed as precluding the assimilation of the State offense."[20] The argument has some merit. If the purpose of the Assimilative Crimes Act is to give the Federal Criminal Code the same breadth of application in the enclaves as a traditional State Criminal Code, then State law should be subject to incorporation even where an enactment of Congress makes the conduct criminal but only to the extent that Federal law does not have an offense category protecting the same interests as the State offense. Thus if the conduct involved is only a larceny under a specific Federal statute and would also be a burglary under State law, the State burglary provision should be the subject of incorporation.[21]

The contrary argument would be that the fact that Congress established the crime of larceny and did not create a Federal crime of burglary represents a congressional judgment that burglary is not to be punished as a crime under Federal law. A case illustrating that

[19] *Cf. Dunaway* v. *United States*, 170 F. 2d 11 (10th Cir. 1948).

[20] 70 HARV. L. REV., *supra* note 10, at 693.

[21] The same results can be reached even under the present wording of section 13 by construing the act constituting the larceny as different from the act constituting the burglary.

type of argument is *Williams* v. *United States*, 327 U.S. 711 (1946). In *Williams* the defendant was charged with having had carnal knowledge on a reservation of an Indian girl who was over 16 but under 18 years of age. A specific Federal statute made it a crime to engage in such conduct where the girl was under 16. Arizona, where the reservation was located, had a similar provision but the statutory age was 18. The Federal prosecution was brought on the theory that the Arizona provision was assimilated. The Supreme Court held that the Arizona statute was not assimilated, stating:

> The fact that the definition of this offense as enacted by Congress results in a narrower scope for the offense than that given to it by the State, does not mean that the Congressional definition must give way to the State definition. . . . We believe that . . . a conflicting State definition does not enlarge the scope of the offense defined by Congress. The Assimilative Crimes Act has a natural place to fill through its supplementation of the Federal Criminal Code, without giving it the added effect of modifying or repealing existing provisions of the Federal Code. (327 U.S. at 717–718.)

How does *Williams* square with the position advanced *supra*, that the existence of a Federal statute on larceny should not bar assimilation of a State burglary offense? Although there might appear at first glance to be some inconsistency, the two positions can be readily reconciled. The larceny-burglary dichotomy is different from *Williams* not simply because two different offenses are involved (the labels should not be treated as decisive) but rather because burglary as a category of crime is designed to protect interests additional to those protected by the law of larceny. The same cannot be said of the statutory rape offenses involved in *Williams*.

Such a "different interests" standard has some built-in vagueness and in particular cases will involve some uncertainty and difficulty of application, but it focuses on the crucial judgment to be made in determining whether an existing Federal law should bar assimilation. Where a related State penal statute is aimed at protecting interests different from those covered by the relevant Federal provision, the failure of Congress to enact such legislation should not, by itself, be deemed to imply a congressional purpose to exempt the conduct not covered by the Federal statute.

Fortunately, some of the problems created by discrepancies between State and Federal offense categories such as in the burglary-larceny area will largely disappear under a well-considered criminal Code that comprehensively deals with all traditional categories of criminality.

To sum up, if there is a Federal offense applicable to the conduct, a *similar* State offense will not be assimilated. Thus a Federal *larceny* statute will prevent assimilation of a State *larceny* provision. If the State offense category appears to be different, however, from any Federal offense, it will be subject to assimilation unless it appears to be intended to protect the same interests as any related Federal offense—in which case assimilation will be barred.

The recommended language has been drafted to reflect this result.

(7) *Section 1(b): "Would Be Inconsistent With Federal Policy."*—

Assimilation of State law is barred where specific Federal law already makes the conduct criminal. Assimilation is also prohibited under prevailing judicial interpretations where to assimilate the State law and prosecute Federally for the conduct is inconsistent with Federal policy. The few cases seem to indicate that the Federal policy that can thus bar assimilation may be found in the Constitution, Federal statutes, administrative regulations or other sources. It may be expressed or implied.

(8) *Section 1(b): "Federal Statutes."*—The clearest case under this heading—one that is so clear that no special provision is really required therefor—would be a case in which a specific Federal statute immunized the conduct from criminal sanction. Cases less clear involve instances where, although a Federal statute does not expressly confer immunity, it can be interpreted to imply a congressional intention to leave the conduct involved unpunished. An example of such a statutorily derived policy has been previously discussed under another heading, *supra* paragraph (6), and is therein treated by specific language; but it may also be viewed as an instance of the application of a statutorily based Federal policy against prosecution. Thus the statute in *Williams* v. *United States*, *supra*, may be seen as reflecting a Federal legislative policy not to prosecute statutory rape cases where the girl is over 16. A Federal policy not to prosecute certain categories of crime by incorporation of State penal law may, of course, also be derived by interpretation from Federal statutes that are not penal in nature.

(9) *Section 1(b): "The Constitution."*—It is manifest that a State penal statute that is inconsistent with Federal policy expressed in the Constitution should not be assimilated. If that constitutional policy is applicable only to the Federal government, assimilation is barred by the "contrary to Federal policy" doctrine described in the preceding paragraphs. If the policy is also applicable to the States, the State statute may be unenforceable even in the State courts. The number of constitutional doctrines applicable only to the Federal government, of course, has decreased in recent years as these doctrines have been extended to the States through interpretation of the fourteenth amendment.

(10) *Section 1(b): "Administrative Regulations and Applicable Legal Precedents."*—Contrary Federal policy expressed in the form of Federal administrative regulations may be sufficient to bar incorporation. The Supreme Court seemed to imply as much in *Johnson* v. *Yellow Cab Transit Co.*, 321 U.S. 383, 390 (1944), and other courts have expressly so held, *e.g.*, *Air Terminal Services, Inc.* v. *Rentzel*, 81 F. Supp. 611 (E.D. Va. 1949). There may, however, be serious questions of determining whether such regulations do indeed express a contrary Federal policy. For example, consider the footnote comments of the Court in the *Yellow Cab* case, *supra:*

> Army regulations have declared certain liquor policies for Army reservations generally. . . . Whether the declaration of policies contained in these various regulations indicates an intention of the War Department to permit all liquor transactions not expressly prohibited and whether, if it does, the War Department has the power under Acts of Congress to permit such transactions, seem open questions. (321 U.S. at 390n. 9.)

And on at least one occasion it has been reported that the Criminal Division of the Department of Justice advised that "military regulations purporting to sanction bingo and similar games would be ineffective to prevent the adoption of State laws prohibiting gambling." [22]

A still more difficult question is whether contrary Federal policy may be derived from sources other than express statutes or regulations. The *Rentzel* case, *supra*, and *Nash* v. *Air Terminal Services, Inc.*, 85 F. Supp. 545 (E.D. Va. 1949), may be used to illustrate some of the problems in this area. In *Nash* the court, in the course of its decision, ruled that a Virginia statute compelling segregation under threat of criminal penalties was assimilated and thus applicable to Washington National Airport, a Federal reservation under exclusive Federal jurisdiction. The court found no contrary Federal policy to prevent assimilation. Indeed, the court noted that at the time in question, instructions of the Federal official responsible for administering the airport as well as the original concession agreement contemplated enforcement of segregation on the reservation.

Seven months earlier, however, in *Rentzel*, the same Federal judge had reached what initially appears to have been a different result in a case which, though decided earlier, involved facts that arose after the facts in *Nash*. In *Rentzel*, the issue was whether the administrator had the authority to issue a regulation barring segregation at the airport. The court ruled that such an expression of Federal policy through regulations is permissible and overrides the assimilation of a contrary State statute. The court in *Nash* distinguished *Rentzel* very simply on the ground that at the time of the facts in that case Federal policy had not yet been expressed in the form of a regulation.

The cases are not, however, so easily reconciled, for in *Rentzel* the court noted a Federal policy to avoid "race distinction in Federal matters," citing *Hurd* v. *Hodge*, 334 U.S. 24 (1948). In *Hurd* the issue was whether racially restrictive covenants could be enforced in the Federal courts, and the Court discussed, at 334 U.S. 35, "the public policy of the United States as manifested in the Constitution, treaties, Federal statutes, and applicable legal precedents." It has been suggested that "this general [Federal] policy [*i.e.*, against racial segregation] could have been found sufficient to bar assimilation in *Nash*." [23] Since the district judge in *Nash* did not see fit to apply that general policy to bar assimilation, in the absence of its incorporation into regulations, one might read *Nash* as standing for the proposition that general policy not incorporated into statute or regulation is not sufficient to bar assimilation. The case should not be so understood, however. For *Hurd*, the case from which this Federal judge derived the policy, was decided on May 3, 1948—after the facts arose in *Nash* and before the facts in *Rentzel*. Thus it is not surprising that the court cited *Hurd* and mentioned the policy in *Rentzel* but not in *Nash* even though *Nash* was actually decided later than *Rentzel*.

The particular problem involved in *Nash* and *Rentzel* cannot, of course, recur since the "general policy" involved has long since been made directly applicable to the States through the fourteenth amend-

[22] Letter dated April 29, 1955, from Ass't U.S. Attorney General, Criminal Division, Dep't of Justice, to U.S. Secretary of Defense, *cited* in COMM. REPORT, *supra* note 2, at 138n. 76.

[23] 70 HARV. L. REV., *supra* note 10, at 695 n. 66.

ment. As here interpreted, those cases read together do not limit the prevention of assimilation to instance where "contrary Federal policy" is expressly incorporated into statute or regulation. Rather they should be read as barring assimilation where a contrary Federal policy is "manifested in the Constitution, treaties, Federal statutes, and applicable legal precedents."

It is debatable whether it is desirable to permit the Federal policy that may block assimilation to be derived by inference from a complex of unspecified Federal sources. The alternative, of course, is to require that the policy be found in a specific Federal statute or regulation. Although it is difficult to conceive of cases akin to the problem in *Rentzel* or *Nash* where the issue might arise today or in the future, it nevertheless may be worthwhile to leave leeway in the statute for that possibility. It is certainly arguable that the policies of the Federal government are not expressed *only* in the form of specific statutes or regulations. On the other hand, by leaving such leeway in the statute, the question of whether any given statutory law is incorporated is made that much more uncertain. But the element of uncertainty is also present with regard to specific statutes or regulations since their meaning and bearing on the assimilation issue may be very unclear. (*See*, for example, the statement quoted *supra* from the *Yellow Cab* case.) On balance, it seems preferable to provide such leeway in the statute despite the possibility of a slight increase in uncertainty of its application in particular cases.

(11) *Section 1(c): "Inconsistent With the Policy of the State."*—It may seem rather odd to provide that assimilation of a State criminal statute into Federal law may be barred by *State* policy. The issue has arisen in a single Supreme Court decision, *United States* v. *Press Publishing Co.*, 219 U.S. 1 (1911). The Federal prosecution involved there was based upon the circulation on a Federal reservation in New York of a newspaper containing material allegedly libelous. A New York statute made the publication of a libel a misdemeanor. The court held that the State libel statute was not assimilated since the policy of State law, as viewed by the court, was that there should be only one prosecution in connection with the publication and circulation of a libel. Since this publication had also occurred within the jurisdiction of the State, prosecution was also possible in State courts and to permit Federal prosecution would be inconsistent with the policy of the State statute.

The *Press Publishing* decision may be treated as sui generis and influenced at least in part by the Court's disfavoring attitude toward criminal libel. Nevertheless it did establish the general principle that State policy, too, may bar assimilation. Although it is difficult to foresee other types of situations where such a doctrine might be invoked, it seems a rule of caution to incorporate the principle into the draft.

(12) *Section 2(a): "Include All State Penal Law."*—By the terms of present section 13, State law that would make the conduct involved "punishable . . . if committed . . . within the jurisdiction" of the State is subject to assimilation into Federal law. The clearest type of State law thus subject to assimilation is State penal statutes, and practically all of the litigated assimilative crimes cases have involved statutes. Although it is difficult to find modern cases in point, it would

seem that, under the terms of section 13, the common law of crimes where still operative in a State either generally or as a residual gap-filler would also be subject to incorporation.[24] That the State criminal law to be assimilated is not codified in the form of legislation is not a reason to treat it differently. If the State sees fit to use a common law approach for part or all of its penal law, that should not prevent incorporation of that State law. If the primary purpose of an assimilative crimes provision is to fill the gap left in Federal criminal law with State criminal law, it would defeat that purpose to distinguish between State common law and statutory crimes.

Such a view of the operation of the assimilative crimes provision does in a certain limited sense tend to create a category of Federal common law offenses although, in general, as the courts frequently note, there are no such Federal crimes. But the category is created by force of a statute — the Assimilative Crimes Act — and only occupies an extremely narrow corner of Federal criminal law.

A more difficult question is whether State regulatory law and particularly State administrative regulations to which criminal sanctions attach can be the subject of assimilation. Again, by its terms, present section 13 would seem to incorporate this form of State criminal law since the conduct "would be *punishable* if committed . . . within the jurisdiction of the State." But the argument has been made:[25]

> It might be contended that Congress did not intend to assimilate those State criminal statutes which are merely regulatory, including those connected with the health, building, vehicle, and game laws of the States, since these laws have such a direct effect on Federal activities that the Federal government itself should determine their content. Indeed, many of these matters are covered by Federal statutes and regulations. Moreover, since the State regulatory laws are often promulgated through State administrative bodies, their assimilation might be objected to on the ground that it would constitute a double delegation of congressional power. In addition, since the proper administration of regulatory laws often requires administrative machinery for the detection of violations, and since State agencies cannot operate within the enclaves, enforcement of assimilated regulatory laws may be frustrated by the absence of appropriate Federal administrative facilities.

The question of whether municipal ordinances should be incorporated involves a similar issue.

Existing case law on the general subject is sparse. Indeed, since the issue has apparently never been passed upon in the context of a Federal criminal prosecution, this suggests that, whatever the law on the subject, Federal prosecutors have not been inclined to bring prosecutions in reliance on the assimilability of this category of State law. The issue has been treated in dicta in several cases, however. For example, in *Crater Lake National Park Co.* v. *Oregon Liquor Control Comm'n*, 26 F. Supp. 363 (D. Ore. 1939), plaintiff tried inter alia to enjoin the

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[24] For an early holding to this effect, *see United States* v. *Wright*, 28 F. Cas. 791 (No. 16,774) (D. Mass. 1871).

[25] 70 HARV. L. REV. *supra* note 10, at 695, 696.

defendant from urging the United States Attorney to enforce the Oregon Liquor Control Act through the Assimilative Crimes Act. The court simply ruled that there was no basis for the issuance of an injunction although its opinion may be interpreted as having assumed the applicability of the Assimilative Crimes Act. In *United States* v. *Warne*, 190 F. Supp. 645 (N.D. Cal. 1960), again in the context of an injunction suit, the court did assume that the California Milk Stabilization Act and regulations issued under it (dealing with minimum prices) were subject to incorporation into Federal law, but the court also held that the Milk Act was in conflict with Federal procurement regulations and policy and for that reason was not in fact assimilated.*

Apart from the case law, the question remains whether State regulatory law should be treated differently for purposes of the assimilative crimes provision. Undoubtedly there are some very specialized State regulatory and administrative provisions that would be inappropriate to apply in Federal enclaves. Others, however, may be needed to fill undesirable gaps in Federal law. Rather than attempt the impossible task of distinguishing by statute between the two categories, it seems preferable to assimilate generally this type of State law, leaving it to the exercise of prosecutorial discretion and the operations of the "contrary to Federal policy" doctrine, *supra*, to avoid the application of inappropriate State regulations.

As to the questions raised regarding this category of assimilation in the quoted excerpt, *supra*, none of them seem to raise insuperable objections. Obviously, if the Federal government feels that a particular type of activity should be the subject of direct Federal regulation, it can enact specific statutes or promulgate regulations (*see* the discussion *supra*, as to whether a Federal administrative regulation bars assimilation) to deal with the matter. The double delegation argument is weak. The fact that the Federal prosecutor is in a position to judge whether the State administrative provisions should be enforced Federally and the courts can prevent enforcement through the "contrary to Federal policy" doctrine should furnish more than adequate protection against any risks that arise from so-called double delegation. The absence of appropriate administrative machinery may, of course, create practical difficulties for enforcement in the enclaves. But this is not an argument against assimilation. Rather it suggests that in appropriate cases it may be desirable somehow to establish such machinery.

(13) *Section 2(b): "Be Interpreted In Accordance With The Decisions Of The Courts Of The State."*—The question of whether State court interpretations of assimilated State penal law are binding on Federal courts has not arisen with any frequency. Typically the Federal court applying an assimilated statute will cite and rely on State court interpretations of such a statute without any indication of whether those interpretations are considered controlling. In an early case, *United States* v. *Andem*, 158 F. 996 (D.N.J. 1908), a district court held that a State rule of statutory construction was binding on the Federal court in construing an assimilated statute. There has been

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* *Warne* was affirmed in part and reversed in part in *Paul* v. *United States*, 371 U.S. 245 (1963). The Court held that there was no conflicting Federal policy and that current State milk price controls were applicable to sales on Federal military bases in the State if the basic State law authorizing such control had been in effect since the time of acquisition of the bases.

language in some cases (*e.g.*, *McCoy* v. *Pescor*, 145 F. 2d 260, 262 (8th Cir. 1944), *cert. denied*, 324 U.S. 868 (1945), however, that seems to suggest that State court decisions are not binding but these usually involve matters not properly the subject of assimilation.

There seems no legitimate reason not to treat as binding State court decisions interpreting an assimilated State statute—*i.e.*, also to assimilate the judicial gloss on a State statute. That is the result that seems required under present section 13, insofar as it requires that the conduct "would be punishable" if within the State's jurisdiction. It really makes no sense only to assimilate the statutory language and to require the Federal court to interpret that as if it had just been promulgated by the legislature. To the extent, of course, that a State judicial gloss on a statute seems to run counter to existing Federal policy, the "contrary to Federal policy" doctrine can be invoked. That doctrine can thus be used either to bar assimilation of the State statute itself or particular interpretations of that statute.

(14) *Section 3: "All Matters Of Procedure."*—The traditional approach is that in connection with assimilative crimes prosecutions, Federal procedure controls. The State substantive criminal law is incorporated but not State *procedural* law. As in other areas of the law, it is easier to state that distinction than to apply it in particular cases.

It has been held, for example, that the sufficiency of an indictment in an assimilative crimes prosecution is to be tested by the standards of Federal and not State law. Similarly, it has been held that the Federal statute of limitations is to be applied to assimilative crimes—that the State limitations statute is not assimilated along with the offense:[26]

> The element of time has nothing to do with the nature of the offense. . . . True, if the alleged offense had been committed within the jurisdiction of the State of New Jersey . . . and an indictment had been found in a state court against the defendant . . . the New Jersey limitation might furnish to the defendant a good defense. But, as time is not of the essence of the offense, as the limitation prescribed by the New Jersey law is in a different statute from that which defines the offense, and as the section of the congressional act . . . provides that the punishment to be imposed shall be the same as that which may be imposed by the state of New Jersey for a like offense . . . so far as the present case is concerned, it incorporates only that part of section 197 of the New Jersey crimes act which defines the offense . . .

In a more recent case, *Smayda* v. *United States*,[27] the question was whether the fourth amendment was violated by law enforcement observations into the privacy of a privy stall. The Supreme Court of California had earlier ruled in a State prosecution that such police conduct violated the Constitution.[28] Since a constitutional question as well as a matter of procedure was involved, however, the case may be a clearer one for refusing to assimilate a State decision. In *Smayda*, the Ninth Circuit stated:

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[26] *United States* v. *Andem*, 158 F. 996, 1000 (D.N.J. 1908).

[27] 352 F. 2d 251 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966).

[28] *Bielicki* v. *Superior Court*, 57 Cal. 2d 602, 371 P. 2d 288, 21 Cal. Rptr. 552, (1962).

> . . . [The Assimilative Crimes Act] refers to California statutes for its definition and its penalty, but it does not incorporate the whole criminal and constitutional law of California . . . A decision of the Supreme Court of California, construing the Constitution of the United States, while entitled to great respect, is not binding upon the Federal courts. (352 F.2d at 253.)

Although the *Smayda* court appears to have been proved wrong on the merits of the constitutional issue involved, *see Katz* v. *United States*, 389 U.S. 347 (1967), it was clearly correct in refusing to be *bound* by the California decision in *Bielicki*.

The problem raised by these cases is reminiscent of that posed on the civil side in diversity cases by *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). Under the command of *Erie* also, Federal courts apply State substantive law and Federal procedural law. There, the court has wrestled with an "outcome" test: "whether . . . it significantly affect[s] the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court." *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109 (1945). And the Court has recently refined that approach in *Hanna* v. *Plumer*, 380 U.S. 460 (1965). But the analogy with *Erie*, though superficially attractive, is misleading. There are considerations present in a diversity context—*e.g.*, the risk of forum shopping—that are not fairly presented by an assimilative crimes situation. The assimilative crime mechanism primarily serves a gap-filling purpose. To the extent that this is its principal function, it makes sense only to assimilate that State law which supplies a void in Federal law—*i.e.*, the State law that defines an offense and attaches a penalty to it. To the extent that all other matters are adequately covered by Federal law, including rules of evidence, pleading, statutes of limitation and the like, Federal law should control. This approach deemphasizes the use of the assimilative crimes device as a means of insuring that crimes committed on enclaves will be treated similarly to crimes committed within the State's jurisdiction. Although that once may have been a significant goal of the Assimilative Crimes Act, the steady growth of specific Federal crimes has substantially removed it as a factor.

The approach taken tends to limit severely that body of State law to be assimilated and to define expansively those matters to be treated as procedural and thus to be handled according to Federal law.

The difficulty, however, of applying such an approach in this area is well illustrated by *Kay* v. *United States*, 255 F. 2d 476 (4th Cir.), *cert. denied*, 358 U.S. 825 (1958). The prosecution was for driving under the influence of intoxicants and reckless driving. The court ruled that sections of the Virginia statutes providing for chemical analysis of a blood sample (taken with consent of the accused) and admissibility of reports of the analysis, and establishing certain presumptions arising out of a finding of certain alcoholic content, were assimilated into Federal law. The court concluded that: [29]

> [The] presumptions are not merely procedural, for they amount to a redefinition of the offense. . . . [While the provision for chemical analysis] may be said to be largely proce-

[29] 255 F.2d at 479.

> dural, it is a preliminary, pre-judicial procedure which may be employed only with the consent of the accused. It is designed . . . to protect the validity of the presumption. . . .

The Court is thus construing broadly that which relates to "the definition of the substantive offense" was able to assimilate State law relating to chemical analysis in drunk-driving cases and presumptions arising therefrom.

It is difficult to foresee all of the possible categories of State law relating to a criminal prosecution with respect to which the assimilation issue may arise. Although the matter has apparently not yet been passed upon, whether State rules regarding defenses like insanity, intoxication or mistake should be assimilated poses similarly difficult questions. On balance, my judgment is that these particular matters are sufficiently related to the definition of the offense that they should be assimilated. On the other hand, if the determining factor is to be whether there is a gap in Federal law, Federal doctrines regarding these matters would be applied.

Two alternative approaches on this issue are incorporated in the language of the draft. Under the first, the touchstone of assimilability is whether the State law is sufficiently related to the definition of the offense. That approach has a certain built in indefiniteness, well illustrated by the *Kay* case, *supra*, but it would permit the courts to shape results to the varying requirements of particular cases. The second approach is clearer in that it makes the issue turn on whether there is Federal law on the subject, but it will tend to make results dependent on the fortuitous existence of particular Federal doctrines.

III. Alternative Approaches to the Assimilative Crimes Problem

In connection with the foregoing draft and comments, it has been assumed that the assimilative crimes approach would be retained in any revision of the Federal Criminal Code. In this part, the more basic question of whether that approach ought to be retained or another substituted is discussed.

The assimilative crime approach may be seen as a gap-filler insofar as State law is incorporated by reference and applied in Federal prosecutions to fill lacunae not occupied by specific Federal statutory crimes. The approach has some major advantages and disadvantages. It relieves Congress of legislating with respect to a mass of minor offenses while ensuring that misconduct in the enclaves will not be left without applicable sanctions. It permits the Federal government without financial cost in effect to make use of the lawmaking services of State legislatures to prescribe sanctions for Federal misconduct. It makes Federal criminal law consonant with State law applied outside of the enclave (or even perhaps within the enclave) at least insofar as specific Federal statutes do not deal with the problem.

On the other hand, in the assimilative crimes realm, the Congress is not able directly to determine the content of the criminal laws applicable to misconduct in the enclaves. The legislator thus is not in a position to adopt the criminal laws in this area to the problem of particular enclaves or of the enclaves generally. (Federal prosecutors and the Federal courts do, of course, maintain a Federal finger on the use of State law for this purpose). In effect, the Federal government in the

assimilative crime area receives a grab-bag of State criminal laws the content of which is uncertain and varies depending on the location of the enclave. And this content is made even more uncertain by the somewhat technical special doctrines and interpretative policies applicable only to assimilative crimes, as described in the preceding part.

The consistent adherence by Congress to this approach in its reenactments of the Assimilative Crimes Act from 1825 up to and including the 1948 revision of the Federal Criminal Code may be deemed to reflect repeated congressional judgments that such a legislative approach is the most desirable of the various alternative approaches that might be taken. Such prior judgments should not, moreover, be deemed necessarily controlling on the issue. There is no evidence that these various reenactments of section 13 and its predecessors involved a thorough reassessment of the desirability of that approach. Rather, they tended to focus only on the problem of the State law to be incorporated. Also, it may be that modern development in the growth of specific Federal crimes relating to the special maritime and territorial jurisdiction, or in the number and type of enclaves covered by that jurisdiction or in the experience with assimilative crimes prosecutions provides a new factual framework in which to evaluate the assimilative crime approach. Finally, as a general proposition, a fresh look ought to be taken at all basic legislative policy issues as part of the comprehensive penal law reform effort. Accordingly, in the following paragraphs several alternative approaches, their feasibility, and their advantages and disadvantages are discussed.

One extreme approach to the assimilative crime and enclave crime issues would be to defederalize the problem—*i.e.*, make Federal criminal law inapplicable to the enclaves by eliminating the enclave category from the special maritime and territorial jurisdiction. Even apart from the objection that State criminal law would still be inapplicable in the exclusive jurisdiction enclaves, it is clear that this is a totally unacceptable solution. There is certainly a sufficient Federal interest in the enclaves to justify applying Federal penal provisions to them. Moreover, this solution would throw the baby out with the bath water. It would result in the abolition of enclave criminal jurisdiction primarily to simplify the treatment of assimilative crimes.

Once the premise is accepted that enclave criminal jurisdiction and assimilative crimes are primarily a Federal problem, or at least that there should be Federal penal laws applicable to all or most criminal misconduct in the enclaves, the choice is between various means of accomplishing this. Congress could attempt to legislate *comprehensively* for the enclaves by specific statutes and eliminate any incorporation of State law by reference. The Assimilative Crimes Act (section 13) would simply be repealed. Such an approach could be viewed as the logical outgrowth of a trend that has seen the gradual expansion of special Federal crimes applicable to the maritime and territorial jurisdiction. It would in effect be a reversal of the initial decision referred to in *Sharpnack*, *supra*, not to prepare "a code enumerating and defining specific offenses applicable to the enclaves."

Such an approach, if feasible, would simplify the operation of the Federal criminal law in the enclaves. It would avoid all of the technical problems, previously discussed, associated with incorporation of State law. And it would make the operation of the Federal criminal law consistent throughout the enclaves. At the same time, however, it

would eliminate whatever advantages attach because local conduct usually involving minor offenses is dealt with under local (*viz.*, State) law.

The decisive argument against this approach is that it is not feasible. Despite a marked expansion in the coverage of Federal penal law, it is just not realistic to expect Congress to be able to legislate concerning the multitude of matters that can arise in the diverse types of enclaves that are under the aegis of the Federal government. Even if feasible, it would make little sense to occupy valuable congressional time with such matters of detail.

Inevitably under such an approach, either some alternative means of dealing with minor crimes would have to be devised or the fact that some conduct involving minor offenses would go unpunished if committed on any enclaves would have to be accepted.

If section 13 were repealed and Title 18 did not deal with all forms of misconduct, the remaining misconduct would normally still be punishable by prosecution in the State courts under the minor misconduct provisions of the more comprehensive Criminal Code of the State. But if the enclave were within the *exclusive* legislative jurisdiction of the Federal government (and as previously discussed, most enclaves fall into this category), State law would be inapplicable, and the misconduct would not be subject to any criminal sanctions.

The unacceptability of such a solution is apparent. Even where State law is applicable, it would leave the Federal government without *any* handle to deal with many forms of minor misconduct or leverage to influence the State to act. Experience has shown that where both jurisdictions have concurrent authority, the State is sometimes hesistant to act, apparently on the theory that the conduct is primarily a Federal matter since it occurred on an enclave. There is at least a risk that this same attitude might also continue where no Federal legislation applies to the conduct. More importantly, it would be intolerable to leave some misconduct in exclusive jurisdiction enclaves to no sanctions whatsoever.

All of the foregoing alternative approaches appear either not feasible or unacceptable. There is an approach, however, which would substitute for the assimilative crimes device another means of comprehensively covering through Federal law all forms of misconduct on an enclave.

An alternative way of filling the gaps not covered by specific statutory provisions would be to repeal the Assimilative Crimes Act and rely instead on the Federal administrative agency responsible for administering the particular enclave to promulgate regulations to which panel sanctions would attach to deal with the misconduct involved. Such an alternative approach, which will be denoted herein as the administrative-regulation approach, has certain attractive features and merits careful consideration.

Substitution of administratively promulgated regulations for the assimilative crimes approach would give the Federal government (albeit Federal administrative agencies and only indirectly the Congress) more direct control over the content of *all* the criminal laws applicable to the enclaves in Federal prosecutions and would remove the "grab-bag" feature of the present approach. It would permit a shaping of the agency-derived offenses to the needs of particular enclaves and eliminate the necessity of making some of the peculiar inquiries often made

in connection with assimilative crimes—*e.g.*, whether the State offense conflicts with Federal policy. A larger lawmaking burden will be cast on the responsible Federal agencies who will no longer be able to rely on the assumption that if they omit to deal with a problem, it is probably covered by State law. It will result in increasing the proportion of the Federal criminal law found in administrative regulations rather than legislation, a result that may be deemed undesirable. On the other hand, it will make it unnecessary to consult State law sources in order to determine whether a Federal crime has been committed.

Under the new Code, there will be an increase in the number of serious Federal offenses applicable to the enclaves and the assimilative crimes issue will be limited to minor offenses. It is therefore assumed that any administratively promulgated regulations substituted for the assimilative crimes approach would be so limited.

Substitution of an administrative regulation approach for the Assimilative Crimes Act does have certain drawbacks because of possible limitations regarding administrative agencies' powers to prescribe penalties. It has long been clear that Congress, having itself fixed the penalty for violation of regulations, can delegate the authority to determine the content of the regulations to an administrative agency.[30] It is more doubtful, however, whether Congress can constitutionally delegate the authority also to prescribe [31] penalties limited only by some standard such as reasonableness.[32] Congress could probably, however, set up several categories of penalties and delegate the authority to determine, subject to appropriate standards, that violations of different regulations fall into one or another category.

Absent meaningful standards, however, serious issues of constitutionality and policy might be raised. The issues may be put this way. Would Congress be willing to delegate to Federal agencies the authority not only to prescribe whether particular conduct was criminal but also to prescribe the degree of criminality within the range of minor offenses—*e.g.*, high misdemeanors and misdemeanors? If Congress is so willing, would the courts sustain such a delegation?

It is, of course, possible to satisfy the policy objections and to protect such a delegation against constitutional attack by inserting adequate standards in the authorizing legislation. The difficulty is that the minor offense problem varies markedly from agency to agency and enclave to enclave, and it would be difficult to devise a standard applicable to all that would have any significant content. The alternative would be to delegate authority separately for different agencies and/or enclaves. The legislative burden at that point becomes sufficiently great to make one wonder whether it is worth such an effort to deal with this relatively small corner of the Federal criminal law.

The other alternative is to concede away the desired penalty flexibility and establish a single minor offense penalty category for administrative regulation offenses. The present assimilative crimes ap-

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[30] *United States* v. *Grimaud*, 220 U.S. 506 (1911).

[31] The issue here should be distinguished from *imposition* of penalties by the agencies in a judicial proceeding.

[32] *But see Smallwood* v. *District of Columbia*, 17 F.2d 210 (D.C. Cir. 1927), where such authority as to fine was delegated to the Director of Traffic of the District of Columbia.

proach, of course, has an advantage in this regard since it incorporates not only State offenses but the whole range of penalties applicable under State law.

The issues posed for the Commission thus are whether: (a) to retain the assimilative crimes approach or substitute a comprehensive administrative-regulation approach for dealing with minor offenses on the enclaves; and (b) if the administrative regulation approach is adopted, whether (i) to prescribe by statute a single penalty for all such offenses; or (ii) to delegate some limited authority to the responsible agency to prescribe penalties and, if so, under what statutory standards.

Several alternatives are set forth below in rough draft form. It is assumed in connection with each that section 13 would be repealed.

Alternative I.

(1) The head of each Federal agency responsible for the administration of an enclave specified in section , may, in addition to other authority granted by law, promulgate reasonable regulations applicable to conduct within the enclave and designed to maintain order in and further the operation of the enclave.

(2) Violation of such regulations shall be punishable as . . . [a Class A misdemeanor].

Alternative II [To Be Substituted for Subsection (2) in Alternative I].

(2) The head of the responsible agency shall prescribe the penalty applicable for violation of each such regulation, but such penalty shall not exceed . . . for any one such violation.

Alternative III.

(2) The head of the responsible agency shall in each regulation prescribe whether its violation is punishable as a [Class A misdemeanor] [Class B misdemeanor] or [an infraction].

COMMENT

on

BASIS OF CRIMINAL LIABILITY; CULPABILITY; CAUSATION: CHAPTER 3; SECTION 610

(Weinreb; March 29, 1968)

INTRODUCTION

The purpose of this chapter is to state basic conditions of criminal liability under Federal law. No crimes or defenses to particular crimes are defined. Some elements of some crimes and defenses to crime, which are general and can be stated without reference to the particular conduct proscribed or the particular excuse or justification asserted, are defined. The chapter states axioms about criminal liability on which definitions of the substantive offenses in a Federal Criminal Code depend.

There are no provisions comparable to those contained in this chapter in Title 18 or elsewhere in the United States Code.[1] Nor do most State Criminal Codes include explicit treatment of the subjects covered here. Some States have statutes dealing very generally with criminal liability.[2] The basic principles of liability have generally been regarded as axiomatic, and, as axioms, have been considered only indirectly, in the formulation of subsidiary principles. Statutes providing for defenses based on incapacity or involuntariness, for example, are applications of the general principles of liability treated in this chapter; such defenses may be given explicit recognition in a State Criminal Code even though the Code does not include provisions

[1] Crimes are defined in Part I (sections 1–3000) of Title 18 (and in other titles of the Code). Chapter 1 of Title 18 (sections 1–15) contains general provisions, none of which concerns criminal liability as such.

[2] *E.g.*, CAL. PEN. CODE § 20 (West 1955): "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." COLO. REV. STAT. § 40–1–1 (1963): "A crime or misdemeanor consists in a violation of a public law in the commission of which there shall be a union or joint operation of act, and intention or criminal negligence." GA. CODE ANN. § 26–201 (1953): "A crime or misdemeanor shall consist in a violation of a public law, in the commission of which there shall be a union or joint operation of act and intention, or criminal negligence;" § 26–404: "A person shall not be found guilty of any crime or misdemeanor committed by misfortune or accident, and where it satisfactorily appears there was no evil design, or intention, or culpable neglect." LA. CRIM. CODE § 14–8 (Rev. Stat. 1950): "Criminal conduct consists of: (1) An act or a failure to act that produces criminal consequences, and which is combined with criminal intent; or (2) A mere act or failure to act that produces criminal consequences, where there is no requirement of criminal intent; or (3) Criminal negligence that produces criminal consequences."

dealing generally with criminal liability.[3] The United States Code does not presently contain provisions embodying even subsidiary principles of this sort.

The Model Penal Code and other codifications that have followed its plan do include statements of these basic principles.[4] It is appropriate that a code of Federal criminal laws should do so. Their explicit statement may help to resolve doubts about unsettled issues which depend on them. They may also assist legislators in drafting criminal statutes, by aiding in the development of substantive rules and providing a uniform, clear manner of expression. Other functions aside, the public is entitled to know the principles which govern so central a concern as the nation's criminal laws.[5]

BASIS OF LIABILITY FOR OFFENSES (SECTION 301)

1. Subsection (1). Liability Based on Voluntary Conduct Declared to Be an Offense.—

(*a*) "*Voluntarily engages in conduct.*"—This phrase states the minimum condition of criminal liability: that the person held liable has engaged in criminal conduct. A requirement that the liability (and punishment) of *A* be explained and justified by reference to what *A* has done and not what someone else has done or some event caused is primitive to a rational penal Code. A system in which *A* was "held" responsible and penalized for occurrences with which he was in no

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[3] For example, the Wisconsin Criminal Code (WIS. STAT. ANN. 1963), which does not deal generally with criminal liability, contains the following provisions:

§ 939.42 Intoxication

An intoxicated or a drugged condition of the actor is a defense only if such condition:

(1) Is involuntarily produced and renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed; or

(2) Negatives the existence of a state of mind essential to the crime.

§ 939.43 Mistake

(1) An honest error, whether of fact or of law other than criminal law, is a defense if it negatives the existence of a state of mind essential to the crime.

* * * * * * *

§ 939.46 Coercion

(1) A threat by a person other than the actor's co-conspirator which causes the actor reasonably to believe that his act is the only means of preventing imminent death or great bodily harm to himself or another and which causes him so to act is a defense to a prosecution for any crime based on that act except that if the prosecution is for murder the degree of the crime is reduced to manslaughter.

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§ 939.47 Necessity

Pressure of natural physical forces which causes the actor reasonably to believe that his act is the only means of preventing imminent public disaster, or imminent death or great bodily harm to himself or another and which causes him so to act, is a defense to a prosecution for any crime based on that act except that if the prosecution is for murder the degree of the crime is reduced to manslaughter.

[4] *See, e.g.*, CAL. PENAL CODE REVISION PROJECT (Tent. Draft No. 1, 1967); ILL. CRIM. CODE OF 1961; MICH. REV. CRIM. CODE (Final Draft (1967)); and N.Y. REV. PEN. LAW (McKinney 1967).

[5] *See generally* Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952).

way connected and a repetition of which he could not prevent would now be regarded not as a Criminal Code fixing the criminal liability of individuals but as filling some other presumed social purpose. All the more refined principles of responsibility presume as a minimum that the liability of A is responsive to what A has done.[6]

Whatever the general purposes of a Criminal Code, they cannot be served unless this minimum condition of liability is met. It is apparent that individuals cannot be "deterred" from occurrences unconnected with their own conduct, nor will their "rehabilitation" or "reform," defined somehow, affect the recurrence of such happenings. Even the motives of revenge and the more worthy one of responding to a psychological desire for revenge—which is not explicit but may be behind the first clause of section 102(c) of the proposed draft, "to prescribe penalties which are proportionate to the seriousness of offenses"—are not well served by punishing the wholly innocent.

That liability depends on conduct is derived from the same reasoning. It is no more rational to hold a person criminally liable for a condition over which he has no control than to hold him liable for some wholly external event.[7] While the difference between engaging in specified conduct and being in a specified condition may often be largely a matter of expression, particularly if the "condition" is defined by conduct,[8] a Federal Criminal Code should adopt explicitly the principle that a man is liable for what he does and not what he is. That principle was the basis of the Supreme Court's holding in *Robinson* v. *California*, 370 U.S. 660 (1962), that a conviction which might have been based on a determination that the defendant had the "status" or "chronic condition" of a narcotics addict imposed a cruel and unusual punishment in violation of the due process clause of the fourteenth amendment.[9] It has been applied also in two cases in which

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[6] Such a principle is, of course, consistent with the possibility that a person, by his complicity, may incur criminal liability as a consequence of an act performed by someone else.

[7] "[T]o deny that criminal liability, as well as civil, is founded on blameworthiness . . . would shock the moral sense of any civilized community; or, to put it another way, a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear." HOLMES, THE COMMON LAW 42 (Howe ed. 1963).

Professor Jerome Hall suggested that the basic principles of the criminal law could be stated in a single proposition: "*the harm forbidden in a penal law must be imputed to any normal adult who voluntarily commits it with criminal intent, and such a person must be subjected to the legally prescribed punishment.*" HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 18 (2d ed. 1960).

See generally Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958), in which it is stated at 405, that: "[A crime] . . . is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community."

[8] *See* Mr. Justice White's dissenting opinion in *Robinson* v. *California*, 370 U.S. 660, 685, 686 (1962).

[9] "It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." 370 U.S. at 666.

U.S. court of appeals have held that chronic alcoholism is a defense to a charge of public drunkenness.[10] The question whether conviction of a chronic alcoholic for being drunk in public imposes a cruel and unusual punishment is presented in *Powell* v. *Texas*, now pending before the Supreme Court.[11]*

An effect of the provision basing criminal liability on conduct will be to require that statutes defining particular offenses be cast in terms of conduct rather than "status" or "condition" even where the latter is determined by conduct.

Again, the basic axiom of responsibility requires that criminal liability not attach to conduct unless it is voluntary.[12] This principle, too, is so basic that it has generally been taken for granted and expressed only in the expression of some more particular rule distinguishing between voluntary and involuntary conduct.

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[10] *Easter* v. *District of Columbia*, 361 F.2d 50 (D.C. Cir. 1966) "An essential element of criminal responsibility is the ability to avoid the conduct specified in the definition of the crime. Action within the definition is not enough. To be guilty of the crime a person must engage responsibly in the action. Thus, an insane person who does the act is not guilty of the crime. The law, in such a case based on morals, absolves him of criminal responsibility. So, too, in case of an infant. In case of a chronic alcoholic Congress has dealt with his condition so that in this jurisdiction he too cannot be held to be guilty of the crime of being intoxicated because, as the Act [Act of Aug. 4, 1947, Ch. 472, 61 Stat. 744, D.C. CODE ANN. § 24–501–514 (1967)] recognizes, he has lost the power of self-control in the use of intoxicating beverages. In his case an essential element of criminality, where personal conduct is involved, is lacking. This element is referred to in the law as the criminal mind." 361 F.2d at 52.

Driver v. *Hinnant*, 356 F.2d 761 (4th Cir. 1966): "This addiction—chronic alcoholism—is now almost universally accepted medically as a disease. The symptoms . . . may appear as 'disorder of behavior.' Obviously, this includes appearances in public, as here, unwilled and ungovernable by the victim. When that is the conduct for which he is criminally accused, there can be no judgment of criminal conviction passed upon him. To do so would affront the Eighth Amendment, as cruel and unusual punishment in branding him a criminal, irrespective of consequent detention or fine." 356 F.2d at 764 (footnote omitted).

Cf. Sweeney v. *United States*, 353 F.2d 10 (7th Cir. 1965) (probation condition that chronic alcoholic refrain from use of all alcoholic beverages is unreasonable if his "power of volition" in this respect has been destroyed).

[11] *Probable jurisdiction noted*, 389 U.S. 810 (1967). *See also* the opinion of Mr. Justice Fortas, with whom Mr. Justice Douglas joined, dissenting from the denial of a petition for writ of certiorari in *Budd* v. *California*, 385 U.S. 909 (1966).

For discussions of vagrancy as a "status" not subject to punishment, *see* dissenting opinion of Mr. Justice Douglas in *Hicks* v. *District of Columbia*, 383 U.S. 252 (1966); *Ricks* v. *United States*, 228 F.2d 316 (D.C. App. 1967); *cf. Edelman* v. *California*, 344 U.S. 357 (1953); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939) ("gangsters"). *See also Fenster* v. *Leary*, 20 N.Y. 2d 309, 229 N.E. 2d 426 (1967). *See generally* Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960); Foote, *Vagrancy-type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956); Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203 (1953); Note, *Use of Vagrancy-type Laws for the Arrest and Detention of Suspicious Persons*, 59 YALE L.J. 1351 (1950); Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U. L. REV. 102 (1962).

*Since the date of this paper, the *Powell* case was decided. It was held that since it did not appear that the actor's alcoholic condition rendered him incapable of staying off the street, a conviction for being drunk in public did not impose a cruel and unusual punishment. *Powell* v. *Texas*, 392 U.S. 514 (1969).

[12] ". . . [W]hatever be the philosophical basis of punishment, it cannot, with justice, be predicated otherwise than upon the rebellious will of its victim." Laylin & Tuttle, *Due Process and Punishment*, 20 MICH. L. REV. 614, 641 (1922).

"Historically, our substantive criminal law is based upon a theory of punish-

> For legal purposes it is enough to say that no involuntary action, whatever effects it may produce, amounts to a crime by the law of England. I do not know indeed that it has ever been suggested that a person who in his sleep set fire to a house or caused the death of another would be guilty of arson or murder. The only case of involuntary action which, so far as I know, has even been even expressly referred to as not being criminal is the case in which one person's body is used by another as a tool or weapon. It has been thought worthwhile to say that if *A* by pushing *B* against *C* pushes *C* over a precipice *A* and not *B* is guilty of pushing *C* over the precipice. (2 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 100 (1883) (footnote omitted)).

In the few reported cases, none of them in the Federal courts, in which a defendant's criminal liability depended directly on the requirement of voluntariness (rather than culpability, or some established subsidiary principle based on the requirement of voluntariness, such as the defenses of insanity and coercion), the requirement has been accepted without question.[13] The significance of voluntariness is recognized in the familiar jury instruction that a person is presumed to intend "the natural consequences of his voluntary acts (or omissions)," [14] and is made explicit in the Model Penal Code and other recent codifications of State criminal law.[15]

While the Supreme Court has not accepted the argument that the Constitution does not permit conviction for a crime except on the basis of a person's culpable conduct (*see* below, pp. 121–122), it has in effect accepted the principle that criminal liability can be based only

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ing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong." POUND, INTRODUCTION TO SAYRE, CRIMINAL LAW xxxvi–xxxvii (1927).

"The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must be a 'vicious will.' Common-law commentators of the Nineteenth Century early pronounced the same principle, although a few exceptions not relevant to our present problem came to be recognized." *Morissette* v. *United States*, 342 U.S. 246, 250–251 (1952) (footnotes omitted).

[13] *E.g.*, *Fain* v. *Commonwealth*, 78 Ky. 183 (1879) (somnambulism); *People* v. *Cox*, 67 Cal. App. 2d 166, 153 P. 2d 362 (4th Dist. 1944) (unconsciousness produced by blow to head); *People* v. *Freeman*, 61 Cal. App. 2d 110, 142 P. 2d 435 (2d Dist. 1943) (epileptic unconsciousness); *State* v. *Gooze*, 14 N.J. Super. 277, 81 A. 2d 811 (1951) ("black out" from Meniere's Syndrome).

The solitary, well known exception is the English case *Larsonneur*, 24 Crim. App. 74 (1933). Compare *Larsonneur* with *Martin* v. *State*, 31 Ala. App. 334, 17 So. 2d 427 (1944).

[14] MANUAL ON JURY INSTRUCTIONS IN FEDERAL CRIMINAL CASES § 4.03, 33 F.R.D. 523, 549 (1963).

[15] *See* note 4, *supra*.

on a person's voluntary conduct. In *Lambert* v. *California*, 355 U.S. 225 (1957), the Court held that a person could not consistently with due process be convicted for failing to register under a criminal registration statute if he did not know of the duty to register and there was no showing of the "probability of such knowledge." [16]

Argument can be made that inclusion of the word "voluntarily" to modify the phrase "engages in conduct" is unnecessary and that it will cause confusion. In ordinary circumstances, we should not describe blinking or twitching, or rolling over in sleep, or stumbling over a rock, or being shoved into someone, as "conduct." At least the strong use of the word "conduct" contains some notion of a person's conducting himself in a certain way, exercising control over himself, some element of volition. To some extent, therefore, the word "voluntarily" is unnecessary and the entire phrase "voluntarily engages in conduct" redundant. There are, however, weak uses of the word "conduct." As the performance in question becomes more like the kinds of performance which ordinarily are voluntary—a highly involved "twitch," sleepwalking, or talking in one's sleep instead of rolling over or snoring—it is not so clear that the word "conduct" is inapplicable; used weakly, the word connotes simply behavior. Partial redundancy seems clearly preferable in this case to incompleteness.[17]

The possibility of confusion arises from the ambiguity of the word "voluntarily." There are strong uses of that word according to which conduct is not "voluntary" if it is in any substantial sense the product of an identifiable external or nonconscious internal force. In its strongest sense, which stops just short of rejecting the notion of voluntary conduct altogether, a person engages in conduct "voluntarily" only if his conduct is not significantly subject to explanation by any general theory of behavior.[18] The word is not intended to have that use here. It is intended to exclude from the kind of conduct which may be criminal that which, in the ordinary sense, occurs beyond the control of the actor: reflexes and twitches are paradigms.

Omission of the word "voluntarily" would leave a possibility, small to be sure, that a person whose conduct was truly involuntary in the relevant sense—conduct while asleep, for example—would be prosecuted and obliged to defend on the ground of involuntariness, without an explicit statutory peg on which to hang the defense. Including the word may lead occasionally to the assertion of unintended defenses short of the insanity defense which are based on deterministic theories of human conduct.[19] Of the two possibilities, the latter seems less undesirable. Since the element of voluntariness, elusive as it is, is so much a part of the rationale of criminal liability, it is worthwhile to make it explicit in the statement of the basic principle.

There is a different question, whether the phrase "voluntarily engages in conduct" should be explained in the Federal Code itself.

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[16] 355 U.S. at 229. *See also Bacnder* v. *Barnett*, 255 U.S. 224 (1921). *Compare* the distinction drawn between "status" or "condition" and "conduct," in *Robinson* v. *California*, 370 U.S. 660 (1962), discussed above, pp. 107–108.

[17] *Compare* the discussion of "voluntary action" in 2 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 100–101 (1883).

[18] *See, e.g.*, the position taken by the psychiatrist, Dr. Galen, in *State* v. *Sikora*, 44 N.J. 453, 210 A. 2d 193 (1965).

[19] *See State* v. *Sikora*, 44 N.J. 453, 210 A. 2d 193 (1965). *Compare Commonwealth* v. *Ahearn*, 421 Pa. 311, 218 A. 2d 561 (1966).

The Model Penal Code, for example, undertakes to define its parallel phrase—"voluntary act"—by a combination of example and description:

> The following are not voluntary acts within the meaning of this Section:
>
> (a) a reflex or convulsion;
>
> (b) a bodily movement during unconsciousness or sleep;
>
> (c) conduct during hypnosis or resulting from hypnotic suggestion;
>
> (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual. (§ 2.01(2)).

Subdivisions (a) (b), and (c) illustrate what is not a voluntary act. Subdivision (d), in effect, undertakes to say what feature of the acts in the preceding clauses makes them not voluntary. ("Act" and "action" are defined in section 1.13(2) of the Model Penal Code to include voluntary and involuntary bodily movements.)

As the commentary to section 2.01(2) of the Model Penal Code [20] states, the definition of "voluntary" is partial and indirect. Reflexive and convulsive movements are perhaps identified rather easily, although even some of these will be border cases. How fully unconscious or asleep or under hypnotic suggestion one has to be for conduct to be involuntary is hard to say, however, and subdivisions (b) and (c) of the formulation are useful as examples only aided by the descriptive content of subdivision (d).[21] Subdivision (d), which attempts to formulate the crucial issue, is simply inaccurate, unless one uses the guide to interpretation afforded by the examples. It is easy to think of "voluntary" conduct which is not in the ordinary sense the product of conscious or habitual effort or determination. The commentary notes that the definition corresponds to the reference in section 2 of the Restatement of Torts (Second) (1965) to an "external manifestation of the actor's will." The notion of "willing" without "trying" or "making an effort" or "determining" to do something is what is at stake here, but one can "feel" what is intended more easily than one can state it.

Subsequent codifications based on the Model Penal Code have partially adopted the Code's formulation. The New York Revised Penal Law (§ 15.00(2)) for example, defines "voluntary act" as "a bodily movement performed consciously as a result of effort or determination." [22] It would appear that the definition is intended to exclude the same kinds of conduct excluded by the Model Penal Code.

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[20] MODEL PENAL CODE § 2.01(2), Comment at 121 (Tent. Draft No. 4, 1955). All references to the commentary to the Model Penal Code are to Tentative Draft No. 4.

[21] In *Fain* v. *Commonwealth*, 78 Ky. 183 (1879), for example, the defendant was charged with homicide of a man who was trying to wake him from sleep. He claimed that he was asleep when he shot and killed the deceased, even though he listened to and spoke to the deceased before he shot. The court indicated that he was entitled to present a defense of unconsciousness, or partial unconsciousness, such that he perceived his surroundings to some extent but did not comprehend his situation and believed that he had to defend himself.

[22] N.Y. REV. PEN. LAW § 15.00 (McKinney 1967). Other recent codifications (*see* note 4, *supra*) contain comparable provisions.

These formulations do not seem adequate. In precisely those cases in which the question of voluntariness must be answered, reference to the actor's conscious (or habitual) effort or determination is likely not to be helpful, and may mislead by suggesting that more effort or determination must be shown than is actually intended.[23]

An alternative possibility is to define "voluntary conduct" not in terms of effort or determination, but in terms of ability to control the conduct. For example: "A person does not engage in conduct voluntarily if the conduct is not subject to his control." A test based on a person's ability to control his conduct at the time when he engages in the conduct probably comes closest to the weak sense of voluntariness intended here. A man who is sleepwalking or under hypnosis cannot control his conduct in the relevant sense. Nor are reflexes or convulsions subject to control. But again, the sleepwalker and the subject of hypnosis may exhibit remarkable ability to pursue a course of conduct and to avoid accidents; in that sense, which is a meaningful one, they control what they do.[24] Given notice, a person may be able to control conduct which we would ordinarily regard as reflexive.

Federal cases do not provide helpful analyses of the concept of voluntariness or usable definitions of the word "voluntarily" (or related words, "voluntary," "involuntarily," *etc.*). The courts have regularly considered whether particular conduct was voluntary,[25] but have not explored the concept generally or in the context now being considered. Nor are the few State cases in which the courts have considered directly the nature of voluntary conduct in this context more helpful. Where a court has had to consider a defense that a person's conduct was not voluntary but was nevertheless not covered by one of the established defenses—insanity, compulsion, and so forth—the court has typically referred to consciousness as the controlling factor.[26] Consciousness is a necessary but not sufficient condition of voluntary conduct. In order to determine the sense of "conscious" relevant for

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[23] Many bodily movements which might produce injury and which we might want to characterize as negligent or even reckless do not require effort or determination in any significant sense; *e.g.*, a man might "stretch" without either, and still be acting negligently.

[24] *See, e.g.*, the facts in *Fain* v. *Commonwealth*, 78 Ky. 183 (1879), summarized in note 21, above. *Compare People* v. *Marsh*, 170 Cal. App. 2d 284, 338 P. 2d 495 (4th Dist. 1959). *See generally Bradley* v. *State*, 102 Tex. Crim. 41, 277 S.W. 147 (Crim. App. 1925).

[25] *See, e.g.*, the long line of cases in the Supreme Court considering the voluntariness of confessions. *E.g.*, *Haynes* v. *Washington*, 373 U.S. 503 (1963); *Lynumn* v. *Illinois*, 372 U.S. 528 (1963); *Malinski* v. *New York*, 324 U.S. 401 (1945); *Chambers* v. *Florida*, 309 U.S. 227 (1940); *Wan* v. *United States*, 266 U.S. 1 (1924). For cases in which the Federal courts have considered what constitutes "voluntary conduct" in other contexts, *see, e.g.*, *Browning* v. *United States*, 373 F.2d 915 (Ct. Cl. 1967) (separation from Federal service); *United States* v. *Thompson*, 356 F.2d 216 (2d Cir. 1965), *cert. denied*, 384 U.S. 964 (1966) (consent to a search); *Pearson* v. *United States*, 325 F.2d 625 (D.C. Cir. 1963) (absence from courtroom); *Liberty Mutual Insurance Co.* v. *Borsari Tank Corp.*, 248 F.2d 277 (2d Cir. 1957) (insurance contract; voluntary payment); *Hawkins* v. *Hawkins*, 191 F.2d 344 (D.C. Cir. 1951) ("voluntary separation" as ground for divorce); *Yates* v. *United States*, 245 F. Supp. 147 (E.D. Va. 1965) (plea of guilty).

[26] *See, e.g.*, *State* v. *Gooze*, 14 N.J. Super. 277, 81 A.2d 811 (1951); *Lewis* v. *State*, 196 Ga. 755, 27 S.E. 2d 659 (1943); *Fain* v. *Commonwealth*, 78 Ky. 183 (1879); *People* v. *Cox*, 67 Cal. App. 2d 166, 153 P. 2d 362 (4th Dist. 1944); *People* v. *Freeman*, 61 Cal. App. 2d 110, 142 P. 2d 435 (2nd Dist. 1943); *Bradley* v. *State*, 102 Tex. Crim. 41, 277 S.W. 147 (1925).

the present purpose, one must refer back to the notion of voluntariness.[27]

Two purposes might be served by a definition of voluntariness in this section of the Code. The definition might give content to the main provision of section 301(1), which would then reflect more precisely the basic principle of liability under Federal criminal law. The definition might also help to resolve a jury's confusion in a case involving the question of voluntariness. For the reasons given above, it is unlikely that either of these purposes would in fact be served. Conceptually, the concept of voluntariness is probably primitive. To the extent that examples provide helpful illustrations, it seems preferable to leave the definition of "voluntariness" "open" and allow the cases to develop concrete illustrations, supported by full descriptions of particular facts. Such an approach will allow Federal law to reflect developing understanding of what is relevantly voluntary conduct. A court presented with this issue will explain it to the jury as well as it can, almost certainly using the facts of the case and some general term like "unconscious" to suggest what must be decided.[28] The main statement of the basis of criminal liability will remain, if incomplete, accurate.

(b) "*An act, an omission, or possession.*"—The inclusion of acts, omissions, and possession among the kinds of conduct which can give rise to criminal liability is consistent with established law. A person's (voluntary) acts are the most obvious source of criminal liability. Notwithstanding the confusion frequently engendered by and persistently surrounding criminal liability for a failure to act (*see* pp. 116–117), liability for (voluntary) omissions, properly circumscribed, has the same justification as liability for action: the person held liable has failed to comply with a duty which the law has imposed on him under pain of criminal sanction. A great many Federal statutes explicitly declare the failure to perform some act to be a crime (*see* p. 116), and convictions for violations of such statutes are common.[29] So long as the failure is accompanied by one of the same states of mind that is required for liability for an act, liability for the omission is not at all peculiar. Indeed, in a great many situations, it is not clear whether the conduct is described more properly as action or inaction. For example, section 1856 of Title 18, United States Code, provides: "Whoever, having kindled . . . a fire in or near any forest . . . upon any [Federal] lands . . . leaves said fire without totally extinguishing the same, or permits or suffers said fire to burn or spread beyond his control" commits a misdemeanor. Should such conduct be described as an act or a failure to act?[30]

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[27] Compare the statement in MODEL PENAL CODE § 2.01, Comment at 121–122.

[28] *See, e.g.*, the instructions to the jury in *R.* v. *Charlson*, [1955] 1 All E.R. 859 (Chester Assizes).

[29] *E.g.*, *Johnston* v. *United States*, 351 U.S. 215 (1956) (failure to report for service under draft laws, 50 U.S.C. APP. § 462(a); *United States* v. *Anderson*, 328 U.S. 699 (1946) (refusal to submit to induction into armed forces), 50 U.S.C. APP. § 462(a)); *United States* v. *Lombardo*, 241 U.S. 73 (failure to file statement about alien prostitute, 18 U.S.C. § 2424).

[30] *Compare Commonwealth* v. *Cali*, 247 Mass. 20, 141 N.E. 510 (1923).

The subject of liability for omissions is discussed more fully below, in the comment to section 301(2).

Liability for possession is harder to defend consistently with the basic principle that a person is liable for harmful conduct and not for his status or condition. A person who is in possession of a contraband narcotic drug or a proscribed weapon has not, because of his possession alone, conducted himself inimically to society's proper interests or even (were criminality absent) his own. His situation is like that of a person whose condition includes a proclivity to engage in harmful conduct.

Both as a prophylactic measure and as an aid to prosecution, if possession of a particular article is rarely for a purpose other than to engage in harmful conduct, proscribing possession itself may be justified if the harm to be prevented—use of narcotics, personal injury—is great, other methods of prevention are ineffective, and the individual's interest in possession is slight.[31]

The United States Code now contains many provisions making possession of some article in certain circumstances a crime. It may

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[31] The prophylactic function of possessory crimes is clearly displayed in 26 U.S.C. § 5685(a), which provides:

> Penalty for possession of devices for emitting gas, smoke, etc.
>
> Whoever, when violating any law of the United States, or of any Territory or possession of the United States, or of the District of Columbia, in regard to the manufacture, taxation, or transportation of or traffic in distilled spirits, wines, or beer, or when aiding in any such violation, has in his possession or in his control any device capable of causing emission of gas, smoke, or fumes, and which may be used for the purpose of hindering, delaying, or preventing pursuit or capture, any explosive, or any firearm (as defined in section 5848), except a machine gun, or a shotgun having a barrel or barrels less than 18 inches in length, or a rifle having a barrel or barrels less than 16 inches in length, shall be fined not more than $5,000, or imprisoned not more than 10 years, or both, and all persons engaged in any such violation or in aiding in any such violation shall be held to be in possession or control of such device, firearm, or explosive. [Section 5685(b) provides a greater penalty for possession of the weapons excepted in this section.]

The use of possessory crimes to ease the government's burden of proof, is illustrated by 18 U.S.C. § 1202, which provides:

> Whoever receives, possesses, or disposes of any money or other property, or any portion thereof, which has at any time been delivered as ransom or reward in connection with a violation of section 1201 of this title, knowing the same to be money or property which has been at any time delivered as such ransom or reward, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Still more directly in aid of prosecution are provisions which do not make possession criminal as such, but provide that proof of possession is sufficient to authorize conviction for some other offense. For example 18 U.S.C. § 545 provides in part:

> Whoever knowingly and willfully, with intent to defraud the United States, smuggles or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice or other document or paper; or
>
> Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—
>
> Shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

be a crime, for example, to possess a homing pigeon (18 U.S.C. § 45), counterfeit money and tools and material for making counterfeit money (18 U.S.C., c. 25), documents or information relating to the national defense (18 U.S.C. § 793), intoxicating liquors (18 U.S.C. § 1156, 26 U.S.C. § 5686), blank naturalization or citizenship papers (18 U.S.C. § 1426), stolen bank property (18 U.S.C. § 2113), dangerous weapons (18 U.S.C. § 2277, 26 U.S.C. § 5851), narcotic drugs (26 U.S.C. §§ 4704, 4724), marihuana (26 U.S.C. § 4744), and taxed goods (26 U.S.C. § 7268).

While there may be strong, even sufficient, objection to particular possessory crimes or to provisions that a crime is proved prima facie by proof of possession, on the ground that the connection between possession of the prohibited object and the harm to be prevented is weak, there is no adequate argument that all such crimes should be eliminated from Federal law. Where possession can be avoided, it may also be culpable, and may, therefore, properly be the basis of criminal liability.[32]

(c) "*In violation of a statute which provides that the conduct is an offense.*"—This phrase incorporates the well established rule that "there is no common law offense against the United States." [33] The word "statute" refers to a law of the United States. Not only provisions of the Federal Code but also provisions in other titles of the United

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[32] In *Baender* v. *Barnett*, 255 U.S. 224, 225–226 (1921), the Supreme Court strongly suggested that a statute that made possession which was "not conscious and willing" criminal, would be unconstitutional. *See United States* v. *Sawyer*, 294 F.2d 24, 29 (4th Cir. 1961). The statutory definitions of some possessory crimes, however, do not contain a requirement of culpability (*e.g.*, 18 U.S.C. §§ 487, 701, 1156), and according to general rules of construction might not include such a requirement by implication. *See* the discussion at pp. 120–122, below.

The Model Penal Code (§ 2.01(4)) limits liability for possession to cases in which the "possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession." (The knowledge required is only that one has possession of "the physical object" and not of the object's "specific quality or properties." *See* the commentary to section 2.01 at 123.) With respect to the requirement of knowledge, it seems possible that in some cases liability might properly be based on possession that was negligently acquired. A person might, for example, have a reasonable basis for suspecting that a package of narcotics was unlawfully included in a shipment of drugs to him and be liable, if the statute so provided, for negligently having them in his possession; *i.e.*, for failing to check on the contents of the shipment. (This result might be reached under the Model Penal Code by the reasoning that in such a case the *possession* was knowing and there was negligence with respect to the nature of the goods. But does a person know that he has possession of each item—even those he knows nothing about—in an unopened package?) The requirements of culpability specified in proposed section 302 would protect a person from liability for entirely innocent, unwitting possession of a proscribed article (unless culpability is not required for commission of the offense). The same requirements would avoid liability in the (almost wholly theoretical) case of a person who was an unwilling possessor but who had no way effectively to terminate his possession.

[33] *Jerome* v. *United States*, 318 U.S. 101, 104 (1943). *Accord, e.g., Viereck* v. *United States*, 318 U.S. 236, 241 (1943); *United States* v. *Gradwell*, 243 U.S. 476, 485 (1917).

There is a distinct rule that "where a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning." *United States* v. *Turley*, 352 U.S. 407, 411 (1957) (footnote omitted). *Accord, e.g., United States* v. *Pardee*, 368 F.2d 368 (4th Cir. 1966); *Brundage* v. *United States*, 365 F.2d 616 (10th Cir. 1966). *See generally Morissette* v. *United States*, 342 U.S. 246 (1952).

States Code may establish criminal liability. There are such provisions now in most titles of the Code. While it is desirable generally to collect Federal criminal statutes in a single title of the Code, as this codification attempts to do, it cannot be expected that all such existing provisions and all such provisions enacted hereafter will be located in Title 18. Nor is it on balance desirable that they be there. A major purpose of codification is to make statutes known and readily available. In many cases, a criminal provision will be more readily available if it is located according to its content rather than the fact that crime is involved. See, for example, the penal provisions of the Securities Act of 1933, now included with other provisions of the Act in Title 15, section 77a *et seq.*

2. *Subsections (2). Omissions.*—The subsection states the general rule regarding criminal liability (or liability for an infraction) for omissions, which, so far as it can be said that there is any Federal rule, is now followed in Federal courts. The rule does not attempt to state when there is liability for a failure to act; rather, it provides that there is not liability unless a law provides that the omission is an offense or otherwise creates a duty to perform the omitted act. The rule thus functions to protect a person from liability for harms to which his own acts do not contribute and with which he has no special connection. Since subsection 301(1) provides that criminal liability may be based on an omission, the two provisions together do have the consequence generally that there is liability for omissions which meet the conditions of subsection 301(2) and any other specific requirements that may be imposed.

The effect of the first branch of the subsection is plain. Many Federal statutes provide that a failure to perform a specific act is criminal: for example, failure to summon a citizen for jury duty because of race, color, or previous condition of servitude (18 U.S.C. § 243), failure to deposit public money as required (18 U.S.C. § 649), failure to deliver mail in transit to a post office (18 U.S.C. § 1698), failure to file a statement concerning an alien prostitute (18 U.S.C. § 2424), failure of a witness to testify pursuant to subpoena (2 U.S.C. § 212), and failure to pay a tax, make a return, file records, or supply information (26 U.S.C. § 7203). Liability under such statutes is confirmed.

The second branch of the subsection is more difficult to state clearly or to base firmly in established Federal law. It states that there may be liability if there is a legal duty to perform the omitted act, whether or not a law provides explicitly that the omission is an offense. The most common example of liability so based is liability for involuntary manslaughter, where the defendant is criminally negligent in failing to do some act which he is legally required to perform.[34] In *Jones* v. *United States*, 308 F.2d 307 (D.C. Cir. 1962), the court of appeals reviewed a conviction for manslaughter under section 22–2405 of the District of Columbia Code (1967), which provides a penalty for the offense of manslaughter without defining it. After observing that "the problem of establishing the duty to take action which would preserve

[34] *E.g., United States* v. *Pardee*, 368 F.2d 368 (4th Cir. 1966).

the life of another has not often arisen in the case law of this country" the court said:

> There are at least four situations in which the failure to act may constitute breach of a legal duty. One can be held criminally liable: first, where a statute imposes a duty to care for another; second, where one stands in a certain status relationship to another; third, where one has assumed a contractual duty to care for another; and fourth, where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid. (308 F.2d at 310 (footnotes omitted)).

This statement reflects more-or-less accurately—"more-or-less" because there are not enough cases, Federal cases in particular, to sustain a firm statement—the common understanding of the law,[35] which is carried forward by subsection 301(2). Many questions are left unanswered, as they are under existing law. The provision leaves fully open the possibility of defining criminal liability for omissions more precisely in the sections covering particular offenses. Whether this should be done and whether the rationale of liability for omissions should be developed beyond the limiting principle stated here are questions to be answered when those sections are drafted.

3. *Subsection (3). Publication of Law Required.*—This subsection expresses a requirement, now acknowledged by Federal law, that laws

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[35] The commentary to section 2.01 of the Model Penal Code, at 123, states simply that it is sufficient if "the duty arises under some branch of the civil law."

For examples of cases involving a duty arising (or not) out of a relationship, *see United States* v. *Knowles*, 26 F. Cas. 800 (No. 15,540) (N.D. Cal. 1864); *Commonwealth* v. *Hall*, 322 Mass. 523, 78 N.E. 2d 644 (1948); *People* v. *Beardsley*, 150 Mich. 206, 113 N.W. 1128 (1907); *State* v. *Noakes*, 70 Vt. 247, 40 A. 249 (1897); *cf. State* v. *Sandford*, 99 Me. 441, 59 A. 597 (1905).

For examples of cases involving a contractual duty, *see United States* v. *Knowles*, 26 F. Cas. 800 (No. 15,540) (N.D. Cal. 1864); *People* v. *Montecino*, 66 Cal. App. 2d 85, 152 P. 2d 5 (2d Dist. 1944). In *Instan*, below, the language of the court is in some respects suggestive of contractual obligation as the basis of liability. *See also* the railroad-crossing cases: *State* v. *Harrison*, 107 N.J.L. 1113 (1931); *R.* v. *Smith*, 11 Cox Crim. Cas. 210 (Carlisle Assizes 1896). *Cf. State v. Irvine*, 126 La. 434, 52 So. 567 (1910).

For examples of cases involving an assumption of responsibility, *see R.* v. *Nicholls*, 13 Cox Crim. Cas. 75 (Stafford Assizes 1874); *cf. R.* v. *Instan*, [1893] 1 Q. B. 450.

There may also be a duty to give aid in response to a danger created by one's own (perhaps innocent) act. *See Commonwealth* v. *Call*, 247 Mass. 20, 141 N.E. 510 (1923); *Commonwealth* v. *Putch*, 18 D. & C. 680 (Allegheny Cty., 1932); *cf. Jones* v. *State*, 220 Ind. 384, 43 N.E. 2d 1017 (1942).

See generally Hughes, *Criminal Omissions*, 67 YALE L.J. 590 (1958); Kirchheimer, *Criminal Omissions*, 55 HARV. L. REV. 615 (1942); Perkins, *Negative Acts in Criminal Law*, 22 IOWA L. REV. 659 (1937).

It is often argued that criminal liability for failure to act should be expanded, or, what is the same thing, that the circumstances in which a person has an affirmative duty, enforced by the criminal law, to act should be enlarged. *See, e.g.*, Hughes, *Criminal Omissions*, 67 YALE L.J. 590 (1958); *cf.* Dawson, *Negotiorum Gestio: The Altruistic Intermeddler*, 74 HARV. L. REV. 1073, 1101–1108 (1961). Such a development could take place within the bounds of subsection 301(2), either by specific statutory enactment or by judicial enlargement of the circumstances in which the law imposes a duty to act.

establishing offenses be published. There is a comprehensive scheme for the publication of Federal legislation and regulations.[36]

The requirement of publication is sometimes related to the defense of mistake of law,[37] which is treated in section 610. The publication of most Federal law makes the law "public" to most people only in a Pickwickian sense. Laws typically are "public" only to the people most concerned with the subjects with which particular laws deal, and even then, only through the intermediary of legal or other counsel. The requirement of publication is not realistically a requirement that laws be made available to individuals, so that they will not innocently violate the law. It is a means of preventing the abusive, ad hoc use of legal process, significant much more for its impact on the agencies of law than for its impact on private conduct.[38]* As a limitation on the authority to punish for an offense, it is properly included in the basic section on liability.

Throughout section 301, reference is made to "offenses." The word is used to include both crimes and infractions, which are defined elsewhere. This usage will presumably be explained in the general section on definitions.**

Requirements of Culpability (Section 302)

1. *Federal Law.*—This section follows the example of the Model Penal Code and other recent codifications[39] in their efforts to restate the general requirement of culpability ("mens rea") in a limited number of relatively specific principles. It defines a group of specific

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[36] Act of July 30, 1947, § 106, 1 U.S.C. § 106 (printing of bills and resolutions); Act of Oct. 31, 1951, §§ 106a-b, 1 U.S.C. § 106a (promulgation of laws), § 106b (publication of amendments to the Constitution); Act of July 30, 1947, § 112, *as amended*, 1 U.S.C. § 112 (Statutes at Large); Act of July 30, 1947, § 202, 1 U.S.C. § 202 (United States Code); Act of July 26, 1935, § 5, 49 Stat. 501, *as amended*, 44 U.S.C. § 305 (Federal Register; documents or orders of executive departments and administrative agencies "which shall prescribe a penalty"); Act of Sept. 6, 1966, § 552, 80 Stat. 383, *as amended* by Act of June 5, 1967, § 1, 81 Stat. 54, 5 U.S.C.A. § 552 (1967) (Federal Register; descriptions of activities, statements, rules, opinions, orders, of governmental authorities other than Congress and the courts).

[37] *For example*, in the Model Penal Code a belief that conduct is not an offense is made a defense to prosecution if "the statute or other enactment defining the offense is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged." Model Penal Code § 2.04 (3)(a) (P.O.D. 1962).

[38] *See Graham* v. *Lawrimore*, 185 F. Supp. 761, 763–764 (E.D. S.C. 1960), *aff'd*, 287 F.2d 207 (4th Cir. 1961): "While the Administrative Procedure Act (5 U.S.C.A. § 1003) and the Federal Register Act (44 U.S.C.A. § 307) are set up in terms of making information available to the public, the Acts are more than mere recording statutes whose function is solely to give constructive notice to persons who do not have actual notice of certain agency rules. The Acts set up the procedure which must be followed in order for agency rulings to be given the force of law. Unless the prescribed procedures are complied with, the agency or administrative rule has not been legally issued, and consequently it is ineffective." To the same effect, *see Hotch* v. *United States*, 212 F.2d 280 (9th Cir. 1954). *But see Kessler* v. *F.C.C.*, 326 F.2d 673 (D.C. Cir. 1963); *United States* v. *Aarons*, 310 F. 2d 341 (2d Cir. 1962).

*An alternative formulation might provide that publication is not required when the actor, in fact, knows about the existence of the law; this would avoid the anomaly of an actor with knowledge of the law escaping criminal liability because of a technical violation of publication requirements.

**See, § 109.

[39] *See* note 4, *supra*.

mental states and provides that, unless a law explicitly provides otherwise, one of them must accompany conduct for it to be criminal. In addition, it provides general rules of statutory construction with respect to the requirement of culpability.

There is no comparable Federal statute now. The "mental element" of Federal crimes is specified in the definitions of the crimes, which definitions are frequently modified, if not indeed distorted, in judicial decisions. If one looks to the statutes alone, the specifications of mental states form a staggering array:[40]

	Section
"willful"	542
"willfully"	2
"willfully and corruptly"	2271
"willfully or maliciously"	1362
"willfully and maliciously"	35
"willfully and unlawfully"	2071
"willfully and knowingly . . . [with] knowledge or reason to believe . . ."	954
"willfully . . . with intent to . . ."	32
"corruptly"	201
"corruptly . . . with intent to . . ."	201
"maliciously"	549
"maliciously . . .. with an intent unlawfully to . . ."	1659
"willfuly, deliberate, malicious, and premeditated"	1111
"from a premeditated design unlawfully and maliciously to . . ."	1111
"without malice . . . voluntary" [manslaughter]	1112
"without malice . . . involuntary . . . without due caution and circumspection" [manslaughter]	1112
"voluntarily"	755
"unlawfully"	1427
"unlawfully and willfully"	664
"improperly"	1703
"feloniously"	1506
"wantonly"	1852
"falsely"	485
"falsely and willfully"	911
"fraudulently"	331
"with intent to defraud"	472
"with intent to defraud . . . or to deceive"	1006
"fradulently . . . knowing . . ."	331
"with intent to defraud, knowingly"	658
"with intent to defraud, knowing . . ."	483
"with fraudulent intent . . . knowing . . ."	506
"with intent to defraud, falsely"	482
"fraudulently or knowingly"	545
"with intent to deceive or mislead"	703
"for the fraudulent purpose of . . ."	706
"with intent to defraud . . . for the purpose of . . ."	707
"falsely or fraudulently . . . for the purpose of . . ."	917
"through the fault or . . . with a fraudulent intent"	332
"fraudulently or wrongfully"	1017
"for any purpose"	371
"for any purpose not prescribed by law"	653
"with any intent . . . that . . ."	964
"with unlawful or fraudulent intent"	2314
"with the purpose of fraudulently . . ."	500
"with intent to . . ."	114
"with intent that . . ."	794
"with the intent that . . ."	473
"with the intention of . . ."	663
"intending to . . ."	1343
"for the purpose of . . ."	288
"with intent or reason to believe that . . ."	794
"knowingly"	43

[40] All sections are in Title 18.

	Section
"knowingly and willfully"	288
"knowingly or willfully"	550
"knowingly and unlawfully"	1857
"knowingly and fraudulently"	152
"knowingly and falsely"	289
"knowingly and with intent to defraud"	479
"knowingly and willfully, with intent to defraud"	545
"knowingly and with fraudulent intent"	2318
"knowingly, willfully, and corruptly"	1158
"knowingly and, with a design to . . ."	1657
"knowingly . . ., for the purpose of . . ."	877
"knowing . . ."	287
"with knowledge that . . ."	224
"having knowledge of . . ."	4
"knowing that . . ."	3
"with knowledge or reason to believe that . . ."	491
"without reasonable cause to believe . . ."	542
"neglect"	1115
"negligence, or inattention to . . . duties"	1115
"through gross negligence"	793
"willfully neglects"	1421
"by willful breach of duty"	2196
"by willful breach of duty or by neglect of duty"	2196
"with reckless disregard for the safety of human life"	35
"otherwise than in the proper discharge of his official duties"	205
"without willful negligence or without any intention . . . to violate the law" [forfeiture provision]	492

Unsurprisingly, the courts have been unable to find substantive correlates for all these varied descriptions of mental states, and, in fact, the opinions display far fewer mental states than the statutory language. Not only does the statutory language not reflect accurately or consistently what are the mental elements of the various crimes; there is no discernible pattern or consistent rationale which explains why one crime is defined or understood to require one mental state and another crime another mental state or indeed no mental state at all.

Perhaps the best illustration of the confusion engendered by existing statutory formulations of the mental element in Federal crimes is that surrounding the word "willfully." In *United States* v. *Murdock*, 290 U.S. 389 (1933),[41] the Supreme Court said:

> The word ["willfully"] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But, when used in a criminal statute it generally means an act done with a bad purpose . . .; without justifiable excuse . . .; stubbornly, obstinately, perversely. . . . The word is also employed to characterize a thing done without ground for believing it is lawful . . ., or conduct marked by careless disregard whether or not one has the right so to act.
>
> * * * * *
>
> Aid in arriving at the meaning of the word "willfully" may be afforded by the context in which it is used . . . (290 U.S. at 394–395).

So armed, the courts, including the Supreme Court, have endowed the requirement of willfulness with the capacity to take on whatever meaning seems appropriate in the statutory context.[42] Similarly, the

[41] The case involved section 1114(a) of the Revenue Act of 1926, c. 27, 44 Stat. 116 (now contained in 26 U.S.C. § 7203), which made it a crime "willfully" to fail to pay taxes, make tax returns, keep records, or supply information as required.

[42] *See* Extended Note B, "Willfulness," *infra*.

mental state that accompanies an act done corruptly has been variously described.[43]

The courts have been equally unclear about the meaning of the requirement that conduct be intentional, or even when there is such a requirement. In *Ellis* v. *United States*, 206 U.S. 246 (1907), the Supreme Court considered a statute that made it a misdemeanor "intentionally [to] violate" provisions limiting the services of laborers on public works to 8 hours per day.[44] Rejecting the claim that the defendant was not guilty if he had no knowledge of the law or supposed that in the circumstances he was not violating the provisions in question, the Court said:

> If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent. (206 U.S. at 257.)

A very different legal pattern is suggested in *Morissette* v. *United States*, 342 U.S. 246 (1952), in which the defendant was convicted of violating 18 U.S.C. § 641, which provides that "whoever embezzles, steals, purloins, or knowingly converts to his use" government property commits a crime (felony or misdemeanor, according to the value of the property). The defendant claimed that he believed that the property which he took had been abandoned by the government and that he had no intention of committing theft. In an elaborate opinion by Mr. Justice Jackson, the Supreme Court declared:

> The contention that an injury can amount to a crime only when inflicted by intention . . . is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. (342 U.S. at 250) (footnote omitted).

The Court recognized that there had developed a category of crimes, "aptly called 'public welfare offenses'" (*id.* at 255), which did not require a mental element, and acknowledged that such crimes had been accepted by the Supreme Court.[45] After some tentative discussion of the special nature of such crimes,[46] the Court concluded:

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[43] In *Rosselman* v. *United States*, 239 F. 82, 86 (2d Cir. 1917), the court of appeals observed: "The word 'corruptly' is capable of different meanings in different connections. As used in this particular statute, we think any endeavor to impede and obstruct the due administration of justice in the inquiries specified is corrupt." *Accord*, *United States* v. *Cohen*, 202 F. Supp. 587, 588 (D. Conn. 1962). In related or similar contexts, courts have said that an act was corrupt "because it was a fraud," *United States* v. *Polakoff*, 121 F. 2d 333, 335 (2d Cir.), *cert. denied*, 311 U.S. 653 (1941); because it was "for an improper motive," *Martin* v. *United States*, 166 F.2d 76, 79 (4th Cir. 1948); and because it was "evil." *Caldwell* v. *United States*, 218 F.2d 370, 371 (D.C. Cir. 1954), *cert. denied*, 349 U.S. 930 (1955).

[44] Act of Aug. 1, 1892, c. 352, § 2, 27 Stat. 340.

[45] *See* below, p. 122.

[46] "These cases do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals. Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty. Many violations of such regulations result in no direct or immediately injury to person

> Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not. We attempt no closed definition, for the law on the subject is neither settled nor static. (*Id.* at 260.)

The Court held that, in view of the accepted common law requirement of criminal intent for the crime of theft, the omission of that requirement from the statute did not change the nature of the crimes defined by it.[47]

In *Spies* v. *United States*, 317 U.S. 492 (1943), the Court construed section 145(b) of the Revenue Act of 1936,[48] making a willful attempt to evade a tax a felony. It said that although "mere voluntary and purposeful" conduct might meet the test of willfulness in other contexts, "in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of congressional intent assume that mere knowing and intentional default in payment of a tax where there had been no willful failure to disclose the liability is intended to constitute a criminal offense of any degree." 317 U.S. at 497–498. *United States* v. *Balint*, 258 U.S. 250 (1922), looks the other way. The case involved an unlawful sale of narcotic drugs in violation of the Narcotic Act of December 17, 1914.[49] The defendant demurred to the indictment on the ground that it did not charge him with knowledge of the nature of the drugs sold. The Court stated that whether or not scienter was an element of a statutory offense was a matter of legislative intent, and concluded, against the defendant, that the "manifest purpose [of the statute] is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him." 258 U.S. at 254.[50]

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or property but merely create the danger or probability of it which the law seeks to minimize. While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation." (342 U.S. at 255–256.)

[47] *Morissette* is followed, *e.g.*, in *Findley* v. *United States*, 362 F.2d 921 (10th Cir. 1966), and *Souza* v. *United States*, 304 F.2d 274 (9th Cir. 1962), both involving the theft and subsequent sale of Federal property in violation of 18 U.S.C. § 641, and *Walker* v. *United States*, 342 F.2d 22 (5th Cir.), *cert. denied*, 382 U.S. 859 (1965), involving theft from the mails in violation of 18 U.S.C. § 1708, which makes no mention of criminal intent. In *Honea* v. *United States*, 344 F.2d 798 (5th Cir. 1965), the court of appeals held that intent to defraud was an element of the offense of impersonating a Federal officer and, so doing, demanding or obtaining anything of value, although the offense is defined (18 U.S.C. § 912) without mention of fraudulent intent.

[48] 49 Stat. 1703 (now contained in 26 U.S.C. § 7201).

[49] C. 1, 38 Stat. 785.

[50] *See also United States* v. *Behrman*, 258 U.S. 280 (1922); *United States* v. *Dotterweich*, 320 U.S. 277 (1943). For further discussion of crimes not requiring criminal intent, *see* below, pp. 128–130, 134–135.

2. *Subsection (1). Kinds of Culpability.*—The reasons for requiring one or another mental state, or degree of culpability, for the commision of a particular offense will be worked out in the drafting of provisions defining particular offenses. This portion of the proposed Code, which deals generally with culpability, discards the confused and inconsistent ad hoc approach to culpability that now characterizes Federal criminal law and makes a new departure.

The degrees of culpability, or categories of mental state, are reduced to four; culpable conduct is conduct in which a person engages *intentionally*, *knowingly*, *recklessly*, or *negligently*. All other statutory formulations are eliminated. The four degrees of culpability that are retained express the significant distinctions found by the courts, and are adequate for all the distinctions which can and should be made to accomplish the purposes of a Federal Criminal Code.

"*Intentionally.*" The highest degree of culpability is present when a person engages in conduct *intentionally*, that is "when he engages in the conduct, it is his purpose to do so, whether or not there is a further objective toward which the conduct is directed."

The law can properly single out conceptually and functionally the person who engages in prohibited conduct with the very purpose of engaging in it, who adopts as a guide to his conduct the doing of a prohibited act (or failing to do a required act), the possessing of a prohibited article, or the accomplishing of a prohibited objective. A common way to describe conduct intentional in this sense is to say that it is done "on purpose." [51]

In most cases, the law has not refined this category further, according to the nature of the particular purpose. Thus a person who intentionally takes life is a murderer whether his reason for killing is to destroy a hated enemy or to spare a friend pain. Robin Hood is no less a thief because he stole to feed the poor. Ordinarily the motives which lie behind intentional, prohibited conduct are disregarded in the definition of crime.

Federal law has sometimes looked beyond intent to motive, by requiring a "corrupt intent." [52] Partial explanation for this additional requirement may lie in the common statutory formula which makes "willfulness" an element of the offense and the absence in Federal law of a general principle of exculpation based on mistake of fact. Inquiry into motives is rejected generally in the second clause of the provision defining intentional conduct, which makes it immaterial whether a person has some further (good or bad) objective in mind when he purposely engages in prohibited conduct. The man who steals because he likes to steal, the man who steals to fill his wallet, and the man who steals to feed the poor commit the same crime.

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[51] The choice of the word "intentionally" rather than "purposely" for this category of conduct was made because the former is more familiar to the law. Also, the latter word may too easily suggest a requirement of a particular purpose rather than simply that conduct be purposive. The Model Penal Code makes the latter word primary and provides that the two have the same meaning. The California, Illinois, Michigan, and New York Codes use the word "intentionally."

[52] *E.g.*, *United States* v. *Ramey*, 336 F.2d 512 (4th Cir. 1964), *cert. denied*, 379 U.S. 972 (1965); *Tomlinson* v. *Lefkowitz*, 334 F.2d 262 (5th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965); *United States* v. *McDonald*, 26 F. Cas. 1074 (No. 15,667) (C.C.E.D. Wis. 1879). *See generally*, *Holdridge* v. *United States*, 282 F. 2d 302 (8th Cir. 1960).

In particular cases, a special motive can be made an element of an offense by specifying that the conduct is not criminal unless a person engages in it for a particular purpose. Such a requirement, known as "specific intent," is an element of some offenses under existing Federal law.[53] In the absence of such a requirement, deliberately included in the definition of a crime, the criminal law should not make liability for intentionally engaging in prohibited conduct dependent on an assessment of the merit of the motive that led the person to disregard the law.

"*Knowingly.*" A high, but not the highest, degree of culpability is present when a person engages in conduct *knowingly*, that is "when he engages in the conduct, he knows or has a firm belief unaccompanied by substantial doubt that he is doing so, whether or not it is his purpose to do so."

In many situations, there may be little reason for the criminal law to distinguish between a man who engages in prohibited conduct purposefully and a man who engages in the same conduct not on purpose but knowing that he is doing so. Both are consciously conducting themselves in a way that the law prohibits. In some situations, however, it seems reasonable that the law should distinguish between a man who wills that a particular act or result take place and another who is merely willing that it should take place. The distinction is drawn between the main direction of a man's conduct and the (anticipated) side effects of his conduct. For example, a man might intentionally blow up the grocery store next to the post office, with knowledge that the post office will be blown up as well. A category of conduct in which a person engages knowingly is warranted not only to allow a distinction between purposeful and knowing conduct but also because in most cases it will be sufficient for liability that a person engaged in prohibited conduct knowingly, whether or not it was his purpose to do so.[54]

It should make no difference with respect to liability whether a person can be said to know that he is engaging in the prohibited conduct or only to have a firm belief that he is engaging in the conduct. If the man who blows up the grocery store has no doubt that the blast will blow up the post office as well, his liability is comparable to the man who "knows" that the blast will demolish both buildings (if in fact the post office is demolished). The distinction between a firm belief and knowledge may not even be based on a difference in mental state in many cases, but rather on a difference in evidence for the proposition believed or known, or simply its truth or falsity. In order further to distinguish this state of mind from recklessness, the phrase "unaccompanied by substantial doubt" is added. Although the phrase is partially redundant of the thought expressed by the words "firm belief," it adds to the requirement that a belief be firmly held the requirement that a person not have information creating a substantial doubt of the fact in question. A person might, for example, be said to have a firm belief that was based only on a probability; in such a case, if to his knowledge the probability allowed a substantial possi-

[53] *See, e.g., Screws* v. *United States*, 325 U.S. 91 (1945); *Hartzel* v. *United States*, 322 U.S. 680 (1944).

[54] *See generally* Cook, *Act, Intention, and Motive in the Criminal Law*, 26 YALE L.J. 645, 654–658 (1917); Remington & Helstad, *The Mental Element in Crime—A Legislative Problem*, 1952 WIS. L. REV. 644, 675.

bility that the contrary was true, his belief, albeit firm, would not be "unaccompanied by substantial doubt."

With respect to both intentional and knowing conduct, the phrase "when he engages in the conduct" is added to make it clear that the intention or knowledge must accompany the conduct in time.

"*Recklessly.*" A different order of culpability is present when a person engages in conduct *recklessly*, that is "he engages in the conduct in conscious [,] and [plain and] clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts [, such disregard involving a gross deviation from acceptable standards of conduct]."*

There is little discussion in Federal criminal cases of the standards of recklessness and negligence. In *United States* v. *Pardee*, 368 F.2d 368 (4th Cir. 1966), which involved a prosecution for involuntary manslaughter under 18 U.S.C. § 1112, the court of appeals quoted with approval [55] the following language:

> [T]he law is reasonably clear that a charge of manslaughter by negligence is not made out by proof of ordinary simple negligence that would constitute civil liability. In other words, the amount or degree or character of the negligence to be proven in a criminal case is gross negligence, to be determined on the consideration of all the facts of the particular case, and the existence of such gross negligence must be shown beyond a reasonable doubt. If the resultant deaths were merely accidental or the result of a misadventure or due to simple negligence, or an honest error of judgment in performing a lawful act, the existence of gross negligence should not be found.[56]

The court went on to say:

> "Gross negligence" is to be defined as exacting proof of a wanton or reckless disregard for human life. Furthermore, to convict, the slayer must be shown to have had actual knowledge that his conduct was a threat to the lives of others, or to have knowledge of such circumstances as could reasonably be said to have made foreseeable to him the peril to which his acts might subject others. (368 F.2d at 374.)

This insistence that criminal negligence or recklessness be of a higher degree than is required for civil liability is consistent with the generally accepted rule.[57] The question has commonly arisen in

*This was the text of the Tentative Draft. The bracketed material is adopted in the Study Draft. *See* Footnote 62, *infra*, and accompanying text.

[55] 368 F.2d at 374.

[56] *Maryland* v. *Chapman*, 101 F. Supp. 335, 341 (D. Md. 1951). The case involved a prosecution for manslaughter under Maryland law, removed to the Federal courts pursuant to 28 U.S.C. § 1442, because the defendant was a Federal officer and the acts in question were performed in the course of his official duties.

[57] *See, e.g.*, the discussion in *Commonwealth* v. *Welansky*, 316 Mass. 383, 55 N.E. 2d 902 (1944); *Commonwealth* v. *Pierce*, 138 Mass. 165, 52 Am. R. 264 (1884); *State* v. *Blankenship*, 229 N.C. 589, 50 S.E. 2d 724 (1948); *Bell* v. *Commonwealth*, 170 Va. 597, 195 S.E. 675 (1938). *See generally Annot.*, Test or criterion of term "culpable negligence," "criminal negligence," or "gross negligence," appearing in statute defining or governing manslaughter, 161 A.L.R. 10 (1946); Wechsler & Michael, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 720–722 (1937).

the context of a prosecution for manslaughter, however,[58] and there is reason to believe that the requirement of a special degree of negligence is confined to that crime. In the Federal courts, in a long line of cases, the statutory crime defined by 18 U.S.C. § 1115—"Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed . . . shall be fined . . . or imprisoned. . . ."—has been distinguished from the common law crime of manslaughter, and "negligence" without qualifying adjectives has been found sufficient for a violation of the statute.[59] Similarly, in *United States* v. *McHugh*, 103 F. Supp. 740 (W.D. Pa. 1952), which involved a prosecution for violation of 46 U.S.C. § 526m [60]—"Any person who shall operate any motorboat or any vessel in a reckless or negligent manner so as to endanger the life, limb, or property of any person shall be deemed guilty of a misdemeanor . . ."—the court said: "Negligence is lack of care under the circumstances. It is the failure to exercise that care which a reasonably careful and prudent person would exercise under like circumstances." [61]

The question is fairly posed, therefore, whether the statutory definition of recklessness (and negligence, considered below) should include the material now placed in brackets. If the bracketed material is omitted, the definition will require that a person be aware that there is good reason to believe that he is engaging in the prohibited conduct and that his willingness to take the risk that he is doing so be "clearly unjustifiable." Thus, a bus driver who makes his bus swerve onto the sidewalk does not act recklessly despite the risk that a pedestrian will be injured, if his action was necessary to avoid a collision and was reasonable in the circumstances.

Addition of the adjective "plain" to modify "disregard" would simply emphasize, at the price of some awkwardness of language, the serious nature of the disregard in cases of recklessness and further distinguish recklessness from negligence; the question can reasonably be decided either way. Addition of the concluding clause, "such disregard involving a gross deviation from acceptable standards of conduct," would import into the definition of recklessness the distinction between negligence for civil cases and criminal negligence recognized (at least) in the crime of manslaughter. The argument for including the concluding clause is that it is important to emphasize the distinction between recklessness for purposes of civil liability and the recklessness which may be criminal. This addition is not recommended for two reasons. It seems likely that Congress will in the future, as the

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[58] *See* note 57.

[59] *United States* v. *Abbott*, 89 F.2d 166 (2d Cir. 1937); *United States* v. *Van Schaick*, 134 F. 592 (S.D. N.Y. 1904), *aff'd.*, 159 F. 847 (2d Cir. 1908); *United States* v. *Holmes*, 104 F. 884 (N.D. Ohio 1900); *United States* v. *Beacham*, 29 F. 284 (D. Md. 1886); *United States* v. *Keller*, 19 F. 633 (D. W. Va. 1884); *United States* v. *Collyer*, 25 F. Cas. 554 (No. 14,838) (S.D. N.Y. 1855); *United States* v. *Farnham*, 25 F. Cas. 1042 (No. 15,071) (S.D. N.Y. 1853); *United States* v. *Warner*, 28 F. Cas. 404 (No. 16,643) (D. Ohio 1848); *Charge to Grand Jury*, 30 F. Cas. 990 (No. 18,253) (E.D. La. 1846). *See generally United States* v. *Meckling*, 141 F. Supp. 608, 620 n.27 (D. Md. 1956).

[60] Act of April 25, 1940, c. 155, § 14, 54 Stat. 166.

[61] 103 F. Supp. at 742. *Accord*, *United States* v. *Meckling*, 141 F. Supp. 608, 621 n.28 (D. Md. 1956).

courts have concluded it has in the past, wish to declare acts of ordinary negligence criminal; there is no obvious reason why this should be foreclosed. (Nor is there any obvious reason why the case law finding ordinary negligence sufficient for some crimes should be overruled.) Should it be desirable to limit liability for some crimes, such as manslaughter, to cases involving gross or extreme recklessness, that result can be accomplished by an appropriate definition of those crimes. Second, although the courts have regularly used phrases like "simple" and "gross" negligence, it is doubtful whether such shades of meaning have substantive significance. If it is established that a person has consciously disregarded a likelihood that he is engaging in prohibited conduct, and that his disregard is (plain and) clearly unjustifiable, that may be all that can meaningfully be said. To ask a jury to determine also whether his conduct violates standards of conduct "grossly" or only "simply" is very likely to entrust to it the power to judge the conduct at large without standards.[62]

"*Negligently.*" The lowest degree of culpability is involved when a person acts *negligently*, that is, "he engages in the conduct in unreasonable disregard of a substantial likelihood of the existence of the relevant facts [, such disregard involving a gross deviation from acceptable standards of conduct]." *

It may be argued that negligent conduct should not be criminal, since, there being no consciousness of wrongdoing, the threat of punishment is ineffective and the imposition of punishment inappropriate. We do, however, commonly assume that people can be made to conduct themselves more carefully by adequate threats or admonitions; greater care may involve giving greater attention to the discovery of danger or giving greater weight to dangers that are discovered. In addition, whether or not negligence is precisely a "moral" fault, it is certainly a fault, for which people can and do incur blame. Consequently, whatever response the criminal law ought to make to prohibited conduct in which a person engages negligently, there is little reason to depart from the present inclusion of negligence within the degrees of culpability that are sufficient for criminal liability.[63]

The formulation used distinguishes negligent conduct from reckless conduct by requiring only an "unreasonable" disregard for the former, in comparison with the requirement of "conscious and [plain and] clearly unjustifiable" disregard for the latter. The major difference is that the negligent person need not be aware of the likelihood that he is engaging in the prohibited conduct. Because he may not be aware, it seems more appropriate to talk of "unreasonable" rather than "unjustifiable" disregard; the former word more easily encompasses a negligent failure to be aware of, as well as a negligent failure to give sufficient weight to, the danger involved. In addition, the omission of the word "clearly," which appears in the definition of reckless

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[62] Compare the commentary to the Model Penal Code from which the concluding clause is adapted. MODEL PENAL CODE § 2.02, Comment at 125 (Tent. Draft. No. 4, 1955).

*See note 62, *supra* and accompanying text. The words "or risks" were later inserted in the Study Draft, to make clear that, not only existing facts, but probabilities as well, are involved.

[63] *See generally* MODEL PENAL CODE § 2.02, Comment at 126–127 (Tent. Draft No. 4, 1955).

conduct, emphasizes the difference in degree between the two levels of culpability. Aside from the distinction drawn between recklessness and negligence on the basis of awareness, the formulations allow a jury to conclude that although the defendant was conscious of a risk, the nature and extent of the risk or the manner or degree of the defendant's disregard of it or the reasons for his disregard of it indicate that he was not reckless, but only negligent. Since all of these elements are relevant to the question whether a person was reckless or entirely without fault, it should be possible to reach the middle ground of negligence on the same basis.

Again, the clause "such disregard involving a gross deviation from acceptable standards of conduct" is added in brackets at the end. For the reasons discussed above, its inclusion is not recommended.

Use of the phrase "relevant facts" in the definition of "recklessly" and "negligently" is not intended to confine consideration to questions "of fact" as opposed to questions "of law," such as, perhaps, a person's legal status or the ownership of property.[64] The phrase is used simply as the most neutral phrase to direct attention to all the facts and circumstances of a situation in light of which the determination that a person was or was not reckless or negligent must be made.

"*Willfully.*" There may be no word in the Federal criminal lexicon which has caused as much confusion as the word "willfully" (or "willful").[65] In ordinary speech, the word probably connotes something between purpose and malice, and also something of obstinacy. Despite the confusion that the word has engendered, it has an accepted place in Federal criminal law and can be eliminated only with difficulty. The next best thing to eliminating it entirely is to attempt to give it a clear, fixed meaning. This has been done by providing that a person engages in conduct "willfully" if he engages in it "intentionally," "knowingly," or "recklessly." So confined, the word offers a useful means of referring to the more serious degrees of culpability. None of its connotations have significance for the criminal law.

"*Culpably.*" A major distinction between crimes and infractions, as they will be defined in the Federal Code, is that the former are presumed to require culpability and the latter not to require culpability. These presumptions, both of which can be overcome by explicit provisions in the definitions of particular offenses, are stated in subsections 302(2) and 302(6). Use of the word "culpably" to refer collectively to the four kinds of culpability recognized by the proposed Criminal Code provides a convenient means of expression.

3. *Subsection (2). Requirement of Willfulness for Crimes Unless Otherwise Provided.*—This subsection states a rule of construction for laws that do impose criminal liability without prescribing the requisite degree of culpability. It seems inappropriate, in the absence of a legislative determination, to require more than a conscious (unjustifiable) disregard of the law. By the same token, if liability is to be imposed for negligence without conscious disregard, it should be done by the legislature.[66] In any case in which liability is or is not imposed contrary to congressional intent, the effect of this provision can, of course, be eliminated by enactment of a statute that specifies the intended requirement of culpability.

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[64] It is unnecessary here to consider whether such characterizations are apt.
[65] *See* Extended Note B, "Willfulness," *infra*.
[66] This is the result reached by the MODEL PENAL CODE (§ 2.02(3)).

An issue basic to the proposed Federal Code is resolved in this subsection. Insofar as it provides that, in the absence of an explicit provision to the contrary, willfulness is a requirement of all crimes, the subsection states a presumption that conduct is a crime only if a person engages in it intentionally, knowingly, or recklessly. The subsection also, however, does acknowledge that some conduct may be declared criminal even though a person engages in it not culpably.

There are now many Federal crimes of varying degrees of seriousness which can be committed without culpability. Among them are the unauthorized sale of narcotic drugs (26 U.S.C. § 4705);[67] failure to register as a narcotics addict before leaving or entering the United States (18 U.S.C. § 1407):[68] shipping misbranded or adulterated food, drugs, devices, or cosmetics in interstate commerce (21 U.S.C. § 331(a));[69] selling liquor to certain Indians (18 U.S.C. § 1154);[70] hunting certain birds contrary to regulations (16 U.S.C. § 703);[71] and other offenses generally described as "public welfare" offenses.[72]

The justification for imposing criminal liability where there is no fault has been that enforcement of society's demands requires it. "In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." *United States* v. *Dotterweich*. 320 U.S. 277, 281 (1943). If a person's conduct has been truly without fault, however, the threat of punishment will not favorably affect his conduct. The imposition of punishment is not needed to "reform" or "rehabilitate" him; no fault requiring correction has been identified. Punishment, if it takes the form of detention, will prevent him from engaging in the conduct while he is detained. It may also satisfy the community's (irrational) demand for retribution for the harm which the conduct caused.

These slight functions which can be served are manifestly inadequate justifications for criminal liability without fault. Preventive detention of the kind involved here has no place in the criminal law. It is unlikely that the community will feel strongly about offenses of this kind (although it may strongly support regulation of the activity involved), particularly when there is no culpability, and unlikelier still that, if the community has such feelings, they will be so strong that they should be recognized for the sake of the community, despite their irrationality.

The "practical" arguments for imposing liability for a particular offense without fault may be that the prohibited conduct is such that one rarely would engage in it innocently, that culpability is difficult to establish except as an inference from the conduct itself, and/or that the penalty is so light and the number of violations so great that the

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[67] *See United States* v. *Balint*, 258 U.S. 250 (1922).

[68] *See United States* v. *Juziwiak*, 258 F.2d 844 (2d Cir. 1958), *cert. denied*, 359 U.S. 939 (1959); *Reyes* v. *United States*. 258 F.2d 774 (9th Cir. 1958).

[69] *See United States* v. *Dotterweich*. 320 U.S. 277 (1943).

[70] *See Hayes* v. *United States*, 112 F.2d 676 (10th Cir. 1940).

[71] *See United States* v. *Schultze*, 28 F. Supp. 234 (W.D. Ky. 1939).

[72] *See generally Morissette* v. *United States*, 342 U.S. 246 (1952). The leading Federal cases are discussed and sharply criticized in Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958). Offenses of this kind are discussed generally and classified in Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

economics of the administration of justice warrant an occasional unjust result. As the commentary to the Model Penal Code states:[73]

> [I]f practical enforcement can not undertake to litigate the culpability of alleged deviation from legal requirements, we do not see how the enforcers rightly can demand the use of penal sanctions for that purpose. Crime does and should mean condemnation and no court should have to pass that judgment unless it can declare that the defendant's act was wrong.

At least in the absence of a clear demonstration that only the use of criminal sanctions will accomplish society's purpose and that criminal sanctions cannot be utilized effectively unless liability is imposed without fault, the "practical" arguments are unconvincing.[74]

The various explanations offered for "strict liability" in Federal criminal law depend finally on the conclusion that the legislature intended to impose strict liability, which it has the authority to do. "[S]uch legislation may, in particular instances, be harsh, but we can only say again what we have so often said, that this court cannot set aside legislation because it is harsh." [75] Rejection of strict liability is based on the conclusion that the purposes of Federal criminal law do not require that criminal penalties be threatened or imposed for conduct which is without fault. In the absence of an overriding policy objective which requires the use of criminal sanctions where moral blame does not attach, it is surely preferable to make criminal law conform to moral judgment.[76]

Because Congress has in the past concluded that there should be some crimes of absolute liability, it would not be appropriate to provide in the general section on culpability that there shall be no such crimes at all. The draft goes as far in that direction as it can consistently with established law by providing that criminal liability without culpability shall be imposed only if a law provides explictly that a person who engages in the conduct "but not culpably" commits the crime. To go even this far will require reconsideration of statutes not in Title 18 which have hitherto been construed to impose absolute liability. Such reconsideration, as well as specific advertence to the imposition of liability without fault in each situation in which it may be imposed in the future, is justified by very strong arguments against such liability. Particularly is this so since a separate category of noncriminal offenses known as "infractions" which will not ordinarily require culpability for their commission is established.

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[73] MODEL PENAL CODE § 2.05, Comment at 140.

[74] *See generally* HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 342–351 (2d ed. 1960).

[75] *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U.S. 57, 70 (1910); *see Smith* v. *California*, 361 U.S. 147, 150 (1959); *United States* v. *Dotterweich*, 320 U.S. 277 (1943); *Chicago, Burlington & Quincy Ry.* v. *United States*, 220 U.S. 559 (1911).

[76] "In view of the nature of criminal conduct, there is no avoiding the conclusion that strict liability cannot be brought within the scope of penal law." HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 336 (2d ed. 1960) (footnote omitted). "The whole problem is . . . an artificial one; it arises from using the criminal process for a purpose for which it is not suited." WILLIAMS, CRIMINAL LAW 264 (2d ed. 1961). For a sharp condemnation of crimes of strict liability, and argument that there is neither "moral justification" nor "even a rational, amoral justification" for "condemning and punishing a human being as a criminal when he has done nothing which is blameworthy," *see* Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 422 (1958).

4. *Subsecton (3). Factors to Which Requirement of Culpability Applies.*—This subsection provides that if conduct is not an offense unless a person engages in it with a particular degree of culpability, the requirement of culpability is applicable to every element of the conduct and attendant circumstances except those for which another degree of culpability (including no culpability) is specified.

Such a rule is included to resolve ambiguities about elements of an offense which may not be central to liability and with respect to which culpability, or the same degree of culpability, is not required. For example, 18 U.S.C. § 111 makes assault on a Federal officer engaged in the performance of his duties a felony. There has been confusion whether it is necessary to show that a person charged under this section knew that the person he was assaulting was a Federal officer.[77] Pursuant to the proposed subsection, in the absence of a provision to the contrary, it will not be necessary to show such knowledge. There is no intention to prejudge the issue with respect to a particular element of any crime. Since the definitions of most crimes contain only elements essential to their commission, the direction which the presumption created by this subsection takes should lead to the correct result in most cases.

With respect to elements of offenses that are included to provide a basis for Federal jurisdiction but which have no other bearing on the nature of the conduct, it is presumed that culpability should not ordinarily be required.[78] Subparagraph (c) of subsection (3) so provides with respect to "any fact which is solely a basis for federal jurisdiction." Where an element of conduct is both a basis of jurisdiction and a substantive element of the offense, its inclusion in the definition of the offense will make the presumption of subparagraph (a) applicable.

Subparagraph (b) of this subsection provides that if criminal liability depends on the result of conduct, an element of the offense to be proved and to which, pursuant to subparagraph (a), the required degree of culpability must attach is that result; culpability as to the causal connection between conduct and its consequences must be proved. While this provision states what one would probably conclude in the absence of the provision, the application of the requirement of cul-

[77] Holding that such a showing is not necessary are, *e.g.*, *United States* v. *Wallace*, 368 F.2d 537 (4th Cir. 1966), *cert. denied*, 386 U.S. 976 (1967); *United States* v. *Montanaro*, 362 F.2d 527 (2d Cir.), *cert. denied*, 385 U.S. 920 (1966); *Bennett* v. *United States*, 285 F.2d 567 (5th Cir. 1960), *cert. denied*, 366 U.S. 911 (1961). To the contrary are *Hall* v. *United States*, 235 F.2d 248 (5th Cir. 1956); *United States* v. *Bell*, 219 F. Supp. 260 (E.D. N.Y. 1963). *See also McNabb* v. *United States*, 123 F.2d 848 (6th Cir. 1941), *rev'd on other grounds*, 318 U.S. 332 (1943) (homicide of Federal official, 18 U.S.C. § 1114).

[78] At present, cases go both ways. *See, e.g.*, *United States* v. *Chase*, 372 F.2d 453 (4th Cir.), *cert. denied*, 387 U.S. 907 (1967) (knowledge and intent to transmit gambling paraphernalia in interstate commerce are necessary for violation of 18 U.S.C. § 1953, prohibiting interstate transportation of wagering paraphernalia); *Wheatley* v. *United States*, 159 F.2d 599 (4th Cir. 1946) (knowledge of interstate transportation is necessary for violation of 18 U.S.C. § 1201, prohibiting interstate transportation of kidnapped person); *contra*, *United States* v. *Miller*, 379 F.2d 483 (7th Cir. 1967) (knowledge that interstate facility is being used is not necessary for violation of 18 U.S.C. § 1952, prohibiting use of interstate facilities to further unlawful activity); *United States* v. *Powell*, 24 F. Supp. 160 (E.D. Tenn. 1938); *Loftus* v. *United States*, 46 F. 2d 841 (7th Cir. 1931) (knowledge of interstate transportation not necessary for violation of 18 U.S.C. § 2313, prohibiting receiving stolen car transported in interstate commerce).

pability to the causal connection is important enough and overlooked easily enough to warrant the explicit statement here.

If a person is charged with intentionally causing X by his conduct, it must have been his purpose not only to engage in the conduct but also to cause X. If he is charged with knowingly causing X by his conduct, he must have known not only what he was doing but also have known (or firmly believed) that his conduct would cause X. If he is charged with recklessly engaging in conduct that causes X, it must be shown that he acted "in conscious . . . and . . . clearly unjustifiable disregard of a substantial likelihood" that his conduct would cause X, which, in view of the result-based nature of the crime, is one of the "relevant facts." Similarly, if he is charged with negligently engaging in conduct that causes X, it must be shown that he acted "in unreasonable disregard of a substantial likelihood" that his conduct would cause X.

The effect of this provision in some cases is a departure from the commonly expressed doctrine of "transferred intent." If A shoots at a person with the intention of killing him and does kill him, the requirement of intention is satisfied, even if A intended to shoot at X and thought he was shooting at X but was actually shooting at Y (just as if he shot at X and intended to kill X, but learned later that he had killed the "wrong man"). In such cases, there is no need to "transfer" intent, and there is no conflict between the draft provision and the doctrine of "transferred intent." If, on the other hand, A, intending to kill X, shoots at X, but his bullet misses X and hits Y who is killed, since A did not intend to cause the death of Y, under the proposed formulation, A is not liable for the intentional killing of Y. Under the doctrine of "transferred intent," A's intent to kill X would be "transferred" to his act of killing Y, and A would be liable for the intentional killing of Y.

The doctrine of "transferred intent" is rejected because it is both conceptually unsound and unnecessary. Had A simply missed X, he would have been liable for attempted murder of X. He is no less liable for the attempted murder of X because he happened to kill Y. He may also be liable for the murder of Y if the crime of murder includes a provision relating to extreme recklessness, and so forth, which causes death,[79] or a provision comparable to that now contained in Federal law that a murder "perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree."[80] What A has not done is to kill anyone whom he intended to kill, and he should not be liable for that crime. Because an intent to kill and a death have converged and are causally related, it is easy to overlook the fact that the death of Y is, with respect to A's intent, wholly fortuitous and, again so far as intentional wrongdoing is concerned, has no bearing on A's culpability. If Y's death makes A more culpable than he would be if his bullet had gone astray and hit no one, it is because A's con-

[79] *See, e.g.*, MODEL PENAL CODE § 210.2(1)(b) (P.O.D. 1962).

[80] 18 U.S.C. § 1111. The draft provision is in no way inconsistent with such a provision, which provides simply that a killing accompanied by the prescribed mental state is murder of a certain grade, without relying on a special "general" doctrine of "transferred intent." Indeed, the specific treatment of the problem in the murder statute demonstrates how needless a general doctrine of transferred intent is.

duct was not only intentional vis-à-vis X but also reckless (or wanton) vis-à-vis Y. So far as Y's death is concerned, A's culpability is not different than it would be if A had intended to shoot a deer and not another person.[81] Parallel reasoning applies to conduct in which a person engages knowingly.

The proposed formulation accepts this analysis as truer to the facts and the actual culpability of the defendant than the doctrine of transferred intent. The community's outrage at the death of Y will not be unsatisfied, since A will, in any event, be liable for attempted murder and manslaughter and will, in all probability, be liable for murder as well. All that is rejected is the doctrine of "transferred intent," which is a needless fiction.[82] *

5. *Subsection (4). Culpability Requirement Satisfied by Higher Culpability.*—This subsection states the uncontroversial principle that if culpability of a "higher" degree than the kind of culpability required is established, the requirement of culpability is satisfied.

6. *Subsection (5). Knowledge or Belief that Conduct is an Offense Not Required.*—This subsection states the general rule that ignorance of the law is not a defense to criminal liability, by providing that (unless otherwise provided) knowledge or belief that conduct is an offense is not an element of the conduct constituting the offense. Since it is not ordinarily necessary for even the highest degree of culpability that a

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[81] *See* WILLIAMS, CRIMINAL LAW 134 (2d ed. 1961).

[82] With respect to reckless and negligent conduct, this provision probably does not depart from existing law. The effect of the provision is to limit liability to the consequences which might have been avoided had the person not been reckless or negligent. Thus, if A shoots a gun recklessly, he is not liable if the bullet knocks down a branch which lands on a bear who becomes enraged and attacks and kills X miles away in the forest. Even though the death was a consequence of A's reckless shooting, A did not act "in conscious and clearly unjustifiable disregard of a substantial likelihood" that his conduct would cause X's death. In tort terms, the result was not within the risk. The scope of liability for consequences of reckless conduct need not be drawn very narrowly. Had X been hit directly by the bullet fired from A's gun, A would surely be liable for X's death, even though A did not know that X (or anyone) was within shooting distance and the bullet ricocheted off a rock before hitting X. A's conduct may well have been "in . . . disregard of a substantial likelihood" that someone would be killed. Parallel reasoning applies to conduct in which a person engages negligently.

Where recklessness or negligence is at stake, the scope of the risk is not ordinarily defined in terms of a particular victim or property and there may be no doctrine parallel to that of transferred intent.

The Model Penal Code (§ 2.03(3)(a)) does include a rule parallel to the doctrine of transferred intent. One can imagine a case where A acts in conscious disregard of a likelihood that X will be in a place of danger and be injured, and in fact Y is in the place of danger and is injured. Again, however, this is not a case of "transferred recklessness;" A's recklessness consisted in his acting in disregard of the risk that someone would be injured. If no one was in the place of danger and Y was killed by an unforeseeable chain of circumstances, it is doubtful whether A would be liable for reckless homicide. If so, the result would be parallel to that reached by the doctrine of transferred intent. *See* WILLIAMS, CRIMINAL LAW 110–112 (1953).

*Subparagraph (d) was inserted in the Study Draft to insure that the culpability requirement with respect to the nonexistence of a defense is applicable only to those defenses specified in the Part of the Code defining substantive offenses, and not to defenses specified in the general Part of the Code. Subparagraph (e) was inserted to insure the nonapplicability of the culpability requirement to those factors which the section defining the offense requires must only be proved "in fact" to exist (without regard to the defendant's belief as to its existence).

person know he is violating the law—his intention need only be to engage in the prohibited conduct—ignorance of the law proscribing conduct or mistaken belief that the conduct is lawful is ordinarily not a defense.[83] While this provision states the result which would be reached by the application of other provisions if it were omitted, its inclusion may avoid needless uncertainty about a settled principle of law.

Federal courts have sometimes held that honest belief that conduct is lawful constitutes a defense to a crime an element of which is "willfulness" or, more obviously, intent to evade the law.[84] In such cases the courts have applied a distinct principle, that where ignorance or mistakes negates an element of conduct constituting an offense, the offense is not committed. This principle is stated in section 304.

7. *Subsection (6). No Requirement of Culpability for Infractions.*— Although, for reasons discussed in the comment to subsection 302(2), there are strong objections to the imposition of criminal liability without fault, the use of noncriminal penalties to call the attention of those affected to the provisions of Federal regulatory schemes and the liko is reasonable. The imposition of a penalty may often be a means of giving effective notice of a regulation and indicating to the penalized individual (or corporate body) and others that the government "means business." In view of the many Federal offenses which now can be committed without culpability, it would be idle to reject such offenses altogether.

A category of noncriminal offenses known as "infractions" will be defined in the general section on definitions. Many consequences which may follow from the noncriminal nature of infractions are left to statement elsewhere.[85] Of importance here is the imposition of liability

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[83] *Horning* v. *District of Columbia*, 254 U.S. 135 (1920). "It may be assumed that he [the defendant] intended not to break the law but only to get as near to the line as he could, which he had a right to do, but if the conduct described crossed the line, the fact that he desired to keep within it will not help him. It means only that he misconceived the law." 254 U.S. at 137. To the same effect are *United States* v. *Juzwiak*, 258 F.2d 844 (2d Cir. 1958), *cert. denied*, 359 U.S. 939 (1959); *Reyes* v. *United States*, 258 F.2d 774 (9th Cir. 1958); *United States* v. *Mansavage*, 178 F.2d 812, 817 (7th Cir. 1949), *cert. denied*, 339 U.S. 931 (1950); *United States* v. *Anthony*, 24 F. Cas. 829 (No. 14,459) (N.D.N.Y. 1873).

Holmes' explanation of the rule was:

> Public policy sacrifices the individual to the general good. It is desirable that the burden of all should be equal, but it is still more desirable to put an end to robbery and murder. It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales. (HOLMES, THE COMMON LAW 41, 48 (1923)).

[84] *Yarborough* v. *United States*, 230 F.2d 56 (4th Cir.), *cert. denied*, 351 U.S. 969 (1956). "Ignorance of the law is no defense to crime, except that, where willfulness is an element of the crime, ignorance of a duty imposed by law may negative willfulness in failure to perform the duty." 230 F.2d at 61. To the same effect are *United States* v. *Phillips*, 217 F.2d 435, 442 (7th Cir. 1954); *Miller* v. *United States*, 277 F. 721, 726 (4th Cir. 1921); *see Williamson* v. *United States*, 207 U.S. 425, 453 (1908); *United States* v. *Painter*, 314 F.2d 939, 943 (4th Cir. 1963); *Linden* v. United States, 254 F.2d 560, 568 (4th Cir. 1958).

[85] The Model Penal Code (§ 1.04(5)) provides, for example, that "conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense." This would surely be the minimum implication of the distinction between crimes and violations. Another might be that violations could be "prosecuted" differently (more expeditiously) in the courts or even be

for an infraction committed without culpability. Whereas subsection 302(2) creates a presumption (subject to explicit statement otherwise) that willfulness is an element of crime, this subsection creates a presumption (subject to explicit statement otherwise) that culpability is not an element of an infraction.

The subsection does not decide whether, in the absence of an express statutory provision, an offense is a crime or an infraction. It might be provided, for example, that, unless a law provides otherwise, all offenses for which the maximum penalty is a fine of not more than a certain amount are infractions. The question whether an offense is a crime or an infraction is more properly treated in the general section on definitions. However it is resolved, this subsection and subsection 302(2) will together determine whether or not, in the absence of an express provision, culpability is required. Since this subsection, like subsection 302(2), is applicable only in the absence of an express provision, no option is foreclosed. A law may provide that conduct even if culpable is only an infraction, or that conduct is an infraction if not culpable and a crime if culpable.

Mistake (Sections 304 and 610)

1. *Section 304. Ignorance or Mistake Negating Culpability.*—This section states the established principle that if a person is ignorant of or mistaken about a matter of fact or law and the ignorance or mistake negates the kind of culpability required for the commission of the offense, he does not commit the offense even if his conduct would have constituted the offense had his information been correct.[86] A man who carries off another's suitcase believing that it is his own or that in the circumstances he is otherwise lawfully entitled to do so does not commit theft, even though he is mistaken about his rights. In both cases, the intention which is an element of the crime of theft is absent. On the other hand, a mistaken belief that one is stealing from a wealthy man and not a poor man or that one is shooting at a man and not a woman does not provide a defense to a charge of theft or homicide. Nor is there any reason why such a mistake should provide a defense, since it is irrelevant to the offense charged. For the purpose of the crime involved, it has no greater significance than a mistaken belief that the day is Tuesday and not Wednesday.

A person's mistakes affect the characterization of his mental state and not the characterization of his conduct (aside from his mental state) or its results. Mistake is, therefore, relevant to the "mental element" or degree of culpability of a person's conduct. The rule is stated in terms of culpability.

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placed within the jurisdiction of a nonjudicial agency. *See* Note, 1946 Wisc. L. Rev. 172, 185–191. Many Federal administrative agencies conduct proceedings to determine whether violations of law of one kind or another have occurred and to prescribe remedies; the stakes in such proceedings are often considerably higher than the penalties that would be attached to such violations. There is no obvious reason why all the requirements of due process in a criminal proceeding should attach to a proceeding to determine whether a noncriminal violation has been committed and, if so, what the penalty should be.

[86] *E.g., Morissette* v. *United States*, 342 U.S. 246 (1952).

While this provision states the result that would be reached by the application of other provisions if it were omitted, its inclusion may avoid needless uncertainty about a settled principle of law.[87]

2. *Section 610. Defense of Mistake of Law.*—While it is well established both as a matter of Federal law and generally that ignorance that one's conduct is unlawful is not a defense,[88] some courts have held that if a person has taken affirmative steps to learn what the law is and/or has been affirmatively misled by official action about the relevant law, his honest belief that his conduct is lawful constitutes a defense. In *United States* v. *Mancuso*, 139 F.2d 90 (3d Cir. 1943), the defendant failed to obey an order of the Draft Board which was issued contrary to a court order that turned out to be erroneous. Holding that the defendant was not criminally liable for his failure, the court of appeals said:

> We think the defendant cannot be convicted for failing to obey an order, issuance of which is forbidden by the court's injunction. While it is true that men are, in general, held

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[87] The Model Penal Code provides:

> Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed. (MODEL PENAL CODE § 2.04(2) (P.O.D. 1962)).

This somewhat elaborate provision, in effect, provides that a person may be convicted of a crime he did not commit, and, in some cases (those in which a person's mistake leads him to commit, but for the mistake; a more serious crime than he would have committed had the situation been as he supposed) be sentenced for another crime which he also did not commit. Its limited significance is suggested by the example in the commentary to the Model Penal Code of the burglar who breaks into what he (reasonably) believes is a store and finds himself in a dwelling. If breaking into a dwelling is a more serious offense than breaking into a store, the commentary observes, "it may not be right to hold him for the graver crime." MODEL PENAL CODE § 2.04(2), Comment at 137. It would not be right to do so, however, only because culpability is required with respect to the nature of the building, which is an element of each of the two offenses. And if that is so, it is only the Model Penal Code's elimination of the defense of mistake in the first sentence of this provision that would lead to the mistaken burglar's being held for the graver crime. Unless the first sentence is included, the corrective (primarily for sentencing purposes) of the second sentence of the provision is unnecessary.

As for the first sentence, it establishes a fiction to the extent of imputing to a defendant a degree of culpability which is not his. The commentary to the Model Penal Code gives no justification for the fiction except that a defendant who by mistake fails to commit as serious a crime as he supposed he was committing should not be acquitted altogether. In fact, however, despite his mistake, the defendant would surely be guilty of some offense, at least an attempt, unless his mistake was so basic that he never came close to committing *any* crime, in which case he *should* be acquitted altogether.

An unstated proposition in the commentary's analysis is that the burglar *should* at least be held for the less serious offense, *i.e.*, that the burglar's mistaken entry into a dwelling, which he thought was a store, should not shield him from liability for entering a store. Whether or not that is so depends on the circumstances. Under well drafted provisions on burglary, it certainly could be so, without the aid of the general provision proposed in the Model Penal Code.

Situations of the kind contemplated will be extremely rare. Rare indeed will be the burglar who sets out to enter a store, enters a dwelling, does not adapt his purpose to his situation, and convinces the judge or jury that that is the case.

[88] *See* Comment on subsection (5) of section 302, *supra*.

> responsible for violations of the law, whether they know it or not, we do not think the layman participating in a law suit is required to know more law than the judge. (139 F.2d at 92)) (footnote omitted).[89]

Some Federal statutes have provided that a person shall not be convicted of a violation of a Federal regulatory scheme if he proves that he had no knowledge of the requirement which he violated.[90] More commonly, it has been provided in regulatory legislation that a person shall not be liable for conduct in good faith in conformity with

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[89] *But see United States* v. *Mansavage*, 178 F.2d 812 (7th Cir. 1949), *cert. denied*, 339 U.S. 931 (1950). The issue is discussed at length in *Long* v. *State*, 44 Del. 262, 65 A.2d 489 (1949), in which the defendant, relying on competent but incorrect legal advice that a foreign divorce was valid, remarried and was subsequently prosecuted for bigamy. The court held that the defense of mistake of law was available, where the defendant "made a bona fide, diligent effort, adopting a course and resorting to sources and means at least as appropriate as any afforded under our legal system, to ascertain and abide by the law, and where he acted in good faith reliance upon the results of such effort." 44 Del. at 279, 65 A.2d at 497. Responding to the suggestion that the case was one for exercise of prosecutorial or judicial discretion, the court said that the defendant was entitled to "full exoneration as a matter of right, rather than to something less, as a matter of grace." 44 Del. at 281, 65 A.2d at 498. Other State cases involving mistaken advice of counsel or some official statement of the law on which the defendant relied have been similarly decided. *People* v. *Ferguson*, 134 Cal. App. 41, 24 P.2d 965 (2d Dist. 1933) (violation of blue sky law; advice of corporation commissioner and deputy commissioners); *State ex rel. Williams* v. *Whitman*, 116 Fla. 196, 150 So. 136 (1933) (offense malum prohibitum; decision of circuit court that statute was unconstitutional); *State* v. *O'Neil*, 147 Iowa 513, 126 N.W. 454 (1910) (decision of State Supreme Court that statute was unconstitutional); *State* v. *Longino*, 109 Miss. 125, 67 So. 902 (1915) (decision of State Supreme Court that conduct not prohibited by statute); *State* v. *White*, 237 Mo. 208, 140 S.W. 896 (1911) (violation of election laws; reliance on advice of election officials); *State* v. *Bell*, 136 N.C. 674, 49 S.E. 163 (1904) (advice of counsel based on prior decision of Supreme Court); *see Wilson* v. *Goodin*, 291 Ky. 144, 163 S.W. 2d 309 (1942); *State* v. *Jones*, 44 N.M. 623, 107 P.2d 324 (1940).

Some cases have gone the other way. *State* v. *Striggles*, 202 Iowa 1318, 210 N.W. 137 (1926) (reliance on decision of municipal court and opinions of county attorney and mayor that conduct not prohibited by statute; *O'Neil*, *supra*, distinguished); *State* v. *Goodenow*, 65 Me. 30, 32 (1876) (advice of justice of the peace that remarriage was lawful; "accused have intentionally committed an act [adultery] which is in itself unlawful."); *Hopkins* v. *State*, 193 Md. 489, 69 A.2d 456 (1949), *appeal dismissed for lack of a substantial Federal question*, 339 U.S. 940 (1950) (reliance on State's Attorney that conduct not prohibited by statute); *Staley* v. *State*, 89 Neb. 701, 704, 131 N.W. 1028, 1029 (1911) (reliance on advice of counsel, including deputy county attorney, that first marriage was void and second marriage not bigamous; ". . . it was at least doubtful whether the marriage was void . . . [or the defendant] would not have asked the advice of counsel."); *State* v. *Whiteaker*, 118 Ore. 656, 247 P. 1077 (1926) (blue sky law; advice of counsel); *State* v. *Foster*, 22 R.I. 163, 46 A. 833 (1900) (advice of State Treasurer that licensing provision not applicable).

See also cases holding that where a mistake of law is relevant to the defendant's good faith in engaging in the conduct, reliance on the advice of counsel does not by itself establish a defense. *E.g.*, *United States* v. *Painter*, 314 F.2d 939, 943 (4th Cir. 1963); *Linden* v. *United States*, 254 F.2d 560, 568 (4th Cir. 1958). On the subject of mistake of law generally, *see* Hall & Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641 (1941); Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75 (1908); Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35 (1939).

[90] *E.g.*, Act of Aug. 22, 1940, § 49, 15 U.S.C. § 80a—48 (investment companies); Public Utility Holding Company Act of 1935, § 29, 15 U.S.C. § 79z—3.

a Federal regulation if the regulation is later rescinded or determined to be invalid.[91]

There is no obvious solution to the problem of how to treat cases in which a person commits an offense after having been assured, on his own initiative or otherwise, that the conduct is not unlawful.

There are strong reasons not to hold criminally liable a man who conscientiously tries to conform his conduct to the law. The reasons are not so clearly applicable, however, to a man who deliberately extends his conduct to what he believes are the limits of the law and discovers later that he went beyond the limits. Distinguishing one man from the other is not so easily done, and, in any event, the distinction is concerned with an aspect of conduct akin to "motive," which in another, more general context is largely placed outside the law's concern.[92]

Not only are there significant differences in the attitudes toward the law that lead a man to inquire into what he may do. There are also many different ways of making an inquiry, as indeed there is a difference between passively receiving and then relying on information from an official source and actually initiating an inquiry with the express purpose of basing one's conduct on the response. Again, however, the differences are easier to state than to apply. In most cases, an inquiry whether conduct is lawful is likely to be directed to legal counsel, who will make whatever further inquiry, either research or direct inquiry of an official, seems to him to be appropriate; the response is likely to be channeled through legal counsel to his client, who may not be told or be able to assess how solid the basis for counsel's advice is.

If a defense of reasonable reliance on a competent (official or unofficial) statement of the law is omitted, prosecutors can be counted on to decline prosecutions where the defense would be plainly and fully applicable. There are, indeed, remarkably few reported cases in which the defense has been at issue. Judges will not be likely to impose severe sentences in the cases brought by a too zealous prosecutor. Nevertheless, a person who would not have violated the law if his reasonable understanding of the law, gained by his own efforts to obtain legal advice or from reliable official statements, had not been mistaken should not find himself in the position of having to depend on the prosecutor's or trial judge's decision not to prosecute for a crime which, in law, he committed.*

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[91] *E.g.*, Act of Aug. 22, 1940, c. 686, tit. I, § 38(c), 54 Stat. 841 15 U.S.C. § 80a—37(c) (investment companies), § 211, 15 U.S.C. § 80b—11(d) (investment advisers); Public Utility Holding Company Act of 1935, c. 687, tit. I, 20, 49 Stat. 833, 15 U.S.C. § 79t(d).

[92] *See* comment on subsection (1) of section 302, *supra*.

*The tentative draft provisions have been substantially changed in the Study Draft. The tentative draft proposed that mistake of law excuse conduct where the actor had made a prior reasonable effort to determine the law and reasonably and firmly believed that his conduct did not constitute an offense, thus permitting a defense based upon the erroneous opinion of a lawyer as to viable law. The Study Draft eliminates this "lawyer's advice" defense except to the extent that such advice, in fact, incorporates and is coincident with the statements of law in the enumerated matters. Accordingly, the risk of the deliberately created defense and the attendant difficulty of proving complicity of the lawyer is eliminated. Disruption of existing and satisfactory devices for official interpretation of the law (*e.g.*, in the Treasury and Justice Departments in tax and antitrust matters, respectively) is avoided. The anomaly of submitting questions

Section 610 provides a defense (unless a law expressly provides otherwise) for a person (a) who has taken affirmative steps to assure himself that conduct in which he proposes to engage will not violate the law and (b) who, as a result of having taken such steps and in reliance on whatever information he may already have had, believes reasonably and firmly that the conduct will not violate the law. Such a person should not incur criminal liability. With respect to the law, his conduct is not culpable, within the framework of a system of definite positive laws. He has done all that can reasonably be expected to conform his conduct to the law. There is no room for deterrence in such circumstances without either imposing on persons an unreasonable burden to study the law or, in effect, limiting their conduct more broadly than the criminal law intends to do.

The requirement that a person have "made a reasonable effort to determine whether the conduct constituted an offense" is intended to insure that the defense will be allowed only if the mistake is reasonable not only with respect to the information which a person has and its source, but also with respect to other information which he could reasonably have obtained from other sources. In addition, it provides to some extent an objective test of the person's good faith. What is a "reasonable effort" will vary from case to case. It might, for example, be reasonable for a lawyer (or some lawyers) to rely on a published judicial opinion without seeking further advice, but not reasonable for a nonlawyer to do the same.

The second requirement, that a person believe "reasonably and firmly, without substantial doubt" that his conduct is lawful is a minimum requirement of exoneration due to mistake of law. The law need not excuse criminal conduct because of an unreasonable mistake of law, however honest; and it will, sometimes at least, have a deterrent effect by requiring special care beyond good faith of persons whose judgment in this context is unsound. Nor does it seem unwarranted to require that belief that conduct is lawful be firm and unaccompanied by substantial doubt if the conduct, otherwise criminal, is to be excused. If a person has substantial doubt about the lawfulness of his proposed course of action, it is not unduly strict to require him either to seek more information or to change his plans (or to carry out his plans with whatever risk of criminal liability they entail). This formulation comes as close as the law can or should to distinguishing between the person who wishes to perform and the person who wishes to "evade" his legal obligations.

The phrase "firmly, without substantial doubt" is used despite partial redundancy to make plain that not only must a person believe strongly that his conduct is lawful but also he must not have a substantial doubt which his belief, however strong, overcomes.

Aside from requiring that a person believe reasonably that his conduct is lawful, the draft provision makes no effort to distinguish among the various kinds of evidence on which the belief is based. The Model Penal Code (§ 2.04(3)(b)) in contrast, allows the defense of mistake of law only if the mistake is based on:

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of law to a jury for a determination as to whether or not the defendant's action was "reasonable" is likewise avoided. The provision proposed in the Study Draft is modeled after provisions in the Model Penal Code (§ 2.04(3) (P.O.D. 1962)), and the Illinois Revised Code (c. 38 § 4–8 (1964)).

> an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.

As the Model Penal Code's formulation illustrates, there is little reason to prefer one kind of official statement to another for this purpose; while the categories specified appear to be limiting, they include virtually all governmental statements which are at all official. And while the Model Penal Code seems to be excluding reliance on the advice of counsel, counsel will almost invariably be the source from which a person learns of a statute or decision or other official statement and the source of the statement's meaning as well. Indeed, a person who consults with counsel about the meaning of any of the kinds of statement specified in the Model Penal Code is probably acting much more reasonably than a person (other than a lawyer) who seeks no such advice. Statutes, opinions, and the like must be "interpreted" to determine their significance. It is difficult to imagine competent advice of counsel which does not in that sense "rely" on one of the kinds of statement specified.

The evident purpose of the Model Penal Code's specification of kinds of statements on which an exculpatory mistake of law must be based is to reject such a defense based on no more than legal counsel's advice in a close case that conduct is lawful. As suggested above, it is debatable at best whether a man who deliberately engages in conduct at the limits of what the law allows should be able to defend himself against a criminal charge on the ground that his lawyer told him he could "get away with it." On the other hand, to specify that only certain kinds of evidence of what the law is will be allowed as the basis of an exculpatory mistake of law is to make exculpation depend not on the actor's culpability but on the quality of his lawyer's judgment. Few persons can be expected to ask their lawyer to explain the basis of his advice, and few of those who do can be expected to evaluate it more than superficially. Even if that were not so, an "official statement of the law" as it applies to particular facts is seldom contained as such in statutes, judicial opinions, administrative orders, and the like. Such pronouncements require application by analogy to facts not precisely the same as those before the official body making the statement. Criminal liability should not depend on an after-the-fact determination whether or not there actually was an applicable statement of the law "contained in" a statute or judicial opinion. It is unthinkable that a jury should be permitted to make such a determination, scarcely less so that it should be made by a trial judge. It is another, much more acceptable matter to allow the trier of fact to determine whether a belief is reasonable, which it will do partly on the basis of the nature and source of the advice on which a person relies.

The proposed Criminal Code cannot have it both ways. It must either accept the implications (and occasional unsatisfying results) of a defense based on the theory that a man who reasonably relies on

information that his conduct is lawful, after taking appropriate steps to obtain the information, is not culpable and is therefore not guilty of an offense, or it must reject the defense, on theoretical or "practical" grounds. The draft accepts the defense. Since the "practical" grounds for rejecting the defense may be stronger with respect to some crimes than others—it may, for example, be concluded that the defense should not be allowed with respect to certain securities offenses—the draft includes a statement that the defense is available "unless a law expressly provides otherwise." Section 610 thus creates a presumption in favor of the defense which can be overcome by an expression of contrary legislative intent.

3. *Section 610. Defense of Mistake of Law To Be Shown by Preponderance of the Evidence.**—This section requires that the defense of mistake of law be established by a preponderance of the evidence. Since the defense depends in the first instance entirely on facts which the defendant would know, it is appropriate that he should have the burden of raising the defense and coming forward with evidence to support it. Since the defense operates to cut off liability for what is otherwise a completed crime, it seems appropriate also to require it be established by a preponderance of the evidence.

*The tentative draft contained a separate section dealing with proof of the mistake of law defense. The defense is denominated an "affirmative defense" in section 610 of the Study Draft, which term is defined in section 103(3).

Extended Note A

CAUSATION*

1. *General.*—The principles governing attribution of consequences to a person's conduct for purposes of criminal liability are not ordinarily stated collectively as a coherent body of doctrine. Still less often have such principles been codified. There is no provision comparable to the draft provision in the United States Code.

If anything but for which an event would not have occurred is a cause of the event, there are any number of "causes" of every event. The presence of oxygen in the air and the physical properties of paper are as much causes, in that sense, of the burning of a piece of paper as is touching a lit match to the paper. When we select a cause as *the cause*, the selection is based on some principle that reflects our interests.[1] By making the selection, we focus our attention on some aspect of the situation, usually one which we think is under our control, so that we can assure or prevent a repetition of the occurrence. If someone drops a cup and it breaks, we are more likely to say "You should be more careful," than to say "I wish the floor were not so hard"; but if an infant drops the cup, we are likely to say "We'll have to get him a plastic cup," instead of "He really must not drop things." As a crude and preliminary approximation of ordinary speech and understanding it is fair to say that we distinguish the cause of an event from the (necessary) conditions of an event according to our interests, which usually but not always means that we single out as the "cause" some element of the situation which we can control and describe as "conditions" other necessary elements. Some necessary conditions are taken so much for granted—for example, the presence of oxygen in the air, the physical properties of paper—that unless some curious feature of the situation focuses our attention on them, we do not mention them even as conditions. Without some frame of reference, the question, "What is (are) the cause(s) of X?" is as meaningless as the question, "What are all the conditions but for which X would not have occurred?" Ordinarily the frame of reference is clear and is supplied by commonsense out of common experience.[2]

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*No section on causation was proposed in the tentative draft in light of the considerations set forth in this Note. Section 305 on causation has been included in the Study Draft, in order to elicit comment. A causation section may resolve some issues so that, should they arise, their determination by the jury might be facilitated. The attention of the jury is directed away from metaphysical concepts of "causation" toward the real issue—the culpability of the defendant. Thus, in a case where the issue is whether the defendant's conduct risked death or simple bodily injury (the distinction in culpability between murder and assault), the jury will be asked to answer that question, not whether the defendant "caused" the death.

[1] *See* Kirchheimer, *Criminal Omissions*, 55 Harv. L. Rev. 615, 619 (1942).

[2] *See generally, e.g.*, Beale, *The Proximate Consequences of an Act*, 33 Harv. L. Rev. 633 (1920).

The inadequacy of principles of causation in the criminal law reflects uncertainty about the basis of criminal liability in situations where results are important to liability. We are not certain whether the assailant who gives the hemophiliac a light blow that causes a bruise from which the hemophiliac dies should be punished for assault or homicide;[3] or whether all the senators should be punished as Caesar's murderers even though any dozen could have stayed away from the Forum on the fateful day without changing the result.

There is little uncertainty in cases of purposeful conduct. If the assailant intended to kill the hemophiliac, say by shooting him through the heart, we are not likely to excuse him if his aim was bad and the bullet only bruised the hemophiliac, death resulting later on from the bruise. Nor will a senator be excused because his task—to murder Caesar—is eased by the help of others. (There are limits. If the assailant's gun failed to fire and the hemophiliac were run down by a stranger later in the day, the assailant would not be a murderer simply because he was pleased to hear the news.)

When conduct is not intended to produce the result which it does produce, our uncertainty is manifest. Draft section 301 states as an axiom of criminal law that criminal liability is based on a person's conduct. To base liability, or the degree of liability, not alone on conduct but in part on the consequences of conduct, which may be fortuitous from the actor's point of view, is a departure from the axiom.[4]

> *A* drives recklessly along Highway 1. He has no accident and arrives home safely.
>
> *B* drives recklessly along Highway 1. He hits *Y* who is walking along the road and *Y* is killed.

On the basis of conduct alone, *A* and *B* should be punished alike. The criminal law has generally punished *B*, who may be guilty of involuntary manslaughter, more severely than *A*, who is guilty only of reckless driving. It is our uncertainty about the validity of the reasons we give for punishing *B* more severely that creates the problem of causation in criminal law.[5]

2. *Federal Law.*—There are a number of provisions in the United States Code which base criminal liability partially on the results of conduct; for example, destruction of an aircraft or motor vehicle resulting in death (18 U.S.C. § 34); transportation of explosives resulting in death or injury (18 U.S.C. § 832); involuntary manslaughter (18 U.S.C. § 1112); causing death on a vessel by misconduct, negligence, inattention to duty, and so forth (18 U.S.C. § 1115); and mailing of injurious articles resulting in death (18 U.S.C. § 1716).[6]

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[3] The example is drawn from the facts of *State* v. *Frazier*, 339 Mo. 966, 98 S.W. 2d 707 (1936), in which the assailant was found guilty of manslaughter.

[4] If, as is often the case, the consequences of conduct define the conduct, the problem is suppressed, if not eliminated.

[5] For an extended discussion, *see* HART AND HONORÉ, CAUSATION IN THE LAW, 292–363 (1959).

[6] These crimes should be distinguished from crimes the definition of which includes intentionally or knowingly "causing" some occurrence; *e.g.*, 18 U.S.C. § 1341: "Whoever . . . knowingly causes to be delivered by mail . . . any [fraudulent matter]. . . ." Even though completion of the crime may depend on accomplishment of the result, liability for such crimes (or the degree of liability) is not based on the occurrence of an unintended, unanticipated result.

As already noted, there is no statutory explanation of causation for purposes of criminal liability; nor does Federal case law offer any substantial guidance.[7]

Although the statement that someone's act has caused an occurrence is cast in objective, nonevaluative terms, it reflects a highly complex, albeit usually inexplicit, understanding of how events occur and what about them ought to (and does) interest us practically and ethically. The tentative conclusion, reflected in the absence of a provision defining causation in this draft, is that no elaboration of the concept of causation in a Federal Criminal Code is likely to meaningfully increase that understanding or to make its application to specific cases easier. An indication of the inutility of elaborations of the concept of causation for criminal law is the lack of a common explanatory formula developed by the courts and the absence generally of explanations of causal relation in instructions to the jury in criminal cases of this kind.[8] There is solid basis in experience for the conclusion that causation as an element of some crimes must, and in any event should, remain unelaborated. Not all the concepts employed by the criminal law need be explained. The complexity of the causal relationship does undoubtedly mean that occasionally our solutions to problems of causation will singly or collectively be unsatisfying. That does not mean necessarily, however, that we can reduce the complexity to more readily understood rules. No issue of notice is involved here. An explanation of causation which is likely not to be helpful to a jury and is as likely as not to be confusing should not be included.

3. *Possible Formulations.*—The only statutory attempt in this country to develop a general explanatory formula of causal relation in criminal cases is that of the Model Penal Code (§ 2.03). As the commentary to the Model Penal Code observes, its formula does not systematize the "variant and sometimes inconsistent rules" that have developed, but "undertakes a fresh approach."[9] The inadequacy of the Code's formulation illustrates the difficulties involved.

The basic provision of the Model Penal Code adopts "but for" causation as the general test; it is both necessary and, unless "additional causal requirements" are specifically imposed, sufficient. This provision does not clearly state the accepted rule or easily lead to the correct result in cases of "concurrent causation."

Even though all of the senators may have intended to kill Caesar and all of them stabbed him, under the Model Penal Code's formulation none would be criminally liable for his death since (so I shall assume) he would have died even though any one of them had held back his knife. Even a senator who stabbed Caesar through the heart

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See Reviser's Note, 18 U.S.C.A. § 2(b); *Pereira* v. *United States*, 347 U.S. 1, 9 (1954); *United States* v. *Giles*, 300 U.S. 41 (1937); *King* v. *United States*, 364 F.2d 235 (5th Cir. 1966); *United States* v. *Inciso*, 292 F.2d 374, 378 (7th Cir.), *cert. denied*, 368 U.S. 920 (1961). *But see Mueller* v. *United States*, 262 F.2d 443, 446 (5th Cir. 1958).

[7] Federal cases discussing "causation" are of the kind described in note 6 above, in which there is an intention (or a substitute for intention) to cause the result. For the reasons discussed above, these cases are not helpful in determining how to treat conduct that has unintended consequences.

[8] *See, e.g.*, MANUAL ON JURY INSTRUCTIONS IN FEDERAL CRIMINAL CASES, 33 F.R.D. 523 (1963), which contains no general instruction on causation.

[9] MODEL PENAL CODE § 2.03, Comment at 132 (Tent. Draft No. 4, 1955).

would not be liable, since, so Anthony tells us (act 3, scene 2) "sweet Caesar's blood" was streaming from all the wounds.

The Model Penal Code's reliance on "but for" causation as ordinarily enough for liability ignores the cases in which it is not essential to liability. There are situations in which, for purposes of the criminal law, we are properly "interested" in more than one cause of an occurrence, even though none of them alone is necessary or more than one of them are alone sufficient. The paradigm is a situation in which each of two or more persons engages in conduct that fully satisfies the definition of a crime but in which there is only "one" harmful consequence.

> *A* and *B* simultaneously shoot at *X*, both intending to kill him. The bullets enter *X's* body at the same time. Each wound is sufficient to cause death and would alone cause death in the same amount of time. *X* dies from the joint effect of both wounds.

We are just as properly interested if neither of the wounds alone would cause death but the facts are otherwise the same. (Such a set of facts is, of course, hardly likely to occur. It is not so unlikely that, for lack of evidence, a situation should be treated as if it occurred as described.)

This point was discussed during the American Law Institute's discussion of the Model Penal Code.[10] It was concluded that the matter would be clarified in the commentary to the section. In the discussion, Professor Wechsler indicated that he believed the Model Penal Code's statement was acceptable, evidently on the basis that the specific result caused by concurrent causes would not have occurred but for the operation of each.[11] While this is a permissible construction of the language, it is a strain on ordinary usage, which does not attend so carefully to details of this kind in the face of the major fact of a death.

Additional sections of the Model Penal Code's formulation deal with cases in which the actual result is not intended or is not within the risk created by the actor's conduct, by providing that there is no causal relation in such cases unless either the actual and the intended or probable results differ only in respects generally irrelevant to the criminal law (the specific person or property injured: the greater seriousness of the intended or probable harm) or the actual result is similar to ("involves the same kind of injury or harm as") the intended or probable result, and "is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense."[12] This formulation breaks down in precisely those cases in which difficulties arise, those covered by the last clause. Of the alternative formulations, that which omits the word "just" states the problem without resolving it (by use of the question-begging word "too"); that which includes the word "just" (in addition to using the word "too") refers to an inapt standard for resolving it—that the connection between a result and conduct but for which the result would not have occurred is remote or accidental does not, unless the words "remote" and "accidental" are given special (question-

[10] A.L.I. Proceedings, 77–78, 134–141 (1962).
[11] *Cf.* Perkins, Criminal Law 599–600 (1957).
[12] Model Penal Code § 2.03(2), (3) (P.O.D. 1962).

begging) meaning, affect the justice of holding the actor liable for his conduct.[13]

Illustrative of an alternative to the Model Penal Code's reliance on "but for" causation as the basic test, is the following, drafted for consideration in the Federal Code:

> A causal connection between a person's conduct and an occurrence does not exist if:
>
> (a) the person's conduct was not sufficient to cause the occurrence without the cooperation of one or more events or the conduct of one or more persons; and
>
> (b) without the cooperation of the person's conduct, another event or the conduct of another person was sufficient to cause the occurrence.

Such a provision, which does not attempt to state what causation is but only what, in some circumstances, it is not, leads to the correct result in many cases of concurrent causation by providing that a person's conduct is not the cause of a result if someone else's conduct or some other event is both necessary and sufficient to produce the result. Where conduct is not sufficient to cause an occurrence and there is present and identifiable other conduct or some event which is sufficient to cause the occurrence, common understanding would probably regard the latter as the cause. However, the provision, at best, offers no guidance in the case of sequential, as opposed to concurrent causes. (If A shoots X, as a result of which X goes to the hospital, and while he is there (i) the hospital burns down, or (ii) the wound becomes infected, or (iii) a doctor stabs X inadvertently, or (iv) a doctor stabs X deliberately, and X dies, in which of the four cases should A be liable for X's death?) Even though the provision attempts to say only when causation is not present, it is readily perceived as indicating when causation is present. If we understand the provision to refer only to concurrent and not sequential causes, it is only because, without relying on the provision, we have a sense of when an act or event causes an occurrence. (If the provision is not so understood, A would, or at least might, be liable for X's death in all of the cases described, which would surely be the wrong result at least in case (iv) and possibly in others as well.)

The provision gives limited guidance, and even that only because of our independent understanding of the very concept of causation which the provision attempts partially to illuminate.

A final possibility is not to provide what shall or shall not count as a causal relation, but to list factors which shall be relevant to a determination that conduct did or did not cause a result. One might, for example, specify as such factors the extent to which the conduct manifests the danger which is realized in the result or the extent to which the actor's conduct singles him out as the person responsible for the result. All such "factors," however, are either make-weights which collapse on analysis or depend finally on the concept of causation which they are intended to clarify.

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[13] *See* A.L.I. PROCEEDINGS, 72–77 (1962).

The drafters of the basic provisions on liability have been unable to develop an explanatory formula of causation which is both accurate and meaningful. All such formulae, whether cast in terms of what is necessary or sufficient to establish a causal relationship or, more tentatively, in terms of what is relevant to the existence of a causal relationship, founder in precisely those cases where the existence of the relationship is in doubt. To omit a section defining causation generally will simply acknowledge the absence of any such general provision in Federal criminal law.[14]

[14] No position is taken here on the question whether particular crimes, or any crimes, should be defined partially in terms of results. To eliminate such crimes, including most obviously the crime of involuntary manslaughter, would be a marked departure from Federal law and the common law generally.

Extended Note B

"willfulness"

In a small group of cases, the Federal courts have construed the element of willfulness in a statutory crime to require an intention to do a specific wrong. *Screws* v. *United States*, 325 U.S. 91 (1945), involved a prosecution under what is now 18 U.S.C. § 242 for "willfully" depriving a person of his constitutional right not to be deprived of life without due process of law; the defendants were charged with having beaten to death a Negro arrested on a charge of theft. In order to meet the constitutional challenge to the prosecution on grounds of vagueness, the requirements of due process of law being uncertain and changing, the Court construed " 'willfully' . . . as connoting a purpose to deprive a person of a specific constitutional right." 325 U.S. at 101. "[T]he specific intent required by the Act is an intent to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." *Id.* at 104. It is necessary only that there be intent to deny the right; there need not be intent to deny a constitutional right. *See id.* at 106. This construction of section 242 was applied in *Williams* v. *United States*, 341 U.S. 97 (1951); *United States* v. *Ramey*, 336 F.2d 512 (4th Cir. 1964), *cert. denied*, 379 U.S. 972 (1965); *Pullen* v. *United States*, 164 F.2d 756 (5th Cir. 1947); *Crews* v. *United States*, 160 F.2d 746 (5th Cir. 1947).

Construing section 3 of the Act of June 15, 1917, *as amended*, 18 U.S.C. § 2388, which makes it a felony "willfully [to] cause" insubordination or disloyalty in the military forces or "willfully [to] obstruct military recruitment," the Supreme Court held that use of the word "willfully" required proof "of a specific intent or evil purpose . . . to cause insubordination or disloyalty in the armed forces or to obstruct the recruiting and enlistment service." *Hartzel* v. *United States*, 322 U.S. 680, 686 (1944). "That word, when viewed in the context of a highly penal statute restricting freedom of expression, must be taken to mean deliberately and with a specific purpose to do the acts proscribed by Congress." Similarly, the Court held that a specific intent to overthrow the government by force and violence was an element of the crime defined in section 2(a)(1) of the Smith Act (54 Stat. 671, now 18 U.S.C. § 2385), "to knowingly or willfully advocate" overthrowing the government by force or violence. *Dennis* v. *United States*, 341 U.S. 494 (1951).[1] The "structure and purpose" of the statute required this, the Court said, despite the inclusion of a requirement of specific intent in section 2(a)(2) of the Act and its omission in the section construed. *Id.* at 499. *Cf. Cramer* v. *United States*, 325 U.S. 1

[1] Only four of the eight judges who heard the case joined in the opinion. The other four, two concurring and two dissenting, did not question this portion of the opinion.

(1945) (treason); *Haupt* v. *United States*, 330 U.S. 631 (1947) (same); *Pettibone* v. *United States*, 148 U.S. 197 (1893) (obstruction of justice).

The Federal courts have frequently held that "willfulness" includes some element of "bad purpose." *United States* v. *Murdock*, 290 U.S. 389, 394 (1933). "Doing or omitting to do a thing knowingly and willfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it." *Felton* v. *United States*, 96 U.S. 699, 702 (1877) (use of improper distilling apparatus). Thus, in *Potter* v. *United States*, 155 U.S. 438 (1894), the defendant was prosecuted for willfully violating Revised Statutes § 5208 (now 18 U.S.C. § 1004), which made it unlawful for a bank officer to certify a check for which there were inadequate funds on deposit. The Court said that the word "willfully" "implies on the part of the officer knowledge and a purpose to do wrong," and that the officer's belief in good faith that he was not violating the statute was a defense. 155 U.S. at 446. *Accord*, *Spurr* v. *United States*, 174 U.S. 728 (1899). To the same effect is *Giragosian* v. *United States*, 349 F.2d 166 (1st Cir. 1965), involving a prosecution for willful misapplication of funds by a bank manager, 18 U.S.C. § 656. The court of appeals said: "As a minimum, in order to be guilty of this crime, . . . [the manager] must have acted with such a reckless disregard of the bank's interests as to justify a finding of an intent to injure or defraud it." 349 F.2d at 168. *Accord*, *e.g.*, *Benchwick* v. *United States*, 297 F.2d 330 (9th Cir. 1961); *Seals* v. *United States*, 221 F.2d 243 (8th Cir. 1955); *United States* v. *Wicoff*, 187 F.2d 886 (7th Cir. 1951). *See generally United States* v. *Illinois Central R.R.*, 303 U.S. 239 (1938); *Colella* v. *United States*, 360 F.2d 792, 798 (1st Cir. 1966), *cert. denied*, 385 U.S. 829 (1967); *Roe* v. *United States*, 287 F.2d 435 (5th Cir. 1961); *McBride* v. *United States*, 225 F.2d 249 (5th Cir. 1955), *cert. denied*, 350 U.S. 934 (1956).

"Willfulness" need not connote "bad purpose" when it is used in statutes "denouncing acts not in themselves wrong." *United States* v. *Illinois Central R.R.*, 303 U.S. 239, 242 (1938). Thus, in *Browder* v. *United States*, 312 U.S. 335 (1941), the Court held that any intentional use of a passport dishonestly obtained violated what is now 18 U.S.C. § 1543, making it a crime "willfully and knowingly [to] use" such a passport. "None of . . . [the statute's] words suggest that fraudulent use is an element of the crime. The statute is aimed at the protection of the integrity of United States passports." 312 U.S. at 341. Willfulness was held not to require a bad purpose in *United States* v. *Keegan*, 331 F.2d 257 (7th Cir.), *cert. denied*, 379 U.S. 828 (1964) (union official receiving money from employer, 29 U.S.C. § 186(b), (d)); but knowledge of law required, *semble*, *see United States* v. *Gibas*, 300 F.2d 836 (7th Cir.), *cert. denied*, 371 U.S. 817 (1962); *United States* v. *Carter*, 311 F.2d 934 (6th Cir.), *cert. denied*, 373 U.S. 915 (1963) (employer paying and union official receiving money, 29 U.S.C. § 186(a), (b), (d)); *Finn* v. *United States*, 256 F.2d 304 (4th Cir. 1958) (using profane language at airport, contrary to regulations, 14 C.F.R. § 570.71; D.C. Code § 7–1305); *Chow Bing Kew* v. *United States*, 248 F.2d 466 (9th Cir. 1957) (false representation of citizenship, 18 U.S.C. § 911); *Corcoran* v. *United States*, 229 F.2d 295 (5th

Cir. 1956) (false application for home loan to Veterans' Administration, 18 U.S.C. § 1001); *Zebouni* v. *United States*, 226 F.2d 826 (5th Cir. 1955) (false statement in naturalization proceeding, 18 U.S.C. § 1015(a)); *McBride* v. *United States*, 225 F.2d 249 (5th Cir. 1955), *cert. denied*, 350 U.S. 934 (1956) (keeping false records of dispensation of narcotics, 18 U.S.C. § 1001); *cf. United States* v. *Quinn*, 141 F. Supp. 622 (S.D.N.Y. 1956) (Member of Congress receiving compensation for services, 18 U.S.C. § 281).

In many cases involving violations of regulatory schemes, willfulness has been held not to require a bad purpose: regulations of the Interstate Commerce Commission,[2] *Steere Tank Lines, Inc.* v. *United States*, 330 F.2d 719 (5th Cir. 1963); *Riss & Co., Inc.* v. *United States*, 262 F.2d 245 (8th Cir. 1958); *United States* v. *Joralemon Bros. Inc.*, 174 F. Supp. 262 (E.D. N.Y. 1959); *see United States* v. *Wormsbacher*, 240 F. Supp. 716 (E.D. Wis. 1965); violations of the securities acts, *Tager* v. *SEC*, 344 F.2d 5 (2d Cir. 1965); violations of price and rationing regulations, *United States* v. *Perplies*, 165 F.2d 874 (7th Cir. 1948); *Kempe* v. *United States*, 151 F.2d 680 (8th Cir. 1945).

Tax statutes imposing liability for "willful" failure to pay taxes or to perform related duties have been construed according to the courts' estimates of congressional intent. In *Spies* v. *United States*, 317 U.S. 492 (1943), the Supreme Court said:

> The difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. Both must be willful, and willful, as we have said, is a word of many meanings, its construction often being influenced by its context. . . . It may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness. But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax where there had been no willful failure to disclose the liability is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer. (317 U.S. at 497–498.)

See Sansone v. *United States*, 380 U.S. 343, 351–352 (1965); *United States* v. *Ragen*, 314 U.S. 513, 524 (1942). The subject of willfulness in cases of this kind is discussed in *United States* v. *Vitiello*, 363 F.2d 240 (3d Cir. 1966). *See also Edwards* v. *United States*, 375 F.2d 862 (9th Cir. 1967); *United States* v. *Peterson*, 338 F.2d 595 (7th Cir.

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[2] *But see Dearing* v. *United States*, 167 F.2d 310 (10th Cir. 1948); *cf. United States* v. *Chicago Express, Inc.*, 235 F.2d 785 (7th Cir. 1956).

1964), *cert. denied*, 380 U.S. 911 (1965); *Tomlinson* v. *Lefkowitz*, 334 F.2d 262 (5th Cir. 1964), *cert. denied*, 379 U. S. 962 (1965); *United States* v. *Thompson*, 230 F. Supp. 530 (D. Conn.), *aff'd*, 338 F.2d 997 (2d Cir. 1964). It has generally been held that a willful failure to collect and pay over withholding taxes subject to a penalty assessment under 26 U.S.C. § 6672, does not require a bad purpose but only "a voluntary, conscious and intentional decision not to have the corporation pay over the taxes to the government," *Hewitt* v. *United States*, 377 F.2d 921, 924 (5th Cir. 1967). *Accord*, *e.g.*, *White* v. *United States*, 372 F.2d 513 (Ct. Cl. 1967).

COMMENT
on
ACCOMPLICES AND CRIMINAL FACILITATION: SECTIONS 401 AND 1002
(Green, Pochoda; January 17, 1969)

1. *Introduction; Improvements on Existing Law.*—The objective of sections 401 and 1002 is to declare that criminal liability may depend in whole or in part upon the behavior of another, and to set out those situations in which this result occurs. The principles embodied in the draft are for the most part derived from the language or intended scope of the existing complicity provisions (18 U.S.C. § 2); but some of the provisions are designed to deal with case law, either to codify and clarify it or to alter it.

The reforms which these provisions would accomplish are as follows:

(a) to change the language and structure of the general complicity statute (18 U.S.C. § 2) in order to avoid some of the interpretation problems inherent in it as it now reads;

(b) to clarify certain areas of the law of complicity, such as the mental state involved, and of exemption because of a protected status intended by Congress;

(c) to alter the doctrine that a conspirator is per se an accomplice in any crime committed by any coconspirator in furtherance of the conspiracy;

(d) to provide for the first time a general statute covering facilitation, and in so doing to clarify a chaotic area of Federal case law;

(e) to accommodate in the facilitation statute the competing interests of the legitimate businessman and crime prevention;

(f) to recognize the different position of—and to afford different treatment for—the facilitator, as distinguished from the accomplice who purposefully acts to bring about the criminal end.

Other drafts will cover matters presently comprehended under the definition of accessories-after-the-fact (18 U.S.C. § 3) and problems involved in the criminal liability of corporations, unincorporated associations, and other artificial persons.

There are presently provisions in the United States Code explicitly declaring it an offense to aid particular activities, for example: permitting the use of any die, hub or mold in aid of the counterfeiting of any coins of the United States (18 U.S.C. § 487); knowingly aiding or abetting any person engaged in any violation of any of the provisions of the law dealing with obscene or treasonous books and articles (18 U.S.C. § 552); and aiding or assisting the escape of any person arrested under any law of the United States (18 U.S.C. § 752). There is also legislation making criminal specific conduct proscribed for the reason that it furthers or facilitates commission of a crime, such as

leasing or renting any vehicle, conveyance, place, structure or building knowing or with good reason to know that it is intended to be used for prostitution (18 U.S.C. § 1384), knowingly permitting the use of a vessel for gambling (18 U.S.C. § 1082), and receiving, concealing, storing, bartering, selling or disposing of any motor vehicle or aircraft knowing the same to have been stolen (18 U.S.C. § 2313). Not all such special provisions, even though duplicative, should be eliminated, particularly when they give specific content to the meaning of "aid" in the context of the specific offense. But whether there should be any such special provision is a question to be resolved in the drafting of the specific offense.

2. *Basic Principles of Complicity: Causing and Aiding.*—Section 2 of Title 18, the existing Federal statute of general application prescribing criminal liability for the conduct of another, reads as follows:

> 2. Principals.
>
> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

The principles here expressed—abolition of the distinction between principals and accessories-before-the-fact, and provision for liability for conduct of an innocent agent—are universally recognized bases for criminal liability,[1] and are carried forward in subparagraphs (a) and (b) of subsection (1) of the proposed draft on accomplices.

Although the present formulation in Title 18 was initially viewed with the hope that it could be recommended for retention in the new Code as is, careful scrutiny has indicated that some changes for purposes of clarity and logic are necessary. Subsection (b) of section 2 of Title 18, for example, does not deal as clearly as it might with issues as to scope of its application, requirements of culpability, and similar matters, and has been justifiably criticized.[2] The language proposed in the draft is substantially that used in most of the recent State revi-

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[1] MODEL PENAL CODE § 204.1, Comment at 14 (Tent. Draft No. 1, 1953).

[2] Subsection (b) was added to the complicity section by the 1948 revisers. Upon the basis of criticism by Judge Learned Hand in *United States* v. *Chiarella*, 184 F. 2d 903, 909–910 (2d Cir. 1950), *modified*, 187 F. 2d 12 (2d Cir.), *vacated and remanded for resentencing*, 341 U.S. 946 (1951), the words "willfully" and "or another" were inserted. Even as amended it was criticized in the Model Penal Code commentary as follows:

> It is not limited to acts of an innocent or irresponsible person, though this is the situation with which the Reviser's Note suggests it is designed to deal. Even if limited to that case by construction, it does not make clear whether or when the state of mind of the main actor is to be imputed to the defendant, even though he did not share it; whether the conduct would be criminal had he performed it may depend on that. Even more obscure is the test whether the act would be criminal if performed by 'another,' which the statute makes sufficient to establish liability. Finally, the requirement that the act be caused 'willfully' may suggest that it must be caused purposely, though there are cases in which it would seem that less than this should be enough. (MODEL PENAL CODE § 204.1, Comment at 17 (Tent. Draft No. 1, 1953)).

sions and the Model Penal Code.[3] In subsection (a) of Title 18, section 2, the words "abets" (to the extent that it implies less than "facilitates," a distinct issue) and "counsels" do not seem to add anything to the word "aids," which embraces every kind of activity, and have been deleted. To the extent that "counsels" implies liability beyond that which would constitute aid with intent that the offense be committed, it is intended that such liability should be considered in connection with—and explicitly included in, if desirable—the definition of the specific offense.[4]

One change of some substance has resulted from the draft's attempt to deal explicitly with the problem of the liability of the facilitator. Section 2 of Title 18 offers no guidance to the courts as to when the facilitator should be liable as an accomplice, a deficiency which has resulted in the matter being dealt with by conflicting case law. (*See* the discussion in paragraph 6, *infra*.) In order to implement the draft's approach to this issue, subparagraph (b) of subsection (1) makes it clear that the accomplice must intend that the offense be committed. The separate—and lesser—offense of criminal facilitation deals with the person who merely knows that what he does substantially facilitates its commission. This approach is also a reason for deleting "abets" from the accomplice formulation.

The draft also makes explicit that one is liable as an accomplice if he has a legal duty to prevent the commission of an offense, has the intent that it be committed, and fails to make proper effort to prevent its commission. Such an omission to act under those circumstances might easily be construed as aiding, but is stated here both to insure that the omission will be a basis for liability and also, by implication, to indicate that failures to call the police, for example, where there is no legal duty to prevent the crime should normally not be regarded as complicity, even when a desire that the offense be committed can be shown. Most modern revisions contain such a provision.[5]

3. *Liability of Coconspirator.*—In subparagraph (c) of subsection (1) the draft proposes explicit rejection of the controversial doctrine laid down in *Pinkerton* v. *United States*, 328 U.S. 640 (1946). There the Court upheld a charge to the jury that if it found the defendant had been engaged in a conspiracy with his brother to evade taxes, it could convict him of complicity in his brother's specific attempts to evade taxes if they were found to be in furtherance of the conspiracy. The Court admitted, however, that it might have reached a different result if the specific offenses charged had not been reasonably foreseeable as a natural consequence of the unlawful agreement. The effect of the *Pinkerton* doctrine is that mere membership in a conspiracy is sufficient not only for criminal liability as a conspirator but also for all specific offenses committed in furtherance of it, although, if the dictum is added, the offenses must be a reasonably foreseeable consequence

[3] PROPOSED DEL. CRIM. CODE § 130 (Final Draft 1967); ILL. REV. STAT. c. 38 § 5–2 (1961); MICH. REV. CRIM. CODE § 410 (Final Draft 1967); PROPOSED CRIM. CODE FOR PA. § 206 (1967); CAL. PEN. CODE Rev. PROJECT §§ 450, 451 (Tent. Draft No. 1, 1967); MODEL PENAL CODE § 2.06 (P.O.D. 1962).

[4] *See, e.g.*, 18 U.S.C. § 2387(a)(1) ("advises, counsels, urges, or in any manner causes or attempts to cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States"); 50 U.S.C. APP. § 462 ("knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces").

[5] *See* the statutes cited in note 3, *supra*.

(so that, for example, murder in furtherance of the conspiracy to evade taxes would not usually qualify).

To deal appropriately with this doctrine it appears necessary as a minimum to say something explicitly about it in the provisions describing accomplice liability. While the doctrine deals with the consequences of being a coconspirator and may thus warrant a reference in the criminal conspiracy statute (*see* proposed section 1004), it could only have been enunciated through reliance upon 18 U.S.C. § 2 (although not stated in the opinion), because that is the only Federal statute defining the bases for complicity in specific offenses, and the present conspiracy provisions (18 U.S.C. § 371) do not at all imply such consequences. If the doctrine were to be carried forward into the new Code, an explicit statement of it would be desirable to avoid distortion of the word "aids." If it is to be rejected as here recommended, the proposed handling seems necessary, even though tautological, in order to avoid the *Pinkerton* reading. Aiding should mean something more than the attenuated connection resulting solely from membership in a conspiracy and the objective standard of what is reasonably foreseeable.

The analytical problems which have arisen from the effort to fit the *Pinkerton* doctrine into existing statutory formulations have little significance for us in drafting new laws.[6] The pertinent question therefore is one of policy: should the *Pinkerton* grounds be a basis for vicarious liability? The draft takes the position that such an extension is unwarranted. The persons in a conspiracy who ought to be liable will become so under complicity principles or under the proposed organized crime offense. Those who are "higher ups" in any organization for commission of crime will, if the group is small, be close enough to have commanded, induced, procured or aided its commission.[7] If the organization is so large that such facts are difficult to establish, the "higher ups" will be subject to aggravated penalties under the proposed organized crime offense.

Extension of liability through the *Pinkerton* doctrine sweeps in all persons in the conspiracy, regardless of their roles. Thus, if *A* distributes narcotics to *B*–1, *B*–2, and *B*–3, who are aided by runners *C*–1, *C*–2, and *C*–3, respectively, under prevailing notions as to the scope of conspiracy to distribute narcotics, they would all be in one conspiracy.[8] *A* would be liable for assisting *B*–1, *B*–2, and *B*–3 in their sales to users, as would *C*–1, *C*–2, and *C*–3 be liable for sales by the *B* whom each aided. It would be unjust, however, to hold *B*–1 and *C*–1 liable for all the sales made by anyone who was supplied by *A*, even though it was reasonable to foresee that others would be so supplied.

If an organized crime offense, or something similar, and the felony-murder doctrine are available, there seems little, if anything, to gain from the *Pinkerton* doctrine. If the coconspirator is an accomplice in a serious offense, his "legal" liability for another serious offense would

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[6] For a full discussion of the *Pinkerton* problem, *see Developments in the Law: Criminal Conspiracy*, 72 HARV. L. REV. 920, 993–1000 (1959) [hereinafter cited as *Criminal Conspiracy*], a major source work for these comments.

[7] *See, e.g., United States* v. *McGuire*, 249 F. Supp. 43 (1965), *aff'd*, 381 F. 2d 306 (2d Cir. 1967), *cert. denied*, 389 U.S. 1053 (1968), where liability was based both on the *Pinkerton* rationale and directly under section 2 of Title 18.

[8] *See, e.g., United States* v. *Bruno*, 105 F. 2d 921 (2d Cir.), *rev'd on other grounds*, 308 U.S. 287 (1939) (one conspiracy of 88 defendants, involving smugglers, wholesalers and two groups of retailers, one in the Texas-Louisiana area and one in New York).

not warrant a consecutive sentence, even if permissible under the proposed Code. If he is not an accomplice—or is an accomplice in a minor offense only, while other coconspirators may have committed serious ones—he may be given a severe sentence as a conspirator on principles of conspiracy liability alone. At the same time the *Pinkerton* doctrine could be the source of otherwise avoidable problems: (a) is the coconspirator liable for crimes committed before he joined the conspiracy, as he is for overt acts (a principle which serves another purpose)? (b) do different rules of evidence apply to his liability for conspiracy and his liability for the specific offense? (c) can he be acquitted for conspiracy and re-tried for the specific offense? (d) should the test of withdrawal from the conspiracy be the same as for terminating liability for the specific offense?

The policy argument favoring *Pinkerton* liability has been stated as being that the criminal acts are "sufficiently dependent upon the encouragement and material support of the group as a whole to warrant treating each member as a causal agent.[9]" While there is plausibility to this view, the argument seems to go no further than to support the provision which makes mere membership in a conspiracy a crime even though there is no complicity relationship to the crimes which may be committed.

4. *Legislative Exemption.*—There will be some Federal crimes where it is desirable that a person who would otherwise be an accomplice because of his aid and culpability should not be liable for the particular offense. This is best accomplished by explicit exemptions, examples of which may be found in the organized crime and promoting prostitution drafts proposed for the new Code, where a more severe penalty is to be available to leaders in the criminal enterprise but not to everyone who aids them. Clearly the accomplice provision should not conflict with such explicit exemptions, and the draft so provides in the last sentence of subsection (1).

That sentence, however, goes beyond explicit exemptions and directs the court to consider whether such an exemption was implied, a formulation derived from section 454(2) of the California Penal Code Revision Project (Tent. Draft No. 1, 1967). While it might be reasonable to expect that the Commission's proposed Code will make all the desirable exemptions explicit, it may be too great a burden for all the regulatory provisions outside the Code to carry. Moreover, it would be too cumbersome to set forth even in the proposed Code itself the intended exemption in all instances where it is clear that there should be one. For example, where the act of prostitution is made a Class B misdemeanor, and patronizing a prostitute an infraction, it should not be necessary to make explicit exemption of such conduct from the more serious offenses of promoting and aiding prostitution.[10]

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[9] *Criminal Conspiracy, supra*, note 6, at 998–999.

[10] *See* the proposed draft provisions on prostitution and related offenses (sections 1841–1849). In *United States* v. *Williamson*, 235 F. Supp. 836 (S.D. Tex. 1964), the defendant shipper was charged with aiding an interstate carrier which had violated the prohibitions against operating without a permit issued by the ICC. This prohibition appears in section 303(c) of Title 49, a section that condemns only the conduct of a carrier. However, section 322(c) of that Title explicitly spells out the conduct that constitutes a violation by a shipper who knowingly patronizes an uncertified carrier. Therefore, the court concluded:

> Read together, as they must be as a part of the same chapter of this regulatory act, these sections indicate a congressional intent only to con-

Some other revisions have used more objective criteria than the proposed draft for use by the courts in determining the intent of the legislature. They provide that a person is not an accomplice if (a) he is a victim of the offense or (b) the offense is so defined that his conduct is inevitably incident to its commission.[11] The first is intended to apply to those whom the prohibition is designed to protect but who, under circumstances which may not amount to the defense of duress, willingly yield to the crime in order to protect themselves—the businessman who yields to extortion, for example. The second is intended to deal with persons such as the purchaser in an unlawful sale and the woman upon whom an abortion is performed.[12]

Although it is questionable whether these criteria are more useful in the hard case, in the draft proposed here[13] they are rejected primarily because they may impose too great a limitation on all Federal regulatory legislation, which is frequently enacted without careful regard for principles of criminal liability.[14] Under applicable Federal case law it may be expected that those criteria will be taken into account.[15]

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demn the act of a shipper where the elements set out in § 322(c) are present. Unable to charge the shipper under § 322(c) because of the absence of either rebate or fraud, the Government seeks to circumvent this requirement by charging him as an aider or abettor of the carrier under § 2 of Title 18. If it were the congressional intent to punish the shipper for participation in the same conduct as the carrier, it seems that such provision would have been found in § 303(c). (235 F. Supp. at 837).

[11] MODEL PENAL CODE § 2.06(6) (P.O.D. 1962); PROPOSED DEL. CRIM. CODE § 132 (Final Draft 1967); ILL. REV. STAT. c. 38 § 5-2(c) (1961); MICH. REV. CRIM. CODE § 420 (Final Draft 1967); PROPOSED CRIM. CODE FOR PA. § 206(f) (1967). New York uses the second criterion, N.Y. REV. PEN. LAW § 20.10 (McKinney 1967); and the California revisers use the first, CAL. PENAL CODE REVISION PROJECT § 454 (Tent. Draft No. 1, 1967).

[12] *See* MODEL PENAL CODE § 2.04(5), Comment at 35 (Tent. Draft No. 1, 1953).

[13] Discussion of the "victim" criterion by the Commission and Advisory Committee (appearing by reference in the criminal solicitation draft) indicated doubts as to the desirability of such blanket exemptions and preference for explicit statements in the offense. *See also United States* v. *Holte*, 236 U.S. 140 (1915), where the Supreme Court refused to sustain a demurrer by a transported prostitute to a charge of conspiracy to violate the Mann Act because of the possible circumstances under which she could be held liable for the unlawful transporting itself. The term "victim," however, could be narrowly construed, so as not to apply to cases where she caused or substantially aided the transportation.

[14] In *May* v. *United States*, 175 F.2d 994 (D.C. Cir.), *cert. denied*, 338 U.S. 830 (1949), a person was convicted of giving compensation to a Congressman under then section 203 of Title 18, which prohibited receipt by a government official of such compensation. A related and neighboring statute, then section 202, dealing with bribery, prohibited both the giving and receiving. The court rejected the argument that Congress intended to exempt the giver from liability under section 203, relying upon the fact that section 2 of Title 18 was law when section 203 was enacted and it was reasonable to assume that Congress was aware of its impact. 175 F. 2d at 1004. Of course, it was as reasonable to assume that the draftsmen were also aware of the bribery formulation in section 202. While this case suggests that we should be careful as to our expectations from the Federal legislative process, it should be noted that, under the proposed draft, the *May* court might well have had to reach a different result, even though we would agree that the payor of such compensation, knowing it was unlawful, should be liable (as explicitly provided in our proposed official bribery provisions). It is not too much to expect that the draftsman be aware of related laws.

[15] *See, e.g., Gebardi* v. *United States*, 287 U.S. 112 (1932), which held that the Mann Act was not intended to apply to the female being transported in the circumstances of that case, distinguishing it from the "exceptional circumstances" envisaged in *Holte* (*see* note 13, *supra*).

5. *No Defense Based on Legal Incapacity or Lack of Prosecution of Other Person.*—Subsection (2)(a) merely codifies existing law.[16] It makes it clear, for example, that, while a statute may prohibit a public servant from soliciting or taking a bribe, anyone who may act on his behalf as a "go-between" cannot defend on the ground that he himself could not commit the offense. The formulation is the same as proposed for criminal solicitation, and is more fully discussed in the comment to that draft.

Subsection (2)(b) also codifies existing law, making it clear that it is irrelevant whether the person for whose conduct the accomplice is liable has been prosecuted, convicted, acquitted, or is immune or not otherwise subject to justice.[17]

6. *Criminal Facilitation (Section 1002).*—A problem which has plagued the Federal courts is whether the knowing facilitation of the commission of a crime ought to subject a person to criminal liability if he lacks a true intent that it be committed. As has been noted:[18]

> The problem, to be sure, is narrow in its focus: often, if not usually, aid rendered with guilty knowledge implies purpose since it has no other motivation. But there are many and important cases where this is the central question in determining a liability. A lessor rents with knowledge that the premises will be used to establish a bordello. A vendor sells with knowledge that the subject of the sale will be used in commission of a crime. A doctor counsels against an abortion but, at the patient's insistence, refers her to a competent abortionist. A utility provides telephone or telegraph service, knowing it is used for bookmaking. An employee puts through a shipment in the course of his employment though he knows the shipment is illegal. A farm boy clears the ground for setting up a still, knowing that the venture is illicit. Such cases can be multiplied indefinitely; they have given courts much difficulty when they have been brought, whether as prosecutions for conspiracy or for the substantive offense involved.

The leading Federal cases revealing the problem are *United States* v. *Falcone*, 311 U.S. 205 (1940), and *Direct Sales Co.* v. *United States*, 319 U.S. 703 (1943). In *Falcone* there was no criminal liability for the suppliers of yeast, sugar, and cans to one known to be engaged in an illicit distilling operation. In *Direct Sales* a legitimate but high-pressure drug supplier was held liable for the illegal dispensing of morphine sulphate by a smalltown physician when its sales to him often exceeded by approximately 200 times the annual needs of the average physician. One of the grounds for distinguishing the *Falcone*

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[16] *E.g.*, *United States* v. *Lester*, 363 F. 2d 68 (6th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967) ("the accused may be convicted as causer, even though not legally capable of personally committing the act forbidden by a Federal statute. . . .")

[17] *E.g.*, *United States* v. *Provenzano*, 334 F.2d 678 (3d Cir.), *cert. denied*, 379 U.S. 947 (1964) (principal need not be tried, convicted, or in fact be identified).

[18] MODEL PENAL CODE § 2.04(3), Comment at 27–28 (Tent. Draft No. 1, 1953).

case (another was the nature of the commodity) was that knowledge on the part of the seller that the buyer would use the goods illegally was all that could be established to connect the seller with the conspiracy, and that such knowledge was not sufficient to support the inference that the seller even knew of the conspiracy. Such technical distinctions, it is believed, flow from the fact that the courts must resolve conflicting policies on the basis of full liability (as an accomplice or coconspirator) or no liability at all. If full liability results, it is reasonable to argue, as did Judge Learned Hand in his circuit court opinion in *Falcone*, that: [19]

> [I]t is not enough that [the alleged offender] does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome.

It is also reasonable to argue, as did Judge Parker in rejecting the "stake" principle, that criminal liability should depend only on knowingly aiding and assisting the perpetrators: [20]

> The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise. One who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun. . . .

The proposed resolution of the draft is in effect to create a lesser degree of complicity, a course which only a legislature could take. Criminal facilitation, based upon actual assistance and knowledge of its use in crime, will subject the offender to lesser penalties than the full accomplice. This notion has been implemented by requiring for complicity intent that the crime be committed, rather than merely intent to assist in its commission, which can always be inferred from the conduct of any person who aids the perpetrator with knowledge of what he intends to do. While the line between accomplice and facilitation liability will nevertheless remain shadowy, the fact that there will be some liability (in all serious cases) should make resolution of the problem easier for courts and prosecutors in close cases.

A similar formulation was proposed for inclusion in the Model Penal Code as a basis for full accomplice liability, but was rejected by the American Law Institute.[21] The notion of making such liability a lesser crime has its source in the New York Revised Penal Law (§§ 115.00, 115.05 (McKinney 1967)); and it has been taken up by the California revisers in the California Penal Code Revision Project

[19] *United States* v. *Falcone*, 109 F.2d 579, 581 (2d Cir.), *aff'd*, 311 U.S. 205 (1940).

[20] *Backun* v. *United States*, 112 F.2d 635, 637 (4th Cir. 1940). *See also, e.g.*, *Bacon* v. *United States*, 127 F.2d 985, 987 (10th Cir. 1942) (sale of liquor to illegal State importer); *Malatkofski* v. *United States*, 179 F.2d 905, 916 (1st Cir. 1950) (providing bribe money with knowledge of intended use). Synopses are from MODEL PENAL CODE § 204(3), Comment, n. 35 at 29 (Tent. Draft No. 1, 1953).

[21] It is similarly proposed in Michigan: *see* MICH. REV. CRIM. CODE § 415(b) and Commentary (Final Draft 1967).

(§ 452 (Tent. Draft No. 1, 1967)). The proposed draft is an amalgam of the New York and California provisions.

The draft requires that substantial assistance be provided. This is preferred over "means or opportunity" because, as a lesser offense to complicity, it ought to be as broad. While "substantial assistance" may be regarded as too vague, it is important to note that the factor of substantiality of assistance has been stressed in Federal court decisions. An illegal sale, for example, is a greater service to a criminal enterprise than a legal one because there are fewer persons willing to make it.[22] The difficulty is that no single measure of what constitutes substantial assistance is possible, so that whether the assistance in any given case is such as to warrant holding it criminal must be determined from the circumstances of that case.*

There are two kinds of culpability required. One is knowledge that the person to be aided intends to commit a crime. It goes beyond mere knowledge that he is engaging in conduct which turns out to be a crime, and requires that the facilitator know such conduct constitutes a crime. On the other hand, although he will not be guilty unless a felony is committed, it need not be proved that he knew what class of crime it was that the other person intended to commit. The other kind of culpability required is knowledge that he is providing substantial assistance.

Liability as a facilitator is limited to cases where the crime committed is a felony; the penalty available is one or two classes lower than that prescribed for the felony. This substantially embodies the New York and California approaches, although the California revisers would also embrace facilitation of the more serious misdemeanors. As does the New York statute, this draft reflects the view that liability for aiding commission of a misdemeanor should be based on complicity or not at all. Misdemeanor facilitation tends to be de minimis. Moreover, in practice it is likely that facilitators will be charged as accomplices, but that the facilitation offense will be available for conviction of the lesser offense in borderline cases. No such need is seen for misdemeanors.

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[22] *Direct Sales Co.* v. *United States*, 319 U.S. 703 (1943). *See also Eley* v. *United States*, 117 F.2d 526, 528 (6th Cir. 1941) (quantity of liquor sold is relevant), and a number of cases where the nature of the goods—if access to them is restricted, if they are susceptible to illegal use—was emphasized (*e.g.*, *United States* v. *Tramaglino*, 197 F.2d 928, 930–931 (2d Cir. 1950), *cert. denied*, 344 U.S. 864 (1952) (sale of marihuana); *Bartoli* v. *United States*, 192 F.2d 130, 131 (4th Cir. 1951) (counterfeit money); *United States* v. *Kertess*, 139 F.2d 923, 929 (2d Cir.), *cert. denied*, 321 U.S. 795 (1944) (platinum group metals)).

*The specification in the Study Draft that the ready legal availability of the goods or services provided by a defendant is a factor to be considered in determining whether or not the assistance is "substantial," was added for clarification.

STAFF MEMORANDA
on
RESPONSIBILITY FOR CRIMES INVOLVING CORPORATIONS AND OTHER ARTIFICIAL ENTITIES: SECTIONS 402–406
(Schwartz, Clarkson; May 3, 1969)

Introductory Memorandum

This Introductory Memorandum focuses on the main issues relating to criminal liability of corporations and other associations. It is followed by a more comprehensive memorandum reviewing the entire subject.

The need for special provisions on corporate criminal liability arises mainly from two interrelated problems: (1) the uncertainty whether corporations should be criminally liable at all or for only certain kinds of offenses; and (2) the inappropriateness of ordinary rules of accountability. The corporation—being a fictional entity—can engage in prohibited activity only through human agencies; it does not as an entity "command," "induce," or otherwise meet the literal requirements of liability as an accomplice; nor does it have "intent." It is therefore necessary to prescribe by law the classes of personnel whose behavior may render the corporation liable, and the circumstances under which that result will follow. It will also be necessary to consider whether special kinds of sentencing are called for when the law is dealing with fictional entities that cannot be imprisoned.

Under existing Federal judge-made law, corporations, partnerships, and other associations are subject to criminal conviction. Generally speaking, principles of "agency," ordinarily insufficient to impose criminal liability on a principal, are applied in determining when the corporaton will be held accountable for acts of its human components. The proposed draft incorporates this law with minor variations. Several innovations in sanctions against corporations are proposed, namely a discretionary power in the judge to order appropriate publicity of a corporate conviction and to direct the institution of a class action for the recovery of small claims arising from the criminal offense. (*See* section 405.) The main issues posed by the draft are the following:

1. *Should Corporate Criminal Liability Be Restricted or Extended?*—In favor of restricting corporate criminal liability, it is argued that corporations are nondeterrable; that only human beings are affected by threat of punishment. The availability of a corporate scapegoat may actually impair the deterrent efficacy of the law against the individual human malefactors, if prosecutors and juries are inclined to absolve the individuals of guilt for misbehavior in their corporate capacities. It is also pointed out that fines, the only present sanction available against corporations, have their impact mainly on innocent shareholders.

In favor of broadened corporate criminal liability, it is argued that a mechanism for social condemnation of group offenses is essential under modern conditions when ever larger proportions of economic and social activity are carried out corporately. The public has a right to know that certain organizations' operations are carried on in violation of the criminal law. Often it is difficult to establish individual responsibility in the corporate context. When many people share in decisions, moral responsibility is diffused; one may not be able to say who "acted" or "omitted" to act in the sense in which traditional criminal law makes these elements crucial. Also, it seems unfair to discriminate against individual entrepreneurs by holding them criminally liable for business offenses while their corporate competitors could never be identified as culprits in, for example, adulteration, misbranding, short-weighting, false advertising, violations of labor and safety regulations. Some important offenses are characteristically committed by associations, for example, antitrust violations, violations of laws against corporate or union intervention in political campaigns, illegal rebating of transportation charges.

Extension of corporate criminal liability, which might be justified under the foregoing reasoning, would fall outside the domain of the present Code. The issue presents itself when new regulatory legislation affecting mainly corporate activity (auto safety, for example) is passed. In such situations the controversy over whether the statute should include criminal provisions may be fundamentally a struggle over whether corporations should ever be subject to the criminal process.

2. *Under What Circumstances Should "Unauthorized" Misbehavior Give Rise to Corporate Criminal Responsibility?*—Paragraph (a) of subsection 402(1) identifies the persons whose acts or "authorization" will impose criminal liability on the corporation in respect to most serious offenses. (Liability for minor offenses and "strict liability" offenses is dealt with in paragraphs (c) and (d).) Insofar as paragraph (1)(a)(ii) is restricted to supervisory or managerial agents, the draft may be narrower than existing Federal law, which purports to authorize liability for the act of any agent of the corporation within the area of duties or functions entrusted to him, at least if he is acting in furtherance of, rather than against, the interest of the corporation. However paragraph (1)(a)(iv) insures that where an existing statute makes the corporation liable for the act of its "agent" or "employee" no higher "authorization" will be required.

Paragraphs (b), (c), and (d) deal with situations in which proof of authorization is dispensed with. Paragraph (b) is the easy case: where a duty to act is expressly imposed on the corporation, no inquiry into its internal distribution of responsibility is called for. Paragraphs (c) and (d) take the position that for minor offenses carrying minimal sanctions, and for those rare instances in which Congress may ordain "absolute" criminal liability without proof of culpability, the corporation must respond if the offense was committed on its behalf or in the course of its business. As respects choosing in subsection 402(1)(c) between misdemeanor and infraction as the category of offense for which the corporation may be liable on agency principles, the selection of misdemeanor would be closer to existing Federal law, and is here recommended. (*See* Staff Memorandum, notes 11–18 and accompanying text, *infra.*)

3. *Defense of "Exceptional Occurrence Without Fault In Supervision or Management."*—It may be appropriate to provide for a possible limitation of corporation liability for unauthorized offenses in the case of an "exceptional occurrence without fault in supervision or management" as an affirmative defense.* There are statements in the Federal cases that due care by management will not absolve the corporation, but the cases seem to involve instances in which lack of due care on the part of management was clear: that is, there was a systematic recurrence of violations. (*See* Staff Memorandum, notes 14–16 and accompanying text, *infra.*)

A defense to the corporation that the responsible individuals acted contrary to corporate policy and are convicted could also be provided. This might counter the tendency to evade individual criminal responsibility in the corporate context and would minimize the injustice of group accountability.**

4. *Should Unincorporated Associations Be Treated Differently From Corporations?*—Existing Federal law does not differentiate between these two forms of associational activity, and the draft does not propose to do so. It might be argued that partnerships, unions, philanthropic foundations, clubs, and churches are typical unincorporated associations, and that their activities differ markedly from those of profitmaking business corporations. On the other hand, it hardly seems rational to discriminate according to incorporation or nonincorporation in view of the common use of the "nonprofit corporation" for many of these associations. Should, then, "nonbusiness" entities be exempt from criminal responsibility? It is believed not: the problem of diffusion of responsibility and the utility of a means of condemning antisocial behavior of identifiable organizations speak for entity criminal liability.

Another possibility would be to provide an exemption for small unincorporated associations for those with less than five members for example.***

5. *Should States, Municipalities, and Other Governmental Entities Be Exempted From Criminal Liability?*—Section 406(a) would exempt such organizations, as does the Model Penal Code. (*See* Staff Memorandum, paragraph C, *infra.*) Assuming that the States themselves should not be prosecutable by the Federal government, should not municipalities and State administrative agencies be amenable to Federal criminal law, as where a State liquor agency participates in corrupt transactions or a city pollutes a river or the air, or a board of county commissioners connives corporately at violation of election or civil rights or welfare laws? The problems of diffusion of responsibility are not unlike those in the commercial corporate world. And a pollution offense might well raise damage problems of the sort envisioned in section 405(1)(b). On the other hand, public agencies are generally subject to closer scrutiny than are private corporations, so

*To the extent that the "exceptional occurrence" is precisely the situation in which the corporation is caught, such a statutory provision would be anomalous.

** But, the substantial difficulty of disproving "corporate policy" and the likelihood of manufactured defenses are offsetting considerations.

***Another alternative would be a limitation to misdemeanor liability for small entities. Countervailing considerations to such a proposal include: practical unfeasibility of drafting; in small entities individual responsibility can be more easily determined and, accordingly, entity responsibility more easily assessed.

that the publicity sanctions of section 405(1)(a) might be less needful. This consideration may in turn be countered by the discretionary character of the section 405 penalties and the presumption that judges would use the sanction only where appropriate.

If governmental organizations were made liable it might be appropriate to exclude some of the special sanctions of section 405—publicity and disqualification from employment.

6. *Special Sanctions Against Organizational Offenses.*—Section 405(1)(a) authorizes the court to require that appropriate publicity be given to corporate convictions. The main purpose would be to enhance the deterrent effect of the law. Since imprisonment is impossible and fines may be absorbed as a cost of business, adverse publicity in appropriate cases might be the most feared consequence of conviction in an era when public relations figure so largely among management concerns. Customers and prospective customers of products or securities might be warned that the corporate defendant had engaged in fraudulent practices. Appropriate notices might be required in proxy statements. Advertisements in trade journals or the general press could be employed. Section 405(1)(a) is designed to make the corporation's public relations picture reflect the facts of its antisocial behavior.

Section 405(1)(b) undertakes to make more effective civil recovery of damages resulting from criminal offenses of corporations. Often individual damages for example, from fraudulent sales practices will be too small to make individual law suits worthwhile. Where an individual is prosecuted, it is possible to make probation conditional on restitution, and his offenses are unlikely to hurt so many people. Although class suits in independent civil proceedings may presently be an available remedy, explicit statutory provision for ancillary proceedings in the criminal case would make recovery by numerous small claimants less dependent on the initiative of an eager private lawyer. The court, under section 405(1)(b), could direct that a class suit be brought by the Attorney General as representative of the private persons injured, to determine, collect and distribute damages. (*See* Extended Note to Staff Memorandum, *infra.*)

7. *Should Organizational Officials Be Criminally Responsible for "Willful Default in Supervision"?*—Section 404 confirms the criminal liability of individuals who violate penal norms on behalf of corporations or unincorporated associations. In addition, subsection (4) creates liability for the supervisor whose willful default in supervision contributes to the occurrence of an offense within his supervisory responsibility. (*See* Staff Memorandum, notes 69–75, 91–97, 104, 109–113, and accompanying text, *infra.*)

8. *Should the Criminal Court Be Empowered To Disqualify Convicted Organization Officials From Engaging in Management Functions?*—Section 405(2) provides for such a power where the scope or willfulness of the convicted official's illegal actions make it dangerous or inadvisable for such functions to be entrusted to him. (*See also* Staff Memorandum, notes 91–96 and accompanying text, *infra.*)*

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*If governmental entities were included in section 406, perhaps their officials should be excluded from the sanctions of section 405(2) so as to avoid political confrontations. The effect of section 405(2) on the contract rights of the defendant (he may be entitled to salary but unable to work) and the attendant detriment to the shareholders must be considered. It is noted that viable similar sanctions presently exist with respect to labor unions.

Staff Memorandum

I. Existing Law

A. Federal Statutory and Decisional Law

(1) *Liability of the Entity*

That the criminal penalties of Federal statutes are applicable to inanimate legal entities such as corporations and partnerships is well established.

Section 1 of Title I of the United States Code provides that in determining the meaning of any Act of Congress, the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals, unless the context requires otherwise.

While Title 18 does not contain a general definition of "person," a few sections specify that corporations are included within their prohibitions. Section 402 (criminal contempt) provides that "any person, corporation or association willfully disobeying any writ . . . shall be prosecuted . . . and shall be punished." Chapter 29 (relating to elections and political activities) contains a definition of the terms "person" and "whoever" which includes corporations, partnerships, *etc.* (section 591). Section 831 also contains such a definition with respect to violations of ICC rules and regulations.[1] Section 609, which sets limits on the amount of money which may be received or expended by political committees, provides that any contributions received or expended on behalf of a committee with the knowledge and consent of its chairman or treasurer shall be deemed to be received or expended by the committee.

Outside of Title 18, most acts with penal sanctions specifically provide for corporate liability. Many contain their own definitions of "person," and include the various artificial entities included in Title 1, section 1;[2] others specifically provide that "any person, firm or corporation who violates . . ." shall be fined or imprisoned or both;[3] and some contain both types of provisions.[4]

Finally, several statutes contain a provision to the effect that the act, omission or failure of any official, agent or other person acting for an artificial entity within the scope of his employment shall be deemed the act, omission or failure of such artificial entity, as well as of the official, agent or other person.[5]

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[1] The definition was added in 1960 after the Supreme Court held, in a 5–4 decision, that section 831 was applicable to partnerships pursuant to Title I, section 1. *See* subparagraph I.A.(1)(b), *infra*.

[2] Examples of statutes defining "person" to include corporations and other artificial entities are compiled in part (1) of Appendix A, *infra*.

[3] Examples of statutes including corporations and other artificial entities in their penalty clauses are compiled in part (2) of Appendix A, *infra*.

[4] Examples of statutes containing both a definition of "person" which includes corporations and other artificial entities and a penalty clause including such bodies are cited in part (3) of Appendix A, *infra*.

[5] Examples of statutes containing such a provision are compiled in part (4) of Appendix A, *infra*.

(a) *Corporations*

It seems quite clear that the Supreme Court does not regard a specific declaration in a statute that corporations are subject to its terms as necessary in order to impose criminal penalties of the statute upon such bodies. Rather, it has long ago held that if the section of a statute prescribing a duty to be performed (or proscribing certain conduct) embraces all actors and the actor intended to be reached is as likely to be a corporation as a natural person, the words "any person" in the penal clause of the statute are equally broad, imposing liability for violation upon all who are bound by the duty (or proscription).[6]

The black letter rule that a corporation, which can act only through its agents and employees, may be held responsible for the acts of such agents and employees which violate the criminal law, if such acts are done in behalf of the corporation and within the scope of the agent's employment, seems first to have been stated by the Supreme Court in *New York Cent. & Hudson R. R.R.* v. *United States*, 212 U.S. 481 (1909). The Court there upheld the constitutionality of the provisions in the Elkins Act (49 U.S.C. § 41(1)) to the effect that anything done or omitted to be done by a corporation which if done or omitted to be done by any person acting for the corporation would be a crime under the Act is a crime of the corporation also, and that the acts, omissions and failures of persons acting for a corporation are deemed to be the acts, omissions and failures of the corporation itself. The Court applied the tort law principle of *respondeat superior* to uphold the conviction of a corporation for its agent's conduct, saying that it needed to carry the tort doctrine "only a step farther" to "control" the act of the agent by "imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises."[7]

The Court held that:

> [T]here is a large class of offenses, of which rebating under the Federal statutes is one, wherein the crime consists in purposely doing the things prohibited. . . . [W]e see no good reason why the corporation may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. . . . If it were not so, many offenses might go unpunished and acts be committed in violation of law where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices, forbidden in the interest of public policy. (212 U.S. at 494–495.)

The Court said that history had shown that "statutes against rebates could not be effectively enforced so long as individuals only were subject to punishment for violation of the law, when the giving of rebates or concessions inured to the benefit of the corporations of which the individuals were but the instruments," and indeed that to give immunity from criminal liability to corporations "would

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[6] *United States* v. *Union Supply Co.*, 215 U.S. 50 (1909).
[7] 212 U.S. at 494.

virtually take away the only means of effectually controlling the subject matter and correcting the abuses aimed at." [8]

It is only in cases where the corporation is the intended beneficiary that it may be held for its agents' illegal conduct. Thus if the employee acts not on behalf of the corporation but for his own personal benefit, or for the benefit of a third person to the detriment of the corporation, the corporation is not responsible. In *Standard Oil Co.* v. *United States*, 307 F.2d 120 (5th Cir. 1962), for example, convictions of corporations under the Connally Hot Oil Act (15 U.S.C. § 715 *et seq.*) were reversed where it was shown that the employees, though ostensibly acting in the performance of their duties, were really cooperating with a third company to advance its interests, and the employees' acts not only did not benefit their employers but in some

[8] *Id.* Other Federal cases applying criminal statutes to corporations include *United States* v. *Carter*, 311 F. 2d 934 (6th Cir.), *cert. denied*, 373 U.S. 915 (1963) (conviction of Pilsener Brewing Co. for violation, by its president, of 29 U.S.C. § 186(a) prohibiting payments by employer to official of union representing its employees, upheld); *United States* v. *Chicago Express, Inc.*, 273 F. 2d 751, 753 (7th Cir. 1960) (conviction of corporation for violation of ICC regulation that trucks carrying dangerous commodities be placarded):

> The acts of agents of a corporation acting within the scope of their employment must be attributed to the corporation in order to permit the application of any statute or regulation to such an artificial person. Here the evidence clearly established that defendant's driver had knowledge that the load he was hauling was a Class 'B' poison. Such knowledge is chargeable to the corporation;

United States v. *Steiner Plastics Mfg. Co.*, 231 F. 2d 149 (2d Cir. 1956) (conviction of corporation for engaging in scheme to defraud the United States, based on activities of production manager and others, upheld); *United States* v. *Empire Packing Co.*, 174 F. 2d 16 (7th Cir.), *cert. denied*, 337 U.S. 959 (1949) (conviction of corporation for filing false claims for government subsidies, based on acts of its president, upheld); *United States* v. *George F. Fish, Inc.*, 154 F. 2d 798 (2d Cir.), *cert. denied*, 328 U.S. 869 (1946), (conviction of corporation for violations by its salesmen of price control regulations upheld); *United States* v. *Van Riper*, 154 F. 2d 492 (3d Cir. 1946) (conviction of corporation for gas station manager's violation of price control regulations upheld); *Old Monastery Co.* v. *United States*, 147 F. 2d 905 (4th Cir.), *cert. denied*, 326 U.S. 734 (1945) (conviction of corporation for conspiracy to violate price control act and regulations, based on acts of its president, upheld); *C.I.T. Corp.* v. *United States*, 150 F. 2d 85 (9th Cir. 1945) (conviction of corporation for conspiracy to make false statements in order to influence FHA, based on acts of its branch manager, upheld); *Egan* v. *United States*, 137 F. 2d 369 (8th Cir.), *cert. denied*, 320 U.S. 788 (1943) (conviction of corporation for violation by its president and vice president of Public Utility Holding Act prohibition against corporate political contributions upheld): *Mininsohn* v. *United States*, 101 F. 2d 477 (3d Cir. 1939) (conviction of corporation for conspiracy to defraud the United States by false claims, based on acts of its officers, upheld); *Zito* v. *United States*, 64 F. 2d 772 (7th Cir. 1933) (conviction of corporation for conspiracy to violate Prohibition Act, based on unlawful activities of its salesmen, upheld): *cf. United States* v. *Armour & Co.*, 168 F. 2d 342 (3d Cir. 1948) (conviction of corporation for violation, by its salesmen and certain branch managers, of price control regulations upheld: "*It is not an instance of respondeat superior. It is the case of the non-performance of a non-delegable duty.*"), quoted in *Continental Baking Co.* v. *United States*, 281 F. 2d 137, 150 (6th Cir. 1960) (prosecution of three corporations for conspiracy to violate section 1 of the Sherman Act.)

The above cases hold that the corporation is responsible for crimes which require knowledge and willfullness as well as for conduct for which absolute liability is imposed, and for conspiracy as well as for the substantive offense. It has also been held that a corporation may be held for the activities of employees of its subsidiaries, if the subsidiary is an agent and its employees are subagents. *United States* v. *Johns-Manville Corp.*, 231 F. Supp. 690, 698 (E.D. Pa. 1964).

instances resulted in a theft of the corporations' property. The court held:[9]

> Under a statute requiring that there be 'a specific wrongful intent,' and the 'presence of culpable intent as a necessary element of the offense . . .,' the corporation does not acquire that knowledge or possess the requisite 'state of mind essential for responsibility' through the activities of unfaithful servants whose conduct was undertaken to advance the interests of parties other than their corporate employer.

But if the corporation is the intended beneficiary, it will be held liable even though the illegal action turns out to be misguided and the corporation does not in fact benefit therefrom. Thus in *Old Monastery Co.* v. *United States*, 147 F.2d 905 (4th Cir. 1945), the court said:[10]

> We do not accept benefit as a touchstone of corporate criminal liability; benefit, at best, is an evidential, not an operative, fact.

Involvement of the corporation's managerial or supervisory personnel is not regarded by the Federal courts as a necessary condition of corporate liability. Thus it has been held that the status of the employee violating the law in the corporate hierachy is immaterial, and that all that is necessary is that he be acting in the area of responsibility assigned to him. In *United States* v. *George F. Fish, Inc.*, 154 F.2d 798 (2d Cir.), *cert. denied*, 328 U.S. 869 (1946), which involved violation of price control regulations by the corporation's salesman, the Court of Appeals for the Second Circuit said:[11]

> No distinctions are made in these cases between officers and agents, or between persons holding varying degrees of responsibility. And this seems the only practical conclusion in any case, but particularly here, where the sales proscribed by the Act will almost invariably be performed by subordinate salesmen, rather than by corporate chiefs, and where the corporate hierarchy does not contemplate separate layers of official dignity, each with separate degrees of responsibility. The purpose of the Act is a deterrent one; and to deny the possibility of corporate responsibility for the acts of minor employees is to immunize the offender who really benefits, and open wide the door for evasion.

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[9] 307 F. 2d at 129. *See also Steere Tank Lines, Inc.* v. *United States*, 330 F. 2d 719, 724 (5th Cir. 1963) (while instruction that corporation was bound by knowledge of its officers, agents and employees, including subordinate employees such as truck drivers, in suit for violation of ICC regulation requiring the keeping of accurate logs, was erroneous, where truck drivers had falsified logs not primarily to benefit company but so that they could drive greater number of hours than permitted by law thus making more money, error was harmless where evidence clearly showed manager of corporation's terminal where violations occurred knew of the violations, and insufficient equipment and shortage of drivers "made a rife situation for falsification."); *cf. United States* v. *Hare*, 153 F. 2d 816 (7th Cir.), *cert. denied*, 328 U.S. 836 (1946) (where officers used corporation as instrumentality to sell whiskey above ceiling price, transferring only ceiling price to corporation and keeping the illegal excess for themselves, verdict of not guilty as to the corporation was not difficult to understand.)

[10] 147 F. 2d at 908. *See also United States* v. *Carter*, 311 F. 2d 934, 942–943 (6th Cir. 1963).

[11] 154 F. 2d at 801.

Similarly in *C.I.T. Corp.* v. *United States*, 150 F. 2d 85 (9th Cir. 1945), the argument that the branch manger, for whose conduct liability was imposed upon the corporation, was too low in the corporate hierarchy to bind the company was rejected: [12]

> It is the function delegated to the corporate officer or agent which determines his power to engage the corporation in a criminal transaction . . . Here the manager . . . was not only the person by whom the duty [of making the statements to the FHA] would ordinarily be performed in the Yakima area, he was the only person having that duty.

In accordance with this line of reasoning, the courts have rejected defenses based on the facts that the corporation has not authorized the illegal conduct,[13] that the acts have been done without the knowledge of its officers and directors,[14] that the unlawful activities of its agents have been specifically forbidden [15] and that the executives exercised

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[12] 150 F. 2d at 89. *See also United States* v. *Armour & Co.*, 168 F. 2d 342, 344 (3d Cir. 1948) ("We fail to see that the degree of importance in the appellant corporation of the present offending employee group helps appellant under the facts before us."); *Standard Oil Co.* v. *United States*, 307 F. 2d 120, 127 (5th Cir. 1962) ("[N]o contention is made that 'knowledge' can be acquired only through supervisory or executive personnel. . . . [T]he corporation may be criminally bound by the acts of subordinate, even menial, employees."; *see also United States* v. *Chicago Express, Inc.*, 273 F. 2d 751 (7th Cir. 1960).

[13] *New York Cent. & Hudson R. R.R.* v. *United States*, 212 U.S. 481 (1909).

[14] *United States* v. *Van Riper*, 154 F. 2d 492 (3d Cir. 1946); *C.I.T. Corp* v. *United States*, 150 F. 2d 85 (9th Cir. 1945); *United States* v. *Steiner Plastics Mfg. Co.*, 231 F. 2d 149, 153 (2d Cir. 1956): ("[I]t was not necessary to show that an officer or director was involved in the fraudulent scheme. It was enough to show that agents of the corporation acting within the area entrusted to them, had violated the law."); *Continental Baking Co.* v. *United States*, 281 F. 2d 137, 149–150 (6th Cir. 1960); *cf. United States* v. *E. Brooke Matlack, Inc.*, 149 F. Supp. 814 (D. Md. 1957), where the conviction of a corporation for willfully and knowingly violating an ICC regulation requiring drivers of motor carriers' vehicles to file daily logs with the motor carriers was upheld against the argument of the carrier that it was not acting knowingly and willfully in failing to require proper logs from the drivers. The court said:

> Where an affirmative duty to do something is imposed upon a corporation, it must be performed by some or several of its agents. Conscious disregard of or indifference to the performance of this duty is, in my opinion, what amounts to willful failure on the part of the corporation. The position taken by counsel for the defendant seems to be that because the superior executives of the corporation in the Philadelphia office did not personally know or suspect that the corporation's agents in the Baltimore branch were disregarding the affirmative duty, therefore the corporation should not be held liable. I cannot agree to this view. While the primary responsibility for conducting the operations of the corporation lay with its principal officers, it was their duty in delegating authority to lesser agents to take effective measures to supervise and assure performance of the affirmative duty imposed upon the corporation. Thus the corporation cannot avoid responsibility by merely saying that a subordinate agent neglected his duty. . . . While mere negligence of a particular agent would not be sufficient of itself to constitute a wilful mistake on his part, the situation is different when a corporation charged with an affirmative duty does not secure its performance by proper agents, and where the failure is not merely accidental or individual but systematic and without justifiable excuse. (149 F. Supp. at 820, 821.)

[15] *United States* v. *Armour & Co.*, 168 F. 2d 342 (3d Cir. 1948); *cf. Continental Baking Co.* v. *United States*, 281 F. 2d 137, 149 (6th Cir. 1960).

great care to prevent the unlawful activities by the lower echelon agents.[16] In this respect Federal law differs from State law as reflected in the Model Penal Code, which limits corporate liability for serious offenses to cases where the directors or high executives are involved and for other (nonstrict liability) offenses to cases where it cannot be shown that such executives have exercised due diligence to prevent the commission of the offense.[17] The theory behind the Federal rule seems to be that the duty to be enforced by criminal sanctions does "not arise out of the relation of employer and employee but [is] one that, in virtue of the statute, [is] owed by [the corporation] to the public." [18]

While the point has not been expressly decided by the Supreme Court, the Federal appellate courts have also generally rejected the argument that where a corporation and its agents are tried together acquittal of the individual agents whose criminal acts are "imputed" to the corporation vitiates a verdict convicting the corporation. The most popular reason for rejecting the argument seems to be that consistency in verdicts is not necessary; all that is required is that a verdict of conviction be supported by the evidence.[19]

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[16] *St. Johnsbury Trucking Co.* v. *United States*, 220 F. 2d 393 (1st Cir. 1955) (concurring opinion):

> [S]ome courts have construed and applied criminal statutes to mean that a corporate defendant cannot have the prescribed guilty knowledge unless some higher official of the corporation—perhaps called an '*alter ego*' for the corporation—has such knowledge. See *People* v. *Canadian Fur Trappers Corp.*, 1928, 248 N.Y. 159, 161 N.E. 455, 59 A.L.R. 372. So far as I can find, the federal courts, in construing imprecise Acts of Congress, have not generally drawn such a line in the heirarchy of officers or agents of the corporation. . . . On this view, it would not be enough to absolve the corporation from liability for a criminal offense of the sort here in question, that no member of the board of directors, or no one of the higher executives, knew that a dangerous commodity was being transported by the company truck in a forbidden quantity without the markings required by the regulation. Nor would it be enough that the higher executives of the corporation, as the defendant sought to show here, took the utmost care to lay down for the guidance of the subordinate employees procedures designed to assure compliance with the regulation.

[17] *See infra* at paragraph I.C., for a description of the Model Penal Code provision and other State Code provisions following the Model Penal Code.

[18] *United States* v. *Illinois Cent. R.R.*, 303 U.S. 239, 244 (1938).

Under this statement of the law, the distinction between servant and independent contractor is equally irrelevant, and it has been specifically so held, with respect to strict liability. *United States* v. *Parfait Powder Puff Co.*, 163 F. 2d 1008 (7th Cir. 1947), *cert. denied*, 332 U.S. 851 (1948); *cf. United States* v. *Andreadis*, 366 F. 2d 423 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967), in which the court found it unnecessary to decide whether the knowledge of an independent contractor could be "imputed" to his employer in order to prove a mail fraud case.

[19] *See Magnolia Motor & Logging Co.* v. *United States*, 264 F. 2d 950, 953 (9th Cir.), *cert. denied*, 361 U.S. 815 (1959):

> The verdict finding appellant guilty on each count was inconsistent with the verdict finding Lamb not guilty on each count. Appellant therefore contends that Lamb's acquittal showed that the evidence was insufficient to sustain appellant's conviction. There is no merit in this contention. Consistency in verdicts is not required.
>
> Appellant contends that the evidence was insufficient in that it failed to show that appellant had any criminal intent. There is no merit in this contention. There was substantial evidence that Lamb, appellant's president and duly authorized agent, acting for and on behalf of appellant, stole and converted to appellant's use the property mentioned in Count I

It has even been said that the conviction of a corporation does not depend upon the guilt of its agents.[20]

Some of the courts have recognized the logical difficulty with upholding a corporate conviction under such circumstances,[21] and two have intimated, while not directly so holding, that if confronted squarely with the problem they might overturn a corporate conviction under such circumstances.[22]

(b) *Partnerships and Other Unincorporated Associations*

The Supreme Court has held that the criminal sanctions of a Federal statute are also applicable to artificial entities other than corporations,

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of the indictment, depredated the property mentioned in Count II and did these things willfully, knowingly and with criminal intent. That criminal intent, if such existed, was imputable to appellant.

Southern Advance Bag & Paper Co. v. *United States*, 133 F. 2d 449, 450–451 (5th Cir. 1943):

The co-defendants Kelley, Hunt and Lewis [officers of the Company] were found not guilty . . . and appellant contends that their acquittal was inconsistent with a finding of its guilt. The evidence clearly shows that the Company through its officers had knowledge that the pulpwood was being produced in violation of the Fair Labor Standards Act, and that the paper manufactured from such illegally produced pulpwood was being shipped in interstate commerce. The evidence is ample to sustain appellant's conviction under the Act, and the fact that co-defendants were not convicted does not relieve it of responsibility for its own unlawful conduct.

[20] *American Medical Ass'n* v. *United States*, 130 F. 2d 233, 252, 253 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943):

Appellants contend that the verdict of the jury acquitting all defendants except [the associations] and convicting the . . . associations, constitutes such inconsistency as to require that the verdicts of guilty be set aside. . . .

Appellant's contention confuses the concepts of corporate and individual criminal liability. When a corporation is guilty of a crime it is because of a corporate act, a corporate intent; in short, corporate commission of crime. The fact that a corporation can act only by human agents is immaterial. . . . [T]he conviction of appellants does not depend upon the guilt or conviction of their agents.

[21] *United States* v. *General Motors Corp.*, 121 F. 2d 376, 411 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941):

The jury convicted the appellants, but acquitted the individual defendants. It is well settled that corporations may violate the Sherman Law . . ., but it is fundamental that they could do this only through individual agents. . . .

We can not understand how the jury could have acquitted all of the individual defendants. As a matter of logic, reconciliation between the verdict of guilt and verdict of acquittal is impossible. . . .

[W]e believe that the acquittal of the officers and agents, even if they had been the only persons through whom the corporations could have acted, should not operate without more to set aside the verdict against the corporations. . . . [A]lthough a corporation acts only through its agents, their indictment is not a condition precedent to prosecution against the corporation.

See also United States v. *Austin Bagley Corp.*, 81 F. 2d 229, 233 (2d Cir. 1929) ("How an intelligent jury could have acquitted any of the defendants we cannot conceive.")

[22] *Imperial Meat Co.* v. *United States*, 316 F. 2d 435, 440 (10th Cir.), *cert. denied*, 375 U.S. 820 (1963) (conviction of a corporation, an officer and an employee upheld:

Appellants complain of the instructions given as to what would be required to find the corporate defendant guilty. The court charged that in order to find the corporation guilty, it was necessary to find either defendant Landers or defendant Bethley guilty, or both of them guilty; and the criminal acts of the individuals were committed while they were

such as joint stock companies [23] and partnerships.[24] Thus in *United States* v. *A & P Trucking Co.*, 358 U.S. 121 (1958), the Court held that a partnership may be held, as an entity, criminally liable for violation of a statute whether or not that statute specifically defines the term "person" and includes partnerships; it reasoned that corporations may be so held and that the policy to be served is the same in the case of partnerships: [25]

> The business entity cannot be left free to break the law merely because its owners, stockholders in the Adams case, partners in the present one, do not personally participate in the infraction. The treasury of the business may not with impunity obtain the fruits of violations which are committed knowingly by agents of the entity in the scope of their employment. Thus pressure is brought on those who own the entity to see to it that their agents abide by the law.

Four Justices, while they agreed that a partnership could be held in violation of a statute specifically including "partnership" in a definition of "person," dissented from the majority's holding that where the statute contains no such specific definition, Title 1, section 1 of the United States Code, providing that the terms "person" and "whoever" when used in an Act of Congress include partnerships, corporations and other entities, unless the context requires otherwise, could be used to fill in the gap; since the aggregate (rather than the entity) theory of partnership prevails in the United States, a statute which does not contain a definition of "person" which includes partnerships (or other specific indication that its criminal sanctions are intended to apply to partnerships) does not impose criminal liability on partnerships because "the context requires otherwise."

Finally, it has been held that the fact that a criminal antitrust defendant is organized as a nonprofit corporation [26] or as a labor organization [27] is not a defense to prosecution under the Sherman Act.

> acting as officers, agents, or employees within the scope of their employment. These were the only two persons concerned whose intent could make the corporation liable according to the record. . . . These instructions were applicable under the proof and were not in error.

Pevely Dairy Co. v. *United States*, 178 F. 2d 363, 370–371 (8th Cir. 1949), *cert. denied*, 339 U.S. 942 (1950):

> [W]e note that all individual defendants were found not guilty. The appellants here are corporations. They could act only through officers and agents, yet the only officers and agents who could possibly have committed the violations charged were acquitted. It is true the question on review is not whether the verdict of acquittal of the individual defendants was warranted, but whether the verdict of guilty as against the corporations is sustained by substantial evidence, and mere inconsistency in verdicts is not fatal. However, the verdict of not guilty as to the individual defendants in this case certainly stripped the verdict of guilty as to the corporation defendants of all semblance of logic or reason, and to our minds weakened the presumption of correctness usually attributable to the verdict of a jury.

[23] *United States* v. *Adams Express Co.*, 229 U.S. 381 (1913).

[24] *United States* v. *A & P Trucking Co.*, 358 U.S. 121 (1958). *See also United States* v. *West Side Bakery*, 181 F. Supp. 941 (S.D. N.Y. 1960).

[25] 358 U.S. at 126.

[26] *United States* v. *Montana State Food Distribs. Ass'n*, 271 F. Supp. 403 (D. Mont. 1967), *citing United States* v. *General Motors Corp.*, 384 U.S. 127 (1966), in which an automobile dealer's association was held in a civil Sherman Act prosecution.

[27] *Gulf Coast Shrimpers & Oystermans Ass'n* v. *United States*, 236 F. 2d 658 (5th Cir.), *cert. denied*, 352 U.S. 927 (1956).

(c) *Governmental Corporations*

The Model Penal Code provision on corporate liability specifically excludes from its coverage "an entity organized as or by a governmental agency for the execution of a governmental program," [28] on the theory that "corporate liability is generally pointless in such cases." [29] There does not appear to be any general Federal exemption from corporate liability of governmental agencies (Federal, State, or local), although at least one statute, in including such bodies in its terms, explicitly relieved them from its criminal, as opposed to remedial (treble damages) sanctions.[30] The courts repeatedly held the Act's prohibitions applicable to States,[31] counties,[32] and cities,[33] but a bankruptcy court was held not to be a "person" within the Act's prohibition against violating regulations thereunder.[34] While the statute specifically extended its prohibitions to Federal as well as State agencies, no case has been found in which a court has held such an agency subject to the Act.[35] The prohibitions and civil penalties of other statutes have also been held applicable to States and cities and counties,[36] but, al-

[28] MODEL PENAL CODE § 2.07(4)(a) (P.O.D. 1962). The other recent State Code revisions and proposed revisions (*see* note 54, *infra*) do not include such an exclusion.

[29] MODEL PENAL CODE § 2.07, Comment at 38 (P.O.D. 1962).

[30] Emergency Price Control Act of 1942, c. 26, Title III, § 302(h), c. 26, 56 Stat. 36.

[31] *Case* v. *Bowles*, 327 U.S. 92 (1946).

[32] *Hulbert* v. *Twin Falls Cnty.* 327 U.S. 103 (1946).

[33] *City of Dallas* v. *Bowles*, 152 F. 2d 464 (Ct. Emerg. App. 1945); *cf. Porter* v. *City of Charleston*, 155 F. 2d 209 (4th Cir. 1946).

[34] *In re Freeman*, 49 F. Supp. 163 (S.D. Ga. 1943).

[35] *But see Flores* v. *Secretary of HEW*, 228 F. Supp. 877, 878 (D. P.R. 1964), in which the court said that a Federal agency charged with enforcing a statute must pay due respect to court decisions involving the statute and that absent reversal or modification of such a decision, the agency's refusal or failure to follow the decision in future cases "appears to be contemptuous."

[36] *E.g.*, *United States* v. *California*, 297 U.S. 175, 185 (1936) (State is liable for statutory penalty for violation of Federal Safety Appliance Act by State-owned railroad):

> The [Act] is remedial, to protect employees and the public from injury because of defective railway appliances . . ., and to safeguard interstate commerce itself from obstruction . . . . The danger to be apprehended is as great and commerce may be equally impeded whether the defective appliance is used on a railroad which is state-owned or privately owned.

State of California v. *United States*, 320 U.S. 577, 585–586 (1944) (State and city are subject to Shipping Act's prohibitions applicable to "persons" carrying on the business of furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water, hence it was proper for district court to refuse to set aside Maritime Commission order to State and city to cease and desist from certain practices proscribed under the Act):

> California and Oakland furnished precisely the facilities subject to regulation under the Act, and with so large a portion of the nation's dock facilities, as Congress knew . . ., owned or controlled by public instrumentalities, it would have defeated the very purpose for which Congress framed the scheme for regulating waterfront terminals to exempt those operated by governmental agencies.

United States v. *Holmes Cnty.*, 385 F. 2d 145 (5th Cir. 1967) (county is a "person" against whom United States has statutory right to seek injunction pursuant to Federal voter-registration legislation (42 U.S.C. § 1971); *accord*, *United States* v. *McLeod*, 385 F. 2d 734 (5th Cir. 1967); *see also Griffin* v. *School Board of Prince Edward Cnty.*, 377 U.S. 218 (1964) (suits by Negro school children against State and county officials to enjoin them from invading fourteenth

though it has been said, for example, that there is nothing in the nature of a municipal corporation which would make it inherently incapable of committing a crime,[37] there does not appear to be a Federal case holding a governmental entity as such criminally liable.[38]

(2) *Liability of Individuals Acting for the Entity*

Many Federal statutes specifically provide that the individuals who actually engage in unlawful activities on behalf of an artificial "person" are criminally liable as well as the enterprise itself. Title 18 contains several provisions specifying that corporate officers, directors or managers, or members of partnerships, who participate in violations on behalf of their organizations are responsible.[39] The provisions in statutes outside of Title 18 relating to individual liability in many instances are not limited to executives but also contemplate liability on the part of "agents" and "employees."[40]

Even where a statute does not specifically provide that the individuals engaging in the conduct constituting the offense are criminally liable therefor, the courts have held such individuals responsible. The Supreme Court has stated the general rule that while Congress may exculpate the guilty individuals and hold only the corporation for

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amendment rights are not forbidden by the eleventh amendment); *cf. Monroe* v. *Pape*, 365 U.S. 167, 191 (1961) (Congress did not intend to bring municipalities within the ambit of 42 U.S.C. § 1983 (giving district court jurisdiction to entertain civil actions to redress deprivation of constitutional rights under color of state law)):

> It is said that doubts should be resolved in favor of municipal liability because private remedies against officers for illegal searches and seizures are conspicuously ineffective, and because municipal liability will not only afford plaintiffs responsible defendants but cause those defendants to eradicate abuses that exist at the police level. We do not reach those policy considerations. Nor do we reach the constitutional question whether Congress has the power to make municipalities liable for acts of its officers that violate the civil rights of individuals.

Accord, Burmeister v. *New York City Police Dep't*, 275 F. Supp 690 (S.D. N.Y. 1967).

[37] McQUILLAN, MUNICIPAL CORPORATIONS §§ 49.88–49.93 (3d ed. rev. vol. 1968).

[38] The Australian High Court, however, in dismissing an information against an employee of a government munitions factory under a statute which would have made his conviction dependent upon his being an accessory to an offense committed by the government factory, did not reject the possibility of the Crown being convicted of an offense. *Cain* v. *Doyle*, 72 Commw. L. R. 409 (1946). *See generally*, FRIEDMANN, LAW IN A CHANGING SOCIETY 165–166 (abr. ed. 1964).

[39] 18 U.S.C. § 608(c) (in cases of violation of section's limitations on contributions to political candidates by a "partnership . . . association, corporation or other organization" or group, the "officers, directors or managing heads thereof who knowingly and willfully participate in such violation, shall be punished. . . ."); 18 U.S.C. § 610 (every officer or director of a corporation (or labor organization) who consents to a contribution forbidden by the section (corporate contributions to political campaigns) is punishable); 18 U.S.C. § 709 (false advertising by use of words indicating Federal agency; violation by organization results in a fine; violation by an individual or by an officer or member participating or knowingly acquiescing in a violation by an organization results in fine and imprisonment); 18 U.S.C. § 1115 (where the owner or charterer of a vessel (through whose fault life is lost in violation of the section) is a corporation, any executive officer actually charged "for the time being" with the management of the vessel's operations who has knowingly and willfully caused or allowed such fraud or negligence is punishable).

[40] Examples of the various types of statutes outside of Title 18 specifically imposing liability on individuals for conduct engaged in on behalf of corporations and other artificial entities are compiled in Appendix B, *infra*.

offenses committed in its behalf, such an intent is not to be imputed to Congress without clear compulsion. The rule was first stated in *United States* v. *Dotterweich*,[41] in which the Court held (four Justices dissenting) that the president and general manager of a corporation was properly convicted of a violation of the Food and Drug Act's prohibition against the distribution of adulterated and misbranded articles in interstate commerce, even though no showing had been made that he knew of the violation: only in very exceptional circumstances has Congress held only the corporation and allowed its agents to escape,[42] and the food and drug legislation, being concerned not with the proprietary relation to a misbranded or adulterated drug but with its distribution, must be read to mean that the offense is committed "by all who do have a responsible share in the furtherance of the transaction which the statute outlaws . . . ." [43]

> Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.

The Court declined to define the class of employees which stands in such a relation to the corporate distributor as to be responsible for its violations of the law, saying that to attempt to do so would be a "mischievous futility" and that "such matters" must be entrusted to "the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries." [44] The dissenting Justices held that guilt should not be imputed to a corporate officer solely on the basis of his responsibility and authority as an officer, without any evidence of his personal guilt, unless there is a clear indication in the statute that corporate officers are intended to be so held. They found no such indication in the Food and Drug Act. In addition, the dissent said: [45]

> This fatal hiatus in the act is further emphasized by the ability of Congress, demonstrated on many occasions, to apply statutes in no uncertain terms to corporate officers as distinct from corporations.

It cited several statutes containing a provision to the effect that whenever a corporation violates a penal provision of the Act, the violation will also be deemed to be that of the officers who participated in the violation, and pointed out that such a provision had been deleted from

[41] 320 U.S. 277 (1934).

[42] The Court cited *Sherman* v. *United States*, 282 U.S. 25 (1930), in which the criminal penalties of a statute were held not to apply to officers who were State officials responsible for the administration of a State-owned railroad. The duty of immediate supervision of the employees who violated the law (the Safety Appliance Act (45 U.S.C. § 1 *et seq.*)) was in an inspector appointed by the officers. The officers did not know of the violations. The Court reasoned that the penalty was imposed only upon common carriers, and that under the circumstances the "carrier" was the State and not the board of officers having responsibility for the railroad's administration.

[43] 320 U.S. at 284–285.

[44] *Id.* at 285.

[45] *Id.* at 289.

the final version of the Food and Drug Act, concluding that Congress must have intended to exculpate all corporate officers, innocent or guilty, from criminal liability under the Act.

The Court again applied the rule in *United States* v. *Wise*.[46] There the Court was concerned with an officer of a corporation who had clearly participated in a violation of section 1 of the Sherman Act. It held:[47]

> No intent to exculpate a corporate officer who violates the law is to be imputed to Congress without clear compulsion; else the fines established by the Sherman Act to deter crime become mere license fees for illegitimate corporate business operations. Following Dotterweich, we construe § 1 of the Sherman Act in its common sense meaning to apply to all officers who have a responsible share in the proscribed transaction.

The argument that section 14 of the Clayton Act (15 U.S.C. § 24) was intended to limit prosecution of corporate officers acting in their representative rather than individual capacities to offenses under the Clayton Act and thus exculpate such officers from criminal liability for violation of section 1 of the Sherman Act was rejected:[48]

> [W]e hold that a corporate officer is subject to prosecution under § 1 of the Sherman Act whenever he knowingly participates in effecting the illegal contract, combination or conspiracy—be he one who authorizes, orders or helps perpetrate the crime—regardless of whether he is acting in a representative capacity.

Thus the law is that, unless there is a clear legislative instruction to the contrary, any corporate officer who participates, in whole or in part, in a proscribed transaction on behalf of the corporation (and if the proscription is absolute, no consciousness on the part of the officer of the violation is required) is subject to the penal sanctions imposed by the statute defining the offense as well as the corporation on whose behalf he is acting. No specific provision in the statute to that effect (such as section 14 of the Clayton Act) is required to produce this result.[49]

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[46] 370 U.S. 405 (1962).

[47] *Id.* at 409.

[48] *Id.* at 416.

[49] Federal lower court cases holding participating officers criminally liable for violations of penal statutes include: *United States* v. *Bach*, 151 F. 2d 177, 179 (7th Cir. 1945) (conviction of corporation's salesman for selling whiskey in excess of the OPA ceiling price):

> The fact that the price was paid to [the corporation] and did not go to the defendant does not relieve him from his criminal responsibility for having made the sale. He actually participated in the transaction and knowingly and intentionally sold the whiskey at a price over the ceiling.

Lelles v. *United States*, 241 F. 2d 21 (9th Cir.), *cert. denied*, 354 U.S. 974 (1957) (conviction of President for causing corporation to violate Food and Drug Act held proper); *United States* v. *Colosse Cheese & Butter Co.*, 133 F. Supp. 953 (N.D.N.Y. 1955) In many instances the courts, holding that a corporate officer has been properly convicted, have stated that such officers may be convicted even if they are not present at the time of the violation and do not supervise the same. *E.g.*, *Carolene Products Co.* v. *United States*, 140 F. 2d 61, 66 (4th Cir.), *aff'd*,

While the language of the rule stated in *Wise*, that a statute which imposes liability on "any person" who engages in the conduct forbidden applies "to all officers who do have a responsible share in the proscribed transaction," would seem broad enough to include officers who passively condone violations of law by inferiors, it has been persuasively argued that the fact that the opinions in *Wise* repeatedly referred to the words "acts," "acted" and "acting" indicates that the Court had in mind participation of a more affirmative nature than mere knowledge of violation by a subordinate coupled with passive acquiescence or nonaction.[50] Absent a statutory declaration that specific officers are to be deemed guilty of a corporate violation,[51] or an explicit imposition upon the corporate executive of an affirmative duty

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323 U.S. 18 (1944) (conviction of officers for violation of 21 U.S.C. § 61–63 prohibiting introduction of filled milk into interstate commerce upheld):

> There is ample authority in support of the principle that the directing heads of a corporation which is engaged in an unlawful business may be held criminally liable for acts of subordinates done in the normal course of business, regardless of whether these directing heads personally supervised the particular acts done or were personally present at the time and place of the commission of these acts.

Golden Grain Macaroni Prods. Co. v. *United States*, 209 F. 2d 166, 1968 (9th Cir. 1953 (conviction of President and General Manager of corporation violating Food and Drug Act upheld; criminal responsibility of corporate officer with broad authority does not depend on his physical presence at plant on date of violation). The cases cited, including *Dotterweich* and *Parfait Powder Puff Co.*, involved strict liability: in the absence of a statutory statement that a corporate offense was deemed to be that of the officer also (*see* note 52, *infra*) such liability would probably not exist under a nonstrict liability statute.

[50] Whiting, *Criminal Antitrust Liability of Corporate Executives*, 21 ABA ANTITRUST SECTION 327, 331–332 (1962). *See also Hearings on S. 996, S. 2252, S. 2253, S. 2254 and S. 2255, Legislation To Strengthen Penalties Under the Antitrust Laws, Before the Subcomm. on Antitrust and Monopoly Power of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., at 14–15, 72–73, 75, 78–79, 100, 110 (1961), indicating pre-*Wise* congressional doubt as to liability for such passive conduct. The bills would have amended section 14 of the Clayton Act to impose liability upon corporate executives for ratification of acts constituting a violation; ratification would have been defined as the possession of knowledge or reasonable cause to believe that a corporation is engaging in a violation, the possession of authority to stop or prevent the violation or to report it to someone with such authority, and the failure to exercise that authority.

[51] *See, e.g.*, 18 U.S.C. § 609, which sets limits on the amount of money which political committees may receive or expend, specifies that any contributions received or expended on behalf of a committee with the knowledge and consent of its chairman or treasurer is deemed to be received or expended by the committee, and provides that:

> Any violation of this section by any political committee shall be deemed also to be a violation by the chairman and the treasurer of such committee and by any other person responsible for such violation. . . .

Similarly, the Longshoremen's and Harbor Workers' Compensation Act provides (33 U.S.C. § 938) that any employer required to secure compensation under the Act who fails to do so is guilty of a misdemeanor, and that:

> [W]here such employer is a corporation, the president, secretary and treasurer thereof shall be also severally liable to such fine or imprisonment as herein provided for the failure of such corporation to secure the payment of compensation. . . .

Furthermore, section 938 also makes it a misdemeanor for an employer to knowingly dispose of its property after an injury to an employee, with intent to avoid the payment of compensation under the Act, and provides that:

> [I]n any case where such employer is a corporation, the president, secretary and treasurer thereof shall be also severally liable to such penalty

to exercise care to discover and prevent illegal conduct by employees,[52] it would seem doubtful that the knowing but nonacting executive would be held criminally liable as a "participant" for violation of a nonstrict liability statute.[53]

B. JUSTICE DEPARTMENT POLICY UNDER EXISTING LAW

In consultations with representatives of the Administrative Regulations Section of the Criminal Division of the Department of Justice, it was learned that the official policy of the Department is to include individual defendants in corporate prosecutions whenever an individual with a "responsible and proximate relation to the violation" can be found, rather than to prosecute the corporation alone: the purpose is to avoid the possible fines being treated by the corporation as a "cost of doing business." It is not the policy of the Department, however, to prosecute individuals who do not have such a responsible and proximate relation to the violation, or to prosecute an individual in the lower echelon of the corporate hierarchy where a responsible individual higher up in the hierarchy can be found. In many instances the U.S. Attorneys' dockets are cleared in these cases by the acceptance of a plea of guilty by the corporation in exchange for dismissal of the prosecution against the individuals, particularly where it appears that the individual has taken steps to correct the situation in respect of which the violation occurred.

The fact that judges and juries do not like to convict individuals of "white collar crimes" was also noted.

C. MODEL PENAL CODE AND STATE PROVISIONS

The Model Penal Code and several of the recent revisions and proposed revisions of State Criminal Codes contain a statutory statement of the circumstances under which corporations and unincorporated associations may be convicted of an offense.[54] In essence, the effect of the Model Penal Code provision is to restrict corporate liability to:

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of imprisonment as well as jointly liable with such corporation for such fine.

The officers are also made personally severally liable, jointly with the corporation, for compensation for any injury to the employee while the company fails to secure the compensation required.

The Ship Mortgages Act provides (46 U.S.C. § 941(b)) that "a mortgagor who, with intent to defraud, violates [provisions requiring disclosure of prior liens on vessel], and if the mortgagor is a corporation or association, the president or other principal executive officer . . . shall . . . be fined . . . or imprisoned. . . ."

[52] *See, e.g.*, Comment, *Increasing Community Control Over Corporate Crime—A Problem in the Law of Sanctions*, 71 YALE L.J. 280, 303 (1961), which suggests the imposition of such a duty upon corporate executives, with criminal sanctions for failure to perform.

[53] Liability for such passive conduct could be incurred under the statute which specifically imposes liability upon the officer who "knowingly acquiesces" in a violation; the officer would be liable not as a "participant" under *Wise*, but rather pursuant to the express terms of the statute.

[54] MODEL PENAL CODE § 2.07 (P.O.D. 1962); N.Y. REV. PEN. LAW §§ 20.20, 20.25 (McKinney 1967); ILL. REV. STAT. §§ 5–4, 5–5 1961; PROPOSED DEL. CRIM. CODE §§ 140–143 (Final Draft 1967); PROPOSED CRIM. CODE FOR PA. § 207 (1967); MICH. REV. CRIM. CODE §§ 430, 435 (Final Draft 1967); CAL. PENAL CODE REVISION PROJECT § 409 (Tent. Draft No. 1, 1967).

(1) offenses which (a) are (i) violations or (ii) defined by a statute other than the Code in which a legislative purpose to impose liability on corporations plainly appears (such a purpose is presumed for strict liability statutes), and (b) consist of conduct engaged in by an agent of the corporation acting in behalf of the corporation within the scope of his employment, and if strict liability is not imposed, (c) were not committed despite the exercise of due diligence by the high managerial agent having supervisory responsibility over the subject matter of the offense to prevent its commission (burden of proving due diligence on corporation); provided that if the law defining these offense designates the agents or circumstances of corporate liability, such provisions prevail;

(2) offenses consisting of an omission to discharge a duty of affirmative conduct imposed upon corporations by law; and

(3) offenses the commission of which is 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 employment.

Criminal liability of unincorporated associations is similarly restricted, but the provision for liability for offenses involving high managerial agents and the board of directors is eliminated. Governmental agencies are excluded. "Agent" and "high managerial agent" are defined. It is made clear that an individual cannot escape liability for conduct merely because he engages in it for the corporation rather than for himself; that the individual having primary responsibility for the discharge of a duty to act imposed upon the corporation or association is legally accountable for a reckless omission to perform the required act to the same extent as if the duty were imposed directly upon him; and that a person convicted of an offense by reason of his legal accountability for the "conduct" of a corporation or unincorporated association is subject to the sentence authorized by law when a natural person is convicted of an offense of the grade and the degree involved.

The State revisions and proposed revisions are essentially variations on this theme; the differences between the Model Penal Code and the various State provisions are noted in the table attached to this memorandum.

II. Major Policy Considerations

A. Background; possible targets for criminal sanctions

The purpose of imposing[55] criminal sanctions may be either (a) to restrain conduct which will or in all probability will harm others (for example, theft or fraud),[56] or (b) to coerce the taking of affirma-

[55] *See* Ball and Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 Stan. L. Rev. 197, 199 (1965) [hereinafter cited as "Ball & Friedman"] which distinguishes between the "use" of criminal sanctions in the sense that they are authorized by statute, and "use" in the sense that they are actually applied.

[56] Theft and fraud *against* the corporation by its employees are not within the scope of this paper, which is limited to crimes committed *on behalf* of the corporation—for example, theft or fraud in which the corporation is the intended beneficiary.

tive action so that the possibility that harm to others might result from the conduct of one's affairs is reduced (for example, adulterating, misbranding of food and drugs, failure to comply with safety regulations designed to protect the public by companies which operate or use facilities of interstate commerce, conducting a business without a license required for regulatory (rather than purely revenue) purposes).[57] When it is sought to control conduct performed in the course of conducting a corporate enterprise, which is characterized by a distinct separation of ownership, management and operation,[58] it must further be recognized that such conduct may be reached not only by directing sanctions to the actor himself (and his accomplices),[59] but also by directing them to others in the corporate structure who cannot be so connected with the particular acts constituting the offense, but who have control over or influence upon the actor's conduct.

The objective in considering whether to draft a general Federal statute describing the nature and extent of responsibility for an offense committed in furtherance of a corporate enterprise, and if so how, is to determine the circumstances under which the goals of (a) deterrence and (b) coercion can be achieved more effectively by extending responsibility for criminal conduct beyond the individuals directly performing it (or aiding in its performance) up through the authority and ownership levels of the corporation, or to the corporate

[57] Also, failure to comply with record keeping and reporting requirements which are imposed for the purpose of enabling the government to establish safety standards and other business regulations to protect the public and/or the economy.

[58] The Model Penal Code and certain of the State Code revisions following it (*see* note 54 *supra*) treat corporations and unincorporated associations separately because of the wide range in types, purposes, organization and activities of such associations. *See* MODEL PENAL CODE § 2.07, Comment at 153 (Tent. Draft No. 4, 1955). But corporations range widely in type, purposes, organization and activities also. Most of the existing Federal statutes do not distinguish between corporations and unincorporated associations, nor does there appear to be a basis, in most Federal criminal legislation, for making such a distinction. The Supreme Court has rejected the argument that the prevalence of the "aggregate" theory of partnerships in American jurisdictions requires the exculpation of partnerships from criminal responsibility. *United States* v. *A&P Trucking Co.*, 358 U.S. 121 (1958) (four Justices dissenting) (discussed *supra* at notes 24, 25 and accompanying text). In a situation in which a distinction is proper, partnerships or other unincorporated associations may be excluded from the coverage of the statute (as in the Bank Holding Company Act (12 U.S.C. § 1847)). But for the purposes of drafting a *general* statute describing criminal responsibility for conduct on behalf of artificial bodies, the considerations involved would seem not to vary according to the form of the artificial entity representing the persons on whose behalf the behavior is engaged in. In all cases in which ownership and operation are divided, and the operation is performed by managers and employees who are not identical with the owners, the problems with respect to where to place responsibility are the same. Conversely, the considerations involved do not apply simply because a business is conducted through an artificial entity; they are applicable to the incorporated one-man operation only to the extent that others act on behalf of the owner and violate the law in the course of conducting his business. Therefore, the term "corporation" will be used in this paper to refer to all types of artificial entities, including partnerships and other unincorporated associations, in which ownership and operation are divided.

[59] The term "actor" as used in this memorandum includes the accomplices of the actor as well as the individual who actually commits the offense. The relevant distinction for the purposes of this analysis is between those directly connected with the offense and those who, while they have the power or ability to prevent its commission, are not under a legal duty to do so and hence are not criminally punishable for failure to exercise their authority.

entity itself, than they would be by limiting responsibility to the individuals immediately involved, and to locate the point at which extended responsibility for various crimes reaches optimum effectiveness and should, therefore, terminate.

Actors (including accomplices)

The most immediate target for criminal sanctions in the corporation is the individual who actually does the act proscribed or omits to do the act required by the criminal statute. Under traditional notions of accomplice liability all those who may be said to have directed or caused the actor to do the act, or to have participated in accomplishing the proscribed result, may be treated as the actors. Individuals at all levels of the corporate hierarchy may engage in conduct which constitutes the actual doing of the thing forbidden. The employees of the corporation may actually perform the conduct forbidden, either at the insistence (explicit or tacit) of the officers or certain of them, or on their own initiative. The officers may be actors by reason of their own acts or, as "aiders and abettors" or "accomplices" of the employees, by directing the employees to do the acts constituting the offense.[60] But neglect of their general duties of supervision and management would not constitute them "actors" or "accomplices" in the traditional sense (although a statute could impose liability on them for breach of such a duty). The directors may also be "actors," and other "action" may take the form of a resolution which calls for violation of the law, or of willful authorization or ratification of policies and activities on the part of the officers which violate the law. In addition, any given director may personally aid and abet the commission of an offense by an officer or employee down the line. Finally, it is conceivable that the shareholders may be "actors"; they might willfully elect or re-elect directors who they know will institute policies requiring that the business be conducted through criminal means (fraud, for example).

Many of the existing Federal statutes contain provisions explicitly directing the criminal sanctions of the statute to "actors" in the bottom three levels of the corporate structure (that is, employees, officers, and directors). For example, the Interstate Commerce Act provides (49 U.S.C. § 10(1)) that any common carrier, or if such common carrier is a corporation, any officer or employee thereof, who shall willfully do or cause, suffer or permit any act prohibited by the Act shall be subject to a fine of $5,000, and if the charge is discrimination in rates, also be subject to imprisonment for 2 years. The Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 941(f)) directs its sanctions (for willful failure of an employer thereunder to comply with its safety requirements) to "the officer who willfully permits" the violation to occur, as well as to the corporate employer. The Internal Revenue Code (26 U.S.C. § 7343) directs its sanctions to the officer or employee of a corporation, or the member or employee of a partnership who, as such officer, member or employee is under a duty to perform the act in respect of which the violation occurs, as well as to the corporation or partnership owing the tax. Section 14 of the Clayton Act reaches corporate directors who participate in the

[60] *Cf.* the cases cited *supra* note 49, which state that *the corporation* commits the offense and the officers and employees of the corporation "aid and abet" the *corporation*.

acts constituting the violation as well as officers or other agents and the corporation itself. Finally, the Supreme Court of the United States has said that a statute will be construed to apply to all who have a responsible share in the proscribed transaction, unless the imputation to Congress of an intent to exculpate the individuals acting for a corporation and hold only the corporate entity is clearly compelled.[61]

On the other hand, no Federal statute has been found which explicitly directs its sanctions to the shareholders of the corporation personally. Most Federal statutes reach the collective investment of the shareholders by authorizing the imposition of a fine upon corporate funds. Such statutes do not depend upon "action" by the shareholders,[62] however; hence they must not be viewed as sanctions directed to the shareholders as "actors" with a direct deterrent or coercive effect upon the conduct sought to be controlled.

The Federal statutes authorizing corporate fines (and the judicial decisions applying them) seem to proceed from the assumption that the corporate entity itself is capable of "acting" and hence of being deterred or coerced by such fines. This notion is reflected in the statements of some of the courts that it is the corporation which actually commits the offense and its agents are guilty because they have aided and abetted the corporation,[63] and may be responsible for the importation from tort law of the device of "imputing" the acts, knowledge and intent of corporate agents to the corporation in order to subject the corporation to a fine.[64] As a matter of fact, however, a corporation is nothing more than a "convenient legal device." [65] The corporate form is simply not capable of doing the physical act which violates the law.[66] Neither is it capable of mental self-direction, much less of harboring a specific evil intent to cause an immediate injury to another. It is possible to "personify" the corporate entity in order to

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[61] *United States* v. *Wise*, 370 U.S. 405, 409 (1962). Where the statute violated is one involving strict liability, the Court has indicated that a corporate officer may be held solely on the basis of his responsibility and authority as an officer without any showing that he personally participated in the particular violation. *United States* v. *Dotterweich*, 320 U.S. 277 (1943).

[62] *Cf.* the provision in a post-war French ordinance, decreeing confiscation as punishment for publishing establishments which had collaborated with the enemy, which provides for compensation for all shareholders who can establish their innocence. Discussed in Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21, 30 (1957) [hereinafter cited as "Mueller"].

[63] *See* note 49 *supra*; *cf. United States* v. *Dotterweich*, 320 U.S. 277, 281 (1934) (discussed at note 61, *supra*.): "[T]he only way in which a corporation can act is through the individuals who act on its behalf. . . . [F]rom the point of view of action the individuals are the corporation."

[64] The courts have adopted the tort shorthand of "imputation" without any explanation of how the tort principle of respondeat superior, which may well be necessary as a means of accomplishing the tort objective of compensation for injury, is related to any of the objectives of the criminal law. *See* Mueller, *supra* note 62, at 38, 39.

[65] Henderson, *The Position of Foreign Corporations in American Constitutional Law*, 167–168 (1918), quoted in Lee, *Corporate Criminal Liability*, 28 COLUM. L. REV. 1, 181, 198–199 (1928) [hereinafter cited as "Lee."]

[66] It is no more capable of omitting to do an act required than of doing an act forbidden—omission to act implies the ability to do so. *See* Lee, *supra* note 65, at 4–5, for early cases stating that a corporation may be guilty of nonfeasance but not misfeasance.

"rationalize" the application to it of the criminal law,[67] but to do so does not give it the capability of acting or of being deterred or coerced which it lacks in fact.[68] Many arguments have been advanced in support of the corporate fine but they neither depend upon nor require acceptance of the fiction that a corporation is capable of acting. There would appear to be no substantial reason for perpetuating the fiction and allowing it to find its way into a new Federal Criminal Code.

Nonactors (individuals other than the actor and his accomplices, and the corporate entity)

There are several possibilities with respect to controlling conduct in furtherance of a corporate enterprise indirectly, by placing responsibility for such conduct upon persons in the corporate structure other than the person actually engaging in the conduct, including the corporate "person" itself.

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[67] The idea that a corporation may be compared to an individual for purposes of making the application of the criminal law to it "rational" is reflected in the Model Penal Code provision describing the limits of corporate liability, as well as in English law and in the decisions of some of the State courts. According to the theory (which is accepted as a matter of *fact* by some, as a necessary *fiction* by others), the corporate "body," which exists separately from the shareholders, may be viewed as having a "mind" capable of mental self-direction and of harboring an evil intent (the board of directors and executive officers) and "hands" (the directors and officers and/or inferior employees). Where "concurrence of an evil-meaning mind with an evil-doing hand" (*United States* v. *Morissette*, 342 U.S. 246 (1952)) is required to render an unlawful act a crime, the corporation may be said to "commit" the crime if its "mind" gives a command and its "hands" obey, and the consequence is a violation of a criminal law. Since the law does not permit the conviction of an individual for a serious offense (that is, one for which punishment may be directed to his body as well as his pocket book) if the "hand" acts without direction from the "mind" or where the harmful consequences of the "hand's" act are not intended by the "mind," the theory proceeds, a corporate "body" should not be punished for a serious offense when its corporate "hands" act without direction from its "mind," nor, under the Model Penal Code at least, should it be punished for any other offense if it can show that its "mind" exercised due diligence to prevent unlawful acts on the part of its "hands." Of course for offenses which are defined to exclude any mental element, the corporate "body" may be punished for undirected acts of its "hands" just as any human being might be. *See generally* Williams, *Criminal Law—The General Part* 675 et seq. (1953); Mueller, *supra* note 62, at 25, 38–43.

[68] *See* Lee, *supra* note 65, at 198–199 (quoting Henderson): "[T]o attribute to the corporate 'personality' any sort of reality seems to be the most misleading anthropomorphism." In this respect the distinction between the criminal and the civil law is important. For the civil law purposes of tort, contract and property law, the corporate fiction is a highly useful method of applying the principle of limited liability; a contract or tort constitutes a corporate "act" although obviously the physical signing of the contract or driving of the truck which injures a pedestrian is performed by an individual who is acting on behalf of the corporation. The civil law focuses upon the adjustment and protection of legal relations between private individuals. The criminal law on the other hand focuses upon conduct. Realistically, it is far more difficult to swallow the notion of a corporation performing an "act" forbidden and punishable by the criminal law, which focuses upon *conduct* rather than *relationships*, than it is to accept the idea of a corporate execution of a contract—an "act" necessary for, but essentially incidental to the legal commitment of corporate funds to an arrangement which changes its legal relationship to another individual or organization; in the one case it is the "act" itself which is the subject of legal control, in the other it is the *relationship*, created or evidenced by the "act," to which the regulation is addressed.

(1) *Directors and officers*

There are two possibilities with respect to the corporation's managers. First, the managers of the corporation could be held vicariously responsible for the criminal conduct of the employees of the corporation. The most extreme application of this possibility would be to authorize a fine and/or jail term for the directors for all types of offenses committed by all employees of the corporation: the directors would be held responsible (a) even though they have no direct means of controlling the conduct of the employees, and (b) regardless of (i) whether they had knowledge of the fact the conduct was taking place, or (ii) whether the officers appointed by them were involved in the conduct; each of the executive officers could be held similarly responsible without regard to whether the offense occurred within his particular line of duty or was committed by an employee under his supervision. A more limited application of the vicarious responsibility possibility would be to restrict managerial responsibility on a line of duty basis—the directors would be responsible only for offenses occurring in connection with corporate activities requiring board approval and offenses in which elected officers were involved; and each of the executive officers would be held for offenses occurring within his sphere of authority and for offenses committed by employees under his supervision. Vicarious responsibility could be further restricted by eliminating directorial liability and limiting responsibility of the officers to those offenses within their jurisdiction over which no other person had the final signoff power. Finally, vicarious liability of the officers and directors could be limited to strict liability offenses.[69]

The second possibility with respect to the officers and directors would be to pin their responsibility upon their own fault; they could be held responsibile for offenses which they could have prevented had they properly performed their duties of management and supervision. No existing Federal statute has been found which so provides, and such liability would not seem to exist under the decisional law in the Federal courts. But the suggestion has been made at various times that such a duty be statutorily created. Thus, the following language was proposed in 1921 for inclusion in the Packers and Stockyards Act:[70]

> If any person acting for or employed by any individual, partnership, corporation, or association, negligently or willfully omits personally to perform any necessary act or properly to supervise or apportion duties among his subordinates, in the execution of the authority or functions vested in him, and by reason of such omission a violation of this Act directly results, he shall be liable to all the penal and other provisions of this Act with respect to such violation. . . .

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[69] Corporate officers may be said to be vicariously responsible for strict liability offenses under existing law (*United States* v. *Dotterweich*, 320 U.S. 277 (1934), discussed *supra*), because the basis for such responsibility is their position in the corporation. (This liability is not "vicarious" in the derivative sense because the officer's liability does not depend upon the commission of the offense by a particular employee; it is a *result* which is the basis of liability rather than an act.)

[70] *See* Lee, *supra* note 65, at 193–196, which discusses imposition of such a duty and quotes the bill and report of the House Committee on Agriculture with respect thereto. The report states, in part:

> The committee is of the opinion, however, that the only effective method of compelling huge industrrial corporations, such as the packers and stock-

More recently, hearings were held in 1961 on a bill which would have amended section 14 of the Clayton Act to impose liability on corporate executives for "ratifying" acts constituting a violation of the act, defining "ratification" as the possession of knowledge or reasonable cause to believe that the corporation is engaging in a violation, the possession of authority to stop or prevent the violation or to report it to someone with such authority, and the failure to exercise such authority.[71] And the possibility of imposing a duty on corporate officers "to learn of and control the activities of their employees" was suggested in the recent critique of the Federal Trade Commission prepared by several Yale Law School students under the direction of Ralph Nader.[72]

Finally, it has been suggested that such a duty could be imposed generally upon all corporate executives with respect to all types of criminal conduct occurring on behalf of their corporations.[73] Liability for failure to perform the duty (*i.e.*, to exercise one's authority to prevent the offense) might be compared to the liability, pursuant to subsection (1)(b) of section 401 of the proposed Code, of a public official who fails to make the required effort to perform his public duty to prevent the commission of an offense. One difference would be that liability under section 401 depends upon intent that the offense be committed, whereas a duty imposed on corporate management would probably be meaningless if intent was required; liability would probably have to depend upon negligence, or, perhaps recklessness. The imposition of such a duty, enforced through criminal sanctions directed

yard operators, to comply with the law, is to compel the officers in charge of the activities of the corporation to assume personal responsibility for seeing to it that the corporate affairs are conducted in accordance with law, rather than to rely solely on holding the corporation responsible by fine. The mere fining of the corporation is not so severe but that often the corporation can easily afford, from the profits obtained from the violation, to pay any fine that may possibly result upon being proved guilty of the violation. And the stockholders despite their indirect loss either feel that a good bargain has been driven in their behalf or will find themselves too powerless to bring pressure to bear upon the officers. Again in many cases the officers control a majority of the stock and the realization that a pecuniary loss only will be suffered is a small preventative unless the fine authorized is so large as to make the court hesitant [to] impose it.

[71] *Hearings on Legislation To Strengthen Penalties Under the Antitrust Laws*, *supra* note 50. The House also held hearings on a companion bill.

[72] *The Consumer and The Federal Trade Commission—A Critique of the Consumer Protection Record of the FTC*, in 115 CONG. REC., E.370, E.380 (daily ed. Jan. 22, 1969).

[73] *See, e.g.*, Comment, *Increasing Community Control Over Corporate Crime—A Problem in the Law of Sanctions*, 71 YALE L.J. 280, 303–304 (1961) [hereinafter cited as Comment, *Increasing Community Control*]; Davids, *Penology and Corporate Crime*, 58 J. CRIM. L.C. & P. S. 524, 530 (1967), and authorities there cited; Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 430–433 (1963) [hereinafter cited as "Kadish"], noting the difficulties with respect to defining the extent to which an official of a nationwide corporation must be aware of its far-flung operations. In this connection, responsibility for an omission to perform an affirmative act required by law would in many cases be even more difficult to pinpoint than responsibility for an affirmative unlawful act. The duty imposed upon corporate managers to prevent offenses could include the duty to *allocate* responsibility for compliance as well as a duty to manage and supervise. Perhaps provision could be made for Congressional or administrative direction, with specific reference to the types of business covered by any particular regulatory statute, as to the individual to be responsible for the duty to allocate and liable in case the allocation is never made and the required act never performed.

to the managers, would tend to decrease the incidence of conduct constituting the actual offense by applying a threat to those actually having control over the actors (compulsory self-policing), as well as by stepping up the deterrent impact upon the actor—he is now threatened not only with detection and prosecution by law enforcement officials but with an increased possibility of detection and punishment administered within the corporation for which he works.

The sanctions of the strict liability statutes, to the extent they are applied to corporate managers, may also be viewed as creating a special duty for the officers and directors of the corporation. Under these statutes, the officers of a corporation may be held without showing they participated in the act to which liability attaches; (*i.e.*, introduction of the adulterated product into interstate commerce), or that the act could not have been completed or done if they had properly performed their duties of management and/or supervision. Apparently the theory is that if the president of a company is to be held strictly liable when his company's product turns out to be adulterated or misbranded, he will go out of his way to see to it that procedures are established to avoid the possibility that the product is inadvertently adulterated or misbranded.[74] Thus it has been said that:[75]

> [C]ertainty of conviction is increased. This may readily exert an added deterrent force upon the actor [referring to corporate manager] faced with a choice, since the chances of escaping punishment for a culpable choice, intentional or negligent, are decreased. And even when there is no immediate choice, the effect could sometimes be to influence persons to arrange their affairs to reduce to a minimum the possibilities of accidental violation; in short, to exercise extraordinary care. Further, the persistent use of such laws by legislatures and their strong support by persons charged with their enforcement makes it dogmatic to insist they cannot deter in these ways.

The type of conduct sought to be promoted by the strict liability statutes is not one which can be performed by lower echelon personnel, who have no power to determine what procedures should be instituted to prevent violation, but is one which can be performed only by the managers of the business who do have such power. Thus the strict liability duty is primarily one of management rather than supervision. It is conceivable, however, that the threat of sanctions directed to the managers of the corporation could have an indirect effect on employees down the line in providing a motive for them to use ingenuity greater than that which their jobs would normally entail in order to create and propose to management improved procedures of manufacture or processing to reduce the possibility of violation.

(2) The corporation

As has been noted, the corporation itself, being inanimate, cannot "act" and so cannot be deterred or coerced. And, while theoretically the shareholders can act, and can be deterred or coerced, as a practical matter they are almost never in a position to participate in the con-

[74] *See United States* v. *Dotterweich*, 320 U.S. 277 (1934).
[75] *Kadish*, *supra* note 73, at 441–442.

duct constituting an offense. Hence, fines imposed upon the corporation do not operate directly upon "actors." Similarly, neither the corporation itself (because it is inanimate) nor the shareholders (as a practical matter)[76] can control or influence the managers of the business, or the manner in which they manage it or the supervision of the corporation's employees. Thus, any liability resulting from aiming any sanction at the corporation itself will not be based upon the personal fault of those who bear it, but rather must be vicarious.[77]

There are many possibilities with respect to corporate liability. Responsibility of the corporation could be made total or could be strictly limited; it could be made to depend upon one or more of the following factors:

(a) the nature of the offense,

(b) the status in the corporate hierarchy of the employee committing it, and

(c) the degree of involvement or culpability of the corporate managers.

Thus liability could extend to all types of offenses committed by anyone working for the corporation. Or it could be limited to offenses in which the directors and officers are "actors" (or accomplices); it could be made to depend upon a specific instruction of supervisory personnel; or upon the failure of a manager to properly perform his duties of management and/or supervision; it could be limited to offenses committed by lower echelon employees where all of the managers have properly performed their duties; or to offenses committed in disobedience to a specific instruction on the part of management. It could be restricted to strict liability offenses; to regulatory offenses not re-

[76] One of the reasons for the lack of practical control on the part of the shareholders of a large corporation is that they are rarely in a position to know about the violations of law which take place in conducting the business of the corporation. To authorize a judge to include a provision, in a judgment of conviction of a corporation, requiring that notice of the conviction be given to the shareholders, might be one way to ameliorate the problem. But it would not give the shareholders the power to alter policies of management if that power was not already present, as it usually is not. Furthermore, it would be effective only to the extent that ownership remained relatively stable. And, it would seem, notice of conviction of the corporation would have no greater effect upon the action of the shareholders to change the policy of management than would notice of conviction of a specific manager; in fact, notice of conviction of a manager would seem to be more likely to result in a change of policy initiated by the shareholders, assuming a case where they had the power to control management, since it would be clear where responsibility for the conviction rested.

[77] The point that the burden of a corporate fine will almost always be borne by the "innocent shareholders" has often been made (*see, e.g.*, MODEL PENAL CODE § 2.07, Comment at 148 (Tent. Draft No. 4, 1955); Lee, *supra* note 65, at 13, 181–182; Mueller, *supra* note 62, at 39–40, but to the extent that it reflects the notion that corporate fines are therefore unfair it is not particularly persuasive. From the shareholders' point of view, there are many hazards or risks which come with a share of stock and are, theoretically at least, reflected in the price of the investment. If the corporate fine can be justified on grounds of deterrence or coercion, or as contributive to some other purpose of the criminal law, the fact that "innocent" people will bear its brunt should not constitute a substantial stumbling block. (It might also be noted that if a fine is so large as to make a serious dent in the shareholders' investment, it may be possible to pass it along to the consumer (*see* Mueller, *supra* note 62, at 27–28, quoting Professor Glanville Williams' statement at 1956 debate on Model Penal Code § 2.07), or even to the government in the form of a tax deduction or credit (such as the IRS ruling in connection with the settlement which resulted from the conviction of General Electric and other electrical companies for price fixing.)

quiring a specific intent to cause harm; to offenses in which such a specific intent is required; to felonies; to misdemeanors; to infractions.

The existing Federal case law does not seem to place any limits upon corporate liability.[78] The Model Penal Code, on the other hand, places several limits on it.[79]

The reasoning behind directing sanctions to the corporation seems to "be based upon the assumption that a primary purpose of the corporate fine is to encourage diligent supervision of corporate personnel by managerial employees in those cases in which the corporation is bound by the conduct of inferior personnel." [80] But fines imposed on the shareholders (that is, the corporation) could not serve as a check upon the unlawful acts of management as effectively as would penalties imposed upon those directors and officers who direct the offender's activities more immediately than do the shareholders.[81] A more direct means of coercing due diligence on the part of management would be to impose a duty of diligent supervision and management directly upon the managers, as suggested above. It may be that the availability of the corporate fine could actually impair the incentive of individual managers to conform if, for example, they could reasonably anticipate that either the prosecution or the jury would tend to substitute corporate liability for their own.[82]

The individual actors in the corporation may in some instances be influenced more by the threat of a substantial corporate fine than by the perhaps remote possibility of personal prosecution. This would be true as to lower echelon actors only to the extent that the corporation's managers were not directly involved in the offense, for in cases of such involvement the decision to cross the line would not be made by the inferior actor. Absent such involvement at higher levels, inferior employees might in many instances consider the possibility of taking short cuts which violate the law, or otherwise attempt to save the corporation money or increase its profits, in order to advance their position in the corporate hierarchy. In such cases the threat that a fine will be imposed upon the corporation which is substantial enough to outweigh the possible gain in profit or savings to the corporation by reason of a violation of law (for example, double the gain or loss) could have a deterrent effect on the employee greater than the threat of personal prosecution, if he knows (a) that the fine will inexorably follow detection of the offense, (b) that he will be fired upon discovery that he was responsible, and (c) that the violation is of a nature which will not evoke moral outrage on the part of the community and which will not compel the prosecutor to try him for it personally or a jury to convict him.[83]

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[78] *See* paragraphs I.A. (1) (a) and (b).

[79] *See* paragraph I.C., *supra*.

[80] MODEL PENAL CODE § 2.07, Comment at 154 (Tent. Draft No. 4, 1955).

[81] *See* Lee, *supra* note 65, at 187.

[83] *See, e.g.*, Comment, *Increasing Community Control*, *supra* note 73, at 292: "There is some evidence that the present system of imposing criminal penalties upon the 'corporation' and individuals in the same proceeding has had a debilitating effect upon the imposition of direct criminal sanctions against the policy formulators."

[82] *See* MODEL PENAL CODE, § 2.07, Comment at 148–150 (Tent. Draft No. 4, 1955), concluding that corporate fines "can best be justified in cases in which penalties directed to the individual are moderate and where the criminal conviction is least likely to be interpreted as a form of social moral condemnation." (*Id.* at 149.)

In addition, as noted above, with respect to corporate managers, the strict liability sanctions directed at the corporation could have an indirect effect upon lower echelon employees, increasing the extent of compliance.

Consideration should be given to the possibility of attaching to a conviction of a corporation a requirement that the corporation make known (by notices in proxy materials, or the trade press, for example), the fact of its conviction to persons, such as its stockholders and customers, who might be in a position to react and to correct the abuse. In many instances the condemnatory feature of such a sanction would constitute a greater threat, having a more effective deterrent or coercive impact upon the managers and employees of the corporation, than the threat of a corporate fine and, perhaps, even the threat of personal conviction. It would seem that such a sanction would be most effective in the areas of food and drug legislation, relating to the wholesomeness of food, or violations of other health and safety statutes and regulations. Thus the recommendations of the Yale Law School students who prepared the recent critique of the role of the FTC in the consumer protection area [84] call for the increased use of coercive enforcement methods, including criminal penalties under the Flammable Fabrics Act and the food and drug provisions of the Federal Trade Commission Act. The report states that: [85]

> The threat of prompt, effective and widespread publicity about objectionable corporate behavior must finally be recognized and made use of as a potent enforcement tool. Paradoxically, large corporations are remarkably thin-skinned.

The threat of making public the fact of a company's conviction for violation of weight restrictions imposed by ICC regulations would not seem likely to result in public outrage or boycott of the company's product or service, and the deterrent or coercive effect of such a requirement would accordingly be limited in many cases. *See* Comment, *Increasing Community Control*, *supra* note 73, at 287–289, which discusses the applicability of the term "moral opprobrium" resulting from a criminal conviction to large (endocratic) corporations, and concludes that, largely because of the attitude of the press toward corporate convictions:

> Apparently therefore little moral opprobrium attaches to the convicted corporation except in the highly unusual case because few members of the general public are ever aware of such conviction. Moreover, even in the unusual case, like *General Electric*, the opprobrium is shunted away from the corporation and focused upon the convicted individuals. It is unlikely, therefore, that the threat of tarnishing moral opprobrium is significant to the endocratic corporation in terms of profit diminution or effective deterrence.

In addition, the Comment notes that while informal "black-listing" of the convicted corporation by certain members of the public, through such means as refusal to extend loans or credit, "is frequently mentioned, in practice it is never employed." While attaching such a publicity requirement to a corporate conviction might to some extent

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[84] *See* note 71, *supra*.

[85] 115 CONG. REC., *supra* note 72, at p. E389.

increase "public awareness" thereof and perhaps result in a greater degree of "moral opprobrium," it would probably not be likely to result in a greater degree of "informal black-listing." [86]

In addition, consideration should be given to the possibility of authorizing the imposition of fines upon corporations that are greater in amount than fines authorized for individuals. This has been done in several Federal statutes,[87] and such provisions are contained in certain of the recent State Code revisions.[88] As has been noted, in some instances the threat of a substantial corporate fine may produce a greater deterrent effect upon the corporation's officers and employees than the threat of personal penalties. It would seem that the provision in the proposed sentencing chapters of the new Code authorizing a fine equal to double the gain (or loss) created by the violation could be expected to exert sufficient force to deter or coerce the conduct involved in most such instances. But it may be that a case could arise in which the amount of the gain (or loss) caused by the conduct is unrelated to the motivation for the violation; to cover such a case, a fine determined by some other standard could be authorized. The New York and Michigan statutes, in addition to providing for a double the gain or loss fine, increase the fine authorized for individuals in cases of corporate violators. But in both statutes, even for a felony, the maximum such fine is $10,000. In some instances this figure might be regarded as too insubstantial to constitute a deterrent influence upon potential violators. Another standard which has been suggested is a percentage of the assets, capital, or taxable income of the corporation.[89] It would seem that instances in which the threat of a substantial corporate fine would have greater deterrent force upon corporate personnel than personal sanctions, yet which would not be reached by the double the gain or loss provision, would best be dealt with by authorizing higher fines for corporations than for individuals generally, as do New York and Michigan, and permitting even greater fines to be authorized in particular statutes directed to situations in

[86] The tendency of the press and the public to focus on convicted individuals rather than the corporation itself suggests that a more effective form of the publicity requirement might be to make the requirement depend not upon the *corporate* conviction but upon the conviction of the individual within the corporation who is actually responsible for the violation—the company could be brought into court as a consequence of the conviction of its manager and directed to advertise the fact and nature of his conviction and his connection with the company—or to require inclusion in the notice of identification of the individuals involved and the facts surrounding their commission of the offense. In this connection, and in connection with the unjust enrichment point discussed at note 98, *infra*, it should be noted that while one can imagine alternatives to corporate criminal liability, such as imposing fines and other sanctions upon a corporation pursuant to conviction of an individual for an offense committed in behalf of the corporation, and providing a vehicle for effective civil recovery of unjust profits (or losses) such as a government-led class suit, these alternatives are not likely to be adopted, at least in the immediate future, and that therefore the question of whether and to what extent to retain corporate criminal liability must be considered not in the light of but in the absence of the possible alternatives. The publicity requirement and government-led class suit ideas, then, may more realistically be considered as *additional* sanctions arising from a corporate conviction than as alternatives to corporate criminal liability.

[87] *See* Appendix B.

[88] NEW YORK REV. PEN. LAW § 80.10 (McKinney 1967); MICH. REV. CRIM. CODE § 1515 (Final Draft 1967).

[89] *See* Comment, *Increasing Community Control*, *supra* note 73, at 295.

which even the fines for corporations generally cannot reasonably be expected to have a deterrent effect: in such cases, Congress could consider the size of and other relevant facts about potential offenders in the particular industry or area covered by the statute and evaluate the size fine which would be necessary to deter or coerce the kind of conduct governed thereby.

Finally, the severe sanction of mandatory dissolution of the corporation pursuant to conviction could be authorized. This sanction is not without precedent in Federal law, [90] and the Model Penal Code (§ 6.04(2)) provides that the court may order the charter or certificate authorizing a foreign corporation to do business in the State revoked where the board of directors or a high managerial agent has, in conducting the affairs of the corporation, "purposely engaged in a persistent course of criminal conduct, and . . . for the prevention of future criminal conduct of the same character, the public interest requires" such revocation. Authorization of such a sanction with respect to Federally chartered institutions involved in serious offenses would be a possibility, as would authorization for the court to require a State-chartered institution to "voluntarily" dissolve if a Federal interest would be promoted thereby.

B. EVALUATION OF VARIOUS MEANS OF DISTRIBUTING RESPONSIBILITY, IN TERMS OF SPECIFIC CATEGORIES OF OFFENSES

When the new Code is adopted there will be three basic types of Federal offenses:

(1) offenses defined by the Code;

(2) offenses defined by statutes other than the Code but subject to the provisions of section 1006 of the Code ("regulatory offenses"); and

(3) offenses defined by statutes other than the Code and not subject to section 1006.

The first type of offense will in the main be composed of common law, or "mala in se" offenses, such as murder, robbery, theft, and fraud, which invariably involve intentional, knowing, or reckless conduct which causes or is highly likely to cause an immediate injury to another. The second type will consist mainly of "mala prohibita" offenses, or violations of "prophylactic" regulations, which are designed to prevent harms from occurring, rather than to punish perpetrators of actual harms: offenses involving violations of record-keeping and reporting requirements, and safety regulations imposed upon interstate railroads, truckers, and airlines are examples. These violations almost never involve an intended and immediate injury to another—in many cases the idea that someone may be hurt as a result of his conduct never occurs to the offender, even though his violation of the law is willful. Indeed, in many instances, such offenses ("strict liability" offenses) do not depend upon intent or any other degree of culpability. Under section 1006, nonculpable violations of statutes subject thereto will be punishable only as infractions. Statutes not

[90] *E.g.*, Foreign Banking Act (12 U.S.C. § 617) (Any corporation organized under the Act which violates the Act's prohibition against trading by such corporations in commodities or fixing prices of commodities may forfeit its charter).

made subject to section 1006 will be required to state explicitly (pursuant to proposed section 302(2) of the new Code) for offenses punishable other than as infractions, that "a person who engages in the conduct but not culpably commits the crime," in order to impose strict liability. The third type of offense will be composed, it is assumed, of offenses which are thought to be neither serious enough to be defined in the Code itself nor inconsequential enough to be subject to the "regulatory offense" provisions of section 1006; it would seem likely that most will involve willful violations of statutes regulating business conduct. For the purposes of this paper, these offenses will be called "noncode offenses under regulatory statutes."

The Code provisions for corporate liability would apply to all three types of Federal offenses, unless a subsequent statute should explicitly provide that liability for any particular conduct or offense was not to be determined in accordance with the provisions of the Code.

The considerations involved in determining how to distribute responsibility for offenses committed in behalf of a corporation are different for each type of offense; the effectiveness of directing criminal sanctions to individuals at any given level of the corporate hierarchy and to the corporation itself will thus depend to a great extent upon the type of offense sought to be prevented. An evaluation of the benefit to be gained from directing sanctions to each of the possible "targets" discussed above should proceed within such a frame of reference.

(1) *Offenses Involving Willful Conduct Which Causes or Is Likely To Cause an Immediate Injury to Another*

This category of offenses includes not only the common law crimes defined by the Code itself, but also many offenses defined by statutes other than the Code which are essentially similar in nature to the common law offenses—various brands of fraud, such as securities fraud, income tax fraud, misbranding or mislabeling food or drugs with intent to defraud, are examples. In addition, the commission of a common law offense may involve a violation of a criminal statute other than the Code—for example, reckless design, manufacture or maintenance of planes, trains, ships, or automobiles, which results in an accident causing death; assault by reckless disregard of the personal safety of others by similar design, manufacture or maintenance procedures.[91]

It seems clear that all individuals connected with a corporation on behalf of which such an offense is committed who can be shown to have harbored the intent to cause the injury (or to have acted with the kind of culpability required for the offense) should be punishable for the offense. To exculpate such individuals by reason of the fact that they acted for the corporation rather than to further their own personal interests would greatly impair the deterrent effect of criminal sanctions in the business area. The possibility of authorizing the additional sanction, against an individual offender, of disqualification from further employment in the industry in which the violation oc-

[91] A myriad of examples can be conjured up—reckless labeling of poisons; reckless design, manufacture, and sale of baby cribs with hinge which causes strangulation of a baby; willful marketing of a diet pill known to have unknown and possibly fatal side effects which causes death or injury; reckless distribution of firearms, resulting in death or injury; reckless disregard of safety conditions in mines, resulting in death or injury.

curred, or from accepting a job in which he might be likely to repeat the offensive conduct, should also be noted. Preliminary research reveals that the use of such a measure is not entirely without precedent. First, provisions automatically disqualifying persons convicted of offenses involving official misconduct from holding public office are fairly common.[92] Outside the area of official misconduct, the Supreme Court has recognized that an order barring civil antitrust defendants from employing the president of one of them might be proper as a means of providing adequate relief in a monopolization case in order to render impotent the monopoly power found to be in violation of the Act, where the predatory power has been conspicuous.[93] In addition, State legislation designed to end corruption on the waterfront which in effect disqualified all convicted felons from holding office in relevant unions has been upheld by the Supreme Court.[94] The legislation involved was similar in effect to a provision of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. § 504(a)) forbidding convicted felons from holding union office during the 5 years following the conviction, absent executive pardon. The Court said that: "Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas," which areas the Court characterized as "closely touching the public interterest." [95] Finally, this device is one of the weapons against organized crime authorized in the recent bill introduced in the Senate by Senator McClellan.[96]

Thus, if it were found that a severe problem exists with respect to repeated criminal conduct on the part of executives of certain corporations or organizations, or that there was such a problem in any given industry, support for a provision authorizing (under well-defined limited circumstances and conditions) a court to order a convicted executive not to engage in specified activities for, perhaps, a number of years, would not be wholly lacking.

The fact that most individuals are prohibited by their own consciences from engaging in activities, even to further their own interests, which they know will harm others, and if not by their own consciences by the threat of a heavy criminal penalty, would seem to suggest that individual responsibility of those directly involved in offenses of this nature should be sufficient to deter their commission. However, the possibility of creating by statute a duty on the part of corporate managers to exercise their authority in order to prevent the commission of such offenses should not be overlooked. As noted above, the individ-

[92] *E.g.*, 18 U.S.C. § 203 (compensation unauthorized by law accepted or solicited by Member of Congress or any other officer or employee of the United States); 18 U.S.C. § 204 (practice in Court of Claims by Members of Congress); 18 U.S.C. § 592 (keeping of troops at polling place by civil or military officer of U.S.); 18 U.S.C. § 1901 (trading in public property by collecting or disbursing officer of U.S.); 18 U.S.C. § 2071 (concealment, removal or mutilation of public documents by official having custody thereof); 18 U.S.C. § 2381 (traitor). 18 U.S.C. § 201 (bribery of public officials), imposes a $20,000 fine (or three times the gain, whichever is greater) and up to fifteen years' imprisonment, but provides only that the offender *may be* disqualified from holding office.

[93] *United States* v. *Grinnell Corp.*, 384 U.S. 563, 579 (1966).

[94] *De Veau* v. *Braisted*, 363 U.S. 144 (1960).

[95] 363 U.S. at 158–159.

[96] S. 1861, Corrupt Organizations Act of 1969, in 115 CONG. REC. S. 3856 (daily ed. April 18, 1969).

ual manager in whom the primary discretionary authority with respect to the employee committing the offense and/or the area of the company's operations in which the offense occurred, could be held accountable, not for the offense committed by the employee, but for his own breach of duty to prevent the commission of the offense.

Finally, responsibility for the offense may be extended to the corporation itself.

Recognizing that the need for and effectiveness of the corporate fine are not as great in the area of common law offenses, which are heavily punishable at the level of commission, as in the area of the "mala prohibita" offenses, the Model Penal Code nevertheless retain corporate liability for the more serious offenses, but on a restricted basis: the corporation may be convicted only in cases where direct involvement of corporate management can be shown. The principal reason for retaining corporate liability for such offenses, it would seem, is so that the corporation may be deprived of an "unjust enrichment resulting from the commission of offenses by its agents."[97] Under the new Criminal Code, a fine of double the gain (or loss) resulting from the commission of an offense will be authorized, so that, if corporate liability for common law offenses is retained, it would be possible to force the corporation to disgorge its illegal profits. But it should also be noted that whatever necessity for such a corporate fine might exist under present law (for example, nonenforcement by private individuals under equitable or other civil remedial principles) could be eliminated by providing for an equitable proceeding to be brought by the government to recover from the corporate coffers any profits made and/or damages suffered as a result of the offense. To deal with cases in which many private persons are injured as a result of the offense, perhaps provision could be made for a "class" action in which the government represents the "class." This would relieve private individuals of the often prohibitive (particularly where individual losses are small) expense of a private suit, which often lessens the impact upon corporate managers of the possibility of a large civil recovery against the corporation. This would not only have the effect of depriving the corporation of any unjust enrichment but would also permit compensation to those who really suffer the consequences of the criminal conduct.[98] A discussion of some of the major points which would be covered by a statutory scheme providing for a government-led class suit device is contained in the Extended Note appended to this memorandum.

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[97] MODEL PENAL CODE § 2.07, Comment at 150 (Tent. Draft No. 4, 1955). Also mentioned is the possibility that a crime might be committed in a State by a foreign corporation, and the guilty individual be outside the State's jurisdiction. *Id.* at 150–151. This consideration would seem to be much more relevant in connection with a State code than a Federal code, although the possibility of violation of Federal law by an individual acting for a non-U.S. corporation who promptly leaves the country exists.

[98] *Cf.* Comment, *Increasing Community Control*, *supra* note 73, at 298-300, suggesting a statute providing for an independent civil suit by the government against a corporation charged with a crime to "attach" illegal profits, and a claim procedure whereby persons injured could recover such damages as they could prove from the government, to the extent of the government's recovery, and, beyond that from the defendant corporation. This suggestion, however, would involve the collaboration of adversaries after the government recovery, and it would seem that a class action device would be superior for the reason, among others, that no such collaboration would be required.

While it is possible that an individual might be restrained more by the threat of a corporate fine than the possibility of personal prosecution for the commission of a common law offense, it would seem that such a situation would exist only when the possibility that the scheme and his connection with it will be discovered seems slight and the potential for profit to the corporation relatively great. Where the difficulties of locating the guilty individuals and proving their participation in the offense are great, corporate liability can be a handy substitute. It also presents an alternative to the jury which sympathizes with the individual. The tendency for prosecutors and juries to pin liability upon the inanimate corporation and excuse the guilty individuals is well known.[99] And, while the Model Penal Code commentary to section 2.07 suggests (at 150) that "one would not anticipate the same reluctance on the part of juries to convict [for offenses mala in se] which seems sometimes to be present where the offense is a regulatory crime," in at least one case the jury acquitted the guilty officers and convicted the corporation for a traditional-type, nonregulatory crime—conversion of government property "willfully, knowingly and with criminal intent." [100]

The possibility that the availability of corporate liability might actually impair the effectiveness of individual sanctions should not be lightly dismissed.

Senator McClellan's recent statement, in introducing the "Corrupt Organizations Act of 1969" (S. 1861), that "publicity is one of the most effective actions we have against the organized criminal" [101] points up the particular appropriateness of authorizing the attachment of a publicity sanction to a corporate conviction for serious offenses. In this area, where the deterrent effect of heavy authorized terms of imprisonment is absent, in the case of the corporation itself, if there are cases in which the sanctions directed to the individuals in the corporation are deemed insufficiently effective, the threat of adverse publicity flowing from a corporate conviction [102] could very well exert a greater deterrent force than the threat of even a very large corporate fine. Should a large competitive transportation company face a manslaughter prosecution for failure to equip its stock with adequate safety devices, for example, the threat of public condemnation and perhaps boycott of its services would seem to be more serious than a fine.

Finally, the latter type of case would also call for the application of a government-led class suit device [103]—not only would plaintiffs be able

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[99] *See, e.g.*, MODEL PENAL CODE, § 2.07, Comment at 149 (Tent. Draft No. 4, 1955); Comment, *Increasing Community Control*, *supra* note 73 at 292; Ball & Friedman, *supra* note 55, at 218; Kadish, *supra* note 73, at 431. *See also* the cases cited *supra*, notes 19–22.

[100] *Magnolia Motor & Logging Co.* v. *United States*, 264 F. 2d 950, 953–954 (9th Cir. 1959), quoted *supra* at note 19.

[101] 115 CONG. REC. S. 3856 (daily ed., Apr. 18, 1969).

[102] It should be noted that publicizing a *conviction* should not evoke the same criticism as publicizing an *investigation*. *See generally* Lemov, *Administrative Agency News Releases: Public Information* v. *Private Injury*, 37 GEO. WASH. L. REV. 63 (1968); Rourke, *Law Enforcement Through Publicity*, 24 U. CHI. L. REV. 225 (1957) (discussing the use of preconviction publicity as a law enforcement tool and method of administrative regulation).

[103] *See* Extended Note, *infra*.

to obtain compensation at less expense than through individual suits, but the defendant company would be better off, since it would be required to prepare only one basic defense and could settle all claims against it in a single action.

(2) *Regulatory Offenses for Which Liability Is Sought To Be Imposed Under Subsection (2)(a) of Section 1006; Strict Liability Offenses Under Other Statutes*

As noted above, the duties imposed by strict liability statutes, such as the Food and Drug Act, are inherently performable only by higher echelon personnel—those corporate officers and employees who are in a position to formulate or affect company policy with respect to the manner in which the company's product is manufactured and distributed. The statute forbids a result (that is, the distribution of adulterated or misbranded food or drugs) and puts the burden of preventing the result on all those with a responsible share in the business process producing the result. It seems quite clear that, as a practical matter, the assembly line worker following a set procedure for labeling who puts labels on jars as they come down the conveyor belt is not in a position to influence the method pursuant to which the process of labeling is conducted. Consequently, although he may be said technically to have been the "actor" who committed the crime of "misbranding," the coercive effect of criminal sanctions directed to him is probably nil.

The performance sought by the strict liability statutes and coerced by their criminal sanctions can thus only be effected by directing the sanctions to the company's head of quality control, or other responsible official with authority over the process leading to the result regulated by the statute. In conventional terms, he is not the "actor" with respect to the act of putting the wrong label on a product, although he might be said to be the "actor" with respect to its distribution in such a condition. In any event he is the one to whom the statute's sanctions should be directed.

In addition, his superior, such as the vice president to whom he is responsible, might be directed by the statute to prevent the result (although he is not directly connected with the distribution process) if he has general responsibility with respect to operation. However, if the superior would not be held to be an actor or accomplice in the offense, it would seem that if such a duty were imposed upon him, it perhaps should not be subject to the strict liability element of the offense: he could be given a defense that he exercised extraordinary care, or due diligence, or met some other standard of care in finding ways in which to reduce the likelihood that an offense of the type which occurred (but not, perhaps, the particular offense which did in fact occur) would be committed.[104] The imposition of such a duty

[104] The Model Penal Code provides for a defense for the *corporation* in all cases in which it can be shown that the managers exercised due diligence to prevent the commission of the offense, except in cases of absolute liability. The Model Penal Code does not specify as to responsibility of the individuals in the corporation (except to provide that there is no defense for an individual that the act was performed in the corporate name or that the duty to act was imposed only upon the corporate body and not upon him personally), but the commentary reflects the assumption that corporate managers who are "actors" would be held strictly liable for absolute liability offenses. MODEL PENAL CODE, § 2.07, Comment at 154 (Tent. Draft No. 4, 1955).

would tend to increase the coercive effect of the statutory sanctions at the level of the corporate hierarchy where the greatest power to institute procedures designed to effect compliance exists.

It would appear that the strict liability area is the area in which the argument in favor of retention of corporate liability is the strongest. In many instances the prospect of prosecuting the individual who would be regarded under *Dotterweich* as "responsible" or the "actor" (or of obtaining a conviction) is a bleak one. It may seem eminently unfair to brand as a criminal a person who perhaps has taken steps beyond the call of duty to attempt to reduce the possibility of violation, yet also seem desirable to prosecute someone. In such situations the availability of corporate liability is quite useful. As noted above, the Justice Department often drops a charge against an individual who shows that he has taken steps to correct an abuse in exchange for a guilty plea by the corporation.

In addition, it should be noted that the effect of the threat of a publicity requirement attaching to a corporate conviction would seem to be especially potent in the food and drug area, perhaps more so than the threat of personal conviction to the individual "actor" or "actors."

The food and drug area would also seem to be particularly appropriate for the government-led class suit, especially if it were specifically provided that violation of the statute constitutes something in the nature of "negligence per se," so that proof of lack of due care and foreseeability would be eliminated.[105] The necessity of proving proximate cause could also be eliminated in these cases, leaving only the burden of proving inclusion in the "class" intended to be protected by the statute and the amount of damage suffered on the plaintiff.[106]

(3) *Culpable Regulatory Offenses and Noncode Offenses Under Regulatory Statutes*

Offenses which would be likely to be committed in furtherance of a corporate enterprise—other than the traditional crimes involving evil intent and strict liability offenses—fall within the middle category of violations of regulatory statutes. As noted above, they may or may not be punishable under the new Code as regulatory offenses under section 1006; for the purpose of drafting a statute on corporate criminal liability, whether or not they are so punishable is substantially irrelevant.

The criminal sanctions attached to regulatory statutes may be viewed as weapons to be used in enforcing (a) economic policy and (b) general welfare legislation.[107] They may be seen as tools by which the government may coerce private individuals to conduct their affairs in accordance with standards set by the government in order to protect

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[105] *See Orthopedic Equip. Co.* v. *Eutsler*, 276 F. 2d 455 (4th Cir. 1960), in which it was held that violation of the misbranding provisions of the Food and Drug Act is "negligence per se" under Virginia law, so that proof of proximate cause was all that was required and the elements of due care and foreseeability need not be explained to the jury.

[106] *See generally* Extended Note, *infra*.

[107] *See generally* Ball & Friedman, *supra* note 55, and Kadish, *supra* note 73, in which the effectiveness of and basis for criminal sanctions in the regulatory field are discussed. This memorandum assumes that the use of criminal sanctions in the regulatory field is appropriate and useful.

the nation's economy as well as the personal and property interests of other private individuals.

Culpable regulatory offenses and noncode offenses under regulatory statutes thus include antitrust offenses, as well as violations of specific standards set by statute or administrative regulation with respect to businesses providing or using the facilities of interstate commerce (for example, the transportation, communications, natural gas, and other power companies). In addition, they include violations of statutes and regulations requiring that records be kept, reports submitted, and licenses obtained (for regulatory rather than purely revenue purposes); such statutes and regulations constitute the means by which the government obtains the information necessary to set specific standards and determine whether they are being met.[108] For these culpable offenses (as well as the strict liability offenses) the general objective is one of coercing private industry to do more than is needed to protect its own interests in order to avoid encroaching on the rights of others, rather than one of deterring, or restraining it from acting on the temptation to encroach on others' rights in order to secure an advantage to itself. Failure to perform the required conduct, enforcible by criminal sanctions, is not considered morally reprehensible: even where the failure is reckless, or even intentional, no specific intent to cause an immediate injury to another company or specific individual (or knowledge that such a result will flow from the conduct) is necessarily present.

It is with respect to this middle category of offenses that the greatest confusion on the subject of corporate criminality has developed.

It is in this area that administrators, prosecutors and juries tend to seize upon the opportunity to let the artificial "person" take the rap for the individuals who are in reality responsible for the violation.[109]

As in the case of strict liability offenses, company policy with respect to compliance with regulatory standards or requirements is usually set not at the level of actual compliance or noncompliance, but rather at the highest managerial or supervisory level. There seems to be a general belief that many individual employees who violate these regulatory statutes do so because they are under pressure, although not necessarily stated pressure, from higher levels to increase profits in any way possible. In such cases, it seems distasteful to prosecute inferior officials or employees "who are the tools rather than the responsible originators of the violative conduct."[110] Thus it has been noted, with respect to the electrical equipment cases, that "the

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[108] Culpable regulatory offenses and noncode offenses under regulatory statutes may be distinguished from strict liability offenses (for example, regulatory offenses for which liability is sought to be imposed under subsection (2)(a) of section 1006) in that in the latter case the burden of setting standards which will result in the desired protection is shifted to private industry—criminal sanctions are used there to coerce private individuals to set such standards for themselves (and, indeed, to comply with them once set).

[109] *See* the discussion of existing law, *supra*, at notes 18–22 and accompanying text; *see also* note 98.

[110] Kadish, *supra* note 73, at 431. *See also* Lee, *supra* note, 65 at 191 ("Frequently in the case of a corporate violation it is, however, desirable not to hold liable any officer or employee who commits the prohibited act as, for instance, delivering an illegal issue of securities or charging an unlawful freight rate, but to hold liable only those superior officers who cause or order or whose negligence permits the

high policymakers of General Electric and other companies involved escaped personal accountability for a criminal conspiracy of lesser officials that extended over several years to the profit of the corporations, despite the belief of the trial judge and most observers that these higher officials either knew of and condoned these activities or were willfully ignorant of them." [111] In addition, it has been noted that in many cases violation by a lower echelon employee "may have been produced by pressures on the subordinates created by corporate managerial officials even though the latter may not have intended or even desired the criminal behavior and even though the pressures can only be sensed rather than demonstrated." [112] In either case the problem is essentially one involving the difficulties of locating and proving participation in the offense by such high-level policy formulators.

A twofold response seems to be invited. First, a duty such as that described above, might be imposed upon the managers to know about and to take action to prevent violations of law committed in behalf of the corporation. As put by Professor Kadish, such a step would make a "negligent omission the basis of accountability." [113] Increasing management's duties in this manner might also have an indirect influence on the employee who might otherwise be tempted to commit an offense, by motivating him to comply with the law in order to keep his boss out of court answering a criminal charge based on the offense.

The tendency of juries and prosecutors, as well as the general public, to sympathize with the inferior employee, or "tool" of the corporate policymaker, and to settle for a corporate conviction only, so that no individual is held accountable, reflects, in a way, the other side of the coin. Perhaps the second part of a response to the problem would be to create, for a lower level employee who violates the law under either kind of pressure (that is, explicit or tacit) from above, a specific defense, similar to the general defense which has been considered by the Commission of "superior orders." The objections to creating a general defense of superior orders apply with greatly diminished force in a situation where (a) the conduct involved is not considered morally wrong, (b) in most cases no one will be harmed as a result of the offensive, and (c) in many cases the defense exists de facto anyway. To apply the sanctions of a statute to an employee who must choose between committing the offense and losing his job seems eminently reasonable when the offense is one which will necessarily cause harm to another: but when it comes to the regulatory-type offense, to force him to make a choice between doing something which he knows is against the law but which does not seem immoral to him, and which is not even going to benefit him personally, and losing his job, seems unfair.

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prohibited act or omission.") This thought may have been behind the Supreme Court's statement in *United States* v. *New York Central & Hudson R. R.R.*, 212 U.S. 481, 495 (1909), that history had shown that the "statutes against rebates could not be effectively enforced so long as individuals only were subject to punishment for violation of the law, when the giving of rebates or concessions inured to the benefit of the corporations of which the individuals were but the instruments," and that criminal liability of the *corporations* was therefore required to control the subject matter and correct the abuses aimed at.

[111] Kadish, *supra* note 73, at 431.

[112] MODEL PENAL CODE § 2.07, Comment at 149 (Tent. Draft No. 4, 1955).

[113] Kadish, *supra* note 73, at 432.

In the latter case it may be said that the employee has no effective choice, and concluded that one who cannot choose cannot be coerced or deterred; directing sanctions to such a person is therefore ineffective. In addition, in many instances the availability of such a defense to a defendant would motivate him to disclose to the prosecutor the names of the superiors putting the pressure on him to violate the law in behalf of the company. This would alleviate the problem of locating and proving guilt on the part of those truly responsible, particularly if coupled with the imposition of a duty to prevent offenses upon the superiors. Finally, it should be noted that the situation of an employee violating a regulatory statute in behalf of and under pressure from his employer is essentially dissimilar to the position of a sole proprietor violating under the pressure of competition for profits (as well as from that of the poor man who steals bread under the pressure of hunger). In the sole proprietor case, the man is violating the law to further his personal, albeit business, interest, not the interest of any superior person or entity and, unlike the employee, if he is not responsible no one (at least no individual) is. In the case of the employee it is not a question of individual responsibility versus no individual responsibility, but instead one of appropriate individual responsibility versus inappropriate individual responsibility by default. (Note should also be made of the fact that the reasons for granting the defense would apply equally to an employee of a corporation and an employee of a sole proprietor.)

If the foregoing two steps were taken, the justification for the corporate fine based on (a) the distaste for prosecuting and convicting "tools" and (b) the reasoning that management will thereby be encouraged to use due care to prevent offenses in behalf of the company would be eliminated. There would accordingly be no substantial reason for retaining corporate criminal liability for regulatory-type offenses. But even if corporate liability were retained for these offenses, whatever "debilitating effect" the availability of the corporate fine as a sanction presently has on the effectiveness of individual sanctions could be expected to be devitalized, at least to some extent, and perhaps to a great degree.

Whether or not corporate criminal liability is retained, the publicity requirement and government-led class suit sanctions against the corporation could be quite effective in the culpable regulatory area as well as in the other two classes of offenses. particularly if additional safety legislation with criminal sanctions is passed and/or criminal sanctions are added, for example, to the current automobile safety legislation. The same would be true with respect to such other consumer protection legislation as may be enacted in the future.

Finally, the culpable regulatory offenses would seem to be the class of offenses for which any authorization of liability for governmental corporations would be most appropriate. It is in the area of offenses defined by regulatory statutes that government-related bodies operate enterprises, either in lieu of private business (for example, urban mass transportation, which can no longer attract private capital or be adequately serviced thereby) or in addition thereto (for example, municipal facilities which are perhaps potential contributors to air or water pollution, or subject to safety regulations). If criminal liability is authorized for cities and other gov-

ernmental organizations, however, it would probably be prudent to exempt them specifically from the operation of the punitive sanctions authorized by the Code (that is, fines), limiting available sanctions to those which are remedial in nature—appropriately the class suit, and perhaps in certain instances the publicity requirement.

C. PROSECUTORIAL DISCRETION UNDER A BROAD STATUTE

Assuming a rather broad statutory scope of criminal liability for corporations and unincorporated associations, and the authorization of special sanctions against such organizations, it seems clear that much reliance must be placed upon the prosecutor's discretion, not only to select the appropriate target for prosecution in any given case, but also to decide whether or not to press for the imposition of special sanctions. While the power to prosecute would be broad, the exercise of the power would be limited by discretion to situations in which prosecution of the corporation is more appropriate than prosecution of the human malefactors alone. In almost every instance, for example, an incorporated business owned and managed by a single individual would not be the appropriate target of criminal prosecution; rather, the individual himself should be held accountable when he uses unlawful methods in operating his business. Similarly, it may be that there will never arise an instance in which certain philanthropic associations, or associations with very small memberships should be prosecuted, although liability is not limited by statute to large associations organized for profit. On the other hand, one of the most appropriate occasions for the exercise of the authority to prosecute a corporation or association would be where the offense occurs as a result of diffused individual responsibility—a case where absent corporate liability, the only perpetrators against which a case could be proved are lower echelon employees. In addition, a case where many persons are injured as a result of the offense, or one where the offense is one to which public attention should be directed, would be appropriate for the exercise of the power to prosecute the corporation, making available against the organization such additional publicity and damage sanctions as may be authorized by statute.

Under such a broad statute, then, the considerations discussed in part II of this memorandum may be viewed as indicative of the types of factors which would be considered by the prosecutor in forming his judgment as to who to prosecute in a given case and the type of relief to be sought in the event of conviction.

Extended Note

MAJOR POINTS TO BE COVERED BY A STATUTORY SCHEME CREATING A GOVERNMENT-LED CLASS SUIT PROCEDURE

Adoption of a government-led class suit device, either as an alternative to corporate criminal liability or as an additional sanction against a corporation convicted of an offense, would provide not only a greater deterrent impact than the threat of a corporate fine in many cases but also a vehicle whereby the victims of the offense could inexpensively recover damages for their losses. This extended note will

discuss some of the major points with which a statute creating the device would be concerned.

While the device is considered in connection with the corporate liability provisions because its greatest impact would be upon large organizations, such a statutory scheme could be extended to others than corporations and other organized defendants, making the procedure applicable to all convictions under statutes designed to protect the public or a certain segment of it. It could thus apply not only to corporations, partnerships, and unincorporated one-man operations having nonowner employees, but also to the individual entrepreneur who is convicted of committing an offense on his own behalf. In addition, it could also be made to apply to governmental corporations and other government agencies.

Such a statute would, in effect, create a Federal civil cause of action for all persons found to be within the class which the statute defining the offense was designed to protect to recover damages for the injuries sought to be prevented by that statute. The statute could provide explicitly that the Federal court in which the conviction is had has "subject matter jurisdiction" over the private claims, so that diversity of citizenship would not be required. It could provide that the claims of all the plaintiffs could be aggregated in order to fulfill the jurisdictional amount requirement of 28 U.S.C. § 1331, or it could dispense with the requirement altogether, granting jurisdiction without regard to the amount in controversy (*see, e.g.*, 42 U.S.C. § 1981); the private claims could be considered as being within the court's ancillary jurisdiction in connection with the criminal case pending before it.

The statute could be based upon the theory that violation of the statute creating the offense is negligence per se, thus dispensing with the usual requirements of lack of due care and foreseeability. This would be particularly appropriate, in the case of corporations, if the corporation is given a defense of due care on the part of management in connection with the criminal offense. Even in those situations in which such a defense is unavailable, the criminal offense would generally depend upon some degree of willfulness on the part of the offender. As to foreseeability, the theory behind the negligence per se rules with respect to violation of statutes seems to call for elimination of the necessity of its proof. The statute could also eliminate the necessity of proving proximate cause, providing that the plaintiff must only show that he is within the class of persons intended to be protected by the statute defining the offense and that the damage he suffered is of the sort sought to be prevented by it. Alternatively, it could provide that such proof constitutes a presumption, or prima facie case on the issue of proximate cause, or the traditional proximate cause rules could be retained. Finally, some disposition would probably have to be made with respect to the defense of contributory negligence; perhaps a restricted version (failure to exercise slight or minimal care to avoid the injury, for example) could be authorized.

The statute could list the offenses or statutes defining offenses which would create the cause of action and trigger the class suit device, or it could describe the type of offense or statute to which it referred. Perhaps the statutes covered would be limited to those designed to protect the personal health and safety of consumers or employees protected; on the other hand statutes designed to protect against fraud

generally and other property damage could be included. Or the statute could, in a manner similar to the regulatory offense provisions of the proposed new Code, be triggered by a provision in the statute defining the offense.

Whatever disposition is made as to the above elements of proof, each plaintiff would be required to show the amount of damages suffered by him. In addition, the statute could provide that the government could prove the illegal profits made by the defendant as a result of the offense, and, in the event that such profits exceeded the proved private claims, authorize the collection by the government of such profits to compensate it for its costs in connection with the civil suits and/or criminal prosecutions; any excess could be distributed to the plaintiffs to cover their costs, and the excess above that, perhaps, pro rata according to proved damages.

Several procedural points should be covered. First, the type of claims contemplated would constitute the suit a Rule 23(b)(3) action under the normal class suit rules—that is, common question of law and fact. Under Rule 23 in this type of suit notice must be given to all members of the class, and all those who receive notice and do not request exclusion from the class are bound by the judgment, whether or not favorable to them. The new statute could continue this rule, or it could provide that all who receive notice are concluded by the judgment whether or not they wish to join. While the latter would be favorable to the defendant and to those members of the class with smaller claims, persons with large claims would in many instances prefer to settle their claims in independent litigation.

If it was decided to exclude those who do not wish to participate, provisions as to the effect of the class suit on independent suits would be required. First, a time limit within which the government suit must be filed would be necessary. The statute could provide that the defendant could request a stay of all private suits filed before that date, or the date within which private claims must be filed in the government action. If it is desired to permit the judgment in the government suit to be introduced in evidence in subsequent private suits, provision could be made for tolling the statute of limitations during the pendency of the government suit. Permitting the government judgment to be introduced as evidence in any such independent private suit would be beneficial to those with large claims choosing not to join the class suit. However, it would probably have the adverse effect of encouraging people not to join, but rather to wait and see the result of the class suit—second-guessing the outcome.

The statute could provide that claim forms be sent to the "class" along with the notice, and class members could simply fill them in and return them to the representative (the government or an attorney appointed by the court to represent the class).

Under Rule 23, a class suit may not be dismissed or compromised without the approval of the court. The new statute might change this rule to give the defendant the right to accept and pay selected claims, usually the smaller ones, and contest larger ones. Compromise of claims contested could be subject to court approval. If the defendant chose to contest a claim the plaintiff would be required to appear and prove his damage, with the defendant having the right to cross-examine and submit contrary proof; otherwise the plaintiff would never

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have to appear. Many small claims which would never otherwise be recognized could be handled and paid this way.

Whether the proceeding would take place before the court or a master would also have to be decided. While under Rule 23, class actions are normally conducted before the court and subject to its strict supervision, if the government, as an uninterested party, was given the duty to represent the class there would be less chance of abuse than in the normal case where the representative is himself a member of the class, and such close supervision might not be required.

Finally the question of review would have to be dealt with. It would seem that in most cases review could be sought independently, since the amount of damages would be the only issue. On common questions provision could be made for appeal by the representative.

APPENDIX A

(1) EXAMPLES OF STATUTES DEFINING "PERSON" TO INCLUDE CORPORATIONS AND OTHER ARTIFICIAL ENTITIES

CommodityExchange Act, 7 U.S.C. § 2; Cotton Standards Act, 7 U.S.C. § 62; Grain Standards Act, 7 U.S.C. § 72; Naval Stores Act, 7 U.S.C. § 92(k); Insecticides Act, 7 U.S.C. § 135(s); Nursery Stock Act, 7 U.S.C. § 151; Packers and Stockyards Act, 7 U.S.C. § 182(1); U.S. Warehouse Act, 7 U.S.C. § 242; Perishable Commodities Act, 9 U.S.C. § 449a(1); Tobacco Inspection Act, 7 U.S.C. § 511(a); Tobacco Control Act, 7 U.S.C. § 515a; Agricultural Adjustment Acts, 7 U.S.C. §§ 608a(9), 1301(a)(8); Peanut Statistics Act, 7 U.S.C. § 957; Sugar Act, 7 U.S.C. § 1101(a); Price Supports Act, 7 U.S.C. § 1428(j) (by reference); Federal Seed Act, 7 U.S.C. § 1561(a)(2); International Wheat Agreement Act, 7 U.S.C. § 1642(j); Farm Labor Contractor Registration Act, 7 U.S.C. § 2041(a); Transportation, etc., of Animals for Research Purposes Act, 7 U.S.C. § 2132; Securities Act of 1933, 15 U.S.C. § 77b(2); Trust Indenture Act of 1939, 15 U.S.C. § 77ccc(1) (by reference); Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(1), (9); Public Utility Holding Company Act of 1935, 15 U.S.C. § 79b(a)(1), (2); Investment Company Act of 1940, 15 U.S.C. § 80a–Z(27), (8); Investment Advisers Act of 1940, 15 U.S.C. § 80b–2(16), (5); Sherman Act, 15 U.S.C. § 7; Clayton Act, 15 U.S.C. § 12; Wilson Tariff Act, 15 U.S.C. § 12 (by reference); Wool Products Labeling Act, 15 U.S.C. § 68(a); Fur Products Labeling Act, 15 U.S.C. § 69(a); Textile Fibers Identification Act, 15 U.S.C. § 70(a); Prevention of Unfair Methods of Competition Act, Importation and Sale at Less Than Market Value, 15 U.S.C. § 71; State Cigarette Taxes Act, 15 U.S.C. § 375(1); Hot Oil Act, 15 U.S.C. § 715a(4); Natural Gas Act, 15 U.S.C. § 717a(1); Federal Firearms Act, 15 U.S.C. § 901(1); Automobile Information Disclosure Act, 15 U.S.C. § 1231(b); Federal Hazardous Substances Act, 15 U.S.C. § 1261(e); Flammable Fabrics Act, 15 U.S.C. § 1191(a); Federal Cigarette Labeling Act, 15 U.S.C. § 1332(5); Filled Milk Act, 21 U.S.C. § 61(a); Import Milk Act, 21 U.S.C. § 149; Narcotics Import and Export Act, 21 U.S.C. § 171(d); Opium Poppy Control Act, 21 U.S.C. § 188a(a); Food, Drug and Cosmetic Act, 21 U.S.C. § 321(e); Poultry Products Inspection Act, 21 U.S.C. § 453(c); Narcotics Manufacturing Act, 21 U.S.C. § 502(d); Internal Revenue Code, 26 U.S.C. § 7266(a); Anti-Kickback Act, 41 U.S.C. § 52; Social Security Act of 1960, 42 U.S.C. § 1301(3), (4); Atomic Energy Act of 1954, 42 U.S.C. § 2014(s); Railroad Retirement Act, 45 U.S.C. § 228a(k), (n); Railroad Unemployment Insurance Act, 45 U.S.C. § 351(c); Communications Act of 1934, 47 U.S.C. § 153(i), (j); Interstate Commerce Act, part II (Motor Carriers), 49 U.S.C. § 303(a)(1), part III (Water Carriers), 49 U.S.C. § 902(a), part IV (Freight Forwarders), 49 U.S.C. § 1002(a)(1); Federal Aviation Act, 49 U.S.C. § 1301(27); Bills of Lading Act, 49 U.S.C.

§ 122; Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 402(d) (labor organizations); Oil Pollution Act, 33 U.S.C. § 432(b) (adds owners, masters, officers, employees of vessel, U.S. officers, agents and employees); Bridge Act, 33 U.S.C. §§ 497, 511 (define "bridge owner"); Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 902(1).

(2) EXAMPLES OF STATUTES INCLUDING CORPORATIONS AND OTHER ARTIFICIAL ENTITIES IN THEIR PENALTY CLAUSES

Dumping Farm Products Act, 7 U.S.C. 491; National Housing Act, 12 U.S.C. §§ 1730a(j)(1), 1725(g); National Banking Act of 1933, 12 U.S.C. § 378; Federal Trade Commission Act, 15 U.S.C. § 54; Commodity Credit Corporation Charter Act, 15 U.S.C. § 714m(f); Meat Inspection Act, 21 U.S.C. §§ 88, 90; Cattle Contagious Diseases Act, 21 U.S.C. §§ 117, 122, 127; Virus Serum and Toxin Act, 21 U.S.C. § 158; Practice of Pharmacy in China Act, 21 U.S.C. § 212; Federal Airport Act, 49 U.S.C. § 1118; Navigable Waterways Act, 33 U.S.C. §§ 1, 3, 406, 411, 419, 449, 502; California Debris Commission Act, 33 U.S.C. § 682 (any person or persons who willfully or maliciously injure . . . And any person or persons, company or corporation, their agents or employees, who shall mine . . . in violation of the provisions of said sections shall be guilty . . .); Oil Pollution Act, 33 U.S.C. § 1001(f); Wholesome Meat Act, 21 U.S.C. §§ 602, 610, 611.

(3) EXAMPLES OF STATUTES CONTAINING BOTH A DEFINITION OF "PERSON," WHICH INCLUDES CORPORATIONS AND OTHER ARTIFICIAL LEGAL ENTITIES, AND A PENALTY CLAUSE INCLUDING SUCH BODIES

Tobacco Statistics Act, 7 U.S.C. §§ 503, 504; Export Standard Acts, 7 U.S.C. §§ 589, 586, 599, 596; Interstate Commerce Act, part I, 49 U.S.C. §§ 1(3)(a), 10(3), (4).

(4) EXAMPLES OF STATUTES CONTAINING A PROVISION TO THE EFFECT THAT THE ACT, OMISSION OR FAILURE OF ANY OFFICIAL, AGENT OR OTHER PERSON ACTING FOR AN ARTIFICIAL ENTITY WITHIN THE SCOPE OF HIS EMPLOYMENT SHALL BE DEEMED THE ACT, OMISSION OR FAILURE OF THE ENTITY AS WELL

Commodity Exchange Act, 7 U.S.C. § 4; Cotton Standards Act, 7 U.S.C. § 63; Grain Standards Act, 7 U.S.C. § 73; Nursery Stock Act, 7 U.S.C. § 153; Packers and Stockyards Act, 7 U.S.C. § 223; Cotton Statistics and Estimates Act, 7 U.S.C. § 473 c–3; Tobacco Inspection Act, 7 U.S.C. § 511*l*; Federal Seed Act, 7 U.S.C. § 1597; Transportation, etc., of Animals for Research Purposes, 7 U.S.C. § 2139; Poultry Products Inspection Act, 21 U.S.C. § 461(a); Communications Act, 47 U.S.C. § 217; Elkins Act, 49 U.S.C. § 41(1), (2); Interstate Commerce Act, part IV (Freight Forwarders), 49 U.S.C. § 1021(g) (by reference).

APPENDIX B

EXAMPLES OF STATUTES SPECIFICALLY IMPOSING LIABILITY ON INDIVIDUALS FOR CONDUCT ENGAGED IN ON BEHALF OF CORPORATIONS AND OTHER ARTIFICIAL LEGAL ENTITIES

Section 10(1) of Title 49 (Interstate Commerce Act) provides that any common carrier, or if such common carrier is a corporation, any officer or employee thereof, who shall willfully do or cause, suffer or permit any act prohibital by the act . . . or willfully omit . . . to do anything required by the act . . . shall be subject to a fine . . . and if the charge is discrimination in rates, also be subject to imprisonment for 2 years. Provisions of this type are also contained in the following statutes: Interstate Commerce Act, part II (Motor Carriers), 49 U.S.C. § 322(a), part III (Water Carriers), 49 U.S.C. § 917; Federal Aviation Act, 49 U.S.C. § 1472(d), (e), (g); Bank Suspension Act, 12 U.S.C. § 95; Agricultural Marketing Act, 12 U.S.C. § 1141j(c)(2); Packers and Stockyards Act, 7 U.S.C. § 195; Agricultural Adjustment Act, 7 U.S.C. § 608c(14); Farm Labor Contractor Registration, 7 U.S.C. § 2408; Meat Inspection Act, 21 U.S.C. §§ 79, 80, 90; Wholesome Meat Act, 21 U.S.C. §§ 622, 676(a); Hours of Service Act, 45 U.S.C. § 63; Railway Labor Act, 45 U.S.C. § 152; Railroad Unemployment Insurance Act, 45 U.S.C. § 359(B); Communications Act of 1934, 47 U.S.C. § 205(b) (civil penalty); Federal Coal Mine Safety Act, 30 U.S.C. § 480(d); Metal and Non-Metalic Mines Safety Act, 30 U.S.C. §§ 721(c), 733; Immigration and Nationality Act, 8 U.S.C. § 1185(c). Ship Mortgage Act, 46 U.S.C. § 941(b). Cf. 12 U.S.C. § 582 (no national banking association shall offer or receive United States notes as collateral; any association offending is subject to a fine of $1,000 and a further sum of one-third of the money so loaned. The officer or officers of such association who shall make such loans shall be liable for the further sum of one-fourth of the money so loaned); 12 U.S.C. § 1464(d)(12)(C), which provides that whenever a receiver appointed by the Federal Home Loan Bank Board demands possession of a savings and loan association, "the refusal by any director, officer, employee or agent of such association to comply with the demand shall be punishable by [a fine and/or imprisonment]"; and Selective Service Act of 1967, 50 U.S.C. APP. § 468(h)(1) (any "producer of steel or the responsible head or heads thereof refusing to comply" with requirement of President to make available to companies with orders for steel products for Armed Forces is guilty of a felony and subject to maximum penalty of 3 years and $50.000.)

In addition, section 7343 of Title 26 provides:

> As used in this chapter [chapter 75—crimes and offenses] the term "person" includes an officer or employee of a corporation or a member or employee of a partnership, who, as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

The Labor-Management Reporting and Disclosure Act (29 U.S.C. § 439) also imposes penalties for failure to file required reports and for false statements upon "any *person* who willfully violates" (emphasis added) and specifies that:

> (d) Each individual required to sign reports under sections 431 and 433 of this title shall be personally responsible for

> the filing of such reports and for any statement contained therein which he knows to be false.

Similar provisions apply to reports filed by labor organizations having trusteeship over subordinate labor organizations (29 U.S.C. § 461).

Title 7 contains several provisions which reach the same result by spelling out the persons having a proprietary or managerial connection with certain businesses in stating the requirement of furnishing information about the business, and repeating the list in the clause of the section imposing a penalty for failure to furnish such information.

Thus the Cotton Statistics and Estimates Act provides (7 U.S.C. § 473) in essence:

> It shall be the duty of every owner, president, treasurer, secretary, director, or other officer or agent of any cotton warehouse (*etc.*) whether conducted as a corporation, firm, limited partnership, or individual, and of every owner or holder of any cotton and of the agents and representatives of such owner or holder, when requested by the Agriculture Department, to furnish specified information. Any owner, president (*etc.*), or any owner or holder of any cotton or the agent or representative of any such owner or holder, who, under the conditions specified shall refuse or willfully neglect to furnish information or shall willfully give answers that are false, shall be guilty of a misdemeanor, and fined.

Other such provisions are contained in the Tobacco Statistics Act (7 U.S.C. § 503) and the Peanut Statistics Act (7 U.S.C. § 953): *Cf.* 7 U.S.C. § 13(a) (Commodity Exchange Act) which provides that if any board of trade, or any director, officer, agent, or employee of any board of trade violates the act or any rule, regulation or order thereunder, in lieu of revoking the board's designation as a "contract market," the Commodities Exchange Commission may enter a cease and desist order; noncompliance by such board of trade, director, officer, agent or employee is punishable by a fine of $500 to $10,000 and/or imprisonment for 6 months to 1 year.

Section 14 of the Clayton Act provides (15 U.S.C. § 24):

> Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor. . . .

A similar provision of the Act, which specifically applies to members and employees of partnerships and other unincorporated associations as well as to officers, directors and agents of corporations, prohibits common carriers from having dealings, in the aggregate of more than $50,000 in any 1 year, in any corporation, firm, partnership, or association, where the carrier has a director, president, manager or purchasing or selling agent in the particular transaction, who is at the same time a manager, director, or purchasing or selling officer, or who has a substantial interest in the other corporation, *etc.* Also prohibited is prevention of free competition in bidding.

This section (15 U.S.C. § 20) then provides that:

> If any common carrier shall violate this section, it shall be fined not exceeding $25,000; and every such director, agent,

> manager, or officer thereof who shall have knowingly voted for or directed the act constituting such violation, or who shall have aided or abetted in such violation, shall be deemed guilty of a misdemeanor, and shall be fined not exceeding $5,000 or confined in jail not exceeding one year, or both, in the discretion of the court.

Similar provisions are contained in the following statutes: Trading With the Enemy Act, 12 U.S.C. § 95a (50 U.S.C. APP. § 5(b)(3)) (whoever willfully violates . . . . is guilty; and any officer, director or agent of any corporation who knowingly participates in such violation may be punished . . .); 12 U.S.C. § 378 (prohibits persons, firms and corporations who are engaged in selling securities, or who are unlicensed, from engaging in banking business; punishes whoever shall willfully violate, and any officer, director, employee, or agent of any such organization who shall knowingly participate in such violation); Savings and Loan Holding Company Act (1967), 12 U.S.C. § 1730a(j)(1)(2); Bank Holding Company Act, 12 U.S.C. § 1847 (any company (does not include partnership) violating the act, or regulations thereunder, is subject to a fine of $1,000 per day and any individual who willfully participates in a violation is punishable by $10,000 and 1 year); United Nations Participation Act, 22 U.S.C. § 287c(b) ("Any person who willfully violates . . . and the officer, director, or agent of any corporation who knowingly participates in such violation . . ."); International Claim Settlement Act, 22 U.S.C. § 1631n (identical except for maximum penalty to 22 U.S.C. § 287c(b)); Obstructing Navigable Waterways Acts, 33 U.S.C. § 411 ("Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation . . ."); Metal and Non-Metallic Mines Safety Act, 30 U.S.C. § 733(b) (where the offense is committed by a corporation, the officer or authorized representative of such corporation who knowingly permits such an offense to be committed shall be subject to the same fine or imprisonment or both); *Cf.* Free Trade Zone Act, 19 U.S.C. § 81s ("In case of a violation . . . by a grantee [only corporations may be grantees], any officer, agent, or employee thereof responsible for or permitting any such violation shall be subject to a fine . . .").

The provisions outside of Title 18 which specify only executives include:

15 U.S.C. § 298 (every person, corporation, partnership, and every officer, director or managing agent of same having knowledge of and directly participating in violation of section (forbidding false marketing of gold and silver) or consenting thereto, is guilty);

Neutrality Act of 1939, 22 U.S.C. § 447(c) ("whoever shall knowingly violate . . . Should the violation be by a corporation, organization, or association, each officer or director thereof participating therein shall be liable to the penalty herein prescribed");

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 941(f) (any employer who willfully fails to comply with the act's safety requirements is guilty of an offense and subject to a fine; "And in any case where such employer is a corporation, the officer who willfully permits any such violation to occur shall be guilty of an offense, and . . . shall be punished also for each offense by a fine.")

Finally, it should be noted that some statutes specifically distinguish between the organization and the individual acting for it. Such pro-

visions are basically of three types. The first type recognizes that a corporation or other artificial entity cannot be imprisoned. An example is section 709 of Title 18, which prohibits the unlawful use of words indicating Federal agency for advertising or other business purposes, and provides that whoever uses the specified words in the proscribed manner:

> shall be punished as follows: a corporation, partnership, business, trust, association, or other business entity, by a fine of not more than $1,000; an officer or member thereof participating or knowingly acquiescing in such violation or an individual violating this section, by a fine of not more than $1,000 or imprisonment for not more than one year or both.

See also: Internal Revenue Code, 26 U.S.C. § 7233; Bank Suspension Act, 12 U.S.C. § 95; Trading with the Enemy Act, 12 U.S.C. § 95a, (50 U.S.C. APP. §§ (b)(3), (16)); Savings and Loan Holding Company Act (1967), 12 U.S.C. § 1730a(j)(1), (2); Interstate Commerce Act, 49 U.S.C. § 10(3); Immigration and Nationality Act, 8 U.S.C. § 1185(c); United Nations Participation Act, 22 U.S.C. § 287(b); Obstructing Navigable Waters Acts, 33 U.S.C. §§ 410, 411.

The second type of provision imposes fines on corporations which are different and generally substantially greater in amount than those it imposes on natural persons. Thus the Securities Exchange Act of 1934 provides (15 U.S.C. § 78ff(a)) that any person who willfully violates any provision, rule or regulation, shall be fined not more than $10,000 or imprisoned not more than 2 years, except that when such person is an exchange (which is defined to include both incorporated and unincorporated bodies) a fine not exceeding $500,000 may be imposed. It should be noted that the distinction is not merely between natural and artificial persons, but between exchanges (which would always be artificial entities) and all other persons, natural and artificial. The Public Utility Holding Company Act provides (15 U.S.C. § 79z–3) that any person who engages in proscribed conduct shall be fined $10,000 and imprisoned 2 years, except in the case of a violation of the provisions outlawing certain transactions by unregistered holding companies by a holding company that is not an individual, the fine may be $200,000. The Bank Holding Company Act provides (12 U.S.C. § 1847) that any company (defined to exclude partnerships) willfully violating its provisions is subject to a fine of $1,000 per day during the duration of the violation, and that any individual who willfully participates in a violation is subject to a fine of $10,000 and imprisonment for 1 year. Section 582 of Title 12, prohibiting national banking associations from receiving United States notes as collateral for loans, provides that any association offending is guilty of a misdemeanor and subject to a fine of $1,000 and a further sum of one-third of the money so loaned, but the officer or officers of such association who shall make the loans are liable for a further sum of only one-fourth of the money so loaned. Finally, 18 U.S.C. § 610 provides that every corporation or labor organization which makes a political contribution in violation of the statute may be fined not more than $5,000, while every officer or director who consents to the contribution (and any person who receives the same) may be fined $1,000 and/or imprisoned for 1 year. If the violation is willful the fine is not more than $10,000 and/or imprisonment for not more than 2 years. *See also* 18 U.S.C. § 402 (criminal contempt) (the fine shall not exceed the

sum of $1,000, "nor, in case the accused is a natural person, shall such imprisonment exceed the term of 6 months").

The third type of provision also treats the corporate and individual violators differently, but the difference is in kind rather than in degree. Thus the Foreign Banking Act provides (12 U.S.C. § 617) that any corporation organized under the Act which violates the Act's prohibition against trading by such corporations in commodities or fixing prices of commodities may forfeit its charter; the directors, officers, agents, and employees are forbidden to use or conspire to use the credit, funds or power of the corporation to fix or control prices and "any such person" violating the provision is subject to fine and imprisonment. The Act also provides that before a corporation forfeiting its charter is dissolved, the United States is to bring suit to adjudicate the violation by the corporation, and upon such adjudication, "each director and officer who participated in or assented to the illegal act or acts shall be liable in his individual capacity for all damage which the corporation shall sustain in consequence thereof." A somewhat different approach is taken in connection with companies organized under the Union Pacific Railroad Acts (45 U.S.C. § 81 *et seq.*). The statute directs that the companies subject thereto must operate the railroads as one continuous line and must afford to each other such company equal advantages and facilities. Section 83 then provides that any officer or agent (of the companies) who shall refuse to operate the railroad (or telegraph line) under his control in one continuous line or to afford equal facilities and advantages shall be guilty of a misdemeanor and subject to fine and imprisonment; in the case of failure or refusal of a company to comply with the Act the party injured may sue that company for treble damages. Identical provisions are contained in 47 U.S.C. § 13 relating to railroad and telegraph companies subsidized by the government except that no treble damages are allowed. Finally, the Federal Trade Commission Act contains separate penalties for individuals and corporations (but not partnerships, which are excluded from the definition of "corporation," 15 U.S.C. § 44) violating its reporting requirements. Individuals who refuse to testify or to produce documentary evidence in response to an FTC subpoena, or who make false entries or statements in reports required to be made or to be kept by corporations subject to the act, may be punished by fine and/or imprisonment. Corporations, on the other hand, are subject only to the forfeiture provision ($100 per day) for failure to file annual or special reports required under the Act. *See St. Regis Paper Company* v. *United States*, 368 U.S. 208, 221 (1961) ("[T]he only penalty available against corporations is the forfeiture provision. Thus a corporation that refused to file an annual or special report would be subject to a $100 per day forfeiture. An individual under subpoena who refused to appear and testify or supply documents would be subject to a fine of $1,000 to $5,000 and/or a jail sentence up to three years."). This provision differs from the other provisions discussed in this memorandum in that it does not impose separate penalties on the individual actor and the corporation for the conduct of the individual, but rather imposes separate penalties for two different kinds of conduct: no liability is incurred by any individual for failure of the corporation to file the required reports; on the other hand, the corporation does not incur any liability under the section if the report filed contains false statements.

SOME RECENT STATUTORY PROVISIONS ON CORPORATE CRIMINAL LIABILITY

	Model Penal Code	New York	Illinois	Michigan	Delaware	Pennsylvania	California
The Model Penal Code and the recent Code revisions and proposed revisions of the States listed to the right include sections relating to corporate criminal liability which contain, to the extent indicated, provisions which:							
1. Limit the offenses for which, and the circumstances under which, corporations may be held accountable for the conduct of their agents to:							
(a) An offense consisting of an omission to discharge a specific duty of affirmative conduct imposed upon corporations by law	×	×	----	×	×	×	----
(b) An offense which is a violation and consists of conduct engaged in by an agent of the corporation acting in behalf of the corporation within the scope of his employment	×	×	----	×	×	×[1]	×[1]
(c) An offense which is a misdemeanor and consists of conduct engaged in by an agent of the corporation acting in behalf of the corporation within the scope of his employment	----	×	×	×	×	----	----
(d) An offense which is defined by a statute in which a legislative purpose to impose liability on corporations plainly appears and the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his employment	×[2]	×[3]	×[4]	×[2]	×	×[2]	----
(e) An offense the commission of which 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 employment	×	×[5]	×[5]	×[5]	×[5]	×	×[5]
2. Establish a presumption of legislative intent to impose liability on corporations in cases of absolute liability	×	----	----	----	----	×	----
3. Establish a defense (except in cases of absolute liability or where plainly inconsistent with legislative purpose in defining the offense) if 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	×	----	×	----	----	×	----

4. Specify that ultra vires is not a defense	----	----	----	----	×	----	----
5. Provide for legal accountability of individuals as follows:							
(a) A person is legally accountable for any conduct he performs or causes to be performed in the name of the corporation or in its behalf to the same extent as if it were performed in his own name or behalf	×	×[6]	×	×[6]	×[6]	×	----
(b) When a duty to act (i.e., as in 1(a)) is imposed on the corporation any agent having primary responsibility for the discharge of the duty is legally accountable for a reckless omission to perform the act to the same extent as if the duty were imposed directly upon him	×	----	----	----	----	×	----
(c) When a person is convicted of an offense by reason of his legal accountability for the conduct of a corporation he is subject to the sentence imposed by law when a natural person is convicted of an offense of the grade and degree involved	×	----	×[7]	----	----	----	----
6. Define:							
(a) "Agent" as any director, officer, servant, employee, or other person authorized to act in behalf of the corporation	×	×[8]	×	×[8]	×[8]	×	×[8]
(b) "High managerial agent" as an officer or any other agent of the corporation having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation	×	×[9]	×[8]	×[9]	×[9]	×	×[10]
7. Exclude governmental corporations	×	----	----	----	----	×	----
8. Contain provisions extending the rules (except offenses defined by 1(e)) to unincorporated associations (including partnerships)	×	----	----	----	----	×	×
9. Include provisions setting forth fines for corporations	----	×	×	×	----	----	----

NOTES TO TABLE ON CORPORATE CRIMINAL LIABILITY

California specifically restricts the application of the section to situations where a statute other than the code does not provide to the contrary.

[1] For "violation," California substitutes "infraction," Pennsylvania substitutes "summary offense."

[2] Inserts "other than the Code" after "statute;" provides that where the laws defining the offense designate the agents for whose conduct the corporation is accountable or the circumstances under which it is accountable, such provisions shall apply.

[3] Inserts "such criminal liability" after "impose."

[4] Includes offenses defined by "Section 24-1 of this Code" (unlawful use of weapons).

[5] New York, Michigan, and Delaware substitute "engaged in" for "performed," and add "solicited." California substitutes "committed" for "performed" and "high executive agent acting within the scope of his authority" for "high managerial agent," etc. Michigan substitutes "knowingly tolerated" for "recklessly tolerated." Illinois does not include "recklessly tolerated."

[6] Substitutes "criminally liable" for "legally accountable."

[7] Language differs, and "although a lesser or different punishment is authorized by the corporation" is added.

[8] Does not include "servant."

[9] Substitutes "officer or any 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."

[10] Defines "executive agent" as "an officer or agent of a corporation who is invested with managerial authority and responsibility for the execution of corporate policy."

COMMENT
on
IMMATURITY DEFENSE: SECTION 501
(Stein; October 29, 1968)

1. *Background; Introduction.*—Present 18 U.S.C. § 5032 provides that a person under the age of 18 may be proceeded against as a juvenile delinquent, rather than by criminal prosecution if he is "alleged to have committed one or more acts in violation of a law of the United States not punishable by death or life imprisonment and [is] not surrendered to the authorities of a state, . . . [and] if he consents to such procedure, unless the Attorney General, in his discretion, has expressly directed otherwise." Thus, under the statute as presently worded, a 10-year-old child may be prosecuted for a crime if the Attorney General so decides, and he must be prosecuted for the crime if he commits acts which, were an adult to do them, would amount to murder, kidnapping, rape, treason, espionage, *etc.* To avoid such absurd possibilities, proposed section 501 would establish a minimum age of criminal responsibility under which a child could not be prosecuted for a crime. In line with the recommendations of the American Law Institute and in accord with existing law in many States, the minimum age of criminal responsibility would be 16.[1] Further, when the proposed statute is read in conjunction with present 18 U.S.C. §§ 5031–5037 (dealing with Federal juvenile delinquency proceedings), a choice would exist in each case whether to treat a 16- or 17-year-old as a juvenile delinquent or as a criminal.[2]

There are, of course, few juvenile delinquency proceedings in the Federal courts outside the District of Columbia. There are no Federal family courts outside the District of Columbia and the Federal territories, and Federal policy is to turn over youths who have violated Federal law to the States.[3] Thus, only about 300 of some 30,000 persons subject to Federal criminal prosecution last year were under 18.[4]

[1] *See* MODEL PENAL CODE § 4.10 (P.O.D. 1962), and chart entitled "Distribution of Jurisdiction between Juvenile and Criminal Courts," attached to comment to § 4.10, at 7–13 (Tent. Draft No. 7, 1957).

[2] Many States have similar provisions for the trial of adolescents. *See* chart attached to MODEL PENAL CODE § 4.10, comment at 7–13 (Tent. Draft No. 7, 1957).

[3] This policy is pursued in accordance with the provisions of 18 U.S.C. § 5001: "Whenever any person under twenty-one years of age has been arrested, charged with the commission of an offense punishable in any court of the United States or of the District of Columbia, and, after investigation of the Department of Justice, it appears that such person has committed an offense or is a delinquent under the laws of any State or of the District of Columbia which can and will assume jurisdiction over such juvenile and will take him into custody and deal with him according to the laws of such State or of the District of Columbia, and that it will be to the best interest of the United States and of the juvenile offender, the United States Attorney of the district in which such person has been arrested may forgo his prosecution and surrender him. . . ."

[4] This, and the remaining factual information in this paragraph was obtained in interviews with representatives of the United States Department of Justice.

Of these youths, almost all were treated as juvenile delinquents. A few United States Attorneys do request authority from the Attorney General to prosecute 16- and 17-year-old juveniles criminally, but only a handful of authorizations are granted. The Attorney General authorizes such prosecutions only if the youth has committed some major criminal act—such as armed bank robbery—and it otherwise appears that he is not a good subject to be dealt with as a juvenile delinquent. In recent years, no criminal prosecution has been authorized for a child under 16 years of age, and all such children who violate Federal criminal statutes are treated as juvenile delinquents.

2. *Immaturity; No Criminal Responsibility for Persons Under Sixteen.*—Proposed section 501 declares that no person may be held criminally responsible for acts committed when he was less than 16 years of age. The unlawful acts of a child of 15 or less can, therefore, be considered no more than acts of juvenile delinquency.[5] This principle of immaturity conforms with the law of about one-half of the States, and of the District of Columbia.[6]

Some States, however, provide that the minimum age of 16 for responsibility does not apply to the commission of serious crimes. These exceptions are premised on the view that serious criminal acts—such as murder or rape—indicate viciousness, which must be dealt with by criminal punishment, not by efforts at juvenile reform.[7] For

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[5] Acts of juvenile delinquency are not considered crimes. In a juvenile delinquency proceeding "the juvenile shall be proceeded against by information and no criminal prosecution shall be instituted for the alleged violation." 18 U.S.C. § 5032. "A proceeding under the Federal Juvenile Delinquency Act is not a criminal trial. Congress has removed the criminal stamp from proceedings under the Act. The proceeding shall be without a jury, and such proceeding results in the adjudication of a status rather than a conviction of a crime (80th Cong. House Report No. 304)." *United States* v. *Houston*, 353 F. 2d 723, 724 (7th Cir. 1965). *But cf. Application of Gault*, 387 U.S. 1, 22–24 (1967): "[W]e are told that one of the important benefits of the special juvenile court procedures is that they avoid classifying the juvenile as a 'criminal.' The juvenile offender is now classed as a 'delinquent.' There is, of course, no reason why this should not continue. It is disconcerting, however, that this term has come to involve only slightly less stigma than the term 'criminal' applied to adults."

[6] "[W]here the juvenile court does have exclusive jurisdiction, and full recognition is accorded to this fact, there has been a change in the substantive law itself, since such a transgression is not a crime at all but a different kind of misdeed known as 'juvenile delinquency,' and hence there has been a change in the capacity to commit crime. Stated in terms of the common law the age under which a person is *conclusively presumed* to be incapable of committing crime has been raised from seven to sixteen. . . ." PERKINS, CRIMINAL LAW 736 (1957). It is also Federal employment policy not to hold persons responsible for acts committed before they were 16. *See* U.S. Civil Service Commission, *Standard Form 86, Security Investigation Data for Sensitive Position*, Question 18 (1964): "Have you ever been arrested, taken into custody, held for investigation or questioning, or charged by any law enforcement authority? (You may omit . . . anything that happened before your 16th birthday)."

[7] "It is difficult to attribute to the legislature an intent that every offender under the age of sixteen, though he may have committed murder, rape, robbery or other serious crime and however hardened he may be in iniquity, merely because he has not reached that age, though it be but a matter of days, must necessarily be immune from criminal proceedings . . . That such a course would not accord with the general feeling of mankind is indicated by the fact that in most of the Juvenile Court Acts in the various States, some provision is made for the disposition of such cases, either by excepting certain of the more serious offenses or by giving to some tribunal the power to determine whether the juvenile court or the criminal court should take cognizance of them. Moreover, to

this reason, presumably, the present Federal law excepts from treatment as juvenile delinquents those who violate laws "punishable by death or life imprisonment" (18 U.S.C. § 5031). Nevertheless, the idea of subjecting a child to life imprisonment or the death penalty seems barbaric. If we adopt the view that some teenagers who commit heinous acts may not be readily reformable, and should be held criminally responsible, it would be better to lower the proposed minimum age of responsibility, perhaps to 14, than to provide that any child who commits serious misdeeds may be subjected to maximum criminal penalties.[8]

As in present law, the relevant age for determination of responsibility will be the age as of the time the unlawful act was committed.[9] Thus, under the proposed statute, a youth who committed an unlawful deed when he was 15, but is not apprehended until he is 16, must be tried as a juvenile delinquent. Further, since only persons under 18 are subject to juvenile delinquency proceedings under present 18 U.S.C. §§ 5031–5032, no person 18 or over can be indicted for acts committed when he was under 16 years of age. Again, this raises a special problem concerning those youths who commit serious crimes. If a murder is committed by a 15-year-old, but his crime is not solved until he is 18, there would be no jurisdiction over him. This problem

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draw an arbitrary line of distinction at the age of sixteen, without regard to the character or history of the offender or the circumstances of the offense is hardly cognizant with that individualization of punishment which has become one of the fundamentals of modern penology." *State* v. *Elbert*, 115 Conn. 589, 162 A. 769, 771 (1932). *See also* PERKINS, CRIMINAL LAW 737 (1957):

> With all the good that has resulted from juvenile court legislation there are those who have become disturbed by the thought that juvenile misbehavior has flourished under this type of procedure and insofar as acts of violence and brutality by teenagers are concerned has climbed to an all-time high. No one familiar with the problem would wish to abolish this method of dealing with misguided children but there seem to be an increasing number who question the wisdom of giving the juvenile court exclusive jurisdiction over these cases—at least so far as acts of violence and brutality are involved.

Professor Perkins quotes (at 737–738) from LUDWIG, YOUTH AND THE LAW 311 (1955), as follows:

> Certainly, one consequence of abolishing punitive treatment for young offenders is to deprive the criminal law of its efficacy as an instrument of moral education. . . . Making treatment of all criminal behavior of young offenders, regardless of its seriousness or triviality, depend solely upon the individual need of the offender for rehabilitation may well lead our impressionable young community to conclude that fracturing someone's skull is no more immoral than fracturing his bedroom window.

[8] But cf. N.Y. REV. PEN. LAW § 30.00, Comment at 257 (McKinney 1967). New York has set 16 as the minimum age of criminal responsibility and has done away with prior distinctions as to the nature of the crime: "[I]f a child of fifteen is not deemed sufficiently mature to be responsible for robbery, burglary or assault he can hardly be deemed mature enough to be responsible for murder or kidnapping."

[9] "For the purpose of consideration of the Federal Juvenile Delinquency Act, the age at the date of the commission of the alleged offense is the determinative age. . . . If the accused was under the age of 18 years at the time of the commission of the offense which forms the basis of the charge of juvenile delinquency . . . the accused is entitled to be proceeded against as a juvenile delinquent irrespective of the age of the accused at the time of any hearing or trial." *United States* v. *Jones*, 141 F. Supp. 641, 644 (E.D. Va. 1956). *See United States* v. *Fotto*, 103 F. Supp. 430 (S.D. N.Y. 1952), dismissing an indictment of an 18-year-old for a crime committed when he was 17.

may, in part, be resolved by adding an explicit provision in 18 U.S.C. § 5032 that: "Juvenile delinquency proceedings may be commenced against a juvenile alleged to have committed acts which, were they committed by an adult, would be felonious, at any time until the juvenile attains the age of his majority." This would be tantamount to a 5-year statute of limitations on acts of persons under 16 years of age. But, since a juvenile delinquent may be committed or placed on probation only "for a period not exceeding his minority" (18 U.S.C. § 5034), the ability to impose reform treatment on the juvenile decreases as long as his misdeed goes unsolved, or as long as he is not apprehended. This result, however, does not conflict with the view that the misdeeds of a child must, eventually, be forgiven and forgotten.[10] Of course, if a child's acts are such as to indicate mental derangement, he will be subject to civil commitment.

Lack of criminal responsibility by reason of immaturity is a defense under the proposed statute. That is, the prosecution need not prove in every criminal case that the defendant is 16 years old or over. If a person is tried for a crime when, in fact, he was under 16 at the time of the acts charged against him, he must raise the issue: the prosecution then has the burden of proving that the defendant had attained the age of 16, or the indictment may be dismissed and the case treated as a juvenile delinquency proceeding.

3. *Juvenile Delinquency Proceedings for Persons Sixteen or Over.*— Consideration of the rights to be accorded juveniles charged with violations of law is now of major judicial concern in the nation.[11] But the principle that a child should not be prosecuted as a criminal remains basic. Proposed section 501 sets the minimum age at which nonpenal treatment must be substituted in place of ordinary criminal proceedings. Further, a few changes in the present Federal Juvenile Delinquency Act (18 U.S.C. §§ 5031–5037) would harmonize that Act with proposed section 501.

The Federal Juvenile Delinquency Act sets forth rules for proceeding against persons under 18 in a Federal District Court. A juvenile

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[10] *See* Herman, *Scope and Purposes of Juvenile Court Jurisdiction*, 48 J. CRIM. L. C. & P. S. 590, 603–604 (1958):

> Where . . . juvenile courts are denied jurisdiction over acts that constitute violations of the criminal law, they are denied their protective purpose. The only supervening interest that may be conceived of as justifying this denial of juvenile court jurisdiction must be the social interest of crime prevention . . . If the juvenile court is impotent to institutionalize for longer than minority, it would seem that in some cases the social interest of crime prevention would require jurisdiction in a court with power to institutionalize for longer than minority, *i.e.* the criminal court.

This writer approves the standards recommended by the United States' Children's Bureau: exclusive jurisdiction by way of juvenile delinquency proceedings for all juveniles under 16; juvenile court jurisdiction over minors over 16 who are charged with felonies may be waived where the minor "is not feeble-minded or insane and is not treatable in any institution or facility of the state designed for the care and treatment of children, or where the court finds that the safety of the community clearly requires that the child continue under restraint for a period extending beyond his minority."

[11] *See Application of Gault*, 387 U.S. 1, 30 (1967), holding that juveniles have the right to notice of charges against them, to counsel, to confrontation and cross-examination of witnesses, and to the privilege against self-incrimination, and that juvenile delinquency hearings "must measure up to the essentials of due process and fair treatment."

charged with acts which are not punishable by death or life imprisonment is entitled to the juvenile delinquency proceeding if he consents to it, and the Attorney General has not, in his discretion, directed otherwise. The juvenile's consent is deemed a waiver of trial by jury, and the proceeding is conducted before a judge of the District Court.[12]

The following changes in this procedure are necessary in order to conform the existing legislation with the proposed section, as well as to delete some provisions of doubtful constitutionality.

(a) The specific exception of juveniles who are charged with acts punishable by death or life imprisonment from the right to be proceeded against as juvenile delinquents must be deleted. Under proposed section 501, no child under the specified age may be treated as a criminal, no matter the acts he is charged with. He *must* be proceeded against as a juvenile delinquent. As for 16- and 17-year-olds, the nature of the criminal acts they are charged with will certainly be a factor in determining whether they will be proceeded against criminally. But that may be left to the discretion of court and prosecutor, without the automatic limitation by statue.

(b) The provision that the Attorney General may direct that a juvenile be tried criminally must be eliminated, and replaced with a provision permitting the Attorney General to request that a juvenile be tried criminally, but requiring that the court approve the request before criminal prosecution can be brought. Under proposed section 501, the present provision for exercise of the Attorney General's discretion would become meaningless as applied to those under 16. There would be no way to proceed against these children, except by juvenile delinquency proceedings. Further, a provision permitting the decision between criminal prosecution and juvenile treatment to be made administratively may well be in violation of due process.[13] The decision whether to prosecute a 16- or 17-year-old criminally should be considered in court, and decided by a judge.

(c) Provisions requiring the consent of the juvenile to be proceeded against as a juvenile delinquent, rather than tried as a criminal, should be deleted. Under proposed section 501, a child may not be proceeded against criminally for acts committed when he was under 16. His refusal to consent to juvenile proceedings would, therefore, frustrate any effort to deal with him judicially if the present consent provision were retained. Nor is the consent provision warranted. A juvenile is entitled to due process rights, even in a juvenile delinquency proceeding. Since the purpose of juvenile delinquency proceedings is to protect a child from the punitive provisions imposed on adults who commit crimes, and since the child's due process rights will be protected, the choice of juvenile delinquency proceedings rather than criminal prosecution is entirely to the child's benefit. To require that he consent to the juvenile delinquency proceedings, then, has no pur-

[12] The extent to which the rights accorded to a defendant in a criminal prosecution must be given to a juvenile in a delinquency proceeding awaits resolution in the courts on a case to case basis. Many of the basic procedural rights to which juveniles are entitled have been dealt with in the *Gault* case, *id.* The question as to whether juveniles may have a right to trial by jury, however, was not decided.

[13] *See Kent* v. *United States*, 383 U.S. 541, 554 (1966), holding that the Juvenile Court of the District of Columbia could not waive its jurisdiction over a youth to a criminal court "without hearing, without effective assistance of counsel, without a statement of reasons."

pose—unless it is construed to waive due process rights which a person would ordinarily be entitled to in a criminal prosecution. If this is so, the requirement of consent, waiving due process rights in order to obtain the benefits of a juvenile delinquency proceeding, would be coercive and improper.* It would be best, therefore, to eliminate the consent provisions from present law.

(d) 18 U.S.C. § 5032 should specify that juvenile delinquency concerns acts which, for adults, would constitute violations of *criminal* laws. This would exclude any possibility that a child who violates noncriminal administrative regulations or civil statutes should be dealt with as a juvenile delinquent.[14]

Present 18 U.S.C. §§ 5031–5033 concerning proceedings against "juveniles" (persons under 18 years of age) amended by deleting the bracketed words and adding the underlined words, would read as follows:

§ 5031. *Definitions.* For the purpose of this chapter a "juvenile" is a person who has not attained his eighteenth birthday, and "juvenile delinquency" is the violation of a law of the United States committed by a juvenile [and not punishable by death or life imprisonment].

§ 5032. *Proceeding against juvenile delinquent.* A juvenile alleged to have committed one or more acts in violation of a *criminal* law of the United States [not punishable by death or life imprisonment] and not surrendered to the authorities of a State, shall be proceeded against as a juvenile delinquent [if he consents to such procedure,] unless *he is sixteen years old or more* [the Attorney General, in his discretion, has expressly directed otherwise,] *and a judge of the District Court of the United States having cognizance of the alleged violation, in his discretion, directs otherwise, upon request by the Attorney General.*

§ 5033. *Jurisdiction; [written consent;] jury trial precluded.* District Courts of the United States shall have jurisdiction of proceedings against juvenile delinquents. For such purposes, the court may be convened at any time and place within the district, in chambers or otherwise. The proceeding shall be without a jury [the consent required to be given by the juvenile shall be given by him in writing] before a judge of the District Court of the United States having cognizance of the alleged violation, who shall fully apprise the juvenile of his rights [and of the consequences of such consent. Such consent shall be deemed a waiver of a trial by jury].

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* At least one Federal court, using such reasoning, has already held unconstitutional the provision deeming a juvenile's consent to delinquency proceedings to be a waiver of his right to jury trial. *Nieves* v. *United States*, 280 F. Supp. 994 (S.D.N.Y. 1968).

[14] Children in need of care—abandoned children or mistreated children—are dealt with by local juvenile courts, but they are not within the province of the Federal District Courts. District Courts should deal with juveniles as at present, when they are accused of serious acts against Federal law, and their case is not readily transferable to local juvenile courts for disposition.

CONSULTANT'S REPORT
on
INTOXICATION DEFENSE: SECTION 502
(Robinson, Green; June 23, 1969)

1. *Introduction.*—Personal experience of alcohol use is sufficiently widespread in our society to make unnecessary an extensive introduction to the factual situations primarily addressed by an intoxication statute. Alcohol is a depressant. Seeming stimulation in early stages of intoxication is produced by inhibition of the central nervous system function. If intoxication increases, overall depression of mental function becomes more profound.[1]

The relationship between intoxication and crime is complex and not fully understood. Some researchers tend to believe that immoderate use of alcohol and criminality are largely the product of more basic similar psychological factors, rather than that criminality is primarily attributable to intoxication itself. Yet, the effect of alcohol in relaxing inhibition is generally accepted as being an immediate contributing factor in much delinquent behavior.[2] Dr. Karen Horney is somewhere quoted as having observed that the superego is that part of the personality which is soluble in alcohol. Statistics on arrests indicate a high degree of association between drunkenness and major crimes. A 2-year study by Columbus, Ohio police of all persons arrested for felonies found that 64 percent of these individuals were under the influence of alcohol to a degree causing reduction of inhibitions.[3] In an earlier study of 3,000 admissions to Sing Sing Prison, it was found that 22 percent of the prisoners were habitually intemperate and 15 percent were intoxicated at the time of their crime.[4] (The investigations, together with others, are summarized in GLASER & O'LEARY, THE ALCOHOLIC OFFENDER 11–12 (U.S. Dep't of H.E.W. 1966)).

Opium derivatives and related synthetics, including heroin, morphine, codeine, methadone, do not seem commonly to precipitate criminal behavior by intoxication. While euphoria and excitation at the time of injection is reported by some users, the main effects of these drugs appear to be drive reduction, passiveness, drowsiness.[5]

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[1] *See* PRINCIPLES OF INTERNAL MEDICINE 1388 (5th ed. Harrison 1966); KOLB, NOYES' MODERN CLINICAL PSYCHIATRY 196 (7th ed. 1968) [hereinafter cited as KOLB].

[2] *See* KOLB, *supra* note 1.

[3] Shupe, *Alcohol and Crime, A Study of Urine Alcohol Concentration Found in 882 Persons Arrested During or Immediately After the Commission of a Felony*, 44 J. CRIM. L.C. & P.S. 661–664 (1954).

[4] Banay, *Alcoholism and Crime*, 2 QUART. J. STUDIES ON ALCOHOLISM, 686–716 (1942).

[5] *See* REDLICH & FREEDMAN, THE THEORY AND PRACTICE OF PSYCHIATRY 735–739 (1966).

Thus, although their acquisition is commonly associated with crime, the psychopharmacological consequences are not.[6]

2. *Present Law.*—No special legal doctrine is applied to the vast majority of criminal cases where intoxication has been associated with the commission of the criminal act, nor is one required. Intoxicated persons usually intend their conduct in a way similar to those who are sober. Intoxication is quite uniformly held not to be exculpatory in itself. Furthermore, the requirement of "mental disease" (or "defect"), universal in American tests of criminal responsibility, is held to exclude intoxication. The dicta of the decisions considering intoxication in connection with criminal prosecutions display surprising uniformity. Intoxication is not a defense. Where an offense requires a "specific intent," however, inebriation may be considered in determining whether such intent exists. It will not be deemed material to a crime requiring only "general intent."

These terms mask a good deal of conceptual and decisional ambiguity. It is commonly said that specific intent is intent other than to merely commit the criminal act. Common law theft crimes provide ready examples. In larceny the actor must intend to deprive the owner of his property indefinitely. In burglary he must intend to commit a felony, not merely to unlawfully break and enter. On the other hand, rape is said to require merely general intent. Yet mistake as to consent or marital status may negative the mens rea of rape, thus suggesting that the intent required is more than that of merely committing the act.[7] As Professor Jerome Hall has pointed out, any intent, whether called specific or general, may be inferred from conduct. On the other hand, a required intent may always be negatived by evidence apart from the criminal act.[8] Thus in a sense the mental element of all crimes is specific. The notion that intoxication will not establish a defense to some charges is a special doctrine of liability since awareness of the act committed could factually otherwise be negatived by a showing of extreme inebriation.

It is often helpful to analyze the decisions in which intoxication evidence has been considered in terms of whether the mental element required by an offense is satisfied by recklessness, or whether purpose or knowledge is required. Thus recklessness as to ownership of property is thought insufficient for larceny, and intoxication may negative the purpose or knowledge required. On the other hand, recklessness is sufficient for manslaughter and intoxication is not allowed to disprove it. A similar interpretation may be made of rape cases holding intoxication resulting in mistake as to consent to be no defense. Recklessness as to consent may be sufficient. A major difficulty with such reasoning is not uncommonly that neither the legislative body nor the courts decides whether recklessness is enough to satisfy a mental element of a crime. Decisions tend to speak in terms of whether the intent must be specific or general and circularity and lack of predictability result.[9]

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[6] *See* Comment on Drug Crimes, Extended Note on Classification of Drugs.

[7] *Cf. United States* v. *Short*, 4 U.S.C.M.A. 437, 16 C.M.R. 11 (1954).

[8] *See* HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 141–145 (2d ed. 1960) [hereinafter cited as HALL].

[9] The cases are collected in 8 A.L.R.3d 1236 (1966).

It should be stated that the foregoing discussion of general law is said to be applicable only to voluntary intoxication. However, this characterization is very broadly drawn. While cases of extreme duress or fraud may be hypothesized, Professor Jerome Hall has concluded that they have never met with judicial acceptance.[10] Although chronic alcoholism has received considerable sympathetic recognition as a defense in cases involving statutory interpretation or even constitutional principle under the cruel and unusual punishment clause of the eighth amendment, the decisions have been limited to charges of public intoxication. Extension of the view that chronic alcoholism involves involuntary intoxication to provide a defense to more serious criminal charges has been expressly disavowed.[11] Even the four Justices who dissented from a decision affirming the public intoxication conviction of a chronic alcoholic in *Powell* v. *Texas*, 392 U.S. 514 (1968), stated:

> It is not foreseeable that findings such as those which are decisive here—namely that the appellant's being intoxicated in public was a part of the pattern of his disease and due to a compulsion symptomatic of that disease—could or would be made in the case of offenses such as driving a car while intoxicater, assault, theft, or robbery. . . . If an alcoholic should be convicted for criminal conduct which is not a characteristic and involuntary part of the pattern of the disease as it afflicts him, nothing herein would prevent his punishment. (*id*, 392 U.S. at 559 n. 2).

It is possible, of course, to construe this rather careful language as merely evidencing a reluctance to decide a case not deemed to be before the Court, rather than an expression of opinion on the merits.

The Federal cases applying Federal law have come mostly from the District of Columbia. They follow the general trend of authority that intoxication is not itself a defense to crime; that evidence of intoxication, while admissible to negative specific criminal intent is inadmissible to negative general intent.[12]

3. *Relationship of the Draft to the Insanity Defense Provided by the Code.* Proposed section 502 is based on section 2.08 of the Model Penal Code. As such, it is compatible with the adoption of an insanity defense such as that of the Model Penal Code. Should a modified *M'Naghten* insanity defense be deemed preferable, subsection (4) of the draft should be modified by striking the word "either" and the last conjunctive phrase, so that the section would then, correspondingly, focus on cognition rather than on capacity to control behavior. If a separate insanity defense were to be abolished* the intoxication provision (section 502) could be conformed by striking the first phrase of subsection (1) and all of subsections (3) and (4). In that event it

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[10] HALL, *supra* note 8, at 539.

[11] *Driver* v. *Hinnant*, 356 F. 2d 761, 764 (4th Cir. 1966); *see Easter* v. *District of Columbia*, 361 F. 2d 50 (D.C. Cir. 1966).

[12] *E.g.*, *Parker* v. *United States*, 359 F. 2d 1009 (D.C. Cir. 1966); *Womack* v. *United States*, 336 F. 2d 959 (D.C. Cir. 1964); *Heideman* v. *United States*, 259 F. 2d 943 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 959 (1959); *Allen* v. *United States*, 239 F. 2d 172 (6th Cir. 1956); *Proctor* v. *United States*, 177 F. 2d 656 (D.C. Cir. 1949); *Wheatley* v. *United States*, 159 F. 2d 599 (4th Cir. 1946).

* The consultant recommended the abolition of a separate insanity defense. *See* Comment on Criminal Responsibility—Mental Illness: section 503, *infra*.

would be unnecessary to indicate that intoxication is not a mental disease within the meaning of a defense applicable to such a disease. Likewise "pathological intoxication* need not be treated similarly to mental disease. The largely nonexistent category of nonself-induced intoxication could be treated under general principles of fraud and duress.

4. *No Defense of Unawareness of Risk.*—The major policy decision to be made in considering an intoxication defense statute is whether evidence of intoxication should be given full evidentiary effect so as to negative such awareness as is required for recklessness, or whether intoxication should not be exculpatory in those situations where there would have been awareness if the actor had been sober. Thus, for example, if an assault may be committed by recklessly causing bodily injury to another, lack of apprehension of the risk of harm due to inebriation would not provide a defense under the draft. Where an offense must be committed purposely or knowingly, the draft would give evidence of intoxication its full probative effect.

The decision to make unawareness of a risk due to self induced intoxication immaterial** to an element of an offense which may be established by recklessness is the result of a variety of considerations: it follows the existing law's treatment of crimes which may be committed recklessly; it avoids the difficult-to-litigate issue of awareness; little practical loss to the defendant seems likely in such cases, since drunkenness so extreme as to prevent all awareness of risk (in conduct which does not disable the actor from engaging in the criminal act) would be an unusual finding; furthermore, one who acts destructively when intoxicated may present serious risk if allowed to go free and to drink again.

One who drunkenly assaults or rapes without awareness of his conduct or its effect ought to be subject to criminal sanction. Otherwise there is a hiatus in the law through which dangerous persons may pass. For example, the writer has personal knowledge of a case in which witnesses reported that the defendant had raped a 4-year-old girl. The defendant, a young, ostensibly personable member of the military service, stated that he had been very intoxicated and had had no awareness of whether this had occurred or not. A psychiatrist who examined him concluded that lack of awareness might very well have been the case and concluded with an observation that undoubtedly the defendant should not drink in the future. It is submitted that the possibility of criminal sanctions in cases such as this should be retained.

It may be noted that while chronic alcoholics (variously defined) may be compulsorily hospitalized in 36 States (and persons addicted to drugs in 34 States), no procedures exist for civil involuntary commitment of persons dangerous when drunk who are not chronic in their inebriation.[13] Furthermore, the behavior of individuals when

**See* note **, p. 227, *infra*.

**Alternatively, subsection (2) could be rephrased so as to explicitly provide that the defense of intoxication is "unavailable" where recklessness is the required culpability, and/or placed with the definition of "recklessness" and "negligence" in subsections 302(1)(c) and (d).

[13] THE MENTALLY DISABLED AND THE LAW, 18, 82–88 (Lindman & McIntyre ed., 1961).

intoxicated is so varied and the degree and probability of anticipatable harm so diverse as to make it questionable whether involuntary civil commitment should be authorized. Similar reasoning makes questionable whether a "drunk and dangerous" criminal statute could be rationally graded without becoming a reinstatement of present law.

Considerations pointing in the opposite direction include a distrust of special doctrines giving less than full probative force to intoxication. Furthermore, awareness is the factor establishing culpability in crimes of recklessness. If criminal sanctions are to extend to a person who commits dangerous acts when drunk without awareness of it, his offense should be graded according to his culpability in becoming drunk.[14] The draft could be made to conform with such a position by eliminating subsection (2). (*Compare* Tentative Draft No. 1, 1967, of the California Penal Code Revision Project.)

5. *Intoxication Not Mental Disease.*—The draft follows prevailing authority in stating that intoxication itself does not constitute mental disease within the meaning of an insanity defense.* [15] Professor Jerome Hall has urged the contrary: [16]

> The fact that the state of mind and lack of inhibition of a grossly intoxicated person closely approximate that of a psychotic person should be the paramount datum in the determination of the relevant penal liability.

Of course, the state of mind of such a person is also similar in many respects to that of a sane individual, including (usually) an awareness of conduct and of desires. The major difficulty with Hall's position seems to be one of providing adequate social controls for a person who is adequately inhibited and sane when sober but who performs in an antisocial manner when intoxicated. It would not be satisfying to be told that because such a person's ethical sensitivity is blunted when he is drunk, he must be excused from criminal responsibility, but because he is not mentally ill (at least when sober) he cannot be held civilly.

6. *Pathological Intoxication.*—The draft also treats "pathological"** intoxication as not being self induced. This phrase is sometimes used medically to refer to an outbrust of irrational, combative, destructive behavior after consumption of small quantities of alcohol. Sometimes it is termed an "acute alcoholic paranoid state." There is dispute among medical authorities as to whether such a syndrome exists.[17] Critical data supporting or disproving pathological intoxication apparently are unavailable. It is a rare occurrence, at the most, and, in spite of reservations of the writer in creating lacunae in the law, it was thought desirable to include its formulation.

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[14] *See* WILLIAMS, CRIMINAL LAW, THE GENERAL PART, 181–182 (2d ed. 1961); HALL, *supra* note 8, at c. 14.

*To accommodate those cases in which chronic alcoholism may have produced mental disease and to perhaps make clearer what is implicit in section 503, a phrase or subsection could be added to the effect that intoxication does not bar a defense under section 503.

[15] *Compare Anot.*, 8 A.L.R. 3rd 1236, 1265–1268 (1966).

[16] HALL, *supra* note 8, at 537.

**The Tentative Draft included a separate definition of the term "pathological intoxication." The Study Draft does not use the term, but incorporates the definition thereof in subsection 4(b).

[17] *See* PRINCIPLES OF INTERNAL MEDICINE 1390 (5th ed. Harrison 1966); REDLICH & FREEDMAN, THE THEORY AND PRACTICE OF PSYCHIATRY 755 (1966).

7. *Self Induced Intoxication.*—Finally, it would be observed that the draft uses "self induced" rather than "voluntary" intoxication. The Model Penal Code language is followed as being more descriptive of the decisional law and because it avoids the metaphysical ambiguities surrounding the question of what drinking or drug use ought to be characterized as involuntary.[18]

[18] MODEL PENAL CODE § 2.08 (P.O.D. 1962), and MODEL PENAL CODE § 2.08, Comment at 2–13 (Tent. Draft No. 9, 1959).

CONSULTANT'S REPORT
on
CRIMINAL RESPONSIBILITY—MENTAL ILLNESS: SECTION 503
(Robinson; February 19, 1969)

I. Present Federal Law

A. Supreme Court

In 1897 the United States Supreme Court in *Davis* v. *United States*,[1] approved an insanity charge to a jury which was as follows:

> The term 'insanity,' as used in this defense, means a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing, or where, though conscious of it and able to distinguish between right and wrong, and know that the act is wrong, yet his will—by which I mean the governing power of his mind—has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control.

The Court affirmed the conviction stating that the instruction "under the circumstances of this case, was in no degree prejudicial to the rights of the defendant." [2]

Davis is thus a combination of the rules announced in *M'Naghten's Case*,[3] and a volition test. In *M'Naghten* it was stated: [4]

> [T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

The second element in the *Davis* charge relates to the capacity of the defendant to comply with the requirements of law. While this is sometimes called the "irresistible impulse" doctrine, its formulation in *Davis* makes no requirement that the abnormality be characterized by sudden impulse as opposed to brooding and reflection. We shall call it a control or volitional test.

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[1] 165 U.S. 373, 378 (1897).
[2] *Id.*
[3] 10 Cl. & F. 200, 8 Eng. Rep. 718 (H.L. 1843).
[4] 10 Cl. & F. 200, 210, 8 Eng. Rep. 718, 722.

The Supreme Court has declined many opportunities to speak authoritatively on the subject in recent decades. Congress, too, has remained silent. Substantial development has occurred in the courts of appeal, however.

B. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

In 1954 the Court of Appeals for the District of Columbia Circuit departed from an insanity rule similar to that of *Davis*. It stated in *Durham* v. *United States*,[5]: "[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." The court did not define the terms of the *Durham* rule in that decision. In *Carter* v. *United States*,[6] "product" was said to be established if the criminal act would not have occurred but for the mental disease or defect. The *Carter* opinion indicated that whether or not the accused suffered from a mental disease was a medical question. In *Blocker* v. *United States*,[7] the defendant had been classified by expert medical witnesses as a "sociopath," but they indicated that this was not considered to be a mental disease or defect. Shortly after Blocker's conviction however, the medical staff at St. Elizabeths Hospital, the Federal mental hospital for the District of Columbia, decided to classify sociopathy as a mental disease. The court of appeals ordered reversal of the conviction "on the basis of this new medical evidence." The effect was a judicial acceptance of the hospital staff's assumption of legislative power over the scope of criminal liability of mentally abnormal persons.

However, in *McDonald* v. *United States*,[8] the same court later stated:[9]

> Our purpose now is to make it very clear that neither the court nor the jury is bound by *ad hoc* definitions or conclusions as to what experts state is a disease or defect. What psychiatrists may consider a "mental disease or defect" for clinical purposes where their concern is treatment, may or may not be the same as mental disease or defect for the jury's purpose in determining criminal responsibility.

The court then offered the following definition:

> [T]he jury should be told that a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls.

C. COURT OF APPEALS FOR THE FIRST CIRCUIT

There appear to be no recent decisions of the First Circuit authoritatively announcing an insanity rule. In *Beltran* v. *United States*,[10] the trial court had rejected an insanity defense, indicating that the rule applied was *M'Naghten*. The court of appeals reversed the con-

[5] 214 F. 2d 862, 874 (D.C. Cir. 1954).
[6] 252 F. 2d 608 (D.C. Cir. 1957).
[7] 274 F. 2d 572 (D.C. Cir. 1959).
[8] 312 F. 2d 847, 851 (D.C. Cir. 1962).
[9] *Id.*
[10] 302 F. 2d 48 (1st Cir. 1962).

viction on the basis of the insufficiency of the evidence supporting the findings, and remanded the case, suggesting that findings be made in the light of "such cases as Currens" [11] as well as the standard applied on the first trial, leaving open the question of whether the court would consider adopting a broader rule. Apparently the case was not again heard by the court of appeals.

D. COURT OF APPEALS FOR THE SECOND CIRCUIT

The Second Circuit has recently departed from an insanity test similar to *Davis*. In *United States* v. *Freeman*,[12] the court rejected older criteria as being "not in harmony with modern medical science" and adopted essentially the test prepared for the American Law Institute's Model Penal Code:[13]

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [*wrongfulness*] of his conduct or to conform his conduct to the requirements of law.
>
> (2) . . . [T]he terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

The only modification of the draft of the Model Penal Code made by the *Freeman* court was to substitute the suggested alternative "wrongfulness" (which we have underlined) for the draft term "criminality." This was done to include cases where the perpetrator appreciates that his conduct is criminal, but because of delusion believes it to be morally justified.[14]

E. COURT OF APPEALS FOR THE THIRD CIRCUIT

In *United States* v. *Currens*,[15] the court adopted a modified form of the American Law Institute test. It stated:[16]

> The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated.

The alterations were made to avoid what was deemed to be a residual undue emphasis of cognition and to avoid taking what the court believed to be an unjustified attempt to exclude psychopaths from possible exculpation under the insanity defense. The court indicated that "psychopath" used narrowly refers to people who are disordered not only in terms of behavioral conformity but also in terms of affect, foresight, and general organization of behavior. Furthermore, the court felt the second paragraph of A.L.I. invited essentially terminological dispute.

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[11] 290 F. 2d 751 (3d Cir. 1961).
[12] 357 F.2d 606 (2d Cir. 1966).
[13] MODEL PENAL CODE § 4.01 (P.O.D. 1962).
[14] 357 F.2d at 606n, 52.
[15] 290 F.2d 751 (3d. Cir. 1961).
[16] 290 F.2d at 774.

F. COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Fourth Circuit recently indicated that the entire American Law Institute proposal as presented would be "preferred" although the court declined to require a standard form of instruction. *United States* v. *Chandler*, 393 F.2d 920 (4th Cir. 1968) (*en banc*). The court however added: [17]

> That other changes will come with the future is readily apparent in the imperfection of our present resolution. Endorsement of the American Law Institute formula solves some problems. It is an advance toward the avoidance of retributive incarceration of those not morally responsible for their conduct and toward assuring for them institutional care with psychiatric and related services. It is far from complete assurance that those in federal custody in need of treatment will receive it. Many defendants who are criminally responsible need psychiatric care and guidance, and many of those may be far better prospects for substantial improvement and complete rehabilitation than most of those found to be criminally irresponsible. Some of the criminally irresponsible will be beyond the capacity for help by medical and related sciences in their present state of development, but if public hospitals are required to accept those for whom they can offer only custodial services, prisoners needing hospitalization may be denied it. Resolution of the question of criminal responsibility, therefore, by whatever standard, is far from a perfect means of assuring the kind of institutional care each defendant should receive.
>
> The ideal solution, perhaps, would be to exclude the question of criminal responsibility from the trial, leaving to penologists the answers to the question of criminal responsibility, with leave to record the court's commitment as criminal or civil depending upon the answer to that question, and to the questions of the kind and duration of the custodial care and treatment he receives. Such an arrangement would afford an opportunity for the answers to come after the development of a much fuller, more reliable record upon more thorough psychiatric and psychological testing. Unfortunately, penology, psychiatry and psychology have not advanced to the point that penologists would welcome such responsibilities or that Congress and judges would willingly entrust them to them.
>
> Meanwhile, it may be recognized that a jury is not the most appropriate instrument for the resolution of these problems. As representatives of society, jurors, under the court's instructions, may appropriately exercise a judgment as to a defendant's moral accountability, but they have no demonstrated capacity for answering diagnostic questions or those involved in prescribing the kind of institutional care a defendant should receive. Moreover, the latter question seems inappropriate for an answer on a record made in a trial on criminal charges when the defendant need not testify and may

[17] 393 F.2d at 928.

exclude much evidence relevant to the question. The judge, on the other hand, is experienced in making considered recommendations as to the nature and duration of institutional care, and he may avail himself of the decided advantages of pre-sentence reports by probation officers and thorough clinical studies under such provisions as 18 U.S.C.A. § 4208(b).

There would seem to be, therefore, a wide range for consideration of revisions in our procedures and possible recasting of the questions in order to serve better the ultimate humanitarian purposes of society. For the present, however, we move within the existing framework of the law with awareness that no judicial response to the problem today is perfect and need not endure beyond the availability of more acceptable solutions.

G. COURT OF APPEALS FOR THE FIFTH CIRCUIT

The last rulings of this circuit appear to sustain *Davis*-type instructions. *Howard* v. *United States*, 232 F. 2d 274 (5th Cir. 1956); *Carter* v. *United States*, 325 F. 2d 697 (5th Cir. 1963). In the last case cited a conviction was affirmed *per curiam* by an equally divided court. Nevertheless the possibility of using *Davis* was further sustained by a dissenting opinion's statement that either a *Davis* instruction, an irresistible impulse instruction, or an American Law Institute instruction would be appropriate if adjusted to the facts of the particular case.*

H. COURT OF APPEALS FOR THE SIXTH CIRCUIT

This circuit has just held that a *Davis*-type charge may no longer be given. In its place the court chose a modification of the American Law Institute test, omitting the second paragraph caveat, stating that there is "great dispute over [its] psychiatric soundness." *United States* v. *Smith*, 404 F. 2d 720, 727 n. 8 (6th Cir. 1968).

I. COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The American Law Institute formula with the first paragraph containing the "wrongfulness" modification made by *Freeman* has been adopted by the Seventh Circuit. *United States* v. *Shapiro*, 383 F. 2d 680 (7th Cir. 1967) (*en banc*). The opinion does not make it clear whether the second paragraph of A.L.I. is to be part of an instruction in that circuit.

J. COURT OF APPEALS FOR THE EIGHTH CIRCUIT

This circuit has stated that any of the tests which include cognition, volition and capacity to control behavior are acceptable to it. *Pope* v. *United States*, 372 F. 2d 710 (8th Cir. 1967); *Beardslee* v. *United States*, 387 F.2d 280 (8th Cir. 1967). The court has not made clear the distinction intended between volition and capacity to control but apparently *Davis*, A.L.I. (including its variations in other circuits) or *Durham-McDonald* would suffice.

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*The Fifth Circuit adopted the *Freeman* modification of the A.L.I. text in *Blake* v. *United States*, 407 F. 2d 908 (5th Cir. 1969).

K. COURT OF APPEALS FOR THE NINTH CIRCUIT

Sauer v. *United States*, 241 F. 2d 640 (9th Cir. 1957), affirming a conviction in which a *Davis* instruction had been given by the trial court, still appears to be the leading case. *See Ramer* v. *United States*, 390 F. 2d 564 (9th Cir. 1968).*

L. COURT OF APPEALS FOR THE TENTH CIRCUIT

The court has approved the American Law Institute test (with some ambiguity as to whether the second paragraph caveat is to be included). *Wion* v. *United States*, 325 F. 2d 420 (10th Cir. 1963) (*en banc*). The court added: [18]

> This leads us to suggest that the emphasis on psychiatry at the point of criminal responsibility is misplaced. In most cases where irresponsibility is in issue, the commission of the prohibited act is not disputed, and the question whether the accused is to be excused as mentally irresponsibile, or is to be held accountable, does not solve the problem. In either case, the law must in some way protect the community by rehabilitation or isolation. This involves the sentencing function, which is the ultimate responsibility of the Court, as an instrument of the social order. It is at this point that the behavioral sciences can be of most help to the Court, and to the offender as well.

II. A FEDERAL STATUTE DEFINING THE INSANITY DEFENSE

The formulation preferred by the writer (Alternative Formulation I)** can be most conveniently discussed after consideration of Alternative Formulations II (*M'Naghten*) and III (Study Draft section 503).

A. M'NAGHTEN

Alternative Formulation II is *M'Naghten* as broadened by the language used by the American Law Institute in the first part of its test.[19] It is also similar to the 1967 New York Revised Penal Law (§ 30.05), which follows:

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*The Ninth Circuit has recently joined the Second, Fifth and Seventh Circuits in adopting a modified version of the A.L.I. test. *Wade* v. *United States*, —— F. 2d. —, 7 Cr. L. 2104 (9th Cir. 1970).

[18] 325 F. 2d at 428.

**The tentative draft offered three statutory alternatives on the defense of mental illness. Alternative Formulation III, is proposed as Study Draft section 503. The other alternatives offered in the Tentative Draft are as follows:

ALTERNATIVE FORMULATION I

> Mental disease or defect provides no defense unless it negatives an element of the offense.

* * * * * * *

ALTERNATIVE FORMULATION II

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality of his conduct.

[19] MODEL PENAL CODE § 4.01 (P.O.D. 1962).

1. A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity to know or appreciate either:
   (a) The nature and consequence of such conduct; or
   (b) That such conduct was wrong.

The comments to section 4.01 of the Model Penal Code define the problem and defend the *M'Naghten* aspect of the proposed test as follows:[20]

1. No problem in the drafting of a penal code presents larger intrinsic difficulty than that of determining when individuals whose conduct would otherwise be criminal ought to be exculpated on the ground that they were suffering from mental disease or defect when they acted as they did. What is involved specifically is the drawing of a line between the use of public agencies and public force to condemn the offender by conviction, with resultant sanctions in which there is inescapably a punitive ingredient (however constructive we may attempt to make the process of correction) and modes of disposition in which the ingredient is absent, even though restraint may be involved. To put the matter differently, the problem is to discriminate between the cases where a punitive-correctional disposition is appropriate and those in which a medical-custodial disposition is the only kind that the law should allow.

2. The traditional *M'Naghten* rule resolves the problem solely in regard to the capacity of the individual to know what he was doing and to know that it was wrong. Absent these minimal elements of rationality, condemnation and punishment are obviously both unjust and futile. They are unjust because the individual could not, by hypothesis, have employed reason to restrain the act; he did not and could not know the facts essential to bring reason in to play. On the same ground, they are futile. A madman who believes that he is squeezing lemons when he chokes his wife or thinks that homicide is the command of God is plainly beyond reach of the restraining influence of law: he needs restraint but condemnation is entirely meaningless and ineffective. Thus the attacks on the *M'Naghten* rule as an inept definition of insanity or as an arbitrary definition in terms of special symptoms are entirely misconceived. The *rationale* of the position is that these are cases in which reason can not operate and in which it is totally impossible for individuals to be deterred. Moreover, the category defined by the rule is so extreme that to the ordinary man the exculpation of the persons it encompasses bespeaks no weakness in the law. He does not identify by such persons and himself; they are a world apart.

The American Law Institute reformulation of *M'Naghten* substitutes the word "appreciate" for "know" in order to suggest that an affective sort of knowledge, rather than an abstract cognition, is required for responsibility. Furthermore, rather than requiring total

[20] MODEL PENAL CODE § 4.01, Comment at 156–157 (Tent. Draft No. 4, 1955).

incapacity of cognition to exculpate, lack of "substantial" capacity is made to suffice. The defense is thus broadened to a somewhat indeterminate degree. Nonetheless, most of the criticism which is made with respect to *M'Naghten* could be expected to be applicable to the reformulation made by the first part of the American Law Institute draft. Review and evaluation of such objections follow:

(1) *M'Naghten* is considered obsolete. Enormous expansion has occurred in psychological knowledge since the mid-19th century and indeed *M'Naghten* did not consider the most advanced information obtainable at its own time, most notably in the writing of Dr. Isaac Ray, who concluded that exculpation should follow if a crime was the product of a mental disease.[21]

Criticism of *M'Naghten* in terms of obsolescence is not in itself an argument for its repudiation, of course. Furthermore, it tends to ignore the distinction between a medical concept of mental illness or defect and a normative legal standard for exculpation of a person charged with crime. The legal definition must aim at legal purposes rather than the identification of medical or psychological entities. Ray himself, while a versatile thinker, was a phrenologist and a believer in organic bases for all mental illness; he was by no means a modern psychologist.

(2) *M'Naghten* is said to disregard the realities of mental impairment. *Durham* v. *United States*,[22] for example states:

> The science of psychiatry now recognizes that a man is an integrated personality and that reason, which is only one element in that personality, is not the sole determinant of his conduct. The right-wrong test, which considers knowledge or reason alone, is therefore, an inadequate guide to mental responsibility for criminal behavior.
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> By its misleading emphasis on the cognitive, the right-wrong test requires court and jury to rely upon what is, scientifically speaking, inadequate, and most often, invalid and irrelevant testimony in determining criminal responsibility.

In *United States* v. *Currens*,[23] Chief Judge Biggs expressed the point:

> The vast absurdity of the application of the M'Naghten Rules in order to determine the sanity or insanity, the mental health or lack of it, of the defendant by securing the answer to a single question: Did the defendant know the difference between right and wrong, appears clearly when one surveys the array of symptomatology which the skilled psychiatrist employs in determining the mental condition of an individual. . . . How, conceivably, can the criminal responsibility of a mentally ill defendant be determined by the answer to a single question placed on a moral basis? To state the question seems to us to answer it.

Again the criticism seems misplaced. If *M'Naghten* were designed to identify a medical category of mentally ill, such objections would

[21] RAY, MEDICAL JURISPRUDENCE OF INSANITY 32, 34 *et seq.*, 47 (1st ed. 1838).
[22] 214 F.2d 862, 871–872 (D.C. Cir. 1954).
[23] 290 F. 2d 751, 766–767 (3d Cir. 1961).

appear apposite. As a rule defining criminal responsibility of mentally ill persons, the critiques are misdirected.

(3) Related to the foregoing is the critism that *M'Naghten* does not acquit a sufficient number of mentally ill persons. When strictly applied it probably exempts from criminal responsibility only persons who are grossly mentally deficient and psychotics with blurred perception and consciousness together with some paranoid schizophrenics.[24] This is the most common and the most realistic objection to *M'Naghten*. Frequently it has led to interpretation of key terms of the rule in such a manner as to encompass volitional impairment. "Know" is expanded to include a substantial emotional component together with the possibility of acting upon knowledge. "Wrong" may be expanded to include moral wrong as well as violation of criminal law. More commonly today the approach may be to add a control test to the knowledge test of *M'Naghten* and to exculpate those who are said to be volitionally impaired.

Sometimes the analysis is functional. For example, the comments to the American Law Institute proposal state:[25]

> Jurisdictions in which the M'Naghten test has been expanded to include the case where mental disease produces an 'irresistible impulse' proceed on the same *rationale*. They recognize, however, that cognitive factors are not the only ones that preclude inhibition; that even though cognition still obtains, mental disorder may produce a total incapacity for self-control.

Evaluation of this argument will be deferred until control tests are considered.[26]

Sometimes it is asserted that the narrowness of *M'Naghten* results in release of dangerous persons rather than alleviation of the risk by appropriate treatment or even by a sufficient period of isolation, as would occur upon indefinite commitment to a mental institution.[27] This argument assumes, of course, that appropriate institutions and techniques for successful treatment are or shortly can be available and that in any event prediction of future "dangerousness" can be made with sufficient precision to allow open-ended discretion with respect to release.

(4) It is sometimes stated that the rule asks questions which a psychiatrist cannot answer since they are said to be directed to moralistic rather than scientific concerns.[28] While it must be conceded that there is ample ambiguity in the language of *M'Naghten*, one may suspect that much of the criticism which is made in terms of vagueness, and perhaps of language regarded as prescientific, is actually directed more intensely at the narrow scope of the rule than at its vagueness. For example Dr. Gregory Zilboorg stated in an address:[29]

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[24] *See* Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. Pa. L. Rev. 378, 379–380 (1952).

[25] Model Penal Code § 4.01, Comment at 157 (Tent. Draft No. 4, 1955).

[26] *See* p. 239 *et seq.*, *infra*.

[27] *See, e.g.*, *United States* v. *Freeman*, 357 F.2d 606, 618 (2d Cir. 1966).

[28] *See* Guttmacher, *The Psychiatrist as a Witness*, 22 U. Chi. L. Rev. 325, 326 (1955); Freedman, Guttmacher & Overholser, *Mental Disease or Defect Excluding Responsibility*, 1961 Wash. U. L.Q. 250, 251 (1961).

[29] *Quoted in* Guttmacher & Weihofen, Psychiatry and the Law 406–407 (1952) (emphasis added).

> To force a psychiatrist to talk in terms of the ability to distinguish between right and wrong and of legal responsibility is—let us admit it openly and frankly—to force him to violate Hippocratic Oath, even to violate the oath he takes as a witness to tell the truth and nothing but the truth, to force him to perjure himself *for the sake of justice.* For what else is it if not perjury, if a clinician speaks of right and wrong, and criminal responsibility, and the understanding of the nature and quality of the criminal act committed, when he, the psychiatrist, really knows absolutely nothing about such things.

The dispute must be seen as disagreement by psychiatrists with a legal, not medical, standard. The quoted passage illustrates a failure to grasp the distinction.

(5) It is also frequently contended that *M'Naghten* unjustifiably restricts expert testimony, serving to exclude relevant information. This criticism was made of both *M'Naghten* and the Model Penal Code by the psychiatric consultants to the American Law Institute.[30] The argument was explicitly accepted in *United States v. Freeman:*[31]

> The true vice of *M'Naghten* is not, therefore, that psychiatrists will feel constricted in artifically structuring their testimony but rather that the ultimate deciders—the judge or the jury—will be deprived of information vital to their final judgment.

However, as Professor Abraham Goldstein has recently pointed out, there is little evidence to suggest that the *M'Naghten* jurisdiction courts have limited detailed description of the psychological condition of defendants when counsel have attempted to elicit it.[32] The key terms in *M'Naghten* are capable of flexibility. Moreover, if counsel avoid restricting their questions to attempted solicitations of opinions on the ultimate issues posed by the rules, experience suggests that the evidence is admitted. In the appendix to the comment to section 4.01 of the American Law Institute, Model Penal Code it is reported:[33]

> No American case has been found where a trial court excluded evidence or refused to charge on the defense of insanity merely because the evidence in support of the defense related to neurosis or psychopathic personality or other mental disturbance rather than a psychosis.

Again, it is submitted that the major thrust of this objection is that too few persons are declared irresponsible under *M'Naghten* rather than that the expert is muzzled.

(6) It has also been urged that in the final analysis a *M'Naghten* type of defense results in nullification through the testimony of hostile expert witnesses. Undoubtedly this is sometimes done by psychiatrists who feel that commitment to a mental hospital is preferable to criminal conviction and punishment in all cases. In addition there are others

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[30] Freedman, Guttmacher & Overholser, *Mental Disease or Defect Excluding Responsibility*, 1961 WASH. U. L.Q. 250, 251 (1961).

[31] 357 F.2d 606, 620 (2d Cir. 1966).

[32] *See* GOLDSTEIN, THE INSANITY DEFENSE c. 4 (1967).

[33] MODEL PENAL CODE § 4.01, Comment at 162 (Tent. Draft No. 4, 1955).

who rebel when the class of irresponsibles is defined in as extreme terms as does *M'Naghten*. The result may be conjectural psychiatric judgments which nullify *M'Naghten* in practice.[34] This represents an ethical contribution of some psychiatrists (Professor Wechsler has referred to it as a sort of "psychiatric crypto-ethics") in a field where the normative decisions are ostensibly to be made by the law and not by the witnesses. However such nullification becomes a practical problem to which a draft dealing with criminal responsibility must give consideration.

B. THE CONTROL TESTS

As we have mentioned,[35] in 1897, the Supreme Court approved an instruction which added a defense predicated on lack of power to avoid criminal conduct to the *M'Naghten* test.[36] Functionally, there is much appeal in such a criterion. If one conceives the major purpose of the insanity defense to be the exclusion of the nondeterrables from criminal responsibility, a control test seems designed to meet that objective. Furthermore, notions of retributive punishment seem particularly inappropriate with respect to one powerless to do otherwise than he did. And, treatment and incapacitation can be accomplished in a mental hospital, as well as in a prison. Accordingly, it is perhaps not astonishing that control tests are utilized in the Federal courts today either alone, as in *United States* v. *Currens*,[37] or combined with a cognition test, as was done in *Davis* and the proposal of the American Law Institute. In the District of Columbia, *Durham* was not itself expressed in terms of control. However, the definition of "mental disease or defect" in *McDonald* v. *United States*,[38] required a determination of substantially impaired behavior controls as a basis of nonresponsibility.

A consideration of major criticisms of control tests follows:

(1) It has been common to refer to control tests as the "irresistible impulse" modification of *M'Naghten* and then to criticize the results as too narrow, as implying that only impulsive loss of control will suffice. Such was the objection to existing District of Columbia law expressed in *Durham*, and the *Durham* argument was adopted in the commentary to section 4.01 of the Model Penal Code of the American Law Institute. As we have mentioned, however, *Davis* as well as many other cases in which *M'Naghten* was expressly modified to add a control test as a third rule, makes no requirement that the volitional impairment be impulsive. Indeed, even the phrase "irresistible impulse" may be interpreted consistently with a period of reflection prior to the criminal act. In any event, there seems little basis to restrict a control test to situations of impulsive behavior, and an evaluation ought to confront a proposal which would exculpate the accused if as a result of mental disease or defect he was incapable of preventing himself from committing the criminal act.

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[34] *See* Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367, 374–375 (1955); Diamond, *Criminal Responsibility of the Mentally Ill*, 14 STAN. L. REV. 59–60 (1961).

[35] *See* note 1, *supra*, and accompanying text.

[36] *Davis* v. *United States*, 165 U.S. 373, 378 (1897).

[37] 290 F.2d 751 (3d Cir. 1961).

[38] 312 F.2d 847, 851 (D.C. Cir. 1962).

(2) Another criticism of control tests is that they tend to exculpate too many persons.[39] A concommitant result in jurisdictions where acquittal on the basis of insanity is likely to result in indefinite commitment to a mental hospital is that confinement for any period subject to the discretion of an administrative board may replace the safeguards of the criminal process, particularly a fixed maximum term and proportionality between the maximum period of incarceration and the seriousness of the criminal conduct.

A related difficulty with a control test is associated with a determinism which seems dominant in the thinking of many expert witnesses. Modern psychiatry has tended to view man as controlled by antecedent hereditary and environmental factors. Freud, for example, wrote:[40]

> I have already taken the liberty of pointing out to you that there is within you a deeply rooted belief in psychic freedom and choice, that this belief is quite unscientific, and that it must give ground before the claims of a determinism which governs even mental life.

In their widely recognized recent text, *The Theory and Practice of Psychiatry* (1966), Doctors Frederick C. Redlich and Daniel X. Freedman, the Dean of the Yale Medical School and the Chairman of the Psychiatry Department, University of Chicago, state:[41]

> As a technology based on the behavioral and biological sciences, psychiatry takes a deterministic point of view. This does not mean that all phenomena in our field can be explained, or that there is no uncertainty. It merely commits us to a scientific search for reliable and significant relationships. We assume causation—by which we mean that a *range* of similar antecedents in *both* the organism and environment produces a similar *set* of consequences. (Emphasis original.)

Such a view is consistent with the notion that all criminal conduct is evidence of lack of power to conform behavior to the requirements of law.

One approach to this problem is to conclude that psychiatry and the criminal law operate on sets of separate and inconsistent assumptions. This appears to be the view of Chief Justice Weintraub of the New Jersey Supreme Court.[42] Such a solution is obviously not entirely satisfactory in an endeavor which is as needful of cooperation between law and psychiatry as is the administration of an insanity defense.

Difficult as is a confrontation with a deterministic discipline in the context in which insanity is claimed as a defense, it is considerably more unmanageable when "voluntary conduct" is written into the criminal act requirement, as has been suggested in the draft of section 301 of the proposed Code. If a "voluntary act" (or omission) means something like the volitional standard utilized in a control insanity defense, the result is not mere duplicity. It creates the possibility of

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[39] *See, e.g.*, N.Y. Rev. Pen. Law § 30.05, Comment at 257–258 (McKinney 1967).

[40] Freud, A General Introduction to Psychoanalysis 95 (1935).

[41] Redlich & Freedman, The Theory and Practice of Psychiatry 79 (1966) [hereinafter cited as Redlich & Freedman].

[42] *See State* v. *Lucas*, 30 N.J. 37, 152 A.2d 50 (1959); Weintraub (Panel), *Insanity as a Defense*, 37 F.R.D. 365, 369–375 (1964).

acquittal of persons who have engaged in criminal conduct without facilitating their appraisal for possible commitment to a civil institution. A determination that the accused acted "involuntarily," even though there was consciousness and choice-in-fact, would lead to his unconditional discharge. Accordingly, if volitional incapacity is to be exculpatory, there is much to be said for channeling it into an insanity defense and providing concommitant procedures for a confinement of dangerous persons acquitted by reason of insanity in noncriminal institutions.

In England, these considerations have led to the result that evidence of "automatism" (lack of any awareness of conduct) must be raised with the insanity defense, and "diminished responsibility" (mental disease or defect used as evidence of mens rea only of an offense lesser than that charged) allows the prosecution to ask the jury to consider the claim in connection with an insanity defense.[43] The draft of section 301 presents broader dangers in this regard than does the American Law Institute's equivalent section,[44] which includes an implicit limitation of the voluntary act requirement in its statement that "a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual," and unconscious or reflexive conduct are not voluntary acts within the meaning of that section. No such limitations are contained in our own draft.

The control tests and volitional standards acutely raise the problem of what is meant by lack of power to avoid conduct or to conform to the requirements of law. This may be conveniently confronted in the context of a more basic objection to control tests. To this we shall now turn.

(3) Perhaps the most fundamental objection to the control tests is their lack of determinate meaning. The Royal Commission on Capital Punishment 1949–1953 reported:[45]

> Most lawyers have consistently maintained that the concept of an "irresistible" or "uncontrollable" impulse is a dangerous one, since it is impracticable to distinguish between those impulses which are the product of mental disease and those which are the product of ordinary passion, or, where mental disease exists, between impulses that may be genuinely irresistible and those which are merely not resisted.

The same objection was noted in the comments to the Model Penal Code insanity defense:[46]

> The draft accepts the view that any effort to exclude the nondeterrables from strictly penal sanctions must take account of the impairment of volitional capacity no less than of impairment of cognition; and this result should be achieved directly in the formulation of the test, rather than left to mitigation in the application of *M'Naghten*.
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> Both the main formulation recommended and alternative (a) deem the proper question on this branch of the inquiry to be

[43] *See* A. GOLDSTEIN, THE INSANITY DEFENSE 207 (1967).
[44] MODEL PENAL CODE § 2.01 (P.O.D. 1962).
[45] ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT 1949–1953, para. 228, at 80 (1953).
[46] MODEL PENAL CODE § 4.01, Comment at 157 (Tent. Draft No. 4, 1965).

> whether the defendant was without capacity to conform his conduct to the requirements of law. . . . The application of the principle will call, of course, for a distinction between incapacity, upon the one hand, and mere indisposition on the other. Such a distinction is inevitable in the application of a standard addressed to impairment of volition. We believe that the distinction can be made.

The American Law Institute's commentary fails to elaborate upon its last assertion. *How* can the distinction be made?

Durham suggested that the notion involved in a determination of responsibility was freedom of will. But it is in significant part the difficulty of ascribing operational meaning to concepts of volitional freedom which make it a nebulous, if not impossible, criterion to litigate. To be sure, there are situations in which there would be substantial agreement that freedom of choice was absent, for example, actions during unconsciousness such as occurs in some epileptic seizures and sleepwalking. These are cases in which lack of mens rea and probably actus reus would exculpate, as would a cognitive insanity test. They pose no challenge for a volitional insanity defense. Beyond this core type of situation one can expect little agreement as to the meaning of a volitional standard. There is no consensus with respect even to criteria for decision in the real problem areas, where some yield to desires to engage in proscribed conduct and others do not.[47]

In testimony before the Royal Commission on Capital Punishment, the Director of Public Prosecutions reportedly stated that a volitional standard which extended beyond cases such as automatic epilepsy presented a question which "ceased to be one to which objective tests could readily be applied and became a matter of metaphysical speculation which presented an impossible problem to the Judge and jury." [48] Asked the Lord Chief Justice, "Who is to judge whether the impulse is irresistible or not?" [49]

An extraordinarily perceptive discussion of the problem is contained in the concurring opinion of Mr. Justice Black, joined by Mr. Justice Harlan, in *Powell* v. *Texas*,[50] upholding the constitutionality of criminal penalties applied to alcoholics whose public drunkenness is alleged to be beyond volitional control:

> When we say that appellant's appearance in public is caused not by "his own" volition but rather by some other force, we are clearly thinking of a force which is nevertheless "his" except in some special sense. The accused undoubtedly commits the proscribed act and the only question is whether the act can be attributed to a part of "his" personality that should not be regarded as criminally responsible.
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> [T]he question whether an act is "involuntary" is, as I have already indicated, an inherently elusive question, and one which the State may, for good reasons, wish to regard as irrelevant.

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[47] *See* Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U.PA.L.REV. 378, 383 (1952).

[48] ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT 1949–1953, para. 268, at 95 (1953)

[49] *Id.*

[50] 392 U.S. 514, 540, 544 (1968).

(4) The indeterminacy of control tests is not sufficiently mitigated by the requirement of mental disease or defect.

The disease or defect requirement is present in all of the statements of insanity defenses; it is almost never defined, however. In *M'Naghten* its meaning is rarely critical; perhaps most frequently it is used to exclude intoxication. In the original formulation of *Durham* and in the control tests, definition becomes important as a limitation of their otherwise sweeping or indeterminate reach. Still, there has been little effort at judicial definition. Primary reliance is conventionally placed on the expert testimony, apparently because it is widely assumed (1) that there is a medical consensus on the meaning of these terms, and (2) that this meaning is relevant to the legal purposes at hand. Neither assumption is accurate.

Dorland's *Illustrated Medical Dictionary* (24th ed. 1965) defines "disease" as "a definite morbid process." The *Diagnostic and Statistical Manual of Mental Disorders* of the American Psychiatric Association stopped attempting to define "mental disease" in its 1952 edition and continued this omission in its 1968 edition. The medical profession has little need of attempting to define "disease." Treatment may proceed irrespective of such effort. Psychiatric authorities are occasionally called upon to use the term in a legal context, but here the response is again quite varied. Sometimes there is denial of the existence or usefulness of such an entity.[51] At other times "psychosis" is called mental disease, though "neurosis" is not. (There is little agreement as to the definition of these terms, either.)[52] Sometimes mental disease is used to refer to anything treated by a physician treating mental conditions; sometimes it refers to social malfunctioning as defined by moral or legal criteria; occasionally it refers to failure to realize one's capacities.[53]

Doctors Redlich and Freedman point out:[54]

> In older texts and in current lay parlance, psychiatry is often defined as the science dealing with mental diseases and illnesses of the mind or psyche. Since these are terms reminiscent of the metaphysical concepts of soul and spirit, we prefer to speak of behavior disorder. . . . *Medically* recognizable diseases of the brain cannot, for the most part, be demonstrated in behavior disorders.
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> What, then, are these difficulties psychiatrists are supposed to treat, the so-called behavior disorders? Defying easy definition, the term refers to the presence of certain behavior patterns—variously described as abnormal, subnormal, undesirable, inadequate, inappropriate, maladaptive or maladjusted—that are *not compatible with the norms and expectations of the patient's social and cultural system.* (Emphasis added.)

The difference between using "mental disease" and "behavior disorder" is nonetheless important. One would not have expected an im-

[51] *E.g.*, SZASZ, THE MYTH OF MENTAL ILLNESS 43, 214 (1961).
[52] *See* MENNINGER, THE CRIME OF PUNISHMENT 130, 134 (1968).
[53] *See* Fingarette, *The Concept of Mental Disease in Criminal Law Insanity Tests*, 33 U.CHI.L.REV. 229 (1966).
[54] REDLICH & FREEDMAN, *supra* note 41, at 1–2.

portant test to state: "One is not criminally responsible if his criminal act is the product of a behavior disorder." [55] The absence of analogy to physical illness, the circularity, the confusion of an abstraction from conduct with its cause, the danger of metaphysical assumptions of the *existence* of illness categories, and the failure to provide a standard capable of operational use to distinguish between criminal and noncriminal proscribed behavior would all become more apparent. The problem has perhaps been most realistically recognized in a recent District of Columbia case: [56]

> In Durham v. United States, we announced a new test for insanity: 'An accused is not criminally responsible if his unlawful act was the product of a mental disease or defect.' We intended to widen the range of expert testimony in order to enable the jury 'to consider all the information advanced by relevant scientific disciplines.'
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> This purpose was not fully achieved, largely because many people thought *Durham* was only an attempt to identify a clearly defined category of persons—those classified as mentally ill by the medical profession—and excuse them from criminal responsibility. In fact the medical profession has no such clearly defined category, and the classifications it has developed for purposes of treatment, commitment, etc., may be inappropriate for assessing responsibility in criminal cases. Since these classifications were familiar, however, many psychiatrists understandably used them in court despite their unsuitability. And some psychiatrists, perhaps unwittingly, permitted their own notions about blame to determine whether the term mental illness should be limited to psychoses, should include serious behavior disorders, or should include virtually all mental abnormalities.
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> [T]estimony in terms of 'mental disease or defect' seems to leave the psychiatrist too free to testify according to his judgment about the defendant's criminal responsibility.
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> An alternative to *Durham-McDonald* would be to make the ultimate test whether or not it is just to blame the defendant for his act. If the question were simply whether it is 'just' to 'blame' the defendant, then mental illness, productivity, ability to control oneself, etc., might be factors which the jury could consider in reaching its conclusion on the justness of punishment. Since the words 'just' and 'blame' do not lend themselves to refined definition, the charge to the jury under this test probably would not be detailed. But the words that have been used in other charges, such as 'defect of reason,' 'disease of the mind,' 'nature and quality of the act,' 'behavior controls,' 'mental disease or defect,' 'capacity . . . to appreciate the criminality of his conduct,' and 'capacity to conform his conduct to the requirements of law,' are also

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[55] *Cf. State* v. *Pike*, 49 N.H. 399 (1869): *Durham* v. *United States*, 214 F. 2d 862 (D.C. Cir. 1954).

[56] *Washington* v. *United States*, 390 F. 2d 444, 446, 453, 452n. 23 (D.C. Cir. 1967) (per Bazelon, C.J.).

> vague—the chief difference being that these words give a false impression of scientific exactness, an impression which may lead the jury to ignore its own moral judgment and defer to the moral judgment of scientific 'experts.' However, we are unaware of any test for criminal responsibility which does not focus on the term 'mental illness,' or some closely similar term. This focus may be unfortunate, but we are not deciding that question now, and are not proposing to abandon the term. Contrast Dershowitz, [Address by Prof. Alan M. Dershowitz, *Psychiatry in the Legal Process: A Knife That Cuts Both Ways*, 51 JUDICATURE 370 (1968)], recommending that 'no legal rule should ever be phrased in medical terms . . .'

The American Law Institute Proposal. (Alternative Formulation III (Study Draft Section 503)).—This test must be considered by any group drafting a Federal statute dealing with the insanity defense. Essentially it is a more careful statement of the *Davis* standards, providing exculpation upon lack of cognitive or volitional ability due to mental disease or defect. It is probably the most ably drawn of such tests. It provides that "substantial incapacity" will suffice, rather than requiring that it be total. It uses the more affective term "appreciate" for the more coldly cognitive "know" of *M'Naghten*. It attempts to avoid the circularity of defining repeated criminal conduct as a disease and concluding from the definition that ground for exculpation has thereby presented itself.* In explaining this second paragraph, the comments to the Model Penal Code state:[57]

> While it may not be feasible to formulate a definition of 'disease,' there is much to be said for excluding a condition that is manifested only by the behavior phenomena that must, by hypothesis, be the result of disease for irresponsibility to be established . . . . It does not seem useful to contemplate the litigation of what is essentially a matter of terminology; nor is it right to have the legal result rest upon the resolution of a dispute of this kind.

Our evaluation of the American Law Institute proposal has been suggested by the previous discussion. To summarize:

(1) The key terms are without meaning or extremely vague. A.L.I. is largely a control test, and subject to the metaphysical quandaries associated with assigning operational meaning. To a determinist, the abolition of criminal liability appears to be authorized by it; to a nondeterminist it remains indeterminate in scope. "Mental disease or defect" and "substantial capacity to conform" cannot be resolved except by utilizing the moral preferences of expert witnesses and triers of fact.

(2) The effort to exclude the so-called sociopath from exculpation is likely to be ineffective, since this diffuse, amorphous classification of behavioral deviants can be said to be characterized by more than repeated criminality and otherwise antisocial conduct. As a result,

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*The second paragraph of the A.L.I. test, providing that: "The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct" is, in accordance with recent opinion, excluded from the Study Draft. See pp. 245–247, *infra*, and *Wade* v. *United States*, — F. 2d —, 7 Cr. L. 2104 (9th Cir. 1970).

[57] MODEL PENAL CODE § 4.01, Comment at 160 (Tent. Draft No. 4, 1955).

large numbers of defendants presently regarded as "bad," rather than "sick," would be exculpated on careful psychiatric examination and testimony.[58] According to the latest American Psychiatric Association Manual, these persons (renamed "antisocial personalities") are impulsive, unable to feel guilt, have low tolerance to frustration, and otherwise in addition to engaging in repeated legal or social offenses differ from the normal.[59] Doctor Bernard Diamond has predicted that the second paragraph exclusion of A.L.I. will in fact tend to reduce the number of sociopaths exculpated, but only those who had routine examination would be benefited: the affluent and the fortunate would be able to avoid the restriction.[60]

The effort by the American Law Institute to exclude sociopaths from relief in spite of the fact that they are paradigms of those said to be without capacity to conform to the requirements of law suggests an inconsistency with respect to trust of a volitional standard as an appropriate basis for determining legal responsibility.

Despite the seemingly insuperable indeterminacy and the possibly sweeping scope of volitional tests, statistics in the District of Columbia indicate that the percentage of defendants acquitted by reason of insanity in cases terminated since the *Durham* rule was expressly converted into a control test by *McDonald* in late 1962 averaged between 2 and 3 percent. Defendants found not guilty by reason of insanity during the same period were from about 6 to 9 percent of defendants in all cases tried.[61] The semantic and metaphysical problems to which we have alluded seem to have usually been less than overwhelming to the judges and juries which decided the cases. The expert witnesses have accepted the delegation of authority of the mental disease requirement. Volitional impairment problems have apparently been resolved by intuition. The approach of an opinion of the English Court of Criminal Appeal (considering an issue of diminished responsibility under the Homicide Act of 1957) may provide assistance in understanding the sort of reasoning which may not uncommonly be involved:[62]

> In a case where the abnormality of mind is one which affects the accused's self-control the step between "he did not resist his impulse" [sic] and "he could not resist his impulse" is, as the evidence in this case shows, one which is incapable of scientific proof. A fortiori there is no scientific measurement of the degree of difficulty which an abnormal person finds in controlling his impulses.
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> These problems which in the present state of scientific knowledge are scientifically insoluble, the jury can only approach in a broad, common-sense way. . . .

Such a commonsense approach would presumably consider such factors as the rationality of the conduct of the actor, judged from the perspective of the trier of fact, whether it is associated with a medically-labeled syndrome, whether it represents a repetitive behavior

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[58] *See* Diamond, *From M'Naghten to Currens, and Beyond*, 50 CAL. L. REV. 189 (1962) [hereinafter cited as Diamond].

[59] *Diagnostic and Statistical Manual of Mental Disorders* 43 (1968). *See United States* v. *Currens*, 290 F. 2d 751, 762 (3d Cir. 1961).

[60] Diamond, *supra* note 58, at 194.

[61] REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 535 (1966).

[62] *Regina* v. *Byrne*, 44 Cr. App. R. 246, 2 Q.B.D. 396, 404 (1960).

pattern in the actor and in others similarly situated, and the subjective reports of the actor as to his thought processes, particularly with respect to his control of his behavior. The conclusions of expert witnesses on the ultimate issues, since they are likely to be based on moral and metaphysical assumptions of the person giving testimony, might also weigh heavily, unless they are excluded.[63] Such an approach perhaps avoids intellectual rigor and may be unsatisfying to the contemplative, but it might be a practical solution to a problem which seems to call for at least a verbally less open-ended inquiry than would be presented if the jury were asked if they believed the defendant ought in justice to be exculpated.[64]

III. Abolition of a Separate Insanity Defense

> Judge: Well, what about the question of whether or not this man is responsible under the law? He committed a crime; that we know. But there is still the question of his intentions and his capacity for knowing right from wrong, his capacity to refrain from the wrong if he knows what wrong is. If he is not responsible, then technically he is not guilty.
>
> Answer: [Dr. Karl Menninger] Your Honor, *responsible* is another one of these functionally undefined words.
>
> Judge: But your colleagues have often testified in this court that in their opinion a certain prisoner *was* or was *not* responsible.
>
> Answer: Yes, your Honor, because the word *responsible* is in everyday use. But this use is different from the legal use, as you well know, and that fact is not always clear to your witnesses.
>
> * * * * * * *
>
> What you want to know, I suppose, is whether this man is capable of living with the rest of us and refraining from his propensity to injure us. You want to know whether he is dangerous, whether he can be deterred, whether he can be treated and cured—whether we must arrange to detain him in protective custody indefinitely.
>
> Judge: Exactly. This is indeed what the court would like to know. But it seems we do not know how to communicate with one another, and our laws do not permit us to ask you. How, I beg of you, may I obtain direct, nonevasive answers to precisely these questions?
>
> Answer: Your Honor, by asking for them. As you say yourself, you are not permitted by precedent and custom to do so.[65]

The formulation preferred by the writer* eliminates insanity as a separate defense, according it only evidentiary significance. If evidence of mental disease or defect negatives an element of the offense, it is exculpatory, but not otherwise. Most commonly negatived would

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[63] *Cf. Washington* v. *United States*, 390 F.2d 444 (D.C. Cir. 1967).

[64] *Compare, e.g.*, Royal Commission on Capital Punishment Report 1949–1953 paras. 331, 332 (1953).

[65] Menninger, The Crime of Punishment 136–137 (1968).

*Alternative Formulation I in the tentative draft. *See* note**, p. 234, *supra*.

be a mental element. The Model Penal Code commentary illustrates the proper subject of an insanity defense by the example of a madman who believes that he is squeezing lemons when he chokes his wife. Under Alternative Formation I he would be not guilty of homicide (unless gross negligence suffices for manslaughter), not because he would fall within a special defense but because he would lack the criminal intent required by the homicide offenses. Occasionally, evidence of mental abnormality might negative a required criminal act, as by tending to prove incapacity.

Mentally abnormal offenders suitable for treatment in a mental hospital would be removable from the criminal justice process by: (1) being found incompetent to stand trial, (2) being found not guilty because without criminal intent, (3) being referred to a mental hospital after a finding of guilt and suspension of the imposition of sentence, and/or (4) being transferred from a correctional institution to a mental hospital after sentence. The fundamental policy is to replace the search for an elusive concept of responsibility at the time of the commission of an offense with treatment criteria applied to the defendant at the time of the decision as to his most appropriate disposition.

It may be observed that all three of the formulations ought to be accompanied by provision for notice of intent to rely upon evidence of mental disease or defect and verdict of not guilty by reason of mental disease or defect when that is the basis of a not guilty determination. There is much to be said for facilitating an inquiry as to the desirability of civil commitment of such persons and for providing for Federal commitment if they are found to be presently dangerously abnormal.

Much of the thinking which has led to the conclusion of the desirability of abolition of a separate insanity defense has been indicated in previous discussion in this commentary. An effort will be made to summarize considerations favoring and/or opposing this proposal. The former will be considered first:

(1) Trained mental health personnel, particularly psychiatrists and psychologists, are in critically short supply in the United States. The bulk of these resources are allocated outside the population of persons enmeshed in the criminal process. Pitifully small numbers are engaged in treatment in public mental hospitals and even smaller allocations of psychiatric and psychological personnel have been available to prison and jail populations. Attempting to devote these services to assistance in disposition and treatment of persons who have engaged in criminal conduct seems far more sensible than encouraging their presence in courthouses so that they will be available to engage in retrospective reconstructions of criminal responsibility. (A fairly extreme example is *Wright* v. *United States*,[66] in which eleven psychiatrists examined the defendant and testified before the jury.)

In the District of Columbia a committee of the Judicial Conference reported that the number of psychiatrists attending hospital staff conferences to evaluate persons facing criminal charges was deliberately reduced by the hospital administrators in an effort to lower the number of subpoenas handed out to its staff.[67] Insanity is frequently

[66] 250 F.2d 4 (D.C. Cir. 1957).

[67] JUDICIAL CONFERENCE OF THE DISTRICT OF COLUMBIA CIRCUIT, REPORT OF THE COMMITTEE ON PROBLEMS CONNECTED WITH MENTAL EXAMINATION OF THE ACCUSED IN CRIMINAL CASES, BEFORE TRIAL 32–33 (1965).

properly called a "rich man's defense," for the wealthy can sift the pool of potential expert witnesses for those who will produce favorable testimony in a convincing manner. Indeed, poor men have been strongly disadvantaged in litigating insanity questions. They have typically had to rely on public mental hospital experts or those selected by the court. Commonly, reports and witnesses have been made available to the prosecution as well as the defense. Signs of change are detectable, but they do not appear to be likely to result in a fair litigation of insanity issues. Statutory authority was recently granted for payment of expert witnesses selected privately by the defense.[68] Increased sensitivity to constitutional protections for the accused may make adversary trial of the mental state of the defendant at the time of the crime difficult in the future, as privilege against selfincrimination, right to counsel at examinations and evaluations, and equal protection claims are pressed.[69]

(2) Key terms in the conventionally utilized insanity tests (particularly when one goes beyond *M'Naghten*) such as "mental disease," "capacity to conform," are vague at best and perhaps meaningless. The insanity defenses invite semantic jousting, metaphysical speculation, intuitive moral judgments in the guise of factual determinations.

In *Washington* v. *United States*,[70] Chief Judge Bazelon ordered that expert witnesses in trials involving insanity defenses be instructed to refrain from expressing an opinion as to whether the criminal act charged was the "product" of a mental disease or defect:[71]

> The writer of this opinion would make the following observations for himself. It may be that this instruction will not signficantly improve the adjudication of criminal responsibility. Then we may be forced to consider an absolute prohibition on the use of conclusory legal labels. Or it may be that psychiatry and the other social and behavioral sciences cannot provide sufficient data relevant to a determination of criminal responsibility no matter what our rules of evidence are. If so, we may be forced to eliminate the insanity defense altogether, or refashion it in a way which is not tied so tightly to the medical model. . . .

(3) The literature reveals great uncertainty as to the function of insanity defenses. Currently, it perhaps is most commonly stated as designed to remove from the criminal process those who are deemed to be not blameworthy.[72] Left unclear is the establishment of criteria for determining blameworthiness and the identification of persons meeting such criteria.

(4) The crucial decisions with respect to persons, including mentally abnormal persons, who commit criminal acts involve disposition. An insanity defense is a poor device for determination of whether persons ought to be institutionalized and if so, to what facility they are to be directed. It is far more rational to face this question frankly

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[68] 18 U.S.C. § 3006A(e).

[69] *See Thornton* v. *Corcoran*, 407 F. 2d 695 (D.C. Cir. 1969); *Shepard* v. *Bowe*, 442 P. 2d 238 (Ore. 1968), and the authorities which it collects.

[70] 390 F.2d 444 (D.C. Cir. 1967).

[71] 390 F.2d at 457 n. 33.

[72] *See e.g.*, MODEL PENAL CODE § 4.01, Comment at 156 (Tent. Draft No. 4, 1955).

and directly.[73] Large numbers of defendants who could present effective insanity defenses under present standards do not do so either because the possibility is not recognized or because it is avoided, commonly out of fear of more lengthy detention and/or more painful stigmatization.

No matter what insanity defense approach is taken, it is likely that large numbers of abnormal persons will continue to be placed in correctional institutions. In view of our poor abilities to reform behavioral deviants, irrespective of the sort of institution to which they are directed, this is obviously not a tragedy from the standpoint of the prevention of recidivism. Successful treatment, once a central article of liberal faith, is more commonly today seen by professionals as an illusory goal of our poor skills and meager resources.[74] In view of the large numbers of persons of all personality types who will continue to be found in correctional institutions, rehabilitative efforts must be directed to mentally abnormal offenders who are placed in them. Dr. Bernard Diamond has written that the psychiatric care at Vacaville, a part of the California correctional system, may be categorically said to be better than that available at Atascadero, the hospital for the criminally insane.[75] Dr. Jonas Robitscher adds:[76]

> If the death penalty is abolished, if prison sentences are shortened to be consistent with deterrence and rehabilitation rather than revenge, and if psychiatric and other rehabilitation services are provided, it will not make any real difference if a disturbed person who has admittedly done an illegal act is treated in prison or in a mental hospital; in either case he will have problems of guilt, in either case he will feel he deserves punishment; in either case he will respond—if he responds at all—only to thoroughgoing and sincere efforts to help him whether the setting is called prison or hospital. (What we call our institutions is less important than what we do in them. It is time we recognized the inhumanity of indeterminate sentences, which represent a peculiar 20th century cruelty imposed on the pretext that we are therapists and not jailers, even when the prisoner-patient is not amenable to treatment.)

(5) The criminal process has the advantages of determinate maximum periods of detention, proportionality between the seriousness of the offense and the penalty. Persons channelled out of the criminal system by the insanity defense are subject to incarceration, possibly for life. The criteria for release such as "recovered sanity," no longer "dangerous" are subject to such wide variations of meaning as to afford little protection to the "patient." Prediction of future criminal

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[73] *Cf. Bolton* v. *Harris*, 395 F. 2d 642 (D.C. Cir. 1968), holding that a finding of not guilty by reason of insanity does not provide a constitutionally rational basis for indefinite commitment to a mental hospital. But see *Lynch* v. *Overholser*, 369 U.S. 705 (1962), assuming the contrary if the defense is raised at the instance of the defendant.

[74] *See* A. GOLDSTEIN, THE INSANITY DEFENSE 21 (1967).

[75] Diamond, *Criminal Responsibility of the Mentally Ill*, 14 STAN. L. REV. 59, 85 (1961).

[76] Robitscher, *Tests of Criminal Responsibility; New Rules and Old Problems*, 3 LAND AND WATER L. REV. 153, 172 (1968).

behavior, its frequency, its nature and severity, the length of confinement needed to reduce the risk, is a primitive science in and about which few empirical studies have been conducted.[77] The safe thing for a hospital administrator to do may be to err on the side of caution and continue hospitalization for an extended period of time. The criminal justice system diffuses responsibility among legislature, police, prosecutors, judges and parole boards and may consequently be in a better position to opt for release.

(6) A number of informed observers believe that it is therapeutically desirable to treat behavioral deviants as responsible for their conduct rather than as involuntary victims playing a sick role.

(7) The insanity defense developed in England at a time in which all felonies were punishable by death. In the United States in 1967 a death penalty was administered to one person and in 1968 to none. The appropriateness of capital punishment in the Federal system ought to be directly faced rather than ameliorated by retention of an insanity defense.

(8) The insanity defense discriminates against persons who commit crimes because of influences on their personalities other than mental disease or defect. Professor Norval Morris writes [78]:

> It too often is overlooked that one group's exculpation from criminal responsibility confirms the inculpation of other groups. Why not permit the defense of dwelling in a Negro ghetto? Such a defense would not be morally indefensible. Adverse social and subcultural background is statistically more criminogenic than is psychosis; like insanity, it also severely circumscribes the freedom of choice which a non-deterministic criminal law (all present criminal law systems) attributes to accused persons. True, a defense of social adversity would politically be intolerable; but that does not vitiate the analogy for my purposes. You argue that insanity destroys, undermines, diminishes man's capacity to reject what is wrong and to adhere to what is right. So does the ghetto—more so. But surely, you reply, I would not have us punish the sick. Indeed I would, if you insist on punishing the grossly deprived. To the extent that criminal sanctions serve punitive purposes, I fail to see the difference between these two defenses. To the extent that they serve rehabilitative, treatment, and curative purposes I fail to see the need for the difference.

(9) There is undoubtedly some overlap between the insanity defense and the mens rea requirement. The overlap is most substantial in *M'Naghten*. For persons within this group the insanity defense may become a means of facilitating detention of those who are not guilty of crime and whose present dangerousness has not been estimated.[79]

Arguments favoring retention of a separate insanity defense follow:

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[77] *See* Dershowitz, *Psychiatry in the Legal Process: "A Knife That Cuts Both Ways,"* 51 JUDICATURE 370 (1968).

[78] Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514, 520 (1968).

[79] *See* J. Goldstein & Katz, *Abolish the Insanity Defense—Why Not?*, 72 YALE L. J. 865 (1963).

(1) There is a powerful root feeling in our culture than an "insane" person is not appropriately subject to the condemnation implicit in criminal conviction and sentencing. We sense a lack of culpability. In spite of the vagueness of these feelings and of the terms we use to express them the moral sentiments are strong and pervasive. In part they may be attributable to notions of retribution associated with criminal sanctions, however great our effort to avoid such a rationale. In part these feelings may be attributable to a subjective sense of freedom to avoid criminal conduct ourselves and our lack of identification with grossly abnormal offenders, whom we feel to be different from ourselves in the sense of being less free.

To abolish the insanity defense would be to seem to recognize that criminal sanctions may be imposed irrespective of whether the defendant freely chose his course of conduct, thus weakening what is at least a useful myth.

(2) Criminal convictions carry added sanctions of loss of reputation, self-deprecation, and (frequently) civil legal liabilities. The difficulties experienced by ex-convicts in obtaining employment alone justify avoidance of criminal stigmatization where reasonably feasible.

This argument is considerably weakened by the stigma associated with being judged insane.

(3) Elimination of the insanity defense may be unconstitutional. It has been attempted in two States. In *State* v. *Strasburg*,[80] a statute so providing was declared unconstitutional by the Washington Supreme Court as violating due process of law and the right to a trial by jury. The legislation in that case was held to abolish the use of evidence of insanity in connection with disproving mens rea, thus differing from the abolition suggested by Alternative Formulation I. The second case is *Sinclair* v. *State*,[81] in which a statute similar to the Washington provision was held violative of the due process provision of the Mississippi Constitution.

Powell v. *Texas* [82] may be read to require exculpation of a defendant whose criminal act was beyond his power of avoidance. The four Justices urging reversal of Powell's conviction were joined in such a view by Mr. Justice White, who concurred in affirmance on the basis of the facts of the particular case. On the other hand, even the dissenting Justices disclaimed the accusation that they were creating a constitutional insanity standard of general applicability.[83] In any event, the area of litigation, the mere public drunken appearance of chronic alcoholics, did not present the Court with the question of the elimination of a separate insanity defense in a carefully considered Criminal Code. *Leland* v. *Oregon* [84] sustained a cognition test in the face of a contention that irresistible impulse exculpation was required by the fourteenth amendment.

Another possibility which might be considered would be the vacation of a conviction upon a decision to place one who has been found guilty of an offense in a mental institution for treatment. "Suitability for treatment" presents many questions as to the nature and meaning

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[80] 60 Wash. 106, 110 Pac. 1020 (1910).
[81] 161 Miss. 142, 132 So. 581 (1931).
[82] 392 U.S. 514 (1968).
[83] *See* dissenting opinion of Fortas, J., 392 U.S. 514, 559n.2.
[84] 343 U.S. 790 (1952).

of the criteria employed, the extent to which decisions are influenced by the facilities available in correctional and mental health institutions, and would present great challenges to attempts at evenhanded administration. Although believing it seems worth considering, the writer prefers giving an option for postconviction commitment to a mental hospital. Such a proposal will be considered in connection with procedural suggestions.

(4) The abolition of the insanity defense may be, in fact, impossible. In California, where split trials were established to separate the adjudication of insanity from the trial of guilt of the elements of the offense, evidence of mental abnormality has been commonly introduced in both trials. In homicide cases it is typically presented in the first trial to rebut premeditation, deliberation, or malice and reduce a charge of first degree murder to murder in the second degree or manslaughter.[85] However California has also approved the use of such evidence to establish lack of criminal intent required for any homicide crime.[86]

On the other hand, many jurisdictions have declined to allow evidence of mental abnormality short of insanity to be used to rebut mental elements of an offense. In *Fisher* v. *United States*,[87] a murder case, psychiatric evidence of mental abnormality was received and instructions on insanity, malice, premeditation, and deliberation were given. However, a requested instruction that the jury might weigh the evidence of defendant's mental deficiencies in determining whether there was premeditation and deliberation was refused. The Supreme Court affirmed the conviction, stating that rejection of such a doctrine of "partial responsibility" was in conformity with the common law, and if it were to be changed either Congress or the courts of the District of Columbia, where the case arose, should change it.

Affirmative Formulation I takes the view that evidence of mental abnormality should be accorded its full evidentiary significance. The Model Penal Code took the same position.[88] The effect of this doctrine is to exculpate or mitigate in situations where defendants may be more dangerous as well as thought less culpable by reason of mental abnormalities. It is consequently suggested that concomitant procedures ought to be adopted to determine whether such persons ought to be civilly committed to mental institutions in the event of their exculpation. The California Joint Legislative Committee for Revision of the Penal Code has proposed a similar response be authorized in the event of a successful *Wells-Gorshen* defense.[89]

If the special insanity defense is eliminated, there will be greater need to provide means for channeling mentally abnormal persons away from correctional institutions and into mental hospitals. Under 18 U.S.C. § 4241, a prisoner in a Federal correctional institution may be transferred to a mental hospital by the Attorney General upon recommendation of a medical panel. If the court had power to take a

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[85] *See, e.g., People* v. *Wells*, 33 Cal. 2d 330, 202 P. 2d 53, *cert. denied*, 338 U.S. 836 (1949).

[86] *People* v. *Gorshen*, 51 Cal. 2d 716, 336 P.2d 492 (1959).

[87] 328 U.S. 463 (1946).

[88] MODEL PENAL CODE § 4.02 (P.O.D. 1962), and MODEL PENAL CODE § 4.02, Comment at 193 (Tent. Draft No. 4, 1955).

[89] CAL. PENAL CODE REVISION PROJECT § 534, Comment at 84 (Tent. Draft No. 2. 1968).

similar measure, it might not believe it necessary to impose sentence in many cases, and the decision of the appropriate sentence to impose, if any, could frequently be more wisely made after release from the hospital. Such authority would be a more realistic replacement of one function of the special insanity defense (in jurisdictions where commitment may follow acquittal): the assigning of people to facilities most suited to their needs.

Procedural Proposals Relating to Acquittal Because of Mental Disease or Defect Negativing an Element of an Offense [Insanity]: Commitment

I. present federal law

Federal law contains no present provision for notice or verdict (or finding) of not guilty by reason of insanity. Furthermore, there is no procedure for commitment to mental institutions of persons who obtain acquittals on the basis of insanity defenses. Federal officials must attempt civil commitment by urging local authorities to institute such proceedings. Frequently such efforts are unsuccessful; not uncommonly this is due to lack of sufficient contacts between the acquitted defendant and a particular state for the latter to be willing to undertake care and treatment responsibility for him.[90] The absence of post-acquittal arrangements for commitment is in marked contrast with procedures presently provided by chapter 313 of Title 18, United States Code for Federal commitment of persons found incompetent to stand trial and convicted prisoners who subsequently become mentally ill.[91] Senators Robert Kennedy, Joseph Tydings, and Wayne Morse introduced bills to provide for commitment of dangerously mentally ill persons acquitted by reason of insanity, but no hearings appear to have been held on them.[92]

II. proposals*

It is recommended that procedural reform provide for advance notice that evidence of mental disease or defect will be relied upon in defense in a provision similar to section 4.03(2) of the Model Penal Code. Section 4.03(1) of the Model Penal Code provides that mental disease or defect excluding responsibility is an affirmative defense. While there is much to be said for such a view with respect to a separate defense of insanity, particularly in view of greater accessibility to the defense of evidence of the accused's mental state, the proposal for abolition of such a defense (Alternative Formulation I) could not consistently require the prosecution to prove mental elements of offenses and at the same time have the burden on defendants to disprove them.

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[90] *See* Tydings, *A Federal Verdict of Not Guilty by Reason of Insanity and a Subsequent Commitment Procedure*, 27 Md. L. Rev. 131, 133 (1968).

[91] *See* 18 U.S.C. §§ 4241–4248.

[92] S. 3689, S. 3753, 89th Cong., 2d Sess. (1966); S. 1007, S. 2740, 90th Cong., 1st Sess. (1967); S. 979, 91st Cong., 1st Sess. (1969).

* The Commission did not undertake any detailed consideration of procedural reforms in this or any other area. Current proposals covering procedural reforms in the matter of mental disability and the Federal criminal law include H.R. 15046, 91st Cong., 1st Sess. (1969).

Upon notice that defendant will introduce evidence of mental disease or defect, it is suggested that such a procedural provision permit the court to order psychiatric examinations and reports, the latter to be in other than conclusory terms. These proposals and many of those which follow are modeled closely upon Senate Bill 1007, introduced in the Senate by Senator Tydings for himself and Senator Morse.[93] A finding of mental disease or defect inconsistent with guilt should trigger consideration of possible commitment to a mental hospital. The criteria for ordering commitment would be present mental illness or defect plus dangerousness at the time of the post-acquittal hearing. To at least slightly alleviate the ambiguity of the word "dangerous," it is recommended that the provision require that the danger be found to be substantial. In the event of commitment, regular reports from the hospital to the court should be required and habeas corpus jurisdiction retained. Authorization for utilization of nonfederal institutions should be provided for, to permit maintenance of the patient in the area of family and friends. When dangerousness has receded to the point that compulsory hospitalization need not be required, the court should terminate the commitment.

A Proposal To Authorize Civil Commitment of Persons Convicted of Federal Offenses

I. present federal law

18 U.S.C. § 4241 provides for transfer of mentally ill Federal prisoners to a mental hospital. No similar power is granted sentencing courts.

II. a proposal

It is suggested that Federal courts be given authority to suspend the imposition of sentence on persons found to be mentally ill at the time of conviction and commit them to a hospital for treatment, rather than either imprison or release them. The criteria should be: mental illness or defect and need for custody, care or treatment in a hospital. This provision could be adapted from the *Draft Act Governing Hospitalization of the Mentally Ill* prepared by the National Institute of Mental Health.[94] Similar provisions may be found in many State involuntary commitment statutes. The criteria here would be primarily directed to the most suitable place of treatment and custody, as we are considering persons who have been convicted of a crime and might otherwise be imprisoned. It is thought that Federal courts would welcome the hospitalization option. People would be diverted from treatment in penal institutions on the basis of present suitability for treatment, rather than on retrospective reconstructions of mental status relating to responsibility criteria as of the time of the offense. Similar authority was granted to English courts by the Mental Health Act of 1959, 7 & 8 Eliz. 2, c. 72, § 60. It is said to be commonly used.[95]

Consideration was given to the possibility of vacating the convictions of such persons, but on balance, it is thought undesirable to give

[93] S. 1007, 90th Cong., 1st Sess. (1967).
[94] Public Health Service Publication No. 51, 1952.
[95] *See* H. L. A. Hart, Punishment and Responsibility 194, 198 (1968).

authority to in effect pardon persons convicted of offenses against the United States on the basis of mental health and suitability for hospital treatment criteria. They are too vague to permit evenhanded administration of such a power. Furthermore, it is thought likely that many persons initially referred to a hospital subsequent to conviction will be returned to the court for subsequent possible penal institutionalization. In the event this is done, credit would be given for time served. At any event, hospitalization for a period longer than the term for which imprisonment could be ordered should not be allowed without a determination of dangerousness of the offender. A maximum time limit on hospitalization for treatment should be established. Any revision of chapter 313 of Title 18 [96] should continue to permit hearing to determine dangerousness and subsequent indefinite retention of such persons in a Federal hospital.

Competency To Be Tried, Convicted, or Sentenced

I. present law

The function of the incompetency standards seems to be twofold: First, it appears fundamentally unfair to convict an accused *in absentia*, so to speak. Such was the decision in *Pate* v. *Robinson*, [97] in terms of the due process clause of the fourteenth amendment. In addition, the accuracy of the factual determination of guilt is suspect when an accused lacks opportunity to challenge it at a trial.

Competency to stand trial in Federal courts is governed by chapter 313 of Title 18,[98] which constitutes part of comprehensive legislation enacted in 1949 [99]: "To provide for the care and custody of insane persons charged with or convicted of offenses against the United States, and for other purposes." This chapter was proposed by the Judicial Conference of the United States "after long study by a conspicuously able committee, followed by consultation with Federal district and circuit judges." [100]

18 U.S.C. § 4244 provides that whenever the United States Attorney has reasonable cause to believe that a person charged with a Federal offense may be presently "insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense" he shall file a motion to determine competency. Upon such a motion, or a similar one filed by the accused, or on its own motion, the court shall have the accused examined. If the report of the psychiatrist conducting the examination indicates "present insanity or such incompetency" the court is to conduct a hearing and make a finding with respect to the "mental condition of the accused." If the court finds the accused "mentally incompetent," it may commit him to the custody of the Attorney General "until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law." 18 U.S.C. § 4246. Other sections of chapter 313 deal with incompetency at trial disclosed after trial, and

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[96] 18 U.S.C. §§ 4241–4248.
[97] 383 U.S. 375 (1966).
[98] 18 U.S.C. §§ 4241–4248.
[99] 18 U.S.C. §§ 4244–4248, added by Act of Sept. 7, 1949, c. 535 § 1, 63 Stat. 686.
[100] *Greenwood* v. *United States*, 350 U.S. 366, 373 (1956), per Frankfurter, J.

transfer of persons "insane, or of unsound mind, or otherwise defective" from Federal prisons to mental hospitals, even after expiration of sentence.

The statutes do not explicitly state the test of competency to stand trial, although the strong implication is that the question is whether the accused is "presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense." The leading decision appears to be *Dusky* v. *United States*.[101] There the Court reversed a conviction after the government confessed that the trial court had erred in finding competency on the basis of the record before it. In a very brief, *per curiam* opinion, the Supreme Court stated:[102]

> We also agree with the suggestion of the Solicitor General that it is not enough for the district judge to find that 'the defendant [is] oriented to time and place and [has] some recollection of events,' but that the 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as a factual understanding of the proceedings against him.'

There is no express limitation of time beyond which a Federal patient may not be held upon determination of incompetency to stand trial. However, an alternative procedure is provided for the committing court to hold a hearing to determine if the accused is dangerous to Federal "officers, property, or other interests." If the court so finds 18 U.S.C. § 4248 provides that the commitment shall continue until competency is restored or the danger has passed.

II. EXPLANATION OF A PROPOSAL

Any revision of present laws should closely follow the Model Penal Code, which reads:[103]

> No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures.

The use of rather more extended language could recognize the problem of the existence of a range of capacities among defendants and require "substantial capacity," analogously to the language in the A.L.I. insanity defense proposal, by adding requirements of ability to understand the nature of the charge and to cooperate with defense counsel, not because these things are not fairly implied by shorter formulas, but rather because it is thought that it adds emphasis to the functional position of competency standards. The major problem in the application of the competency to stand trial test has been one of confusion of purposes. Sometimes it is thought to be aimed at withdrawal of psychotics from the criminal process. The Royal Commission on

[101] 362 U.S. 402 (1960).
[102] *Id.* at 403.
[103] MODEL PENAL CODE, § 4.04 (P.O.D. 1962).

Capital Punishment found both in England and in the United States a widespread view among prison medical officials that incompetency to stand trial means "insanity in the ordinary medical sense." [104] This position is not supported by existing law. An accused may be deemed psychotic yet able to function with substantial self protective capacity in a criminal prosecution. At the same time, a substantial overlap between psychosis and incapacity to defend oneself must be acknowledged.

A closely related common misconception is that the competency to stand trial standard is designed to select out the civilly commitable for hospitalization. Again, the overlap of the categories must be noted, without conceding that all persons subject to involuntary hospitalization are incapable of standing trial.

An incompetency proceeding is sometimes also used to satisfy the moral preferences of some psychiatrists and courts to substitute medical custody for possible criminal incarceration. A study in the District of Columbia indicated that after the insanity defense was broadened by *Durham*, both the percentage and number of persons found incompetent to stand trial declined.[105] Some observers interviewed by the D. C. Committee attributed this to a belief by psychiatrists that it was unnecessary to declare as many persons incompetent to stand trial after the broadening of the insanity defense, as acquittals and subsequent commitment to a mental hospital could be more readily anticipated.

Competency criteria should not be designed to identify these other classes of persons, and it does not seem right to confine persons accused of crime in mental hospitals for ends other than that envisaged in the competency tests upon determination only of incapacity to stand trial.

III. EXPLANATION OF PROPOSED CHANGES IN THE PROCEDURAL PROVISIONS RELATING TO COMPETENCY TO PROCEED

Chapter 313 of Title 18 [106] would be left largely unchanged by the proposals contemplated, with the following major exceptions:

(1) The length of time during which an accused could be held on a finding merely that he is incompetent to stand trial should no longer be unlimited. It should be provided that it could not exceed the period for which he could be sentenced upon conviction of the offense charged, and in no event could exceed three years. A longer period of hospitalization should require a finding of substantial dangerousness and thus be equivalent to a most limited type of civil commitment procedure.[107] Assistance of counsel should be expressly provided in the event indefinite commitment is sought, in contrast to the present statute (18 U.S.C. § 4247), which seems to assume that the court is to act to protect the accused. Similar explicit guarantees would seem unnecessary

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[104] ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT 1949–1953, para. 220, at 77 (1953).

[105] JUDICIAL CONFERENCE OF THE DISTRICT OF COLUMBIA CIRCUIT, REPORT OF THE COMMITTEE ON PROBLEMS CONNECTED WITH MENTAL EXAMINATION OF THE ACCUSED IN CRIMINAL CASES, BEFORE TRIAL 44–45 (1965).

[106] 18 U.S.C. §§ 4241–4248.

[107] *Compare* the Ervin Act, Pub. L. No. 78 Stat. 944 (1964); D.C. CODE ANN. § 21–501 *et seq.* (1967).

with respect to the hearing on competency to proceed, since this is clearly a critical phase of the criminal case.[108]

(2) The standard to determine competency to stand trial should be incorporated in the procedural provisions, rather than being only implied.

(3) A minimum of two psychiatrists (if any) should be appointed by a court, rather than one. At best competency standards are rather ambiguous and subject to significant variations of expert judgment. In view of the importance of the issue and the desirability of reducing the likelihood of idiosyncratic evaluation, more than one appraisal is thought desirable.

(4) A determination of incompetency to proceed ought not to prevent determination of pretrial legal issues not requiring the personal participation of the defendant. The recommendation of the American Law Institute proposal is to so provide.[109]

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[108] *See* 18 U.S.C. § 3006A.

[109] MODEL PENAL CODE § 4.06(3) (P.O.D. 1962).

COMMENT

on

JUSTIFICATION AND EXCUSE: CHAPTER 6, SECTIONS 601–609 (Stein; April 10, 1968)

1. *Background; Existing Law on Justification.*—The rules which justify or excuse one person's use of force against another person, developed in case law, have not heretofore been set forth in statutory form in the United States Code. We propose to set forth these rules as statutes so that Congress may correct some unfortunate rules of the uncodified law as well as settle some questions which are cloudy in existing law.

The rules of justification were developed in a society which, of necessity, placed great emphasis on self reliance. In a rural nation one could not quickly obtain the help of neighbors, or readily seek the help of law enforcement officials. Any impairment of access to one's home or land could cause substantial harm. Therefore, under the common law, developed then and still governing today, one may use force against another to defend himself, his family, and others in his household, to protect property and to prevent crime. This right to use force extends even to resistance to a public official attempting to make an arrest, if the arrest is unlawful. Further, because of historical development, an unnecessary distinction exists between justifiable use of force to prevent crime and justifiable use of force to protect others. One could not, apparently, justifiably use force to protect a stranger from a noncriminal, but dangerous, act of another—stopping a hunter, for example, who is about to shoot at what he believes to be a deer, but which the observer knows to be persons.

Deadly force, in present law, may not be used solely to resist arrest or to protect property, but deadly force may be used when necessary for self defense, for the defense of family, or for the prevention of dangerous felonies. It is not clear under what circumstances one must retreat, if it is safely possible, rather than use deadly force. The law has wavered between reluctance to punish someone who has successfully stood up to an aggressor and condemnation for an unnecessary taking of human life. It is clear, however, that one need never retreat from his home, and that a law enforcement officer need not retreat from the performance of his duty.

Law enforcement officers, under present law, may use any force, including deadly force, necessary to effect the arrest of felons or to prevent escape. Any "fleeing felon" may be shot at, even if the crime of which he is suspected is a property crime or fiscal crime posing no threat to life.* Therefore, under the law, one who tries to sneak

But see Sauls v. *Hutto*, 304 F. Supp. 124 (E.D. La. 1969) (deadly force not justified to apprehend a fleeing larceny suspect under State statutes permitting only reasonable force to effect an arrest and limiting justified use of deadly force to enforcement against violent or forcible felonies.)

through merchandise without paying his customs duty, or one who distills untaxed whiskey, risks his life if he runs in panic from a Federal agent. However, the major Federal law enforcement agencies have administratively imposed strict limitations on an officer's use of deadly force. An FBI agent, for example, is forbidden to use deadly force except in self defense.

Additionally, in Federal law, there has been some recognition that extreme situations may arise in which harm must properly be done to some in order to save others. The action taken in such situations may not be defensible under traditional concepts such as self defense, defense of others, or the prevention of crime. The persons acted against may themselves be innocent of any fault, yet the acts taken against them cannot fairly be deemed criminal. This is, for example, the situation which arises when a lifeboat in the ocean is too crowded to hold all survivors of a shipwreck; some must be required, or forced, to leave the boat. (*See* note 23, *infra*).

2. *Justification as a Defense.*—Uses of physical force which would ordinarily constitute criminal offenses may be justified, as in the case of self defense, law enforcement, *etc.*[1] Justification is a defense, *i.e.*, a defendant must come forward with some evidence if he claims justification. If considering all the evidence in the case, the evidence of justification or excuse is sufficient to raise a reasonable doubt as to the defendant's guilt, he is entitled to an acquittal. This is the law as it exists presently in the Federal jurisdiction and most American jurisdictions.[2]

3. *Defense by a Federal Officer in a State Prosecution.*—Federal officers, or persons acting under them, are occasionally prosecuted by the States for alleged acts of force which were done, at least colorably, while they were performing official duties.[3] In recognition of problems of sovereignty involved in such prosecution, 28 U.S.C. § 1442 authorizes the removal of such prosecutions to Federal courts. It does not state, however, what rules as to justification or excuse are to govern in such a case, though the prosecution is continued by the State under its State statute and indictment. Moreover, even if the case is not removed, there is no statutory guidance on the question of whether the Federal officer may be held to the State's justification standards if they are narrower than the Federal standards.

The draft provides that if a Federal officer does face a State criminal prosecution (whatever the court in which he is tried), he

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[1] Not only is this true of intentional conduct, but also the definition of recklessness itself incorporates the notion of lack of justification. *See* section 302 of proposed chapter 3.

[2] "In a great majority of the states . . . it is held that while the burden of establishing self-defense is upon the defendant unless the evidence of the prosecution discloses sufficient evidence thereof, the burden is sustained when, as a result of the whole evidence, a reasonable doubt has been created in the minds of the jury as to whether or not the homicide was in self-defense. If from a consideration of the whole evidence the jury entertains a reasonable doubt upon that question, that doubt is to be determined, like all other doubts in the case, in favor of the defendant . . . [T]he Federal courts [are] with those courts holding that where there is a reasonable doubt as to whether the killing was or was not committed in justifiable self-defense the defendant is entitled to an acquittal." *Frank* v. *United States*, 42 F. 2d 623, 627–629 (9th Cir. 1930).

[3] There were several cases during the Prohibition era, for example, when Federal alcohol agents, perhaps too ready with their guns, were indicted in the States for killing people found at the site of illegal stills.

is entitled to assert in his defense the Federal rules of justification if he used force in the performance of his official duties. Rules of justification vary from State to State. But if a Federal officer claims to have acted under authority defined by Federal law, it seems proper explicitly to allow him defenses available under that law.[4]

4. *Execution of Public Duty.*—It is an obvious proposition of law that one properly obeying a lawful command or authorization to use force cannot be guilty of a criminal act. A soldier at war, for example, or a Federal marshal enforcing a court injunction or a Federal agent executing a search warrant is authorized to use force to the extent necessary and appropriate to fulfill his mandate. Further, a person's conduct is not criminal if he acts in accordance with the order of the public officer who has authority to command the use of force, and whose orders are not plainly illegal.[5]

The Model Penal Code defines execution of public duty to include specifically "duties or functions of a public officer," "execution of legal process," execution of the "judgment or order of a competent court or tribunal," and obedience to "the law governing the armed services or the lawful conduct of war." The draft, in section 602, employs a general provision because it appears to cover the same ground but at the same time obviates the need for special provisions concerning arrest of criminals, prevention of escape, and duties of prison wardens.[6] By virtue of the general requirement in proposed section 609 of only a reasonable belief in the grounds for justification or excuse, the scope of justified or excused action by a public servant is broader here than that provided in the Model Penal Code. Where it could be said under the

[4] "[I]f the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do . . . and if, in doing that act, he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the state. When these things are shown, it is established that he is innocent of any crime against the laws of the state, or of any other authority whatever. . . ." *Cunningham* v. *Neagle*, 135 U.S. 1, 75 (1890).

[5] In *United States* v. *Clark*, 31 F. 710, 717 (E.D. Mich. 1887), the court upheld the shooting by a sentry of a soldier escaping from a military compound. The soldier shot had been imprisoned for a very minor offense. The court noted that no personal motivation for the shooting had been shown, and that it was within the sentry's proper duties to shoot at an escapee. But the court stated:

> [A]n order illegal in itself, and not justifiable by the rules and usages of war, so that a man of ordinary sense and understanding would know, when he heard it read or given, that the order was illegal, would afford the private no protection for a crime under such order; but . . . an order given by an officer to his private which does not expressly and clearly show on its face, or the body thereof, its own illegality, the soldier would be bound to obey, and such order would be a protection to him. . . . [U]nless the act were manifestly beyond the scope of his authority, or . . . were such that a man of ordinary sense and understanding would know that it was illegal, . . . it would be a protection to him if he acted in good faith and without malice.

Cf. U.S. ex rel. Drury v. *Lewis*, 200 U.S. 1, 8 (1906). Defendant, a soldier guarding a Federal arsenal, claimed he shot deceased because he believed him to be a felon fleeing from a theft at the arsenal. Other witnesses, however, claimed that defendant shot at deceased after deceased had surrendered, on orders from his commanding officer. The Supreme Court held that the matter could be tried in the State court for resolution of the factual dispute. The Court stated that, if defendant had fired after the deceased had surrendered, "it could not reasonably be claimed that the fatal shot was fired in the performance of a duty imposed by the Federal law. . . ."

[6] *Cf.* MODEL PENAL CODE §§ 3.07(1),(2),(3), and 3.08(5) (P.O.D. 1962), respectively.

Model Penal Code that it was not a public servant's duty or function to make an illegal arrest, and thus the use of force was unjustified, the test under the proposed draft would be whether the officer reasonably believed that the arrest was legal.[7]

5. *Elimination of Right to Resist 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 law enforcement officer.[8] This right to resist arrest has been severely criticized in recent years.[9] We propose to do away with this privilege to use force to resist an arrest by a public servant.* There are ample nonviolent remedies against improper official action. The law should not sanction any rule which would lawfully put an officer's safety at stake when he seeks to make an arrest.

Although the draft does not permit force for the purpose of resisting arrest, it does not curtail defensive force for the purpose of resisting illegal excessive force. This result follows from the language of section 603(a), negativing use of defensive force only for the purpose of resisting *arrest.***

The elimination of justification for the resistance of a public servant might be expanded, beyond the arrest situation, to any instance in which a public servant is seeking to perform his duty. It is not right, for example, to require an officer executing a warrant to risk justifiable attack from a person who believes the warrant is unlawfully issued. Nor does it seem proper to allow a person to use force against a public servant charged with inspecting premises because he believes the officer has no right to do so and is a trespasser.

Thus an issue posed by section 603(a) is whether the right to resist illegal action by officials in situations other than arrest and execution of warrant should be eliminated.*** For example, we could continue to

[7] New York, which originally adopted the Model Penal Code provision in its revision of the Penal Law, is now amending it to cover "reasonable discretion" exercised by a public officer.

[8] *John Bad Elk* v. *United States*, 177 U.S. 529, 537 (1900). Again in *United States* v. *Di Re*, 332 U.S. 581 594 (1948), the Supreme Court stated, in dictum: "One has an undoubted right to resist an unlawful arrest, and courts will uphold the right of resistance in proper cases."

[9] "The idea that you may resist peaceful arrest . . . because you are in debate about whether it is lawful or not, instead of going to the authorities which can determine . . . [is] not a blow for liberty, but, on the contrary, a blow for attempted anarchy." Judge Learned Hand, quoted in *United States* v. *Heliczer*, 373 F. 2d 241, 246n.3 (2d Cir. 1967). The Second Circuit noted a present trend in the States "toward holding that the legality of an arrest—which is often a close question—should be decided by a court of law without the preliminary trial by battle in the streets."

*However, force in resisting arrest could be excused under Study Draft section 609 where, for example, the resistor mistakenly believed that he was simply being assaulted rather than arrested.

**The last phase of section 603(a) was added to the Study Draft to make clear that this is the result intended.

***The tentative draft proposed as an alternative that, in addition to resistance to arrest and other execution of process, one is not justified in using force to resist other performances of duty by a public servant. This proposal is adopted under the Study Draft, so that forcible resistance to official acts which do not happen to have been undertaken pursuant to process or are not otherwise subject to immediate judicial determination (*e.g.*, border and exigent searches, and attendant seizure and confiscation of property, interrogation and search for and of suspected illegal aliens (*see* 8 U.S.C. §§ 1357(a)(1), (3) and (c)), stop-and-frisk actions, and endeavors to avoid breaches of the peace, such as "move-along" requests, is not justified.

permit justification for resistance, by nondeadly force, of illegal stop-and-frisk, illegal search, illegal inspection of premises, illegal seizures and confiscation of property. The chief reason for drawing the line at illegal arrest and, perhaps, service of warrants is that these official actions are subject to immediate judicial review in preliminary hearings. In the other cases of official action, where prompt judicial review is not readily available, it may seem preferable to put the burden on the officials to invoke judicial authority to compel compliance with the law rather than themselves employ force to overcome resistance and, incidentally, to provoke forcible resistance. It will, of course, often be an offense for the citizen to resist or obstruct. In that case, arrest for the offense of obstruction would be proper, and resistance to the arrest would be unjustifiable.[10]

6. *Citizen's Arrest.*—Under the common law, a private citizen may use force to arrest another person if he has probable cause.[11] The draft contains no general authorization for such conduct. But under sections 609–610 of the proposed draft, the private citizen's conduct will be *excused* if he reasonably believes that he has the authority to make an arrest. The draft does not, however, extend the prohibition against resisting unlawful arrests to those made by private citizens. It may be true that the danger of street battles is greater when the arrest is made by a private citizen rather than by a public official; but, on balance, permitting a private citizen, who is not charged with the duty of law enforcement and is not subject to administrative discipline, to provoke a crime by *his* improper act, even if well motivated, seems unwarranted.

7. *Defense of Others.*—Section 604 permits a person to come to the aid of another person who is in danger of harm from the wrongful acts of a third person, provided that the rescuer has not himself forfeited the right of self defense. The proviso is necessary in order not to foreclose prosecution where a person provokes an attack to secure an opportunity to inflict "defensive" injury. Section 604 makes no distinction between defending members of one's own family and defending strangers. Some traditional formulations permit a broader justification for defense of the family, requiring proof in the case of strangers not merely that harm was threatened but that the behavior forestalled was *criminal.* Although there is some danger in forceful intrusion into strangers' controversies, it is hard to regard the "good samaritan" as a criminal where he makes a good faith effort to protect another from apparently unlawful harm.

8. *Justification for Persons Charged with the Care of Others.*—Proposed section 605 deals with justification in special instances, not otherwise defined in chapter 6, in which the need to employ some force is recognized in order to maintain necessary discipline, or to safeguard a person against whom force is used. This includes force

[10] We note, also, that a statute proscribing abuses of authority by public officials will be offered for the proposed Code.

[11] "The common law authorizes a private person also to arrest for a felony committed in his presence; or if a felony has been committed and he has probable cause to believe and does believe the person arrested to be guilty. He can justify his not getting a warrant though he had opportunity, by proving the arrested person was actually guilty." *Dorsey* v. *United States*, 174 F. 2d 899, 901 (5th Cir. 1949).

employed by a parent or teacher upon a child, a person in charge of a public meeting place or moving vehicle upon disorderly persons, a doctor upon his patient, or any person in an effort to save another from harming or killing himself.

The right to use force is more broadly stated in these proposed criminal provisions than it is in rules of law covering civil liability, since criminal punishment is a far harsher sanction than civil liability.[12] It may be that these special provisions need not be included in a Federal Criminal Code: local law may be relied upon whenever such problems arise in Federal enclaves. But inclusion of the proposed provisions in the Federal Code would assure uniformity of treatment wherever Federal law is paramount, such as in Federal enclaves and on airplanes.

9. *Defense of Premises and Property.*—Section 606 authorizes the use of nondeadly force in certain cases of defense of property. The section does not substantially change existing law, except that it explicity requires a request to the trespasser to desist, where such a request is feasible and safe, before force may be resorted to. Such a requirement may be implicit in existing law which permits force only where use of force is "necessary". On use of "deadly force" to protect property, *see* comment below.

10. *Limits on Use of Deadly Force.*—Section 607 defines the occasions on which deadly force may be employed defensively. The general policy is to confine the use of deadly force to prevention of serious danger to the person. This obviously extends to prevention of homicide, rape, and robbery. However, the issue arises whether the privilege to use deadily force should also apply to arson and burglary. All these would be within the section if the reference to Class A or B felonies is retained.*

Arson often does involve danger to the person; but it is questionable whether deadly force should be employable in a case of property destruction where risk of life is not clearly involved. Burglary presents a unique problem since there may be no way to stop the burglar, short of using deadly force, without endangering persons in the house. For example, a person may hear an intruder in his house at night: he may go downstairs and hear the sounds of another's presence, of rifling through drawers. The householder is not immediately threatened, but he has no way of knowing, if he calls for help or otherwise reveals himself, whether the intruder, perhaps armed, will attack him. In short,

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[12] For instance, a doctor's failure to obtain a parent's consent for an operation on a 15-year-old boy may render him liable to civil damages (*Bonner* v. *Moran*, 126 F. 2d 121 (D.C. Cir. 1941)); but, absent criminal negligence, the doctor should not be guilty of criminal assault or manslaughter merely for the failure to seek consent. Again, in disciplining children, only *necessary* acts are deemed free of civil liability; such a rule would be too harsh in terms of criminal sanctions. *See* MODEL PENAL CODE § 3.08, Comment at 71–75 (Tent. Draft No. 8, 1958).

*These references are retained in subparagraph (2) (b) of the Study Draft, but are qualified so that only those felonies "involving violence" are included. The qualification clarifies the basic notion of that provision—to cover only crimes involving harm to the person. Subparagraph 2(c), covering justified use of deadly force in a dwelling, also retains the reference to Class A or B felonies, but does not contain the limitation "involving violence", except insofar as the last phrase requires that deadly force can be used to prevent the crime only if persons must otherwise be exposed to substantial danger of serious bodily injury.

there may be no reasonable way to determine to what extent, if at all, persons in the home are threatened by the intruder. A decision to use deadly force in this circumstance, rather than to endanger others, is justifiable under the draft provision.

Present law, however, permits use of deadly force, if necessary, against a burglar, whether the intrusion is into a dwelling, store, office, or any other premises.[13] But the situation in a home, where a person confronted with a strange intruder may have no recourse other than to use deadly force, is different from the situation in a store or office, where retreat may be possible and where only property may be at stake. Reference to "place of work" is therefore, bracketed in the draft in subsection (2)(c).*

(a) *Retreat.*—In the late 19th century, the Supreme Court held, in several cases, that there was no absolute requirement to retreat from a deadly attack.[14] In a famous opinion on the subject, Mr. Justice Holmes explained that failure to retreat "is a circumstance to be considered with all the others in order to determine whether the defendant went further than he was justified in doing; not a categorical proof of guilt." [15]

Section 607(2)(b) would require retreat under defined circumstances. Deadly force is not justified if its use can be safely avoided; one would have no justifiable right to kill if he knows of a safe way to retreat.[16] Further, the draft requires that other minimal steps to

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[13] "A man may repel force by force in defense of his person, habitation or property against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary and the like, upon either." *Beard* v. *United States*, 158 U.S. 550, 562 (1895).

*This phrase is incorporated, unbracketed, into the Study Draft, section 607(2)(b) and (c). Policy alternatives to the Study Draft could include, on the one hand giving citizens broader justification by including any felonious theft or property destruction, but limiting their application to dwellings, and including a justification in the instance of escape without property or, on the other hand, restricting citizens' justification by excluding all escapes and nonviolent crimes.

[14] "The defendant was where he had a right to be when the deceased advanced upon him in a threatening manner and with a deadly weapon; and if the accused did not provoke the assault, and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life or do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat but was entitled to stand his ground. . . ." *Beard* v. *United States*, 158 U.S. 550, 564 (1895). Beard defended himself on his own property (though not in his house). However, the same rule was applied to cases where a defendant did not retreat from an attack on another's property (*Alberty* v. *United States*, 162 U.S. 499 (1896), and in a public hotel office (*Rowe* v. *United States*, 164 U.S. 546 (1896)).

[15] *Brown* v. *United States*, 256 U.S. 335, 343 (1921).

[16] *Cf. Laney* v. *United States*, 294 F. 412, 414 (D.C. Cir. 1923), in which a man threatened by a mob in a race riot successfully escaped, then came out to shoot at the rioters. His shooting was held not to be justifiable:

> It is a well-settled rule that, before a person can avail himself of the plea of self-defense against the charge of homicide he must do everything in his power, consistent with his safety, to avoid the danger and avoid the necessity of taking life. If one has reason to believe that he will be attacked, in a manner which threatens him with bodily injury, he must avoid the attack if it is possible to do so, and the right of self-defense does not arise until he has done everything in his power to prevent its necessity. In other words, no necessity for killing an assailant can exist, so long as there is a safe way open to escape the conflict.

avoid killing must be taken, where possible. For example, if an apology or stepping aside will avert an attack and avoid the use of deadly force, the apology or step to the side must be made. It should be noted, however, that section 609(2) *excuses* a failure to retreat depending upon whether one can be expected, under the circumstances, to make a wise judgment.

The draft provision explicitly states that a person is not required to retreat from his dwelling unless he is the original aggressor or the person attacking him also lives there. This would require that a person, in a violent family dispute, leave his home rather than kill his spouse. It may be that, under modern urban conditions, one should, whenever safely possible, be required to leave his home and seek outside help, rather than resort to deadly force, even against a person who is *not* a member of the household. But, given the pervasive psychological attitudes towards a home, little blameworthiness attaches to the failure to retreat from strangers there. Moreover, in rural conditions, it is too harsh a rule to require a person to leave his home and seek help which is not readily available.

The Model Penal Code [17] proposes that the right not to retreat from one's home be extended to the place of work as well. This may seem a salutary suggestion, especially in the Federal context; many government offices and installations contain vital files, materials and equipment which should, as a matter of public safety, not be left unattended. However, such a provision may place too high a value on property, compared to human life. It should be noted that, in any event, some protection of property situations where personal safety is involved, property such as warning devices, reservoirs, dams, etc., may be covered by section 608 dealing with justification of conduct to avoid greater harm.

(b) *Arrests.*—The FBI has, at our request, given us the following statement of policy with respect to the use of deadly force in making arrests:

> The FBI 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 FBI forbids it. FBI 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 FBI 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

[17] MODEL PENAL CODE § 3.04(2)(b)(ii) (P.O.D. 1962).

> have avoided the unnecessary sacrifice of human life, either criminal or innocent, by either accident or design.

Similarly, the Treasury Department informs us that it proposes to adopt the following formal statement of policy for all its law enforcement agencies:

> A firearm may be discharged only as a last resort when, in the considered opinion of the officer, his life or the life of another person is in danger.[18]

Here, as elsewhere in the law of justification, it is important to bear in mind that the defenses are framed not in terms of ideal behavior, but in terms of behavior which is so egregiously at variance with law-observing norms as to warrant criminal conviction for grave offenses. It may therefore be appropriate for law enforcement agencies to have strict rules about using guns, although we would not necessarily say that every violation of such rules leads to liability for murder. The rules for use of guns by police officers in the District of Columbia may, for example, be quite different from those governing customs or revenue officers.[19] The draft does seek, however, to proscribe the use of deadly force against a person who clearly poses no harm to the life or physical safety of others.

The draft, therefore, permits the use of deadly force in making arrests only when the person arrested has, by the nature of his crime, by use of a weapon, or in some other manner, indicated that he is "likely to endanger human life or to inflict serious bodily injury unless apprehended without delay." Normally, for example, a robber could be apprehended by use of deadly force, if necessary, because that crime usually involves the use or threatened use of "deadly force." There are some dangerous felonies, however, where deadly force is not always necessarily employed, though persons are endangered—burglary, kidnapping, arson. The bracketed provision would, if adopted, permit use of deadly force in apprehending such culprits.*

(c) *Mass violence.*—Section 607(2)(f)(i) provides a defense for the use of deadly force by law enforcement officers to an extent reasonably necessary to "prevent" overt acts of certain types of violence. In the case of treason, insurrection and sabotage the defensive use of deadly force is akin to the "war" privilege spelled out in subsection (2)(a). The word "riot" is included, although riot will be an offense defined in part B of the proposed Code, and not until the scope of that offense has been finally determined will it be possible to define

[18] A policy similar to the FBI's has long been followed informally by Treasury's major enforcement agencies—Narcotics, Internal Revenue and the Secret Service.

[19] "Officers patrolling the streets at night do not prearrange the setting. They do not schedule their steps in the calm of an office. Things just happen. They are required as a matter of duty to act as reasonably prudent men would act under the circumstances as those circumstances happen. Even the ultimate power of an officer in the case of a felony, the justification for killing an offender, depends on the circumstances of the moment." *Bell* v. *United States*, 254 F. 2d 82, 85 (D.C. Cir. 1958). The Federal criminal laws concerning justifiable force in law enforcement should apply to all Federal law enforcement agents, D.C. police and patrolmen on other Federal enclaves, as well as FBI agents.

*The tentative draft originally made the following proposal as to the types of crime justifying deadly force under subsection (d): felonies involving deadly force and possibly "[a Class A [or B] felony]."

precisely the scope of permitted repressive measures.* The words "overt and forceful acts" are intended to safeguard against premature use of force against possibly unlawful assemblies which have not yet given rise to acts of violence.

Despite the obvious danger in the crimes of mass violence, it may not be necessary to have special justifications for use of deadly force by law officers. They would, under other subsections, have a variety of defensive justifications, for example, to preserve their own lives and the lives of others, to prevent specific violent crimes, to effect arrests. Apart from these specific occasions, use of deadly force to suppress riots has been severely criticized.[20] In any event, it is clear under Federal law that "self help" against riots does not extend to the use of deadly force.[21]

(d) *Prison escapes.*—For circumstances after the arrest, when a person is imprisoned or otherwise detained by court order, proposed provision 607(2)(e) permits use of deadly force to prevent escapes. This seems a practical necessity for the maintenance of discipline and respect for lawful authority in security institutions. In any sizeable place of detention it may be impossible to quickly determine, during an attempted escape, exactly who is escaping, under what circumstances, and how dangerous the escape is.[22] Institutions which confine only nondangerous prisoners will, of course, have their own rules limiting the use of force by prison personnel. But, for purposes of a general statute, the standard of "necessity" to use force is quite adequate to cover the situation. The draft does proscribe the use of force, however, if the persons escaping are known not to be dangerous, either individually or together.

11. *Conduct Justified to Avoid Greater Harm.*—Proposed section 608 embodies the legal doctrine of "necessity." It makes no sense to punish persons who have acted to avoid great harm, even if they have "broken a law" to do so. This would include such obvious instances as speeding in order to reach a hospital in an emergency, or destroying property to stop a forest fire; it would also include extreme cases, such as killing some persons to save a greater number.[23]

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*The tentative draft originally proposed "treason, insurrection [or riot]." The latter instance has been particularized in Study Draft subparagraph 607(2)(f)(ii).

[20] The use of deadly force to put down a riot has been severely criticized by some knowledgeable authorities. *See* REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 329–331 (Bantam ed. 1968). *See also Riot Lessons*, Wall Street Journal, April 11, 1968, at 1, col. 1; *Restraint in Riot Control Result of Long Planning*, N.Y. Times, April 14, 1968, at 1, col. 2. *Cf. Chicago Arsonists To Be Shot*, Washington Post, April 16, 1968, at 1, col. 2.

[21] In *Laney* v. *United States*, 294 F. 412 (D.C. Cir. 1923) (*quoted* in note 16, *supra*), the conviction of a man who had fled a rioting mob, then returned to shoot at them, was upheld. Generally, concerning the role of public law enforcement authorities in putting down riots, and preventing future riots, *see* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT; THE POLICE 192–193 (1967).

[22] The penitentiary . . . may contain convicted murderers, felons of every grade, as well as others charged with vagrancy or simple breaches of the peace, and criminals of all descriptions between the two. If the guard sees one of these prisoners scaling the wall, and there be no other means of arresting him, may he not fire upon him without stopping to inquire whether he is a felon or a misdemeanant?" *United States* v. *Clark*, 31 F. 710, 715 (E.D. Mich. 1887).

[23] Killing out of "necessity" was considered in *United States* v. *Holmes*, 26 F. Cas. 360 (No. 15,383) (C.C. E.D. Pa. 1842). The defendant, a ship's mate whom the captain had placed in charge of the lifeboat, threw over 14 men picked at

The proposed formulation of the concept of necessity is derived from section 7.13 of the Illinois Criminal Code of 1961. The Illinois Code goes no further than to state the definition of necessity, because to go further "might unduly restrict the utility of the defense in situations where it might be justified." [24] However, section 35.05(2) of the New York Revised Penal Law specifies that the defense of necessity cannot refer exclusively to the defendant's opinion as to the desirability or morality of the law. That is, one could not willfully break a law solely for purposes of protest without remaining subject to punishment. That provision is included in the proposed draft.

12. *Excuse; Reasonable Mistake, Recklessness and Negligence.*— Proposed section 609 recognizes a class of behavior between justifiable use of force and criminally negligent use of force. It seeks to define an area in which the use of force, though not strictly justifiable, should not be deemed criminal and should be excused. The proposed distinction between a justification and an excuse is theoretical: the former indicates that the conduct is proper and not criminal while the latter indicates grounds for a defense only. The consequences would be the same.* In one respect, the draft restates present law. One who makes a reasonable mistake, believing that the force he uses is required to meet the situation, when actually it is not, would not be guilty of any crime.[25]

The draft further makes it clear that the culpability of a person who intentionally uses forces against another in the sincere belief that he is acting defensively is to be measured in terms of criminal negligence or recklessness, rather than intent to inflict harm. If a person acts for defensive purposes, as defined in the rules of justification, but with gross disregard of proper limits, he will be guilty of an offense of criminal negligence or recklessness. Of course, if the person's acts would have been unprivileged—as, for example, a person

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random from the overcrowded boat (women and children were not thrown over and married couples were not separated). The court intimated that it would have been better to pick those to be sacrificed by lot rather than leave the random selection to the officer. The defendant was convicted of manslaughter, but received a very light sentence (6 months' imprisonment at hard labor). A fuller discussion of the case is in PERKINS, CRIMINAL LAW 849–851 (1957).

It should be noted that, under the proposed draft, a life cannot be taken solely for the purpose of saving one other life when each has an equal chance to live. Each human life is considered equal in value, and the proposed provision would provide justification only when the harm avoided is "clearly greater" than the harm done. *See* MODEL PENAL CODE § 3.02, Comment at 8–9 (Tent. Draft No. 8, 1958).

[24] ILL. REV. STAT. § 7.13, Comment at 304 (1961).

* This is true except insofar as the last sentence of subsection (1) provides that the excuse of mistake may, in some instances, i.e., with respect to mistake of law or duress (§§ 610, 611), be an affirmative defense.

[25] "[T]he law of self-defense justifies an act done in honest and reasonable belief of immediate danger. The familiar illustration is that, if one approaches another, pointing a pistol, and indicating an intention to shoot, the latter is justified by the rule of self-defense in shooting, even to death; and that such justification is not avoided by proof that the party killed was only intending a joke, and that the pistol in his hand was unloaded. Such a defense does not rest on the actual, but on the apparent, facts, and the honesty of belief in danger. . . ." *New Orleans & N.E. R. Co.* v. *Jopes*, 142 U.S. 18, 23 (1891). "And if, without fault or carelessness, he is misled concerning [the facts], and defends himself correctly according to what he supposes the facts to be, he is justifiable, though they are in truth otherwise, and he has really no occasion for . . . 'extreme measure'" *Owens* v. *United States*, 130 F. 279, 282 (9th Cir. 1904).

who uses deadly force against a trespasser who he knows intends no harm—he will be guilty of an intentional or knowing crime.[26]

Similarly, one who takes defensive action in reckless or negligent disregard of the safety of others will be held responsible for unnecessary harm done them. A person cannot be justified in recklessly risking harm to others; serious injury or death of innocent persons outweighs the good to be derived from a defensive act.[27] For example, a policeman cannot be justified in firing into a crowd to catch a fleeing criminal, and a homeowner cannot be justified in setting dangerous traps on his property to harm trespassers.

However, a new provision (section 609(2)) is proposed to excuse some defensive conduct which, under cool analysis, could not be deemed entirely "reasonable", but which occurred in special circumstances. For example, a police officer chasing a felon down the street who shoots as the felon reaches toward his pocket, would not be held criminally responsible for his hasty act if he truly believed that the felon was reaching for a gun. And a person repelling the attack of another would not be criminally liable if, in the heat of battle, he used more force than necessary to subdue the aggressor. However, the section excuses only "marginally" excessive or hasty action. Given extreme overreaction to a situation, the defendant would be chargeable with recklessness or criminal negligence.

The proposed provision, therefore, is designed to emphasize the necessity for consideration of all circumstances involved when one must measure the action of a person in terms of a rule of reason. It is based on the decision of Mr. Justice Holmes, in *Brown* v. *United States*:[28]

> There was evidence that the last shot was fired after [the aggressor] was down . . . [but] if the last shot was intentional and may seem to have been unnecessary when considered in cold blood, the defendant would not necessarily lose his immunity if it followed close upon the others while the heat of the conflict was on and if the defendant believed that he was fighting for his life.

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[26] In *Arwood* v. *United States*, 134 F.2d 1007 (6th Cir. 1943), the defendant killed a Federal agent whom he knew to be on his premises only for purposes of conducting a search. His conviction for murder was sustained. *Cf. Warren* v. *Territory of Hawaii*, 119 F.2d 936 (9th Cir. 1941), upholding the manslaughter conviction of an operator of a brothel, who sprang an electric trap on an officer trying to enter and make an arrest. The court held the manslaughter conviction for a killing resulting from such a trap proper even if the defendant thought the victim was a trespasser. *Foreman* v. *United States*, 268 F.2d 899 (D.C. Cir. 1959), sustained the manslaughter conviction of the caretaker of a cemetery, who fired a gun at small boys, who were intruders, and killed a 9-year-old.

[27] An exception would perhaps exist in extreme cases of necessity. *See* discussion of proposed section 608, *supra*.

[28] 256 U.S. 335 (1921). *See also United States* v. *Heliczer*, 373 F.2d 241, 249 (2d Cir. 1967), with respect to a defendant's claim that he had intervened in a fight to help an apparent victim, unaware that the "victim" was resisting arrest by a Federal officer.

> In any event before intervening [a bystander] must make a reasonable effort to inquire into the nature and purpose of the attempted arrest and the authority of the one making it, unless circumstances make such inquiry impossible or fruitless. As in the case of a person being arrested, the circumstances may reasonably appear to the bystander to be nothing but a private assault and in no respect an official arrest and the situation so grave and extreme involving risk of death or serious bodily harm, that swift action with no pause for inquiry was demanded.

COMMENT

on

JUSTIFICATION AND EXCUSE; DURESS: SECTION 611 (Stein; October 28, 1968)

1. *Introduction; Background.*—The defense of duress has been recognized in Federal case law. The defense serves to excuse behavior where extrinsic circumstances compel a person to perform unlawful acts which he did not otherwise wish to do. There is no just reason to impose criminal sanctions, or to try to reform a man, because he committed unlawful acts which anyone else, given the circumstances, would also have committed. But Federal judicial definition unrealistically limits the utility of the defense [1]:

> [I]n order to excuse a criminal act on the ground of coercion, compulsion or necessity, one must have acted under the apprehension of immediate and impending death or of serious and immediate bodily harm. . . . [One] must manifest a determination to resist commands and orders until such time as he is faced with the alternative of immediate injury or death. . . . The person claiming the defense of coercion and duress must be a person whose resistance has brought him to the last ditch.

This rule fails to consider the plight of a person coerced into action because persons he loves are in danger or because he has been terrorized, or his will otherwise broken by unrelenting pressures. Nor does it deal with situations in which death or serious injury is threatened, not by men seeking to compel conduct, but by natural forces. Proposed section 611 would define duress to extend the defense to such situations, and others in which a person is found to have acted no less heroically than others would in the situation.

In the Federal courts, the defense of duress has, for the most part, been raised in cases of treason. These cases concerned American citizens, living in an enemy country during wartime, who gave aid and comfort to the enemy—by radio propaganda broadcasts to American

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[1] *Iva Ikuko Toguri D'Aquino* v. *United States*, 192 F. 2d 338, 358 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952). The quoted statement on duress is typical. Other statements on the subject are quite similar: "[T]o provide an excuse the compulsion must be present, immediate and impending, and of such a nature as to induce a well founded fear of death or at least serious bodily injury. And there must be no reasonable opportunity to escape the compulsion without committing the crime." *R.I. Recreation Center* v. *Aetna Cas. & Sur. Co.*, 177 F.2d 603, 605 (1st Cir. 1949). "Coercion which will excuse the commission of a criminal act must be of such nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not done. One who has full opportunity to avoid the act without danger of that kind cannot invoke the doctrine of coercion and is not entitled to an instruction submitting that question to the jury." *Shannon* v. *United States*, 76 F.2d 490 (10th Cir. 1935).

troops,[2] or by abusing American prisoners of war.[3] There is, of course, always a real possibility of duress in such cases, since they involve persons living among a hostile population, constantly aware that they may, at any time, be subjected to harsh treatment, perhaps to death. But, in each of the reported cases of treason, there was ample evidence to show that the defendants had undertaken their treasonous tasks willingly.[4] The defense of duress has also been unsuccessful in cases in which American prisoners of war, who acted to avoid for themselves atrocities visited upon their fellows, were convicted by military tribunals for acts of cooperation with the enemy.[5]

The claim of duress has been no more successful when urged with respect to the commission of other crimes. It has been held, quite naturally, that persons who have willingly joined in a criminal conspiracy cannot defend, after the fact, on the ground that they were subsequently threatened if they betrayed the scheme.[6]

The archaic common law presumption that wives who commit crimes with their husbands have been "coerced" into doing so has not

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[2] *Iva Ikuko Toguri D'Aquino* v. *United States*, 192 F.2d 338 (9th Cir.), *cert. denied*, 343 U.S. 935 (1952) (radio broadcasts to U.S. troops from Japan during World War II); *Gillars* v. *United States*, 182 F.2d 962 (D.C. Cir. 1950) (radio broadcasts to U.S. troops from Germany during World War II).

[3] *Tomoya Kawakita* v. *United States*, 343 U.S. 717 (1952). The defendant held dual nationality, both as an American and a Japanese. The Court noted that "an American with dual nationality who is charged with playing the role of the traitor may defend by showing that force or coercion compelled such conduct" (343 U.S. at 736), but that the evidence in the case before it showed the defendant to have voluntarily thrown in his lot with Japan.

[4] In addition to the cases cited in notes 2 and 3, *supra*, *see also Giugni* v. *United States*, 127 F.2d 786 (1st Cir. 1942), in which an Italian crew destroyed the engine of their tanker, held in American waters, so that the ship would not fall into hostile hands upon Italy's entry into World War II. The crew was convicted of tampering with the vessel:

> The Captain testified that he was the only armed man on board; that his officers and men were aware of that fact; that he carried his revolver in plain sight when giving orders for the demolition of the ship's machinery; and that he would have shot any man who refused to obey. This is not enough to prove coercion. There is no evidence of any reluctance on the part of anyone on board to carry out the orders given, and since the work of destruction was done over a period of two weeks during which the ship was tied up alongside the shore, anyone who wished could have escaped ashore and sought sanctuary with the authorities, had he been so inclined, and thus escape coercion (127 F.2d at 791).

[5] *United States* v. *Fleming*, 7 U.S.C.M.A. 543, 23 C.M.R. 7 (1957), concerning prisoners of war taken in Korea. *See generally*, Note, *Misconduct in the Prison Camp: A Survey of the Law and an Analysis of the Korean Cases*, 56 COLUM. L. REV. 709 (1956). Under the proposed section, the fact that other prisoners of war in the same situation were able to refrain from acts of cooperation with the enemy would indicate that "a person of reasonable firmness" would have been able to resist. A person acting after having been throughly broken and "brainwashed" by the enemy would, however, be entitled to the proposed defense. *Cf.* the report of the Marine Corps Court of Inquiry recommending against disciplinary action in the case of Col. Frank H. Schwable, N.Y. Times, April 28, 1954, at 16, col. 1.

[6] *Shannon* v. *United States*, 76 F.2d 490 (10th Cir. 1935). The evidence showed that the defendants, conspirators in a kidnapping, were not threatened until after they had voluntarily kept the victim imprisoned.

been recognized in Federal courts.[7] Judicial reluctance to extend the concept of duress can further be seen in a noncriminal case concerning an employee who was ordered to take money from his firm and deliver it to criminals waiting in a car outside, who were holding his brother and his brother's wife as hostage.[8] The criminals also threatened to later "take care" of his child. The court refused to recognize duress in this case, because the employee, while in his office away from the criminals, could have escaped the coercion by seeking help from other employees there at the time, or from the police. The court did note: "Perhaps a well-grounded apprehension of death or serious bodily injury to another, particularly to a close relative, may constitute coercion. We are not prepared to hold otherwise." But, somewhat unrealistically, the court found the employee's fear not "well-grounded" in this case, because it was not reasonable to believe that his relatives would be shot in a public street, or that the police could not safely rescue them. A concurring opinion noted, however, that the employee might not be criminally liable for his act; only civil liability towards the employer whose funds he took was under consideration.[9]

Finally, it should be noted that the closely related defense of "necessity" has been dealt with elsewhere in the proposed Code, as a distinct subject.[10]

2. *Duress; Compelled Criminal Conduct.*—Acts are justifiable when they are taken against an unlawful aggressor or taken with an intent clearly to save a situation from worse harm. The affirmative defense of duress concerns unlawful acts which may have no such beneficial

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[7] *Conyer* v. *United States*, 80 F. 2d 292, 294 (6th Cir. 1935). The defendant was convicted of dealing in moonshine whiskey. She claimed coercion because her husband was present when she sold the whiskey.

> The modern statutes dealing with the status of women have modified the common-law rule that a woman violating a statute in the presence of her husband is presumed to be acting under his coercion. The independence of women in political, social and economic matters rightly places upon them an increased responsibility.

In *United States* v. *Anthony*, 145 F.Supp. 323, 340 (M.D. Pa. 1956), a wife conspired to commit bank robbery with her husband. The court, noting that the common law presumption of coercion by the husband was out of favor, stated:

> [M]arriage does not affect the capacity of the spouses to commit crime. If in committing it they act out of their own free will and not under the coercion of the other they are held to the same responsibility for criminal acts as other persons.

Since this common law presumption has not been recognize in the Federal courts, its explicit abolition by statute, as suggested by the Model Penal Code and proposed in some revisions of State codes, is not necessary here. *Cf.* MODEL PENAL CODE § 2.09(3), (P.O.D. 1962).

[8] *R.I. Recreation Center* v. *Aetna Cas. & Sur. Co.*, 177 F. 2d 603, 605 (1st Cir. 1949).

[9] As the concurring opinion of Chief Judge Magruder pointed out, this was an action for recovery of proceeds under an insurance policy for stolen property. The insurance company claimed that the loss occurred because of the "dishonest" act of an employee, and was not therefore covered by the policy.

[10] *See* discussion of the draft on "Conduct Otherwise Justifiable to Avoid Greater Harm," proposed section 608 of chapter 6 (General Principles of Justification and Excuse).

consequences, but which may be excused. Under the proposed provision, such unlawful acts are excusable only when the circumstances compelling them are such that we must admit that anyone other than a person of extraordinary will power would have succumbed to the pressure.

The proposal provides a defense to a charge of crime for anyone who can convincingly show that he was compelled to act as he did under such circumstances of compulsion "as would render a person of reasonable firmness incapable of resisting the pressure." The concept of a "person of reasonable firmness" is one which can be understood and realistically considered by any juror. State Code revisers have adopted or proposed a similar duress defense for their jurisdictions with respect to compulsion by force or threat of force.[11]

The possibility of fabrication of the defense of duress is the primary reason why existing law—while recognizing it—has narrowly circumscribed its use, especially where it is claimed that an accomplice "forced" the accused to participate. There is also recognition that collaboration in violent and organized crime often includes a real element of *mutual* coercion which it would be undesirable to open up as an excuse.[12] This feared weakening of the force of law is avoided in the proposed provisions. First, the requirements of "reasonable firmness" and "resistance" demand that a person not simply give in to coercion. The defense is inapplicable if a reasonable person could stand up under the coercion without breaking the law. Second, duress is an *affirmative* defense; the burden of proof by a preponderance of the evidence is imposed upon the person claiming it; it must be established by a preponderance of the evidence that the defendant was compelled to break the law under the circumstances. Further, under proposed subsection (2), the defense is unavailable to anyone who joined a criminal conspiracy, or voluntarily associated himself with a venture he had reason to know would be unlawful. Only otherwise can innocent persons, forced into an unlawful situation, claim the defense of duress.

The defense of duress would apply to any crime, even treason or homicide.[13] Of course, "reasonable firmness" to resist commission of a crime would vary with the nature of the crime. As past cases have illustrated, one can reasonably be expected to hold firm against the commission of treasonous acts, except under extreme forms of physical torture or psychological "brainwashing," or threat of immediate death.

The proposed duress provision would excuse conduct compelled by the imminence of death or serious bodily harm whether the imminence

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[11] Other codes adopting or proposing the same or a similar duress defense include: N.Y. Rev. Pen. Law § 35.35 (McKinney 1967); Cal. Penal Code Revision Project § 2.09 (Tent. Draft No. 1, 1967); Proposed Del. Crim. Code § 240 (Final Draft 1967); Proposed Hawaii Penal Code § 231 (Tent. Draft No. 1, 1968); Mich. Rev. Crim. Code § 635 (Final Draft 1967); Proposed Crim. Code for Pa. § 209 (1967); *see* Model Penal Code § 2.09 (P.O.D. 1962).

[12] *See* Paulsen & Kadish, Criminal Law and Its Processes 363–377 (1962) [hereinafter Paulsen & Kadish].

[13] *But cf. R.I. Recreation Center* v. *Aetna Cas. & Sur. Co.*, 177 F.2d 603, 605 (1st Cir. 1949): "It appears to be established, however, that although coercion or necessity will never excuse taking the life of an innocent person, it will excuse lesser crimes."

of death or harm is deliberately caused by others or occasioned by natural circumstance. In this sense, the defense of duress goes beyond the general principle of justification (proposed section 608) that conduct is justifiable when it is necessary to avoid clearly greater harm than the harm which might result from such conduct. In discussing "necessity" as a justification, we noted that: [14]

> [u]nder the proposed draft, a life cannot be taken solely for the purpose of saving one other life when each has an equal chance to live. Each human life is considered equal in value, and the proposed provision would provide justification only when the harm avoided is "clearly greater" than the harm done.

That is not true of the proposed defense of duress. Proposed section 611(1) would allow one to show (by a preponderance of the evidence) that he engaged in proscribed conduct in order to avoid death or serious injury to himself or a person close to him under circumstances in which "a person of reasonable firmness" would have done the same. It is an adaptation of the defense of "necessity" as proposed for the California Penal Code Revision Project.[15] The conduct here dealt with is not justifiable: indeed, worse harm may be done by it than if the person forbore, and allowed injury or death to come to himself or a loved one. The conduct is excusable, if at all, because given the circumstances other reasonable men must concede that they too would not have been able to act otherwise.

The proposed duress provision deals with situations in which a person may be brainwashed or psychologically coerced by others into commission of a misdemeanor, even without the threat of death or serious injury, as well as any situation in which imminent death or serious harm compels conduct. A person cannot normally be permitted to steal other property to replace his own [16] or injure another in order to avoid slight injury to himself, and such conduct is inexcusable. But when a person acts to save himself or another in a coercive situation brought on by any cause for which the person is not responsible, the proposed provision would apply to him. Thus, an employee forced to commit an infraction by his employer, at threat of loss of job, might have this defense.* Or, if a pilot whose plane is out of control over a populated area bails out, rather than tries to guide the plane to an area where people below will not be hurt, his act would be excusable if it convincingly meets the test of the proposed statute. His act can

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[14] *See* Comment on Justification and Excuse: Chapter 6: Sections 601–609 at n. 23.

[15] Proposed section 611(1)(b) is modeled on proposed section 520(2) of CAL. PENAL CODE REVISION PROJECT at 42–43 (Tent. Draft No. 1, 1967).

[16] Of course, relatively minor unlawful acts, taken to avoid wholesale destruction of one's own property, may be justified under proposed section 608, since the harm done is "clearly greater" than the harm avoided.

* With respect to misdemeanors, the Study Draft expands duress to include threats of economic harm. But one result of this may be to excuse conduct which characteristically occurs in a context of threat of economic harm and which is not excused by necessity or avoidance of greater harm, *e.g.* antitrust, labor and tax violations, if defendant can establish lack of fault in the creation of the coercive situation.

be seen in no worse light than if another person ordered him to aim his plane at a specific target.[17]

But, in considering the defense of duress, jurors may be required to make harsh moral judgments. For example, in the case of an overcrowded lifeboat, suppose a crewman throws off strangers in order to save the crew. The issue would not be so difficult under principles of justification: when each life is of equal value, the deliberate selection of one person over another would be unlawful. Faced with the defense of duress, however, jurors must decide whether the defendant has convinced them that "a person of reasonable firmness" in the situation would have been "incapable of resisting the pressure" to try to save his friends.

The defense of duress, therefore, inevitably involves a clash with moral strictures expressed by the law. Because recognition of duress as an excuse for otherwise criminal conduct does constitute a relaxation of the social demand for obedience to law, it should be considered whether duress should be dealt with, not as an excuse to commission of a crime, as here proposed, but merely as a factor in mitigation of punishment.

3. *Duress an Affirmative Defense.*—Duress is an excuse for criminal conduct, not a justification. Since we are dealing with conduct which is, objectively considered, criminal, it seems quite appropriate to place the burden of proof on the defendant to establish an excuse. This is accomplished, under the proposal, by denominating duress an "affirmative defense". It is contemplated that affirmative defenses would require a defendant to present a preponderance of evidence to convincingly exculpate himself from responsibility for his proven acts. This would be unlike an ordinary defense, in which a defendant would be required merely to raise an issue, which the government must still prove beyond a reasonable doubt. The distinction here adopted is used in the New York Revised Penal Law of 1967 (§ 25.00).

4. *Defenses Unavailable to Persons Sharing Responsibility for the Unlawful Conduct.*—Proposed section 611(2) sets forth a necessary exception to use of the defense of duress. The defense is unavailable

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[17] The example of the uncontrolled plane is taken from the commentary on proposed section 520, CAL. PENAL CODE REVISION PROJECT at 43 (Tent. Draft No. 1, 1967. *See also* PAULSEN & KADISH, *supra* note 12, at 376–377:

> X is unwillingly driving a car along a narrow and precipitous mountain road, falling off sharply on both sides, under the command of Y, an armed escaping felon. The headlights pick out two persons, apparently and actually drunk, lying across the road in such a position to make passage impossible without running them over. X is prevented from stopping by the threat of Y to shoot him dead if he declines to drive straight on. If X does go on and kills the drunks in order to save himself he will be excused under [the duress defense] if the jury should find that 'a person of reasonable firmness in his situation would have been unable to resist,' although he would not be justified under the lesser evil principle. . . .
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> [Suppose] the same situation as above except that X is prevented from stopping by suddenly inoperational [*sic*] brakes. His alternatives are either to run down the drunks or to run off the road and down the mountainside. If X chooses the first alternative to save his own life and kills the drunks he will not be excused under [the duress defense] even if a jury should find that a person of reasonable fortitude would have been unable to do otherwise.
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> Can the difference in these two cases be defended?

to a person who himself is in some part responsible for bringing about the conditions requiring the unlawful conduct by intentionally, knowingly or recklessly placing himself in a situation in which he probably would be subject to duress or compulsion. Additionally, if a person is negligent in putting himself into such a situation, he is responsible for his criminally negligent conduct.

As well as ensuring that no accomplice or conspirator in a crime can escape liability by the claim of duress, the provision excludes application of the defense for any person whose conduct creates the situation requiring unlawful action. For example, a person whose reckless or negligent driving leads to a situation in which he must hit a pedestrian rather than swerve his car and injure himself cannot disclaim responsibility for reckless or negligent homicide or assault.

COMMENT
on
LIMITATION OF TIME UPON PROSECUTIONS: SECTION 701*
(Nebeker, Green; June 4, 1968)

1. *Creation, Purpose and Scope.*—Present Federal criminal law, like the law of almost every State,[1] limits the time within which prosecutions of various types must be instituted. The history of the development of these statutes of limitations is set forth below. The period is generally 5 years after the offense. Capital offenses may be prosecuted at any time without limitation. A few minor offenses carry 1-year limitation periods. There is provision for suspending limitations during wartime—for certain fraud prosecutions—until 3 years after proclamation of the termination of hostilities; and, under judicially developed principles, the period of limitations is suspended while a suspect is a fugitive from justice.

Time limitation upon prosecution is of statutory rather than common law origin.[2]

The primary reasons for restrictions of time revolve around universally accepted notions that prompt investigation and prosecution insures that conviction or acquittal is a reliable result, and not the product of faded memory or unavailable evidence; that ancient wrongs ought not to be resurrected except in some cases of concealment of the offense [3] or identity of the offender; [4] and that community security and economy in allocation of enforcement resources require that most effort be concentrated on recent wrongs.

The underlying purpose of a statute of limitations should not be confused with fundamental constitutional rights such as speedy trial or due process. A period of limitation is an arbitrary cutoff point; constitutional rights (or for that matter the right to a prompt indictment under rule 48(b) of the Federal Rules of Criminal Procedure), may or may not be abridged within the prescribed period.[5] Unlike the bar of the limitation period, such constitutional issues always involve a balancing of all circumstances and are within the discretion of courts.

The reach of the limitation on prosecution of Federal offenses goes beyond statutes defining Federal crimes in one area. The Assimilative

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*The statute proposed by the Consultant appears in the Staff Note, *infra*.

[1] *See* table entitled "Criminal Statute Limitations in the United States by Years." MODEL PENAL CODE, § 1.07, Comment at 18–19. (Tent. Draft No. 5, 1956) [hereinafter cited as table].

[2] *United States* v. *Cadarr*, 197 U.S. 475, 478 (1905).

[3] Paragraph 4(a), *infra*.

[4] Paragraph 3(d), *infra*.

[5] *Nickens* v. *United States*, 323 F. 2d 808 (D.C. Cir. 1963); *Ross* v. *United States* 349 F. 2d 210 (D.C. Cir. 1965).

Crimes Act of 1948 (18 U.S.C. § 13) makes punishable in Federal courts criminal acts or omissions not made punishable by enactments of Congress if committed on Federal property in any State, territory, possession, or district within the special maritime and territorial jurisdiction of the United States (18 U.S.C. § 7), whose laws proscribe such conduct. Only the substantive offenses of a State are assimilated into Federal law. Thus, a different State period of limitation will not control prosecution under the Act.[6]

The Federal limitation period, however, does not govern a State prosecution removed to a U.S. district court pursuant to sections 1442, 1442a, and 1443 of Title 28.[7] This is so because substantial or vested rights cannot be affected by such removal.[8] The bar of the statute of limitations is such a right.

Since the statute of limitations, on expiration of the prescribed period, becomes a vested right, a prosecution once barred cannot be maintained after an amendment to the statute enlarging the period. However, an enlargement of the applicable period prior to the expiration of the shorter period will apply to an offense committed before the enlargement.[9]

A defendant may assert the present Federal statute of limitations as a bar to prosecution, trial, or punishment. It may be raised before trial,[10] during trial if issues of fact need be resolved, such as the existence of a conspiracy or "fugitivity," or by collateral attack after conviction even if not raised during the original proceedings.[11]

2. *Historical Context.*—From the first Federal statute of limitations to the present enactments the policy of repose has been expressed in terms that no person shall be "prosecuted, tried or punished" except if the indictment is returned within the period provided. The modern

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[6] *United States* v. *Andem*, 158 F. 996 (D.N.J. 1908).

[7] Section 1442 permits removal of State prosecutions against officers of the United States acting under color of office or Act of Congress for the apprehension or punishment of criminals or the collection of revenue. The section also covers officers of the United States courts acting under color of office or in the performance of duty, and officers of Congress officially acting under appropriate order.

Section 1442a permits removal of State prosecutions against members of the Armed Forces under circumstances similar to those applicable to section 1442.

Section 1443 applies to removal of State prosecutions in certain civil rights situations.

[8] *Cf. Great Southern Life Ins. Co.* v. *Burwell*, 12 F. 2d 244, 245 (5th Cir.), *cert. denied*, 271 U.S. 683 (1926).

[9] *Dennis* v. *United States*, 302 F. 2d 5, 14 (10th Cir. 1962).

[10] *E.g.*, *United States* v. *Haramic*, 125 F. Supp. 128 (W.D. Pa. 1954).

[11] *E.g.*, *Askins* v. *United States*, 251 F. 2d 909 (D.C. Cir. 1958). A judicial preemption of the statute of limitations has occurred in narcotics law enforcement in the District of Columbia. It arose because of the clandestine method of operation used in some narcotics law enforcement. This method utilizes covert agents who infiltrate the narcotics underworld to observe and record illicit transactions. Concern over the ability of the accused to defend at trial developed because the agents' necessarily secret status was not compromised until many months after the transaction. In reporting on many offenses and offenders, the agents necessarily rely upon notes to refresh their memories while the unsuspecting defendants are left to chance recall of the events or a total inability to assert an alibi. A due process concept was interjected into these delayed arrest narcotics cases in *Nikens* v. *United States*, 323 F. 2d 808, 810n.2 (D.C. Cir. 1963). Full development of the concept occurred in *Ross* v. *United States*, 349 F. 2d 210 (D.C. Cir. 1965). As a result, individual undercover narcotics investigations in the District of Columbia are now terminated within 4 to 5 months and prosecutions promptly begun thereafter.

preferable approach is expressed in terms of commencement of prosecution.[12]

(*a*) *Statutes of General Application.*—The first Federal statute of limitations appeared in the first Crimes Act: the Act of April 30, 1790 [13]. Section 30 of that statute provided that no person or persons should be prosecuted, tried, or punished for treason or other capital offense, willful murder or forgery being excepted, unless the indictment was returned by the grand jury within 3 years next after the commission of the offense. With respect to other offenses, the statute fixed a limitation of 2 years. The statute eliminated any time bar upon prosecution of persons fleeing from justice. These provisions were carried into the Revised Statutes of the United States as section 1043 (3 years as to treason or other capital offense except willful murder), section 1044 (2 years for other offenses), and section 1045 (the fleeing from justice provision).

The 2-year period for general offenses was increased to 3 years by the Act of April 13, 1876.[14] Section 1043 of the Revised Statutes was superseded by the Act of August 4, 1939,[15] which for the first time abolished the limitation period as to all capital offenses.[16] Sections 1044 and 1045 have been recodified and are now incorporated, as amended, in sections 3282 and 3290 of Title 18. By the Act of September 1, 1954 [17] the 3-year limitation imposed in 1876 was increased to 5 years.[18] Although the increase to 5 years was initially prompted by special situations involving asserted government "scandals," [19] it was finally determined to have a general 5-year period rather than to carve out another exception.

(*b*) *Statutes of Specific Application.*

Customs and slave-trade violations.—Various enactments have provided exceptions to the generally applicable period of limitations. By the Act of March 26, 1804,[20] indictments for offenses arising under the revenue and slave-trade laws of the United States were returnable within 5 years after the offense. This provision was carried into the Revised Statutes of the United States as section 1046 and, as amended, has been codified as section 3283 of Title 18. The term "customs laws" was substituted for "revenue laws" because customs laws were considered as included in the term "revenue laws" and a different limitation had been provided for internal revenue violations by section 6531 of Title 26.[21] Under the proposed 5-year period of limitations as to such offenses this provision is unnecessary. It is presently superfluous as well and may properly be eliminated.

Seduction on the high seas.—The Act of March 24, 1860 [22] (now 18

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[12] *See, e.g.*, MODEL PENAL CODE § 1.06 (P.O.D. 1962).
[13] Ch. 9, 1 Stat. 112, 119.
[14] Ch. 56, 19 Stat. 32.
[15] Ch. 420, 53 Stat. 1198, now 18 U.S.C. § 3281.
[16] U.S. offenses punishable by death, including those under the District of Columbia Code, are listed and described in the appendix, *infra*.
[17] Ch. 1214, § 10, 68 Stat. 1142, renumbered. Sept. 26, 1961, as 75 Stat. 648. Pub. L. No. 87–299.
[18] 18 U.S.C. § 3282.
[19] 100 Cong. Rec. 15419 (daily ed., Aug. 19, 1954) (Statement of Mr. Williams).
[20] Ch. 40, § 3, 2 Stat. 290.
[21] *See* Reviser's Note to 18 U.S.C. § 3283.
[22] Ch. 8, 12 Stat. 3.

U.S.C. § 3286), provides that prosecution for the seduction of a female passenger on an American vessel during the voyage shall be limited to 1 year after the vessel on which the offense was committed arrives at its destination. The present need for this provision is very doubtful. Its elimination is recommended. Any special limitations required for sex offenses can be included in the provisions defining the specific offense. See, for example, section 213.6(5) of the Model Penal Code, which requires notice to be given to public authorities within 3 months of the alleged rape or molestation.

Criminal contempt.—The Act of June 25, 1948 [23] (now 18 U.S.C. § 3285) bars prosecution for contempts constituting crimes unless instituted within 1 year. Increased use of contempt powers might be expected under the Bail Reform Act of 1966, which greatly expands the concept of bail in Federal prosecutions. Because contempt prosecutions are unique and directly involve the courts, retention of this period is recommended. The 1-year period for these offenses is included in the draft of the proposed statute. It is not believed necessary to perpetuate the last clause of section 3285 relating to contempt proceedings not barring criminal prosecution for the same act. See *Jurney* v. *McCracken*, 294 U.S. 125, 151 (1935), which holds that the former jeopardy provision does not apply to such situations.

Nationality, citizenship, and passport laws.—By the Act of June 29, 1906 [24] the Congress passed a 5-year statute of limitations for violations of the naturalization laws. Under the 1948 revision of Title 18, which consolidated 8 U.S.C. § 746 (g) and 18 U.S.C. § 582, the 3-year period again become applicable.[25] Subsequently, by the Act of June 30, 1951 [26] (now 18 U.S.C. § 3291), the applicability of the general 3-year period was terminated and a 10-year period was made applicable to violations of nationality, citizenship, and passport laws.[27] The shorter period was not deemed sufficient. See 1951 U.S. Code Cong. & Ad. News 1547–1548.

Espionage and subversive activities.—A 10-year period has been provided by section 19 of the Internal Security Act of 1950 [28] for prosecutions under the espionage statutes (18 U.S.C. § 792 *et seq.*), as well as for subversive activities prosecutions under the Subversive

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[23] Ch. 645, 62 Stat. 828.

[24] Ch. 359, § 24, 34 Stat. 603.

[25] Reviser's Note to 18 U.S.C. § 3282. The 3-year period of section 3282 was extended to 5 years by Act of Sept. 1, 1954, ch. 1214, § 12(a), formerly § 10(a), 68 Stat. 1145, renumbered Sept. 26, 1961, Pub. L. No. 87–299, § 1, 75 Stat. 648.

[26] Ch. 194, § 1, 65 Stat. 107.

[27] The offenses now covered by the 10-year period of section 3291 are:

Section 1423—Misuse of evidence of citizenship or naturalization.
Section 1424—Personation or misuse of papers in naturalization proceedings.
Section 1425—Unlawful procurement of citizenship or naturalization.
Section 1426—Reproduction of citizenship or naturalization papers.
Section 1427—Sale of citizenship or naturalization papers.
Section 1428—Failure to surrender naturalization certificate.
Section 1541—Issuance of passport without authority.
Section 1542—False statement in application for and use of passport.
Section 1543—Forgery or false use of passport.
Section 1544—Misuse of passport.

[28] Ch. 1024, § 19, 64 Stat. 1005.

Activities Control Act itself.[29] A similar period is prescribed for prosecution of restricted data offenses under the atomic energy laws.[30]

Internal revenue laws.—The Act of July 5, 1884[31] prescribed a 3-year period for all internal revenue law violations punishable by imprisonment in a penitentiary and 2 years as to all other such offenses. This same enactment permitted the filing of a complaint with a U.S. Commissioner within the prescribed period to extend that period until the discharge of the grand jury at its next session. This 2-year period was changed to 3 years by section 1010(a) of the Revenue Act of 1924.[32] Section 1010(a) also embodied a provision allowing a 6-year period as to offenses involving defrauding or attempting to defraud the United States. Section 1108(a) of the Revenue Act of June 6, 1932, extended the 6-year limitation to the offenses of willfully attempting or conspiring to defeat or evade any tax or payment thereof and willfully aiding or assisting in presenting false claims, returns, or documents under the revenue laws. Section 3748 of the Internal Revenue Code of 1939[33] continued the viability of the above provisions of the 1924 and 1932 acts. Finally, the Internal Revenue Code of 1954 added to the 6-year period offenses relating to (1) willfully failing to pay a tax or make a timely return; (2) false statements or documents; (3) intimidation of revenue-related officers or employees of the United States; (4) certain revenue offenses committed by such officers or employees; and (5) conspiracies under section 371 of Title 18 to evade or defeat a tax or its payment. The 1954 Code also changed the period of extension after filing a timely complaint with a U.S. Commissioner to 9 months from making the complaint. These provisions now appear in section 6531 of Title 26.

Bankruptcy.—Section 11 of the Act of May 27, 1926, as amended[34] (now 18 U.S.C. § 3284), provides that the offense of concealment of assets of a bankrupt shall be deemed to be a continuing offense and the period of limitations shall not begin to run until final discharge or denial of discharge. The purpose of the provision was "to protect creditors against the running of the statute in such cases."[35] Such bankruptcy offenses are covered in subsection (c)(2) of the proposed statute and are discussed *infra*, in paragraph 4(a) at note 73.

The copyright laws.—In the copyright field a 2-year period of limitations was imposed by section 104 of the Act of July 8, 1870.[36] The period was extended to 3 years by section 39 of the Act of March 4, 1909.[37] The provision was reenacted without change by section 1 of the Act of July 30, 1947.[38] That provision is now found in section 115(a) of Title 17, and applies to offenses relating to: (1) false affidavits aiding a claim to copyright (17 U.S.C. § 18); (2) willful infringement for profit (17 U.S.C. § 104); and (3) fraudulent notice of copyright (17 U.S.C. § 105).

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[29] Ch. 1024, § 4, 64 Stat. 992; *see* 50 U.S.C. § 783(e).
[30] 42 U.S.C. § 2278, ch. 18, § 228, 68 Stat. 919.
[31] Ch. 225, 23 Stat. 122.
[32] Ch. 234, 43 Stat. 341.
[33] Ch. 2, 53 Stat. Part I, Internal Revenue Code, 461.
[34] Ch. 406, 44 Stat. 665; ch. 575, 52 Stat. 856.
[35] *See* S. Rep. No. 1916, 75th Cong., 3d Sess. (1938).
[36] Ch. 230, § 104, 16 Stat. 215; *see also* R.S. 4968.
[37] Ch. 320, § 39, 35 Stat. 1084.
[38] Ch. 391, § 115, 61 Stat. 664.

This statute is totally unlike the other Federal statutes of limitations. Where others are phrased in the language: "No person shall be prosecuted, tried or punished . . .," section 115(a) provides: "No criminal proceedings shall be maintained . . . unless the same is commenced within 3 years . . . ." It is recommended that this provision be repealed. Thereafter, any prosecutions under Title 17 would be governed by the general enactment.

Wartime suspension.—Shortly after World War I it was ascertained that there were cases involving fraud against the United States which would be barred by the 3-year period before the government could conclude its investigations. As a result, the Act of November 17, 1921,[39] was approved. It provided, inter alia, a 6-year period for prosecution of offenses involving defrauding or attempting to defraud the United States, or any agency thereof, whether by conspiracy or not. In 1927, when all war fraud offenses would have been barred under the 6-year provision, steps were taken to bring about the return to the general 3-year limitation. The statute effecting that change was approved on December 27, 1927.[40]

The general 3-year statute of limitations remained in operation until August 24, 1942, when it was again recognized by Congress that the departments and agencies of the Federal government would be unable to cope in time with wartime fraud. As a result, the Wartime Suspension of Limitations Act was approved,[41] which provided that the "running" of the statute of limitations applicable to offenses involving fraud against the United States or any agency thereof, whether by conspiracy or not, indictable under existing statutes "shall be suspended until June 30, 1945," or such earlier time as designated by concurrent resolution of the Congress or by the President. Section 1 of the Suspension Act was amended by section 19(b) of the Contract Settlement Act of July 1, 1944,[42] to extend the bar of the statute of limitations until 3 years after the termination of hostilities. By Proclamation No. 2714, 12 Fed. Reg. 1, hostilities were declared terminated on December 31, 1946. Also during World War II, the running of the statute of limitations, applicable to violations of the antitrust laws, was suspended by an Act of October 10, 1942.[43] This Act was amended on June 29, 1945, so as to continue such suspension until June 30, 1946. The legislation was recommended and requested by the Secretary of War, the Secretary of the Navy, and the Attorney General because proceedings under the antitrust laws would seriously interfere with the war effort and be contrary to the national interest and security.[44]

The purpose of the Wartime Suspension of Limitations Act was to prevent crimes "committed in the hurly-burly of war" from going unpunished.[45] The suspension provisions now appear in section 3287 of Title 18.

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[39] Ch. 124, 42 Stat. 220.
[40] Ch. 6, 45 Stat. 51.
[41] Ch. 555, 56 Stat. 747.
[42] Ch. 358, 58 Stat. 649, 667.
[43] Ch. 589, 56 Stat. 781.
[44] *See* S. REP. No. 422, 79th Cong., 1st Sess. (1945).
[45] *United States* v. *Gottfried*, 165 F. 2d 360, 368 (2d Cir.), *cert. denied*, 333 U.S. 860 (1948). *See also United States* v. *Smith*, 342 U.S. 225, 230 (1952) (concurring opinion of Clark, J.).

In view of the 1946 termination of hostilities proclamation, section 3287 need not be retained. Moreover, the special wartime period was provided in contrast to the general 3-year period of limitations. With that period now extended to 5 years the need for a hostility-related suspension is lessened.

3. *Proposed Changes in Federal Law.*

(*a*) *Commencement of Prosecution.*—The present Federal limitations statutes are stated in terms of "no person shall be prosecuted, tried, or punished" unless the indictment or information is filed within a certain period after commission of the offense. A simpler and sufficient way of setting forth the requirement is in terms of when the prosecution should be commenced, a form which avoids decisions on whether punishment was properly imposed when, in fact, the validity of the entire proceeding is in question,[46] and otherwise permits easy solutions to problems regarding lesser included offenses. (*See* paragraph 4(b), *infra.*)

Moreover, the modern view is to define commencement as early as when process is first issued, i.e., when a complaint is filed, rather than only when an indictment or information has been filed.[47] In the Federal system, commencement by complaint is presently permitted to extend the period applicable to internal revenue offenses by 9 months.[48]

The statute proposed here would permit filing of a complaint to toll the statute in all cases. At that point the process will be governed by speedy trial considerations and, specifically, rule 48(b) of the Federal Rules of Criminal Procedure, which requires presentation of a charge to a grand jury or the filing of an information without unnecessary delay (where the defendant has been held to answer). It may be noted that this approach facilitates handling the provision for added time when a new prosecution must be commenced after dismissal of a defective indictment or information. (*See* paragraph 3(e), *infra.*)

(*b*) *Length and Grading of Periods.*—In fixing the period of limitations, two related problems arise: first, how long should the period be, and second, whether or to what extent there should be different periods for different offenses.

The selection of the length of the period of limitation is largely arbitrary. In the Model Penal Code commentary,[49] it was observed that there are no empirical data upon which to select, say, 6 years as better than 4, 5 as better than 7. The variety in the length of periods provided in State statutes as of 1956 is shown in a table compiled for the Model Penal Code.[50] Despite the variety, it appears that, where felonies are governed by a statute of limitations, the length of the period generally ranges between 3 and 6 years. Most States, moreover, provide a period for misdemeanors ranging between 1 and 3 years. Recent revisions carry forward this pattern. In the Proposed New York Criminal Procedure Law (§ 15.10) the period for all but Class A felonies is 5 years, for misdemeanors 2, and for petty offenses 1 (substantially what New York has had for years). In the Michigan Revised Crim-

[46] *See Askins* v. *United States*, 251 F.2d 909, 913 (D.C. Cir. 1958).

[47] *See* PROPOSED N.Y. CRIM. PROC. LAW § 15.10(5)(a); MICH. REV. CRIM. CODE § 130(5) (Final Draft 1967); MODEL PENAL CODE § 1.06(5) (P.O.D. 1962).

[48] 26 U.S.C. § 6531.

[49] MODEL PENAL CODE § 1.07, Comment at 20 (Tent. Draft No. 5, 1956).

[50] Table, *supra* note 1, at 18–19.

inal Code (§ 130) (Final Draft 1967), the proposal is: murder, none; Class A felony, 6 years; Class B or C felony, 3 years; Class A misdemeanor, 2 years; Class B or C misdemeanor, 1 year; and violation, 6 months. The Michigan proposal is substantially what is recommended in section 1.06 of the Model Penal Code.

As noted earlier, the general Federal period has been moved up from 2 years to 3 years to its present level of 5, with notable exceptions of no period for capital offenses, 6 years for some revenue offenses and 3 years for others, and 10 years for certain internal security and naturalization offenses. However, there is no generally shorter period for minor offenses.

Even though selection of the actual number of years may be largely arbitrary, there are nevertheless certain considerations to serve as guidelines. The period should not be so long that it fails to serve the purposes of the "policy of repose." On the other hand, it should not be so short that it fails to allow reasonably diligent law enforcement authorities to conduct sufficient investigation to reach a responsible conclusion about proceeding with or dropping the matter.

This latter consideration suggests, for example, that longer periods may be necessary for certain crimes in which the perpetrator has a peculiar capacity to hide or prevent discovery of his wrongdoing, such as in the breach of a fiduciary duty or misconduct in public office. (*See* paragraph 4(a), *infra.*) At the same time it may be recognized that "Parkinson's Law," *i.e.*, the time deemed necessary will expand to fill the time available, operates in the law enforcement area as well as in others, and that deadlines have a healthy influence on the dispatch of public business. Knowledge by prosecuting attorneys and investigators that there is only a specified time within which to act will lead to responsible decisions in allocating resources. It is too easy to let a matter slide indefinitely, counting on public forgetfulness or passing the buck to a successor administration. To let the statute of limitations run on an offense is a decision for which a public official can be held accountable.

Finally, there are considerations which are peculiar to Federal law enforcement. First, where concurrent jurisdiction exists, there would appear to be a consensus today that the responsibility of prosecution should lie primarily with local authorities. Accordingly, the decision as to whether Federal prosecution should be undertaken may frequently have to wait upon whether the local authorities are capable or willing to exercise their primary responsibility. Second, the kinds of minor offenses which constitute the large portion of Federal prosecutions (other than in the District of Columbia and other Federal enclaves) and the manner of their enforcement pose problems which differ from those which exist in the States. Many Federal prosecutions of a petty nature involve regulatory offenses: food and drug violations, carrier violations, *etc.* These must be uncovered and processed by the departments and agencies, through field and central offices, before being transmitted to the Department of Justice and finally to the U.S. attorney. Not only is this process time consuming, but also it is frequently complicated by the fact that criminal prosecution, in lieu of the use of other sanctions, is not a typical response and requires more consideration than other methods of dealing with the matter. This is in sharp contrast to the nature and manner of prosecution of

local petty offenses, which are typically street crimes—prostitution, disorderly conduct, simple assaults, petty thefts, *etc.*—of a kind which rarely end up in a Federal court and which result in either immediate arrest and prosecution or none at all.

In light of the foregoing, the statute proposed here makes some choices and poses some alternatives. It provides for no limitations on murder prosecutions, which is consistent with Federal tradition and State statutes, including the recent New York and Michigan revisions and the Model Penal Code. In recommending this provision, the Michigan revisers commented as follows: [51]

> Whether in fact prosecutions can successfully be maintained after a long period of years has elapsed as a matter of some doubt; in most cases the exemption of murder from the statute of limitations serves simply to emphasize the fact that murder is viewed with general apprehension on the part of citizens. Any abuse of the provision by the prosecution, *e.g.*, by deliberately refusing to arrest a person thought to be the murderer and who is openly resident in the state, can be dealt with under the constitutional right to a speedy trial [citations omitted].

The draft suggests, in brackets, that there may be offenses other than murder which should not be subject to limitations. In lieu of additions to the list, however, some other means might be used to reflect the policy that certain offenses are of sufficient gravity so as to be subject to exceptions. For example, if the period of extension on account of fugitivity is to have defined limits (*see* paragraph 3(d), *infra*), certain offenses could be exempted from the application of the defined extended period.

The proposed draft also suggests continuation of the 5-year period for felonies generally. No difficulties have been apparent which warrant a change; it is also in the range of the period used in the States. This constitutes a change in those statutes, noted in paragraph 2(b), *supra*, which provide for 10-year limitations; but no need for the additional time has been demonstrated. It would also constitute a reduction of 1 year for income tax evasion and some other revenue offenses, presently governed by a 6-year statute. Uniformity would seem to be a more rational objective than distinguishing revenue offenses on the basis of 1 year.[52] As between 5 and 6 years, 5 represents the period presently applicable to most Federal offenses and was chosen by Congress for the extension made in 1954, despite the fact that 6 was already the period for serious revenue offenses.

The draft also poses the alternatives of (1) having different periods for different classes of offenses or (2) having 5 years apply to all, except murder and contempt (*see* paragraph (b), *supra*). The grading of periods in accordance with the severity of offenses reflects the view that the more minor the offense: (1) the less costly the loss of prosecution through lapse of time; (2) the sooner evidence becomes stale, particularly at the level of offenses *mala prohibita;* and (3) the more desirable that the decision whether to prosecute or not be made quickly.

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[51] MICH. REV. CRIM. CODE, § 130, Comment at 7 (Final Draft 1967).

[52] It will, however, be necessary to continue the provision relating to computation of time for internal revenue offenses as provided in 26 U.S.C. § 6513 which, in effect, defines the date upon which the offense was committed. Such a provision appropriately should remain in Title 26 or wherever the offense is defined.

In any event, most States either provide for a shorter limitation on misdemeanors or have a shorter period than 5 years for all offenses.[53] In its revision, New York perpetuated its previous grading of limitations (5 for felonies, 2 for misdemeanors), and the proposed Michigan Code would make a change from 6 years for all offenses to a grading system similar to the Model Penal Code's.

In the Federal system there is a form of grading for the revenue offenses governed by section 6531 of Title 26. The general limitation is prescribed as 3 years; but a 6-year period is prescribed for eight exceptions, which embrace attempted evasions of any tax, frauds and false statements, failure to file returns, intimidation of Federal public servants, and offenses by such public servants. This system was inaugurated at a time when the period of limitations for Federal offenses generally was 3 years. The first exception recognized the problem of concealment which is characteristic of fraud offenses,[54] but the list has been expanded over the years, largely perhaps as a reflection of considerations similar to those which prompted the increase to 5 years for Federal offenses generally in 1954.

It should be noted that the existence of a separate statute of limitations for internal revenue laws has produced some anomalous results. The increase in the number of 6-year exceptions—and thus extension of the period in line with the Federal extension generally—has been made with regard to offenses where collection of revenue is the primary concern. The taxing power has been used, however, to create offenses where collection of revenue is only a jurisdictional device. Thus, while many minor offenses presently included in Title 18 are subject to the general 5-year limitation period, offenses relating to transfers of narcotics (26 U.S.C. § 4701 *et seq.*) and marihuana 26 U.S.C. § 4741 *et seq.*), and illegal possession of firearms (26 U.S.C. § 5801 *et seq.*), are governed by the 3-year period of the internal revenue limitations provisions.[55]

Those offenses relating to collection of revenue which are still governed by the 3-year period appear generally to be those which may be classified as minor offenses or regulatory offenses, that is, violations which do not necessarily mean that the violator is attempting to evade the tax. These include recordkeeping or supplying information (parts of 26 U.S.C. §§ 7203, 7204), giving false or no information to an employer regarding exemptions (*re* withholding) (26 U.S.C. § 7205), offenses relating to stamps (26 U.S.C. §§ 7208, 7209), failure to obey a summons (26 U.S.C. § 7210), misrepresentations as to portions of the sale price of any item attributable to Federal tax (26 U.S.C. § 7211), and unauthorized disclosure of information (26 U.S.C. § 7213).

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[53] *See* Table, *supra* note 1.

[54] Not all of the exceptions are stated in terms of offenses as defined in specific sections of the Internal Revenue Code. This has led to some apparently unintended difficulties. Thus, when the exception was defined only as "offenses involving the defrauding or attempting to defraud the United States," the provision was held not to include "evading" or "defeating" the tax. *See United States* v. *Scharton*, 285 U.S. 518 (1932). Such a narrow construction led to an amendment explicitly extending the 6-year limitation to attempted evasions. See H. REP. No. 1492, 72d Cong., 1st Sess. 29 (1932).

[55] *See United States* v. *Reina*, 172 F. Supp. 113 (S.D. N.Y. 1959) (narcotics) and *Waters* v. *United States*, 328 F.2d 739 (10th Cir. 1964) (firearms).

The situation with respect to the revenue laws described above has ambiguous implications. On the one hand, the trend of adding to the 6-year exceptions suggests that, as was done with all other Federal offenses, the period in the 5- to 6-year range should apply to all Federal offenses. On the other hand, it would seem clear that a longer period has not been considered necessary for those offenses still covered by the 3-year limitation, otherwise they would have been added to the list of exceptions. In effect, the issue posed by the first bracketed alternative in the draft is whether the scheme presently used for the internal revenue laws should apply to Federal criminal laws generally.

In this writer's view, the better choice is the single period, presently in effect for all Federal offenses other than the internal revenue laws. This would accommodate unique Federal concerns noted above—the nature of the minor offenses and Federal law enforcement methods. At the same time there does not appear to be evidence that this relatively long period for minor offenses has resulted in abuses which could not be remedied for the particular case by the right to a speedy trial or due process. Moreover, it is believed that the decisions relevant to classifying an offense for penalty purposes will not always reflect the considerations relevant to the length of time required for adequate investigation and for an informed prosecutive decision, at least in the Federal system. With regard to many minor Federal offenses, the likelihood of criminal prosecution alone is probably more of a deterrent than imposition of the penalty. Accordingly, this writer believes that, if the Commission does not adopt a uniform period for all Federal offenses (except murder and contempt), all minor offenses, regardless of classification, should have no less a period of limitations than approximately 3 years. Such a change would shorten by 2 years the presently applicable 5-year period.

(*c*) *Continuing Offense.*—Normally, a statute of limitations begins to run when the offense is completed. This is so even when the acts committed are charged as an offense having characteristics of finality (contempt in the presence of the court) but could have been charged as a continuing offense (obstruction of justice).[56] It is the offense charged in the indictment, not the general nature of the act involved, that governs. A continuing offense involves, as its name implies, attributes of nonfinality. Hence, falsification by scheme, even though the falsifying act was one committed beyond the period of limitation, is deemed a continuing offense if the act continued to produce fruits within that period.[57] Possession-of-contraband offenses are continuing offenses.[58] Of course, conspiracy during its life is a continuing offense.[59]

The distinguishing characteristics of continuing offenses are best seen in context with one of the basic purposes for statutes of limitations. Aside from the avoidance of aged and untrustworthy evidence, periods of limitation are imposed to insure reasonably prompt prose-

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[56] *United States* v. *Irvine*, 98 U.S. 450 (1878).

[57] *Bramblett* v. *United States*, 231 F.2d 489 (D.C. Cir.), *cert. denied*, 350 U.S. 1015 (1956).

[58] *Von Eichelberger* v. *United States*, 252 F. 2d 184 (9th Cir. 1958).

[59] A conspirator must terminate his association by going to the authorities or communicating to his coconspirators actual disassociation in the venture before the period will begin to run for him. *United States* v. *Borelli*, 336 F. 2d 376, 388 (2d Cir. 1964).

cution when no further social damage is forthcoming from the criminal act. Therefore, a continuing offense is one from which continuing injury arises. Continuance of the result of the crime, however, does not supply this attribute unless the continuing result depends upon further cooperation of the conspirators.[60] Apparently, it is because of this general rule regarding continuance of result that concealed offenses not the result of a conspiracy have been given special legislative treatment.[61]

Two offenses have been declared continuing offenses by Congress. Concealment of a bankrupt's or other debtor's assets is such an offense during the pendency of bankruptcy proceedings. 18 U.S.C. § 3284. Failure of an agent of a foreign power to register under the Foreign Agents Registration Act of 1938, as amended (22 U.S.C. § 611, *et seq.*), is also a continuing offense. 22 U.S.C. § 618(e). This provision was added by the Internal Security Act of 1950.[62]

The Federal case law in this area has rationally dealt with the necessity of balancing the basic interests at stake in limiting the time for prosecutions of offenses which have trappings of continuing social harm. Moreover, special legislation dealing with concealed offenses of a fiduciary nature can meet the one area where the administration of justice requires an accommodation. Therefore, except for the concealed fiduciary-type offense for which a recommendation is herein embodied, it does not appear necessary or appropriate to attempt general legislative definition in the area, but this does not preclude the possibility that, with respect to specific offenses (conspiracy, for example) it may be desirable to define the life of the offense with the specific offense provisions themselves. *See* section 5.03(7) of the Model Penal Code which deals with duration of a conspiracy.

(*d*) *Fugitivity.*—Beginning with the first statute of limitations a "person fleeing from justice" was to receive no benefit from the passage of time. There is a substantial division of authority in the Federal courts on whether an intent to avoid justice must be established in order to defeat a plea of the statute of limitations.[63] It is the resolution of this conflict that prompts the following analysis and recommendation.

In 1956 the U.S. Court of Appeals for the Fifth Circuit made clear its view that intent to avoid justice must be found.[64] The court was divided, and the dissenting opinion listed the cases reflecting a

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[60] *United States* v. *Irvine*, 98 U.S. 450 (1878); *United States* v. *Kissel*, 218 U.S. 601, 607 (1910).

[61] *See Larceny by a Fiduciary—Statute of Limitations*, 22 N.Y.U. L.Q. 488, 489 (July 1947), and paragraph 4(a), *infra*.

[62] Ch. 1024 § 20(b), 64 Stat. 1005.

[63] *See Recent Cases: Criminal Procedure*, 104 U. PA. L. REV. 1111 (1956). Changing habits and abode after commission of the offense can support a factual conclusion of the existence of the requisite intent. *Brouse* v. *United States*, 68 F.2d 294 (1st Cir. 1933). The same is true regarding resistance to removal proceedings (*Greene* v. *United States*, 154 F. 401, 412 (5th Cir.), *cert. denied*, 207 U.S. 596 (1907)), and escape from custody (*Howgate* v. *United States*, 7 App. D.C. 217 (D.C. Cir. 1895)). However, involuntary absence (confinement in a Cuban jail) did not toll the statute. *United States* v. *Heweoker* 79 F. 59 (S.D.N.Y. 1896). A different result was obtained in the District of Columbia where the defendant was imprisoned in a State. *Taylor* v. *United States*, 238 F.2d 259 (D.C. Cir. 1956).

[64] *Donnell* v. *United States*, 229 F.2d 560 (5th Cir. 1956), relying on *Porter* v. *United States*, 91 F. 494 (5th Cir. 1898), and *Greene* v. *United States*, 154 F. 401 (5th Cir.), *cert. denied*, 207 U.S. 596 (1907).

contrary view. Among them is a District of Columbia case holding that the meaning of "person fleeing from justice" is the same as in the extradition law and, therefore, intent or purpose is not relevant. "It is enough that he [the defendant] did not remain for 3 years within the District." [65] That opinion purports to follow the U.S. Supreme Court decision in *Streep* v. *United States*, 160 U.S. 128 (1895). That decision, however, did not expressly eliminate intent or purpose, but held that intent to avoid the justice of a State having criminal jurisdiction over the same act was sufficient, absent proof of an intent to avoid the justice of the United States.[66] The Eighth Circuit has indicated in *King* v. *United States*, 144 F.2d 729 (8th Cir. 1944), that it follows the rule that proof of the intent is unnecessary. The court based its conclusion on the *Streep* case, although there was substantial evidence of actual intent to avoid justice. The Fourth Circuit also appears to adopt this view.[67]

With these divergent views on the meaning of a "person fleeing from justice" it appears most appropriate that Congress resolve the impasse and impose a uniform test for a "fugitive" exception from the Federal criminal statute of limitations. There are, of course, two geographical kinds of flight from justice. There is flight within the country and international fugitivity. The former does not involve the complexities of extradition since Federal removal under rule 40 of the Federal Rules of Criminal Procedure, and habeas corpus ad prosequendum (28 U.S.C. § 2241 (c) (5)), are available depending into whose custody the defendant is placed. The proposed statute embodies language consistent with the view that intent to avoid justice should be a uniform requirement of proof for interstate flight. Such purpose or intent in international flight should be viewed as irrelevant, primarily because of the difficulties of proving intent. Evidence on this issue would usually be beyond the power of the court and prosecution to produce.

There is a conflict of views on whether flight from justice should toll the running of the statute indefinitely during the period of absence. Some believe that, consistent with the policy of repose, a maximum period should be provided. In the Michigan and Model Penal Code proposals the maximum is 3 years; and in the New York proposal, the maximum extension is 5 years. While this latter view has the virtue of finality, it also has the vice of rewarding successful flight to avoid prosecution or detection.[68] Both alternatives are set forth in the proposed statute. This writer believes, however, that a better balance is struck by eliminating the premium of immunity for successful flight.

(*e*) *The Defective Indictment.*—Prior to 1934, challenge to the indictment could be delayed by dilatory tactics until the limitation period had run. If the challenge was successful reindictment was then barred.

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[65] *McGolzen* v. *United States*, 105 F.2d 791, 792 (D.C. Cir. 1939).

[66] 160 U.S. at 135. The proposed statute is drafted so that the concept of avoidance of justice of a State, as well as of the United States, will be perpetuated.

[67] *Bruce* v. *Bryan*, 136 F. 1022 (4th Cir. 1905), *affirming In re Bruce*, 132 F. 390 (C.C.D. Md. 1904).

[68] If identity is known, of course, a complaint or indictment may be filed to begin the prosecution within the period, notwithstanding the fact of flight. However, unlike "John Doe" warrants of arrest, anonymous or "John Doe" complaints or indictments cannot commence prosecution since the identity of the defendant is unknown.

It was to correct this situation that the Congress enacted chapter 170 of the Act of April 30, 1934[69] and chapter 278 of the Act of May 10, 1934.[70] The former, inter alia, imposed a 10-day period after arraignment for challenging an irregularly composed or created grand jury, and tolled the period of limitation from the date such motion was filed until the end of the next term of court during which a grand jury sat. The latter statute permitted reindictment after the limitation period had expired where the first timely indictment was dismissed as defective or insufficient for any other cause. Reindictment was required within a limited period. Chapter 278 of the Act of May 10, 1934 dealt with two situations: (1) where the indictment was dismissed after the limitations period had run and, (2) where the indictment was dismissed prior to the expiration of that period but reindictment was impossible within the period. These provisions are now in sections 3288 and 3289 of Title 18.

Under the proposed statute a prosecution can be commenced—and the running of the period stopped—upon the filing of a complaint. The cumbersome provisions regarding reindictment and availability of a grand jury are therefore unnecessary. The period of 30 days,[71] proposed in the draft, should provide sufficient time for the prosecutor to "turn around" from the dismissal and to file a complaint, if not an indictment. Thereafter, the requirement of rule 48(b) that the defendant be indicted without unnecessary delay would govern.

4. *Proposed Additions to Federal Law.*

(*a*) *The Concealed Offense—Public or Private.*—The general assumption underlying regular statutes of limitations is that crime is usually known or discovered by the victim or by interested officials through adequate investigation. There is, however, a major exception in the after-discovered or concealed offense cases involving a breach of public or private trust.[72]

Under present Federal statutes of limitations, prosecution for misconduct similar to that of a private fiduciary [73] is governed by the gen-

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[69] 48 Stat. 648.

[70] 48 Stat. 772.

[71] A 30-day period would correspond with the time for the government to appeal under 18 U.S.C. § 3731. In the event of such an appeal the time for a new prosecution would abide the outcome of the appeal.

[72] *See Larceny by a Fiduciary—Statute of Limitations*, 22 N.Y.U. L.Q. 488 (July 1947).

[73] By section 3284 of Title 18, concealment of assets by a bankrupt is deemed a continuing offense and the period of limitation does not begin to run until final discharge or denial of discharge. A practical problem exists where a bankrupt conceals real or personal assets outside the jurisdiction and is able to hold them for 5 years after discharge before selling or refinancing. It is usually at this point that previous bankruptcy proceedings are discovered along with the fact that the asset was not declared. It is then too late to prosecute. In cases where the concealment is discovered during the bankruptcy proceedings, there is no present requirement of more prompt prosecution save for rule 48(b) of the Federal Rules of Criminal Procedure, which permits dismissal of unnecessarily delayed charges once the defendant has been held to answer in the district court. (Such a dismissal is not likely to occur in bankruptcy cases.)

There is some respectable opinion among bankruptcy officials that the date of discharge or denial thereof is not a rational point to begin the running of the period. It is suggested that discovery of such concealment should be the crucial point.

eral provisions of section 3282 of Title 18.[74] The same is true of breach of public trust by officers or employees of the United States.[75] It is suggested that there be special Federal legislation in this area, as there is in many of the States.

There are several ways of dealing with these special concerns. With regard to offenses in which the breach of a fiduciary obligation is a material element, both the Michigan and Model Penal Code proposals would extend the period to 1 year after the discovery of the offense by an aggrieved party or by a person who has a legal duty to represent an aggrieved party or who is himself not a party to the offense, but would limit this extension to no more than 3 years beyond the period otherwise applicable. The New York revisers' proposal is both broader and narrower. It provides for an extension of 1 year after discovery (by the same persons) without any outside limitation measured from the date of the offense, but imposes a different kind of limitation—1 year—measured from the date when, in the exercise of reasonable diligence, the facts constituting the offense should have been discovered by the aggrieved party or his representative.

The draft differs from both of the above. While it is similar to the Michigan/Model Penal Code proposal in imposing an outside limit of 3 years, it does not have the 1-year-from-discovery limitation within that limit, principally because of the unique Federal enforcement considerations noted above. Moreover, the proposal here does not have the due diligence requirement of the New York statute. It would seem better to recognize this type of offense as extending the statute by 3 years, subject only to a shorter period depending upon whether it was discovered within 3 years of its commission, than to have to litigate the issue of when it should have been discovered. That requirement appears desirable only in the context of the New York statute, which has no outside limitation in years. It should also be noted that concealment of assets by a bankrupt is included in the proposal here, for reasons noted in note 73, *supra.*

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[74] A special 6-year period, however, was provided for prosecutions of fraud against the United States by the Act of November 17, 1921, ch. 124, 42 Stat. 220. The provision was added to the 3-year general limitations statute to accommodate prosecutions of World War I government fraud cases. *See* H. REP. No. 365, 67th Cong., 1st sess. (1921). By the Act of December 27, 1927, ch. 6, 45 Stat. 51, that 6-year provision was repealed as no longer needed and all noncapital offenses were again governed by the 3-year period. *See* S. REP. No. 2 and H. REP. No. 16, 70th Cong., 1st sess. (1927). Although section 10(b) of the Act of September 1, 1954 (c. 1214, section 10, 68 Stat. 1145), extended the general limitations period from 3 to 5 years, a primary motive was to extend the period to facilitate prosecution of fraudulent misconduct in office expenses. *See Hearing before Subcomm. of the Senate Comm. on the Judiciary on S. 1451 and S. 3310 (Extending the Statute of Limitations)*, 83d Cong., 2d Sess. 3 (1954) (Statement of Hon. John J. Williams).

[75] There are four exceptions to the general 5-year period which could cover certain official misconduct. A 10-year period is prescribed under 42 U.S.C. § 2278 for noncapital atomic energy espionage-type offenses and under 18 U.S.C. § 3291 for passport, citizenship, and nationality offenses. A 10-year period is also provided under 50 U.S.C. § 783(e) for criminal subversive activities. This enactment deals specifically with criminal misconduct in office by providing that the period begins to run "after such person has ceased to be employed as such officer or employee." *See* note 76, *infra.* Of course, no limitations period applies to capital offenses of a misconduct-in-office character such as treason or espionage. A 3-year period is prescribed for the three existing copyright offenses under 17 U.S.C. § 115(a). (*See* discussion of this provision under paragraph 2(b), *supra.*)

With regard to an offense based upon misconduct in public office, the need for special consideration is not only the peculiar opportunity for concealment but also the fact that the offender's position may dampen enthusiasm for prosecution or permit him to influence the effectiveness of investigation or the decision to prosecute. Accordingly, unlike the case of the breach of a fiduciary obligation, the most significant point from which to measure the extended period is the time when the defendant left public office, rather than when the offense was discovered. An extreme position on how long the extension should be has been taken by the New York revisers, who propose that prosecution be permitted at any time during the defendant's service in the public office involved or within 2 years after the termination of such service. The New York revisers propose that there be no limit on the extension other than 2 years after the public official terminates service in the office involved in the offense.

The draft proposed here reflects the view that such an extension is much too extreme and would permit, in the case of public servants with long service, prosecutions 10 or 20 or even 30 years after the alleged misconduct of even the most petty type. The special considerations of this type of offense do not warrant complete rejection of the purposes of the statute. Accordingly, while the proposed draft would measure the running of the statute from the date when the defendant left public office,[76] it provides an outside limit to the extension of 3 years added to the period otherwise applicable, measured from the date of the offense. This is substantially the result achieved by different language in the Michigan/Model Penal Code proposals.

One further problem in the area of concealed offenses should also be noted. That is the question of whether the provisions of the draft dealing with offenses involving the breach of a fiduciary duty, should also apply to any offense in which fraud is a material element, as they would in the Michigan/Model Penal Code proposals. In the Federal system there is a significant number of fraud prosecutions: both frauds against the government, including false statements in all manner of situations, and frauds against private parties, including mail frauds and securities frauds. Federal law enforcement is presently geared to uncovering these offenses and commencing prosecution within existing time limitations. Extension of the general Federal limitation period from time to time has largely been prompted by law enforcement needs in the fraud area—internal revenue law violations, for example. It is believed that adding a limitation period which is keyed to the time of discovery will serve in the long run only to weaken the pressure on law enforcement authorities to uncover the fraud within the normal period, while aggravating the problems which the policy of repose is designed to serve. Accordingly, it is not recommended that fraud generally be subject to an extension keyed to the time of discovery. The New York proposal is in accord.

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[76] The proposed draft uses the term "public office" in lieu of "such public office" to eliminate possible technical confusion in the event of a promotion or transfer which may continue the power to conceal although the incumbency in the technically described public office or position has terminated. This is a failing in 50 U.S.C. § 783(e) where a 10-year period is prescribed "after such person has ceased to be employed as *such* officer or employee" (emphasis added).

It might also be observed that unlike section 783(e), relating to subversive activities, no provision affecting misconduct in office is provided for violation of the atomic energy espionage-type offense under 42 U.S.C. § 2278.

(*b*) *The Lesser Included Offense.*—Rule 31(c) of the Federal Rules of Criminal Procedure, permits a finding of guilty of an offense necessarily included in the offense charged.[77] It is clearly established in most States [78] and in the District of Columbia [79] that one cannot be convicted of an offense necessarily included in the one charged if the included offense is barred by the statute of limitations even though the charged offense is not. In *Chaifetz* [80] the defense sought an instruction on a misdemeanor internal revenue offense as being lesser included in the charged felony of willfully attempting evasion of income tax. It was held that the trial judge correctly refused to give the instruction because conviction for the misdemeanor was barred by the expiration of the 3-year period. A case of more striking importance to the administration of criminal justice is *Askins* v. *United States*, 251 F.2d 909 (D.C. Cir. 1958). The defendant had been held in a mental hospital as an incompetent under indictment for first-degree murder. After many years the initial indictment was nol-prossed. Subsequently, after competence was regained, he was reindicted for the capital offense and convicted of the lesser included, noncapital offense of second-degree murder.[81] After unsuccessful appeal, Askins sought to vacate the sentence (by application under 28 U.S.C. § 2255), raising for the first time the bar of the statute of limitations as to noncapital offenses.

The appellate court held that because the second-degree murder conviction was barred "the sentence imposed was not authorized by law [the language of section 2255]." Accordingly, the sentence was vacated because the "statute [of limitations] simply precludes punishment for the offense [of second-degree murder]." [82] The State of Georgia holds a contrary view,[83] as does New Jersey.[84] The New Jersey court reasoned that murder is but one offense regardless of degree.[85]

Statutes which permit verdicts on lesser included offenses, like rule 31(c) have been held not to provide for an extension of a limitation period on a lesser included offense. *People* v. *Di Pasquale*, 161 App. Div. 196, 146 N.Y.S. 523 (1914). The New York court in *Di Pasquale* based its holding on the theory that the statute permitting lesser included verdicts prescribed a rule of pleading and not a restriction of the valuable right under the statute of limitations. The same result obtained in West Virginia where a similar statute permitted sentencing on a lesser found offense.[86]

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[77] In this discussion attempts are considered to be lesser included offenses. There is presently no general Federal attempt statute; but one has been proposed for the new Criminal Code.

[78] *State* v. *King*, 140 W. Va. 362, 84 S.E. 2d 313 (1954), and cases cited.

[79] *Chaifetz* v. *United States*, 288 F. 2d 133 (D.C. Cir. 1960).

[80] *Id.*

[81] It should be noted that the Federal statute of limitations applies to District of Columbia Code offenses. Askins was charged with murder under D.C. CODE Ann. § 22–2401 (1967).

[82] *Askins* v. *United States*, 251 F.2d 909, 913 (D.C. Cir. 1958). This result was not reached as to a noncapital verdict under the Federal kidnapping statute because harm to the victim, which permitted the jury to impose the death penalty, merely affects punishment. *Coon* v. *United States*, 360 F. 2d 550 (8th Cir. 1966).

[83] *Sikes* v. *State*, 20 Ga. 80, 92 S.E. 553 (1917).

[84] *State* v. *Brown*, 22 N.J. 405, 126 A.2d 161 (1956).

[85] *See* Note, *Recent Cases: Criminal Procedure*, 105 U. PA. L. REV. 1000 (1957).

[86] *State* v. *King*, 140 W. Va. 362, 84 S.E. 2d 313 (1954).

Florida attempted specific legislation aimed at this resultant inability to convict for a lesser offense. The enactment which permitted a lesser degree of homicide to be returnable even though barred when the indictment was for a capital offense was viewed as an unconstitutional deprivation of equal protection of the law.[87] As in the cases prohibiting lesser verdicts under the permissive lesser verdict statutes, the basis for the result was a fear that the prosecution will overcharge to avoid the limitation period. The drafters of the Model Penal Code observed this result when different periods of limitations apply to possible included offenses but made no recommendation to strike an accommodation between the all-or-nothing result and the possibility of abusive prosecution to avoid the limitation period.[88]

The problem must be faced in Federal legislation in view of possible multiple grading of Federal offenses and the fact that lesser included offenses having a shorter limitation period will be present in many criminal prosecutions (if the proposed alternative of a shorter period for misdemeanors is adopted) or, at least, in murder cases and any other cases for which there is an unlimited period.[89] An effort must be made to accommodate the very real and undesirable possibility of prosecutive abuse with the harsh result of *Askins*. This can be done by providing, as does the draft, that prosecution for a lesser verdict shall be deemed to be timely commenced if there was evidence admitted at trial sufficient to submit to the trier of fact the offense actually charged and for which a limitation period has not expired or does not apply.

In this way arbitrary and unwarranted overcharging for purposes of avoiding a limitation period is prevented; and the trier of fact is not faced with an all-or-nothing situation when the true facts reflect lesser guilt. The general policy of statutes of limitation which reflect concern for stale evidence and impaired defense is not served when an approach is taken that the evidence is too stale or the defense too weakened for the lesser offense but not for the greater offense. Certainly, to permit conviction for first degree murder on old and perhaps faded evidence or when the defense capability is gone, but to say that such factors bar conviction for second degree murder or manslaughter is anomalous and not in keeping with sound policy.

There is an additional problem with lesser included offenses which plays an ever-increasing role in the administration of criminal justice. It is in the area of accommodated dispositions or "plea bargaining." If there is to be more than one period of limitation, it is appropriate that legislation permit a valid plea of guilty or nolo contendere to an included offense, notwithstanding expiration of the period, where the period has not run for the greater offense. The draft accomplishes this goal by providing that "a prosecution shall be deemed to have been timely commenced" in such cases. Of course, it would be advisable for the court to insure that the defendant waives the defense where there might be any doubt (*see* rule 11, F.R. Cr. P.) before accepting the plea. This precaution would eliminate the possibility of subsequent collateral attack on the sentence under 28 U.S.C. § 2255.

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[87] *Mitchell* v. *State*, 157 Fla. 121, 25 So. 2d 73 (1946).

[88] *See* MODEL PENAL CODE § 1.07, Comment at 28 (Tent. Draft No. 5, 1956).

[89] Offenses punishable by death are listed in the appendix. Many have lesser included alternative verdicts depending on specific intent. For example, espionage (18 U.S.C. § 794) could include violation of 18 U.S.C. § 793; and 42 U.S.C. § 2272 is made noncapital where there is no specific intent.

APPENDIX

UNITED STATES AND DISTRICT OF COLUMBIA OFFENSES PUNISHABLE BY DEATH*

TITLE 18, UNITED STATES CODE

Section 34—If death results from violation of chapter 2—dealing with injury to aircraft or aircraft facility or ground transportation or facility.

Section 794—Espionage with intent to injure the United States.

Section 837**—Certain explosives used where death results.

Section 1111—Murder, first degree. *See also* section 1114—Murder of an officer or employee of the United States.

Section 1201**—Kidnapping if victim harmed.

Section 1716—Mailing nonmailable injurious article if death results.

Section 1751—Assassination of President or Vice President.

Section 1992—Train wrecking with death.

Section 2031—Rape.

Section 2113(e)**—Federally insured bank robbery—death or kidnapping results.

Section 2381—Treason.

TITLE 21, UNITED STATES CODE

Section 176(b)**—Furnishing heroin to one under 18 years of age.

TITLE 42, UNITED STATES CODE

Section 2272**—Violation of certain atomic energy laws with intent to injure the United States.

Sections 2274–6**—Restricted data"—atomic energy espionage.

TITLE 49, UNITED STATES CODE

Section 1472(i)—Piracy of aircraft.

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*"Offenses punishable by death" have been described as any offense "deserving of, or liable to, punishment: capable of being punished by law or right." *Coon* v. *United States*, 360 F. 2d 550, 554n. 7 (8th Cir.) *cert. denied*, 385 U.S. 873 (1966).

**The death penalty provision in each of these statutes is probably unconstitutional in light of *United States* v. *Jackson*, 390 U.S. 570 (1968), because such sentence may be imposed only on jury direction. It was there held such a provision placed an unconstitutional price on the exercise of the right to jury trial.

Staff Note

REVISION OF STATUTE OF LIMITATIONS

The consultant's draft of the statute read as follows:

LIMITATION OF TIME UPON PROSECUTIONS

(*a*) *Limitation Periods Generally.*—Except as otherwise provided, prosecution must be commenced within the following periods after the offense:

(1) felonies, misdemeanors, and petty misdemeanors: 5 [6] years.

[(2) misdemeanors: 3 years].

(3) [petty misdemeanors], criminal contempt, [and all other offenses]: 1 year.

(*b*) *Unlimited Prosecution.*—Prosecution for murder [other offenses?] may be commenced at any time.

(*c*) *Extended Period for Flight, Breach of Fiduciary Duty, Misconduct in Office.*

(1) The period of limitation shall not run as to any person who conceals himself within the territorial jurisdiction of the United States to avoid justice, or who goes beyond the territorial jurisdiction of the United States [but in no event shall this provision extend the period of limitation prescribed herein by more than 3 years].

(2) The period of limitation shall not begin to run for an offense when a material element is a breach of fiduciary duty or the concealment of assets of a bankrupt or other debtor, until the breach of fiduciary duty or concealment has been discovered by an aggrieved party or by a person who has a legal duty to represent him and who is himself not a party to the offense, but in no event shall this provision extend the period of limitation by more than 3 years.

(3) The period of limitation shall not begin to run for an offense based on misconduct in office by a public servant until such public servant shall have left public office, but in no event shall this provision extend the period of limitation by more than 3 years.

(*d*) *Commencement of Prosecution.*

(1) A prosecution is commenced upon the filing of a complaint before a judicial officer of the United States empowered to issue a warrant or upon the filing of an indictment or information. Commencement of prosecution for one offense shall be deemed commencement of prosecution for any included offenses.

(2) A prosecution shall be deemed to have been timely commenced notwithstanding that the period of limitation has expired:

(i) for an offense necessarily included in the offense charged if as to the offense charged the period of limitation has not expired or there is no such period, and there is, after the evidence on either side is closed at the trial, sufficient evidence to sustain a conviction of the offense charged, or

(ii) for any offense to which the defendant enters a plea of guilty or nolo contendere.

(e) *Added Period to Commence New Prosecution.*—If a timely complaint, indictment or information is dimissed for any error, defect, insufficiency, or irregularity, a new prosecution may be commenced within 30 days after the dismissal even though the period of limitation has expired or will expire within such 30 days.

The foregoing statute was substantially rewritten. Among the reasons for the changes made, note the following:

(1) The 10-year period in present law for certain national security crimes is retained for certain serious felonies which generally are not easily discovered. This extended period reflects not only the seriousness of the crime but also the secrecy surrounding it. Thus sabotage, although a very serious felony against the state, does not have this 10-year period of limitations, because sabotage, as a class, is likely to come promptly to official attention. An alternative to describing the type of crime intended would be to list them in the statute itself.

(2) Five years is the basic period for felonies and for misdemeanors which are likely to be covered up. All other offenses have a 2-year period. Thus, while simple assaults, private petty thefts, and the like have an appropriately short period, a longer period is provided for the government to discover and prosecute concealed offenses. Stating it as an absolute period is much simpler than the complex 3-year "extension" in subsection (c)(2) above and yet still provides a long enough period to deal with such offenses.

(3) Extensions for fugitivity were dropped because it is rarely relevant to whether or not prosecution can be commenced. If the offender's identity is known, a complaint can be filed regardless of his flight. If his identity is not known, his flight rarely makes the discovery of his connection with the crime more difficult. Arguably, a suspect's presence aids in eyewitness identification or permits his interrogation, but the suspect cannot be made to anwer questions and identifications more than 5 years after the offense are likely to be unreliable.

(4) Limitations is denominated a defense to make clear how the issue is to be raised, and that, unlike present law, it is waived if not raised at trial.

(5) An extended period for felonies committed by organized crime involving connivance of a public servant was added. Corrupt public servants make it unusually difficult to discover that a crime has even been committed. This subsection recognizes that organized crime is especially heinous and hard to deal with.

(6) The long periods of limitations are further controlled to prevent abuse. If the crime and defendant's connection with it are known he should be prosecuted as soon as reasonably possible. If he can prove unreasonable delay he can have the prosecution dismissed, even though it is brought within the extended period.

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COMMENT

on

ENTRAPMENT: SECTION 702

(Starrs; October 23, 1968)

1. *Major Problems in Formulating an Entrapment Statute.*

(a) Is a statute on the subject necessary or desirable?

(b) Should entrapment be recognized as a defense to crime or as a rule, the violation of which will result in the exclusion of evidence from the trial?

(c) Should entrapment be predicated on the theory:

(i) that the law should not countenance *governmental wrongdoing* which offends the sensibilities of society *or* impugns the integrity of the judicial process; or

(ii) that the law should not permit the conviction of *otherwise innocent* persons who have been induced to commit on offense.

If entrapment is to be included as a defense, then it will be necessary to determine:

(i) whether a defendant's prior criminal record should be admissible on the issue of his unreadiness to commit the offense, when the defendant fails to take the witness stand; and

(ii) whether entrapment of the innocent by private persons not acting in cooperation with the government should be included within a definition of the defense of entrapment.

(d) Should a claim of entrapment be permitted as to all crimes or only to some?

(e) Should the claim of entrapment be triable by the court or by the jury?

(f) Upon whom, the government or the defendant, should the burden of establishing or disproving the claim of entrapment be placed?

(g) Should the defendant be allowed to argue both that he did not do the act charged (*not guilty*) *and* that he was entrapped into doing it (*entrapment*)?

2. *Justifications for a Federal Entrapment Statute.*—Entrapment, as it is now recognized in the Federal system, is not a matter of statutory prescription, nor has it ever been. Indeed, it does not appear that Congress has ever been requested to enact a law on the subject.

Federal entrapment law has been a matter of exclusive concern of the Federal courts. Its origin and its current status derives from two opinions of the United States Supreme Court, in *Sorrells* v. *United States*[1] and *Sherman* v. *United States*.[2]

[1] 287 U.S. 435 (1932).
[2] 356 U.S. 369 (1958).

The present necessity for an entrapment statute, therefore, requires some explanation. In many respects, the reasons for the enactment of a statute on this subject are those which justify the statutory treatment of criminal law in general. There is a need here, as elsewhere, for as precise a delineation as possible of the range of permissible conduct in which individuals may engage. But entrapment is distinguished by the fact that its lines are drawn to control the conduct of government agents or persons acting on their behalf and not solely the actions of an accused person. In addition, there is much to be said for a statute that seeks to establish guidelines for the proper performance of the functions of those who enforce the criminal laws. Law enforcement officials themselves have much to gain from such a statute for it gives them a sense of confidence and direction as they are confronted with on-the-street emergencies.

An entrapment statute is also better suited than judicial decisions to provide the procedures for its use in particular cases. It can allocate the burden of proof, decide the measure of that burden, impose obligations of notice when required, and do all else necessary to effectuate the claim of entrapment, whenever it appears. A statute can organize and define the subject of all entrapments without regard to the specific factual circumstances that often restrict the generality of a judicial opinion. Furthermore, in contradistinction to case law, a statute can be concise, complete, and general. The present state of entrapment law is such as to require and justify a statutory restatement in terms which will be uniform in application and unambiguous in theoretical formulation.

The foregoing reasons for adopting an entrapment statute in the proposed Code find support in those many States which have enacted such a statute or which are proposing to do so. In the last decade, there has been a growing trend toward statutory rendition of the subject of entrapment. It is submitted, therefore, that an entrapment statute is both necessary and desirable for the Federal law.

3. *Brief Summary of the Proposed Entrapment Statute.*

(a) *Subsections 702(1) and (2).*—The proposed entrapment statute concedes the legitimacy of the defense of entrapment and proposes that entrapment should be a defense because the government has used methods, in its pursuit of criminal offenders, that are inappropriate and offensive.* By analogy to the coerced confession and illegal search and seizure cases, the defendant's guilt or innocence is deemed to be irrelevant in the determination of whether an entrapment has occurred. The focus is upon the conduct of the government and not upon the disposition of the defendant towards the particular offense charged or his criminal conduct in general. The fear implicit within the proposal is that the actions of the government might induce innocent persons to engage in criminal conduct because of the temptations posed by the government. This, it is submitted, is not a proper or desirable function of law enforcement.

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*Entrapment is denominated in section 702(1) as an affirmative defense, requiring (under section 103) proof by a preponderance of the evidence, since evidence of the threshold involvement of the government in the commission of the offense will always be in the case and should not, consistent with the formulation of the defense in section 702(2), warrant acquittal.

(b) *Subsection 702(4)**.—Subsection (4) follows the approach taken in subsections (1) and (2). Subsection (4) permits the defendant, at his election, to provide the defense of entrapment to the court, not to the jury. It is believed to be unnecessary to declare that evidence of a defendant's past criminal conduct would be inadmissible on the entrapment issue since subsection (2) makes it sufficiently clear that the test is an objective one which is concerned with the actions of the government, not the criminal propensities of a particular defendant. Subsection (4) is intended to resolve a major dispute of logical dimensions which has been much adumbrated in the Federal circuit courts. There are those who say that the defense of entrapment and a plea of not guilty are inconsistent. Others disagree, moved less by the consistency or inconsistency of these dual allegations than by their realization that a finding of inconsistency hinders the complete development of the facts of the crime, and, consequently, the ascertainment of the truth. Proposed subsection (4) assumes that the pursuit of a just verdict in a criminal cause is more important than strict observance of principles of logic. Consequently, the entrapment defense may be raised under a plea of not guilty.**

4. *Existing Federal Law of Entrapment and the Proposed Statute.*—By virtue of the Supreme Court's decisions in *Sorrells* and *Sherman* entrapment is recognized in the Federal courts as a *defense* to crime. In that respect, it is on a parity with other defenses such as insanity or self defense. But unlike other defenses to crime, the genesis for the entrapment defense lay not in common law precedents or in the Courts' own evaluation of what defenses might be best for administration of criminal justice in the Federal system. Rather the Court, in *Sorrells*, found that the defense of entrapment was implicit in the intention of Congress in enacting the National Prohibition Act. Its origin, thus, was in a *statutory construction* by the Court, and so it remained, even though it has been applied in prosecutions for crimes under other statutes.

Under present Federal decisional law, the defense of entrapment, like other defenses, raises an issue of the accused's guilt or innocence. Thus a successful claim of entrapment results in an acquittal on the theory that the accused is innocent of the crime charged. This is true in spite of the fact that the accused may have committed the proscribed acts with the forbidden intention. In fact, such an acquittal is the consequence less of the accused's innocence than of the government's wrongdoing, for it is conceived to be contrary to the congressional intent to convict one who might not have committed the offense without the active and energetic promptings of the government. As Chief Justice Hughes, speaking for the majority in *Sorrells*, expressed it:[3]

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*Originally section 702 had a subsection (4) which read: "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." The subsection was deleted as essentially procedural.

***See* Appendix for an alternative formulation together with a discussion and analysis of it. Supplementary procedural provisions could include a requirement of notice by the defendant to the government prior to trial or a plea of "not guilty by reason of entrapment."

[3] 287 U.S. at 448.

> We are unable to conclude that it was the intention of Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them.

The defense of entrapment, as defined in Chief Justice Hughes' opinion, has an "origin-of-intent" emphasis. It seeks to determine whether it was the strength and persistence of the government's urging or the accused's own pre-existing criminal intention which gave rise to the commission of the conduct constituting an offense. The defense has, therefore, come to require both that: (a) the government has engaged in activities beyond the reasonable limits of those artifices or stratagems necessary to produce evidence of criminality, and that (b) the accused was not predisposed in fact or by reason of his past conduct to engage in the prohibited conduct. These twin elements of *inducement* and *predisposition*, when conjoined, form the presently recognized basis for the entrapment defense.

The proposed statute changes the existing law by giving principal significance to the inducements of the government. Entrapment is continued as a defense to a crime, but the question of the accused's predisposition is removed and the issue is framed rather in the objective terms of whether persons at large who would not otherwise have done so would have been encouraged by the government's actions to engage in crime. The focus of the proposed statute is on the activities of the government and their relation to the reasonable man.

5. *Relation of Entrapment to Law Enforcement Practices and Procedures.*

(a) *Impact on Law Enforcement; Habitual Criminals.*—The entrapment defense, as presently recognized in the Federal courts, has been found not to be "a significant limitation upon police encouragement practices."[4] The proposed statute is not expected to exert any more restraints upon police law enforcement procedures than does the present law. Yet, it is also true that the proposed statute might require more cautious behavior on the part of law enforcement personnel when dealing with habitual criminals than is presently the case. This is so because the predisposition of the defendant is not of crucial concern in the proposed statute whereas the present law requires a lack of predisposition as a condition precedent to an entrapment.

In recognition of the present importance of predisposition, an Internal Revenue Service training manual notes that:[5]

> It is difficult to think of an instance in which an habitual criminal could be entrapped into the commission of his specialty, although he might be induced to commit some other crime; for example, a bootlegger might be entrapped into violating the narcotic laws even though he is an habitual offender of the liquor laws.

One of the most serious shortcomings of the present entrapment law is that the predisposition element tends to encourage or tempt

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[4] TIFFANY, MCINTYRE & ROTENBERG, DETECTION OF CRIME 287 (1967) [hereinafter cited as TIFFANY].

[5] IRS MANUAL § 726 (10), 14 (2) (May 7, 1965) [hereinafter cited as MANUAL].

law enforcement into a "devil-may-care" or "anything goes" attitude toward persons of a known criminal reputation. To the extent that the proposed statute discourages this reaction, it is believed to constitute a justified advance in present law and practice.

(b) *Instances of Permissible Deceptions.*—The proposed statute is not designed, however, to preclude the use of all "artifice and stratagem" by the government in its attempts to detect the commission of crime through the undercover operations of its agents or informants. In *Sorrells*, Chief Justice Hughes made it quite plain that "artifice and stratagem may be employed to catch those engaged in criminal enterprises. . . ." [6]

The undercover operations of a criminal investigator are often conceived to be one of the most effective instruments in the detection and suppression of crime.[7] And the various training manuals for the "extensive undercover operations" of Treasury Department employees bear witness to this fact and go on to diagram and detail the kinds of disguises, ploys, and other simulations that will best assist the undercover operative in performing his assignments.[8] Indeed, the manual for the Treasury Law Enforcement Officer Training School states that "disguises and aliases are legally permitted" so long as they serve to provide "the opportunity to commit a crime," and do not implant "the criminal intent." [9] The manual goes further and defines as kinds of pretenses that "may be valuable" those which involve faking infirmities such as deafness, poor eyesight, or lameness which will "elicit sympathy and give (the) impression of harmlessness." Standing alone, none of these artifices would be prohibited by the proposed statute, but in the context of a particular case, they might present a substantial risk that the "unwary innocent" would be inveigled into crime. If so, it is contemplated that they would not be permissible stratagems of law enforcement.

The types of deceptive methods used by undercover agents are myriad, diverse, and subject to a great amount of speculation. There are those, such as feigned withdrawal symptoms in order to induce the sale of a drug,[10] which seem to exceed or raise questions as to the

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[6] 287 U.S. 435, 441–442.

[7] TIFFANY, *supra* note 4, at 275.

[8] Letter from Martin B. Danziger, Executive Assistant to the Special Assistant to the Secretary of the Treasury Department (for Enforcement), to Richard A. Green, Deputy Director, National Commission on Reform of the Federal Criminal Laws, March 22, 1968 [hereinafter cited as Letter].

[9] TREASURY LAW ENFORCEMENT SCHOOL, TACTICS OF DEFENDANTS, Part XI, § D, at 21 (Dec. 1967).

[10] The following situation was presented for discussion at the former Treasury Department's Bureau of Narcotics Training School:

> 3. A situation in which the undercover agent or informant portrays a Junkie, and simulates sickness as a result of lack of drugs, then appeals to the potential suspect on the grounds that he is violantly [sic] ill and would the suspect do him a favor and sell him enough drugs to help him over the withdrawal syndrome. The potential suspect had no intention of selling to the undercover officer or the informant drugs, but as a result of strong appeal made by the agent or informant, he (the suspect) reluctantly supplied the drugs. (Memorandum from Wm. J. Olivanti, Instructor, Bureau of Narcotics Training School, to Patrick P. O'Carroll, Assistant to the Commissioner, March 11, 1968) [hereinafter cited as Memorandum].

limits of proper law enforcement. And there are others which are settled as valid law enforcement techniques. *Lopez* v. *United States* [11] illustrates one such permissible operation. There, an Internal Revenue agent pretended to be willing to take a bribe from the defendant, but unbeknownst to the defendant, the agent taped a conversation between them which later was introduced as incriminating evidence at the trial. The defendant's misplaced reliance on the corruptibility of the agent was insufficient to raise an issue of entrapment. And, more recently, union leader James Hoffa was convicted in part upon the testimony of a trusted confidant who was secretly working in league with the government.[12] The deception was not considered to rise to the level of an entrapment. Such cases and the deceptions employed in them would not be affected by the rule of the proposed statute.

(c) *Application to all Crimes—Victimless, Violent, or Statutory.*— The undercover operations of law enforcement agencies in which methods of deception and subterfuge are employed run the gamut of criminal conduct. For example, in the undercover operations of Treasury agencies, their investigators "gamble, purchase contraband such as narcotics, counterfeit money, forged government securities, guns, untaxed alcohol, and smuggled goods." [13] On other occasions, "decoy letters are sent to trap postal thieves . . . [and] plainclothesmen resist homosexual advances only after the suspect has done enough to allow the police to obtain a conviction." [14] Governmental inducement is sometimes found in cases of claimed disloyalty.[15] Even the more traditional common law variety of crimes, such as robbery, burglary, larceny, and receiving stolen property, might involve some governmental persuasion or, at least, assistance in their commission. It has been reported, for instance, that the police departments in New York City and Chicago are disguising police officers as "decoys" in order to detect rapists, muggers, and the like who will attack women, drunks, or other seemingly defenseless victims.[16]

In spite of the wide variety of crimes in which deception is used to uncover criminal activity, it is most particularly in the enforcement of so-called "sumptuary legislation," [17] for crimes such as gambling, prostitution, and drugs, that it is deemed to be both most necessary and desirable. Such crimes have one common feature which requires the use of such devices. They are all committed "privately with a willing victim who will not complain, making normal detection virtually impossible." [18]

The proposed statute does not pretend to distinguish the availability of an entrapment defense according to the type of crime charged to

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[11] 373 U.S. 427 (1963).

[12] *Hoffa* v. *United States*, 385 U.S. 293 (1966).

[13] Letter, *supra* note 9.

[14] Comment, *The Serpent Beguiled Me and I Did Eat—The Constitutional Status of the Entrapment Defense*, 74 YALE L.J. 942 (1965) [hereinafter cited as Comment].

[15] *Dennis* v. *United States*, 341 U.S. 494 (1951).

[16] Codd, *Operation Decoy: Bold Technique Against Crime*, F.B.I. L. ENF. BULL. 3 (July 1963); TIFFANY, *supra* note 4, at 281.

[17] Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons and Agent Provocateurs*, 60 YALE L.J. 1091, 1093–1094 (1951) [hereinafter cited as Donnelly].

[18] TIFFANY, *supra* note 4, at 273; Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871, 874 (1963) [hereinafter cited as Rotenberg].

the accused. The courts have not done so and it would seem to be unnecessary to draw such distinctions simply because usage indicates that entrapments occur more in the "victimless" sphere of criminal activity than any other. However, Chief Justice Hughes in *Sorrells* did suggest that crimes of a "heinous or revolting" nature might well be excluded from the reach of an entrapment defense.[19] Contrariwise, Mr. Justice Roberts, in a concurring opinion in *Sorrells*, makes it plain that his view encompasses both "crimes mala in se and statutory offenses of lesser gravity . . . ." [20]

The cases indicate that entrapment is rarely raised as a defense to a crime involving physical violence.[21] The closest the cases come to broaching the problem occurs when plainclothes policemen, upon acting as decoys by feigning drunkenness, are assaulted. As to this, the courts have said that the police have merely provided an opportunity for the crime rather than having engaged in an entrapment.[22] And certainly a police decoy in a robbery does not consent to be robbed. It is submitted that in these cases of traditional common law characteristics it is in outlining the proper scope of the defense of consent or coercion that this issue might better be resolved. In any event, any law enforcement officer who improperly ensnares a suspect into committing a violent crime upon another person would seem to be justly deserving of condemnation through the entrapment defense.

(d) *Application to all Undercover Personnel—Informers and Government Agents.*—The proposed statute does not delineate the entrapment defense according to whether the entrapper is an undercover government employee or whether he is a special employee, "canary," "stoolie," or just plain informer. Under the statute, whoever the entrapper might be, the standard to determine the propriety of his conduct is the same.

The courts, however, do tend to be more willing to find an entrapment when the criminal conduct results from the undercover activities of an informer rather than when a government agent is directly involved. Professor Donnelly has characterized the general reaction to the informer as one of "aversion and nauseous disdain." [23] Then, too, the various Treasury Department agency training manuals include an admonition to the agent to "strive to prevent his informants from entrapping any innocent person" by the specific instructions he gives them.

It is particularly the *contingent-consideration informer* whose activities are searchingly investigated by the courts upon a claim of entrapment. Such an informer will engage in his undercover operations for a price payable upon the successful completion of his assignment—which is the commission of a crime by another. The contingent reward can be in money or in the dismissal of charges then outstanding against him.

In one case, *Williamson* v. *United States*,[24] the Fifth Circuit refused to "sanction a contingent fee agreement to produce evidence

[19] 287 U.S. at 451.
[20] *Id.* at 455.
[21] *People* v. *Lewis*, 80 Ill. App. 2d 101, 224 N.E. 2d 647 (1967); *People* v. *Hanselman*, 76 Cal. 460, 18 P. 425 (1888).
[22] *People* v. *Hanselman*, 76 Cal. 460, 18 P. 425 (1888).
[23] Donnelly, *supra* note 17, at 1093.
[24] 311 F.2d 441, 444 (5th Cir. 1962).

against particular named defendants as to crimes not yet committed," unless certain precautionary steps were first observed. These safety measures might include "certain knowledge" by the government that the suspect was involved in criminal activities or careful instructions to the informer on the rules against entrapment. The manual of instructions for Internal Revenue agents interprets the "certain knowledge" requirement of *Williamson* to mean such knowledge as would "be at least as strong, and maybe of the same nature, as solid probable cause evidence." [25]

It would seem that some agencies of the government use a system of compensation or awards to informants more than others. Chapter 19 of the Bureau of Customs Enforcement Manual contains a lengthy exposition of the practices and policies observed by that agency in the use of informers. It reveals that informers may be offered steady employment on a per diem basis or that they may be compensated by awards under the pertinent provisions of the Tariff Act [26] or that "the information may be purchased from the informer pursuant to an agreement entered into with him prior to his furnishing the information."

Even though the use of informers is not viewed by the courts as entrapment as a matter of law,[27] nevertheless the activities of informers are carefully scrutinized by the courts. This is most evident when the informer "makes" cases for the government in return for the dismissal of charges against him. In one case, the court took judicial notice "that it is a practice of the Narcotics Bureau to secure informants from among persons charged with narcotics crimes" and "almost" took "judicial notice of the lack of honor among scoundrels" when dealing with narcotics informers.[28]

The fear of overreaching by informers, whether operating on a contingent-consideration basis or not, is not directly reflected in the proposed statute. It is anticipated, however, that the standard which is articulated will be comprehensive enough to allow the courts, if they wish, to establish gradations of wrongdoing among undercover agents or informers.

(e) *A "Frame-Up" is Not an Entrapment; Other Available Defenses.*—The use of informers sometimes leads to situations which do not strictly involve an entrapment but which are analogous to it. In *Williamson* v. *United States*, for example, the court referred to a contingent-fee arrangement with an informer as tending to "a 'frame-up', or to cause an informer to induce or persuade innocent persons to commit crimes which they had no previous intent or purpose to commit." [29] Professor Donnelly also views the stool pigeon situation as one where "the temptation to 'frame' a case is great." [30]

A "frame-up" can occur in a number of ways, but all of them are distinguished by the fact that one or more of the essential ingredients of criminality is totally absent. It can be the guilty mind or, on occasion, the guilty conduct which is lacking. But in either case, it is dis-

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[25] MANUAL, *supra* note 5, § 726(10).14(5) (May 7, 1965).
[26] Tariff Act of 1930, 19 U.S.C. § 1619.
[27] *Lucaze* v. *United States*, 391 F. 2d 516, 521 (5th Cir. 1968).
[28] *United States* v. *Curry*, 284 F. Supp. 458, 468–469 (N.D. Ill. 1968).
[29] 311 F. 2d 441 (5th Cir. 1962).
[30] Donnelly, *supra* note 17, at 1094.

tinguished from entrapments in which the accused does commit a formal violation of the law and does fulfill the requisite components of the crime. An entrapment involves government actions which bear the strong likelihood of convincing innocent persons to engage in crimes. But a "frame-up" is of a different order entirely. It does not involve any criminal culpability of the accused at all. A "frame-up" occurs from more than governmental inducement. It is, in fact, the government's "supplying the sine qua non of the offense" [31] or there being no offense at all.

"Frame-ups" have many forms. The Bureau of Narcotics Training School uses the following "frame-up" situation as the factual background for a class discussion of entrapment: [32]

> A situation where the informant talks to a suspect, then hides a quantity of narcotics. Later the informant tells the undercover agent that he can purchase drugs from the suspect. The informant then confers again with the suspect, picks up the drugs which he had previously hidden, leaves the money, then returns to the agent with the drugs stating that he received the narcotics from the suspect. . . .

The IRS Manual warns undercover investigators against furnishing "equipment unavailable to the violator, such as plates for counterfeit stamps, regardless of the violator's intent . . . ." [33] This is not strictly an entrapment, the Manual says, "but the courts frown upon it because it is analogous to entrapment."

Judicial resistance to a "frame-up" has long been encountered. In the early case of *United States* v. *Healy*,[34] the defendant was accused of illegally selling liquor to Indians although the buyer was a decoy. The court described the defendant's conduct as "unconscious offending" which, of course, was not an offense at all since an essential element of the crime was lacking, namely a sale to Indians. (The government agent appeared to be Caucasian and so successfully concealed the fact that he was Indian as to lead the defendant into committing the "crime.")

A number of cases have involved situations where the "frame-up" resulted from the defendant's willingness to hold a package for a friend who happened also to be an informer. In one such case, the informer later retrieved the package and paid the defendant for keeping it.[35] An arrest, prosecution, and conviction for possession and sale of narcotics followed, but the appellate court reversed. In another case,[36] an en banc decision of the District of Columbia Circuit Court, the court remarked that the use of the term entrapment was "a complete misnomer" when applied to the facts of the case. The defendant had agreed to hold a package of narcotics for a friend while the friend visited a barber shop. Later the defendant was arrested and charged with possession of narcotics. On appeal, the court criticized the trial

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[31] *People* v. *Strong*, 21 Ill. 2d 320, 172 N.E.2d 765, 768 (1961).
[32] Memorandum, *supra* note 10.
[33] MANUAL, *supra* note 5, at § 726(10).14(4).
[34] 202 F. 349 (D. Mont. 1913).
[35] *People* v. *Carmichael*, 80 Ill. App.2d 293, 225 N.E.2d 458 (1967); *see also People* v. *Strong*, 21 Ill.2d 320, 172 N.E. 2d 765 (1961).
[36] *Smith* v. *United States*, 331 F. 2d 784, 790 (D.C. Cir. 1964).

court for failing to submit "to the jury the question of whether or not this appellant was the victim of a 'frame-up' in light of the background. . . ." [37] Such "planted evidence" cases have often been distinguished from "entrapments."[38]

In another series of cases, where the accused was misled into believing that his conduct was not prohibited by law, the deception was usually practiced, not by an informer, but rather by a law enforcement official who was known to be such by the accused. Situations of this character are quite similar to those giving rise to a legitimate defense of good faith and reasonable ignorance or mistake of law. The mistake could proceed from the accused's reasonable belief that a law enforcement agent would not have returned the liquor he had once confiscated if the accused's possession of it was truly illegal. An arrest, thereafter, for its illegal possession will not stand.[39] Or, the accused might be misled by a police official into believing that a mass demonstration in a certain designated place would be permissible and lawful, only to find himself under arrest for observing that advice. Mr. Justice Goldberg, speaking for the Supreme Court in *Cox* v. *Louisiana*, refused to sanction such "an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him." [40] In more traditional criminal law terms, this is simply a mistake of law, no doubt somewhat exacerbated by the strong possibility that the law enforcement agent purposely misled the accused in order to arrest him.

The proposed statute does not attempt to state a rule in terms which would be conformable to "frame-up" type situations. It is believed that the "frame-up," although it involves misconduct of the worst sort, does not require the statement of a specific statutory defense in order to insure against it. Other defenses, *i.e.*, defenses arising from mistake of law, or the general requirements of criminality, namely actus reus or mens rea, are deemed sufficient to insulate the victim of a "frame-up" from a conviction. In any event, the proposed entrapment statute is drafted broadly enough to encompass such situation, if need be.

6. *Review of the Entrapment Issue by Courts, Legislatures, and Scholarly Journals.*—That entrapment, in one form or other, should constitute a valid defense to crime is the prevailing opinion of the courts and the scholars.[41] It is said that Tennessee is the only State

[37] *Id.* at 791.

[38] *Glavin* v. *United States*, 396 F.2d 725, 729 (9th Cir.), *cert. denied*, 393 U.S. 926 (1968).

[39] *Scott* v. *Commonwealth*, 303 Ky. 353, 197 S.W. 2d 774 (1946).

[40] 379 U.S. 559, 571 (1965), quoting *Raley* v. *State of Ohio*, 360, U.S. 423, 426 (1959).

[41] A representative sampling of scholarly opinion would include: Hitchler, *Entrapment as a Defense in Criminal Cases*, 42 DICK. L. REV. 195 (1938) [hereinafter cited as Hitchler]; Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U.PA.L.REV. 245 (1942) [hereinafter cited as Mikell]; De Feo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U.SAN FRAN.L.REV. 243 (1967) [hereinafter cited as De Feo]; Rotenberg, *supra* note 18; Cowen, *The Entrapment Doctrine in the Federal Courts, and Some State Court Comparisons*, 49 J.CRIM.L., C. & P.S. 447 (1959) [hereinafter cited as Cowen]; Comment, *supra* note 14; Donnelly, *supra* note 17; Comment, *Judicial Control of Secret Agents*, 76 YALE L.J. 994 (1967) [hereinafter cited as Comment, *Judicial Control*]; Orfield, *The Defense of Entrapment in the Federal Courts*, 1967 DUKE L.J. 39, 71 (1967) [hereinafter cited as Orfield].

which does not recognize the defense of entrapment,[42] but even that view is not completely accurate since the Tennessee decisions could be read to adopt the entrapment defense when joined with a defense of consent.[43] The decisions from other States generally grant ready acceptance to the entrapment defense.[44]

Scholarly opinion is, with rare exceptions,[45] favorable to the defense of entrapment. The most comprehensive and penetrating statement of the defense and its conflicting bases is found in the American Law Institute's Model Penal Code,[46] whose proposed entrapment statute has been the paradigm for most legislative activity on this subject.

The first of such legislative endorsements of the entrapment defense appears in the Illinois Criminal Code of 1961,[47] which is somewhat loosely patterned after the proposal of the Model Penal Code. Most recently, the New York legislature approved the entrapment defense in its revision of the New York Penal Law.[48] And most of the other States which are currently revising their penal Codes are including a statute on entrapment. For example, the California, Pennsylvania, Michigan, and Maryland proposed penal Code revisions all contain entrapment provisions that are basically modeled after the Model Penal Code.

Not only is this legislative activity recent but the courts too have delayed, at least until this century, in examining, evaluating, and devising entrapment law. Indeed, save for a now repealed statute in Florida,[49] the courts have been the chief architects of this defense. The courts have been compelled to take action in this matter by the proliferation of statutes proscribing conduct where there is no victim who will be likely to complain.[50] The narcotics, prostitution, homosexuality, gambling, and liquor laws are those that most frequently elicit an allegation of entrapment.[51] Coupled with this statutory development, which one author [52] has labelled the "overcriminalization" of the criminal law, there has been an increased awareness of the difficulties which the lack of a complainant present in the enforcement of such laws.[53] As a consequence, police undercover operations

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[42] Rotenberg, *supra* note 18, at 891n. 62.

[43] *Hagemaker* v. *State*, 208 Tenn. 565, 347 S.W.2d 488 (1961).

[44] *People* v. *Benford*, 53 Cal.2d 1, 345 P.2d 928, 934 (1959); *Comm.* v. *Conway*, 196 Pa. Super. 97, 173 A.2d 776 (1961); *State* v. *Thurston*, 100 Ariz. 297, 413 P.2d 764 (1966) (en banc); *State* v. *Anthony*, 181 Neb. 352, 148 N.W.2d 324 (1967); *State* v. *Curry*, 70 Wash. 2d 383, 422 P.2d 823 (1967); *McKibben* v. *State*, 115 Ga. 598, 155 S.E.2d 449 (1967); *Spight* v. *State*, 226 N.E.2d 895 (Ind. 1967).

[45] De Feo, *supra* note 41.

[46] *See* MODEL PENAL CODE § 2.10 (Tent. Draft No. 9, 1959); MODEL PENAL CODE § 2.13 (P.O.D. 1962).

[47] ILL. REV. STAT. c. 38 § 7–12 (1965).

[48] N.Y. REV. PEN. LAW § 35.40 (McKinney 1967).

[49] FLA. STAT. ANN. § 22–838.11 (repealed 1959).

[50] *Sorrells* v. *United States*, 287 U.S. 435, 453 (1932) (Roberts, J., concurring).

[51] Rotenberg, *supra* note 18, at 873–874; Tiffany, *supra* note 4 at 275; LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 451 (1965) [hereinafter cited as LAFAVE]; SKOLNICK, JUSTICE WITHOUT TRIAL 100n.16 (1966); NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNONENCE WITHOUT TRIAL 188–192 (1966).

[52] Kadish, *The Crisis of Overcriminalization*, 274 THE ANNALS 157 (1967) [hereinafter cited as Kadish].

[53] Rotenberg, *supra* note 18, at 874.

as well as police use of civilian informers have become a commonplace in their attempts to control the incidence of crimes in these areas. "[T]he nature of the crime," it is said, "affects the nature of its detection." [54] Much has been written on this type of law enforcement and its evils and almost as much has been said concerning its futility.[55]

Of course, the explanation for the rise of entrapment as a defense cannot be attributed entirely to the emergence of crimes of present day importance. The promotional policies of police departments must share in the responsibility. If police competence for the purposes of advancement is to be determined by the number of arrests they have made, then it is likely that some crimes will result less from the unfettered judgment of a criminal than from police inducement.[56]

The defense of entrapment was devised to counter those activities of the police which are generally regarded as improper means of law enforcement. It has been the sense of the commentators, both scholarly and judicial, that the police are meant to deter or discover, not to foster, criminality. To allow such conduct to pass unchecked would be to give silent comfort to corrupting influences within the police department and within society at large. Unfortunately, no remedy short of the defense of entrapment [57] seems suited to make any inroads into this "dirty business." [58]

7. The Rationale for the Entrapment Defense.

(a) *Competing Views—Sherman* v. *United States and Sorrells* v. *United States.*—The chief difficulty in drafting an acceptable entrapment statute arises from the lack of any single, well recognized, and consistent rationale for it. In part, the dilemma is a matter of historical accident. If the decision in *Sorrells* [59] had been announced only a few years later, it is likely that Supreme Court, in the exercise of its then self-established supervisory power over the administration of criminal justice within the Federal courts, would not have had to turn to statutory construction to divine the source of the entrapment defense. The defense could then have stood on the same and firmer footing of the *McNabb-Mallory* exclusionary rule.[60] Indeed, but for the somewhat attenuated logic of the decision in *Sorrells*, entrapment might have become a matter of criminal procedure rather than the substantive defense to crime it is today.

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[54] Rotenberg, *supra* note 18, at 872.

[55] Rotenberg, *supra* note 18, at 871–879; LAFAVE, *supra* note 51; Kadish, *supra* note 52.

[56] NIEDERHOFFER, BEHIND THE BLUE SHIELD 72 (1967); in the New York Times report on the arrest of three New York City vice squad detectives for selling narcotics, Deputy Chief Inspector Ira Bloth, commander of the Narcotics Bureau is reported to have said: "One of the best yardsticks for advancement into the unit was the number of arrests made by a detective." N.Y. Times, Dec. 14, 1967, at 52, col. 5.

[57] Professor Mikell at one time proposed punishing the police. Mikell, *supra* note 41, at 263–264.

[58] *Id.*

[59] *Sorrells* v. *United States*, 287 U.S. 435 (1932).

[60] The *McNabb-Mallory* rule, enunciated in *McNabb* v. *United States*, 318 U.S. 322 (1943), and *Mallory* v. *United States*, 354 U.S. 449 (1957), precludes the use of a confession obtained in violation of rule 5(a) of the Federal Rules of Criminal Procedure as evidence. The rule itself only forbids unnecessary delays in taking suspects before a commissioner for a preliminary examination.

The most often cited reasons for the origin of an entrapment defense are in estoppel predicated upon governmental misconduct;[61] the "surer ground" of constitutional precepts;[62] the desire to preserve the integrity of the judicial processes;[63] and the refusal to condone the conviction of those who would be innocent of wrongdoing but for the overwhelming and unconscionable allurements of the government.[64] Of these diverse bases the two that have joined issue most repeatedly are the innocent theory [65] and the police misconduct theory.[66]

The controversy had its inception and its most exhaustive play in two Supreme Court opinions.[67] Both opinions "sharply divided" [68] the Court as to the proper foundation for a claim of entrapment. In *Sorrells*, the defendant had been charged with bootlegging in violation of the National Prohibition Act. Chief Justice Hughes, speaking for the majority, reversed the conviction after examining the applicable statute. The defense of entrapment was to be allowed "in the view that the defendant is not guilty" [69] if entrapped into criminal conduct. Yet there is heavy emphasis in Chief Justice Hughes' opinion, not alone on the defendant's innocence, but on the offensive creative activity of the government as well.

Yet Chief Justice Hughes made it quite clear that not all "artifice and stratagem" [70] by the government were prohibited by this defense. There was then to be an area of permissible inducement in which the government might engage without let or hindrance. The Hughes rationale for the entrapment defense as well as his bifurcation of it into inducement and lack of predispositon have become the norm for most Federal [71] and State courts. In 1958, Chief Justice

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[61] *Casey* v. *United States*, 276 U.S. 413, 425 (1928) (Brandeis, J. dissenting); *United States* v. *Healy*, 202 F. 349, 350 (D. Mont. 1913); PERKINS, CRIMINAL LAW 1036 (2d ed. 1969); and *United States* v. *Lynch*, 256 F. 983 (S.D.N.Y. 1918).

[62] Cowen, *supra* note 41, at 447; Comment, *Due Process and the Entrapment Defense*, 1964 U. ILL. L. FORUM 821 [hereinafter cited as Comment, *Due Process*]; Rotenberg, *supra* note 18, at 883–884. Two decisions from the Seventh Circuit have come close to deciding on constitutional premises. *United States ex rel. Hall* v. *Illinois*, 329 F.2d 354 (7th Cir.), *cert. denied*, 379 U.S. 891 (1964), and *United States ex rel. Toler* v. *Pate*, 332 F.2d 425 (7th Cir.), *cert. denied*, 379 U.S. 585 (1964). *See also Banks* v. *United States*, 249 F.2d 672, 674 (9th Cir. 1957), *cert. denied*, 358 U.S. 886 (1958).

[63] *Sorrells* v. *United States*, 287 U.S. 435, 459 (1932) (Roberts, J. concurring); *Sherman* v. *United States*, 356 U.S. 369, 378 (1958) (Frankfurter, J. concurring).

[64] *Sorrells* v. *United States*, 287 U.S. 435 (1932); *Sherman* v. *United States*, 356 U.S. 369 (1958).

[65] Justice Hughes speaking for the majority in *Sorrells* v. *United States*, 287 U.S. at 451, and Chief Justice Warren speaking for the majority in *Sherman* v. *United States*, 356 U.S. at 372.

[66] Justice Roberts speaking for the minority in *Sorrells* v. *United States*, 287 U.S. at 459, and Justice Frankfurter speaking for the minority in *Sherman* v. *United States*, 356 U.S. at 378.

[67] *Sorrells* v. *United States*, 287 U.S. 435 (1932); *Sherman* v. *United States*, 356 U.S. 369 (1958).

[68] *Lopez* v. *United States*, 373 U.S. 427, 434 (1963).

[69] 287 U.S. at 452. A recent and outspoken exception appears in *Kadis* v. *United States*, 373 F.2d 370 (1st Cir. 1967).

[70] 287 U.S. at 441.

[71] Some examples are: *United States* v. *Head*, 353 F. 2d 566 (6th Cir. 1965); *Lucas* v. *United States*, 355 F. 2d 245 (10th Cir.), *cert. denied*, 384 U.S. 977 (1966); *United States* v. *Lauchli*, 371 F. 2d 303 (7th Cir. 1966); *Garcia* v. *United States*, 373 F. 2d 806 (10th Cir. 1967); *Kibby* v. *United States*, 372 F. 2d 598 (8th Cir.), *cert. denied*, 387 U.S. 907 (1967).

Warren endorsed the Hughes view of entrapment in a less than positive or affirming manner.[72] Justice Warren refused to reassess the majority opinion in *Sorrells* since that issue had not been "raised here or below by the parties before us." [73]

In contradistinction to the Hughes-Warren view of entrapment are those of the concurring opinions of Justice Roberts in *Sorrells* and Justice Frankfurter in *Sherman*. The unifying theme in the Roberts-Frankfurter approach is that entrapment is a defense because "the methods employed on behalf of the government to bring about conviction cannot be countenanced." [74] The overriding determinant in Justice Roberts' opinion is "that courts must be closed to the trial of a crime instigated by the government's own agent." [75] It is not that the defendant is any less guilty where he alleges entrapment but that the court must refuse "to lend the aid of (its) own processes to the consummation of a wrong" [76] perpetrated by the government.

There is no room in the Roberts-Frankfurter appraisal for a subjective determination of the predisposition of a particular defendant to commit this or any other crime.[77] Evidence of predisposition is irrelevant. Emphasis is misplaced when predisposition is put in issue. The sole and imperative concern is "whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power." [78] The standard of Justices Roberts and Frankfurter is objective, *i.e.*, is it likely that the questioned police action would induce only those who are then ready and willing into crime.

The crucial first question, therefore, in drafting an entrapment statute is to ascertain the correct basis for the existence of this defense. Once this has been accomplished, the other, subsidiary issues of procedure tend to resolve themselves in domino-like fashion. Thus, if the Hughes-Warren view is accepted, then it is reasonable to impose the ultimate burden of proof of this issue upon the government. The jury too becomes the obvious choice as the fact finding body. However, if the Roberts-Frankfurter approach is found to be a more convincing rationale, then the defendant might legitimately be required to bear the brunt of proving the entrapment and then to the satisfaction of the court rather than to the jury.

(b) *The Proposed Controlling Standard—Objective View (Police Misconduct) of Roberts-Frankfurter.*—The draft entrapment statute accepts the concurring opinions in *Sorrells* and *Sherman* as the proper basis for the entrapment defense. This view is the position espoused by the draftsmen of the Model Penal Code,[79] although only after much debate. And New York has recently followed suit in its new entrapment statute.[80] The draftsmen of the proposed Michigan,[81] California,[82]

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[72] *Sherman* v. *United States*, 356 U.S. 369 (1958).
[73] *Id.* at 376.
[74] *Id.* at 380.
[75] *Sorrells* v. *United States*, 287 U.S. at 459.
[76] *Sherman* v. *United States*, 356 U.S. at 380.
[77] *Id.* at 383.
[78] *Id.* at 382.
[79] MODEL PENAL CODE § 2.13 (P. O. D. 1962).
[80] N.Y. REV. PEN. LAW § 35.40 (McKinney 1967).
[81] MICH. REV. CRIM. CODE § 640 (Final Draft 1967).
[82] CAL. PENAL CODE REVISION PROJECT § 550 (Tent. Draft No. 1, 1967).

Pennsylvania,[83] and Maryland [84] entrapment statutes likewise adhere to the Roberts-Frankfurter or police misconduct theory of entrapment. Only Illinois,[85] of all the States which either have or have under review an entrapment statute, aligns itself with the Hughes-Warren majority view in *Sorrells* and *Sherman*. Even the Supreme Court, in a recent opinion,[86] has emphasized that it is "the manufacturing of crime by law enforcement officials and their agents" [87] which is the preeminent concern of the defense of entrapment. The scholars too have tended to side with the view of Justices Roberts and Frankfurter, that entrapment finds its origin and justification in police misconduct.[88]

(c) *Arguments for Controlling Standard: Constitutional and Prejudicial.*—On behalf of the Roberts-Frankfurter view, it has been argued that only insignificant inroads will be made into police misconduct under an analysis which looks to the "innocence" of the defendant as well as the guilty conduct of the police.[89] If the courts are to remain unimplicated in overbearing police conduct, they must review the challenged police action unimpeded by considerations of the defendant's guilt or innocence. Otherwise law enforcement officers will be tempted to employ methods of law enforcement which affront the civilized instincts of society in the hope that the criminal predisposition of the defendant will save them from judicial reproach. The logic of this analysis has long been accepted with respect to the various exclusionary rules of evidence propounded by the Supreme Court. Indeed, even the majority opinion in *Sherman* perceived an analogy between entrapment and "the coerced confession and the unlawful search." [90]

The creation of a defense of entrapment in order to thwart police misconduct can be justified on other than constitutional grounds. The Federal courts' recognized supervisory authority over police practices has often been called upon for this purpose. Recently that supervisory control has resulted in decisions granting immunity from prosecution to persons subjected to retaliatory prosecutions. In one of these decisions, the Fifth Circuit dismissed a prosecution where the defendants, although guilty of the crimes charged, had been arrested "not to redress violations of the law, but simply to harass voting workers." [91] In another decision, this time from the District of Columbia Circuit, Chief Judge Bazelon reversed the conviction of a retired Negro police sergeant for two traffic violations where the government was admitted to have prosecuted the apparently guilty

[83] PROPOSED CRIM. CODE FOR PA. § 213 (1967).
[84] Brumbaugh, Memorandum to the Commission on Maryland Criminal Law 19 (1966).
[85] ILL. REV. STAT. c. 38 § 7–12 (1965).
[86] *Lopez* v. *United States*, 373 U.S. 427, 434 (1963).
[87] *Id.*
[88] *See* Cowen, *supra* note 41, at 449; Donnelly, *supra* note 17, at 1112, Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 FORDHAM L. REV. 399, 417 (1959) [hereinafter cited as Williams]; Mikell, *supra* note 41, at 260; Note, 46 HARV. L REV. 848, 849 (1933); Note, 33 N.Y.U.L. REV. 1033, 1039 (1958) [hereinafter cited as Note]; Note, 73 HARV. L. REV. 1333, 1335 (1960).
[89] MODEL PENAL CODE § 2.10, Comment at 20 (Tent. Draft No. 9, 1959).
[90] *Sherman* v. *United States*, 356 U.S. 369, 372 (1958).
[91] *United States* v. *McLeod*, 385 F.2d 734 (5th Cir. 1967).

defendant for the wrong motives, *i.e.*, in retaliation for defendant's reneging on his promise not to file a complaint against the arresting officers.[92]

But the defense of entrapment can be validated on constitutional grounds. There are pervasive and obvious analogies between the defense of entrapment and those exclusionary rules which spring from violations of the fourth and fifth amendments:[93]

> Clearly entrapment is a facet of a broader problem. Along with illegal search and seizures, wiretapping, false arrest, illegal detention and the third degree, it is a type of lawless law enforcement. They all spring from common motivations.

Entrapment bears its closest resemblance to those law enforcement practices which so shock the conscience as to violate due process. Certainly, to permit unlimited solicitations of suspects simply because they appear to be dangerous or because they have, on the occasion in point, succumbed to the inducements of the police would contravene the requirements of due process.[94] The language of the courts in condemning entrapments is vividly reminiscent of the outrage expressed by the Supreme Court in the well known "stomach-pump" case.[95] Entrapment has been denounced as "a detestation," "indecent," "intolerable," and "unconscionable."[96] These terms are indicative that at least some entrapments have gone so far that "enough is more than enough—it is just too much."[97] When that happens, due process has been impaired.

The constitutional restrictions upon methods of gathering evidence also provide illuminating and persuasive analogies to entrapment. Indeed, in one early decision an unsuccessful attempt was made to suppress evidence obtained as a result of an entrapment.[98]

It has been argued that the coerced confession cases are authority for allowing an entrapment defense under the aegis of the Constitution. The basic objectives in both types of case are the same:[99]

> to induce the defendant to supply evidence of his guilt. And the methods used share a crucial feature; in each case the police do not merely collect extrinsic evidence, but actively entice the defendant to incriminate himself.

Of course, the coerced confession is verbal evidence of guilt whereas the fruits of an entrapment are acts, not words. Yet, "It is unreasonable to suppose that the Constitution protects a person against confession of an actual crime and not against commission of a staged offense, as if tempting a man to be honest were more reprehensible than tempting him to be wicked."[100]

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[92] *Dixon* v. *District of Columbia*, 394 F.2d 966 (D.C. Cir. 1968).
[93] Donnelly, *supra* note 17, at 1111.
[94] Comment, *supra* note 14, at 952.
[95] *Rochin* v. *California*, 342 U.S. 165, 169 (1952).
[96] Comment, *Due Process*, *supra* note 62, at 826; Cowen, *supra* note 41, at 449; *Butts* v. *United States*, 273 F. 35 (8th Cir. 1921).
[97] *Williamson* v. *United States*, 311 F.2d 441, 445 (5th Cir. 1962) (Brown, J., concurring).
[98] *Spring Drug Co.* v. *United States*, 12 F. 2d 852 (8th Cir. 1926).
[99] Comment, *supra* note 14, at 950.
[100] *Id.* at 951.

Entrapments and coerced confessions both involve the overbearing of a suspect's will. The devices are more subtle in entrapments but the result is the same in both. And the object is not so much to avoid the image of brutal misbehavior, but to minimize the possibility that the police will wrench from a reluctant will even an honest confession or induce the commission of crime.

Entrapments can be analogized to those intrusions upon privacy which transgress the fourth amendment. In both there is a right to be free. In one, it prevents "physical encroachments aimed at detecting crime." [101] In the other, it should preclude official inducements into crime. The desire for the privacy of one's premises from a search is no greater than the wish for privacy of the person from inroads upon the freedom of the will.

Only rarely have the Federal courts been asked to find that the Constitution prohibits entrapments. In *Banks* v. *United States*,[102] it was said that a "conviction so procured is in violation of the due process provision of the Fifth Amendment . . . ." Unfortunately, the court gave no authority for this proposition, other than Justice Roberts' concurring opinion in *Sorrells*, and it did not elaborate upon the point. Later cases,[103] both in the Ninth Circuit and elsewhere, have cast considerable doubt on the strength of the constitutional adjudication in *Banks*.

The Seventh Circuit has passed upon the question on two occasions. In *United States ex rel. Toler* v. *Pate*,[104] Judge Mercer's concurring opinion states a strong case for the constitutional underpinnings of the entrapment defense. But in *United States ex rel. Hall* v. *Illinois* [105] the defense of entrapment was said to be a matter of local concern and would not be given constitutional status, at least as long as the States continued to give full recognition to the defense. It is unclear from the opinion whether the court intended to say that the entrapment defense is not grounded in the Constitution or that it was not necessary to come to that conclusion under present circumstances. In any event, the cases are so meager and so inconclusive that it is still arguable that entrapment has a constitutional dimension.

(d) *Predisposition Irrelevant.*—When the issues of police misconduct and the accused's predisposition are conjoined, the emphasis of judicial attention tends to focus on the accused's predisposition or the lack of it. This distorts the true meaning of entrapment and injects a highly prejudicial irrelevancy into the case. The contest is no longer over the action of the police but turns to the criminal life history of the accused, a life history which may be enough to convict him regardless of his innocence on this particular occasion.

If lack of predisposition or innocence is to be weighed, the police are then given leave to engage in impermissible and selective law enforcement. If the accused is of a known criminal propensity, the

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[101] *Id.*

[102] 249 F. 2d 672, 674 (9th Cir. 1957), *cert. denied*, 358 U.S. 886 (1958).

[103] *Simmons* v. *United States*, 302 F. 2d 71, 78 (3d Cir. 1962); *Banks* v. *United States*, 258 F.2d 318 (9th Cir.), *cert. denied*, 358 U.S. 886 (1958). *See also Cambiano* v. *United States*, 295 F.2d 13, 14 (9th Cir. 1961), *cert. denied*, 368 U.S. 999 (1962).

[104] 332 F. 2d 425, 427 (7th Cir. 1964).

[105] 329 F. 2d 354 (7th Cir. 1964).

police are given, in advance, "carte blanche" for their conduct. The past offender is always a prime target for police inducements, whereas only the law-abiding citizen is protected. Such a view "runs afoul of fundamental principles of equality under law, and would espouse the notion that when dealing with the criminal classes anything goes." [106]

In reply, it is argued that the moral wrong of the accused cannot be gainsaid by any amount of police misconduct. It has also been asserted that "without the use of traps, decoys and deception" [107] the laws against "victimless" or consensual crimes, such as prostitution or narcotics would be well-nigh unenforcible, since "alternative detection methods are simply inadequate." [108] Legitimate police endeavors to cope with these offenses would be frustrated by a prudence and wariness on their part occasioned by the fear that their conduct would be over-scrupulously reviewed by the trial and appellate courts. And since under both minority and majority opinions in *Sorrells* and *Sherman* the conduct of the police will be judicially scrutinized, it would be unwise to create a new "boon for the wayward" [109] by making "innocence" irrelevant. Yet, these arguments are based upon unproven assumptions and exaggerated speculations which have not been verified in other areas where police misconduct has fostered exclusionary rules or restrictive judicial attitudes.

8. *Specific Comment on Subsection (2) of the Proposed Entrapment Statute.*

(a) *An Objective Standard of Police Misconduct; Predisposition Eliminated.*—The formulation of subsection (2) in proposed section 702 essentially follows the Model Penal Code view, which is that of the minority in *Sorrells* and *Sherman*. The language of the Model Penal Code is altered somewhat to insure that an objective standard is employed to determine whether police conduct is sufficiently unsavory to justify an entrapment defense. Needless to say, the accused's penchant for criminality, either on this occasion or in the past, is not to be placed in issue under this proposal, unless such evidence is admissible on some theory other than entrapment.[110]

Other definitions of entrapment, which also emphasize the activities of the police, have been propounded. Justice Roberts' phrasing of the defense has often been quoted. As he viewed it, "Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer." [111] The difficulty with this analysis is that it tends to shift one's sights from the police conduct involved to the issue as to whether it caused the accused to commit the alleged crime. An investigation of causation, of necessity, must treat the question of the accused's criminal predisposition. The Roberts test then begins with the police involvement but terminates with an examination of the accused's behavior, which is osten-

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[106] *Sherman* v. *United States*, 356 U.S. 369, 383 (1958) (Frankfurter, J., concurring).

[107] Comment, *Judicial Control*, *supra* note 41.

[108] Rotenberg, *supra* note 18, at 872, 876.

[109] DeFeo, *supra* note 41, at 244.

[110] Cowen, *supra* note 41, at 450–451.

[111] *Sorrells* v. *United States*, 287 U.S. 435, 454 (1932).

sibly not under review. Justice Frankfurter's statement of the proper standard of entrapment is also deficient since it places too heavy reliance on the impropriety of the police conduct, without considering its objective impact upon reasonable men who would not commit such crimes in its absence.

The phrase "likely to cause" appears here to negate any requirement of complete certainty that the challenged conduct was of a nature likely to induce the average law-abiding person to commit an offense. The substantial probability of that should be enough for the police to cease their blandishments. Indeed, complete certainty is not a standard with which the factfinder is acquainted nor is it one upon which he can be expected to act with assurance or the requisite unanimity.

It is recognized that this objective test may work injustice in particular cases. Therefore, guilty (predisposed) persons may be exonerated under this test where the police conduct is so unreasonable or outrageous as to fall below the stated standard. On the other hand, persons who were not predisposed to commit crime may be convicted when the police conduct is not so offensive as to violate the statutory standard for entrapment. These possibilities do not seem sufficiently critical, however, to warrant restructuring the test to include an "otherwise innocent" element, which possesses hazards of its own.

The standard, it is to be reminded, is an objective one. Thus the focus is not on the accused, nor is it on the "situational" or the "chronic" offender.[112] The proposed California entrapment statute is said by its draftsmen to be based on the propensities of those "who are susceptible but not already disposed at the time of the event, rather than at the citizen of strong law-abiding habits."[113] This rather particularized standard is eschewed here in favor of one patterned after the oft-encountered reasonable man. It is rather in the alternate draft (*see* Appendix) that the Hughes-Warren or subjective approach is adopted.

(b) *Only Police or Their Agents May Entrap.*—Proposed subsection (3) limits the defense to those who have been entrapped by "a law enforcement agent" of a Federal, State or local law enforcement agency, and "any person cooperating with such an agency or acting in the expectation of reward, pecuniary or otherwise, for aiding law enforcement." The cases justify the exclusion of entrapments by private citizens[114] unless, of course, the private citizen acts in concert with the police.[115] However, paid informers and persons who act under a promise of immunity have been considered to be government agents. Even the expectation of leniency by one who has previously been a

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[112] Donnelly, *supra* note 17, at 1114. ABRAHAMSEN, CRIME AND THE HUMAN MIND 93–126 (1944), explains the meaning of these terms. *See also* Rotenberg, *supra* note 18, at 893.

[113] CAL. PENAL CODE REVISION PROJECT § 550, Comment at 50 (Tent. Draft No. 1, 1967).

[114] *Byerley* v. *State*, 417 S.W.2d 407 (Tex. Crim. App. 1967); *Johnson* v. *United States*, 317 F.2d 127, 128 (D.C. Cir. 1963) (dictum); *Papadakis* v. *United States*, 208 F.2d 945, 954 (9th Cir. 1953); *Pearson* v. *United States*, 378 F.2d 555, 561 (5th Cir. 1967); *Henderson* v. *United States*, 237 F.2d 169, 175 (5th Cir. 1956); *Gonzales* v. *United States*, 251 F.2d 298 (9th Cir. 1958); *Kott* v. *United States*, 163 F.2d 984 (5th Cir. 1947); *Jundra* v. *United States*, 69 F.2d 429 (5th Cir. 1934).

[115] *State* v. *White*, 151 N.W.2d 552 (Iowa 1967).

police informer may suffice.[116] Under *Sherman* v. *United States*, the test of whether a government is to be accountable for entrapments by private citizens is whether there was a pre-existing relationship between the entrapper and the police upon which the entrapper could count for his reward. In contrast, subsection (3) does not require a pre-existing relationship as a basis for "the expectation of reward . . . for aiding law enforcement."

Entrapment will exist as a defense in the Federal courts even though the entrapper is a State official.[117] It was thought best to define those nonpublic officials whose entrapments will give rise to a defense as persons "cooperating with law enforcement agencies," *etc.*, rather than as their "agents," as in Illinois.[118] Concepts of agency would but add confusion to an already much befuddled field.

(c) *Probable Cause or Reasonable Suspicion Prior to Governmental Inducements.*—Proposed section 702 does not propose to limit governmental inducements to those situations in which the government has "some knowledge at the time of the offer that its target might respond to a criminal suggestion." [119] This so-called "reasonable suspicion" criterion has been engrafted onto the entrapment defense by a few courts [120] apparently by analogy to the probable cause standard for an arrest and a search and seizure. Yet the application of this additional test has been haphazard, irregular, and contradictory.

The standard has been applied in either one of two forms:

(i) lack of reasonable suspicion by the police of the defendant's predisposition requires an acquittal of the defendant on an entrapment theory so long as there has been some police inducement and in spite of the predisposition of the defendant to commit this crime; *or* [121]

(ii) reasonable suspicion by the police of the defendant's predisposition negates the entrapment defense in spite of extraordinary practices of inducement by the police.[122]

Neither the Model Penal Code's entrapment section nor its accompanying commentary adverts to this "reasonable suspicion" requirement. It is likely that the authors of the Model Penal Code's formulation felt that this issue could best be resolved within the context of their standard as proposed. The test there, as here, is an objective one, *i.e.*, has the police conduct fallen below the minimum standards of decency required by society in the conduct of police affairs so that

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[116] *Cratty* v. *United States*, 163 F.2d 844 (D.C. Cir. 1947); *Hayes* v. *United States*, 112 F.2d 676 (10th Cir. 1940); *Sherman* v. *United States*, 356 U.S. 369, 373–374 (1958).

[117] *Billingsley* v. *United States*, 274 F. 86 (6th Cir.), *cert. denied*, 257 U.S. 656 (1921).

[118] ILL. REV. STAT. c. 38 § 7–12 (1965).

[119] Orfield, *supra* note 41, at 48.

[120] *Childs* v. *United States*, 267 F.2d 619 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 948 (1959); *Weathers* v. *United States*, 126 F.2d 118 (5th Cir.), *cert. denied*, 316 U.S. 681 (1942); *See also Washington* v. *United States*, 275 F.2d 687, 690 (5th Cir. 1960) ("good cause").

[121] *Wall* v. *United States*, 65 F.2d 993, 994 (5th Cir. 1933); *United States* v. *Certain Quantities of Intoxicating Liquor*, 290 F. 824 (D.N.H. 1923); *Williamson* v. *United States*, 311 F.2d 441 (5th Cir. 1962).

[122] *Trice* v. *United States*, 211 F.2d 513, 516 (9th Cir.), *cert. denied*, 348 U.S. 900 (1954); *Heath* v. *United States*, 169 F.2d 1007, 1010 (10th Cir. 1948); *see generally* Orfield, *supra* note 41, at 48–50; Note, 28 COLUM. L. REV. 1067, 1070–1071 (1928); Hitchler, *supra* note 41, at 201.

it bears a significant risk of embroiling innocent persons in criminal behavior. In determining whether police conduct meets the measure of this standard, it is necessary to evaluate a number of factors, of which their reasonable suspicion of the accused's predisposition is but one. The nature of their activity, its duration, and other factual considerations bulk large in resolving this objective test. None of these matters are specifically enumerated, but that is not to say that they are not relevant in a final appraisal of the police conduct.

It seems preferable to leave the matter of "reasonable suspicion" by a police agent unstated, as are the other factual determinants of an entrapment situation. It will be within the court's discretion to weigh those considerations it deems to be relevant on the ultimate issue of governmental misconduct. Some courts may test the reasonableness of the police officer's conduct in the circumstances according to the existence or absence of his reasonable suspicion of the accused's criminal propensities. Others may disagree. And there will undoubtedly be some courts that will determine that the constitutional prohibition against the denial of equal protection of the laws might mandate a reasonable suspicion requirement.[123]

In any event, it is somewhat unrealistic to suppose that the police will waste their time and efforts in indiscriminate entrapments against the innocent and the predisposed alike. Such random selection is more likely to be the hallmark of the civilian informer, as to whom some courts have found entrapment as a matter of law.[124]

The various training manuals for undercover agents of the Treasury Department do not avert to the necessity for a reasonable suspicion prior to engaging in undercover operations as to a particular suspect, all, that is, except the manual for Internal Revenue agents which does adjure its agents to have "grounds for believing a subject intends to violate the law" [125] before launching an undercover investigation. It is assumed that the other agencies, for the sake of agent economy if for no other reason, operate under similar, albeit unwritten, rules.

(d) *Providing Opportunity is Not Entrapment.*—The last sentence of proposed subsection (2) has been taken bodily from the Illinois entrapment statute. The provision is probably unnecessary since it is implicit within the statute. Yet, it is included out of an excess of caution and because it seems best, as a matter of policy, to announce openly that not all police encouragements to crime are forbidden. The New York revision and the proposals in California and Michigan are in harmony with this view. And in *Osborn* v. *United States*,[126] the leading United States Supreme Court case on entrapment since *Sherman*, the Court makes it clear that the entrapment defense was not designed to include the mere providing of opportunities to one who is ready and willing to accept them.

On the other hand, it is submitted that there is utterly no warrant for including the New York provision, which reads:[127]

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[123] Orfield, *supra* note 41, at 56n.103. *Cf. Whiting* v. *United States*, 321 F.2d 72, 76 (1st Cir.), *cert. denied*, 375 U.S. 884 (1963).

[124] *Williamson* v. *United States*, 311 F.2d 441 (5th Cir. 1962), *cert. denied*, 381 U.S. 950 (1965) (civilian informer operating on a contingent fee arrangement with the police). *But cf. Hoffa* v. *United States*, 385 U.S. 293 (1966); *Lewis* v. *United States*, 385 U.S. 206 (1966); *Osborn* v. *United States*, 385 U.S. 323 (1966).

[125] *See* MANUAL, *supra* note 5.

[126] 385 U.S. 323 (1967).

[127] N.Y. REV. PEN. LAW § 35.40 (McKinney 1967).

> Inducement or encouragement to commit an offense means *active* inducement or encouragement.

Only New York and Michigan use this language, which is reminiscent of hornbook distinctions between malfeasance and nonfeasance. The heritage of those cases which have drawn a distinction between active and passive conduct is not a happy one[128] and should not be encouraged here. Indeed, some have said that all police encouragements must be active to be effective,[129] but others have disagreed,[130] although without elaborating the line that distinguishes active from passive conduct. In any event, the requirement of active conduct would seem to be implied within the statutory statement that "affording a person an opportunity to commit an offense does not constitute entrapment."

(9) *Specific Comment on Subsection (4) of the Proposed Entrapment Statute.**

(a) *Burden of Proof; Triable by Court or Jury.*—Proposed subsection (4) confronts issues of large procedural dimensions in connection with the entrapment defense. The issues are two:

(i) should the prosecution or the defendant have the burden of proof as to entrapment?

(ii) should the court or the jury decide the issue of entrapment?

As is true of the concepts embraced by proposed subsection (2), these issues have also split the Supreme Court.[131] The Hughes-Warren view would put the burden on the defendant to show government inducement, whereas the government must prove the defendant's predisposition. This bifurcation is not retained in section 702 in accord with the Model Penal Code and a recent opinion from the First Circuit.[132] Under this section and section 103 (proof and presumptions) the defendant must prove the governmental misconduct by a preponderance of the evidence. And, unlike other defenses to crime,[133] whether he has done so or not is for the court, not the jury, to decide, unless the defendant elects otherwise.

The jury is the favorite of those who view the entrapment situation as one particularly suited to the traditional abilities and functions of a jury. It is said that matters of credibility and subjective response to the stimulus of an entrapment are appropriately within the ken of jury.[134] Moreover, the jury, if it wishes, can acquit because of the moral revulsion which the police conduct evokes in them, notwithstanding any amount of convincing evidence of the defendant's predisposition. A judge must toe a straighter line. Of course, if entrapment is viewed as reaching the merits of the issue of guilt or innocence. then the defendant's right to a jury trial would oppose a judicial determination of this issue.

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[128] *Lambert* v. *California*, 355 U.S. 225 (1957); *United States* v. *Juziciak*, 258 F.2d 844 (2d Cir. 1958), *cert. denied*, 359 U.S. 939 (1959).

[129] Rotenberg, *supra* note 18, at 877.

[130] Comment, *supra* note 14, at 995.

*Subsection (4) has been deleted. See (3) (b), *supra*.

[131] *See Sorrells* v. *United States*, 287 U.S. 435 (1932), and *Sherman* v. *United States*, 356 U.S. 369 (1958).

[132] *Kadis* v. *United States*, 373 F. 2d 370 (1st Cir. 1967).

[133] *Davis* v. *United States*, 160 U.S. 469 (1895) (burden of proof on the issue of insanity is on the prosecution).

[134] DeFeo, *supra* note 41, at 270–271 lists the arguments pro and con.

Most scholarly writing [135] favors a judicial determination of entrapment, whereas the courts hew closely to the majority view in *Sorrells* and *Sherman*,[136] which leaves the question to the jury, except in those rare instances where entrapment is established as a matter of law. It is possible that a judicial pronouncement on this subject will present the police with a more definite guide to future action, than will a jury verdict, which may or may not be directly related to the entrapment defense. After all, the entrapment defense is grounded in a serious desire to deter police misconduct. Thus, standards are necessary and the courts are most skilled in this pursuit.

Concededly, entrapment will raise a host of factual issues, but the courts always resolve such matters when their jurisdiction is challenged. And the court is apt to decide factual issues unencumbered by the prejudice that will inevitably arise from proof of the defendant's predisposition. Some have even said that the question of "the civility of police conduct goes to the very jurisdiction of the court." [137]

(b) *Defendant's Past Record.*—The entrapment statute does not contemplate that the defendant's past misconduct will be admissible on the entrapment question, at least until the defendant takes the witness stand. The possibility of prejudice and obfuscation of issues which are the common upshot of emphasizing the defendant's past or even future [138] misdeeds warrants this provision. The California courts have long operated with this limitation upon the entrapment defense.[139] Also, the District of Columbia Circuit, in acknowledgement of this point, has recently drawn new and restricted guidelines for the admissibility of a past record on the entrapment issue.[140] The majority in *Sherman* was appreciative of the dangers lurking here. In this regard, the argument against the admission of a prior record is similar to that which moved the Supreme Court to require a separate and independent hearing on the voluntariness of a confession.[141]

(c) *Not Guilty Plea and Entrapment Defense—No Improper Inconsistency.*—The first sentence of proposed section 702(4) is designed to permit the defendant simultaneously to deny that he committed the offense and to claim an entrapment. The section, therefore, allows the defendant to plead inconsistent defenses. No similar statutory provision appears in the entrapment statute of the Model Penal Code nor does its commentary mention this situation.

As a general rule of civil procedure, inconsistent defenses are permitted even though they may tend to confuse the jury.[142] In criminal law, too, the usual rule allows a defendant to go to trial on inconsistent defenses.[143] Permissiveness exists in both civil and criminal

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[135] MODEL PENAL CODE § 210, Comment at 21 (Tent. Draft No. 9, 1959); Williams, *supra* note 88, at 417; Cowen, *supra* note 41, at 452–453; Note, *supra* note 88, at 1040–1041.

[136] *United States* v. *Markham*, 191 F.2d 936 (7th Cir. 1951); *Nero* v. *United States*, 189 F. 2d 515 (6th Cir.), *cert. denied*, 342 U.S. 872 (1951); *Butler* v. *United States*, 191 F. 2d 433 (4th Cir. 1951); *State* v. *Cook*, 263 N.C. 730, 140 S.E. 2d 305 (1965); *State* v. *Pachero*, 13 Utah 2d 148, 369 P. 2d 494 (1962).

[137] De Feo, *supra* note 41, at 273.

[138] *Gonzalez* v. *United States*, 251 F. 2d 298, 299 (9th Cir. 1958).

[139] *People* v. *Benford*, 53 Cal. 2d 1, 345 P. 2d 928 (1959).

[140] *Hansford* v. *United States*, 303 F. 2d 219, 222 (D.C. Cir. 1962) (en banc).

[141] *See Jackson* v. *Denno*, 378 U.S. 368 (1964).

[142] FED. R. CIV. P. 12(b), 8(e)(2).

[143] 21 AM. JUR. 2d *Criminal Law* § 142 at 211 (1965); *Annot.*, 55 A.L.R. 2d 1322, 1343 (1957); *Annot.*, 61 A.L.R. 2d 677 (1958).

procedure because "the common goals of all trials, civil and criminal . . . is to arrive at the truth . . . ." [144]

Yet, with respect to entrapment, "[a] very interesting, highly criticized, and apparently waning rule" [145] has operated to deprive the defendant of the defense of entrapment unless he admits having committed the criminal act. But this rule is not uniformly followed.[146] Nor is it without large and important exceptions. It is said that the rule will not apply if the government injects the issue of entrapment into the case.[147] Nor is it applied where, by a judicial sleight-of-hand, there is found to be no impermissible inconsistency.[148]

Of course, there can be no inconsistency between defenses "so long as the proof of one does not necessarily disprove the other." [149] Thus, if the defense of entrapment relates to police misconduct rather than to the accused's innocence of the crime charged, a not guilty assertion is not inconsistent with the defense of entrapment. On this view, which is the position taken in proposed subsection (2), the first sentence of subsection (4) would be unnecessary. But it is suggested that it be retained as a matter of caution.

It can be argued that even if entrapment and a not guilty plea are inconsistent, still the demands of justice in a criminal case are such that both should be allowed as alternative defenses.[150] Certainly, it is not desirable to insulate the police from censure "merely because the defendant has decided, as a matter of strategy, to deny the commission of the offense in hopes that the government cannot establish it beyond a reasonable doubt." [151] Such tactical maneuverings are not conducive to excising the sporting theory from criminal justice.

10. *Pretrial Notice of Entrapment Defense.*—Proposed section 702 does not contain a provision requiring pretrial notice to the prosecution of intent to rely on the entrapment defense.

Although some States require a defendant to give pretrial notice of certain defenses, there appears to be no State jurisdiction in which the defendant must either specially plead or give advance warning that he will raise an entrapment defense. Under the common law, a not guilty plea sufficed to raise all existing defenses.[152] But today some 10 States [153] require a special plea of not guilty by reason of insanity and

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[144] *Henderson* v. *United States*, 237 F.2d 169, 172 (5th Cir. 1956).

[145] Orfield, *supra* note 41, at 65; *see also Annot.*, 61 A.L.R. 2d 677 (1958).

[146] *Hansford* v. *United States*, 303 F.2d 219 (D.C. Cir. 1962); *Crisp* v. *United States*, 262 F.2d 68, 70 (4th Cir. 1958); *People* v. *Asta*, 59 Cal. Rptr. 206, 221 (5th Cir. Ct. App. 1967); *People* v. *Perez*, 62 Cal. 2d 769, 401, P. 2d 934, 44 Cal. Rptr. 326 (1965).

[147] *Sears* v. *United States*, 343 F.2d 139, 143 (5th Cir. 1965); *Notaro* v. *United States*, 263 F.2d 169 (9th Cir. 1966).

[148] *Crisp* v. *United States*, 262 F.2d 68 (4th Cir. 1958); *Henderson* v. *United States*, 237 F.2d 169 (5th Cir. 1956).

[149] *McCarty* v. *United States*, 379 F.2d 285 (5th Cir.), *cert. denied*, 389 U.S. 929 (1967).

[150] *See Hansford* v. *United States*, 303 F. 2d 219 (D.C. Cir. 1962).

[151] Orfield, *supra* note 41, at 66 n. 166.

[152] ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 305 (1947) [hereinafter cited as ORFIELD].

[153] Alabama, California, Colorado, Indiana, Louisiana, Maryland, Ohio, Washington, Wisconsin, and Wyoming; the list is taken from WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 357 (1954) [hereinafter cited as WEIHOFEN].

another 7 or so States require pretrial notice of intent to rely on an insanity defense,[154] although not a special plea. In the Federal system, the Second Preliminary Draft of the Proposed Amendments to the Federal Rules of Criminal Procedure (March 1964) would have imposed a pretrial notice requirement on the right to raise the insanity defense, but that proposal was not included in the Rules as amended. More recently, Congress, in revising the District of Columbia Code, enacted a provision requiring pretrial notice of insanity in any criminal proceeding in the District of Columbia criminal courts.[155]

The defense of alibi cannot be raised in some 15 States [156] unless pretrial warning is given to the prosecution of the defendant's intention to do so. Pennsylvania was one of the most recent States to approve this view. [157] The latest revisions to the Federal Rules of Criminal Procedure do not include this requirement, although it had been proposed in the 1962 Preliminary Draft.[158] The draftsmen of the extensive and thoughtful revisions to the Louisiana Code of Criminal Procedure rejected an alibi notice statute arguing that:[159]

> It was their consensus that the state should be prepared to meet possible alibi defenses just as it should be prepared to meet other defenses such as self-defense, lack of some element of the crime, etc.

Except for the sweeping recommendations of the Wickersham Commission that all affirmative defenses be pleaded specially,[160] most scholarly opinion limits the pretrial notice requirement to the defenses of self-defense, alibi, and insanity.[161] No one has as yet proposed that the entrapment defense be included in that category.

The silence of the commentators with respect to entrapment speaks tellingly against the enactment of such a notice requirement. The scholars and the legislatures have been concerned lest the prosecution be disadvantaged in the presentation of its case by a surprise defense. Surprise might well exist as to alibi, self-defense, or insanity, but it is unlikely that an entrapment defense would catch one who is party to the offense off guard. And there is an element of possible self incrimination involved here, which can be particularly acute if entrapment is considered to be inconsistent with a defense on the merits. A refusal to allow the defendant to testify on this issue at the trial where pretrial notice had not been given would give rise to troublesome issues under the self incrimination clause. Moreover, under the Roberts view

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[154] Florida, Iowa, Michigan, Oregon, Utah, Vermont and apparently also Arkansas: list compiled in WEIHOFEN, *supra* note 153, at 358–359.

[155] Pub. L. No. 90–226, Tit. II § 201(j) (1967).

[156] Arizona, Indiana, Oklahoma, Iowa, Kansas, Michigan, Minnesota, New Jersey, New York, Ohio, Pennsylvania, South Dakota, Utah, Vermont, Wisconsin: list appears in ORFIELD, *supra* note 152, at 308n.173.

[157] PA. R. CRIM. P. 312 (1965).

[158] FED. R. CRIM. P. 12a.

[159] LA. STATE LAW INST., C. CR. PROC. REV., EXPOSE DES MOTIFS, No. 17, Title XVI, Arraignment and Pleas 16–17 (March 16, 1962).

[160] NATL. COMM. ON LAWS OBS. AND ENF., REP. ON CRIM. PROC. 34, 47 (1931).

[161] Millar, *The Statutory Notice of Alibi*, 24 J. CRIM. L. 849 (1934); Millar, *The Modernization of Criminal Procedure*, 11 J. CRIM. L. 344, 351 (1920).

of entrapment [162] a failure to raise the defense would not bar it since the court should notice it on its own motion as a matter of self-protection.

On balance, therefore, it was thought wiser to propose neither a requirement that a special plea of entrapment be tendered nor a requirement that pretrial notice be given. In any event, it would be inappropriate in a substantive Code of criminal law.

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[162] *Sorrells* v. *United States*, 287 U.S. 435, 457 (1932).

APPENDIX

ALTERNATE FORMULATION

(1) A person may not be convicted of an offense if he has been entrapped into committing it. A person is entrapped into committing an offense when a public officer or a person acting in cooperation with a public officer for the purpose of obtaining evidence of the commission of an offense, induces or encourages him to commit an offense when he is not then otherwise ready to commit it. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

(2) A person shall be acquitted if, when the issue of his entrapment is fairly raised by the evidence, the government fails to sustain its burden on proving beyond a reasonable doubt that the conduct did not occur in response to an entrapment. Evidence of a defendant's prior criminal conduct is inadmissible on the issue of entrapment unless the defendant testifies. The issue of entrapment shall be decided by the jury, unless the court finds that entrapment exists as a matter of law.

Comment

Alternate subsection (1) expresses the view that entrapment is a defense only when two determinations are made. First, the conduct of the government must have caused the accused to perform the acts for which he is charged. And, second, the accused must have been reluctant to commit the offense, and his reluctance overcome by the inducements of the government. This proposal combines the elements of governmental encouragement and the accused's lack of predisposition before a defense of entrapment may be established. The main thrust, however, of this formulation of the defense is to the innocence of the accused of responsibility for the crime charged. An acquittal, here, unlike one under section 702, means that there is reasonable doubt of the accused's guilt.

If alternate subsection (1) is adopted, it is suggested that alternate subsection (2) should also be approved, since it is integrally related to alternate subsection (1), that it is the accused's innocence which gives rise to the entrapment defense. It places the burden of proof on this issue on the government, as is the case with other defenses which refer to the question of the innocence or guilt of the defendant, *i.e.*, insanity. It gives the jury the task of determining, as a factual matter, whether the defense sufficiently appears. And it attempts to insulate the nontestifying defendant who claims an entrapment from the serious possibility of prejudice if his past criminal behavior were admissible into evidence against him.

COMMENT

on

MULTIPLE PROSECUTIONS: SECTIONS 703–708

(Rosett, Green; May 8, 1969)

1. *Background; Purposes.*—The statutory provisions proposed in the draft will represent the first attempt by Congress to deal comprehensively with a significant set of problems in the Federal system of criminal justice which have heretofore been left for haphazard—and sometimes unsatisfactory—judicial decisions and prosecution policy. These problems are grouped under the general heading "multiple prosecutions" and include both the prosecution of more than one crime at a time and successive prosecutions for the same or related conduct.

Successive criminal prosecutions present uniquely difficult problems in our Federal system when one prosecution is brought under State authority and the other is for violation of Federal law. In a few instances Congress has dealt with the question whether there can be a Federal prosecution after a State conviction or acquittal based on the same conduct.[1] But generally it has been left to the Attorney General to promulgate general policy on successive prosecutions within the framework of opinions of the Supreme Court. Of course the Attorney General has very limited direct power to control those situations in which a State brings a prosecution after the Federal conviction is obtained. One of the proposed sections (§ 706) states a general legislative policy on the question, dealing with Federal prosecution after prosecution by a State or foreign country. Another (§ 707) deals with the converse situation in which State prosecution follows Federal conviction or acquittal—by means of a procedure only the Congress can establish.

The draft proposes such other reforms as: (a) barring multiple trials for charges based on essentially the same or related conduct, even though technically not the same offense; and (b) defining the circumstances in which a second trial is permissible after a first trial is terminated before reaching a conclusion.

The draft also codifies a number of existing judge-made rules, including those that (a) allow conviction of an included offense which is not explicitly charged in the indictment or information, but the included offense need not be submitted to the jury unless there is a rational basis for acquitting of the inclusive offense and convicting of the included offense, and (b) permit the appellate court to enter judgment for an included offense if the inclusive offense is dismissed for insufficiency of the evidence after verdict.

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[1] *E.g.*, 18 U.S.C. §§ 659, 660, 1992, 2117.

Section 703 focuses on those situations where more than one offense is involved in a single prosecution. This section deals with questions of multiple charging, multiple trials, and multiple convictions. The remaining five sections, sections 704–708, deal with successive prosecutions arising out of the same or related conduct. Not all of the problems of multiple and successive prosecutions are dealt with in the draft statutes. Multiple sentencing, the question of when cumulative punishment may be imposed for related crimes, is governed by the sentencing provisions (section 3206) as are resentences (section 3006) which recent cases suggest are governed by double jeopardy considerations. Questions of joinder and severance of defendants and crimes will continue to be governed by the Federal Rules of Criminal Procedure and common law rules of pleading.

2. *Multiple Offense Problems Generally.*—Rarely is there only one possible charge that can be brought as a result of a person's criminal activity. For example, a theft of goods from an interstate shipment in violation of 18 U.S.C. § 659 may lead to possible charges of stealing, possessing, transporting, and receiving the goods. The forgery of a social security check is likely to provide a basis for a comparable number of offenses under 18 U.S.C. § 495, including the forgery, uttering, and presentment or negotiation of the instrument. Some of the most bizarre examples of multiplication of charges can be found under the alcohol and narcotics control laws, where there is a wide variety of statutes drawing upon different jurisdictional bases and defining a maze of overlapping but separate offenses for each small step of the total operation of moonshining or selling narcotics.

Too often problems of multiple crimes are treated as if they turn on the logical or metaphysical question: "What collection of events constitutes a single crime?" This phrasing of the question is unacceptable because it provides no help in defining the important practical contexts in which multiple prosecution problems arise. Nor does it help identify the complex interests to be served by any rule and the very different constraints on action likely to be encountered. As already noted, some of these issues are matters of pleading, others of judicial economy, while others are essentially problems of sentencing and the correction of offenders. Issues involving successive trials are likely to be governed by judicial fairness doctrines as well as the double jeopardy clause of the fifth amendment, and the scope of permissible legislation is limited.

The premise of this draft is that the problem of multiple offenses is not so much one of metaphysics or logic as it is one of penal administration. It is not so much a matter of the number of offenses for which a person shall stand convicted, but of how offenders should be dealt with and the duration of permissible punishment reasonably determined. If this approach is recognized the need to reform existing law becomes clear.

There are at least three kinds of situations that give rise to multiple offenses:

(a) Most of the attention of the draft statute is directed at those situations in which one act may constitute two or more includable offenses. This category includes not only the familiar lesser included offense, but also those situations, many of which will be remedied in the new Code, in which a single act is punishable under a special as

well as a general statute, such as bank robbery and a general robbery statute. It also includes situations in which a single activity is divided into different independent parcels, different stages of which are made separately criminal. Examples of this include the attempt and the consummated crime, burglary and larceny, or unlawful entry and robbery under the Federal Bank Robbery Act. This category also includes situations in which the existence of a specific state of mind enhances the seriousness of the basic crime. Finally, there are situations in which different legal norms enter into apparent or real competition for the punishment of the same act. An example of apparent competition might be drug laws which control the importation of drugs, tax their sale, and prohibit their prescription except by a licensed physician pursuant to a written order. All of these regulatory schemes are directed at the single end of controlling drug use and are not really competitive, although cases have allowed separate punishments for violations of two or more regulatory schemes by a single act of selling drugs which are illegally imported and upon which the tax has not been paid without a prescription. One can imagine activities which violate two entirely independent sets of norms, such as the sale of liquor on Sunday or the forcible rape of a near relative.

(b) A second major category of multiple offenses encompasses those in which different crimes are closely related in time and are all part of a single course of conduct. An illustration has already been provided above in the discussion of section 495 of Title 18. The theft of a social security check typically involves stealing from the mail and the possession of stolen postal matter. The writing of the signature on the back of the check is one offense, the possession of the check so forged is a second, its presentation for payment is a third. Often, however, the parceling of a course of conduct into the separate offenses does not involve this kind of fine logic chopping. A basic scheme to rob a bank is likely to involve a whole series of logically unrelated criminal acts, such as the theft of an automobile for a getaway car, the entry into the bank with firearms for purposes of committing a felony therein, the actual theft, assaults upon bank employees, often a kidnapping, the transportation of the proceeds in interstate commerce, and sometimes a shootout with arresting officers. During the course of this scheme interstate communications facilities may be used as well as the mails. Because both offenses in one episode are not inevitable, even though commonly committed together, the theft of the getaway car and the murder of the bank guard are regarded less as one offense than are the forging and uttering of the social security check.

Present rules of pleading and proof also treat as multiple offenses for joinder purposes a series of entirely independent crimes that are related in time, such as a series of liquor store holdups or sales of narcotics to different persons at different times. The draft treats this category of multiple crimes primarily in the context of joint trial, that is, whether all related offenses may or must be tried together. The sentencing part (section 3206) deals with whether a defendant convicted of more than one related offense may be subjected to consecutive punishment.

(c) A third category of multiple offenses includes those relatively unusual situations in which one act results in injury to two or more persons. A single muscular contraction around the trigger of a gun

may cause a bullet to pass through the bodies of a number of persons, killing one or more.[2] Frequently it is difficult to decide whether a course of conduct comes under this heading or under the second category. For example, the mailing of a thousand copies of a printed brochure to different persons on a mailing list as part of the scheme to defraud may be what is essentially one act of the defendant. Schemes to churn and manipulate the securities market in violation of the Securities Exchange Act of 1934 may involve a whole series of transactions which only become criminal in the effect of their totality to manipulate the market price. Violations of section 10(b)(5) of the Securities Exchange Act may consist of a single utterance of words by a corporate official to a newspaper reporter who in turn disseminates these words to the entire nation with the end result that millions of persons are defrauded. The Draft does not focus specifically on this category of multiple offenses, as these problems are best resolved by careful drafting of the substantive provisions of the Code defining the particular offense.

The interests involved.—The possibility that charges and punishment may be multiplied or that successive prosecutions will be brought for the same conduct offends our sensibilities in a number of ways. When separate prosecutions are threatened for a single episode of criminal conduct, the traditional notions of res judicata and collateral estoppel as well as judicial economy argue against relitigating questions already resolved. A closely related idea is that the state should not be able to pile on prosecutions and reprosecute a defendant when it is dissatisfied with the verdict or punishment imposed after the first prosecution. Fears of political oppression and official abuse cause us to refuse to allow the state to apply the maxim, "If at first you don't succeed, try, try again."

The multiplication of charges and punishment in a single criminal proceeding seems to be at variance with at least two related policies. One is that the legislature, by fixing a punishment for a crime, has determined the maximum level of penalty for that conduct. When the prosecutor is permitted to multiply a single act and to convert it into a series of criminal acts, each carrying cumulative punishment, this legislative policy is defeated. A second basic idea is that for one man there should be one punishment; that is, that the criminal penalties are not so much directed toward retribution and the vindication of past conduct as they are aimed toward the offender as a person, his correctional needs, and the protection of society. (Deterrence is irrelevant as a correctional consideration when the commission of a second offense is essential to make the commission of the first worthwhile.) It is hard to argue that persons who commit violations of the various subheading of section 495 of Title 18 in a single forgery of a check are more dangerous than persons who simply put their signature on the check, or who pass it. The logic of atomizing offenses is difficult to accept in any event, but it becomes nonsensical when we recognize that the issue is basically one which appropriately is decided in terms of the social danger or correctional needs of the offender. If we are concerned with the ultimate social reintegration of the offender there ought to be a way for a man to make quits of his criminal career and

[2] *Ladner* v. *United States*, 358 U.S. 169 (1958).

to wipe the whole slate clean at one time. He should be able to emerge from the criminal system confident that he isn't going to be hit with stale charges, detainers, and further prosecution. All of these interests compel a policy that requires a state to punish once and not to multiply that punishment by artificial distinctions of pleading and proof.

3. *Multiple Charges.*—Cumulative pressures lead prosecutors to multiply the individual counts in an indictment or information. There is a high degree of uncertainty at the time of charge as to just what the proof at trial will be. The speed which is essential to a humane and efficient system of criminal administration compounds this uncertainty, for a prosecutor often must draw the charge very shortly after the crime or arrest and is not free to engage in extensive discovery and investigation while the defendant is in custody awaiting trial.

The sixth amendment right to a grand jury indictment has been understood severely to restrict the prosecutor's right to amend indictments, and this combines with the rules concerning variance to place a heavy penalty on the prosecutor who does not plead to cover every contingency of proof at trial. Returning to the hypothetical concerning the forgery of the social security check, reliance solely upon a forgery charge is likely to lead to disaster if, as is too often sadly the case, the expert handwriting witness lacks credibility or the person who accepted the check proves a weak identification witness at trial. In such a situation, however, it is likely that the theft of the instrument from the mail or its possession by the defendant can be independently proved without these weak witnesses.

Rules of criminal pleading also lead a prosecutor to break down his charge into as many counts of individual offenses as possible. The prosecutor is justifiably apprehensive of violating the hypertechnical rules of multiplicity and duplicity which are said to be related to the defendant's sixth amendment right to be specifically informed of the precise charges against him. A parallel pressure is exerted by the prosecutor's desire to present the judge and jury with narrow, clear issues of fact.

The dynamics of criminal justice administration also contribute to the multiplication of charges. Most criminal charges are disposed of by a plea of guilty, which often is the product of explicit or tacit negotiations between prosecutor and defense counsel. The multiplication of charges provides both lawyers with leverage for negotiation, even when as a practical matter there can be only one conviction or sentence and the likelihood of consecutive sentences is remote. Often a defendant can be persuaded to plead guilty to one charge on the assurance that the remaining 27 counts will be dismissed. Some judges express resentment when a prosecutor presents a 1 count indictment or information, complaining that this unduly restricts their sentencing flexibility.

Finally, the impact of the multiplicity of charges on proof at trial must be recognized. Some judges will not allow proof of similar acts not charged in the indictment and sometimes a prosecutor will be limited in showing the entire transaction if it includes other criminal offenses not charged. All of these pressures to charge as large a number of offenses as possible tend to be aggravated by the prosecutor's perception of himself as the avenging agent of society. Certainly there is often more emotion than sense in the 100 count indictment, but the

existing rules provide few countervailing pressures, or even escapes, through which the prosecutor can avoid the multiplication of charges.

Turning to the proposed draft of section 703(1), it candidly must be noted that the revision does little to relieve the pressures that lead the prosecutor to overcharge and, therefore, holds litle hope of reducing the likelihood of overcharging. The thrust of section 703(1) is to make clear the prosecutor's right to charge a defendant with each offense established by his conduct and to place no limit on the number of charges that may be brought on the basis of one act or transaction. The pressures for overcharging come primarily from basic organizational and dynamic aspects of the prosecutorial system of criminal justice, as well as from the substantive definitions of particular crimes, and to this extent are not amendable to effective reform by a mere change in pleading rules. In sum, the approach taken in this draft is that of existing case law, which leaves problems of multiplicity of charges to the traditional judicial remedies of the bill of particulars and the election between counts at the close of the government's case.[3] These remedies, while of limited help in preventing abuse at the plea negotiation stage of the case, at least avoid the risk that prolix pleading may have some psychological effect upon a jury by limiting the number of offenses submitted for its consideration.[4]

4. *Multiple Trials.*—Issues of joinder and severance are largely beyond the scope of the Code, but it is impossible to deal with the problems of multiple charges without considering whether such charges may be tried together or, conversely, whether multiple charges may be tried separately and successively. As a general principle, it would appear in everyone's interest to dispose of all charges arising out of a single criminal transaction in a single trial and to dispose of all outstanding criminal charges against a single defendant at one time. The defendant is likely to object to this procedure when codefendants are involved and testimony against them may prejudice his case. He is also likely to object when this joinder results in a cumulation of weak cases against him in which the whole is much greater than the sum of the parts.

There are a few situations in which one can justify a prosecutor's not bringing all charges known to him against a single defendant at one time. More often, the second prosecution is a means of obtaining redress for what the prosecutor considers an unjustifiably lenient result in the first case or of maintaining leverage against a defendant he hopes will cooperate by testifying or providing information sought by the government. As proposed in section 703(2), many of the problems of multiple charges can be ameliorated by a rule of compulsory joinder of criminal charges in which the prosecutor and defendant are given the right to move for a severance in those cases in which the joined trial would prejudice their interests.

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[3] *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 225 (1952): "A draftsman of an indictment may charge crime in a variety of forms to avoid fatal variance of the evidence. He may cast the indictment in several counts whether the body of facts upon which the indictment is based gives rise to only one criminal offense or to more than one. To be sure, the defendant may call upon the prosecutor to elect or, by asking for a bill of particulars, to render the various counts more specific."

[4] *United States* v. *Ketchum*, 320 F.2d 3, 8 (2d Cir. 1963); *United States* v. *Mamber*, 127 F. Supp. 925 (D. Mass. 1955).

Such an approach would not be without its costs. As one commentator has noted: [5]

> By eliminating the opportunity for afterthought, compulsory joinder would deprive the prosecutor of the means to correct what he considers a failure of justice. Thus put on notice that there will be no second chance, the prosecutor's probable reaction will be to multiply and magnify the possible offenses within a single indictment, thereby enhancing the likelihood of conviction, and the chance of cumulative punishment.

One result of a compulsory joinder provision would be to substantially raise the price on faulty pleadings by a prosecutor. In an age in which civil pleadings have gained great flexibility, it would seem undesirable to further increase the preoccupation with technical precision of pleading in criminal cases. The vitality of the highly technical approach can be seen in such cases as *Stirone* v. *United States*, 361 U.S. 212 (1960), and *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563, 571–572 (2d Cir. 1961); *see also* the dissent of Harlan, J., in *Russell* v. *United States*, 369 U.S. 749, 781, 792 (1962). A solution to this difficulty might be freer permission to use superseding or amended indictments for trial and greater tolerance for variation or amendments of a relatively minor sort to cure difficulties that arise at trial or to conform the pleadings to the proof as is permitted under the civil rules.

Proposed subsections (2) and original (3)* of section 703 are derived from the Model Penal Code.[6] The draft requires that all offenses arising out of the same conduct or episode and known to the prosecutor at the time of indictment be joined in single prosecution. Some problems created by a compulsory joinder provision can be mitigated if the court is granted authority to order separate trials in appropriate cases, as provided in original subsection (3).

The compulsory joinder rule is consistent with existing government administrative policy under the so-called *Petite* rule. In *Petite* v. *United States*, 361 U.S. 529 (1960), the defendant was prosecuted in two different district courts for false statements arising out of the same deportation proceeding. He pleaded nolo contendere to a conspiracy charge in one district and the government dismissed the remaining counts of the indictment. Subsequently he was indicted in another district for suborning perjury in the same proceeding. The subornation in question had been alleged as an overt act in the conspiracy indictment to which the defendant pleaded nolo contendere.

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[5] Cipes, *Criminal Rules* § 8.07[3], 8 MOORE'S FEDERAL PRACTICE 8–59 (1967).

* The draft originally had a subsection (3) which read as follows:

"(3) Authority of Court to Order Separate Trials. When a defendant is charged with two or more offenses, the court on its own motion or motion of the government or the defendant may order any such charge to be tried separately if the court is satisfied that justice so requires."

This was eliminated as being essentially procedural and thus beyond the scope of the proposed Code.

[6] The phraseology of the draft seeks to preserve the virtues of both the original Model Penal Code version (section 1.08 (2) and (3) of Tentative Draft No. 5 (1956)), and section 1.07 (2) and (3) of the later Proposed Official Draft. *See also* MICH. REV. CRIM. CODE § 150 (2), (3) (Final Draft 1967). *Cf.* PROPOSED N.Y. CRIM. PROC. LAW § 20.20 (3) (1967).

Before the Supreme Court, the government asked that the conviction be vacated and the case remanded with directions to dismiss the indictment on the ground that it was the general policy of the Federal government "that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, the policy dictated by considerations both with fairness to defendants and the efficiency and orderly law enforcement." [7]

A different approach is recommended in standards recently adopted by the American Bar Association. *See* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, JOINDER AND SEVERANCE § 1.3 (Approved Draft 1968). Under this approach the defendant must make a timely motion for joinder of charges on related offenses or waive his right to joinder as to those with which he knew he was charged. Joinder must be granted "unless the court determines that because the prosecuting attorney does not have sufficient evidence to warrant trying some of the offenses at that time, or for some other reason, the ends of justice would be defeated. . . ." A subsequent prosecution for a related offense is to be dismissed unless the previous motion for joinder was denied or the defendant's right of joinder was waived or the court makes the same determination as quoted above for the motion for joinder.

The ABA approach puts the burden on the defendant and has the virtue of avoiding severance hearings in those instances in which the defendant considers it in his best interest not to consolidate related offenses. As will be noted below, a motion by the defendant is essential if the jurisdictional bar to consolidation is to be overcome, in the case of multidistrict charges. Except for the shift in the burden of raising the issue, the essential aspects of the draft and the ABA proposal are similar. The ABA approach was not adopted because it seems important that the burden of going forward on charges clearly be placed upon the prosecution, not the defense. On grounds of basic fairness, efficiency, and practicality the defendant should not be placed in the position in which he can obtain protection from piecemeal prosecution only by asking to be prosecuted on charges which the government has known about but has not been disposed to proceed on. Stating the same point affirmatively, it seems desirable to motivate the prosecution at the time it begins court proceedings to consider the entire picture known to it and to present all charges that might feasibly be joined which it may wish to bring against the defendant at that one time.

Special prosecution problems are encountered in the Federal system when a nationwide criminal scheme may give rise to separate offenses in a number of districts or when a peripatetic offender commits distinct offenses around the country. The government may not be able to charge all offenses in a single district under existing venue rules, which are based on the sixth amendment to the Constitution. To the extent that this is a constitutional matter of jurisdictional significance, the compulsory joinder ban of section 703(2) as drafted does not apply,

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[7] 361 U.S. at 530. *See also United States* v. *American Honda Motor Co.*, 271 F. Supp. 979 (N.D. Cal. 1967); *United States* v. *American Honda Motor Co.*, 273 F. Supp. 810 (N.D. Ill. 1967); *Cf.*, *United States* v. *American Honda Motor Co.*, 289 F. Supp. 277 (S.D. Ohio 1968).

since the offenses are not within the jurisdiction of a single court. The potential for successive prosecutions could be reduced without constitutional difficulty, but not eliminated, by a broader Federal criminal venue provision allowing prosecution in a single district for all offenses that are part of a scheme, plan, episode, or course of conduct that take place in more than one district. *Compare* 18 U.S.C. § 3237. Rules 18, 20, and 21 of the Federal Rules of Criminal Procedure now permit such transfers only when requested by the defendant because of prejudice or convenience of witnesses or for purposes of guilty or nolo contendere pleas. These provisions should be broadened to permit consolidation on a defendant's motion when all offenses are part of a single scheme. It would seem generally in the interest of both the government and the defendant to dispose of all charges arising out of a multidistrict scheme in one prosecution.

The law should permit the consolidation in one district of all prosecutions involving the same defendant, even if the crimes charged are unrelated. If indictments have been returned in more than one district, the defendant should be permitted to move that they be consolidated in one proceeding and to elect whether he wants them tried separately or jointly. Either by Federal Rule or statute, provision would have to be made to permit consolidation without re-presentation to a grand jury and to overcome venue problems. As mentioned, rule 20 of the Federal Rules permits such consolidation only when the defendant pleads guilty or nolo contendere. While the court should have power to deny consolidation when it involves undue inconvenience to witnesses or when there are codefendants, the basic rule should favor consolidation.

Other special problems are created by multiple charges, multiple trials, and multiple convictions of conspiracy charges. What constitutes a single conspiracy and what delimits its scope and duration are substantive aspects of conspiracy law and they will be dealt with elsewhere.

It should be noted that the authority to grant separate trials (in original subsection (3)*) is broader than that necessary to sever offenses to be joined under subsection (2). The reason is that this provision will be the only statutory authority for severance and, in order to avoid any misunderstanding, should be as broad as the authority for permissive joinder granted in rule 8(a) of the Federal Rules of Criminal Procedure. Crimes may be joined although "not based on the same conduct or arising out of the same episode." *See, e.g., Drew* v. *United States*, 331 F. 2d 85, 90 (D.C. Cir. 1964), in which the court noted that two robberies of dairy stores 2½ weeks apart could be joined in one indictment and trial, unless such joinder would be prejudicial to the defendant. In taking this broader approach, the draft follows existing rule 14.

5. *Multiple Convictions.*—Should there be some limitation upon multiple convictions? It is clear that regulation of the number of the charges in the indictment is needed since this will affect the way the matter is presented to the jury and also evidentiary questions on trial. It is also clear that there must be a regulation of multiple trials and multiple punishments since these obviously have the most serious

*See note * p. 337, *supra.*

effect upon the defendant and upon the government. If charges, trials, and punishments are controlled, what need is there to control multiple convictions? It might be simpler to permit the jury to convict on any count charged in the indictment and limit the sentences that might be imposed on these various convictions.

Existing Federal law does place limitations on multiple convictions. *Milanovich* v. *United States*, 365 U.S. 551 (1961), directly considers this issue, holding that merely setting aside multiple sentences may be inadequate relief and that it is for the jury to decide upon which of two adequately proved charges (aiding and abetting a theft, and receipt of its proceeds) there should be a conviction. It is not clear from the majority opinion in *Milanovich* whether the decision rests on constitutional grounds.

The second major reason for controlling multiple convictions is that the collateral effects of conviction are governed by a perplexing variety of State and Federal statutes. Multiple offender status, eligibility for probation and parole, and a variety of other things may be influenced by the number of convictions which an offender has suffered. Since it does not seem possible to deal directly with the vices which may flow from improper use of multiple offender status, it may be desirable to control the multiplicity of convictions at their source.

Ultimately the issue boils down to the choice whether the judge or the jury shall determine which of the several offenses of which evidence will support a conviction shall be the basis of punishment. If multiple convictions are permitted but there can be only one sentence, in effect it is the judge who chooses among the possibilities when imposing sentence. If only one conviction is permitted the jury will make that choice. The draft adopts the latter choice and is derived from section 1.07(1) of the Model Penal Code.*

6. *Multiple Punishment.*—The question of multiple punishment is dealt with in the sentencing part of the Code. Clearly the prevention of undue accumulation of punishment lies at the very heart of the multiple crime problem as well as the more narrow problem of double jeopardy. Both this draft and section 3206 of the sentencing part take a position quite strongly opposed to the multiplication of punishments in common multiple offense situations.

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*Draft section 703 originally had a subsection which read as follows:

(4) Multiple Convictions. A defendant may not be convicted or sentenced for more than one offense to the extent

(a) one offense consists only of a conspiracy or other form of preparation to commit the other; or

(b) inconsistent findings of fact are required to establish the commission of the offenses; or

(c) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or

(d) the offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses;

(e) one offense is included in the other, as defined in subsection (5) of this section.

Subparagraphs (a) and (c) now appear in section 3206(2) of the Study Draft as a limitation on sentencing. Subparagraph (e) remains in section 703(3) as a limitation on convictions. Subparagraph (b) is present case law and, as such, remains a limitation on conviction. Subparagraph (d) is deleted as being, essentially, a statement of what constitutes one crime, rather than a limitation on convictions when two crimes occur.

A major source of dispute and difficulty concerning punishment for multiple offenses has been the so-called *Blockburger* or "same evidence" rule which permits consecutive or cumulative punishment for offenses arising out of a single criminal transaction so long as there is some slight variation in the elements of proof required for the two offenses. In *Blockburger* v. *United States*, 284 U.S. 299 (1932), a single sale of narcotics was penalized cumulatively as two offenses—selling drugs not in a stamped package and selling drugs not pursuant to a written order. In *Gore* v. *United States*, 357 U.S. 386 (1958), a comparable single narcotics sale was divided into three counts with cumulative punishment. *Blockburger* states the "same evidence" test as follows:[8]

> Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.

It seems beyond argument that the appropriate sentence and the number of years for which a man shall be punished for an offense is not rationally a function of the number of statutory violations into which his conduct may be parsed by a clever pleader. The Draft, therefore, is careful not to use the *Blockburger* approach and to this extent changes existing Federal law.

7. *Included Offenses.*—Subsections (3), (4), and (5) of section 703 establish rules regarding included offenses. What constitutes an included offense is set forth in subparagraphs (a), (b), and (c) of subsection (3). The definition of included offenses in this provision is identical to the Model Penal Code, section 1.07(4), with the addition of criminal facilitation, which—as proposed for the new Code—will sometimes be an included offense to accomplice liability.

The provision permitting conviction of the included offense even though it is not explicitly charged is consistent with existing rule 31(c) of the Federal Rules of Criminal Procedure, which permits conviction of all offenses "necessarily included" in charged offenses and of attempts to commit such offenses.

The basic principle of subsection (4)—that the trial judge need not instruct the jury with respect to an included offense unless there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting him of the included offense—is in accord with long standing Federal law.[9]

While the purpose of subsection (4) is to make it clear that a defendant is not entitled to have an included offense submitted where there is no rational basis for it, the draft is permissive and impliedly the court may submit it in such a situation. The draft follows the Model Penal Code and several State statutes[10] in this regard, essentially permitting the court to charge the jury in a way that may result in an irrational included offense conviction. There is little case law on this subject and no Federal authorities have been found. The problem was debated at some length by the American Law Institute,[11] and

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[8] 284 U.S. at 304.
[9] *Sparf* v. *United States*, 156 U.S. 51, 63 (1895).
[10] *E.g.*, Mo. Rev. Stat. § 556.220 (1949); N.M. Stat. § 41-13-1 (1964).
[11] ALI Proceedings 143–50 (1956).

the formulation adopted in this draft was selected to enable the prosecutor and judge greater flexibility by allowing the jury a possibility of choosing a lesser conviction when the lesser offense is not necessarily technically an included one. A defendant sometimes may prefer to gamble on an acquittal for the major offense rather than allow the jury the possibility of a compromise verdict on the lesser crime. On balance, however, it would seem preferable to permit the judge to seek a more just result by allowing him, without defense request, to charge the lesser offense.

A second complication is presented by the doctrine recently announced in *Sansone* v. *United States*, 380 U.S. 343, 349–350 (1965):

> The basic principles controlling whether or not a lesser-included offense charge should be given in a particular case have been settled by this Court. Rule 31(c) of the Federal Rules of Criminal Procedure provides, in relevant part, that the 'defendant may be found guilty of an offense necessarily included in the offense charged.' Thus, '[i]n a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifie[s] it . . . [is] entitled to an instruction which would permit a finding of guilt of the lesser offense.' Berra v. United States, supra, at 134, 76 S. Ct. at 688. See Stevenson v. United States, 162 U.S. 313. . . . But a lesser-offense charge is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses. Berra v. United States, supra: Sparf v. United States, 156 U.S. 51, 63–64. . . . In other words, the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater. A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense. Berra v. United States, supra; Sparf v. United States, supra, 156 U.S. at 63–64.

In its note 6, the Court said:

> This Court has long recognized that to hold otherwise would only invite the jury to pick between the felony and the misdemeanor so as to determine the punishment to be imposed, a duty Congress has traditionally left to the judge. . . .

In part this problem is one the Commission must resolve in defining substantive offenses and in deciding the extent to which a court shall be authorized to attach less stringent penalties, such as misdemeanor rather than felony status, after a conviction. The *Sansone* doctrine seems dubious, for one would think that it is the traditional province of the jury, as well as the prosecutor and judge, to convict of a lesser offense in situations where the felony charge seems unduly harsh. In any event, these situations are not ones in which there is a rational basis for acquittal on one charge and conviction on the other since the crimes charged are coextensive. The section as drafted, therefore, is not inconsistent with *Sansone*.

Subsection (5) permits the trial court on a motion for a new trial after verdict or an appellate court to enter judgment for a lesser

offense without necessity of a new trial when a review of the evidence shows insufficient evidence to support the conviction but sufficient evidence to support a lesser charge. This restates Federal case law.[12]

8. *Successive Prosecutions.*—The first section of the proposed draft statute deals with multiple offenses in a single prosecution while the remaining sections deal with situations in which a defendant is prosecuted more than once for related offenses. These sections include a statutory restatement of the doctrine of double jeopardy and the pleas of autrefois convict and autrefois acquit. The basic rules are contained in section 704 and are derived directly from the Model Penal Code formulation. These provisions are a restatement of existing law and work no substantial changes in the Federal case law on double jeopardy. In subsection (a) the draft provision follows *Green* v. *United States*, 355 U.S. 184 (1957), in holding that conviction of an included offense serves as acquittal of any greater offenses charged and bars conviction of the more serious offense on retrial.

There are two major branches to the bar to subsequent Federal prosecution created by section 704. The first, in subsections (a) and (c), generally reflects the double jeopardy, autrefois convict root to forbidding second prosecutions. The second branch, subsection (b), is derived from a different conceptual basis and incorporates doctrines of res judicata and collateral estoppel. Instances in which this second set of principles might apply include findings that the statute of limitations has run or determination that a defendant has been granted immunity or was previously convicted or pardoned.[13]

Subsection (d) deals with those situations in which the trial is aborted after jeopardy attaches but before conclusion. This is the only area covered by the section which is a matter of current litigation and serious difference of respectable opinion. The draft is similar to the Model Penal Code and is believed to reflect the views of the majority opinion in all pertinent court decisions. All agree with the principle that once a trial starts jeopardy attaches and the prosecution must stand or fall on its performance at the trial, but this is tempered by recognition of the force of Mr. Justice Story's position allowing broad discretion to the trial judge to grant a mistrial with the possibility of retrial:[14]

> [W]e think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes. . . .

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[12] *E.g.*, *United States* v. *Ciongoli*, 358 F.2d 439 (3d Cir. 1966); *Robinson* v. *United States*, 333 F.2d 323 (8th Cir. 1964); *United States* v. *Wilson*, 284 F.2d 407 (4th Cir. 1960).

[13] *See United States* v. *Oppenheimer*, 242 U.S. 85 (1916).

[14] *United States* v. *Perez*, 22 U.S. (9 Wheat) 256 (1824).

The problem lies in drawing a line between placing on the accused the burden of being required to go to trial a second time and accommodating those extraordinary circumstances requiring termination of a trial which are not the fault of court or of the prosecution. Judicial opinion divides on the extent to which the prosecution should be an insurer, taking the full burden of such extraordinary circumstances when they arise. The draft is explicit, however, that the prosecution cannot create the terminating circumstances with intent to get the opportunity to start over, at least without the consent of the defense.

The proposed draft statute and existing case law appear to draw the line at those situations where a key witness failed to appear although attempts were made to subpena him. Speaking for the Court in *Downum* v. *United States*, 372 U.S. 734, 735–36 (1963), Mr. Justice Douglas stated the problem:

> From *United States* v. *Perez*, 9 Wheat. 579, decided in 1824, to *Gori* v. *United States*, 367 U. S. 364, decided in 1961, it has been agreed that there are occasions when a second trial may be had although the jury impaneled for the first trial was discharged without reaching a verdict and without the defendant's consent. The classic example is a mistrial because the jury is unable to agree. . . . In *Wade* v. *Hunter*, 336 U.S. 684, the tactical problems of an army in the field were held to justify the withdrawal of a court-martial proceeding and the commencement of another one on a later day. Discovery by the judge during a trial that a member or members of the jury were biased pro or con one side has been held to warrant discharge of the jury and direction of a new trial . . . . At times the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him may be subordinated to the public interest—when there is an imperious necessity to do so . . . . Differences have arisen as to the application of the principle . . . . Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches . . . . But those extreme cases do not mark the limits of the guarantee. The discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and striking circumstances,' to use the words of Mr. Justice Story in *United States* v. *Coolidge*, 25 Fed. Cas. 622, 623. For the prohibition of the Double Jeopardy Clause is 'not against being twice punished, but against being twice put in jeopardy.' . . .

The cases dealing with the wide variety of situations that arise are reviewed in Orfield, *Double Jeopardy in Federal Criminal Cases*, 3 CAL. W. L. REV. 76 (1967), and SIGLER, DOUBLE JEOPARDY, 39–47, 83–92 (1969).

The Federal Penal Code on successive prosecutions must consider two complicating factors:

(a) Those situations in which the second prosecution is not for violation of the same statutory provision or on precisely the same evidence, but is for conduct closely related to that which gave rise to the first prosecution;

(b) Those situations in which successive prosecutions are instituted by different jurisdictions, particularly where one prosecution is by a State and the other is by the Federal government.

9. *Same Offense Problem.*—What standard determines whether the second prosecution is for the "same offense" as the first and therefore is barred by the double jeopardy doctrine? The answer to this question is by no means clear under existing Federal case law. Fortunately, whatever reason may have existed for believing that the *Blockburger* rule that any additional fact distinguishes offenses, is to be applied to successive prosecutions as well as multiple charges in a single prosecution, has been cast in doubt by recent cases. In particular, Mr. Justice Brennan's separate opinion in *Abbate* v. *United States*, 359 U.S. 187 (1959), specifically rejects the *Blockburger* approach: [15]

> Obviously separate prosecutions of the same criminal conduct can be far more effectively used by a prosecutor to harass an accused than can the imposition of consecutive sentences for various aspects of that conduct. It is always within the discretion of the trial judge whether to impose consecutive or concurrent sentences, whereas, unless the Fifth Amendment applies, it would be solely within the prosecutor's discretion to bring successive prosecutions based on the same acts, thereby requiring the accused to defend himself more than once. Furthermore, separate prosecutions, unlike multiple punishments based on one trial, raise the possibility of an accused acquitted by one jury being subsequently convicted by another for essentially the same conduct. See *Hoag* v. *New Jersey*, supra; cf. *Ciucci* v. *Illinois*, 356 U.S. 571. Thus to permit the Government statutorily to multiply the number of offenses resulting from the same acts, and to allow successive prosecutions of the several offenses rather than merely the imposition of consecutive sentences after one trial of those offenses, would enable the Government to "wear the accused out by a multitude of cases with accumulated trials." *Palko* v. *Connecticut*, 302 U.S. 319, 328. Repetitive harassment in such a manner goes to the heart of the Fifth Amendment protection. This protection cannot be thwarted either by the "same evidence" test or because the conduct offends different federal statutes protecting different federal interests. The prime consideration is the protection of the accused from the harassment of successive prosecutions, and not the justification for or policy behind the statutes violated by the accused. If the same acts violate different federal statutes protecting separate federal interests those interests can be adequately protected at a single trial by the imposition of separate sentences for each statute violated. See, e.g., *Bell* v. *United States*, 349 U.S. 81, 82–83; *Gore* v. *United States*, 357 U.S. 386.

At another place in the opinion Justice Brennan forcefully states his view of the rule: "[I] think it clear that successive Federal prosecutions of the same person based on the same acts are prohibited by the

[15] 359 U.S. at 199–200.

Fifth Amendment even though brought under federal statutes requiring different evidence and protecting different federal interests." [16] It must be noted that this was a separate opinion by Justice Brennan. The other members of the Court did not reach this issue in deciding the case.

This draft, in section 705, adopts the position of the Model Penal Code and Justice Brennan by barring successive trials of charges which should have been prosecuted together under the compulsory joinder provisions. The proposed basic rule thus would be that all charges based on the same conduct or criminal episode must be brought in a single prosecution.

This is consistent with existing government administrative policy under the so-called *Petite* rule.[17]

10. *Dual Sovereignty: Where State Has Prosecuted First.*—Double jeopardy doctrine is not now understood to bar successive prosecutions by a State and the Federal government. Federal doctrine as recently confirmed by the Supreme Court in *Abbate* v. *United States*, 359 U.S. 187 (1959), is that the national government and the States are separate sovereignties and that acts violating the criminal statutes of both give rise to entirely separate crimes which may be tried and punished successively:

> Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. . . . *Moore* v. *Illinois*, 55 U.S. (14 How.) 14, 21 (1852).
>
> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory . . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.
>
> It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the Federal Government, . . . and the double jeopardy therein forbidden is a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority. *United States* v. *Lanza*, 260 U.S. 377 at 382 (1922).

The reaction to the *Abbate* decison and its companion case, *Bartkus* v. *Illinois*, 359 U.S. 121 (1959), which considered the converse problem of prosecution by a State following a Federal prosecution, has been intense and generally unfavorable. Within a month of the decisions the Attorney General announced a Federal policy highly restrictive

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[16] 359 U.S. at 197.

[17] *See* paragraph 4, *supra*. *See also* the discussion at pp. 343–345, *supra*, concerning the special successive prosecution problems encountered in the Federal system.

of Federal prosecutions following a State prosecution for "substantially the same act or acts." More significantly, later Supreme Court decisions in cognate criminal administrative fields have made deep inroads on the separate sovereignty concept.[18] While it is possible to distinguish those cases from *Abbate* and *Bartkus*, there is quite strong ground for Mr. Justice Harlan's recent dictum that the Court has "abolished the two sovereignties rule." *Stevens* v. *Marks*, 383 U.S. 234, 250 (1966). Moreover, it appears that a third of the States have passed statutes forbidding prosecutors to retry a man already acquitted or convicted by the Federal government for the same criminal act.[19] Finally, a number of provisions of Title 18 already forbid Federal prosecutions following State prosecutions for specific offenses.[20]

In light of all of these developments it seems clear that the proposed new Code should adopt a general Federal rule severely restricting successive Federal prosecution for conduct already prosecuted by a State.

The draft, in section 706, has adopted the Model Penal Code formulation of such a rule, although this formulation is not without difficulties.* The most notable problem is in defining those situations in which the subsequent Federal prosecution is for "the same offense" and therefore is barred. The Model Penal Code formulation raises the definitional problems of the *Blockburger* rule and is unattractive for that reason. At the same time, the broader formulation generally forbidding subsequent prosecution for the same acts, conduct or transaction would create other difficulties. Federal and State penal interests are not always identical and an overly broad provision might foreclose vindication of very important Federal interests. A current example is suggested by *United States* v. *Guest*, 383 U.S. 745 (1966), a prosecution under the Civil Rights Act of several persons (who had allegedly murdered Lemuel Penn, a Negro Army officer traveling through Georgia) for violation of Penn's Federal right of interstate travel.

The Federal prosecution was precipitated by the defendants' acquittal on murder charges by a State jury. There are strong independent Federal interests in prosecuting the perpetrators of such acts. Indeed, a major reason for the existence of the Federal penal provision was clearly a sense that protection of Federal interests by State prosecution often was defeated or inadequate and needed Federal supplementation. A double jeopardy standard which does not recognize these independent interests may unduly encroach upon the national power.

The solution proposed in this draft announces a general ruling barring subsequent prosecution by the United States where a State

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[18] *See, e.g., Elkins* v. *United States*, 364 U.S. 206 (1960), and *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964).

[19] Comment, *Successive Prosecutions by State and Federal Governments for Offenses Arising Out of Same Act*, 44 MINN. L. REV. 534, 539n. 31 (1960); Fisher, *Double Jeopardy and Federalism*, 50 MINN. L. REV. 607, 608n.8 (1966).

[20] *See, e.g.*, 18 U.S.C. §§ 659, 660, 1992, 2117.

*Originally subparagraphs (i) and (ii) of subsection (a) of sections 706–707 appeared at the ends of the sections after the requirement of Attorney General certification. Thus, both Attorney General certification and a different harm or nonconsummation was required. This was changed to follow existing Federal law more closely. Under the Study Draft if there is a different harm or nonconsummation, no certification is needed. Even if the harm is not substantially different and the second offense was consummated when the first trial began, there can still be a second prosecution by the other sovereignty if the Attorney General makes the proper certification. The Model Penal Code would absolutely bar a second prosecution in that situation.

has prevously brought a prosecution based on the same conduct or arising from the same criminal episode. A limited exception is provided for cases in which the Attorney General certifies to the district court that the governmental interests of the United States would be unduly and substantially damaged if the Federal prosecution is barred, and the court determines that the Federal statute is aimed at a substantially different harm or evil than the statute upon which the State prosecution was brought. The standard of "undue and substantial harm" to the governmental interests of the United States may seem vague and not of great help. The intent is to convey two ideas: (a) that the appropriate approach to the problem is a case-by-case consideration of the governmental interests involved; and (b) that the standard by which the government's showing should be be made is to be a high one.

The draft departs from the Model Penal Code in making previous prosecution under the laws of another country a bar to proescution by the United States. Other modern penal code revisions are split or ambiguous on this point, which would seem more significant for a Federal than for a State penal law.[21] The provision that subsequent prosecutions should be barred represents a return to the position taken by the American Law Institute in the 1935 double jeopardy study, section 15. This departure is considered appropriate, since the bar created by the section as now drafted is not absolute and can be lowered upon a finding of the court and determination of the Attorney General. Federal prosecution for crimes already punished by another country would seem unusual at best, and most likely to occur in cases having strong political dimensions or those in which there is the most direct sort of threat against Federal governmental interests (theft from or fraud upon the government). A rather strict standard, requiring caution and deliberation before the second prosecution is brought, seems particularly appropriate.

The basic solution to the dual sovereignty problem suggested by this draft section inevitably will be unpopular with those who consider the *Abbate* decision wise in end result, as well as with the many observers who consider that decision wrong as a matter of constitutional law. The effect of the section as now drafted should be to prevent successive Federal prosecutions in all but the most unusual sorts of cases; but, by permitting such prosecution in exceptional circumstances, the draft does imply the constitutionality of such prosecution.

This provision thus creates a presumptive bar against successive prosecution and brings to bear upon the determination of the issue both a judicial assessment of the facts and an administrative determination of the governmental interests of the United States by the Attorney General. This approach codifies existing Federal practice under Attorney General Rogers' memorandum to United States Attorneys following *Abbate*. This tends to insure that the matter receives careful attention at the policymaking level of government before an application is made to the court for successive prosecution. Where determinations both by the Attorney General and by the court are not made, the prosecution is barred.

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[21] *See* SIGLER, DOUBLE JEOPARDY, 120–22, 225 (1969).

11. *Dual Sovereignty: Where Federal Government Prosecutes First.*—Additional difficulties are presented by the converse situation, when a State seeks to prosecute on the basis of conduct which has already resulted in a Federal prosecution. It sems 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.[22] This is the approach generally taken in Federal testimonial immunity from State prosecution.[23] Here the interests of the United States in the correction of offenders against its laws appears strong enough to justify forbidding the States to interfere with the sound correctional planning by subsequent prosecution arising out of the same conduct.

A more difficult question is presented as to whether all State prosecutions should be barred or whether, as is the case with successive Federal prosecutions, there should be provision for successive prosecutions in limited circumstances. If the *Abbate* and *Bartkus* decisions are not accurate statements of the constitutional doctrine of double jeopardy, then, of course, there can be no successive prosecutions in any circumstances. While this draft takes the position that those decisions are unsound, it accepts their doctrinal validity as a statement of the constitutional rules of double jeopardy. It therefore permits a procedure comparable to that provided Federal prosecutions following State prosecutions, under which successive State prosecution may be permitted upon application by the Governor of a State.*

The application setting forth the State interest is to be made by the Governor, since the function of the State Attorney General varies so markedly from State to State. In some States the Attorney General is primarily concerned with civil, rather than criminal, matters and would not be the appropriate official to make the decision.

The significance of "unduly and substantially" damaged is the same as in section 706 but, in addition, there is added the criterion that the interests of the United States would not be impaired.

Difficulty was encountered in deciding whether a State or Federal court should make the determination that the governmental interests of the State would be unduly and substantially damaged if the prosecution is barred. This draft tentatively places this responsibility on the Chief Judge of the U.S. Court of Appeals for the circuit in which the State is located, but no firm views are entertained on this point. Difficulty might be encountered if an attempt was made by a congressional act to confer jurisdiction on State courts to make such a determination without reference to existing State jurisdictional stat-

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[22] *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956).

[23] *Brown* v. *Walker*, 161 U.S. 591 (1896); 18 U.S.C. §§ 1954(b), 1406, 3486(c).

*The draft originally provided that the Chief Judge of U.S. Court of Appeals for the judicial circuit in which State is located made the decision upon application of the Governor of the State. This was changed in the Study Draft. The Governor is not in a position to certify that U.S. interests would not be impaired. Adding the determination of the U.S. Attorney General to that of the Governor would make the procedure quite complex. This procedure, being so similar to the one in the preceding section, should be governed by the same criteria and giving the initial determination to the Attorney General in both instances should result in a unified approach to the problem.

utes. It is felt that there may be particular problems if this responsibility to make a determination which may be contrary to that of a Governor's certificate is given to a single U.S. district judge, and it is for this reason that the chief judge of the court of appeals was chosen.

12. *General Exceptions to Bar Against Successive Prosecutions.*—Section 708 explicitly sets forth exceptions to the bar against successive prosecutions provided in sections 704–707. Subsection (a) deals with a prosecution which was void because the court lacked jurisdiction, and subsection (c) with a prosecution declared invalid by subsequent proceedings attacking the judgment. Both are declarations of existing law.[24]

Subsection (b) is adopted from the Model Penal Code and the proposed New York Criminal Procedure Law (§ 20.20(2)). It is designed to avoid the danger created by expansion of protection against successive prosecutions that a defendant may fraudulently procure the first prosecution for a lesser offense. In a system of criminal justice administration as complex as that in this country, in which there are literally thousands of coordinate prosecutive agencies, there must be some safeguard against the corrupt extension of immunity.

[24] *See United States* v. *Tateo*, 377 U.S. 463 (1964); *United States* v. *Ball*, 163 U.S. 662, 669–670 (1896).

COMMENT

on

CRIMINAL ATTEMPT AND CRIMINAL SOLICITATION: SECTIONS 1001 AND 1003

(Green, Pochoda; April 10, 1968)

General Introduction

The sections proposed are intended to provide, for the first time in the history of the Federal criminal law, general provisions on attempt and solicitation applicable to every Federal criminal offense. In addition, they are designed to provide—again for the first time in the Federal system—statutory definitions of what constitutes an attempt and a solicitation, setting forth standards as to requisite intent and requisite conduct, and dealing uniformly with such questions as impossibility, corroboration, renunciation, punishment and incapacity of the actor. Another statute, not yet drafted, will deal with the consequences of the fact that attempt and solicitation are included offenses, *i.e.*, always established when the completed offense is proved. Among the questions to be dealt with there are whether the included offense must be charged and whether there can be double punishment.

Attempt and solicitation, common law crimes, can have considerable significance in a modern Federal Criminal Code. Although, when viewed as unsuccessful efforts to commit crime, their specific prohibition probably has little deterrent effect, attempt and solicitation offenses have purposes consistent with current penological thinking. These purposes have been stated as follows:

> *First:* When a person is seriously dedicated to commission of a crime, there is obviously need for a firm legal basis for the intervention of the agencies of law enforcement to prevent its consummation. In determining that basis, there must be attention to the danger of abuse; equivocal behavior may be misconstrued by an unfriendly eye as preparation to commit a crime. It is no less important, on the other side, that lines should not be drawn so rigidly that the police confront insoluble dilemmas in deciding when to intervene, facing the risk that if they wait the crime may be committed while if they act they may not yet have any valid charge.
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> *Second:* Conduct designed to cause or culminate in the commission of a crime obviously yields an indication that the actor is disposed towards such activity, not alone on this occasion but on others. There is a need, therefore, subject again to proper safeguards, for a legal basis upon which the special danger that such individuals present may be assessed and

dealt with. They must be made amenable to the corrective process that the law provides.

Third: Finally, and quite apart from these considerations of prevention, when the actor's failure to commit the substantive offense is due to a fortuity, as when the bullet misses in attempted murder or when the expected response to solicitation is withheld, his exculpation on that ground would involve inequality of treatment that would shock the common sense of justice. Such a situation is unthinkable in any mature system, designed to serve the proper goals of penal law. *See* MODEL PENAL CODE § 1.02 (Tent. Draft No. 4, 1955). (MODEL PENAL CODE Article 5, Comment at 25 (Tent. Draft No. 10, 1960)).

CRIMINAL ATTEMPT: SECTION 1001

1. *Background.*—Although there has never been a general attempt statute in the Federal system, this does not mean that attempts have not been punishable, at least with respect to certain crimes. In the absence of a Federal criminal common law, however, punishment of the attempt could only be accomplished by explicitly prohibiting the attempt in the definition of a specific offense. While there are many such statutes, this approach has led to many absurd omissions, for example, attempts in relation to the following offenses: embezzlement of any "record, voucher, money or thing of value" of the United States or of any department or agency thereof (18 U.S.C. § 641); embezzlement of any property of value of any bank which is a member of the Federal Reserve or is insured by the Federal Deposit Insurance Corporation (18 U.S.C. §§ 655, 656); stealing of any goods or chattels which are a part of an interstate or foreign shipment (18 U.S.C. § 659); disclosure of classified information to an unauthorized person (18 U.S.C. § 798); robbery within the special maritime jurisdiction and territorial jurisdiction of the United States (18 U.S.C. § 2111); robbery of property belonging to the United States (18 U.S.C. § 2112) and smuggling merchandise into the United States (18 U.S.C. § 545).[1]

This approach has also led to needless repetition of attempt language in numerous specific crimes. Typical examples are:

> Whoever . . . communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government . . . (18 U.S.C. § 794)

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[1] In *Keck* v. *United States*, 172 U.S. 434 (1899), the Court found no violation of section 2865 of the Revised Statutes, which contained the same basic language as the present 18 U.S.C. § 545, although the evidence presented demonstrated the defendant's clear intent to smuggle diamonds into the United States, and that the diamonds had been concealed and transported by ship from Belgium to the port of Philadelphia. The Court stated that:

> while it [section 2865] embraces the act of smuggling or clandestine introduction, it does not include mere attempts to commit the same. . . . It was, indeed, argued at bar that, as the concealment of goods at the time of entering the waters of the United States tended to render possible a subsequent smuggling, therefore such acts should be considered and treated as smuggling; but this contention overlooks the plain distinction between the attempt to commit an offense and its actual commission. (172 U.S. at 444.)

> Whoever . . . willfully prevents, obstructs, impedes, or interferes with, or willfully attempts to prevent, obstruct, impede or interfere with . . . any order . . . of a court of the United States. (18 U.S.C. § 1509)
>
> Whoever forges, counterfeits, or steals, or attempts to forge, counterfeit, or steal . . . (18 U.S.C. § 2197)
>
> Whoever . . . passes, utters, publishes, or sells, or attempts to pass, utter, publish or sell, . . . any . . . counterfeited, or altered obligation . . . of the United States. (18 U.S.C. § 471)

Generally speaking, moreover, where the present Federal statutes seek to encompass an attempt, there is no elaboration as to what constitutes an attempt. As indicated by the examples above, the statutes merely state that an attempt to do the acts listed constitutes the crime. There is no definition, for example, of how close to commission one must come before being held liable for the attempt.

It is true, however, that in many instances acts short of infliction of the ultimate harm, which can be regarded as attempts, are specially prohibited. Sometimes this is done in the statute which prohibits the ultimate harm, defining as criminal both efforts to obtain the prohibited result as well as the prohibited result itself. Examples are:

> Whoever, under a threat of informing . . . *demands* or receives any money or other valuable thing . . . (18 U.S.C. § 873)
>
> Whoever falsely assumes or pretends to be an officer . . . of the United States . . . and . . . in such pretended character *demands* or obtains any money, paper, document or thing of value . . . (18 U.S.C. § 912)

Moreover, many statutes define as a separate crime conduct which is only a step toward commission of a more serious harm. It is not always clear, however, whether such conduct is made a crime in order to punish its attempt relationship to a more serious harm or in order to express the basis for Federal jurisdiction over the ultimate offense. Such jurisdictional conduct is sometimes merely preparatory, such as traveling in interstate commerce. Examples of such "attempt" crimes—in addition to burglary and assault with intent to commit murder, *etc.*, which are traditional—are as follows:

> Whoever travels in interstate . . . commerce, or uses any facility in interstate . . . commerce . . . with intent to . . . promote, manage, establish, carry on . . . any unlawful activity. . . . (18 U.S.C. § 1952)
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> Whoever, knowingly and with intent to defraud the United States . . . possesses any false, altered, forged, or counterfeited writing or document for the purpose of enabling another to obtain from the United States . . . any sum of money. . . . (18 U.S.C. § 1002)
>
> 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, . . . 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. . . . (18 U.S.C. § 1341)

> Whoever . . . controls, holds or possesses any plate, stone, or other thing, . . . from which . . . may be printed any counterfeit note, bond, obligation or other security. . . . (18 U.S.C. § 481)

2. *Advantages of Proposed Attempt Statute.*—As is manifest from the foregoing description of the present Federal approach to punishment of attempts, there can be considerable improvement by adopting an attempt provision of general applicability. It will avoid gaps, simplify definitions of crimes and permit elimination of many statutes which merely prohibit conduct amounting to an attempt. The Federal system appears to be today the only jurisdiction in the United States in which there is no general attempt law.[2] This is probably the result of a combination of the factors that there is no common law of Federal crimes and that Federal criminal law, despite its revisions and codifications, has grown in a haphazard fashion. Whatever the reason, however, the change is long overdue.

Enactment of a general attempt statute also would afford an opportunity to establish a uniform treatment policy relating the attempt penalty to the penalty for the crime attempted, and to give statutory content to the meaning of attempt. Not only can Congress express itself on several important issues which arise in this area of the criminal law, but also the need for uniform rules in the Federal system is imperative. Present Federal law on some issues, such as proximity of the act to commission of the crime, is chaotic. (*See* discussion under paragraph 4, *infra.*) On other potential issues there appear to be no Federal decisions, so that the Federal courts must establish the law by choosing among divergent State precedents,[3] a process which becomes even less desirable as the States improve upon their own precedents by new statutory formulae.[4]

3. *Definition of Attempt: Requisite Intent.*—Implicit in the notion of attempt is the requirement that whatever the person is doing is being done with the purpose of committing a crime. Present Federal case law recognizes this.[5] Proposed section 1001 makes this requirement explicit by requiring that the conduct be intentionally engaged in but otherwise with the culpability required for the offense.[6]

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[2] Colorado was the only other jurisdiction: but a change has already been recommended to its legislature and may have been enacted. The various State attempt statutes are compiled in MODEL PENAL CODE § 501, Appendix at 76 (Tent. Draft No. 10, 1960).

[3] *See* MODEL PENAL CODE § 501, Appendix at 76–81 (Tent. Draft No. 10, 1960), for an example of the wide range of positions adopted by the various State courts on the question of what constitutes an attempt.

[4] All of the recent State revisions, enacted or proposed, elaborate on the meaning of attempt and address such issues as the requisite intent and act, and questions of impossibility and renunciation. *See, e.g.*, PROPOSED DEL. CRIM. CODE § 309 (Final Draft 1967); ILL. REV. STAT. c. 38, § 8–4 (1965); MICH. REV. CRIM. CODE § 1001 (Final Draft 1967); MINN. STAT. ANN. § 609.17 (1963); N.Y. REV. PEN. LAW § 110.00 (McKinney 1967); PROPOSED CRIM. CODE FOR PA. § 501 (1967).

[5] *E.g., United States* v. *Stephens*, 12 F. 52 (9th Cir. 1882); *United States* v. *Baker*, 129 F. Supp. 684 (S.D. Cal. 1955).

[6] It should be noted that the requirement of intentional conduct is for the purpose of excluding from the attempt area the attempt to commit a crime where the result, even though not intended, is an element of the crime. An example is negligent homicide. The fact that death has resulted has turned the negligent act into a crime. The mere performance of the negligent act is not an attempt to commit negligent homicide, even though death could have resulted.

There is no clear pattern in modern Code revisions as to what is the most desirable way to define the requisite intent. One formulation requires that the person be acting "with the kind of culpability otherwise required for commission of the crime," but "purposely" with respect to "a course of conduct planned to culminate in commission of the crime." [7] Thus, if as to some elements of the substantive crime he need only be acting recklessly, that is all that would be required for the attempt as to those elements. [8]

The requirement of the requisite criminal intent is set forth in a number of recent State revisions, however, as only "intent to commit a crime." [9]

The proposal here is somewhat of a hybrid of these two approaches. At the same time that it eliminates some of the former formulation for purposes of economy (". . . course of conduct planned to culminate in commission of the crime . . ."), it is explicit that, except for the intentional conduct constituting the substantial step, the requisite culpability is that provided for in the definition of the offense. Not only is such a formulation more precise, but also it has the virtue of emphasizing the fact that in the proposed new Code we recognize, by precise definition and use of terms, that different elements of a crime may require different kinds of culpability.

4. *Definition of Attempt: Requisite Act.*—The most difficult problem in the area of attempts is determining when the person who possesses the requisite intent has done enough to warrant his being held liable for a criminal act. At present there is no clear line of approach which could be regarded as "the Federal law."

Like the courts in many jurisdictions, the Federal courts sought to improve on the old common law distinction between "mere preparation," which is not an attempt, and conduct beyond that, which constitutes an attempt. The range of possible substitutions for that distinction, as reflected in the development of case law in many jurisdictions, is shown in the Model Penal Code commentary. (*See* MODEL PENAL CODE § 5.01(1)(c), Comment at 39–48 (Tent. Draft No. 10, 1960)). In recent Federal cases two different tests have been applied. One is the so-called "dangerous proximity" test, adopted by Judge Learned Hand in a case in which the defendant (Judith Coplon) was

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[7] This language is used in Pennsylvania and in the Model Penal Code. PROPOSED CRIM. CODE FOR PA. § 501(a) (1967); MODEL PENAL CODE § 5.01(1) (P.O.D. 1962).

[8] The Model Penal Code offers this example:

> Suppose . . . that it is a federal offense to kill or injure an FBI agent and that recklessness or even negligence with respect to the identity of the victim as an agent suffices for commission of the crime. There would be an attempt to kill or injure such an agent . . . if the actor with recklessness or negligence as to the official position of the victim attempts to kill or injure him. . . . [T]he killing or injuring would be the required purpose; the fact that the victim is an agent would be only a circumstance as to which the actor had the kind of culpability otherwise required for the commission of the crime.

MODEL PENAL CODE § 501, Comment at 27–28 (Tent. Draft No. 10, 1960).

[9] MINN. STATS. ANN. § 609.17(1) (1963); N.Y. REV. PEN. LAW § 110.00 (McKinney 1967); IL. REV. STAT. c. 83, § 8–4(a) (1965) (intent to commit a specific offense); MICH. REV. CRIM. CODE. § 1001 (1) (1967) (intent to commit a specific offense).

arrested before passing classified government documents which were in her purse to her paramour: [10]

> [P]reparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree. If the preparation comes *very near* to the accomplishment of the act, the intent to complete it *renders the crime so probable* that the act will be a misdemeanor, although there is still a locus poenitentiae, in the need of a further exertion of the will to complete the crime. (Emphasis added.)

A different test was used in a case in which the defendant was charged with using communication facilities in attempting to commit the crime of illegally importing narcotic drugs, having mailed a letter to a Mexican manufacturer of heroin in which he asked to purchase some. The court said: [11]

> To attempt to do an act does not imply a completion of the act, or in fact any definite progress toward it. Any effort or endeavor to effect the act will satisfy the terms of the law.

Perhaps this confusion surrounding attempt law is epitomized by a Supreme Court opinion which defined the word "endeavor," employed in a statute prohibiting the corrupt influencing of a juror. The Court tried to distinguish that word from the word "attempt" in order to avoid the confusion surrounding the latter, even though, by ordinary understanding and even dictionary definition, "attempt" is equivalent to "endeavor." In *United States* v. *Russell*, 255 U.S. 138 (1921), the defendant had spoken to the wife of a potential petit juror to find out his disposition toward the accused in a coming trial, indicating that he wanted to know because he did not want to pay money to someone who would not vote for acquittal. The government charged that this was the defendant's way of conveying an offer to the juror.

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[10] *United States* v. *Coplon*, 185 F. 2d 629, 633 (2d Cir. 1950) (*quoting* Holmes, J., in *Commonwealth* v. *Peaslee*, 177 Mass. 267, 272, 59 N.E. 55, 56 (1901)), *cert. denied*, 342 U.S. 920 (1952).

[11] *United States* v. *Robles*, 185 F. Supp. 82, 85 (N.D. Cal. 1960). A recent compilation of model instructions for Federal judges adopts the language used by the court in *Robles* as the definition of attempt. MATHES & DEVITT, FEDERAL JURY PRACTICE AND INSTRUCTIONS (1965). *See also*, *United States* v. *Debolt*, 253 F. 78 (S.D. Ohio 1918), where the court stated:

> To attempt to cause a thing to be done is an attempt to effect or bring about the doing of that thing. Advising and attempting to influence the doing of a thing is a means, and often a most potent means, of effecting or accomplishing the desired result. Mere words may constitute the offense of an attempt when they solicit the commission of a crime. 253 F. at 82.)

The facts involved in the case of *United States* v. *Stephens*, 12 F. 52, 56–57 (C.C.D. Ore. 1882), were analogous to those in *Robles*, but a different decision was reached because the court used a different standard in judging the existence of an attempt. In *Stephens* it was demonstrated that the defendant intended to introduce liquor illegally into Alaska, and had made an offer to purchase the liquor in San Francisco. The court employed a "last proximate act" test, stating that even if the liquor had been purchased, that would be

> merely a preparatory act, indifferent in its character, of which the law, lacking the omniscience of Deity, cannot take cognizance. . . . [i]t is doubtful whether the attempt, or the act necessary to constitute it, can be committed until the liquor is taken so near to some point of . . . Alaska as to render it convenient to introduce it from there, or to make it manifest that such was the present purpose of the parties concerned.

The same result might be reached under the statute proposed here, but by a different route.

In response to the defendant's argument on appeal that this was at most a preparation for an attempt and not an attempt itself, the Court said: [12]

> The word of the section is "endeavor", and by using it the section got rid of the technicalities which might be urged as besetting the word "attempt", and it describes any effort or essay to do or accomplish the evil purpose that the section was enacted to prevent.

The formulation proposed here for the new Criminal Code differs from both of the above, although leaning more to the "any act" test than to the "proximity" tests. The shift is one of emphasis: from what remains to be done to what has already been done. The language "substantial step" is preferred over "any act" because it connotes something more than the most remote preparation. It is the language used in the Model Penal Code, the Illinois revision, and in the proposed revisions in Pennsylvania and Delaware.[13]

More significant than the choice of "substantial step" over "any act" is the proposed provision which describes a substantial step as being "strongly corroborative of the firmness of the actor's intent to complete the commission of the offense." (The same requirement could be imposed, of course, even if the language is "any act".) Its purpose is to avoid the possibility that guilt will be predicated, in effect, upon declarations of criminal intent. "Thinking out loud" coupled with some equivocal act would otherwise constitute a sufficient basis for conviction. It is believed that the better approach, consistent with Federal law which presently requires independent corroboration of a confession or admission,[14] is to require that the conduct itself corroborate that the actor meant what he said. This is substantially the requirement, by judicial interpretation, of "any act" in Michigan [15] and is substantially the rule in other states with similar statutory formulations, as well as being recommended by the Model Penal Code.[16] The single difference in the language proposed here is that the conduct must corroborate the "firmness" of the criminal intent. It is believed to be more precise—equivocal intent is not enough—and poses the issue of the probability of completion in the light of the nature of the final act required and the nature of the commitment by the preparatory act performed.

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[12] 255 U.S. at 143. The language cited from *United States* v. *Robles*, *supra*, indicates that the court there used the word "endeavor" interchangeably with "attempt" in an effort to find that the defendant's acts were covered by the relevant attempt provision. In support of this position the court in *Robles* cites the *Russell* decision, which, as noted, tries to distinguish between these two words.

[13] MODEL PENAL CODE § 5.01(1) (P.O.D. 1962); ILL. REV. STAT. c. 38, § 8-4(a) (1961); PROPOSED CRIM. CODE FOR PA. § 501(a) (1967); PROPOSED DEL. CRIM. CODE § 310 (Final Draft 1967). This language was originally proposed in the New York revision, but was changed prior to enactment to "conduct which tends to effect the commission of the crime" because that had been the statutory language formerly used and under it a body of case law had been developed. N.Y. REV. PEN. LAW § 110, Comment (McKinney 1967). The proposed Michigan revision uses "any act toward the commission of the offense" for the same reason: it follows the precise language of its present attempt provisions under which a satisfactory approach has been developed. MICH. REV. CRIM. CODE § 1001, Comment (Final Draft 1967).

[14] *Smith* v. *United States*, 348 U.S. 147 (1954).

[15] MICH. REV. CRIM. CODE § 1001, Comment at 83 (Final Draft 1967).

[16] *See* discussion and statutes compiled in MODEL PENAL CODE § 5.01, Comment at 47-48, 76 (Tent. Draft No. 10, 1960).

A possible formulation not included here would be one specifically designed to deal with the so-called "last proximate act" cases. These are situations where a person has done all that might be necessary to cause the particular result which is an element of the crime, but completion depends upon some independent occurrence, *e.g.*, that the intended victim fired at is hit by the bullet, or is hit by the bullet and dies, or upon the actor's not changing his mind and undoing what he has done before the result occurs, *e.g.*, not defusing the time bomb. There does not appear to be any disagreement that such a person has committed a criminal attempt. Modern Code revisions disagree as to whether it is necessary to have a specific provision in order to cover these cases. Where such provisions have been proposed, they provide that a person has committed an attempt if:[17]

> when causing a particular result is an element of the crime, [he, acting with the requisite culpability,] does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part.

The purpose of such a provision is to define an attempt *without* the requirement that the conduct be a substantial step strongly corroborative of the firmness of the actor's criminal purpose, albeit the formulation is confined to crimes where causing a particular result, *e.g.*, death or bodily injury, is an element of the crime. Accordingly, the question is whether such an exception from the rationale for requiring corroborative conduct is necessary or desirable.

It is difficult to conceive of situations in which the prohibited result could *actually* be caused by an intentional act or omission which would not be corroborative of the firmness of the actor's criminal purpose. The requirement is that it have the *corroborative* quality, not that it independently prove the actor's guilt. To the extent therefore that the act or omission could *actually* cause the result, the "substantial step" provision should be adequate.

The provision previously quoted, however, makes the criminality of the conduct depend not upon whether it could cause the result but whether it was engaged in for the *purpose* of causing that result or in the *belief* that it would cause that result. The act or omission could be extremely remote or otherwise equivocal. Such cases might not truly be "last proximate *act*" cases, but cases where the nature of the actor's belief alone, whether or not firmly held, would be sufficient for criminal liability. The sweep of such a provision, therefore, is much too broad. It is believed that those cases which ought to be covered will be those encompassed by the "substantial step" provision, and, therefore, that the provision based on the actor's belief alone is undesirable.

One feature of some recent revisions derived from the Model Penal Code, not included in the draft proposed here but worthy of consideration, is the listing of kinds of conduct which should not be arbitrarily rejected as "substantial steps." That is, if they meet the requirement

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[17] The attempt provisions in the Model Penal Code and the Proposed Crimes Code for Pennsylvania have specific language dealing with the causation of a particular result when that result is an element of the crime attempted. The statutes in New York, Michigan, Illinois, Delaware and Minnesota do not single out these cases from the general definition of attempt. *See* statutes cited *supra* note 4.

of being corroborative of the firmness of the actor's criminal intent, they would be sufficient conduct for an attempt. Such a list might include the following:

(a) lying in wait, searching for or following the contemplated victim of the crime;

(b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;

(c) reconnoitering the place contemplated for the commission of the crime;

(d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;

(e) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;

(f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;

(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

From time to time such conduct has been held insufficient as a matter of law, although not in the Federal system and not under the statutory formula proposed here. The issue regarding their inclusion in the proposed Code is one of usefulness rather than one of necessity, with Congress providing a uniform guideline for the multiple Federal circuits.

5. *Attempt to Aid Another to Commit a Crime.*—Proposed subsection (2) is designed to deal with the accomplice, who would be liable as a principal if the crime were consummated (under a yet undrafted provision which will probably be similar to 18 U.S.C. § 2), in the situation where the crime is not in fact committed by the person he seeks to aid. If, for example, a person prepared a fraudulent document for another upon which some Federal action was to be sought but the Federal agency involved was not deceived, the person preparing the document, who would be liable as a principal if the fraud were consummated, would be guilty of criminal attempt under this subsection. The lack of such a provision has not been noted in the Federal system, probably because, where an attempt to commit a crime has been punishable, it has been so provided in the definition of the offense to which the complicity provisions of 18 U.S.C. § 2 have been applicable. Thus, an attempt to evade income taxes is presently an offense; and if someone aids the person attempting to evade taxes, 18 U.S.C. § 2 makes him punishable as a principal.[18] In addition, if there was an

[18] *United States* v. *Johnson*, 319 U.S. 503 (1943) (defendants by consciously contributing to attempt of another to defeat and evade payment of income tax, aided and abetted the commission of offense of tax evasion and became principals in the common enterprise).

understanding between the accomplice and the perpetrator, liability has been based on conspiracy.[19]

Since attempt language will for the most part be eliminated from substantive offenses, the proposed provision is necessary to continue to allow traditional prosecutions, as with income tax evasions. Reliance on the conspiracy law is a possible alternative, but would not be wholly effective. Situations can be envisioned in which a person attempts to aid another without the latter's knowledge. The most likely cases are those where the unsolicited accomplice, knowing that a crime is being attempted, engages in conduct designed to facilitate it, such as leaving a door unlocked. It would be anomalous if he could not be prosecuted for attempting to aid the commission of a crime if in fact it has been thwarted.

Two features of this proposal should be noted. One is that it does not specifically require—as does subsection (1)—that the conduct be strongly corroborative of the firmness of the actor's criminal purpose. The reason for this omission is that the provision defining accomplice liability will define the conduct for which the accomplice can be held liable. Since the accomplice's conduct will be the same whether the crime is committed or not committed, it is believed at this time that the complicity test for liability—in whatever form is considered appropriate—should govern in order to avoid confusion, although the question may have to be reconsidered once that section has been drafted.

A second feature is that this provision incorporates only that part of a complicity statute which prohibits aid. It does not include soliciting and commanding. Such acts, even when they do not meet with success, are expected to constitute an independent crime. (*See* proposed section 1003 on criminal solicitation.)

6. *Impossibility Not a Defense.*—Although there appear to be no Federal cases dealing clearly with the question of whether impossibility is a defense to a charge of attempt, that question has arisen in other American jurisdictions and should be anticipated in the drafting of a Federal attempt statute. The question is whether a person should be punishable if (a) he receives goods believing them to be stolen when, in fact, they are not, (b) he shoots at a dummy believing that it is a person he intends to kill, or (c) with an intent to take its contents, he opens a safe which proves to be empty. This question is frequently discussed in unhelpful terms of whether the mistake is one of fact or of law.[20] The last sentence of proposed subsection (1) follows the view that such mistakes, whether of fact or of law, should not constitute a defense.*

This approach is consistent with the overwhelming modern view, and is taken in the New York and Illinois Code revisions, as well as all those still in the proposal stage.[21] The reasons have been succinctly stated as follows:[22]

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[19] 18 U.S.C. § 371. *See, e.g., United States* v. *Knox Coal Co.*, 437 F.2d 33 (3d Cir. 1965) (conspiracy between corporation and certain individuals to evade income tax).

[20] *See, e.g.*, Perkins, *Criminal Attempt and Related Problems*, 2 U.C.L.A. L. REV. 319, 333 (1955); Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464 (1954); Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821 (1928).

*For a recent discussion of impossibility, *see* A. Enker, *Impossibility in Criminal Attempts—Legality and the Legal Process*, 53 MINN. L. REV. 665 (1969).

[21] *See* statutes cited *supra* note 4.

[22] MODEL PENAL CODE 5.01, Comment at 31 (Tent. Draft No. 10, 1960). The

In all of these cases (1) criminal purpose has been clearly demonstrated, (2) the actor has gone as far as he could in implementing that purpose, and (3) as a result, the actor's dangerousness is plainly manifested.

Concern has been expressed that such an approach permits conviction in what are called "extreme cases," such as that of the person who sticks a pin into a doll believing that it will kill the person in whose image the doll was fashioned. This concern was accommodated in the Model Penal Code by a provision (section 5.05(2)) permitting the court in any case to lower the grade of the offense or, in extreme cases, to dismiss the prosecution where the conduct "is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting" punishment assigned to it. There is disagreement among recent revisions as to whether such a provision is necessary.[23] It is not followed here because, it is believed, such cases will fall into one of the following categories:

(a) cases in which lack of mental responsibility will be a good defense;

(b) cases in which the inherent unlikelihood that the conduct will result or culminate in commission of the crime may constitute a reasonable doubt as to the actor's intent to commit the crime, justifying exercise of discretion by the prosecutor not to proceed;

(c) cases in which, despite the inherent unlikelihood of success of this particular attempt, firmness of criminal purpose is so clear that the actor should be prosecuted because, being educated by his failure, he is likely to try to achieve the same result in another, more dangerous manner.

Excluding the defense of impossibility, however, is not intended to permit prosecution of a person who believes that he is violating a law when, in fact, no such law exists, for example, a person who possesses liquor in a jurisdiction which he erroneously believes is "dry." Exclusion of such imaginary crimes would appear to be accomplished by provisions in the proposed Code which state that an offense is only what a Federal law defines as such.* A belief, therefore, that what one is doing is criminal would not meet the requirement that the conduct be planned to culminate in commission of an "offense" or the condition that the "offense" could be committed if the attendent circumstances were as he believed them to be.

Recent statutory formulations for eliminating impossibility as a defense do not follow any one pattern. One formulation defines the offense in such a way as to include the "impossible" crimes within that definition: conduct constituting a "substantial step" includes the phrase "under the circumstances as [the actor] believes them to be." [24]

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comment contains an extended discussion on eliminating "impossibility" as a defense to a charge of criminal attempt.

[23] Among the recent revisions, only the Model Penal Code and the Proposed Crimes Code for Pennsylvania include this provision. MODEL PENAL CODE § 5.05(2) (P.O.D. 1962); PROPOSED CRIM. CODE FOR PA. § 505(b) (1967).

*See, Study Draft section 301.

[24] PROPOSED DEL. CRIM. CODE § 309 (Final Draft 1967); PROPOSED CRIM. CODE FOR PA. § 501 (1967); MODEL PENAL CODE § 5.01 (P.O.D. 1962).

An alternative formulation is to state in a separate subsection the fact that impossibility, whether legal or factual, is not a defense.[25]

The provision proposed here is that of the latter alternative. There are two reasons:

(a) The clarification regarding impossibility is set forth in a separate sentence because it will probably be irrelevant in most prosecutions in which the attempt statute figures. Accordingly, when the court, in typical fashion, reads the relevant portions of the statute to the jury, it can avoid introducing the irrelevant considerations regarding impossibility.

(b) Explicitly referring to factual or legal impossibility should help in avoiding any construction of "circumstance" which would perpetuate old problems; for example, is the legal status of an object or person a "circumstance." [26]

7. Renunciation as an Affirmative Defense.—Proposed subsection (3) provides that a voluntary and complete renunciation of the culpable effort is an affirmative defense to a charge of attempt. In so doing it follows the lead of the recently revised State Codes.[27]

There appear to be no Federal decisions bearing directly on this issue, although there have been decisions in the somewhat analogous situation of the person who withdraws from a conspiracy.[28]

Withdrawal in both the conspiracy and complicity areas, however, involves considerations different from renunciation in the attempt area, and will be dealt with in the context of the statutes defining conspiracy and complicity.

There are two principal reasons for allowing a defense of renunciation. First, renunciation of culpable intent tends to negate dangerousness. As previously indicated, the exclusion of mere thoughts and preliminary acts from criminal attempt liability is based on the desire not to punish where there is an insufficient showing that the actor has a firm purpose to commit the crime contemplated. In cases where the actor has taken steps indicating prima facie sufficient firmness of

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[25] ILL. REV. STAT. c. 38, § 8–4(b) (1961); MICH. REV. CRIM. CODE § 1001(2) (Final Draft 1967); N.Y. REV. PEN. LAW § 110.10 (McKinney 1967).

[26] *People* v. *Jaffe*, 185 N.Y. 497, 78 N.E. 169 (1906) (goods received as "stolen" were not such); *State* v. *Taylor*, 345 Mo. 325, 133 S.W.2d 336 (1939) (person bribed as "juror" was not one).

[27] PROPOSED DEL. CRIM. CODE § 312(2) (Final Draft 1967); MICH. REV. CRIM. CODE § 1001(3) (Final Draft 1967); MINN. STAT. ANN. § 609.17(3) (1963); N.Y. REV. PEN. LAW § 35.45 (McKinney 1967); PROPOSED CRIM. CODE FOR PA. § 501(d) (1967). Illinois, however, has no statutory provision on renunciation.

[28] In the conspiracy area the traditional test is whether the conspirator can show affirmative withdrawal by making a clean breast to authorities or by communicating the fact of his withdrawal to his coconspirators. *United States* v. *Borelli*, 336 F.2d 376 (2d Cir.), *cert denied*, 379 U.S. 960 (1965). This test has been developed, however, within the context of determining (a) whether the conspirator can be held liable for overt acts committed after his alleged withdrawal, the issue arising on the question of whether the statute of limitations bars prosecution or (b) whether statements of coconspirators are admissible against him, as being made in furtherance of a conspiracy to which he is a party. These decisions deal, therefore, with the question of whether the actor will be liable for acts of others occurring after his withdrawal, not whether he will be absolved of criminal liability for what he has done up to that point.

purpose, he should be allowed to rebut such a conclusion by showing that he has plainly demonstrated his lack of firm purpose by completely renouncing his intention to commit the crime.

A second reason for allowing renunciation of culpable intent as a defense to an attempt charge is to encourage actors to desist from pressing forward with their criminal designs, thereby diminishing the risk that the substantive crime will be committed.

A common situation to which this defense would apply is that of smuggling. If an item has been carefully concealed in order to evade a customs inspection, the would be smuggler will have renounced sufficiently to avoid prosecution if he lists the item when asked if he has anything to declare or otherwise avoids landing the item illegally.

Some courts and writers disagree with this result.[29] The feeling is that once the defendant's acts have gone far enough to make him liable for a criminal attempt, no subsequent repentence or change of mind or abstention from further crime can possible wipe away liability for the crime already committed—just as once the murder victim is dead nothing else matters. The fact is, however, that a person may engage in conduct for which there is good reason, absent renunciation, to make him amenable to punishment, but he has not, so far as he knows, engaged in the conduct which the law has specifically prohibited in the definition of the substantive offense. If an individual voluntarily decides not to complete the specific substantive crime and not to "break the law" as he knows it or to cause any harm, he is in a very different moral position from the person who goes ahead and knowingly commits the crime, and then realizes that he was wrong, and desires to undo any harm done.

Of course the renunciation must be completely voluntary. By a "voluntary" abandonment is meant a change in the actor's purpose reflecting a change in attitude or orientation toward the crime, what may be termed repentance or change of heart. Lack of resolution or timidity may not suffice. Renunciation is not voluntary if it is motivated in whole or in part by circumstances not present or apparent at the inception of the actor's course of conduct, which increase the probability of detection or apprehension or which make more difficult the consummation of the offense. The would be smuggler would not have renounced sufficiently if he did not declare the item until the customs inspector started to lift up the false bottom in his suitcase.

Renunciation is also not complete if it is motivated by a decision to postpone the offense until a more advantageous time or to transfer the criminal effort to another objective or victim.

It should be noted that subsection (3) requires that the actor take steps to avoid the crime where abandonment itself will not necessarily achieve this objective, for example, where a bomb has been planted or a fire has been started, he must also remove the source of danger. If he is unsuccessful, prosecution will be based upon the completed sub-

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[29] *People* v. *Hayes*, 78 Mo. 307 (1883); *R.* v. *Page*, 5 Vict. L. R. 351, 39 Austl. Argus L.R. 374 (1933); 1 BISHOP, CRIMINAL LAW § 732 (7th ed. 1892); Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464, 473 (1954); WILLIAMS, CRIMINAL LAW § 20 (2d ed. 1961).

stantive offense and renunciation will not constitute a defense, although it might serve to mitigate punishment.

It will be noted that renunciation is termed an affirmative defense. What that means will be spelled out in another provision of the proposed Code. It is expected to provide that the defendant must raise the defense and carry the burden of establishing it by a preponderance of the evidence.*

8. *Grading.*—The principal issue in determining what should be the maximum sentence for an attempt is whether there is any penological significance to the fact that the crime was not actually committed. In the present Federal system, wherever an attempt is punishable, there generally is no distinction; the attempt is punishable equally with the offense. An exception is attempted murder or manslaughter (18 U.S.C. § 1113), where the maximum—incongruously—is only three years. It should be noted, however, that assult with intent to murder has a maximum of 20 years (18 U.S.C. § 113).

Although the present Federal approach probably has not developed from a clearly articulated penal philosophy, its result is consistent with modern rationalizations under which ". . . sentencing depends upon the antisocial disposition of the actor and the demonstrated need for a corrective sanction. . . ."[30] Whether or not the crime is consummated, under this view, would have little or no bearing on the maximum which should be available to the sentencing judge, even though the reasons why it was not consummated may have relevance to the actual sentence. This view is also consistent with the present exception in Federal law: that an attempted murderer would not be subject to the same penalty as a successful murderer. The penalty for a crime such as murder is assigned because a particular result has occurred, and to some extent reflects a retributive purpose—an eye for an eye.[31] Such a purpose is not relevant to the dangerousnes of the offender and the need for corrective measures upon which the attempt would be punishable.

The common law and most American jurisdictions, however, have made every criminal attempt subject to a lesser penalty. This approach reflects not only the factor of retribution but also the factor of deterrence in the penalty imposed for the completed offense. The full preventive force of the law is derived from the published penalty for success since all attempters contemplate success. Lesser penalties for attempt are justified as economy in punishment after failure of the maximum deterrent.

At common law an attempt to commit a felony was punishable only as a misdemeanor. In some State statutes the measure has been one-

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*See, Study Draft section 103(3).

[30] MODEL PENAL CODE § 5.05, Comment at 178 (Tent. Draft No. 10, 1960). *Also see* the statement in the paragraph 1, *supra*, from the Model Penal Code comment concerning the desirability of punishing attempts.

[31] Other sections of Title 18 also impose a higher penalty if a certain result is caused. Thus, 18 U.S.C. § 34, for example, provides for the possible imposition of higher penalties—death or life imprisonment—if actions prohibited in 18 U.S.C. § 32 and 18 U.S.C. § 33, concerning the destruction of aircraft or motor vehicles, result in the death of any person; 18 U.S.C. § 832 and 18 U.S.C. § 837 increase the possible sentence to 10 years and $10,000, from 1 year and $1,000, if bodily injury results from the prohibited transportation of explosives or other dangerous articles. It is likely that this notion will continue in certain of the more serious crimes where there is a possibility of death or serious bodily injury, as, for example, in robbery, arson and kidnapping.

half of the maximum prescribed for the completed offense. In others there has been a hybrid approach: equal treatment or one-half plus an outside ceiling measured in years.[32]

Recent State revisions and proposed revisions reflect a similar variety in approach:

Delaware: equal, except where life is mandatory court can sentence to any number of years. PROPOSED DEL. CRIM. CODE §§ 309, 1004(2) (Final Draft 1967).

Illinois: equal, except for year-ceilings of 20 for treason, murder and aggravated kidnapping, 14 for any other forcible felony and 5 for any other offense. ILL. REV. STAT. c. 38, § 8–4(c) (1965).

Michigan: one class lower than the class of offense attempted. (Class maxima: life, 20, 10, 5, 1, 90 days, 30 days.) MICH. REV. CRIM. CODE § 1001(4) (Final Draft 1967).

Minnesota: one-half of maximum imprisonment or fine for offense attempted, but no more than 20 years if maximum is life and no less a maximum than 90 days or $100. MINN. STATS. ANN. § 609.17(4) (1963).

New York: one class lower than the class of offense attempted. (Class maxima: life, 25, 15, 7, 4, 1, and 3 months.) N.Y. REV. PEN. LAW § 110.05 (McKinney 1967).

Pennsylvania and Model Penal Code: equal to most serious crime attempted, except felony of 1st degree is felony of 2nd degree. PROPOSED CRIMES CODE FOR PA. § 505(a)(1967); MODEL PENAL CODE § 5.05(1) (P.O.D. 1962).

New York's pattern of punishment at one class lower than prescribed for the completed offense is roughly consistent with its former approach of one-half. There seems to have been little discussion about it;[33] and its acceptance is probably due to the force of tradition plus the fact that its system of administering justice is geared to plea bargaining for which a plea to an attempt, insuring a lower maximum sentence, is an attractive consideration for the defendant.[34] In adopting the New York approach, the Michigan revisers said so explicitly, as follows:[35]

> In suggesting a lower penalty for attempts the Committee relies on two factors: (1) that the act of attempt, although possibly as dangerous as action consummating in the completion of crime, generally causes less physical harm; and (2) reduced punishments for attempts will afford a general vehicle for plea bargaining available throughout the Code.

The first ground stated by the Michigan revisers appears to be contrary to the principle that treatment provisions should reflect the dangerousness of the actor and not the perhaps fortuitous circumstance that the harm he intended actually occurred. There is, nevertheless, an argument in favor of a lower attempt maximum; in at least some cir-

[32] For a survey of the variety of attempt penalties prescribed in the States as of 1960, *see* MODEL PENAL CODE § 5.05, Comment at 174–175, 181–187 (Tent. Draft No. 10, 1960).

[33] N.Y. REV. PEN. LAW § 110, Comment (McKinney 1967).

[34] A number of United States Attorneys have expressed a desire that attempt be made generally a lesser included offense to allow for plea bargaining in order to facilitate and expedite criminal prosecutions. It may be noted, however, that such a course would result in a false statistical picture of Federal convictions.

[35] MICH. REV. CRIM. CODE § 1001(4), Comment at 89 (Final Draft 1967).

cumstances, this is consistent with that treatment principle. Such an argument is that, while persons who, with intent to commit a crime, have taken a substantial step towards its commission should be amenable to prosecution and corrective measures, many will be apprehended before they have exhibited the same firmness of purpose as the person who has gone through with it or who has advanced to the last proximate act. For reasons similar to those which support the defense of renunciation, those persons, it can be argued, should not be subject to the same treatment possibilities as provided for those who have committed the crime.

To accommodate the probably larger group of attempt prosecutions, persons apprehended after having performed or engaged in the last proximate act, it would seem necessary to provide nevertheless that they would be subject to the same penalty provided for the persons who committed the crime. Yet reasonable objection to this approach would be that such a refinement in sentencing is too great for the Congress to provide for and is better left to the sentencing court.

The draft proposed here contains the two sharply different alternatives of (a) equal treatment, except at the highest ranges, and (b) one class lower all the way down the line.* No preference is here expressed because it is believed that the final decision will depend on what is determined to be appropriate for overall sentencing structure, such as how high the penalties are and how great the differences will be between the classes of offenses. Of particular significance will be the decision on whether to include a provision similar to that in the ALI's Model Penal Code [36] and endorsed by the ABA Advisory Committee on Sentencing and Review [37] permitting the court to reduce

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*This was changed. The Study Draft discriminates between kinds of attempts which should be subject to the maximum available for the completed offense and those which should be subject only to a lesser penalty. Under proposed section 1001(4), criminal attempt is an offense of the same class as the offense attempted, but with two exceptions.

First, attempts to commit Class A felonies are Class B felonies.

Second, although the "dangerous proximity" doctrine was rejected as a test for attempt liability generally because of the view that persons who take a substantial step toward commission of an offense, with firmness of purpose to commit it, ought to be subject to criminal prosecution, the test was retained for determining the amount of the *penalty* that should be available for attempts to commit Class B and C felonies. The section provides for determination of this issue by a preponderance of the evidence at sentencing (unless, of course, the defendant has been charged with or has pleaded guilty to attempt as an offense of one lower grade). This avoids needlessly complicating attempt prosecutions, because the jury need only consider one standard—whether the conduct constitutes an attempt—rather than two; at the same time, the judge is limited by the statutory criterion, reviewable by an appellate court if his determination is challenged. One of the reasons for allowing a lower penalty—limited by the statutory criterion—is that studies indicate that attempt is regarded as less serious than the completed offense, except where the offender is within physical proximity to completion or some fortuity intervenes.

Misdemeanor and lesser attempts have the same maximum as does the completed offense; any discrimination in grading is much too fine to make in legislation.

[36] MODEL PENAL CODE § 6.12 (P.O.D. 1962).

[37] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 3.7 (Approved Draft 1968).

a felony conviction to a lesser degree of felony or to a misdemeanor if, having regard to the nature and circumstances of the crime and to the history and character of the defendant, it is of the view that it would be unduly harsh to sentence the offender in accordance with the proposed Code.* This prerogative might also be extended to United States Attorneys. In any event such a provision would have the collateral effect of greater flexibility for plea bargaining purposes.

9. *Issues for Included-Offense Statute.*—Several matters of relevance to the crime of attempt are also relevant to other included crimes, for example, crimes all of whose elements must be established in order to show the defendant's guilt of another, greater crime. It is expected that there will be provisions in the general part of the proposed Code to deal with these matters as they affect all included crimes throughout the Code.

Such matters involving attempts are:

(a) that the charging instrument—the complaint, information and indictment—need not specifically set forth the charge of attempt in order for both the charge of the completed crime and the attempt, or even the attempt alone, to be submitted to the trier of the fact; [38] **

(b) that the defendant may not be convicted or, at least, punished for both the commission of the completed offense and the commission of the attempt; [39] ***

(c) that it is no bar to conviction of the attempt that the crime had actually been committed; [40] ****

(d) (possibly) that conviction of the completed offense is deemed to be conviction of the attempt if the evidence is subsequently determined to be insufficient to support conviction of the completed offense, provided that submission of the charge of the completed offense to the jury on such insufficient evidence was not prejudicial to the defendant. The purpose of such a provision would be to avoid the necessity of a retrial when the determination of insufficiency is made after verdict—on appeal, on a motion for judgment of acquittal or on a motion for a new trial—and the evidence is sufficient to support a conviction of the attempt, the

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* *See* Study Draft section 3004.

[38] This is presently the rule in the Federal system. FED. R. CRIM. P. 31(c); *Simpson* v. *United States*, 195 F. 2d 721 (9th Cir. 1952).

** *See* Study Draft section 703(3).

[39] This is in agreement with Federal decisions, *e.g.*, *Giles* v. *United States*, 157 F. 2d 588 (9th Cir. 1946), *cert. denied*, 331 U.S. 813 (1947); and is in accord with the well established rule that a prosecution for a minor offense included in a greater will bar a prosecution for the greater if on an indictment for the greater the accused can be convicted for the lesser. 22 C.J.S. *Criminal Law* § 284 at 744 (1961); 1 WHARTON, CRIMINAL LAW § 283 (Anderson ed. 1957).

*** *See* Study Draft section 703(3).

[40] Federal cases demonstrate that an attempt to violate a Federal law includes a successful as well as an unsuccessful endeavor. *Giles* v. *United States*, 157 F.2d 588 (9th Cir. 1946), *cert. denied*, 331 U.S. 813 (1947); *Guzik* v. *United States*, 54 F.2d 618 (7th Cir.), *cert. denied*, 285 U.S. 545 (1932); *O'Brien* v. *United States*, 51 F.2d 193 (7th Cir.), *cert. denied*, 284 U.S. 673 (1931); *contra*, *United States* v. *Baker*, 129 F. Supp. 684 (N.D. Cal. 1955) (dictum).

**** *See* Study Draft section 703(4). The court may charge the jury with respect to an included offense even though there is no rational basis for it.

elements of which were necessarily found by the jury in reaching their verdict on the completed offense; [41] *

(e) that an attempt to commit an included offense is an included offense. If a person is charged with aggravated assault, for example, the rules with respect to charging, conviction, *etc.*. would apply not only to attempted aggravated assault and to simple assault (both clearly included offenses) but also to attempted simple assault, also an included offense for aggravated assault, but expressly made so in order to avoid any doubt about it.**

10. *Provisions to be Deleted or Modified.*—With a general attempt provision contained in the proposed Code, it will be possible—as noted earlier—to delete attempt language from some sections presently in Title 18 and to eliminate entirely others which merely define an attempt. The recommendations for such deletions and modifications will be made in the reports dealing with those statutes.

Criminal Solicitation: Section 1003

1. *Background and Advantages.*—The proposed statute on criminal solicitation is designed to provide punishment for the person who does not commit the offense itself but merely instigates its commission. The problems involved in such a provision are divisible on the basis of whether the instigator—here called a solicitor—has been successful or unsuccessful, *i.e.*. whether or not his efforts are met with some form of culpable response from the person he is seeking to influence.

There would appear to be little difficulty with the principle of punishment of successful solicitations. The principle is well established in Federal law and has long been reflected in provisions of general applicability. For example, present law punishes successful solicitations in the accomplice statute, under which one who "aids, abets, counsels, commands, induces or procures . . . commission [of an offense against the United States] is punishable as a principal" [1] and under conspiracy statutes, such as 18 U.S.C. § 371, which punish the agreement to commit a crime where there has been "an overt act in further-

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[41] This provision is based on the Proposed New York Criminal Procedure Law § 240.30 (1967), which states in part that an appellate court may modify a judgment of a criminal court in the following manner:

> Upon a determination that the trial evidence adduced in support of a verdict is not legally sufficient to establish the defendant's guilt of an offense of which he was convicted, but is legally sufficient to establish his guilt of a lesser included offense, the court may modify the judgment by changing it to one of conviction for the lesser offense.

The same result was reached in *State* v. *Bronston*, 7 Wis. 2d 627, 97 N.W. 2d 504 (1959), *overruled on admission of confession*, 133 N.W. 2d 753 at 762 (1965), *following Jackson* v. *Denno*, 378 U.S. 368 (1964).

*See Study Draft section 703(5).

**See Study Draft section 703(3).

[1] 18 U.S.C. § 2. A conviction based on this section requires that the substantive offense have been committed. This must be demonstrated at the trial of the alleged solicitor either by a prior conviction or by direct evidence. *United States* v. *Provenzano*, 334 F.2d 678 (3d Cir.), *cert. denied*, 379 U.S. 947 (1964).

ance thereof." [2] It is anticipated that the New Federal Criminal Code will contain similar provisions.

There is at present, in the Federal system, however, no statute of general applicability to deal with unsuccessful solicitations. A few statutes defining specific offenses include language prohibiting its solicitation, such as soliciting payment of a bribe (18 U.S.C. § 201); and others prohibit soliciting of certain conduct which may or may not be illegal, such as soliciting another to gamble in certain illegal establishments (18 U.S.C. § 1082), persuading, inducing or enticing females to travel in interstate commerce for prostitution or immoral purposes (18 U.S.C. § 2421, *et seq.*), and advocating, abetting, advising or teaching the violent overthrow of the government (18 U.S.C. § 2385).

At least one Federal case and several State cases hold that many or all solicitations can be punished as attempts.[3] In *United States* v. *DeBolt*, 253 F. 78 (S.D. Ohio 1918), it was explicitly held that a bare solicitation is an "attempt". The court decided that, under section 3 of the Sabotage Law of April 20, 1918,[4] providing that whoever in time of war destroys war material, or whoever willfully attempts to make or causes to be made in a defective manner any war materials, is guilty of sabotage, a conviction could be had for an "attempt" where the evidence showed a willful advising and soliciting of another to commit the felony named in the Act. In that case, two persons tried to convince an employee in a plant producing defense equipment to sabotage the assembly line. The employee after first agreeing changed his mind and revealed the plan. The court stated:

> To attempt to cause a thing to be done is an attempt to effect or bring about the doing of that thing. Advising and attempting to influence the doing of a thing is a means, and often a most potent means, of effecting or accomplishing the desired result. Mere words may constitute the offense of an attempt when they solicit the commission of a crime. (253 F. at 82.)

Later in its opinion, the court appeared to be restricting the application of this principle to the serious offense of sabotage committed during wartime; and there is no evidence that this holding that a bare solicitation is an attempt has ever been relied upon by another Federal court. Moreover, an earlier Federal decision implied a contrary result: that there is no attempt liability if the commission of the crime depends upon the actions of an independent third party. *United States* v. *Carroll*, 147 F. 947 (D. Mont. 1906). *See also* the discussion in paragraph 4 of the commentary on attempt.

Proposed section 1003 is based upon the view that an unsuccessful solicitation should not be treated as an attempt. It is true, as noted in

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[2] The overt act requirement has not been a major obstacle to successful prosecutions. The courts have emphasized that the "gist" of the crime is the unlawful act and agreement; the overt act need not be a "wrong", but just a manifestation that the conspiracy is at work. *Jordan* v. *United States*, 370 F.2d 126 (10th Cir.), *cert. denied*, 386 U.S. 1033 (1966).

[3] The Model Penal Code commentary indicates that in approximately seven jurisdictions a bare solicitation is treated as a type of attempt to be governed by ordinary attempt principles. MODEL PENAL CODE § 5.02, Comment at 85 (Tent. Draft No. 10, 1960).

[4] C. 50, 40 Stat. 533.

the general introduction, *supra*, that the purposes of providing punishment of solicitation and attempt are similar: permitting law enforcement intervention, dealing with persons who have indicated their dangerousness, and avoiding inequality of treatment when some fortuity has prevented the intended criminal result. But, generally speaking, an unsuccessful solicitation poses less of a threat than an attempt by a person to commit the crime himself. In line with the *Carroll* decision, *supra*, it may be said that the requirement of action by an independent third party raises the possibility that he will be deterred by the penalty prescribed for commission of the offense. Moreover, despite the earnestness of the solicitation, the actor is merely engaging in talk which may never be taken seriously. The remoteness from completion of the offense is therefore different from that for an attempt.

These considerations suggest a possible resolution of issues different from their resolution in the attempt statute: should solicitation of *any* offense or only certain offenses be a crime? Does the variety of ways in which a crime may be instigated require the use of special words to describe what will constitute "attempt by solicitation"? What kind of corroborative circumstances, if any, should be required?

The draft proposed here suggests that existing Federal law can be improved by extending solicitation to crimes other than those where solicitation prosecutions are now authorized specifically—or, at least, to different crimes than are now covered if a solicitation is regarded as an attempt under statutes where an attempt prosecution is specifically authorized. The issue is posed in the draft, however, by use of the word "felony", as to whether all offenses should be covered;it seems fairly clear that the provision should cover certain crimes, such as murder, assault, robbery and arson; but it is not so clear that a crime such as fraud, which depends (once the defrauder is successfully solicited) upon the application of persuasion to yet another party for completion, should also be covered. (*See* paragraph 4, *infra*.)

The draft also proposes that the solicitation be described in words which limit it to actual instigation, *i.e.*, "entreats", rather than mere encouragement. (*See* paragraph 2, *infra*.) It also proposes an innovation in solicitation law in requiring circumstances strongly corroborative of the fact that the solicitor really means to be taken seriously. (*See* paragraph 3, *infra*.)

It should be noted that even if a solicitation should be regarded as an attempt, it would nevertheless be convenient to have a separate statute to deal with solicitation. As will be discussed below, there are additional issues which arise with respect to "attempt by solicitation" which do not arise for other forms of attempt, such as liability when the person solicited is innocent or irresponsible, what constitutes renunciation, *etc.* It would be cumbersome to deal with them in an attempt statute. While perhaps as much might be said for inserting "attempting to aid another to commit a crime," [5] as a separate subsection in the attempt statute, at least solicitation has traditionally

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[5] Recent revisions in Delaware and Michigan do treat this in a separate section. *See* PROPOSED DEL. CRIM. CODE § 311 (Final Draft 1967); MICH. REV. CRIM. CODE § 1005 (Final Draft 1967).

been viewed in Anglo-American law as a separate crime.[6] (*See* discussion in paragraph 3, *infra.*)

2. *Definition of Solicitation: Required Criminal Intent and Conduct.*—The intent required by the proposed draft is the intent to promote or facilitate the commission of a crime. "Promote or facilitate" is used, rather than "cause", because it is intended to embrace solicitations of actions by accomplices as well as principals. Limiting solicitation to criminally purposive conduct is consistent with Federal case law,[7] and with modern State revisions.[8]

With regard to the conduct required, it should be remembered that we are trying to deal here with the person who has set out to instigate the commission of a crime. While it may be true that persons who merely express approval of or even applaud the commission of a crime are antisocial, we are not prepared to say that such antisocial tendencies constitute such a threat as to be punishable. (*See* discussion in paragraph 3, *infra*, regarding analogous problems in the area of free speech). Care must be taken, therefore, to avoid descriptions of the utterances required which might embrace those which do not amount to instigation.

Under the existing Federal statute defining complicity, the words are "counsels, commands, induces or procures" (18 U.S.C. § 2). The Model Penal Code uses the phrase "commands, encourages, or requests;" the New York Revised Penal Law uses the phrase "solicits, requests, commands, importunes or otherwise attempts to cause another to engage in such conduct;" the proposed Michigan Revised Criminal Code uses "commands or solicits such other person."[9]

The phrase preferred here is "commands, induces, entreats or otherwise attempts to persuade." The verb "solicits" has been rejected because its common law history has made it too vague. Words such as "counsels," "encourages," and "requests" have also been rejected because they suggest equivocal situations too close to casual remarks or even to free speech, although "requests" would be a possible extension of the scope of the prohibition.

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[6] In *Rex* v. *Higgins*, 2 East 5, 23, 102 Eng. Rep. 269 (K.B. 1801), it was held that to solicit a servant to steal his master's goods was a misdemeanor although no other act was done. Since *Higgins* it has been the accepted view that to solicit another to commit at least a felony is a misdemeanor at common law. As stated in a Massachusetts case:

> It is an indictable offense at common law for one to counsel and solicit another to commit a felony or other aggravated offense although the solicitation is of no effect. (*Commonwealth* v. *Flagg*, 135 Mass. 545, 549 (1883)).

[7] Decisions based on various sections of Title 18 which concern the actions of an aider, or conspirator, or solicitor, require a showing of criminal intent. *E.g.*, *Carter* v. *United States*, 333 F.2d 354 (10th Cir. 1964) (intent to commit substantive offense is an essential ingredient of crime of conspiracy); *Danielson* v. *United States*, 321 F.2d 441 (9th Cir. 1963) (must prove at least that degree of criminal intent necessary under substantive count to sustain conviction for conspiracy); *McClanahan* v. *United States*, 230 F.2d 919 (5th Cir.), *cert. denied*, 352 U.S. 824 (1956) (community of unlawful intent between accessory and perpetrator of crime must exist).

[8] Proposed Del. Crim. Code § 300 (Final Draft 1967); Ill. Rev. Stat. c. 38, § 8–1 (1961); Mich. Rev. Crim. Code § 1010 (Final Draft 1967); N.Y. Rev. Pen. Law § 100.00 (McKinney 1967); Proposed Crim. Code for Pa. § 502 (1967).

[9] Model Penal Code § 5.02 (P.O.D. 1962); N.Y. Rev. Pen. Law § 100.00 (McKinney 1967); Mich. Rev. Crim. Code § 1010 (Final Draft 1967).

3. *Definition of Solicitation: Corroboration.*—The proposed statute contains a requirement that the circumstances in which the solicitation is made be strongly corroborative of the defendant's intent to promote or facilitate the commission of the crime. This requirement reflects concern that otherwise a prosecution and conviction could rest solely upon proof of the mere words of the accused which, in the appropriate combination, amount to a solicitation. It recognizes the fact that, even for persons trained in the art of speech, words do not always perfectly express what is in a man's mind. Thus in cold print or even through misplaced emphasis, a rhetorical question may appear to be a solicitation. The erroneous omission of a word could turn an innocent statement into a criminal one (for example, "You shoot the President" *versus* "Should you shoot the President?").

If a *successful* solicitor is prosecuted under existing Federal law, his conduct may be simply that he said something, but more than his mere words must be proved to establish his guilt. If he is prosecuted as an accomplice, the commission of the crime by someone and his connection with the perpetrator of the crime must be established.[10] If he is prosecuted as a conspirator, not only the agreement but also his connection with an overt act in furtherance of the conspiracy must be established.[11] Compared particularly with the traditional Federal requirement of an overt act for conviction of conspiracy, which is, like solicitation, an inchoate crime, a substantially lesser requirement for an unsuccessful solicitation would be anomalous. The Federal courts' skepticism as to the probative value of words standing alone is further illustrated by the rule that an accused cannot be convicted upon his uncorroborated confession or admission.[12]

Concern for this problem has been expressed by some of the proponents of recent Code revisions; and it has been dealt with in various ways. Most place reliance upon the fact that the intent to cause commission of a crime must be established beyond a reasonable doubt.[13] If the circumstances cast a reasonable doubt as to this intent, for example, the defendant was telling a joke or drunk or reading from *Macbeth*, they will be brought to light by the defendant at the trial. At least one formulation, however, reflects the view that this leaves too much to the jury and places too much reliance on its assessment of the credibility of the defendant who tries to explain his utterance of the incriminating remarks. This statute, in Wisconsin, requires that, where a person advises another to commit a felony, with intent that the felony be committed, he must do so ". . . under circumstances which indicate unequivocally that he has such intent. . . ." [14]

Several State statutes presently require a different quality of corroboration for a different purpose. The fear being addressed is that, if unsuccessful solicitations are made criminal, they may be used as the basis of blackmail or oppression. This latter problem is reflected

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[10] *See* note 1, *supra* and accompanying text.

[11] *See* note 2, *supra* and accompanying text.

[12] *Warszower* v. *United States*, 312 U.S. 342 (1941). In *Smith* v. *United States*, 348 U.S. 147 (1954), the Court noted "the realization that sound law enforcement requires police investigations which extend beyond the words of the accused."

[13] *See* the recent revisions and proposals cited in note 8, *supra*.

[14] WIS. STAT. ANN. § 939.30 (1957).

by a requirement of corroboration of the testimony of the person allegedly solicited that the solicitation was made.[15]

The problem was recognized in a different context by the court in *Kelly* v. *United States*, 194 F. 2d 150 (D.C. Cir. 1952). In *Kelly* the defendant was accused of approaching a park officer on "vice patrol" and requesting him to enter into homosexual relations. There was no dispute on the facts except as to the content of the conversation between defendant and the officer. The accused offered a plausible explanation of his conduct and denied making the request charged. The officer's uncorroborated testimony was accepted by the lower court and the accused was adjudged guilty. In reversing the decision the court of appeals emphasized the probative dangers inherent in this type of case, and decided, therefore, that some corroborating evidence was necessary. The court, however, refused to impose a specific "rigid requirement as to quantity or character of proof in these cases" because of a concern that this would "seriously restrict prosecutions for this offense and to that extent impair enforcement of the statute." [16]

Since it is difficult at this time to see what Federal crimes would be of a kind where a false charge of solicitation would lend itself to blackmail, it is believed that a general corroborative requirement of this kind is undesirable and that a better approach is to deal with such problems when drafting and defining the specific substantive offense in which the problem may arise.

The Wisconsin approach is preferred, however, over that of the other recent revisions on the question whether independent evidence should be required to corroborate the firmness of the solicitor's criminal intent. It is believed that the language proposed here is an improvement because it is more precise than "unequivocal", used in the Wisconsin statute, focusing on circumstances which strongly corroborate the solicitor's intent that the person he is addressing do what is being solicited. Thus, a barroom broadcast for someone to get rid of the solicitor's wife would not satisfy the test, but a guarded conversation with a known criminal would. At the same time this formulation would help to draw a sharper line between protected and unprotected speech in the political area. (*See* discussion in paragraph 4, *infra*.)

A possible alternative would provide that the soliciting of another to commit a crime be accompanied by an overt act. This formulation would also involve a corroborative element that goes beyond the words constituting the bare solicitation; the solicitor must not only communicate his intent to cause commission of a federal offense but must also commit an overt act in furtherance of such intent,[17] thereby demonstrating firmness of criminal purpose.

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[15] *See* CAL. PEN. CODE § 653f (1955) (two witnesses or one witness and corroborating circumstances); HAWAII REV. LAWS § 248-9 (1955) (corroboration of testimony of persons allegedly solicited); COLORADO LEGISLATIVE COUNCIL REPORT TO THE COLORADO GENERAL ASSEMBLY, COLORADO CRIMINAL LAW 78 (Research Publication No. 68, 1962) (two witnesses or other evidence direct or circumstantial or a confession by the accused).

[16] 194 F. 2d at 154.

[17] As stated, this "test" is related to the requirements for a conviction of a solicitor under 18 U.S.C. § 371 in those instances where the person solicited agrees to commit the crime, although someone other than himself may perform the overt act. The decisions under 18 U.S.C. § 371 concerning the nature of the requisite overt act would be relevant and provide guidance to prosecutors and the courts if such a formulation were adopted.

However, the additional element of an overt act does change the traditional nature of the crime of solicitation, that is, the asking or commanding of another to commit a crime. In doing so, some bare solicitation cases will no longer be covered.[18] No matter how persuasive or demanding a solicitor and no matter how clear the circumstances supporting his firmness of purpose, he would not be guilty of criminal solicitation unless his words were accompanied by the requisite overt act.[19]

4. *Definition of Solicitation: Nature of the Offense Solicited.*—In two places the proposed statute deals with what it is that the solicitor intends to accomplish: what he intends to promote or facilitate and what he is soliciting the other person to do. There are three issues involved.

First: as noted earlier, in pointing out possible distinctions between attempt and solicitation, it may not be desirable to make the unsuccessful solicitation of every Federal offense a crime. At common law, most jurisdictions only punished solicitation to commit felonies and "aggravated" misdemeanors.[20] Even within the terms of modern penology, which focuses on the dangerousness of the actor and of the situation he creates, one may ask whether the need is compelling to embrace the solicitation of all crimes, keeping in mind that if the solicitation meets with success, even only to the extent of an agreement and an overt act, the solicitor can be punished as a conspirator. Limiting solicitation to felonies would still permit prosecution of those unsuccessful solicitors whose conduct threatens a serious harm such as murder, treason, sabotage, aggravated assault, arson and robbery. On the other hand, an unsuccessful solicitation to commit an impersonation, and similar crimes which are not seriously harmful in themselves, would not be punishable.

Recent State revisions, with the exception of the Wisconsin statute previously quoted because of its corroboration provision, uniformly make the solicitation of any offense, felony or misdemeanor, a crime, following the logic of the purposes set forth in the General Introduction, *supra.*[21]

By suggesting a choice between any felony, and any offense, the draft poses a choice between the common law and the modern revision approaches. Other possibilities are the listing of all the crimes to which the solicitation provisions should apply, based upon analysis of each as it is drafted, or making the section apply to all felonies plus only selected misdemeanors, such as those, like simple assault, where the offense might easily and directly be committed by the person solicited and involves infliction of physical harm.

Whatever the approach taken, it may still be desirable to prohibit solicitations in the definition of the offense, *e.g.*, payment of a bribe, obstruction of some governmental function.

Second: there is a question as to whether criminal solicitation should include more than solicitation of another to engage in conduct con-

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[18] For example, the defendants in *United States* v. *DeBolt*, 253 F. 78 (S.D. Ohio 1918), did no more than solicit the commission of sabotage.

[19] If the solicitation were successful, of course, prosecution could be based on provisions of the proposed Code dealing with complicity and conspiracy.

[20] *See* note 6, *supra.*

[21] *See* the recent revisions and proposals cited in note 8, *supra.*

stituting a completed crime. It should be noted that, in any event, the proposed section would cover one who solicits another to engage in conduct that might constitute an attempt, *e.g.*, one who seeks the performance of an act which because of some unknown circumstance would not result in the intended criminal result, because the goal determines the solicitor's liability.

In addition, it is believed that the statute should embrace conduct solicited which might involve only complicity in the commission of an offense rather than the direct commission of the offense. If *A* solicits *B* in turn to solicit *C* to commit murder, *A* should be liable even though he did not himself contact *C*. The conduct sought from *B* will itself involve the commission of an offense under the complicity or conspiracy provisions. This is consistent with the traditional common law view and with Federal case law.[22] It is explicit in the proposed statute that the solicited person's commission of the offense may be either as principal or as accomplice.

Third: the fact that *specific** conduct is required serves a significant purpose. While solicitation of another to commit a crime apparently is not absolutely privileged by the first amendment,[23] it remains a legislative question whether the punishment of solicitations should be curtailed in order to protect free speech. The objective is not to protect one who uses words as a means to crime, who intends that his words should cause a criminal result. It is not contended that he makes a contribution to community discussion which is worthy of protection. The problem is in preventing legitimate discussion or agitation of an extreme or inflammatory nature from being misinterpreted as solicitation to crime. It would not be difficult to convince a jury that inflammatory rhetoric in behalf of an unpopular cause is in reality an invitation to violate the law rather than an effort to seek its change through legitimate criticism. Minority criticism may have to be extreme in order to be politically audible.[24]

The Supreme Court has expressed its concern in this area in a number of cases interpreting the Smith Act (18 U.S.C. § 2385.) This Act provides in part:

> Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States . . . by force or violence, or by the assassination of any officers of any such government. . . .

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[22] Thus, for example, if two people agree to commit crime X, and then seek a third person to perpetrate the crime, they would be guilty of a conspiracy to commit crime X. *United States* v. *Lester*, 282 F. 2d 750 (3d Cir. 1960), *cert. denied*, 364 U.S. 937 (1961). *See* MODEL PENAL CODE § 5.02, Comment at 87 (Tent. Draft No. 10, 1960), for a discussion of the common law decisions supporting this view.

* The term "specific" has been changed to "particular" in the Study Draft.

[23] *Dennis* v. *United States*, 341 U.S. 494 (1951).

[24] In *Hartzel* v. *United States*, 322 U.S. 680 (1944), the conviction of the defendant for willfully attempting to cause insubordination, disloyalty, mutiny or refusal of duty in the United States military service (during wartime) was reversed because his statements did not make direct or affirmative appeals to that effect, even though they were characterized, by Mr. Justice Jackson, as " . . . vicious and unreasoning attacks on one of our military allies, flagrant appeals to false and sinister racial theories and gross libels of the President." 322 U.S. at 687.

In *Yates* v. *United States*, 354 U.S. 298 (1957), the Court adopted the view that the Smith Act did not prohibit advocacy and teaching of forcible overthrow as an abstract principle divorced from any effort to instigate action to that end; that Congress intended to punish only the advocacy "directed at promoting unlawful action". Moreover, the advocacy must assume the form of present advocacy of, or future immediate violent overthrow of the government; that is, it must be " 'advocacy of action' for the accomplishment of such overthrow either immediately or as soon as circumstances prove propitious, and uttered in terms reasonably calculated to 'incite' such action." *Scales* v. *United States*, 367 U.S. 203, 230 (1961). Incitement to action, as contrasted with an expression of Communist doctrine, is the key factor.[25]

The proposed solicitation statute makes an effort, consistent with the above Supreme Court decisions, to protect legitimate agitation by requiring that the criminal conduct allegedly solicited by the speaker be "specific." How specific is "specific" must be left to the courts which analyze the facts of particular cases, in the same manner the Supreme Court dealt with the Communist cases.

5. *Affirmative Defense of Renunciation of Criminal Purpose.*—Subsection (4) provides for a renunciation defense similar to that proposed for attempt. The justifications and comments pertinent to abandonment of criminal attempts are generally applicable here. (*See* commentary on Attempt (section 1001), paragraph 7.) It may be possible in a final version of both statutes to eliminate duplication of those provisions defining renunciation which are identical.

6. *Defense of Legal "Immunity".*—Subsection (2) of proposed section 1003 reflects the same policies that are expected to be embodied in the statute dealing with complicity. Basically, the provision is designed to ensure that one who could not be liable as an accomplice if the substantive crime were completed will not be liable for solicitation. The reasoning behind the anticipated complicity section, which would be carried over to the proposed solicitation provision, would be that one who is the victim of the crime, for example, the 15-year-old victim of statutory rape should not be liable as a participant in the offense even if she solicited it. To hold the female an accomplice in a statutory rape upon her person would be inconsistent with the legislative purpose to protect her against her own weakness in consenting.

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[25] For example, in *Scales* the Court stated (367 U.S. at 234) that at least the following patterns of evidence would be sufficient to constitute illegal advocacy:

> (a) the teaching of forceful overthrow, accompanied by directions as to the type of illegal action which must be taken when the time for revolution is reached and (b) the teaching of forceful overthrow, accompanied by a contemporary though legal course of conduct clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated.

In *Noto* v. *United States*, 367 U.S. 290, 297–98 (1961), the Court stated:

> We held in *Yates* and we reiterate now, that the mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching . . .

Following a similar line of reasoning the Supreme Court decided, in *Gebardi* v. *United States*, 287 U.S. 112 (1932), that a woman could not be guilty under the Mann Act of a conspiracy to transport herself across State lines.

It is also expected to be provided in the complicity statute that a person shall not be liable as an accomplice if his behavior is inevitably incidental to the commission of the offense. Whether this will be so depends upon an interpretation of the particular statute involved; but typical examples are a female who seeks an abortion, the unmarried party in a bigamous marriage. If the substantive statute in these areas is read to negate accomplice liability for such activities, it should also bar liability for solicitation. This is provided in subsection (2).

Subsection (2) is consistent with common law decisions and with the formulations in the Model Penal Code and the recently revised State Codes.[26]

7. *Defense Based on the Mental State or Legal Position of the Person Solicited Precluded.*—Subsection (3) of the proposed statute is based upon the universally acknowledged principle that one is no less guilty of the commission of a crime because he uses the overt behavior of an innocent or irresponsible agent. A person in this situation should be accountable as if the behavior were his own.

This principle has been repeatedly upheld in the Federal courts.[27] The basic difference between the situation under the solicitation provision and those dealt with in such cases is that the solicitation provision will be utilized when the agent, for one reason or another, was unsuccessful in carrying out the criminal activity. However, if the agent's innocence or legal irresponsibility would not prevent prosecution of the instigator when the crime was committed, it should not bar this prosecution when the crime was solicited but never completed.

The precise language proposed here is modeled on the recent Michigan revision,[28] but is not significantly different from the other recently revised codes. It may be noted that this provision will also be applicable to a conspiracy statute, thus suggesting that it may ultimately be placed in a separate section applicable to both crimes.[29]

8. *Defense Based on the "Incapacity" of the Solicitor Precluded.*—Subsection (e)* of the proposed statute rests on the generally accepted principle that a person who is not capable in his individual capacity

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[26] *See* the recent revisions and proposals cited in note 8, *supra*.

[27] *See, e.g., Maxey* v. *United States*, 30 App. D.C. 63 (1907) (child given funds and directed to obtain abortion; viewed as instigation through irresponsible agent); *United States* v. *Giles*, 300 U.S. 41 (1937) (false entry by innocent persons because of defendants' withholding of entry slips); *Nigro* v. *United States*, 117 F.2d 624 (8th Cir. 1941), and *United States* v. *Brandenberg*, 155 F.2d 110 (3d Cir. 1946) (physicians circulating illegal narcotic prescriptions guilty of sale by innocent druggist); *Boushea* v. *United States*, 173 F.2d 131 (8th Cir. 1949) (innocent party induced to submit false claim).

[28] MICHIGAN REV. CRIM. CODE § 1010(4) (Final Draft 1967).

[29] *See* section 5.04 of the Model Penal Code (P.O.D. 1962), for an example of such a provision.

* This subsection was deleted as unnecessary. An *accomplice* is charged with the substantive crime, *e.g.*, official misconduct, and therefore that the crime is defined so as to render him incapable of committing it must be negated. The *solicitor*, on the other hand, is charged not with the substantive crime, but with solicitation; and solicitation is not defined so as to exclude anyone from being able to commit it.

(for example, not being a Federal official) of committing a crime (for example, official misconduct), may nevertheless be liable for the behavior of another who has the capacity to commit the crime. Federal decisions offer numerous examples of this doctrine.[30] In fact, as noted by the courts, the purpose of an amendment to 18 U.S.C. section 2 making an aider and abettor in the commission of a crime "punishable as a principal" rather than making him "a principal," is to clarify and make certain the intent to punish aiders and abettors regardless of the fact that they may have been incapable of committing the violation which they are charged with having aided and abetted.[31]

If the solicitor's "incapacity" would not prevent his prosecution for the completed offense when the crime has been consummated by the person solicited, it should not bar his prosecution for the solicitation where the crime was solicited, but never completed.

The precise language proposed here is a modification of the language used in the Model Penal Code, and of the other recently revised Codes.[32] This provision, too, will be applicable to a conspiracy statute, and, therefore, may ultimately be placed in a separate section applicable to both crimes.[33]

9. *Grading: Included Offense Considerations.*—Since successful solicitation—amounting to complicity or conspiracy—will be punishable under the statutes dealing with those situations,[34] the principal concern in grading the distinct crime is with the unsuccessful solicitor. Present Federal law deals with him in the same manner in which it deals with persons who commit an attempt. If he is prosecuted for an attempt or under the few statutes which prohibit soliciting, the maximum penalty is equal to that of the perpetrator or the successful solicitor.

Many of the considerations relevant to punishment of an unsuccessful solicitation are the same as those involved in prescribing the punishment for an attempt. (Accordingly, *see* commentary on Attempt (section 1001), paragraph 8.) Upon the view that the purposes for punishing an attempt apply equally to punishing an unsuccessful solicitation, a number of recently proposed revisions punish solicitation and attempt equally—the proposed Michigan and Pennsylvania Codes and the Model Penal Code.[35] A few of the other revisions treat solicitation as a lesser crime, but do not explain why, apparently adopting the common law approach in their respective jurisdictions with little change.

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[30] *E.g., United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States* v. *Lester*, 363 F.2d 68 (4th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967).

[31] *Swanne Soon Young Pang* v. *United States*, 209 F.2d 245 (9th Cir. 1953); *United States* v. *Lester*, 363 F.2d 68 (4th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967).

[32] MODEL PENAL CODE § 5.04(1) (P.O.D. 1962). *See* Note 8, *supra*, for citations to recently revised Codes.

[33] *See* MODEL PENAL CODE § 5.04 (P.O.D. 1962).

[34] Successful solicitations are presently punishable in the Federal system on a variety of bases. If the solicitor is prosecuted as an accomplice or under the few statutes which specifically prohibit soliciting, the maximum penalty is equal to that available for the perpetrator. If he is prosecuted under a conspiracy provision, the maximum is the same for all conspirators (but will vary according to which conspiracy statute is employed for the charge).

[35] MICH. REV. CRIM. CODE § 1010(6) (Final Draft 1967); PROPOSED CRIMES CODE FOR PA. § 505(a) (1967); MODEL PENAL CODE § 5.05(1) (P.O.D. 1962).

Delaware: if solicitation of a Class A felony (life imprisonment), 7 years; any other felony (25, 15, 7 or 4 years), 4 years; any misdemeanor (1 year or 3 months), 1 year (on the theory that when one solicits a petty misdemeanor, he makes the situation worse than if one person sought to commit it alone). PROPOSED DEL. CRIM. CODE §§ 300, 301, 302 (Final Draft 1967).

Illinois: maximum penalty for any solicitation, one year, but equal to solicited offense if less than one year. ILL. REV. STAT. c. 38, section 8–1 (1965).

New York: solicitation of murder or kidnapping in first degree (life imprisonment), seven years; any other felony (25, 15, 7 or 4 years), one year; any other crime (up to one year), 15 days. N.Y. REV. PEN. LAW §§ 100.00–100.10, 70.00, 70.05, 70.15 (McKinney 1967).

Although the draft here poses the choices posed in the draft on attempt—equal to the offense solicited or one class lower—the approach taken to the issues raised in the discussion of whether solicitation of any offense should be a crime may suggest that the penalties be prescribed as in Delaware, Illinois or New York.*

It should also be noted that, since an unsuccessful solicitation punishable under the provisions proposed here will be an included offense to the one for which a successful solicitor will be liable, issues involving solicitation will have to be treated in an included-offense statute. (*See* commentary on Attempt (section 1001), paragraph 9.)

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* Study Draft section 1003(5) grades solicitation the same as attempt Note, however, that with respect to unsuccessful solicitations, the solicitor will always be able to establish that his conduct did not come dangerously close to commission of the offense solicited, and so will benefit from reduction of Class B and Class C felonies.

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INTRODUCTORY MEMORANDUM
and
EXCERPTS FROM CONSULTANT'S REPORT
on
CONSPIRACY AND ORGANIZED CRIME: SECTIONS 1004 AND 1005
(Schwartz, Blakey; January 17, 1969)

INTRODUCTORY MEMORANDUM

1. *The General Character of the Proposals.*—An amorphous, judge-made law of conspiracy—*see* Extended Note A on Background and Criticism of Present Conspiracy Law—is replaced by two clear-cut provisions each designed to deal with a distinct problem: (1) Section 1004 deals with planned but uncommitted crimes, and deals with them on the same basis as attempts. Particularly, the severity of authorized punishment is linked to the gravity of the crime which was the object of the conspiracy. (2) Section 1005 deals with "organized crime," a multiparty continuing criminal business. Very severe penalties are provided for "leading" such enterprises. Such legislation would be the first to deal explicitly with these underworld countergovernments and to reflect the degree of concern properly evoked by the power of criminal syndicates to corrupt government and the readiness to resort to murder and other crimes of violence to protect the criminal business, intimidate witnesses and informers, and maintain internal discipline.

We do not regard these proposals as "solutions" to the problem of organized crime or as answers to all the criticisms which have been directed against conspiracy law. Organized crime obviously has its roots so deeply imbedded in our social structure that far more than legal changes would be required to eliminate it. The main reliance for immediately improving the situation must be on allocating more law enforcement resources to the detection and conviction of these criminal entrepreneurs. However, proper identification of the target and grading the offense on a parity with the worst crimes of violence will help mobilize public opinion and enforcement resources, as well as offering the maximum deterrent to organized crime.

With regard to the well known criticisms of existing conspiracy law, the main reforms will be in criminal procedure, with which we are not presently concerned. *See* Extended Note B on procedural problems in conspiracy. There have been abuses of joinder resulting in "mass trials." There have been abuses of the rules of evidence and of the rules of accomplice liability, resulting in incrimination by hearsay of persons peripherally associated with the criminal operation. There have been abuses of venue, where the prosecution has available an almost unlimited choice of forums as a result of the wide scope of the criminal enterprise. Although these procedural problems are not dealt with directly in our present submissions, we believe that the clarifica-

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tion of substantive law would provide a useful cue for the judiciary to deal with those problems both in decisional law and in new rules.

2. *Conspiracy.*—Subsection (1) of section 1004 essentially retains the existing formulation of conspiracy in terms of agreement to commit crime. Professor Blakey offers an alternative in terms of "consent to enter into a relationship." *See* Extended Note C on an alternative formulation of "conspiracy." Although his argument has force from an analytic point of view, the difference does not have much practical significance and therefore the draft sticks closer to the present way of expressing the law. Practical difference between the two points of view is minimized by subsection (4) of section 1004. This negates any defense based on acquittal or immunity of the other party to an "agreement." Plainly the new Federal conspiracy law should reject holdings and dicta to the effect that where *A* and *B* plan to commit an offense, it is a defense to *A* that *B* was insane, or had no intention to carry out the plan (that is, did not subjectively "agree"), or has been let off by the jury. It is sufficient that "he [the accused] agrees."

Under present Federal law, the maximum penalty for conspiracy is 5 years, but not in excess of the punishment provided for a misdemeanor where the conspiracy has a misdemeanor as its object. An accidental result of this patchwork is that where a Federal felony is punishable by a 2- or 3-year-maximum, a mere conspiracy to commit it carries a 5-year-maximum. In other situations under present law, the conspiracy maximum is far less than the maximum for the substantive offense. Sometimes the draftsmen of a particular penal statute happened to couple conspiracy with the substantive offense, in which case conspiracy may carry a very high maximum equal to that for the object crime. *See* Extended Note D on arbitrary variations in penalties for conspiracy. The draft adopts the rational plan of the attempt statute, systematically relating conspiracy grading to that of the object crime.

Subsection (2) makes clear that conspiracy is viewed as an "inchoate crime" so that, contrary to existing law, one cannot be consecutively punished for conspiring and for committing the object crime.* Where the scale and gravity of the conspiracy justifies special penalties, they will be provided by section 1005 dealing with organized crime.

3. *Leading Organized Crime.*—Section 1005 is based on the description of organized crime developed in a series of congressional hearings [1] and by the President's Commission on Law Enforcement and Admin-

*This provision now appears in the Study Draft as section 3206(2) (a).

[1] *See generally* Senate Special Comm. to Investigate Organized Crime in Interstate Commerce, (Senator Kefauver), S. Rep. No. 307, 82d Cong., 1st Sess. (1951); Sen. Select Comm. on Improper Activities in the Labor or Management Field, (Senator McClellan), S. Rep. No. 1417, 85th Cong., 2d Sess. (1958), S. Rep. No. 621, 86th Cong., 1st Sess. (1959), S. Rep. No. 1139, 86th Cong., 2d Sess. (1960); Permanent Subcomm. on Investigations of the Sen. Comm. on Gov't Operations, *Gambling and Organized Crime*, (Senator McClellan), S .Rep. No. 1310, 87th Cong., 2d Sess. (1962); *Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations* (Senator McClellan), 88th Cong., 1st Sess. (1963); Permanent Subcomm. on Investigations of the Sen. Comm. on Gov't Operations, *Organized Crime and Illicit Traffic in Narcotics* (Senator McClellan), S. Rep. No. 72, 89th Cong., 1st Sess. (1965).

istration of Criminal Justice ("National Crime Commission").[2] Organized crime is viewed as a fusion of business enterprise and underground government. It is characterized by large-scale organization, specialization of function, continuity with changing personnel, and a system of internal laws, judicial tribunals, and executive and military power. Obviously this phenomenon is not described by antique conspiracy law referring to any agreement of "two or more" to commit a single crime.

The proposed section, carrying very high penalties, must narrow the target. It does so in two ways: by limiting itself to enterprise of considerable scale, and by reaching only the "leaders" of such enterprises. The enterprise must involve "10 or more" (it is impossible to avoid some arbitrariness in choice of the critical number) engaged in crime on a continuing basis. Leaders include key figures in the criminal syndicate. One who "organizes, finances, manages, directs, or supervises" is within the conventional scope of leadership. It seems appropriate to include within this most reprehensible category several classes who supply key assistance, whether or not they are conventionally regarded as leaders. Thus, lawyers, accountants, and others who furnish "managerial assistance" are classed as leaders, and so are the "enforcers"—gunmen and thugs who are the executioners of the underground government—and the corrupt public servants who connive in the racketeering.

A further narrowing of the section results from the last sentence of subsection (1), which prevents underlings from being caught in this net designed for big fish. On general principles of accessorial liability, the truckdriver for a bootlegging organization would be a "principal in the conspiracy" because he was knowingly aiding and abetting it. So also for the janitress in a house of prostitution, and all the other performers of menial tasks associated with any enterprise, lawful or unlawful. These people may properly be implicated as accessories in the particular offenses they promote.

The definition of "criminal syndicate" is patterned on existing antiracketeering legislation. The basic antiracketeering statute in the Federal system is 18 U.S.C. § 1952. This statute prohibits travel in interstate or foreign commerce, or the use of any facility in interstate or foreign commerce, with intent to—

> (1) Distribute the proceeds of any unlawful activity; or
> (2) Commit any crime of violence to further any unlawful activity; or
> (3) Otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on, of any unlawful activity.

Subsection (b) of this statute states:

> As used in this section "unlawful activity" means (1) any *business enterprise* involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses, in violation of the laws of the State in which they are committed or of the United States . . . . (emphasis added).

The principle of selection followed in designating the "racket" crimes is to include those crimes which experience has shown to be the

[2] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME (1967).

specialties of the criminal syndicates, yielding illicit funds and power. Excluded from the list are ordinary crimes of violence, antigovernment crimes like treason, sedition, election offenses, ordinary commercial frauds, violators of antitrust, securities, pure food, and other regulatory laws. The first two classes carry heavy penalties even without "organized crime." The latter categories, although frequently involving large organizations, are unlikely to employ terror as an instrument of power or to be wholly underground.

An incidental benefit of the present proposals would be to make possible a more meaningful appraisal of the effectiveness of governmental programs against organized crime. Present "statistics" do not distinguish between conviction of leaders and conviction of minor figures for particular crimes. Sometimes the relation of a conviction to organized crime rests on little more than rumor that the defendant is in some unspecified way connected with "the mob" or "the Mafia." Convictions under proposed section 1005 would be a truer index of success.

4. *Grading.*—Subsection (3) classifies the crime as a Class A felony (equivalent to murder and aggravated kidnapping, rape, arson, or robbery) if the organization numbers over 25. Considering that many Federal prosecutions against narcotics and liquor conspiracies have involved more defendants than this, there will be opportunity to impose maximum sentences on the leadership group of these large operations, particularly since subsection (2) makes it clear that arm's-length dealers participating in an established illicit distribution system are to be regarded as associates.

A different issue is whether leading organized crime should be a Class A felony if only 10 people are involved, where any of the crimes of the organization are "felonies," that is, even Class C felonies. Class C felonies will include a great many of the offenses typical of organized crime. For example, if 10 people were involved in conducting a house of prostitution or an illicit still, the leaders of the group could be made subject to Class A felony sentences. It might be preferable to limit the clause to Class B felonies as is done in subsection (3).

5. *Attorney General's Certification (subsection (4)).*—This is proposed on the ground that operations against big criminal syndicates will be centrally coordinated. Also, the extraordinary sanctions should be invoked only in selected cases.

6. *Relation of Offense to General Sentencing Structure.*—It will be recalled that, under the general sentencing scheme contemplated for the new Code, there will be a range of sentences within the maximum for each offense that is available if the judge finds that the accused is a professional or persistent offender and therefore specially dangerous. Proposed section 1005 supplements those provisions; where the defendant is convicted of a separate offense, leading organized crime, he may receive a sentence very much longer than that available for any particular offense committed. It would be possible to proceed toward the same goal by an alternate route, namely, to permit the judge to impose "organized crime penalties" following a conviction of any crime or felony if he finds in a sentence proceeding that the accused's crime was related in a significant way to organized crime.* The practical issue is whether the usual rules as to the kind of evidence required and the burden of proof beyond a reasonable doubt should apply to the organized crime element in the case.

*This alternative is set forth as section 3203 of the Study Draft.

Excerpts From Consultant's Report

Draft Conspiracy Statute Proposed by the Consultant

(1) *Simple Conspiracy.*

A person is guilty of simple conspiracy when, with intent that conduct constituting a crime be performed, he consents to enter into a relationship with one or more persons having as its objective the engaging in or causing of the performance of such conduct. A person shall not be convicted of simple conspiracy unless an overt act is alleged and proved to have been committed by one of the conspirators to effect the objective of the relationship.

(2) *Parties.*

If a person guilty of simple or aggravated,* conspiracy knows or should know that a person with whom he conspires has conspired or will conspire with another that the same conduct be engaged in or caused, he is guilty of conspiracy with such other person although he does not know his identity.

(3) *Objective.*

If a person is guilty of aggravated conspiracy or simple conspiracy having as its objective conduct constituting more than one crime, he is guilty of one simple or aggravated conspiracy so long as such conduct is the objective of the same continuous conspiratorial relationship.

(4) *Duration.*

(a) A simple or aggravated conspiracy is a continuing relationship. It terminates when its objective is realized, frustrated, or abandoned. Abandonment is presumed if no overt act is committed by a conspirator to effect the objective of the relationship during the applicable period of limitation.

(b) A conspirator may terminate the relationship as to himself by individual abandonment. An individual abandonment is effected by a conspirator timely advising those with whom he conspired of his abandonment or by timely informing duly constituted law enforcement authorities of the existence of the relationship and his participation in it.

(5) *Disallowed Defenses.*

It shall not be a defense to a charge of simple or aggravated conspiracy that the person with whom the person is alleged to have conspired—

(a) has not been prosecuted or convicted; or
(b) has been convicted of a different crime; or
(c) has been acquitted; or
(d) is otherwise not subject to justice.

(6) *Multiple Liability.*

(a) A person may not be consecutively sentenced for conduct constituting both simple conspiracy and the realization of its objective.

(b) A person may be consecutively sentenced for conduct constituting simple conspiracy having as its objective conduct constituting a series of crimes and the realization of its objective.

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*Professor Blakey's proposed statute also proposed the formulation of a provision similar to the "Organized Crime Leadership" provision set forth in section 1005 of the Study Draft, which he refers to as "Aggravated Conspiracy."

(c) A person may be consecutively sentenced for conduct constituting aggravated conspiracy and the realization of its objective.

(d) A person guilty of aggravated conspiracy is liable for any crime committed by one of his co-conspirators in furtherance of the relationship and reasonably foreseeable as a natural consequence of it.

(7) *Grading.*

A simple conspiracy is a crime of the same grade as the most serious crime which is an objective of the relationship.

PROCEDURAL ASPECTS OF CONSULTANT'S PROPOSED CONSPIRACY STATUTE

Venue

(1) Venue shall lie for simple conspiracy in any district in which the person entered into the relationship or in which he committed an overt act to effect the objective of the relationship.

(2) Venue shall lie for aggravated conspiracy in any district in which the person entered into the relationship or in which one of the conspirators committed an overt act to effect the objective of the relationship.

Admissions

Evidence of an otherwise hearsay declaration is admissible against a defendant where the court finds that—

(a) the declaration was made by the declarant while he was participating in a conspirational relationship;

(b) the declaration was made under circumstances from which trustworthiness may be inferred;

(c) the declaration relates to the conspiratorial relationship; and

(d) the declaration was made prior to or during the time the defendant was participating in the conspiratorial relationship.

EXTENDED NOTE A

BACKGROUND AND CRITICISM OF PRESENT CONSPIRACY LAW

The exact origin of conspiracy theory in the common law apparently is not known. While it first received legislative recognition as early as 1305,[1] it did not reach full maturity until the 17th century, when the criminal law experienced perhaps its greatest growth, largely at the hands of the infamous Star Chamber. In 1611, the Star Chamber in the *Poulterers* case [2] held for the first time that an unexecuted agreement was itself punishable. Emphasis was thus shifted from the criminal objective to the agreement that preceded it. Thereafter, the history of conspiracy theory has aptly illustrated, as Mr. Justice Jackson has pointed out, "the tendency of a principle to expand itself to the limit of its logic." [3] It was a short step to the proposition that an

[1] Ordinance of Conspirators, 33 Edw. 1 (1305).

[2] 9 Co. Rep. 55b, 77 Eng. Rep. 813 (S. C. 1611).

[3] *Krulewitch* v. *United States*, 336 U.S. 440, 445 (1949) (concurring opinion), quoting CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (1929).

agreement to commit any crime was a criminal conspiracy.[4] Thereafter, the courts, particularly the Star Chamber, eagerly extended the scope of conspiracy.[5] An unsubstantiated statement by Hawkins,[6] that the acts contemplated by a conspiracy need not themselves be criminal but need only be "wrongful" in order to make the conspiracy punishable gained widespread and permanent acceptance.

Writing in 1842, Chief Justice Shaw in the leading case of *Commonwealth* v. *Hunt* [7] summed up the historical development of conspiracy and gave to the concept its classic definition: "a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means." Justice Shaw's definition was adopted by the Supreme Court 51 years later in *Pettibone* v. *United States*,[8] and remains in force today.

The modern crime of conspiracy has been defined as "so vague that it almost defies definition." [9] This factor has resulted in widely varying definitions of the elements of this crime. A brief description of some of the specific problems that have arisen follows.

Intent: Few aspects of present conspiracy law are more productive of confusion and controversy than those surrounding the issue of intent. Two issues have occupied the major part of the courts' attention. The first deals with the question of so-called "corrupt intent," which was introduced into American law in *People* v. *Powell*,[10] often, too, called the *Powell* doctrine. The second, a problem peculiar to Federal jurisprudence, deals with the so-called issue of "anti-Federal" intent.[11]

In *Powell*, defendants, prosecuted for conspiracy to violate a statute requiring municipal officials to advertise for bids, urged as a defense that they had acted in good faith ignorance of the statute. The court accepted their argument and held that a "confederation" to do an act "innocent in itself" was not criminal unless it was "corrupt," since more than simply "to do the act prohibited in ignorance of the prohibition" was "implied in the meaning of the word conspiracy." [12] This view has found "general acceptance" [13] in this country, save only

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[4] *See* Pollack, *Common Law Conspiracy*, 35 GEO.L.J. 328, 340–343 (1947) [hereinafter cited as Pollack]; Sayre, *Criminal Conspiracy*, 35 HARV.L.REV. 393, 400 (1922) [hereinafter cited as Sayre].

[5] This has been attributed to the exceptionally vigorous growth of the criminal law during the 17th century, and to the contemporary tendency to identify law with morality. *See* Pollack, *supra* note 4, at 343–344, and Sayre, *supra* note 4, at 400.

[6] HAWKINS, PLEAS OF THE CROWN tit. 446 (8th ed. Curwood 1824).

[7] 45 Mass. (4 Met.) 111, 123 (1842).

[8] 148 U.S. 197, 203 (1893). Earlier opinions had reflected a similar approach. *See e.g., United States* v. *Gooding*, 25 U.S. (12 Wheat.) 460, 469–472 (1827) (Story, J.).

[9] *Krulewitch* v. *United States*, 336 U.S. 440, 446 (1949). A commentator has stated that "in the long category of crimes there is none . . . more difficult to confine within the boundaries of definitive statement than conspiracy." Harno, *Intent in Criminal Conspiracy*, 89 U.PA.L.REV. 624 (1941).

[10] 63 N.Y. 88, 92 (1875) ("The confederation must be corrupt.") *See generally Developments in the Law: Criminal Conspiracy*, 72 HARV. L. REV. 920, 936–937 (1959) [hereinafter cited as *Developments*]; MODEL PENAL CODE § 5.03, Comment at 113–116 (Tent. Draft No. 10, 1960).

[11] *See generally Developments*, *supra* note 10 at 937–940; MODEL PENAL CODE § 5.03, Comment at 110–113 (Tent. Draft No. 10, 1960).

[12] 63 N.Y. at 92.

[13] Developments, *supra* note 10, at 936.

in some Federal courts, for example, *Chadwick* v. *United States*,[14] apparently the first Federal case to face the issue, where it was unequivocally rejected. Judge Learned Hand, in dictum, rejected the rule for the Second Circuit in *Mack* v. *United States*,[15] in these terms:

> Starting with *People* v. *Powell* . . . the anomalous doctrine has indeed gained some footing in the circuit courts of appeals that for conspiracy there must be a "corrupt motive" . . . yet it is hard to see any reason for this, or why more proof should be necessary than that the parties had in contemplation all the elements of the crime they are charged with conspiracy to commit.

The Supreme Court itself has never faced the issue.[16]

The experience with *Powell* has not been happy. The case is subject to, and has been given, a number of interpretations. Indeed, there have even been conflicts within the same jurisdiction.[17] The rule was not adopted in the Model Penal Code,[18] and there appears, it is suggested, no convincing reason why it should be followed in the new Federal Code.

The so-called issue of anti-Federal intent arises in this fashion. The Federal Government, of course, has no general criminal jurisdiction.[19] It is thus necessary for the Congress to add to what would normally be a State offense some circumstance that affords a basis for Federal jurisdiction; for example, causing stolen goods to be transported in interstate commerce[20] or using the mails to defraud.[21] Most decisions dealing with these offenses hold that knowledge of the interstate transportation or use of the mails is unnecessary to commit the substantive offense.[22] But they hold that such knowledge is required for a conspiracy to commit the offense.[23] What is involved here, strictly speaking,

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[14] 141 F. 225, 242–243 (6th Cir. 1905); *but cf. Landen* v. *United States*, 299 F. 75 (6th Cir. 1924).

[15] 112 F. 2d 290, 292 (2d Cir. 1940).

[16] In *Keegan* v. *United States*, 325 U.S. 478, 506 (1945), Chief Justice Stone, with Justices Reed, Douglas, and Jackson concurring, indicated in dissent that "the doctrine of *People* v. *Powell* . . . has never been accepted by this Court."

[17] *Compare People* v. *Bowman*, 156 Cal. App. 2d 784, 796–797, 320 P.2d 70, 78 (1958), *with People* v. *McLaughlin*, 111 Cal. App. 2d 781, 245 P.2d 1076 (1952).

[18] MODEL PENAL CODE § 5.03, Comment at 115–116 (Tent. Draft No. 10, 1960).

[19] *United States* v. *Coolidge*, 14 U.S. (1 Wheat.) 415 (1816); *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32 (1812).

[20] 18 U.S.C. § 2314.

[21] 18 U.S.C. § 1341.

[22] But note that the question of "knowledge," *i.e.*, foreseeability, may still be involved in the question of "causing." *See, e.g., United States* v. *Scandifia*, 390 F. 2d 244, 250 (2d Cir. 1968).

[23] *See e.g., United States* v. *Crimmins*, 123 F. 2d 271, 272–273 (2d Cir. 1941) (conspiracy to transport stolen securities), where Judge Hand observed:

> Ordinarily one is not guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal. That awareness is all that is meant by . . . mens rea . . . But it does not follow, because a jury might have found him guilty of the substantive offense, that they were justified in finding him guilty of a conspiracy to commit it. . . . While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiracy to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past.

is thus not a question of conspiracy law as much as it is an issue of how the substantive offense is defined. Indeed, this is the way the Supreme Court has handled the issue without much ado.[24] Consequently, it is suggested it is not necessary to deal with this aspect of conspiracy theory beyond specifying that there is an "intent that conduct constituting a crime be performed." The substantive offense's definition will then move in and supply the rest.[25]

Objective: Three questions have chiefly occupied the courts' attention in the area of the objective of the conspiracy. First, what objectives should be made the subject of criminal liability where there is a conspiracy? Second, how should conspiracies with multiple and changing objectives be treated? [26] And third, what are the permissible inferences that can be drawn as to objective in the so-called sales cases, a question obviously also related to the issues of intent, agreement, and parties.

18 U.S.C. § 371, the present general Federal conspiracy statute,[27] prohibits not only conspiracy to commit a crime, but any "offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose. . . ." That the statute includes conspiracy to commit a crime is, of course, largely without controversy. But that it extends as well to "offenses" [28] and situations

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[24] *See, e.g., In Re Coy*, 127 U.S. 731 (1888) (Federal intent not required in abuse of general election voting conspiracy); *Pettibone* v. *United States*, 148 U.S. 197 (1893) (Federal intent required in obstruction of injunction conspiracy).

[25] *See* MODEL PENAL CODE § 5.03, Comment at 113 (Tent. Draft No. 10, 1960). One other issue in this area merits brief mention. The statute proposed by the consultant, because it says "a crime," rejects the so-called Wharton Rule, which arbitrarily carves out of conspiracy law certain types of offenses that by their definition already require joint action, *i.e.*, bribery, when the minimum number of individuals are implicated. *See United States* v. *Dietrich*, 126 F. 664 (C.C. D. Neb. 1904) (bribery of U.S. Senator). The rule, it is felt, ignores the inchoate crime function of conspiracy. *See* ILL. REV. STAT. c. 38, § 8–2, Comment (1961), which likewise sets aside the Wharton Rule. *See People* v. *Purcell*, 304 Ill. App. 215, 26 N.E. 2d 153 (1940).

[26] *See generally* Note, *Federal Treatment of Multiple Conspiracies*, 57 COL. L. REV. 387 (1957).

[27] 18 U.S.C. § 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or 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 fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

[28] Originally, "offenses" was read to mean only "criminal" statutes. *See, e.g., United States* v. *Sanche*, 7 F. 715 (C.C. W.D. Tenn. 1881). But in *United States* v. *Hutto*, 256 U.S. 524, 528–529 (1921), the Supreme Court rejected this construction in these terms:

> [The statute] does not in terms require that the contemplated offense shall of itself be a criminal offense; nor does the nature of the subject matter require this construction. . . . [W]e deem it clear that a conspiracy to commit any offense which by act of Congress is prohibited in the interest of the public policy in the United States, although not of itself made punishable by criminal prosecution, but only by suit for penalty, is a conspiracy [which is] punishable under the terms of that section.

involving "fraud" [29] has occasioned sharp criticism,[30] the burden of which is that it does not provide a standard of conduct sufficiently ascertainable to warn the individual and to limit the hand of the prosecutor.[31] It is on this basis, moreover, that the Model Penal Code,[32] the New York Revised Penal Code,[33] and the Illinois Criminal Code of 1961 [34] have rejected such formulations. It is not necessary, however, to agree with or reject this view to argue for the narrowing of the present general conspiracy provision. For this debate is in fact largely over the scope of the substantive offense, a debate which has not yet been faced on its own terms, since there is no general substantive provision prohibiting the defrauding of the United States. Moreover, the inchoate crime function and the group danger rationale, which underwrite the law of conspiracy, simply will not support, in a general fashion, a conspiracy statute not backed up by a substantive offense.[35] It is suggested, therefore, that the new provision be limited to criminal behavior, and the "offense" and "defraud" issues be faced in the context of the drafting of the other substantive provisions of the proposed Code.

At one time there was a conflict of authority among Federal cases whether a combination to commit several offenses was punishable as one conspiracy or as several.[36] The Supreme Court, however, in *Braverman* v. *United States*,[37] finally resolved the issue in these terms:

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[29] The scope of the phrase "to defraud" was outlined for the Court by Mr. Justice Fortas in *Dennis* v. *United States*, 384 U.S. 855, 860–861 (1966), which dealt with a conspiracy to defraud that included filing false affidavits with the National Labor Board, in these terms:

> But the essence of their alleged conduct was not merely the individual filing of false affidavits. It was also the alleged concert of action—the common decision and common activity for a common purpose. . . . It has long been established that this statutory language ["to defraud the United States"] is not confined to fraud as that term has been defined in the common law. It reaches "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government. . . ."

[30] The classic critique is Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405 (1959). Professor Goldstein, in masterful fashion, carefully traces the history of the statute and subjects it to cogent criticism.

[31] This is, of course, the classic critique of what Professor Radzinowicz terms "the liberal position" of the 18th century. *See* RADZINOWICZ, IDEOLOGY AND CRIME 9–14 (1966). What this position seemingly gives insufficient attention to is the distinction between what Pound calls a "standard" and a "rule," and the legitimate, although sharply limited, function the "standard" may have in the administration of justice. *See* POUND, CRIMINAL JUSTICE IN AMERICA 30–31 (1950); *Nash* v. *United States*, 229 U.S. 373, 377 (1913) (Holmes, J.): "[T]he Law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree."

[32] MODEL PENAL CODE § 5.03, Comment at 103 (Tent. Draft 1960).

[33] N.Y. REV. PEN. LAW § 105.00, Comment at 173 (McKinney 1967).

[34] ILL. REV. STAT. c. 38 § 8–2, Comment at 309 (1965).

[35] Obviously, all that one can do alone need not be permitted when one acts in concert. "It is perfectly possible and even may be rational to enact that a conspiracy to accomplish what an individual is free to do shall be a crime." *Drew* v. *Thaw*, 235 U.S. 432, 438 (1914) (Holmes, J.). Laws against conspiracy in restraint of trade are an example of this principle. Nevertheless, the realization that there may be particular exceptions to the proposition noted above does not undermine its applicability in any consideration of a general conspiracy statute.

[36] *Compare Sprague* v. *Aderholt*, 45 F.2d 790 (N.D. Ga. 1930), *with Yenkichi Ito* v. *United States*, 64 F.2d 73, 77 (9th Cir.), *cert. denied*, 289 U.S. 762 (1933); *but cf. Frohwerk* v. *United States*, 249 U.S. 204, 210 (1919) (Holmes, J.): "The conspiracy is the crime, and that is one, however diverse its objects."

[37] 317 U.S. 49, 53–54 (1942).

> [The] . . . precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes . . . The single agreement is the prohibited conspiracy, and however diverse its objects it violates but a single statute. . . .

Nevertheless, *Braverman* does not squarely resolve the difficulty that may arise when different objectives are added and executed over a period of time. However, the "courts generally avoid such inquiries and results (that is, finding two conspiracies) by finding that the original agreement subsequently came to 'embrace' additional objects . . ." [38] This result is, of course, facilitated under the consultant's proposed draft, since it focuses not only on the issue of agreement, but also of relationship. Thus, while conceptually the notion of a dynamic agreement may involve difficulties, the notion of a dynamic relationship poses none.

The so-called "sales cases" do not lend themselves to ready classification, for they pose at once issues going to the heart of intent (that is, knowledge), agreement (that is, assent), and objective (that is, knowledge of and assent to unlawful goal). These cases are discussed in the commentary to the proposed drafts on complicity and facilitation.

Parties: It is difficult to factor out for independent discussion in any consideration of conspiracy theory such elements as intent, objective and party, since each bears such a close relation to the other. For as the element of intent is broadened or narrowed, as the objectives are multiplied or reduced, so too is the party scope made wider or narrower, and, indeed, as will be noted below, so also the time and area elements. The various issues exist on various levels.[39]

On the first level, it is obvious that persons cannot conspire when they are not aware of one another's existence. This was a holding of *United States* v. *Falcone*, 311 U.S. 205 (1940). Nevertheless, on another level, it is also apparent that agreement is possible although the parties are unaware of each other's identity.[40] Indeed, it is not

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[38] MODEL PENAL CODE § 5.03, Comment at 129–130 (Tent. Draft No. 10, 1960).

[39] *See generally* Note, *Federal Treatment of Multiple Conspiracies*, 57 COL. L. REV. 387 (1957).

[40] *See, e.g., Blumenthal* v. *United States*, 332 U.S. 539, 557–558 (1947). This issue is often faced using the "wheel" or "chain" metaphor. Where several otherwise unconnected individuals (spokes) engage in a similar relationship with the same person (hub), the crucial question is to what degree there is a relationship among themselves (rim). *See Kotteakos* v. *United States*, 328 U.S. 750 (1946). Without a "rim," several conspiracies are present, rather than just one. Another common form of conspiratorial relationship is described as a "chain conspiracy," which "has as its ultimate purpose the placing of . . . [a] forbidden commodity [such as narcotics] into the hands of the ultimate purchaser." *United States* v. *Agueci*, 310 F. 2d 817, 826 (2d Cir. 1962), *cert. denied* 372 U.S. 959 (1963). Here each subgroup forms a "link" in the "chain" that taken together is the overall group which achieves the conspiratorial objective. In short, it is not necessary that each know the other, but only that each know that there is a scope to the relationship. *United States* v. *Edwards*, 366 F. 2d 853, 859 (2d Cir. 1966), *cert. denied*, 386 U.S. 908 (1967). In any event ". . . whether a scheme is one conspiracy or several is primarily a jury question, since it is a question of fact as to the nature of the agreement." *United States* v. *Dardi*, 330 F. 2d 316, 327 (2d Cir.) *cert denied* 379 U.S. 845 (1964), quoting *United States* v. *Crosby*, 294 F. 2d 928, 945 (2d Cir. 1961).

unreasonable to ask one who joins with an ongoing criminal enterprise to run the risk of having an unknown number of associates. It is thus not unfair to say with Judge Hand, "[H]e takes his chances."[41] This then is the approach of the draft proposed by the consultant.

Such a rule would help to cut down problems with prejudicial variance, that is, where one conspiracy is alleged, but several conspiracies are shown, an issue that has occupied the attention of the Supreme Court on a number of occasions,[42] and which promises to be even more bedeviling in the future, as will be explained below, because of recent rulings on the automatic prejudice resulting from the admission of inadmissible hearsay.[43] Along with subsection (3) at the end of the consultant's draft,[44] it also permits a finding of single rather than multiple conspiracy, when latecomers join the ongoing enterprise, since courts generally consider that a person who joins such a relationship becomes a party to the same conspiracy.[45] When a party joins an existing conspiracy, however, he should not necessarily be held "retroactively [guilty of] . . . a previously consummated crime"[46] under the teaching of the Supreme Court in *Bollenbach* v. *United States*.[47] It is necessary to examine the exact character of the relationship he enters. This, too, is the rule embodied in the statute recommended by the consultant.[48]

Overt Act: At common law, conspiracy was a completed offense without the additional commission of an overt act.[49] Under the general Federal Conspiracy Act,[50] but not all particular conspiracy clauses,[51] an overt act is now required. The Supreme Court in *Yates* v. *United States*[52] explained the function of the overt act in these terms:

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[41] *United States* v. *Andolschek*, 142 F. 2d 503, 507 (2d Cir. 1944).

[42] *See, e.g., Berger* v. *United States*, 295 U.S. 78 (1935) (no prejudice); *Kotteakos* v. *United States*, 328 U.S. 750 (1946) (prejudice).

[43] *Compare Burton* v. *United States*, 391 U.S. 123 (1968) (confession incriminating coconspirator but not admitted against him pursuant to instructions found reversible error), *with Fiswick* v. *United States*, 329 U.S. 211 (1946) (admission of post conspiracy admissions held reversible error).

[44] As to objectives, too, it is possible to "take your chances." *See Blumenthal* v. *United States*, 332 U.S. 539 (1947); *Rudner* v. *United States*, 281 F. 516 (6th Cir.), *cert. denied*, 260 U.S. 734 (1922).

[45] *See, e.g., Mendelson* v. *United States*, 58 F. 2d 532 (D.C. Cir. 1932).

[46] *State* v. *Phillips*, 240 N.C. 516, 520, 82 S.E. 2d 762, 766 (1954).

[47] 326 U.S. 607 (1946) (dictum) (fence, without more, not guilty of conspiracy to transport stolen goods interstate). Here everything depends on the scope of the conspiracy joined. *See United States* v. *Cardillo*, 316 F. 2d 606 (2d Cir.), *cert. denied*, 375 U.S. 822 (1963) (purchaser guilty of conspiracy to transport); *United States* v. *Lester*, 282 F. 2d 750 (3d Cir. 1960), *cert. denied*, 364 U.S. 937 (1961) (purchaser guilty of conspiracy to transport).

[48] It thus departs from the Model Penal Code, which is less willing to permit generally, a finding that the conspiracy is "congruent in scope both as to party and its objective dimensions." Model Penal Code § 5.03, Comment at 122 (Tent. Draft No. 10, 1960).

[49] *See Hogan* v. *O'Neill*, 255 U.S. 52, 55 (1921).

[50] 18 U.S.C. § 371 (". . . and one or more of such persons do any act to effect the object of the conspiracy . . . "). Only one overt act need be pleaded, while proof of others at trial is not barred: *Reese* v. *United States*, 353 F. 2d 732 (5th Cir. 1965); *United States* v. *Negro*, 164 F. 2d 168, 173 (2d Cir. 1947).

[51] 18 U.S.C. § 1951 (extortion interference with commerce); *cf. Singer* v. *United States*, 323 U.S. 338 (1945) (Selective Service Act).

[52] 354 U.S. 298, 334 (1957). This approach is reflected, too, in lower court opinions. *See, e.g., United States* v. *Armone*, 363 F. 2d 385, 400 (2d Cir.), *cert. denied*, 385 U.S. 957 (1966).

> [Its] function . . . is simply to manifest 'that the conspiracy is at work' . . . and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence.

Thus, as will be noted in greater detail below, it anchors the conspiracy in time and place.

Under present law, there is no requirement that the overt act be a commencement of the consummation,[53] that is, equal to conduct amounting to an attempt to commit the substantive offense itself. Any act or omission,[54] however otherwise innocent,[55] other than those acts surrounding the hatching of the plot itself,[56] performed by any member of the conspiracy,[57] while the conspiracy remains yet afoot,[58] fulfills the requirement. Indeed, the commission of the substantive offense itself may be alleged and proved as an overt act.[59] The consultant's proposed draft is consistent with these rules.

Duration.—The duration of a conspiracy is important on a number of levels. Duration influences, inter alia, the admissibility of coconspirator declarations,[60] vicarious substantive liability,[61] the substantive liability of later-joining conspirators,[62] and, most importantly, when the statute of limitations begins to run. Indeed, it has been largely in the context of the statute of limitations that the courts have considered the question of duration.

The courts originally took the position that since the crime of conspiracy was completed when the agreement was formed and, where required, an overt act had been committed, the statute of limitations began to run from that point.[63] Dissatisfaction with this rule led to the adoption of the position that each successive overt act started anew the running of the statute of limitations.[64] Ultimately, in *United States* v.

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[53] Language to the contrary in *Hall* v. *United States*, 109 F. 2d 976, 984 (10th Cir. 1940), does not represent the law. *See* Note 55, *infra; cf. Hyde* v. *United States*, 225 U.S. 347, 387–88 (1912) (Holmes, J., dissenting).

[54] *United States v. Offutt*, 127 F. 2d 336 (D.C. Cir. 1942) (failure to report for induction).

[55] *Yates* v. *United States*, 354 U.S. 298, 333–334 (1957) (attendance at meeting).

[56] *People* v. *Hines*, 168 Misc. 453, 457, 6 N.Y.S. 2d 2, 5 (Sup. Ct. 1938).

[57] *Bannon* v. *United States*, 156 U.S. 464, 468–469 (1895):

> It has always been, however, and is still, the law that, after *prima facie* evidence of an unlawful combination has been introduced, the act of any one of the coconspirators in furtherance of such combination may be properly given in evidence against all. To require an overt act to be proven against every member of the conspiracy, or a distinct act connecting him with the combination to be alleged, would not only be an innovation upon established principles, but would render most prosecutions for the offense nugatory.

[58] *United States* v. *Ehrgott*, 182 F. 267 (C.C. S.D. N.Y. 1910).

[59] *Pinkerton* v. *United States*, 328 U.S. 640 (1946).

[60] *See, e.g., Logan* v. *United States*, 144 U.S. 263, 308–309 (1892) (declaration after termination inadmissible).

[61] *See, e.g., Pinkerton* v. *United States*, 328 U.S. 640, 645–647 (1946) ("so long as the partnership in crime continues" vicarious substantive liability obtains).

[62] *See e.g., McDonald* v. *United States*, 89 F. 2d 128 (8th Cir.), *cert. denied*, 301 U.S. 697 (1937) (after kidnapping, joining to exchange ransom, guilty of kidnapping conspiracy); *but cf. Bollenbach* v. *United States*, 326 U.S. 607, 611 (1946) (dictum) (fence not guilty of interstate transportation).

[63] *United States* v. *Owen*, 32 F. 534 (D. Ore. 1887).

[64] *Jones* v. *United States*, 162 F. 417, 426–427 (9th Cir.), *cert. denied*, 212 U.S. 576 (1908).

Kissel,[65] the Supreme Court, through Mr. Justice Holmes, found that a conspiracy could be treated as a continuous relationship. Justice Holmes observed:[66]

> The defendants argue that a conspiracy is a completed crime as soon as formed, that it is simply a case of unlawful agreement, and that therefore the *continuando* may be disregarded. . . . Subsequent acts in pursuance of the agreement may renew the conspiracy or be evidence of a renewal, but do not change the nature of the original offense. . . .
>
> The argument, so far as the premises are true, does not suffice to prove that a conspiracy, although it exists as soon as the agreement is made, may not continue beyond the moment of making it. . . . [W]hen the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one. . . .

Thus the *Kissel* Court held that the conspiracy continued until it was abandoned or terminated through success.[67] The rules soon developed, too, that a conspiracy was presumed to continue until the contrary was shown,[68] that frustration as well as abandonment or success could work a termination,[69] but that, even where the conspiracy was presumed to continue, the last overt act marked the end of the duration of the conspiracy.[70]

At one time, it was thought necessary for the prosecution to present evidence of the absence of abandonment.[71] The Supreme Court, however, in *Hyde* v. *United States*,[72] established the rule that the defendant himself must show "affirmative conduct" indicating such abandonment. Writing for the Court, Mr. Justice McKenna observed:[73]

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[65] 218 U.S. 601 (1910). Note that once the decision is reached to treat the offense as continuing, it becomes improper to divide it into segments to make it separate offenses. *See In re Snow*, 120 U.S. 274 (1887).

[66] 218 U.S. at 607.

[67] *United States* v. *Kissel*, 218 U.S. 601, 610 (1910).

[68] *See, e.g., Teamsters Local 167* v. *United States*, 291 U.S. 293, 297–298 (1934).

[69] *See, e.g., Fiswick* v. *United States*, 329 U.S. 211, 215–217 (1946) (arrest equals frustration for declaration rule). But the question is one of fact. *See Franzese* v. *United States*, 392 F. 2d 954, 963–964 (2d Cir. 1968) (bank robbery conspiracy contemplated post-arrest activity).

[70] *Grunewald* v. *United States*, 353 U.S. 391, 396–397 (1957) (statute of limitations). The Court has faced on several occasions the issue of whether or not acts of "concealment," allegedly an objective of the conspiracy, may be held to continue the life of the conspiracy. Obviously, if they were held to have such an effect routinely, the policy behind the statute of limitations would be thwarted. *See generally* Comment, *Conspiracy, Concealment and the Statute of Limitations*, 70 YALE L.J. 1311 (1961). To date, the Supreme Court has refused, as a matter of evidence, to permit such an inference. *See Krulewitch* v. *United States*, 336 U.S. 440 (1949); *Lutwak* v. *United States*, 344 U.S. 604 (1953); *Grunewald* v. *United States*, 353 U.S. 391 (1957). There is no objection, however, where the conspiracy is itself still continuing and it includes an objective of concealment to so treating it. *See Forman* v. *United States*, 361 U.S. 416 (1960) (tax evasion); *United States* v. *Hickey*, 360 F. 2d 127 (7th Cir.), *cert. denied*, 385 U.S. 928 (1966) (to defraud).

[71] *Wave* v. *United States*, 154 F. 577, 580 (8th Cir.), *cert. denied*, 207 U.S. 588 (1907).

[72] 225 U.S. 347, 357 (1912); *see also Pinkerton* v. *United States*, 328 U.S. 640, 645 (1946).

[73] 225 U.S. at 369–370.

> [The view of the conspiracy as continuing] does not . . . take the defense of [termination] from conspiracies. It allows it to all, but makes its application different. Nor does it take from a conspirator the power to withdraw from the execution of the offense or to avert a continuing criminality. It requires affirmative action, but certainly that is not hardship. Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law. . . . As he has started evil forces he must withdraw his support from them or incur the guilt of their continuance. Until he does withdraw there is conscious offending. . . .

Unfortunately, few decisions have treated the issue of what "affirmative action" constitutes abandonment. In most, the issue is dismissed on the grounds of lack of evidence.[74] "It is fair to say, however, that the most commonly accepted test . . . is . . . giving notice to the other conspirators . . . ." [75] The test apparently rests on the notion that this withdraws the mutual support otherwise existing.[76] On the other hand, a stricter rule has been applied in some decisions. In *Eldredge* v. *United States*,[77] for example, the court held that:

> A withdrawal from a conspiracy cannot be effected by intent alone: it must be accompanied by some affirmative action *which is effective*. A declared intent to withdraw from a conspiracy to dynamite a building is not enough, if the fuse has been set; he must step on the fuse.

Consequently, the court refused to find that a mere communication of withdrawal was sufficient to abandon a conspiracy to falsify books to conceal an embezzlement; it was necessary, at least, for the defendant to dissuade the other from pursuing the conspiracy to embezzle and conceal in the future.

The statute proposed by the consultant rejects this test as too strict. Instead, it is suggested, it should be sufficient if the conspirator makes a timely declaration of withdrawal to his coconspirator or the duly constituted law enforcement authorities. To require more, practically speaking, would be tantamount to refusing to recognize the defense at all.

Extended Note B

Procedural Problems in Conspiracy

Procedural concerns relating to the law of conspiracy have caused as much concern and confusion as the substantive definitions noted above. Some of these procedural issues are discussed below.

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[74] *See, e.g., United States* v. *Borelli*, 336 F. 2d 376 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965); *United States* v. *Keenan*, 267 F. 2d 118, 126–127 (7th Cir.), *cert. denied*, 361 U.S. 863 (1959).

[75] Model Penal Code § *5.03*, Comment at 154 (Tent. Draft No. 10, 1960). In *United States* v. *Borelli*, 366 F. 2d 376, 378 (2d Cir. 1964), the court referred to the "affirmative action" required as either informing the authorities or the coconspirators of the abandonment.

[76] *Developments*, *supra* Note 10, at 968.

[77] 62 F. 2d 449, 451 (10th Cir. 1932) (emphasis added).

Venue: At common law, venue, the place of trial, could be laid as to all the conspirators either where the agreement was made [1] or wherever an overt act was committed by any one of them.[2] Under the sixth amendment, which guarantees a speedy trial by an impartial jury of "the State and district wherein the crime shall have been committed," a similar result obtains, as it was decided by the Supreme Court in *Hyde* v. *United States*.[3] Because of modern mobility and techniques of communication, the overt acts from which the existence of the unlawful relationship must be inferred are often spread over many districts; consequently, it is seldom possible to know in which district the conspiracy was formed.[4] This view of the law thus "adds greatly to the effectiveness of Federal conspiracy prosecution." [5]

On the other hand, it is this view, among others, that has occasioned some of the sharpest criticism. It is said to "dilute" [6] the provisions of the Constitution dealing with venue, reduce them to a "phantom," [7] and represent "the most extreme instance" [8] of criminal venue.[9] While recognizing, of course, that the prosecutor is not free—wholly independent of the evidence as he finds it—to expand or contract the scope of the conspiracy, and thus to manipulate where venue may lie,[10] con-

[1] *Regina* v. *Best*, 1 Salk 174, 91 Eng. Rep. 160 (K.B. 1705).

[2] The *King* v. *Brisac*, 4 East 164, 102 Eng. Rep. 792 (K.B. 1803). Indeed, venue today may be laid as to one defendant on the basis of an overt act committed by a coconspirator prior to the defendant's entry into the relationship. *See United States* v. *Lester*, 282 F. 2d 750 (3d Cir.), *cert. denied*, 364 U.S. 937 (1961).

[3] 225 U.S. 347 (1912) (venue proper in district where coconspirator committed overt act); *see Hyde* v. *Shine*, 199 U.S. 62 (1905) (venue proper in district where conspiracy formed). The same rule obtains, even though the particular conspiracy provision does not require that an overt act be committed. *See United States* v. *Trenton Potteries*, 273 U.S. 392, 402–403 (1927) (dictum) (Sherman Act); *United States* v. *New York Great Atl. and Pac. Tea Co.*, 137 F. 2d 459 (5th Cir. 1943). For the venue rule for international conspiracy cases, *see Ford* v. *United States*, 273 U.S. 593 (1927).

[4] A prosecution laid in the wrong district is reversible. *United States* v. *Liss*, 137 F.2d 995, 1006 (2d Cir.), *cert. denied*, 320 U.S. 773 (1943).

[5] *Developments*, Extended Note A *supra*, Note 10, at 975.

[6] *Id.* at 976.

[7] *Krulewitch* v. *United States*, 336 U.S. 440, 445 (1949) (Jackson J., concurring).

[8] *Gratz* v. *Claughton*, 187 F. 2d 46 (2d Cir. 1951) (Hand. J.), *cert. denied*, 341 U.S. 920 (1951).

[9] Holmes, too, objected to "the hardship and injustice of shaking a man across the continent for trial." 1 HOLMES-POLLOCK LETTERS, 193 (Howe ed. 1941), commenting on *Brown* v. *Elliott*, 225 U.S. 392 (1912). *But see* the observations of Professor Abrams in his comprehensive study *Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula*, 9 U.C.L.A. L. REV. 751, 769n.99 (1962) [hereinafter cited as Abrams]:

> No cases have been discovered in which it clearly appears that the prosecution has by expansively describing the scope of the conspiracy attempted to try the larger number of conspirators in a district in which only a 'fringe' participant acted.

Note, too, that where the conspiracy count is joined with a substantive count, the trial must take place in a district in which all counts can be tried; thus, the substantive count narrows the conspiracy count.

[10] *See* Abrams, *supra* note 9, at 768–769 ("Dilution of venue protection . . . is, in large measure, made possible by the overt act rule."). *See Capriola* v. *United States*, 61 F. 2d 5, 13 (7th Cir. 1932), *cert. denied*, 287 U.S. 671 (1933): "If those who conspire to violate the law dislike a trial with so many defendants, they should reduce the scope of their conspiracy and lessen the field of its operation . . . ." It has been objected that such reasoning begs the question of guilt. *Developments*, Extended Note A *supra*, Note 10, at 982. This view is mistaken. "Guilt" may be used in two senses. First, it may refer to ultimate criminal liability. And second, it may refer to liability for the purpose of joint trial, which

sideration was given to redefining the overt act requirement to make it the equivalent of an attempt and to eliminate vicarious liability for the overt acts of coconspirators. This change would have guaranteed that trial would have to be located in a district having a necessary relation to each conspirator.[11] Ultimately, however, this approach was rejected, for two reasons.

First, raising the level of the overt act requirement to that of attempt, unless the attempt requirement was simultaneously diluted, would seriously jeopardize the function of conspiracy as an inchoate crime, authorizing police intervention, on a substantial basis, to prevent the commission of an offense. For example, suppose that the FBI learned from confidential informants or through other lawful sources that a "contract" had been let by an organized crime "family" to "hit" a particular person, perhaps the government's chief witness in a trial.[12] Would it really be wise to allow the conspiracy to move forward to the point of an attempt? In this sort of situation, obviously, immediate action must be taken.

Second, it is not altogether clear that it would be to every defendant's advantage to narrow the present venue rules. Little is required to imagine instances where the "overt act" connecting the defendant with the conspiracy as "the place where the crime was committed" would not have been committed in the district most convenient for the trial, convenient in terms of witnesses testifying on guilt or innocence or in terms of the home or place of business of the defendant himself.[13] Indeed, what appears to be the right course of action is to leave the present venue rules as they stand and move to remedy substantive injustice by requiring greater specificity in conspiracy pleading,[14] granting more

need only be established by probable cause and not beyond a reasonable doubt. Thus, if the court is understood to mean that individuals who by their actions give probable cause for joint trial to the proper authorities have no legitimate basis to complain of joint trial, no question of ultimate guilt is begged.

[11] This approach was preferred to the technique of the Model Penal Code, which seeks the same end by redefining the scope, both party and object, of the conspiracy itself. *See* MODEL PENAL CODE, § 5.03, Comment at 138–139 (Tent. Draft No. 10, 1960). The Code's approach achieves this result at the expense of an almost debilitating evidentiary cost.

[12] *See Testimony of Nicholas deB. Katzenbach, Invasions of Privacy, Hearings before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 85th Cong., 1st Sess., pt. 3 at 1158 (1954):

> We must dismiss (organized crime cases) because key witnesses or informants suffer 'accidents' and turn up . . . in a river wearing concrete boots. Such accidents are not unusual. We have lost more than 25 informants in this and similar ways in the past 4 years.

[13] Professor Abrams, *supra* note 9, at 817, has rightly observed:

> Whether interpreted loosely or restrictively, [the present crime committed formula governing venue] has no necessary connection to the location of the victim, witnesses, documents, or other similar factors. It does not take account of the residence of the accused or his whereabouts at the time of arrest nor even sometimes at the time of the offense. It is not directly concerned with the possibilities for joint trial of parties or joint prosecution of offenses. In short, it does not deal . . . with most of the practical factors which should be relevant in determining the place of trial.

[14] Under *Wong Tai* v. *United States*, 273 U.S. 77, 81 (1927), it is "not necessary to allege with technical precision all of the elements essential to the commission of the offense which is the object of the conspiracy." *See also Thornton* v. *United States*, 271 U.S. 414 (1926). Consequently, although the conspiracy must be fairly charged, *Pettibone* v. *United States*, 148 U.S. 197, 203 (1893), it is not always clear from the indictment alone which other districts may be appropriate for the trial, since overt acts of one conspirator may be held against the others,

sensitive severances,[15] and making more liberal transfers.[16] This approach would do more to remedy "improper venue" in the conspiracy area than changing the present venue formula.

On the other hand, some changes in the present venue rules, reflecting the attempt of the proposed statute to draw a sharper distinction between conspiracy as inchoate crime and group activity, do not seem out of order. Consequently, the present rules are retained only in the area of aggravated conspiracy, while the vicarious aspects of them are eliminated where the charge is simple conspiracy.

Admissions: As noted above, there is a close interrelationship between the functional operation of the various rules, procedural and substantive, that have developed in the conspiracy area. Indeed, it is unrealistic to attempt to formulate rules relating to substantive liability without paying due attention to the process of proof itself, for unless that process is realistically formulated, there is a substantial danger that any formulation of the substantive will remain precatory. For this reason, the statute proposed by the consultant treats the most significant of the special roles dealing with proof, the coconspirator's hearsay exception.

The existence of the conspirational relationship is usually shown [17] either by circumstantial evidence,[18] the testimony of a coconspirator who has turned state's evidence, or by evidence of the out-of-court declarations or acts [19] of a coconspirator or of the defendant himself.

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while the evidence connecting the other conspirators to him, because it is evidence, need not be charged. *Brannon* v. *United States*, 156 U.S. 464 (1895). Indeed, the means themselves to be used to effect the conspiracy also need not be alleged at all. *Crawford* v. *United States*, 212 U.S. 183 (1909); *Frohwerk* v. *United States*, 249 U.S. 204 (1919). It is not normal, moreover, to go behind the indictment. *See Benson* v. *Henkel*, 198 U.S. 1 (1905). Thus, although it is possible to transfer the case to other districts under rule 21 of the Federal Rules of Criminal Procedure, even districts in which the trial could not have been originally brought (*see* notes of advisory committee on rule 21(b)), this requires some sort of hearing or other time-consuming procedure. It would be better all around if, for this, as well as other reasons, a greater degree of specificity were required of conspiracy indictments.

[15] F. R. CRIM. P. 14; *cf. Bruton* v. *United States*, 391 U.S. 123, 131–132 (1968).

[16] F. R. CRIM. P. 21; *cf.* Abrams, *supra* note 9, at 817–818.

[17] *Developments*, Extended Note A *supra*, note 10, at 984–985. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942): "Participation in a criminal conspiracy need not be proved by direct evidence: a common purpose and plan may be inferred from a 'development and a collocation of circumstances;'" *Isaacs* v. *United States*, 301 F. 2d 706, 725 (8th Cir.), *cert. denied*, 371 U.S. 818 (1962):

> Conspirators ordinarily do not announce that they have joined their efforts for the purpose of engaging in or furthering some unlawful scheme or plan—rather they are inclined to cover their machinations, thereby casting upon the prosecution the burden, sometimes difficult, of establishing the conspiracy, and the overt acts in consequence thereof, by circumstantial evidence—by actions of the conspirators.

[18] *See Nye & Nissen* v. *United States*, 168 F. 2d 846, 857 (9th Cir. 1948), *aff'd* 336 U.S. 613 (1949) ("[W]ide latitude is allowed in presenting evidence, and it is within the discretion of the trial court to admit evidence which even remotely tends to establish the conspiracy charged."): *Wangrow* v. *United States*, 399 F. 2d 106, 115 (8th Cir. 1968) ("great latitude", "particularly broad", "conspiracy").

[19] Contrary to the usual formulation of the vicarious evidence rule (*see United States* v. *Gooding*, 25 U.S. (12 Wheat.) 460, 469 (1827)), acts, as opposed to declarations, form no part of it. Relevancy alone governs their admissibility. *Lutwak* v. *United States*, 344 U.S. 604 (1953).

As a "firmly established" [20] exception to the general rule against the use of hearsay to establish criminal liability, any "declaration by one coconspirator, committed in furtherance of the conspiracy and during its pendency, is admissible against each coconspirator provided that a foundation for its admission is laid by independent proof of the conspiracy." [21] Originally founded as a means of securing convictions in the "treason trials of fellow travelers of the French Revolution" in England,[22] the rule was soon rested in American jurisprudence on agency principles—by no less a jurist than Mr. Justice Story.[23] And it remains—as yet—unquestioned by the Supreme Court.[24]

The consultant's proposed statute is a codification, in all but one respect, of the present law. The current formulation of the rule requires the court [25] to find, not only participation [26] and pend-

[20] *Krulewitch* v. *United States*, 336 U.S. 440, 443 (1949).

[21] *Developments*, Extended Note A *supra*, note 10, at 983–984; *United States* v. *United States Gypsum Co.*, 333 U.S. 364 (1948); *see generally* Levie, *Hearsay and Conspiracy*, 52 MICH. L. REV. 1159 (1954) [hereinafter cited as Levie]. The rule has also been held to apply to cases which involve accomplices and accessories, even though there is no conspiracy charge in the indictment. *People* v. *Luciano*, 277 N.Y. 348, 14 N.E. 2d 433, *cert. denied*, 305 U.S. 620 (1938).

[22] Levie, *supra* note 21, at 1162. *See, e.g.*, Trial of Thomas Hardy, 24 How. St. Tr. 200, 451–458, 473–477 (1794); *King* v. *William Stone*, 6 T.R. 527, 101 Eng. Rep. 684 (1796), full transcript as *Trial of William Stone*, 25 How. St. Tr. 1155, 1270 (1796).

[23] *United States* v. *Gooding*, 25 U.S. (12 Wheat.) 460, 469 (1827). Nevertheless, it has been suggested that the true rationale remains necessity. *See* Levie, *supra* note 21, at 1163. *Developments*, Extended Note A *supra*, note 10, at 989 puts it, bluntly but realistically, in these terms:

> The practice of admitting evidence because of necessity conflicts with the policy behind the general hearsay rule, which is to exclude evidence which is inherently less reliable than other evidence. However, when there is a category of socially undesirable conduct of which direct evidence is characteristically unavailable, the choice may not be between more reliable and less reliable types of evidence but between admitting inferior evidence and admitting no evidence at all. . . . [and this is an] . . . evidentiary difficulty . . . peculiar to . . . [conspiracy itself], rather than merely to the individual case.

Thus, what seems to be at issue here is not really so much a question of evidence, but a species of substantive liability, a point which incidentally makes its coverage appropriate in the proposed penal code itself. *See Van Riper* v. *United States*, 13 F. 2d 961, 967 (2d Cir. 1926) (Hand, J.) ("Such declarations are admitted upon no doctrine of the law of evidence, but of the substantive law of crime.") When an individual can be shown to have conspired with another, which must be shown by sufficient evidence aliunde, *Glasser* v. *United States*, 315 U.S. 60, 74 (1942), the law rightly holds him liable for the declarations of his coconspirator. *See Ferina* v. *United States*, 302 F. 2d 95 (8th Cir.), *cert. denied*, 371 U.S. 819 (1962) (declaration alone not enough). This is one of the risks one who conspires must run, a risk the individual violator need not run, for he poses less of a social danger.

[24] *See Bruton* v. *United States*, 391 U.S. 123, 128n.3 (1968).

[25] *See Carbo* v. *United States*, 314 F. 2d 718 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964), which holds that the admissibility of the evidence is a preliminary question of fact that must be determined by the court.

[26] *Glasser* v. *United States*, 315 U.S. 60, 74 (1942). Normally, the order of the proof will be relaxed, and declarations will be provisionally admitted, subject to later connection. *See, e.g., Esco Corp.* v. *United States*, 340 F. 2d 1000, 1005 (9th Cir. 1965); *Parente* v. *United States*, 249 F. 2d 752, 754 (9th Cir. 1957). Previously, should such proof fail, any error could be corrected by instructions. *See Delli Paoli* v. *United States*, 352 U.S. 232 (1957), *overruled in Bruton* v. *United States*, 391 U.S. 123 (1968). *Bruton*, which held that such instructions could not cure such error, seems now to indicate that a mistrial would

ency,[27] but also furtherance, a requirement of somewhat ill-defined meaning, apparently an outgrowth of the agency rationale.[28] Admissibility may properly rest ultimately on principles analogous to those of agency, yet more ought to be required. Something should be explicitly said about trustworthiness.[29] And this is what the statute recommended by the consultant does—without going further.

It might well be that this formulation would not, in practice, either expand or contract the present rule. But what it would do is make the search for the just answer surer, since it would explicitly articulate the end to be sought. One who joined a conspiracy would then run the risk of liability for only the circumstantially trustworthy statements of his fellow conspirators, a not unreasonable risk.

Extended Note C

An Alternative Formulation of "Conspiracy"

The chief defect in the present law of conspiracy is its attempt to serve separate goals within the same basic analytical framework. When the law simultaneously reaches out to attack group criminal activity, it rightly adopts stern measures that are out of place when its goal is the articulation of a suitable legal vehicle to permit intervention in the earliest stages of criminal activity. What is appropriate when applied to the maturity of organized crime thus violates our sense of justice when applied to incipient antisocial behavior. The solution to this tension in the law seems evident: break it. Thus, the proposed statute set out below is intended to deal only with the inchoate aspect of conspiracy.

> *Simple conspiracy.*—A person is guilty of simple conspiracy when, with intent that conduct constituting a crime be performed, he consents to enter into a relationship with one or more persons having as its objective the engaging in or

have to be entered. Thus, *Bruton* seems to have carried with it not only *Delli Paoli*, but also cases like *Berger* v. *United States*, 295 U.S. 78 (1934) (no prejudice on variance), and *Lutwak* v. *United States*, 344 U.S. 604 (1953) (harmless error in admissions).

[27] *See, e.g., Fishwick* v. *United States*, 329 U.S. 211 (1946) (postarrest admissions not during pendency).

[28] *See* Levie, *supra* note 21, at 1167–1168. Sometimes the furtherance requirement is stated in res gestae language. *See e.g., American Fur Co.* v. *United States*, 27 U.S. (2 Pet.) 358, 364 (1829); *Nudd* v. *Burrows*, 91 U.S. 426, 438 (1875); *Wiborg* v. *United States*, 163 U.S. 632, 657–58 (1896) ("... must be made in furtherance of the common object, or must constitute a part of the *res gestae* of acts done in such furtherance."). Other courts, while ostensibly retaining the requirements, apply it so broadly that anything which relates to the conspiracy is found to be in furtherance of its objectives. This reduces the requirement to relevancy, and since all evidence must be relevant, it eliminates it, in substance, if not in form. The position of the Model Code of Evidence § 508(b) (1942), and the Uniform Rules of Evidence, rule 63(9)(b) (1953), is that this is how it should be, although this position has not yet found general acceptance in the courts. *See, e.g., State* v. *Yedwab*, 43 N.J. Sup. 367, 374, 128 A. 2d 711, 714–715 (App. Div. 1957).

[29] IV Wigmore, Evidence § 1080a (3d ed. 1940), suggests that such evidence, like declarations against interest generally, is unusually trustworthy, and therefore is admitted although hearsay. But this fails to distinguish between "declarations showing the existence of a consniracy and declarations concerning its membership or aims." Levie, *supra* note 21, at 1165. Obviously, there is no necessary identity of interest that guarantees trustworthiness between all conspirators on all issues at all times.

> causing of the performance of such conduct. A person shall not be convicted of simple conspiracy unless an overt act is alleged and proved to have been committed by one of the conspirators to effect the objective of the relationship.

The penalty for simple conspiracy would be the same as that provided for the substantive offense which it is the object of the conspiracy to commit.

This alternate formulation recognizes that if there is a tension in the law between conspiracy as inchoate crime and group activity, there is also a tension in the law between conspiracy as "agreement," *i.e.*, mental assent, and conspiracy as "combination," *i.e.*, concerted activity.[1] The cases abound, for example, with pithy statements—in which the distinction, if present at all, is not clearly observed—such as "the combination of minds in an unlawful purpose is the foundation of the offense," [2] "the criminality of a conspiracy consists in an unlawful agreement of two or more persons," [3] "the gist of the offense is still the unlawful combination," [4] or "formal agreement is not necessary to constitute an unlawful conspiracy . . . . The essential combination . . . may be found in a course of dealing or other circumstances . . . ." [5] Indeed, some opinions use the two ideas as if they were simply interchangeable.[6] In truth, they are neither in contradiction, nor interchangeable, but complementary.[7] Mr. Justice Holmes, speaking for the Court, in *United States* v. *Kissel*,[8] makes the point:

> It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it. . . . A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract but is a result of it. The contract is instantaneous, the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes.[9]

Conspiracy thus must be defined in terms which emphasize not only mental assent, but also concerted activity. This is met by joining the notions of agreement and relationship. Unless this step is taken, serious analytical problems are posed, relating to continuity in time, parties, and objectives, which it is difficult otherwise satisfactorily to resolve.

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[1] *Developments*, Extended Note A, *supra*, note 10, at 933–935.

[2] *United States* v. *Hirsch*, 100 U.S. 33, 34 (1879).

[3] *Pettibone* v. *United States*, 148 U.S. 197, 203 (1893).

[4] *Bannon* v. *United States*, 156 U.S. 464, 468 (1895); *cf. Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226, (1939) (". . . agreement . . . was not a prerequisite to an unlawful conspiracy.").

[5] *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809–810 (1946). Here, too, Mr. Justice Burton, for the Court, uses the concerted action to infer the "meeting of minds." *Id.* at 810.

[6] *See, e.g. United States* v. *Gooding*, 25 U.S. (12 Wheat.) 460, 469 (1827); *United States* v. *Bayer*, 331 U.S. 532, 542–43 (1947).

[7] *But see Developments*, Extended Note A, *supra*, note 10, at 933–935; MODEL PENAL CODE, § 5.03, Comment at 116 (Tent. Draft No. 10, 1960). ("We think it clear that neither combination as distinguished from agreement nor the analogy of partnership should be included in the formal definition.")

[8] 218 U.S. 601, 607–608 (1910).

[9] *See also Scales* v. *United States*, 367 U.S. 203, 224–228 (1961) ("membership" in Communist Party analogized to participation in conspirational relationship); *Pinkerton* v. *United States*, 328 U.S. 640, 646–647 (1946) ("partnership in crime" "enterprise").

Extended Note D

Arbitrary variations in penalties for conspiracy

Existing conspiracy provisions vary arbitrarily in respect to penalties, and reflect no thought-out response to the problem of organized crime. The penalty limits never differentiate between organizers and leaders, on the one hand, and the most insignificant participants. The general conspiracy section (18 U.S.C. § 371) has a 5-year maximum which applies to conspiracies with such objects as murder (18 U.S.C. § 1111—possible death penalty), rape (18 U.S.C. § 2031—possible death penalty), aggravated assaults (18 U.S.C. § 113—up to 20 years), arson (18 U.S.C. § 81—up to 20 years), bank robbery or burglary (18 U.S.C. § 2113—up to 25 years). Thus conspiracy is often penalized much less severely than the substantive offense.

On the other hand, if the substantive offense happens to carry a 5-year maximum, or if the draftsman of a particular statute happened to throw a conspiracy clause into the same section with the substantive offense, conspiracy and substantive offense will carry the same maximum: kidnapping (18 U.S.C. § 1201—death), assassination of President (18 U.S.C. § 1751—death), prison riot (18 U.S.C. § 1792—10 years), military insubordination or refusal of duty in wartime (18 U.S.C. § 2388—20 years), robbery and extortion obstructing interstate commerce (18 U.S.C. § 1951—20 years), mail fraud (18 U.S.C. § 1341—5 years), antitrust conspiracies (15 U.S.C. §§ 1 and 2—1 year).

Existing Federal conspiracy law provides a more severe penalty for conspiracy than for the substantive offense in many instances. This follows from the fact that the only exception to the general 5-year maximum for conspiracy, under 18 U.S.C. § 371, is for conspiracies to commit "misdemeanors," defined in 18 U.S.C. § 1 as offenses punishable by a maximum of not exceeding 1 year. Among the "felonies" punishable by more than 1 but less than 5 years are false statements to defraud customs (18 U.S.C. § 542), many violations of the election laws (18 U.S.C. §§ 591–613), false personation of officials (18 U.S.C. § 912), offenses against neutrality (18 U.S.C. §§ 958–962), frauds against some Federal instrumentalities (18 U.S.C. §§ 1007–1008), purchasing or receiving government-issue military equipment (18 U.S.C. § 1024), interstate transmission of gambling information (18 U.S.C. § 1084), lottery offenses (18 U.S.C. §§ 1301–1302), inciting desertion in Armed Forces (18 U.S.C. § 1381), broadcasting obscenity (18 U.S.C. § 1464), malicious mischief to post boxes and mail (18 U.S.C. § 1705), malicious assault or interference with a postal clerk (18 U.S.C. § 2116), resistance to search and seizure (18 U.S.C. §§ 2231, 2233).

A final oddity relates to all misdemeanors punishable by less than 1 year; 18 U.S.C. § 371 prescribes that in such case the maximum for conspiracy shall not exceed that for the substantive offense. Thus the law envisions criminal conspiracies punishable by 6 months (unauthorized manufacture, sale, use of Federal and other identifying badges and passes—18 U.S.C. §§ 700–713), 90 days (hunting Indian lands—18 U.S.C. § 1165), or $100 fine (evading postal class rates—18 U.S.C. § 1723). In some instances conspiracy is punishable where the law, incomprehensibly, does not penalize individual behavior (*e.g.*, 18 U.S.C. § 371—to defraud the United States; 18 U.S.C. § 956—to destroy property of foreign government).

COMMENT

on

REGULATORY OFFENSES: SECTION 1006

(Schwartz, Markowitz; July 11, 1968)

1. *Declaration of Policy.*—The declaration of policy* states the underlying basis for a new approach to use of penal sanctions in regulatory law. Declarations of policy are, of course, common in the regulatory statutes themselves, but relate entirely to the substantive provisions of the legislation. Here we are regulating the use of punishment in connection with such statutes.

A declaration of policy may also be influential in shaping future legislation outside the proposed Federal Criminal Code where the legislative draftsman prefers not to follow the suggestion made below (*see* subsection (1) and comment 3) that section 1006 be incorporated by reference in new regulatory statutes. If the Commission does not wish to put a declaration of policy into the text of 1006, the material can be shifted to the commentary.

2. *"Regulatory" Distinguished from Traditional Offenses.*—Criminal law has always differentiated between two kinds of punishable behavior. On the one hand, homicide, rape, robbery and the other common law crimes are universally recognized outrages and threats to common security. Common morality forbids such behavior, and there is little possibility of innocent transgression. Commission of offenses of this sort evidences a serious disregard for the rights of other individuals, and identifies the offender as dangerous because of his lack of inhibitions and distorted system of values. Traditionally, offenses of this first type have been designated "mala in se", that is, "evil in themselves", in contrast with the other category of offenses, "malum prohibitum", that is, "bad because forbidden".

The regulatory statutes, which are the concern of section 1006, belong in the "malum prohibitum" class. The behavior is not immediately recognizable as evil or dangerous, and does not necessarily identify the actor as immoral. In a complex modern society, there are hundreds of thousands of legal commands and prohibitions, violation of which may incur criminal liability. The motor vehicle laws offer the best examples: driving over the speed limit or without a license, failure to carry a registration card or a safety inspection certificate, parking in a prohibited zone, passing a stopped school bus, and a host of others. The conduct of businesses is often minutely controlled by statute and by rules and orders issued by administrative agencies. The

* The original statute contained a declaration of policy which has been shifted to the Comment to Study Draft section 1006.

appendix to this comment contains a sample of Federal regulatory offenses. Included are regulations protecting the safety and comfort of passengers by ship, airplane, rail and motor carriers; food and drug controls; animal inspection and quarantine; prohibitions of rate discrimination, deceptive advertising, and other unfair business practices; license and inspection requirements for various businesses; regulation of packaging and labeling; compulsory maintenance of records and filing of reports.

There are other touchstones by which to distinguish regulatory offenses, in addition to the distinctions between malum in se and malum prohibitum. It is characteristic of regulatory controls that they are prophylactic in purpose: that the standards of behavior are detailed, specific, and subject to change and development, and that special expertise is called for in laying down and modifying the rules.

The prophylactic purpose means that the rules are designed to *prevent* harms from occurring, rather than to punish perpetrators of actual harms. If the forest rules forbid or restrict campfires, it is to cut down even remote possibilities of conflagration. The rule may prevent ten perfectly safe fires in order to avert the possibility of one unsafe fire. It makes no difference what precautions a particular camper takes with his fire. Thus a careful man would feel no impropriety in building his fire if he had no notice that fires were absolutely forbidden. Similarly, in the field of business regulation, a hundred legitimate operators may have to keep elaborate business records to facilitate government enforcement of tax or production controls against the occasional dishonest operator. So, also, rules against conflicts of interest by public servants inhibit many innocent relationships in order to forestall corruption by a few. The fact that prophylactic controls inevitably affect many more law-abiding people than evildoers dictates a policy of relatively low maximum penalties for regulatory offenses.

Detailed, specific, and flexible controls are characteristic of regulatory offenses. That is why many Federal regulatory statutes penalize violation of such rules and orders as may be issued by the administrative agency after enactment of the statute. It is not possible for Congress to provide in advance for all the situations that may arise. Safety in transportation may be threatened in new ways, or new safety devices may be invented; new plant or animal pests may be identified; new devices to evade controls may have to be countered by new reporting or disclosure requirements. Sometimes the characteristic detail and specificity appear in the statute itself. (*See*, for example, the wild life conservation provisions of 18 U.S.C. §§ 41 and 42.)

It is clear from the characteristics of regulatory statutes already discussed that expertise in a particular field is essential to formulate the substantive requirements of these laws, rules, and administrative orders. The necessity for such expertise and for delegation of authority to administrative agencies is therefore an additional indication that we are dealing with material that logically belongs outside

the Criminal Code (except for the penal provisions). The Committees of Congress which regularly deal with conservation and the Department of the Interior can then handle the substantive wildlife provisions mentioned above, leaving the criminal provisions to the Judiciary Committees with their dominant concern with the administration of justice.

Two more identifying characteristics of "regulatory" offenses may be noted in concluding this comment. It will often be found that regulations apply to particular groups, *e.g.*, distillers, drug manufacturers, public officials, operators of specified public service facilities, rather than to the general public; and that nonpenal sanctions are more effective than penal sanctions for this kind of misbehavior. License suspension, forfeiture of illegal goods, civil penalties, dismissal from employment—these may be more drastic and more appropriate than prosecution.

3. *Scope of Section: Applicable at Congress' Discretion.*—As provided in subsection (1), the section will operate only if and to the extent that it is explicitly incorporated by reference in some other statute outside the proposed Criminal Code. Thus no change will be made in existing regulatory sanction law merely by enactment of the new Criminal Code, except for those regulatory offenses being transferred from Title 18 to other titles. It would be expected, however, that new regulatory statutes would selectively incorporate section 1006 by some such formula as "Violations of this statute or of any regulation or order issued thereunder shall be punishable as provided in section 1006 of the Criminal Code", or "Violation of sections ——— or of rules and regulations issued thereunder shall be punishable under section 1006 of the Criminal Code". Old statutes may gradually fall in line with the penal policies here expressed. Experience will permit an evolution of section 1006 towards a more complete and satisfactory general treatment of regulatory offenses.

"Penal regulation" is defined in subsection (1) to include, in addition to statutory command, any administrative rule or individualized administrative order for which a statute provides punishment. The punishment there provided may be merely a civil penalty or forfeiture. That would be enough to show Congress' intention to penalize violations. Then, if the statute in question contains a provision incorporating section 1006, subsections (2) and (3) would be activated, particularly the provisions authorizing conviction of a Class B misdemeanor in the case of a willful violation and conviction of a Class A misdemeanor for a persistent or willful and dangerous violation. Civil penalties have a useful place in law enforcement, but it does not make sense to treat continuing purposeful defiance of regulatory authority as a purely civil matter. However, the reshaping of the penalty structure in this way would not automatically follow from enactment of section 1006, since this section applies only "to the extent that another statute so provides".

Section 1006 does not govern or affect civil penalties or forfeitures, which would continue as provided in legislation outside the proposed

Criminal Code. The present law of civil penalties is chaotic and requires reconsideration, perhaps at a later state of the present reform project, or as a separate enterprise. These penalties are intended [1] as punishment, although imposed in civil proceedings (compare exemplary damages in tort law and treble damages in antitrust suits). The imposition of "civil" penalties for regulatory offenses, without the usual safeguards that surround criminal prosecution, can be rationalized on several grounds. Nothing is at stake in the proceedings except a money judgment; there is no "conviction" of crime with the associated disgrace and disabilities. Furthermore, recovery by the government can be regarded as reimbursement for the cost of the enforcement system.

4. *General Scheme of Regulatory Sanctions.*—The main defect of existing law of regulatory sanctions is its lack of discrimination between serious and trifling offenses. (*See* the appendix *infra.*) At the end of a long and complicated regulatory statute, the draftsman—he is likely to be expert in the substance of carrier or food and drug law, but inexpert in criminal law—typically adds a section making it a misdemeanor to violate any provision of the law or any rule or order issued thereunder. This not only leaves vast discretion to prosecutors as to whether to treat trivial offenses as criminal; it actually impedes enforcement insofar as trivial offenses have to be handled with the cumbersome formality of substantial prosecutions in the United States District Courts.

Reducing offenses to the Class A misdemeanor level or less opens up the possibility of putting the matter at the disposition of the United States Commissioner. Under 18 U.S.C. § 3401, U.S. Commissioners, when specially authorized by the District Court, may try petty offenses committed in places where Federal jurisdiction is exclusive or concurrent. Petty offense is anything punishable by not over 6 months. 18 U.S.C. § 1(3). The Federal Magistrates Act, S. 945, 90th Congress, passed by the Senate, would amend section 3401 to allow specially designated commissioners (renamed magistrates) to try minor Federal offenses whether or not occurring within Federal territorial jurisdiction.[2] In a statement on the bill, Senator Tydings pointed out: [3]

> There is a tendency to downgrade certain offenses from felony or misdemeanor status so that they can be tried as petty offenses before the commissioner rather than burdening the dockets of the district courts. For the same reason some offenses are not prosecuted at all. Neither of these practices serves the ends of justice. And when offenses of a minor nature are nonetheless tried in the district courts, their pros-

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[1] *See* the appendix *infra.*

[2] *See Hearings before the Subcomm. on Improvements in Judicial Machinery, S. Comm. on Judiciary,* 90th Cong., 1st Sess. (Comm. Print 1967). The text of S. 945 appears at p. 241a. A memorandum on constitutionality of trial of minor offenses by Federal magistrates appears at p. 246; *see especially* pp. 249–251.

[3] *Id.* at 239, 240.

ecution too often lends a "police court" atmosphere to the Federal court.

> Let me point out that we now have the rather ridiculous situation where a U.S. Commissioner can try a petty offense when it is committed within the confines of a Federal reservation, but if the petty offense is not committed within the confines of a Federal reservation it must be tried in the U.S. district court. When I was U.S. attorney for the district of Maryland, we took the valuable time of the district court every fall for a period of 2 months trying migratory bird treaty cases—cases in which a man might have taken one bird more than he should have, or might have thrown some corn around a duck blind. I submit that these minor offenses can and should be tried by U.S. magistrates.

The proposed solution is to extend the up-graded U.S. Commissioners' jurisdiction to offenses punishable by not more than a year's imprisonment, giving an election to the defendant to be tried by the district court. Our own misdemeanor—felony line may be at 6 months rather than a year, and Class B misdemeanors are likely to carry a maximum of 30 days. For such minor matters it may not be necessary to preserve an election to be tried in the first instance by the district court. A right of appeal to the district court may be enough.

5. *Sensible Grading of Regulatory Offenses.*—The distinctions made in subsection (2) between willful and nonculpable violations and between persistent and isolated or casual transgressions find precedent in existing laws.[4] But existing laws are notably inconsistent and arbitrary in their penalty provisions, as indicated in the following discussion which considers how some existing laws would be affected if Congress elected to substitute section 1006 in place of present penalties. Subsection (4) should be considered in connection with the present discussion: it creates a presumption of willfulness for persons engaged in the public service or regulated callings. Such "professionals" have a special duty to inform themselves of the laws under which they operate, and it is probable that they do know the applicable regulations. The discussion below draws on the appendix to this comment, a sampling of regulatory offenses.

Sanitary, medical, and other regulations to protect ship passengers are presently subject only to civil penalty, no matter how willful or repeated the violation; this would be corrected. A passenger's violation of quarantine, presently punishable as a misdemeanor, would become

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[4] *See, e.g.*, 7 U.S.C. § 207 (rate schedule obligations of stockyard dealers: "willful" violations punishable by up to 1 year, otherwise, civil penalty); 46 U.S.C. § 452 (excess passengers on vessel: "knowing" violation punishable by up to 30 days; otherwise, civil penalty); 21 U.S.C. § 333 (adulteration of food and drug: heavier penalties where intent to mislead); 49 U.S.C. §§ 322 (c) and 1021(c) (higher penalties for second offenses); 7 U.S.C. § 135f(b) (insecticide labelling: first offense finable; subsequent offenses carry up to 1 year or fine or both); 21 U.S.C. § 461 (violating poultry inspection regulations: violations with intent to defraud or involving distribution of adulterated articles, 3 years and/or a $10,000 fine; other violations, 1 year and/or a $1,000 fine.)

more discriminately punishable as a mere infraction[5] where the violation was neither willful nor dangerous, a Class B misdemeanor where the behavior is willful or by a person whose calling obligates him to be aware of regulations, a Class A misdemeanor if violation is dangerous or defiantly persistent. Inconsistencies in treatment of like offenses would be eliminated.

Equipment regulations exhibit gross inconsistencies of policy which would be corrected. For example, only civil penalties are provided for failure to provide safety equipment on ships and trains; but failure to equip refrigerators with inside handles carries up to a year in prison. Compare the Auto Safety Act, which provides only civil penalties. Under proposed section 1006(2), these would generally be Class B misdemeanors (up to 30 days) insofar as the misbehavior is by "professionals", with higher penalties for persistent disregard, *etc.*

The Unfair Trade Practices listed in the Appendix as misdemeanors carrying only pecuniary sanctions would appear to be better handled under proposed subsection (2): Class A misdemeanor sanctions including possible imprisonment should be available for "willful and persistent disobedience"; and, on the other hand, summary prosecution before a United States Commissioner for a Class B misdemeanor offense should be more attractive to enforcement officers than prosecution in the United States District Court for a Class A misdemeanor.

The following are examples of inconsistent and arbitrary penal policy. Interlocking corporate directorates may entail 3 years' imprisonment in the railroad industry, but no more than a $1,000 fine in the liquor industry. Defiance of an order of the Secretary of Agriculture enforcing prohibitions of an antitrust character carries the utterly unrealistic penalty, if imprisonment is imposed, of 6 months to 5 years. One may contrast this with the purely pecuniary sanctions for violating a Federal Trade Commission order the 1-year penalty for violating the Sherman Act, the nonpenal Clayton Act violations, and the misdemeanor-fine-only sanctions of section 10(1) of the Interstate Commerce Act. The stockyard dealer's obligation to publish tariffs

[5] It is anticipated that an infraction will be subject only to a fine, as in the proposed Delaware revision ($250) and the Model Penal Code ($500). Two other recent revisions, however, authorize both a fine and short jail term: New York ($250, 15 days); Michigan ($100, 15 days). All of these provisions are subject to higher fine maxima applicable to corporations and to defendants who have profited financially from their wrongdoing, *e.g.*, double the illicit gain. *See* PROPOSED DEL. CRIM. CODE § 1006(4) (1967), MODEL PENAL CODE § 6.03(4) (P.O.D. 1962), N.Y. REV. PEN. LAW §§ 70.15(4), 80.05(4) (McKinney 1967), MICH. REV. CRIM. CODE §§ 1505(4), 1415(2) (Final Draft 1967).

and adhere to them is backed by imprisonment of up to 1 year under 7 U.S.C. § 207 (f), (g), and (h), while the Interstate Commerce Act appears to make these merely finable offenses.

6. *Presumptions.*—The presumption in subsection (4) reflects the rational probability that persons engaged in the public service or a regulated calling either know or are reckless in not knowing the applicable regulations. Note that "willfully," under proposed section 302 (1)(e) means intentionally, knowingly, or recklessly. Knowledge that conduct is an offense need not be proved by the prosecution under proposed section 302(5), but mistake of law based on specific authoritative construction could be a defense, with the burden of persuasion on the defendant, under proposed section 610.

Occasion for additional presumptions may be revealed as we pursue our studies in the field of narcotics and liquor law. There may be instances in which what appears to be merely a "regulatory" offense points to a serious transgression. Laws carrying severe felony penalties for sales without order forms or by unregistered persons, *etc.*, reflect this relationship between regulation as such and the substantive evil of trafficking in contraband. One can imagine a case, however, in which it would be absurd to disregard the difference. For example, the license of a legitimate manufacturer of drugs might lapse for some technical reason; he makes sales as before through legitimate channels, records the transactions, pays appropriate taxes, *etc.* The license default clearly does not in itself warrant classification as a felony. Perhaps, the solution may lie in making certain regulatory offenses prima facie cases of "illicit trafficking."

7. *Transfer of Regulatory Offenses From Title 18.*—Presently dispersed throughout Title 18 are many offenses which have all the characteristics of regulatory offenses as described above. There appears to be no good reason to retain them in the new Criminal Code. It is proposed that such offenses be transferred to more compatible surroundings and amended to provide that violations shall be penalized as provided in section 1006. For example, the following statutes could be adapted to section 1006 by appending to their present provisions the statement that "Violation shall be penalized as provided in section 1006 of the Criminal Code": 18 U.S.C. §§ 41–47 (protection of certain animals, birds, fish, and plants); 18 U.S.C. § 290 (agents and attorneys of servicemen, veterans, or their beneficiaries or dependents); 18 U.S.C. §§ 438–439 (agreements with Indians); 18 U.S.C. § 836 (transportation of fireworks); and 18 U.S.C. §§ 1761–1762 (commerce in prison made goods).

Statute	Subject matter	State of mind	Criminal penalty	Civil penalty
	REGULATIONS CONCERNING PASSENGERS AND CARRIER EMPLOYEES			
46 U.S.C. § 452	Carrying too many passengers on vessel			Liable to passengers for amount of passage and $10 for each excessive passenger.
46 U.S.C. § 153	Accommodations of steerage passengers	Knowingly	$100 and/or 30 days	$250.
46 U.S.C. § 155	Medical care of steerage passengers			$250.
46 U.S.C. § 156	Sanitary requirements for steerage passengers			$250.
42 U.S.C. § 271(b)	Violation of quarantine by vessel, plane			$5,000.
45 U.S.C. § 63	Railroad employee may not work more than 16 consecutive hours.			$200 to $500.
42 U.S.C. § 271(a)	Violation of quarantine by passenger on ship or plane.		$1,000 and/or 1 year	
46 U.S.C. § 151	Carrying too many steerage passengers		$50 for each excessive passenger and/or 6 months.	
45 U.S.C. § 66	8 hours shall be a day's work in contract covering railroad employees.		$100 to $1,000 and/or 1 year	
46 U.S.C. § 154	Food for steerage passengers	Willful	$500 and 6 months	
46 U.S.C. § 156a	Animals must be kept apart from steerage passengers.		$1,000 and 1 year	
	SAFETY EQUIPMENT REGULATIONS			
49 U.S.C. § 26(h)	Installation of railroad safety system			$100 plus $100 each day.
45 U.S.C. § 18	Equipment of locomotive with safety ash pan			$200.
45 U.S.C. § 6, 13	Equipment of railroad cars as prescribed			$250.
45 U.S.C. § 34	Equipment of locomotives as prescribed			$250.
46 U.S.C. § 481(c)	Equipment of vessel with lifesaving, firefighting devices.			$1,000 owner or operator, $500 master.
15 U.S.C. §1212	Equipment of refrigerators with inside handles		$1,000 and/or 1 year	
	REGULATIONS FORBIDDING TRAFFICKING IN CERTAIN ITEMS			
15 U.S.C. § 1398	Manufacturing of substandard autos, tires			$1,000 each; limitation of $400,000 for related series.
16 U.S.C. § 853	Transportation of black bass and other fish where law prohibits.		$200 and/or 3 months	
21 U.S.C. § 63	Dealing in filled milk		$1,000 and/or 1 year	

21 U.S.C. § 134e	Violation of regulations re animals exposed to disease.	Knowingly	do	
21 U.S.C. § 158	Dealing in harmful, worthless serums, toxins for animals.		do	
21 U.S.C. § 333	Dealing in adulterated food, drug, device, cosmetic.	1. None (good faith exception)	1st conviction $1,000 and/or 1 year. Subsequent conviction $10,000 and/or 3 years.	
		2. Intent to defraud or mislead	$10,000 and/or 3 years	
21 U.S.C. §§ 461, 465	Dealing in unwholesome poultry	None (except carrier: Knowledge or reason to know).	1st conviction $3,000 and/or 6 months, 2nd $5,000 and/or 1 year, subsequent conviction $10,000 and/or 2 years.	
15 U.S.C. § 1196	Dealing in flammable fabrics	Willfully (good faith exception)	$5,000 and/or 1 year	
21 U.S.C. § 104	Importation of diseased animals	Knowingly	$5,000 and/or 3 years	Forfeiture of vessel.
21 U.S.C. § 676	Dealing in adulterated meat	1. None (good faith exception)	$1,000 and/or 1 year	
		2. Intent to defraud; distribution of adulterated meat.	$10,000 and/or 3 years	
46 U.S.C. § 481(d)	Manufacturing, sale of defective lifesaving or firefighting equipment.	Willfully and knowingly	$10,000 and/or 5 years	
21 U.S.C. § 122	Import, export of infected livestock, poultry	Knowing	$100 to $1,000 and/or 1 year	
21 U.S.C. § 127	Unlawful transportation of cattle, poultry from quarantine.		do	
21 U.S.C. § 117	Transportation of diseased livestock, poultry by carrier.	Knowingly	$100 to $5,000 and/or 1 year	

UNFAIR TRADE PRACTICES

49 U.S.C. § 1021 (b) and (c)	Discrimination in rates—freight forwarder and person obtaining by any means.	Knowing and willful	1st conviction $500, subsequent conviction $2,000.	
46 U.S.C. § 815	Discrimination in shipping rates and by false means.	do	$5,000	
49 U.S.C. § 917 (b), (c)	Discrimination in water carrier rates; solicitation, acceptance; false claim to obtain.	do	$5,000	
49 U.S.C. § 1472 (d)	Air carrier participation in rebates, concessions to obtain lower rates.	do	$100 to $5,000	
49 U.S.C. § 322(c)	Participation in discrimination in motor carrier rates.	do	1st conviction $200 to $500, subsequent conviction $250 to $2,000.	
49 U.S.C. § 10 (1), (2) and (3)	Discrimination in railroad rates; false billing to permit obtaining lower rates by false claim (fraud).	do	$5,000 and/or 2 years	
7 U.S.C. § 207	Rates must be filed and published—stockyard dealers.	1. None		$500 and $25 a day.
		2. Willful	$1,000 and/or 1 year	
46 U.S.C. § 844	Intercoastal shipping rates must be filed and posted.			$1,000 a day.
49 U.S.C. § 322(h)	Motor carrier rates must be filed			$500 and $250 each day.
49 U.S.C. § 322(a)	Deviated from filed and posted rates	Knowing and willful	1st conviction $100 to $500 each day, subsequent conviction $200 to $500 each day.	
49 U.S.C. § 10(1)	Railroad—unlawful combinations, agreements	Willfully	$5,000	

Statute	Subject matter	State of mind	Criminal penalty	Civil penalty
		UNFAIR TRADE PRACTICES—Continued		
7 U.S.C. § 195	Packers and stockyards—monopoly, price fixing		$500 to $10,000 and/or 6 months to 5 years	
27 U.S.C. § 208	Interlocking directorates—liquor		$1,000	
49 U.S.C. § 20a(12)	Same—railroad carriers		$1,000 to $10,000 and/or 1 to 3 years	
49 U.S.C. § 1(7)	Free transportation—railroad		$100 to $2,000	
46 U.S.C. § 817 (b), (c)	Free transportation for government personnel on American, foreign vessels.	Knowing	$500 to $10,000	
27 U.S.C. § 207	Exclusive outlets, tied house, bribery—liquor		$1,000	
45 U.S.C. § 83	Government-aided railroad—failure to afford equal facilities.		$1,000 and minimum 6 months, if jail imposed, no maximum [sic].	$100 to each person plus damages.
49 U.S.C. § 1(20)	Unlawful extension/abandonment of railroad lines.	Knowing	$5,000 and/or 3 years	
7 U.S.C. § 491	Dumping by commission merchants		$100 to $3,000 and/or 1 year	
7 U.S.C. § 499c	Commission merchants, misrepresentation, substitution after grading.	1. Not willful		Fees due and $25 a day.
		2. Willful		$500 and $25 a day.
46 U.S.C. § 1228	Conflicts of interest, collusion in bidding—subsidized shippers.	Knowing and willful	1. Natural person $10,000 and/or 1 to 5 years; 2. Corporation $25,000.	
7 U.S.C. § 1596	False advertising—seeds	1. None		$25 to $500.
		2. Knowingly or gross negligence.	1st conviction $1,000; subsequent conviction $2,000.	
27 U.S.C. § 207	Deceptive advertising—liquor		$1,000	
15 U.S.C. § 1335	Deceptive advertising—cigarettes		$10,000	
21 U.S.C. § 333	Improper, false advertising—food, drug, device, cosmetic.	1. None	1st conviction $1,000 and/or 1 year; subsequent conviction $10,000 and/or 3 years.	
		2. Intent to defraud or mislead	$10,000 and/or 3 years.	
		CONDUCT FORBIDDEN WITHOUT LICENSES, PERMITS		
7 U.S.C. § 499c	Commission merchants require license	1. Not willful		Fees due and $25 a day.
		2. Willful		$500 and $25 a day.
49 U.S.C. § 1471	Certificate of airworthiness			$1,000.
27 U.S.C. § 203	Liquor dealer—permit		$1,000	
7 U.S.C. § 135f(a)	Economic poisons (insecticides) must be registered.		$1,000	
7 U.S.C. § 586	Exporting of apples, pears, requires certificate of quality.	Knowingly	$100 to $10,000	
7 U.S.C. § 596	Exporting of grapes, plums requires certificate of quality.		do	
7 U.S.C. § 218a	Poultry dealers—license		$500 and/or 6 months	

42 U.S.C. § 262	Traffic in biologicals (virus, serum, toxin) unlawful unless prepared at licensed establishment.		$500 and/or 1 year	
21 U.S.C. § 158	Toxins for animals must be prepared at licensed est.; importation requires permit.		$1,000 and/or 1 year	
46 U.S.C. § 391a(7)	Vessels carrying inflammable liquid cargo in bulk-permit.		do	
21 U.S.C. § 676	Meat dealers must register	1. None (good faith exception) 2. Intent to defraud	$1,000 and/or 1 year $10,000 and/or 3 years	
21 U.S.C. § 212	Practice of pharmacy in consular districts of China requires license.		$50 to $100 and/or 1 month to 60 days	
21 U.S.C. § 145	Importation of milk and cream—permit	Knowing	$50 to $2,000 and/or 1 year	
21 U.S.C. § 188L	Production and distribution of opium—license		$2,000 and/or 5 years	
21 U.S.C. § 515(a)	Manufacture of narcotic drugs—license		$10,000 and/or 5 years	

INSPECTION REGULATIONS

15 U.S.C. § 1398	Inspection of auto plants			$1,000 each.
49 U.S.C. § 20 (7) (d)	Railroad land, buildings, equipment			$100 each day.
49 U.S.C. § 26(h)	Railroad carriers, apparatus			100 and $100 each day.
46 U.S.C. § 277	Register or license of vessel by revenue officer	1. None 2. Willful	 "Fine" $1,000 and/or 1 year	$100. "Penalty" $1,000.
45 U.S.C. § 34	Locomotives			$250.
7 U.S.C. § 135i(b)	Examination of economic poisons		1st conviction $500; subsequent convictions $1,000 and/or 1 year.	
7 U.S.C. § 586	Apples, pears for export	Knowingly	$100 to $10,000	
7 U.S.C. § 596	Grapes, plums for export		do	
42 U.S.C. § 262	Establishments preparing biologicals (virus, serum, toxin); of products.		$500 and/or 1 year	
21 U.S.C. § 134e	Animals and carriers to prevent spread of contagion.	Knowingly	$1,000 and/or 1 year	
46 U.S.C. § 391a(7)	Vessels carrying inflammable liquid cargo in bulk.		$1,000 and/or 1 year	
21 U.S.C. § 158	Establishments preparing viruses, serums, toxins for animals; products; imports.		$1,000 and or 1 year	
21 U.S.C. § 676	Meat, meat plants	1. None (good faith exception) 2. Intent to defraud	$1,000 and/or 1 year $10,000 and/or 3 years	
21 U.S.C. § 461	Poultry—premises		1st conviction $3,000 and/or 6 months; 2d conviction $5,000 and/or 1 year; subsequent conviction $10,000 and/or 2 years.	
21 U.S.C. § 145	Imported milk, cream	Knowing	$50 to $2,000 and/or 1 year	
21 U.S.C. § 212	Prescriptions		$50 to $100 and/or 1 month to 60 days	
49 U.S.C. § 1474	Aircraft—ports of entry, clearance, quarantine			$500 and forfeiture.

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Statute	Subject matter	State of mind	Criminal penalty	Civil penalty
		LABEL AND CONTAINER REGULATIONS		
15 U.S.C. § 233	Label apple barrel if not standard size	Knowingly		$1 and costs each barrel.
21 U.S.C. § 23	Misgrading, misbranding apples	do		do.
7 U.S.C. § 1596(b) cf. § 1596(a).	Identification of seeds; alteration forbidden			$25–$500.
7 U.S.C. § 135f(b)	Insecticides, identity; poison labels; alteration forbidden		1st conviction $500; subsqeuent conviction $1,000 and/or 1 year.	
27 U.S.C. § 207	Liquor—identification; alteration forbidden		$1,000	
7 U.S.C. § 1596(a) cf. § 1596(b).	Seeds—identification; alteration forbidden	Knowingly or gross negligence or failure to make reasonable effort to inform.	1st conviction $1,000; subsequent conviction $2,000.	
15 U.S.C. § 1233	Auto—price; make	1. Willful failure to affix by manufacturer.	$1,000	
		2. Willful alteration by any person.	$1,000 and/or 1 year	
15 U.S.C. § 1335	Cigarettes—caution		$10,000	
21 U.S.C. § 17	Sale of dairy, food products falsely labeled or branded.		$500 to $2,000	
16 U.S.C. § 853	Black bass, fish identification		$200 and/or 3 months	
15 U.S.C. § 1264	Dealing in misbranded hazardous substance; alteration of label forbidden.	1. None	1st conviction $500 and/or 90 days; 2d conviction $3,000 and/or 1 year.	
		2. Intent to defraud, mislead	$3,000 and/or 1 year.	
42 U.S.C. § 262	Biologicals—identity, license number of manufacturer; alteration; falsity.		$500 and/or 1 year	
21 U.S.C. § 333	Misbranding food, drug, device, cosmetic	1. None (good faith exception)	1st conviction $1,000 and/or 1 year; subsequent conviction $10,000 and/or 3 years.	
		2. Intent to defraud or mislead	$10,000 and/or 3 years.	
21 U.S.C. § 676	Meat identity; mark of inspection	1. None (good faith exception)	$1,000 and/or 1 year	
		2. Intent to defraud	$10,000 and/or 3 years.	
21 U.S.C. § 461	Poultry—identity; inspection; false label; counterfeiting inspection mark.	None (except carrier: Know or reason to know).	1st conviction $3,000 and/or 6 months; 2d conviction $5,000 and/or 1 year; subsequent conviction $10,000 and/or 2 years.	
21 U.S.C. § 212	Practice of pharmacy in consular district of China—poison labels.		$50 to $100 and/or 1 month to 60 days	
19 U.S.C. § 467	Importing liquor without stamp			Forfeiture.
19 U.S.C. § 468	Emptying package of imported liquor without destroying stamp.			do.
19 U.S.C. § 469	Dealing in empty stamped imported liquor containers.			$200 each forfeiture.
7 U.S.C. § 499c	Tampering with stamps, commercial merchandise.	1. Not willful		Fees due and $25 a day.
		2. Willful		$500 and $25 a day.
15 U.S.C. § 1264	Use of food, drug, cosmetic container for hazardous substances.	1. None	1st conviction $500 and/or 90 days; 2d conviction $3,000 and/or 1 year.	
		2. Intent to defraud, mislead	$3,000 and/or 1 year.	

21 U.S.C. § 461	Reuse of marked container (for poultry)	None (except carrier: Know or reason to know).	1st conviction $3,000 and/or 6 months; 2d conviction $5,000 and/or 1 year, subsequent conviction $10,000 and/or 2 years.	
27 U.S.C. § 206	Liquor—bottling and bulk regulations		$5,000 and/or 1 year	Forfeiture.

REPORTS AND RECORDS

49 U.S.C. § 20(7)(c)	Reports by carrier—railroad			$100 each day.
49 U.S.C. § 20(7)(a)	Failure to keep, submit records by railroad, pipeline carrier.			$500 each day.
15 U.S.C. § 1398	Failure make reports; refusal of access to records auto—manufacture.			$1,000 each; limitation of $400,000 for related series.
7 U.S.C. § 1596	Records required—seed manufacturer	1. None		$25 to $500.
		2. Knowingly	1st conviction $1,000; subsequent conviction $2,000.	
46 U.S.C. § 309	Failure to report arrival of merchandise by ship to collector.			$50 each day and forfeiture.
49 U.S.C. § 322(h)	Motor carrier—keep file, records, reports	(cf. § 322(g) below)		$500 and $250 each additional day.
49 U.S.C. § 26(h)	Accident reports—railroad and pipe (failure of system).			$100 and $100 each day.
19 U.S.C. § 1460	Failure to report arrival of vessel to customs			$100 each day and penalty equaling value of unreported merchandise and $500 for each passenger landed and forfeiture.
45 U.S.C. § 34	Accident reports—railroad			$250.
45 U.S.C. § 39	Monthly accident reports		$100 each day	
7 U.S.C. § 135f(b)	Access to records; right to copy (insecticide dealers).		1st conviction $500; subsequent conviction $1,000 and/or 1 year.	
49 U.S.C. § 917(d)	Water carrier—make reports, answer questions, falsifications.	Willfully	$5,000	
49 U.S.C. § 1021(d)	Same—freight forwarder	do	$5,000	
49 U.S.C. § 322(g)	Same—motor carrier	do	$5,000	
49 U.S.C. § 1472(e)	Air carrier—make reports, keep records, falsification.	Knowingly and willfully	$100 to $5,000	
15 U.S.C. § 1264	Access to, copying of records (dealers in hazardous substances).	1. None	1st conviction $500 and/or 90 days; 2d conviction $3,000 and/or 1 year.	
		2. Intent to defraud, mislead	$3,000 and/or 1 year.	
46 U.S.C. § 391a(7)	Documents required—ships		$1,000 and/or 1 year	
21 U.S.C. § 333	Refusal to permit access to or copying records; maintenance of records; making reports—food and drug dealers	1. None	1st conviction $1,000 and/or 1 year; subsequent conviction $10,000 and/or 3 years.	
		2. Intent to defraud or mislead	$10,000 and/or 3 years.	
21 U.S.C. § 461	Access to, copying records; maintenance—poultry dealers.	None (except carrier: Know or reason to know).	1st conviction $3,000 and/or 6 months; 2d conviction $5,000 and/or 1 year; subsequent conviction $10,000 and/or 2 years.	
49 U.S.C. § 20(7)(b)	Falsification records, reports, accounts—railroad and pipelines.	Knowingly and willfully	$5,000 and/or 2 years	

Statute	Subject matter	State of mind	Criminal penalty	Civil penalty
		REPORTS AND RECORDS—Continued		
7 U.S.C. § 221	Failure to keep prescribed records—packers, stockyards, poultry dealers.		$5,000 and/or 3 years	
21 U.S.C. § 515(a)	Keeping of records, reports narcotics		$10,000 and/or 5 years	
21 U.S.C. § 212	Pharmacy in China—maintenance of prescriptions.		$50 to $100 and/or 1 month to 60 days	
49 U.S.C. § 322(a)	Reports—motor carriers	Knowingly and willfully	1st conviction $100 to $500; subsequent conviction $200 to $500.	
7 U.S.C. § 491	False report about produce by commission merchant.	Knowing and with intent to defraud.	$100 to $3,000 and/or 1 year	
49 U.S.C. § 1472(g)	Refusal to produce papers (or testify) air carrier		$100 to $5,000 and/or 1 year	
		IMPROPER DISCLOSURE OF INFORMATION		
49 U.S.C. § 1021(f)	Improper disclosure of information about cargo of freight forwarder.	Knowingly and willfully	1st conviction $100; subsequent conviction $500.	
7 U.S.C. § 135f (b) and (c)	Of formulae of economic poisons	1. None	1st conviction $500; subsequent conviction $1,000 and/or 1 year.	
		2. Intent to defraud, misuse	$10,000 and/or 3 years	
49 U.S.C. § 15, par. (11)	Re cargo of railroad	Knowing	$1,000	
49 U.S.C. § 917(f)	Re cargo of water carrier	Knowing and willful	$2,000	
15 U.S.C. § 1264	Misuse of confidential information about hazardous substances.	1. None	1st conviction $500 and/or 90 days; 2d conviction, $3,000 and/or 1 year.	
		2. Intent to defraud or mislead	$3,000 and/or 1 year	
49 U.S.C. § 20, par. (7)(f)	Disclosure of confidential information by agent, accountant, examiner of railroad carrier.	Knowingly and willfully	$500 and/or 6 months	
49 U.S.C. § 322(d)	Same—of motor carrier	do	$500 and/or 6 months	
49 U.S.C. § 917(e)	Same—of water carrier	do	$500 and/or 6 months	
49 U.S.C. § 1021(e)	Same—of freight forwarder	do	$500 and/or 6 months	
21 U.S.C. § 333	Misuse of confidential information—food drugs etc.	1. None	1st conviction $1,000 and/or 1 year; subsequent conviction $10,000 and/or 3 years.	
		2. Intent to defraud or mislead	$10,000 and/or 3 years	
21 U.S.C. § 461	Misuse of information re poultry	None (except carrier: Know or reason to know).	1st conviction $3,000 and/or 6 months; 2d conviction $5,000 and/or 1 year; subsequent conviction $1,0000 and/or 2 years.	

FURNISHING OF FALSE INFORMATION OTHER THAN IN LABELS, REPORTS

7 U.S.C. § 135f(b)	Giving of false guaranty of conformity (insecticides).		1st conviction $500; subsequent conviction $1,000 and/or 1 year.	
15 U.S.C. § 1264	Same—hazardous substances	1. None	1st conviction $500 and/or 90 days; 2d conviction $3,000 and/or 1 year.	
		2. Intent to defraud or mislead	$3,000 and/or 1 year	
21 U.S.C. § 333	Same—food, drug, etc	1. None	1st conviction $1,000 and/or 1 year; subsequent conviction $10,000 and/or 3 years.	
		2. Intent to defraud or mislead	$10,000 and/or 3 years	
15 U.S.C. § 1196	Same—flammable fabric	Willfully	$5,000 and/or 1 year	
7 U.S.C. § 499c	Commission merchant—make false statement for fraudulent purpose.	1. Not willful		Fees due and $25 a day.
		2. Willful		$500 and $25 a day.
21 U.S.C. § 212	Pharmacy in China—fraudulent representation to evade regulations.		$50-$100 and/or 1 month-60 days	
21 U.S.C. § 515(b)	False statement in application for license to manufacture narcotics.	Willful	$2,000 and/or 1 year	
21 U.S.C. § 188L	Same—manufacture opium	Willful	$2,000 and/or 1 year	
49 U.S.C. § 1472(o)	Interference with accident investigation—aircraft-removal of part of plane or property.	Knowingly	$100-$5,000 and/or 1 year	
45 U.S.C. § 60	By threat, order, attempt to prevent furnishing of information on railroad accident.		$1,000 and/or 1 year	
49 U.S.C. § 1472(b)	Forgery of certificates; false marking of aircraft	Knowingly and willfully	$1,000 and/or 3 years	
49 U.S.C. § 1472(c)	Interference with air navigation—signals	Intentional	$5,000 and/or 5 years	

RULES PURSUANT TO REGULATIONS

7 U.S.C. § 608a(4) & (5)	Violation of any order issued under section establishing sugar quotas.	Willful	$100	Sum equaling value of excess at current market price.
49 U.S.C. § 1159(a)	Violation of rules to be made on use of air facilities outside continental United States.	Knowingly and willfully	$500 and/or 6 months	
49 U.S.C. § 1523	Security regulations affecting aircraft	Knowingly and willfully	$10,000 and/or 1 year	
50 U.S.C. § 192	National emergency regulations for ships in territorial waters.	None if owner, master, crew; otherwise must have knowledge.	$10,000 and/or 10 years	Forfeiture of vessel if by person in charge.
46 U.S.C. § 1228	Violation of order, rule, regulation of Federal Maritime Board if no other penalty prescribed.	Knowingly and willfully	$500 each day	

Note: In addition, note that numerous statutes include the phrase "violation of this section or of regulations, orders, or rules lawfully made pursuant to it."

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COMMENT

on

OFFENSES RELATING TO NATIONAL DEFENSE:

SECTIONS 1101–1122
(Agata; July 11, October 4, 1969)

Treason and Participating In or Facilitating War Against the United States: Sections 1101, 1102

1. *The Need to Redefine Treason.*—Several considerations invite the conclusion that the treason offense should be more specifically and narrowly described than it is under current law,[1] and that the offense called "treason" should be limited to actual participation in a foreign war against the United States by a person owing allegiance to the United States.

First, an amorphous definition of the ultimate offense of treason in a modern criminal Code is an anachronism. If it accomplishes nothing more, a 20th century criminal Code should deal with the concerns of the criminal law in contemporary terms and categories. But to date there has been no serious attempt to formulate the treason offense in contemporary terms. That the Model Penal Code and recent State Code revisions have not done so is understandable, for treason is, by nature, essentially a Federal offense. That the Federal statute defining treason remains embalmed in language first enacted in 1351 [2] (and which most certainly was conceived even earlier) is not so easily explained. It may be said that the use of ancient formulae to define offenses in a modern Code is justifiable when their meaning is clear

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[1] 18 U.S.C. § 2381 provides:

> Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined not less than $10,000; and shall be incapable of holding any office under the United States.

[2] *See generally* Hurst, *English Sources of the American Law of Treason*, 1945 Wis. L. Rev. 315.

and the decision to adopt the language reflects considered agreement with its content—but such is not the case with the treason offense.[3]

The statutory formulation of treason substantially repeats article III, section 3 of the Constitution,[4] and it has been thought that the repetition of the constitutional language in the original statutory enactment of the offense [5] by many of the same persons who drafted the Constitution reflected a common understanding of the meaning of the constitutional language.[6] But while there may have been some general agreement as to the type of conduct intended to be *excluded* from the offense (for example, the 1351 proscription of "compassing or imagining the death of the King")[7], the attention of the drafters seems to have been directed neither to the sorts of acts intended to be covered by "levying war" or "giving aid and comfort to the enemy," nor to the precise nature of the culpability element of the offense.[8] There is no evidence that the substantive elements of the treason offense were considered analytically as were the essential elements of other criminal offenses. As a result, the courts have had to resolve, on a case by case basis, numerous very difficult issues:

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[3] That the meaning of the Federal treason formula is neither clear nor understood is plain from even a casual perusal of judicial and other commentaries on the subject. As aptly stated by Professor Willard Hurst:

> The doctrinal development of the law of 'treason' after the adoption of the Constitution is contributed primarily by the judges; treatise discussions are scissors and paste-pot affairs, or horn-book recitations of question-begging generalities. The judges, however, shine mainly by comparison. In view of the potentialities for good and evil in the instrument of treason prosecutions, it is surprising how little judicial imagination has been stirred to clarifying analysis in such cases as have presented themselves. Indeed the American cases have on the whole served little more than to annotate the doctrine which was, explicitly or implicitly, in the seventeenth and eighteenth-century English treatises.

Hurst, *Treason in the United States* (*Part III*) 58 HARV. L. REV. 806 (1945), part of larger study of which Part I is at 58 HARV. L. REV. 226 and Part II, at 58 HARV. L. REV. 395 [hereinafter cited as Hurst, *Treason*].

[4] The Constitution provides:

> Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.
>
> The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.

[5] Act of April 30, 1790, "for the Punishment of certain Crimes against the United States."

[6] *See* Hurst, *Treason*, *supra* note 3, for a detailed discussion of the various reasons which have been advanced for the repetition of the constitutional language in the statute. One of the reasons mentioned by Hurst which underlies the current statute is the assumption that the treason clause in the Constitution is not self-executing.

[7] That exclusion clearly indicates a purpose to abolish the evils of "constructive treason," or "accepting the word or thought for the deed"—a purpose also suggested by the two witness-overt act rule.

[8] Recognition has been given by the Supreme Court to the failure of the constitutional formulation of treason to provide more than an amorphous framework for judicial construction:

> The framers' effort to compress into two sentences the law of one of the most intricate of crimes gives a superficial appearance of clarity and simplicity which proves illusory when it is put to practical application. There are few subjects on which the temptation to utter abstract interpretative generalizations is greater or on which they are more to be distrusted. The little clause is packed with controversy and difficulty . . . (*Cramer* v. *United States*, 325 U.S. 1, 46–47 (1944)).

(a) What is an "enemy?"
(b) What is "adhering" to a enemy?
(c) What is "giving aid and comfort" to an enemy?
(d) What is "levying war?"
(e) What is the culpability element in treason; what is an "intent to betray?"
(f) Who may commit treason; who "owes allegiance" to the United States?
(g) Wht is an "overt act?"
(h) To what type of act does the two witness rule apply?

Careful analysis by the courts in the process of resolving these issues has been lacking until recently.

Second, it may fairly be said that one of the effective functions of the treason clause in the Constitution [9] is to permit prosecution for conduct which does not otherwise fall within any of the *specific* proscriptions of the criminal statutes. The provision said to bar "constructive treason" is thus so vaguely stated that its constitutionality would be in doubt were it not enshrined in the Constitution itself; it permits, in fact requires, a court to construe its meaning after the fact, a circumstance which would doom a statute subject to the ordinary due process requirements for other criminal offenses. The issue is whether prosecution for the most serious crime should be permitted under a provision which would be held too vague to support a conviction for even the least serious offense. The obvious answer is that it should not.

Finally, the present statutory definition of treason cannot be supported analytically. A careful analysis of the types of conduct covered by treason and not covered and heavily penalized as offenses elsewhere specifically defined suggests that the amorphous treason formulation is not necessary. Spying is specifically proscribed and subject to the penalty of death.[10] Sabotage is specifically proscribed and subject to a penalty of 30 years' imprisonment.[11] Internal threats against the security of the state are also specifically covered and subject to severe penalties: rebellion against the authority of the government—10 years' imprisonment; conspiracy to overthrow the government—20 years; advocacy of the immediate overthrow of the government—20 years.[12] The only type of conduct, then, which is contemplated by the treason offense and is not subject to prosecution as a specific offense involves the external threat to the security of the state presented by a foreign war. No unalterable principle would appear to preclude the enactment of a statute specifically proscribing participation in such a war by a person who owes allegiance to the United States.[13] Rather, specific defini-

[9] The other main functions of the clause may be said to be to insure that the stigma of the term "traitor" will attach only to those who clearly fall within the constitutional term as construed and that those who do will be protected by the procedural safeguards provided by the two witness-overt act rule, against the emotional dangers inherent in any treason prosecution.

[10] 18 U.S.C. § 794.

[11] 18 U.S.C. §§ 2153, 2154.

[12] 18 U.S.C. §§ 2383, 2384, 2385.

[13] It is possible to argue that the treason clause was intended not only to forbid Congress and the courts to *expand* the category of conduct punishable as treason but also to forbid *constriction* of the statutory offense to apply only to *some* of the conduct falling within the constitutional language. Acceptance of such an argument would compel the conclusion that *all* conduct which may be said to constitute "levying war"—external war as well as internal war—must be in-

tion of the conduct and culpability elements of such an offense is called for by the policy consistently adhered to in drafting the proposed Criminal Code.

The important question, therefore, is whether the offense so described should be called "treason" or something else. The corrollary question is whether all other conduct should be excluded from the label "treason."

Analytically, the case for branding as "treason" the offense of participation in a foreign war against the United States by a person owing allegiance and for reserving the label "treason" for such an offense is strong. The essence of treason is betrayal: in this context, a transfer or shift of allegiance. Betrayal can be said truly to take place only where one's allegiance is shifted from one's own state to a foreign state, where one's purpose is to subject his state to a foreign power or to cause it to lose authority over its territory. Armed insurrection and whatever constitutes seditious conduct, on the other hand, may more properly be viewed as impermissible means of achieving change in government or government policy. This perspective permits analysis to focus, within the context of the first amendment, on that point at which the use of force or the threat or advocacy of force cannot be tolerated in effecting government change, thereby removing the treason epithet from domestic factional disputes.[14] It is noteworthy that such

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cluded in the statutory offense. But the argument is difficult to support either by reason or by authority. First, the treason statute, as enacted by the drafters of the Constitution, includes two aspects of the offense not referred to in the Constitution—that the treason defendant must "[owe] allegiance to the United States" and that the offense may be committed "within the United States or elsewhere." Although these aspects of the offense could be said to be implicit in the constitutional formula (*see, e.g., United States* v. *Wiltberger*, 18 U.S. 76, 97 (1820) (Marshall, C.J.)), their inclusion in the statute strongly suggests that the drafters of the statute recognized that the constitutional provision would require construction. Second, an 1863 decision (*United States* v. *Greathouse*, 26 F. Cas. 18 (No. 15,254 C.C.N.D. Cal. 1863) (Field, J.)), which held that a prosecution for aiding rebellion amounted to a prosecution for treason so that the government was required to meet the two witness-overt act rule, suggests that Congress may formulate an offense more specific than "treason" for conduct embraced by the general treason language. More recent cases, while restating the *Greathouse* rule that Congress may not dispense with the two witness rule merely by proscribing conduct which amounts to "treason" under a different name, have held the rule to be inapplicable unless the specific offense incorporates all of the elements of treason. *See Cramer* v. *United States*, 325 U.S. 1, 45 (1945); *In re Quirin*, 317 U.S. 1 (1942). The significance of these later cases with respect to the two witness-overt act rule would be of concern if Congress chose to impose that requirement for proof of an offense without regard to whether the conduct proscribed by the statute defining the offense would be held by a court to incorporate all of the elements of treason. In the absence of such legislative action, the real import of the cases is their rejection of the notion that the Constitution precludes Congress from defining an offense involving conduct contemplated by the treason offense and penalizing it specifically.

[14] The use of treason prosecutions in domestic factionalism was a matter of deep concern to the delegates to the Constitutional Convention. *See* Hurst, *Treason*, *supra* note 3, at 395, who also describes (at 238) rebellion as "constructive levying of war." The inclusion of rebellion in treason is arguably an anachronism in contemporary society—a carry-over from the political theory current in 1351 when the original statute was adopted and when allegiance, feudal and personal in nature, was to the King. Thus, seeking to depose the King to whom one owed allegiance or fealty and to replace him with another was analogous to seeking to impose the power of a foreign state over one's own government in a later age when nation-states became the object of allegiance. This treason concept does not easily fit internal struggles for power in a republic,

an approach is characteristic of the civil law Codes[15] which are regarded as exemplary attempts at rational analysis.

The draft proposals on the treason complex of offenses which (a) create a specific offense to cover a United States national who participates in the military activities of an enemy foreign power, (b) label the offense treason, and (c) exclude all other offensive conduct involving the national security from the offense so labeled, should be considered in the light of the above discussion.

2. *Scope of Proposed Section 1101: Treason.*—Proposed section 1101 limits the scope of the existing treason offense[16] to conduct which amounts to participation in the military activity of an enemy. The offense can be committed only by a "national" of the United States, as defined,[17] and must be done with "intent to aid the enemy or obstruct or prevent a victory of the United States," [18] at a time when the United States is engaged in international war.

The draft, in limiting the offense to conduct occurring in time of war, is consistent with the present construction of the existing treason statute which requires an actual levying of war for the levying war clause and the existence of war and a foreign enemy for the adhering to the enemy clause.[19] The term "participa[tion] in military activity of the enemy" more specifically identifies conduct intended to be covered by treason than does the general term "adhering to the enemy, giving aid and comfort to the enemy." It is broad enough, however, to embrace the wide variety of forms "participation" can take.[20] Also, it covers conduct relating to enemies which is not covered by the more narrowly defined offenses of espionage and sabotage.[21] Finally, its combination with the culpability and other elements of

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although it does fit the betrayal of the republic itself, *i.e.*, the nation, to a foreign power or different sovereign.

[15] The distinction between domestic threats and foreign threats or removal of territory from the jurisdiction of an existing government is common in foreign Codes, *see, e.g.*, THE PENAL CODE OF SWEDEN, c. 18, § 1, c. 19, § 1 (1965) (Sellin trans.).

[16] 18 U.S.C. § 2381.

[17] *See* paragraph 4, *infra.*

[18] Discussed *infra* this paragraph.

[19] The levying war clause has been used in cases involving domestic rebellions, the adhering to the enemy clause in cases involving foreign wars. *See, e.g., United States* v. *Greathouse*, 26 F. Cas. 18 (No. 15,254) (C.C.N.D. Cal. 1863), which also discusses the question of what constitutes "levying war;" *cf. United States* v. *Stephan*, 50 F. Supp. 738, 741–742 (E.D. Mich. 1943), in which the court, apparently referring to the levying war clause, said, "In times of peace it is treason for one of our citizens to incite war against us." *See also United States* v. *Fricke*, 259 F. 673, 677 (2d Cir. 1919) (war is required for "adhering to the enemy"); *Stephan* v. *United States*, 133 F. 2d 87, 94 (6th Cir. 1943) ("enemy" must be foreign); *accord, United States* v. *Greathouse, supra.*

[20] The Commission may wish to consider a more detailed specification of the activities contemplated by "participation." For example, the Danish Criminal Code lists prohibited acts which it states are "deemed to be of assistance to the enemy." Included in the list is "(iv) any propaganda for the benefit of any military . . . power of the enemy." DANISH CRIMINAL CODE § 102 (1933) (Copenhagen). *Cf. Chandler* v. *United States*, 171 F.2d 921 (1st Cir. 1948), and *Gillars* v. *United States*, 182 F.2d 962 (D.C. Cir. 1950), which treat propaganda broadcasters as traitors. Under the proposal, the issue of whether such conduct constitutes treason in a specific case would be a matter of construing the general language of draft section 1101 under the facts of each case.

[21] Proposed sections 1113, 1106.

the offense in the statute should serve to avoid confusion in identifying the elements of the offense and in jury instructions.

The draft provides a statutory definition of the culpability required to render conduct treasonous: an "intent to aid the enemy or prevent or obstruct a victory of the United States." The culpability presently required for treason does not appear in the statute; it has been judicially formulated as an "intent to betray." [22] The terminology of the draft seeks not only to avoid the "passion-rousing potentialities" [23] of the term "intent to betray" but also to make specific the object to which the offensive intent must refer; under the draft, the intent must be to accomplish an objective—aiding the enemy or preventing or obstructing a victory of the United States—which is much more concrete than the objective of "betrayal," an abstract concept enmeshed in the intricacies of political theory and fraught with danger in construction.[24] The draft term would reduce the difficulty of determining whether treason is committed by a father who intentionally helps his son to avoid discovery, knowing the son is an enemy saboteur, which in current law depends on whether the father intended to aid the son as a son or as an enemy.[25]

3. *Relationship of Proposed Section 1102 to Treason.*—The primary function of proposed section 1102 is to prohibit nonnationals from engaging, within the United States, in conduct which would be treason if done by a national. In effect, section 1102 prohibits anyone within the United States from aiding an enemy of the United States. Section 1101, applicable only to nationals, covers conduct within and outside the United States (*See* proposed sections 208(b) and 201 concerning extraterritorial jurisdiction). Exigencies of drafting result in some overlap between sections 1101 and 1102, because both cover nationals. This was necessary to prevent a person who is in fact a national, but who proves that he did not believe he was a national, from availing himself of the defense provided in proposed section 1101 for treason prosecutions [26] and thereby achieve a blanket immunity for conduct engaged in within the United States.

The culpability element of an offense under proposed section 1102 is identical to that required for treason,[27] but since the offense contemplates conduct by a person who does not owe any permanent loyalty to the United States, it is essentially different from treason. First, it is limited to conduct within the United States. Second, facilitation of, as well as participation in, the military activities of the

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[22] *Cramer* v. *United States*, 325 U.S. 1, 29 (1945).

[23] *Id.* at 45.

[24] *See Cramer, id.* at 19, for a detailed consideration of the changing concept of loyalty. *See also* the Extended Note on Typical Instructions in a Treason Case, *infra*, for a discussion of the confusion which inheres in the concept of "intent to betray."

[25] *See Haupt* v. *United States*, 330 U.S. 631 (1947), a treason prosecution, in which the Court said that the jury was correctly instructed that if they found that the defendant's intention "was not to injure the United States but merely to aid his son as an individual, as distinguished from assisting him in his purposes, if such existed, of aiding the German Reich, or of injuring the United States, the defendant must be found not guilty."

[26] *See* paragraph 4, *infra*.

[27] Likewise, an offense under section 1102 is identical to treason in requiring the existence of international war.

enemy is forbidden by draft section 1102. Such peripheral conduct, when engaged in within the United States during a war, would not be subject to the same ambiguities of proof as could be expected to surround such conduct when committed outside the United States. For this reason, prosecution for conduct by nationals which amounts to facilitation, as distinguished from participation, is excluded from the treason offense, but is permitted under section 1102 when the conduct is performed within the United States.

The draft provides a defense for a nonnational acting as a member of enemy armed forces in accordance with the laws of war and an affirmative defense for a national who reasonably believes he is not a national.

4. "*National of the United States.*"—The draft substitutes the term "national," defined in section 1101 as a citizen or domiciliary of the United States, for the existing phrase "whoever owing allegiance." The crime of treason is thereby reserved for those whose duty of loyalty to the United States is of the highest order—those for whom the brand "traitor" has meaning.[28]

The term "national" as defined is limited to persons whose duty of loyalty to the United States is permanent—one which does not depend upon physical presence within the United States. It excludes alien sojourners, who have been said by some courts to owe "temporary allegiance" to the United States and therefore to be subject to prosecution for treason.[29] The thrust of the "temporary allegiance" language is really that anyone who comes within the territory of the United States has an obligation to abide by its laws. That obligation can effectively be enforced without resorting to the treason statute: for participating in or facilitating military activities of the enemy within the United States (*i.e.*, during the period of his "temporary allegiance")[30] he may be prosecuted under proposed section 1102; for

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[28] As to whether a person may demand to be tried as a "traitor" in order to reap the benefits of the procedural safeguards of a treason trial, *see Cramer*, *Quirin*, and *Greathouse*, considered in paragraph 1, *supra; see also* Hurst, *Treason*, *supra* note 3, at 421.

[29] *See, e.g., Carlisle* v. *United States*, 83 U.S. 147, 154 (1873), a claims case, in which the issue involved the question whether a British citizen could commit treason against the United States:

> By allegiance is meant the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign in return for the protection he receives. It may be an absolute and permanent obligation, or it may be a qualified and temporary one. The citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or at least until by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign. *The alien, whilst domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence.*
>
> *This obligation of temporary allegiance by an alien resident* in a friendly country is everywhere recognized by publicists and statesmen. (Emphasis added.)

(It is not clear whether the Court meant to draw a distinction between "domicile" and "residence."). *Cf.*, the discussion of extraterritorial jurisdiction over domiciled or resident aliens on the principle of nationality in Harvard Research in International Law, *Jurisdiction With Respect to Crime*, AM. J. INT'L. L. 437, 533 (Supp. 1935).

[30] Even if the term "owing allegiance" were retained, a person owing only "temporary" allegiance could not commit treason outside the United States.

other conduct involving the national security he may be prosecuted for espionage, sabotage or facilitating armed insurrection;[31] in addition he is subject to prosecution for any of the other specific offenses under the Code which he commits during his stay in the United States.

The draft refers to a person "domiciled in the United States or a territory thereof." Consideration was given to the term "resident alien", but "domicile" was selected as more nearly expressing the permanent tie to the United States which is an essential element of treason. The distinction is significant only for prosecution under section 1101 for an offense committed abroad, because both are covered by section 1102 for conduct within the United States. Thus, the issue narrows to whether a resident alien should be, or constitutionally could be, subject to a treason charge for conduct outside the United States or whether policy and constitutional considerations are sufficiently satisfied by coverage of noncitizen domicilaries, which will include many resident aliens.

5. *Defense of Belief in Status of Nonnational.*—Proposed section 1101 incorporates the teaching of *Kawakita* v. *United States*,[32] in which the Supreme Court recognized that a person with dual nationality would have a defense, in a treason prosecution, that he believed he had divested himself of his American citizenship, even though the divestiture had not been effective in fact. By adding the proviso that the belief in nonnationality be "not recklessly held or arrived at," the draft withholds the defense from a national who believes he has been wronged by and therefore no longer owes loyalty to the United States but does nothing more than "mentally" divest himself of his citizenship. If he then participates in the military activities of the enemy, a jury is authorized to find that he does so knowing that he is taking the risk he is still a citizen and he is subject to prosecution for treason.[33]

6. *The Two Witness-Overt Act Rule.*—The Commission will want to consider whether the Code should explicitly include the two witness-overt act rule, which is constitutionally applicable to treason prosecutions, and if so whether it should be made applicable to treason only, or to other offenses in the national security area as well. If it is decided to include the rule in the statute, it will be necessary to decide whether the "overt act" which must be proved by two witnesses need amount to anything more than a neutral act, such as purchasing an automobile for another, or whether testimony of two witnesses to

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[31] Proposed sections 1113, 1106, 1103.

[32] 343 U.S. 717, 722 (1952).

[33] Whether such a person would have a defense under existing law is not free from doubt. The Court in *Kawakita* v. *United States*, 343 U.S. 717 (1952), approved the following instructions, given by the lower court:

> As to any overt act or acts charged in the indictment and submitted for your consideration which you may find to have been committed by the defendant, even though you also find the defendant was an American citizen, if you further find that at the time of such overt act or acts, if any, the defendant honestly believed that he was no longer a citizen of the United States, then the defendant could not have committed such overt act or acts with treasonable intent, and you must acquit him. (Quoting from 96 F. Supp. 824 at 847.)

While the Court did not opine on what would be required to show an "honest" belief, the use of the term "honest" indicates that more than an actual belief would be necessary. For a general consideration of the *Kawakita* instruction, *see*, Extended Note, *infra*.

some additional facet of the act, such as that the other was an enemy, should be required. Under present law, the Supreme Court has held that the overt act must constitute aid and comfort but need not be evidence of the treasonous intent.[34] Presumably, if Congress were to make the rule explicit it could require an act with greater substantive relationship to the essence of the treason offense than is now required.[35]

7. Recruitment and Enlistment for Service Against the United States.—The draft does not re-enact 18 U.S.C. §§ 2389 and 2390 which proscribe recruitment, within the United States, of soldiers and sailors to engage in armed hostilities against the United States and enlistment by persons with intent to serve in such hostilities. The present statutes were enacted at the outset of the Civil War. The reason for their enactment has been stated as follows:[36]

> [I]t seems to have been the view of the congress by which it was enacted, that recruiting or enlisting soldiers or sailors for the service of the enemy, or opening a recruiting station for that purpose, or the act of being enlisted, were not treasonable within the law of 1790, and that further legislation was therefore needed to warrant their punishment.

There have been no reported cases under these statutes.

Proposed sections 1103 (armed insurrection) and 1105 (paramilitancy activities), which establish such important prerequisites to conviction as imminency of the hostilities, and carefully define the nature of the "military activities" proscribed, would cover the proscribed recruitment and enlistment where the "hostilities" to be engaged in are domestic in nature and with respect to them there is no need to carry over the present statutes.

With respect to enlistment in cases of foreign hostilities, despite the doubt that such conduct is treason,[37] it could fall within proposed section 1102 and would also constitute a violation of proposed section 1203 (unlawful recruiting and enlistment in foreign armed forces). If penalties greater than those provided in section 1203 are deemed necessary, the intent to engage in hostilities against the United States could be used to upgrade the offense under draft section 1203. Although special coverage is not deemed necessary, if it is desired the approach should be to utilize the other offenses in the Code instead of proliferating offenses.

Extended Note

TYPICAL INSTRUCTION IN A TREASON CASE

A distinct advantage of proposed section 1101 (Treason) is that it identifies the culpability and conduct elements of treason in accordance with principles applied throughout the remainder of the Code. Under current law these elements are not so clearly isolated.

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[34] *See Cramer* v. *United States*, 325 U.S. 1 (1945), and *Haupt* v. *United States*, 330 U.S. 631 (1947).

[35] *See* the consideration of *Greathouse*, *supra* at note 13, for additional discussion of the two witness-overt act rule.

[36] *Charge to Grand Jury*, 30 F. Cas. 1036 (No. 18,272) (C.C.S.D. Ohio 1861).

[37] *See* text accompanying note 36, *supra*.

The instructions in *United States* v. *Kawakita*[1] apparently are typical in treason cases, and instructive on the imprecision which masquerades as objectively stated standards for decision. In *Kawakita*, the court instructed the jury on eight elements of the offense, of which six are relevant here:[2]

> First: That the defendant, Tomoya Kawakita, at all times during the period specified in the indictment, namely, August 8, 1944, up to and including August 24, 1945, was an American citizen owing allegiance to the United States;
>
> Second: That while an American citizen owing allegiance to the United States, the defendant did 'adhere to the enemies of the United States and more particularly . . . the Government of Japan, with which the United States at all times since December 8, 1941, and during the time set forth in this indictment, has been at war . . . ,' with the intent to betray the United States;
>
> Third: That while so adhering to the enemies of the United States, the defendant committed one or more or all of the overt acts alleged in the indictment and remaining to be submitted for your consideration;
>
> Fourth: That the overt act or acts so committed by the defendant actually gave aid and comfort to the enemies of the United States, to-wit, the Government of Japan;
>
> Fifth: That in so adhering to the enemies of the United States, and in so giving aid and comfort to such enemies, the defendant acted knowingly, intentionally, willfully, unlawfully and feloniously;
>
> Sixth: That in so adhering to the enemies of the United States, and in so giving aid and comfort to such enemies, the defendant acted traitorously and treasonably, and for the purpose and with the intent to betray the United States and to adhere to, and give aid and comfort to the enemies of the United States, to wit, the Government of Japan. . . .

The instructions reflect four possible issues to which states of mind can be relevant:

> (1) adherence to the enemy (Instruction No. 2);
>
> (2) adherence to the enemy with intent to betray (Instruction No. 2);
>
> (3) commission of the overt act "knowingly, intentionally, willfully, unlawfully and feloniously" (Instruction No. 5),
>
> (4) adherence and commission of the overt act, traitorously and treacherously and with intent to betray and to give aid and comfort to enemies of the United States (Instruction No. 6).

Although there is some language in other cases that equate adherence to the enemy and intent to betray, the instructions in *Kawakita* treat them as separate elements—a view which is supported by language in at least one Supreme Court case.[3] Two types of conduct may be accompanied by culpability or culpabilities. Whether the Court so intended is uncertain, but a workable approach would be to view

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[1] 96 F. Supp. 824 (S.D. Cal. 1950).
[2] *Id.* at 840.
[3] *Cramer* v. *United States*, 325 U.S. 1, 31 (1945).

adherence to the enemy and giving aid and comfort, as two kinds of conduct and require that both be done with an intent to betray. This does not define any of the elements, but does provide a basis for analysis. However, this "neat" division is not necessarily to be found in the quoted instructions or in the explanation in later portions of the instructions. Furthermore, language in other cases provides additional shadows. The *Kawakita* court explained instruction No. 2, adherence to the enemy and intent to betray, as follows: [4]

> The charge of adherence to an enemy is old in the law of treason. The expression is found in the ancient Treason Act of England from the year 1351. The expression "adhere to an enemy" means to break allegiance to one's own country by casting one's lot with the enemy—to be disloyal in mind and heart to the cause of the country to which a person owes allegiance—to betray one's country by siding with her enemies.
>
> Since adherence may consist in nothing more than a state of mind, evidence as to acts or happenings or events not charged in the indictment, which has been received for the sole and limited purpose of aiding the jury to determine the defendant's state of mind or intent during the period specified in the indictment, may be considered along with all other evidence in the case in determining whether or not the defendant did "adhere to the enemies of the United States and more particularly . . . the Government of Japan," as charged in the indictment.

The court makes no reference to "with intent to betray" which appears in its own instruction as something in addition to "adherence to the enemy." Instead, it equates the two ideas when it states "adhere to an enemy means . . . to betray one's country by siding with her enemies". The court's explanation makes disloyalty to a country to which one owes allegiance a critical part of adherence to the enemy. In its elaboration on Instruction No. 5, the court [5] relies on a statement in *Cramer:* [6]

> As the United States Supreme Court said in the Cramer case previously mentioned, 325 U.S. at page 29, 65 S.Ct. at page 932:
>
> '. . . the crime of treason consists of two elements; adherence to the enemy; and rendering him aid and comfort. A citizen intellectually or emotionally may favor the enemy and harbor sympathies or convictions disloyal to this country's policy or interest, but so long as he commits no act of aid and comfort to the enemy, there is no treason. On the other hand, a citizen may take actions which do aid and comfort the enemy—making a speech critical of the government or opposing its measures, profiteering, striking in defense plants or essential work, and the hundred other things which impair our cohesion and diminish our strength—but if there is no adherence to the enemy in this, [and] if there is no intent to betray, there is no treason.'

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[4] 96 F. Supp. 824, 843–844 (S.D. Cal. 1950).
[5] *Id.* at 845.
[6] *Cramer* v. *United States*, 325 U.S. 1 (1945).

This statement could support the *Kawakita* court's Instruction No. 6, but does not support its elaboration thereof.[7] To compound the difficulty, the court, in the quoted instruction, added the word "[and]" to the last sentence in the *Cramer* quote, which actually reads: ". . . but if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason." In the context in which the statement appears in *Cramer*, it suggests that "adhere to the enemy" and "intent to betray" represent essentially the same and not separate ideas.

Despite language in other cases that the "intent to betray" is derived from adherence to the enemy, the more reasonable and workable approach is that "intent to betray" derives from the word "treason" and that "adhering to the enemy, giving him aid and comfort" is the proscribed "conduct," albeit mental, and that it need not be defined to include "disloyalty," the culpability element. Thus, a person who owes no allegiance to the United States could adhere to its enemies. What makes adherence treason is, inter alia, the element of violating a duty of loyalty; this is derived from the term "treason," not adherence to the enemy. Much of the confused and foggy discussion in the cases can be traced to an attempt to analyze "adherence to the enemy, giving him aid and comfort" as constituting or suggesting both the conduct and culpability elements of the offense; whereas the culpability or "guilt" element of the treason offense is derived from the concepts implicit in the word "treason" in the Constitution. The remainder of the treason clause limits the kind of conduct which will be treated as treason when the requisite culpability is present.

Armed Insurrection: Section 1103

1. *Scope of the Armed Insurrection Offense; Current Law.*—Proposed section 1103 would replace the existing statutes proscribing rebellion or insurrection [1] and seditious conspiracy.[2] It would substitute as the object of the proscription "armed insurrection with the intent to overthrow, supplant or change the form of the government of the United States or of a state or territory of the United States" for the bare "rebellion or insurrection" language in the present rebellion statute. The elements of force ("armed") and broad action ("insurrection") are thus made express. The need to use the term "rebellion" in addition to the term "insurrection" is eliminated by including in the intent clause both the purpose to overthrow the government or change its form and the purpose to set up a new nation on all or part of its territory ("supplant"). The statement of the intent clause also makes clear that the offense is committed only in cases involving the broad political purpose of affecting the political or territorial structure of government.

Absent such a purpose, violent or forcible conduct will be relegated to other offenses under the Code, such as physical obstruction of gov-

[7] *See* note 4, *supra*. 325 U.S. at 29.
[1] 18 U.S.C. § 2383.
[2] 18 U.S.C. § 2384.

ernment function,[3] riot,[4] homicide,[5] assault,[6] arson or other property destruction; [7] trial of such nonpolitical offenses may then proceed untrammeled by the passion which may be engendered by the label "armed insurrection" and the separate treatment required by the first amendment for politically oriented crimes.

The draft distinguishes in grading between leaders of and substantial contributors to armed insurrection and those who merely engage in it, facilitate it, solicit it, incite others to engage in it, or conspire to engage in it.[8] It also limits the circumstances under which conduct amounting to attempt, criminal solicitation and conspiracy will constitute the offense.[9]

2. *Grading.*—The present statutes punish engaging in an insurrection by 10 years' imprisonment and $10,000 [10] and conspiracy to overthrow the government by 20 years and $20,000.[11] The draft grades the offense as a Class B felony [12] raising the penalty level to Class A for leaders, organizers and substantial contributors. Reserving the heaviest penalties for leaders is in accord with actual sentencing practice and with the policy reflected in the Code provisions on riot [13] and organized crime leadership.[14]

3. *Facilitation, Solicitation, Attempt and Conspiracy.*—Along with engaging in an armed insurrection, the draft proscribes (and penalizes at the Class B felony level) facilitating, soliciting, inciting or conspiring with another to engage in an armed insurrection. The latter forms of involvement are punishable under the section, however, only where the conduct is engaged in with the knowledge that armed insurrection is actually in progress or impending, *i.e.*, about to begin. The draft places the same limit upon convictions for the separate general offenses of criminal solicitation, criminal facilitation, attempt, and conspiracy, having the object of armed insurrection. The limit, which is designed to avoid the first amendment problems encountered by inchoate political offenses, clearly meets the "imminent danger" test of *Brandenburg* v. *Ohio.*[15] Other inchoate offenses relating to armed insurrection are dealt with in separate sections of the proposed draft: advocacy is proscribed in proposed section 1104; organizing and engaging in paramilitary activities are proscribed in section 1105. Political conduct not rising to the level of the inchoate offenses defined in sections 1103–1105 may constitute inchoate offenses under specific proscriptions of nonpolitically oriented conduct, such as phys-

[3] Section 1301. Nonpolitical conduct of this type has been construed to come within the present rebellion statute (18 U.S.C. § 2383) and even the treason clause. *See* the cases cited in *Cramer* v. *United States*, 325 U.S. 1, 25n.38 (1945); Hurst, *Treason in the United States*, 58 HARV. L. REV. 806, 818 *et seq.* (1945).

[4] Sections 1801–1804.

[5] Sections 1601–1603.

[6] Sections 1611–1612.

[7] Sections 1701–1705.

[8] *See* paragraph 2, *infra.*

[9] *See* paragraph 3, *infra.*

[10] 18 U.S.C. § 2383.

[11] 18 U.S.C. § 2384.

[12] Facilitating and soliciting or inciting another to engage in an armed insurrection, when done with knowledge the armed insurrection is in progress or about to begin, is also graded as a Class B felony (*see* paragraph 3, *infra*).

[13] Sections 1801–1804.

[14] Sections 1005, 3203.

[15] 395 U.S. 444 (1969).

ical obstruction of government functions, or attempts, solicitations or conspiracies to commit homicide, assault and arson.[16]

ADVOCATING IMMINENT ARMED INSURRECTION: SECTION 1104

1. *Section 1104 and the Smith Act (18 U.S.C. § 2385).*—Proposed section 1104 deals with advocacy of armed insurrection. It is designed to restate present law as embodied in the Smith Act,[1] and to incorporate the judicial construction thereof as well as the constitutional limitations necessary to preserve the validity of a statute which covers advocacy.

The Smith Act, enacted in 1940, generally proscribes teaching and advocacy of the forceful overthrow of the government of the United States or any of its States or territories.[2] The potentially broad scope of the statute has been considerably narrowed by judicial construction. First, a conviction for violation of the Smith Act requires a showing of a specific intent to overthrow the government;[3] it was not intended that knowingly teaching about, studying or discussing ideas relating to overthrowing the government would be criminal.[4] The language of the Smith Act is imprecise in this respect. Its proscription would appear to reach "knowingly or willfully advocat[ing], abet[ting], advis[ing], or teach[ing] overthrow of the government," without regard to whether the speaker intends these ideas to be carried out; but in *Dennis* v. *United States*, the Supreme Court read the language to require an intent to overthrow the government as an essential element of the crime.[5] The draft explicitly requires the prohibited conduct to be accompanied by an "intent to induce or otherwise cause others to engage in armed insurrection in violation of section 1103." Proposed section 1103 proscribes forceful action with "intent to overthrow, supplant or change the form of the government of the United States or of a state or territory of the United States."

Second, it has been held that advocacy of abstract doctrine may not be restricted; it is advocacy of illegal *action* to which the statute must be addressed. "The essential distinction is that those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to *believe* in something." *Yates* v. *United States*, 354 U.S. 298, 324–325 (1957).

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[16] *See* notes 3–7, *supra*.

[1] 18 U.S.C. § 2385.

[2] Another feature of the present Smith Act—advocacy of assassination of a government official—where it constitutes a serious threat to the official personally rather than a threat to overthrow the government, is covered by proposed section 1614, proscribing terroristic threats. In addition, there is a specific provision dealing with threats against the President (proposed section 1615).

[3] *Dennis* v. *United States*, 341 U.S. 494, 499 (1951).

[4] The potential stultifying effect of a statute so broadly worded as to appear to forbid teaching or studying such doctrines was discussed by the Supreme Court in *Keyishian* v. *Board of Regents of the University of the State of New York*, 385 U.S. 589, 597–602 (1967). The *Keyishian* opinion discussed the New York "criminal anarchy" law, a statute very similar to the Smith Act. Indeed, the New York statute was the "particular prototype" from which the Smith Act derived. *Yates* v. *United States*, 354 U.S. 298, 309 (1957).

[5] "We hold that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the government by force and violence." 341 U.S. 494, 499–500 (1951).

The prohibition of advocacy of armed insurrection with intent to cause others to engage in armed insurrection, in section 1104, makes it clear that it is advocacy of action, not abstract doctrine, that is proscribed.

Third, judicial construction of the Smith Act has further assured that advocacy of action may be reached only by the adoption of an objective standard as to the *effect* of the advocacy. In the *Dennis* case, the Court held that Congress might proscribe advocacy of the use of force to overthrow the government when there is a clear and present danger that use of such force is imminent. The Court further explained this concept in *Yates*:

> [T]he essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to "action for the accomplishment" of forcible overthrow, to violence as "a rule or principle of action," and employing "language of incitement" . . . is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonable to justify apprehension that action will occur. (354 U.S. at 321.)

Recently, in *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969), the Supreme Court, in a *per curiam* decision, noted that:

> [T]he Constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except when such advocacy is directed to inciting or producing imminent lawless action *and* is *likely to produce* such action. (Emphasis added.)[6]

In conformity with these holdings, proscription of advocacy under proposed section 1104(1)(a) is limited to that which occurs "under circumstances in which there is substantial likelihood [the] advocacy will imminently produce a violation of section 1103 [insurrection and action immediately preceding insurrection]."[7]

Fourth, the section of the Smith Act dealing with organization of and membership in insurrectionist groups[8] has been defined as limited to organizers and "active members" of such groups. This avoids conviction of those who attend meetings—whether out of curiosity or sympathy—but are not themselves prepared to engage in illegal conduct.[9]

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[6] In a footnote to the above quoted sentence, the Court stated. "it was on the theory that the Smith Act . . . embodied such a principle and that it had been applied only in conformity with it that this Court sustained the Act's constitutionality . . ." 395 U.S. 444, 447n.2.

[7] *Cf.* Sweden's sedition provision, which expresses a similar limitation: "takes action which dangerously favors the realization of such intent." THE PENAL CODE OF SWEDEN, c. 18 §1 (1965) (Sellin trans.)

[8] 18 U.S.C. § 2385.

[9] In *Scales* v. *United States*, 367 U.S. 203, 228 (1961), the Supreme Court, upholding the conviction of an active member, stated that due process considerations "are duly met when the statute is found to reach only 'active' members having also a guilty knowledge and intent, and which therefore prevents a conviction on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action." In a companion case, in which the conviction of a party member was reversed, the Court stated that evidence of

Proposed section 1104(1)(b), which deals with advocacy in an organizational context, codifies the decisions in *Scales* v. *United States* [10] and *Noto* v. *United States*,[11] limiting its penalties to those who "organize an association which engages in the advocacy prohibited in subparagraph (a), or, as an active member of such association . . . facilitates such advocacy."

Finally, only *present* advocacy of violent overthrow of the government is reached by section 1104 and the membership clause of the Smith Act. Manifestations of an intent to advocate in the future may evidence undesirable thoughts, but the right of an individual to his thoughts is privileged, at least until he actually acts upon them. Thus, organizational conspiracies or other preliminary plans by an association of persons to engage in unlawful advocacy at some propitious time in the future may not be proscribed until the advocacy actually takes place, at which time the role of the person in the illegal effort—whether it be that of organizer, active member, or perhaps sympathetic but unwilling bystander, can be measured.[12] The draft limits prosecutions for inchoate advocacy in accordance with constitutional standards by further providing: "a person shall be convicted under sections 1001 through 1004 of an attempt or conspiracy to violate this section, or of facilitating or soliciting a violation of this section, only if the prohibited advocacy occurs." [13]

2. *Grading of Section 1103.*—The Smith Act carries a penalty of up to 20 years' imprisonment. Penalties actually imposed in previous convictions, however, appear to have been much less.[14] Moreover, under the structure of the proposal, the offense of advocacy is a step removed from the offense of actual insurrection. Actual leaders of armed insurrection, in progress or about to begin—those who call on

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the member's role in the organization must be judged strictly, "for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share." *Noto* v. *United States*, 367 U.S. 290, 299–300 (1961).

[10] 367 U.S. 203 (1961).

[11] 367 U.S. 290 (1961).

[12] "[I]t is present advocacy, and not an intent to advocate in the future or a conspiracy to advocate in the future once a groundwork has been laid, which is an element of the crime under the membership clause. To permit an inference of present advocacy from evidence showing at best only a purpose or conspiracy to advocate in the future would be to allow the jury to blur the lines of distinction between the various offenses punishable under the Smith Act." (*Noto* v. *United States*, 367 U.S. 290, 298–299 (1961)).

Noto was concerned with the membership clause; *cf. Yates* v. *United States* 354 U.S., 298, 324 (1957), where the Court stated: "We intimate no views as to whether a conspiracy to engage in advocacy in the future, where speech would thus be separated from action by one further removed is punishable under the Smith Act."

[13] Of course, conspiracies or attempts to commit other specific offenses are subject to punishment as violations of the applicable provisions. In particular, engaging in paramilitary activities (proposed section 1105) will reach conduct involving the collection of weapons, and organization and training for political purposes.

[14] *E.g.*, the 14 persons convicted in the *Yates* case were each sentenced to 5 years' imprisonment and a fine of $10,000. *Yates* v. *United States*, 354 U.S. 298, 302 (1957). Junius Scales was sentenced to 6 years' imprisonment. *Scales* v. *United States*, 367 U.S. 203, 259 (1961).

others to take arms with them—will be guilty of a Class A felony, and others who actually take violent action will be guilty of a Class B felony under proposed section 1103; advocates of armed insurrection who take no further action, and are not leaders or inciters under section 1103 will be guilty of a Class C felony under proposed section 1104.

3. *50 U.S.C. § 783(a): Conspiracy or Attempt to Establish Totalitarian Dictatorship.*—50 U.S.C. § 783(a) (conspiracy or attempt to establish totalitarian dictatorship) creates an offense punishable by $10,000/10 years under 50 U.S.C. § 783(d).

50 U.S.C. § 783(a) provides:

> It shall be unlawful for any person knowingly to combine, conspire or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, as defined in paragraph (15) of section 782 of this title, the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual: Provided, however, that this subsection shall not apply to the proposal of a constitutional amendment.

50 U.S.C. § 782(15) states:

> The terms 'totalitarian dictatorship' and 'totalitarianism' mean and refer to systems of government not representative in fact, characterized by (A) the existence of a single political party, organized on a dictatorial basis, with so close an identity between such party and its policies and the governmental policies of the country in which it exists, that the party and the government constitute an indistinguishable unit, and (B) the forcible suppression of opposition to such party.

There have been no reported prosecutions under this section, nor have any judicial comments on its constitutionality, scope or meaning been uncovered.

The basic limiting factor which characterizes the offense is the requirement in 50 U.S.C. § 782(15)(B) of the "forcible suppression of opposition" to the totalitarian government party. The fact it is foreign dominated should not be deemed essential because whether of foreign or domestic vintage, there is an equally strong interest in proscribing conduct of the kind embraced. However, the current form of the statute could raise constitutional issues similar to those under the Smith Act, and it is believed that the area is adequately covered without the need to retain 50 U.S.C. § 783(a). Coverage is afforded by provisions prohibiting intimidation, threats, *etc.*, in connection with the election process, which, after all is the core conduct with which the current law deals, and threats, *etc.*, against public officials. These basic provisions, combined with the conspiracy and attempt provisions and utilization of the piggy-back jurisdiction (proposed section 201(b)) to reach conspiracies to engage in more serious harms, will protect against the feared harm of dictatorship in traditional criminal law terms, thereby avoiding the constitutional issues necessarily accompanying criminal legislation framed in the political terminology of 50 U.S.C. § 783(a). Therefore, repeal of 50 U.S.C. § 783(a) is recommended.

Paramilitary Activities: Section 1105

Proposed section 1105 prohibits, in essence, private armies. There is no such prohibition in existing law, but there is a statute which requires registration (enforceable by criminal sanctions) of organizations engaged in "civilian military activities."[1] The draft would replace the registration statute by punishing, with Class C felony penalties, persons who engage in activities which are unauthorized[2] and which involve:

(a) the acquisition, caching, use or training in the use of weapons,

(b) for political purposes,

(c) when done by an association or group of 10 or more persons.

Class B penalties are applicable to persons who lead, organize or substantially contribute to activities involving 100 persons or more.[3] A person who is merely a member of an organization engaging in the prohibited activity, but who does not himself, engage in its paramilitary activities is not covered.

The activities prohibited by the draft are limited neither to those with armed insurrection as the object,[4] nor to those aimed at overthrow of the government, nor to those carried on by organizations under foreign control.[5]

The draft reflects the view that association to accomplish political ends by the use of weapons is not protected by the first amendment and should be prohibited. The Commission should, however, consider whether the limitation of the proscription to groups with "political purposes" presents a constitutional or policy danger by permitting wide latitude in executive and judicial discriminations as to what constitutes a "political purpose." The evil, if it exists, is in the classification rather than in the prohibition, so that it might be avoided by applying the prohibition across the board to all weapons-oriented groups regardless of purpose.

The statute deals with a matter of real concern, but it should be recognized that it is difficult to draft a provision which could not be subject to abuse. That the concern is common to a number of democratically organized nations is evidenced by similar provisions set forth in the Appendix, *infra*, in England, Canada, Sweden, Norway and Denmark.

In considering the merits of the proposal which can be viewed as a provision whose frequent use is not contemplated and where successful prosecution is not likely but which can serve as an aid to discourage

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[1] 18 U.S.C. § 2386. The Department of Justice reports that there have been no registrations under the section; nor are there any reported cases involving it.

[2] Section 1105 excludes activities of the armed forces of the United States or of a State, including reserves and the National Guard, and official Federal or State law enforcement activities, from the operation of the section.

[3] The grading of the offense parallels the grading of the proposed armed insurrection offense (section 1103).

[4] Proposed section 1105 strikes at activities having potential for producing armed insurrection, rather than at the insurrection itself.

[5] In this respect the draft differs from the present registration statute (18 U.S.C. § 2386), which requires registration only if the organization has a purpose to overthrow the government or is subject to foreign control.

participation in this type of activity, consideration should be given to the language of these foreign statutes. In particular, the English statute poses an interesting alternative:

(1) The offense could be defined in terms of a purpose to "usurp" the functions of the armed forces or the police. It should be noted that considered and rejected in the draft of proposed section 1105 was an express inclusion of the prohibited activity "whether or not designated defensive." Inclusion of this phrase together with a reference to police functions could intensify the possibility that the provision would be used as an instrument of political oppression against groups which, in a particular local situation, have a need to organize for self-protection. The varying conditions of local life and a doubtful Federal interest militated against creation of this possibility;

(2) In order to further limit the possibility of political abuse, the provision could require that the prohibited conduct "arouse reasonable apprehension that the group is organized or equipped" for political purposes or to usurp the function of the armed forces. Consideration should also be given to inclusion of a provision similar to the English statute, to deal with the display of weapons in judicial and other official proceedings. The provision would read:

> *Display of Weapons at Official Proceedings.* A person is guilty of a Class C felony if he [carries or] displays a dangerous weapon while present at an official proceeding in reckless disregard of the risk that his conduct will arouse reasonable apprehension that he intends to influence the conduct or outcome of the proceeding.

This provision would be located appropriately in chapter 13 of the new Code.

As originally drafted, section 1105 was limited to "clandestine" activities, but reconsideration resulted in the conclusion that there was little reason to distinguish between "open" and "secret" private armies in terms of possible coercive effects, although in terms of potential government control or prevention of harm, the former may present a lesser challenge.

Appendix

Foreign statutes on paramilitary activities

England

Sections 2 and 4, Public Order Act of 1936, 5 Halsbury's Statutes of England 1088–1090, 1091:

> 2. Prohibition of quasi-military organisations.—(1) If the members or adherents of any association of persons, whether incorporated or not, are—
>
> (*a*) organised or trained or equipped for the purpose of enabling them to be employed in usurping the functions of the police or of the armed forces of the Crown; or
>
> (*b*) organised and trained or organised and equipped either for the purpose of enabling them to be employed for the use or display of physical force in promoting any political object, or in such manner as to arouse reasonable

apprehension that they are organised and either trained or equipped for that purpose;

then any person who takes part in the control or management of the association, or in so organising or training as aforesaid any members or adherents thereof, shall be guilty of an offence under this section:

Provided that in any proceedings against a person charged with the offence of taking part in the control or management of such an association as aforesaid it shall be a defence to that charge to prove that he neither consented to nor connived at the organisation, training, or equipment of members or adherents of the association in contravention of the provisions of this section.

4. Prohibition of offensive weapons at public meetings and processions.—(1) Any person who, while present at any public meeting or on the occasion of any public procession, has with him any offensive weapon, otherwise than in pursuance of lawful authority, shall be guilty of an offence.

(2) For the purposes of this section, a person shall not be deemed to be acting in pursuance of lawful authority unless he is acting in his capacity as a servant of the Crown or of either House of Parliament or of any local authority or as a constable or as a member of a recognised corps or as a member of a fire brigade.

Denmark

Danish Criminal Code, section 114 (English translation, Copenhagen 1958):

114. (1) Any person who participates in or grants substantial pecuniary or other substantial support to any corps, group or association which intends, by the use of force, to influence public affairs or to disturb the public order shall be liable to imprisonment for any term not exceeding six years.

(2) Any person who takes part in any unlawful military organisation or group shall be liable to a fine or to simple detention or, in aggravating circumstances, to imprisonment for any term not exceeding two years.

Norway

Norwegian Penal Code, section 104a (English translation, N.J. 1961):

Section 104a. Anybody who establishes or participates in a private organization of military character or supports such organization, shall be punished by imprisonment up to two years. If the organization or its members maintains supplies of arms or explosives, or if there are other aggravating circumstances, the punishment shall be imprisonment up to six years.

Anybody who institutes, takes part in or supports an association or organization which by sabotage, violence or other illegal means, aims to disturb the order of the community or to obtain influence in public affairs, shall be punished similarly.

Sweden

Swedish Penal Code, chapter 18, section 4. (English translation, Stockholm, 1965):

> Sec. 4. If a person organizes or participates in an association, which must be considered to constitute or, in view of its character and the purpose for which it has been organized, is easily capable of developing into an instrument of force, such as a military troop or a police force, and which does not with due permission strengthen the defense establishment or the police, or who on behalf of such association is concerned with arms, ammunition or other like equipment makes available a building or land for its activity or supports it with money or in other ways, shall be sentenced for unlawful military activity to pay a fine or to imprisonment for at most two years.

Canada

Canadian Criminal Code, section 71 (1953–54, as amended to 1965):

UNLAWFUL DRILLING

Orders by Governor in Council—General or special order—Punishment

> 71. (1) The Governor in Council may from time to time by proclamation make orders
>
> (a) to prohibit assemblies, without lawful authority, of persons for the purpose
>
> (i) of training or drilling themselves,
>
> (ii) of being trained or drilled to the use of arms, or
>
> (iii) of practising military exercises; or
>
> (b) to prohibit persons when assembled for any purpose from training or drilling themselves or from being trained or drilled.
>
> (2) An order that is made under subsection (1) may be general or may be made applicable to particular places, districts or assemblies to be specified in the order.
>
> (3) Every one who contravenes an order made under this section is guilty of an indictable offence and is liable to imprisonment for five years.

SABOTAGE, RECKLESSLY IMPAIRING MILITARY EFFECTIVENESS, INTENTIONALLY IMPAIRING DEFENSE FUNCTIONS: SECTIONS 1106–1108

1. *Sabotage: Current Law.*—The existing current basic sabotage statutes prohibit damage to or destruction of,[1] as well as defective production of,[2] defense materials or facilities. The authorized penalty and the required culpability vary, depending upon whether the prohibited conduct occurs in time of war or national emergency, or in peacetime.

[1] 18 U.S.C. §§ 2153 (wartime), 2155 (peacetime).
[2] 18 U.S.C. §§ 2154 (wartime), 2156 (peacetime).

If the prohibited conduct occurs in wartime or in a "national emergency" the culpability required is either "an intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war or defense activities" or "reason to believe" that his act might have such an effect. The maximum penalty is 30 years' imprisonment and a fine of $10,000.[3] Peacetime sabotage is committed only if the prohibited conduct is accompanied by an "intent to injure, interfere with, or obstruct the national defense of the United States"; the maximum penalty is ten years' imprisonment and a fine of $10,000.[4]

The materials and facilities which one may not damage, destroy or defectively produce are described in a lengthy and complicated list;[5] whether the purpose of the list is merely to assure that the listed items are covered or to limit the objects which may be the subject of sabotage is unclear, but the fact that "all articles . . . suitable for use" in war or defense activities are included suggests not only that it cannot be the latter but also that in any event it is impossible to specify with precision everything to be covered. The present statutes, being directed to physical damage and destruction and defective production, do not clearly proscribe such forms of interference with the supply of materials and services to war or defense activities as blocking transport or causing delays in computerized production techniques.[6]

2. *Prohibited Conduct and Culpability Under Sections 1106 and 1108.*—Offenses designated or associated with sabotage can properly be viewed as aggravated versions of conduct which would usually be offenses under general provisions of a Criminal Code, such as arson or criminal mischief. The major purpose for such discrimination is grading, although under the United States Federal system it also serves as a jurisdictional base for Federal prosecution.[7] The basis for discrimination takes into account the type of harm or conduct, the accompanying culpability and the context of the conduct, *e.g.*, war or peace. The context of the conduct is considered in paragraph 3, *infra*, on grading of sections 1106, 1107 and 1108.

The culpability required by subsection (1) of section 1106 and by section 1108 is an "intent to impair the military effectiveness of the United States." This is substantially the same as the intent requirement under current law. Current law proscribes an "intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for war or carrying defense activities."[8] Sections 2153, and

[3] 18 U.S.C. §§ 2153 (destruction or damage), 2154 (defective production).

[4] 18 U.S.C. §§ 2155 (damage or destruction), 2156 (defective production).

[5] 18 U.S.C. § 2151. Note that 18 U.S.C. § 2152 is covered by the sabotage complex (sections 1106–1108), general offenses against property (chapter 17) and criminal trespass (section 1712).

[6] Fear that work stoppage in labor disputes could be deemed sabotage provides one explanation for the omission to cover delays; the fear could be justified under present law, for the culpability requirement for wartime sabotage includes "reason to believe" as well as "intent" to injure the relevant war activities of the United States. Delays could be covered without including labor disputes by limiting the culpability to "intent". Alternatively, such disputes could be expressly excluded, as is done in 18 U.S.C. § 1362 (injury to communications lines, stations or systems), and in the sabotage provision of the Canadian Criminal Code. THE CRIMINAL CODE §§ 51, 52(3) (1953–1954) (as amended to 1965) (Canada).

[7] Federal jurisdiction over sabotage is complete under proposed section 201.

[8] 18 U.S.C. §§ 2153–2156.

2154 of Title 18 also include persons who act "with reason to believe" the proscribed result will occur. (*See* discussion of draft section 1107, paragraph 3, *infra*, for disposition of this facet.) Injury to an "associated nation," the term in current law, is covered if there is an intent thereby to injure the United States. This is accomplished by the definition of "defense establishment" (draft section 1106(3)(a)) as including "a nation at war with any nation with which the United States is at war." This is intended to assure that the concern of the United States for hostile acts abroad is properly limited to conduct related to a United States military interest and not the wholly domestic concern of the foreign power. (*Cf.* draft section 1202 conspiracy to commit offenses against a friendly nation.)

A major departure from current law is reflected in the description of the prohibited conduct. Clauses (a) through (d) of subsection (1) of draft section 1106,* substitutes for the complicated list of materials and facilities which may be the subject of the sabotage offense under present law a proscription of four basic types of behavior, each having relation to a general category of objects:

(a) damaging or tampering with anything;**

(b) defectively making or repairing anything of direct military significance;

(c) improperly operating or failing to operate a machine, device or system of direct military significance;***

(d) delaying of obstructing transportation, communication or power, operated by or furnished to the defense establishment.

These are incorporated by reference into sections 1107 and 1108.

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*The comments refer to an earlier version of section 1106, but are relevant to the Study Draft version which is substantially similar.

The earlier version read:

§ 1106. Sabotage.

(1) Offense. A person is guilty of sabotage, a Class A felony, if, with intent to impair the military effectiveness of the United States, in time of war or when the prohibited conduct is likely to or does seriously impair missiles, satellites or nuclear weaponry, early warning systems or other means of defense or retaliation against sudden enemy attacks, he:

(a) damages or tampers with anything under circumstances when such damage or tampering is likely to or does seriously impair the military effectiveness of the United States;

(b) defectively makes or repairs a thing of direct military significance which is part of or belongs to the defense establishment;

(c) improperly operates or fails to operate a machine, device or system of direct military significance which is part of or belongs to the defense establishment; or

(d) delays or obstructs transportation, communication or power, operated by or furnished to the defense establishment.

(2) Definitions. In this section:

(a) "defense establishment" means the defense establishment of the United States or of a nation at war with any nation with which the United States is at war;

(b) a thing, machine, device or system of "direct military significance" includes armament or anything else peculiarly suited for military use, in course of manufacture, transport, or other servicing or preparation for the defense establishment.

**Note that the final version of the Study Draft limits section 1106(a) to "anything of direct military significance." To a degree, this avoids the problems discussed in the text, but raises issues concerning Federal protection of civilian food and water supplies. These could be left to State prosecution or be made a Federal jurisdictional base for criminal mischief (section 1705) or catastrophe (section 1704).

***This was excluded from the final version of the Study Draft.

Clause (a)* which covers damaging or tampering with anything is the broadest and is limited to "circumstances when such acts are likely to or do seriously impair United States military effectiveness." The generality of the property covered, "damages or tampers with *anything*," recognizes a degree of futility in attempting to list, or narrow the scope of, the protected property. This provision will also cover tampering with things related to Atomic Energy information under 42 U.S.C. § 2276 (tampering with restricted data) and with national defense information for which there is no specific provision in current law. Note that the draft refers to damaging or tampering while 42 U.S.C. § 2276 covers "remov[ing], conceal[ing], tamper[ing] with, alter[ing], mutilat[ing] or destroy[ing]." "Tampers" or "damages" in the draft, together with the espionage provisions (draft sections 1113–1116), are intended to cover all the conduct described in 42 U.S.C. § 2276.

The limitation concerning serious impairment of military effectiveness ("is likely to or does" occur), avoids covering as a Class A or B felony conduct with only a potentially minor effect on military effectiveness, such as breaking a window in a warehouse as an expression of opposition. Such conduct, of course, is punishable as criminal mischief, but not as sabotage except in the improbable event it occurs in circumstances under which military effectiveness will be thereby seriously impaired. This approach avoids the kind of problem which can arise where essentially innocuous conduct and minor harm are combined with an intent which is proscribed, but which may be more a manifestation of pique than of subversion. The sort of damage comprehended by "serious impairment" obviously involves some borderline situations. While this fact alone is insufficient to bar constitutionality, since the conduct itself is prohibited and should not be engaged in any event,[9] the Commission may wish to consider the possibility of statutorily identifying factors involved in the notion of serious impairment, such as increased costs, delayed production, risk to lives, the need to alter or abandon a previous plan.

Clauses (b) and (c)** involve defective manufacture or repair and improperly operating or failing to operate[10] something of "direct

See note **, p. 441, *supra*.

** This was excluded from the final version of the Study Draft.

[9] *See, e.g., Palakiko* v. *Harper*, 209 F.2d 75, 101–102 (9th Cir. 1953), upholding a statute making killing committed with "extreme atrocity or cruelty" first degree murder. *See also Boyce Motor Lines* v. *United States*, 342 U.S. 337, 340 (1952), in which the Court stated:

> Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.

In this connection, *see Etherton* v. *United States*, 249 F.2d 410 (9th Cir. 1957), which upheld a statute creating a felony offense for contributing to the delinquency of a minor but provided alternative penalties. In addition, the culpability requirement of section 1106(1) ("intent to impair") sufficiently advises the defendant as to what he may not do. *See Gorin* v. *United States*, 312 U.S. 19, 26–27 (1941), sustaining against a charge of vagueness the espionage provision of Title 18 which proscribes conduct in relation to "national defense information" by relying on the culpability element of intent to injure the United States.

The term "seriously" was also relied on in an earlier version of Study Draft section 1306. *See* note **, p. 441 *supra*.

[10] The labor dispute situation under sections 1106(1) and 1108 (*see* note 5, *supra*) is excluded by limiting culpability to "intent" rather than "reason to believe." *See* the discussion of culpability, *infra*. Consideration should be given to expressly excluding labor stoppages or "*lawful* labor stoppages" from section 1107.

military significance which is part of or belongs to the defense establishment" and clause (d)* covers obstruction of supply from vital facilities. A thing of "direct military significance" is not further defined except to assure inclusion of items in the process of manufacture or delivery (proposed section 1106(3)(b)).** The use of the adjective "direct" and the requirement it belong to or be part of the military establishment is intended to permit judicial construction under varying circumstances to insure sufficient coverage, and at the same time to convey the idea it does not cover all things belonging to the establishment but rather, only those of "direct military significance." Damage to a typewriter, a record player or a locker ordinarily would not be damage to things of "direct" military significance.

3. *Grading of Proposed Sections 1106, 1107, and 1108.*—In lieu of the discrimination between war and national emergency, on the one hand, and peace, on the other, under present law, the proposal eliminates "national emergency" as a basis for grading, retains war and adds injury to sudden-strike systems and defenses against such systems, as the grading element for the most serious offense, sabotage, (a Class A felony under section 1106).

Grading injury to sudden-strike systems as the most serious sabotage offense, a Class A felony, affords recognition to contemporary defense postures in which attacks on the viability of these systems may occur before a national emergency is declared or a condition of war exists. Under current law (18 U.S.C. §§ 2155, 2156), in the absence of war or a declared national emergency, sabotage of an ICBM site would be graded equally with peacetime sabotage to a warehouse or other minor facility. Under the proposal, such conduct is graded more seriously, *i.e.*, at the highest level (Class A felony) and without regard to whether it occurs in war, peace or national emergency.

Elimination of "national emergency"[11] as a basis for grading is based on the practical point that its continuation would make any grading of sabotage illusory because the state of national emergency has been a continuing one for a number of reasons.[12] It should be emphasized that only the grading is affected. Conduct which would con-

*Study Draft section 1106(c).

**Note that the Study Draft version contains an exclusive definition. *Cf.* note*, p. 441, *supra*.

[11] In the event, "national emergency" is retained as an element in grading, it should be limited to "national defense emergency" in order to limit Class A felony penalties to conduct occurring in emergencies related to the national defense; unrelated emergencies such as those concerning economic conditions which have been declared by the President under the Trading With the Enemy Act (50 U.S.C. APP. § 5(b)) should not give rise to Class A felony penalties. The present period of national emergency is expressly declared to give rise to "wartime" sabotage penalties by 18 U.S.C. § 2157. Whether a "national *defense* emergency", which would give rise to Class A felony penalties, exists can be declared by an Act of Congress (as in 18 U.S.C. § 2157) or in the terms of the presidential declaration of national emergency under the Trading With the Enemy Act.

[12] Earlier draft versions which relied on the war-national defense emergency basis for aggravating sabotage presented difficult grading and drafting problems. The conclusion was reached that, in addition to war, the most serious danger was conduct likely to result in military or defense *catastrophe*. This approach resulted in the adoption of sabotage of means of attack by defense against, sudden-strike capabilities.

The following alternative provisions are earlier attempts at rational grading with reliance on war and national defense emergency. They are instructive on the difficulty of discriminating between major and minor conduct in light of the coverage of national emergency in times of relative peace. Clauses (a)–(d),

stitute sabotage under section 1106 could be a Class C felony under section 1107 (intentionally impairing defense functions) whether or not a national emergency exists.

As noted above, section 1106 reserves Class A felony treatment and the term sabotage to the specified prohibited conduct and culpability "in time of war"* or when such conduct "is likely to or does seriously impair missiles, satellites or nuclear weaponry, early warning systems or other defenses or retaliation systems against sudden enemy attacks." The same conduct accompanied by the same culpability, is a Class C felony under section 1108 if it "causes destruction or damage to a thing constituting a loss exceeding $5,000."** Although it must be conceded that pecuniary loss is not a precise proxy for the extent of serious impairment of military effectiveness, it can serve as a measure to distinguish between minor conduct and serious conduct. Overriding this grading approach is the possibility of prosecution of destructive conduct under chapter 17 (offenses against property) as the Class B felony of arson, endangering fire or explosion or release of destructive forces (proposed sections 1701, 1702, 1704), or as Class C felonies under section 1705 (criminal mischief). Further it should be emphasized that the amount of loss is irrelevant in a prosecution for serious impairment of sudden-strike systems, a Class A felony under section 1106(2).

Section 1107 grades recklessly impairing military effectiveness as a Class C felony. The precise disposition of this conduct under current law cannot be stated with certainty. 18 U.S.C. §§ 2153, 2154 treat destruction and defective manufacture in time of war or national emergency with "reason to believe" it will injure the United States on a par with such conduct accompanied by an intent to injure the United States. Treating a greedy manufacturer as equally culpable with an enemy saboteur is not appropriate. The proposal translates reason to believe as "reckless",[11] limits the offense to time of war and instances

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referred to in the provisions, were substantially the same as the version of the Tentative Draft discussed in the text and set forth in note,* *supra*, p. 441, except that clause (a) read: "damages or tampers with anything" (*i.e.*, there was no reference to the likelihood of damaging military effectiveness).

Alternative I: Sabotage is a Class A felony if it is committed in time of war or in time of national defense emergency declared by Congress or by the President pursuant to Congressional authorization and is likely to or does seriously impair military effectiveness. Sabotage is a Class B felony if (i) it seriously impairs military effectiveness and it is forbidden by clause (a), or (ii) the conduct is likely seriously to impair military effectiveness and the person damages or tampers with a thing of direct military significance or engages in the conduct forbidden by clauses (b)–(d).

Alternative II: Sabotage is a Class A felony if it causes pecuniary loss in an amount of $100,000 or more, or if it endangers life or if it prevents the success of a military engagement or operation. [Sabotage is a Class B felony if it causes pecuniary loss in excess of $10,000 and less than $100,000; otherwise, it is a Class C felony] [Otherwise, it is a Class B felony].

*Note that the final version also relies on jeopardizing life or the success of a military operation.

**Grading as a Class B felony with a loss exceeding $10,000 was considered in order to distinguish the offense from malicious mischief (section 1705).

[11] Whether "recklessly" is a precise counterpart to "reason to believe" the war effort will be injured is unclear, but it has been held that "defective manufacture" with such "reason to believe" would be sabotage. *Schmeller* v. *United States*, 143 F.2d 544 (6th Cir. 1944). *See the* comment on avoiding military service obligations, paragraph 2, *infra*, with respect to other war contract violations.

of danger to sudden-strike systems, and makes it a Class C felony for a person to engage in prohibited conduct, *e.g.*, intentionally cut corners in manufacture, "in reckless disregard of a substantial risk of seriously impairing the military effectiveness of the United States." [12]

AVOIDING MILITARY SERVICE OBLIGATIONS: SECTION 1109

1. *Scope of Proposed Section 1109; Present Law.*—The proposal seeks to identify the core violations involving refusal of service [1] under the Selective Service Act (and any other law relating to obtaining armed forces personnel), assigning to them Class C felony penalties; current law makes no distinctions among the various possible violations of the Selective Service Act all of which carry 5-year/$10,000 felony penalties.[2]

The proposal deems the intent to avoid one's own service the most grievous form of culpability of concern to the Selective Service System, and proscribes the conduct which evidences a commitment to that purpose: failure to register; failure to report for induction; refusal to be inducted; and refusal or failure or avoidance of the performance of required civilian work. Violations of regulations will be treated as regulatory offenses (section 1006) or misdemeanors, but when accompanied by the prohibited intent can be prosecuted as attempts to violate proposed section 1109. Similarly, solicitation of violations by others may be prosecuted under proposed section 1110 (obstruction of recruiting or induction) or under the general criminal solicitation statute.[3] The proposal represents a departure from existing law, reflecting the view that a violation of a regulation, albeit a Selective Service regulation, which is characterized neither by an intent to avoid service nor by conduct constituting an attempt or solicitation, amounts to nothing more than defiance of a regulation, and that punishment as serious as that provided for actually refusing service is not justified.[4]

Although the proposal departs from existing law in order to provide a basis for grading, it should be noted that several cases have construed existing law as requiring something more than a mere failure to comply with Selective Service regulations and have spoken in terms of "usual criminal intent;" [5] the statutory term "knowingly" has been equated with the stronger term "willfully" [6] and it has been rec-

[12] For consideration of use of the term "seriously," *see* note 9, *supra*.

[1] Obstructing recruiting and deceiving others in order to avoid service are dealt with in § 1110.

[2] 50 U.S.C. APP. § 462. (Penalty provision of Selective Service Act of 1967). Failure to notify the Selective Service Board of a change in status which authorizes exemption or deferment could fall within the literal terms of 50 U.S.C. APP. § 462, as a felony. Such matters as failure to advise the Board of a marriage or the birth of a child, or of a change in physical condition such as that one has become a paraplegic could be covered. Similarly, under current law a person who destroys his draft card and immediately offers himself for induction or applies for a new card would be treated as a felon in the same manner as a person who engages in such conduct to conceal his whereabouts or identity.

[3] Proposed section 1003.

[4] Also note that proposed section 1751 grades forgery or counterfeiting of United States government documents, which would include selective service documents, as a Class C felony.

[5] *United States* v. *Hoffman*, 137 F. 2d 416, 419 (2d Cir. 1943).

[6] *Graves* v. *United States*, 252 F. 2d 878, 882 (9th Cir. 1958).

ognized that "intent" should at least be relevant on the issue of sentence.[7] The proposal works an improvement in current law by its greater precision in defining culpability, as well as by providing a basis for rational grading.

2. *Failure to Comply With Defense Production Orders and Contracts (50 U.S.C. App. §§ 468, 2071–73).*—Subsections (f) and (h)(1) of 50 U.S.C. App. §§ 468 authorize $50,000 fines and 3 years' imprisonment for violations of priority and production orders placed "in the interest of the national security" under that section. 50 U.S.C. App. § 2073 authorizes a $10,000 fine and 1 year's imprisonment for: (a) violation of 50 U.S.C. App § 2071, authorizing the President to promote national defense by declaring priorities in the performance of contracts, requiring entry into contracts and allocating materials and facilities; and (b) hoarding scarce materials in violation of 50 U.S.C. App. § 2072.

It is recommended that:

(a) these provisions remain in Title 50 Appendix;

(b) the 3-year sentence authorized for 50 U.S.C. App. § 468 violations be reduced to the misdemeanor level.

Felony treatment for these war production offenses is not warranted from the vantage point of sanctions necessary to enforce the law. It is arguable that no criminal sanctions are appropriate and that civil suits for penalties and to compel disgorging of profits, as well as the power of injunction and to seize plants, would satisfy the objects the provisions are intended to serve. Whether or not criminal sanctions ultimately are deemed appropriate, a first offense should not be a felony. The fine provisions could be used to eliminate financial incentives to violate the law; persistent violators could be subjected to increased penalties under the regulatory offense or persistent misdemeanant provisions (proposed sections 1006, 3003).

OBSTRUCTING RECRUITING, CAUSING INSUBORDINATION IN ARMED FORCES AND IMPAIRING MILITARY EFFECTIVENESS BY FALSE STATEMENT: SECTIONS 1110–1112

1. *Scope of Proposed Section 1110; Current Law.*—Proposed section 1110(1)(a) penalizes at the Class C felony level both intentional physical interference with the recruiting service of the United States and solicitation of another to violate proposed section 1109, *i.e.*, to unlawfully avoid military service obligations in time of war. "Recruiting service" is defined to include not only the Selective Service System but also systems for voluntary enlistment and for obtaining personnel[1] for the armed forces. The draft recognizes that the factors of wartime and obstructing the recruiting services aggravate the general obstruction of government function offense (section 1301) and accordingly upgrades the offense from a Class A misdemeanor under section 1301, to a Class C felony under proposed section 1110(1)(a).

Existing law, which also proscribes attempts to obstruct the recruiting[2] or enlistment service, imposes a maximum penalty of 20 years'

[7] *Leonard* v. *United States*, 386 F. 2d 423 (10th Cir. 1967).

[1] The present provisions. (*see* note 3, *infra*) have been construed to embrace acquisition of "supplies" as well as personnel. *See Schenck* v. *United States*, 249 U.S. 47, 53 (1919).

[2] *See* paragraph 2, *infra*.

imprisonment and a $10,000 fine.[3] It should be noted in this connection that physical obstruction of recruitment could be punished even more severely if it amounted to sabotage as defined in proposed section 1106.

2. *Solicitation of Unlawful Refusal to Submit to Induction.*—Non-physical obstruction of recruitment is proscribed under proposed section 1110(1)(a) only where the object is to induce unlawful refusals to submit to induction; then solicitation is also prohibited. The term "solicit" should be read in light of the proposed statute on criminal solicitation,[4] which, in an effort to avoid first amendment objections to mere advocacy offenses,[5] requires the solicitation to be to commit a "specific offense." This is consistent with a series of cases, the most recent being *Brandenburg* v. *Ohio*,[6] which continues to narrow the scope of governmental power to suppress expressions of opinion, or even advocacy in the absence of a specific danger intended and imminent. It should also be noted that the term "solicits" seems to be more in accord with current court doctrine than the term "counsels" which appears in the Selective Service Act of 1967.[7]

An attempt to induce another not to *enlist* would not be prohibited; since no one has an obligation to enlist, attempting to persuade another not to enlist should not be a crime.[8]

3. *Proposed Section 1110(1)(b); Force, Threat or Deception to Avoid or Delay Service.*—Subsection (1)(b) of proposed section 1110 proscribes the exertion of force, threat or deception upon a public servant in order to avoid or delay one's own or another's service. Class C felony penalties are prescribed; the maximum penalty under the present statute is 5 years' imprisonment and $10,000.[9] The draft continues present law in prohibiting the conduct regardless of whether it is committed in time of war, national defense emergency or peace and in not lessening the penalty for a peacetime offense.[10]

The definition of "deception"* in clause (2)(b) is derived from the Model Penal Code's provision on theft by deception.[11] Consideration

[3] 18 U.S.C. § 2388. The complex of offenses presently proscribed by 18 U.S.C. §§ 2387 and 2388 and 50 U.S.C. App. § 462 are covered by draft sections 1110–1112. For the most part the current statutes cover identical conduct, but there are some differences between them. Thus, section 2387, which is applicable both in war and in peace, requires an intent to interfere with, impair or influence the loyalty . . . of the armed forces, in order to render solicitation of refusal of duty an offense, whereas section 2388, which applies in wartime only, requires the causing or attempting to cause refusal of duty to be "willful." In addition, violation of section 2388 is subject to 20 years' imprisonment whereas section 2387 imposes a 10-year penalty.

[4] Proposed section 1003.

[5] *See* comment to proposed section 1003: *See also* the discussion of advocacy in connection with the Smith Act in the comment to proposed section 1104, *supra*.

[6] 395 U.S. 444 (1969).

[7] 50 U.S.C. App. § 462. *Cf. United States* v. *Spock*, Nos. 7205–7208 (1st Cir. 1969), which, although necessarily dealing with the term "counsels," recognized a first amendment requirement of a specific intent to cause the commission of an offense substantially as reflected in the proposed solicition offense.

[8] The language of the existing statute is broad enough to cover inducement not to enlist, but the leading cases (*Schenck* v. *United States*, 249 U.S. 47 (1919), and *Debs* v. *United States*, 249 U.S. 211 (1919)) assume that only those who have already enlisted (or are subject to the draft) could be the objects of the proscribed inducement.

[9] 50 U.S.C. § 462.

[10] It should be noted that while peacetime solicitation of draft evasion is not specifically covered by the proposal, it could be dealt with under the general criminal solicitation provision (section 1003).

*This was omitted in the Study Draft.

[11] MODEL PENAL CODE § 223.3 (P.O.D. 1962).

should be given to bringing within the ambit of the definition the draft board member who knows that his colleagues are acting upon false information or a false assumption and then fails to enlighten them with intent that another avoid service.

4. *Proposed Section 1111; Causing or Soliticting Insubordination in the Armed Forces.*—Proposed section 1111 prohibits causing or soliciting insubordination, mutiny or refusal of duty by any member of the armed forces. It is intended to substantially continue and simplify the statement of the offense under existing law.[12]

There have been a number of prosecutions with serious first amendment implications under the present statutes. Prosecutions for broadside opposition to World War I, appealing to members of the general public as well as to members of the armed forces, as attempts to cause insubordination have been permitted. *See Debs* v. *United States*, 249 U.S. 211 (1919), *Frohwerk* v. *United States*, 249 U.S. 47 (1919), and *Schenck* v. *United States*, 249 U.S. 47 (1919). These cases, however, have been largely discredited by *Brandenburg* v. *Ohio* [13]. The use of the term "solicits" in the proposed provision eliminates from the scope of the proscription the mere expression of opinion which does not amount to solicitation to commit a specific offense,[14] and to that extend is intended to overrule whatever viability remains in the *Debs*, *Schneck* and *Frohwerk* holdings.

5. *Proposed Section 1112; Impairing Military Effectiveness by False Statement; Content of Proscribed False Statement.*—Proposed Section 1112 prohibits knowingly making false statements, in time of war, with "intent to aid the enemy or to prevent or obstruct the success of military operations of the United States." Whereas present law [15] imposes a 20-year imprisonment penalty, the draft punishes the offense at the Class B felony level if serious impairment of military effectiveness results and grades the offense as a Class C felony otherwise.

The draft recognizes that false statements initiating rumors of catastrophe and false statements concerning enemy action are common devices which are designed to and can effectively demoralize the civilian and military populace and change the course of a war. On the other hand, the dangers inherent in prohibiting political statements are also recognized. Accordingly, the draft restricts the class of false statements covered to "fact concerning losses, plans, operations or conduct of the armed forces of the United States or those of the enemy, civilian or military catastrophe, or other report likely to affect the strategy or tactics of the armed forces of the United States or likely to create general panic or serious disruption," Political discussions and conclusions or opinions concerning political issues, statements concerning the motives of public figures or the purposes or merits of govern-

[12] 18 U.S.C. §§ 2387, 2388. *See* note 3, *supra*, for a description of current statutes. Note that draft section 1111 does not include the reference to "loyalty" contained in 18 U.S.C. § 2387, because of the indefinite nature of the term. Further, its connotation of a state of mind without conduct is at odds with the philosophy of the treason provision in the Constitution which would not punish "adherence" without conduct. *See Cramer* v. *United States*, 325 U.S. 1, 29 (1945), quoted in the comment on sections 1101–1102, text accompanying note 6, *supra*. If the solicitation involves "disloyalty" to be manifested by unlawful conduct, it is sufficiently covered as solicitation to commit an offense.

[13] 395 U.S. 444 (1969).

[14] *See* proposed section 1003 (criminal solicitation) and the discussion of "specific offense" in paragraph 3 of the comment to section 1110, *supra*.

[15] 18 U.S.C. § 2388.

mental policy and any other statements or reports which seek lawfully to affect government policy or public opinion are excluded. The precaution is intended to avoid cases such as *Pierce* v. *United States*, 252 U.S. 239 (1920), in which a pamphlet containing a number of statements was held to contravene the provisions of present 18 U.S.C. § 2388. The statements, together with the Court's reasons for agreeing that a jury could find they were false, follow:

Alleged False Statement	*Proof of Falsity*
"Into your homes the recruiting officers are coming. They will take your sons of military age and impress them into the army" (252 U.S. at 245). *"And still the recruiting officers will come; seizing age after age, mounting up to the elder ones and taking the younger ones as they grow to soldier size"* (252 U.S. at 246)	To prove the alleged falsity of these statements the government gravely called as a witness a major in the regular army with 28 years' experience, who has been assigned since July 5, 1917, to recruiting work. He testified that "recruiting" has to do with the volunteer service and has nothing to do with the drafting system and that the word "impress" has no place in the recruiting service. (252 U.S. at 264 (dissent).)
"The Attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled Banner is played, that he has no time to protect the food supply from gamblers. (252 U.S. at 246.)	To prove the falsity of this statement the government called the United States attorney for that district, who testified that no federal law makes it a crime not to stand up when the "Star Spangled Banner" is played and that he has no knowledge of any one being prosecuted for failure to do so. The presiding judge supplemented this testimony by a ruling that the Attorney General, like every officer of the government, is presumed to do his duty, and not to violate his duty, and that this presumption should obtain unless evidence to the contrary was adduced. The Regulations of the Army (No. 378, Edition of 1913, p. 88) provide that if the National Anthem is played in any place, those present, whether in uniform or in civilian clothes, shall stand until the last note of the anthem. The regulation is expressly limited in its operation to those belonging to the military service, although the practice was commonly observed by civilians throughout the war. There was no federal law imposing such action upon them. The Attorney General, who does not enforce Army Regulations, was therefore not engaged in sending men to prison for that offense. (252 U.S. at 265–266 (dissent).)
"Our entry into it was determined by the certainty that if the Allies do not win, J.P. Morgan's Loans to the Allies will be repudiated, and those American investors who bit on his promises would be hooked" (252 U.S. at 247).	Common knowledge (not to mention the President's address to Congress of April 2, 1917, and the Joint Resolution of April 6 declaring war [40 Stat. 1], which were introduced in evidence) would have sufficed to show at least that the statements as to the causes that led to the entry of the United States into the war against Germany were grossly false, and such common knowledge went to prove also that defendants knew they were untrue. (252 U.S. at 251.)

The proposal follows Justice Brandeis' dissent in the *Pierce* case to the effect that the statement must be something "capable of being proved false in fact." (252 U.S. at 255)

ESPIONAGE AND RELATED OFFENSES: SECTIONS 1113–1117

1. *Current Law; General Organization of Draft Proposals.*—The central provisions in current law covering the protection of information related to the national security are:

(a) Title 18, chapter 37 (espionage and censorship);

(b) 50 U.S.C. §§ 783 (b), (c) and (d), which deal with public servants communicating classified information to foreign governments and "communist organizations" and the receipt of such information by the proscribed persons; and

(c) Title 42, which deals with restricted data under the Atomic Energy Act (particularly 42 U.S.C. §§ 2274–2277).

Proposed sections 1113–1117 would substitute for the current overcomplicated provisions of current law, a simplified and rationally organized group of offenses covering five major categories of concern in the area of information related to the national security.

(a) Section 1113 deals with espionage, the communication, with hostile intent (as defined in the draft), to a foreign government of information which should be quarantined—this is the base offense.

(b) Section 1114 deals with the situations which present the risk that information relating to national security will fall into unauthorized hands whether or not the actor so intended.

(c) Section 1115 is directed to the special problems which arise because information is classified by the government as affecting the national security.

(d) Section 1116 is addressed to special categories of persons—foreign agents and members of certain communist organizations who obtain classified information, or seek to induce others to communicate classified information.

(e) Wartime censorship of communications is covered by Section 1117.

2. *Definition of Espionage and National Defense Information; Proposed Sections 1113(1) and (4).*—Subsection (1) of draft section 1113 defines espionage as intentionally revealing national defense information to a foreign power with intent to injure the United States or to benefit a foreign power in an actual or possible military or diplomatic confrontation with the United States. The key concepts in the proposed offense are "national defense information," the act of *revealing* such information to a foreign power and the culpability.

Subsection (4)(a) defines "national defense information." One of the main deficiencies of present law arises from lack of certainty as to the kind of information to which the prohibition of communication refers. The current basic espionage statute outlaws the communication to a foreign agent of "information relating to the national defense" (18 U.S.C. § 794(a)).[1] The primary subject of concern in prosecutions

[1] 18 U.S.C. § 794(b) outlaws wartime communication to "an enemy" of specified information "or any other information relating to the public defense, which might be useful to the enemy."

under this statute involves the undefined phrase "information relating to the national defense." The fact that information is classified is not conclusive on whether it is "national defense information",[2] and if it is not classified, it could still be "national defense information". The issue is submitted to the jury under judicially devised standards. *Gorin* v. *United States*, 312 U.S. 19 (1941), and *United States* v. *Heine*, 151 F. 2d 813 (2d Cir. 1945), demonstrate the difficulties the courts have had in devising a definition. Relevant excerpts from these opinions are set forth in the Appendix, *infra*.

In *Gorin* the Supreme Court accepted the government's definition of information relating to the national defense:

> . . . a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness. (312 U.S. at 28.)

In its first three categories the draft definition of "national defense information" (proposed section 1113 (4)(a)(i)–(iii)), incorporates the ideas of the *Gorin* definition and 18 U.S.C. § 793(a) (gathering information) and § 794(a), to cover information regarding:

> (i) the military capability of the United States or of a nation at war with a nation with which the United States is at war;
> (ii) military or defense planning or operations;
> (iii) military communications, intelligence, research, or development;

In addition to these three categories, the definition also includes:

> (iv) restricted data under the Atomic Energy Act;
> (v) military or diplomatic codes;
> (vi) any other information which could be diplomatically or militarily useful to an enemy.

The references in clauses (iv), (v), and (vi) serve to incorporate the provisions of 42 U.S.C. § 2274(a) and 18 U.S.C. §§ 798 (classified codes) and 952 (diplomatic codes) into the general espionage section and eliminate the need for special provisions on these subjects.[3]

It should be noted that neither 18 U.S.C. § 798 nor 18 U.S.C. § 952 [4] now require an intent to injure the United States and section 798 is limited to "classified" information concerning codes. Insofar as communication without intent is concerned, much of this conduct will be covered by proposed section 1114 (mishandling sensitive information relating to national security) as reckless conduct. The effect of the proposal on the "classified" facet of military codes [5] under 18 U.S.C. § 798, is to make no change in current law. This conclusion is warranted by the

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[2] *United States* v. *Rosenberg*, 108 F. Supp. 798, 808 (S.D.N.Y. 1953). *See* note 24, *infra*, and accompanying text.

[3] Continued coverage of public servants under 18 U.S.C. § 952, where there is no harm to national security, could be accomplished by disciplinary means or a regulatory offense located in Title 22. *See* note 4, *infra*.

[4] Note that 18 U.S.C. § 952 is essentially a foreign relations provision, limited to revelation by public servants and former public servants of codes and intercepted diplomatic messages. The current provision was the subject of much controversy when enacted and, as in the proposal, is not limited to public servants, but revelation must have some relationship to national security which includes actual or potential diplomatic confrontations.

[5] The complicated definitions of codes in 18 U.S.C. § 798 and the explicit references to information derived from decoding in 18 U.S.C. § 952 are not included in the proposal. The references to "codes" and the general clause, section 1113 (4)(vi), "any other information which could be diplomatically or militarily useful to an enemy," are deemed sufficient for this purpose.

following discussion of the term "reveals" in section 1113 and the current requirement that the classification "in fact" be in the interest of national security.[6]

The use of the term "reveals" in lieu of a term like "communicates" is intended to meet the point in *Gorin*[7] and *Heine*[8] which exclude information which has been previously revealed to the public or which may be disclosed for domestic consumption, from the coverage of the espionage statutes (18 U.S.C. § 794). *Heine* makes it clear that the gist of espionage is that it covers only such information which can aid an enemy as would not be available to the enemy except for the conduct of a person avoiding a restriction on communication or *revelation* to the public. The *Heine* approach to the problem makes it unclear if the holding is that such information is not "national defense information" or if the court is reading into the section a defense that it is in the public domain. The latter explanation is more in accord with the court's language, but results in the court adding a defense rather than construing statutory phraseology. The term "reveals" is intended to convey this idea by dealing with the defendant's act, *i.e.*, revealing, with respect to the information defined.[9]

Consideration was given to relying on a "public domain" defense rather than the term "reveals," but this resulted in overcomplicated drafting. In particular, it would have led to difficulties with the conduct now covered in 18 U.S.C. § 794(b) which covers information communicated to an enemy about which there may be domestic public knowledge, but which should not be known by an enemy. Thus, although aspects of large-scale military activity, such as the D–Day invasion, may be known to the public because of the necessarily public nature of the activities, revelation of this information to an enemy is a serious form of espionage.[10] Reliance on "reveals" in lieu of formulating a defense avoids the need for detailed exceptions and careful charting where the more general term serves the ultimate purpose. The effect of classification under current law is considered at length in paragraph 6, *infra*. For purposes of proposed section 1113, it is sufficient to note that information need not be classified to constitute "national defense information" and the fact it is classified does not preclude the defendant from challenging the propriety of classification. This is in accord with current law under 18 U.S.C. § 794.[11]

The general inclusion of "any other information which could be diplomatically or militarily useful to an enemy," reflects the teaching of *Gorin*. Although a general clause of this kind could undercut the attempt at more precise definition, the culpability required under section 1113 together with the requirement of "revealing" sufficiently protects innocent conduct.

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[6] *See* paragraph 6, and note 24, *infra*.

[7] *Gorin* v. *United States*, 312 U.S. 19 (1941).

[8] *United States* v. *Heine*, 151 F.2d 813 (2d Cir. 1945).

[9] Note that this leaves open the possibility that "facilitating [the] use [of information] by condensing and arranging it," conduct excluded under *Heine*, Appendix *infra*, could under appropriate facts constitute "revealing" under proposed section 1113.

[10] For an early version of 18 U.S.C. § 794(b) which provided that the "jury trying the cause shall determine . . . whether such information was of such character as to be useful to the enemy," *see* the Bill set forth in H. Rep. No. 65, 65th Cong., 1st Sess. (1917). (The Bill also provided for presidential designation of proscribed information.)

[11] *See* note 2, *supra*.

The culpability required for espionage by current law (18 U.S.C. § 794(a)) is communication of national defense information "with intent or reason to believe it is to be used to the injury of the United States or to the advantage of a foreign nation." The culpability requirement of the draft is defined as an "intent to injure the United States or to benefit a foreign power in the event of military or diplomatic confrontation with the United States." Coverage of both diplomatic and military confrontations extends to an avowed purpose to even up the sides. This intent is consistent with the nature of the information sought to be protected by the espionage offense.[12]

The term "reason to believe" in current espionage provisions has not been construed in any case in which an intent to benefit or injure was lacking. If it means recklessness, the current language could subject a defendant to the death penalty under 18 U.S.C. § 794(a) for reckless conduct. It is likely that such a construction neither was contemplated nor would be judicially decreed, but with the more precise definitions of culpability in the proposed new Code, there is no need to retain language which probably was intended only to reflect the kind of evidence from which a jury could find intent to benefit or injure.[13] Draft section 1114 covers some forms of reckless conduct. (*See* paragraph 5, *infra.*)

3. *Grading of Espionage; Proposed Section 1113.*—Present 18 U.S.C. § 794(a) authorizes the highest penalty (death) for both war and peacetime espionage. The failure of existing law to make any distinctions between war or peace on the subject of the espionage may be explained by the variety of provisions with lesser maxima under which the same conduct could be punished.[14] The proposal grades espionage as a Class A felony if committed during time of war or if it involves codes, sudden-strike or nuclear weaponry. This is similar to the grading in proposed section 1106 (sabotage).[15]

4. *Attempt and Conspiracy to Commit Espionage; Proposed Section 1113(3).*—Proposed section 1113(3) follows current law (18 U.S.C. § (a)) in grading attempt and conspiracy to communicate national defense information to a foreign government equally with the completed offense.

On the substantive issues of attempt, the draft improves current law in two respects: (a) it specifies certain conduct that will constitute attempt without regard to whether it would meet the substantial step test under the general attempt provision (proposed section 1001), and (b) it eliminates the need for complicated and antiquated provisions such as 18 U.S.C. § 793(a), (b) and (c).

Under the proposal, "obtaining, collecting, eliciting, or publishing information directly related to the military establishment or enter-

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[12] Any possible differences between the general espionage provision, 18 U.S.C. § 794(a), and the special wartime communication to an enemy under 18 U.S.C. § 794(b) will be covered by the draft because communication to an enemy of the proscribed information, by definition, will injure the United States or benefit a foreign nation in a confrontation.

[13] Note that 42 U.S.C. § 2274 distinguishes in grading between an intent to injure and reason to believe, when atomic secrets are involved.

[14] *See, e.g.*, 18 U.S.C. § 793 (gathering information—10 years); 18 U.S.C. § 798 (classified codes—10 years); 50 U.S.C. § 783(b) (communication of classified information by public servant—10 years).

[15] *See* the comment on sabotage (sections 1106–1108), *supra.*

ing a restricted area to obtain such information" (with the required intent) would constitute attempted espionage. Current law treats "gathering" national defense information with the proscribed intent separately from communicating such information.[16] 18 U.S.C. § 794(a) prohibits both communication and attempted communication and authorizes the death penalty for both, while gathering is subject only to a 10-year penalty. The source of the distinction in current law is not certain and there is no reason to perpetuate it.[17]

5. *Mishandling Sensitive Information Relating to National Security: Section 1114.*—Proposed section 1114 would replace 18 U.S.C. § 793(d)–(f), and, in some aspects, 18 U.S.C. § 793(c), with simplified descriptions of conduct involving mishandling national security information, when done in reckless disregard of potential injury to the national security of the United States. The conduct involves: (a) revealing national defense information to unauthorized persons; (b) violating a duty as a public servant with respect to custody or reporting loss of information;[18] and (c) failing to surrender a national security document or other thing on demand.

Current law[19] authorizes a 10-year penalty for such conduct, equal to the penalty for gathering with a hostile intent. The proposal, in grading the offense as a Class C felony, improves Federal law by taking into account the less serious culpability involved, and is consistent with the more recent grading policy reflected in the Atomic Energy Act, which does recognize differences between a subversive "intent" and recklessness.[20]

If it is deemed necessary to perpetuate criminal sanctions for negligent public servants or those who fail to report losses or theft without culpability concerning actual risk to national security, it is recommended that these be dealt with in Title 50 as regulatory offenses (proposed section 1006).

6. *Mishandling Classified Information: Proposed Section 1115.*—Section 1115 brings the provisions of 50 U.S.C. § 783(b) into Title 18 as a Class C felony.[21] It prohibits intentional communication of classified national security information to a foreign government or communist organization[22] by a public servant.

The major issues raised by this section are whether it should be expanded in one or both of the following respects:

(a) should it cover communication by any person or be limited to public servants?

(b) should it cover communication to any unauthorized person or be limited to foreign governments and communist organizations?

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[16] 18 U.S.C. § 793(a) and (b); 19 U.S.C. § 794(a).

[17] *Cf.* the Official Secrets Act of 1911, 1 & 2 Geo. 5, c. 28, §§ 1, 2, which contains similar distinctions.

[18] The reporting requirement is presently imposed under 18 U.S.C. § 793(f). A self incrimination question similar to that involved in *United States* v. *King*, 402 F. 2d 694 (9th Cir. 1968), might be applicable both to present law and the draft. The court in *King* held that the fifth amendment precludes conviction for willfully concealing information relating to a bank robbery by failing to report its commission to the authorities, where the defendant had reason to believe he would be implicated in the robbery committed by others.

[19] 18 U.S.C. § 793.

[20] *Compare* 42 U.S.C. § 2274(a) *with* 42 U.S.C. §§ 2274(b) and 2277.

[21] Current law authorizes a $10,000 fine or 10 years' imprisonment or both.

[22] Defined in 50 U.S.C. § 782(5).

Expanding coverage would practically eliminate the present distinction between "national defense information," which all persons are forbidden to communicate under the espionage statute (18 U.S.C. § 794), and "classified information" under 50 U.S.C. § 783, which only public servants are forbidden to communicate to a foreign agent or communist organization. Nonpublic servants communicating classified information must presently be prosecuted for offenses under 18 U.S.C. §§ 793 and 794(a)—offenses relating to "national defense information".[23] In a prosecution under one of the latter provisions the government must prove and the jury must find that the information communicated was "national defense information." Proof that the information was classified does not suffice (though if it was *properly* classified it would amount to national defense information).[24]

Problems of improper classification as such do not arise. But in a prosecution of a public servant for communicating classified information in violation of 50 U.S.C. § 783, the government need only prove the fact of classification. The obvious problems presented in this situation are compounded by the holding of *United States* v. *Scarbeck*, 317 F.2d 546 (D.C. Cir. 1962), which denied the defendant the defense that the information was improperly classified. While denial of the defense can thus have the harmful consequence of felony conviction for transmitting harmless information, as well as posing some threat to first amendment interests and to some extent undermining the policy against undue government secrecy, permitting the defense could, by necessitating exposure of the basis for classification, defeat the purpose of classifying information. Current law provides a practical approach to the problem. The fact that it is limited to communications to designated recipients substantially eliminates first amendment and undue government secrecy worries; those interests are not served by permitting revelation of classified information to a foreign government or "communist organization"—such recipients of classified information can hardly be said to have "standing" to raise the issue of a "right to know." The fact that such revelations are characteristically surreptitious underlines the point.

On the other hand, if the category of prohibited communicants and recipients is not limited as under present law, but expanded to include communication by anyone to any unauthorized person, it would be necessary to provide a defense of improper classification in order to avoid the danger of using classification and the threat of criminal sanctions to conceal government policy from those who have a right to know.[25] Such an expansion of the offense concerning communication

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[23] *See* S. Rep. 111, 81st Cong., 2d Sess., on 18 U.S.C. § 798, quoted at length in note 26, *infra*, which in 1951, indicated a reluctance to expand the scope of the criminal law dealing with classified information.

[24] *See United States* v. *Rosenberg*, 108 F. Supp. 798, 808 (S.D. N.Y. 1952), a prosecution under 18 U.S.C. § 794 for communication of national defense information in which the court recognized the defendant's right to show that the classification of the information was arbitrary.

[25] The following provision was considered:

§ 1114. Mishandling Classified Information.

A person is guilty of a Class A misdemeanor if he knowingly violates a regulation with respect to disclosure of information the dissemination of which has been restricted by an appropriate governmental authority for reasons of national security. It is an affirmative defense to a prose-

of classified information, even with a defense of improper classification, is subject to two serious objections. First, as previously noted, litigating the propriety of classification would effectively destroy the effectiveness of proper classification. Second, a blanket prohibition on communication is bound to limit revelation when it is proper because of the undue risk a person would be compelled to take to determine if classification was improper. The Congressional history [26] concerning restrictions on revealing government information reflects a continuing concern with the latter danger and there appears no factual basis to expand the carefully limited scope of 50 U.S.C. § 783(b).

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cution under this section that the information was improperly classified or that is was publicly available at the time of the alleged offense.

An alternative would limit coverage to communication by a public servant "in violation of regulations to which he was subject" but, like the above quoted provisions, would not limit the prohibited class of recipients.

Still another approach considered would grade the offense on the basis of the classification category, *i.e.*, the highest penalty for "top secret," *etc.* This was rejected as impractical and as providing no standard other than executive judgment because classification categories and standards are established by Executive Order without statutory standards. *See* Executive Order No. 10501, "Safeguarding Official Information", reproduced following 50 U.S.C.A. § 401 (1970 Supp.), which replaced Executive Order No. 10290, "Regulations Establishing Minimum Standards for the Classification, Transmission and Handling of Official Information", reproduced following 50 U.S.C.A. § 401.

[26] In particular, *see* the debates concerning 18 U.S.C. § 952 (diplomatic codes). Cong. Rec. 73d Cong., 1st Sess., pp. 3125–3140, 5333–5334 (1933). *See also*, S. Rep. No. 111, 81st Cong. 2d Sess., on 18 U.S.C. § 798 (classified information concerning codes), particularly instructive on the limits of current law and congressional concern and assurances:

> The purpose of the bill [now 18 U.S.C. § 798] is well summarized in the quotation from the Joint Congressional Committee for the Investigation of the Attack on Pearl Harbor, which recommended, on page 253 of the report, that—
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> ". . . effective steps be taken to insure that statutory or other restrictions do not operate to the benefit of an enemy or other forces inimical to the Nation's security and to the handicap of our own intelligence agencies. With this in mind, the Congress should give serious study to, among other things. . . . legislation fully protecting the security of classified matter."
>
> This bill is an attempt to provide just such legislation for only a small category of classified matter, a category which is both vital and vulnerable to an almost unique degree.
>
> Earlier versions of this same bill (S. 805, 79th Cong.; S. 1019, 80th Cong.; and S. 2680, 80th Cong.) would have penalized the revelation or publication, not only of direct information about United States codes and ciphers themselves but of information transmitted in United States codes and ciphers. This provision is not included in the present version. Under the bill as now drafted there is no penalty for publishing the contents of United States Government communications (except, of course, those which reveal information in the categories directly protected by the bill itself). Even the texts of coded Government messages can be published without penalty as far as this bill is concerned, whether released for such publication by due authority of a Government department or passed out without authority or against orders by personnel of a department. In the latter case, of course, the Government personnel involved might be subject to punishment by administrative action but not, it is noted, under the provisions of this bill.

In addition, the report indicates that classification must be proper for an offense under 18 U.S.C. § 798:

> The bill specifies that the classification must be *in fact* in the interests of national security. (Emphasis added.)

7. *Prohibited Recipients Obtaining Information; Proposed Section 1116.*—Draft section 1116 prohibits foreign agents and members of certain communist organizations from seeking to induce the offenses of mishandling classified information (proposed section 1115) and mishandling information relating to national security (proposed section 1114). Coverage of solicited violations of proposed section 1114, extends 50 U.S.C. § 783(d) to information which is not classified, thus changing present law. Retaining the offense in this expanded form insures that the prohibited recipients and solicitors are subject to felony penalties.

8. *Wartime Censorship of Communications; Proposed Section 1117.*—This provision deals with violations of wartime regulations restricting communication with the enemy or imposing censorship. The language is essentially the same as 50 U.S.C. App. §§ 3(c) and (d), current provisions in the Trading With the Enemy Act.[27] When the violation of the regulation is accompanied by the requisite culpability, it is a Class C felony. Otherwise it is subject to the proposed regulatory offense provision of the draft (section 1006). The grading is lower than the 10 year penalties available for all offenses but one, under the current Trading With the Enemy Act.[28] These offenses are not so serious as to require treatment equal with espionage, graded in the draft as a Class A felony; in the absence of proof of hostile intent they serve mainly as prophylactic measures. Inclusion of this provision would require excision from the Trading With the Enemy Act of the criminal provisions presently applicable to subsections (c) and (d) of 50 U.S.C. App. § 3 (reserving, however, the provisions authorizing issuance of regulations).

9. *Disposition of Prophylactic Offenses in Title 18, Chapter 37 (Espionage and Censorship).*[29]—18 U.S.C. §§ 795–797 authorize imprisonment of 1 year or a $1000 fine or both, for photographing and sketching defense installations in violation of regulations (section 795), permitting the use of aircraft for such purpose (section 796), or disseminating such items in violations of such regulations (section 797); 18 U.S.C. § 799 authorizes the same penalties for violating NASA regulations for the "protection or security" of NASA property. Essentially, these provisions are prophylactic in nature; only 18 U.S.C. § 799 contains any culpability element ("willfully") and none requires culpability or a showing of harm relating to national security; all involve violation of regulations. 18 U.S.C. §§ 795–797 expressly authorize otherwise proscribed conduct, if there is compliance with censorship regulations. It is recommended that these provisions be relocated in other titles: 18 U.S.C. §§ 795–797 in

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[27] The draft expands the limited prohibitions in present 50 U.S.C. App. § 3(c) on transmitting tangible items to the enemy other than in the regular course of the mail, and broadly proscribes any communication with the enemy which violates a regulation.

[28] The exception is 50 U.S.C. App. § 19, which authorizes a $500 fine or 1 year's imprisonment, or both, for violation of foreign language newspaper regulations. *See* the Comment on Offenses Affecting Foreign Relations, *infra*, for additional treatment of the Trading With the Enemy Act.

[29] 18 U.S.C. § 792, harboring or concealing spies, is covered by proposed section 1118 (harboring or concealing national security offenders), discussed *infra*.

Title 50 (War and National Defense)[30], and 18 U.S.C. § 799 in Title 42, chapter 26, which contains the basic provisions regulating the National Space Program. This disposition is in accord with the general plan of the draft to locate nonfelony regulatory provisions in the titles containing the basic regulatory scheme governing the subject matter.[31] It should be noted that violations of these provisions with the culpability proscribed in the draft provisions on espionage and related matters (sections 1113–1117) constitute completed or attempted felonies.

APPENDIX

EXCERPTS FROM

Gorin v. *United States*

AND

United States v. *Heine*

Gorin v. *United States*, 312 U.S. 19, 30–31 (1941):

An examination of the instructions convinces us that no injustice was done petitioners by their content. Weighed by the test previously outlined of relation to the military establishments, they are favorable to petitioners' contentions. A few excerpts will make this clear:

"You are instructed that the term 'national defense' includes all matters directly and reasonably connected with the defense of our nation against its enemies. . . . As you will note, the statute specifically mentions the places and things connected with or comprising the first line of defense when it mentions vessels, aircraft, works of defense, fort or battery and torpedo stations. You will note, also, that the statute specifically mentions by name certain other places or things relating to what we may call the secondary line of national defense. Thus some at least of the storage of reserves of men and materials is ordinarily done at naval stations, submarine bases, coaling stations, dock yards, arsenals and camps; all of which are specifically designated in the statute. . . . You are instructed in the first place that for purposes of prosecution under these statutes, the information, documents, plans, maps, etc., connected with these places or things must directly relate to the efficiency and effectiveness of the operation of said places or things as instruments for defending our nation. . . . You are instructed that in the second place the information, documents or notes must relate to those angles or phases of the instrumentality, place or thing which relates to the defense of our nation; thus if a place or

[30] Prior to the 1948 revision of Title 18, 18 U.S.C. §§ 795–797 constituted chapter 4A of Title 50 (U.S.C. §§ 45–45c, repealed June 25, 1948, c. 645, § 21, 62 Stat. 862).

[31] Note that similar provisions concerning photographing and sketching Atomic Energy Commission installations are located in Title 42 (42 U.S.C. § 2278b). In addition, Title 42 also contains provisions similar to 18 U.S.C. § 799 (violation of NASA Regulations), involving protection of the Atomic Energy Program. *See, e.g.*, 42 U.S.C. §§ 2273, 2278a.

thing has one use in peacetime and another use in wartime, you are to distinguish between information relating to the one or the other use. . . .

"The information, document or note might also relate to the possession of such information by another nation and as such might also come within the possible scope of this statute. . . . For from the standpoint of military or naval strategy it might not only be dangerous to us for a foreign power to know our weaknesses and our limitations, but it might also be dangerous to us when such a foreign power knows that we know that they know of our limitations.

"You are, then, to remember that the information, documents or notes, which are alleged to have been connected with the national defense, may relate or pertain to the usefulness, efficiency or availability of any of the above places, instrumentalities or things for the defense of the United States of America. The connection must not be a strained one nor an arbitrary one. The relationship must be reasonable and direct."

Petitioners' objection, however, is that after having given these instructions, the court instead of determining whether the reports were or were not connected with national defense, left this question to the jury in these words:

"Whether or not the information, obtained by any defendant in this case, concerned, regarded or was connected with the national defense is a question of fact solely for the determination of this jury, under these instructions."

United States v. *Heine*, 151 F.2d 813, 816–817 (2d Cir. 1945):

A less impossible interpretation would be to confine the clause to information about things adapted only for the national defense, and things of ambiguous use which have been already collected, or prepared, for the supply of the armed services. The first would include airplanes, cannon, small arms and munitions of war, warships, forts, and the like: the second, coal, food, clothing or other supplies accumulated for the army and navy. In that interpretation the clause would cover those military planes, though made by private companies, which Heine's reports included. Even so, there might be doubt whether the judge's charge to the jury should not have distinguished between military and commercial planes; but we need not consider that question because we think that it was lawful for him to include information about both kinds of planes. As declared in *Gorin* v. *United States*, 312 U.S. 19, 28, 61 S.Ct. 429, 85 L.Ed. 488, and as the judge himself charged, it is obviously lawful to transmit any information about weapons and munitions of war which the services had themselves made public; and if that be true, we can see no warrant for making a distinction between such information, and information which the services have never thought it necessary to withhold at all. There can, for example, be no rational difference between information about a factory which is turning out bombers, and to which the army allows access to all comers, and information about the same bombers, contained in an official report, or procured by a magazine through interviews with officers. The services must be trusted to determine what information may be broadcast without prejudice to the "national defense," and their consent to its dissemination is as much evidenced

by what they do not seek to suppress, as by what they utter. Certainly it cannot be unlawful to spread such information within the United States; and, if so, it would be to the last degree fatuous to forbid its transmission to the citizens of a friendly foreign power. "Information relating to the national defense," whatever else it means, cannot therefore include that kind of information, and so far as Heine's reports contained it, they were not within the section.

There is independently reason to suppose that this was the meaning which the House at least had in mind when the bill was before it during the First War—1917. It is true that the debates on the floor of both Houses do not tell much, but at the hearings before the Judiciary Committee a number of the witnesses expressed concern at the possible suppression of information as the bill read even before its scope had been enlarged by the amendment. Possibly it was to allay these fears that the Committee, in reporting to the House, used the following words in connection with § 4 as it then was: "This section of the bill has been carefully and patiently considered by the Committee. The Committee realizes that the section as recommended gives the President broad power, but it must be admitted by all patriotic persons anxious for the success of our armies in times like these through which we are now going, it is important that the Commander-in-Chief shall have authority to prevent the publication of national defense secrets which would be useful to the enemy, and, therefore, harmful to the United States." Section 4, about which this language was used, gave the President power to declare a national emergency, and to "prohibit the publication or communication of . . . any information relating to the national defense which in his judgment is of such a character that it is, or might be, useful to the enemy." It is most unlikely that the words in § 4 had a meaning different from the same words then in § 2 of the bill, and now in § 32 of Title 50. At least the Judiciary Committee of the House supposed that the act was directed at "secrets." It is not necessary for us to go so far; and in any event "secrets" is an equivocal word whose definition might prove treacherous. It is enough in the case at bar to hold, as we do, that whatever it was lawful to broadcast throughout the country it was lawful to send abroad; and that it was lawful to prepare and publish domestically all that Heine put in his reports. We do not forget that there was evidence that in his letters and in his talks he misled his correspondents as to his motive in asking for information; but that is not relevant to the second count. Whatever the wrong done to his correspondents, that motive did not make the spread of information criminal, which it would not have been criminal to spread, if he had got it fairly. Nor did it make a difference that Heine did not transmit to the Volkswagenwerke the information as he got it; but combed it out, arranged it and compressed it into convenient form. The section is aimed at the substance of the proscribed information, not at the act of making it more readily available for use.

Gorin v. United States, supra (312 U.S. 1961, S.Ct. 429, 85 L.Ed. 488), contains nothing to the contrary of what we are holding. It is true that the court (312 U.S. 28, 61 S.Ct. 434) there accepted the following definition of the phrase, "relating to the national defense" taken from the prosecution's brief: "a generic concept of broad connotations, referring to the military and naval establishments and the

related activities of national preparedness." The words, "related activities of national preparedness," do indeed create a penumbra of some uncertainty; but it cannot comprise such information as is here in question, as appears from what immediately preceded the language we have quoted: "Where there is no occasion for secrecy, as with reports relating to national defense, published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government." Obviously this could not mean that it may not be to the advantage of a foreign government to have possession of such information; it can only mean that, when the information has once been made public, and has thus become available in one way or another to any foreign government, the "advantage" intended by the section cannot reside in facilitating its use by condensing and arranging it.

As to the first count, in spite of the absence of any direct evidence showing the connection of the Volkswagenwerke with the Reich, there was ample in Heine's history and conduct to support a verdict based upon the finding that he was acting as an agent for the Reich, and the jury was of course not bound to accept his own explanation. The Volkswagenwerke had never made airplanes; and, so far as appears, they did not propose to make military planes anyway. Why should they wish accounts of the industry in this country as complete as possible? What good would it do them to learn the amount of our production, all of which at the time was for our own use? Moreover, although it is true that in the summer of 1940, war was not imminent, everyone knew that it was not impossible. France had fallen; Russia was apparently neutral, and had overrun part of Poland in conjunction with Germany; Britain stood alone, with every prospect of herself going down. We were already embarked upon our belated preparation, and that could be directed only against the Reich. If a jury was not permitted in such a setting to infer that the collection and transmission of such information by such means as Heine employed. was for the Reich, and not for the Volkswagenwerke, there is an end to circumstantial proof. Nobody but a simpleton could fail to detect the hall-marks of the principal in whose interest the whole web of chicane and evasion had been woven.

Conviction on the first count affirmed.

Conviction on the second count reversed.

Harboring or Concealing National Security Offenders: Section 1118

1. *Proposed Section 1118: Harboring or Concealing National Security Offenders; Before-the-Fact and After-the-Fact Liability.*—Proposed section 1118 proscribes knowingly harboring and concealing a person who is about to commit or who has committed treason, sabotage, espionage or murder of the President or Vice President. Present law proscribes harboring or concealing a person one knows "or has reasonable ground to believe or suspect, has committed, *or is about to commit*" espionage (emphasis added).[1] Similar proscriptions apply to harboring or concealing a person who is interfering or is about to in-

[1] 18 U.S.C. § 792.

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terfere with military activities in wartime.[2] Finally, it is an offense if a person who knows that treason has been committed against the United States, "conceals and does not, as soon as may be, disclose and make known the same to the President or to some judge of the United States, or to the Governor or to some judge or justice of a particular state."[3] In addition the general misprision[4] and accessory-after-the-fact[5] provisions of current law apply to national security offenses.

In its after-the-fact aspect, section 1118 overlaps hindering law enforcement (section 1303), but does not require proof of an intent to hinder law enforcement—only proof of defendant's knowledge an offense has been committed.

In its before-the-fact aspect, section 1118 extends the current prohibition against concealment of those about to commit espionage (18 U.S.C. § 792), to treason, sabotage and presidential assassination. Assuming justification for penalizing this before-the-fact conduct when espionage is involved, no basis for limiting it to espionage is apparent.[6] Section 1118 broadens the scope of the draft's general provisions in that the espionage or other offense need not ultimately be committed as would be required under the facilitation provision (section 1002), nor need the defendant under section 1118 have the culpability required of an accomplice under section 401. The proposal requires only that the concealment be engaged in by a person with knowledge the offense is about to be committed. Furthermore, prosecution for before-the-fact concealment raises the possibility that the harborer will be subject to criminal liability in some situations when the person he harbored is not, because he has neither attempted nor committed nor conspired to commit an offense.

There is a serious question as to whether the before-the-fact offense should be perpetuated. The conspiracy, accomplice, facilitation and attempt provisions will cover the actual fact situations of some of the cases that could be brought under this section, although additional elements of proof will be required.[7]

It should be noted that the proposal does not carry forward the culpability in 18 U.S.C. § 792 concerning a person who has "reasonable ground to believe or suspect" the principal offense has been committed or is about to be committed. As an objective standard, it is a great burden to place on a layman, and insofar as reasonable ground to *suspect* is concerned, it places a burden on the defendant to make a decision under circumstances in which even a court could not authorize search or arrest of the persons with respect to whom the defendant under section 1118 has acted.

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[2] 18 U.S.C. § 2388(c).

[3] 18 U.S.C. § 2382.

[4] 18 U.S.C. § 4.

[5] 18 U.S.C. § 3.

[6] In this connection, note the obligation on public servants to report concerning missing national defense information: 18 U.S.C. § 793(f)(2); draft section 1114(b).

[7] A possible use of the offense arises from the inclusion of traitors and saboteurs in the proscription against harboring. This avoids the sort of difficulty involved in cases such as *Haupt* v. *United States*, 330 U.S. 631 (1947), where a father who "harbored" his son, an intended saboteur, was prosecuted for treason. Under the proposal, a treason prosecution would be unnecessary in such circumstances, for the harborer could be charged with the more appropriate offense of knowingly concealing a saboteur or prospective saboteur. *See also* the comment on the treason complex (sections 1101–1102) *supra*, at note 25, concerning culpability in *Haupt*.

2. *Failure to Inform.*—Proposed section 1118 does not include an obligation to inform. Under current law, the obligation to inform is part of the misprision statutes (18 U.S.C. §§ 4, 2382) which require harboring or concealing *and* failure to inform. In this form, the requirement that the defendant inform adds nothing to the prohibition against concealing.[8]

In addition, there is a serious doubt concerning the constitutional validity of a prosecution for failure to inform about an offense which has been committed.[9] As a matter of policy, an obligation to inform before the fact would rest on the theory that the objective of crime prevention is better served by requiring disclosure before the crime has been committed rather than after-the-fact, when the damage has been done. While the implications of imposing a requirement to inform about *future* crimes in terms of engendering suspicions and insecurity are obvious, if a requirement to inform before the fact is constitutional, the offense would have quite limited application in that the duty to disclose would devolve only upon a person who actually harbors or conceals the intended felon and has facts sufficient to know that the person intends to commit one of the specified high crimes rather than some lesser act of disloyalty. It would not cover a person who knows about the intended felony, but commits no act of harboring or concealing. It may well be said that to require a person who is housing another to report that his guest is about to blow up an arsenal does not create an unreasonable burden, but perhaps the real question is not whether such a duty can be justified as a reasonable one, but whether criminal sanctions will be effective to coerce compliance with a duty not otherwise recognized by the miscreant.

Aiding Deserters: Section 1119

Proposed section 1119 incorporates the provisions of present law which prohibit enticing desertion from the military and harboring deserters,[1] and broadens the present proscription against "enticing or procuring" a member of the armed forces to desert in order to reach the intentional giving of any assistance to a member of the armed forces to desert or attempt to desert with intent to avoid discovery or apprehension of the deserter.

Once a soldier, sailor or airman has deserted, the proposed provision proscribes harboring or concealing him or otherwise aiding him by conduct proscribed by section 1303 (hindering law enforcement):[2]

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[8] *See* the comment on hindering law enforcement (section 1303).

[9] *See United States* v. *King*, 402 F. 2d 694 (9th Cir. 1968), discussed in the comment on espionage and related offenses (sections 1113–1117) *supra*, at note 18.

[1] 18 U.S.C. § 1381.

[2] Note that under current law concealment may include harboring which, it has been held, is merely an aggravated form of concealment: "To conceal, as used, means to hide, secrete or keep out of sight. To harbor, as used, means to lodge, to care for after secreting the deserter." *Firpo* v. *United States*, 261 F. 850, 853 (2d Cir. 1919). In *Firpo*, the court reversed the conviction of an attorney who advised a soldier to stay out of sight pending a legal determination as to whether he was properly enlisted in military service. The court further stated: "The statute is aimed to make it a crime knowingly to harbor or conceal a deserter after knowledge of the existence of his status as such, and this with felonious intent to shield him from the law." *See also* the discussion of the meaning of "conceal" with relation to proposed section 1303 (hindering law enforcement).

The proscription in section 1119 is a restatement, in conformity with the remainder of the proposed Code, of the present proscription against protecting or assisting a person one knows to be a deserter, or refusing to give up such person upon the demand of an officer authorized to receive him.

The proposed general provision on hindering law enforcement (section 1303) which proscribes interfering with the prosecution or punishment of another for a crime, would not cover aiding deserters because desertion is a violation of military law, and does not constitute a crime defined in the Federal Criminal Code. The current statute on aiding deserters, therefore, "provides for the punishment of civilians, not subject to the Articles of War, who are accessories to the crime of desertion by a soldier." [3] It has been held that in proving the case against a civilian, the government must show that the person aided was, in fact, a deserter, and that the defendant knew he aided a deserter [4] rather than merely a person who was absent without leave.[5] The proposed provision makes no changes in these established rules.

A distinction in grading is, however, proposed. The present statute provides for a penalty of up to 3 years' imprisonment. Under the proposal, aiding a deserter would be a Class C felony in time of war, when the crime—even if committed by friends or relatives of a soldier—has its most serious ramifications. It would be a Class A misdemeanor if committed in peacetime.

Unlicensed Manufacture and Disposition of Vital Materials: Section 1121

1. *Proposed Section 1121 (Unlicensed Manufacture and Disposition of Vital Materials).*—A rational pattern in the national defense area requires some relocation and regrading of offenses dealing with "development and control of atomic energy", chapter 23 of Title 42 (42 U.S.C. §§ 2272–2276).

As previously noted, revealing restricted data concerning nuclear energy, under 42 U.S.C. §§ 2274, 2275, when there is some culpability concerning national security is covered by draft sections 1113 (espionage) and 1114 (mishandling sensitive information relating to national security). The sabotage provisions (draft sections 1106–1107) will replace 42 U.S.C. § 2276 (tampering with restricted data).

Draft section 1121 replaces the penal provisions of 42 U.S.C. § 2272*.

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[3] *Kurtz* v. *Moffitt*, 115 U.S. 489, 502 (1885).

[4] *See Beauchamp* v. *United States*, 154 F.2d 413 (6th Cir. 1946), which affirms the conviction of an employer who kept a deserter working for him while concealing the deserter's identity. Though the deserter was court martialled not for desertion, but for a lesser military crime, the court held that the fact of the soldier's desertion was proved at the trial of the defendant, as was the fact that defendant knew the soldier was a deserter and concealed him with that fact in mind. Similarly, *see Mancuso* v. *United States*, 162 F. 2d 772 (6th Cir. 1947).

[5] *See Haley* v. *United States*, 215 F. 2d 778 (9th Cir. 1954), in which the conviction of the fiancee of a soldier, with whom he stayed upon leaving his base, was reversed despite the fact that an army officer had called her and warned her that her boyfriend was a "deserter." *See also Firpo* v. *United States*, 261 F. 580 (2d Cir. 1919), quoted *supra* note 2.

*Violation of 50 U.S.C. § 167c, regulating helium transactions, is also covered by section 1121.

which grades a "willful" violation of specified sections of Title 42 (§§ 2077, 2122, 2131, 2138) as a felony authorizing 5 years' imprisonment or a $10,000 fine, or both, but if the same conduct is accompanied by *an intent to injure the United States or benefit a foreign nation*, the authorized penalty is death or life imprisonment, or a $20,000 fine or 20 years' imprisonment, or both. These provisions deal with unauthorized dealings in and shipments of nuclear materials, including atomic weapons, and the right of the government to recapture such materials.

Although some forms of conduct covered by 42 U.S.C. § 2272 could be embraced by other provisions in the draft, such as reckless endangerment of life, the basic regulatory purpose—national control of atomic energy—is not dealt with by any other draft provision concerned with misconduct generally. If felony treatment is to be continued for such violations, the penal provision should be located in Title 18, and draft section 1121, which grades the offense a Class B or Class C felony, depending on the presence or absence of an intent to injure the United States or to benefit a foreign nation in a military or diplomatic confrontation, serves this purpose.

It is intended that coverage of interfering with recovery of nuclear materials in violation of 42 U.S.C. § 2138, now covered by 42 U.S.C. § 2272, will be covered by obstruction of government functions (section 1301) and the piggy-back jurisdiction provision. In addition, the right to recapture under 42 U.S.C. § 2138 will constitute termination of a license to possess and continued possession will be punishable under draft section 1121.

2. *Disposition of Other Atomic Energy Offenses: 42 U.S.C. §§ 2273, 2277 and 2278a.*—42 U.S.C. § 2273 authorizes a $5,000 fine or 2 years' imprisonment or both for "willful" violations of provisions of Title 42, chapter 23 (development and control of atomic energy), for which no specific penalty is provided; if the violation is with intent to injure the United States or to secure an advantage to a foreign power, a $20,000 fine or 20 years' imprisonment, or both, is authorized. It is proposed to retain this provision in Title 42 as no more than a misdemeanor. When the violation is accompanied by an intent to injure the United States, it will be an attempt to commit one of the felonies applicable to control of nuclear energy such as sabotage or espionage. Hence, no special provision is required.

42 U.S.C. § 2277 authorizing a fine of $2500 for employees, former employees and contractors knowingly revealing restricted data to unauthorized persons should remain in Title 42.

42 U.S.C. § 2278a authorizes the Atomic Energy Commission to restrict entry into its installations and provides punishment for violations. The section should be retained in Title 42 as a basis for regulatory authority, but violations constituting trespasses should be punishable under draft section 1712 (criminal trespass). *See Goldberg* v. *Hendrick*, 254 F. Supp. 286 (E.D. Pa. 1966), *cert denied*, 385 U.S. 971 (1966), to the effect that 42 U.S.C. § 2278a serves as a basis for prosecuting trespass in the absence of a general Federal trespass statute.

Person Trained in Foreign Espionage and Sabotage System: Section 1122

Under 50 U.S.C. § 851 *et seq.* registration with the Attorney General of persons trained in foreign espionage and sabotage systems is required. Apparently designed as a prophylactic measure, it does not appear that for the purposes of criminal law reform, the Commission need consider the necessity or effectiveness of such a registration requirement. However, reform of the Federal criminal law does require consideration of defining and grading the offense of noncompliance. In addition, the registration requirement presents an issue of compulsory self-incrimination under the fifth amendment.

Grosso v. *United States*,[1] *Marchetti* v. *United States*[2] and *Haynes* v. *United States*,[3] present difficult questions concerning the constitutionality of the registration requirements. The disposition in *Haynes*, however, should serve as a guide to the Commission's disposition of 50 U.S.C. § 851. In *Haynes*, the court recognized that there are a number of "uncommon circumstances" where registration under the Firearms Act would not reveal violation of the Act. The Court stated:[4]

> We agree that the existence of such situations makes it inappropriate, in the absence of evidence that the exercise of protected rights would otherwise be hampered, to declare these sections impermissible on their face. Instead, it appears, from the evidence now before us, that the rights of those subject to the Act will be fully protected if a proper claim of privilege is understood to provide a full defense to any prosecution either for failure to register under § 5841 or, under § 5851, for possession of a firearm which has not been registered.

Similarly, having been trained in a foreign espionage or sabotage system is not unlawful nor is a person who has been trained necessarily one who has committed sabotage or espionage against the United States. Thus if registration under 50 U.S.C. § 851 presents a danger of self incrimination, the privilege could be asserted and a prosecution for failing to register defeated. However, following *Haynes*, the Act is not unconstitutional on its face with respect to those who do not or cannot assert the privilege.

On the view the statute is not clearly unconstitutional, draft section 1122 carries forward as a Class C felony, knowing failure to register and making of material false statements in a registration statement. The latter upgrades a misdemeanor false statement under draft section 1352. Other violations of the regulatory scheme will be punishable as regulatory offenses under draft section 1006 and the offenses will be located in Title 50.

Extended Note

50 U.S.C. §§ 811–826: Detention Act of 1950

50 U.S.C. §§ 822–824 define offenses and prescribe penalties with respect to the enforcement and administration of the Detention Act of

[1] 390 U.S. 62 (1968).
[2] 390 U.S. 39 (1968).
[3] 390 U.S. 85 (1968).
[4] 390 U.S. at 99.

1950. This Act authorizes the detention of a person "as to whom there is reasonable ground to believe [he] . . . probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage" (50 U.S.C. § 813). The Act is applicable in a state of "internal security emergency" which may be declared by the President in the event of "(1) invasion of the territory of the United States or its possessions, (2) declaration of war by Congress, or (3) insurrection within the United States in aid of a foreign enemy" (50 U.S.C. § 812). The Act's provisions deal with procedures for the issuance of warrants, hearings and detention, relevance of certain evidence, administration and criminal penalties.

The Justice Department has recommended the repeal of the Emergency Detention Act. (The following bills introduced in the first session of the 81st Congress would repeal the Detention Act of 1950: H.R. 1157, S. 1872, H.R. 10396, H.R. 10727, H.R. 11575, H.R. 11825). The Commission, although recognizing the likelihood of repeal, should recommend the following disposition of the Act's criminal sanctions in the event the Act remains law.

The Act has three criminal sections:

(a) 50 U.S.C. § 822, 10 years/$10,000, for resisting or knowingly disregarding or evading apprehension under a warrant or escaping from detention or confinement;

(b) 50 U.S.C. § 823, 10 years/$10.000, for an accomplice of one who violates sectio n822 (823(a)), for aiding escape (823(b)), for an accessory after the fact with respect to a violator of section 822 (823(d)), and for attempt or conspiracy to violate sections 823 (a)-(c) (823(d));

(c) 50 U.S.C. § 824, 1 year/$5,000, for "willfully" impeding, etc. public servants enforcing the act.

It is recommended that:

(a) 50 U.S.C. § 822 be retained in Title 50, as a misdemeanor to the extent that it covers disregarding or evading apprehension.

(b) the escape provision of section 822 be covered by the general escape provisions of the proposed Code (section 1306) by adding to the definition of "official detention" in section 1306 the following clause after "deportation": "apprehension or confinement or detention under the Detention Act of 1950."

If the defendant engages in more serious misconduct in the course of violating section 822, under proposed section 201(b), the conduct will piggy-back the more serious offenses of assault and the like, and, of course, the defendant will be subject to felony penalties if he engages in the feared conduct, *i.e.*, espionage and sabotage.

The amendment to section 1306 is necessary because the term "arrest" in section 1306 may not be sufficient to cover Detention Act apprehensions and will not be sufficient to cover confinement and detention under that Act. It is added to the general escape provisions to incorporate the grading and official misconduct provisions of sections 1306–1307.

(c) 50 U.S.C. §§ 823 and 824 be repealed. Repeal will not eliminate coverage embraced by current law, because:

(i) 50 U.S.C. § 823(a) is covered by the general accomplice provision (proposed section 401);

(ii) 50 U.S.C. § 823(b) is covered by the escape (sections 1306–1309) and accomplice (section 401) provisions:

(iii) 50 U.S.C. § 823(c) will be covered by:

(A) hindering law enforcement (section 1303) because section 822 remains as an offense; and

(B) when applicable, by section 1118 as aiding the concealment, *etc.*, of spies and saboteurs;

(iv) 50 U.S.C. § 823(d) will be covered by the general attempt and conspiracy provisions; and

(v) 50 U.S.C. § 824 will be covered by obstructing government functions (section 1301) and the piggy-back consequences of draft section 201(b).

Extended Note

50 U.S.C. § 784 (prohibitions on employment of members of communist organizations) and 50 U.S.C. § 789 (use of mails)

50 U.S.C. § 784 declares it is unlawful for a member of an organization, with "knowledge or notice" the organization is registered or has been ordered to register with the Subversive Activities Control Board:

> (A) in seeking, accepting, or holding any nonelective office or employment under the United States, to conceal or fail to disclose the fact that he is a member of such organization; or
>
> (B) to hold any nonelective office or employment under the United States; or
>
> (C) in seeking, accepting, or holding employment in any defense facility, to conceal or fail to disclose the fact that he is a member of such organization; or
>
> (D) if such organization is a Communist-action organization, to engage in any employment in any defense facility.

50 U.S.C. § 794 authorizes imprisonment for 5 years and a $10,000 fine for a violation of 50 U.S.C. § 784. *United States* v. *Robel*, 389 U.S. 258 (1967), held clause (D) unconstitutional because its overbreadth violated first amendment guarantees of the right of association. The constitutionality of the remaining clauses has not been passed upon by the Supreme Court and it is arguable that the constitutionality of those clauses may be secure. Thus, constitutionality could be sustained if: (1) the inhibitions on concealment and failure to disclose are treated as false statements, and (2) a distinction is made between the potentially broad sweep of "defense facilities," *i.e.*, those so designated by the Secretary of Defense under section 784(b), and the narrower scope of Federal employment. On the other hand, the total prohibition on all such employment or the absolute right to refuse employment on the basis of membership alone raises significant constitutional issues. It is not the purpose of this note to explore the constitutional ramifications, rather it is here sought to point out that these constitutional issues are involved, and because of the general policy of the draft to deal with felonies in Title 18, disposition of this section necessarily comes within the scope of the Commission's consideration.

Clearly 50 U.S.C. § 784 cannot be relocated "as is" into Title 18, as a felony or otherwise. At the least, clause (D), held unconstitutional in *Robel*, *supra*, must be deleted. But eliminating clause (D) is not suffi-

cient; consideration of the constitutional issues raised by the other clauses is required as well.

It is recommended that 50 U.S.C. § 784 be retained "as is" in Title 50 and made a regulatory offense or misdemeanor. This would be consistent with the general treatment of prophylactic offenses and would leave intact the underlying philosophy of the draft without requiring the Commission to address itself to constitutional issues peripheral to Criminal Code revision. (It should be noted that both the majority and the dissent in *Robel* consistently characterized this provision as "prophylactic." [1] Of course, most and probably all false statements would be subject to prosecution under the proposed general false statement provision, draft section 1352.[2]

Regulatory treatment is also recommended for 50 U.S.C. § 789 which prohibits use of the mails and instrumentalities of interstate or foreign commerce by the subject organizations without a suitable legend on the material attributing its source to a registered organization. It is now a felony under 50 U.S.C. § 794.

It should also be noted that violation of 50 U.S.C. § 784(2), a felony under 50 U.S.C. § 794, would also be a regulatory offense under the proposed disposition. It provides that it is unlawful:

> (2) For any officer or employee of the United States or of any defense facility, with knowledge or notice that such organization is so registered or that such order has become final—
>
> (A) to contribute funds or services to such organization; or
>
> (B) to advise, counsel or urge any person, with knowledge or notice that such person is a member of such organization, to perform, or to omit to perform, any act if such act or omission would constitute a violation of any provision of subparagraph (1) of this subsection.

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[1] 389 U.S. at 265, 276 (1967).

[2] *See United States* v. *Knox*, —— U.S. ——, 90 S. Ct. 363 (1969), which holds that a prosecution for making a false statement is not constitutionally barred, despite the original right of the defendant to refuse to make the statement under *Marchetti* v. *United States*, 390 U.S. 62 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968). If felony penalties for false statements in violation of 50 U.S.C. § 784 are deemed advisable, one course would be simply to raise the misdemeanor false statement under proposed section 1352 to a Class C felony for statements concerning membership in registered organizations in applications for Federal employment and, perhaps, private employment in defense facilities, and leave the other conduct "as is" in Title 50 as a regulatory offense or as a misdemeanor.

TABLE

Comparative Sentences for National Security Offenses

[References are to criminal and penal codes of Great Britain, Canada, Sweden, Norway, and Denmark]

Offense under the draft	Present Federal laws	Great Britain	Canada	Sweden	Norway	Denmark
Sec. 1101—Treason..... *Class A felony* (national aiding foreign enemy, in or out of United States). Sec. 1102—*Class A felony.* Participating in or facilitating war against the United States within its territory.	*Death or at least 5 years.* Levying war, aiding enemy, in or out of United States by person owing allegiance: 18/2381.	*Death:* (1351 act)..... *Life* (1848 act).	*Death:* Assisting enemy or armed forces against whom Canadian forces are engaged in hostilities (S. 46(1)(b), (c); S. 47(1)(a)).	*4 to 10 years; life:* During war, if act is likely to cause considerable harm to forces or aid to enemy, but 6 years if lesser harm (22/1). *10 years to life:* In peace, but if damage minor, 4 to 10 years (19/1). *2 to 8 years:* Producing danger of war (19/2).	*8 years to life:* Subjecting Norway to foreign rule (8/83). *5 years to life:* Causing war against Norway or ally (8/84). *3 years to life:* Various acts with respect to enemy in time of or for purpose of war (8/86). *Up to 5 years:* If done by gross negligence (8/86a). *Up to life:* Improper assistance to enemy not covered by 8/86 (8/86b). *Up to 4 years:* Other acts in time of war (8/87).	*Up to life:* Subjecting Denmark to foreign rule (X11/98); using foreign assistance to violate Danish independence (X11/99); changing constitution by foreign assistance, by force or threat thereof (X11/111). *Up to 16 years:* Assisting enemy or impairing military effectiveness (X11/102). *Up to 8 years:* Undue cooperation with enemy for commercial purposes (X11/109). *Up to 6 years:* Inciting to enemy action bringing about evident danger of such action (X11/100(1)). *Simple detention or 1 year:* Same re intervention by foreign power (XX/101(2)).

No specific provision on inchoate offense (attempt, conspiracy) to violate Secs. 1101 and 1102.			*Life or death:* Conspiracy or attempt (intent with overt act) (S. 46(1)(f), (g); S. 48(1)(b)).	*Maximum for completed crime: Not less than imprisonment:* Attempt (23/1). *Less than maximum for main offense, unless danger slight, then no penalty:* Preparation or conspiracy (23/2).	*Up to 10 years, but no more than ¾ maximum for main offense:* Conspiracy, incitement, dealing with foreign power or leading army with intent to commit treason felony, or offer to commit same (8/94).	*Up to 16 years:* Preparation to aid enemy, in face of impending war (X11/101).
Sec. 1103—Armed insurrection (attempt to overthrow the government). *Class A felony.* Leading organizing. *Class B felony.* Engaging in, soliciting to, knowing insurrection is in progress or about to begin.	*10 years/$10,000/both; disqualification from office:* Meeting, assisting, engaging in rebellion or insurrection (18/2383). *20 years/$20,000/both:* Conspiracy to overthrow (18/2384) (may also be treason under 18/2381).	*Death:* Levying war (Treason Act, 1351) punishable under 1914 act. *Life.* Treason Felony Act, 1848.	*Death or life:* Levying war or preparing to use force to overthrow government (S. 46(1)(d), S. 47(1)(b)).	*10 years to life:* Action dangerously favoring realization of intent to overthrow the government (unless it is high treason, foreign involvement). (18–1).	*Life:* Attempt to illegally alter constitution by use of arms or exploitation of fear of foreign intervention (9/98); preventing free exercise of authority of king, by force (9/99). *5 years to life:* Hampering authorities by use of arms or exploitation of fear of foreign intervention (9/99a).	*Up to life:* Act aimed at changing constitution (X111/111). *16 years; life if aggravating circumstances:* Interfering with diet, ministers, courts, *etc.*, freely carrying out activities (X11/113).
Inchoate offense. Sec. 1103(3): No conviction unless conduct occurs when armed insurrection is actually in progress or about to begin.			*Death or life:* Conspiracy or attempt (intent with overt act) (S. 46(1)(f)(g), S. 47(1)(b)).	*Maximum for completed crime, not less than imprisonment:* Attempt (23/1). *Less than maximum for main offense unless danger slight, then no penalty:* Preparation or conspiracy. (23/2).		
Sec. 1104—Advocating imminent armed insurrection. *Class C felony* (advocating overthrow of government where substantial likelihood of imminent armed insurrection; leading organization engaging in same).	*20 years/$20,000/both; disqualification from office for 5 years:* Advocating overthrow of government, by force or assassination, *etc.*; organizing or becoming member of group to do so (18/2385).	*7 years:* Taking oath to belong to organization with seditious purpose (Unlawful Oaths Act, 1797); unlawful to belong to society requiring members to take unlawful oaths (Unlawful Societies Act, 1799), also Seditious Meetings Act, 1817, B 16; Unlawful Oaths Act, 1812) (life).	*14 years:* Speaking seditious words, publishing seditious libel, being party to seditious conspiracy (S. 60).			

TABLE—Continued

Comparative Sentences for National Security Offenses—Continued

[References are to criminal and penal codes of Great Britain, Canada, Sweden, Norway, and Denmark]

Offense under the draft	Present Federal laws	Great Britain	Canada	Sweden	Norway	Denmark
Inchoate offense: Sec. 1104(2); No conviction unless advocacy actually occurs.	*20 years/$20,000/both; disqualification from office for 5 years:* Conspiracy to advocate overthrow (18/2385).					
Sec. 1105—Paramilitary activities... *Class B felony:* Organizing, leading organization. *Class C felony:* Engaging in forbidden activities carried on by organization.	Registration statute only (18/2386).	5 Halsbury's 1088–1091 usurping function of armed forces or police.	*5 years:* Violation of Governor's orders prohibiting unlawful assemblies for the purpose of drilling and unlawful drilling when assembled, *etc.* (S. 71).	*6 to 10 years:* Leading, assembling or training armed force with intent crime be committed against public security or liberty (18/3). *2 years:* Organizing, participating in, providing resources for association easily capable of developing into an instrument of force. (18/4).	*6 years:* Participation in or support of private organization of military character, if it maintains a supply of arms or there are other aggravating circumstances. *2 years:* Otherwise, similar punishment for participation in organization aiming by sabotage, violence, *etc.*, to disturb order of the community, *etc.* (9/104a).	*2 years:* Participation in or support of association intending to disturb order by force; taking part in unlawful military organization if aggravating circumstances, simple detention or fine otherwise (X11/114).
No specific inchoate offense				*Maximum for completed crime not less than imprisonment if 2 years' minimum:* Attempt (18/7, 23/1). *Less than maximum for main offense, but not more than 2 years unless 8 or more years may be imposed for main offense; if danger slight, no penalty:* preparation and conspiracy (18/7, 23/2).		

Sec. 1106, Sabotage *Class A or Class B felony:* Intentionally impairing U.S. military effectiveness in time of war or by serious impairment of sudden strike facilities and defenses. Sec. 1107 *Class C felony:* Recklessly impairing military effectiveness in war by intentional acts. Sec. 1108 *Class C felony:* Intentionally impairing defense functions anytime.	*30 years/$10,000/both:* Destruction, defective production of war materials, war premises, or war utilities (in time of war) (18/2153,2154). *10 years/$10,000/both:* Destruction, defective production of national defense materials, premises, utilities (no war) (18/2155, 2156).	(No specific provision; *see generally* Malicious Damage Act, 1861, 5 Hals. 750.)	*10 years:* Doing prohibited act prejudicial to safety, security, defense of Canada, her forces or other forces lawfully present in Canada; exemption for labor disputes (S. 52).	*4 to 10 years, or life:* Damge to fortresses, *etc.*, in time of war, if act is likely to result in considerable harm to military forces or defense or involves considerable aid to enemy. *6 years:* Otherwise (22/1). *4 years:* Careless damage to fortresses, *etc.*, in time of war (22/2).	*3 years to life:* In war or for purpose thereof weakening ability of Norway to resist by destroying, *etc.*, objects of importance for war effort, or by illegal strike with same effects. *Less than 3 years:* If activity is of minor importance (8/8/86(3)). *5 years:* If important activity done with gross negligence (8/87).	*Up to life:* Organizing extensive sabotage, suspension of production or traffic, or taking part, in order to subject Denmark to foreign rule (X11/98(2)).
No specific inchoate offense.....	*Punishment for main offense:* Conspiracy (with overt act) (18/2153-2156).	----------	----------	*Maximum for completed offense, not less than imprisonment if 2-year minimum:* Attempt (22/12, 23/1, D-6-8). *Less than maximum for main offense; no penalty for more than 2 years unless 8 years may be imposed for main offense:* Preparation, conspiracy (22/12, 23/2).	*10 years, but no more than maximum sentence for main offense:* Conspiracy, inciting, dealing with foreign power with intent to commit sabotage (8/94).	
Sec. 1109—Avoiding service in Armed Forces. *Class C felony:* Failure to register, report for induction, refusal to be inducted; use of force or deception on public servant with duty under regulatory act; all other violation of regulations are punishable outside Title 18.	*5 years/$10,000/both:* Including violation of any regulations under act (50 App./462).	----------	----------	*4 years or 8 years:* Self-incapacitation for duty in services, feigning illness, depending on whether war or peace (18/6).	----------	----------

TABLE—Continued

Comparative Sentences for National Security Offenses—Continued

[References are to criminal and penal codes of Great Britain, Canada, Sweden, Norway, and Denmark]

Offense under the draft	Present Federal laws	Great Britain	Canada	Sweden	Norway	Denmark
Sec. 1110—Obstruction of recruiting service. *Class C felony:* Physical obstruction of recruiting service, soliciting another unlawfully to refuse to submit to induction.	*20 years/$10,000/both; disqualification from office for 5 years:* Willful obstruction of recruiting service in war (18/2388).	----------	----------	----------	----------	----------
Sec. 1111—Causing or soliciting insubordination in armed forces. *Class B or C felony:* Depending on whether war; intentionally causing or soliciting insubordination, *etc.*	*10 years/$10,000/both; disqualification from office for 5 years:* Urging refusal of duty, *etc.*, with intent to impair morale, *etc.* (18/2387). *20 years/$10,000/both:* Willfully causing insubordination, *etc.*, in time of war (18/2388(a)).	----------	*6 years:* Willful interference with loyalty of forces, urging insubordination, *etc.*, (8. 63).	*4 to 10 years, or life:* Seducing forces to mutiny in war, if act likely to result in considerable harm to military forces or defense, or considerable aid to enemy, otherwise 6 years (22/1(1), D-5); also, serviceman provoking disloyalty (22/5); 4 years if careless (22/3).	*3 years to life:* In war or for purpose of war, inciting treason; less than 3 years if act of minor importance (8/86(4)).	
No specific provision on inchoate offense.	*20 years/$10,000/both:* Conspiracy plus act willfully to cause insubordination, *etc.*, in time of war (18/2388 (b)).	----------	----------	*Maximum for completed offense, but not less than imprisonment if minimum for completed offense is 2 years* (23/1). *Less than maximum for main offense; no imprisonment for over 2 years unless 8 may be imposed for main offense; no penalty if danger slight:* Conspiracy, preparation (23/2).	*10 years but no more than ¾ of main offenses:* Conspiracy (8/94).	

Sec. 1112—Impairing military effectiveness by false statement. *Class B or C felony*, depending on whether serious impairment of military effectiveness occurs: In war and with intent to aid enemy or obstruct U.S. military success, knowingly making false statement of fact about U.S. losses, plans, *etc.*	*20 years/$10,000/both:* In war, with intent to interfere with success of United States or aid enemy, willfully making false statements or reports (18/2388(a)).	----------	----------	*4 to 10 years, life:* By untrue representation, spreading distrust among the people in war, if likely to result in considerable harm to military or aid to enemy. 6 years, otherwise (22/1(5)). *2 years:* Spreading false rumor apt to produce danger for security of realm to foreign power; servicemen spreading rumor harmful to defense (22/6).	*2 years:* Spreading false rumors likely to endanger security to foreign power, against one's better judgment or with gross negligence (8/97b).	
No specific provision on inchoate offense.	*20 years/$10,000/both:* conspiracy with act (18/2388(b)).	----------	----------	*Maximum for completed offense and not less than imprisonment if minimum for main offense is 2 years or more:* attempt to violate 22/1(5); (23/1). *Less than maximum for main offense but no more than 2 years unless 8 years may be imposed for main offense; no penalty if danger slight:* conspiracy, preparation to violate 22/1(5); (23/2).	----------	
Sec. 1113—Espionage, communication of national defense information with hostile intent to enemy or foreign government.	*Death/life/any term of years:* Communication to foreign government of national	*3 to 14 years:* Taking pictures, obtaining, communicating to anyone information	*Death or life*, if war, 14 years otherwise: Communicating to foreign agent any	*10 years to life:* With intent to aid foreign power, obtaining, transmitting, *etc.*,	*3 years to life:* In war or for purpose of war, supplying enemy with information	*Life or 16 years:* Inquiring into or giving information, true or false, by or to foreign

TABLE—Continued

Comparative Sentences for National Security Offenses—Continued

[References are to criminal and penal codes of Great Britain, Canada, Sweden, Norway, and Denmark]

Offense under the draft	Present Federal laws	Great Britain	Canada	Sweden	Norway	Denmark
Class A felony: In war or related to codes or sudden-strike forces. *Class B felony:* Otherwise.	defense information with intent it will be used to injure United States or advantage of foreign nation (18/794(a)); collection of same with intent it be communicated to enemy in war (18/794(b)). *10 years/$10,000/both:* Gathering information with intent to injure or secure foreign advantage (18/793).	which is calculated to be, might be, or is intended to be useful to an enemy for any purpose prejudicial to interests of the state (Official Secrets Act, 1911).	sketch, plan, *etc.*, which one knows or ought to know may be used by that state or a purpose prejudicial to the safety of defense of Canada (S.46(1)(c); S.47(1)(c)(d)).	information concerning defense facility, disclosure of which can bring harm. *6 years:* If crime not grave. *4 years or 2 years:* If no intent to aid, depending on whether war or peace. *2 years or 6 months:* If grossly careless transmission, depending on whether war or peace (19/5–7).	for use in such operations, unless minor importance, then less than 3 years may be imposed (8/86).	power, depending on whether war or information about secret negotiations involving safety of state is involved (X11/107). *12 or 6 years:* Otherwise enabling foreign intelligence to operate in Denmark, depending on whether war or information on military affairs (X11/108).
Sec. 1113—Attempt or conspiracy to commit espionage. *Class A or B felony* as for main offense: Obtaining, collecting, eliciting, publishing, or entering restricted area to obtain information are sufficient to constitute substantial step for attempt.	*Death/life/term of years:* Conspiracy (plus overt act) to violate 794(a) or (b), attempt to violate 794 (a) (18/794(c)(a)). *10 years/$10,000/both:* Conspiracy to obtain information with intent to injure or secure foreign advantage (18/793 (g)).	*3 to 14 years as for main offense:* Attempt, incitement, solicitation (Official Secrets Act, 1920).	*Death or life, if war; 14 years otherwise:* Conspiring, or forming intent plus overt act, to commit espionage (S. 46(1)(b), S. 47(1)(c), (d)).	*Maximum for completed crime, not less than imprisonment if lower punishment is 2 years or more:* Attempt (19/14; 23/1). *Less than maximum for main offense but no more than 2 years if punishment for main offense is less than 8 years.* Preparation, conspiracy (19/13; 23/2).	*10 years but no more than ¾ maximum for main offense:* Conspiracy to commit espionage (8/94).	
Sec. 1114—Mishandling information related to national security.	*10 years/$10,000/both:* (1) disclosure of spe-	*2 years:* Having possession of specified in-	----------	*2 years:* With intent to aid foreign power.	*2 years:* Secretly seeking to gather politi-	*3 years:* Taking picture of defense establish-

Class C felony: Doing various acts with respect to national defense information; no foreign agent necessary; communication to person not entitled to receive it in reckless disregard of potential injury to national security.	cified military information to persons not entitled to receive it; use of same to prejudice of U.S. interests (18/798); (2) communication of national defense information to one not entitled to receive it (18/793 (d)); retaining and permitting loss; failure to deliver on demand to United States (18/793(e)); permitting same to be unlawfully removed (18/793(f)), failure to report removal of same by another (18/793(f)).	formation, and communicating it to one not entitled to receive it, using it to benefit foreign nation, retaining it without right, or being careless with respect to it (Official Secrets Act. 1911).		carrying on activity in Sweden to obtain military or other information, revelation of which to the foreign power can produce harm to another foreign power; applies to information about personal affairs (19/8).	cal or personal information for benefit of foreign state (8/91a); in war, unlawful dissemination of military information (8/92).	ments, *etc.*, if aggravating circumstances; simple detention: otherwise (XII/110a).
No specific provision on inchoate offense.	*10 years/$10,000/both:* Conspiracy, with overt act to commit (1) (18/793(g)).	*2 years as for main offense:* attempt, solicitation, incitement (Official Secrets Act, 1920).	----------	*Maximum for completed offense:* attempt. Less than for main offense, no more than 2 years: Preparation, conspiracy (19/16, 23/12).	----------	
Sec. 1115—Mishandling classified information. *Class C felony;* Intentional communication of classified information by public servant to foreign government or Communist organization.	*10 years/$10,000/both:* disqualification from office: (1) employee of U.S. communicating classified information he knows to be classified to foreign agent or member of Communist organization he knows to be such agent or member (50/783(b)); or (2) anyone disclosing certain classified information re codes to person not entitled to receive it (18/798).	----------			*10 years:* Unlawful disclosure of state secret if to foreign state, or considerable danger is caused; 3 years, otherwise. 1 year negligent disclosure: Penalties increased by ½ if secret confided to perpetrator by his office (8/90).	*18 years:* Disclosure of information on secret of state or rights in relation to foreign state (including economic). 3 years if negligent (XII/109).

TABLE—Continued

COMPARATIVE SENTENCES FOR NATIONAL SECURITY OFFENSES—Continued

[References are to criminal and and penal codes of Great Britain, Canada, Sweden, Norway, and Denmark]

Offense under the draft	Present Federal laws	Great Britain	Canada	Sweden	Norway	Denmark
No specific provisions on inchoate offense.					*6 years or 2 years:* Unlawfully possessing secret with intent to reveal, depending on whether intent to betray or disclosure would have created serious harm, 1 year: No intent (8/91).	
Sec. 1116—Prohibited recipient obtaining information. *Class C felony:* Foreign agent or member of Communist organization knowingly obtaining, attempting to obtain, classified information or inducing mishandling classified information.	*10 years/$10,000/both:* disqualification from office; Receipt of or attempt to receive, by foreign agent or member of Communist organization, classified information (50/783 (c)).	*2 years:* Receiving secret information knowing disclosure violates the act (Official Secrets Act, 1911).				*Life or 10 years:* Foreign agent inquiring into information which should be secret, depending on whether war or secret negotiations involving safety of state or rights in relation to foreign states (including economic interest) (X11/107).
No specific provision on inchoate offense.			*2 years as for main offense:* Attempt, incitement, solicitation (Official Secrets Act, 1920).			
Sec. 1117—Wartime censorship of communications. *Class C felony:* In war and against regulations, communicating with enemy, evading submission to censorship communication from enemy, using code with intent to conceal meaning of same, using mode of communication knowing	*10 years/$10,000/both:* Willful evasion or attempt to evade submission of communications to censorship pursuant to regulations; use of code to conceal meaning of such					

it is forbidden (other violations to be regulatory offenses).		communication; sending communication to enemy, or out of the country other than in the regular course of the mail (50 App/ 3(c)(d); 10).			
No specific provisions on inchoate offense					
Sec. 1118 *Class C felony:* Harboring or concealing offender or potential offender with respect to treason, espionage, sabotage or presidential assassination.	*10 years/$10,000/both:* Harboring or concealing spy or potential spy (18/1792) in war, harboring or concealing one who causes or intends to (1) cause insubordination in Armed Forces, (2) obstruct U.S. recruiting service, or (3) convey false reports to interfere with military operation (18/2388). *7 years/$1,000/both:* Concealing and not reporting traitor, by person owing allegiance (18/2382).	*Life and absolute forfeiture of goods, forfeiture of profits for life:* Concealment of high treason (1 and 2 Phil. and Mar., c.10, 1554–5). *2 years:* Harboring spy or potential spy, permitting spies to assemble in one's premises, or having so harbored or permitted willfully failing to disclose same (Official Secrets Act, 1911).	*14 years:* Knowing a person is about to commit treason (including armed insurection and espionage), failing to report same or to take steps to prevent the crime (S.50). *Summary conviction:* Aiding, assisting, harboring, concealing a known deserter (S.54).	*Punishment as for attempt, conspiracy, complicity:* Failure to reveal high treason, espionage, no more than 2 years if he did not realize offense was about to be committed, but should have (21/14,15).	*3 years:* In war, furnishing shelter, support to enemy spy (8/87(2)).
Sec. 1119—Aiding deserters *Class C felony or Class A misdemeanor* depending on whether war; Intentionally assisting member of armed forces to desert or attempt to desert, concealing or assisting deserter to avoid discovery.	*5 years/$2,000:* Enticing desertion; harboring deserters (18/1381).				
		2 years, as for main offense: Attempt, incitement, solicitation (Official Secrets Act, 1920).			

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COMMENT
on
OFFENSES RELATING TO FOREIGN RELATIONS: SECTIONS 1201–1206
(Agata; October 3, 1969)

1. *Introduction.*—The draft approach towards offenses relating to foreign relations recognizes that there are several areas serving different policies and they require different modes of disposition. The proposal does not attempt to change any basic foreign relations policy, *i.e.*, what should and should not be prohibited, and, generally speaking, does not attempt to change the decision that a criminal sanction should be employed to effect that policy. The proposal does, however, change some penalties, attempt to make the language and coverage of the penal provisions appropriate to contemporary conditions, and recommend repeal of some obsolete provisions.

The basic areas of concern are neutrality, international obligations to prevent private hostile acts against friendly powers, the protection of foreign diplomatic functions, protection of the United States in its dealings with foreign powers, regulation of international trade, and piracy. The different legislative approach each requires is considered in detail in the ensuing comments, but may be summarized as follows:

(a) the transfer of some provisions to Title 22 (Foreign Relations and Intercourse) for treatment as regulatory offenses or misdemeanors with only aggravated violations included in Title 18 as felonies. The treatment of neutrality offenses is characterized by this approach;

(b) the use of the foreign relations or international law aspect of an offense as a jurisdictional base for a general offense in Title 18. Piracy and protection of diplomatic personnel are characterized by this approach;

(c) the repeal of some offenses because they are either obsolete or their meaning and purpose uncertain or lost by virtue of total nonuse;

(d) the retention of a basic core of offenses in Title 18 characterized by private hostile acts against friendly foreign powers. The provision dealing with military expeditions exemplifies this concern (proposed section 1201);

(e) the addition to Title 18 of felonies now located in other titles, such as the provisions relating to trade and foreign agent registration requirements (proposed sections 1204 and 1206).

2. *Neutrality Generally.*—Unlike most provisions of the Criminal Code which are directly concerned with the preservation of internal order and security and for the most part reflect an individual moral element, legislation dealing with neutrality is essentially regulatory in

nature. Neutrality provisions reflect the effort of the nation to implement its obligations under international law and contain measures to assure that control of foreign policy shall be in the hands of constituted authority. There are some general statements which can be made concerning the principles of international law governing neutrality, but these principles even when embodied in conventions and treaties govern national and not individual conduct.[1] Traditionally, it is the duty and right of each government to determine how it will perform its international obligations with respect to its control of individuals.[2] Early 19th century United States criminal legislation on neutrality is conceded to be the origin of modern doctrines of neutrality which sought to assure that it did not become embroiled in foreign wars by virtue of private adventures or the unauthorized acts of public officials.[3]

United States legislation was the model for later British legislation [4] and the source of much of the language in treaties, learned treatises and conventions which sought to state the international law of neutrality.[5] Much of the language in the statutes, while appropriate to its times, is strained by today's advanced technology and new concepts of political organization and reality.[6] The experience immediately preceding World War II underscored the basic reality that neutrality legislation or abstract concepts of "international law" would not stand in the way of official government action to protect the vital interests of the United States.[7] There are changing concepts of neutrality, and a contemporary international society which purportedly does not tolerate an absolute right to go to war may be compelled to recognize that there are statuses outside outright belligerency which may justify a nation supporting and having an interest in the outcome of armed hostilities.[8] Thus, changing modes of warfare and

[1] *See* Research in International Law, Harvard Law School, *Rights and Duties of Neutral States in Naval and Aerial War*, 33 AM. J. INT'L L. 169 (1939) (Draft Convention with Comment) [hereinafter cited as Draft Convention] for an extensive survey of the issues and international law principles involved in neutrality.

[2] *See* 2 OPPENHEIM, TREATISE ON INTERNATIONAL LAW 657 (7th ed. Lauterpacht 1952) [hereinafter cited as OPPENHEIM], for consideration of the difficulties of maintaining this distinction under current conditions where totalitarian states, and others as well, exercise significant control over economic and personal activities of its citizens.

[3] OPPENHEIM, *supra* note 2, at 631. For general development of neutrality doctrines in international law, *see* OPPENHEIM, *id.* at 623–666. For extensive history, *see* NEUTRALITY, I–DEAK & JESSUP, THE ORIGINS: II–PHILLIPS AND REEDE, THE NAPOLEONIC PERIOD; III–TURLINGTON, THE WORLD WAR PERIOD; IV–JESSUP, TODAY AND TOMORROW (1935, 1936) [hereinafter cited as NEUTRALITY].

[4] Garcia-Mora, *International Law and The Law of Hostile Military Expeditions*, 27 FORD. L. REV. 309, 318 (1958) [hereinafter cited as Garcia-Mora]; For American legislation enacted during the period 1794–1818, *see* DEAK & JESSUP, NEUTRALITY LAWS, REGULATIONS AND TREATIES 1079–1086 (1939); for British legislation enacted in 1819, *see* DEAK & JESSUP, *id.* 125–133. *See also* FENWICK, NEUTRALITY LAWS OF THE UNITED STATES (1913).

[5] Comment to Draft Convention, *supra* note 1, sets forth language from numerous relevant sources.

[6] *See* note 2, *supra*; *see also* consideration of air power in the comment on proposed section 1201, *infra*.

[7] *See, e.g.*, consideration of United States as "arsenal of democracy" before entry into World War II, 11 WHITEMAN, DIGEST OF INTERNATIONAL LAW 461–467 (1968) [hereinafter cited as WHITEMAN]; OPPENHEIM, *supra* note 2, at 641–642.

[8] A dramatic example is in the delivery of 50 "moth balled" destroyers to Great Britain and the distinction the Attorney General made in construing 18

developing concepts of international obligations concerning armed hostilities suggest it is neither practicable nor sensible for a more or less permanent body of legislation like the Federal Criminal Code to attempt to deal with anything more than very basic government policy on neutrality.

The approach of the draft and accompanying proposals recognizes that legislation concerning neutrality and related foreign policy questions is basically regulatory in nature and places in the hands of the executive the power to steer the course Congress may set in a particular situation. Thus, under current law the determination of when neutrality provisions now contained in Title 22 of the United States Code are to be effective is dependent on a proclamation by the President that the requisite conditions exist.[9] In like vein, the details of regulations concerning trade which are seen as affecting international peace or United States security are subject to regulation promulgated in accordance with the needs of the situation.[10] There are some provisions in current law which reflect a permanent congressional policy: when the President promulgates the proclamation referred to above, certain financial transactions are prohibited.[11] It is proposed that these provisions remain in Title 22.

U.S.C. § 964 to permit delivery of existing destroyers, but not mosquito boats in the process of construction. For the correspondence on this matter, *see* 7 HACKWORTH, DIGEST OF INTERNATIONAL LAW 419–421 (1943) [hereafter cited as HACKWORTH]. *See* 3 HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 2235 (2d ed. 1945) [hereafter cited as HYDE], for comment concerning United States interest in this transaction. For discussion of this event, *see* OPPENHEIM, *supra* note 2, at 638–699, wherein the author points out that the act might have been inconsistent with "relevant specific rules of neutrality as they crystallized in the nineteenth century and in the Hague Conventions."

> But it is probable that these acts were in accordance with the law of neutrality viewed in its entirety and in its true historic perspective. They were adopted as measures of discrimination against a belligerent who had resorted to war in violation of International Law.

A typical formulation of neutrality obligations forbids a neutral to permit the use of its territory as a "base of operations" for belligerent operations against an enemy. For discussion of the difficulties with this term, *see* HYDE, *id.*, at 2249 *et seq.* For the obligations of a neutral in naval and air warfare, *see* Draft Convention, *supra* note 1, generally and at page 338:

> The following acts are among those which may be classed as using neutral territory 'as a base of operations':
> Recruiting armed forces;
> Setting up prize courts . . .
> Augmenting forces of ships or aircraft . . .
> Operating against enemy craft from neutral refuges . . .
> Disseminating military information . . . Other acts not here listed may fall under the same classification.

Special situations arise concerning use of telecommunications, refueling of vessels and a host of other situations involving new technology and further changes in what are considered relevant international facts and require constant reconsideration of the issues involved. These are considered in WHITEMAN, *supra* note 7, at 211–230; 7 HACKWORTH, *id.* at 390–396 (1943). The subject matter is replete with technical rules as well as being subject to the changing interest of the nations involved (*see* HYDE, *supra* note 7) not easily susceptible to long range generalizations appropriate for a Criminal Code. For a discussion of a technical rule involving 18 U.S.C. § 964, *see* note 12, *infra*.

[9] 22 U.S.C. § 441.

[10] 22 U.S.C. §§ 441, 1934; 50 U.S.C. APP. § 2021 *et seq.*

[11] 22 U.S.C. § 447.

Although there are some neutrality offenses in Title 18 which presently represent "permanent" congressional policy, they should, if retained, be transferred to Title 22 and viewed as part of the total picture governing the supply of armaments to and other relations with, belligerent forces.[12] Thus, 18 U.S.C. § 961 (strengthening armed vessel of a foreign nation), 18 U.S.C. § 963 (detention of armed vessel); 18 U.S.C. § 964 (delivering armed vessel to belligerent nation); 18 U.S.C. § 965 (verified statements as prerequisite for vessel's departure); 18 U.S.C. § 966 (departure of vessel forbidden for false statements); 18 U.S.C. § 967 (departure of vessel forbidden in aid of neutrality), at the least, should be transferred to Title 22. The effect would be that provisions dealing with conduct which is lawful except for the existence of belligerency of third party nations would be located in Title 22, graded no higher than Class A misdemeanors. Certain aggravated violations would be graded Class C felonies under sections 1204 and 1205 in the proposed Criminal Code. (For detailed consideration of sections 1204 and 1205, *see* paragraph 4, *infra*.)

3. *Sections 1201 and 1202: Depredations Against Friendly Powers Launched From the United States.*—The proposed Criminal Code will contain provisions dealing with hostile conduct launched from the United States against a nation with which it is at peace. Proposed sections 1201 and 1202 deal with hostile military expeditions and con-

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[12] Other provisions in Title 22 deal with financial transactions (22 U.S.C. § 447), solicitation of funds (22 U.S.C. § 448), restrictions on use of American ports and waters (22 U.S.C. §§ 450, 451). Some of the language in current law which dates from 1794–1818 is archaic and obviously was intended to deal with privateers. These provisions should be modernized when transferred to Title 22. For "privateer" origins of aspects of neutrality law, *see* NEUTRALITY—THE ORIGINS, *supra* note 3, at 12–16. In addition there are some distinctions in current law which would be eliminated if dealt with on a regulatory basis. For example, the distinction between the sale of a war vessel as an object of commerce like arms and ammunition, subject only to a belligerent's powers concerning contraband, and the sale of a war vessel built on the order of a belligerent should not be a distinction of concern to the main body of criminal law. This is current construction of 18 U.S.C. § 964 and was relied on to support the 50-destroyer exchange with Great Britain (*see* note 8, *supra*), but the Attorney General conceded that the "distinction, although of course logically correct, is hair-splitting." The sale of such vessels would be subject to regulation under 22 U.S.C. § 1934 as arms and ammunition and prohibited when there is a presidential proclamation concerning the belligerency of others (22 U.S.C. §§ 441, 447), but there is no reason to distinguish between the two situations in terms of penalty or regulatory coverage. For relationship of this issue to "privateering" as the object of the original neutrality laws, *see* FENWICK, THE NEUTRALITY LAWS OF THE UNITED STATES 109 (1913) [hereinafter cited as FENWICK].

For an example in foreign law, *see* the Danish Criminal Code which contains a general prohibition on violation of Danish neutrality:

> 110b. Any person who gives his assistance to any violation of neutrality against the Danish State on the part of any foreign power shall be liable to imprisonment for any term not exceeding eight years.
>
> 110c. Any person who, intentionally or through negligence, contravenes any provisions or prohibitions that may have been provided by law for the protection of State defence or neutrality or for the fulfilment of its obligations as a member of the United Nations shall be liable to a fine or to simple detention or, in aggravating circumstances, to imprisonment for any term not exceeding three years. (CRIMINAL CODE OF DENMARK (English translation. Copenhagen, 1958)).

See also rules of Denmark's neutrality promulgated in 1938, in 1 DEAK & JESSUP, A COLLECTION OF NEUTRALITY LAWS, REGULATIONS AND TREATIES OF VARIOUS COUNTRIES 479–483 (1939) [hereinafter cited as DEAK & JESSUP].

spiracies to engage in espionage, assassination and the destruction of property abroad. With the exception of espionage, for reasons examined later, they apply without regard to whether the other power is engaged in war, *i.e.*, is a belligerent. The provisions are broader in purpose than neutrality regulations, but they are also important in protecting neutrality.

Section 1201 makes the organization or promotion of a military expedition assembled in the United States to engage in armed hostilities against a foreign nation with which the United States is at peace a Class C felony. The section is intended to modernize current 18 U.S.C. § 960,[13] which provides:

> Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined not more than $3,000 or imprisoned not more than three years, or both.

18 U.S.C. § 960 both supports neutrality when others are engaged in war, and implements an international obligation requiring a nation to prohibit the use of its territory as a base for launching attacks against another nation with which it is at peace.[14]

The essence of the offense under the draft (as is true under current law) is the prohibition of an expedition organized in the United States which is intended to be launched from the United States to engage in armed violence of a political nature.

The provision is limited to organizing an expedition assembled in the United States or promoting it by joining it or by providing it with substantial resources in the United States or by providing the expedition with transportation from the United States. The concept of an expedition assembled in the United States distinguishes it from those cases in which there is basically a commercial transaction involving the sale in the United States of goods or arms to a military group organized outside this country. This is consistent with current law. *See United States* v. *Trumbull*, 48 F. 99 (S.D. Cal. 1891). It leaves to other provisions the regulation of such trade within the United States

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[13] *See generally* Curtis, *The Law of Hostile Military Expeditions as Applied by the United States*, 8 AM. J. INT'L. L. 1 (1914); for the need for modernization of the international law principles and language and coverage of 18 U.S.C. § 960, *see, e.g.*, Garcia-Mora, *supra* note 4; statement of Attorney General Kennedy, in WHITEMAN, *supra* note 7, at 231. 18 U.S.C. § 960 was enacted in 1794 substantially in its current form (Act of June 5, 1794, § 5, 1 Stat. 381). The original neutrality provisions are contained in 2 DEAK & JESSUP, *supra* note 12, at 1079 *et seq.*

[14] *See* 3 HYDE, *supra* note 8, at 2254 n.2:

> It should be observed that this broad obligation is not attributable to the law of neutrality. It exists whether the foreign State be at war, or endeavoring to suppress unrecognized insurgents, or enjoying freedom from any internal disturbance. It has not been as a neutral that the United States has most frequently felt the burden of this particular duty. It may be noted that § 8, title V, of the Act of June 15, 1917, 40 Stat. 223, 18 U.S.C.A., § 25, like the earlier law which it amended, is not limited in its operation to occasions when in the course of a war the United States is a neutral.
>
> See also report of the Commission of Jurists of 1923, on Art. 46 of the Rules of Aerial Warfare, *Am.J. XXXII, Official Documents, 12, 37.*

See also FENWICK, *supra* note 12, at 82–83.

(*e.g.*, 18 U.S.C. §§ 961, 963, 964, mentioned in paragraph 2, *supra*), and does not purport to regulate the supply or the joining of such expeditions outside the United States. Coverage of those outside the United States who conspire to cause the assembling of an expedition within the United States is left to resolution as a jurisdictional issue (section 208(d)). The requirement that the expedition be organized in the United States excludes from this section the conduct of a foreign warship which enters a domestic port and engages in hostilities after it leaves the United States port. Current law treats this separately (18 U.S.C. § 961). It is arguable that this conduct could be treated together with the launching of hostile military expeditions from the United States under proposed section 1201. However, there are other issues involved in the warship case, such as the fact warships may be permitted to enter and depart our ports, and the further fact that supply of such ships is not wholly prohibited. Thus, coverage of these situations is better left to regulatory provisions governing neutrality, the use of ports and the sale of goods to belligerents. (*See* paragraphs 2 *supra*, and 4, *infra*).

The term "expedition" has been construed under current law to be an "organized force" as distinguished from a group of individuals not otherwise organized into a fighting force who travel abroad together to join a foreign military force.[15] The draft resolves the issue

[15] *United States* v. *Tauscher*, 233 F. 597, 599–600 (S.D. N.Y. 1916), distinguishes other situations:

> Thus a most completely organized military detachment of soldiers marching from a neutral into a belligerent country, simply to march in and then out again, without threat or purpose of attack in any direction upon the belligerent, or upon any of its institutions, while it might impinge upon international neutrality regulations, would not, it is believed, contravene the statute; nor would a wholly unorganized and irresponsible mob of persons going from a neutral into a belligerent state, with a purpose of committing depredations upon the latter's military institutions, alone constitute an infringement of the statute. But if there be a preconcerted plan of operations, with leadership, and a co-ordination of men and arms and munitions and other means for attacking the armies or navies of the belligerent, or crippling or destroying her military institutions, set on foot for the purpose and with the intention of so attacking the belligerent nation in either aspect, and thereby to render aid and assistance to the enemy, the military enterprise or expedition contemplated by the statute would seem to be complete.

A recent statement which reflects the case law and State Department attitudes on the issue was occasioned by the problems raised by the conduct of Cuban refugees in the United States:

> There is nothing criminal in an individual leaving the United States with the intent of joining an insurgent group. There is nothing criminal in several persons departing at the same time.
> What the law does prohibit is a group organized as a military expedition from departing from the United States to take action as a military force against a nation with whom the United States is at peace. (Statement of Attorney General Kennedy, in WHITEMAN, *supra* note 7, at 231.)

See generally FENWICK, *supra* note 12, at 81–87; cases and other materials in 7 MOORE, DIGEST OF INTERNATIONAL LAW §§ 1299, 1300 (1906) [hereinafter cited as MOORE]; HACKWORTH, *supra* note 8, at section 644. Concededly, the line has been difficult to draw between departure to enlist in foreign armies and the shipment of munitions in ordinary commerce or as part of an expedition (*see* FENWICK, *supra*, note 12, at 86), but the courts have been dealing with the issue effectively and there is no indication that further statutory definition would aid solution.

of whether to prohibit individuals from leaving the United States with intent to become part of a foreign military force in favor of current law which imposes no such prohibition. Whether or not this traditional tenet of United States foreign policy, recognizing an individual's right to go abroad to fight in a cause in which he believes, should be maintained is a basic foreign policy question not deemed an appropriate subject for change by this Commission on the basis of any criminal law principles.[16]

Consideration was given to further defining "expedition." No definition appears in the current statute, and the evidence is that there is need to afford an opportunity for judicial construction adapting the term to the various forms an "expedition" may take. Therefore, the draft contains no limiting definition of expedition whose meaning is rendered sufficiently certain by reference to the policy it seeks to implement as reflected in prior cases and international law concepts.[17] However, the draft does expressly resolve one issue relating to the scope of "expedition," concerning which some doubt has been expressed. It prohibts launching air attacks from the United States whether or not the project would otherwise constitute an "expedition." It is likely such conduct would constitute an "enterprise" under 18 U.S.C. § 960.[18] Since "enterprise" is here eliminated from the offense for other reasons, it was concluded that this type of attack, even though it involves only one person, is still a military expedition in the context of modern warfare, *i.e.*, a force ready to engage in military activities consequent upon its organization in the United States.[19] The provision is intended to cover missiles, aircraft and poisonous substances launched or transmitted through the air from the United States.[20]

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[16] A recent statement by a United States official in the Cuban refugee situation correctly states the underlying philosophy of the current law as originally enacted and followed by the United States government:

> Second, the neutrality laws were never designed to prevent individuals from leaving the United States to fight for a cause in which they believed. There is nothing in the neutrality laws which prevents refugees from Cuba from returning to that country to engage in the fight for freedom. Nor is an individual prohibited from departing from the United States, with others of like belief, to join still others in a second country for an expedition against a third country. (Statement of Attorney General Kennedy, in WHITEMAN, *supra* note 7.)

For consideration of contrary views and the problems raised by so-called Chinese volunteers in Korea and its implications for international law, see Brownlie, *Volunteers and the Law of War and Neutrality*, 5 INT'L & COMP. L.Q. 570 (1956); Garcia-Mora, *supra* note 4, at 325–331. *See also* discussion of unlawful recruiting and enlistment in foreign armed forces, paragraph 5, *infra*.

[17] *See* 7 *Hackworth*, *supra* note 8; MOORE, *supra* note 15; OPPENHEIM, *supra* note 2, at sections 330–332.

[18] *See, e.g., United States* v. *Sander*, 241 F. 417, 420 (S.D.N.Y. 1917) (discussion of hypothetical bombing of Mexico City by single pilot departing from New York); *but cf. United States* v. *Ram Chandra*, 254 F. 635, 636 (N.D. Cal. 1917) (refusal to commit court on the issue).

[19] Although commentators have stated a belief that such conduct would constitute hostile expeditions, there is still doubt concerning the precise scope of international obligations concerning aircraft. *See* WHITEMAN, *supra* note 7, at 232–233.

[20] *Cf.* 18 U.S.C. § 962 (dealing with outfitting and arming a ship), a provision intended to deal with privateers (*see* FENWICK, *supra* note 12, at 71). To the extent it involves the assembly or organization of a hostile force, it is covered by proposed section 1201. In addition, those facets of 18 U.S.C. § 962 which are basically trade provisions would be covered by proposed section 1204.

The proposed section applies to both internal and international hostilities, thereby prohibiting the use of United States territory as a launching pad for all military operations of a political nature. (*See* definitions of "foreign power" in proposed section 1201(2)(a) and "armed hostilities" in proposed section 1201(2)(b)). Current law prohibits an expedition "against the territory or dominion of any foreign prince or state, or of any colony, district or people with whom the United States is at peace." The draft prohibits a purpose to engage in "armed hostilities," *i.e.*, international war, civil war, rebellion or insurrection, against a "foreign nation," which is defined to include unrecognized governments and factions engaged in civil war, rebellion or insurrection. Thus neither existing governments nor rebels may form expeditions on United States territory. In addition, express reference to the kinds of "armed hostilities" embraced by the statute denotes the political nature of the action, distinguishing it from actions by or against bandits.[21]

The offense is graded a Class C felony; current law authorizes 3 years' imprisonment and a $3,000 fine. Thus, felony status of the offense is preserved in the proposal.[22] This is justified primarily in terms of deterrence. Minor penalties may have no significance to military adventurers and the conduct, if undeterred, could have a serious impact on American foreign relations.

Proposed section 1202 prohibits conspiracy in the United States to engage in specified "conduct hostile to a friendly nation" with which the United States is at peace provided a conspirator performs an act within the United States in furtherance of the agreement. The prohibited object of the conspiracy is hostile conduct to be committed in the territory of a foreign nation. "Conduct hostile to a friendly nation" is defined to include espionage in behalf of a belligerent (subsection (a)); political assassination (subsection (b)); and property offenses (subsection (c)). In substance, section 1202 embraces matters now covered by military "enterprise" under 18 U.S.C. § 960 and property depredations under 18 U.S.C. § 956. 18 U.S.C. §§ 956 and 960, which it replaces in whole and in part, respectively, authorize imprisonment for 3 years. The offense under draft section 1202 is a Class C felony.

Section 1202 continues to implement an obligation presently recognized by the United States to prevent its territory from being used as a base for specified activity against foreign governments and for the commission of "common crimes against life or property" in which a government, as distinguished from an individual, is the object or is intimately involved.[23] It is a corollary to the principle requiring suppression of hostile military expeditions covered by proposed section 1201.

The section is limited to conspiracies, as distinguished from individual conduct; but it is recognized that justification of the distinction presents a close question. The resolution in favor of the limitation to conspiracy takes into account that conduct by an individual in the

[21] *See* HYDE, *supra*, note 8 at 2254.

[22] Under current law, the offense is a felony by virtue of the authorized term of imprisonment exceeding one year (18 U.S.C. § 1(1)), but as originally enacted in 1794 with the same penalty as in current law it was designed a "high misdemeanor." *See* DEAK & JESSUP, *supra note* 12, at 1081.

[23] 1 OPPENHEIM, TREATISE ON INTERNATIONAL LAW 260–261 (7th ed. Lauterpacht 1948).

United States will be either in aid of another's conduct outside the United States or, if he intends to act alone, it will constitute only preparation or possibly attempt, within the United States. A person who aids another who is outside the United States would be covered by proposed section 1202 because there is likely to be an agreement, not merely parallel action. The fact that one party is outside the United States does not mean that an agreement was not in the United States, if the other party is within this country. On the other hand, to cover a person who merely departs the United States with an intent to engage in the prohibited conduct without having entered into an agreement, creates a serious danger of abusive prosecution for the mere act of travel with proof of intent, based on the assertion such conduct constitutes an attempt to kill or engage in other prohibited conduct. In addition, the current law concerning property depredations is limited to conspiracy (18 U.S.C. § 956) and no difficulties with this limitation have been demonstrated under that section. Further, despite some judicial language that "enterprises" under 18 U.S.C. § 960 may involve only one person, in practice the cases have involved more than one person.[24]

Proposed section 1202(a), which essentially describes wartime espionage, is intended to cover conduct now covered by "enterprise" under 18 U.S.C. § 960. Subsection (a), together with subsection (b) (assassination) and subsection (c) to the extent it covers sabotage, eliminate the need for the indefinite term "enterprise" with no loss in current coverage. The difficulties with "enterprise" are considered in the Extended Note on Military Enterprise Under 18 U.S.C. § 960, *infra*.

The proposal requires an intent to reveal national defense information, terminology which is used in the proposed domestic espionage statute (section 1113) and which will serve as a basis for applying this provision.

The conduct must be in aid of international war against a foreign nation with which the United States is at peace. It was concluded that it was not mere coincidence that the reported cases on "enterprise" involved existing international war situations as distinguished from cases of peacetime espionage.[25] The contours of an obligation of one nation to protect another from damage unrelated to treaty or neutrality obligations or acts of hostile military expeditions are unclear. Even with respect to property destruction, until 1917 the United States criminal law afforded a foreign nation no protection against destruction of property in another nation unrelated to military hostilities.[26] In the absence of any demonstrated need, it was concluded that protection of foreign powers from espionage should be limited to conduct in aid of existing war.

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[24] In addition, there is a general assumption underlying international law obligations that "an individual acting alone cannot seriously threaten the peace and security of a foreign state." Garcia-Mora, *supra* note 4, at 315.

[25] *See, e.g., United States* v. *Sander*, 241 F. 417 (S.D. N.Y. 1917).

[26] *See, e.g., United States* v. *Bopp*, 230 F. 723 (N.D. Cal. 1916) (quashing indictment alleging plan to blow up bridges in Canada where there was a failure to allege military character or purpose of the plan). Although examination of the legislative record did not reveal the purpose of what is now 18 U.S.C. § 956 (conspiracy to injure property of foreign government), its enactment in 1917 suggests it was a response to the problem presented by *Bopp*, *supra*. Act of June 15, 1917, c. 30, tit. VIII, § 5, 40 Stat. 226.

Consideration was given to whether or not proposed section 1202(a) should cover all armed hostilities, including rebellion, and not just international war. It was concluded that such coverage would not be appropriate for espionage offenses involving foreign nations. The question of whether a nation is in a state of rebellion or insurrection involves a question of internal law for the foreign state and its coverage under proposed section 1202 would require the United States Federal courts to make this determination. This could involve the courts in delicate questions, better left to the other branches for decision. Therefore, it is recommended that the provision be limited to international war, but if all armed hostilities are included they should be only such hostilities as are declared to be such by presidential or congressional proclamation. Thus, a court need not decide if the decision by an existing government to learn the secrets of its inhabitants (perhaps, in revolt) is espionage or is authorized.

Section 1202(b) is limited to conspiracies to kill foreign public officials abroad on account of their official functions.[27] Thus, it covers essentially political assassinations which, in the absence of treaty, is the primary interest the United States would have in preventing homicides abroad. Although there are no cases on the subject, it is likely that when a war or rebellion is involved such conducted is covered by "enterprise" under 18 U.S.C. § 960. Even if this is an addition to the current law, it is justified by the increased use of this method of political conduct and because it is so clearly contrary to law anywhere, little difficulty should arise in enforcement of the section.

Section 1202(c) replaces 18 U.S.C. § 956, which prohibits a conspiracy, within the United States, to injure property of a foreign government or certain public facilities located abroad,[28] and also covers the sabotage activities which would be covered by military enterprise under 18 U.S.C. § 960.[29] Neither the proposal nor 18 U.S.C. § 956 is limited to "military purposes." [30] Both recognize an obligation to prevent depredations launched from the United States which have a

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[27] Such conduct could be covered by a general provision such as section 105.20 of the New York Revised Penal Law (McKinney 1967):

> 2. An agreement made within this state to engage in or cause the performance of conduct in another jurisdiction is punishable herein as a conspiracy only when such conduct would constitute a crime both under the laws of this state if performed herein and under the laws of the other jurisdiction if performed therein.

It was concluded that, in the absence of treaty, the United States need not assume so broad an obligation which by its terms might include sedition laws and regulatory offenses.

[28] 18 U.S.C. § 956:

> (a) If two or more persons within the jurisdiction of the United States conspire to injure or destroy specific property situated within a foreign country and belonging to a foreign government or to any political subdivision thereof with which the United States is at peace, or any railroad, canal, bridge, or other public utility so situated, and if one or more such persons commits an act within the jurisdiction of the United States to effect the object of the conspiracy, each of the parties to the conspiracy shall be fined not more than $5,000 or imprisoned not more than three years, or both.
>
> (b) Any indictment or information under this section shall describe the specific property which it was the object of the conspiracy to injure or destroy.

[29] *See, e.g., United States* v. *Chakraberty*, 244 F. 287 (S.D. N.Y. 1917); *United States* v. *Ram Chandra*, 254 F. 635 (N.D. Cal. 1917).

[30] *See* note 26, *supra*.

public significance.[31] Both protect against the destruction of property belonging to a government with which the United States is at peace, but the proposal also protects such property against theft and tampering. Both protect against the destruction of public facilities, with section 1202(c) relying on the definition of "vital public facility" in proposed section 1709(c). The proposal deals with property outside the United States which belongs to a government with which the United States is at peace or if it is a vital public facility, it must be situated in a country with which we are at peace. The first part, which is concerned with property belonging to a foreign government, does not limit the location of the property to a nation with which we are at peace. It is unclear if 18 U.S.C. § 956 requires it be located in a nation with which we are at peace. The proposal, while accepting this limitation where property not owned by the government is concerned (vital public facilities), would also protect property belonging to a friendly government located in a nation with which we are at war. Thus, a conspiracy to blow up Country *A*'s embassy located in Country *B*, when we are at war with *B* but at peace with *A*, would be punishable under this section.

Proposed section 1202(c) requires the conduct to be a felony if the property involved was situated in the United States. This restriction eliminates minor depredations and by relying on other provisions of the proposed Code provides a ready guide for defining the conduct condemned under this section. The grading of the other Code provisions is not adopted, however, because the gravamen of the offense is the "foreign relations" element and not the harm to the property. For example, the tampering or destruction of property might be sabotage, a Class A felony, if directed against the United States. While "sabotage" provides a basis for defining the conduct, it would not be a Class A felony if directed against a foreign nation outside the United States, but a Class C felony under this section.

Consideration was given to including conduct amounting to violations of proposed section 1103 (armed insurrection), thereby covering the facts of some cases prosecuted under 18 U.S.C. § 960.[32] This was rejected on the grounds that the specific conduct, not amounting to launching a hostile military expedition or espionage, or assassination or property destruction, theft or shipment of munitions in violation of other provisions of law, would involve the Federal courts in essentially political issues of the status of parties and the likelihood of the commencement of rebellion, and could involve essentially speech under circumstances where the significant evidence is abroad and, perhaps, not susceptible to the insight of a court in the United States. The issue was resolved so that a question of whether a government-in-exile is leading a rebellion in a foreign nation within the meaning of proposed section 1103 would not be presented to a Federal court under proposed section 1202.

4. *Sections 1204 and 1205: Prohibited International Transactions.*— Regulation of foreign transactions is an important instrument of modern foreign policy. Regulation may be an element in protecting neutrality or national security or a means of leverage to accomplish international goals. Current provisions are scattered throughout the United

[31] One reported prosecution involves a conspiracy to blow up a bridge in Zambia. *United States* v. *Elliot*, 266 F. Supp. 318 (S.D. N.Y. 1967).

[32] *See* the Extended Note on Military Enterprise Under 18 U.S.C. § 960, *infra*.

States Code and generally speaking do not discriminate between minor and serious violations for the purpose of grading offenses. Most are presently graded as felonies and some authorize penalties up to as much as 10 years. Proposed sections 1204 and 1205 seek to identify those provisions for which felony treatment for aggravated violations would be appropriate and the proposed sections further specify what constitutes an aggravated violation.

(a) *Section 1204: violating laws regulating international transactions.* Section 1204* deals with violations of: 22 U.S.C. § 447(c) (financial and arms transactions with belligerents); 22 U.S.C. § 287c(b) (support of United Nations Security Council Resolutions); 50 U.S.C. App. § 3(a) (unlicensed trading with the enemy); 50 U.S.C. App. § 2405 (exports to communist dominated nations under the Export Control Act). Under the proposal, these provisions would remain in their present titles and violations would be misdemeanors or regulatory offenses (section 1006), or Class C felonies under proposed section 1204 if the specified aggravated circumstances exist. The circumstances specified in section 1204 focus on culpability of the actor and harm to the regulatory scheme. Engaging in conduct in violation of the specified laws "with knowledge that his unlawful conduct substantially obstructs, impairs, or perverts the administration of the statute or any government function" or with intent to conceal a transaction from the enforcing agency would constitute a Class C felony. The obstruction aspect of section 1204 parallels draft section 1301 (physical obstruction of government functions) but does not require the obstruction to be "physical" and adds the requirement of substantiality. The latter requirement will permit judicial development of factors discriminating between felony and regulatory treatment. Thus, a failure to file a minor form ordinarily would not be a substantial obstruction. The key to construction would be related to the harm the statute is designed to prevent. Consideration was given to use in the draft of the phrase, "substantially impairs implementation of the policy which the act involved was designed to serve." Concern that such a formulation would be deficient for vagueness was a factor in the adoption of the draft language which is a common formulation.[33] Consideration was given to grading classifications based on the amount of the transaction and whether or not the actor was engaged in the business of foreign trade.[34]

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*The Study Draft version of section 1204 also covers 12 U.S.C. § 95a and 50 U.S.C. App. § 5(b).

[33] With respect to the term "substantially" see the apposite comments on "seriously" in the comment on sabotage at note 8.

[34] Earlier versions of the prohibited trade provisions would have discriminated between felony and nonfelony conduct by limiting felony conduct to the serious harm to be avoided, and explicitly identifying the felony conduct as by specifying the prohibited transactions:

§ —. Prohibited Trade With Belligerents.

(1) A person is guilty of a Class C felony if he violates the provisions of:

(a) 22 U.S.C. § 447, by knowingly engaging in trade in arms, ammunition or implements of war or in a financial transaction with a foreign nation engaged in armed hostilities;

(b) 18 U.S.C. §§ 963, 966–967, by knowingly violating the restrictions on the departure of a vessel or aircraft designated in an order issued pursuant to such provisions in reckless disregard of the fact it will cause harm against which such provisions are directed.

These factors were rejected as the basis for discriminating between felonies and lesser offenses because they did not necessarily involve the culpability or the harm for which felony treatment is reserved in the proposed Code.

The standards proposed in section 1204 would permit taking these factors into account in determining whether a felony has been committed, but consistent with the underlying policy of the Code, the main focus would be on culpability and the substantiality of the harm. It should be noted that transactions involving persistently "bad actors" or large amounts, even if not subject to felony grading under section 1204, could be subject to increased penalites under the persistent misdemeanant provision (section 3003) or regulatory offense provision (flouting regulatory authority under section 1006). In addition, Title 18 imposes no limit on the fines which may be imposed under the provisions of other titles which, together with control over licensing, should be sufficient to deter violations of these essentially regulatory offenses without reliance on a blanket threat of felony prosecution.

(b) *Effect of sections 1204 and 1205 on existing neutrality provisions (18 U.S.C. §§ 961–967; 22 U.S.C. §§ 441–447).* Current law contains several provisions which regulate trade in aid of neutrality policy. The basic provision, 22 U.S.C. § 447, authorizes 5 years' imprisonment for engaging in trade in war materials or financial transactions with belligerents but do not require a proclamation under 22 U.S.C. § 441. In addition, 18 U.S.C. §§ 961, 962 and 964 prohibit supplying items to belligerents but do not require a proclamation under 22 U.S.C. § 441. Essentially "base of operation" provisions,[35] they prohibit supplying arms to warships (18 U.S.C. § 961) or fitting out warships (18 U.S.C. § 962), within the United States, or sending warships out of the United States, built on order of a belligerent (18 U.S.C. § 964). It is proposed to transfer these Title 18 sections to Title 22; but consideration should be given to their eventual elimination with their present coverage to be assumed by the current pervasive Federal regulation of ship building and sales of ships and export of arms (*see, e.g.*: 46 U.S.C. § 835; 22

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(2) In this section, "trade" means a transaction in which the total amount involved exceeds [$100,000] or the profit realized exceeds [$20,000].

§—. Trading With the Enemy.

(1) A person is guilty of an offense if he violates the provisions of 50 U.S.C. App. § 3(a) by intentionally engaging in a transaction with an enemy of the United States or an ally of such enemy.

(2) The offense is a Class B felony if the actor is regularly engaged in the business of foreign trade or if the transaction exceeds $5,000 in value. Otherwise it is a Class C felony.

§ —.Trading With A Nation With Which Trade Is Prohibited.

A person is guilty of a Class C felony if:

(a) he is regularly engaged in the business of foreign trade or if he is not so engaged, he acts in reckless disregard of the fact that the transaction in which he engages is prohibited or requires a license, and

(b) he violates the provisions of:

(i) 22 U.S.C. § 287c, by engaging in trade or using communications facilities with a foreign nation when such conduct is prohibited under 22 U.S.C. 278e(b); or

(ii) 50 U.S.C. App. § 2025(b), by knowingly exporting things to a "communist-dominated" nation.

[35] *See* note 8, *supra*.

U.S.C. § 1934; 50 U.S.C. App. § 2023) which may have to be modified to cover transfers within the United States. In any event, the area should be simplified and the myriad of overlapping regulations systemized.[36] Proposed section 1204 contributes to this simplification by placing in Title 18 only one Class C felony offense which deals with trade with belligerents as a violation of 22 U.S.C. § 447(c) (proposed section 1204(2)(a)). 22 U.S.C. § 447 prohibits engaging in certain arms and financial transactions after the President has promulgated a declaration under 22 U.S.C. §§ 441, designating nations as belligerents. With the transfer of 18 U.S.C. §§ 961 and 964 to Title 22 as misdemeanors or less, violations of these provisions (now felonies) would not be felonies unless the conditions for invoking 22 U.S.C. § 447 are present and the items traded are war materials under that section.[37]

Current 18 U.S.C. §§ 963 and 965–967 supplement the other neutrality provisions by making it a felony to violate restrictions on departures of vessels where the order is designed to restrict the delivery of the vessel, or the supply of goods or services, to a foreign nation engaged in armed hostilities. 18 U.S.C. §§ 963 and 965–967 will be transferred to Title 22 in a form which authorizes the issuance of such orders and a knowing violation will be a Class C felony under proposed section 1205. Section 1205 also covers departure of aircraft and 18 U.S.C. §§ 963 and 965–967 should be amended accordingly. Note that the "order" violated must be authorized and "designed for the purpose of restricting deliveries" and, hence, Class C felonies are not created merely by virtue of an order from a possibly overbearing official; there will have to be some actual basis in fact that the policy of the law was endangered by violation, *i.e.*, the order was designed for the proper purpose. Of course, bare violation of an order could be a regulatory offense.

(c) *Effect of section 1204 on 22 U.S.C. § 287c (United Nations Security Council Resolution) and 50 U.S.C. App. § 2405(b) (trade with communist dominated nations).* 22 U.S.C. § 287c authorizes measures to enforce United Nations Security Council resolutions by embargo and quarantine and authorizes 10 years' imprisonment. This was deemed too harsh even within the context of current law which provides for penalties no greater than 5 years for trade in violation of neutrality (22 U.S.C. § 447) or with communist nations in violation of 50 U.S.C. App. § 2405(b). Section 1204 retains felony treatment for violations of orders issued under 12 U.S.C. § 287c(b) if the requisite culpability is present. (*See* the discussion of proposed section 1204, *supra.*) 50 U.S.C. App. § 2405(b) is part of a complex which, in effect, gives the President unlimited power over exports. Criminal penalties for violation include 1 year's imprisonment and/or $10,000 for the first violation and 5 years and/or $20,000 for a second violation, under 50 U.S.C. App. § 2405(a), as well as 5 years and/or $20,000

[36] Detailed analysis of these provisions is not attempted in this comment, but for the overlapping aspects of the Title 18 provisions, *see* FENWICK, *supra* note 12, and for a recent summary description of other provisions, *see* Warnke & Morris, *National Security and International Business*, 1 L. & POL. IN INT'L BUS. 77 (1969).

[37] Whether a war material is in the prohibited category depends upon executive action under 22 U.S.C. § 1934. Attention is directed to the fact that 22 U.S.C. § 447 refers to 22 U.S.C. § 452(i), the predecessor of section 1934 and not to section 1934. Although section 452(i) should be read as section 1934, this is not a desirable way of handling a criminal statute. Act of Aug. 26, 1954, c. 937, tit. V, sections 542(a)(12), 542(b), 68 Stat. 861.

for export for the benefit of a communist dominated nation under 50 U.S.C. App. § 2405(b). The proposal would retain the felony for trade with the communist dominated nation, if the requisite culpability under section 1204 exists. Other violations of 50 U.S.C. App. § 2405, as well as 22 U.S.C. § 287c, will be regulatory offenses or misdemeanors.

(d) *Effect of section 1204 on the Trading with the Enemy Act (50 U.S.C.* App. §§ *1 et seq.*). Subsection 2(c) makes proposed section 1204 applicable to unlicensed trading with the enemy in times of declared war as provided by 50 U.S.C. App. §§ 3(a) and 2. Currently all violations of the Trading With The Enemy Act, with one minor exception,[38] are subject to 10-year penalties.[39] This includes violations of regulations which may not involve any threat of the harm which the Act was designed to prevent.[40] Reliance on section 1204 permits discrimination in grading based on the seriousness of the conduct. (Note that violation of censorship regulations is covered by proposed section 1116). Other violations concerning trade would be regulatory offenses or misdemeanors as may be determined under Title 50.

Felony treatment is not accorded violations of 50 U.S.C. App. § 5 (b)* which gives the President, in time of national emergency, power coextensive with his power in time of war, to regulate foreign trade by prohibiting financial transactions and freezing foreign assets. The national emergency provision best justifies the Supreme Court's characterization of the Act: "Instead of a carefully matured enactment, the legislation was a makeshift patchwork." *Guessefeldt* v. *McGrath*, 342 U.S. 308, 319 (1952).

The national emergency provision was added to the Act in 1933 to deal with the economic crisis; but under its aegis national emergencies with respect to national security have been dealt with, including those involving Korea and Cuba. *See Sardino* v. *Federal Reserve Bank of New York*, 361 F. 2d 106, 109 (2d Cir. 1966). The 10-year penalty applies to national emergency violations which may involve some very minor conduct. *See, e.g., United States* v. *China Daily News*, 224 F. 2d 670, 673 (2d Cir. 1955), dealing with small financial transactions involving newspaper advertisements and aid to relatives. Conduct warranting felony treatment should be explicity identified and included in Title 18, but it does not appear that there is a sufficient basis for treating such essentially regulatory violations as felonies.

5. *18 U.S.C. § 955 and Other Provisions Dealing With Foreign Transactions.*

(a) *18 U.S.C. § 955: financial transactions with foreign governments.* It is proposed that 18 U.S.C. § 955, which deals with financial transactions with foreign governments in debt to the United States, if retained, be transferred to Title 22 as a regulatory offense. An individual who buys a small denomination bond or even "sells" such a bond of a nation in debt without knowledge of the debtor-creditor relationship to the United States is currently subject to a penalty of $10,000

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[38] 50 U.S.C. App. § 19 (print, newspaper or publication in foreign languages).

[39] 50 U.S.C. App. § 16, 5(b)(3).

[40] The penalty provisions, *id.*, apply to "willful" violations of "provisions" of the Act, or "of any license rule, or regulation issued thereunder" or "order of the President."

*The final version of Study Draft section 1204 includes coverage of 50 U.S.C. App. § 5(b) and the identical provision in 12 U.S.C. § 95a because of their coverage of gold, a basic element of international monetary policy.

and 5 years' imprisonment, because there is no requirement of culpability in the statute. Aggravated or repeated offenses are sufficiently covered by the proposed regulatory offense provision (section 1006). If additional deterrence is required, transactions in excess of a stated amount can be made a Class A misdemeanor in Title 22 and repeated violations would be covered by the proposed persistent misdemeanant provision (section 3003).

(b) *Miscellaneous foreign trade provisions.* Consideration should be given to a number of special trade provisions in other Titles which authorize felony penalties. As previously noted, the offenses which remain in Title 22 (*e.g.*, section 445 (travel on belligerent ships); section 448 (soliciting contributions for belligerents); section 1934 (arms import and export)) are recommended either to be governed by the proposed regulatory offense provision (section 1006) or to be no greater than Class A misdemeanors. Similar decisions must be made concerning, for example:

(i) 15 U.S.C. §§ 76–77 and 46 U.S.C. §§ 142–43, which authorize a 2-year penalty for violating retaliatory import and foreign trade restrictions;

(ii) 16 U.S.C. § 8250—2-years' imprisonment for violating export restrictions on electricity;

(iii) 31 U.S.C. § 395—5 years for violations concerning export of United States coins;

(iv) 46 U.S.C. § 835—5 years for unlawful transactions concerning ships;

(v) 50 U.S.C. App. § 1932—2 years for violations concerning import restrictions on rubber.

It is intended that these offenses remain in their respective titles, but be no more than misdemeanors or regulatory offenses. The proposed grading is deemed sufficient unless some special circumstances not presently apparent require felony treatment, considering the lack of prosecution under current law and the fines authorized in the proposed Code to take the profit out of such transactions. Note that proposed section 3301 authorizes fines of twice the pecuniary gain from the transactions and even greater fines may be authorized outside Title 18.

6. *Section 1203: Recruiting and Enlistment in Foreign Armed Forces Within the United States.*—The proposed new Criminal Code will also include a provision dealing with use of United States territory as a base for recruiting for foreign armed forces. Although most of the foreign relations offenses to be retained in the Code are felonies, retention of this misdemeanor in Title 18 is proposed because it is a basic permanent plank of American foreign policy, not dependent on a status of neutrality.

Proposed section 1203 makes it a Class A misdemeanor to recruit for, or enter, foreign armed forces within the United States. It preserves the substance of current law under 18 U.S.C. § 959 which, however, authorizes punishment of 3 years' imprisonment and $1,000. It was concluded that raising the current penalty to Class C felony status imposed too severe a punishment for merely joining a foreign army while in the United States, particularly when neither current law nor the proposal prohibits departure from the United States with intent to join

a foreign armed force.[41] Of course, if the departure constitutes a military expedition under proposed section 1201 (current law—18 U.S.C. § 960), it would be embraced by that section. It should be noted that this provision, like current law, applies to recruiting and enlistments at *any time* and is not limited to "neutrality" situations, *i.e.*, where a state of war exists. Thus, it is only, in part, a "base of operations" provision. (*See* note 8, *supra.*)

The exceptions contained in 18 U.S.C. § 959(b), relating to enlistment by citizens of United States allies, and 18 U.S.C. § 959(c), concerning enlistment of foreign citizens aboard their nation's warships, are narrow in scope and rely, in part, on regulations. These should be transferred to Title 22. The defense in draft section 1203(2) dealing with enlistment or recruiting authorized by statute permits reliance on these provisions as a defense. For further discussion, *see* the note on 18 U.S.C. § 959(c), *infra.*

The term "enters or agrees to enter" is intended to include the acceptance of commissions and to replace 18 U.S.C. § 958, which provides:

> Any citizen of the United States who, within the jurisdiction thereof accepts and exercises a commission to serve a foreign prince, state, colony, district, or people, in war, against any prince, state, colony, district, or people, with whom the United States is at peace shall be fined not more than $2,000 or imprisoned not more than three years, or both.

Although 18 U.S.C. § 958 is limited to the acceptance of commissions and the exercise thereof within the United States by United States citizens and must involve a nation with which we are at peace, it covers nothing that is not covered by 18 U.S.C. § 959 and proposed section 1203.[42]

The term "recruits" is intended to connote foreign official involvement or sanction as distinguished from the persuasion of one individual by another to leave the country to join, for example, Biafran or Israeli forces. Under the proposal, "recruits" is viewed as the counterpart to conduct within the United States amounting to either an entry into the foreign service within the United States or an agreement to enter, with formal enlistment occurring abroad. Recruiting, so conceived, is an offense under current law and under proposed section 1203(1)(b). Both the language and application of current law present uncertainties with respect to solicitation. For example, the exception to 18 U.S.C. § 959(a) in section 959(b) for recruiting by citizens of allies does not apply if they "hire or *solicit*" a citizen of the United States. However, it is not clear that 18 U.S.C. § 959(a) prohibits "soliciting" a person to enlist unless it constitutes an attempt at enlistment, hiring or retention within the United States. Current law is not entirely clear on the status of broadside appeals by way of newspaper advertisements and other means of soliciting a person to go abroad to

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[41] As originally enacted with the same penalty (3 years/$1,000), it was designated a "high misdemeanor." *See* DEAK & JESSUP, *supra* note 13; *see also* notes 15 and 16, *supra.*

[42] *See* FENWICK, *supra* note 12, at 60–61, who strains to find some purpose for 18 U.S.C. § 958, but concludes that the acceptance of the commission is the equivalent of enlistment under 18 U.S.C. § 959. For diplomatic correspondence on the subject, see HACKWORTH, *supra* note 8, at 404 *et seq.*

join a foreign armed force.[43] It is the intention of proposed section 1203 that mere solicitation of a person to go abroad, without more, should not be an offense if the conduct goes no further than mere persuasion and involves no commitment or agreement entered into within the United States.[44]

7. *Section 1206: Agents of Foreign Governments.*—18 U.S.C. § 951 provides:

> Whoever, other than a diplomatic or consular officer or attache, acts in the United States as an agent of a foreign government without prior notification to the Secretary of State, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

It is proposed that this provision be transferred to Title 22 (Foreign Relations and Intercourse).[45] 22 U.S.C. § 611 *et seq.* authorize 5 years' imprisonment for failure to register as an agent of a foreign principal. Both 22 U.S.C. § 611 *et seq.* and 18 U.S.C. § 951 cover agents of foreign governments, but 22 U.S.C. § 611 *et seq.* cover agents of nongovernmental foreign principals, as well. 22 U.S.C. § 611 *et seq.* are oriented to political activities such as propaganda. 18 U.S.C. § 951 does not contain a definition of the activity which requires registration and it has been said that the cases "assume that it means one who acts directly or indirectly for the benefit of a foreign government." [46]

It is unclear whether 18 U.S.C. § 951 is intended to cover more persons that 22 U.S.C. § 611 *et seq.* It is clear they presently overlap except with respect to the identity of the official with whom an agent must register.[47] It is also clear that 18 U.S.C. § 951—an offense, on its face, basically prophylactic—is used to subject defendants to possible 10-year terms when the proof falls short of that required for espionage.[48] This cannot be rationally justified on the basis of the conduct with which the statute on its face purports to deal.[49] A mere failure

[43] *See* HACKWORTH, *supra* note 8, at 406–407, wherein a 1915 statement of the Assistant Secretary of State avers it is "possible" that advertising for recruits violates neutrality laws, but 1916 and 1917 statements are to the contrary. *See* FENWICK, *supra* note 12, at 127, where it is stated that mere solicitation does not contravene the Criminal Code.

[44] *See* note 43, *supra*. For various kinds of additional acts, including agreement and payment of passage, *see* 7 HACKWORTH, note 42, *supra*.

[45] It was formerly located in Title 22. 22 U.S.C. § 233 (1940 ed.)

[46] *United States* v. *Butenko*, 384 F.2d 554, 566 (3d Cir. 1967).

[47] *See United States* v. *Melekh*, 193 F. Supp. 586 (N.D. Ill. 1961); *see also Von Clemm* v. *Smith*, 255 F. Supp. 353, 368 (S.D. N.Y. 1965), to the effect that an "agent" under 18 U.S.C. § 951 and an "agent" under 50 U.S.C. App. § 9a (Trading With The Enemy Act) are analogous insofar as the definition of "agent" is concerned, and that an agent of a foreign government can be one who engages in intelligence work. *Sarthou* v. *Clark*, 78 F. Supp. 139 (S.D. Cal. 1948), or propaganda, *Hansen* v. *Brownwell*, 234 F.2d 60 (D.C. Cir. 1956).

[48] *See, e.g., United States* v. *Heine*, 151 F.2d 813 (2d Cir. 1945), *cert. denied*, 328 U.S. 833 (1946); *see also United States* v. *Melekh*, 193 F. Supp. 586 (N.D. Ill. 1961), for a prosecution under 18 U.S.C. § 793 and § 951, each a 10-year offense for essentially the same conduct.

[49] *Cf. United States* v. *Melekh*, 193 F. Supp. 586 (N.D. Ill. 1961), to the effect that 22 U.S.C. § 611 and 18 U.S.C. § 951 serve different interests, but consider that this does not mean the penalties should differ for essentially the same conduct. 193 F. Supp. at 591. Furthermore, it is more likely that the national security oriented conduct under 22 U.S.C. § 611 *et seq.*, now 5 years, is more serious than the general conduct under 18 U.S.C. § 951, now 10 years.

to register or notify authorities should be no more than a Class B misdemeanor and should be located in Title 22. Where there is a purpose to defeat the purposes of the statute by concealing one's status or activities, it would be a Class C felony under proposed section 1206.

Unless 18 U.S.C. § 951 has some application which is not apparent, it is recommended that it be repealed. Notification of the Secretary of State *and* the Attorney General could be accomplished as an administrative matter, by registration with the Secretary of State or the Attorney General with a copy to the other.

8. *Private Correspondence With Foreign Governments.*—18 U.S.C. § 953 states:

> Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined not more than $5,000 or imprisoned not more than three years, or both.
>
> This section shall not abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects.

This section, known as the Logan Act, should be repealed. There has been doubt concerning its scope and wisdom since its enactment. The statute has not been used for prosecution; and insofar as there is a need to protect foreign relations from private acts, the prohibited conduct can be covered by perjury and false statements, impersonation of officials and physical obstruction provisions. By its terms, correspondence containing ideas clearly identified as individual action, addressed to foreign officials, could come within its scope and could be an instrument of political oppression. The constitutionality of the Logan Act is also in doubt. In *Waldron* v. *British Petroleum Co.*, 231 F. Supp. 72, 89 (S.D. N.Y. 1964), where plaintiff's alleged violation of the Logan Act was raised as a defense in a civil suit, the court stated:

> Another infirmity in defendants' claim that plaintiff violated the Logan Act is the existence of a doubtful question with regard to the constitutionality of that statute under the Sixth Amendment. That doubt is engendered by the statute's use of the vague and indefinite terms, 'defeat' and 'measures.' See United States v. Shackney, 333 F.2d 475 (2d Cir. 1964); Note, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U.Pa.L.Rev. 67 (1960); E. Freund, The Use of Indefinite Terms in Statutes, 30 Yale L. J. 437 (1921). Neither of these words is an abstraction of common certainty or possesses a definite statutory or judicial definition.

In *Waldron*, the court also briefly summarized the history of the Act:

> The Logan Act originated out of a resolution offered on December 26, 1798 by Congressman Roger Griswold of Connecticut. After it was reported out as a bill, it was approved by President Adams on January 30, 1799. The debates on this legislation before the 5th Congress, 3rd Session (1798–1799) were thereafter compiled by Gales and Seaton in 1851 as Annals of Congress of the United States. Page references herein are to the 1851 compilation.
>
> The primary purpose of the resolution was "to punish a crime which goes to the destruction of the Executive power of the Government" (p. 2438); 'to guard by law against the interference of individuals in the negotiation of our Executive with the Governments of foreign countries' (p. 2494; see also pp. 2588, 2604); to proscribe the exercise by an individual of the power 'to frustrate all the designs of the executive' (p. 2494).
>
> The statute as a whole was criticized in debate by Albert Gallatin (of Pennsylvania) and Edward Livingston (of New York) on the ground that 'it is drawn in the loosest possible manner; and wants that precision and correctness which ought always to characterize a penal law' (p. 2637; see also p. 2595); and that there is no 'clear idea of the precise acts upon which it is designed to operate' (p. 2690).
>
> The record of debates discloses no discussion of the intended meaning of the words 'defeat' or 'measures.'
>
> The Court finds no merit in plaintiff's argument that the Logan Act has been abrogated by desuetude. From the absence of reported cases, one may deduce that the statute has not been called into play because no factual situation requiring its invocation has been presented to the courts. Cf. Shakespeare, Measure For Measure, Act II, Scene ii ('The law hath not been dead though it hath slept.')
>
> It may, however, be appropriate for the Court (Canons of Judicial Ethics, Judicial Canon 23) to invite Congressional attention to the possible need for amendment of Title 18 U.S.C. § 953 to eliminate this problem by using more precise words than 'defeat' and 'measures' and, at the same time, using language paralleling that now in § 954. (231 F. Supp. at 89n.30.)

9. *False Statements Influencing Foreign Governments.*—18 U.S.C. § 954 states:

> Whoever, in relation to any dispute or controversy between a foreign government and the United States, willfully and knowingly makes any untrue statement, either orally or in writing, under oath before any person authorized and empowered to administer oaths, which the affiant has knowledge or reason to believe will, or may be used to influence the measures or conduct of any foreign government, or of any officer or agent of any foreign government, to the injury of the United States, or with a view or intent to influence any measure of or action by the United States or any department or

agency thereof, to the injury of the United States, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

The subject matter of 18 U.S.C. § 954 is to be dealt with under the proposed perjury provisions by providing a jurisdictional base for official proceedings, whether foreign or domestic, in which the United States is a party. This will define the "dispute or controversy" reference in 18 U.S.C. § 954, and also limit the subject matter to statements of facts.

10. *Possession of Property in Aid of Foreign Government; Interference with Foreign Relations Function of the United States.*—18 U.S.C. § 957 [50] was first enacted in 1917 and, even at that time the scope and meaning of its terms was uncertain.[51] There have been no reported prosecutions under this section. Its repeal is recommended. To the extent it covers aiding a foreign government to violate a penal statute, it can be covered by the accomplice provisions which do not permit a defense that the other party is "immune from prosecution, or is otherwise not subject to justice." (*See* proposed section 401 (2)(b) (accomplices).)

The possible 10-year penalty for aiding a foreign nation to violate the rights of the United States under the law of nations or a treaty is also subject to serious objection. The content of the entire "law of nations," to which this section literally refers, is not definite enough to warrant inclusion by reference in a modern Criminal Code.

Insofar as rights under a treaty are concerned, one solution would create jurisdictional bases for physical obstruction of governmental functions under proposed section 1301, to include all governmental functions within the territory of the United States and also include physical obstructions abroad either by (a) a citizen of the United States or (b) citizens whose conduct is directed to the "foreign relations function." The "foreign relations function" could be further defined as:

(i) the receipt of a benefit, the exercise of a right or the performance of an obligation, by the United States, under a treaty or other agreement with a foreign government; or

(ii) the carrying on of armed hostilities, or negotiations in connection with armed hostilities, by the United States.

The former would cover such conduct as blowing up AID material in a foreign harbor, or assassinations. The latter would cover individuals who are disillusioned with the conduct of a particular war (*e.g.*, Vietnam) and who would attempt an adventure of their own by bombing Hanoi with the intention to obstruct our negotiations. If the jurisdictional base is adopted, the offense would be graded either

[50] § 957. Possession of property in aid of foreign government.

Whoever, in aid of any foreign government, knowingly and willfully possesses or controls any property or papers used or designed or intended for use in violating any penal statute, or any of the rights or obligations of the United States under any treaty or the law of nations, shall be fined not more than $1,000 or imprisoned not more than ten years, or both.

[51] *See* CONG. REC. 2068–2069 (1917) for discussion of identical language in provision dealing with search warrants, now covered by Rule 41 of the Federal Rules of Criminal Procedure.

as a Class A misdemeanor (proposed section 1301) or the class for any other offense which is committed in the course of violating section 1301.

11. *Protection of Foreign Diplomatic Missions in the United States.*—No specific offenses concerning foreign diplomatic personnel or property are proposed. Instead, the status of the victim as a foreign diplomat or head of state is to become a jurisdictional base for offenses elsewhere in the proposed Code, such as homicide, assault *etc.* Grading would be based on the offense committed and not the victim's status. 18 U.S.C. § 112 which authorizes 3 years' imprisonment and $5,000 for assaults on diplomatic personnel, without regard to seriousness of the injury, would be repealed.[52] In addition, proposed section 1381 covers impersonating foreign officials and together with the fraud provisions in the new Code eliminate the need for a separate impersonation provision as in current 18 U.S.C. § 915. It is also concluded that 18 U.S.C. § 703, wearing the uniform of a friendly nation "with intent to deceive or mislead" is adequately covered by fraud provisions.

12. *Piracy.*—It is recommended that 18 U.S.C. § 1661 (piracy under the law of nations) be repealed and that the subject matter be covered by making piracy a base for the exercise of Federal jurisdiction over designated offenses defined in the new Criminal Code. A section on piracy to be included in the chapter on jurisdiction would state:*

> Piracy.
>
> (1) *Jurisdiction defined.* An offense to which this section is expressly made applicable is [piracy,] a federal offense, if it is comitted for private ends by the crew or the passengers of a private ship or a private aircraft, or committed by the crew of a warship or government ship or government aircraft whose crew has mutined and taken control of the ship or aircraft, and directed:
>
> (a) on the high seas, against another ship or aircraft, or against persons or property on board another ship or aircraft;
>
> (b) against a ship, aircraft, persons or property in a place outside the jurisdiction of any nation or government.
>
> (2) *Definitions.*
>
> (a) "Piracy" includes participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
>
> (b) "High seas" means all parts of the sea that are not included in the territorial sea or in the internal waters of any nation or government;
>
> (c) "Pirate ship or aircraft" means a ship or aircraft under the control of persons who have used or intended

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[52] Current law grades on status but does not require knowledge of the status. *See, e.g., United States* v. *Ortega*, 27 F. Cas. 359 (No. 15, 971) (C.C. E.D. Pa. 1825), Denmark and Norway increase the usual penalties when a foreign head of state or representative is involved. DANISH CRIM. CODE § 110d (1933) (Copenhagen 1958); NORWEGIAN PEN. CODE § 96 (1961) (American Series of Foreign Penal Codes).

*Note the inclusion of piracy as a common jurisdictional base under proposed section 201(*l*) and the definition in proposed section 212.

to use a ship or aircraft to commit an offense to which this section is applicable.

18 U.S.C. § 1651, the current basic United States statute on piracy, states:

Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.

The constitutional basis for Federal legislation on piracy is article 1, section 8, clause 10:

The Congress shall have Power . . . to define and punish Piracies and Felonies committed on the High Seas, and Offences against the Law of Nations.

On May 26, 1960, the United States Senate ratified the Convention on the High Seas adopted by the United States Conference on the Law of the Sea. [1962] 13 U.S.T. 2313, T.I.A.S. No. 5200. The Convention defines piracy as follows:

Article 15

Piracy consists of any of the following acts:

(1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(*a*) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(*b*) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State:

(2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.

The proposed jurisdictional provision, substantially the same as article 15 of the Convention would be a base for Federal jurisdiction over murder, robbery, assault, kidnapping, rape, arson and theft. It would differ from the Convention article only in that conduct defined by the new Criminal Code would be substituted for the more indefinite terminology of the Convention, "illegal acts of violence, detention or any act of depredation." [53]

The recommended approach is supported by the philosophy of the proposed Code and the nature of piracy itself. The Code seeks to de-

[53] The reference in the proposed jurisdictional definition to the warship run by a mutinous crew is derived from article 16 of the Convention on the High Seas, May 26, 1960 [1962] 13 U.S.T. 2313, T.I.A.S. No. 5200.

The United States Department of Justice in a letter to the Commission dated May 10, 1968 enclosed a draft bill which would have substituted for 18 U.S.C. § 1651 the piracy definition in the Convention, including the "illegal acts of violence, detention or any act of depredation" phrase.

fine prohibited conduct and to identify the basis for the exercise of Federal jurisdiction. Piracy is essentially a jurisdictional base for dealing with certain conduct outside the territorial jurisdiction of any nation. In substance, international law piracy or piracy under the law of nations describes conduct which may be subjected to the municipal jurisdiction of any nation, *i.e.*, "the jurisdiction to arrest and punish has been regarded as universal," but it requires the municipal law to subject it to such jurisdiction.[54] After some early legislative shifts and uncertainties,[55] the United States assumed jurisdiction over piracy "as defined by the law of nations" (18 U.S.C. § 1651). What constitutes piracy has been a matter of uncertainty in international law and consequently in United States municipal law which explicity relies on the "law of nations." [56]

The nature of the depredations which may be subject to "universal jurisdiction" is not clear in all cases likely to come before a municipal court. For example, the status of mutineers aboard a ship and the position vis-à-vis a foreign power of unrecognized insurgents have been uncertain. The proposal seeks to resolve these problems and place international law piracy in its proper perspective as a jurisdictional base. It does so by relying on municipal definitions of the offenses and an international definition of the jurisdiction. The offenses included are those which are appropriate to the treaty phraseology which goes beyond the most narrow extant definition of "sea-robbery." [57] United

[54] Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334, 339 (1924) [hereinafter cited as Dickinson]: HARVARD RESEARCH IN INTERNATIONAL LAW, *Draft Convention on Piracy*, 739 (1934) [hereinafter cited as *Draft Convention on Piracy*].

[55] The history is detailed in Dickinson, *Is the Crime of Piracy Obsolete*, *supra* note 54. In passing, it should be noted that the author's answer was in the negative.

[56] The 1948 Reviser's Note stated:

> In the light of far-reaching developments in the field of international law and foreign relations, the law of piracy is deemed to require a fundamental reconsideration and complete restatement, perhaps resulting in drastic changes by way of modification and expansion. Such a task may be regarded as beyond the scope of this project. The present revision is, therefore, confined to the making of some obvious and patent corrections. It is recommended, however, that at some opportune time in the near future, the subject of piracy be entirely reconsidered and the law bearing on it modified and restated in accordance with the needs of the times.

See Comment on Article 3, *Draft Convention on Piracy*, *supra* note 54, at 749, 768 *et seq.* for an extensive discussion of what constitutes international law piracy. *See also* 2 HACKWORTH, *supra* note 8 at 684 *et seq.*

[57] *See* Dickinson, *supra* note 54. *Cf.* article 3 of the *Draft Convention*, *supra* note 54:

ARTICLE 3

> Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state:
>
> 1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.
>
> 2. Any act of voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship.
>
> 3. Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article.

States cases have often referred to "sea-robbery" as a basic concept, but the cases and language support the broader view represented by the inclusion of murder, arson and the other offenses referred to above.[58]

The recent ratification of the United Nations Convention covering piracy [59] provides a unique opportunity to modernize the law of piracy and to resolve current uncertainties as follows: [60]

> (i) The intention to rob (animus furandi) is not required. Acts of piracy may be prompted by feelings of hatred or revenge, and not merely by the desire for gain;
>
> (ii) The acts must be committed for private ends;
>
> (iii) [Except for mutinied warships], piracy can be committed only by private ships and not by warships or other government ships;
>
> (iv) Piracy can be committed only on the high seas or in a place situated outside the territorial jurisdiction of any State, and cannot be committed within the territory of a State or in its territorial sea;
>
> (v) Acts of piracy can be committed not only by ships on the high seas, but also by aircraft, if such acts are directed against ships on the high seas;
>
> (vi) Acts committed on board a ship by the crew or passengers and directed against the ship itself, or against persons or property on the ship, cannot be regarded as acts of piracy.

Unlike the International Law Commission, to which the foregoing relates and which did not recognize that piracy can be committed by aircraft against aircraft,[61] the Convention provides that acts of piracy can be committed by and against ships and aircraft, but states the victim must be "on the high seas." Consideration should be given to expanding jurisdiction to include "over the high seas," as is the case with United States aircraft within the special maritime and territorial jurisdiction of the United States (18 U.S.C. § 7(5)).[62]

In addition to piracy under the law of nations, the United States defines other conduct as piracy. 18 U.S.C. §§ 1652, 1653 and 1654 were designed to deal with privateering against the United States on behalf of a foreign power by an American citizen (18 U.S.C. §§ 1652, 1654) and by an alien contrary to treaty between the United States and his own government (18 U.S.C. § 1653). Although "privateering," the

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[58] *See* Dickinson, *supra* note 54, and authorities and cases in 4 WHITEMAN, *supra* note 7, at 648–667; 1 MOORE, DIGEST OF INTERNATIONAL LAW 935 (1906); 2 MOORE, *id.*, 951–979 (1906).

[59] *See* the declaration of Great Britain that the U.N. Convention is to be "treated as constituting part of law of nations" in piracy proceedings, 47 HALS. 178, 184 (1967).

[60] 4 WHITEMAN, *supra* note 7 at 658 (commentary on the 1956 Draft of the International Law Commission, which was substantially the same as the U.N. Convention).

[61] *Id.* at 659.

[62] *See United States* v. *Cordova*, 89 F. Supp. 298, 302 *et seq.* (E.D. N.Y. 1950), holding that an airplane "over" the high seas was not on the high seas for jurisdictional purposes.

commissioning of private ships to plunder an enemy,[63] is not a major problem today, the United States should continue to outlaw privateering against its ships and aircraft by American citizens and by aliens in violation of treaty. To assume such coverage, a jurisdictional base to cover this issue should be included in the proposed Code. Thus, a jurisdictional base could read:*

> On the high seas, or in a place outside the jurisdiction of any state against citizens of the United States or against United States property, vessels or aircraft by a United States citizen, or an alien contrary to a treaty between the United States and the nation of the alien's citizenship.

The remainder of chapter 81, Title 18 (piracy and privateering) can similarly be dealt with as jurisdictional bases. Those portions not covered by piracy under the law of nations can be dealt with on the basis of jurisdictional assertions over United States vessels and the special maritime jurisdiction of the United States. For example,

> 18 U.S.C. § 1655. Assault on commander as piracy.
>
> Whoever, being a seaman, lays violent hands upon his commander, to hinder and prevent his fighting in defense of his vessel or the goods intrusted to him, is a pirate, and shall be imprisoned for life,

would be covered by robbery and assault under a general jurisdictional base covering offenses on United States vessels and aircraft; and if pirates are involved, the defendant would be a pirate or an accomplice of pirates.

Similar disposition will be made of 18 U.S.C. §§ 1656–1661, which in part involve either piracy under international law or common law offenses committed on the high seas or within the United States maritime jurisdiction.

Extended Note

Military Enterprise Under 18 U.S.C. Section 960

18 U.S.C. § 960 condemns hostile military "expeditions" and "enterprises."[1] Proposed section 1202 is intended to deal with the "enterprise" aspect of 18 U.S.C. § 960 by specifically describing conduct which in current law is neither statutorily defined nor, unlike "expedition,"[2] well developed in case law. There are two significant aspects to judicial treatment of the term "enterprise," relevant to the need for codification. The first is a liberating aspect which frees it from the strictures on what constitutes an "expedition." The source of this idea is *Wiborg* v. *United States*, 163 U.S. 632, 650 (1896), in

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[63] *See* 2 Hackworth, *supra* note 8 at 689–690, for authority privateering is permitted by international law according to a 1927 League of Nations study quoted therein. The U.N. Convention may outlaw privateering because it speaks of a conduct from a "private ship," but this language is a common description of pirate ships to distinguish it from public ships and the privateer seems to fall somewhere in the middle. The fact he acts with authority of a government is said to take him out of the "universal outlaw" class.

*See proposed section 208(g).

[1] 18 U.S.C. § 960 is set forth in the comment on proposed section 1201, *supra*.

[2] *See* comment on proposed section 1201, *supra*.

which the Supreme Court, after quoting authorities on international law on the obligations of neutrals with respect to "warlike" acts launched from neutral territory, sought to explain what is now 18 U.S.C. § 960:

> But this statute is to be construed as other domestic legislation is, and its meaning is to be found in the ordinary meaning of the terms used. The definitions of the lexicographers substantially agree that a military expedition is a journey or voyage by a company or body of persons, having the position or character of soldiers, for a specific warlike purpose; also the body and its outfit; and that a military enterprise is a martial undertaking, involving the idea of a bold, arduous, and hazardous attempt. The word 'enterprise' is somewhat broader that the word 'expedition'; and, although the words are synonymously used, it would seem that, under the rule that its every word should be presumed to have some force and effect, the word 'enterprise' was employed to give a slightly wider scope to the statute.

Concluding that an "enterprise" need not qualify as an "expedition," the question remained, what is an "enterprise" under 18 U.S.C. § 960? General statements in the cases are unsatisfactory.[3] Thus, considering the *Wiborg* statement just quoted, while "martial undertaking" is helpful, its adoption as a standard without qualification would render the restrictions on what constitutes an expedition meaningless. The Court then states it involves "the idea of a bold, arduous and hazardous attempt." Literally, this would mean that neutral territory could be used if the conduct was safe or not taxing. Having said this, it still must be recognized that there is conduct, not constituting the launching of a hostile military expedition, which should be prohibited. The cases which have relied on the term have condemned the sending out of spies from the United States,[4] sabotage missions launched from the United States,[5] and organizing revolutions (including supply of munitions to rebels) in the colonies of one belligerent in order to aid its enemy.[6] Thus, the cases provide a guide to specific conduct which

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[3] *See, e.g., United States* v. *Sander*, 241 F. 417, 419 (S.D. N.Y. 1917):

> I think the test was properly laid down in this court by Judge Wolverton in the case of United States v. Tauscher (D.C.) 233 F. 597, and applied by me at the trial and that test (although in the case of United States v. Tauscher there was a military expedition, as well as enterprise) is: What is the substantial character of the act? Was the act one which can fairly be considered as an accompaniment of military operations, so intimately connected with them that it forms a natural, if not inevitable, part of such operations? And were the person or persons engaged in it such persons as are reasonably to be regarded as part of a military or warlike enterprise?

There is often a failure to distinguish between expeditions and enterprises. *See, e.g., Jacobsen* v. *United States*, 272 F. 399 (7th Cir. 1920); *United States* v. *Chakraberty*, 244 F. 287 (S.D. N.Y. 1917) (only requires an act "warlike in nature"); *United States* v. *Ram Chandra*, 254 F. 635 (N.D. Cal. 1917).

[4] *See United States* v. *Sander*, 241 F. 417, 419 (S.D. N.Y. 1917), quoted *supra* note 3.

[5] *See United States* v. *Tauscher*, 233 F. 597 (S.D. N.Y. 1916), and *United States* v. *Ram Chandra*, 254 F. 635 (N.D. Cal. 1917).

[6] *See United States* v. *Chakraberty*, 244 F. 287 (S.D.N.Y. 1917).

a statute should condemn, but without any significant aid from the term "enterprise" or judicially developed descriptions or definitions. The strain of uncertainty or looseness of thought is illustrated by the following excerpt from *United States* v. *Sander*, 241 F. 417, 420 (S.D. N.Y. 1917), wherein the court concluded sending spies out from the United States is an "enterprise," but then stated:

> Nor do I mean to say that a person is not within the inhibitions of the act who is not within the precise category of a soldier or spy. The act prohibits a military enterprise, which the Supreme Court has defined as 'a martial undertaking, involving the idea of a bold, arduous, and hazardous attempt.' Wiborg v. United States, 163 U.S. 650, 16 Sup. Ct. 1134, 41 L. Ed. 289. It would seem evident that a person who inaugurates within the United States any act of a warlike nature, to be carried on thence against the territory or dominion of a foreign state with which this government is at peace, is denounced by the statute.
>
> I have wished to point out that the words 'military enterprise,' while including a military expedition, have been held by the Supreme Court to give a wider scope to the statute than the latter term, and that a 'military enterprise' may consequently include various undertakings by single individuals, as well as by a number of persons.

The underlying thought is that foreign governments are not entitled to protection by way of *criminal* statutes which broadly state politically oriented offenses when this approach is rejected for protection of the United States government itself.

Extended Note

18 U.S.C. section 959(c) (proposed section 1203(2)(b))

It has been stated that:[1]

> The 959(c) 'exception' was first included in Section 2 of the original 1794 Neutrality Law. . . .
>
> * * * * * * *
>
> The background to the proviso in original Section 2, present Section 959(c), is described in Fenwick's *Neutrality Laws of the United States* (1913) at page 99. Fenwick says:
>
> 'It was not thought by the framers of the Acts of 1794 and 1818 that the neutral obligations of the United States extended to the prevention of enlistments in the service of a foreign state, when the persons so enlisting owed allegiance to the foreign state as its subjects. In the *Instructions to the Collectors of Customs*, issued by Hamilton on August 4, 1793, it is distinctly stated that 'vessels of either of the parties, not armed, or armed previous to their coming into the ports of

[1] Whiteman, Digest of International Law, 242 (1968).

the United States, which shall not have infringed any of the foregoing rules, may lawfully engage or enlist therein their own subjects or citizens.'

* * * * * * *

The first substantial change, after 1794, in the history of present Section 959(c) took place in 1874. The 'exception,' previously included in Section 2 of the original Act of 1794, was separated and became an independent provision, Section 5291, of the Revised Statutes of 1874, by its terms applicable to all of the substantive crimes listed under Title 67, 'Neutrality.' Title 67, 'Neutrality,' included predecessors of present Sections 960 and 961. I have found no statements as to why the revisors made the 'exception' applicable to all of these neutrality crimes. Probably the exception was made applicable to all the neutrality [crimes] out of an abundance of caution. A transient alien who enlists on a war vessel of his own country might be violating Section 960, for instance, if the war vessel was to proceed on an expedition against a country at peace with the United States. The 1874 revisers might have reasoned that such a result was not contemplated by the original law, if the basic act of enlisting on the vessel of war was specifically said not to be a crime.

Until 1948 the neutrality laws remained substantially in the form of the revised statutes of 1874. However, in 1948, prior Section 5291, the 'exception,' was attached on to present Section 959 as sub-section (c) and the exception was said not only to apply to Section 959(a) (concerning enlistments and hiring) but also to 960 and 961. The Appendix to the report of the House Committee on the Judiciary said with respect to the revision of Section 959:

'References in subsection (c) to Section 960 and 961 of this Title are to the only other Sections to which the subsection can apply.' (H.R. Rep. No. 304, Appendix, 80th Cong., 1st Sess., p. A77 (1947).) A. Neidle, Attorney, the Legal Adviser's Office, Department of State, to the Legal Adviser (Chayes), 'Memorandum on the Legislative History of section 959(c) of title 18, United States Code,' Apr. 14, 1961, MS. Department of State, file 711.34/4–1461.

The relationship of section 1203(2)(b) to section 1201 (military expeditions against friendly powers) should be considered. No exception for hostile military expeditions or augmenting vessels (18 U.S.C. § 961) is included in the proposal, because joining a war vessel in the service of a foreign power where it was not commissioned or "organized" in the United States is not considered an expedition organized in the United States for the purpose of proposed section 1201. It is also proposed to treat 18 U.S.C. § 961 as a regulatory matter under Title 22 by way of regulation of trade in specific goods.

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APPENDIX

DISPOSITION OF CURRENT PROVISIONS ON FOREIGN RELATIONS

Current provision	*Disposition in new Criminal Code*
1. *18 U.S.C.* § *951* (agents for foreign governments).	Transfer to Title 22; sanction covered by section 1206 (failure of foreign agents to register); *see* comment, *supra*, for alternative disposition.
2. *18 U.S.C.* § *952* (diplomatic codes and correspondence).	Section 1112 (espionage); section 1113 (mishandling sensitive information relating to national security).
3. *18 U.S.C.* § *953* (private correspondence with foreign governments).	Repeal.
4. *18 U.S.C.* § *954* (false statements influencing foreign government).	Recommended as jurisdictional base for perjury (section 1351); *see* comment on 18 U.S.C. § 954.
5. *18 U.S.C.* § *955* (financial transactions with foreign governments).	Transfer to Title 22.
6. *18 U.S.C.* § *956* (conspiracy to injure property of foreign government).	Section 1202(c) (conspiracy to commit offenses against a friendly nation).
7. *18 U.S.C.* § *957* (possession of property in aid of foreign government).	Repeal: *see* comment, pp.——, *supra*, for coverage of substance of section 957 in general provisions.
8. *18 U.S.C.* § *958* (commission to serve against friendly nation).	Substance covered by section 1203 (unlawful recruiting and enlistment in foreign armed forces.
9. *18 U.S.C.* § *959* (enlistment in foreign service).	Section 1203 (unlawful recruiting and enlistment in foreign armed forces) covers section 959(a); subsections 959 (b) and (c) to be relocated in Title 22.
10. *18 U.S.C.* § *960* (expedition against friendly nation).	Section 1201 (military expeditions against friendly powers); section 1202 (conspiracy to commit offenses against a friendly nation).
11. *18 U.S.C.* §§ *961–967* (strengthening armed vessel of foreign nation; arming vessel against friendly nation; detention of armed vessel; delivering armed vessel to belligerent nation; verified statements as prerequisite to vessel's departure; departure of vessel forbidden for false statements; departure of vessel forbidden in aid of neutrality).	Substance of sections to be transferred to Title 22. Criminal sanctions: section 1204 (violating laws regulating international transactions); section 1205 (violating orders prohibiting departure of vessels and aircraft); section 1352 (false statements).
12. *18 U.S.C.* § *969* (exportation of arms, liquors and narcotics to Pacific Islands).	Transfer to Title 22.

COMMENT

on

IMMIGRATION, NATURALIZATION AND PASSPORTS

OFFENSES; SECTIONS 1221–1229
(Agata, Cross; March 24, 1970)

1. *Introduction.*—Sections 1221 through 1225 represent an effort to integrate into the new Code the many existing offenses designed to assist government regulation of immigration, citizenship, and foreign travel by citizens. Generally speaking, the approach has been:

(a) to avoid interfering with existing policy;

(b) to identify the parts of those offenses which are covered by general offenses such as bribery, perjury, false statements, forgery, *etc.*, and can thus be eliminated; and

(c) to identify the offenses which ought to remain in, or be transferred to, Title 18—usually the felonies—and which lesser grade matters ought to be regarded as regulatory offenses and placed in other titles, amended, if necessary, to provide for minor penalties or incorporation of the regulatory offense provision (section 1006). For those offenses which remain in Title 18, the objective is to reconcile the grading and definition with the general penal policy of the remainder of the Code.

The principal substantive changes which result from this process are in grading. The drafts give to Congress the primary role of identifying more particularly than existing law which misconduct should be a felony and which a misdemeanor.

For disposition of current offenses as a result of the proposed new Code, *see* Appendix, *infra.*

2. *Section 1221: Unlawful Entry into the United States.*—Section 1221 combines into one offense the conduct embraced by 8 U.S.C. § 1325, covering unlawful entry into the United States, and 8 U.S.C. § 1326, covering re-entry into the United States after deportation.

(a) *Avoiding immigration authorities and entry by deception.* Subsections 1 (a) and (b) of section 1221 carry forward, in almost identical language, the existing provisions of 8 U.S.C. §§ 1325 (1) and (2), relating to entry at a time or place other than one designated by law and evasion of inspection or examination by immigration officers. Subsection 1(c) of draft section 1221 replaces 8 U.S.C. § 1325(3) which deals with an alien who "obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact." Subsection (c) simply refers to an alien who intentionally "obtains entry to the United States by deception." The definition of "deception" in draft section 1229, derived from the theft provisions (section 1749), would cover all modes of deception, including use of false documents and impersonation. The requirement of a

written statement is consistent with administrative practice and the general false statements provision (section 1352). "Materiality" is built into the draft's requirement that the entry be obtained "by" deception.[1]

(b) *Re-entry after deportation.* Subsection (1)(d) of draft section 1221, carries forward 8 U.S.C. § 1326, and makes it an offense for an alien to enter after having been deported. The affirmative defenses to prosecution under the draft, contained in section 1221(3), carry forward two situations which are expressly excluded from current law by 8 U.S.C. § 1326. It is an affirmative defense to a prosecution under subsection 1(d) that the Attorney General consented to application for re-entry or that such consent is not required. Stated as affirmative defenses instead of exclusions as in existing law (8 U.S.C. § 1326), the issues of burden of proof and mistake are resolved with greater precision than in current law (draft sections 103(3), 303). Note that reasonable mistake of fact as to whether the Attorney General consented is an affirmative defense under draft subsection (3)(a). Draft subsection (4) carries forward the reference in 8 U.S.C. § 1326 to a deported alien "found" in the United States, as a presumption that he intentionally re-entered, rather than as part of the definition of the offense.[2] (For the effect of a presumption, *see* section 103 of the new Code.)

(c) *Grading of section 1221 (unlawful entry).* The major difference between draft section 1221 and current law is in grading. Under section 1221, unlawful entry is basically a Class A misdemeanor, but is graded a Class C felony: (i) if the actor uses another's, or a forged or counterfeit, entry document; or (ii) if he re-enters after having been deported because he was convicted of a felony involving moral turpitude. Under current law (8 U.S.C. § 1325) unlawful entry is a misdemeanor punishable by 6 months' imprisonment and conviction for a second offense is punishable by 2 years' imprisonment. All re-entry after deportation is currently a felony (8 U.S.C. § 1326: 2 years' imprisonment).[3] Generally, grading the offenses as Class A misdemeanors accords with existing prosecuting policy and administration of the immigration laws, because a second unlawful entry, or a re-entry after deportation for which felony treatment is authorized, is rarely prosecuted as a felony. In any event, general Class A misdemeanor treatment should be adequate in view of the power to treat persistent misdemeanants as felons under draft section 3003, and the right to deport illegal immigrants. Reservation of Class C felony grading for criminals who re-enter after being deported and those who use fraudulent documents covers cases presenting the most serious sources of harm and in which the threat of felony prosecution may be most effective as deterrent.

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[1] Similarly, 8 U.S.C. § 1325(3) refers to obtaining entry "by a willfully false or misleading representation or the willful concealment of a material fact."

[2] Apparently, the existing provision was intended to facilitate prosecutions for unlawful re-entry, but its form as a separate offense permitted prosecution of an unlawful alien re-entrant "found" in the United States after the enactment of the provision but who had re-entered prior to its adoption. *See United States* v. *Alvarado-Soto*, 120 F. Supp. 848 (S.D. Cal. 1954); GORDON & ROSENFIELD, IMMIGRATION LAW & PROCEDURE § 9.25 [hereinafter cited as GORDON & ROSENFIELD].

[3] That is, all illegal entry is so treated. Exceptions are stated in 8 U.S.C. § 1326; these are defenses under section 1221(3).

3. *Section 1222: Smuggling Aliens.*—Draft section 1222 (unlawfully bringing aliens into the United States) carries forward the existing prohibition against smuggling aliens (8 U.S.C. § 1324(a)(1)). The definition of the offense is unchanged from existing law, but the grading of section 1222 discriminates between conduct deserving of felony treatment and that for which misdemeanor treatment will suffice. Current law grades all such conduct as a felony. The proposal designates as felons those who act for pecuniary gain or who knowingly aid the unlawful entry of those who intend to commit a felony; other violations of section 1222 are Class A misdemeanors. Thus, while a person who illegally brings his wife into the United States would be guilty of an offense, under the proposal it is a misdemeanor and not a felony. On the other hand, professional smugglers, including those who, *e.g.*, as employment agencies, derive income from illegally bringing aliens into the United States, would be guilty of a Class C felony. It is contemplated that 8 U.S.C. §§ 1327 and 1328, aiding subversives and prostitutes to enter illegally, will be repealed, but the most serious aspect of this conduct—aiding with knowledge the alien intends to commit a felony—would be a Class C felony. In this respect, the proposal is broader than current law because it is not limited to prostitutes or subversives, but covers any felony under State or Federal law. In a sense, this is a facilitation punishable as a Class C felony. It should also be noted that under the accomplice provisions (section 401), one who aids an unlawful entrant would commit a felony if he aided an alien whose entry in violation of section 1211 is a felony.[4]

4. *Section 1223: Hindering Discovery of Illegal Entrants.*—Proposed section 1223 embraces the conduct proscribed by 8 U.S.C. § 1324 (2), (3). Current law makes it a felony (5 years/$2,000) to conceal or harbor an alien with intent to shield him from detection (8 U.S.C. § 1324(3)) or to knowingly transport an illegal alien in the United States "knowing or having reasonable grounds to believe his last entry into the United States occurred less than three years prior" to the furnishing of transportation (8 U.S.C. § 1324(a)(2)). These provisions are essentially accessory-after-the-fact provisions. (Those who aid the actual entry are accomplices to the entry.) Subsection (1) of section 1223 defines the offense in terms which track the accessory-after-the-fact provisions in section 1303 (hindering law enforcement). Subsection (2) grades the offense a Class C felony if it is engaged in for payment (subsection (2)(a)), or pursuant to the business of an employment agency (subsection (2)(b)), or with intent to employ the alien in a commercial enterprise (subsection (2)(c)), or with knowledge the alien intends to commit a felony (subsection (2)(d)); otherwise it is a Class A misdemeanor. The current law's express exclusion of employment from the definition of "harboring and concealing" is deemed unnecessary in view of the requirement that it be done with *intent* to prevent the alien's discovery. Thus, the very definition of the offense excludes mere employment of an alien, but where there is an intent to prevent the alien's discovery, coupled with the purpose to retain him in the employ of a commercial enterprise, the harboring is

[4] The legislative history of existing law and its judicial construction is replete with concern over its coverage of attempt, complicity in and conspiracy to violate the statute (*see* GORDON & ROSENFIELD, *supra* note 2, §§ 9.23b, 9.23e), concerns reduced by the proposed Code's general provisions on these subjects.

deemed serious enough to warrant felony treatment. If express assurance of exclusion of "mere employment" situations is deemed necessary, a subsection (3) could be added to read:

> *Effect of Mere Employment.* Nothing in this section shall be construed so that, by itself, employment of the alien by the actor, including the usual and normal practices incident to employment, constitutes a violation of this section.

Apparently the exclusion in current law is intended as reassurance for persons who employ aliens with knowledge of their illegal entry. One viewpoint would make even such conduct an offense in order to remove incentive for illegal entry and, at the least, implicit encouragement of such illegal entry. It is argued that knowing employment of illegal entrants subverts an important purpose of regulating immigration—maintenance of wage scales and employment opportunities for the legal domestic work force—and undermines an enforcement program involving significant executive and judicial resources committed to preventing illegal immigration.

5. *Fraudulent Acquisition of Citizenship and Passports (Sections 1224 and 1225); Disposition of "Use" Offense Under 18 U.S.C. § 1015(c).*—Sections 1224 and 1225 consolidate those aspects of sections 1015(a), 1424, 1425 (a) and (b), and 1542, dealing with fraudulently obtaining citizenship or a passport, and retain the felony treatment under current law. By virtue of sections 1224 and 1225, the misdemeanor false statements offense under section 1352 is raised to a Class C felony. The requirement that acquisition be "by deception" imports a requirement of materiality.[5]

The proposed complex does not contain a counterpart to either 18 U.S.C. § 1015(c), making it a felony to "use" fraudulently obtained documents or those "otherwise unlawfully obtained", or 18 U.S.C. § 1423, dealing with use of documents unlawfully issued or made. However, "use" of fraudulently obtained documents is generally a Class A misdemeanor under proposed section 1753 (deceptive writings) or a Class C felony if used in a fraud involving $500 or more (section 1753).[6] With respect to documents "otherwise unlawfully obtained", the prosecution should be for the unlawful act of obtaining, if it is criminal, or for the unlawful harm sought by its use. Mere use of a document not obtained by criminal means or not used for otherwise criminal purposes should not be an offense. Of course, this would not preclude revocation of citizenship obtained by noncriminal unlawful means. One important effect of prosecution for "use" could be extension of the statute of limitations on proof of fraudulent acquisition when the "use" would otherwise not be an offense and the statute bars prosecution for fraudulent acquisition. This undercuts the basic policy underlying the statute of limitations on fraudulent acquisition and would be an anachronistic deviation from general policy not apparently necessary to the effective administration of naturalization laws in view of the power to denaturalize and deport

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[5] *See, e.g., United States* v. *Ubani*, 141 F. Supp. 30 (S.D. Cal. 1956); *cf. Bridges* v. *United States*, 199 F. 2d 811 (9th Cir. 1952), *rev'd on other grounds*, 345 U.S. 209 (1953).

[6] Forged or counterfeit documents are covered by section 1751 and facilitating counterfeiting by section 1752.

for fraudulent acquisition of citizenship without regard to a statute of limitations.[7]

APPENDIX

DISPOSITION OF CURRENT PASSPORT, IMMIGRATION AND NATURALIZATION MAJOR OFFENSES

Current provision	*Disposition in new Criminal Code*
A. *18 U.S.C. § 1015 (naturalization, citizenship, alien registry):*	
1. *18 U.S.C. § 1015(a)* (false statement under oath).	Section 1351 (perjury); section 1224 (obtaining naturalization or evidence of citizenship by deception).
2. *18 U.S.C. § 1015(b)* (denial of citizenship with intent to avoid duty or other liability).	Section 1351 (perjury); section 1352 (false statement); specific provisions where status is material, *e.g.*, section 1108 (avoiding military service obligations).
3. *18 U.S.C. § 1015(c)* (use of certificate, etc. obtained by fraud or false evidence).	Section 1753 (deceptive writings); section 1221 (unlawful entry).
4. *18 U.S.C. § 1015(d)* (false statement concerning appearance of another before actor with respect to naturalization, *etc.*)	Section 1351 (perjury); section 1352 (false statement); section 1226 (wrongful issuance of documents, *etc.*); section 1753 (deceptive writing); general provisions, section 401 (accomplices) and section 1002 (criminal facilitation), and section 1224 (obtaining naturalization or evidence of citizenship by deception).
B. *Title 18, Chapter 69 (nationality and citizenship):*	
1. *18 U.S.C. § 1421* (accounts of court officers).	Chapter 17 (theft).
2. *18 U.S.C. § 1422* (fees in naturalization proceedings).	Chapter 17 (theft): section 1362 (unlawful rewarding of public servants).
3. *18 U.S.C. § 1423* (misuse of evidence of citizenship or naturalization)	Section 1753 (deceptive writing): section 1225 (obtaining passport by deception).
4. *18 U.S.C. § 1424* (personation or misuse of papers in naturalization proceedings).	Section 1224 (obtaining naturalization or evidence of citizenship by deception); section 1753 (deceptive writing); section 1351 (perjury): section 1352 (false statements). Re: "use" in second paragraph of 18 U.S.C. § 1424, *see* Disposition, *etc.* of 18 U.S.C. § 1015(c), *supra*.
5. *18 U.S.C. § 1425* (procurement of citizenship or naturalization unlawfully).	Section 1224 (obtaining naturalization or evidence of citizenship by deception); section 1753 (deceptive writing); section 1216 (wrongful issuance of document by public servant); also general perjury, false statement and bribery sections (sections 1351, 1352, 1361).
6. *18 U.S.C. § 1426* (reproduction of naturalization or citizenship papers).	Section 1751 (forgery or counterfeiting), *see* section 1751(2)(b)(iv) for grading; section 1752 (facilitation of counterfeiting).

[7] In addition, if the falsehood need be material, however, to support denaturalization, it would not make sense to permit prosecution for use of citizenship papers obtained by an immaterial false statement, when the defendant's citizenship cannot be challenged. *Cf. Chaunt* v. *United States*, 364 U.S. 350 (1960). Where the case involves a citizen who obtains a passport by an immaterial false statement, obtaining as well as use in connection with travel, could be a regulatory offense. *Cf. United States* v. *Browder*, 312 U.S. 335 (1941).

Current provision	*Disposition in new Criminal Code*
B. *Title 18, chapter 69 (nationality and citizenship)*—Continued	
7. *18 U.S.C.* § *1427* (sale of naturalization or citizenship papers).	General complicity provision (sections 401, 1001–1004) with respect to, *e.g.*, section 1221 (unlawful entry) and section 1222 (unlawfully bringing alien into United States); section 1223 (hindering discovery of illegal entrant); and section 1225 (obtaining passport by deception).
8. *18 U.S.C.* § *1428* (surrender of cancelled naturalization certificate).	To be transferred to Title 8 as regulatory offense or infraction; conduct can be basis for proving complicity with respect to any other offense involved.
9. *18 U.S.C.* § *1429* (penalties for or refusal to answer subpoena).	Section 1342 (failure to appear as a witness, *etc*); section 1343 (refusal to testify).
C. *Title 15. Chapter 75 (passports and visas)*:	
1. *18 U.S.C.* § *1541* (issuance without authority).	Section 1753 (deceptive writing); section 1352 (false statements).
2. *18 U.S.C.* § *1542* (false statement in application and use of passport).	Section 1225 (obtaining passport by deception); section 1352 (false statements); section 1753 (deceptive writing); for use, *see* comment, 18 U.S.C. section 1015(e), this table, *supra*.
3. *18 U.S.C.* § *1543* (forgery or false use of passport).	*See* comment, 18 U.S.C. section 1426, this table, *supra*
4. *18 U.S.C.* § *1544* (misuse of passport).	Section 1221 (unlawful entry); section 1222 (aiding unlawful entry); complicity provisions for other offenses (sections 401, 1001–1004).
5. *18 U.S.C.* § *1545* (safe conduct violations).	This is a foreign relations provisions to be transferred to Title 22.
6. *18 U.S.C.* § *1546* (fraud and misuse of visas, permits, and other entry documents).	Section 1751 (forgery and counterfeiting); section 1752 (facilitation of counterfeiting); section 1753 (deceptive writing); section 1221 (unlawful entry); section 1222 (unlawfully bringing aliens into the United States); section 1352 (false statements).
D. *Title 8 (Aliens and Nationality)*:	
1. *8 U.S.C.* § *1324* (bringing and harboring certain aliens; persons liable; authority to arrest).	Section 1222 (unlawfully bringing aliens into the United States); section 1223 (hindering discovery of illegal entrants); procedural provision to be located in Title 8 or procedural part of Title 18.
2. *8 U.S.C.* § *1325* (entry of alien at improper time or place; misrepresentation and concealment of facts).	Section 1221 (unlawful entry); section 1352 (false statements).
3. *8 U.S.C.* § *1326* (reentry of deported alien).	Section 1221 (unlawful entry).
4. *8 U.S.C.* § *1327* (aiding or assisting subversive alien to enter); *8 U.S.C.* § *1328* (importation of alien for immoral purpose).	Taken into account in grading of sections 1321–1323; facilitation of national defense offenses; section 1841 (promoting prostitution); section 1842 (aiding prostitution).
5. *8 U.S.C.* § *1252* (apprehension and deportation of aliens—arrest and custody; review of determination by court).	Retention in Title 8; offenses graded as misdemeanor; obligation to depart would be enforceable by section 1341 (criminal contempt) and section 1345 (willful disobedience of court's lawful order); failure to report to be subject to section 1305 (failure to appear after release; bail jumping).

COMMENT

on

SECTIONS 1301–1309

(Agata; January 28, 1969)

PHYSICAL OBSTRUCTION OF GOVERNMENT FUNCTION: SECTION 1301

and

PREVENTING ARREST AND DISCHARGE OF OTHER DUTIES: SECTION 1302

1. *Background; Purpose.*—Sections 1301 and 1302 both deal with aspects of the intentional obstruction of government functions. Section 1301 proscribes such obstruction by any kind of physical interference or obstacle except that interposed by a person fleeing from or resisting arrest, a matter which requires special attention. Section 1302 is primarily designed to deal with that special situation in terms which introduce elements beyond mere physical interference, *i.e.*, creating a *substantial* risk of bodily injury or the need for *substantial* force to overcome resistance.

It is important to understand at the outset the limited purpose of these provisions. First, they obviously are not intended to deal with all obstructions of government functions. An effort is being made in the new Code to be as specific as possible regarding such obstructions, not only by carrying forward traditional obstructive crimes such as bribery, perjury, false statements, *etc.*, but also by breaking down existing general obstruction of justice statutes, *e.g.*, 18 U.S.C. § 1503, into specific components, such as unlawful communications with jurors and other offenses to be presented in other drafts. A sensible division, as indicated by the drafts proposed here, can be made along lines of what constitutes physical interference and potentially injury producing conduct.

Another limited purpose of these provisions is to reflect the extent to which an obstructive intent will have bearing on the penal consequences of such physically obstructive conduct as is embraced in the offenses of murder, assault, endangering, and the like, and arson and other intentional destruction of property. These offenses in State Codes are primarily directed toward keeping the peace. In the Federal Code, except for their application to enclaves where the principal concern is the same, they are primarily directed toward preventing and penalizing obstructions of government functions. The victims to be protected from assaults are government officials attempting to discharge their duties; the property to be protected from destruction or damage is government property.[1] This concern will be implemented in

[1] *See* text accompanying note 2, *infra*, and Extended Note B, *infra*, for a description of the statutes.

the proposed Federal Criminal Code by providing an appropriate jurisdictional base for these harm producing offenses, probably similar to that used in existing Federal law for murder and assault, *i.e.*, if committed against a person while he is engaged in or on account of the performance of his official duties (18 U.S.C. §§ 111, 1114).

These offenses will be graded—as they are in existing law when they deal with the government or a government employee as victim—according to the gravity of the misbehavior without regard for the intent to obstruct a government function. This is not to say, however, that such intent will never affect the gravity of the offense. Rather, it expresses the policy that there is a point beyond which the offense itself, *e.g.*, murder, aggravated assault, is so serious—and the penalty so severe—that the obstructive intent has little significance. By the same token, below that point the obstructive intent becomes more significant and can appropriately serve to aggravate the penalty for the misbehavior. Thus, an unarmed scuffle between neighbors over the dividing line between their properties can appropriately be graded as a Class B misdemeanor; but if the property owner engages in such a scuffle with a government surveyor to prevent him from doing his job, it is appropriate to consider his obstructive intent and to raise the offense to a Class A misdemeanor. It is this policy which is carried out in proposed sections 1301 and 1302.

In addition, these provisions constitute catch-all offenses which can replace many specific offenses in present law when the conduct is intended to obstruct a government function, *e.g.*, obstruction of mail (18 U.S.C. §§ 1701, 1702), interference with railway or steamboat post office by assault or malicious interference (18 U.S.C. § 2116), interference with certain agriculture officials (7 U.S.C. § 86), destroying survey marks (18 U.S.C. §§ 1858–1860) and boundary signs relating to Indian reservations (18 U.S.C. § 1164), forcible rescue of property seized under revenue laws or by search and seizure (18 U.S.C. §§ 2232).[2] If it is desirable and appropriate to prohibit certain conduct (in addition to that which will be covered in the traditional offenses such as assault and criminal mischief) because of its *effect* on government functions, regardless of whether there is *intent* to obstruct, these can be dealt with as regulatory offenses for which lesser penalties will be prescribed. (Some obstructions, of course, may be equally or more severely penalized because of a specialized obstructive intent, for example, to sabotage national defense.)

2. *Formulation of Physical Obstruction Offense.*—The verb "obstructs," in section 1301, is the one which is the common denominator of Federal statutes dealing directly with the subject matter of this offense and has a long history in Federal law which may prove helpful in its construction in the new Code.[3] It may well embrace the other

[2] Also included would be some aspects of the statutes described in Extended Note B, *infra*, and provisions such as 18 U.S.C. § 754 (rescue by force of the body of an executed offender) and 18 U.S.C. § 1701 (obstruction of mails), and conduct condemned in *Harper* v. *United States*, 27 F. 2d 77 (8th Cir. 1928) (false arrest to impede a witness). In addition to 18 U.S.C. § 1701, it would also embrace some of the more specific provisions of 18 U.S.C. §§ 1691–1734 (postal service). Some specific depredations may call for special treatment because of sentencing or interdepartmental jurisdictional considerations.

[3] *See, e.g.*, 18 U.S.C. § 401(1) (contempt) and 18 U.S.C. § 1503, both derived through a number of revisions beginning with the Act of March 2, 1831, 4 Stat. 487, 488, § 2. For history, *see Slade* v. *United States*, 85 F.2d 786, 788 *et seq.* (10th Cir. 1936).

verbs employed—"impairs" and "perverts." But they also recur in the cases, statutes and literature dealing with contempt and common law and statutory offenses dealing with obstruction of justice.[4] Those verbs are included not only because of this history of usage but also because they appear in recent State revisions and proposed revisions[5] and harmony here should also be helpful in developing a common construction for this admittedly broad concept.

"Administration of law" is included with "government function" when the latter alone might suffice; but the former carries forward in substance terminology employed in the principal existing general obstruction statutes (18 U.S.C. §§ 1503 and 1505). Section 1503 speaks of "administration of justice" and deals with judicial functions, while section 1505 speaks of "administration of law" to describe proceedings before departments and agencies. "Administration of law" serves both purposes, and is used in other recent revisions.[6] Together with "government function" it should prove to be all-inclusive, embracing as well the concern of section 1505 with congressional inquiries and investigations.

The draft is limited to acts of physical interference and interposing a physical obstacle, as noted, to draw a line between general conduct of this nature and other obstructive conduct to be dealt with in other provisions. This formulation is broad enough to embrace all acts of force, without using language such as assaults, which would raise unnecessary problems as to the relationship of this provision to other specific offenses. The draft does not include threats, although whether or not they should be included is recognized as a close question. Exclusion is proposed here because (a) threats are recognized as obstructive offenses (with the appropriate jurisdictional base) in proposed sections 1614 (terrorizing) and 1615 (menacing) and may, with other circumstances, evidence an attempt, and (b) because, on balance, it is regarded as undesirable to permit an official to create what otherwise would not be an offense, by refusing to act in the face of threatening speech. It may be noted, however, that the draft does require an obstruction; and this latter concern could be dealt with by including threat as a specified act and leaving to causation principles resolution of whether the threat was of such a nature, under the circumstances that it constituted an obstruction.[7]

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[4] There have been a number of attempts to define the various recurring phrases in contempt and obstruction statutes. *See, e.g., District of Columbia* v. *Little*, 339 U.S. 1 (1950); *United States* v. *McDonald*, 26 F. Cas. 1074 (No. 15,667) (E.D. Wis. 1879); *United States* v. *Seeley*, 27 F. Cas. 1010 (No. 16,248a) (C.C. S.D. N.Y. 1844). *State* v. *Welch*, 37 Wis. 196, 200–202 (1875), is a brave attempt at definition. For additional development, *see* WILLIAMS, CRIMINAL LAW, THE GENERAL PART §§ 138–141 (2d ed. 1961).

[5] MODEL PENAL CODE § 242.1 (P.O.D. 1962); and MODEL PENAL CODE § 208.30, Comment at 126 (Tent. Draft No. 8, 1958); N.Y. REV. PEN. LAW § 195.05 (McKinney 1967); MICH. REV. CRIM. CODE § 4505 (Final Draft 1967).

[6] *See* note 5, *supra*.

[7] For threat cases, *see United States* v. *Lowry*, 26 F. Cas. 1008 (No. 15,636) (C.C.D. Pa. 1808); *United States* v. *Smith*, 27 F. Cas. 1161 (No. 16,333) (E. D. Ark. 1870). *Cf. Ex parte Geissler*, 4 F. 188 (N.D. Ill. 1880) (offensive and opprobrious language without any overt act may constitute an interference with an election supervisor's duties). Unless this rises to the level of "disorderly conduct" or is part of a scheme to create fear of physical danger, this would be a very loose standard for imposing criminal liability.

Considered and rejected was the New York Revised Penal Law and Model Penal Code provision condemning obstruction by any "independently unlawful act," which the Michigan revisers also rejected.[8] Adoption of this language would extend the scope of the proposed provision to a variety of matters concerning which independent and specific policy decisions ought to be made in the context of each individual situation. Inasmuch as a great many Federal offenses are offenses only because they will obstruct a government function, the effect of including the Model Penal Code language would be automatically to raise all of those offenses to a Class A misdemeanor and thereby render irrelevant careful grading decisions as to most minor offenses, such as failure to keep records.

3. *Culpability Required for Physical Obstruction.*—The culpability problem has two facets. First, the characteristics of the offense for which a measure of culpability is required do not include the lawfulness of the government function or the fact that it is a function of the Federal government. Legality is an element of the offense, but knowledge of legality is not; and subsection (3) provides that a mistaken belief as to its illegality is no defense.[9] That intent to obstruct a *Federal*, as distinguished from State or municipal, function is not required will be accomplished in defining the jurisdictional base.

The second facet of the culpability problem is what is to be required with respect to obstruction of a government function. Since the conduct without obstruction culpability will (or will not) constitute an offense under principles governing the behavior (assault, criminal mischief, *etc.*), recklessness would be too low a requirement to reflect the purposes of the offense. Appropriate definition of the jurisdictional base for assault on a Federal official, for example, would permit Federal prosecution where the assault is committed in reckless disregard of its likelihood to obstruct a government function. Accordingly, the issue is whether intent to obstruct or mere knowledge of obstruction should be the requisite element.

The status of current Federal law is unclear and also varies from provision to provision. In *Pettibone* v. *United States*, 148 U.S. 197 (1893), the Supreme Court required at least knowledge of the existence of a government proceeding before an obstruction charge could stand. The Court went on to say that intent to interfere would accompany obstructive action if there was such knowledge,[10] indicating that the ultimate finding must be one of purpose to obstruct. This case illustrates that, as a practical matter, proof of knowledge that a government function is being obstructed will most often support a finding

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[8] MICH. REV. CRIM. CODE § 4505, Comment at 328 (Final Draft 1967).

[9] *See, e.g., Armstrong* v. *United States*, 306 F.2d 520, 522 (10th Cir. 1962), denying defendant's right to scrutinize activities of agents lawfully on an Indian reservation and then claiming as a defense to an assault charge, "they, in good faith, believe that the government agents are not performing official duties or are engaged in work which is not authorized by law." *See also Finn* v. *United States*, 219 F.2d 894 (9th Cir.), *cert. denied*, 349 U.S. 906 (1955), upholding a conviction for conspiracy and actual interference with a United States Attorney on account of performance of duties where defendants erroneously believed a restraining order obtained by an official was void and in violation of their civil rights and thereupon they made a civilian arrest of the official during his office hours.

[10] 148 U.S. at 206–209.

of intent. But the circumstances may also indicate that, while the offender knew his conduct would obstruct a government function, it was not his purpose to do so. In such situations—as when he recklessly disregarded the obstructive consequences—it would be inconsistent with the purposes of the offense to penalize him for obstruction. It should be remembered that the obstruction element will be the base for Federal prosecution if his conduct is otherwise an offense, whether serious or minor.

4. *Interference with Exercise of Rights Under Court Orders (18 U.S.C. § 1509.*—The obstruction of government function complex in current law contains 18 U.S.C. § 1509 which deals with interference with the performance of duties and the exercise of rights under court orders. Section 1509 was enacted as part of the Civil Rights Act of 1960 because of doubts as to whether 18 U.S.C. § 1503's "due administration of justice" clause covered mob-dominated interference with judicial desegregation orders.[11] Insofar as section 1509 was intended to cover interferences with persons complying with injunctions (school boards), they are covered by proposed section 1301 if they are physical interferences.[12] The draft would also cover physical interference with public servants who seek to enforce judicial decrees and judgments.[13] The protection of persons asserting rights under a decree is left for resolution in the context of civil rights provisions to be drafted.[14] Of course, some of those cases may involve interference with both performance of duties and the exercise of rights.

5. *Resisting Arrest.*—Subsection (2) of section 1301 excludes resistance to arrest from the general provisions dealing with physical interference with a government function. Like some other recent revisions,[15] it recognizes that resistance to an arrest can involve the closing of a door or a removal of the officer's hand from the shoulder or other minor, nondangerous, almost reflex kinds of action. The completion of the arrest is sufficient sanction for these purposes. Since this is not true of third persons, subsection (2) is also explicit that a similar exclusion does not exist for them.

On the other hand, the creation of a dangerous situation for the officer does warrant making such conduct an offense even if the arrest is accomplished. Accordingly, proposed section 1302 deals with conduct with intent to prevent arrest or discharge by a public servant of other official duties which creates a substantial risk of harm to the public servant or anyone else. The conduct condemned need not be an assault; the creation of the risk or need for the officer to use substantial force, regardless of the means, is sufficient.

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[11] *See* S. REP. No. 1205, 86th Cong., 2d Sess. (1960); *see also Clark* v. *Boynton*, 362 F.2d 992, 997 n.14 (5th Cir. 1966).

[12] *See, e.g., Taylor* v. *United States*, 2 F.2d 444, 446 (7th Cir. 1924), *cert. denied*, 266 U.S. 634 (1925), holding a conspiracy to violate an injunction to be an offense and stating that a violation of an injunction order is "an impediment to the due administration of justice" under 18 U.S.C. § 1503 (then section 135).

[13] *See* Extended Note A, *infra*.

[14] A literal reading of 18 U.S.C. § 1509 makes it an offense to use force or threat to prevent a person from collecting a debt reduced to judgment, *i.e.*, his right under a court decree. This is broader than the purpose for which section 1509 was enacted and is not covered by proposed section 1301. *See* Extended Note A, *infra*.

[15] *See* the provisions listed in note 5, *supra*.

This provision covers some of the ground now occupied by 18 U.S.C. § 1501, dealing with obstructing, resisting and opposing a process server and punishable by up to 1 year and/or $300, but would limit it to physically dangerous situations. The general physical obstruction provision, proposed section 1301, will deal with other physical interferences except where the person is resisting arrest. The significant change in current law is that conduct by the person who is being arrested must rise to the danger level of proposed section 1302, or be dealt with as misbehavior governed by assault provisions without the obstructive intent as an aggravating factor. Conduct in connection with other kinds of official duties and conduct of third parties in resisting arrest situation will be subject to both sections 1301 and 1302.

6. *Resistance to Unlawful Arrest or Process.*—Both sections 1301 and 1302 attempt to deal with obstructive conduct where an officer is attempting to execute process which has been unlawfully issued. The standard proposed is less than lawfulness, only that the officer be acting in good faith under color of law. This is accomplished in subsection (3) of section 1301 and subsection (2) of section 1302.

The effect of these provisions, together with other provisions of the new Code, would be to resolve the frequently doubtful status of resistance to unlawful process as follows:

(a) The justification provisions eliminate the illegality of arrest or process as a justification for use of force; [16]

(b) The drafts proposed here would prohibit all physical resistance to process, except arrest, which an officer has authority to act upon and which he is executing in good faith and under color of law;

(c) The standard of what is prohibited conduct by a person resisting arrest would ignore petty, reflex actions;

(d) The standards for judging resistance to bad faith arrests and to unlawful official action other than arrest will be the same as those which govern the conduct when the official considerations are absent, *e.g.*, justifiable use of force in self defense.

The rationale and status of current law is in doubt and the changes which these approaches will effect cannot be stated with assurance. At the outset, it should be kept in mind the use of excessive force to obstruct an unlawful act may constitute an assault, even if these provisions are not adopted.[17] The basic question is when all force or physical interference or conduct of the type creating the risk of harm described in section 1302 should also be prohibited.

A recent district court opinion [18] reiterated previously espoused positions that present law permitted resistance to a search warrant issued without probable cause.[19] There is some authority to the contrary; [20] but the rationale of the contrary authority is not clear. It may be based only on the issue of what constitutes appropriate resistance,[21] or it may be based on some notion that the agent is not only

[16] Proposed section 603.
[17] Proposed section 607.
[18] *United States* v. *Dentice*, 289 F. Supp. 299 (E.D. Wis. 1968).
[19] *See, e.g., Sparks* v. *United States*, 90 F. 2d 61 (6th Cir. 1937).
[20] Consider *Hodgdon* v. *United States*, 365 F. 2d 679 (8th Cir. 1966), *cert. denied*, 385 U.S. 1029 (1967). *See also* the comment on proposed section 603, paragraph 5.
[21] *See, e.g., Abrams* v. *United States*, 237 F. 2d 42 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 1018 (1957); *United States* v. *McCarthy*, 249 F. Supp. 199 (E.D.N.Y. 1966).

authorized to execute the process, but is obligated to execute it.[22] The district court decision involves a construction of a statute,[23] but it also suggests a constitutional limitation on denying the right to use reasonable force to resist unconstitutional action.[24] On the other hand, there have been some legislative proposals to deny the right to use force to resist an unlawful arrest or to resist other performances of duty.[25] The Michigan revisers propose this approach, but limit it to obstructing peace officers.[26]

Another tenable solution is to subject this conduct to the principles governing justifiable use of force in defense of person or property and place it in those sections, leaving section 1302 to only wholly lawful government conduct. This approach would avoid condemning conduct which does not rise to the level of assault, but nevertheless obstructs the officer. Proposed section 1302 requires taking such resistance into the courtroom and prohibits self help.

This is consistent with the proposed exclusion of the unlawfulness of an arrest and other process as a justification for assault;[27] but is not necessarily demanded by the justification provisions.[28] One reason for adopting the proposed exclusions is to reduce the possibility that minor resistances can escalate into major violence. It can be argued, and is probably true, that this provision will not immediately and perhaps not at all, reduce resistance to process, if the defendant intends to resist. By like token, if he intends to resist, the latent unlawfulness of the process is probably no factor in his decision. Hence, to permit him to resist is only a recognition of an infirmity in the government conduct and not a concession to the defendant's purer motives. It is usually a surprise to the defendant when the infirmity is discovered.

If the process is defective, but the officer is under a duty or authorized to act by virtue of the warrant, the deficiency of the magistrate or some irregularity not rendering the conduct obviously invalid could be asserted in another forum. This would be consistent with limiting the obstruction provisions to lawful government functions, because the public servant who enforces a process valid on its face does have authority to act and will be personally protected from liability, just as the magistrate is still acting with authority if he errs.

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[22] *United States* v. *Thompson*, 28 F. Cas. 89 (No. 16,484) (C.C.D.C. 1823); *United States* v. *Tinklepaugh*, 28 F. Cas. 193 (No. 16,526) (S.D.N.Y. 1856).

[23] 18 U.S.C. § 111.

[24] *United States* v. *Dentice*, 289 F. Supp. 799, 800 (E.D. Wis. 1968):

> If the statute making it a crime to resist an officer in the performance of his official duties did not require that the officer *in fact* be acting in an official capacity—i.e., pursuant to valid authority—then criminal sanctions could be imposed upon a citizen for asserting his constitutional rights. Such a result would clearly not be consonant with our system of constitutional safeguards and protections.

But cf. United States v. *Bernstein*, 287 F. Supp. 84 (S.D. Fla. 1968), which construes "authorized" in 18 U.S.C. § 2232 to mean color of law. *See also United States* v. *Scolnick*, 392 F.2d 320 (3d Cir.), *cert. denied*, 392 U.S. 931 (1968).

[25] *See, e.g.*, MODEL PENAL CODE § 3.04(2)(a)(i) (P.O.D. 1962); MICH. REV. CRIM. CODE § 4625 (Final Draft 1967); ILL. REV. STAT. § 7-7 (1965).

[26] *See* note 25, *supra*.

[27] Proposed section 603.

[28] Although if the "or other performance of duty" clause is adopted in section 603, it would also support a broader exclusion than now appears in section 1301(4).

In fact, the officer may be *required* to execute the process. All this section does is choose the manner in which "validity" may be challenged.

There may be constitutional issues;[29] but the approach is consistent with the approach of the newer State Codes and the effectiveness of any constitutional challenge to denying a right to use self help is doubtful if there are other remedies available. In any event, if the invalidity of the process is not constitutional in scope, this approach is proper.

Extended Note A

Civil judgements: 18 U.S.C. § 1509, due exercise of rights

18 U.S.C. § 1509 was enacted for the limited purpose of dealing with interference with the exercise of rights under school desegregation orders,[1] but by its terms it covers the "due exercise of rights" under "any" court "order, judgment or decree." Thus, simple money judgments in diversity suits would be covered, as well as civil rights decrees. Although broad in respect to the kinds of rights involved, it is limited to "threats or force." Unlike section 1503, a section 1509 violation is a misdemeanor (1 year/$1000) and not a felony.

The proposed Code will not contain any express reference to the protection of the exercise of rights under a court order, judgment or decree. Some of the conduct now covered by section 1509 is included in the proposed obstruction sections,[2] but others are not intended to be covered. Thus, a threat by the defendant against the successful plaintiff who has obtained a money judgment in an action at law intended to discourage collection would not be covered on the grounds that after the judgment is obtained, there is merely a debt and the administra-

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[29] *See* note 24, *supra; cf. District of Columbia* v. *Little*, 339 U.S. 1 (1950), where the Court avoids the issue. Consider *Wright* v. *Georgia*, 373 U.S. 284 (1963). Also consider that some limits may be placed on the right to resist unconstitutional action. This should be particularly valid if there is a forum to test the issue without irreparable injury. In this connection, *see United States* v. *Angelet*, 231 F.2d 190 (2d Cir.), *cert. denied*, 351 U.S. 952 (1956). In *Angelet*, the court held the trial court properly refused an instruction to the effect that if the jury found the officer was engaged in an unwarranted arrest, "the defendants had a right to resist . . . and could use sufficient force to meet that of the arresting officers to resist their unlawful arrest." 231 F. 2d at 193. In upholding the refusal, the court said the language and implication "is too broad." Defendant could only use "reasonable force" as part of the law of self defense. This would be a limit on the force, because at some time he would have to submit to avoid killing or maiming, conduct which some courts have forbidden in resistance cases. *See Abrams* v. *United States*, 237 F.2d 42 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 1018 (1957). *But cf. United States* v. *Mundell*, 27 F. Cas. 23 (No. 15,834) (D. Va. 1795), which held defendant could not be guilty of an offense when he resisted a writ which stated bail was required when the statute did not authorize and, in fact, prohibited demanding bail. This could be explained on grounds such as obvious illegality, but the case is of interest because the court describes the defendant's conduct as "an inhuman assault upon an innocent and meritorious officer."

[1] *See* comment to section 1301, note 11.

[2] *See* comment to section 1301, paragraph 4.

tion of law or government function is no longer in operation.[3] Of course it could be another offense, but not an obstruction or interference with a government function. A literal construction of section 1509 would cover this situation, but this was not its purpose. The conclusion that such conduct is not to be treated as an obstruction of government function is believed consistent with current law absent section 1509, although no direct holding has been found,[4] and its coverage was not the purpose of section 1509.

A more difficult question is the protection of the exercise of rights under a court order, decree or judgment when an injunction is involved. A second question related to the judgment debt involves conduct relating to its collection. The injunction issue is considered first because it was the direct concern of section 1509 and it will also provide a guide to resolving the second issue.

How does present law deal with conduct which interferes with or violates the terms of an injunction? Insofar as criminal prosecutions are concerned, there are few reported cases and it is difficult to make an affirmative statement under present law without considering section 1509. Of course, there are contempt proceedings and where criminal contempt is proper, many, and perhaps all, could be section 1503 violations. A broad statement appears in *Taylor* v. *United States*,[5] which held a conspiracy to violate an injunction to be an offense and stated that the violation of an injunction order is "an impediment to the due administration of justice" within the meaning of section 1503.[6] In so holding, the court relied on *Pettibone* v. *United States* [7] which found an indictment defective for failure to allege that the purpose of the conspiracy was to obstruct the injunction or that the defendants had knowledge or notice of the injunction. As the *Taylor* case holds, it can be argued that *Pettibone* assumed that a conspiracy with such a purpose

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[3] This does not mean that Code provisions will not protect civil proceedings. Witnesses, jurors and other public servants, as well as evidence involved in civil proceedings will be dealt with in specific provisions being drafted. *See also Roberts* v. *United States*, 239 F. 2d 467 (9th Cir. 1956), and *Welder* v. *United States*, 143 F. 433 (4th Cir.), *cert. denied*, 204 U.S. 674 (1906), dealing with influencing witnesses and tampering with evidence in civil cases.

Clearly, direct physical interference with a judicial proceeding would be covered by proposed section 1301 as well as contempt proceedings. This is consistent with and makes no change in current law without taking section 1509 into account.

[4] *But see Buck* v. *Raymor Ballroom Co.*, 28 F. Supp. 119, 121 (D. Mass. 1939), a contempt proceeding in which the court held the adjudication of a debt in an equity proceeding would be regarded as the equivalent of a judgment at law and mere nonpayment was not a contempt, whereas a violation of a mandatory order to pay or resistance to the court's process would be subject to contempt. In this case, there was resistance to the Marshal. The court found civil contempt would lie for the debtors and suggested they and those who aided the resistance would also be subject to criminal contempt. This case suggests that it is when judicial process involves the operation of a mandatory order and not the mere assertion of adjudicated rights, that the issue of obstruction arises. Although it is a contempt case and not an obstruction case, the intimate relation between the two, *see, e.g.*, *United States* v. *Seeley*, 27 F. Cas. 1010 (No. 16,248a) (C.C.S.D. N.Y. 1844), suggests a course of line drawing.

[5] 2 F. 2d 444 (7th Cir. 1924), *cert. denied*, 266 U.S. 634 (1925).

[6] *Taylor*, *id.*, at 446. In *Taylor*, the court was dealing with Criminal Code section 135, predecessor to the relevant provisions of 18 U.S.C. § 1503.

[7] 148 U.S. 197 (1893).

would be a crime. On the other hand, it may only have held that without alleging such knowledge or purpose clearly no offense was alleged.

Whether these cases also can stand for the proposition that those not parties to the injunction or not subject to contempt proceedings commit an offense under section 1503 if they endeavor to prevent compliance with the injunction by force or threat or "corruptly" is not clear. *But see* the discussion of *Buck* v. *Raymor Ballroom Co.*, *supra*. Presumably, this was one facet of the difficulty which inspired the passage of section 1509. Proposed section 1301 appears sufficient for this purpose. Unlike payment of a judgment at law, compliance with an injunction can be viewed as part of the administration of justice with the interest of the court being a continuing one. Noncompliance is subject to contempt and in appropriate cases criminal contempt. The inclusion of such conduct characterized by affirmative physical interference accompanied by the intention to obstruct and which does obstruct, merely makes a criminal proceeding available where criminal contempt would be appropriate. Whether there should be limitations on invoking both contempt and section 1301 is left for consideration with the proposed contempt provisions. In any event, the language of section 1301 is sufficient to meet the limited purpose of section 1509 and if any more specific provision is required for civil rights cases, it is left to consideration in the civil rights chapter.

Further considering the scope of current law and section 1301 in the enforcement of or exercise of rights under judicial orders, both current law and section 1301 condemn the use of force or threats against the person of a public servant executing a judicial mandate. Thus, beating a marshal levying execution with the intent to obstruct his official duties is covered by current law and section 1301.[8] The more difficult question arises with respect to conduct which is not directed against the person. Are physical interferences or obstacles such as concealing or removing property to prevent seizure to be condemned? The issue can arise in several ways and the current law is not clear. 18 U.S.C. § 2232 makes it an offense to destroy, remove, *etc.* property "before, during or after seizure of any property by any person authorized to make searches and seizures, in order to prevent the seizure or securing" of the property. Considering the context of this provision in the chapter dealing with search warrants, it appears to be limited to searches and seizures and does not cover levying execution on a judgment. This should continue to be an offense and is covered by proposed section 1323. Section 1301 could also be construed to cover this conduct as a physical interference.[9] If section 1301 does cover this conduct, the next question is whether it does and should cover similar conduct in connection with levying execution on a judgment debt. A distinction can be made between the search and seizure and the levy of execution situations. In the search and seizure case,

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[8] *See* 18 U.S.C. §§ 1501, 2231. *See also Buck* v. *Raymor Ballroom Co.*, 28 F. Supp. 119 (D. Mass. 1939), and *Russell* v. *United States*, 86 F. 2d 389 (8th Cir. 1936) (both contempt).

[9] In this connection, the similar proposed Michigan provision is said to cover locking records in a safe to prevent authorized inspection, but if the records were placed under lock without this intention, then it is merely a refusal to permit inspection and requires another provision. MICH. REV. CRIM. CODE §§ 4505, 4510, Comment at 333 (Final Draft 1967).

the process relates to the specific property destroyed and the official process is intended to deal with that specific property, whereas before seizure or attachment to pay or secure a judgment debt there is no relationship between the government function and specific property.[10] Thus, it could be concluded that a person who conceals property or removes it in anticipation of execution or attachment orders he knows have been issued does not physically interfere with a government function under proposed section 1301.

On the other hand, the language of section 1301 is susceptible to a different meaning and current law is unclear on the point. There is dicta in one case[11] which states that 18 U.S.C. § 1501 is applicable to concealing or removing property to hinder execution or attachment. However, the case involved an attachment which had been accomplished prior to removal. The case *does* involve a construction of the term "obstruct" and this gives it added significance. In another case, the removal of goods which had been attached but not in the physical custody of the public servant was held not to violate the forerunner of section 1503.[12] In that case, however, section 1501 was not involved, although its forerunner was on the books. In the section 1503 case, the court argued that the statute covered only what was previously a contempt and this was not such a case, and if the statute created new offenses it was not intended to apply to mere trespasses which delayed proceedings. It is also significant that the statute dealt with threats or force, not *any* physical obstruction, and the court found the vi et armis aspect of a simple trespass did not satisfy this requirement. If section 1501 had been involved, the result is uncertain. Turning to section 1501, the language might include the conduct under consideration and this is given added weight by the penalty provision which applies "except as otherwise provided by law." This phrase has been explained as intending to preserve the heavier penalty in section 2232 for search and seizure cases.[13] This suggests that prior destruction or removal is covered by section 1501. However, in the 1940 Code, the forerunner of section 1501 did not contain this clause and the Code did contain the equivalent of section 2232. Furthermore, it does not follow that because some conduct condemned by section 2232 may be covered by section 1501, that all conduct (particularly prior destruction) is covered when an execution or attachment is involved.

The kind of issue considered at length in the preceding comments is necessarily an element of any attempt to generalize with respect to conduct which can take a myriad of forms. The situations which may arise in civil litigation which are not in direct opposition to judicial authority or public servants, as in current contempt law, and which involve no specific property as in searches and seizures or accomplished seizures in civil suits, have not heretofore been subject to the criminal process as a matter of practice. There is no compelling reason why they should be. Civil remedies are sufficient. If some are to be covered criminally, they might best be approached in provisions dealing with concealment of assets and the like. If this conclusion is accepted, then

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[10] This distinction can also be made concerning the concealment of records in the Michigan situation discussed in note 9, *supra*.

[11] *United States* v. *McDonald*, 26 F. Cas. 1074 (No. 15,667) (E.D. Wis. 1879).

[12] *United States* v. *Seeley*, 27 F. Cas. 1010 (No. 16,248a) (C.C. S.D. N.Y. 1844).

[13] *See* Revisers' Notes. 18 U.S.C.A. § 1501.

the problem is statutory language to accomplish the result. To carve out possible exceptions or to generalize the exceptions in a provision which may, but does not necessarily, cover the case will cause more problems of construction than the goal is worth. It is suggested that the legislative history of the provision should preserve the intention that such matters not be covered and this will be sufficient for the purpose. At worst, this statute may be construed otherwise, but it would involve wrongful conduct anyway. At best, its legislative history would narrow the possible embrace of the language and would not seek to broaden language inadequate for the purpose. Insofar as its effect on current law is concerned, it states the same general principle set forth in section 1501 and permits judicial development of the issue.

Extended Note B

Federal statutes dealing with physical obstruction

Current Federal law contains no general provision dealing with physical or physically oriented interference with government functions. There are a number of provisions which deal with aspects of this conduct, but the total product is a patchwork of overlapping provisions with gaps in coverage and an irrational sentence structure. The following summary of relevant current Federal statutes will serve to display those characteristics:

(1) If there are any Federal provisions which embrace all physical interferences with all kinds of government functions, 18 U.S.C. §§ 371 and 372 would qualify. These provisions are limited to conspiracies.

(2) Another broad area of coverage is embraced by 18 U.S.C. §§ 1503 and 1505. These provisions, however, are limited to official proceedings.

(3) There are a number of provisions which deal with attacks on or physical interferences with public servants:

(a) 18 U.S.C. § 1501 condemns resisting, obstructing or opposing an officer executing judicial process; 18 U.S.C. § 1502 has similar provisions concerning extradition agents. Section 1501 also prohibits resisting officers executing other orders or process, but only when the defendant "assaults, beats or wounds" the officer. The penalties for sections 1501 and 1502 offenses are $300 and/or 1 year.

(b) 18 U.S.C. § 1503's protection of an officer "in or of any court of the United States" covers all judicial officers and therefore could include some of those covered by 18 U.S.C. § 1501. In section 1503, the protection is against injury to his person or property on account of performance of duties and the possible sentence is $5,000 and/or 5 years.

(c) 18 U.S.C. §§ 111, 1114 protect from assault and homicide, respectively, certain officers while they are engaged in official duties or on account of their performance of those duties. The penalty for a section 111 offense is $5,000 and/or 3 years. The homicide is punishable in accordance with the homicide penalties. 18 U.S.C. § 111 also condemns "resisting, opposing, impeding, intimidating or interfering" with such officers and authorizes an increased penalty for use of a dangerous or deadly weapon.

(d) 18 U.S.C. § 2231 provides the same protection as section 111 for officers engaged in executing search warrants. The penalties are the same as in 18 U.S.C. § 111. These might also be covered by section 1501.

(e) 18 U.S.C. § 372 condemns all conspiracies to injure an officer of the United States in his person or property on account of performance of duty or while he is engaged in the discharge of his duties or to "injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties." Penalty: $5,000 and/or 6 years. This covers everything covered by the other sections and more as well, but is limited to conspiracies.

Hindering Law Enforcement: Section 1303
and
Aiding Consummation of Crime: Section 1304

1. *Background; Existing Law; General Scope.*—Sections 1303 and 1304 deal with persons who intentionally assist others either to avoid apprehension or prosecution or to profit from the fruits of their crimes. These offenses are distinguishable from some other forms of prohibited conduct which would aid the offender, such as tampering with witnesses or jurors, in that they are directed solely at the aider. Some of the conduct prohibited if engaged in by the offender, *e.g.*, obtaining transportation, would not be a separate crime. These offenses are associated with the common law notions of accessory-after-the-fact and, to some extent, misprision of felony (as presently interpreted).

Several Federal statutes presently deal with such conduct, to some extent with disparate requirements, inconsistent penalties and avoidable overlap.[1] 18 U.S.C. § 3 makes subject to a penalty half that prescribed for the principal offense any person who, knowing that the offense has been committed, "receives, relieves, comforts or assists the offender." [2] Under 18 U.S.C. § 1071, a person who harbors or conceals another for whom he knows an arrest warrant has been issued is subject to a penalty of 1 year and/or $1,000 or, if it was issued on a felony charge or after conviction of any offense, 5 years and/or $5,000. Under 18 U.S.C. § 1073 (Fugitive Felon Act), one who aids a fugitive from State prosecution is subject to a penalty of 5 years and/or $5,000,

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[1] 18 U.S.C. §§ 3, 4, 1071, 1072 and 1073 are dealt with in the text, *infra*. In addition, Federal law has separate provisions dealing with the defense of the state in 18 U.S.C. § 2382 (misprision of treason) and 18 U.S.C. § 792 (harboring and concealing spies) and 18 U.S.C. § 1381 (harboring armed forces deserters). The proposed chapter makes no special provision for these matters which are to be considered with the national security provisions. Misprision of treason differs from misprision generally (18 U.S.C. § 4) because it has no requirement of "harboring;" it requires only concealing and a failure to inform. 18 U.S.C. § 792 condemns harboring or concealing any person the defendant knows, or has reasonable grounds to believe or suspect, has committed, or is about to commit the espionage offenses. This, too, significantly differs from the misprision and accessory offenses in 18 U.S.C. §§ 3 and 4. *See also* 8 U.S.C. § 1324 (harboring illegal immigrants); 18 U.S.C. § 1381 (harboring armed forces deserters).

[2] Unlike the common law, it does not require the conviction or apprehension of the principal offender, nor is it limited to felonies. *Hiram* v. *United States*, 354 F.2d 4 (9th Cir. 1965); *United States* v. *Chapman*, 3 F. Supp. 900, 903 (D.C. Ala. 1931).

more than may be available if the fugitive is fleeing from Federal prosecution, where the aid must be harboring or concealing.[3] Under 18 U.S.C. § 1072 a person who "willfully" conceals or harbors an escaped prisoner is subject to a penalty of up to 3 years. 18 U.S.C. § 4, entitled "misprision of felony" and penalizing (by up to 3 years and/or $500) the concealing and failure to inform about a felony, has been construed to require affirmative acts of concealment,[4] such as concealment of evidence, harboring the offender, *etc.*,[5] which would appear to be covered by "assists" the offender in 18 U.S.C. § 3.[6]

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[3] *See, e.g., Hett* v. *United States*, 353 F.2d 761 (9th Cir.), *cert. denied*, 384 U.S. 905 (1966), sustaining conviction of defendant as an aider and abettor of one who committed the offense of becoming a fugitive under 18 U.S.C. § 1073.

[4] There is some dispute as to whether it was a crime at common law to merely fail to inform concerning a felony. *See* PERKINS, CRIMINAL LAW 440–441 (1957). Judge Wyzanski in *United States* v. *Worcester*, 190 F. Supp. 548, 565–566 (D. Mass. 1960), surveys the authorities and concludes (a) the "sounder" conclusion is that there was no such offense at common law and (b) a mere failure to inform was never an offense under Federal law. *See also* the leading case, *Neal* v. *United States*, 102 F.2d 643, 649 (8th Cir. 1939), *cert. denied*, 312 U.S. 679 (1941).

[5] *Neal* v. *United States*, 102 F.2d 643, 649 (8th Cir. 1939); *United States* v. *Worcester*, 190 F.Supp. 548 (D. Mass. 1960). What constitutes "concealing" under 18 U.S.C. § 4 cannot be stated with certainty. *Lancey* v. *United States*, 356 F.2d 407, 409 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966), adopted the statement in *Neal*, 102 F.2d at 646, setting forth the elements of the offense including that the defendant "took affirmative steps to conceal the crime of the principal." However, it suggested that merely harboring the offender might be concealing, relying on dicta in *Bratton* v. *United States*, 73 F.2d 795, 797 (10th Cir. 1934), and found "affirmative acts of concealment. . . . [because defendant] either concealed or *permitted [the principal] to conceal*" certain physical items (*Lancey*, 356 F.2d at 411). This appears to be the only reported case sustaining a misprision of felony conviction and most of the discussion revolves around the defendant's failure to inform and the facts show a harboring. There is no specific item defendant himself is shown to have concealed. *Bratton* argues that not only does section 4 require "some affirmative act of concealment," but "some such interpretation is necessary to rescue the act from an intolerable oppressiveness and to eliminate a serious question of constitutional power." As examples of affirmative acts of concealment, *Bratton* includes "suppression of evidence, harboring of the criminal, intimidation of witnesses, or other positive act designed to conceal from the authorities the fact that a crime has been committed."

[6] In the absence of a bare requirement to inform, there is little practical difference in the kinds of conduct embraced by 18 U.S.C. §§ 3 and 4. That separate offenses may as well be eliminated is supported by the discussion in WILLIAMS, CRIMINAL LAW, THE GENERAL PART §§238–241 (2d ed. 1961). The merger of the two ideas is illustrated in *Neal* v. *United States*, 102 F. 2d 643 (8th Cir. 1939), where the defendant was charged with misprision and as an accessory-after-the-fact. The only difference in proof required was the failure to inform and the case failed on both counts for failure to prove concealment. The concealment, of course, was the aid required for an accessory-after-the-fact charge. One opinion stated that misprision is like the accessory offense except no maintenance is given the person. *United States* v. *Perlstein*, 126 F.2d 789, 798 (3d Cir. 1942) (dictum). In 1956, Judge Brown of the Fifth Circuit was impelled to note:

> Interestingly enough, apparently because of the heavy burden of showing a concealment *and* affirmative acts, the annotations indicate no conviction for misprision ever affirmed. (*Miller* v. *United States*, 230 F.2d 486, 489 n.7 (1956)).

There was a misprision conviction affirmed since that statement (*see Lancey* v. *United States*, 356 F.2d 407 (9th Cir. 1966), discussed note 5, *supra*) and also a reversal, *United States* v. *King*, 402 F.2d 694 (9th Cir. 1968). *King* stated that receipt of money in exchange for not informing would constitute an affirmative step to conceal; also, if the defendant drove the offenders to a place where

The hindering offense, proposed section 1303, consolidates those aspects of existing "assistance" provisions which prohibit interference with law enforcement efforts to bring an offender "to book." It goes beyond those provisions, however, by imposing criminal liability (at least to the extent of a Class A misdemeanor) regardless of whether the offense was actually committed (unlike 18 U.S.C. §§ 3 and 4). This expands upon the notion embraced in the offense of harboring when an arrest warrant has been issued (18 U.S.C. § 1071) but makes harboring, *etc.*, criminal whether or not a warrant has been issued. The principle underlying the offense is that it is an obstruction of justice, rather than that the offender is an accessory in the crime.[7] The aiding consummation offense (proposed section 1304), on the other hand, consolidates aspects of existing law more closely related to accessorial conduct—hiding stolen money, disposing of marked ransom bills—than to thwarting enforcement of the law against the offender.

2. *Hindering: Prohibited Conduct and Culpability.*—In order to implement the notion that law enforcement efforts can be wrongfully obstructed regardless of whether the offense was actually committed, the draft does not—like 18 U.S.C. § § 3 and 4—require that the aider know an offense was committed. He must intend by his conduct, however, to interfere with, hinder, delay or prevent the apprehension, prosecution, conviction or punishment of another for a crime.[8] This intent may derive from knowledge of facts indicating that the other has committed a crime or merely from facts indicating that he is being sought by law enforcement authorities or was indicted, convicted, or sentenced. Criminal liability for such obstructive efforts should not depend upon whether guilt of the other is ultimately established, or whether the obstructor knows the specifics of his offense, although

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they could hide, but not if he was only a passenger. It is not clear why "not informing," in exchange for money, is concealing. This will be covered in the new Code in a bribery of witness and informer section. As a passenger, section 401 (accomplices) could embrace him in the hindering law enforcement provisions if he is aiding the driver.

In addition, imposing punishment for failing to inform is subject to serious constitutional informity under the fifth amendment, according to *King*.

[7] This is in accord with recent revisions. *See, e.g.*, N.Y. REV. PEN. LAW, §§ 205.50, 205.55, 205.60, 205.65 (McKinney 1967); MICH. REV. CRIM. CODE §§ 4635–37, 4640 (Final Draft 1967); MODEL PENAL CODE § 242.3 (P.O.D. 1962).

[8] The "intent" element is in accord with current law. *See, e.g., United States* v. *Carrier*, 344 F. 2d 42, 45 (4th Cir. 1965). *Cf. Hiram* v. *United States*, 354 F. 2d 4, 7 (9th Cir. 1965), wherein the court states:

> The appellant contends that the government did not prove that he acted willfully and with specific intent to commit the crime charged. Under 18 U.S.C. § 3 it is enough that the government prove the appellant had knowledge of the bank robbery and acted with that knowledge when he assisted the alleged robber.

This could mean proof of knowledge is sufficient as proof of the offense or that it is a sufficient basis from which the jury can find the prohibited purpose. In an earlier portion of the opinion, the court stated as an element of the offense: "that with such knowledge, appellant in some way assisted Edmund in order to hinder or prevent his apprehension, trial or punishment."

these factors may have bearing upon the enormity of the obstructive conduct and thus affect grading.[9]

An alternative formulation, favored in several of the recent criminal law revisions, would make it criminal to engage in the specified conduct, *e.g.*, concealing another, "with intent to hinder, etc." [10] The difference is that under such a formulation a person would be guilty of hindering even though there was no basis for an obstruction of justice, *i.e.*, there was no crime and no effort by law enforcement authorities to apprehend anyone, while under the proposed draft some interference would have to be shown. The difference is probably more theoretical than real. Such violations are likely to be undiscovered, and, if discovered, not prosecuted. Under the proposed draft such violations, if prosecuted, would be attempts (impossibility is no defense); and it is believed that they should be regarded as such.

The language of the draft is similar to that in existing law—hindering or preventing "apprehension, trial or punishment" (18 U.S.C. § 3)—and in other recent revisions.[11] 18 U.S.C. § 1071 prohibits preventing "discovery and arrest," but "apprehension" is an adequate substitute for both.

Some States, by definition of the offense or explicit exemption, seek to provide amelioration for the situation where relatives or friends assist a fugitive upon motivations other than the intent to thwart law enforcement. Thus, some require that "no other" motive be present.[12] Some States have exceptions for close relatives;[13] but this presents problems of determining a proper limit to the class and of creating a license for that class when the assistance may not in fact be solely motivated by acceptable impulses. The approach of the draft is to require the intent to hinder, *etc.*, leaving the existence of mixed motivation or close relationship to sentencing or prosecuting discretion.

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[9] The relationship of accessory-after-the-fact and the principal offense has been procedural and caused difficulties under the common law. *See* PERKINS, CRIMINAL LAW 580–588 (1957). *Government of Virgin Islands* v. *Aquino*, 378 F. 2d 540, 553 *et seq.* (3d Cir. 1967), recognizes the "substantive difference in the nature of the criminal conduct involved" in aiding the commission of the principal offense and aiding the offender to avoid apprehension. Thus, *Aquino* held that the charge of committing the offense or aiding in its commission did not embrace 18 U.S.C. § 3 as a lesser included offense, but recognized that a defendant's prior acquittal as a principal did not bar his later prosecution as accessory after the fact. A direct holding, in accord, on the double jeopardy issue is *Orlando* v. *United States*, 377 F. 2d 667 (9th Cir. 1967). (Although the conviction was later vacated. *Orlando* v. *United States*, 387 F. 2d 348 (9th Cir. 1967), as being contrary to Justice Department *policy* that several offenses arising out of a single transaction should be alleged and tried together, and should not be made the basis of multiple prosecutions, the double jeopardy holding of the prior decision was apparently left untouched.) *See United States* v. *Anthony*, 145 F. Supp. 323, 339 (D. Pa., 1956) (conviction of defendant as aider and abettor and accessory-after-the-fact with respect to the same principal offense, sustained).

[10] *See* note 7, *supra*.

[11] *Id.*

[12] MODEL PENAL CODE § 208.32, Comment at 198 (Tent. Draft No. 9, 1959), cites some State statutes with this provision. Consider *Mortensen* v. *United States*, 322 U.S. 369 (1944) (Mann Act prosecution claim that madam took her wards on vacation but trip back was immoral. Court dealt with a "dominant" motive test). *Cf. Haupt* v. *United States*, 330 U.S. 631 (1947).

[13] MODEL PENAL CODE § 208.32, Comment at 201 (Tent. Draft No. 9, 1959). An exemption is provided by WIS. STAT. ANN. § 946.47 (1955). Neither New York nor Michigan has adopted such a provision.

As do recent revisions,[14] the draft specifies the prohibited aid, thereby avoiding problems invited by the generality of "assists" (as in 18 U.S.C. § 3). Aid of any character might embrace acts which we are reluctant to deem criminal, such as refusing to answer police questions about a fugitive, giving misleading answers, and advising or counseling a fugitive.[15] Specification permits focusing upon affirmative acts of assistance and making policy decisions concerning them. At the same time it facilitates closing existing gaps, *e.g.*, a harboring and concealing prohibition was held not to prohibit providing money to a fugitive to avoid arrest[16] (*see* proposed section 1303(1)(b)), concealment of relevant items was held not to be assisting when their evidentiary nature was not established[17] (*see* proposed section 1303 (1)(c)). Warning another of impending discovery or apprehension is prohibited; but an exception can be made for warnings made for the purpose of deterring unlawful conduct, *e.g.*, "don't make that entry because the auditor is on his way"[18] (*see* proposed section 1303(1)(d)).

Another possible specification which has been proposed elsewhere, but not included in the draft, would be the volunteering of false information to a law enforcement officer.[19] While such a provision would penalize sending officials on "wild goose chases," it is questionable whether to draw a line between information of that kind which is solicited and that which is volunteered. Moreover, in this context, it would also embrace minor diversions. False unsworn statements to Federal investigators have proved to be a troublesome area in Federal criminal law. The courts have rejected prosecutors' attempts to

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[14] *See* note 7, *supra*.

[15] *See* notes 19–23, *infra*, and accompanying text for consideration of the false statement issue. For cases involving counseling, *see Neal* v. *United States*, 102 F. 2d 643, 650 (8th Cir. 1939), *cert. denied*, 312 U.S. 679 (1941), and *Firpo* v. *United States*, 261 F. 850 (2d Cir. 1919). In *Neal*, evidence showed defendant knew where the other was hiding and "may have advised him about escaping," but failure to inform was said to be not sufficient alone to constitute a crime under the statute (18 U.S.C. § 4). Defendant was also charged as an accessory-after-the-fact and presumably this would not be assistance under 18 U.S.C. § 3; *Firpo* involved a similar construction of "assists" under 18 U.S.C. § 1381 (harboring deserters).

[16] *United States* v. *Shapiro*, 113 F. 2d 891 (2d Cir. 1940) (18 U.S.C. § 1071). Concealing required some "physical act tending to the secretion of the body of the offender;" harboring means "to lodge, to care for, after secreting" the offender. *Id.* at 893. *But cf. United States* v. *King*, 402 F. 2d 694 (9th Cir. 1968); *Piquett* v. *United States*, 81 F. 2d 75 (7th Cir.), cert. denied, 298 U.S. 664 (1936); (surgical change of facial appearance as concealing). Also *see* discussion of *Miller* v. *United States*, 230 F. 2d 486 (5th Cir. 1956), discussed note 21, *infra*, wherein Judge Brown expressed doubts it could be a harboring or concealing to merely permit another to remain "for his studied purpose of avoiding discovery." Even if not an "obstruction" under section 1501, it is difficult to see why this would not be a harboring under section 1071. *Cf. King*, *supra*, and taking money not to inform as concealing.

[17] *Neal* v. *United States*, 102 F. 2d 643, 650 (8th Cir. 1939).

[18] Michigan includes it, MICH. REV. CRIM. CODE § 4635(b) (Final Draft 1967); New York does not, but its provisions are limited to aiding felons.

[19] MODEL PENAL CODE § 242.3(e) (P.O.D. 1962). *See also* WIS. STAT. ANN. § 946.41 (1957), which makes it an offense to "knowingly resist or obstruct" an officer, *etc.*, and defines "obstruct" to include "without limitation knowingly giving false information to the officer with intent to mislead him in the performance of his duty including the service of any summons or civil process."

bring them within the general false statement provisions (18 U.S.C. § 1001),[20] the obstruction of process provisions (18 U.S.C. § 1501),[21] and provisions dealing with forcibly impeding a Federal official [22] (18 U.S.C. § 111). A congressional committee which recommended recent legislation prohibiting tampering with potential witnesses or informants (18 U.S.C. § 1510) made it clear in its report that there was no intent to subject the witnesses or informants themselves to prosecution for giving false or misleading information.[23] The considerations involved in criminalizing such statements will be more fully explored in drafts dealing generally with false statements to public servants and with false reports to law enforcement authorities. For the present it is believed that false statements, volunteered or otherwise, should not be one of the specified acts in this draft.

Another specified form of aid considered, but not included in the draft would state:

> Prevents or obstructs, by means of force, deception or intimidation, anyone from performing an act that might aid in the discovery or apprehension of such person.

The New York and Michigan Codes contain such a provision,[24] but the Model Penal Code does not. The New York revisers, who originated the provision, state that it covers such acts as hindering "divulging information to a prosecutor." [25] The provision for this purpose is not needed in the proposed new Federal Code because this type of conduct will explicitly be covered in tampering with informants provisions,[26] where it is a Class C felony and not a Class A misdemeanor.

However, the New York provision may cover other types of conduct. Leaving to one side the issue of including "deception" and its relationship to false statement issues, it would apply to any forcible act or threat against another. In the proposed new Federal Code such conduct is to be covered by the more general physical interference provisions and preventing arrest provisions. Furthermore, insofar as the physical obstruction provision is a jurisdictional base for more serious offenses, forcible acts to assist an alleged offender will be dealt

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[20] *See, e.g., Friedman* v. *United States*, 374 F.2d 363 (8th Cir. 1967) (false charges not within 18 U.S.C. § 1001). *Contra, United States* v. *Adler*, 380 F.2d 917 (2d Cir.), *cert. denied*, 389 U.S. 1006 (1967).

[21] *United States* v. *Miller*, 230 F.2d 486 (5th Cir. 1956), holding no violation of § 1501 where defendant refused to permit a marshal without a warrant to serve a subpoena on a person in defendant's home and defendant's denial of the other's presence was known by defendant to be false. Judge Brown found no "obstruction" because the marshal knew the statement was false, and he was reluctant in any event, to permit prosecution based on an unsworn false statement. Even if a felony were involved, he doubted it could be a misprision of felony (18 U.S.C. § 4). *Miller* did not involve a "volunteered" false statement, but there is doubt whether there is any basis in current law to prosecute even "volunteered" false statements. *See* note 23, *infra*, and accompanying text. *But cf. United States* v. *Adler*, 380 F. 2d 917 (2d Cir. 1967).

[22] *Long* v. *United States*, 199 F. 2d 717, 719 (4th Cir. 1952), reversing conviction under 18 U.S.C. § 111 based on defendent's falsely denying presence of another as "a mere attempt to deceive the officers without use of force."

[23] H.R. REP. No. 653, 90th Cong., 1st Sess. 3 (1967).

[24] MICH. REV. CRIM. CODE § 4635(d) (Final Draft 1967); N.Y. REV. PEN. LAW § 205.50–54 (McKinney 1967).

[25] N.Y. REV. PEN. LAW § 205.50, Comment at 684 (McKinney 1967).

[26] Current law: 18 U.S.C. § 1510.

with for what they are—assault, murder, kidnapping, *etc.*—and penalized accordingly. In addition, if such a provision is desirable, it is more akin to and should be contained in the tampering with informants provision where it would be a Class C felony.[27] Class C felony treatment of this type of hindering, *etc.*, is justifiable despite the Class A misdemeanor treatment of other aid because it involves conduct intended to harm other persons.

3. *Hindering: Grading.*—As previously noted, the offense is primarily intended to penalize obstruction of law enforcement efforts. Accordingly minimum criminal liability is graded as a Class A misdemeanor, even though the principal offense turns out to be only a Class B misdemeanor. It is thus equivalent to the catch-all offense of physical interference with governmental functions (section 1301). But, in view of the seriousness of offenses to be classified as Class A or Class B felonies (murder, armed robbery, kidnapping, rape, *etc.*), hindering apprehension, prosecution, conviction or punishment for such crimes warrant a more serious penalty if the aider knows that the person he is aiding has committed such offenses or has been charged with or convicted of such offenses. Thus, in such circumstances, hindering is a Class C felony. This is substantially the approach of other recent revisions.[28]

4. *Hindering: Jurisdiction.*—While it is clear that jurisdiction should extend to aiding persons sought for Federal offenses, it may also be desirable to extend it to persons sought by State authorities when they flee from justice across State lines. This may depend upon whether the Federal interest in such persons, presently expressed in the Fugitive Felon Act (18 U.S.C. § 1073), is to continue, whether or not that Act is to be retained (at present it is only a device for giving Federal agents jurisdiction to aid the States in apprehending and returning the fugitives) or its purposes are effected in some more direct way, *e.g.*, authorizing such assistance to the States. Since the thrust of the proposed draft is against interference with Federal officials, it should be applicable to persons who so interfere regardless of whether the principal offense is State or Federal*. It should be noted that if the draft does so apply, some adjustment will have to be made to the grading provisions in order to encompass State offenses equivalent to Federal Class A or Class B felonies as grounds for Class C felony liability.

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[27] A provision could read:

> A person is guilty of a Class C felony, if believing another might aid law enforcement authorities in the discovery, apprehension, prosecution, conviction or punishment of another or has information relating to a violation of a criminal statute, he employs force, threat or bribe with the intent to hinder, delay or prevent (a) the other from rendering such aid or (b) the communication of such information.

[28] MICH. REV. CRIM. CODE §§ 4636, 4637 (Final Draft 1967). Where the intent to hinder is in relation to a Class C felony or Class A misdemeanor, it is a Class A misdemeanor; if it is a Class A or B felony, it is a Class C felony. The Michigan provision is not entirely clear as to whether the defendant's intention must be to hinder, *etc.*, concerning conduct which in fact constitutes a Class A or Class B felony or a Class C felony or Class A misdemeanor, as the case may be, or whether the defendant need only *intend* to hinder concerning such conduct, whether or not it is in fact in that class. It is likely he need have knowledge of actual conduct. *See* MICH. REV. CRIM. CODE § 4640, Comment at 370 (Final Draft 1967).

*See section 1310 (flight to avoid prosecution, *etc.*)

If it is to encompass State offenses, the draft as written can easily be applied to aiders of State fugitives by making the status and conduct of the fugitive a jurisdictional base for Federal action, rather than a Federal offense for which the aider would be liable under complicity law. This will avoid the anomaly in *Hett*,[29] which results in a penalty for aiding a State fugitive greater than the penalty for aiding a Federal fugitive.[30]

5. *Aiding Consummation.*—As already noted, proposed section 1304 is primarily directed toward specifying accessorial conduct not covered by hindering under proposed section 1303. While it might overlap when hiding the proceeds of a crime also constitutes suppression of evidence, this may not always be the case.[31] Concealment of the proceeds does not always imply an intent to hinder prosecution, and may even occur after conviction. This provision will serve to replace 18 U.S.C. § 1202,[32] dealing with exchange of kidnapping ransom money, and will cover acts of assistance in disposing of stolen goods which do not in themselves amount to receiving, under provisions yet to be drafted.

Since the orientation of the offense is more accessorial conduct than obstruction of justice, grading is linked to the gravity of the principal offense. If the principal offense is a felony, this offense is one or two classes lower, depending on the class of the principal offense. If the principal offense is a misdemeanor, this offense has an equivalent classification on the ground that distinctions at that level are too fine to be warranted.[33]

Bail Jumping: Section 1305

1. *Background; Existing Law.*—As expressed through the provisions of the Bail Reform Act of 1966, chapter 207 of Title 18,[1] current Federal policy is to maximize releases of defendants pending trial and to minimize the posting of money bail or bond as a condition of release. Various alternatives as to the nature of the release are authorized, ranging from release on personal recognizance to the imposition of conditions such as placing the person in the custody of one who will supervise him; restricting his travel, association or place of abode; requiring return to custody after specified hours; and any other condition deemed reasonably necessary to assure appearance as required, including, of course, making bond or depositing security

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[29] *Hett* v. *United States*, 353 F. 2d 761 (9th Cir. 1966), discussed note 3, *supra*.

[30] For an aider and abettor of a section 1073 violator, the maximum penalty is $5,000/5 years, and as an accessory-after-the-fact, one-half the penalty (18 U.S.C. § 3). Also, "harboring and concealing" a fugitive from an issued Federal warrant is subject to a maximum penalty of only $1,000 or 1 year, or both (18 U.S.C. § 1071).

[31] Consider *Skelly* v. *United States*, 76 F.2d 483, 487 (10th Cir.), *cert. denied*, 295 U.S. 757 (1935).

[32] Also 18 U.S.C. § 2113 (bank robbery proceeds).

[33] *See also* Mich. Rev. Crim. Code §§ 4560–4561 (Final Draft 1967); Model Penal Code § 242.4 (P.O.D. 1962).

[1] 18 U.S.C. §§ 3141–3152.

under 18 U.S.C. § 3146(a). A revised bail jumping provision was retained in the new Act, and reads as follows:[2]

> Whoever, having been released pursuant to this chapter, willfully fails to appear before any court or judicial officer as required, shall, subject to the provisions of the Federal Rules of Criminal Procedure, incur a forfeiture of any security which was given or pledged for his release, and, in addition, shall, (1) if he was released in connection with a charge of felony, or while awaiting sentence or pending appeal or certiorari after conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both, or (2) if he was released in connection with a charge of misdemeanor, be fined not more than the maximum provided for such misdemeanor or imprisoned for not more than one year, or both, or (3) if he was released for appearance as a material witness, shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

Although, in light of the new emphasis on release without bond or security, there is increased reliance on the penal provisions to deter would-be "no-shows," it should be noted that there are other consequences to provide such deterrence. The judicial officer ordering release may "at any time amend his order to impose additional or different conditions of release" under 18 U.S.C. § 3146(e), and may thus escalate the conditions for insubstantial failures to appear. Moreover, the circumstances of a failure to appear may be taken into account by a judge sentencing an offender for the principal offense, without a separate prosecution for bail jumping, in the same way perjury by a defendant is usually dealt with. Of course, when bond or security has been posted, forfeiture can be required, or the amount of bail can be increased. A committee which recently studied the operation of the Bail Reform Act in the District of Columbia concluded, however, that there was too great reluctance on the part of the United States Attorney's Office to prosecute for bail jumping.[3]

Only a few insubstantial changes in the existing statute are recommended in section 1305. These result from the view that the offense should be one of general applicability, located among the specific offenses in the new Code; that the culpability requirement should reflect the more precise definitions in the new Code, *i.e.*, "willfully" in existing law may not have the same meaning, and that the grading should be integrated into the new sentencing structure.

2. *General Applicability.*—The existing provisions providing a criminal penalty for bail jumping, 18 U.S.C. § 3150, apply only to releases under the Bail Reform Act, which deals exclusively with criminal proceedings. There are other releases on bail or recognizance authorized by Federal law, however, which the proposed draft would take into account.

Presently there is a gap with regard to juvenile proceedings. 18

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[2] 18 U.S.C. § 3150.

[3] *See* REPORT OF THE JUDICIAL COUNCIL COMMITTEE TO STUDY THE OPERATION OF THE BAIL REFORM ACT IN THE DISTRICT OF COLUMBIA, DISTRICT OF COLUMBIA CIRCUIT at 17–20 (May 1968).

U.S.C. § 5035 authorizes release of a juvenile "on bail, upon his own recognizance or that of some responsible person. . . ." There is no provision, however, similar to 18 U.S.C. § 3150 providing explicitly that it is a violation of law to fail to appear as required. Forfeiture of bail appears to be the only authorized sanction. A bail jumping statute is necessary if a juvenile, released as such under 18 U.S.C. § 5035, is to be proceeded against as an adult for failure to appear, a discretionary matter under 18 U.S.C. § 5032. It also may be necessary in order to proceed against him separately as a juvenile for having jumped bail, since otherwise there is no law which has been violated to provide the basis for juvenile proceedings.

There are releases from custody authorized by Federal law other than in criminal and juvenile delinquency cases. For example, releases subject to a condition to return are authorized in deportation proceedings (8 U.S.C. § 1252(a)) and in emergency round-ups of enemy aliens (50 U.S.C. § 23). Whether or not a bail jumping statute ought to apply in such situations is an issue which is reserved for consideration in the context of the areas of regulation in which they arise; but facilitating the use of such a provision, if one is warranted, is a matter which can be dealt with here.

Accordingly the proposed draft is designed for incorporation by reference in any other Federal law which authorizes conditional releases. It is thus similar to the proposed new Code's regulatory offense provision, section 1006. In contemplation that the other laws, such as the Bail Reform Act,[4] will deal with all nonpenal matters, the draft has eliminated the bail forfeiture provisions from the present formulation in 18 U.S.C. § 3150. This deletion also serves to avoid the ambiguity of existing law as to whether forfeiture is a condition precedent to criminal prosecution.[5] A further change considered warranted because of possible general use is to make it clear that criminal failure to appear must be failure to appear at a specified time and place.

The principle underlying the draft—that the need for a bail jumping statute should be determined in enactment of the law authorizing the release—could be effected in other ways. One alternative would be merely to amend 18 U.S.C. § 3150 to integrate its provisions with those in the proposed new Code, and let it serve as a model for other release laws. Another alternative would be to refer explicitly in the draft to the release provisions to which it is to apply. The differences are not substantial; but the draft's approach is preferred because the penal provisions would not require amendment to apply to new release provisions and because it is perhaps a better vehicle for reserving felony treatment to the kinds of cases specified.

3. *Culpability.*—A further change in existing law is necessary in order to integrate it into the proposed new Code's definitions as to the culpable mental state required for commission of offenses. As proposed in Professor Weinreb's report [6] "willfully" or the absence of an adverb connoting culpability means "intentionally," "knowingly" or "reck-

[4] *See also* FED. R. CRIM. P. 46 (f).

[5] *Compare Migdol* v. *United States*, 298 F.2d 513 (9th Cir. 1961), *with Franco* v. *United States*, 342 F. 2d 918 (D.C. Cir. 1964), decided under predecessors to 18 U.S.C. § 3150. A proper construction of current law should not require forfeiture as a condition for imposing criminal penalties; hence, the draft does not substantively change current law.

[6] *See* the comment on chapter 3.

lessly." Although "willfully" is used in the existing law, its meaning at present, as Professor Weinreb pointed out, is not as precise as that to be provided by the new Code and varies according to the context in which it is used. Accordingly it is necessary to reconsider what culpability should be required for this offense. The "willful" concept has not been judicially construed in section 3150, although it was considered in predecessor provisions.[7]

In the earlier versions, there was concern as to whether the defendant need have actual notice of the forfeiture of his bond, which was a condition precedent to initiating prosecution. Present section 3150 makes the forfeiture a consequence of a willful failure to appear and does not contain a grace period as did earlier versions, before prosecution can commence. Thus, the earlier considerations of "willful" are not directly helpful. However, the discussion in *Hall*[8] suggests the standard is less demanding than in a contempt proceeding and that knowledge of a requirement to appear combined with the intention not to do so would be sufficient.

There are some indications that the obligation to appear is being treated capriciously by defendants.[9] To the extent that criminal sanctions are part of a proper response to reduce these delinquencies, a requirement of knowingly or even intentionally failing to appear would probably embrace a great number of these cases. However, the myriad of excuses and the failure of defendants to extend themselves to determine their precise obligations support a lesser standard; thus, the draft proposes "recklessly" as the standard of culpability for the lowest grade of offense.[10]

The discrimination among kinds of culpability proposed in the proposed new Code, however, permits discrimination in the consequences of committing the offense with different kinds of culpability. Thus a mere reckless failure to appear is graded as a Class A misdemeanor, even though other factors would otherwise make it a felony. Grading is discussed in paragraph 4, *infra*, but it is appropriate to consider here whether any fruitful distinction can be made between "intentionally" and "knowingly" when culpability greater than recklessness is to be required.

The problem arises because failure to appear is an omission, concerning which it is difficult to distinguish between intention and knowledge. Suppose a defendant goes to Syracuse to visit his mother when he should be appearing in court in Buffalo. He may intend not to appear in any event; but it could be plausibly argued that he intended to appear in Buffalo, but went to Syracuse instead merely

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[7] *See, e.g. United States* v. *Hall*, 346 F. 2d 875 (2d Cir.), *cert. denied*, 382 U.S. 910 (1965).

[8] *Id.*

[9] *See* note 3, *supra*.

[10] The Model Penal Code discriminates between a "mere" default on appearance "without flight or hiding" and a "flight to defeat justice," MODEL PENAL CODE § 208.35, Comment at 139 (Tent. Draft No. 8, 1958), grading the first failure to appear "without lawful excuse," as a misdemeanor and the second as a felony. MODEL PENAL CODE § 242.8 (P.O.D. 1962); Michigan condemns an "intentional" failure to appear, MICH. REV. CRIM. CODE §§ 4620, 4621 (Final Draft 1967); New York, "fails to appear," N.Y. REV. PEN. LAW §§ 205.35, 205.40 (McKinney 1967), but it is not clear what culpability is required in New York, (*See* § 15.15(2)).

knowing that by doing so he was failing to appear. Since a person is always doing something else when he fails to do what is required of him, an inquiry into intent becomes an inquiry into motive; *i.e.*, was his motive for doing the other sufficient to support his claim that he did intend to appear. Such inquiries are inappropriate in terms of culpability,[11] and, accordingly, the draft uses "knowingly," which—in the proposed new Code—will also embrace "intentionally." [12]

The question of motive—the accused's reasons for not appearing—does, however, require some attention. Even with certain knowledge of his obligation, he may fail to appear because he is recuperating from a heart attack and to leave his bed would imperil his life, or, after he has made careful plans for transportation to the court house, his vehicle breaks down or unexpected weather conditions bring travel to a halt. Such justifiable reasons for not appearing would probably be taken into account under existing law through a construction of "willfully" which required an "evil motive," but such looseness in words of culpability has been rejected in the new Code as well as in all other modern criminal law revisions.

Proposed section 1305(3) provides an affirmative defense, to be established by the defendant, when he has been prevented from appearing by circumstances described as those "to which he did not contribute in reckless disregard of the requirement to appear." This formulation should permit appropriate discrimination among the infinite varieties of reasons which may be urged as justifying nonappearance. If the defendant never planned to appear or, because it was raining, merely did not want to get wet, the defense will be unavailable because he either was not "prevented" from appearing or his attitude was the preventing "circumstance," which he created in reckless disregard of his obligation to appear. If he is unable to appear because he lacks transportation, his efforts to have obtained it will determine whether he recklessly disregarded the obligation. If he has an auto accident on the way to court, the defense will be available, even though he may have been driving recklessly (perhaps in an effort to be on time), because his reckless contribution to the circumstances was not in reckless disregard of the requirement to appear.

This formula is preferred over possible alternatives in the belief that it provides more precise guidance on the issue involved. "Recklessly" might be relied upon to carry out the purpose of the defense: but this puts too great a burden on the meaning to be ascribed to it in the new Code:

> . . . if he engages in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts, such disregard involving a gross deviation from acceptable standards.

"Relevant facts" would have to mean more than those which constitute knowledge that he is failing to appear as required and include those facts whose relevance depend on whether they prevented his appear-

[11] *See* the comment on chapter 3.
[12] Proposed section 302.

ance; and "conduct" would have to mean more than not being where he is obliged to be and include conduct which is not stated to be an offense. Such a construction would distort the meaning of "recklessly," since the word would have to be applied in two senses: first, that it required something *less* than the certain knowledge of when and where one has to appear, and, secondly, that it *adds* an element to the offense—of recklessly putting oneself in a position where appearance is virtually impossible, regardless of the certainty of one's knowledge. (To make a distinction between knowing and reckless failures to appear for purposes of grading, as proposed in this draft, the felony requirement would have to be "knowingly *and* recklessly," rather than just "knowingly.")

Reliance on other provisions in the proposed Code is also unsatisfactory. To rely upon the definition in section 301 of conduct as "voluntary" would not take into account the fact that the person recklessly created the circumstances which made his failure to appear involuntary or deal with the case where he voluntarily but justifiably chose to do something else. The "choice of evils" justification (proposed section 608) is also unsatisfactory, even though it is intended to deal with the matters that "voluntary" does not. It speaks in terms of avoiding clearly greater harm, in a situation which developed "through no fault of the actor." The actor may choose to stay in a hospital bed because of a situation created by his own negligence, and thus be unable to avail himself of this defense, even though the negligent (or even reckless) conduct which put him there was not in disregard of his obligation to appear.

Other recent revisions handle the problem somewhat differently from the proposed draft. Some make it explicit in the definition of the offense that the failure to appear was "without lawful excuse;" but this seems to do no more than leave it to the court to decide whether the excuse is valid.[13] In New York an affirmative defense has been provided "that the defendant's failure to appear was unavoidable and due to circumstances beyond his control."[14] "Unavoidable" will probably be construed to have the same effect as "in reckless disregard of the requirement to appear;" literally everything is avoidable. But the proposed formula should offer more precision.

4. *Grading.*—Current law makes no distinctions in grading with respect to culpability. Distinctions are made with respect to the nature of the original offense or the status of the person. Failures to appear as a material witness or upon release on a charge of mis-

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[13] This phrase is contained in the Michigan Code and the Model Penal Code. MICH. REV. CRIM. CODE §§ 4620, 4621 (Final Draft 1967); MODEL PENAL CODE § 242.8 (P.O.D. 1962). The Michigan revisers admit that the scope of lawful excuse is left to judicial determination in the light of the function of the section. *See* MICH. REV. CRIM. CODE §§ 4620, 4621, Comment at 363 (Final Draft 1967).

[14] N.Y. REV. PEN. LAW § 205.45 (McKinney 1967). New York perpetuates the grace period of 30 days within which the defendant can appear in order to avoid criminal liability, a notion deleted from Federal law in the 1966 Bail Reform Act. This in itself would avoid the need to consider many excuses, such as failure of transportation. At the same time it permits intentional obstruction of efforts to dispose of cases in an orderly manner.

demeanor are punishable by 1 year and/or a fine.[15] Failure to appear on a charge of felony or after conviction for any offense is subject to 5 years or $5,000 or both.

The draft combines the culpability element and the current classifications as a basis for grading. If "willfully" in current law does not cover "recklessly," the draft can be viewed as adding a penalty for recklessly failing to appear upon release after a charge or conviction for any offense. If current law does include recklessly, then the proposal reduces a reckless failure to appear on a charge of felony or after conviction for any offense from 5 years to a Class A misdemeanor.

Under existing law material witnesses are dealt with separately, but the difference in consequences between them and misdemeanants pending trial is only that a fine of $1,000 is set for witnesses while the fine available for misdemeanants is that available for the misdemeanor charged. Under the classification system of the new Code separate handling is unnecessary.

There are alternative approaches to grading which deserve consideration. These would look to the nature of the defendant's conduct beyond his failure to appear. One such approach would consider the harm in bail jumping to be the same regardless of the gravity of the original offense: it is an impediment to the regular functioning of the judicial process. On this assumption, the distinction between a Class C felony and Class A misdemeanor would be based on conduct constituting an aggravated impediment, to wit: flight, hiding or concealing oneself with intent to hinder apprehension, trial, punishment or any other purpose of the proceeding or his required appearance. This approach recognizes the difficulty in distinguishing between intentionally, knowingly, or recklessly when a failure to appear is the essence of the offense and concentrates instead on the difficulty the defendant intends to create for the judicial process. In the absence of flight or concealment, the need to arrest the defendant or merely set a new date is the impediment. This would be treated as a Class A misdemeanor, but if he makes even the arrest difficult by concealment or flight, it would be treated as a Class C felony.

This approach could be combined with the factors which make bail jumping a felony under existing law in several ways: retaining the existing factors and adding concealment or flight as a factor in order to raise the offense for persons awaiting trial on misdemeanor charges; retaining the felony classification for all persons who fail to appear on felony charges and requiring concealment or flight for all misdemeanor cases, whether pending trial or after conviction; or limit-

[15] New York condemns a failure to appear and treats all violations as a Class A misdemeanor, and where the original charge is a felony, as a Class E felony. N.Y. REV. PEN. LAW §§ 205.35, 205.40 (McKinney 1967). The Michigan Revised Criminal Code grades on the basis of release on murder charges and Class A and B felonies (section 4620—Class C felony) and other offenses (section 4621—Class A misdemeanor). MICH. REV. CRIM. CODE (Final Draft 1967). The Model Penal Code employs two bases for grading: the greater offense involving release on a felony charge or the failure to appear when there is flight or concealment. MODEL PENAL CODE § 242.8 (P.O.D. 1962).

ing the felony classification to persons on felony charges who conceal themselves or flee.[16]

Another approach to sentencing for bail jumping is to make available the same sentence for bail jumping as for the original offense.[17] When the original offense is serious, this may well be a deterrent, but could be subject to abuse. Thus, a person either innocent or against whom the charge is difficult to prove, may be subject to prosecution on the easily proved charge of bail jumping. This may not be objectionable if we consider that all the defendant is asked to do is appear as a condition of his release. If we took this approach, the distinction might be made between purposes for failing to appear. On the other hand, if the sentencing possibilities are too severe, it might discourage resort to criminal prosecutions in an area when there is a clear need to enforce the mandate to appear. It should also be considered that where the penalty for the substantive offense is light, bail jumping may be more serious than the substantive offense.

Since there appears to be insufficient basis for urging any of these alternative approaches as better than the present approach, the proposed draft substantially follows current law.

Escape and Related Offenses: Sections 1306–1309

1. *Background; Changes in Existing Law.*—The provisions proposed here, dealing with escape and other offenses related to the security of prisoners, substantially carry forward in the proposed new Code the principles expressed in existing law. The principal changes are—

(a) to clarify what is meant by the custody from which escape is an offense—virtually all custody connected with law enforcement following arrest and, in addition, custody connected with extradition and deportation;

(b) to provide explicitly when illegality of the detention will constitute a defense to escape;

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[16] This last is the approach of Model Penal Code § 242.8 (P.O.D. 1962). An important facet of creating a bail jumping offense is to protect the efficacy of the prosecution's case, that is, to avoid the disappearance or reluctance of witnesses and parties and other evidentiary problems. There was consideration and rejection of the possibility of trying to tie in with the penalty an inability to proceed because of the disappearance, but unless there could be reliable judicial control on this issue, it would be left too much in the hands of the prosecutor who could seek the easy way of relying on bail jumping as the principal offense. On the other hand, if we do not concern ourselves with whether the defendant's purpose has been accomplished, but rather with the purpose itself, the Model Penal Code approach to grading can be utilized with greater confidence.

[17] Current law utilizes this approach in one case: "if he was released in connection with a charge of misdemeanor, be fined not more than the maximum provided for such misdemeanor or imprisoned for not more than one year, or both", 18 U.S.C. § 3150. A general proposal to this effect is contained in a letter dated May 22, 1968 from Edward I. Koch, New York City Councilman (now Congressman) to Ramsey Clark. The Attorney General opposed the proposal on grounds "that bail-jumping as an offense is generally considered to be a separate and distinct offense unrelated to the substantive offense charged." Letter from Hon. Fred M. Vinson, Jr., Assistant Attorney General, to the National Commission to Revise and Reform the Federal Criminal Laws, June 11, 1968.

(c) to make more severe penalties available if a dangerous weapon or force, or threat of force, against another were used; and

(d) to deal with the introduction or possession of contraband on the basis of its usefulness in an escape and its dangerousness in that connection, separately from the situation where its presence in a detention facility is undesirable.

2. *What Constitutes "Official Detention" and "Escape."*—Among the difficult decisions to be made in drafting escape provisions is to determine when leaving custody should constitute the offense of escape and what significance is to be attached to the different kinds of custody. The variety of viable approaches to these issues is evidenced by the fact that modern draftsmen do not concur in any single approach.[1] The proposed draft is based on the view that, for general purposes, escape is removal from custody beginning at the time of arrest (or surrender in lieu of arrest) and continuing up to release on bail or personal recognizance, or on probation or parole or full, unconditional release.[2] This view does not generally discriminate, for purposes of making escape an offense or for grading, between "breaking out" of a facility or escaping while being transported between facilities or to court or to a hospital, *etc.*[3] Once a person has been subdued and searched, it is considered appropriate to regard his unauthorized leaving of custody as an extraordinary—and perhaps dangerous—obstruction of a government function.

The definition of "official detention"—in section 1306(3)(a)—embraces virtually all such custody, explicitly including civil commitments imposed in lieu of criminal proceedings or while criminal proceedings are held in abeyance, *e.g.*, pursuant to the Narcotics Addict Rehabilitation Act of 1966.[4] Moreover, escape embraces the failure to return from authorized releases when they are for limited periods or specific purposes.[5] Detention in the nature of "stop-and-frisk"—short of what constitutes an arrest—is not included. Persons who leave such detentions will be covered by sections 1301 (physical obstruction of

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[1] *See* MICH. REV. CRIM. CODE § 4601 (Final Draft 1967); N.Y. REV. PEN. LAW § 205.00 (McKinney 1967); ILL. REV. STAT. § 31–36 (1965); WIS. STAT. ANN. § 946.42 (1959).

[2] This is the approach of Model Penal Code, section 242.6 (P.O.D. 1962).

[3] *See, e.g., Read* v. *United States*, 361 F. 2d 830 (10th Cir. 1966) (reformatory prisoners, accorded "wide latitude of movement," taken outside grounds for speech contest by unarmed guards, held, "in custody"); *Frazier* v. *United States*, 339 F. 2d 745 (D.C. Cir.), *cert. denied*, 379 U.S. 948 (1964) (custody of Attorney General construed to mean "legal" custody and includes St. Elizabeth's Hospital to which the Attorney General had authority to transfer prisoner even if thereafter he had no control over institution or prisoner).

[4] 42 U.S.C. §§ 3401–3442 (Narcotic Addict Rehabilitation) authorizes civil commitment of persons not charged with any criminal offense and makes the escape provisions of 18 U.S.C. §§ 751 and 752 (assisting escapes) applicable (42 U.S.C. § 3425). By their terms, the Title 18 provisions could not apply because no crime is charged incident to the commitment proceeding and this is the touchstone for sentence limits in 18 U.S.C. §§ 751 and 752.

[5] These releases are now covered by 18 U.S.C. § 4082(d). A Colorado district court in *Arter*, an unreported case (information from Justice Department and Bureau of Prisons), has held the escape provisions inapplicable to juvenile limited release programs. Prior to 18 U.S.C. § 4082(d), in *United States* v. *Person*, 223 F. Supp. 982 (S.D. Cal. 1963), general escape provisions were held not applicable. *Contra*, *McCullough* v. *United States*, 369 F. 2d 548 (8th Cir. 1966); *Nace* v. *United States*, 334 F. 2d 235 (8th Cir. 1964).

government function), 1302 (preventing arrest and discharge of other official duties) and those dealing with assaults, or not at all. "Escape" is merely the unlawful removal from "official detention." [6]

The nature of the detention and its purposes do have significance in the proposed drafts. If a person has not yet been committed pursuant to official proceedings and is not in a detention facility, he may, under certain circumstances, have available to him a defense based on irregularity or lack of jurisdiction in his detention. (*See* paragraph 3, *infra.*) Whether or not the escapee is detained pursuant to a judicial order has significance in whether a guard's lack of care results in criminal liability. (*See* paragraph 5, *infra.*) Whether or not a detention facility is involved affects criminal liability for introduction or possession of contraband useful in escape. (*See* paragraph 6, *infra.*) And whether a person is detained pursuant to conviction will affect the grade of the escape offense, regardless of whether force or a dangerous weapon is used. (*See* paragraph 4, *infra.*)

Current law bases escape on the Federal authority for the detention, *e.g.*, in 18 U.S.C. § 751(a) the escape must be from the custody of the "Attorney General or his authorized representative" or from any facility in which he is confined "by direction of the Attorney General." No such limitations are contained in the drafts, because they are viewed as matters relating to the scope of Federal jurisdiction over the offenses. This will facilitate providing for a broader jurisdictional base than escape from Federal detention if the purposes of the Fugitive Felon Act (18 U.S.C. § 1073)—to permit Federal aid in the apprehension of State fugitives—are to continue to be effected by making such flight a Federal offense.

3. *Illegality or Irregularity of Detention.*—Current law does not recognize the illegality of the detention as a defense to escape,[7] except that if the escape is from custody pursuant to an arrest only, the arrest must have been "lawful." The proposed draft carries forward these principles; but reduces the requirement from lawfulness of the arrest to whether the detaining authority acted in good faith under color of law,[8] providing that the escape did not involve substantial

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[6] MODEL PENAL CODE § 242.6 (P.O.D. 1962). "[A]bscondment from restraint and custody was an escape under section 751." *Nace* v. *United States*, 334 F. 2d 235, 236 (8th Cir. 1964). New York declined to define the term on grounds it was used "in its ordinary, accepted meaning and connotes an unauthorized voluntary departure from or substantial severance of official control." N.Y. REV. PEN. LAW § 205.05, Comment at 669 (McKinney 1967). Although the term "escape" has not been the focus of difficulty in Federal law, there have been difficult cases which resolved the issues in terms of the meaning of "custody" or "confinement." Furthermore and in another context a Federal district court noted the common law distinction between escape and prison breach and stated: "Neither prison breach nor escape are defined in the statute and so must be construed in the light of their common law use." This was a consideration of a Pennsylvania statute in a deportation proceeding. *United States* v. *Zimmerman*, 71 F. Supp. 534, 537 (E.D. Pa. 1947); *Wisconsin:* " 'Escape' means to leave in any manner without lawful permission or authority." WIS. STAT. ANN. § 946.42(5)(a) (1955).

[7] *See, e.g., United States* v. *Jerome*, 130 F. 2d 514, 519 (2d Cir. 1942), *rev'd on other grounds*, 318 U.S. 101 (1943); *Godwin* v. *United States*, 185 F. 2d 411, 413 (8th Cir. 1950); *Aderhold* v. *Soileau*, 67 F. 2d 259, 260 (5th Cir. 1933).

[8] *See United States* v. *Heliczer*, 373 F. 2d 241, 246 (2d Cir.), *cert. denied*, 388 U.S. 917 (1967), particularly 246n.4 doubting the proposition reasonable force cannot be used to escape captors who have accomplished an unlawful arrest; *United States* v. *McCarthy*, 249 F. Supp. 199 (E.D. N.Y. 1966).

risk of harm to the person or property of anyone other than the detainee and that the escape was not from a detention facility, *e.g.*, local jail, courthouse "pen," *etc.*, while awaiting the first appearance before a magistrate (*see* proposed section 1306(3)). This approach is consistent with that taken in the preventing arrest provisions (proposed section 1302) and with the limited scope of the proposed defense of justification for use of force (proposed section 603).

4. *Grading of Escape.*—Current law (18 U.S.C. § 751) provides as penalties for escape:

> (a) up to 5 years and/or $5,000, if detention is by virtue of a felony arrest or charge or of conviction of any offense; and
>
> (b) up to 1 year and/or $1,000, if detention is for extradition or by virtue of a misdemeanor arrest or charge, prior to conviction, or by virtue of arrest or confinement in connection with juvenile proceedings.

Grading in the draft is substantially the same as in current law.[9] Attempts are treated the same as completed offenses,[10] and juvenile escapes, generally speaking, still constitute a misdemeanor. The proposed draft, however, introduces the use of force as an aggravating factor and raises the penalty to higher than current law if a dangerous weapon is used.

All escapes, regardless of what is the nature of the detention or when it occurs, are Class C felonies if they involve the use, or threat, of force against another. (The danger of bodily injury, not property destruction, is the significant element; if it embraced force against property the distinction would be relatively useless.) When a dangerous weapon is used to effect the escape (as distinguished from being picked up later, at which time other laws will come into play), it is a Class B felony. Current law does not take these factors into account in the definition or grading of the escape offense itself; but the current absence of limitations on consecutive sentencing, as they are proposed for the new Code, would result in the availability of considerably more significant penalties if assault or assault with a dangerous weapon occur or are attempted.

The grading proposed for use of force or a dangerous weapon in escape and the grading contemplated for resisting arrest may, in some instances, make the question of whether the arrest has been accomplished a significant one. While the former are Class C or B felonies, resisting arrest, as covered in proposed section 1302, is a Class A misdemeanor (if it creates a substantial risk of injury or the need for substantial force to effect the arrest); and other assaults and endangerment in that situation are graded according to what is provided

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[9] There is little agreement among recent revisions on grading. *See* MODEL PENAL CODE § 242.6 (P.O.D. 1962); MICH. REV. CRIM. CODE §§ 4605–4607 (Final Draft 1967); N.Y. REV. PEN. LAW § 205.15 (McKinney 1967).

[10] This is in accord with current law, but there is no general attempt provision in current law. Also in accord, MICH. REV. CRIM. CODE §§ 4605–4607 (Final Draft 1967). If not included here, attempted escapes could be subject to lesser penalties under the general attempt provisions (proposed section 1001). Information from the Bureau of Prisons indicates attempts are rarely prosecuted. There is reliance, instead, on prison discipline and loss of good time. In this connection, it should be noted that good time credits are not presently part of the proposed sentence provisions, although early parole would still be affected. For discussion of theory of escape provisions, *see United States* v. *Person*, 233 F. Supp. 982, 985 (S.D. Cal. 1963), discussed note 5, *supra*.

for those specific offenses depending upon whether they are aggravated or simple assaults, *etc.* Although making the distinction between resisting arrest and escaping from custody will at times be difficult, the distinction is nevertheless a valid one for determining the severity with which such conduct is to be treated. Resistance is neither so unexpected nor so unusual that the person who resists can be regarded as being as dangerous or as obstructive as the person who has already been subdued and searched and is now expected to be docile. In any event the distinction is made in current law; 18 U.S.C. § 751 goes no farther than "custody . . . pursuant to lawful arrest:" and reported cases reveal no difficulty which would justify trying to eliminate the distinction in the new Code.

Like current law and the proposed bail jumping provision, section 1305, the fact that the person is being held on a felony charge aggravates the penalty available. While this results in viewing the escape of an innocent person charged with a felony more severely than the escape of a guilty person charged with a misdemeanor,[11] it is unavoidable without creating the possibility that a guilty felon could escape and, by prolonged absence, defeat the felony prosecution, facing upon his capture only a misdemeanor charge; and it is preferable to treating misdemeanor escapes as felonies, if force is not used.

5. *Liability of Persons Other than the Escapee.*—Current law (18 U.S.C. § 752) provides, in provisions paralleling those dealing with escape, that it is a crime if one "rescues" or "instigates, aids or assists the escape, or attempt to escape" of another. To the extent that this provision is directed toward accomplices, it will be covered by the proposed draft on accomplices, as it appears now to be covered by 18 U.S.C. § 2.[12] To the extent it deals with persons who merely facilitate commission of the escape, that aspect will be covered by the proposed new offense of criminal facilitation. It should be noted, however, that, as criminal facilitation, it will be graded lower than the principal offense and will impose no criminal liability for merely facilitating escapes which are misdemeanors (criminal facilitation being limited to felonies). The reasons for this approach are discussed in the comment to the drafts on accomplices and criminal facilitation. It should further be noted, however, that the hindering law enforcement offense, section 1303, deals with hindering apprehension and punishment by providing transportation, money and other assistance and by harboring and concealment, so that virtually all assistance after escape will be a specific offense. Introduction of contraband into a detention facility is also a specific, and serious, offense (*see* proposed section 1309).

"Rescue" [13] is not included in the escape proposals because the grava-

[11] *See United States* v. *Person*, 232 F. Supp. 982 (S.D. Cal. 1963).

[12] In fact, the existence of 18 U.S.C. § 752 at a time when its penalty was less than 18 U.S.C. § 751, precluded application of aider and abettor provisions. *See, e.g., United States* v. *Lucas*, 114 F.Supp. 584 (D.W.Va. 1953).

[13] "Rescue" at common law (it does not appear to have been litigated under current Federal escape provisions) means "forcibly and knowingly freeing another from arrest or imprisonment without any effort by the prisoner to free himself." BLACK'S LAW DICTIONARY, 1472 (4th ed. 1951). Such a case could arise when others who fear what a prisoner might tell authorities seek to remove him, even against the prisoner's will, from the custody of the authorities. Although current Federal provisions dealing with escape expressly refer to "rescue," there is no purpose served by including it in the escape provisions in the new Code. None of the newer State Codes or the Model Penal Code specifically deal with "rescue."

men of "rescue" is an interference with the governmental function like those covered in the physical interference provision, proposed section 1301. Aggravated conduct can be prosecuted as assault, kidnaping, *etc.*

The proposed draft—section 1307—continues to provide specific treatment for conduct of public servants relating to escapes which does not rise to the level of complicity.

18 U.S.C. § 755 provides:

> Whoever, having in his custody any prisoner by virtue of process issued under the laws of the United States by any court, judge, or magistrate, voluntarily suffers such prisoner to escape, shall be fined not more than $2000 or imprisoned not more than two years, or both; or if he negligently suffers such person to escape, he shall be fined not more than $500 or imprisoned not more than one year, or both.

"Voluntarily" permitting escape under current law may be the equivalent of rendering substantial assistance in the proposed facilitation provisions. Thus, some of the conduct may be embraced by the new facilitation provisions. Draft section 1307 extends liability of public servants beyond the limits of the facilitation provisions in the following respects:

> (a) Unlike the facilitation provisions, the "permitting escape" draft is not limited to felonies;
>
> (b) Liability under the "permitting escape" provision is based on recklessness and negligence and not limited to "knowing" an escape is to be effected;
>
> (c) Conduct in "permitting escape" in a particular case which does not rise to the level required by facilitation will nevertheless be an offense under this provision.

The culpability requirements in present law are unclear. Although "negligence" in current law apparently means lack of due care in the civil liability sense,[14] the meaning of "voluntarily" is difficult to state.[15] The draft utilizes the new Code's culpability concepts and substitutes "recklessly" for voluntarily, and makes reckless conduct a Class A misdemeanor. The draft retains "negligence" as a lesser offense, but "negligence" in the new Code has a meaning more serious than civil liability's lack of due care. Negligently permitting escape as a lesser offense will constitute a Class B misdemeanor. A mere failure to perform a duty can be dealt with by internal discipline and dismissal.

The proposal speaks in terms of persons "concerned in official detention," rather than "custody" as in current law, to avoid any question about who has custody. It is also limited to cases where the public

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[14] *See United States* v. *Davis*, 167 F.2d 228 (D.C. Cir.), *cert. denied*, 334 U.S. 849 (1948). Negligently permitting escape apparently was an offense at common law for the one who had custody. It probably dealt with a failure to perform a duty or neglect of duty, as distinguished from reasonable care concepts in tort law which were probably developed after the common law crime.

[15] *E.g.*, "voluntarily" has been construed to mean "a willful or intentional permission to escape . . . carelessness of whatever grade is not synonymous therewith." *Zimmerman* v. *United States*, 1 F.2d 712, 717 (6th Cir. 1924). This might even exclude "recklessness" and be akin to facilitation.

servant has custody by virtue of process. This is in accord with current law. Not limiting the provision to custody by virtue of process could provide a basis for criminal liability for an officer who arrests someone and releases him in the exercise of discretion, even though criminally reckless or negligent.

The draft is also limited to permitting escapes dealt with in proposed section 1306—escapes from law enforcement, extradition and deportation detentions. Current law speaks of "prisoners," and, while imprecise, seems to apply only to criminal cases. While the conduct of public servants in noncriminal cases, such as attendants at mental hospitals, will be considered in drafting provisions dealing with official misconduct, the bracketed sentence * included in draft section 1307 would permit its extension to such public servants where the "escape" itself is not regarded as an offense.[16]

6. *Contraband.*—Proposed section 1309 deals with the introduction and possession of contraband. This is now covered by 18 U.S.C. §§ 1791, 1792. The draft is a departure from the present law, which subjects every violation of rules relating to contraband to a maximum of 10 years' imprisonment.[17] In fact, current statutory language is one of strict liability for breach of regulations. The proposal recognizes a distinction between potential escape items and nonescape items and would leave the nonescape items to the regulatory offense provisions.

An amendment to 18 U.S.C. § 4001 would accomplish this goal. Such a provision could state:

> Violations of rules or regulations issued by the Attorney General governing the introduction of things into or upon the grounds of any Federal penal or correctional institution for which punishment is not otherwise provided shall be punishable as provided in section 1006 of the Federal Criminal Code.

In the event certain items of contraband not related to escape require more specific treatment they should be dealt with in provisions governing prisons. This might include the introduction of such items as liquor or narcotics. The proposal does not contain a provision dealing with sending items out of the prison in violation of a regulation now covered by 18 U.S.C. § 1791. It would be more appropriate to deal with this problem as part of provisions dealing with the regulation of prison discipline. Of course, if such conduct is part of an escape plan or attempt, it would be covered by provisions in the proposed draft.

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*The bracketed sentence does not appear in the Study Draft. It read:

> For the purposes of this section, official detention means, in addition to the meaning prescribed in section 1306, detention pursuant to process or commitment issued by a court, judge or magistrate.

[16] Michigan has covered such situations. *See* MICH. REV. CRIM. CODE §§ 4610–4611, Comment at 357 (Final Draft 1967). *See also* MODEL PENAL CODE § 242.6(2) (P.O.D. 1962); WIS. STAT. ANN. § 946.74 (1957) (aiding escape from mental institutions).

[17] "Whoever, contrary to any rule or regulation promulgated by the Attorney General, introduces or attempts to introduce into or upon the grounds of any Federal penal or correctional institution or takes or attempts to take or send therefrom anything whatsoever, shall be imprisoned not more than ten years." 18 U.S.C. § 1791.

18 U.S.C. § 1792 bans introduction of a list of items "*designed* to kill, injure, or disable any officer, agent, employee, or inmate" of a prison (emphasis added). These are not necessarily directed to interference or escape activities—they may be just ordinary assaults and homicides and would be covered by other provisions. As potential escape items, they are covered by section 1309. As part of schemes for assault or homicide they would be covered elsewhere. 18 U.S.C. § 1792 also deals with instigating, *etc.*, riots in a prison and supplying items which can be used for destructive purposes within the prison. Here, also, these problems are reserved for fuller consideration in connection with mutiny and riot and prison discipline issues.*

* Section 1308 has been inserted in the Study Draft to cover prison riots. *See* Study Draft comment on section 1308.

CONSULTANT'S REPORT

on

A FUGITIVE FELON STATUTE: *See* SECTION 1310 (Abrams; July 4, 1969)

INTRODUCTORY STAFF NOTE

The report following this note concerns the consultant's draft of fugitive felon provisions which are materially different from those proposed in Study Draft section 1310. The Study Draft section retains interstate flight of State fugitives as a Federally prosecutable offense whereas the consultant's draft proposes to eliminate it as an offense but provide for Federal authority to arrest State fugitives who have fled interstate. Accordingly, section 1 of the consultant's draft proposes an amendment to 18 U.S.C. § 3052 (powers of Federal Bureau of Investigation) adding authority (in addition to that presently obtaining to arrest for any Federal offense) to arrest for interstate flight of a State fugitive upon request of local authorities. Section 2 of the consultant's draft explicitly provides for judicial authority to issue such a warrant.

The consultant's provisions are based upon a determination, detailed in the comment below, that the almost exclusive function of the current interstate fugitive statutes (18 U.S.C. §§ 1073, 1074) has been not as a basis for Federal prosecution, but rather as a vehicle to provide Federal assistance to the States in the apprehension, solely by exercise of Federal authority to arrest, of their fugitives.

Retention of interstate flight of State fugitives as a Federally prosecutable offense can be based upon the following considerations: (1) reasonable administrative guidelines have been effective in avoiding improvident prosecution under such statutes: (2) Study Draft section 207 codifies restraints in the exercise of Federal prosecutorial, as well as investigative, authority: (3) 18 U.S.C. §§ 1073, 1074 have proved to be adaptable to the general penal policies in the proposed Code: (4) fugitives in interstate flight from State justice can pose a significant threat to the safety of the citizens of many States, a harm appropriately cognizable by the Federal sovereign as a Federal offense, albeit subject to most sparing use as the sole basis for a Federal prosecution: (5) harborers of such out-of-State fugitives may not be covered by the statutes of the asylum State and, where their complicity is substantial (*e.g.*, plastic surgery for the desperate murderer) Federal prosecution can most readily be made available by retaining fugitive flight as a Federal offense, coupling it with an appropriate complicity statute. (*See*, proposed section 1303.)

No comment in the working papers is provided for Study Draft

section 1310 since the basic issues are set forth in the Study Draft explanatory comment to it, this introductory note and the following Consultant's Report.

Consultant's Report

I. Introduction

Draft sections 1 and 2 and these comments relate to material presently covered under 18 U.S.C. §§ 1073–1074 and § 3052. The draft effects an important formal change in existing Federal criminal law. The current fugitive felon provisions, sections 1073–1074, are to be repealed and not to be replaced by substantive penal provisions. It will no longer be a Federal crime merely to travel interstate to avoid State prosecution. However, that Federal arrest authority presently dependent on sections 1073–1074 (the circumstances under which Federal agents can apprehend and arrest fugitive State felons) is not affected by the repeal of sections 1073–1074. Such authority is expressly and directly set forth in the draft sections. Section 1 would amend section 3052 which presently deals with F.B.I. arrest authority. Section 2 is new. It expressly authorizes specified judicial officers to issue arrest warrants for fugitive felons.

Comments on the particular draft provisions including minor and clarifying changes in the description of F.B.I. authority to arrest fugitive felons (changes that are unrelated to the repeal of sections 1073–1074) are discussed in part IV below. Analysis of the history, purpose and functions of the fugitive felon provisions and the arguments for and against their repeal are discussed in part II below. Part III describes certain aspects of present law and practice in connection with fugitive felon arrests. In part V, certain procedural aspects of the new approach are discussed.

II. Background

A. *History and Purposes*

The original statute making it a Federal crime to flee across State lines to avoid prosecution or to avoid testifying in a criminal proceeding, commonly known as the Fugitive Felon Act, was first enacted on May 18, 1934, as part of a package of legislation extending the reach of the Federal criminal law in aid of State law enforcement.[1] At about the same time, for example, the National Bank Robbery Act and the National Stolen Property Act, found today in 18 U.S.C. §§ 2113 and 2311 respectively, were enacted. In its present form, the Fugitive Felon Act is found in 18 U.S.C. § 1073.

As originally enacted, the Act made it a Federal felony punishable by 5 years' imprisonment for any person "to move or travel in interstate commerce" with intent either to avoid prosecution for certain specified crimes committed under State law including murder, kidnapping, burglary, robbery, mayhem and rape, or to avoid giving testimony in a criminal prosecution involving a felony charge.

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[1] *See generally* S. Rep. No. 539, 73d Cong., 2d Sess. (1934); H.R. Rep. No. 1458, 73d Cong., 2d Sess (1934).

A fugitive felon statute might have been designed to serve one or more of the following purposes:

(1) To authorize Federal law enforcement agencies to assist State and local police in *locating and apprehending* a person who has committed a State crime and has left the jurisdiction;

(2) to permit the substitution of Federal removal procedure for interstate extradition in *bringing the arrested person back* to the jurisdiction in which the original crime was committed;

(3) to permit the trial of the fleeing felon *where he is apprehended*, without the necessity for resort either to State extradition or Federal removal;

(4) to provide a basis for *Federal prosecution* where the State is dilatory, unwilling to prosecute, or for some other reason Federal prosecution seems preferable.[2]

There is evidence from the legislative history of the Act and other sources to suggest that the Fugitive Felon Act was originally intended to serve both of the first two purposes.[3] Although there is some indication that those who originally contemplated this legislation may have had in mind the third reason,[4] it was finally rejected, for as enacted, Federal prosecution was limited to the Federal judicial district in which the original State crime was committed.

Available evidence suggests that, for a long time as implemented by the F.B.I. and the Department of Justice, section 1073 has not served the second purpose. It is not clear exactly when, but at an early date the Department began turning over arrested fugitive felons to State authorities for interstate extradition.[5] The Department of Justice itself states that the Act "does not supersede, nor is it intended to provide an alternative for, state extradition proceedings; rather its primary purpose is to permit the Federal Government to assist in the location and apprehension of fugitives from State justice." [6]

The fourth purpose is being implemented today, if at all, in a very tiny proportion of cases. The Department of Justice has indicated that requests from United States Attorneys to the Attorney General for approval to initiate fugitive felon prosecutions are "very rare." [7] For example, in 1964–1968, there were over 3,000 Federal fugitive felon arrests made annually; but no known prosecutions undertaken against fugitive felons, as distinguished from their harborers, undertaken.[8]

Examination of those few appellate cases where convictions had been obtained for the crime of being a fugitive felon suggests that it has

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[2] The statute might, of course, also have had as a purpose to permit both Federal *and* State prosecutions of the same person, but there is little evidence to support such an interpretation. Compare, however, Minority Views on H.R. 468, H.R. Rep. No. 827, 87th Cong., 1st Sess. (1961).

[3] *See e.g.*, H.R. Rep. No. 539, 73rd Cong., 2d Sess. (1934); Chamberlain, *Federal Criminal Statutes* 1934, 20 A.B.A.J. 501 (1934); Brabner-Smith, *The Commerce Clause and the New Federal "Extradition" Statute*, 29 ILL. L. REV. 355 (1934) [hereinafter cited as Brabner-Smith].

[4] *See* 32 MICH. L. REV. 378, 385 (1933).

[5] For many years, responsibility for enforcement of the statute rested in the Civil Rights Division of the Department of Justice. It now resides in the Criminal Division.

[6] Letter from the U.S. Department of Justice dated May 17, 1968.

[7] Letter from the U.S. Department of Justice dated May 29, 1968.

[8] Information furnished orally by the U.S. Department of Justice.

on occasion been used as a basis for prosecuting an accessory after the fact (one who harbors, conceals or otherwise conceals an escaping felon). One such case is *United States* v. *Brandenburg*.[9] In *Brandenburg*, the defendant, a physician who had assisted a fugitive felon by operating on him to remove his fingerprints, was charged with misprision of a Federal felony, to wit, violation of the fugitive felon statute. Were there no underlying Federal crime involving interstate flight, there would have been no Federal basis for prosecuting Dr. Brandenburg. Presumably, however, he could have been prosecuted under State law in the State where he performed the misprision. A more recent similar case is *Hett* v. *United States*,[10] where the defendant was charged with aiding and abetting a robber to flee from San Francisco to Brazil to avoid prosecution in the State of Washington.

Information from the Department of Justice indicates that on a couple of occasions the Department has approved a fugitive felon prosecution because the United States Attorney thought that prosecution was essential either because State prosecution was inappropriate for some reason or because he had agreed to prosecute him Federally (presumably shortcircuiting a harsher State prosecution) in exchange for information. Examination of the few reported Federal fugitive felon convictions suggests also that on rare occasions a fugitive felon count may be added to other charges in an indictment to increase the penalty or reduce the possibility of acquittal or reversal on appeal.[11] The statistics on the number of fugitive felon prosecutions instituted annually suggest, however, that cases where it is necessary to rely on a fugitive felon charge for any of these purposes are very rare.

The reasons for, and functioning of the fugitive witness portion of section 1073 differ somewhat from the fugitive felon provision. Originally, apprehension was probably an important function to be performed by Federal agencies. Making Federal prosecutions possible was probably not a major purpose except perhaps in rare cases to give the Federal prosecutor some bargaining leverage. It should be noted in this connection that witnesses who fail to appear are normally not guilty of a State felony, although the possibility exists of a contempt charge, sometimes criminal in nature. Thus, for example, under California law, a witness who willfully disobeys court process and is found guilty of contempt has committed a misdemeanor.

The possibility of Federal removal to the State from which the witness fled probably was seen as the most important purpose in making this a Federal crime. At an earlier time, such removal may have appeared to provide the only legal way to compel the return of the witness since extradition of a witness, not charged with any crime, was not generally available, as it was in the case of the fugitive felon.

Experience under the witness provision has not been as great as under the felon clause. Fewer arrests of fugitive witnesses occur under section 1073. What experience there has been however, confirms that apprehension has been the principal function served; that prosecutions are rare; and that Federal removal is not the exclusive way to compel

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[9] 144 F.2d 656 (3rd Cir. 1944).
[10] 353 F.2d 761 (9th Cir. 1965).
[11] *See, e.g., Halliday* v. *United States*. 262 F. Supp. 325 (D. Mass. 1967).

the presence of a fugitive witness. Forty six States have enacted, in some form, the Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Proceedings. Although somewhat cumbersome, that Act establishes procedures whereby the presence of a fugitive witness can be compelled without resort to a Federal criminal charge and Federal removal proceedings.

B. *The Arguments For and Against an Alternative Approach*

The foregoing suggests that section 1073 is a category of crime that is rarely prosecuted—that its primary function is to authorize Federal apprehension of interstate fugitives. In light of this fact, is it desirable to retain this as a Federal crime? An alternative approach would be to repeal the penal section and substitute a provision directly authorizing apprehension by Federal law enforcement agents.

The major argument for repeal is that elimination of this as a crime would remove unnecessary disparities in the operation of the Federal criminal law. Federal prosecutions are infrequently initiated for this crime but frequently enough to raise questions about the evenhandedness of Federal criminal justice in this area. Inevitably, of course, prosecutors must exercise discretion whether to prosecute in connection with all categories of crime, but there is something rather disturbing about a discretion that is exercised so rarely. Moreover, this particular use of section 1073 is very odd. If the State offense is one that should be prosecuted by Federal officials when the State is unwilling to prosecute or dilatory, then a Federal offense category related to the State offense ought to be available and used rather than a catch-all offense category such as section 1073, the penalty for which bears no necessary relationship to the original criminal conduct. Indeed, even under present law, there are often such Federal offense categories available, and under a well conceived, revised Federal penal Code, there will surely be a specific Federal crime for any case in which it is appropriate to prosecute Federally.

A related use of section 1073 mentioned above, again relied upon very infrequently, has been to make it possible to charge a lesser offense in cases where a negotiated plea is called for. Again under a carefully drafted Federal penal Code, a greater number of lesser offenses, including attempts, would be available for such purposes, and it should not be necessary to utilize the fugitive felon provision for such a purpose.

Nor does analysis of other traditional Federal penal interests suggest that interstate flight should be made a Federal crime. In view of the infrequent incidence of prosecution, it seems very doubtful that any felon is deterred from traveling interstate by the prospect of being punished Federally. If there is a specifically Federal deterrent, it is created merely by the prospect that the F.B.I. will enter the case and thereby increase the chances that the fugitive will be caught. This is not a category of crime where there is a clear Federal interest (*e.g.*, counterfeiting) or where State prosecution is fraught with difficulties not present in a Federal trial (*e.g.*, a multi-State Dyer Act case) or where the State is not typically able or does not wish to prosecute. The only basis for this charge is that the fugitive has fled interstate to escape State prosecution. The Federal penal interest here, if any, is very difficult to discover.

The 1961 amendment to section 1073 requiring the approval of the Attorney General may be viewed as an effort to deal with the unevenness of the impact of this section.[12] But placing responsibility for decision in a higher official has not removed the apparent unevenness of application involved in initiating a handful of Federal prosecutions in connection with thousands of arrests. Whatever purposes the Attorney General has had in mind in exercising his discretion, they should be equally well served through the use of other offense categories under a revised Code.

One other argument also merits mention: that Federal agents need to have available the threat of Federal prosecution in order to cajole information out of recalcitrant witnesses. The fugitive felon statute is, however, only needed to serve this function in cases where: (1) an interstate fugitive has needed information: (2) the possibility of State prosecution is an insufficient threat; and (3) there is no other Federal offense category under which he might be prosecuted. That those three conditions will coincide very often seems unlikely, particularly under a revised Federal penal Code. The rarity of Federal prosecutions in the past suggests that the argument has, even up to now, had little relevance to the fugitive felon, although it is of course, possible that the use of such leverage almost always has had its desired effect, and therefore few Federal prosecutions have had to be instituted.

There are two final arguments for not adopting this approach to the fugitive felon problem. The first is that the approach may involve constitutional difficulties. On close inspection, however, there is no significant obstacle. The apparent difficulties are discussed in the next section. The weight to be given to the second argument is more difficult to assess. Summed up, it amounts to the contention that the change is not worth the effort. For in exploring the practical implications of making the change, it appears that there are all sorts of minor procedural and technical adjustments that may have to be made to accommodate the proposed change and yet keep the system operating in relation to fugitive felons in a substantially similar manner. Indeed it is fair to say that an additional reason for the approach taken in 1934 may have been that it was easier and simpler than any other. The question then boils down to whether it is worth going through all of these adjustments in order to accomplish a change in statutory approach the major merits of which are that it eliminates idiosyncrasies and matches the statutory description of the Federal role to the limited function that it is, in fact, serving.

Because of some peculiarities of the fugitive witness problem the arguments relating to repeal of that provision merit separate treatment. As noted, Federal criminal prosecution of fugitive witnesses also has not been a significant function under section 1073. Apprehension remains the primary purpose. In addition to apprehension, however, section 1073 may also be used to remove the witness back to the originating State. If so, repeal of section 1073 would eliminate the possibility of Federal removal, and the States would be forced

[12] The Department of Justice has indicated that the 1961 amendment "incorporated existing administrative practice." letter from the U.S. Department dated May 17, 1968.

to rely on the Uniform Act, mentioned above. Again, the use of a penal statute primarily to lay a foundation for removal is very odd, and it would be preferable to accomplish that result, if it is deemed important enough, by a more direct approach. The repeal of the fugitive witness clause of section 1073 is, therefore, also recommended, substituting, as in the case of the fugitive felon, a provision directly authorizing apprehension of fugitive witnesses by Federal agents. The constitutionality of such a provision is also discussed in the next section. In addition, the Commission should propose to Congress the enactment of a Federal statute dealing with the problem of obtaining out-of-State witnesses in criminal cases. Enactment of such Federal legislation would be an appropriate, desirable and relatively inexpensive method for the Federal government to supplement State law enforcement. Since the drafting of such legislation is outside the scope of this memorandum, no provisions therefor have been included here.

C. *The Constitutional Issues*

The constitutional debate in 1934 revolving around the fugitive felon proposal was whether the commerce power could be relied upon as a justification for this extension of Federal criminal authority.[13] That issue, however, has long been settled. That the power to regulate commerce among the States gives the Federal government a sufficient interest to make criminal the interstate movement of persons to avoid prosecution or testifying under State law is no longer open to serious question. Certain constitutional issues involved in the proposed approach to the fugitive felon problem remain, however: whether there is a similar basis in the commerce power for the authorizing of Federal arrests without making the underlying conduct criminal under Federal law; and whether there are any other constitutional objections to authorizing Federal arrest of persons who have engaged in conduct not involving any Federal crime.

The commerce power justification seems as applicable to the proposed approach as to the existing section 1073, particularly when seen in light of existing practice. Indeed, if to implement the commerce power Congress can make the interstate movement of fugitives a Federal crime, surely it has the power to enact legislation not involving as extreme an exercise of Federal legislative power—*viz.*, merely providing for Federal arrest authority. Experience has borne out the fact that it is Federal apprehension that more directly serves the Federal commerce interests. Establishing Federal criminal penalties may be a constitutionally permissible way of implementing those interests, but it is certainly not the exclusive method. In many other areas in exercise of the commerce power, Congress has used legislative techniques other than that of making the conduct criminal. Although the use of Federal arrest authority alone has not previously been legislated, such a legislative approach would seem constitutionally permissible, insofar as the commerce power is concerned.

Thus the Supreme Court has held that Congress can legislate to protect a Federal interest in connection with a State prosecution by

[13] *See* Note, *Federal Cooperation in Criminal Law Enforcement*, 48 HARV. L. REV. 489 (1935); Brabner-Smith, *supra*, note 3.

authorizing removal of the prosecution into the Federal courts.[14] The fact that there was no precedent for such legislative action was not deemed a constitutional barrier. Similarly, here, Congress can act to implement a Federal interest (the commerce power) in aid of State law enforcement, and no constitutional inference should be drawn from the fact that Congress never before has authorized Federal arrests in the absence of a Federal crime. Indeed, it seems unlikely that the Supreme Court would find constitutionally objectionable legislation that authorizes doing openly and directly that which is anyway being done under another guise.

It is true that historically Congress has enacted a new Federal crime whenever it has wished to authorize Federal investigation and arrest. Thus in connection with the fugitive felon provision itself or the enactment of legislation such as the Lindbergh kidnapping law,[15] where authorization was sought for Federal investigation and apprehension Congress made the conduct a Federal crime. These historical instances are not, however, dispositive of the constitutional questions involved. In each instance, there were motives in addition simply to authorizing Federal investigation and arrest. Also the focus of constitutional doubt at that point in history was whether Congress had authority at all in this area under the commerce power, not whether it could authorize arrest in the absence of a Federal crime. Finally, of course, the fact that Congress has in the past seen fit to follow one legislative path does not indicate that other routes are not constitutional.

The additional constitutional issue involved in this area may be formulated as follows: Assuming Congress has the authority under the commerce power to authorize Federal arrests of fugitives fleeing across State lines, is there any other constitutional objection, perhaps under the fourth amendment, to authorizing Federal arrests where the criminal conduct involved is violative only of State law? The issue is a tricky one. First it should be made clear that the question at this point is *not* whether Federal arrests can be authorized in the absence of evidence of any criminal conduct, since, by hypothesis, there is probable cause to believe that a serious offense under State law has been committed.

That even private citizens can, under some circumstances, make arrests for State crimes was established even at the time the Constitution was adopted. It is true that what is proposed here would give Federal agents arrest authority in relation to State crimes exceeding that of the private citizen, but there is nothing in the fourth amendment or any other provision of the Constitution that would seem to prohibit Federal law enforcement agents from exercising that type of authority. A State could, as a matter of State law, give such authority to Federal agents, and surely Congress can do so too, as a matter of Federal law, provided that there is a substantive constitutional basis for the exercise of Federal authority—in this case, the commerce power.

The constitutional issue in relation to fugitive witnesses is similar, but has some additional dimensions. The commerce power argument applies here with equal force. Abolition of the provision making it a

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[14] *Tennessee* v. *Davis*, 100 U.S. 257 (1880).

[15] 18 U.S.C. § 1201.

Federal crime to flee interstate to avoid testifying in a State criminal proceeding may, however, leave the Federal apprehension authority without *any* criminal conduct on which to base a Federal arrest, since, as noted earlier, the flight of the witness may not be a crime under State law. If, however, the State has the power to detain material witnesses who have committed no State crime, and the Federal government similarly can detain material witnesses in connection with Federal prosecutions,[16] again there would seem to be no constitutional barrier to Federal detention of State fugitive witnesses. Analytically, such arrests can be justified as a necessary incident of the State's authority to prosecute, with Federal intervention grounded on the use of the commerce power to supplement this legitimate exercise of State authority. It should, of course, be emphasized that lengthy detentions are not contemplated here.

III. Present Law and Practice

A. For a violation of section 1073 to occur under present law, it is not necessary that the fugitive felon be under indictment in the State in which the State offense was alleged to have been committed. If the fugitive fled with the necessary mens rea from the State in which he was alleged to have committed a specified offense, that is sufficient to trigger section 1073.[17] The only case holding to the contrary—*i.e.*, that a State indictment or information must have issued prior to flight, *United States* v. *Rappaport*,[18] was a district court opinion which has not since been cited as authority and seems to run counter to the language of section 1073 and the purposes of the legislation. In the words of the judge in the *Lupino* case:[19]

> If the construction urged by the defendant were the correct one, then I dare say that the statute would be an ineffective aid to the capture or prosecution of fleeing felons because of the time which would necessarily be required to institute some formal prosecution.

B. Although a formal criminal charge is not required in the originating State, Department of Justice practice is generally not to enter the case until a State warrant is issued in the originating State for the fugitive. Based upon this State warrant, a Federal warrant is then issued.

C. In theory, since a Federal offense has been committed by the movement interstate with the necessary mens rea, F.B.I. arrest authority is that generally established in connection with felonies, as set forth in 18 U.S.C. § 3052.[20]

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[16] *See* 18 U.S.C. § 3149.

[17] *Lupino* v. *United States*, 268 F.2d 799 (8th Cir. 1959); *United States* v. *Bando*, 244 F.2d 833 (2d Cir. 1957); *Barker* v. *United States*, 178 F.2d 803 (5th Cir. 1949).

[18] 156 F. Supp. 159 (1957).

[19] *Lupino* v. *United States*, *supra* note 17, at 802.

[20] Section 3052 provides:

> The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and

Such arrests may thus be made with or without a warrant. Unless the fugitive is already in Federal custody or is somehow apprehended beforehand, normal practice is for arrests under section 1073 to be made under a Federal warrant issued based upon a State warrant as mentioned above.

D. There is no requirement under present law that the Attorney General or any other Department of Justice official must give his approval before a Federal warrant can be issued. A recent district court case,[21] rejected the contention that the 1961 amendment to section 1073 providing that "Violations of this section may be prosecuted . . . only upon formal approval in writing by the Attorney General or an Assistant Attorney General . . ." required such an approval before a Federal warrant could be issued, holding that, for purposes of the quoted language, a prosecution starts with the filing of a complaint and the issuance of a warrant, not an information or indictment.

E. A Federal arrest warrant for violation of section 1073 is issued in the same way as Federal warrants for other violations of Title 18, United States Code: by a United States Commissioner or district court judge, based upon the usual showing of probable cause.

IV. Comments on the Consultant's Proposed Statutes

A. *Introduction*

Under draft section 1, 18 U.S.C. § 3052 is amended to give F.B.I. agents authority to arrest, with or without a warrant, accused and convicted felons or witnesses who have fled interstate in the specified circumstances. Under present law, F.B.I. arrest authority is limited to making arrests under an arrest warrant or without a warrant for offenses against the United States committed in the presence of the officer or for felonies cognizable under the laws of the United States.

Under existing law, arrest warrants may only be issued in connection with offenses against the United States or cognizable under the law of the United States. Consequently eliminating interstate flight as a crime removes any basis under existing law for the issuance by a Federal judicial officer of a warrant to arrest an interstate fugitive. To insure, under the proposed approach, that a warrant for the arrest of an interstate fugitive may be issued, it is necessary to provide expressly therefor in the Federal statutes. The approach taken thus involves two parts: (1) direct expansion of F.B.I. arrest authority; and (2) expansion of the power of specified judicial officers to issue warrants under the authority of the United States.

Enactment of either provision alone would make it possible for F.B.I. agents to arrest interstate fugitives under some circumstances. But if only an expansion of judicial authority to issue warrants were effected, the F.B.I. would be limited to making interstate fugitive

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subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony recognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

[21] *United States* v. *McCarthy*, 249 F. Supp. 199 (E.D. N.Y. 1966).

arrests only where an arrest warrant had been issued. There are, or may be, occasions where an arrest of an interstate fugitive must be made without a warrant, and amendment of the F.B.I. arrest authority in 18 U.S.C. § 3052 is necessary to authorize such arrests.

A disadvantage of any direct amendment of section 3052 is that it is subject to a charge that an expansion of F.B.I. arrest authority with respect to State crimes is involved. It may appear to some that expansion is a move in the direction of a national police force. The appropriate response to this, of course, is that the F.B.I. has been performing this particular apprehension function since 1934.

B. *F.B.I. Arrest Authority: Draft Section 1*

Section 1 first restates the existing language of section 3052. It then sets forth an F.B.I. arrest authority commensurate with that which flowed from the previous existence of section 1073. However, certain changes are made in the scope of that authority by adjusting the type of State crimes upon which Federal arrest assistance can rest.

As originally enacted, the Fugitive Felon Act covered interstate flight to avoid prosecution for certain specified State felonies. The class of State offenses to which it was applicable was broadened by a 1961 amendment to cover crimes punishable by death or which were felonies or, as in the case of New Jersey, were high misdemeanors under the law of the State from which the person fled. But the statute was still limited to serious crimes on the order of a felony, probably on the theory that it was only with respect to the more serious offenses that Federal intervention and the allocation of Federal resources could be justified.

The term "felony", which has always meant different things in different States, may no longer be an adequate indicator that the State offense involved is of sufficient gravity. In recent years, a large number of penal reform efforts have been initiated, and in many instances accomplished. A new terminology may be developing. Several alternate approaches are possible. The draft might try to take account of the new terminology or, as is provided for in draft section 1, the minimum penalty and the type of penal institution in which it might be served may be used as an index of the seriousness of the State crime. Thus, draft section 1 provides that the State offense must be subject to a minimal punishment of not less than 2 years in prison. Although "2" seems a reasonable figure, other choices are possible. The principle is that the *possible* penalty (not the label) and the *possible* place of incarceration (a penitentiary, not a local jail) are the determining factors.

Draft section 1 does not, however, remove an existing failing of present law. Because of the approach taken, a State still has it in its power to determine whether Federal intervention is authorized in connection with particular conduct by legislating a higher penalty for such conduct. The issue comes up most frequently in connection with attempts by State officials to obtain F.B.I. assistance to apprehend errant fugitive fathers who have failed to make support payments or fugitive debtors. Presently, these cases are scrutinized with care and almost never pursued, pursuant to internal policy guidelines within the Department of Justice. It is assumed that this approach will be continued.

The fugitive witness clause of 18 U.S.C. § 1073, originally applicable to "felony" cases, then amended to apply to offenses punishable by imprisonment in a penitentiary, was amended in 1961 to accord with the fugitive felon clause in the same statute by extending its application to crimes punishable by death, felonies and New Jersey high misdemeanors. Draft section 1, in effect, shifts back to the pre-1961 fugitive witness formula, makes it more specific by specifying a term of years and applies it to both the felon and the witness clauses.

Under present law, there is no statutory requirement that a State warrant for a fugitive felon be issued before Federal investigation and apprehension are triggered. But the practice of the Department of Justice generally is not to enter a case until a State warrant is issued. It is assumed that this general practice will be continued. There are, of course, urgent situations where it would be wise not to insist that a State warrant be issued before a Federal arrest is authorized. Federal arrests should not, however, be authorized unless there are: (1) reasonable grounds to believe that the requirements for Federal intervention are present *viz.*, interstate flight, a serious crime, *etc.*; and (2) the appropriate State authority expresses a desire for Federal assistance. Accordingly, draft section 1 makes both requirements. Insistence that there be a request from a responsible State official at an appropriately high level will serve to protect State interests. It will also serve to insure that Federal intervention is not obtained without cause. Since under the new approach, there will be no back-up Federal crime in case the State changes its mind, it is particularly important to require that a responsible State request be involved.

At the same time, it is not desirable to make the procedure for invoking Federal assistance too cumbersome or time-consuming. A telephone request from the local district attorney or his assistant to the F.B.I. regional office or resident agency should be sufficient to trigger Federal assistance, and the draft so provides.

The existence of both the required reasonable grounds and the request from a State official are set forth as preconditions for making an arrest without a warrant or issuing an arrest warrant in a fugitive felon case. Presumably, the absence of either pre-condition would make the arrest illegal and a ground for excluding, in a State prosecution, the evidence obtained incident thereto. If it is deemed inappropriate to treat a Federal arrest as illegal for purposes of admitting evidence because of the absence of a statutorily required State request, an additional provision clarifying the matter can be drafted.

The draft limits the power to make arrests of fugitive felons to agents of the Federal Bureau of Investigation. Under present law, any Federal law enforcement agents with general arrest powers have, in theory, authority to arrest fugitive State felons. As a matter of Justice Department policy and as a practical matter, however, the F.B.I. is the Federal agency responsible for enforcement of section 1073. The draft thus again simply codifies the existing situation. If, for some reason, it is desired that other Federal law enforcement agencies have a similar arrest authority, appropriate adjustment in the draft language can be made.

No attempt has been made in the draft to reenact section 1074 which was a legislative response to a rash of firebombings of homes and places of worship in the South in the late 1950's and early 1960's.

Though cast in fugitive felon terms, it arguably should have really been aimed at those who move interstate either *before* or *after* having committed a bombing. As a fugitive felon arrest provision it seems unnecessary since under the draft approach, the general provision for dealing with the fugitive aspect of the problem seems adequate, and if it is not, further attention ought to be paid to the description of the categories of crime for which Federal arrests of fugitives may be made.

As a substantive provision aimed at Federal prosecution and conviction, it clearly ought to be recast and not limited, as it is in present law, to fugitive situations. It is worth noting that since section 1074 was enacted in 1960, there has not been a reported appellate case involving a prosecution based under the section.

C. *Authority of Judicial Officers To Issue Federal Arrest Warrants for State Fugitive Felons: Section 2*

The warrant issuance powers of Federal judges and U.S. Commissioners are not specifically provided for by statute,[22] but the scope of their authority has been described in detail in some judicial opinions.[23] And where the exercise of unusual powers has been desired, express statutory provisions have been enacted. Thus, a close analogue of the type of provision contemplated here—*i.e.* extending the warrant issuance authority of Federal judges and United States Commissioners to include interstate fugitives, even in the absence of the commission of any Federal offense, is found in 18 U.S.C. §§ 3183 and 3184. Section 3183 authorizes an "officer or representative of the United States vested with judicial authority" in a case where a fugitive from a State has fled to a country in which the United States exercises extraterritorial jurisdiction "shall cause such fugitive to be arrested and secured" upon appropriate demand by the executive authority of the State.

Similarly in cases involving a fugitive from a foreign country which is a party to an extradition treaty with the United States, section 3184 authorizes "any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State . . . [to] issue his warrant for the apprehension of the person so charged . . . ."

Proposed draft section 2 may be viewed as simply extension of sections 3183 and 3184 to authorize, as a matter of Federal law, both Federal and State judicial officers to issue warrants for the arrest of interstate fugitive felons. Under present law, most State judicial officers probably already have this power under State law. Inclusion of State judicial officers under this provision will permit F.B.I. agents to serve a warrant issued by a State judicial officer for the arrest of an interstate fugitive, since the warrant is thereby issued under the authority of the United States. Although normal practice would be to seek such a warrant from a Federal judge or U.S. Commissioner, there may be situations where only a State judicial officer is available. Such a provision has precedent in section 3184, *supra*, and is consistent with existing section 3041 that authorizes State judges and magistrates to hold for trial a person arrested for committing an offense against the United States.

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[22] *See* 28 U.S.C. § 631.

[23] *See, e.g., United States* v. *Allred*, 155 U.S. 591 (1894).

The circumstances under which a warrant of arrest for a fugitive may, under draft section 2, be issued are identical with those described in draft section 1, *supra*, dealing with F.B.I. arrest authority. The same type of requirement set forth in the latter section, that the chief prosecution officer of the local government unit must request that a warrant of arrest be issued, is provided.

A complaint upon which a Federal warrant may be issued will usually allege the fact that a State arrest warrant on a charge of the required nature has been issued; the grounds for believing that he has fled interstate to avoid prosecution and the fact that there has been an official request from the appropriate local official.

V. Additional Procedural Implications of the New Approach

A. The new approach *may* require some minor changes in the language of the Federal Rules of Criminal Procedure which are geared to charges of a Federal offense.

Rule 5 of the Federal Rules requires that a person arrested by Federal agents must be brought before a United States Commissioner "or any other nearby officer empowered to commit persons charged with offenses against the laws of the United States." Several functions are to be immediately performed by the magistrate. He must inform the defendant of the complaint against him and of his various rights in connection therewith. He must allow him to consult counsel and admit him to bail in accordance with the Rules. And if the defendant waives a preliminary examination, he "shall forthwith hold him to answer in the district court." If there is no waiver, a preliminary examination is to be held within the times specified in the recently enacted 18 U.S.C. § 3060.

Typically, under present practice, a fugitive felon arrested by a Federal agent is brought before a U.S. Commissioner, is informed of the complaint and warned of his rights. If he does not waive the preliminary hearing, a date for it is set, but prior to that date the defendant is turned over to State authorities in the State of apprehension for extradition to the State of origin. The Federal charge is then dismissed.[24]

There seems to be no practical reason why, under the draft approach, Federal agents who arrest a fugitive felon should not continue to bring him before a U.S. Commissioner or other Federal judicial officer. Of course, the possibility of bringing him before a State judicial officer which exists under present law [25] should also be available.

Whether a U.S. Commissioner or other Federal judicial officer is legally empowered as a matter of Federal law to perform the above-mentioned functions in relation to persons not charged with a Federal offense is not clear. (He may, of course, have such power under the law of the particular State in which he sits.) Arguably, as a judicial officer, he may have inherent power to perform the relatively minor, though constitutionally important, functions of informing the arrestee of the complaint against him, warning him of his rights, admitting him to bail and possibly testing the validity of the arrest on its face. It is doubtful, however, that such inherent power, even if it does exist, would extend to holding the arrestee to answer in a State court.

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[24] *Cf.* 18 U.S.C. § 3060(e).

[25] *See* Fed. R. Crim. P. 5; 18 U.S.C. § 3041.

Under the approach, the committing judicial officer would, in the normal course, simply inform the arrestee of the complaint and warn him of his rights at the first appearance. The arrestee would shortly thereafter be turned over to State authorities for extradition, consistent with present procedures. The fugitive felon is normally not admitted to bail since, by his earlier flight, he has shown that he cannot be relied upon to appear at later proceedings. If the judicial officer has inherent power to perform such limited functions, no changes in the Federal Rules may be required. The argument would be that rule 5 and its requirements are applicable only to arrestees charged with a Federal offense, and persons arrested by Federal agents for State offenses are not covered thereby.

It would probably be preferable, however, to oppose amendments to the Federal Rules or a statutory provision that describes the procedures to be followed in those cases where a person is arrested by Federal agents on a State charge "as to which Federal arrest authority exists." Proposing amendments to the Federal Rules on these matters may raise issues regarding the scope of the Commission's activities. This, in turn, may affect the judgment to be made whether to adopt this new approach to the fugitive felon problem. Until these issues are resolved it was deemed better not to attempt to draft the language of any proposed amendment to the rules.

There is ample precedent for the limited function that Federal judicial officers will perform in connection with a fugitive arrested by Federal agents on a State charge. The function is somewhat comparable to that provided under existing law for a State judge or magistrate acting in connection with the charge of a Federal offense. Under present law, Federal officers may bring persons arrested on Federal charges before "any other nearby officer empowered to commit persons charged with offenses against the laws of the United States." [26] Such officers consist of "any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where the offender may be found . . . ." [27] Under the draft it is assumed that the arrested fugitive felon may also be brought before an appropriate State judicial officer. It may, however, be necessary to amend section 3041, if it is desired to provide therefor as a matter of Federal law.

Of course, consistent with the analysis of the constitutionality of the authorizing of apprehension by Federal agents of those who have crossed State lines to avoid prosecution on State charges, there is no constitutional obstacle to authorizing either Federal or State judicial officers to perform these functions in relation to such State charge arrestees.

B. The provisions of rule 5(a) require that a person be brought without unnecessary delay before a judicial officer. Although the arrest by Federal officers will, under the proposal, be for a State offense, since Federal officers are involved, the "without unnecessary delay" clause should be deemed applicable. If new provisions are drafted, a similar phrase should thus be incorporated to cover Federal arrests on State charges.

C. Under the provisions of rule 5(a) where a person is arrested without a warrant, "a complaint shall be filed forthwith." Although

[26] FED. R. CRIM. P. 5.
[27] 18 U.S.C. § 3041.

as a matter of Federal law, the arrest may be made without a Federal warrant, it is assumed that this requirement that a complaint must be issued is inapplicable to the situation contemplated here.

D. It is contemplated under the proposal that a Federal arrest warrant will normally be issued based upon the State warrant and compliance with the specified procedures. In such case, a return on the warrant would be required to be made consistently with the provisions of rule 4. Again, it would be better to draft an express provision dealing with this matter. Where the arrest is made by Federal officers acting without a Federal arrest warrant, the arrest will be treated Federally as one without a warrant, despite the fact that a State warrant may previously have been issued.

E. Federal agents acting under the authority of draft section 1 will enjoy the same right of search incident to an arrest that they possess under present law. If the arrest is legal because the draft section expressly authorizes it, then the usual right of search incident thereto is applicable. Evidence legally seized by Federal agents may, of course, be admitted in the subsequent State prosecution.[28] Suppose, however, that no arrest has yet occurred but an arrest would be authorized if the arrestee could be found, and in the course of their investigation, the F.B.I. have reason to believe that instrumentalities of the State crime or evidence as to the fugitive's whereabouts may be found in a certain apartment. May they obtain a warrant to search it? Rule 41, authorizing the issuance of Federal search warrants, seems to contemplate that an offense against the United States be involved.[29] There are, of course, circumstances under which it would be useful in these cases for Federal agents to be able to obtain a search warrant.[30] It may be necessary to amend rule 41 to make clear that such authority is available in any case where Federal agents may make an arrest.

F. Miscellaneous other problems similar to those described above require consideration. For present purposes, it should suffice to mention the principal ones.

(1) Are the provisions of the Bail Reform Act 18 U.S.C. §§ 3146–3150, applicable to persons arrested under the new approach? It seems that they should be, but a question may be raised, for example, regarding the applicability of 18 U.S.C. § 3147(a).

(2) Would the provisions of present sections 751 *et seq.*, relating to escape from Federal custody be applicable to persons arrested under the draft approach? Under the present section 751, a question might be raised regarding the penalty provisions of that section since they are geared to the type of Federal charge for which the arrest is made. The matter can easily be handled in the drafting of the new escape provisions

(3) Similarly, the provisions of the new Code relating to resisting arrest and assaulting officers serving warrants[31] and concealing persons for whom a Federal warrant has been issued[32] should be drafted in terms that take account of the approach of the proposed provisions.

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[28] *See, United States ex. rel. Puntari* v. *Maroney*, 220 F. Supp. 801 (W.D. Pa. 1963).

[29] *See, e.g.*, FED. R. CRIM. P. 41(b)(1):

> A warrant may be issued under this rule to search for any property.
> (1) Stolen or embezzled *in violation of the laws of the United States* . . . (Emphasis added.)

[30] *Cf. United States* v. *Birrell*, 243 F. Supp 36 (E.D.N.Y. 1965).

[31] *See*, 18 U.S.C. §§ 111, 1501.

[32] 18 U.S.C. § 1071.

COMMENT

on

OBSTRUCTION OF JUSTICE:

SECTIONS 1321–1324, 1326–1327, 1355, 1366, 1367
(Agata; February 19, 1969)

Tampering with Witnesses, Informants and Physical Evidence: Sections 1321–1323

1. *Background; Purpose; Scope.*—Proposed sections 1321–1323 deal with interference with official proceedings from third party conduct directed to witnesses and informants (sections 1321–1322), by the destruction of evidence (section 1323), and by witnesses concealing themselves.* The current statutory provisions dealing with these matters, primarily 18 U.S.C. §§ 1503, 1505 and 1510,[1] state the offenses in general terms which have been a source of difficulty and uncertain construction. Bribetaking by witnesses or informants, now governed by 18 U.S.C. §§ 201(e), 1503 and 1505, is dealt with in proposed sections 1321(2) and 1323(2).

18 U.S.C. § 1503, in terms derived from criminal contempt statutes and common law formulations of obstruction of justice offenses, condemns conduct characterized as "corrupt" or involving threats or force which: (a) "endeavors" to influence witnesses, jurors and court officers in any court of the United States; or (b) influences or obstructs or impedes the "due administration of justice;" or (c) "endeavors" to obstruct, *etc.* the due administration of justice. Section 1503 of Title 18 also prohibits injuring such persons in their person or property on account of their service as a witness or performing official duties. 18 U.S.C. § 1505 contains similar provisions dealing with witnesses in legislative and administrative proceedings and obstructions of the "administration of law."

Proposed sections 1321–1323 are concerned with only portions of the scope of present sections 1503 and 1505, *i.e.*, witnesses, informants

*This section was omitted from the Study Draft. It is discussed *infra*, p. 576.

[1] In addition, obstruction of justice and government functions has been dealt with under 18 U.S.C. § 111 (assault) and 18 U.S.C. § 372 (conspiracy). *See* Extended Note A, Conspiracy to Defraud, *infra*, and Extended Note B to the comment on section 1301 (physical obstruction of government function).

and evidence; other provisions drafted or to be drafted deal with other aspects.[2]

Present sections 1503 and 1505 deal with a great variety of situations under the aegis of language which provides neither standards sufficient to predict whether particular conduct is condemned nor adequate guidance to make important policy distinctions between related kinds of conduct. Section 1503, for example, concludes "[whoever] . . . corruptly or by threats of force, or by any threatening letter or communication, influences, obstructs, or impedes or endeavors to influence, obstruct, or impede, the due administration of justice . . ." is subject to a $5,000 fine and/or 5 years' imprisonment. Although the courts have not denied the constitutionality of 18 U.S.C. §§ 1503 and 1505, frequently the statutes have been the subject of limiting constructions, possibly in part reflecting an understandable reluctance to read a criminal statute as authorizing practically limitless discretion to determine what constitutes a crime.[3] Thus, the apparently broad term "due administration of justice," often interpreted narrowly, required the recent enactment of 18 U.S.C. § 1509.[4]

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[2] Such provisions cover tampering with jurors (section 1324); retaliation (section 1367); threats to judicial officials (section 1366). Under the general rubric "corrupt" and other language in 18 U.S.C. §§ 1503 and 1505, current law extends to intimidating witnesses. *See Smith* v. *United States*, 274 F. 351 (8th Cir. 1921) (decided under 18 U.S.C. § 241, now 18 U.S.C. § 1503); *Harper* v. *United States*, 27 F.2d 77 (8th Cir. 1928) (conspiracy for false arrest of witness); *United States* v. *Kindred*, 5 F. 43 (E.D. Va. 1880) (J.P. involved in false arrest and whipping of witness in Federal case). It also includes: offers to bribe witness (*United States* v. *Mannarino*, 149 F. Supp. 351 (W.D. Pa. 1956)); attempts to suborn perjury (*United States* v. *Batten*, 226 F. Supp. 492 (D.D.C. 1964), *cert. denied*, 380 U.S. 912 (1965) (18 U.S.C. § 1505)); inducing another to destroy records (*Berra* v. *United States*, 221 F.2d 590 (8th Cir. 1955), *aff'd*, 351 U.S. 131 (1956) (18 U.S.C. § 1503)); destroying records in contemplation of Senate Committee investigation (*United States* v. *Presser*, 187 F. Supp. 64 (N.D. Ohio 1960), *aff'd*, 292 F.2d 171 (6th Cir. 1961), *aff'd*, 371 U.S. 71 (1962) (18 U.S.C. § 1505)); destruction of records (*United States* v. *Solow*, 138 F. Supp. 812 (S.D. N.Y. 1956) (18 U.S.C. § 1503)); *United States* v. *Siegel*, 152 F. Supp. (S.D. N.Y. 1957), *cert. denied*, 359 U.S. 1012 (1959) (18 U.S.C. § 1503); *United States* v. *Curcio*, 279 F.2d 681 (2d Cir. 1960), *cert. denied*, 364 U.S. 824 (1960) (18 U.S.C. §§ 371, 1503)). For some anomalous situations raised by overlap with perjury provisions, *see, e.g., United States* v. *Knohle*, 379 F.2d 427 (2d Cir.), *cert. denied*, 389 U.S. 973 (1967); *Roberts* v. *United States*, 239 F.2d 467 (9th Cir. 1956); *Doan* v. *United States*, 202 F.2d 674 (9th Cir. 1953).

[3] Consider *Haili* v. *United States*, 260 F.2d 744 (9th Cir. 1958); *Falk* v. *United States*, 370 F.2d 472 (9th Cir. 1966), *cert. denied*, 387 U.S. 926 (1967); *United States* v. *Kahn*, 366 F.2d 259 (2d Cir.), *cert. denied*, 385 U.S. 948 (1966); *Taran* v. *United States*, 266 F.2d 561 (8th Cir. 1959); *Rosner* v. *United States*, 10 F.2d 675 (2d Cir. 1926); *United States* v. *Scoratow*, 137 F. Supp. 620 (W.D. Pa. 1956).

[4] Speaking of the "due administration of justice" phrase in 18 U.S.C. § 1503, a House Report on Civil Rights notes that the particular phrase has been narrowly interpreted by the courts. HOUSE COMM. ON THE JUDICIARY, CIVIL RIGHTS, H.R. REP. No. 956, 86th Cong., 1st Sess. 5 (1959). Apparently, the Attorney General made this statement during the course of the hearings. *Id.* at 36. *See also* the legislative history of 18 U.S.C. § 1510, dealing with violation of injunctions, enacted because of a narrow construction of the pending proceeding requirement in 18 U.S.C. § 1503. HOUSE COMM. ON THE JUDICIARY, OBSTRUCTION OF CRIMINAL INVESTIGATIONS. H.R. REP. No. 658, 90th Cong., 1st Sess. 2 (1967), *citing Haili* v. *United States*, 260 F.2d 744 (9th Cir. 1958), and *United States* v. *Scoratow*, 137 F. Supp. 620 (W.D. Pa. 1956) (FBI investigation is not a pending proceeding protected by 18 U.S.C. § 1503).

Another limiting feature of present sections 1503 and 1505 is that judicial construction has required a "pending proceeding" as an element of the offense. The proposed sections avoid using these troublesome requirements and phraseology.

The term "corruptly" in 18 U.S.C. § 1503 has carried a burden of characterizing both conduct and culpability in a multitude of situations. Despite a long history of litigation under 18 U.S.C. § 1503 and its predecessors, the term has no generally accepted meaning.[5] The proposals in sections 1321–1323 and elsewhere do not rely on "corruptly,"[6] but specify the prohibited conduct and employ the terms denoting culpability (intentionally, knowingly, recklessly, *etc.*) which have tentatively been approved for use throughout the proposed Code. The result is not only greater certainty in defining offenses, but it permits dealing with issues in terms appropriate to the unique problems presented by such different conduct as tampering with jurors, witnesses or evidence and physical interferences generally. The total impact of these new provisions embraces a broader class of conduct than does current law, and should avoid the judicial hostility and prosecutorial caution fostered by the uncertainties of the more general provisions of current law.

Another consequence and purpose of being specific about the prohibited conduct is to avoid the use of a term such as "endeavors" in current law (18 U.S.C. §§ 1503, 1505). Instead of using this term or a similar one with its connotations of "attempt," proposed section 1321, in effect, codifies the present construction of "endeavors."[7] It defines the conduct with the prohibited purpose without regard to whether it would be an "endeavor," "attempt" or "solicitation" by other standards.

2. *Pending Proceeding Issue.*—By virtue of subsection (3)(c) of section 1321, lack of a pending proceeding is no defense to a prosecution under section 1321. The section relies solely on the defendant's culpability, that is his "intent" to influence another in an official proceeding.[8] This eliminates the requirement under current law[9] of an actual pending proceeding or a prospective proceeding that is actually con-

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[5] *See Anderson* v. *United States*, 215 F.2d 84 (2d Cir.), *cert. denied*, 348 U.S. 888 (1954) (upholding constitutionality). *See also Rosselman* v. *United States*, 239 F. 82, 86 (2d Cir. 1917), to the effect that "corrupt" has different meanings in different contexts.

[6] *See* MODEL PENAL CODE § 240.1, Comment at 196 (P.O.D. 1962), explaining decision not to use "corruptly" in bribery provision.

[7] *See United States* v. *Russell*, 255 U.S. 138, 143 (1921) (by using the word "endeavor," "the section got rid of the technicalities which might be urged as besetting the word 'attempt', and it describes any effort or essay to accomplish the evil purpose that the section was enacted to prevent . . ."). For recent congressional criticism of the term, *see* HOUSE COMM. ON THE JUDICIARY, CIVIL RIGHTS, H.R. REP. No. 956, 86th Cong., 1st Sess. 35 (1959) (minority views on H.R. 8601, 18 U.S.C. § 1509).

[8] Mens rea issues under current law have been a source of great difficulties. For some examples, *see* Extended Note B, Mens Rea Requirements, *infra*.

[9] *See, e.g., United States* v. *Scoratow*, 137 F. Supp. 620 (W.D. Pa. 1956) (FBI investigation not a proceeding); *Haili* v. *United States*, 260 F. 2d 744 (9th Cir. 1958).

templated by the authorities.[10] The irrational distinction suggested in current interpretations of 18 U.S.C. § 1503 between whether beating a person to prevent him from testifying occurred before or after a proceeding has been commenced is eliminated.

The irrationality of the distinction is well illustrated by the colorable argument it permitted the defendant to make in a losing cause in *Hunt* v. *United States*.[11] Charged with violating section 1503 because he beat a person subpoenaed to appear in a preliminary hearing before a Commissioner, defendant argued there was no offense because the victim was not a witness under 18 U.S.C. § 1503. He was not a witness, defendant contended, because there was no proceeding before a court of the United States when the beating took place. The court held that "section 1503 comes into play at least when a complaint has been filed with a United States Commissioner," but it would have had difficulty so holding if the same person had been beaten before the complaint had been filed. Language in the case suggests the court might have been willing to find an offense without the filed complaint, but earlier cases would have to be disregarded or distinguished.[12]

The Model Penal Code does not require proof of a pending proceeding to establish the tampering with witness offense; its provision relies solely on the defendant's culpability, *i.e.*, the defendant's "belief an official proceeding or investigation is pending or about to be instituted."[13] The explicit exclusion of the possible defense in section 1321(3) is a more direct approach to the issue. In addition, the defendant's "belief" referred to in the Model Penal Code, is actually a matter of evidence which would tend to prove the "intent" required under section 1321.[14]

3. *Persons Not to be Interfered With.*—Under current law, the definition of "witness" can be a decisive factor in a section 1503 prosecution. It was previously noted with respect to the "pending proceeding" issue, in order for one to be a witness, current law requires a

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[10] The cases in note 9, *supra*, would be overruled; and, in addition, there would no longer be an issue as to: (a) whether or not a grand jury was in session when defendant requested others to tamper with records (*Bosselman* v. *United States*, 239 F. 82 (2d Cir. 1917); (b) whether the process preceding formal complaint is an administrative proceeding (*Rice* v. *United States*, 356 F. 2d 709 (8th Cir. 1966) (court found a proceeding for purposes of 18 U.S.C. § 1505)). Even under current law, if a conspiracy is charged it may relate to a future and not a pending proceeding, *See, e.g., United States* v. *Kahn*, 366 F. 2d 259 (2d Cir.), *cert. denied*, 385 U.S. 948 (1966); *United States* v. *Perlstein*, 126 F. 2d 789 (3d Cir. 1942). *See also Etie* v. *United States*, 55 F. 2d 114 (5th Cir. 1932).

[11] 400 F. 2d 306 (5th Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969).

[12] *See* notes 9 and 10, *supra*.

[13] MODEL PENAL CODE § 241.6(1) (P.O.D. 1962). *Cf.* N.Y. REV. PEN. LAW § 215.10 (McKinney 1967) ("knowing that a person is or is about to be called as a witness in an action or proceeding"); MICH. REV. CRIM. CODE § 5020 (Final Draft 1967) ("a witness or a person he believes is about to be called as a witness in any official proceeding").

[14] The formulation under section 1321 also avoids the need to prove as an element of the offense, a relationship in time between the defendant's conduct and the point at which the victim is to testify. This, inadvertently, may be implicit in the Model Penal Code's formulation, "about to be instituted." *See* note 13, *supra*. If the Model Penal Code approach is adopted, the phrase "likely to be instituted" should be substituted for "about to be instituted." *See* paragraph 5, *infra*, for a discussion of this language in section 1323 (tampering with physical evidence).

"pending proceeding." [15] But even if there is a "pending proceeding," the issue of who is a "witness" under current law (18 U.S.C. §§ 1503, 1505) involves such considerations as whether he *has been* subpoenaed or *will be* subpoenaed, whether he actually intends to testify or only if the defendant believes he intends to testify. The case law has not clearly defined a "witness." [16] The proposal eliminates the issue by not relying on the term or an equivalent, but, instead, describes the functions the defendant intends to affect. For example, if *D* offered *B* a bribe with intent to influence *B*'s testimony in an official proceeding, he violates proposed section 1321(1)(a) regardless of *B*'s status as a subpenaed witness, prospective witness or possible witness. As a practical matter, the focus is on defendant's conduct toward another, rather than the status of the other. The defendant's conduct, of course, will be a product of his belief the other may intend or be required to supply evidence in a proceeding; and thus, the reality will be that the defendant's belief about the other's status as a witness is involved. But the draft's focus upon his actual conduct and intent obviates the need to rely on any reference to "witness" and the difficulties that term has presented in this context.[17]

While proposed section 1321 covers conduct directed towards both witnesses and informants, its focus is on proceedings. Although conduct directed towards influencing persons supplying information in criminal investigations often contemplates proceedings will follow, section 1322 has been proposed to assure retention of the present coverage of 18 U.S.C. § 1510, prohibiting obstruction of criminal investigations.[18]

4. *Prohibited Techniques and Purposes in Section 1321.*—As previously noted, proposed sections 1321 and 1322 define the prohibited conduct and culpability, thereby avoiding the pitfalls of amorphous terms such as "corruptly."

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[15] *See* text accompanying notes 10 and 11, *supra*; 18 U.S.C. §1510 (obstruction of investigations) was enacted to protect informants before a proceeding commenced and to avoid *United States* v. *Scoratow*, 137 F. Supp. 620 (W. D. Pa. 1956). (See note 3, supra, and accompanying text, and 1967 U.S. CODE CONG. & AD. NEWS 2689). The relationship between the two concepts is illustrated in *United States* v. *Batton*, 226 F. Supp. 492 (D.D.C. 1964), *cert. denied*, 380 U.S. 912 (1965), where the court considered whether a SEC investigation was a proceeding to support a prosecution under 18 U.S.C. § 1505 for inducing false testimony. *See also Williams* v. *United States*, 265 F. 2d 214 (9th Cir. 1959).

[16] *See, e.g., Falk* v. *United States*, 370 F. 2d 472 (8th Cir.), *cert. denied*, 387 U.S. 926 (1967); *Berra* v. *United States*, 221 F. 2d 590 (8th Cir. 1955), *aff'd*, 351 U.S. 131 (1956); *Walker* v. *United States*, 93 F. 2d 792 (8th Cir. 1938); *Roberts* v. *United States*, 239 F. 2d 467 (9th Cir. 1956); *Stein* v. *United States*, 337 F. 2d 14 (9th Cir. 1964), *cert. denied*, 380 U.S. 907 (1965); *Samples* v. *United States*, 121 F. 2d 263 (5th Cir.), *cert. denied*, 314 U.S. 662 (1941); *Smith* v. *United States*, 274 F. 351 (8th Cir. 1921); *United States* v. *Cusson*, 132 F. 2d 413 (2d Cir. 1942). *See* Extended Note C, Meaning of "Witness" in 18 U.S.C. §§ 1503 and 1505, *infra*.

[17] The mistaken belief issue is resolved in the same manner as in the pending proceeding issue. *See* note 13, *supra*.

[18] The draft makes it clear that the prohibited deception is that committed on the informant, not on the law enforcement authorities. 18 U.S.C. § 1510 was not intended to cover false statements to criminal investigators, but its language is susceptible to a contrary construction. *See* the comment on proposed section 1303 (hindering law enforcement). It should be noted that this provision supplements proposed section 1303, which deals with proscribed conduct other than interference with the communication of information to law enforcement authorities. *See* the comment on section 1303, note 23.

Section 1321 grades as a Class C felony, the use of bribery, deception, force or threat to influence another's conduct with respect to official proceedings. Section 1321(2) makes solicitation of a bribe by a witness a Class C felony. The classification of intimidation under subsection (1) raises to Class C felony status all threats and use of force employed with the prohibited purpose. Class C felony treatment of bribery is consistent with the other proposed bribery provisions.[19] Current law (18 U.S.C. § 1503) subjects the intimidation conduct to 5 years and bribery (18 U.S.C. § 201(d)) to 15 years, although bribery cases have been prosecuted under 18 U.S.C. § 1503.[20] To the extent mere persuasion falls within "corruptly" in 18 U.S.C. § 1503, it is presently subject to a 5-year penalty.

Section 1321 (intimidation and bribery) prohibits seeking to "influence testimony" whether truth or falsity is the goal.* Mere persuasion as an offense, is limited to persuading another to testify falsely and constitutes a solicitation to commit perjury or if the persuasion is successful, the actor is an accomplice in the perjury.

Subsection (1)(b)(i) prohibits using the techniques therein described to induce any withholding of testimony or information.

Attempts to persuade another to engage in prohibited conduct unaccompanied by the prohibited means of force, bribery, *etc.*, are viewed as solicitations to engage in criminal or contemptuous conduct under section 1346. If the proposed contempt reform (sections 1341–1349) is not adopted, it will be necessary to include such solicitations as offenses under this section. The following language would accomplish the inclusion:

> (2) A person is guilty of a Class A misdemeanor if he communicates with another with intent to induce or otherwise cause the other:
>
> (a) to withhold unlawfully any testimony, information, document or thing in an official proceeding; or
>
> (b) to violate section 1323 (tampering with physical evidence); or
>
> (c) to absent himself from an official proceeding to which he has been legally summoned.

Thus, another person may not wish to become involved in a civil suit. Insofar as his unilateral conduct is concerned, he need not become involved: and it is presently no offense to advise him or even persuade him that he need not volunteer information to a private litigant. Neither section 1346 nor the alternative change this result because they are limited to inducing him to withhold "unlawfully" any testimony, *etc.* On the other hand, section 1321(1)(b)(i) makes it unlawful to use force or to bribe a person not to reveal information. This is in accord with what current law designates as "corrupt."[21]

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[19] Proposed section 1361 (official bribery).

[20] *See* note 2, *supra*.

*The Study Draft would permit a defense to a prosecution based on threat of harm, if the harm is lawful and truth is the object (section 1321(3)(a)). This would avoid the possibility that a prosecutor commits an offense if he threatens a potential witness with a perjury prosecution if he testifies falsely.

[21] It would cover threats of defamation and offers of financial security. *See Broadbent* v. *United States*, 149 F. 2d 580 (10th Cir. 1945).

Both sections 1321 and 1346 (as well as the alternatives) cover cases of seeking to induce another to assert has privilege against self incrimination. It is clear there are occasions when it is not improper to advise or persuade another to plead the privilege; it is not clear, however, when it is improper to do so. The cases have wrestled unsatisfactorily with providing a standard for this question.[22] Section 1321 resolves the issue as follows:

> (a) A person not using force, threats or bribery will not violate the law if he merely communicates to the other to advise or persuade him to rely on his privilege. The prohibition in section 1346 is limited to communication to induce the "unlawful" withholding of testimony under section 1343.
>
> (b) If the defendant uses any of the means set forth in section 1321, however, he will violate the law.[23]

Use of force, bribe or threats to induce another to fail to obey a summons to appear (section 1321(1)(a)(iv)), or to elude legal process in any case (section 1321(1)(b)(iii)) is a Class C felony. Section 1346 does not prohibit persuasion for all of those purposes. It is a Class A misdemeanor to seek to persuade another to disobey a summons to appear (proposed section 1342). Under the alternative to section 1346. discussed above, persuading another to disobey a subpena is persuasion to commit at least a contempt and is treated like persuasion to commit a crime. Unless it is decided that concealing oneself to avoid process should be an offense,[24] persuading another to conceal himself to elude process should not be an offense; the draft reflects this view.

Persuading a person to avoid service of process is treated in the same manner as inducing another to withhold testimony. If the withholding is not unlawful, the persuasion is not prohibited. A contrary view would hold that it does not follow that a third party should not be prohibited from engaging in affirmative acts designed to thwart

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[22] *See, e.g., Cole* v. *United States*, 329 F. 2d 437 (9th Cir.), *cert. denied*, 377 U.S. 954 (1964); *United States* v. *Grunewald*, 233 F. 2d 556, 570–571 (2d Cir. 1956), *rev'd*, 353 U.S. 391 (1957); *United States* v. *Herron*, 28 F. 2d 122 (N.D. Cal. 1928).

[23] The inclusion of bribery in proposed section 1321 raises an issue in the assertion-of-privilege cases when codefendants consult concerning their defense and agree that neither will take the stand. Their failures to testify could be regarded under the proposed draft as things of value. It would seem undesirable to interfere with such conduct and the provision should not be so construed. *See Walker* v. *United States*, 93 F. 2d 792, 795 (8th Cir. 1938). where there was a suggestion of suborning perjury. The court stated:

> It may be observed that it is not a crime [citing statutes], for one jointly indicted with others and charged with conspiracy to consult with his co-defendents after the indictment has been returned. The Courts should be reluctant to interfere or to make such consultation hazardous by stretching the statute to cover cases not clearly within its purview.

An appropriate provision, recognizing a distinction between swapping assertions of the privilege and the sale of the privilege, could be added to the subsection to the effect that "the lawful assertion of a privilege not to testify by a defendant in a criminal prosecution is not a thing of value when offered, given or agreed to be given as consideration for the assertion of the same privilege by a codefendant." It should be noted that the use of force, threat or deception would still be prohibited.

[24] *See* paragraph 6, *infra*.

obtaining another's testimony, merely because the other need not volunteer or make himself amenable to process. Neither New York nor Michigan make such persuasion a crime, but the Model Penal Code does.[25] The draft does prohibit threats, force or bribery to induce another to elude process and the facts of the relevant reported valid Federal prosecutions appear to involve something more than mere persuasion, although whether persuasion alone would be sufficient under current law is uncertain.[26]

Coverage of unsuccessful solicitation under section 1346 or "communication" in the alternative formulation is consistent with present law.[27] Like a bribe offer which is refused, even the failure in an attempt to persuade a witness to engage in misconduct is treated as a violation of the interest protected here: the administration of justice. Subject to the provisions of section 1321(4)(a), which, in effect, provides protection of the witness' home, those cases in which the defendant has not communicated or made contact with the witness but has made efforts in that direction would be governed by the principles in the general attempt provisions. The term "communicate" is used in the alternative formulation (instead of the word "attempts" which appears in some other Codes [28]) to make clear: (a) there is an actual harm to the process by the unlawful contact; (b) this is to be treated as the completed offense; and (c) the shifting standards of attempt principles are not to be introduced where there is actual contact with the other person.

In summary, the alternative, as well as section 1346, posits the following approach:

> (a) If *D* communicates with *W*, with the prohibited intent, there is a completed offense;
>
> (b) If *D* communicates with *X* who communicates with *W*, there is a completed offense;
>
> (c) If *D* contacts *X* to have him contact *W*, and *X* makes no contact,[29] there is an attempt or a solicitation, or both, depending on the application of those provisions.

Proposed section 1321(4)(a) recognizes for practical purposes the approach to a person in the same household or a spouse is likely to have the same effect as a direct approach to the prospective witness. Therefore, this is treated as an approach to the witness. Inclusion of

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[25] MODEL PENAL CODE § 241.6(c) (P.O.D. 1962).

[26] *See* Extended Note D, Cases on Inducing Witnesses to Avoid Testifying, *infra*.

[27] The classic statement is in *United States* v. *Russell*, 255 U.S. 138, 143 (1921), involving an approach to a juror: "guilt is incurred by the trial—success may aggravate: it is not a condition of it;" but 18 U.S.C. § 1503, the current statute, also applies to witnesses.

[28] *See, e.g.*, MICH. REV. CRIM. CODE § 5015 (Final Draft 1967) (intimidating a witness): "if he attempts, by use of a threat directed to a witness;" *id.*, § 5020 (tampering with a witness): "attempts to induce;" MODEL PENAL CODE § 241.6 (P.O.D. 1962): "attempts to induce or otherwise cause." *See* note 7, *supra*, for the comment in *Russell* on "attempt." Of course, these would be solicitations to commit perjury or to withhold testimony under the draft.

[29] Some of the reported cases involve prosecution of a person who takes money to induce another. Not only might this be an attempt or solicitation on the part of the giver of the funds, but the one who takes the funds could be charged with conspiracy to unlawfully induce the witness or with soliciting the one who gave the funds to commit an offense.

subsection (4)(a) means that sections 1321 and 1346 embrace all of the most likely situations as completed offenses.[30]

5. *Tampering with Physical Evidence (Section 1323).*—Proposed sections 1321(1)(b)(ii) and 1323(2) prohibit a person from seeking to induce another to tamper with physical evidence, while proposed section 1323(1) deals with the one who actually tampers with the evidence with the belief a proceeding is pending or about to be instituted. While a successful inducement of another to tamper with physical evidence would render the inducer liable as an accomplice for violation of section 1323, such inducement is proscribed in section 1323(2) in order to make even the unsuccessful attempt a specific offense. The proposed solicitation provisions, tentatively approved for application to felonies only, would not be useful, since some violations of section 1323 are graded at the Class A misdemeanor level. (Class C felony treatment is provided when the defendant *intends* to affect a criminal proceeding and, *in fact*, materially affects such a proceeding.[31]) Moreover, the use of force, threat, deception or bribery by the inducer is a more serious offense, a Class C felony, under section 1321.

The use of the term "about to be instituted" in section 1323 recognizes that tampering with physical evidence often can involve ambiguous acts which may or may not be unlawful without the requisite purpose. The purpose in destroying a record, for example, may be wholly unexpressed except by the ambiguous and often private conduct of destruction. Proof of the actor's purpose will ordinarily be by proof of the pendency or notice of actual or prospective proceedings. In the absence of such proof, the purpose may have to be assessed long after the destruction of the actor's personal property has been accomplished.

Nevertheless, the draft relies on defendant's belief and not the actual pendency of a proceeding. In this respect, it differs from current law which also forbids tampering with evidence.[32] Even though the difference in language between proposed sections 1321 and 1323* suggests a difference in belief concerning the immediacy of a proceeding, proof of belief will usually depend on what actually fostered the belief—a proceeding, pending or contemplated. Thus, the practicalities of proof will cause little difference in result, but the focus in section 1323 will reduce the possibility of dangerously unfair speculation concerning defendant's purpose in destruction cases. The danger does not exist to the same degree with tampering with persons (proposed section 1321) because the purpose of the conduct toward the other is normally externalized and is an integral part of the conduct toward

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[30] *United States* v. *Russell*, 255 U.S. 138 (1921), leading case involving approach to wife of juror. *See* note 27, *supra*.

[31] Grading as a Class A misdemeanor is consistent with the treatment of physical obstructions generally (section 1301). If the conduct involves other offenses, the defendant can be subject to those provisions, *e.g.*, tampering with business records, presenting false statements or perjury, tampering with public records, destroying records he is required to maintain. Section 1323 should be distinguished from section 1355 (tampering with public records), where no evidentiary purpose is required, although in some cases they will overlap.

[32] *See United States* v. *Presser*, 187 F. Supp. 64 (N.D. Ohio 1960), *aff'd*, 292 F. 2d 171 (6th Cir. 1961), *aff'd*, 371 U.S. 71 (1962).

*An earlier version of section 1321 referred to defendant's belief a proceeding was "likely to be instituted."

the other, hence more easily subject to proof. Thus, a threat or bribe under section 1321(1) would reveal the purpose, whereas the mere destruction of one's own property is ambiguous. If the destruction is otherwise unlawful, the actor will be subject to prosecution under other provisions, as where the law requires records to be maintained or if he destroys property of another. Section 1323's reference to destruction in anticipation of process would cover destruction to avoid execution of a search warrant (now covered by 18 U.S.C. (§ 2232) and conduct to evade any civil investigative demand under the Antitrust Civil Process Act (18 U.S.C. § 1505).

The proposed Michigan Code expressly limits the coverage of a provision similar to section 1323 to a person "acting without legal right or authority" because there is some dispute "whether a person does not have a lawful right to destroy evidence before it has been seized or subpoenaed." MICH. REV. CRIM. Code § 5045, Comment at 417 (Final Draft 1967). This limitation is not included in proposed section 1323, because the section itself seeks to deny this power to a person when the destruction is undertaken with the requisite state of mind.

6. *Concealment to Avoid Service of Process.*—A proposed section* would make it an offense to conceal oneself to avoid service of process to testify in a criminal case, knowing the process has been issued. It is not clear if current law prohibits this conduct[33] without the element of "bribery" or other "corrupting" influence. The section limits the offense to criminal cases, requires affirmative acts (concealing) and includes the culpability element of knowledge.

Mere failure to obey process is not covered by this provision. The failure to obey a subpena is presently a contempt and inducing another to disobey may be both a contempt and an obstruction under 18 U.S.C. §§ 1503 and 1505. Whether mere disobedience should be a criminal offense is reserved for consideration in connection with contempt. If a provision similar to the section under discussion is adopted, other provisions should be adopted to make it an offense to take a bribe in ex-

*The following section was considered, but not included as part of the Study Draft:

§ —. *Concealment to Avoid Process.*

(a) A person is guilty of a Class B misdemeanor if, knowing legal process summoning him to testify or supply evidence has been issued in connection with a criminal [administrative or legislative] proceeding, he conceals himself with the intent to avoid such process.

(b) In this section "conceals" includes secreting or hiding oneself, hiding or changing one's identity, affirmatively secreting or hiding one's place of abode.

[33] *See* Extended Note D, Cases on Inducing Witnesses to Avoid Testifying, *infra*. Also consider the Fugitive Felon Act (18 U.S.C. § 1073) which is generally believed to be applicable only in aid of State proceedings (*but see Durbin* v. *United States*, 221 F. 2d 520 (D.C. Cir. 1954), where it was applied without question to flight to avoid testifying in a U.S. District Court in a District of Columbia case concerning Title 18 violations). 18 U.S.C. § 1073 appears to require an actually pending proceeding for it to apply to witnesses (*United States* v. *Bando*, 244 F. 2d 833, 843 (2d Cir.), *cert. denied*, 355 U.S. 844 (1957)), and the facts of the cases involve issued process, even though it may not be a requirement. *See, e.g., Hemans* v. *United States*, 163 F. 2d 228, 231 (6th Cir.), *cert. denied*, 332 U.S. 801 (1947), where the defendant had not been subpenaed to appear at the preliminary hearing because he had left the jurisdiction, but he was "under a continuing subpena as a witness before the one-man grand jury."

change for disobedience.[34] The proposed section makes it an offense to knowingly conceal oneself to avoid issued process in criminal proceedings. The possibility of including administrative and legislative proceedings is offered by the bracketed material, but is not recommended on the view that the criminal sanction should be reserved for only the most compelling circumstances. The limited scope of the section recognizes a special obligation on the part of individuals to cooperate in cases where there is a special public interest. The proposed section does not go as far as a similar Illinois provision [35] making it an offense for a person to conceal himself if he has knowledge material to a criminal prosecution. Unlike the proposed section, Illinois has no requirement process be issued, but its provision is limited to criminal cases.

Insofar as civil suits are concerned, while a civil litigant could not rely, under the proposed section, on criminal sanctions to compel another to make himself available to process, subparagraphs 1321(1)(b)(iii) and (iv) do protect civil litigation from the "corrupt" actions of third parties who use force, threat, deceit, or bribery to induce another to elude process.

7. Acceptance of Bribes (Sections 1321(2) and 1323(2)); Compounding (Section 1321(3)(b)).—Section 1321(2) covers the receipt by and solicitation of bribes by witnesses and informants to engage in the conduct dealt with in section 1321. The provision is necessary because witnesses and informants are not covered by the general bribery provisions dealing with public servants (proposed section 1361). The draft covers the conduct now covered by 18 U.S.C. §§ 201(e), 1503 and 1505, and makes no substantial changes in current law except for punishment. Current 18 U.S.C. § 201 expressly provides that its penalties are in addition to those prescribed by 18 U.S.C. §§ 1503 and 1505. 18 U.S.C. § 201(e) provides for penalties up to $20,000, 15 years' imprisonment and disability from holding office. The draft makes solicitation or acceptance of a bribe a Class C felony and is in accord with proposed section 1361. The draft contains a provision similar to current 18 U.S.C. § 201(j) expressly exempting witness fees for travel and subsistence and fees for expert witnesses. Such a provision is probably unnecessary because the fees are not in exchange for any of the prohibited purposes (section 1321(3)(b)). An expert witness' fee is not intended to influence his testimony, but pays for his time.

Although the Model Penal Code, the Michigan revisers and New York [36] make it an offense to pay or receive something of value as consideration for not initiating a prosecution or investigation, compounding—as it is called—is not a separate offense in the proposed draft. It is not clear whether compounding as such is presently a

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[34] In this connection, the provisions of current 18 U.S.C. § 3150 make it an offense for a material witness to fail to appear after being released, punishable by imprisonment of up to 1 year. Failure to obey a subpoena could be made a Class B misdemeanor. Making it a crime recognizes that a similar interest is involved as in 18 U.S.C. § 3150. Grading it a Class B misdemeanor takes into account it would cover all proceedings, civil as well as criminal, and the conduct is not as serious as obtaining release and then failing to appear (18 U.S.C. § 3150).

[35] ILL. REV. STAT. c. 38, § 31–4 (1965).

[36] MICH. REV. CRIM. CODE § 4530 (Final Draft 1967); N.Y. REV. PEN. LAW § 215.45 (McKinney 1967); MODEL PENAL. CODE § 242.5 (P.O.D. 1962).

Federal offense:[37] but any conduct of that nature which should be prohibited is or will be adequately dealt with in sections 1321 through 1323 and section 1617 (criminal coercion).

Although the draft contains no general compounding provision, proposed section 1321(3)(b) assures that good faith settlements of claims are not criminal merely because a party agreed not to commence a criminal prosecution. It should be emphasized that the provision relates only to the initiation by the recipient of a criminal prosecution or investigation; it does not justify a refusal to testify or to give information on request if the prosecution is initiated by public authorities.

Extended Note A

Conspiracy to defraud the United States

In addition to the "due administration of justice" catch-all provision of 18 U.S.C. § 1503, the government has relied on 18 U.S.C. § 371, which condemns conspiracies "to defraud the United States." The "intent to defraud" provision has been read to include an intent to defraud the United States of a lawful function.[1] This has been interpreted to include conspiracies to do those acts which may have been obstructions in present law and are obstructions in the proposed new provisions.[2] Properly drafted substantive provisions should eliminate the need to rely on this general provision and avoid the peculiar dangers historically associated with overly general conspiracy statutes. Provisions to be drafted will be concerned with making it an offense to deprive the government of the services of a public servant and with misconduct of the public servant. Under the conspiracy provisions already proposed, it would be a crime to conspire to violate those provisions.

Extended Note B

Mens rea requirements

The culpability requirements of current obstruction provisions present a confusing picture because of the failure of the statutes adequately to distinguish between jurisdictional elements and the intent or knowledge of the defendant with respect to the existence of a Federal function and the obstructive effect of his conduct. The obstruction provisions of the new Code will clarify this area by separating out the jurisdictional elements, defining the misbehavior, and utilizing some measure of culpability (intent, knowledge) concerning gov-

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[37] "There is no federal compounding statute." Model Penal Code § 208.32 A. Comment at 210 (Tent. Draft No. 9, 1959). On the other hand, both the language of 18 U.S.C. § 873 (blackmail) and the fact it is derived from 18 U.S.C. § 250 (part of the obstruction of justice chapter, 1940 ed.), support the view that there is a statutory basis for a Federal offense of compounding.

[1] *See, e.g., United States* v. *Grunewald*, 233 F.2d 556 (2d Cir. 1956) (tax fixing ring), *rev'd on other grounds*, 353 U.S. 391 (1957); *United States* v. *Manton*, 107 F.2d 834 (2d Cir. 1939), *cert. denied*, 309 U.S. 664 (1940); *Outlaw* v. *United States*, 81 F.2d 805 (5th Cir. 1936) (giving false testimony before grand jury). *See* Model Penal Code, § 208.30, Comment at 126–127 n.42 (Tent. Draft No. 8, 1958), for a synopsis of cases construing 18 U.S.C. § 371.

[2] *See e.g., Outlaw* v. *United States*, 81 F.2d 805 (5th Cir. 1936), charging same acts as conspiracies to violate 18 U.S.C. §§ 1503 and 371; *see also, United States* v. *Manton*, 107 F.2d 834 (2d Cir. 1939), *cert. denied*, 309 U.S. 664 (1940).

ernmental functions to determine whether the conduct is embraced by the statute defining the misbehavior.

For example, a simple assault on a Federal officer does not violate proposed section 1301 (physical obstruction of government function), if there is no intent to obstruct a government function. Such an intent usually would require some knowledge of the status of the officer as a Federal official or at least, as some official. It does not not mean that an assault on a Federal official without the culpability required by section 1301 would not be subject to Federal prosecution at all. The question of whether it is so subject, however, will be resolved in the context of the jurisdictional base for assault, which may or may not require such knowledge. By separating these issues, the problem presented by 18 U.S.C. § 111 is avoided. For example, *United States* v. *Lombardozzi*, 335 F.2d 414 (2d Cir.), *cert. denied*, 379 U.S. 914 (1964), held that knowledge of the status of the victim as a Federal officer was not a necessary element of an 18 U.S.C. § 111 offense. The court recognized that "in section 111 Congress merely sought to provide a federal forum for the trial of cases involving various offenses against federal officers in the performance of official duties." 335 F.2d at 416. While this approach is plausible and may well be adopted in resolving *jurisdictional* issues for assault cases, it raises some difficult questions in the context of 18 U.S.C. § 111. 18 U.S.C. § 111 covers not only assaults, but uses the terms "resists, opposes, impedes" and these connote some measure of knowledge (*see Burke* v. *United States*, 400 F.2d 866 (5th Cir. 1968)). In addition, as the Second Circuit itself recognized in *United States* v. *Heliczer*, 373 F.2d 241 (2d Cir.), *cert. denied*, 388 U.S. 917 (1967), *Lombardozzi* "comes into collision with the right of self-defense" when an arrest is made. "[I]t is probable that a modification or limitation would be placed on the reach of the interpretation and application of the *Lombardozzi* holding as extended to arrest cases." 373 F.2d at 248.

The proposed Code (section 1301, physical obstruction of government function) eliminates the problem by defining only the conduct and mens rea to be condemned for purposes of protecting the administration of justice and leaving jurisdictional considerations for assault generally, to the assault and jurisdiction provisions. Of course, it could be concluded that protection of government functions requires elimination of knowledge or purpose as a requirement: the issue is not resolved in that fashion in these provisions, although the issue of recklessness is considered in the comment to section 1301.

The foregoing dealt with whether *any* culpability requirement concerning the government function is recognized in present law. The courts have recognized such a requirement when 18 U.S.C. § 1503, which deals with obstruction, is involved. However, even in those cases it is not clear what requirement the courts impose. The statutory language is not helpful, and the judicial language is unclear and sometimes contradictory.

Some examples help present the issue:

(1) In *Knight* v. *United States*, 310 F.2d 305 (5th Cir. 1962), the court states:

> There is no question but that there must exist a specific intent in order to violate section 1503 . . . . This specific intent must be to do some act or acts which tend to impede or influence, obstruct or impede the due administration of justice.

This statement and the case evidence either a lack of insight into the distinction between a purpose to impede and a purpose to engage in conduct, or a failure to clearly state the insight. It does demonstrate a need to carefully define culpability requirements for each element of the offense.

(2) *Odom* v. *United States*, 116 F.2d 996 (5th Cir.), *rev'd.* 313 U.S. 544 (1941), presents a classic case of confusion. In an 18 U.S.C. § 1503 prosecution for intimidating a witness, the trial court instructed the jury:

> The defendants must have known or must have had reasonable grounds for believing that the case was pending in the United States District Court and that Stansbury was a witness in that case . . . and it must have been for the purpose of attempting to influence . . . Stansbury . . . . (116 F.2d at 999).

To the defendant's claim that the jury had to find defendant knew the status of the other as a witness, the Court of Appeals replied:

> The charge means that the accused must have positively known or must have believed on reasonable grounds, that Stansbury was a witness, and must have intended to influence or impede him as such . . . . [D]irect or absolute knowledge is not necessary. What is necessary on this point is the intent to affect the witness as such, and a reasonably founded belief that he is a witness (he being such in fact) sufficiently supports the criminal scienter. (116 F.2d at 999).

While the Court of Appeals' statement may have been clear, it is obvious the charge was not. In any event the Solicitor General confessed error in the Supreme Court (313 U.S. 544 (1941)), conceding the test in an obstruction case is actual knowledge or belief.[1] A clearer statement of the mens rea requirement in the statute would have avoided the issue and this is one result of the proposal.

(3) The difficulties are heightened by the oft-quoted language in *Pettibone* v. *United States*, 148 U.S. 197, 206 (1893), that an indictment "must charge knowledge or notice . . . on the part of the accused that the witness or officer was such." The use of the word "notice" is not necessarily consistent with actual knowledge or belief. Thus, in *Kloss* v. *United States*, 77 F. 2d 462 (8th Cir. 1935), there is some confusion evidenced concerning (a) the jurisdictional basis for the offense, (b) what constitutes an element of the offense, and (c) what constitutes proof of the element of the offense. In *Kloss*, a prosecution for assaulting another who was to be a witness before a grand jury, the court stated there was no requirement that defendant have knowledge an indictment had been found or that a proceeding was pending; the only proof required was defendant have "notice" and "reasonable ground to believe" the other is a witness in a pending proceeding and the assault was with intent to affect his testimony.[2] The language

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[1] *United States* v. *Solow*, 138 F. Supp. 812, 816, 817 n.14 (S.D. N.Y. 1956).

[2] 77 F. 2d at 464. *Citing Pettibone*, *supra*, the court states:

> Clearly the Supreme Court held [sic] [had] in mind that notice was all that was required, and notice is not so strong a requirement as knowledge.

is in terms of what constitutes the element of the offense, but it really deals with proof. In fact, the *Kloss* court in a later portion of the opinion conceded the defendant must know the other is a witness, but this can be proved by showing reasonable grounds to believe he is a witness in a pending proceeding.

The proposals seek to remedy the situation demonstrated by these cases by explicit resolution of the issues. This should create greater ease in drafting indictments and preparing jury charges, reduce areas of disagreement concerning construction, and thereby reduce the possibilities of reversals. In a sense, the resolution of these issues, however resolved, removes an obstruction to the administration of justice.

Extended Note C

Meaning of "witness" in 18 U.S.C. §§ 1503 and 1505

A broad approach is taken in *Falk* v. *United States*, 370 F. 2d 472 (9th Cir. 1966), *cert. denied*, 387 U.S. 926 (1967), which held that under the broad "omnibus" provision of 18 U.S.C. § 1503 (charging interference with due administration of justice), witness is not a term of art when used in an indictment referring to a "prospective witness," and means only the intended status of the victim as the defendant believed it to be. There is no requirement that the victim be a "witness" by any definition of that term. This is substantially the approach of proposed section 1321 and avoids any need to determine if the victim intended to testify. *Accord*, *United States* v. *Mannarino*, 149 F. Supp. 351 (W.D. Pa. 1956). *Compare Berra* v. *United States*, 221 F. 2d 590 (8th Cir. 1955), *aff'd*. 351 U.S. 131 (1956), *with Stein* v. *United States*, 337 F. 2d 14 (9th Cir. 1964), *cert. denied*, 380 U.S. 907 (1965), where the intent to testify was decisive of the issue of who is a "witness." *See also Walker* v. *United States*, 93 F. 2d 792 (8th Cir. 1938), for a limiting view of what is a "witness." The distinctions are often based on the various clauses in 18 U.S.C. § 1503, *i.e.*, interference with a "witness" or with "due administration of justice." Who is a "witness" is eliminated as an issue in section 1321 and the subjective purpose of the defendant clearly is made the test.

Smith v. *United States*, 274 F. 351, 353 (8th Cir. 1921) defined "witness" to include: (1) those who are subpenaed; (2) those who are called and come without process; (3) those who appear, prompted by their own best interests; (4) those who expect to come; (5) those who are selected and expected to come to testify. In *Hunt* v. *United States*, 400 F. 2d 306, 307 (5th Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969) (*see* the comment to section 1321, notes 15 and 16 *et. seq.* and accompanying text) the court stated: "This Court defines a 'witness' as one who 'knows or is supposed to know material facts, and is expected to testify to them, or to be called on to testify . . . as a witness.'" quoting and citing *Odom* v. *United States*, 116 F. 2d 996 (5th Cir. 1941). *Hunt* also cites *Smith*, *supra*, as in accord with its statement, but it is not clearly in accord because the statement in *Smith*, quoted *supra*, emphasizes the intent of the "witness" and only refers to the expectation of others when the "witnesses" are "selected" (*see* part (5) of *Smith*, *supra*.). This discussion serves only to emphasize the need to get rid of the issue. As Judge Wisdom stated in *Hunt*, *supra* (400

F. 2d at 308), involving the beating of a person who had been subpenaed but never called to testify in a preliminary hearing: "The statute, 18 U.S.C. § 1503, is designed to prevent what occurred in this case and to punish those responsible for what happened to Levya [the "witness"]. If any witness ever needed protection of the law, it was [Levya]. If any persons ever needed restraint, it was the group who maltreated [Levya]."

Extended Note D

Cases on inducing witnesses to avoid testifying

Pollock v. *United States*, 35 F. 2d 174 (4th Cir.), *cert. denied*, 280 U.S. 600 (1929), charged a conspiracy to obstruct justice and induce a defendant to stay away to avoid trial. Presumably, there was a fear he might be a witness against the others. The conspirators also sent him money, but it is not clear what the result would have been if (1) there were no conspiracy, (2) he were only a witness and not a defendant, and (3) no money was sent. In any event, the report does not indicate the payment of money was part of the charge. For a similar conspiracy case, *see United States* v. *Minkoff*, 137 F. 2d 402 (2d Cir. 1943) (conspiracy to have codefendant obtain operation to cause delay or mistrial). *Harrington* v. *United States*, 267 F. 97 (8th Cir. 1920), upholds a conviction for conspiracy to obstruct justice by concealing a witness and sending her to Canada, and assumes helping her to evade service of a subpena is unlawful. In *Keeney* v. *United States*, 17 F. 2d 976 (7th Cir. 1927), bribing a person to influence a witness to stay away was punished as a contempt, but this may not be a contempt today in view of *Nye* v. *United States*, 313 U.S. 33 (1941). *Heinze* v. *United States*, 181 F. 322 (2d Cir.), *cert. denied*, 218 U.S. 675 (1910), involved bribing a witness to stay away and apparently assumed it was not material that a subpena was no longer outstanding. *See also Wilder* v. *United States*, 143 F. 433 (4th Cir. 1906), *cert. denied*, 204 U.S. 674 (1907), involving inducing a witness to conceal himself and evade process in a civil case. *Cf. Barnard* v. *United States*, 342 F. 2d 309, 325 (9th Cir.), *cert. denied*, 382 U.S. 948 (1965) (dissent). Although the evidence concerning inducing a witness or prospective defendant to stay away concerned the issue of whether the defendant's attorney was a party to the principal offense, the dissent stated it was "neither criminal nor otherwise wrongful" for an attorney to advise his clients (criminal suspects) to leave town and not keep themselves available for questioning. *See also* Mich. Rev. Crim. Code § 5020, Comment at 414 (Final Draft 1967):

> Although the attorney's activity [inducing] might raise certain ethical issues, it should not give use [sic] [rise] to criminal liability, since neither the means used nor the object sought is unlawful in itself.

In this connection, consider the possible violation of 18 U.S.C. § 1073. The liability of the witness himself is also unclear. *United States* v. *Cusson*, 132 F. 2d 413, 414 (2d Cir. 1942), involved prosecution of a prospective witness who went to Mexico as part of a conspiracy to avoid testifying. The court said the offense depended "on the likelihood she might be subpoenaed as a witness." *But see In re Brule*, 71

F. 943 (D.Nev. 1895), which upholds a contempt charge for bribing a known material witness to stay away, and quotes from a State case to the effect that bribing a witness to stay away is punishable even if the recipient cannot be punished unless he was subpenaed. Compare the statement of Judge L. Hand in *United States* v. *Cusson*, *supra*, 132 F. 2d at 414, in a conspiracy prosecution:

> The fact she had not been subpoenaed was no protection to a charge that she had agreed to go beyond the jurisdiction where she could not be subpoenaed. . . .

Interference With Jurors: Sections 1324 and 1326

1. *Background; Scope; Purpose.*—Proposed sections 1324 and 1326 are part of a group of provisions which define criminal conduct with respect to jurors. Since jurors are included within the definition of public servant (*see* proposed section 109(x)), bribery and threats to influence their official action and retaliation for such action are dealt with in the provisions on those matters which deal with public servants generally (proposed sections 1361, 1366 and 1367, respectively). Further, it is expected that physical offenses such as assault, kidnapping, murder, *etc.* will also be Federal offenses when committed against persons on account of their service as Federal jurors, *i.e.*, their being vicitims in such circumstances will be a jurisdictional base for Federal prosecution of those offenses.

The proposals here take into account the unique function performed by jurors, *i.e.*, making a decision in a particular case only, and the unique features of their service as "public servants," *i.e.*, it is temporary, requires no special qualifications, and embroils the citizen—often reluctantly—at the center of intense controversy. The proposed sections condemn harassments and communications with intent to influence jurors in their official action (section 1324(1)), harassments of persons because they are jurors (section 1324(2))*, and instrusions on jury deliberations (section 1326). The drafts thus carry out a policy of insulating jurors from external pressures to a greater extent than may be warranted for other persons performing public service.[1]

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*This provision was omitted in Study Draft. *See* note 8, *infra*.

[1] This is the policy of current law. *See* Extended Note A, Communications With Jurors Under Current Federal Law, *infra*. The policy is so embracing that prior to the 1940 amendment to 18 U.S.C. § 1504 excluding requests to appear before the grand jury from its prohibition against written communications to jurors, a bare request to appear may have been prohibited as a communication with intent to influence. *See, e.g., Duke* v. *United States*, 90 F. 2d 840 (4th Cir.), *cert. denied*, 302 U.S. 685 (1937) (letter requested permission to appear *and* urged grand jury not to indict, but court said only issue was whether a letter was sent). The exception concerning such communications in current law is not expressly included in the Study Draft, but is carried forward in the proposal by virtue of such communications being "part of the proceedings." There is also a strong policy requiring mistrials for unauthorized contacts with the jury:

> In a criminal case, any private communication, contact, tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during trial, with full knowledge of the parties. (*Remmer* v. *United States*, 347 U.S. 227, 229 (1954)).

These provisions broaden the scope of prohibited conduct, beyond that of the *written* communication limitation in present law, and provide a firmer basis for dealing with mere harassment*; but otherwise they substantially carry forward existing Federal policy.

2. *Intent to Influence; Any Communication.*— In view of the role played by a juror in the administration of justice, *all* private communications with him for the purpose of influencing his decision are prohibited. The scope of the prohibition is thus broader than that provided for communications with witnesses (*see* proposed section 1346), since some contacts with witnesses are entirely appropriate, *e.g.*, to persuade them to make themselves available, to testify accurately and truthfully, *etc.* Only when certain techniques are employed with witnesses—force, bribery, *etc.*—does the prohibition extend to influencing witnesses to do even the proper thing. With respect to jurors, however, any private contact prior to their rendering a verdict is suspect and should be discouraged.

For similar reasons there is no restriction to only written communications designed to influence the juror in the statute proposed here, as there is in present 18 U.S.C. § 1504. Oral communications are viewed as equally undesirable. The only apparent reason for such a limitation is that the quality of proof as to criminal oral communications is not as good. But threats and bribe offers, more serious offenses, must frequently rest on oral communications and, under current statutes (18 U.S.C. §§ 201 and 1503), serious offenses involving communications to jurors have been successfully prosecuted without proof that the communications were in writing.[2]

3. *Exception for Communications in a Proceeding.*—Limiting prohibited communications to those with an "intent to influence," instead of prohibiting all communications with jurors, is consistent with current 18 U.S.C. § 1504 and with recent dispositions of the issue in modern State revisions.[3] Whether this constitutes a change from current Federal law other than 18 U.S.C. § 1504 is not clear.[4]

It is necessary, of course, to recognize that some communications to jurors are authorized. One, recognized explicitly in the definition of the offense (proposed section 1324(1)), is a communication to the grand jury requesting an opportunity to testify.[5] Another instance is that involving communications by the court, attorneys, and others who either counsel the jurors as to their functions or properly seek to influence their decision. Accordingly, the prohibited communica-

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See note, *supra*, p. 583.

[2] *See, e.g., Osborn* v. *United States*, 385 U.S. 323 (1966); *Kong* v. *United States*, 216 F.2d 665 (9th Cir. 1954); *Calvaresi* v. *United States*, 216 F.2d. 891 (10th Cir. 1954), *rev'd*, 348 U.S. 961 (1955).

[3] New York changed a broader provision to its current provision requiring an intent to influence. *See* N.Y. REV. PEN. LAW § 215.25 and Practice Commentary (McKinney 1967), discussing replacement of former Penal Law § 376-a. Michigan explains its provision: "The burden upon the prosecution of proving an intent to influence the juror's vote should protect any person who honestly attempts to engage a juror in an innocent conversation concerning a case." MICH. REV. CRIM. CODE § 5040, Comment at 417 (Final Draft 1967).

[4] For current law see Extended Note A. Communications With Jurors Under Current Federal Law, *infra*, especially the discussion of *Ward* v. *United States*, 296 F. 2d 898 (5th Cir. 1961), and *Caldwell* v. *United States*, 218 F. 2d 370 (D.C. Cir. 1954), *cert. denied*, 349 U.S. 930 (1955).

[5] *See* note 1, *supra*.

tions are defined, in section 1324(1), as those "other than as part of the proceedings in a case." The language is derived from the proposed Michigan Revised Criminal Code, section 5040(1) (Final Draft 1967). An alternative formulation—"except as authorized by law"—used in the New York Revised Penal Law, section 215.25 (McKinney 1967), has been rejected because it offers less guidance to the courts. No occasion to influence other than as part of the proceedings seems warranted.[6]

4. *Mere Harassment of Jurors.*—An express prohibition against harassment of jurors without proof of an intent to influence* would provide a firmer statutory basis to deal with such conduct than current law provides.[7] Illinois has a similar provision, although it is more akin to the general retaliation provision proposed in section 1367.[8]

5. *Who is Protected.*—Proposed section 1324(2) defines a juror to include a person "who has been drawn or summoned to attend as a prospective juror." Thus, a person need not have been selected as a juror to receive the protection of the criminal laws. This is in accord with the Michigan and New York revisions[9] and, to the extent it can be ascertained, reflects existing Federal law.[10]

Since a definable class of persons who should also be shielded from improper pressures consists of relatives residing in the same household with a juror, section 1324 also provides that the harassing conduct or improper communications, when directed toward such persons because of the juror's service as such, shall be deemed to constitute the offense. This is similar to a provision in the statute dealing with communications to witnesses (proposed section 1321(4)(a)).

6. *Eavesdropping on Deliberations.*—Proposed section 1326, prohibiting eavesdropping on jury deliberations is the same as 18 U.S.C. § 1508, enacted in response to the conduct of certain jury studies by a University of Chicago Law School faculty member. At least two State counterparts[11] have been found and arguably the provision could pre-

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[6] *See Remmer* v. *United States*, 347 U.S. 227, 229 (1954).

*Such a provision was included in an earlier version of section 1324. It read:

> (2) *Harassment Serving No Legitimate Purpose.* A person is guilty of a Class B misdemeanor if he engages in conduct with the intent to harass, annoy or alarm another as a juror and which serves no legitimate purpose.

This provision was derived in substance from the Illinois and New York provisions. New York's section 240.25 states in part: "A person is guilty of harassment when, with intent to harass, annoy or alarm another person . . . 5. He engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose." "Harass" also appears in section 223 of the Communications Act of 1934, 47 U.S.C. § 223 (1964), *as amended* (Supp. IV 1968).

[7] For discussion of current law, *see* consideration of *Sinclair* v. *United States*, 279 U.S. (1929), and related problems in Extended Note A. Communications With Jurors Under Current Federal Law, *infra*.

[8] The Illinois statute deals with the harassment of a juror or witness "who has served . . . because of the verdict . . . or . . . the testimony." ILL. REV. STAT. c. 38 § 32–4a (1969 Supp.). New York has no special provision covering harassment of jurors, but has a general harassment provision. N.Y. REV. PEN. LAW § 240.25 (McKinney 1967).

[9] MICH. REV. CRIM. CODE § 5001(2) (Final Draft 1967): N.Y. REV. PEN. LAW § 10.00(15) (McKinney 1967).

[10] *See Calvaresi* v. *United States*, 216 F. 2d 891 (10th Cir. 1954), *rev'd.* 348 U.S. 961 (1955); definitions in 18 U.S.C. § 201(a).

[11] MICH. REV. CRIM. CODE § 5050(1)(f) (Final Draft 1967): PROPOSED CRIM. CODE FOR PA. § 2204 (1967).

vent valuable studies from being accomplished. Consideration could be given to permitting recordings to be made under some sort of judicial control. In the absence of judicial control, it is clear this conduct should be prohibited.

7. *Fair Trial—Free Press Considerations.*—While a literal construction of existing Federal law prohibiting written communications intended to influence jurors (18 U.S.C. § 1504) might embrace articles carried in the news media, it has never been so construed and appears not to have been enacted to deal with such a complex and difficult issue. Current considerations of the problems of prejudicial publicity in criminal cases include, in addition to standards for appropriate conduct by attorneys and law enforcement authorities, a standard describing improper conduct by the news media which, although in terms of what constitutes a contempt, could lend itself to statutory formulation, making it a crime if:[12]

> . . . a person who, knowing that a criminal trial by jury is in progress or that a jury is being selected for such a trial:
>
> (i) disseminates by any means of public communication an extrajudicial statement relating to the defendant or to the issues in the case that goes beyond the public record of the court in the case, that is willfully designed by that person to affect the outcome of the trial, and that seriously threatens to have such an effect; or
>
> (ii) makes such a statement intending that it be disseminated by means of public communication.

The Judicial Conference of the United States has considered this question and, upon the report prepared by one of its committees (Committee on the Operation of the Jury System), has not recommended any direct criminal sanctions against the news media or for a change in 18 U.S.C. § 401, describing the contempt power of Federal judges, to give them explicit authority to deal with the problem.[13] In the light of this approach by the Federal judiciary, no new criminal offense directed at the news media is proposed here.[14]

Extended Note A

Communication with Jurors under Current Federal Law

The protection of jurors under current Federal law is the function of several statutes and contempt powers. The scope of the protection under each of the statutes and contempt is unclear as is the total extent of the protection. Current Federal statutes prohibit bribery of a juror (18 U.S.C. § 201(a)), written communications with intent to influence

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[12] *See* ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press § 4.1(a) (Approved Draft 1968).

[13] *See* Extended Note B, Fair Trial and Free Press, *infra*.

[14] To what extent such conduct is now covered is uncertain. There is no specific reference to mass media in Title 18, but the use of mass media with the prohibited culpability in sections 1503 or 1505 is not excluded as an offense in either section. *Cf.*, the proposed revision of the Iowa Criminal Code, which would expressly add to a section, section 723.1, very similar to 18 U.S.C. § 1503, "printing or broadcasting" as a prohibited means of interfering with the administration of justice.

a juror (18 U.S.C. § 1504), corruptly seeking to influence or intimidate him or to harm him because of his service as a juror (18 U.S.C. § 1503).

18 U.S.C. § 1503 presents the same problems with respect to jurors as it does concerning witnesses, on the need for a pending proceeding,[1] the meaning of "corruptly," [2] and the status of an individual as a "juror" under the statute.[3] Although some of the conduct covered by 18 U.S.C. § 1504 would also be covered by 18 U.S.C. § 1503,[4] 18 U.S.C. § 1504 involves a lesser category of guilt because it prohibits written communication with a mere intent to influence without regard to the kind of influence. Presumably, the conduct would be less than that which qualifies as "corruptly," although no reported cases dealing with the issue have been found. 18 U.S.C. § 1504 reflects a policy to *totally* insulate the juror,[5] a policy not applicable to others in the judicial process under current law, to whom the "corruptly" element of 18 U.S.C. § 1503 applies.[6]

Although 18 U.S.C. § 1504 requires an intent to influence, the requisite culpability for an 18 U.S.C. § 1503 offense is unclear. For example, in *Ward* v. *United States*, 296 F. 2d 898, 904–905 (5th Cir. 1961), the court, affirming a bribe offer conviction, expressed doubt about the trial court's charge to the effect that talking to a prospective juror to determine his general feeling about a general class of cases is not "unlawful." The Fifth Circuit said it was a lower standard than it would adopt and without stating it was unlawful expressed the view litigants should not contact prospective jurors to "ascertain their feelings" or to "canvass . . . or feel their pulse." It is not "necessary or proper."

In *Caldwell* v. *United States*, 218 F. 2d 370 (D.C. Cir. 1954), *cert. denied*, 349 U.S. 930 (1955), a conviction under 18 U.S.C. § 1503 was sustained where the defendant was charged with offering another money to ascertain the "feelings" of an impaneled jury prior to the verdict. The court held that this endeavor to invade the jury's privacy was "corrupt" as a matter of law and there was no need to prove an intent to influence the jury. The dissent argued "evil motive" must be proved. *Caldwell* is a particularly weak holding in the light of the specific requirement of 18 U.S.C. § 1504, a lesser offense, which requires an intent to influence when the communication is directed to the juror and is in writing.

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[1] *See, e.g., Calvaresi* v. *United States*, 216 F.2d 891, 902 (10th Cir. 1954), *rev'd*, 348 U.S. 961 (1955).

[2] *Kong* v. *United States*, 216 F.2d 665 (9th Cir. 1954) (purpose in seeking to influence juror is immaterial); *Caldwell* v. *United States*, 218 F.2d 370 (D.C. Cir. 1954), *cert. denied*, 349 U.S. 930 (1955).

[3] *See* note 2, *supra*.

[4] *I.e.*, where there is an "endeavor" or "intent" to influence. Also bribery may be prosecuted under both 18 U.S.C. §§ 201 and 1503. *See, e.g., Bedell* v. *United States*, 78 F.2d 358 (8th Cir.), *cert. denied*, 296 U.S. 628 (1935); *United States* v. *DeAlesandro*, 361 F.2d 694, 699–700 (2d Cir.), *cert. denied*, 385 U.S. 842 (1966) (court says they are "separately punishable"). *See* 18 U.S.C. § 201(k): "The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504 and 1505. . . ."

[5] *See* comment on section 1324, *supra*.

[6] *E.g.*, in *United States* v. *Kahaner*, 317 F.2d 459, 470 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963), there was no claim of impropriety in approaching a Federal judge to discuss a pending decision on sentence.

The policy of insulation also underlies the pre-*Nye* v. *United States*[7] contempt case of *Sinclair* v. *United States*, 279 U.S. 749, 764 (1929), which held it a contempt to shadow a juror without the necessity to show actual contact with the juror or "that any juror had knowledge of being observed." "Neither the actual effect produced upon the juror's mind nor his consciousness of extraneous influence was an essential element of the offense." In the absence of proof of an element making the conduct "corrupt" under 18 U.S.C. § 1503 or proof that the conduct was within the geographic purview of the court under 18 U.S.C. § 401 (contempt), the *Sinclair* conduct may not be covered by any current provision because of the limiting construction of section 401 in *Nye*.[8]

Extended Note B

Fair Trial and Free Press

from

Report of the Committee on the Operation of the Jury System to the Judicial Conference of the United States at 18–20 (September 20, 1968)

The Committee does not presently recommend any direct curb or restraint on publication by the press of potentially prejudicial material. Such a curb, it feels, is both unwise as a matter of policy and poses serious constitutional problems.[1] The Supreme Court has not definitively decided whether the courts by the use of the power to punish for contempt, or by other direct measures, may control news media to the extent of requiring them to refrain from publishing prejudicial information not brought out in court, or from making prejudicial comments, whether in editorial or news reports. See Barist, The First Amendment and Regulation of Prejudicial Publicity—An Analysis, 36 Fordham L. Rev. 425 (1968). In several cases the Supreme Court has decided that, under the particular facts presented, the power to

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[7] 313 U.S. 33 (1941) (announcing the geographic concept of the 18 U.S.C. § 401 contempt power as opposed to the causal concept).

[8] *I.e.*, the conduct was not within the geographic proximity to the court. *See Calvaresi* v. *United States*, 216 F. 2d 891, 905–906 (10th Cir. 1954), *rev'd.*, 348 U.S. 961 (1955).

[1] Both the Reardon and the Medina Committees reject an expansive use of the contempt power to control the news media. Because of "the constitutional problems that would be raised" and "the inhibitory effect on speech that ought not to be prohibited," the Reardon Committee proposes the use of the contempt power only, "when a serious threat to the fairness of an ongoing trial by jury is created by an extrajudicial public statement calculated to affect the outcome of that trial." ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press § 4.1, Comment at 27 (Approved Draft 1968) [hereinafter cited as Reardon Report]. The Medina Committee is of the view that "as a matter of both constitutional law and policy, . . . extension of the contempt power is neither feasible nor wise . . . ." Special Comm. of the Bar Ass'n. of the City of New York, Freedom of the Press and Fair Trial 11 (1967) [hereinafter cited as Medina Report].

punish for contempt should not have been exercised. *Bridges* v. *California*, 314 U.S. 252 (1941); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Wood* v. *Georgia*, 370 U.S. 375 (1962). On the other hand, Mr. Justice Frankfurter and Mr. Justice Jackson, among others, have expressed the opinion that such a power exists and should be exercised when necessary. *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 917–18 (1950) (opinion of Mr. Justice Frankfurter respecting the denial of petition of writ of certiorari); *Craig* v. *Harney*, *supra* at 384 (dissenting opinon of Mr. Justice Frankfurter), at 394 (dissenting opinion of Mr. Justice Jackson; *Pennekamp* v. *Florida*, *supra* at 350 (concurring opinion of Mr. Justice Frankfurter).[2] In this connection it should be pointed out that the problem of prejudicial editorial comment still remains and will not be directly affected by the proposed restraints on the release of information by attorneys and courthouse personnel. It is hoped that this problem will be solved by self-restraint on the part of the news media, so that the courts will not have to consider the imposition of direct controls.

Threatening Public Servants: Section 1366

1. *Background; Scope; Improvements.*—Proposed section 1366 provides a general basis for dealing with threats made for the purpose of influencing official conduct. As a form of improper external pressure on public servants, it constitutes a corollary to the offense of official bribery (proposed section 1361) and protects the same classes of persons—employees, congressmen, judges, jurors, *etc.*[1] It is graded at the same level as official bribery, a Class C felony. This offense also constitutes an aggravated form of criminal coercion (proposed section 1617), and like certain other coercive conduct, *e.g.*, rape and extortion, reflects the view that the purpose of the threat warrants more serious treatment than that provided for criminal coercion generally, which is a Class A misdemeanor. The proposed provision will overlap some of the other threat provisions of general applicability in the new Code when the jurisdictional base for the other offense, such as extortion, is that the government is the intended victim. But it will cover a much broader spectrum of conduct demanded of the public official, and may not apply in some instances where the general offense would apply, if the jurisdictional base for the general offense does not require *knowl-*

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[2] Constitutional limitations on the exercise of the contempt power to control the news media are discussed in the Reardon Report, *supra* note 1, at 68–73 (Tentative Draft) and 27–28 (Approved Draft), and in the Medina Report, *supra* note 64, at 1–11.

Apart from constitutional inhibitions, the power of a federal court to punish for contempt by publication is presently limited by the federal criminal contempt statute to "misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice," 18 U.S.C. § 401(1) (1964), and to "[d]isobedience or resistance to its lawful writ, process, order, rule, decree or command." 18 U.S.C. § 401(3) (1964). In *Nye* v. *United States*, 313 U.S. 33 (1941), the Supreme Court ruled that the power conferred by the first portion of this statute is restricted to the immediate geographical vicinity of the courtroom.

[1] *See* proposed section 109(x) (definition of "public servant"). A full discussion of the classes of persons covered may be found in paragraph 3 of the comment on proposed section 1361, official bribery.

edge by the actor that the Federal government or a Federal official is the victim. For example, extorting Federal funds from an official could be a Federal offense only because of the status of the funds, not because of an intent to influence the official's conduct as an official.

Current Federal law contains no single provision of the kind proposed here, although it does contain a number of threat provisions which vary in terms of the public officials protected, the kind of threats condemned, and the culpability required for the offense.[2] Accordingly, one improvement in the draft is a consolidation of these offenses to the extent they deal with improper threats to influence public officials. Other improvements are:

(a) the draft is not limited—as are the threats covered by 18 U.S.C. §§ 1503 and 1505—to the requirement that a proceeding be pending; [3]

(b) it embraces *all* public servants and is not limited to those specified in some current provisions; [4]

(c) it avoids the problem of whether a person to be influenced has the capacity of a public servant or is about to become one by focusing the issue on whether the threat is to influence his conduct as, when, or if, he becomes a public servant; [5]

(d) it covers nonviolent threats, *e.g.*, blackmail, whereas some current statutory provisions are limited to violent or forcible threats. [6]

2. *Kinds of Threats and Action to be Influenced.*—The draft in effect proposes three offenses embracing both violent and nonviolent threats when accompanied by the prohibited purpose. All are Class C felonies, whether or not the threats otherwise would be noncriminal or lesser offenses. Menacing (section 1616) and criminal coercion (section 1617) are proposed as Class A misdemeanors.

Two factors determine the differences among the three offenses:

(a) whether the threat is to commit *any* harm or only an *unlawful* harm; and

(b) whether the official conduct involves discretion or a "known legal duty."

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[2] 18 U.S.C. § 1503 (judicial officers, jurors, and witnesses (witnesses will be covered by proposed section 1321)); 18 U.S.C. § 1504 (written communication to juror); 18 U.S.C. § 1505 (legislative investigations and administrative proceedings); 18 U.S.C. § 111 (threats against officials listed in 18 U.S.C. § 1114 (may be limited to threats of force, *Long* v. *United States*, 199 F. 2d 717, 719 (4th Cir. 1952))); 18 U.S.C. § 372 (conspiracies); 18 U.S.C. § 871 (President, Vice President, *etc.*); 18 U.S.C. § 876 (threatening communications to anyone through mails).

[3] For a discussion of the difficulties which this requirement presents, *see* comment on proposed sections 1321–1323, paragraph 2, *supra*.

[4] *See* notes 1 and 2, *supra*.

[5] This is consistent with the new Code's proposals concerning witnesses (section 1321) and clearly eliminates the issue raised in *Calvaresi* v. *United States*, 216 F. 2d 891, 898 (10th Cir. 1954), *rev'd.*, 348 U.S. 961 (1955), holding a juror need not have been selected for a particular proceeding to be covered by 18 U.S.C. § 1503. It is also broader than *Calvaresi* because the victim need not even be part of a jury panel. For a full discussion of this problem, *see* the comment on proposed section 1361, official bribery, paragraph 4.

[6] *See Long* v. *United States*, 199 F. 2d 717 (4th Cir. 1952).

It should be noted that "harm" is defined, in proposed section 109(j), as any "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." "Official action," which is significant in paragraphs (1)(a) and (1)(b), is defined in section 109(u) as "a decision, opinion, recommendation, vote or other exercise of discretion." "Legal duty," which figures in paragraph (1)(c), is not explicitly defined.

When the official conduct sought to be influenced is a specifically defined and required duty, *e.g.*, a ministerial act, it is an offense under this section to threaten *any* harm—lawful or unlawful—with the purpose of inducing the official to violate that duty (section 1366(1)). When the actor seeks to influence what is defined as official action, whether or not the threat is to inflict a lawful harm can be material. When the discretion is to be exercised in a judicial or administrative proceeding, any threat of harm—lawful or unlawful—is an offense when made with the intent to influence that discretion (section 1366(1)). On the other hand a threat intended to influence discretion in other discretionary situations (section 1366(2)) is a crime only if it is a threat to do anything unlawful or any one of three kinds of blackmail-type threats described in criminal coercion (section 1617 (1) (a)–(c)): to commit any crime, to accuse anyone of a criminal offense, or to expose a secret or publicize an asserted fact tending to subject any person, living or deceased, to hatred, contempt or ridicule, or to impair his credit or business repute.

The distinction between proscribing threat of *any* harm to influence official action in judicial or administrative proceedings and threat of only unlawful harm or blackmail-type threats for other official action proceeds from the view that *any* purposeful coercive influence on the exercise of discretion by courts, juries, commissions or agency examiners corrupts the process and should not be tolerated, including such threats as political reprisal or to foreclose a mortgage where the actor has the right to foreclose.[7] By like token, some threats of harm in connection with other discretionary government functions might not only be tolerated but may be proper. Thus, a threat to seek the replacement of an official on the grounds the actor believes he is not implementing the policy of a statute may be tolerated and be a proper exercise of first amendments rights.[8]

However, not all threats of harm in nonproceeding cases can be justified on the grounds the actor had a right to engage in the conduct. Hence the draft makes it an offense if the official himself is threatened

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[7] *See* MODEL PENAL CODE § 208.11, Comment at 108 (Tent. Draft No. 8, 1958). Also consider that the threat to foreclose can be viewed as an offer not to foreclose and hence, be deemed a bribe offer under proposed section 1361. The conduct covered by section 1366(1) would be covered by "corruptly" in current law's 18 U.S.C. §§ 1503 and 1505. *See* the comment on sections 1321–1323, *supra*. It would cover cases like *Broadbent* v. *United States*, 149 F. 2d 580 (10th Cir. 1945) (threat of defamation as "corruptly" influencing under 18 U.S.C. § 1503; case involves witness, but section 1503 also applies to jurors and judicial officers).

[8] *See* MODEL PENAL CODE § 208.11, Comment at 108 (Tent. Draft No. 8, 1958).

with unlawful harm or any other unlawful act or if the actor makes the threats proscribed in the criminal coercion provision.[9]

It should be noted that the statute explicitly provides that the defenses available to a charge of criminal coercion are not available when the threat has been employed to coerce official action (*see* section 1366 (3)).[10] The use of such threats is deemed an inappropriate way to influence the exercise of official action. A threat of harm to achieve a proper result is in no better position than a bribe for that purpose.[11] If a person knows that a judge is taking a bribe, he may threaten to accuse him of the offense to stop him from doing so; but he may not use such threat to have the judge decide the case in his favor.

NONDISCLOSURE OF INTEREST IN PROCEEDINGS: SECTION 1327

1. *Background; Purpose.*—Proposed section 1327 is designed to deal with special situations which have been prosecuted, through permissive judicial construction, under the general language of 18 U.S.C. § 1503 as corrupt endeavors "to influence, obstruct, or impede, the due administration of justice." These special situations have been cases where an Assistant United States Attorney and a Federal judge were approached privately with appeals for leniency in the disposition of criminal cases—conduct viewed as not improper in itself; but unbeknownst to the Federal official, the person making the appeal was being paid to make it. One such case, *United States* v. *Kahaner*, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963), involved an

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[9] Clause (a) of section 1617(1) (criminal coercion), which deals with a threat to commit any crime, is incorporated in the provision proposed here even though it may in most instances be a threat of unlawful harm against the official. The reason is that the crime threatened could be one which is not regarded by the official as harm to himself, *e.g.*, the destruction of property in which he has no interest or duty to protect. Paragraph (d) of section 1617(1), which deals with a threat to take or withhold official action as a public servant, is not incorporated because it is not as serious a threat in this context as the others and it could involve officials in an offense as a consequence of inter- or intradepartmental discussions of policy, when—as recommended here—the defenses available to a charge of criminal coercion are not available. Other modern revisions do not take this course of incorporating some criminal coercion provisions into a threat provision such as this. Michigan and New York deal with threats to public officials as criminal coercion. New York makes such threats an aggravated form of criminal coercion (N.Y. REV. PEN. LAW § 135.65(2)(c) (McKinney 1967)); Michigan does not (MICH. REV. CRIM. CODE § 2125, and Comment at 375 (Final Draft 1967)). Model Penal Code section 240.2 is similar to the proposal here but grades as felonies only the threats regarding judicial and administrative proceedings and does not explicitly incorporate blackmail-type threats. (The Model Penal Code provision also deals with private communications to public officials, a matter dealt with here in proposed section 1327 (failure to disclose interest in a proceeding).)

[10] The defenses are: ". . . (i) that the primary purpose of the threat was to cause the other to conduct himself in his own best interests, or (ii) that a purpose of the threat was to cause the other to desist from misbehavior, engage in behavior from which he could not lawfully abstain, make good a wrong done by him, or refrain from taking any action or responsibility for which he was disqualified."

[11] *See United States* v. *Labovitz*, 251 F.2d 393 (3d Cir. 1958), and *United States* v. *Manton*, 107 F.2d 834, 846 (2d Cir. 1939), *cert. denied*, 309 U.S. 664 (1940), rejecting as a defense the correctness of the rendered judicial decision, by a judge charged with conspiracy to obstruct justice by taking money to render the decision.

approach regarding a prospective sentence to a Federal judge by a New York State Supreme Court Justice (a former U.S. Attorney in that district and the brother of a Congressman), who had been paid about $20,000 for making the appeal. Another, *United States* v. *Polakoff*, 121 F.2d 333 (2d Cir.), *cert. denied*, 314 U.S. 626 (1941), involved a bondsman who had solicited $500 from a defendant to make an appeal to an Assistant U.S. Attorney, a social friend, for a lenient sentence recommendation to the judge.[1] Although proposed section 1365 of the new Code would prohibit trading in special influence (the power to influence through kinship or position as a Federal public servant)[2] it would not reach either of these cases.

These situations have been characterized as "special," within the area of corrupt endeavors to influence justice, because there is no evidence of an attempt to corrupt the official himself (by bribery or coercion), and the official is expected to consider the entreaty on its merits, if not welcome it as a contribution—for what it is worth—to the totality of information available to him. Indeed, the Federal judge in *Kahaner*, *supra*, stated that "within the limits of the time that was available, I would talk with any person who had anything to say in behalf of a person about to be sentenced." 317 F. 2d at 472. Thus it is difficult to ascertain precisely what is the corruption of justice which is abhorrent in these situations. There is an element of deception; but the cases do not turn on whether the representations on the merits as to the defendant are true or false, only on deception as to what motivated the entreaty. In *Polakoff*, the court stated:[3]

> Does one corruptly endeavor to obstruct justice if for supposedly disinterested reasons, though actually in expectation of financial gain, he uses what influence he has with the District Attorney to secure favorable disposition of a pending criminal case?
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> * * * * *
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> Here . . . [t]hat endeavor was corrupt because it was a fraud. Actually he was working for himself when in appearance he was working for [the person awaiting sentence].

Concealment of the pecuniary motive, which, if known to the official, would undoubtedly affect the weight he would ascribe to the entreaty, is thus clearly a matter of concern. In addition, it is believed that an unarticulated rationale relates to the nature of the discretion being exercised. In the effective administration of criminal justice, heavy

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[1] *See also Craig* v. *United States*, 81 F.2d 816 (9th Cir.), *cert. denied*, 298 U.S. 690 (1936), in which the indictment charged conspiracy to "corruptly" obstruct due administration of justice when defendants told another they would "corruptly" bring about dismissal of an indictment and would "corruptly" influence a Senator to aid in the plot. Holding the indictment need not allege the nature of the corrupt plot, the court found the proof supported the conspiracy charge. Under the facts as proved, it is not clear whether the mere receipt of money to accomplish the result was "corrupt," or whether, if the receipt of money was revealed and the request to dismiss was made on the merits, it would have been corrupt nevertheless.

[2] *See* draft and comment on proposed section 1365.

[3] 121 F. 2d, at 334, 335. The prosecution in *Kahaner* was also based upon the motivation of the State judge in approaching the Federal judge, not upon any impropriety in the approach or what he said about the persons to be sentenced. *See* 317 F. 2d at 472.

reliance is placed upon the sound exercise of discretion by prosecutors and judges as to what treatment should be accorded antisocial conduct, a power of which the public—or, at least, so prosecutors and judges believe—is highly suspect. Accordingly, even though concealment of the pecuniary motive is not in itself harmful to the system of justice itself, it does tend to bring the process into disrepute. In short, in these matters prosecutors and judges, because of their role as monitors of improper conduct of others, should be specially protected from even the appearance of being parties to the sale of criminal justice, implied in the surreptitious payment of money to others.

Upon this analysis the specific offense proposed here—as one of the number of specific offenses derived from the general prohibition of 18 U.S.C. § 1503 against corrupt endeavors to influence the administration of justice—has been formulated to prohibit the nondisclosure of a retainer to influence official action in the areas of criminal justice discretion of special concern. It is recommended that other areas of official action where such nondisclosure may be critical be dealt with by regulatory offenses. (*See* paragraph 4, *infra.*)

2. *Scope; Exclusions; Culpability.*—Although designed to meet the cases noted in paragraph 1, *supra*, the draft protects a broader group of public servants than prosecutors and judges, who were the public officials in those cases, and matters of discretion other than the sentencing decision, which are similar in impact, *i.e.*, initiation, conduct or dismissal of a prosecution, probation and parole decisions. While U.S. Attorneys and judges do make many of the decisions to be given special protection here, others in the government exercise similar discretion in deciding whether to proceed criminally or civilly in a matter, *e.g.*, antitrust, tax, SEC, or to release a person from prison or supervision. These public servants can be regarded as equally vulnerable to improperly motivated entreaties. This scope of coverage is accomplished by defining the official action concerned, rather than listing the public servants.

The draft recognizes that certain persons are expected to be paid advocates—attorneys and others who may be authorized to appear before an agency. They are thus explicitly excluded from application of the section if they are acting in such capacities and make that known or have filed a notice of appearance or complied with whatever procedure is authorized (*see* proposed section 1327(2)).

The draft does not require that the person retained know that he must reveal the existence of the retainer or that an intent to mislead must be found. This proposal is based on the premise that, because of the nature of the official action to be influenced, the actor must know that his failure to reveal the retainer is a material concealment. This premise would not be valid if the offense applied to a retainer to influence any official action.

3. *Grading.*—The offense is graded here as a Class A misdemeanor, paralleling the grading proposed for trading in special influence (proposed section 1365) and in recognition of the fact that the more serious misbehavior of official bribery is graded as a Class C felony (proposed section 1361). Under 18 U.S.C. § 1503 the available penalty is 5 years' imprisonment and/or $5,000 and inasmuch as the defendants in the *Kahaner* case, *supra*, were given felony sentences, consideration

should be given to alternatives which identify factors which might make the offense suitable for felony treatment.

One alternative would grade the offense on the basis of whether the influence being bought is "special influence," as defined in the proposed offense of trading in special influence (section 1365): power to influence through kinship or by reason of position as a public servant. This grading test would broaden the public servant category to include nonfederal public servants, thus embracing the State court judge in the *Kahaner* case, but would not make a felon of the bondsman in the *Polakoff* case. The indirect effect of this provision on the trading in special influence offense would be to raise it to a Class C felony when the entreaty was actually made and the illegal retainer not revealed (the trading offense prohibits only the retainer), but only when the official action to be influenced is that as narrowly described here (the trading offense applies to any official action).

A second alternative would grade the offense on the basis of the amount of money paid. The theory would be that the higher amount is usually indicative of the power of influence which the recipient can exert and the importance of the matter involved.

4. *Other Official Action; Ex Parte Communications Generally.*— As noted earlier, it is recommended that if nondisclosure of a retainer is to be an offense when related to official action other than the limited areas described in proposed section 1327, it should be dealt with in a regulatory offense which reflects considerations as to the specific official action involved and notice to the person of the disclosure requirement or, in the alternative, whether an intent to mislead is required. A substantial part of the business of some public officials is to deal with private entreaties, arguments, *etc.*, intended to influence their official action; and making criminal the failure to reveal a retainer in all such situations is too broad a response to a problem which has many facets, *e.g.*, description and registration of lobbyists.

Similarly, the question of whether or when ex parte communications to public officials are to be prohibited is regarded as one not susceptible to treatment in the new Code. There is no general provision in current law which prohibits or even deals with ex parte communications to public officials. Current law, as well as proposed new Code provisions, deal with only certain kinds of ex parte communications, such as threats to witnesses and public servants and communications with the purpose of influencing jurors (proposed sections 1321, 1324).

Surreptitious communications, as such, are not dealt with in current statutes. There is no provision similar to the Model Penal Code's section 240.2(d) (P.O.D. 1962):

> A person commits an offense if he:
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> * * * * * * *
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> (d) privately addresses to any public servant who has or will have an official discretion in a judicial or administrative proceeding any representation, entreaty, argument or other communication designed to influence the outcome on the basis of considerations other than those authorized by law.

A committee of the Administrative Conference of the United States has rejected a proposed general provision imposing criminal liability

on ex parte communications to public officials because it did "not think that criminal sanctions are essential or would be very effective in dealing with ex parte activities. Furthermore, the use of criminal sanctions would require that the prohibitions be drafted with a specificity that the subject matter seems to preclude." [4] The matter is still being considered by the Conference and it is likely the approach will be in the form of regulations appropriate to each agency. The proposed new Code's regulatory offense provisions (section 1006) are sufficient to provide criminal sanctions for such regulations if criminal sanctions are deemed desirable. In light of the extensive report by the Administrative Conference Committee and the Conference's present consideration of the issue, it is recommended that the Commission should not now propose any general regulation of ex parte communications. None appears in the new State Codes.

Retaliation: Section 1367

1. *Background; Scope; Purpose.*—Proposed section 1367, prohibiting retaliatory action against a broad class of persons because of their service in protected capacities, is a catch-all provision serving a function similar to that of the offense of physical obstruction of government function (proposed section 1301). As a Class A misdemeanor, it reflects the fact that either the offense itself or a formulation like it will serve as a jurisdictional base for Federal prosecutions of serious offenses—murder, aggravated assault, kidnapping, arson, *etc.*—where, as provided for some offenses in existing law, *e.g.*, murder and assault, the offense was motivated on account of the victim's performance of an official duty. Also, as a Class A misdemeanor, it recognizes that the retaliatory purpose serves to raise lesser offenses to this level and to make otherwise noncriminal (but nevertheless unlawful) conduct, *e.g.*, libel and defamation, a crime. Without explicit provision, either as an offense or jurisdictional base, retaliatory conduct would not be subject to Federal prosecution.[1]

The proposal broadens current law, which protects some Federal officials from harm to both person and property, some from harm to person only, and all from conspiracies to harm them in person or property.[2] Like current law, witnesses are protected (18 U.S.C. §§ 1503, 1505), but the protection of informants is expanded to protect informants with respect to all government functions and not criminal investigations alone (18 U.S.C. § 1510).

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[4] Comm. on Internal Organization and Procedure, Administrative Conference of the United States, Report on Recommendations for the Prohibition of Ex Parte Communications Between Persons Inside and Persons Outside the Agency, at 24 (June 13, 1962). *See also* Recommendation No. 16, Administrative Conference of the United States (1962): H.R. 14, 87th Cong., 1st Sess., § 7(f) (1961).

[1] *See, e.g., United States* v. *McLeod*, 119 F. 416 (N.D. Ala. 1902), where, without explicit provision as in present Federal law, an official was not protected from retaliation. *See also Smith* v. *United States*, 274 F. 351 (8th Cir. 1921), which demonstrates the need for the provision.

[2] 18 U.S.C. § § 1503, 1505 and 1510 protect witnesses, informants, jurors and judicial officials from harm to "person or property" on account of their government associated activities. 18 U.S.C. § 372 condemns conspiracies to injure "officers of the United States" in their person or property on account of their discharge of official duties. 18 U.S.C. § § 111, 1114, 2231 protect specified Federal officials from assault and homicide on account of their official duties.

2. *Requirements.*—The proposal speaks of the defendant's "unlawful act" and is intended to cover State crimes and torts, as well as Federal offenses. Its purpose is to assure protection against unlawful conduct in which the defendant engages merely by virtue of the victim's participation in governmental functions. Hence, the proposal speaks in terms of another's "service" in the protected capacity and, unlike 18 U.S.C. § 372 ("lawful discharge of the duties of his office") and the Model Penal Code, is not limited to retaliation for "anything lawfully done" by the other.[3]

If the conduct of the retaliator is an unlawful act, whether or not the conduct of the public servant, witness or informant, is lawful can appropriately be regarded as irrelevant to the determination of guilt, as it is when retaliatory purpose is used as a jurisdictional base under present law. The culpability element of intent is necessarily included in proposed section 1367's term "retaliation for or on account of the service of another."

Tampering With Public Records: Section 1355

1. *Background; Scope.*—Proposed section 1355 deals with unauthorized impairment of existing government records by making false entries or physical acts of mutilation, destruction, *etc.* This general provision deals with such conduct as an obstruction of a government function and, like the physical interference provision (proposed section 1301), is a Class A misdemeanor. A person who engages in such conduct with any further purpose, such as a purpose to defraud, or who represents a false or counterfeit record as genuine, will be subject to other provisions, such as perjury, false statements, theft, forgery or any other provision concerned with the gravamen of the conduct.[1]

The draft would replace 18 U.S.C. § 2071,[2] the current general provision dealing with concealment, removal or mutilation of public records, without substantial change except in grading. 18 U.S.C. § 2071 provides for a penalty of up to 3 years' imprisonment and/or a $2,000 fine. The proposed reduction to a Class A misdemeanor is based on the view that if the purpose of the tampering can be established as something requiring more severe treatment, *e.g.*, sabotage, fraud, *etc.*, it will constitute a more serious offense for which a more severe penalty will be authorized.

The draft is also intended to replace the portions of 18 U.S.C. § 1506 proscribing theft, alteration and falsification of judicial records "whereby any judgment is reversed, made void, or does not take effect," an offense presently subject to a penalty of 5 years' imprisonment

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[3] Model Penal Code § 240.4 (P.O.D. 1962). The Model Penal Code formulation would not cover, for example, unlawful retaliation for perjured testimony, which should not be dealt with extra-officially.

[1] Current law recognizes the distinction between an offense of merely tampering with records and tampering with them for a particular purpose: *compare* 18 U.S.C. § 2071 (willful and unlawful mutilation of records, *etc.*) *with* 18 U.S.C. § 2073 ("with intent to deceive, mislead, injure, or defraud"). *See also* the New York revised statute which makes such conduct with "intent to defraud" a Class D felony (section 175.25), without such intent, a Class A misdemeanor (section 175.20).

[2] *Cf.* 18 U.S.C. § 1001 (general false statement or entries provision to be dealt with in a false statement offense in the new Code).

and/or a $5,000 fine. A separate and/or more serious offense based upon the fortuity of the result is not warranted: again, if the tampering with judicial records has a purpose constituting another offense, the tamperer can be prosecuted for it.

Finally, one of the purposes of the draft is to facilitate determinations by Congress that records other than those kept by the government should be given similar protection. (*See* paragraph 3, *infra.*)

2. *Culpability Requirement.*—18 U.S.C. § 2071 condemns tampering with public records when engaged in "willfully and unlawfully." The draft's equivalent of "willfully" is "knowingly." To be guilty one would have to know that a public record was involved and either that he was making a false entry or false alteration (section 1355(1)(a)) or that he was destroying it, *etc.*, without lawful authority (section 1355(1)(b)).

Unlike present 18 U.S.C. § 2071(b), which prohibits only "unlawful" falsifications, the draft assumes that no one is authorized to exercise his discretion in making a statement in a public record which he knows to be false. If he has no discretion in making the entry, he would have available to him the defense of justification (under proposed section 602, execution of public duty).[3]

On the other hand, there is authority to destroy records;[4] the draft requires knowledge that such authority was lacking. Under the draft formulation—"without lawful authority"—a defense would be available whether the actor believed that the law authorized him to destroy the record or that he had been lawfully authorized to do so by another. While the primary purpose of the draft is to protect a subordinate acting on orders of a superior, it also protects one who believes he has authority directly derived from the law.[5] It is difficult to ascertain whether this constitutes a change from current law; but it it does not seem likely that felony treatment and forfeiture of and disqualification from holding public office, authorized by current law, would be warranted as a consequence of a good faith destruction of a public record.

3. Records Kept by Others.—There are numerous records required to be kept by private persons for the benefit and information of the government. Their purposes and their relationship to the needs of the private party retaining and maintaining those records vary. Some enable the government to establish industry-wide policy, such as some agricultural records (7 U.S.C. § 1373(b)); others permit control of dangerous products (21 U.S.C. § 360(d) (depressant and stimulant drugs)); still others facilitate inspection and regulation of the partic-

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[3] *Cf.* N.Y. REV. LAW § 175.20 (McKinney 1967), which states:

> A person is guilty of tampering with public records in the second degree when, knowing that he does not have the authority of anyone entitled to grant it, he knowingly removes, mutilates, destroys, conceals, makes a false entry in or falsely alters any record or other written instrument filed with, deposited in, or otherwise constituting a record of a public office or public servant.

The New York provision appears to provide a defense to falsity if a person believes another has authority to authorize a false entry—the draft does not. On the other hand, New York appears to provide no defense if the actor believes his authority to destroy is derived directly from the law.

[4] *See, e.g.*, 44 U.S.C. §§ 366 *et seq.*, dealing with disposition of records.

[5] *See* note 86, *supra.*

ular enterprise (15 U.S.C. § 80a–30 (SEC regulations)). Methods of enforcement also vary.[6] There often is a distinction between failures to comply and "willful" failures to comply, with the latter carrying criminal penalties. The penalties also vary.[7]

On the premise that records maintained by private parties for the government's information should be subject to the same sanctions for violation as those in the possession of the government,[8] the proposal would make tampering with those records a Class A misdemeanor (section 1355(2)(b)).

However, the great variety of records and the need to assure that the records subject to this provision be identified with certainty underlies the approach in the proposal subjecting those records to this provision only if another law expressly so provides. It is envisioned that the numerous provisions requiring records to be kept will be examined with a view to determining if they should be subject to this provision, the regulatory offense provision (proposed section 1006), or none at all. Of course, as with other government records, if there is criminal conduct to which tampering is incidental or a means to a criminal end, it will be subject to other provisions as well.

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[6] *See, e.g.*, 15 U.S.C. § 70d(c), "neglect or refusal" to maintain fiber products identification records as unfair method of competition or deceptive practice under Federal Trade Commission Act, where "willful" violation is punishable by $5,000 and/or 1 year's imprisonment under 15 U.S.C. § 70i(a). *See also* 15 U.S.C. § 70e. There are similar provisions in SEC statutes, *e.g.*, 15 U.S.C. §§ 77yyy, 78q, 78ff(a) and (b).

[7] *See* note 6, *supra*.

[8] This is the assumption of the Model Penal Code, section 241.8. *See also* MODEL PENAL CODE § 208.27, Comment at 122 (Tent. Draft No. 8, 1958). The Michigan Revised Criminal Code (Final Draft 1967) does not include such records in its false business records provision (section 4125), because it is limited to conduct with an intent to defraud. The revisers assert that such records are included in their tampering with public records provision (section 4555). MICH. REV. CRIM. CODE § 4125, Comment at 295 (Final Draft 1967). However, their inclusion is not apparent from the definition of "public record:" "all official books, papers or records created by or received in any government office" (section 4555(2)), without some extensive judicial construction of the terms "created" or "received." A possible guide to the kinds of records kept by an individual and retained by him which might be included here may be found in the cases deciding to which records the privilege against self incrimination applies (*see, e.g., Shapiro* v. *United States*, 335 U.S. 1 (1948); *Rodgers* v. *United States*, 138 F. 2d 992, 995 (6th Cir. 1943)); but the line drawn in such cases seems too fuzzy to serve the purposes of the draft.

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COMMENT

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CRIMINAL CONTEMPT: SECTIONS 1341–1349; 1325
(Agata, Green, Clarkson; June 22, 1969)

Criminal Contempts: Section 1341

1. *Background; General Purpose.*—As shown in the Consultant's Report (attached as an appendix to this comment), exercise of the criminal contempt power by Federal courts has been curbed in one way or another for more than a century, in some instances by legislation and in others by the courts themselves, either through appellate decisions or the Federal Rules. Nevertheless, the Consultant argues, use of the power, which does not accord the defendant the protections he would have in a normal prosecution, remains an unsatisfactory way to deal with criminal conduct, and abuses—or, at least, the potential for abuse—still exist. The ideal reform he proposes would be to complete the job of defining as specific offenses conduct heretofore treated as criminal contempt, to rely upon noncriminal remedies for some of the conduct not suitable to such treatment, and to eliminate resort to the criminal contempt power entirely.

The package of provisions here presented goes part, but not all, of the way along that proposed route. Added to the proposed obstruction of justice provisions [1] are the traditional contempts of failing to respond to a subpena (section 1342), refusal to testify (section 1343), disorderly conduct in a proceeding (section 1344), and violation of certain court orders (section 1345). The draft of proposed section 1341 on criminal contempt, however, reflects the view that, while it should be tamed radically and some of its more dangerous features changed, there are cogent reasons for retaining a legislative definition of the contempt power in the same terms which have been used since 1831, now contained in 18 U.S.C. § 401.

It is believed that retention of a modified definition of the contempt power is the least of possible evils, if evil it be. This appraisal is based on the fact that, whether or not the courts possess an inherent contempt power which can be exercised regardless of what the Congress says (the Consultant argues that they do),[2] Federal courts have

[1] Sections 1321–1330.

[2] *See* Consultant's Report, Appendix, *infra; but cf. Nye* v. *United States*, 313 U.S. 33, 47–48, 51 (1941):

> Congress [in enacting, in 1831, legislation concerning contempts of court] was responding to grievances arising out of the exercise of judicial power. . . . Congress was intent on curtailing that power The two sections of the Act of March 2, 1831, when read together, as they must be, clearly indicate that the category of criminal cases which could be tried without a jury was narrowly confined. That the previously undefined power of the courts was substantially curtailed by that Act was early recognized by lower federal courts. . . . Its legislative history, its interpretation prior to 1918, the character and nature of the contempt proceedings, admonish us to . . . recognize the substantial legislative limitations on the contempt power. . . .

been willing to abide by the restraints imposed by 18 U.S.C. § 401 and other statutes. One course, repeal of present section 401, might well lead to revival of an unfettered contempt power, despite an exhortation in the legislative history that the courts refrain from using it. Another course, an explicit attempt to abolish the contempt power by statute, would likely force a confrontation with the congressional power to do so, if use of the contempt power seems necessary or appropriate. Such a confrontation could lead again to unfettered exercise of the contempt power and ought not to be risked if some other course can substantially discourage its use and minimize its abuses.

It is difficult to establish that the contempt power is never necessary or appropriate. First, there is a variety of conduct where at least the threat of a contempt adjudication should be available to the court and which does not warrant definition or prosecution as a specific offense. Such conduct would be that of attorneys, court officers, and other persons whose behavior may affect the court's ability to conduct the proceedings before it, *e.g.*, failure to be prompt in attendance.[3] Sanctions such as disbarment or terminating employment may be too severe or cumbersome to invoke, and may not be wholly effective, since the individual judge can usually do no more than influence the exercise of these sanctions, not impose them himself. Second, even when the conduct is also subject to prosecution as a specific offense, a court should have the power, even if rarely exercised, to vindicate its authority at its discretion, without reliance upon the United States Attorney to initiate the prosecution. Since the U.S. Attorney must sign all indictments, as well as informations, and cannot be compelled by the court to do so,[4] the court should have the power to proceed directly at the very least against contempt of its own authority. It may even be that the U.S. Attorney or other government personnel are the contemnors. Third, contempt is presently the only area where petty offenses clearly can be prosecuted without regard to the constitutional right to trial by jury, at least when imprisonment does not exceed 6 months.[5] Considering the proposal made here that the maximum term

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Bloom v. *Illinois*, 391 U.S. 194, 203, 204 (1968): ". . . [D]rastic curtailment of the contempt power in the Act of 1831, . . . which 'narrowly confined' and 'substantially curtailed' the authority to punish contempt summarily . . . has continued to the present day as the basis for the general power to punish criminal contempt."

[3] *See Hallinan* v. *United States*, 182 F.2d 880 (9th Cir. 1950), *cert. denied*, 341 U.S. 952 (1952), holding that an attorney's conduct in continuing to cross-examine a witness, contrary to court rulings sustaining objections to the questions, and other acts showing intentional disregard of court rulings, went beyond making a record for appeal, and was properly regarded as contempt; *In re Osborne*, 344 F. 2d 611 (9th Cir. 1965), holding that an attorney who refused to proceed with cross examination, repeatedly demanding a recess, was contumacious.

[4] *United States* v. *Cox*, 342 F. 2d 167, 172 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965):

> Because, as we conclude, the signature of the Government attorney is necessary to the validity of the indictment and the affixing or withholding of the signature is a matter of executive discretion which cannot be reviewed by the courts, the contempt order must be reversed.

[5] In *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966), the Supreme Court held that a contempt conviction entailing a penalty of 6 months' imprisonment constituted a petty offense, which does not require jury trial. In *Bloom* v. *Illinois*, 391 U.S. 194, 208 (1968), however, the Court held that "when serious punishment for contempt is contemplated" (in this case, a sentence of 24 months' imprisonment was imposed), a jury trial must be granted.

be curtailed even further, and the lack of apparent necessity of a jury trial for such very petty cases, it is difficult to urge that the right to jury trial should be extended to them. (The Federal Rules preserve all other requirements of due process for criminal contempt proceedings, except for the narrow area of conduct committed in the actual presence of the judge and seen or heard by him, for which summary treatment is permitted.)[6]

The draft, therefore, preserves the explicit statutory limitation on the courts' contempt power but makes the following major changes:

(a) It sharply limits the penalty for misbehavior and violation of petty orders to a $500 fine and/or imprisonment up to 5 days (infraction plus 5 days),* thus recognizing that the power is largely retained for use against petty contemptuous conduct;

(b) It applies double jeopardy principles to contempt prosecutions, with the exception of disruptive behavior which calls for an immediate response, thus discouraging use of the power for serious contempts which are subject to normal prosecution under specific offense statutes.

Other reforms make it clear (a) that criminal contempt proceedings are assimilated into the general scheme of the proposed new Criminal Code (except for procedure), *e.g.*, as respects culpability, conspiracy, justifications, entrapment, probation, collection of fines, *etc.*, and (b) that civil contempt is not affected by the criminal contempt provisions a matter of occasional confusion in the courts.

2. *Penalty Ceilings.*—The most significant of the reforms in the proposed draft have to do with the imposition of jail penalty ceilings—both the fact that such ceilings are imposed for *all* criminal contempts and the length of the maximum terms proposed. The Supreme Court has indirectly imposed a general limit in holding that "serious punishment for contempt" (perhaps any sentence more than 6 months' imprisonment) cannot be imposed without a jury trial;[7] but the power remains to impose a term of any length if a jury trial is offered. It should be noted, however, that this is one area where the appellate courts review sentences and do occasionally modify them.[8]

In a few specific instances Congress has imposed similar indirect penalty ceilings, requiring a jury trial for jail sentences longer than a certain number of days.[9] In a few other instances Congress has imposed direct maxima.[10] Presently 18 U.S.C. § 402 imposes a maximum penalty of 6 months' imprisonment and $1,000 fine (for a natural

[6] FED. R. CRIM. P. 42.

*Treatment as a Class B misdemeanor is offered as an alternative in Study Draft section 1341.

[7] *See* note 5, *supra*.

[8] *See, e.g., United States* v. *United Mine Workers*, 330 U.S. 258 (1947); *United States* v. *Maragas*, 390 F.2d 88 (6th Cir. 1968); *United States* v. *Conole*, 365 F.2d 306 (3d Cir. 1966), *cert. denied*, 385 U.S. 1025 (1967). The cases are summarized in Extended Note A to this comment, *infra*.

[9] *See, e.g.*, 42 U.S.C. §§ 1973*l* and 1995 (jury trial required for sentence longer than 45 days). *See also* 29 U.S.C. § 528, 42 U.S.C. § 2000h (jury trial required for all contempts).

[10] *See, e.g.*, 42 U.S.C. §§ 1995, 2000h (6 months). A provision in the recently enacted Jury Selection and Service Act of 1968 (Pub. L. No. 90-274, 28 U.S.C. § 1866(g)) imposes a 3-day maximum penalty on a refusal to appear for jury service (which apparently constitutes a violation of a court order because the court can proceed by order to show cause). Note that this provision was derived from a Judicial Conference bill, S. 989, introduced on February 16, 1967 (89th Cong., 2d Sess.), by Senator Tydings.

person) (a) when the conduct also constitutes an offense under a Federal statute or under a State statute where committed *and* (b) the conduct is not a contempt committed in the presence of the court or near thereto and not a contempt committed in disobedience of a lawful order, *etc.*, entered in an action brought in behalf of the United States. This restraint appears to be observed by the courts [11] and, accordingly, constitutes precedent for the limitations imposed by the draft.

It is noteworthy that, when Congress first restricted contempt jurisdiction in 1831, the legislation derived from its direction to the House Committee on the Judiciary "to inquire into the expediency of defining by statute all offenses which may be punished as contempts of the courts of the United States, and also to limit the punishment for the same." [12] The result was the forerunner of 18 U.S.C. § 401 and the first specific offense of obstruction of justice. Although obstruction of justice offenses are today graded in varying severity, the original, which has been said only to separate causal from geographic contempt,[13] carried maximum penalties of $500 and 3 months.[14]

Even though retention of the criminal contempt power is warranted, it does not follow that Congress should not limit this extraordinary power even more than under existing law. The draft proposal that the imprisonment ceiling be 5 days and the fine ceiling $500 * expresses two policies. One is that the kinds of otherwise undefined, petty misbehavior for which the power is reserved does not warrant a greater penalty. The other is that where the conduct also violates a statute, prosecution should proceed in the traditional mode, if a greater penalty is available and appears desirable. Note that refusal to obey subpenas and to answer questions and disorderly behavior in a proceeding are being added to the catalogue of specific offenses as Class A misdemeanors.

An exception is made for disobedience to lawful orders which constitute injunctions or restraining orders (section 1341(2)).[15] (Minor

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[11] *See Bloom* v. *Illinois*, 391 U.S. 194, 204 (1968), mentioned note 2, *supra*:

> The courts also proved sensitive to the potential for abuse which resides in the summary power to punish contempt. Before the 19th Century was out, a distinction had been carefully drawn between contempts occurring within the view of the court, for which a hearing and formal presentation of evidence were dispensed with, and all other contempts where more normal adversary procedures were required.

The Court also noted that 18 U.S.C. § 402 serves as a limitation on judicial contempt powers. 391 U.S. at 204n.6.

[12] 7 CONG. DEB., 21st Cong., 2d Sess., February 1, 1831, cols. 560–561, *cited* in *United States* v. *Essex*, 407 F.2d 214, 216n.2 (6th Cir. 1969).

[13] *United States* v. *Essex*, 407 F.2d 214, 217 (6th Cir. 1969).

[14] *See* the original provisions in *Cammer* v. *United States*, 350 U.S. 399, 407n.6 (1956).

*Note that Study Draft section 1341 presents Class B misdemeanor treatment as an alternative.

[15] An alternative possibility for defining the class of orders deemed to be of sufficient importance to warrant increased penalties would be to refer to the provisions of the United States Code which govern appealability; such a definition would embrace all final orders, preliminary injunctions, and interlocutory orders which are appealable under 28 U.S.C. § 1292(a), 11 U.S.C. § 47(a), 28 U.S.C. §§ 1252, 1253, or 11 U.S.C. § 47(c) (as well as temporary restraining orders, which are not ordinarily appealable). It is believed that the proposed provision defines the class of orders which are appealable, but if it were desired to refer to an existing, fairly definite standard for "important orders," the appealability provisions could be used.

orders, such as to answer interrogatories by a certain date, remain in the petty category.) This is to be treated as a Class A misdemeanor, with its proposed ceiling on fines, or, as an alternative, with no ceiling on fines. The reason for the exception is that such orders may deal with serious misconduct for which there is no alternative mode of prosecution; and, even though it is conduct which has not been defined as a specific offense, the higher maximum is warranted because there has been a prior adjudication (or, in the case of a temporary restraining order, albeit ex parte, there has been careful consideration by the court) and a specific direction has been given to the potential defendant. It may also be that, where a specific offense deals with the same conduct, the 6-month penalty provided here is a longer one; but the same justification would also apply in this situation.

Disobedience of such orders is also defined as a specific offense (proposed section 1345) and classified as a Class A misdemeanor. The contempt power is retained, nevertheless, under what may be the same penalty, because it is believed that the court should not be dependent upon the concurrence or zeal of the U.S. Attorney or grand jury in order to vindicate its authority in such matters. Civil complaints will retain the opportunity to go directly to the courts in seeking sanctions more serious than 5 days. In addition the court can consider civil and criminal contempt sanctions at the same time. (If the penalty for a Class A misdemeanor should ultimately be fixed at a period longer than 6 months it would seem advisable to retain the 6-month maximum for contempt based on the same conduct because of the constitutional jury trial limitation. *See* the discussion of jury trials in paragraph 3, *infra.*)

While a fine would probably be appropriate for most of the ordinary contempt prosecutions envisioned, entirely depriving the courts of the power to jail could have unforeseen destructive consequences on their efforts to obtain compliance and respect for their authority, not worth risking in the face of possible abuses under a 5-day maximum. A maximum longer than 5 days, on the other hand, would tend to weaken the policy favoring prosecution under specific offense statutes for conduct warranting more severe penalties and also would create a need to redefine and perhaps grade the misbehavior constituting contempt, an enterprise of doubtful value. (*See* paragraph 3, *infra.*)

As already noted, the 6-month maximum for violation of certain orders accords with the jury trial requirement. That it should be a sufficient maximum jail term for such violations is supported by the sentences in pertinent reported cases, and the maximum selected for situations covered by present 18 U.S.C. § 402. Preserving the power of the court to impose fines without statutory limitations is based on the fact that, on occasion, criminal contempt fines of up to $700,000 have been upheld as warranted on review. On the other hand, appellate courts have been alert to modify fines when they are deemed excessive.[16]

The draft corrects what was probably an unintentional consequence of the language used in 18 U.S.C. § 401, its construction to prohibit

[16] For a survey of cases on these matters, *see* Extended Note A to this comment, *infra.*

imposition of *both* a fine and imprisonment. This has proved to be a source of considerable difficulty.[17]

3. *Modifications of Criminal Contempt: Scope and Procedure.*—Imposing penalty limits on criminal contempt on the order of those proposed in the draft lessens the need to be more precise in the definition of the conduct included within the courts' criminal contempt powers. As definitions of specific offenses the descriptions of contemptuous conduct in 18 U.S.C. § 401 would not be satisfactory. Moreover, their overlap with the jury and witness tampering provisions are a source of difficulty. But in view of the penalty limitations, the virtually insurmountable task of making appropriate discrimination among the varieties of misconduct, and the fact that the courts have lived with and interpreted these definitions for more than a century retaining those definitions is, on balance, warranted, with the exception of singling out willful violations of injunctions and restraining orders for higher penalties.

The penalty limits also permit repeal of the somewhat irrational statutory prescription of the right to jury trial. 18 U.S.C. §§ 402 and 3691 presently provide for jury trial in the same situations where the 6-month penalty limits now apply, where certain violations and misbehavior also constitute violation of a criminal statute. It is anomalous to provide such protections for defendants when the disobedience of the court order also transgresses a statute but not when the legislature has failed to identify criminal conduct in advance. One can cogently argue for precisely the opposite result: that where there is no express legislative prohibition of the conduct, the defendant should have more rather than less protection. The problem is mooted, however, by the maximum penalty of 5 days; it is difficult to justify the need for a jury trial in such circumstances, regardless of whether the conduct also constitutes a specific offense.

The solution is not so clear with respect to the trial for disobedience of injunctions or temporary restraining orders, where a 6-month jail sentence or very high fine could be imposed. But such treatment is presently permitted by the Supreme Court without jury trial.[18]

Some existing rights to jury trial could be retained. One existing statute [19]—18 U.S.C. § 3692—provides for jury trial in all labor cases and for venue in the place where the contempt occurred, rather than where the court is located. While, in today's climate, it appears anachronistic, it is difficult to express strong reasons for its repeal. In any event these provisions seem to belong in the procedural part of the Code, not the substantive.

4. *Modifications of Criminal Contempt: Double Jeopardy.*—

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[17] Cases holding that both fine and imprisonment cannot be imposed as a penalty under 18 U.S.C. § 401 include: *Penfield Co.* v. *SEC*, 330 U.S. 585 (1947); *In re Bradley*, 318 U.S. 50 (1943); *In re Osborne*, 344 F.2d 611 (9th Cir. 1965); *United States* v. *DeSimone*, 267 F.2d 741 (2d Cir. 1959). But, it has been noted, where the same act constitutes both civil and criminal contempt, both fine and imprisonment may be imposed. *MacNeil* v. *United States*, 236 F.2d 149 (1st Cir.), *cert. denied*, 352 U.S. 912 (1956).

[18] *See* note 5, *supra*.

[19] *See also* 29 U.S.C. § 528, 42 U.S.C. §§ 1973, 1995, 2000h, and note 9, *supra*.

Treating criminal contempt as a graded offense is intended to make a criminal contempt prosecution as much like an ordinary prosecution as possible, except for procedural differences. The various defenses defined in part I of the Code should be available, as well as the sentencing alternatives provided in part III.[20] It may also be that some procedural sections should also be applicable, *e.g.*, ordering of a pre-sentence report.

One of the considered consequences of this policy is that criminal contempt will be explicitly subject to statutory limitations on multiple prosecutions. Present law would permit subsequent prosecutions based on the same conduct for criminal contempt and for violation of a statute, regardless of which came first,[21] with one notable exception.[22] The effect of the draft would be to bar such subsequent prosecutions, which should in turn tend to discourage use of the contempt procedure except in clearly appropriate cases.

The desirability of double jeopardy is most questionable when criminal contempt constitutes, in effect, a lesser offense, *i.e.*, where its penalty is lower than that available if there were prosecution of the conduct as a statutory offense. The court's initiative in proceeding first for criminal contempt would foreclose the U.S. Attorney from seeking a conviction which would invoke more severe consequences. Generally speaking, however, this should not be a real problem. Since the court, not the prosecutor, enjoys the sentencing discretion, the court's determination to proceed by contempt procedure represents in effect a judgment that it sees no need for the greater penalty and would impose the lesser penalty even if it had greater options under a statute. This rationale presupposes, of course, that the court will be able to make a considered judgment in advance of prosecution, which is not always the case. Accordingly the draft identifies an exception: when the court has acted reasonably for the purpose of invoking the immediate deterrent effect of punishment to protect an ongoing proceeding from disruptive conduct.

It should be noted, however, that recent criminal law revisions which have dealt with this matter do not bar a subsequent prosecution, but

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[20] *See Pendergast* v. *United States*, 317 U.S. 412 (1943), holding contempt to be an offense for purposes of the statute of limitations.

[21] "Acts of misbehavior, though constituting violation of the criminal law, may also constitute contempt of court if committed in the presence of the court." *O'Malley* v. *United States*, 128 F. 2d 676, 684 (8th Cir. 1942), *rev'd on other grounds*, 317 U.S. 412 (1943) (fraud involving funds deposited in court); *see also United States* v. *Johansen*, 36 F. Supp. 30 (S.D. N.Y. 1940) (perjury constitutes both a contempt and an obstruction of justice).

[22] 42 U.S.C. § 2000h–1, concerning the Civil Rights Act of 1964, provides:

> No person should be put twice in jeopardy under the law of the United States for the same act or omission. For this reason, an acquittal or conviction in a prosecution for a specific crime under the laws of the United States shall bar a proceeding for criminal contempt, which is based upon the same act or omission and which arises under the provisions of this Act; and an acquittal or conviction in a proceeding for criminal contempt, which arises under the provisions of this Act, shall bar a prosecution for a specific crime under the laws of the United States based upon the same act or omission.

only urge the second court to take into account the earlier sentence.[23]

Other consequences of deeming criminal contempt to be an offense under the Code are the applicability or provisions on attempt, solicitation, facilitation, and conspiracy.

5. *Civil Contempt.*—The failure of 18 U.S.C. § 401 to make explicit the fact that Congress intended to restrict only the exercise of the courts' criminal contempt powers has, over the years, led to occasional confusion as to the statute's effect on the civil contempt powers. While, in practical effect, the distinction is sometimes difficult to discern, a distinction can be and is made. Some recent Federal legislation, which prescribes criminal contempt sanctions for certain misconduct and imposes restrictions on its use, contains provisions which seek to make it clear that those restrictions do not apply to civil contempt.[24]

Subsection (4) of the draft is included for the same purpose. Most of the text has been taken from these recent Federal statutes. Differences include a tightening of the language to tie down civil contempt to its purpose of securing compliance with an order, which embraces the notion that compliance can bring an end to the mode of coercion, *e.g.*, detention, daily or contingent fine, *etc.* Added is the purpose of compensating the complainant for losses. The text thus reflects the terse definition in *United States* v. *United Mine Workers*, 330 U.S. 258, 303–304 (1947). (The phrase in the existing statutes expressing an additional purpose ". . . to prevent obstruction of, as distinguished from punishment for violations of, any lawful writ, [*etc.*] . . ." has been deleted on the ground that it does not add anything of substance, yet inappropriately suggests employment of unconditional sanctions and confuses what difference there is between coercion and punishment.)

It may be that civil contempt is an area in greater need of clarification and reform than criminal contempt and that confusion of the two will persist, even though the draft attempts clarification of criminal contempt. But reform of civil contempt is generally outside the scope of substantive criminal law reform. A possible exception is setting a limit to the power of detention as a civil contempt sanction, even though, when used, such detention is not intended as punishment but as a means of overcoming the contemnor's resistance to doing what has lawfully been ordered.

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[23] *E.g.*, N.Y. REV. PEN. LAW § 215.55 (McKinney 1967): "Adjudication for criminal contempt under subdivision A of section seven hundred and fifty of the judiciary law shall not bar a prosecution for the crime of criminal contempt under section 215.50 based upon the same conduct but, upon conviction thereunder, the court, in sentencing the defendant shall take the previous punishment into consideration." Michigan, in commentary on the Final Draft of its Revised Criminal Code, notes that its proposed statute on "interfering with judicial proceedings" would "be subject to the normal double jeopardy limit," but the existing provision of Michigan's Judicature Act "authorizes additional criminal proceedings against a person found in contempt." MICH. REV. CRIM. CODE § 5050, Comment at 422 (Final Draft 1967).

[24] *See* 42 U.S.C. §§ 1973*l*, 1995, 2000h concerning contempts in violation of the Civil Rights Act. Section 2000h provides: ". . . Nor shall anything herein be construed to deprive courts of their power, by civil contempt proceedings, without a jury, to secure compliance with or to prevent obstruction of, as distinguished from punishment for violations of, any lawful writ, process, order, rule, decree, or command of the court in accordance with the prevailing usages of law and equity, including the power of detention." An almost identical provision is in section 1995.

The bracketed proposal in subsection (4), imposing a limit of 1 year on the coercive sanction of detention, is intended to raise the issue of whether there should be a statutory limit and, if so, how it should be expressed. It should be noted, however, that if the Commission expresses its views on this question, the provision may be more appropriate in Title 28, dealing with courts and civil matters generally, than in Title 18. The principal concern of the Commission in recommending such reform outside the criminal laws would arise from the view that detention under civil contempt is—or, at least at some point, becomes—an indirect imposition of punishment upon the incorrigible contemnor.

Although, as the Supreme Court has noted in discussing this sanction, ". . . any imprisonment . . . has punitive and deterrent effects . . . ," [25] the only existing limitation based on a clearly recognized legal standard derives from the theory of its coercive purpose, not from its punitive aspects. This limitation is the duration of the contemnor's ability to comply. For example, if one has been ordered to turn over property to a trustee in bankruptcy, destruction of the property would make him unable to comply and entitle him to immediate release.[26] Where civil contempt detention is used to coerce a witness to testify before a grand jury (its most frequent use in the Federal system), his release is required when that grand jury is discharged, on the theory that he can no longer comply with the order under which he was confined.[27] Presumably if he could show that the inquiry had terminated before discharge of the grand jury, he would be entitled to earlier release. This limitation, whether measured by the life of the grand jury or indication of the termination of the particular inquiry, is nevertheless technical, since the witness could be recalled and reimprisoned in a new inquiry—if necessary, before a successor grand jury. [28]

Length of detention has been a factor in some kinds of civil contempt cases; but it has been worked into the test of inability to comply. Thus, it has been said that when a bankrupt is committed until he turns over certain property, on a finding that his denial of possession is false, his detention "for a reasonable interval of time" will add weight to his original denial and result in his release.[29] Conceivably,

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[25] *Shillitani* v. *United States*, 384 U.S. 364, 370 (1966). The Court held that defendant, though "sentenced" to 2 years' imprisonment unless he answered questions before a grand jury, was imprisoned conditionally: he had the ability to free himself at any time by answering the questions. This constituted civil, not criminal, contempt. But defendant could not properly be confined after the grand jury's discharge, since he then had no further opportunity to purge himself of the civil contempt.

[26] *See Maggio* v. *Zeitz*, 333 U.S. 56, 64 (1948): "Conduct which has put property beyond the limited reach of the turnover proceeding may be a crime, or, if it violates an order of the referee, a criminal contempt, but no such acts, however reprehensible, warrant issuance of an order which creates a duty impossible of performance, so that punishment can follow."

[27] *Shillitani* v. *United States*, 384 U.S. 364, 370 (1966).

[28] *Id.* at 371 n.8: "By the same token, the sentences of imprisonment may be continued or reimposed if the witnesses adhere to their refusal to testify before a successor grand jury."

[29] *Oriel* v. *Russell*, 278 U.S. 358, 366 (1929): "Where [confinement] has failed and where a reasonable interval of time has supplied the previous defect in the evidence, and has made sufficiently certain what was doubtful before, namely the bankrupt's inability to obey the order, he has always been released, and I

this notion of reexamination of the propriety of the order after lengthy detention will be employed, if the occasion arises, in other contexts. For example, even though a grand jury has not been discharged and an investigation is still pending, a court might be willing to inquire whether something of value is still to be gained from the witness compliance or whether the need is only technical. Similar inquiries might be made if, following release based upon discharge of the grand jury, the witness is recalled before a successor grand jury.

Because ability to comply is often determined by circumstances beyond the control of the contemnor, *e.g.*, life of the grand jury, civil contempt detention has been challenged on the ground that length of imprisonment depends upon fortuitous circumstances.[30] Under the practice of releasing a recalcitrant grand jury witness when the grand jury is discharged, the length of detention will depend upon when he was first called and how much life remains to the grand jury thereafter. In a recent case, however, the Supreme Court, in an opinion by Mr. Justice Clark, noted that it was within the authority of the court to set an outside limit to civil contempt detention, for the "benefit" of the defendant.[31] The bracketed proposal in subsection (4) suggests that such an outside limit be imposed by Congress, making not a perfect resolution of some of the difficulties discussed above but at least a reasonable, if rough, effort towards such resolution. Since any pre-announced ceiling tends to weaken the coercive effect of the detention, 1 year has been suggested as a period which indicates that further detention is unlikely to produce compliance and which is also commensurate with the maximum available when the contemnor is prosecuted in the normal manner for his disobedience.

Failure To Appear as Witness or Produce Information: Section 1342

1. *Scope of Proposal and Current Law.*—Proposed section 1342 makes Class A misdemeanors of (a) the failure to obey subpenas or similar orders creating an obligation to attend an official proceeding to testify or produce evidence, and (b) once there, to refuse to take the stand or to be sworn. Although the latter offense is usually considered an aspect of refusal to testify (defined in section 1343), it is actually more akin to a failure to appear than a refusal to answer questions, in terms of its effect on the proceedings and of whether the actor needs any protections, *i.e.*, there is less subtlety and ambiguity than in what constitutes criminal refusal to answer.

The major change in current law is that the failure to appear or assume the posture of a witness in *judicial* proceedings, now subject

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need hardly say that he would always have the right to be released as soon as the fact becomes clear that he cannot obey;" *Maggio* v. *Zeitz*, 333 U.S. 56, 76 (1948).

[30] *Shillitani* v. *United States*, 384 U.S. 364, 371–372 (1966):

> The objection that the length of imprisonment thus depends upon fortuitous circumstances, such as the life of a grand jury and when a witness appears, has no relevance to the present situation. The argument would apply only to unconditioned imprisonment for punitive purposes, which involved different considerations.

[31] *Id.* at 371 n.6.

only to contempt proceedings,[32] can be prosecuted as an ordinary criminal offense. The proposal retains criminal sanctions for such disobedience in a congressional hearing (2 U.S.C. §§ 192, 194), and for some—but not all—administrative hearings.[33]

The offense requires: (a) a lawful subpena or order: (b) a reckless (or intentional) failure to appear or to produce evidence or a knowing refusal, *i.e.*, failure to obey a lawful order, to assume the posture of a witness; (c) engaging in such conduct unlawfully, *i.e.*, "without lawful privilege". Note that a requirement to appear by virtue of a summons under the Federal Rules of Criminal Procedure (Rule 4), which is used in lieu of arrest and, if disobeyed, can be enforced by arrest is not covered by section 1342 because it is not an order "to testify or to produce information." The language of the draft is sufficient to include both oral and written orders.

A defense is defined as a substitute for standards such as "contumaciously" (when the conduct is proceeded against as contempt), "willfully" (as it would likely be construed under its present elasticity), and "without lawful excuse" (a possible—but less desirable—alternative).*

2. *Lawfulness of Order; Unlawfulness of Failures to Comply.* Whether a subpena or order imposes a legal obligation on a person to comply or whether his failure to comply is unlawful are matters to be determined by reference to the legal authority and conditions for its exercise established outside proposed section 1342. This approach is substantially that taken in the draft on refusal to testify, section 1343. This would make no change in present substantive law concerning congressional hearings and, except for the major change creating a specific criminal offense, makes no change with respect to judicial proceedings. Although there *need* be no change with respect to administrative proceedings, the concept of "authorized agency" as proposed here, curtailing present authority, may result in some change. (*See* paragraph 4, *infra*.) There is no change intended or made with respect to procedures currently available to contest the validity of a subpena.

There are a myriad of issues which can arise in connection with the obligation to appear or to produce records, particularly since authority to issue subpenas is, by delegation, widely conferred and loosely controlled.[34] Resolution of these issues is left to judicial consideration of the facts of each case under the draft's elements of (a) a lawful order, (b) noncompliance without lawful privilege, and (c) the defenses in subsection (3).

By way of example, the following are some of the issues which have arisen under current law:

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[32] FED. R. CRIM. P. 17(g), FED. R. CIV. P. 45(f), and 18 U.S.C. § 401 authorize contempt proceedings.

[33] *See* Extended Note B to this comment for those administrative situations presently subject to direct prosecution. Considerations involved in designating the administrative proceedings are discussed in paragraph 4, *infra*.

**See* discussion of "Without lawful excuse" in the comment on Study Draft section 1305 (failure to appear after release; bail jumping), *supra*.

[34] *E.g.*, FED. R. CIV. P. 45(a) provides: ". . . The clerk shall issue a subpena, or a subpena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.": FED. R. CRIM. P. 17(g) is similar; *see also* Extended Note B for administrative agency powers to issue subpenas.

(a) whether absence of a quorum is a defense to failure to produce and when a witness must raise the issue.[35]

(b) how the witness must raise the issue of his nonpossession or the nonexistence of subpenaed documents.[36]

(c) refusal of a government official to produce because of agency regulations or orders of a superior.[37]

(d) when lack of power of the court in terms of jurisdiction over the person or the subject matter or jurisdiction to determine jurisdiction or in terms of a "void" mandate may be asserted as a basis for noncompliance.[38]

The absence of an indication of what culpability is required means that even a reckless failure to appear is sufficient.[39] This means that, although the person subpenaed must be lawfully served it need not be established that he *knew* the contents of the subpena to be held liable. Since placing a subpena in his hands would clearly be lawful service, this would suffice to establish reckless failure to appear, without proof that it was read to him or he was seen reading it. Moreover, there need be no further inquiry as to his intention [40] absent his raising the defense in subsection (3).

3. *Defenses.*—The defense set forth in subsection 3(a), paralleling the defense developed for bail jumping (*see* proposed section 1315 and extended discussion in paragraph 3 of the comment thereto), is intended to effect the concepts of lawful excuse and unavoidable noncompliance. It will serve a function similar to the motion to quash and its informal variants. It would cover cases where the person subpenaed is faced with unforeseen difficulties in responding or hard choices as to where he should go as well as cases where the records are too voluminous. While the motion to quash is more orderly, since it gives warning to the issuing party, the person subpenaed cannot al-

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[35] *United States* v. *Bryan*, 339 U.S. 323 (1950).

[36] With respect to nonpossession, actual destruction or concealment of subpenaed documents, as distinct from mere nonpossession, will be a crime. *See* proposed sections 1323 (tampering with physical evidence) and 1324 (concealment to avoid process), and comments thereto. With respect to nonexistence, *see McPhaul* v. *United States*, 364 U.S. 372 (1960); *Hale* v. *Henkel*, 201 U.S. 43 (1906); *Shelton* v. *United States*, 404 F.2d 1292 (D.C. Cir. 1968), *cert. denied*. — U.S. —, 89 S. Ct. 634 (1969).

[37] *Appeal of United States Securities & Exchange Commission*, 226 F.2d 501 (6th Cir. 1955); *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951).

[38] *See United States* v. *United Mine Workers*, 330 U.S. 258 (1947); *compare Cliett* v. *Hammonds*, 305 F.2d 565, 570 (5th Cir. 1962), and *United States* v. *Thompson*, 319 F.2d 665, 667–668 (2d Cir. 1963); *Rosenstiel* v. *Rosenstiel*, 278 F. Supp. 794, 802–804 (S.D. N.Y. 1967).

[39] *See* proposed section 1342.

[40] *See United States* v. *Bryan*, 339 U.S. 323, 329–330 (1950), upholding the conviction of a witness who refused to produce subpenaed documents on the return date, *later* claiming that she could not be required to do so because there was no quorum of the subpenaing body (a congressional committee) on that date;

> If it is shown that such an inquiry is, in fact, obstructed by the intentional withholding of documents, it is unimportant whether the subpenaed person proclaims his refusal to respond before the full committee, sends a telegram to the chairman, or simply stays away from the hearing on the return day. His statements or actions are merely evidence from which a jury might infer an intent to default. A proclaimed refusal to respond, as in this case, makes that intent plain. But it would hardly be less plain if the witness embarked on a trip to Europe on the day before his scheduled appearance before the committee.

ways afford nor will he always have the time to proceed in that manner. It is believed that, if he can, he will still choose to do so, rather than risk criminal prosecution. But the defense will serve to equalize criminal liability among those who can move to quash and those who cannot.

A difference between the defense here and the similar defense to bail jumping is that, while the latter requires the defendant to establish the defense by a preponderance of the evidence, here there need only be sufficient evidence of the defense in the case to raise a reasonable doubt in order to maintain the burden of disproof beyond a reasonable doubt on the prosecution. (*See* proposed section 103, proof and presumptions.) The reason for this difference is that, in bail jumping, the obligation is stronger, the actor having been before the court and then released on condition he appear when required, while—in this offense—subpenas may be issued indiscriminately, as previously noted. Thus, even though the matter is one concerning which the defense has the facts, keeping the burden of disproof on the government seems warranted in order to avoid improvident decisions to prosecute.

The defense set forth in subsection (3)(b), parallels the provision applicable to perjury and false statements which permits retraction of the falsehood without criminal liability before it is manifest that it will be shown up and before it substantially affects the proceedings. Its purpose is to encourage compliance. Under contempt practice it is not likely that noncompliance in such situations would be prosecuted.[41]

4. *Administrative Agencies.*—Criminal sanctions for disobeying subpenas issued by administrative agencies are limited to "authorized agencies." If there is disobedience to a court order in aid of an administrative subpena, it is dealt with as disobedience to a court order and is not subject to the "authorized agency" limitation. Current law contains a variety of provisions concerning enforcement of such subpenas.[42] Some may be enforced directly by criminal prosecution: others require the agency to seek the aid of a court: still others provide both criminal sanctions and authorize the agency to invoke the aid of a court. In the last situation, it is not always clear from the face of a statute if the aid of a court must be sought as a condition for criminal prosecution.[43] The reasons for differences amongst the various agencies in this area are not clear: no pattern emerges, although circumstances

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[41] *See Shillitani* v. *United States*, 384 U.S. 364, 371 (1966):

> [T]he justification for coercive imprisonment as applied to civil contempt depends upon the ability of the contemnor to comply with the court's order . . . . This limitation accords with the doctrine that a court must exercise '[t]he least possible power adequate to the end proposed.'

See also Babee-Tenda Corp. v. *Gharco Mfg. Co.*, 156 F. Supp. 582, 589 (S.D. N.Y. 1957), which suggests contempt will not lie even for a total failure to produce documents when the failure neither damaged the plaintiff nor affected the course of the proceedings.

[42] *See* Extended Note B, *infra.*

[43] This may be a requirement as a practical matter. *See Federal Power Comm'n* v. *Metropolitan Edison Co.*, 304 U.S. 375, 385–387 (1938), considered in the comment to section 1343 at paragraph 3(a).

of passage and historical experience with the specific agency may account for some of the differences.

In any event, it is not intended in this draft to resolve whatever issues may be involved by making broad changes in current law on this point. The proposal contemplates a policy decision with respect to each agency. This could take the form of listing agencies whose subpenas are currently enforceable by criminal sanctions and adding or deleting agencies on an ad hoc basis or the scheme could be to let the statutory provisions regarding the agency's powers expressly make the agency and certain of its proceedings the beneficiary of this section.

The factors which should be taken into account include:

(a) the nature of the administrative proceeding: whether it is investigatory or adjudicative;

(b) the precision with which the statute establishing the agency sets forth its substantive powers;

(c) experience with the agency concerning contests of its powers;

(d) the necessity or desirability of eliminating the court as a middleman for purposes of efficiency as opposed to the protection afforded by judicial control.

Ultimate resolution of the powers of administrative agencies in this respect would be a suitable project for inquiry by an agency such as the Administrative Conference of the United States.

5. *Limitation on "Official Proceeding."*—The provisions of subsection (4)(a), limiting the "official proceedings" to which the offense applies, are primarily intended to avoid making criminal the defined noncompliance when it occurs in the myriad minor situations in which testimony is taken, unless a statute expressly says so or a court expressly orders it. The general definition of "official proceeding," being used for perjury, false statements, bribery, tampering with witnesses, *etc.*, is deemed too broad for the criminal liability created by this offense, presently prosecuted only as a contempt of court. (*See* the comment on proposed section 1349 at paragraph 1.) In addition these provisions help serve the purpose of bringing over current section 192 of Title 2, which deals with contempt of Congress, to Title 18, and of complementing the proposed provisions as to what constitutes an authorized agency.

6. *Definition of "Official Proceeding."*—The definition of "official proceeding," in section 1342(4)(a) differs somewhat from the general definition of that term provided in section 109(v).

The definition of an "official proceeding before Congress" in subsection 1342(4)(c) is stated in language identical to present sections 192 and 194 of Title 2 dealing with contempt of Congress. The consequence is a transfer of the substance of 2 U.S.C. § 192 to Title 18.

Refusal To Testify: Section 1343

1. *General Scope; Grading.*—Proposed section 1343 makes it a Class A misdemeanor without lawful privilege to refuse to testify in official proceedings. Substantively, current law concerning congressional hearings (2 U.S.C. §§ 192, 194) is preserved. (*See* paragraph 2, *infra.*) In the case of judicial proceedings (including grand juries) a specific criminal offense is created for situations heretofore dealt with

exclusively by contempt. The section also deals with refusals to testify in administrative proceedings, which are presently subject to prosecution in different ways. (*See* paragraph 3, *infra.*)

The draft by its terms does not create any new liability for refusal to testify: whether the witness may lawfully refuse to answer will be determined by standards outside the section, such as the privilege against self incrimination or the authority of the agency making the inquiry.

Grading the offense as a Class A misdemeanor is consistent with the Class A misdemeanor treatment of physical obstruction of government functions in proposed section 1301. Although no prescribed jail penalty is longer than 1 year, current law is not uniform in the penalties provided for refusals to testify in administrative proceedings. (*See* Extended Note A, *infra.*) There is no maximum for refusals to testify in grand jury and other judicial proceedings which are presently treated as contempt. Under present 2 U.S.C. § 192, refusals to testify in congressional hearings are subject to a fine of not less than $100 nor more than $1,000 and "imprisonment in a common jail for not less than one month nor more than twelve months," as well as punishment for contempt[44] although the latter method has not been used in recent years.

2. *Refusal to Answer Inquiry Before Congress: Section 1343(1)(a).*—The purpose and effect of proposed subparagraph (1)(a) of section 1343 is to transfer to Title 18 the provisions of 2 U.S.C. § 192, which, inter alia, make it an offense to refuse to answer "pertinent" inquiries in congressional hearings.[45] The draft preserves the current term "pertinency" in 2 U.S.C. §§ 192, 194 governing the proper scope of inquiry in a congressional proceeding because, together with the concept of what is an authorized inquiry, it has been judicially considered in criminal cases.[46] There is no compelling reason to discard the developing body of law on the subject unless more precise standards can be recommended. Although other standards have been considered, such as "relevancy," "materiality," "lawful and proper," "material and proper,"[47] they are either less precise than "pertinency," which now has a judicial history, or, at least as to "relevancy" or "materiality," less appropriate than "pertinency," because of the absence of well defined issues in a legislative hearing as compared to a judicial proceeding.

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[44] *See Jurney* v. *MacCracken*, 294 U.S. 125 (1935); *cf. Barry* v. *United States*, 279 U.S. 597 (1929), for an instance of the use of arrest by order of the Senate to bring a witness before the Senate.

[45] *See also* proposed sections 1349(4) and 1342(4) defining congressional inquiry and establishing a certification procedure.

[46] *See* discussion and consideration of cases in *Gojack* v. *United States*, 384 U.S. 702 (1966). The meaning of "pertinency" includes "a specific, properly authorized subject of inquiry." *Id.* at 708. There is no authority to "expose the private affairs of individuals without justification in terms of the functions of the Congress." *Watkins* v. *United States*, 354 U.S. 178, 187 (1957). It is therefore clear that "the obvious first step in determining whether the questions asked were pertinent to the subject under inquiry is to ascertain what that subject was." *Russell* v. *United States*, 369 U.S. 749, 758–759 (1962). And, once the subject of the inquiry is clearly established, the concept of pertinency includes jurisdiction to make the inquiry and relevance of the questions asked. *Id.* at 757–758.

[47] *See, e.g.*, N.Y. REV. PEN. LAW § 215.60 (McKinney 1967) (criminal contempt of legislature): "4. Refuses to answer any material and proper question."

The notion that the offense be a *continued* refusal to answer following a direction to testify codifies the requirement that the witness be clearly advised that the committee demands an answer despite his objection or refusal before he is deemed to have committed an offense.[48] The draft proposes that the direction also include a warning that the witness' refusal may subject him to criminal proceedings *or* contempt.

3. *Official Proceedings other than Congressional Hearings: Section 1343(1)(b).*—Paragraph (b) of proposed section 1343(1) deals with refusals to answer in official proceedings other than congressional hearings. Unlike paragraph (a) (congressional hearings), it does not attempt to define the quality or nature of the inquiry by a term such as "pertinency." In addition, paragraph (b) requires that the refusal to answer be in violation of a judicial direction or order to answer where paragraph (a) merely requires the direction of the presiding officer, *i.e.*, the person presiding over the congressional hearing. These characteristics of paragraph (b) have different implications for court proceedings and proceedings ancillary thereto, for grand jury proceedings and for administrative proceedings.

(a) *The requirement of a judicial order to answer.*—Unlike the situation presented by failure to appear or to produce information under a subpena served in advance, a witness asked a question is unable to utilize proceedings such as the motion to quash in order to contest the validity of the asserted obligation. The proposal's requirement that there be a judicial direction provides the witness with this opportunity. Making the requirement explicit does not change current law, however, with respect to court proceedings or grand jury proceedings. In a court trial or hearing, the judge will rule on the question and direct an answer. In grand jury proceedings, the Supreme Court has held there is no contempt until a judge directs the witness to answer.[49] The provision would also make no change with respect to ancillary proceedings such as examinations before trial.[50]

A special problem is presented by refusals to testify before United States magistrates and referees in bankruptcy. Under current law, contumacious conduct, including refusals to testify, before a magistrate or a referee in bankruptcy is tried by a district court judge after certification of the facts by the magistrate or referee.[51] No change in this procedure is contemplated in the revision of the criminal contempt provisions made by proposed section 1341. The specific offense of refusal to testify proposed here similarly does not contemplate expansion of the powers of the magistrate, Commissioner or referee, although their direction to testify, as presiding officers, is regarded as a sufficient consideration of the need for an answer and of a warning. Judicial control over the penal consequences, however, is retained by requiring certification of the facts of violation by a judge to a

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[48] *See Flaxer* v. *United States*, 358 U.S. 147 (1958); *Emspak* v. *United States*, 349 U.S. 190 (1955); *Quinn* v. *United States*, 349 U.S. 155 (1955). *See also Slagle* v. *State of Ohio*, 366 U.S. 259 (1961), applying to the States the principle that the fourteenth amendment requires a clear disposition of the witness' objections as a precondition to punishment.

[49] *Brown* v. *United States*, 359 U.S. 41, 49–50 (1959), where the Court stated:

> When the petitioner first refused to answer the grand jury's questions, he was guilty of no contempt. He was entitled to persist in his refusal until the court ordered him to answer.

[50] *See* FED. R. CIV. P. 37(a).

[51] 28 U.S.C. § 636(d); 11 U.S.C. § 69.

United States Attorney as a condition precedent to instituting prosecution. (*See* proposed section 1348.)

Treatment of refusals to answer in administrative hearings appears on its face to vary according to whether there is a statute making it a specific offense or whether the agency must seek the aid of the court by applying for and obtaining a direction to the witness to testify, which would then make it an offense.[52] In practice the agencies virtually never rely on a direct prosecution even if their statutes permit it. Partly this may be because unprivileged refusals can usually be overcome by threatened civil contempt or civil sanctions, such as loss or suspension of license, *etc.* In addition, most such refusal-to-testify statutes require that the refusal be "willful." The Supreme Court has indicated in dictum, that "willful" in this context in effect requires a direction from a court to answer before the offense has been committed. In *Federal Power Comm'n* v. *Metropolitan Edison Co.*, 304 U.S. 375, 387 (1938), the Court stated:

> The qualification that the refusal must be willful fully protects one whose refusal is made in good faith and upon grounds which entitle him to the judgment of the court before obedience can be compelled.

Although this construction of "willfully" permits direct prosecution of one who refuses to testify in *bad faith*, such a possibility is illusory—as, perhaps, the lack of such prosecutions indicates—because, even for those witnesses whose purpose is to obtain delay through a vain trip to court, it should not be difficult to find arguable grounds meeting a good faith standard.[53]

On the question of whether provisions permitting direct prosecution should be retained, perhaps with improvements, or whether they should be repealed and all administrative refusals should be prosecutable only after a court order, the draft, on balance, supports the latter course. The policy stated in *Metropolitan Edison Co.*, *supra*, and in the Administrative Procedure Act, 5 U.S.C. §§ 555, 556, which only authorizes the agency to seek the aid of the court, reflects the view that the variety and number of reasons for a witness' failure to respond to a question are so great that it is unfair even to subject him to prosecution, let alone the possibility of conviction, without a court passing upon it in the first instance.[54] The task of sorting out "good

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[52] *See* Extended Note A, *infra*.

[53] *Cf. United States* v. *Murdock*, 290 U.S. 389 (1933), a prosecution for "willfully" refusing to answer a question by the Internal Revenue Service, in which the Court held that a refusal, although "intentional and without legal justification," was not "willful," if based on a good faith assertion of the privilege against self incrimination.

[54] The point is sharply stated in *S & W Cafeteria* v. *Aird*, 60 F. Supp. 599, 600 (E.D. Tenn. 1945):

> The Board has issued a subpoena requiring the attendance of one of complainant's employees to appear, produce records of complainant and testify before a panel of the Board. A statute of the United States penalizes the failure of a witness to obey a lawful summons of a Board. If the witness fails to appear, he runs the risk of prosecution if the summons be a lawful one, that is, if the Board has jurisdiction over the business of the complainant. A citizen is not required to run that risk, but may test the question in a proceeding such as this. . . . . [P]ending a hearing as to the correctness of the facts stated in the complaint, this witness should not be compelled either to testify, or to risk prosecution upon the exercise of his own judgment and refusal to obey the summons.

faith" from "bad faith" refusals would be most appropriately one for the court, even in a direct prosecution; and it must be remembered that we are dealing with an act of omission, not commission, and that the crime is in effect being created by the interrogator, not the legislature. Although it appears that agencies sometimes feel frustrated by the need to go to court in order to have their proceedings go forward in orderly fashion, it is believed that such occasional frustration is unavoidable if witnesses are to receive fair treatment.

It should be noted that the person who fails to appear as a witness in response to an administrative subpena does not receive the same treatment (*see* proposed section 1342); he may be prosecuted directly even though his misbehavior is an omission and his crime has been created by whoever thought it desirable that he appear. The reasons why there is less concern about requiring that a court first order his appearance are: (a) the same subtleties do not exist in a requirement to appear or bring documents, and to the extent that there may be a good excuse, an explicit defense is provided; (b) there is usually time to complain about or contest the validity of the subpena before the time the appearance or production is required; and (c) it is contemplated that direct prosecution will be authorized only for certain proceedings of selected agencies.[55]

If it should be concluded that direct prosecution of administrative hearing refusals should be permitted, the same sort of selective judgments should be made as to when the statute should apply, *e.g.*, adjudicative proceedings but not investigative proceedings, and the bad faith element discussed in *Metropolitan Edison*, *supra*, should be explicitly stated.

(b) *Lawfulness of refusal to answer.*—Although prosecutions for refusals in congressional hearings will be subject to the requirements that it be "without lawful privilege" *and* that the injury be "pertinent" (paragraph (a)),[56] for all other official proceedings, where the court must direct an answer, the requirement is that the refusal be "without lawful privilege." Consideration was given to stating an explicit requirement that the question be lawful and proper, as New York does;[57] but that course was rejected because the issue is whether

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[55] *See* the comment to section 1342 at paragraph 4, *supra*.

[56] *Cf. Yellin* v. *United States*, 374 U.S. 109, 123 (1963); *Sinclair* v. *United States*, 279 U.S. 263, 299 (1929), holding that in a congressional hearing the witness who refuses to answer takes the risk of violating 2 U.S.C. § 192 if his good faith belief is wrong as a matter of law. *Cf. United States* v. *Murdock*, 290 U.S. 389, 397 (1933), discussing *Sinclair*, construing 2 U.S.C. § 192 to involve two offenses, a default with respect to a subpena and a refusal to answer, and concluding that "willfulness" was required with respect to a default, but not for refusal to answer. However, subsequent Federal cases have not recognized any distinction between the two offenses respecting culpability and have not recognized a good faith mistake of law as a defense. *See e.g., Licovoli* v. *United States*, 294 F. 2d 207 (D.C. Cir., 1961), *cert. denied*, 366 U.S. 936 (1961), in which the Court stated at 209: "*Murdock* has no application here [2 U.S.C. § 192] . . . The elements of intent are the same in both cases [default and refusal to answer]." Advice of counsel is no defense to default; *but see Townsend* v. *United States*, 95 F. 2d 352, 358–366 (D.C. Cir. 1938), *cert. denied*, 303 U.S. 634 (1938), suggesting that reliance on advice of counsel might be a sufficient defense against a charge of willful default.

[57] N.Y. REV. PEN. LAW § 215.50 (McKinney 1967) ("contumacious and unlawful refusal . . . to answer any legal and proper interrogatory.")

or not the witness has a privilege to refuse to answer even a proper question, such as the case of a witness' assertion of his privilege against self incrimination. The draft thus leaves to judicial development, without further guidance, application of "unlawfully" to situations where the question is so clearly improper or irrelevant or immaterial or unclear that an answer should not be compelled.[58] Hopefully this judgment will be made in the first instance, when the court is called upon to give the direction to testify.

It should be noted that the courts today, in proceeding against refusals to testify as criminal contempts, may rely upon the culpability requirement "contumaciously" to avoid criminalizing good faith failures to respond. That requirement has not been included in the draft because, if it is to be translated into something more precise, it would be stated as an "intent to obstruct justice," *i.e.*, an unlawful and intentional refusal to testify following a judge's direction to do so. However, a refusal to answer without lawful privilege in defiance of a direction to do so covers the same conduct without introducing difficulties concerning culpability ("intentionally") and mistake of law with respect to the existence of a privilege.

It is clear that refusals privileged under the fifth amendment and rules of evidence, *e.g.*, attorney-client privilege,[59] would not be unlawful, as well as refusals to answer inquiries in an administrative proceeding outside the statutory authority granted to the agency. Whether irrelevant or immaterial or harassing questions can lawfully be met with silence or refusal is not clear,[60] particularly in grand jury proceedings, where the judgments on these questions are prosecutive rather

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[58] *See* note 60, *infra*.

[59] *See Gretsky* v. *Miller*, 160 F. Supp. 914 (D. Mass. 1958), for a case involving the attorney-client privilege in a proceeding commenced by a summons from the Internal Revenue Service.

[60] Current law is unclear on whether irrelevancy of a question in a judicial proceeding is a proper ground for refusal to obey an order to answer. It could be argued it is not misbehavior under 18 U.S.C. § 401(1) but disobedience of an order under 18 U.S.C. § 401(3). *Grudin* v. *United States*, 198 F. 2d 610 (9th Cir. 1952), may hold that refusal to answer an immaterial question cannot be contempt; *but see United States* v. *Barker*, 11 F.R.D. 421, 422–423 (N.D. Cal. 1951) (contempt for refusal to answer on grounds of improper cross examination: defendant's "remedy was to appeal and not to openly and brazenly defy the court's order and authority.") *See also Fawick Airflex Co.* v. *United Electrical, R. & M. Wks.*, 92 N.E. 2d 431, 434 (Ohio Ct. App. 1950):

> [A] witness, or a party and a witness who are identical, cannot be permitted to refuse to answer a question on the ground that it is irrelevant. To declare a rule to the contrary that a witness could decide for himself upon the relevancy or competency of a question, against the opinion of the judge presiding, would be subversive of all order in judicial proceedings. The rights of the litigants are preserved against an erroneous ruling by the trial judge through the process of asserting prejudicial error on appeal:

United States v. *United States District Court*, 238 F. 2d 713 (4th Cir. 1956), *cert. denied*, 352 U.S. 981 (1957) (grand jury); *Babee-Tenda Corp.* v. *Gharco Mfg. Co.*, 156 F. Supp. 582, 589 (S.D. N.Y. 1957); *Allen Bradley Co.* v. *Local Union No. 3*, 29 F. Supp. 759 (S.D. N.Y. 1939) (objections to relevancy must be raised when offered in evidence). *But cf. Oceanic Transport Co.* v. *Alcoa Steamship Co.*, 129 F. Supp. 160 (S.D. N.Y. 1954) (admiralty arbitration proceeding; motion to punish for contempt denied for refusal to produce without court order where court found matters not "material" or "even relevant evidence.")

than judicial.[61] As noted, the approach of the draft is to leave these decisions to judicial development in the context of specific cases.

Despite similar difficulties, the "pertinency" requirement was retained in paragraph (a) for congressional hearings because: (i) there is a body of judicial construction of the term and its omission might imply an unintended change in the law in this respect; (ii) this is the only place in which the scope of the power of Congress to ask questions will appear in a statute. It is possible to define the power of Congress elsewhere as a power to make "pertinent" inquiry, delete the requirement of "pertinent" in paragraph (a) and rely on refusal "unlawfully" as the basis for challenging the pertinency of a question. Inclusion here, however, makes it clear that no change in the law is intended and that the matter under inquiry and pertinency are to be considered by the grand jury.[62]

It remains to be noted that in prosecutions for refusal to testify under proposed section 1343 and for criminal contempt under proposed section 1341, the defenses available in criminal prosecutions generally will also be applicable. Thus, an innocent bystander who becomes a witness under conditions where he might endanger his life or the lives of loved ones if he testifies could rely on the defense of conduct otherwise justifiable to avoid greater harm under proposed section 608. This defense is not available, however, to a person who has placed himself in that position by virtue of his own illegal conduct.[63] The defense would also appear to be available in a civil contempt proceeding.

4. *Evasive Answers.*—Consideration was given to making an explicit statement in the draft as to when answers such as "I don't know" or "I don't remember" should be considered evasive, and therefore constitute refusals to testify. The issue seemed to warrant consideration because such answers, when false and while constituting perjury, are also sometimes tantamount to a refusal to answer because the claim is so patently false the interrogator is not misled. Thus, the answer "I don't remember" to the question whether the witness talked to anyone during a brief recess just before resuming the stand is a way of saying "I refuse to tell you." Since there are significant differences between perjury and refusal to testify prosecutions, *e.g.*, penalty, requirements of materiality and corroboration of single witness, the conditions for prosecution for refusal to testify, an attempt was made to draw a line between cases which should or could go one way rather than the other. The only line deemed useful was one that made all such answers perjury. The final conclusion, however, is that some such cases could appropriately be treated as refusals and that it is better not to deal with the matter by statute but to leave it to judicial development and prosecutive discretion.

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[61] Whether there is any limit to a grand jury's power of inquiry or any power in the court to determine issues of relevancy is open to serious question. Presumably outright abuse would be subject to some control; *but see In re Grand Jury Proceedings*, 4 F. Supp. 283 (E.D. Pa. 1933); *United States* v. *Levine*, 267 F. 2d 335 (2d Cir. 1959); *Application of Texas Co.*, 27 F. Supp. 847 (E.D. Ill. 1939).

[62] *See Russell* v. *United States*, 369 U.S. 749 (1962).

[63] *See, e.g., Piemonte* v. *United States*, 367 U.S. 556 (1961), where, in a criminal contempt proceeding, the Court disregarded the drug seller's refusal to reveal his supplier on grounds that he feared harm to himself and his family.

5. *Refusals to Assume the Posture of a Witness.*—Refusal to be sworn or to make other affirmation or to take the witness stand are covered by proposed section 1342, refusal to appear as a witness, and not as refusal to testify under proposed section 1343. Although present law has construed refusals to testify as embracing this conduct because there was no express provision describing it,[64] the draft reflects the view that this conduct is equivalent to a failure to appear, both in its effect and the kinds of protections and defenses required.

6. *Defense of Timely Compliance: Section 1343 (2).*—The defense proposed in subsection (2) is intended to encourage compliance.[65]

HINDERING PROCEEDINGS BY DISORDERLY CONDUCT: SECTION 1344

1. *General.*—This provision deals with disorderly conduct in or near a place where an official proceeding is being conducted. It is concerned essentially with noisy types of behavior and applies to all official proceedings. It covers conduct which would be contempt of court under 18 U.S.C. § 401—misbehavior in the presence of or near a court—and makes such conduct a specific offense with respect to all kinds of proceedings. There is presently no counterpart to this offense in the United States Code.

2. *Culpability and Grading.*—Intentional disruption of an official proceeding under section 1344(1) is a Class A misdemeanor, whether or not the disorderly conduct occurs within the proceeding room itself. Thus, if noisemaking is intended to interfere with the proceeding and has that effect (or constitutes an attempt to do so, under the attempt provisions), it is punishable even though it occurs at some distance from the building in which the proceeding is held. Intent and effect are the elements, rather than any arbitrarily defined area.

It is believed that reckless but unintentional disruptions, even though they may have the same effect, should not generally be regarded as criminal, *e.g.*, horseplay in the corridors, pile-driving for a new building next door. Remedies other than criminal prosecution should be sought for such interruptions. An exception is made, however, in subsection (2) of the proposed provision for reckless but unintentional disruptions in the proceeding room itself.* This provision should back up the authority of the presiding officer to maintain quiet and order in the proceeding room. It is more likely to prove useful in congressional and administrative contexts than in court-

[64] *See, e.g. Eisler* v. *United States*, 170 F. 2d 273, 280 (D.C. Cir. 1948).

[65] *See* the comment on proposed section 1342 at paragraph 3.

*The text refers to section 1344(2), as originally drafted:

> (2) *Reckless Hindering.* A person is guilty of an infraction if he recklessly hinders an official proceeding by noise or violent or tumultuous behavior or disturbance in the presence of a court or other agency conducting such proceeding, after being authoritatively notified his substantially similar conduct is hindering such proceeding.

The Study Draft changed the grading and deleted the limitation, "in the presence of a court or other agency conducting such proceeding." The offense defined in the Tentative Draft merely offered a counterpart to contempt: the Study Draft defines the offensive conduct more broadly than that which would be subject to contempt. The change in grading, regardless of which definition of the offense is adopted, is designed to encourage prosecution as a specific offense in lieu of punishment as contempt.

rooms, since the courts can still resort to criminal contempt. Use is somewhat circumscribed by the requirement that an authoritative warning first be given; but this does no more than make explicit a condition which is likely to be self imposed in all cases of reckless misbehavior. This offense has been proposed as an infraction because it deals with *reckless* conduct, even after a warning. Knowing disobedience would constitute an intentional obstruction under subsection (1).

3. *Disorderly Conduct Definition.*—The definition of the offense embodies a definition of disorderly conduct which is designed to cover disturbances or noises which hinder the conduct of a proceeding. The language has mixed derivation.[66] The New York statute requires that the conduct directly tend to disrupt a proceeding, a qualification commonly mentioned in contempt cases. Since it is not clear what is meant by this requirement, it is not used in the draft. Whatever limits on power it connotes are accomplished by: (a) making violations subject to the ordinary criminal process; (b) requiring that the conduct constitute a hindrance; (c) requiring either an intent to hinder under proposed subsection (1) or continued misconduct which hinders after warning under subsection (2).

DEMONSTRATING TO INFLUENCE JUDICIAL PROCEEDINGS: SECTION 1325*

1. *Background; General Scope.*—Proposed section 1325 will carry forward an existing statute, 18 U.S.C. § 1507, substantially in its present form in order to circumscribe the use of demonstrations to influence judicial proceedings. The purpose of such a provision, as stated by the Supreme Court in upholding the constitutionality of an identical State provision, copied from the Federal statute, is not only to protect judicial proceedings from such influence but also to avoid the appearance that judicial determinations are a product of intimidation.[67] The Federal statute resulted from action by the Judicial Conference of the United States in 1949 (prompted by the picketing of Federal courthouses by partisans of the defendants during trials involving leaders of the Communist Party) and was endorsed by the American Bar Association, numerous State and local bar associations, and others.[68] Although there has never been a Federal prosecution under it, the law has existed as a potential back-stop to or substitute for local law enforcement.

Some of the changes in the draft from existing law reflect the fact that other provisions of the proposed new Code will make Class A misdemeanors of intentional physical obstruction of a government function or administration of law (proposed section 1301) and of disorderly conduct (noise, *etc.*) affecting judicial proceedings, (section 1344), and will deal with conduct, whether picketing or some other act, if it constitutes a threat made to influence the testimony of a witness (section 1321(1)), or a threat to influence the official action of a judge (section 1366(1)(b)), or a threat to induce a public servant to violate

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[66] N.Y. REV. PEN. LAW § 215.50 (McKinney 1967), and MODEL PENAL CODE § 250.2 (P.O.D. 1962).

*Section 1325 is included in the Obstruction of Justice complex of offenses (section 1321 *et seq.*) in the Study Draft.

[67] *See Cox* v. *Louisiana*, 379 U.S. 559, 556 (1965).

[68] *Id.* at 561–562.

a known legal duty (section 1366(1)(c)), or a communication to influence the official action of a juror or an effort to harass a juror (section 1324). Thus the draft makes demonstrating a Class B misdemeanor (30 days), down from the 1 year maximum in 18 U.S.C. § 1507, and eliminates the specific intent to obstruct the administration of criminal justice, which did not figure in the Supreme Court decision in *Cox* on the statute's validity as did the intent to influence, which has been retained.

2. *Specific Conduct; Area; Protected Persons.*—The language describing the prohibited conduct, taken from existing law, can be faulted as not precise enough—"pickets," "parades," "demonstrations;" but it has been retained not only because alternatives are not clearly better but because, in *Cox*, the Supreme Court approved them—or, at least, explicitly approved "pickets" and "parades"—as not being too vague for constitutional purposes. The dangers from such conduct envisioned by the Court involved the notion of influence on courts by mobs or masses of people (there were 2,000 demonstrating in the *Cox* case); but definition by numbers has its own unsatisfactory features, *cf.* the riot provisions (sections 1801–1804). It is believed that the deficiencies in the terms used to describe the unlawful conduct are balanced by the requirement of specific intent to influence a judge, *etc.*, and by the prohibition's geographic limitation to areas in or near the courthouse or residence, *etc.*, of protected persons.

One of the major problems in *Cox* resulted from the statute's failure to be more precise than "near" in describing the guaranteed area. (A majority of the Court reversed the conviction because it felt that a police officer had indicated to the demonstrators that across the street from the courthouse was not "near" within the meaning of the statute.) The draft borrows "200 feet" from New York's statute dealing with similar conduct.[69] It also borrows "displays a placard or sign, *etc.*"

The draft deletes "court officers" from the list of protected persons, *e.g.*, clerks, marshals, jury commissioners. Since their duties are ministerial, it is believed that they are entitled to no greater protection than other public servants and, in any event, are not likely to be the persons sought to be influenced. (In *Cox* the demonstrators' purpose to secure the release of persons arrested the day before and held in a jail in the courthouse was regarded as directed at the judge who could order their release or fix bail, not at the jailer.) It should be noted that, by retaining jurors in the protected class, the draft overlaps the prohibition against harassment of them and communication with them with intent to influence (proposed section 1324); but such overlap is preferable to the problems which might arise from their omission.

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[69] N.Y. REV. PEN. LAW § 215.50(7) (McKinney 1967). The New York statute, which describes the prohibited conduct more precisely than does the draft and is limited to cases where a trial is in progress, does not require an intent to influence a judge, *etc.*:

> On or along a public street or sidewalk within a radius of two hundred feet of any building established as a courthouse, he calls aloud, shouts, holds or displays placards or signs containing written or printed matter, concerning the conduct of a trial being held in such courthouse or the character of the court or jury engaged in such trial or calling for or demanding any specified action or determination by such court or [illegible] in connection with such trial.

WILLFUL DISOBEDIENCE OF COURT'S LAWFUL ORDER: SECTION 1345

1. *General Scope.*—The draft of section 1345 proposes that violation of a court's major orders be a specific offense which can be prosecuted in the normal manner as a Class A misdemeanor, but, as an alternative, without a limit on fines. It thus parallels the provisions of the criminal contempt draft (section 1341) which makes an exception to the general limit on summary contempt punishment for violation of such orders to permit sentences up to 6 months in jail and unlimited fines. Because of the duplication, there are not likely to be many prosecutions under this section and perhaps it is not necessary. It is proposed, however, because it does enable the courts to avoid the extraordinary contempt procedures and because, under the exception from court certification as a prerequisite to prosecution where the United States is a party,[70] the Justice Department and other departments and independent agencies together can exercise prosecutive discretion, as they do now with respect to violations of statutes and regulations which the other department or independent agency enforces. In addition, this statute complements the proposed Class A misdemeanor for *physical* obstruction of government function or administration of law.[71]

2. *Violation of Agency Orders.*—While there is no existing general statute making the violation of a government agency's order a crime, there are several such provisions applicable to specified agencies' orders.[72] The customary practice, however, is for all agencies—not only those that must do so—to seek penal enforcement through a court order based upon the agency proceeding so that a violation would constitute criminal contempt. There is some feeling that this is cumbersome, wasteful, and—because of the delay—sometimes obstructive of the agency's purpose, and that violation of any agency's specific order, at least one that has been adjudicated by the agency, should be a specific offense of general applicability.

Even without a statute that makes violation of agency orders a crime, there will be occasions when conduct will become criminal only after an agency has issued a specific order. Examples would be where an agency has issued a subpena or a draft board has ordered a person to report for induction. These, however, involve specifically described orders where the nature of the disobedience is known and its general gravity assessed.

It does not follow, however, that there should be a specific offense of general applicability which gives the agencies powers similar to those of the courts. Agencies are not courts; and we are not ready to say that all their final orders should be treated for criminal purposes as if they were. Whether their specific orders should have the force of criminal law will depend upon the agency involved, the nature of the administrative proceeding, and nature of the order and the conduct to which it is addressed. These are judgments which we consider to be beyond the scope of the present draft. When it is determined that violation of a particular agency's specific orders, narrowly defined, is to be an offense, that law could then be tied into the proposed Code's regulatory offense provision (section 1006) or to its classification of offenses.

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[70] *See* proposed section 1349.
[71] *See* proposed section 1301.
[72] *See* Extended Notes B and C, *infra*.

Certification for Prosecution of Offenses Under Sections 1342 to 1345: Section 1349

1. *Prerequisites to Prosecution.*—A limitation on the prosecutive discretion of the United States Attorney and the grand jury, is to retain in the courts and the Congress—the institutions offended by the violations—the power to determine when an alleged violator should be prosecuted for most of the offenses in the contempt groups of offenses. The court presently holds this power in a criminal contempt prosecution, either by initiating the proceeding or by signing an order to show cause. It is believed appropriate to preserve this power when translating traditional contempts into specific offenses. While it is not likely that a United States Attorney would prosecute if the court informally let it be known that a prosecution was unwarranted, there is insufficient reason to risk complete independence of the prosecutor who may have greater difficulty withstanding the pressure from disgruntled litigants or who may be the disgruntled litigant himself.

Precedent for this prerequisite exists in the specific offense of contempt of Congress, set forth in 2 U.S.C. §§ 192, 194. Although the *language* of 2 U.S.C. § 194 is not clear as to whether certification is a condition precedent to initiating prosecution,[73] both custom and judicial decisions have treated it as such.[74]

It is clear that, when Congress does certify a contempt to the United States Attorney, he *must* present it to a grand jury. (Note that he is not authorized to file an information on his own, even though the offense is a misdemeanor and it would ordinarily be within his power to do so.) This requirement has been preserved.

While the condition precedent read into the congressional statute has been borrowed for judicial contempts, it is questionable whether

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[73] Section 194 provides:

Certification of Failure to Testify: Grand Jury Action.

Whenever a witness summoned as mentioned in section 192 fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

[74] *See In re Chapman*, 166 U.S. 661, 667 (1897); *United States* v. *Dennis*, 72 F. Supp. 417, 422 (D.D.C. 1947) (failure to comply with certification is a matter of defense). *See also Wilson* v. *United States*, 369 F.2d 198 (D.C. Cir. 1966) (construing 2 U.S.C. § 194 to require an exercise of discretion by Speaker in certifying to United States Attorney when Congress not in session; consideration by entire House contemplated as part of procedure); *Russell* v. *United States*, 369 U.S. 749, 753 *et seq.* (1962) (stating grand jury indictment is a necessary element for prosecution under 2 U.S.C. § 192). Note that section 1349 reflects *Wilson*, *supra* by *authorizing* the Speaker or President of the Senate to certify to the United States Attorney a contempt report filed when Congress is not in session.

the duty to prosecute should also apply in judicial situations. The possibility that it should is reflected in the portions of the draft dealing with certifications which include "a recommendation that a prosecution be instituted." If it is not adopted, the United States Attorney could still exercise prosecutive discretion not to proceed, and might well do so where the contumacious conduct was favorable to his cause. It is not recommended, however because the court still retains its contempt power, even though curtailed in the penalty available, and the prosecutor's discretion can serve as a brake on the vindictive judge.

The certification procedure is applicable to all offenses involving court proceedings, except contempt (section 1341) and soliciting obstruction (proposed section 1346);[75] it applies only to refusals to appear (proposed section 1342) or to testify (proposed section 1343) when grand jury proceedings are involved. Both the distinction and the grant of power is in accord with the philosophy underlying *Brown v. United States*, 359 U.S. 41, 49 (1959):

> A grand jury is clothed with great independence in many areas, but remains an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses. It is the court's process which summons the witness to attend and give testimony, and it is the court which must compel a witness to testify if, after appearing, he refuses to do so.

Judicial control over initiation of prosecution for disruptive conduct (proposed section 1344) in grand jury proceedings is not part of present law nor can the court perform a useful function in such cases.

2. *Section 1349(5): Failure to Certify as a Defense.*—A failure to comply with the certification requirements is made a matter of defense in subsection (5). This continues current law when congressional certification under 2 U.S.C. § 194 is involved.[76] Because it is a defense, compliance need not be alleged in the indictment or information. This avoids possible prejudice to the defendant from the jury's knowledge that a judge or Congress has decided the defendant's conduct warranted prosecution. Also to avoid this possibility of prejudice, the provision requires the court without a jury to decide the issue unless the defendant elects to present it to the jury.

Extended Note A

Examples of Sentences for Criminal Contempt of Court Orders under 18 U.S.C. Section 401(3)

A. Orders Entered Pursuant to Regulatory Statutes; Enjoining Violations; Enforcing Agency Orders

(1) *In re Debs*, 158 U.S. 564 (1895).

Violation of order restraining railroad workers from forcibly obstructing interstate commerce and carriage of the mails and con-

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[75] For a discussion of the solicitation offense, *see* the discussion of section 1346 in the comment on section 1321.

[76] *See In re Chapman*, 166 U.S. 661, 667 (1897); *United States* v. *Dennis*, 72 F. Supp. 417, 422 (D. D.C. 1947).

spiracy to so obstruct. A sentence of 3–6 months was not discussed by the Supreme Court, which held the United States has the power to keep interstate commerce and the mails free from obstruction and that it can do this not only through criminal prosecution but also by injunction against acts (whether or not such acts also constitute a crime) punishable by contempt.

(2) *United States* v. *United Mine Workers*, 330 U.S. 258 (1947).

Violation by union and its president of temporary restraining order (in effect until hearing on preliminary injunction in declaratory judgment action could be had) enjoining union from terminating, by strike, employment agreement with United States which had control of coal mines. Holding that the Norris-LaGuardia Act did not prohibit the issuance of the preliminary injunction, the district court found the union and Lewis guilty of civil and criminal contempt and fined them $3,500,000 and $10,000 respectively. It also issued a preliminary injunction. The Supreme Court held that the Norris-LaGuardia Act did not apply, but even if it did defendants were bound to obey the T.R.O. until such time as the court could hold a hearing to determine its jurisdiction to issue an injunction. The District Court has power to preserve existing conditions while it is determining its own authority to grant injunctive relief.

The majority held that it was proper for the District Court to find the defendants guilty of both civil and criminal contempt, and that the facts warranted the $10,000 fine against Lewis for criminal contempt. But the judgment against the union was excessive. Only a $700,000 punitive fine is warranted: the other $2,800,000 is coercive and is to be paid only if the union cannot show full compliance with the law's mandate within five (5) days.

See also United Mine Workers v. *United States*, 177 F. 2d 29 (D.C. Cir.), *cert. denied*, 338 U.S. 871 (1949). (For violation of T.R.O. during period until hearing on preliminary injunction could be held, fines for criminal contempt of $1,400,000 for union and $20,000 for Lewis, being twice the fines authorized the year before by the Supreme Court, were not excessive.)

(3) *Frank* v. *United States*, 384 F. 2d 276 (10th Cir. 1967), *aff'd*, 395 U.S. 147 (1969).

Defendant was convicted, without a jury, of criminal contempt for disobeying a permanent injunction, which had been obtained in 1952 by the SEC, restraining him from using the facilities of interstate commerce to sell certain oil interests without a registration statement (in violation of the Securities Act of 1933, 15 U.S.C. §77f(b)). Imposition of sentence was suspended for 3 years and defendant was placed on probation. The Court of Appeals rejected the argument that the injunction was invalid because it enjoined acts that are crimes (citing *In re Debs*. 158 U.S. 564 (1895)), and also held that there was no right to jury trial under *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966), because sentence was not imposed and defendant was placed on probation. The latter point was recently upheld by the Supreme Court (three Justices dissenting), which reasoned that persons convicted of any offense (except those for which the penalty of death or life imprisonment is authorized) may be placed on probation for up to 5 years, and that though "[p]robation is, of course, a significant infringement of personal freedom . . . it is certainly less

onerous a restraint than jail itself." *Frank* v. *United States*, 395 U.S. at 151 (1969).

(4) *In re Holland Furnace Co.*, 341 F. 2d 548 (7th Cir.), *cert. denied*, 381 U.S. 924 (1965).

Violation of an order of the Circuit Court directing compliance with an FTC cease and desist order against various unfair trade practices pending review of the order by the Court. The company was convicted of criminal contempt and fined $100,000 plus costs; its president was guilty of aiding and abetting in some of the violations and remanded to the custody of the Attorney General for imprisonment for 6 months; two other officers were fined $500 and, in the event of default, remanded to the custody of the Attorney General until the fine was paid or until they were otherwise discharged by law.

(5) *Goldfine* v. *United States*, 268 F. 2d 941 (1st Cir. 1959), *cert. denied*. 363 U.S. 842 (1960).

Refusal of the president of a company and an employee thereof who had actual control of the company's books to obey an interim court order enforcing an IRS administrative subpena directing the officers of the company to produce certain records at the IRS office. Sentences for criminal contempt of 3 months (president) and 10 days (employee) were upheld. "These sentences, which, if anything, err on the side of moderation, are justified and well within approved limits. . . . We find no abuse of discretion." 268 F. 2d at 947.

(6) *Brody* v. *United States*, 243 F. 2d 378 (1st Cir.), *cert. denied*, 354 U.S. 923 (1957).

Refusal to submit statement under oath in obedience to court order enforcing an IRS summons. A conviction of criminal contempt for which a 1 year sentence was imposed was affirmed, but the appellate court did not discuss the sentence. It noted, however, that while the defendant could have been prosecuted for failure to obey the summons, which would have been done only through regular criminal channels with the right to jury trial, he could not have been punished for a contempt of court for his failure to obey the IRS summons.

(7) *United States* v. *Schine*, 260 F. 2d 552 (2d Cir. 1958), *cert. denied*, 358 U.S. 934 (1959).

Violation of divestiture and certain injunctive provisions of a consent antitrust decree. Convictions of criminal contempt resulting in fines totalling $73,000 imposed on several corporations and individuals were upheld without discussion of the sentences.

(8) *United States* v. *Aberbach*, 165 F. 2d 713 (2d Cir. 1948).

Violation of injunction restraining defendant from beginning or continuing to use tin in violation of a War Production Board General Preference Order. A conviction of criminal contempt was upheld, including the sentence which was not stated. Disposition of a civil fine not shown to be related to damages was error, and the case was remanded on this point.

(9) *Moore* v. *United States*, 150 F. 2d 323 (10th Cir.), *cert. denied*, 326 U.S. 740 (1945).

Violation of a temporary injunction against selling cars in excess of the OPA ceiling price and offering cars for sale without having attached price tags required by Regulations. A fine of $5,000 imposed upon the criminal contempt conviction was upheld by the Tenth

Circuit against the charge that it was excessive and unreasonably burdensome, hence constituting an abuse of discretion. The court said that to deliberately violate the Regulations themselves constitutes a serious offense, as it impedes the war effort, "[b]ut to wilfully and intentionally hold in contempt the solemn judgment of a court enjoining such violations until the final hearing could be held [was] a more serious offense. Such conduct breeds disrespect for lawful authority and brings government into disrepute." 150 F. 2d at 325. The court noted that if the defendant had been convicted in a criminal proceeding he could have received a sentence of $20,000 and 8 years' imprisonment, and also the sentences for contempt in the following cases:

Rapp v. *United States*, 146 F. 2d 548 (9th Cir. 1944) ($1,500 and 90 days for violation of injunction restraining receipt of rent in excess of the ceiling price);

United States v. *Lederer*, 139 F. 2d 861 (7th Cir. 1943) (1 year and 1 day for violation of preliminary injunction against selling at greater than ceiling price upheld); and

Huffman v. *United States*, 148 F. 2d 943, 944 (10th Cir. 1945) ($1,000 for 5 violations of a preliminary injunction).

(10) *Carter* v. *United States*, 135 F. 2d 858 (5th Cir. 1943).

Violation of temporary restraining order against interfering with a certain business by boycotting, picketing, *etc.*, issued for the period during which the court was determining whether it had jurisdiction to hear the case. The majority held that it was contempt to disobey the T.R.O. which preserved the status quo pending the jurisdictional decision, even though the decision was that there was no jurisdiction and even though it would not be contempt to violate a permanent injunction issued by a court which was without jurisdiction. (On rehearing, the sentence was set aside and the case remanded, since the statute does not authorize both a fine and a term of imprisonment).

(11) *United States* v. *Custer Channel Wing Corp.*, 247 F. Supp. 481 (D. Md. 1965), *aff'd*, 376 F.2d 675 (4th Cir.), *cert. denied*, 389 U.S. 850 (1967).

Corporation and individual convicted of contempt for violation of an injunction against selling securities in violation of the 1933 Act, 15 U.S.C. § 77d, were sentenced to $5,000 and one half of the costs and 183 days and one half of the costs respectively.

(12) *United States* v. *Schlicksup Drug Co.*, 206 F. Supp. 801 (S.D. Ill. 1962).

Violation of temporary injunction restraining the introduction of certain drugs into interstate commerce in violation of the Food and Drug Act. The company was fined $250.00.

(13) *United States* v. *Brotherhood of R. R. Trainmen*, 95 F. Supp. 1019 (D.D.C. 1951).

A $50,000 fine was imposed upon the union for criminal contempt in violating a temporary restraining order against a walkout (as well as a civil judgment in favor of the United States of $25,000 for the costs of the suit), the court recognizing that the acts constituting the contempt were participated in only by about 10 percent of the membership of the union.

(14) *United States* v. *Murray*, 61 F. Supp. 415 (E.D. Mo. 1945).

A city health officer was convicted of contempt of a court order

requiring him to permit an OPA inspector to inspect food lockers in the city. He was sentenced to commitment to the custody of the Attorney General for imprisonment for a period of 30 days, execution of the sentence to be stayed during his good behavior.

(15) *United States* v. *B & W Sportswear*, 53 F. Supp. 785 (E.D. N.Y. 1943).

Disobedience to decree, entered pursuant to stipulation that defendants had violated the Fair Labor Standards Act, restraining defendants from paying less than the minimum wage or employing employees for hours longer than those authorized, without proper compensation. Fines of $1,000 and $500 were imposed on the corporate and individual defendants, but no jail terms were imposed, since the Act provides that no person shall be imprisoned for first offense.

B. Orders Entered in the Course of Civil Actions

(1) *Dunn* v. *United States*, 388 F.2d 511 (10th Cir. 1968).

Conviction of an attorney of criminal contempt for violating a temporary restraining order issued by the Federal district court against prosecution of a State court action. The appellate court held that the T.R.O. was invalid and remanded the contempt case for reconsideration in light of the invalidity of the order: while criminal contempt does not depend on the validity of the T.R.O. (even if not appealable), it is appropriate to remand where the court convicting of contempt proceeds on the assumption of validity of the order. (*Donovan* v. *Dallas*, 377 U.S. 408 (1964), in which the Supreme Court remanded for reconsideration the contempt convictions of an attorney and others for violation of a State court order restraining prosecution of a Federal action, was cited in this connection).

(2) *United States* v. *Maragas*, 390 F. 2d 88 (6th Cir. 1968).

Conviction of principal shareholders of motel property under section 401(3) of Title 18 for interfering with a receiver, appointed by the Federal court, of the assets of the motel which was involved in a State court foreclosure action. The district court imposed sentences of 60 days and 10 days, saying:

> [The] acts of the defendants were intentional and did interfere with the receiver and his possession of the assets of the motel. The attendant publicity was not beneficial to the motel or to the receiver's operation thereof. Such interference with a receiver constitutes contempt of court. (390 F. 2d at 91).

The Sixth Circuit held that the sentences, while within permissible limits of Federal law, were excessive and modified the sentences to 10 days and 5 days, comparing the allowable sentences under Ohio law.

(3) *United States* v. *Conole*, 365 F. 2d 306 (3d Cir. 1966), *cert. denied*, 385 U.S. 1025 (1967).

Conviction of officers and directors of corporation of criminal contempt for willful disobedience to temporary restraining order issued pendente lite in civil action. Fines ranging from $1,000 to $5,000 were imposed by the district court. The Third Circuit vacated the fines and remanded with directions that they be reduced by 90 percent.

(4) *United States* v. *Garden Homes, Inc.*, 144 F. Supp. 644 (D.N.H. 1956).

Conviction for criminal and civil contempt of president of and counsel for company involved in foreclosure action brought by United States; the court had ordered the receiver appointed by it to pay money to the company so that the company could pay certain bills. The receiver paid the money but the company did not pay the bills, nor did the president and counsel when so ordered. The court said he was in violation not only of the court order (therefore guilty of contempt under 18 U.S.C. § 401(3)), but also of misbehavior as an officer of the court in regard to a transaction so closely under the supervision of the court as to be an official transaction within section 401(2). A fine of $400 plus costs was imposed for the criminal contempt. (The amount of the bills, $473, was ordered to be paid to the United States for the civil contempt.)

(5) *Juneau Spruce Corp.* v. *International L. & W. Union.* 131 F. Supp. 866 (D. Haw, 1955).

Violation of attachment order and garnishee summons held to be criminal contempt of the court's process under 18 U.S.C. § 401(3).

Extended Note B

Enforcement provisions for conduct related to administrative proceedings

A. *General Statute: Administrative Procedure Act, 5 U.S.C. § 555*

§ 555. Ancilliary matters

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a state-

ment or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance with the law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial. Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 385.

B. *Specific Statutes*

(1) Statutes Providing for Enforcement of Subpenas and Orders by Contempt Only

(a) Typical statute: 7 U.S.C. § 499m.

§ 499m. Complaints; procedure, penalties, etc.—Investigation by Secretary of Agriculture; inspection of accounts, records and memoranda; penalty for refusing inspection

(a) The Secretary or his duly authorized agents shall have the right to inspect such accounts, records, and memoranda of any commission merchant, dealer, or broker as may be material (1) in the investigation of complaints under this chapter, or (2) to the determination of ownership, control, packer, or State, country, or region of origin in connection with commodity inspections, or (3) to ascertain whether section 499i of this title is being complied with, and if any such commission merchant, dealer, or broker refuses to permit such inspection, the Secretary may publish the facts and circumstances and/or, by order, suspend the license of the offender until permission to make such inspection is given. The Secretary or his duly authorized agents shall have the right to inspect any lot of any perishable agricultural commodity covered by this chapter, and if any commission merchant, dealer, or broker having ownership of or control over such lot fails or refuses to authorize or allow such inspection, the Secretary may, after thirty days' notice and an opportunity for a hearing, publish the facts and circumstances and/or, by order, suspend the license of the offender for a period not to exceed ninety days.

Hearings; Subpenas; Oaths; Witnesses; Evidence

(b) The Secretary, or any officer or employee designated by him for such purpose, may hold hearings, sign and issue subpoenas, administer oaths, examine witnesses, receive evidence, and require by subpoena the attendance and testimony of witnesses and the production of such accounts, records, and memoranda as may be material for the determination of any complaint under this chapter.

(c) In case of disobedience to a subpoena, the Secretary or any of his examiners may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of accounts, records, and memoranda. Any district court of the United States within the jurisdiction of which any hearing is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring the person to appear before the Secretary or his examiner or to produce accounts, records, and memoranda if so ordered, or to give evidence touching any matter pertinent to any complaint; and any failure to obey such order of the court shall be punished by the court as a contempt thereof.

(b) United States Code provisions identical with or similar to 7 U.S.C. § 499m, with significant variations in parentheses.

5 U.S.C. § 304	Executive department, military department or bureau in which claim against United States is pending (judge or clerk of court issues subpena, can enforce obedience if witness neglects or refuses to appear or testify).
5 U.S.C. § 1507	Civil Service Commission.
5 U.S.C. § § 8125, 8126	Labor Department (punishment as for contempt if witness neglects or refuses to attend, or misbehaves during hearing or near place of hearing so as to obstruct it).
7 U.S.C. § 499m	Agriculture Department, perishable commodities.
7 U.S.C. § 511n	Agriculture Department, tobacco inspection.
9 U.S.C. § 7	Arbitration (punishment for contempt if witness neglects or refuses to attend).
11 U.S.C. § 69	Bankruptcy, referees (punishment as for contempt if witness neglects or refuses to attend, or misbehaves during hearing or near place of hearing so as to obstruct it.)
12 U.S.C. § 1818(n)	Federal Deposit Insurance Corporation.
12 U.S.C. § 1730a	Federal Savings and Loan Insurance Corporation.
15 U.S.C. § 77v	Securities Exchange Commission, domestic securities.
15 U.S.C. § 77uuu	Securities Exchange Commission, trust indentures.
15 U.S.C. § 155(b)	Commerce, China Trade Act.
15 U.S.C. § 687b	Small Business Administration.
19 U.S.C. § 1333	Tariff Commission.
21 U.S.C. § § 198a, 198c	Treasury Department, narcotics.
22 U.S.C. § 268	International Joint Commission, boundary waters between United States and Canada.
22 U.S.C. § § 270a, 270b, 270d	International tribunals.

22 U.S.C. § 286f	International Monetary Fund.
22 U.S.C. § 1623	Foreign Claims Settlement Commission.
25 U.S.C. § 374	Interior, Indians (enforced by 35 U.S.C. § 24, Patents).
28 U.S.C. § § 1783, 1784 [1]	Subpena of foreign witness.
29 U.S.C. § § 161, 162	National Labor Relations Board.
30 U.S.C. § 475	Federal Coal Mine Safety Board of Review.
33 U.S.C. § 927	Labor Department, longshoremen's and workers compensation (punishment as for contempt if witness neglects or refuses to attend, or misbehaves during hearing or near place of hearing so as to obstruct it).
35 U.S.C. § 24	Patent Office (punishment for contempt if witness neglects or refuses to appear or testify).
38 U.S.C. § § 3311, 3313	Veterans' Benefits.
41 U.S.C. § 39	Labor Department, public contracts.
42 U.S.C. § 405	Social Security.
42 U.S.C. §§ 2201(c), 2281	Atomic Energy Commission.
45 U.S.C. § 157	National Mediation Board, railway labor.
45 U.S.C. § 362	Railroad Retirement Board.
46 U.S.C. § 239(e)	Coast Guard.
46 U.S.C. § § 826, 828	Federal Maritime Commission, complaints against common carrier by water.
46 U.S.C. § 1124	Federal Maritime Commission, merchant marine.
50 U.S.C. App. § 2001	War Claims Commission.

(c) Criminal contempt proceedings.

42 U.S.C. § 2000h	Civil Rights Act of 1964.

(2) Statutes Providing for Enforcement of Subpenas and Orders by Contempt and Criminal Prosecution

(a) Typical statute: 47 U.S.C. § 409.

Subpenas; Witnesses; Production of Documents; Fees and Mileage

(e) For the purposes of this chapter the [Federal Trade] Commission shall have the power to require by subpena the attendance and testimony of witnesses and the production of all books, papers, schedules of charges, contracts, agreements, and documents relating to any matter under investigation. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

Designated Place of Hearing; and In Enforcement of Orders

(f) Such attendance of witnesses, and the production of such docu-

[1] Provides specific penalty of $100,000 and costs of prosecution.

mentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

CONTEMPTS

(g) Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpena issued to any common carrier or licensee or other person, issue an order requiring such common carrier, licensee, or other person to appear before the Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

PENALTIES

(m) Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, schedules of charges, contracts, agreements, and documents, if in his power to do so, in obedience to the subpena or lawful requirement of the Commission, shall be guilty of a misdemeanor and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $100 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

(b) United States Code provisions identical with or similar to 47 U.S.C. § 409, with penalty variations in parentheses.

7 U.S.C. § 15	Agriculture Department commodities exchange (enforced by 49 U.S.C. §§ 12, 46–48; $100 to $5000, 1 year, or both).
7 U.S.C. § 222	Agriculture Department, stockyard dealers (enforced by 15 U.S.C. §§ 46, 48–50; $1000 to $5000, 1 year, or both).
15 U.S.C. § 49, 50	Federal Trade Commission ($1000 to $5000, 1 year, or both).
15 U.S.C. § 78u [1]	Securities Exchange Commission ($1000, 1 year, or both).
15 U.S.C. § 79r [1]	Securities Exchange Commission, public contracts ($1000, 1 year, or both).
15 U.S.C. §80a–41 [1]	Securities Exchange Commission, investment companies ($1000, 1 year, or both).
15 U.S.C. § 80b–9 [1]	Securities Exchange Commission, investment advisers ($1000, 1 year, or both).
15 U.S.C. § 717m [2]	Federal Trade Commission ($1000, 1 year, or both).

[1] Culpability for criminal prosecution is failure or refusal to attend and testify without just cause.

[2] Culpability for criminal prosecution is willful failure or refusal to attend and testify.

16 U.S.C. § 825f[2]	Federal Power Commission ($1000, 1 year, or both).
22 U.S.C. § 703 [3]	Service courts, friendly foreign nations ($2000, 6 months, or both).
26 U.S.C. §§ 6420(e), 6421(f), 6424(d), 7602.	Internal Revenue Service (enforced by 26 U.S.C. § 7604) ($1000, 1 year, or both and costs of prosecution).
33 U.S.C. §§ 504, 506	Army, bridges over navigable waters ($1000, 1 year, or both).
46 U.S.C. § 652	Coast Guard (up to $100 for each violation).
47 U.S.C. § 409	Federal Communications Commission ($100 to $5000, 1 year, or both).
49 U.S.C. § 12	Interstate Commerce Commission (enforced by 49 U.S.C. § 46; $100 to $5000, 1 year, or both).
49 U.S.C. § 305(d)	Interstate Commerce Commission, motor carriers (enforced by 49 U.S.C. § 46. $100 to $5000, 1 year, or both).
49 U.S.C. § 916	Interstate Commerce Commission, water carriers (enforced by 49 U.S.C. § 46. $100 to $5000, 1 year, or both).
49 U.S.C. §§ 1472(g), 1484	Civil Aeronautics Board ($100 to $5000, 1 year, or both).
50 U.S.C. §§ 819, 824 [4]	Detention Review Board ($5000, 1 year, or both).
50 U.S.C. App. §§ 643a, 643b.[1]	War Production Board ($5000, 1 year, or both).
50 U.S.C. App. § 1152 [2]	Navy, war and defense contracts ($10,000, 1 year, or both).
50 U.S.C. App. § 2155 [5]	Defense Production Act ($1000, 1 year, or both).

(3) Statutes Providing for Enforcement of Subpenas and Orders by Criminal Prosecution Only

(a) 2 U.S.C. § 212. Congress, contested elections.

§ 212. Penalty for failure to attend or testify. Any person who, having been summoned in the manner above directed, refuses or neglects to attend and testify, unless prevented by sickness or unavoidable necessity, shall forfeit the sum of $20, to be recovered, with costs of suit, by the party at whose instance the subpena was issued, and for his use, by an action of debt, to any court of the United States, and shall also be liable to an indictment for a misdemeanor, and punishment by fine and imprisonment. (R. S. § 116.)

(b) 43 U.S.C. § 104. District Land Offices.

§ 104. Disobedience to subpena

Any person willfully neglecting or refusing obedience to such subpena, or neglecting or refusing to appear and testify when subpenaed, his fees having been paid if demanded, shall be deemed guilty of a misdemeanor, for which he shall be punished by indictment in

[2] Criminal prosecution is based on fact of contempt.
[4] Culpability for criminal prosecution is willful resistance, prevention, *etc.*
[5] Culpabiltiy for criminal prosecution is willful failure to perform.

the district court of the United States or in the district courts of the Territories exercising the jurisdiction of district courts of the United States. The punishment for such offense, upon conviction, shall be a fine of not more than $200, or imprisonment not to exceed ninety days, or both, at the discretion of the court: *Provided*, That if such witness has been prevented from obeying such subpena without fault upon his part he shall not be punished under the provisions of this section.

(4) STATUTES REQUIRING CERTIFICATION TO GRAND JURY OF REFUSALS TO APPEAR OR TESTIFY OR MISBEHAVIORS

(a) 2 U.S.C. §§ 192, 194 Congressional investigations.

§ 192. Refusal of witness to testify or produce papers

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

§ 194. Certification of failure to testify; grand jury action failing to testify or produce records

Whenever a witness summoned as mentioned in section 192 fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United State attorney, whose duty it shall be to bring the matter before the grand jury for its action.

(b) Statutes enforced under 2 U.S.C. §§ 192, 194:

8 U.S.C. § 1106(g)------	Joint Committee, Immigration and Nationality Policy.
25 U.S.C. §§ 640--------	Joint Committee, Navajo-Hopi Indian Administration.
42 U.S.C. § 2254---------	Joint Committee, Atomic Energy Commission.

(c) 31 U.S.C. § 229, private claims pending before Congress. Master reports contumacious conduct to appropriate House of Congress.

(d) 50 U.S.C. § 792(d)(2), (3), (4), Subversive Activities Control Board.

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Hearing open to public; rights of parties; record and transcript of testimony: failure to appear; penalty for misbehavior; jurisdiction of courts

(2) Where an organization or individual declines or fails to appear at a hearing accorded to such organization or individual by the Board in proceedings initiated pursuant to subsection (a) of this section, the Board shall, nevertheless, proceed to receive evidence, make a determination of the issues, and enter such order as shall be just and appropriate. Upon failure of an organization or individual to appear at a hearing accorded to such organization or individual in proceedings under subsection (b) of this section the Board may forthwith and without further proceedings enter an order dismissing the petition of such organization or individual.

(3) Any person who, in the course of any hearing before the Board or any member thereof or any examiner designated thereby, shall misbehave in their presence or so near thereto as to obstruct the hearing or the administration of the provisions of this subchapter, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $500 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment. Whenever a statement of fact constituting such misbehavior is reported by the Board to the appropriate United States attorney, it shall be his duty to bring the matter before the grand jury for its action.

(4) The authority, function, practice, or process of the Attorney General or Board in conducting any proceeding pursuant to the provisions of this subchapter shall not be questioned in any court of the United States, nor shall any such court, or judge or justice thereof, have jurisdiction of any action, suit, petition, or proceeding, whether for declaratory judgment, injunction, or otherwise, to question such authority, function, practice, or process, except on review in the court or courts having jurisdiction of the actions and orders of the Board pursuant to the provisions of section 793 of this title, or when such authority, function, practice, or process, is appropriately called into question by the accused or respondent, as the case may be, in the court or courts having jurisdiction of his prosecution or other proceeding (or the review thereof) for any contempt or any offense charged against him pursuant to the provisions of this subchapter.

(5) Some Statutes Providing Criminal Penalties for Refusal to Provide Inspection of or Access to Records

(a) Typical statute: 7 U.S.C. § 473.

Section 473. Persons required to furnish information; request; failure to furnish; false information

It shall be the duty of every owner, president, treasurer, secretary, director, or other officer or agent of any cotton warehouse, cotton ginnery, cotton mill, or other place or establishment where cotton is stored, whether conducted as a corporation, firm, limited partnership, or individual, and of any owner or holder of any cotton and of the agents and representatives of any such owner or holder, when requested by the Secretary of Agriculture or by any special agent or other employee of the Department of Agriculture acting under the instructions of said Secretary to furnish completely and correctly, to

the best of his knowledge, all of the information concerning the grades and staple length of cotton on hand, and when requested to permit such agent or employee of the Department of Agriculture to examine and classify samples of all such cotton on hand. The request of the Secretary of Agriculture for such information may be made in writing or by a visiting representative, and if made in writing shall be forwarded by registered mail, or by certified mail and the registry receipt or receipt for certified mail of the Post Office Department shall be accepted as evidence of such demand. Any owner, president, treasurer, secretary, director, or other officer or agent of any cotton warehouse, cotton ginnery, cotton mill, or other place or establishment where cotton is stored, or any owner or holder of any cotton or the agent or representative of any such owner or holder, who, under the conditions hereinbefore stated, shall refuse or willfully neglect to furnish any information herein provided for or shall willfully give answers that are false or shall refuse to allow agents or employees of the Department of Agriculture to examine or classify any cotton in store in any such establishment, or in the hands of any owner or holder or of the agent or representative of any such owner or holder, shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $300 or more than $1,000.

(b) Statutes identical with or similar to 7 U.S.C. § 473, with penalty provisions in parentheses.

5 U.S.C. § 8314	United States employees questions relating to service as an employee (forfeiture of annuity or retired pay)
7 U.S.C. § 473	Agriculture Department, cotton statistics ($300 to $1,000)
7 U.S.C. § 503	Agriculture Department, tobacco statistics ($300 to $1,000, 1 year, or both)
7 U.S.C. § 953	Agriculture Department, peanut statistics ($300 to $1,000, 1 year, or both)
7 U.S.C. § 1373 [1]	Agriculture Department, adjustment of quotas (up to $500)
7 U.S.C. § 1642 [1]	Agriculture Department, International Wheat Market (up to $1,000 for each violation, in addition to existing penalties)
13 U.S.C. § 221	Commerce, census questions applying to self or family or farm ($100, 60 days, or both)
13 U.S.C. § 223	Commerce, census questions applying to owners, proprietors, *etc.* of hotels, apartment houses, boarding or lodging houses (up to $500)
13 U.S.C. § 224	Commerce, census questions affecting companies, businesses, religious bodies, and other organizations ($500, 60 days, or both)

[1] Culpability for criminal prosecution is failure to make report.

15 U.S.C. § 155(d) [2]_____	Commerce, China Trade Act (up to $5,000 for each violation)
45 U.S.C. § 228j(b)4, 228m	Railroad Retirement Board ($10,000 or 1 year)

Extended Note C

VIOLATION OF AGENCY ORDERS

Administrative agencies do not have power to punish, by fine or imprisonment, for disobedience to their lawful orders. The Supreme Court has even said that it would be inconsistent with due process of law to invest them with such authority. *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447, 485 (1894). The power to compel obedience to agency orders is thus vested in the courts.

As appears from Extended Note B, *supra*, presently existing statutes generally provide for enforcement of agency subpenas and directions to testify in agency proceedings or to answer lawful inquiries therein by making disobedience a criminal offense, as well as by granting jurisdiction to the United States district courts to compel compliance through their own orders, and making disobedience to those orders punishable by the issuing court as a contempt thereof. Under the proposed draft, such behavior will be punishable directly as an offense (a Class A Misdemeanor) as well as, in some cases, a criminal contempt.

Agency orders other than subpenas and directions to testify or answer, on the other hand, cannot be described generally as being punishable directly through criminal sanctions. Enforcement patterns vary from statute to statute; in some cases, the statute requires the agency to obtain a court order enforcing its own order, disobedience to which is punishable as contempt of the court; [1] in others, the statute provides for civil penalties in cases of disobedience to agency orders; [2] some statutes combine district court enforcement by order with civil [3] or criminal [4] penalties by authorizing both enforcement

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[2] Culpability for criminal prosecution is refusal of access or hindering, obstructing or resisting access.

[1] *E.g.*, SEC orders under the Securities Act of 1933 (15 U.S.C. 77t); ICC orders to pay damages (49 U.S.C. § 16(2)); orders regarding consolidation and control of carriers (49 U.S.C. § 5(8)); orders other than for the payment of money (49 U.S.C. § 16(12)); orders with respect to conditions of license of motor carriers (49 U.S.C. § 322(b)); FTC orders under Natural Gas Act (15 U.S.C. § 717(s)); FPC orders (16 U.S.C. § 825m(b)); Federal Home Loan Bank Board cease and desist orders (12 U.S.C. § 1464(d)(3)(B)); Federal Maritime Commission orders other than for the payment of money (46 U.S.C. §§ 826, 828, 1124); NLRB orders (29 U.S.C. § 160)); SBA cease and desist orders (15 U.S.C. § 687a(f)).

[2] *E.g.*, various ICC orders (49 U.S.C. §§ 1(17) (orders regarding car service); 1(21) orders requiring adequate facilities on extension of lines; 16(8) orders under section 3, 13 or 15).

[3] *E.g.*, various FCC orders (47 U.S.C. §§ 401 (orders other than for the payment of money), 407 (orders for the payment of money), and 47 U.S.C. §§ 203(e) (orders modifying schedule of charges), 214(d) orders regarding establishment of adequate facilities)); FTC cease and desist orders under the Clayton Act (15 U.S.C. § 21), and Federal Trade Commission Act (15 U.S.C. § 45); (certain orders of the Secretary of Agriculture with respect to stockyard dealers (7 U.S.C. §§ 215, 211, 213).

[4] *E.g.*, SEC orders under the Investment Advisers Act (15 U.S.C. §§ 80b—17 (felony), 80b–9(e)); Public Utility Holding Company Act (15 U.S.C. §§ 79z–3 (felony) 79); FPC orders (16 U.S.C. §§ 825 (fine), 825m); orders of the Secretary of Agriculture under the Packers and Stockyards Act (7 U.S.C. § 193, 28 U.S.C. § 2351).

procedures;[5] a few provide directly for criminal sanctions for violation of the agency order itself.[6]

The variety of enforcement procedures applicable to orders (other than subpenas and directions to testify or answer) of the several independent agencies and executive departments suggests that a general provision in the proposed new Code making it an offense to violate such an agency order would be impractical, if not unwise. However, if it were considered desirable to make uniform the penalties presently attaching to disobedience to such orders, a provision could be added to the regulatory offenses section of the new Code (proposed section 1006) to deal with agency orders; or the definition therein of "penal regulation" could be altered to make clear that specific or adjudicative orders are covered, as well as regulations and orders in the nature of regulations. In this way Congress could bring under the regulatory offense provisions the enforcement schemes of such agencies as it deemed appropriate, leaving untouched the enforcement procedures of other agencies.

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[5] While the fact that the language in most such statutes relates to "rules, regulations and orders" suggests that only legislative (or general) as opposed to adjudicative (or individual) orders are intended to be covered, at least one court has refused to read that distinction into such a statute. *United States* v. *Western Pacific R.R.*, 385 F.2d 161 (10th Cir. 1967), *cert. denied*, 391 U.S. 919 (1968).

[6] SEC orders under the Investment Company Act (15 U.S.C. § 80a–48 (felony)), and the Trust Indenture Act (15 U.S.C. § 77 (felony)); orders of Board of Governors of Federal Reserve System (12 U.S.C. § 1847 (felony for willful participation by individual)); requests for information for census by Secretary of Commerce (13 U.S.C. §§ 221, 223, 224 (petty offenses)); certain orders of the Secretary of the Army regarding bridges (33 U.S.C. §§ 495, 502, 519, 533 (misdemeanor)); certain orders of the Secretary of Agriculture (*e.g.*, 7 U.S.C. §§ 13a, 195, 207(g)); also NASA orders for protection of security (18 U.S.C. § 799 (felony)).

APPENDIX

CONSULTANT'S REPORT
on
CONTEMPT
(Goldfarb; June 10, 1969)

I. INTRODUCTION

Contempt, an offense frequently described as sui generis, is disobedience or disrespect of a government body or official.[1] Its peculiarities take a variety of forms which merit mention in measuring change. Essentially, contempt provides the muscle to make government agencies and agents operative and to punish certain kinds of misconduct in the midst of official government proceedings.

Traditionally viewed as a technical and legal device, the contempt power is really much more than that. Ramifications of its use lead into tangential areas of the law; the character of the contempt power is no more provoking than are the diverse problem areas it affects.[2]

The thousands of cases in England and especially the United States which deal with the contempt power all presume that some such power exists inherently in the very nature of government bodies. In this respect contempt differs from all other crimes.[3]

Contempt procedings have been the forum for testing and resolving pressing and controversial issues.[4] In modern times, the limits, if any, on the power of the press to report crime news have been the subject of contempt proceedings. Newspapers have argued that punishing their prejudicial publications infringed on their first amendment privileges and on the very raison d'etre of the institution of the press.[5] The labor movement's struggle for economic power was fought out in contempt proceedings concerning violations of labor injunctions.[6] Disputes involving congressional inquiries on national security during the midcentury were marked by contempt cases involving artists and writers and others, contesting the power of congressional committees to invade their privacy, associations, political affiliations, and other private affairs by coercing their testimony.[7]

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[1] GOLDFARB, THE CONTEMPT POWER (1963).

[2] *See generally* THOMAS, PROBLEMS OF CONTEMPT OF COURT (1934); AIYER, LAW OF CONTEMPT; PASQUEL, CONTEMPT OF COURT.

[3] *See generally* FOX, CONTEMPT OF COURT (1927).

[4] Contempt has been the subject of numerous historic episodes: From Chief Justice Gascoigne who had to punish the son of King Henry IV for contempt of his father, to Major General Andrew Jackson who was found guilty of contempt and fined for his conduct toward local officials during the seige of New Orleans in 1814. *See* SHAKESPEARE, HENRY IV, Part 2, Act 5, Scene 2; 46 A. B. A. J. 966 (1960).

[5] Goldfarb, *Public Information, Criminal Trials and the Cause Celebre*, 36 N.Y.U. L. REV. 810 (1961).

[6] Moskovitz, *Contempt of Injunctions*, 43 COLUM. L. REV. 780 (1943).

[7] BECK, CONTEMPT OF CONGRESS (1959).

In the 1950's, Federal clashes with labor racketeers and members of organized crime and racketeering syndicates were fought in hotly contested contempt cases.[8] A crucial issue in the civil rights battles of this decade concerned implementation of Civil Rights Acts and Federal court orders through summary contempt proceedings.[9]

Major domestic issues seem inevitably to be continually focused in contempt proceedings, raising questions with important legal ramifications, deep philosophical impact and far-reaching political implications. Determination of its proper scope reaches the very core of fundamental American values, the nature of our freedom and the proper restrictions on government power.

II. Analysis of Present Statutes

Courts and Congress historically have exercised what they considered to be their inherent powers to punish certain misconduct summarily as contempts. This "inherent" power, it has been held, is in addition to power to proceed against the same misconduct under traditional criminal statutes. Congress and the courts, by the very nature of their governmental functions, are considered to have innate and necessary powers to punish interference with their work and the courts, especially, have exercised this power frequently.

Nevertheless, in the course of the last half century, contempt powers have been delineated in a number of Federal statutes, and the tendency has been to proceed under these contempt statutes and not the inherent, nonstatutory powers. However, power under the two parallel contempt powers continues, in the potential at least, and there is nothing to prevent either the Federal courts or Congress from circumventing their statutory contempt powers by proceeding under their assumed, inherent powers to punish the very same act instead of or along with the relevant criminal statutes.

To this extent, any recommendation by the Commission about how to proceed to punish contempts will be exhortatory Federal policy: it can be no more without raising critical separation of powers questions to which there may not be satisfactory answers. There have been threats that repeated reversals by the Supreme Court of contempt of Congress convictions under 2 U.S.C. § 192 could lead to a renewed use of Congress' inherent, summary contempt power. However unlikely these admonitions may be, they do reflect an implicit assumption that Congress' inherent contempt powers exist. That courts also consider that they have this power may be seen in the fact that they exercise it not infrequently.

Contempt of Court

Contempt of court was provided for first in the Judiciary Act of 1789 which gave courts the power to punish ". . . all contempts of authority in any case . . . ."[10] State legislation on this order followed.[11] In 1831 the Federal law was changed and the punishable contempts were described as misbehavior in the presence of the court or so near

[8] Kefauver, Crime in America (1951).

[9] *United States* v. *Barnett*, 376 U.S. 681 (1964); *see also* Goldfarb & Kurzman, *Civil Rights* v. *Civil Liberties*, 12 U.C.L.A. Rev. 486 (1965).

[10] C. 20, 1 Stat. 73, (1789).

[11] Pa. Acts 1809, P.L. 146, 5 Sm. L. 55; N.Y. Rev. Stat. c. 3, § 10 (1829).

thereto as to obstruct the administration of justice, disobedience of process and discipline of court officers. That provision, for the most part, has been maintained through the years although the courts, after some inconsistency and debate, have interpreted in a geographic rather than causal sense the key provision involving misbehavior near enough to the court to interfere with the administration of justice.[12]

The present, basic contempt of court statutes are 18 U.S.C. §§ 401 and 402.[13] In addition to these basic statutes, rule 42 of the Federal Rules of Criminal Procedure defines the procedural implementation of the contempt of court statute and determines when contempt may be proceeded against summarily (rule 42(a)) or after notice and hearing (rule 42(b)).[14]

[12] *Nye* v. *United States*, 313 U.S. 33 (1940), *overruling United States* v. *Toledo Newspaper Co.*, 247 U.S. 402 (1918). Nelles & King, *Contempt by Publication in the U.S.*, 28 COLUM. L. R. 410 (1928); THOMAS, CONSTRUCTIVE CONTEMPT (1904).

[13] 401. A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as:

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

402. Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both.

Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months.

This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.

[14] Rule 42. Criminal Contempt

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

Furthermore, special statutes have been passed to deal with specific instances when trial by jury is required in the prosecution of criminal contempts. There has been a recent tendency to include special provisions for trial by jury in the prosecution of contempts of court under new legislation, such as: the Clayton Act;[15] the Norris-La Guardia Act;[16] the 1957 Civil Rights Act;[17] the Landrum-Griffin Act;[18] the Labor-Management Reporting and Disclosure Act of 1959.[19]

Contempt of Congress

The source of Congress' own contempt power is subject to some academic debate centering on its derivation from English Parliamentary contempt powers. Parliament's contempt power is said to have emanated from the fact that the House of Commons formerly exercised judicial powers.[20] When it became a strictly legislative body, the argument goes, the rationale for use of this "*judicial*" contempt power ended.

The basis of this argument is clouded by historical uncertainties, compounded by the long and unchallenged actual use of contempt by Parliament and Congress under the rationale that the power belongs to a legislature as a legislature. At this point, this historical uncertainty has become a bootless concern; in fact, Congress always assumed it had the inherent power and commonly exercised it. The Supreme Court upheld this position in the 19th century but later cases raised some question about the constitutional source of Congress' inherent contempt power.[21] In 1857, a Federal statute made contempt of Congress a crime. The statute, with rare exceptions, has been followed ever since and the present statute is the heir of that law.[22]

III. Statement of the Problem

Contempt has been one of the most troublesome areas of the law. It has raised perplexing and confounding issues of classification as well as a wide range of serious constitutional issues.

A. *Classifications of Contempts.*

Classification problems unique to contempt have provoked considerable litigation and justify characterizing contempt as "the proteus of the legal world." [23]

(1) *Criminal Contempt and Related Crimes.*—One of the troublesome peculiarities surrounding the past use of contempt results from

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[15] 18 U.S.C. § 3691.
[16] 18 U.S.C. § 3692.
[17] 42 U.S.C. §§ 1971(e), 1995.
[18] 29 U.S.C. § 528.
[19] *Id. See also* 18 U.S.C. § 1507.
[20] Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. Pa. L. Rev. 691 (1926).
[21] *Watkins* v. *United States*, 354 U.S. 178, 188–200 (1957); *Kilbourn* v. *Thompson*, 103 U.S. 168 (1880); *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204 (1821).
[22] Section 192. Refusal of witness to testify. Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100, and imprisonment in a common jail for not less than one month nor more than twelve months.
[23] Goldfarb, The Contempt Power, c. 2 (1963).

the fact that many criminal acts which might ordinarily have been covered by specific criminal statutes also could be considered contempts.

For example, a bribe or an attempted bribe of a juror might be indicted under the standard bribery statutes; it also might be considered contempt of the court trying the case for which the juror was empaneled. Similarly, perjury before a grand jury could be indicted as perjury and could also be considered an obstructive contempt of the grand jury. In one case in a Federal district court in New York City, a defendant in a narcotics trial lost his temper and threw a chair at the prosecutor. The court immediately adjudged the man guilty of contempt for obstructive misbehavior in its presence. Later the man was indicted for assault based on the same facts. When he raised the question that this double prosecution should be considered double jeopardy, the courts upheld both cases on the ground that while the obstructive conduct was singular, the gist of the offense was double: an injury to the dignity of the court as well as to the safety and security of the prosecutor. Thus, the same act was considered to constitute two separate crimes.

The breadth of the contempt power subjects contemnors to this kind of treatment in a broad category of situations—obstruction of justice, disorderly conduct, breach of peace, escape, picketing and many others. All these acts could be punished as contempts in addition to being prosecuted as ordinary crimes. In fact, it is a rare act of contempt which is not perforce the violation of a specific and more apt criminal statute.

(2) *Civil and Criminal Contempt.*—Another perplexing distinction classically made is that between civil and criminal contempts. The general rule has been that the use of the contempt power for prospective, coercive purposes defines it as a civil contempt; the use of the contempt power to punish a completed act reflects a criminal contempt.[24] However, the two are frequently confused. For example, through the convenient labeling of a proceeding as partaking of the characteristics of civil contempt, standard criminal law protections against such impositions as indefinite sentencing can be circumvented.

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[24] RAPALJE, A TREATISE ON CONTEMPT 25 (1884); OSWALD, CONTEMPT OF COURT, (1911); *see Bessetti* v. *Con Key*, 194 U.S. 324 (1903); *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418 (1911); *United States* v. *United Mine Workers*, 330 U.S. 258 (1947).

> If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. It is true that punishment by imprisonment may be remedial, as well as punitive, and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison. But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provision of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. . . . On the other hand, if the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done nor afford any compensation for the pecuniary injury caused by the disobedience. If the sentence is limited to imprisonment for a definite period, the defendant . . . cannot shorten the term by promising not to repeat the offense. Such imprisonment operates, not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience. (*Gompers*, *id.*, at 441, 442).

This issue arose in a recent celebrated case [25] when a Federal district court sentenced a witness to jail for refusing to answer grand jury questions. Although the witness served 1 year without answering, it was considered an action for civil contempt, and thus not subject to constitutional limitations applicable to ordinary cases.

(3) *Direct and Indirect Contempts.*—Traditionally, courts have drawn odd distinctions between what are described as direct and indirect contempts. Basically, it comes into play when the issue is whether the questioned action took place in or out of the presence of the court.[26] It has more than metaphysical interest because its resolution has an important procedural impact upon the contemnor.

Direct contempts used to be punished summarily on the theory it was essential for courts to be able to quickly control their proceedings and that further proof of the alleged misconduct was unnecessary because the court itself had witnessed the act. Currently, this is not the universal result of such a classification, but classification of contempt as direct or indirect continues to affect protective, procedural characteristics of the proceeding, such as disqualification of the offended judge, and the right to notice and hearing. Although these procedures are now covered by rule 42 of the Federal Rules of Criminal Procedure, the distinctions often are made in a confusing fashion, inconsistent and unpredictable.[27]

(4) *Contempt and Other Disciplinary Powers of Government Agencies.*—Administrative agencies and courts have used their police and licensing powers to control the conduct of participants in their proceedings.[28] These powers, although akin to contempt, are deemed beyond the province of the contempt statutes and are not diminished in any way by such statutes. Regulatory agencies, for example, use their traditional licensing controls to censure or punish certain categories of relatively minor misconduct by attorneys. Here again, the catch-all

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Criminal prosecutions, that is, those which result in a punishment, vindictive as opposed to remedial, are prosecuted either by the United States or by the court to assert its authority. The first are easily ascertainable: they will be openly prosecuted by the district attorney: it would seem to be of consequence how they are entitled when that is true. In the second the court may proceed sua sponte without the assistance of any attorney, as in the case of disorder in the courtroom; there can be little doubt about the kind of proceeding when that is done. But the judge may prefer to use the attorney of a party, who will indeed ordinarily be his only means of information when the contempt is not in his presence. There is no reason why he should; but obviously the situation may in that event be equivocal, for the respondent will often find it hard to tell whether the prosecution is not a remedial move in the suit, undertaken on behalf of the client. This can be made plain if the judge enters an order in limine, directing the attorney to prosecute the respondent criminally on behalf of the court, and if the papers supporting the process contain a copy of this order or allege its contents correctly. We think that unless this is done the prosecution must be deemed to be civil and will support no other than a remedial punishment. (*McCann* v. *N.Y. Stock Exchange*, 80 F. 2d 211, 214–215 (2d Cir. 1935)).

[25] *Giancana* v. *United States*, 352 F. 2d 921 (7th Cir.), *cert. denied*, 379 U.S. 1001 (1965).

[26] *Brown* v. *United States*, 359 U.S. 41 (1959).

[27] *McCann* v. *N.Y. Stock Exchange*, 80 F.2d 211 (2d Cir. 1935); *Harris* v *United States*, 382 U.S. 162 (1965).

[28] N.L.R.B. Rules, Regulations & Statements of Procedure; S. 102.35; S. 102.44; *Okin* v. *S.E.C.* 137 F. 2d 398 (2d Cir. 1943); Survey of Administrative Organization, Proceedings & Practice in the Federal Agencies, Part IIe, 85th Cong., 1st Sess. 1819 (1955).

accommodation of a power like contempt comes into play in some cases where other adequate and more appropriate enforcement techniques are available.

(5) *Contempts of Executive and Administrative Agencies of Government, Distinguished from Congressional and Judicial Contempts.*— Trial courts and the Congress are the major users of the contempt power; other agencies have or claim contempt powers, as well. In the case of "derivative type" judicial and legislative agencies (grand juries and referees of the courts; committees and subcommittees of the Congress), they may resort to the contempt power, but only through their parent or supervisory agency.[29] Furthermore, occasionally some executive or hybrid agencies (such as coroners, notaries public) as well as truly administrative agencies claim the need to exercise the contempt power. Sometimes the power is denied as in the case of executive officials;[30] at other times, the power is provided through recourse to the courts, as in the case of administrative agencies.

In the vast world of administrative agencies comprising the fourth branch of our government, numerous situations arise requiring agency enforcement powers. These agencies also exercise judicial functions in holding their hearings. When the CAB, SEC, FCC, NLRB or any administrative agency is defied in the course of running a proper proceeding, should it have recourse to the contempt power?

As a rule, direct contempt powers are denied administrative agencies.[31] Therefore, these administrative agencies must resort to the courts for the enforcement of their orders. However, all agencies have the power bodily to exclude the obstreperous and to supervise attorneys who misbehave, as well as the right to seek normal prosecution for misconduct such as assaults or disorderly conduct.

The necessity for the contempt power regarding executive officials, or others exercising quasi-judicial functions in limited instances is minimal. Executive officials usually have been denied the power on separation of powers ground, even though they might be exercising quasi-judicial powers.[32]

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[29] *Brown* v. *United States*, 359 U.S. 41 (1959) : *see* Bankruptcy Act, 11 U.S.C. § 69, re referees; FEDERAL GRAND JURY HANDBOOK, SECTION OF JUDICIAL ADMIN. OF ABA (West 1961).

[30] Wigmore states that "the Executive . . . has a limited inherent power comparable to that of the legislature to employ testimonial compulsion for aiding executive purposes." 8 WIGMORE, EVIDENCE § 2195 at 87 (McNaughton rev. 1961) : judicial powers like contempt can not be conferred on executives ancillary to their exercise of executive power. RAPALJE, CONTEMPT OF COURT, § 3.

[31] *ICC* v. *Brimson*, 154 U.S. 447, 485 (1894) :

> Such a body [as the ICC] could not, *under our system of government, and consistently with due process of law*, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. . . . [*T*]*he power* to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the U.S. *can only be exerted* under the law of the land *by a competent judicial tribunal* having jurisdiction in the premises. (Emphasis added.)

[32] *See* note 31, *supra*; *e.g.*, former Secretary of State Dean Rusk held a hearing in his office at the State Department to determine whether that Department should issue a warrant of extradition to Canada of an American seaman wanted there on criminal charges. The purpose of this hearing was to decide if the crime was political or not, thus leading to acquiescence in or the overruling of the recommendation made in this case by the U.S. Commissioner. The Secretary

On theoretical and pragmatic grounds, there should be no difference in the need for recourse to contempt based on the label of the government agency. If the need exists, and the function is quasi–judicial, the power should be granted. However, the degree of the need will vary from agency to agency, being most apparent in courts, less so in Congress, and even less in administrative, executive and miscellaneous agencies.

B. *Constitutional Problems.*

The classification problems and other unique aspects of the contempt power which will be considered herein, have resulted in a constitutional maze and considerable litigation has surrounded the exercise and implementation of the contempt power. There is less guidance for potential offenders and for offended officials regarding the contempt power than is the case with traditional crimes. Furthermore, in many areas unresolved and serious constitutional questions remain, although the Supreme Court, in recent years, has begun to deal with some of them more explicitly.[33]

The historic rationale for the use of inherent contempt powers by judicial and legislative bodies has been a constant and frequent source of litigation. Some of the vital constitutional issues, such as the right to trial by jury which conflicts with any summary exercise of the contempt power,[34] can be resolved only when the unique status of contempt as a crime is eliminated and all matters are treated by statute and not summarily.[35] But even if that is the case, some issues will remain.

No matter what the rationales of the past have been, the unique nature of the contempt power should no longer be allowed to exclude it from traditional constitutional protections covering other crimes. The present reform should take the final step away from the fettered thinking of the past that contempt is a unique quasi–crime. Contemnors are considered convicts. The criminal statute of limitations applies to contempt.[36] The wrong is considered a public wrong and in every other way, contemnors are treated by the law as criminals.[37]

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overruled the Commissioner's recommendation to extradite and the matter was closed.

At the crucial hearing in the Secretary's office, legal officers for the State Department were present, as was defense counsel, the interested party and a representative for Canada. In fact, Secretary Rusk was exercising quasi–judicial functions at this time, raising the question whether executive officials in the exercise of their official functions should be able to claim the contempt power when necessary and appropriate.

[33] *See, e.g., Bloom* v. *Illinois*, 391 U.S. 194 (1968); *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968); GOLDFARB, THE CONTEMPT POWER c. IV (1963).

[34] *Green* v. *United States*, 356 U.S. 165 (1957).

[35] GOLDFARB, THE CONTEMPT POWER c. IV and Conclusion (1963).

[36] *Pendergast* v. *United States*, 317 U.S. 412 (1943).

[37] Justice Holmes, in *Gompers* v. *United States*, 233 U.S. 604, 610 (1913), has stated:

> These contempts are infractions of the law visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure, and that at least in England it seems that they may be and preferably are tried in that way.

However, contempt prosecutions are not treated as other criminal proceedings.[38]

(1) *Trial by Jury.*—The most controversial constitutional question under current contempt procedures concerns the right of an accused to have a trial by jury before being imprisoned.[39] Recently, there has been a constant retreat from the absolute denial of the right to a jury trial.[40] Presently, most serious criminal contempts are punished only after a trial. However, civil contempts are not and some criminal contempts still may be punished without the right of trial by jury.[41]

(2) *First Amendment.*—Several first amendment issues have been

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[38] *Green* v. *United States*, 356 U.S. 165, 193–194 (1958) (Black, J., dissenting):

> The power of the judge to inflict punishment for criminal contempt by means of a summary proceeding stands as an anomaly in the law. In my judgment the time has come for a fundamental and searching reconsideration of the validity of this power which has aptly been characterized by a State Supreme Court as 'perhaps, nearest akin to despotic power of any power existing under our form of government.' Even though this extraordinary authority has slipped into the law as a very limited and insignificant thing, it has relentlessly swollen, at the hands of not unwilling judges, until it has become a drastic and pervasive mode of administering criminal justice usurping our regular constitutional methods of trying those charged with offenses against society. Therefore to me this case involves basic questions of the highest importance for transcending its particular facts. But the specific facts do provide a striking example of how the procedural safeguards erected by the Bill of Rights are now easily evaded by the everready and boundless expedients of a judicial decree and a summary contempt proceeding. I would reject those precedents which have held that the federal courts can punish an alleged violation outside the court room of their decrees by means of a summary trial, at least as long as they can punish by severe prison sentences or fines as they now can and do. I would hold that the defendants here were entitled to be tried by a jury after indictment by a grand jury and in full accordance with all the procedural safeguards required by the Constitution for 'all criminal prosecutions.' I am convinced that the previous cases to the contrary are wrong—wholly wrong.

[39] Article 3, section 2 of the Constitution provides that "the trial of all crimes . . . shall be by jury. . . ." The Bill of Rights twice reaffirms this important right. The fifth amendment directs that "no persons shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury . . ." and the sixth amendment decrees that "in all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial by an impartial jury. . . ."

[40] *See Bloom* v. *Illinois*, 391 U.S. 194 (1968).

[41] *See, e.g., United States* v. *Barnett*, 376 U.S. 681 (1964). *See also United States* v. *Ballantyne*, 237 F. 2d 657, 667 (5th Cir. 1956):

> The history which gave rise to the constitutional provisions guaranteeing the right of trial by jury is succinctly summarized in the Declaration of Independence in which complaint was made that the Colonies were deprived 'in many cases, of the benefits of Trial by Jury.'
>
> The Constitution provides, 'The trial of all Crimes . . . shall be by jury. . . .' But those fresh from experiences with tyranny were not content with this general guarantee, and Amendments VI and VII were promptly adopted, the former providing: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .' The concept of a criminal 'prosecution' is broader than a 'trial' and the addition of the more inclusive term indicates a determination to afford the right of trial by jury to those subjected to prosecution of any sort which might result in fine or imprisonment. The selection of the language of the Sixth Amendment is hardly explainable upon any other postulate.

raised by contempt cases in the past.[42] In some cases, courts have hesitated to act in civil cases where religious issues were in question. For example, ordering a witness to testify on the Sabbath against his will or enforcing decrees pertaining to the religion of parties could give rise to the assertion of a claim of first amendment protection. Better reasoning would suggest that the government agencies abstain from bringing contempt cases in these kinds of situations. Such potential abuses should be avoided in the Federal system in the future.

The press has raised first amendment objections to contempt convictions against writers, editors and publishers for publications deemed to interfere with fair criminal trials. The Supreme Court has rather consistently overruled State [43] convictions and the geographic construction of 18 U.S.C. § 401 represents some limit on Federal contempt power in this area. Insofar as it can make any difference, the present legislative reform of criminal laws should affirm the Supreme Court's present posture in this area. These latter two points can be stressed in the legislative history.

(3) *Attorneys.*—The Court, in *Cammer* v. *United States*, 350 U.S. 399 (1956), has held attorneys are not "officers of the court" under 18 U.S.C. § 401, but there have been several contempt cases involving alleged misconduct of attorneys. The Supreme Court has reversed several such convictions, in one case on the ground that an attorney's conduct in the line of duty cannot be a contempt unless it constitutes an obstruction of judicial duties,[44] and, more recently, on the ground that denial of a hearing violated the due process clause of the fourteenth amendment.[45] Here, it is recommended that the present Federal penal reform should reinforce those decisions leaving to the disciplinary powers of the courts and the bar associations over all attorneys the province of punishing excesses in court and to more specific criminal statutes punishment of other, more serious misconduct.

(4) *Double Jeopardy and Self Incrimination.*—Some difficult constitutional issues concern contempt prosecutions and the double jeopardy and self incrimination clauses of the fifth amendment. Any reform should prohibit crossfires of prosecutions; that is, situations where one offensive act may be prosecuted both as a criminal contempt and another crime. Less easily resolved are questions involving (a) reiterated and (b) multiplied contempt situations. Reiterated contempt arises when a defendant is made to repeat his offenses. By multiple contempt is meant the conversion of one offense into two as when an individual refuses to testify before a legislative committee or a grand jury or a court, is sentenced for contempt and subsequently he refuses to answer the same question before a different agency. May he be punished a second time in these situations?

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[42] *Lynch* v. *Uhlenhopp*, 78 N.W. 2d 491, 248 Iowa 68 (1956). 42 IOWA L. REV. 617 (1967).

[43] *See Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Craig* v. *Hainey*, 331 U.S. 367 (1947); Goldfarb, *Public Information. Criminal Trials and the Cause Celebre*, 36 N.Y.U. L. REV. 810 (1961); Donnelly & Goldfarb, *Contempt by Publication in the U.S.*, 24 MODERN L. REV. 239 (1961); FRIENDLY & GOLDFARB, CRIME AND PUBLICITY, THE IMPACT OF NEWS ON THE ADMINISTRATION OF JUSTICE (1967); *Sheppard* v. *Maxwell*, 384 U.S. 364 (1966) (habeas corpus overturned State criminal conviction for prejudicial publicity).

[44] *In re McConnell*, 370 U.S. 230 (1962).

[45] *In re Green*, 369 U.S. 689 (1962).

Cases today seem to condemn reiterated contempts, denying the rationale that the offenses are separate and thus so may be the punishments. In *Yates* v. *United States*, 355 U.S. 66 (1957),[46] the Supreme Court reversed 10 of 11 contempt convictions of a person charged with violating the Smith Act who refused to answer 11 questions on cross-examination. The trial court treated each refusal as a separate contempt and sentenced her to concurrent 1-year terms in prison for each contempt. Conceivably, there could have been an indefinite imprisonment in this case. The Supreme Court, holding it to be "an improper multiplication of contempts," ruled that the refusals constituted one contempt and that the refusal to answer several questions in one area of inquiry constituted but a single offense. However, State and Federal courts have not ruled consistently on this issue.

In a New York case, a witness who refused to testify before successive State grand juries was successively convicted and sentenced for contempt for each refusal. The Court of Appeals rationalized upholding the conviction on the ground that each refusal constituted a separate offensive act of defiance to a separate agency of government.[47] Although a distinction can be made when different agencies are involved, the underlying principle of *Yates* should apply to such cases. There is no Supreme Court ruling on this type of case, but it can arise quite easily if State and Federal legislative committees are examining the same subject.

The policy of any recommended reform should be that where separate questions in the same or separate proceedings seek to establish one fact or relate to a single subject of inquiry, a refusal to testify [48] or to answer questions concerning a single area of inquiry constitutes but one offense.

The other problem revolving around the self incrimination clause of the fifth amendment recently was relieved by the Supreme Court in *Murphy* v. *Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1966). Before *Murphy*, refusals to answer questions on the ground that the answer would subject the witness to prosecution for a crime in the same jurisdiction were proper, but refusals to testify because the testimony would incriminate one in a crime in another jurisdiction or before another body of government had been held to constitute contempt not protected by the fifth amendment.[49]

At the present time, in a contempt case, the privilege may be raised as a defense to testifying, where the testimony would incriminate the individual in a criminal contempt. It would seem that the privilege may be successfully raised to avoid civil contempt, as well. And now, *Murphy* teaches that unless there is immunity in the Federal jurisdiction, an individual may refuse to testify about matters which would subject him to a noncontempt-criminal prosecution in another Federal or State jurisdiction, and this refusal will not be deemed a contempt. *Murphy*, however, found there was a contempt in the refusal because the Federal jurisdiction would not be permitted to use the compelled

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[46] *See also* GOLDFARB, THE CONTEMPT POWER 234–241 (1963).

[47] *Matter of Cirillo*, 12 N.Y.2d 206, 188 N.E. 2d 138, 237 N.Y.S. 2d 709 (1963). That these multiple investigations are permissible is suggested by *Wyman* v. *Uphaus*, 360 U.S. 72 (1959); *see* GOLDFARB, *id.*, at 240–241.

[48] *See, e.g., United States* v. *Costello*, 193 F. 2d 200, 204 (2d Cir. 1952).

[49] *See* GOLDFARB, THE CONTEMPT POWER 245–249 (1963).

testimony. Where one inquiry solicits testimony relating to incriminating incidents in two jurisdictions, a defendant may refuse to testify about any of the incidents or demand absolute immunity from later prosecution or a restriction on use of the testimony in either jurisdiction.

(5) *Disinterested Tribunal.*—In striking the delicate balance between impulses toward either reprisal or leniency which might compromise or injure the authority of the court, we are considering what Justice Frankfurter, in reviewing one such conviction, described as "subtle matters . . . that concern the ingredients of what constitutes justice." [50] Federal rules now provide that in indirect criminal contempt cases the judge allegedly contemned must disqualify himself.[51] The courts, however, have condoned the practice of contemned judges sentencing for direct contempts committed in their presence. This situation could never occur if the prosecution for contempt was treated like other crimes which are always tried before a disinterested judge.

(6) *Tenth Amendment.*—A final constitutional issue in current contempt practice arises under the tenth amendment. The powers that are not delegated by the Constitution to the Federal government nor prohibited to the States are reserved hereunder to the States. Several cases,[52] in particular the recent case involving the conflict between the New York-New Jersey Port Authority, and a House Judiciary Subcommittee dealt with this problem.[53] The courts have gone far to avoid confrontations in these cases. While no criminal law reform can resolve this political kind of issue, it is recommended that, as a matter of policy, contempt prosecutions not be brought against officials of government agencies acting in the course of their official duties and under the orders of their respective agencies, but that instead intramural channels of communications be developed to arbitrate conflicts of this kind.[54]

IV. Recommendations

The conclusions of this report are that the aims of reform of criminal contempt should be:

(1) confine contempt coverage to offenses related to process and powers of government bodies; [55]

(2) eliminate the use of contempt as a catchall criminal statute;

(3) integrate the contempt statutes with other specific statutes covering criminal acts of misbehavior elsewhere treated as contempt;

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[50] *Offutt* v. *United States*, 348 U.S. 11, 14 (1954); *see also Sacher* v. *United States*, 343 U.S. 1, 30 (1952).

[51] Fed. R. Crim. P. 42.

[52] *United States* v. *Oxlett*, 15 F. Supp. 736 (M.D. Pa. 1936); *In re Commingore*, 96 F. 552 (D. Ky. 1899).

[53] *United States* v. *Tobin*, 195 F. Supp. 588 (D. D.C. 1961), *rev'd*, 306 F. 2d 270 (D.C. Cir.), *cert. denied*, 371 U.S. 902 (1962).

[54] *See* Sky, *Judicial Review of Congressional Investigations*, 31 Geo. Wash. L. Rev. 399 (1962).

[55] An alternative would be to devise a broad statute aimed at misbehavior as well as disobedience but which is applicable only where the act in question is not covered by another more specific, more apt criminal statute, such as perjury or obstruction of justice. Such a model statute was proposed in Goldfarb, The Contempt Power 302 (1963).

(4) end the practice of avoiding procedural protections by resorting to the summary contempt power; and

(5) reduce the peculiar procedural and legal aspects of the traditional use of contempt.

This could be accomplished by repealing all existing contempt statutes and replacing them with two precise statutes aimed at the two kinds of offenses which essentially and uniquely affect the power of government bodies; disobedience to process and to lawful orders. Other contemptuous misconduct would be covered exclusively by other criminal laws. The procedures governing the two contempt statutes would be the same as those governing the implementation of all other criminal statutes. The following statutes are recommended:

§ ———. Disobedience to Legal Process

A person commits a class ——— misdemeanor if, when subpenaed to appear, produce or testify before a legally constituted and properly conducted government agency, he refuses, without legal right, to appear, produce or testify in any matter pertinent to that inquiry. Violation of this section will be punishable by a fine up to ——— and imprisonment up to ———.

§ ———. Disobedience to Government Orders

A person commits a class ——— misdemeanor when he disobeys, without legal right, a lawful and proper order of any government agency. Violation of this section will be punishable by a fine up to ——— and imprisonment up to ———.

(1) We have seen that the classic American contempt statutes have covered three kinds of offenses: failure to conform to lawful process, misbehavior, and misconduct by officials. The recommended statutes deal only with the first category of wrongs, leaving to other more appropriate criminal statutes the control of the other two categories of offenses.[56]

In recommending two restricted contempt statutes, this report aims for simplicity and clarity where in the past, considerable confusion lay. It would clearly define what conduct is to be covered by the contempt statute. Congress would not entertain the controversial, fundamental questions which would inevitably surround any legislative curtailments of inherent judicial contempt powers, but in the accompanying legislative analysis, could make known its preferences regarding such policy questions as the preferred procedural implementation of contempt proceedings or the preferred courses of prosecutive action when another criminal statute applies. This approach augments the specific articulation of related criminal statutes in other parts of the proposed Code, making clear when the contempt provision in the Code is the appropriate provision. It would reduce to a sensible, workable minimum the essential acts requiring contempt treatment, leaving to other laws other problems, and avoiding many of the subsidiary issues raised by the prior use of the traditional contempt power.

The intent of the recommendation in this report is to require that contempt treatment be confined only to those offenses which uniquely

[56] *See e.g.*, proposed sections 1321–1330 (obstruction of justice) and some of the provisions in the proposed physical obstruction of government function article.

and essentially constitute obstructions of the inherent processes and fundamental workings of the court and to leave to other criminal statutes the prosecution of offenses which, while they also might be considered contemptuous, are really offenses of another kind. Thus, in the proposed obstruction of justice provisions for the new Code, separate statutory provisions are proposed to cover such offenses as tampering with witnesses, harrassment of jurors, threats to public servants, tampering with public records, preventing arrests, escape and bail jumping. Elsewhere in the Code, there are separate statutes covering such offenses as perjury, disorderly conduct, assaults and the like. Where these statutes apply, they should be used exclusively; where the recommended contempt statute applies it should be used exclusively. It should be the Federal prosecutive policy here to prohibit using both statutes to punish what is really only one act of misconduct.

This approach has not been followed in recent reforms of State penal laws. Offenses such as bail jumping, bribery, perjury, corruptly influencing official proceedings, obstruction of justice, tampering with evidence, and even disorderly conduct have been treated specifically and separately from traditional, catchall contempt laws to some extent, but many State statutes still include misbehavior in the embrace of their criminal contempt statutes. N.Y. Rev. Pen Law § 215.50 (McKinney 1967); Mich. Rev. Crim. Code § 5050 (Final Draft 1967); Proposed Del. Crim. Code § 759 (Final Draft 1967); Proposed Crim. Code for Pa. §§ 2215, 2216 (1967). It should be noted, however, that these statutes do not generally cover all government agencies and deal with courts and legislatures separately.[57] In New York, criminal contempt of legislature statutes are confined to disobedience of process and refusals to testify, while contempt of court statutes have gone further and included misbehavior. *Compare* N.Y. Rev. Pen. Law § 215.50 (courts) *with* § 215.60 (legislatures). Section 215.60 follows the Federal approach in 2 U.S.C. § 192. On the other hand, Pennsylvania includes disorderly conduct in its contempt of legislature provision. Proposed Crim. Code for Pa. § 2216 (1967).

Recourse to the proposed Federal Criminal Code's contempt statutes is to be confined to wrongs related to appearances before governmental agencies and responses to their proper orders, such as failures to appear in response to subpenas ad testificandum or failures to produce pursuant to subpenas duces tecum, failures to testify before government agencies exercising their proper powers and disobedience of the proper orders of government agencies. Thus, these provisions deal with the problems which a contempt statute needs to face, key problems not likely to be covered by other criminal laws.

It is recommended that the Commission assure that practices sometimes used in the implementation of the contempt power by the courts be dispelled. This policy would be in agreement with recent judicial decisions dealing with this subject. Furthermore, this is the practice Congress has followed since the passage of 2 U.S.C. § 192 and which the courts should have followed since the passage of 18 U.S.C. § 402. There is ample evidence in Congress' experience that proceeding under

[57] *See also* N.Y. Rev. Pen. Law, § 215.65 (McKinney 1967), which covers contempt of a temporary State commission by disobedience to process.

a criminal statute rather than an inherent contempt power need not jeopardize the efficient functioning of a government agency.

(2) Some of the protections intended by reform of criminal contempt laws still could be circumvented by treatment of certain misconduct as civil contempts.[58] It is recommended, therefore, that as a matter of policy, no custody summarily imposed as a civil contempt sanction exceed one week. This should be part of the legislative history of the present contempt laws and it should be urged upon the Judicial Conference. When custody exceeds one week, it is fair to say that it has become punishment, not inducement; if it warrants longer punishment, it should only be imposed pursuant to prosecution and conviction for a specific offense.

Civil contempts are not intended to be covered by the present statute, however, as the courts have consistently categorized civil contempts as having noncriminal characteristics and therefore as not part of the criminal law.[59] Where the purpose of the court is to coerce enforcement of its orders and not to punish misbehavior, executory powers (like levy of execution) should be used instead of the civil contempt power, which often does not accomplish the end sought and only serves to punish fruitlessly.

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[58] GOLDFARB, THE CONTEMPT POWER 66–67 (1963):

> A wrongdoer may never know, at the time of his wrongful act, whether he has committed a civil or criminal contempt or what the form of his sanction will be. Courts appear to survey all concomitants of a case and decide on the basis of the special characteristics of the act the remedy sought, the nature of the action, and the aim of the remedy, whether the act looks like what has been vaguely considered civil or criminal contempt in the past. To this end the key issues considered by courts have been: who will primarily gain from exercise of the contempt power; is exercise of the power to punish a completed act or to coerce a future one; will the contempt proceeding constitute a separate action or will it be part of the execution of the original one; and what standard indicia of civil or criminal proceedings appear to attach to the processing of the power in the instant case. Characteristically, certain kinds of offenses have been treated as criminal contempt, such as obstruction of court proceedings or court officers, attacks on court personnel, publications obstructing trials, and interference with parties, and jurors. Personal characteristics like deliberateness, bad faith, and fraud have also inclined the decision-makers to classify contempts as criminal.
>
> Such acts as disobedience to judgments, orders, or court process, and the like, have been considered civil contempts. Though this is the usual case, certain acts of disobedience to court orders have been deemed to have reached such a point of contumacy as to warrant classification as criminal. Civil contempts usually arise out of equity actions because of the peculiar in personam character of these decrees, and criminal contempts often are of a gravity which would suggest some public interest. Yet, a governmental body may seek civil, remedial contempt relief, and individuals may institute criminal contempt actions, though both practices are unusual out of the contempt arena. The peculiarities of certain civil contempt cases have resulted in certain extended imprisonments which would seem to indicate a gravity lacking in the typical civil situation. A thorough consideration of the cases leaves a distinct impression that courts apply an *ad hoc* kind of accounting to contempt situations and arrive at conclusions which, no mater how just in the immediate case, compose only the most casual and intellectually unsatisfying link with any body of law or legal principle.

[59] *See* apparent concession of this point by Justice Goldberg in *Barnett* v. *United States*, 376 U.S. 681, 753–754 (1964) (dissent); *but see also*, GOLDFARB, THE CONTEMPT POWER 58–62 (1963).

This approach is consistent with the draft sentencing chapter (proposed section 3304) wherein imprisonment for failures to pay fines may be avoided by satisfaction if the court's order so provides. When a court or other government agency desires only to have its order followed and does not intend to punish a contemnor, the sentencing chapter should permit provision in any sentence after a conviction under these proposed statutes (note 56, *supra*) that upon compliance with the order giving rise to the conviction, the contemnor may be released from imprisonment.

Under current contempt law, civil contempt sentences conceivably could last indefinitely. This would not be the case under the recommended statute which would provide a maximum sentence with a right only to shorten the statutory sentence by conformity with the order.

The proposed statute, together with the sentencing statute, could replace the present civil contempt power. Of course, the question remains what would happen if courts chose to avoid this legislative policy by claiming inherent powers of civil contempt which may not be restricted by legislation. The only way to resolve this potential clash would be for this Commission to try to reach harmony with the courts, possibly through the Judicial Conference, so that a standard procedure along the proposed lines could be worked out and voluntarily followed in the Federal courts.

(3) Differences in the way the proposed Code will view the seriousness of contempts of different government agencies should be reflected in the grading of statutory contempt. *E.g.*, contempt of court could be treated as a Class A misdemeanor while contempt of a minor executive official could be deemed a Class B misdemeanor.

Conclusion

If misconduct other than the subject of the proposal contained in this report is punishable under ordinary criminal statutes, as will be the case under the new Code, summary treatment of such misconduct should also be eliminated; if this course is followed, there is no need or logic in denying to all agencies of government recourse to a criminal statute to bolster only their powers to operate when there is disobedience of orders and subpenas and refusals to testify, the subject matter of the proposed two contempt statutes.

Once the historic objections to expansion of contempt powers are satisfied, the trend rejecting resort to contempt by hybrid or nonjudicial agencies need not be continued. Under the proposal, all prosecutions would be limited, in substance, to disobedience to official powers and to lawful orders, and the same governmental needs could be said to be present in all agencies. Since the dangers of autocratic misuse are eliminated by limiting contempt action to prosecutions in the ordinary fashion [60] and by not countenancing summary uses of the common law contempt power, traditional fears of expanding access to contempt are inappropriate.

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[60] "It is the absence of administrative powers of imprisonment that sharply distinguishes a legal system like the Anglo-American from those which prevail in those countries we disparagingly describe as totalitarian." SCHWARTZ, INTRODUCTION TO AMERICAN ADMINISTRATIVE LAW 101 (1958).

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COMMENT

on

PERJURY AND FALSE STATEMENTS: SECTIONS 1351–1354

(Stein, Green; May 8, 1969)

1. *Background; Purposes.*—The proposed provisions regarding perjury and false statements would make significant changes in existing Federal law. The perjury statute—section 1351—does not make a substantial change in the present definition of the offense but proposes substantial reform on corollary matters, not now dealt with by statute, such as corroboration, method of prosecution when there are mutually contradictory statements, and the significance of a retraction.[1] The draft also reduces the significance of materiality in perjury prosecutions by providing a lesser offense for immaterial false statements under oath in official proceedings (section 1352(1)).

The false statements provisions—sections 1352 and 1353—make substantive changes in penalty and definition, eliminating oral statements from the scope of the general false statement prohibition and discriminating between false statements generally and false statements and reports to law enforcement authorities. Section 1352 reduces the maximum penalty for false statements generally from 5 years to a Class A misdemeanor, which would remove the present anomaly of non-oath false statements being subject to penalty equal to that available for perjury. If the false statement is not perjury, the felony penalty would be available only when the ultimate felony is established, *e.g.*, fraudulently obtaining government funds (theft), embezzlement, evading income tax, fraudulently obtaining citizenship, *etc.* This course will permit repeal of a number of misdemeanor false statement provisions scattered throughout the United States Code which are presently inconsistent in penalty with the general false statement felony (18 U.S.C. § 1001). In addition, the proposal broadens application of the false statement statute to the courts in recognition of the fact that their administration involves matters analogous to those dealt with by the other branches. *e.g.*, making payments to appointed counsel under the Criminal Justice Act.

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[1] Similar reforms have recently been proposed or adopted in the following Codes: PRELIM. REV. OF COLO. CRIM. LAWS art. 32 (Research Report No. 98, Nov. 1964); PROPOSED DEL. CRIM. CODE §§ 720–729 (1967); CRIM. CODE OF GA., § 26–24 (1969); ILL. CRIM. CODE § 32–2 (1961); PROPOSED IA. CRIM. CODE §§ 721.1–721.4 (1967 Proj.); MICH. REV. CRIM. CODE §§ 4901–4940 (Final Draft 1967); N.Y. REV. PEN. LAW §§ 210.00–210.50 (McKinney 1967); PROPOSED CRIM. CODE FOR PA. §§ 2101–2110 (1967); TEX. PEN. CODE REV. PROJECT, §§241.0–241.5 (Oct. 1967).

2. *Perjury; Substantive Definition; Mens Rea.*[2]—The present perjury statute, 18 U.S.C. § 1621, proscribes the giving of any "testimony, declaration, deposition, or certificate" on a material matter which the actor "does not believe to be true," when such statement is given under oath "before a competent tribunal, officer, or person." The proposed substantive definition of the crime of perjury retains the essential elements of the crime as stated in the present statute—taking of an oath, materiality of the falsification, and the requirement that the falsification be in an official proceeding. Official proceeding is defined, as at present, to include hearings before any judicial, legislative, or administrative tribunal or official authorized to take evidence under oath. The major proposed reforms lie, not in the definition of the elements of the crime, but in the scope of permissible proof of the crime and in defining materiality, topics which are discussed separately, *infra*.

The proposed provision retains the same requirement of mens rea as is now stated in Federal law—the giving of a statement which declarant "does not believe to be true." In terms of the proposed standards of culpability for the new Code, this would include statements "recklessly" made;[3] that is, the declarant is responsible for statements he makes falsely because he does not think they are important, or does not care whether he tells the truth or not, if, in fact, the statements are important to the inquiry. Materiality as a matter of law will determine his liability for a felony, regardless of his belief as to materiality (*see* paragraph 3, *infra*). This resolves two conflicting means of measuring the cost of perjury to society. Lawful process is not harmed when investigating authorities obtain the true information they properly seek; rather there are dangers of governmental abuse of its powers of inquiry if its investigation goes further, as well as of waste of governmental resources. But, while the scope of governmental investigation is restricted by an objective test of materiality, the individual culpability of a perjurer does not depend so much on the intended effect of his extrinsic conduct as it does on his conscious violation of his oath. Therefore, once it is established that the truthful answers demanded are relevant to the inquiry, a person under oath becomes culpable for "recklessly" giving false answers.

This concept of perjury, however, depends on the premise that there is no crime unless the statement given is in fact false. Intending to lie is not an offense if, as it turns out, the answer is truthful. This would be so, also, for inchoate acts—attempts to commit perjury or subornation of perjury: there is no offense if the statement attempted or solicited is truthful, even if the attemptor or solicitor believes it is not.* In this light, a statement of personal opinion becomes a special problem because of its subjective element. We define statement, as under present law, to include not only statements of purported fact, but also of the declarant's opinion or beliefs. This is necessary in situ-

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[2] For the remainder of this discussion draft, we are greatly indebted to the Model Penal Code commentary on article 241 concerning perjury and other falsification to authorities, pp. 96–145 (Tent. Draft No. 6, 1957). The Model Penal Code has dealt with the criticisms of present perjury law here noted, and provided the model statutes for the recommended reforms of the law in this area.

[3] *See* draft section 302(c).

Cf. Study Draft section 1001(1). Impossibility is not a defense in attempt.

ations where the state of mind of the person testifying is directly material to the inquiry. If, for example, a person in a selective service proceeding testifies that he believes he is lawfully married, when it can be shown that he is not, in fact, lawfully married and that he could not have believed so, his testimony is perjurious; if, however, it objectively appears that he is, in fact, lawfully married, he would not be guilty of perjury merely because he, subjectively, really believes he was not. Here, the perjury relates to an overt fact, which can be shown to be true or false, as the case may be. But when a person who claims "conscientious objector" status testifies, the relevant inquiry is solely concerned with his state of mind. If it can be shown (*i.e.*, through admissions to others) that he does not hold conscientious beliefs against war, though he testified he did, his statement of personal opinion is perjurious. The proposed definition of "statement" therefore includes statements of opinion "only if the representation clearly relates to state of mind apart from or in addition to any facts which are the subject of the representation." [4]

3. *Perjury: Materiality.*—The proposed definition of "materiality" does not differ substantially from that given by prevailing law. Materiality has been defined to embrace anything "capable of influencing the tribunal on the issue before it" [5] or which "has a natural tendency to influence, impede or dissuade [a grand jury] from pursuing its investigation." [6] The definition proposed here—that falsification is material "if it could have affected the course or outcome of the official proceeding or the disposition of the matter in which the statement is made"—maintains the broad scope of the prevailing definitions.

The issue of materiality, however, is a constant source of debate in individual cases, and in some cases, prosecutions have been dismissed, perhaps needlessly, because of holdings that the defendant, though he may have lied deliberately under oath, did not, under the circum-

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[4] *Cf. United States* v. *Remington*, 191 F.2d 246 (2d Cir. 1951), *cert. denied*, 343 U.S. 907 (1952), 347 U.S. 913 (1954), upholding an indictment insofar as it charged that defendant "did not believe his denial [before a grand jury] of membership in the Communist Party." Under the draft proposal, Remington's conviction could not be sustained if he stated he was not a member of the Communist Party when, in fact, he was not (even if the defendant thought he was a member and he was lying). He could, however, be convicted for falsely stating that he had not *considered himself* a Communist, if his belief in this matter was material to the inquiry.

[5] *Blackmon* v. *United States*, 108 F.2d 572 (5th Cir. 1940) (false statement as to witness' purpose in visiting an illegal distillery held material, since it affected the weight to be given to his testimony concerning matters learned during his visit); *cf. Beckanstin* v. *United States*, 232 F.2d 1 (5th Cir. 1956) (false testimony by a contractor, in a civil suit over a house built by him, that he had "graduated" from the Massachusetts Institute of Technology; that he did not, in fact, graduate, though he had attended M.I.T., was held to be of "no consequence" and immaterial).

[6] *Carroll* v. *United States*, 16 F.2d 951 (2d Cir.), *cert. denied*, 273 U.S. 477 (1927) (upholding conviction of a theater owner who had testified, in investigation of whether alcoholic drinks were served at a party he had held, that no girl was in a bathtub containing some liquid at the party; materiality of the falsehood was based on the possibility that the girl, if she was in the tub, might have testified as to the nature of the liquid in the tub); *see also Robinson* v. *United States*, 114 F.2d 475, 476 (D.C. Cir. 1940): "whether such statements had a natural tendency to influence the [marriage] clerk in his investigation of the facts . . ."

stances of the case, lie as to a material matter.[7] Such difficult cases have led to proposals, such as that of the National Conference of Commissioners on Uniform State Laws,[8] to eliminate materiality altogether from the definition of perjury. However, retention of materiality as an element of the crime is valuable as a restriction of felony prosecu-

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[7] *See* the discussion of three Federal cases in MODEL PENAL CODE, art. 241, Comment at 108–109, 111–112 (Tent. Draft No. 6):

> *Pyle* v. *United States*, 156 F.2d 852 (D.C. Cir. 1946), held that Pyle could not be convicted of perjury for falsely asserting, in the course of her testimony as a witness for the government in a Mann Act prosecution, that a statement she had made against the same defendant before trial resulted from coercion by F.B.I. agents. This falsification was held immaterial because she had not repudiated the purport of the pretrial statement, and therefore her false charge of coercion in relation to the pretrial statement 'could have had no effect on the jury's decision.'
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> The question whether 'importance' is an element of materiality divided the United States Court of Appeals in the *Lattimore* case [*United States* v. *Lattimore*, 215 F. 2d 847 (D.C. Cir. 1954)]. The court sustained a count charging that defendant falsely swore before a Congressional investigating committee that he did not know Asiaticus was a Communist. Asiaticus had contributed articles to a journal edited by Lattimore. The opinion of the court holds that such a falsification might be material, in an investigation of Communist influence, even if 'not important', Judge[s] Edgerton, Clark and Bazelon dissented, asserting that 'material' means 'not only pertinent but also important in some substantial degree.' They could see no sufficient importance in the fact, if it was a fact, that Lattimore knew one of his contributors was a Communist. *United States* v. *Cameron*, 282 Fed. 684 (D. Ariz. 1922), illustrates the absurd length to which the requirement of materiality can be pushed. An indictment charging the filing of a false statement of election campaign *receipts* was dismissed on the ground that the Corrupt Practices Act penalized only excessive *expenditures*, although the Act required disclosure of both receipts and expenditures.

The Model Penal Code commentary on these cases concludes (at 111) that:

> *Pyle* can be regarded as one of those hard cases that make bad law under any formulation. Ordinarily, falsification like Pyle's would be found material under [the proposed] definition. So far as the *Lattimore* case is concerned with its controversy as to whether materiality implies 'importance' [the proposed] definition accepts the majority position, inasmuch as we do not specify any particular *degree* of influence which the falsification might have. Yet it is clear that trivial falsification is excluded by [the proposed] test; and it will be easier and less dangerous for the courts to limit felonious perjury to misstatements having some substantial potential for obstructing justice, because of the availability of the misdemeanor. . . .

[8] A succinct statement of weaknesses in the present perjury law was written by the National Conference of Commissioners on Uniform State Laws, in 1952. In a preparatory note to the Model Act on Perjury, the Conference stated:

> In the first place . . . a person may not be convicted of perjury if he makes contradictory statements under oath, unless the indictment charges and the prosecution proves that one of the contradictory statements is false. In the second place, proof of falsity of a statement alleged to be false must be established by two independent witnesses or by one witness and corroborating circumstances. In the third place, a false statement must be proved not only to be false but also to be material to the proceeding for which it was made. This rule has meant immunity for many witnesses who have wilfully given false evidence in court, and much delay and uncertainty have arisen in the course of the interpretation and application of the rule. In the fourth place, a great difficulty in administering the law of perjury has been the severity of the penalties specified by the statutes. In the less aggravated forms of perjury, much could be gained in effectiveness and respect by making penalties less severe in the books and more frequently applied in the court rooms. . . . (quoted in MODEL PENAL CODE, art. 241, Comment at 102–103 (Tent. Draft No. 6, 1957)).

tions to serious and important cases.[9] Upon the view that lying under oath in an official proceeding even though not material should nevertheless be an offense, proposed subsection (1) of the false statements provision in effect provides a lesser included crime to perjury by its applicability to official proceedings but without the requirement of materiality. Its availability should render less difficult consideration of "hard" cases on the issue of materiality.

The proposed general provision on materiality also explicates some desirable propositions of law and preserves existing law in these respects:

It provides that the issue of materiality does not depend on whether the statement was admissible under rules of evidence. Rules of evidence vary widely from proceedings in court to grand jury investigations and administrative hearings.[10] Further, relevant testimony may be excluded for a variety of technical reasons under the rules of evidence. But the nub of the crime of perjury is the declarant's willingness to lie under oath; culpability should not depend on whether the false testimony might otherwise have been excluded from evidence.

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[9] *See* Blakey, *Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis*, in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME, [hereinafter cited as TASK FORCE REPORT] at 89 (1967):

> While the requirement [of materiality] has resulted in much litigation and has resulted in the freeing of individuals clearly guilty of false swearing, it probably ought to be retained in the law. False answers to trivial and insignificant questions seldom cause substantial harm to the administration of justice. Perjury prosecution[s] should be limited as a matter of law to the serious and important. The requirement of materiality is a device which works to make this the case.

Thus, the President's Commission on Law Enforcement and Administration of Justice, while criticizing the weaknesses of present perjury law, and making recommendations for change (especially with respect to current problems of dealing with organized crime), did not recommend elimination of the materiality requirement:

> Many prosecutors believe that the incidence of perjury is higher in organized crime cases than in routine criminal matters. Immunity can be an effective prosecutive weapon only if the immunized witness then testifies truthfully. The present special proof requirements in perjury cases inhibit prosecutors from seeking perjury indictments and lead to much lower conviction rates for perjury than for other crimes. Lessening of rigid proof requirements in perjury prosecutions would strengthen the deterrent value of perjury laws and present a greater incentive for truthful testimony.
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> The Commission recommends [that] Congress . . . abolish the rigid two-witness and direct-evidence rules in perjury prosecutions, but retain the requirement of proving an intentional false statement. (TASK FORCE REPORT at 16–17 (1967)).

[10] Consider, for example, the grand jury:

> All persons within its jurisdiction, upon being lawfully summoned before it, are bound to disclose what they know in answer to questions asked to discover the truth concerning the matters being investigated. Neither the competency of their testimony [n]or its relevancy is their concern. . . . As the investigation proceeds, whatever leads may be developed must be run down to find as accurately as possible what the truth is, and any false testimony which impedes and hampers the course of the investigation is material in the sense that it has a tendency to affect the ultimate action of the grand jury. (*United States* v. *McGovern*, 60 F. 2d 880, 889 (2d Cir.), *cert. denied*, 287 U.S. 650 (1932) (affirming a contempt conviction).

The proposed provision also expressly negatives any defense that the declarant mistakenly believed his falsehood to be immaterial.[11] This proposition also prevents reintroduction of difficult issues as to materiality, for a declarant could, absent this provision, claim mistake as to materiality in all but the most obvious cases.

The proposed provision also codifies the existing rule that the issue of materiality is a question of law.[12] The court, therefore, can instruct the jury as to whether a statement, if they find it to have been made by the defendant, was or was not material.

4. *Perjury: Irregularity of Oath; Authority of Official Proceeding.*—The proposed general provision on irregularity of the oath specifies that it is no defense that the oath was administered or taken in an irregular manner, that declarant was not competent to make the statement in question or that any document presented by the defendant as having been made under oath was not, in fact, so verified. Such irregularities are of no proper concern to the false declarant. The defendant's awareness of the need for an oath is notice enough of the seriousness of the matter.[13]

For similar reasons, it might be argued that there should be no defense available to the person who deliberately lied under oath, even when the body before which he testified had no jurisdiction in the case. No such provision is proposed, however, because the governmental interest in truthful testimony is limited to statements given before official bodies or agencies acting entirely within their proper field of authority. If, then, the body before which a statement was made had no jurisdiction in the case, it can properly be claimed that the state-

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[11] *I.e.*, culpability is not required as to materiality (*see* section 302(3)). *Cf.* the proposed general provision on mistake of fact or mistake of law, draft sections 609 and 610.

[12] "Materiality . . . [is] an issue for the court." *United States* v. *Jones*, 374 F.2d 414, 419 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967); *see also Masinia* v. *United States*, 296 F.2d 871 (8th Cir. 1961); *Brooks* v. *United States*, 253 F.2d 362 (5th Cir.), *cert. denied*, 357 U.S. 927 (1958); *United States* v. *Parker*, 244 F.2d 943 (7th Cir.), *cert. denied*, 355 U.S. 836 (1957); *Travis* v. *United States*, 123 F.2d 268 (10th Cir. 1941); *United States* v. *Stutzky*, 79 F.2d 504 (3d Cir. 1935); *United States* v. *Shinn*, 14 F. 447 (C.C. Ore. 1882). The proposition is overwhelmingly accepted.

[13] Under present law, an oath need not be in any particular form (*Holy* v. *United States*, 278 F. 521 (7th Cir. 1921)), and erroneous technicalities—such as a mistake in the use of a seal and in the use of the term "county" instead of "city"—do not affect the validity of the oath (*United States* v. *Neale*, 14 F. 767 (C.C. Va. 1883)). But taking an oath before a person who lacked any authority to administer the oath is a defense to a charge of perjury. "It is fundamental in the law of criminal procedure that an oath before one who has no legal authority to administer oaths of a public nature, or before one who, although authorized to administer some kind of oaths, but not the one which is brought in question, cannot amount to perjury at common law, or subject the party taking it to prosecution for the statutory offense of wilfully false swearing." *United States* v. *Curtis*, 107 U.S. 671, 672–673 (1883). Under the proposed provisions, a complete failure in the administration of the oath would be deemed a fundamental defect, not a technical "irregularity." But a person submitting a document which he purports to be under oath would be bound by his submission. The issue, then, would properly focus upon the authority of the proceeding to call for a statement under oath, rather than the meaningless issue of whether a person who knowingly submitted a sworn statement, swore his oath before someone authorized to take it.

ment was not made in an "official proceeding".[14] On the other hand, in instances in which a valid "official proceeding" is conducted it does not matter that the outcome of the proceeding is inconclusive. For example, when a grand jury inquires into possible violations of law within its district, perjury before it is punishable, even though the proceeding eventually finds no crime, issues a defective indictment, or finds that the crime it was investigating occurred in another district.[15]

5. *Perjury: Retraction.*—Present Federal law holds a person responsible for his false testimony even if he recants:[16]

> Deliberate material falsification under oath constitutes the crime of perjury and the crime is complete when a witness' statement has once been made. It is argued that to allow retraction of perjured testimony promotes the discovery of the truth and, if made before the proceeding is concluded, can do no harm to the parties. The argument overlooks the tendency of such a view to encourage false swearing in the belief that if the falsity be not discovered before the end of the hearing it will have its intended effect, but, if discovered, the witness may purge himself of crime by resuming his role as witness and substituting the truth for his previous falsehood. It ignores the fact that the oath administered to the witness calls on him freely to disclose the truth in the first instance and not to put the court and the parties to the disadvantage, hinderance, and delay of ultimately extracting the truth by cross-examination, by extraneous investigation, or other collateral means.

The proposed provision on retraction seeks to provide opportunity for retraction during the course of the proceeding while avoiding the dangers of this policy noted by the Supreme Court. The possibility that a witness may be encouraged to lie, believing that he can recant at the end of the hearing if his falsehood is discovered, is disposed of by specifying that the retraction must be made before it becomes manifest that the falsification is or will be exposed. The possibility that the hearing body may be seriously hindered by the delay in finding the truth is avoided by specifying that the retraction must be made before

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[14] *See* the proposed general definition of "official proceeding," which is defined as a proceeding before an agency or official "authorized to take evidence under oath" (draft section 109(v). *See also Christoffel* v. *United States*, 338 U.S. 84 (1949), in which the defendant who had made false statements before a congressional committee was allowed to raise the question of the presence of a quorum; *Brown* v. *United States*, 245 F. 2d 549, 555 (8th Cir. 1957), holding that a grand jury is not authorized to conduct "an inquisition into the life and conduct of a defendant with reference to matters that are not relevant or material."

[15] *See United States* v. *Williams*, 341 U.S. 58 (1951), holding that false statements in the course of a trial on an indictment subsequently held not to charge a Federal crime are punishable; *United States* v. *Neff*, 212 F. 2d 297 (3d Cir. 1954), holding that perjury before a grand jury making a good faith investigation of offenses within its district is punishable notwithstanding an eventual determination that venue properly lay elsewhere.

[16] *United States* v. *Norris*, 300 U.S. 564, 574 (1937) (defendant, in the course of a congressional committee investigation, denied having received financial backing for a political campaign; the next day, after hearing a witness testify to the contrary, defendant took the stand again and admitted the acceptance of funds).

the falsification substantially affects the proceeding. Given this provision, then, the ability of an investigating body to learn the truth is enhanced. The declarant, though he may, in a moment of panic or without sufficient thought on the consequences, have lied, still has some time to think about his error and reverse himself. There is, then, an effective incentive to "discovery of the truth [which], made before the proceeding is concluded, can do no harm to the parties." [17]

6. *Perjury: Inconsistent Statements.*—Over a quarter century ago, United States Circuit Judge Augustus Hand commented: "It seems strange that in the federal courts an indictment for perjury may not yet be drawn in the alternative and that there may not be a conviction for deliberately making oath to contradictory statements unless the prosecutor shows which of the statements was false." [18] Lack of a provision for pleading and proof of inconsistent statements works to frustrate prosecution of someone who manifestly perjures himself, simply because it cannot, with certainty, be ascertained which of his statements is the lie. Pursuant to persistent recommendation of a special rule for pleading and proof in this area, the proposed perjury provision contains a specific provision on inconsistent statements.[19]

Under the proposed provision, when mutually contradictory statements have been made under oath, the declarant may be prosecuted on the basis of an indictment setting forth the inconsistent statements in a single count. The prosecution need not prove which of the statements was the false one; the inconsistency is enough to establish a prima facie case, that "one or the other was false." The evidence can, of course, be challenged by showing that the statements are reconcilable. The prosecution must show that the defendant could not have believed each of the statements at the time he made them. The burden of persuading a jury beyond a reasonable doubt that one or the other of the statements must necessarily have been falsely sworn remains on the prosecution.

Additionally, since it cannot be demonstrated which of the inconsistent statements is false, it is explicitly provided that the fact that the declarant's sworn statements are inconsistent cannot be used to convict the defendant of the felony of perjury if he might, in fact, be guilty only of the misdemeanor of making an immaterial false statement under oath. That is, if one or more of the inconsistent statements was not material to the inquiry in which it was made, the provision presumes that the nonmaterial statement was the false one, and the defendant, therefore, is not guilty of perjury.

7. *Perjury: Corroboration.*—The strict "two-witness" rule of proof

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[17] *Id.*

[18] *United States* v. *Buckner*, 118 F.2d 468, 470 (2d Cir. 1941), affirming a conviction in which defendant had admitted which of the inconsistent statements was the false one.

[19] *See* the criticisms of the National Conference of Commissioners on Uniform State Laws and of the President's Commission on Law Enforcement and Administration of Justice, discussed in notes 8 and 9 *supra*. *See also* Professor Blakey's report to the President's Commission, *supra* note 9, at 91. A proposal to permit indictments based on contradictory sworn statements before a court or grand jury is now pending before Congress (S. 30, 91st Cong. 1st Sess.).

in perjury cases has been subjected to much judicial qualification [20] and also subjected to much criticism by commentators. [21] The rule "was adopted into the common law because of a fear of the situation created by oath against an oath." [22] It was followed by the Supreme Court in *Weiler* v. *United States:* [23]

> Since equally honest witnesses may well have differing recollections of the same event, we cannot reject as wholly unreasonable the notion that a conviction for perjury ought not to rest entirely upon "an oath against an oath." The rule may originally have stemmed from quite different reasoning, [24] but implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted.

While application in prosecutions for perjury, the rule was not made applicable in false statement cases under 18 U.S.C. § 1001. [25]

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[20] *See* MODEL PENAL CODE, art. 241, Comment at 137 (Tent. Draft No. 6, 1957): A number of qualifications of the 'one-witness-plus-corroboration' rule have been introduced. Thus, no contradictory witness is required where direct observation is impossible, as where defendant is accused of perjury as to his own mental state, e.g., 'I don't remember.' Such a prosecution can proceed entirely on circumstantial evidence (*Behrle* v. *United States*, 100 F. 2d 714 (D.C. Cir. 1938)). An authenticated record of conviction suffices to demonstrate the falsity of the defendant's sworn denial that he had ever been convicted of crime. (*Holy* v. *United States*, 278 F. 521 (7th Cir. 1921): *United States* v. *Flores-Rodriquez*, 237 F. 2d 405 (2d Cir. 1956)) If defendant on trial for perjury admits the falsity but defends on the ground of good faith, no other witness to falsity is required (*United States* v. *Buckner*, 118 F. 2d 468 (2d Cir. 1941)); out-of-court admissions by the defendant, for example, in letters which he has written, may perform the same function (*United States* v. *Wood*, 39 U.S. 430 (1840)).
Further, corroboration may be circumstantial (*United States* v. *Goldberg*, 290 F. 2d 729, 733–775 (2d Cir. 1961), and perjury may be proved by separate witnesses testifying to different events, rather than cumulatively to the same event, as in *May* v. *United States*, 280 F. 2d 555 (6th Cir. 1960), in which the testimony of each of 8 women refuting defendant's statement (in an NLRB proceeding) that he had, at different times, visited each of them, was held sufficient to convict for perjury, notwithstanding the fact that the 8 women did not corroborate each other.

[21] *See* notes 8 and 9, *supra*. A present bill before Congress (S. 30, *supra*, note 19) proposes to eliminate the "two-witness" rule, as applied to cases of perjury before a court or grand jury by creating a new "false statement" crime, not bound to common law rules.

[22] Prefatory Note to the Model Act on Perjury of the Commissioners on Uniform State Laws. The Note goes on to state: "As pointed out by Dean Wigmore in his attack upon the rule (Wigmore, Evidence, §§ 2040–43), that reason vanished with statutes which made defendants competent to testify in their own behalf. This mechanical rule seems out of place in modern practice. The requirement of proof beyond a reasonable doubt would be sufficient to safeguard the accused . . . ."

[23] 323 U.S. 606, 609 (1945).

[24] The "two-witness" rule originated in English Star Chamber proceedings, when defendants were not permitted to testify in their own behalf.

[25] That the "two-witness" rule does not apply to "false statement" cases was held in *Fisher* v. *United States*, 231 F. 2d 99 (9th Cir. 1956); *United States* v. *Marchisio*, 344 F. 653 (2d Cir. 1965); *Travis* v. *United States*, 269 F. 2d 928 (10th Cir. 1959), *rev'd on other grounds*, 364 U.S. 631 (1961); *United States* v. *Killian*, 246 F. 2d 77 (7th Cir. 1957), and other cases in those Circuits.

Under the proposed corroboration provision, the "two-witness" rule will retain validity only in cases in which the sole proof of falsity rests upon the contradiction of the statement by another person. In such cases, the witness' testimony will have to be supported, as at present, either by the testimony of another witness or by corroborating evidence. This rule recognizing the reason for the vitality of the "two-witness" rule, meets the fear that innocent persons may be harassed by other individuals—unsuccessful litigants, paid informers or the like, in alleged perjury cases. But for all other cases, in which proof of perjury rests on extrinsic evidence, whether direct or circumstantial, demonstrating a person's guilt of the crime beyond a reasonable doubt, the normal rules of evidence will apply to perjury, as they do to other crimes.

8. *Subornation of Perjury.*—Present 18 U.S.C. § 1622 declares that "whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both." This offense appears to embody nothing more than a statement of accomplice liability, and may be subsumed under our general provisions concerning accomplices (if the suborner succeeds in obtaining commission of perjury by another) and solicitors (if the suborner fails in his efforts to convince another to commit perjury).[26] Since solicitation of perjury can defeat an official proceeding, even before it is held, *e.g.*, the person solicited, if he falsely denies having material information may not be called as a witness, the act should carry a penalty equivalent to that for perjury itself. This could be the result of a sincere, unretracted effort to suborn, since, in terms of the general solicitation provision, the solicitation would be "dangerously close to commission of the offense." (*See* sections 1001(4), 1003(5)). The present subornation of perjury statute will, therefore, be unnecessary in the proposed new Code. If, however, all subornations are not graded equally to perjury itself, this should be accomplished by an explicit provision in the perjury statute, grading all solicitations of perjury at the same level as the completed crime.

9. *False Statements: General Applicability and Penalty.*—Because of its broad scope, its application to any false statement, whether written or oral, sworn or unsworn, its lack of requirement that a specific purpose for the falsification be shown, and its provision for up to 5 years' imprisonment, 18 U.S.C. § 1001 is a frequent basis for Federal prosecution. The statute proscribes generally any knowingly false statements made "in any matter within the jurisdiction of any department or agency of the United States." The penalty provided is as high as that for perjury for any lie knowingly made, even where no oath is taken, no official proceeding is under way, and no specific intent to defraud or mislead the government is proved. Nor does perjury's strict corroboration requirement (the "two-witness" rule—*see* paragraph 7, *supra*) apply to proof of this crime. The statute is

[26] *See* proposed sections 401 and 1003, respectively. If a general solicitation provision is not adopted, proposed section 1003 (1), (3) and (4) may be specifically adopted as a subornation of perjury statute, for inclusion in the perjury group of offenses.

used in preference to numerous other provisions in the U.S. Code which proscribe the making of false statements under specific circumstances involving government matters, most of which carry lesser penalties. (*See* the appendix, *infra.*) It may be noted that these discrepancies in the prescribed penalty for the same conduct were referred to in the House Judiciary Committee's Report supporting the need for the legislation creating this Commission. Other paradoxes exist in the fact that embezzlements of less than $100 in certain circumstances are punishable as misdemeanors (*see* 18 U.S.C. §§ 653–658), while the false statements made to cover up such embezzlements can be prosecuted under section 1001 as felonies. Indeed, many Federal fraud prosecutions can be—and are—based upon section 1001, avoiding the need for findings that all the elements of a fraud exist.[27] In short, the fact that all false statements can be prosecuted as felonies carrying 5-year penalties produces inconsistencies, paradoxes, and distortions in the Federal criminal law process, and constitutes an abdication by the Congress (to the prosecutors and the courts) of its

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[27] Proof of an intended fraud was an element in the predecessor of present 18 U.S.C. § 1001, but this element was eliminated for a specific reason:

> During the economic collapse of the 1930's the government, at an accelerated pace, began entering the field of economic reform and regulation. Jurisdiction over various parts of our economy was being delegated to innumerable Federal agencies. For a proper functioning of their regulative and reform power these agencies depended upon information supplied by the individuals and corporations with which they were dealing. The giving of false information to those agencies would, of course, seriously pervert their functions, making effective regulations impossible. However, a fatal defect in the existing law made punishment of such fraudulent activity very difficult. The forerunner of the present § 1001 proscribed the making of false pecuniary claims against the government, but not the supplying of false information. In 1934, largely at the request of the Secretary of the Interior to regulate 'hot oil' shipments, the defect was remedied when Congress amended the statute to substantially its present form. Obviously, the immediate and primary purpose in amending the old 'fraudulent claims' statute was to curtail the flow of false information to the newly created regulative agencies. Though the statute was drafted in broad inclusive terms, presumably due to the numerous agencies and the wide variety of information needed, there is nothing to indicate that Congress intended this statute to have application substantially beyond the purposes for which it was created. (*Freidman* v. *United States*, 374 F.2d 363, 366 (8th Cir. 1967)).

But the old 5-year penalty for fraud was retained, even though the statute was broadened. This high penalty, equivalent to that for perjury, has proved distressing:

> In fact, if we adopt a literal application of this statute, anything more than a casual social conversation with a Government employee would, without warning, subject the speaker to the possibility of severe criminal punishment. . . .
>
> Finally, we note that a literal application of the statute would completely remove the necessity for taking oaths. The numerous statutes authorizing investigative agencies to administer oaths would be rendered useless. Since the Judiciary is an agency of the United States Government, a strict application of this statute would remove the time-honored and now necessary formality of requiring witnesses to testify under oath. We simply cannot believe that Congress intended to supplant the existing perjury statutes and destroy the protections they afford. (Id. at 366–367.)

responsibility to make the discriminating judgments as to what maximum penalty attaches to certain wrongful conduct.[28]

The approach proposed for the new Code, reversing the present situation, is that the false statement offense of general applicability should be a minor one and that the occasions when deception is to be a felony should be specifically identified.[29] The premise for this approach, reflected in the many existing provisions where particular false statements call for minor penalties, is that not all false statements either create a potential for great harm or exhibit great dangerousness of the maker.[30] Accordingly, the false statements provision proposed for the new Code—section 1352—is a Class A misdemeanor.[31]

The deceptions which warrant felony penalties will be presented as separate specific offenses. One, perjury, is proposed here. Others will or may include: theft or attempted theft, forgery, draft evasion and other frauds in national defense matters, fraudulently obtaining citi-

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[28] In *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 46 (1952), the Supreme Court held that "some methods of attempting to evade taxes" would violate both specific tax exasion statutes and the general false statements provision, and a person could be charged with violation of either the specific or the general provision. But, though the *Beacon Brass* case dealt with a felony of willful tax evasion, note that under 26 U.S.C. § 7207 the submission of a knowingly false statement to tax authorities is a misdemeanor, whereas the same act is a felony under present 18 U.S.C. § 1001, the general false statements statute. *See also United States* v. *Diogo*, 320 F.2d 898, 902 (2d Cir. 1963): "The statutory pattern reveals that acts sufficient to constitute violation of . . . 18 U.S.C. § 1546 [knowingly false statements in documents required by immigration laws or regulations] will also constitute a violation of 18 U.S.C. § 1001;" *Bartlett* v. *United States*, 166 F.2d 920, 926–927 (10th Cir. 1948), holding the general false statements statute to proscribe acts covered by a provision proscribing, as a misdemeanor, false statements under the Emergency Price Control Act of 1942; *United States* v. *Tommasello*, 160 F.2d 348 (2d Cir. 1947), holding that issuance of a false prescription for drugs violates general false statement provisions and internal revenue provision; *United States* v. *Barra*, 149 F.2d 489 (2d Cir. 1945), holding that the knowingly false statement of a registering alien constitutes a felony under the general false statement provision, even though the presidential proclamation and regulations requiring the registration provide no penalty for a violation.

[29] This follows the recommendations of current proposals for reform of perjury law, such as those of the National Conference of Commissioners on Uniform State Laws (*see* note 8, *supra*); MODEL PENAL CODE §§ 241.2, 241.3, Comment at 138–145 (Tent. Draft No. 6, 1957); and the grading distinctions between perjury and false swearing proposed in current State Criminal Code revisions cited *supra*, note 1.

[30] *See* the appendix. For example, false statements proscriptions are common in the immigration laws, but the present statutes indicate no need to penalize false statements, even though intentional, above the misdemeanor level, unless a national emergency exists or the statement is made under oath (*see* 8 U.S.C. §§ 1185(a)(7), 1251, 1252, 1287, 1306(c), 1325, 1357).

[31] The same penalty distinction applies with respect to false reports to law enforcement authorities. False terroristic threats, causing significant public upset (bomb scares, for example), will be punished as felonies (*see* proposed section 1614). Where the false report is intended to divert law enforcement personnel, to facilitate another crime, as for example, an escape, the culprits will be punishable as accomplices or facilitators in the plotted crime (*see* proposed sections 401, 1002). But crank calls, or other forms of petty malice though they may cause government inconvenience, do not manifest great criminal culpability, and will be sufficiently penalized under the proposed section proscribing false reports to law enforcement officers.

zenship, fraudulently obtaining government credit, *etc.* While false statements may be the means in most such cases by which the deception is attempted or accomplished, other deceptive conduct will also be embraced by these offenses. (Specific offenses of parallel scope will deal with minor deceptions, *e.g.*, fraudulently obtaining a visa or passport.) The proposed general false statements provision will thus serve as a lesser-included crime in any situation involving a false written statement in which fraud or another intentional felony is charged but cannot be proved.

The application of the general false statements statute is broadened by the draft to include the judicial branch, which has been held not to be embraced by present 18 U.S.C. § 1001.[32] One consequence is that the statute can be a vehicle (in subsection (1)) for the lesser offense to perjury of false swearing in an official proceeding as to an *immaterial* matter. (*See* paragraph 3, *supra.*) In addition, it will embrace written false statements made to agencies of the judicial branch in administrative matters, such as in administering grand jury and petit juror selection and payments to attorneys under the Criminal Justice Acts and in dealing with its employees, expense vouchers, and the myriad other matters in which the courts may be involved.

10. *False Statements: Oral Statements and Law Enforcement Investigations.*—The proposed "false statement" statute, except for subsection (1) concerning statements under oath, deals only with written statements, records, and material objects. The draft deals with false oral statements not under oath in a separate section concerning false reports to law enforcement authorities. This is the only area in which the government may have to rely on oral information. But the apparent coverage of 18 U.S.C. § 1001 to include statements made to investigating authorities, whether they are oral statements or exculpatory denials, has caused judicial concern:[33]

> 'An inquiry might be made of any citizen concerning criminal cases of a minor nature, or even of civil matters of little consequence, and if he wilfully falsified his statements, it would be a violation of this statute. It is inconceivable that Congress had any such intent when this portion of the statute was enacted. A literal construction of a statute is not to be resorted to when it would bring about absurd consequences, or flagrant injustices, or produce results not intended by Congress.'

Indeed, judicial concern with possible over-extension of 18 U.S.C. § 1001 in this area has resulted in decisions that matters under investigation by Federal law enforcement investigators are not "within the

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[32] *See Stein* v. *United States*, 363 F.2d 587 (5th Cir.), *cert. denied*, 385 U.S. 934 (1966) (tax court an administrative body within the executive, not the judicial, branch of government); *United States* v. *Allen*, 193 F. Supp. 954 (S.D. Cal. 1961) (grand jury not a "department or agency" within meaning of 18 U.S.C. § 1001.)

[33] *Paternostro* v. *United States*, 311 F.2d 298, 303 (5th Cir. 1962), *quoting United States* v. *Davey*, 155 F. Supp. 175 (S.D. N.Y. 1957).

jurisdiction of any department or agency of the United States," in terms of the statute:[34]

> Though the giving of false information might have the effect of causing needless investigation, it does not pervert the agency's functions as envisioned by the purposes of the statute. The F.B.I. was only empowered to investigate the claim. This mere investigation of the claim caused no real corruption of its authorized activities.

The basic concern is that use of the statute by agents with the authority to investigate crime generally might subject persons to unlimited questioning, without the procedural safeguards that are afforded by grand jury investigations, or administrative safeguards afforded by the clear delineation of jurisdiction in other governmental agencies. Thus, in proposing a bill proscribing obstruction of communication of information regarding crime to a criminal investigator (18 U.S.C. § 1510), a congressional committee specifically declared:[35] "This committee wishes to make it clear that this legislation cannot be used by a federal investigator to intimidate or harass a potential witness or informant by reason of his giving false or misleading information about a criminal violation."

Subsection (3) of the proposed false statements section, therefore, explicitly declares the statute inapplicable with respect to information given during the course of an investigation into possible commission of a crime unless the declarant is lawfully obligated to give the information in an official proceeding or otherwise. Including information which the declarant is lawfully obligated to provide is necessary for those instances in which an agency suspecting some error, possibly deliberate, in information given to it in the normal course of its

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[34] *Friedman* v. *United States*, 374 F.2d 363, 366 (8th Cir. 1967), holding that the F.B.I., in investigating possible violations of criminal law, does not exercise governmental "jurisdiction" within the meaning of 18 U.S.C. § 1001; *see also Paternostro* v. *United States*, 311 F.2d 298 (5th Cir. 1962); *United States* v. *Moore*, 185 F.2d 92 (5th Cir. 1950), holding that a preliminary investigation by the Department of Labor, to determine whether an employer was engaged in interstate commerce so as to be subject to the substantive provisions of the Fair Labor Standards Act, is not a matter within the Department's jurisdiction, although such investigation is authorized by the Act; *contra*, *Brandow* v. *United States*, 268 F.2d 559 (9th Cir. 1959), concerning a false affidavit by a taxpayer exculpating an internal revenue agent under investigation; *Knowles* v. *United States*, 224 F.2d 168 (10th Cir. 1955), concerning oral statements to internal revenue agents investigating a taxpayer's returns; *United States* v. *Adler*, 380 F.2d 917 (2d Cir. 1967), affirming the conviction of a person who falsely reported an offense to the F.B.I. *See also Marzini* v. *United States*, 335 U.S. 895 (1948), upholding, by a 4–4 decision, a conviction based on unsworn oral statements to a department superior in a controversy over the prospective discharge of the defendant from government employment because of doubts as to his loyalty.

[35] HOUSE COMM. ON THE JUDICIARY, H.R. REP. No. 658, 90th Cong., 1st Sess., *in* 1967 U.S. CODE CONG. AND ADMIN. NEWS 2690. *See also* SEN. COMM. ON THE JUDICIARY (S. REP. No. 307, 90th Cong., 1st Sess.):

> [One witness] expressed the fear that the bill would vest in Government investigators a weapon which could be used to intimidate or harass potential witnesses by unjustly accusing them of obstructing or impeding criminal investigations by giving false or misleading information about criminal violations. However, . . . there is no possibility that the legislation would endow a Government investigator with the 'power to put the man he is talking to in jail' as the witness suggested.

business, has lawful authority to request supplemental information, or demand information under oath.[36] In such situations, if a person chooses to lie (rather than exercise any due process privilege to refuse to answer), he will be culpable under the proposed statute.

But there are certainly cases in which government investigatory resources are clearly misspent, and innocent reputations endangered, by malicious statements. In this sense, potential impairment of government operations and cost to the public can be quite as great as when false written statements are filed with an agency. The proposed section on false reports to law enforcement authorities would, therefore, unambiguously proscribe the giving of false information to Federal enforcement officials when the false information is given with intent to implicate another, or when the informant knows that the "information" he supplies concerns events which did not occur or that he knows nothing about. This would set penalties for malicious cranks or publicity seekers who substantially abuse Federal criminal investigating facilities. The proposed law enforcement provision which does not proscribe any more than this, includes a corroboration provision so that it is not open to use for the unjust harassment of suspects or witnesses, and is limited in penalty to the misdemeanor level.

11. *False Statements; Materiality; Intent; Corroboration; Retraction.*—Some reforms of false statement provisions suggest that, with respect to unsworn false statements, the requirement of proof of materiality of the statement may be omitted, but a requirement of showing an intent to mislead the public servant be added.[37] The proposal, however, tracks present law in this respect—maintaining a requirement of materiality, but imposing no burden on the prosecution to show an intent to mislead.[38]

A requirement of materiality is retained to avoid excessive exercise of governmental power, abusive inquiries by government agencies in areas in which they may have no jurisdiction. This requirement is not necessary if proof of the declarant's intent to mislead is an element of the crime, since ordinarily this intent "could not be shown unless the lie related to something to declarant recognizes to be material."[39]

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[36] As, for example, a request by internal revenue officials for supplemental information to confirm or clarify items in a tax return. The agency's general right to request such supplemental submissions is authorized by statute. 26 U.S.C. § 6001. *See also* 26 U.S.C. § 7602, authorizing internal revenue agents to demand information under oath. Further examples include 5 U.S.C. § 304(a), authorizing the head of any bureau or agency in which a claim against the United States is made to subpena any witness for testimony under oath, and, of course, rule 17 of the Federal Rules of Criminal Procedure, concerning the judicial power of subpena in criminal matters.

[37] *See* MODEL PENAL CODE §§ 241.2, 241.3, Comment at 125–126, 141–143 (Tent Draft No. 6, 1957).

[38] Though materiality appears literally to be required only in connection with the first clause of 18 U.S.C. § 1001, dealing with deception whether or not by false statement, it has been read into the whole statute as a general requirement applying to false statements, in *Friedus* v. *United States*, 223 F.2d 598, 601 (D.C. Cir. 1955); *Ebeling* v. *United States*, 248 F.2d 429 (8th Cir. 1957); *Rolland* v. *United States*, 200 F.2d 678 (5th Cir. 1953); *contra*, *United States* v. *Silver*, 235 F.2d 375, 377–378 (2d Cir. 1956).

[39] MODEL PENAL CODE §§ 241.2, 241.3, Comment at 126 (Tent. Draft No. 6, 1957).

But, since the rationale for the false statements statute is the harm to governmental processes which the making of knowingly false statements may cause, the proposal refrains from requiring proof of an affirmative intent to mislead. A knowingly false statement, made recklessly, without caring whether the statement may be important, or whether the government will, in fact, rely on it, nevertheless impairs governmental operations. Further, to prove intent comes close to proving felonious behavior, which will be dealt with in fraud and other statutes concerning specific felonies.

There may well be cases in which a knowingly false statement to the government would invoke no criminal sanction at all. But these sympathetic or *de minimus* situations are not necessarily excluded from the scope of the statute by using an intent test in preference to a materiality test. An ex-employer, for example, finding himself willing to help another and forget past mistakes, may write a glowing, but false, recommendation concerning the employee's competence for government service. In such a case, he intends to mislead the government concerning the employee's past ability, and his statement is material. Situations such as these are not readily definable, and must be left to prosecutorial or judicial discretion.

It should be noted that the proposed provision, in subsection (2)(b), does require proof of an intent to create a false impression in cases in which material information is *omitted* from an application for a government benefit. The proposed subsection covers those matters referred to in present 18 U.S.C. § 1001 as "conceal[ing] or cover[ing] up by any trick, scheme, or device a material fact." In cases of knowing omission, the possibility of honest mistake or simple desire to maintain personal privacy is too great to make criminal punishment available without limitation. Especially so since "when one considers the typical proceeding in court, administrative agency or legislative committee, or the way that government forms are usually drafted, there seems to be little danger of misleading the government by omission." [40]

The proposal further continues to follow present law by not applying perjury's special rules of corroboration to the false statements offense. In light of criticism of the "two-witness" rule in perjury cases (*see* paragraph 7, *supra*) there seems no reason to extend the rule to the false statements provision, to which it has not heretofore been applied. Moreover, since the proposed false statements provision will serve, in many cases, as a lesser crime to be charged when intent to defraud cannot be proved, adoption of the corroboration rule in false statement cases would lead to the anomaly of having a higher requirement of proof of the misdemeanor than for the felony.

However, the proposal does apply the retraction provision to the false statement crimes, as well as to perjury. The rationale for the rule is the same in all such cases. The prime interest of the government is in obtaining truthful information, and if a sincere retraction of a statement is obtained before the matter in which it is given is adversely affected by it, there is no need to prosecute the declarant. (*See* paragraph 5, *supra.*)

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[40] *Id.*, at 124.

APPENDIX

"FALSE STATEMENT" STATUTES IN PRESENT FEDERAL LAW

I. "False Statement" Statutes in Title 18

[Included in this table are statutes proscribing presentation of false statements to government agencies. Excluded are general theft and fraud proscriptions and statutes proscribing counterfeiting and forgery of government documents.]

Sections	
35	False report of crime concerning an attempt to destroy aircraft. Civil penalty or, if willful, and malicious: $5,000 fine and/or 5 years
43	False report of importation of wildlife contrary to governmental regulation: $500 and/or 6 months
152	False oath, account or claim in bankruptcy proceeding: $5,000 and/or 5 years
287	Presentation of a false claim against a Federal department or agency: $10,000 and/or 5 years
288	False claim for postal losses: $500 and/or 1 year or, if claim is for less than $100, fine only
289	False claims for veteran's pension: $10,000 and/or 5 years
494	Presentation of false or counterfeit bond, bid, proposal, contract guarantee, security, public record, affidavit or other writing for purpose of defrauding the United States: $1,000 and/or 10 years
495	Presentation of false contracts, deeds and powers of attorney with intent to defraud the United States: $1,000 and/or 10 years
499	Use of false military pass: $2,000 and/or 5 years
542	Importation of goods by means of false statements: $5,000 and/or 2 years
545	Presentation of false invoice or other document with intent to smuggle: $10,000 and/or 5 years
550	False claim for refund of duties: $5,000 and/or 2 years
954	False statement, under oath, in a dispute between the United States and a foreign government, with intent to injure the United States: $5,000 and/or 10 years
965	False statement for purpose of obtaining clearance for departure of ship from port, when United States is a neutral during war time: Ship forbidden to depart and cargo seized
1001	False statements, generally, to any department or agency of the United States: $10,000 and/or 5 years
1007	False statement to Federal Deposit Insurance Corporation: $5,000 and/or 2 years
1008	False statement to Federal Savings and Loan Insurance Corporation: $5,000 and/or 2 years

Sections	
1010	False statement in transactions concerning the Department of Housing and Urban Development and Federal Housing Administration: $5,000 and/or 2 years
1014	False statements in obtaining a Federally backed loan: $5,000 and/or 2 years
1015	False statement in naturalization proceeding: $5,000 and/or 5 years
1016	False acknowledgment by oath-taker of person's having taken an oath in any matter where it is required by the United States or a Federal department or agency: $2,000 and/or 2 years
1018	False certification by a public officer: $500 and/or 1 year
1019	False certification by a consular officer: $10,000 and/or 3 years
1020	False statement in connection with Federal highway projects: $10,000 and/or 5 years
1021	False certification of title record: $1,000 and/or 5 years
1022	False certification of receipt for military or naval property: $10,000 and/or 10 years
1026	False statement for the purpose of influencing Department of Agriculture concerning a compromise adjustment, or cancellation of farm indebtedness: $1,000 and/or 1 year
1027	False statements in relation to documents required by Welfare and Pension Plans Disclosure Act: $10,000 and/or 5 years
1542	False statement in application and use of passport: $2,000 and/or 5 years
1621–1622	Perjury and subornation of perjury: $2,000 and/or 5 years
1712	Falsification of postal returns, by postal employee, to increase compensation: $500 and/or 2 years
1722	False evidence to secure second class postal rate: $500
1732	False certification, by postmaster, of the bond of a bidder for a postal contract: $5,000 and/or 1 year, and dismissal
1917	False report or grading of civil service examination by civil service employee: $100–$1,000 and/or 10 days–1 year
1919	False statement to obtain unemployment compensation for Federal service: $1,000 and/or 1 year
1920	False statement to obtain Federal employee's compensation: $2,000 and/or 1 year
1922	False report by Federal employee concerning another employee's entitlement to compensation: $500 and/or 1 year
2071	Falsification of Federal government records by employee who has custody of them: $2,000 and/or 3 years, and dismissal
2072	False crop reports by government employees: $5,000 and/or 5 years

Sections	
2073	False accounts of moneys and securities by Federal employees: $5,000 and/or 10 years
2074	False weather reports: $500 and/or 90 days
2235	Malicious procurement of search warrant: $1,000 and/or 1 year
2386	False statement in registration of subversive organization: $2,000 and/or 5 years
2424	False statement by person harboring alien prostitute: $2,000 and/or 2 years

II. "False Statement" Statutes in the United States Code Outside Title 18

Title 7 Agriculture

Sections	
60	Falsification or forging of certificates of classification of cotton standards: $1,000 and/or 6 months
85	False and misleading samples, descriptions of grain by grain inspector: $1,000 and/or 1 year
473	False information from owner or officer of cotton warehouse to Department of Agriculture: $1,000
503	False report to Department of Agriculture on amount of tobacco on hand: $1,000 and/or 1 year
615(b–3)(3)	False statement in application for issuance of tax-payment warrant: $5,000 and/or 5 years
953	False statement or report as to amount of peanuts owned and processed: $1,000 and/or 1 year
1156	False information to Secretary of Agriculture by those in sugar industry: $1,000
1373	False information to Secretary from buyers and carriers dealing in grains, peanuts, tobacco: $500
1380o	False reports about rice: $2,000
1622h	Official's false making of official certificate, mark, *etc.*, when commodity has not been so graded: $1,000 and/or 1 year
1642(c)	False record dealing with wheat stabilization: $1,000
1903	Suppliers of livestock not to report falsely to agency during national emergency: $10,000 and/or 5 years

Title 8 Aliens and Nationality

Sections	
1185(a)(7)	False permit when President has declared national emergency: $5,000 and/or 5 years
1252(d)	False information by deportable alien in regard to information required of him: $1,000 and/or 1 year
1287	False representation by ship's officer that illegally entering alien is bonafide crew member: $5,000
1306(c)	False registration of alien: $1,000 and/or 6 months
1325	False statement to obtain entry to United States: $500 and/or 6 months—first offense: $1,000 and/or 2 years
1357	False statement, under oath, with respect to entry into the United States: Perjury penalties

Title 11 Bankruptcy

Section

205(p) False statement with regard to receivership proceeding against railroad: $10,000 and/or 3 years (unless person proves no knowledge of rule)

Title 13 Census

Sections

221 False answer in census survey: $500 and/or 1 year

224 False answer regarding company, religious body and organization: $10,000 and/or 1 year

Title 15 Commerce and Trade

Sections

50 False report to FTC: $5,000 and/or 3 years

77yyy False statement to SEC concerning trust indentures: $5,000 and/or 5 years

78ff False statement in application to become broker: $10,000 and/or 2 years; if an exchange: $500,000

79z–3 False statements to SEC concerning public utility holding company: $10,000 and/or 2 years; if holding company: $200,000

80a–33 False statements to SEC concerning investment companies: $10,000 and/or 2 years

645 False statement to obtain loan, extension, anything of value (Reconstruction Finance Corp.): $5,000 and/or 2 years

714m Over valuation of security or false statement to obtain money or value and influence the Corporation (Commodity Credit Corporation): $10,000 and/or 5 years

905 False statement in applying for license for firearm: $2,000 and/or 5 years

Title 16 Conservation

Sections

371 False oath as to financial condition to use free bathhouse at National Park: $300 and/or 60 days

776b False report to International Pacific Salmon Fisheries Commission on number of fish (salmon) caught: $1,000 and prohibition from fishing

831t False entry or report to defraud Corporation (TVA): $10,000 and/or 5 years

916e False report on whaling operations to International Whaling Commission: $500 and prohibited from whaling

Title 17 Copyrights

Section

18 False affidavit to obtain registration of a claim to a copyright: $1,000 and forfeiture of rights under the copyright

Title 19 Customs Duties

Sections

1436 False document on entry of vessel: $5,000 and/or 2 years

1581(c) False papers to examining customs officer: $5,000

1919 False statement to influence Secretary of Commerce or to obtain money or value (tariff adjustment): $5,000 and/or 2 years

1975 False statement to increase payment or assistance authorized under section 1971: $1,000 and/or 1 year

Title 21 Food and Drugs

Sections

188–1 False statement in application for license to produce opium poppy: $2,000 and/or 1 year

461 Falsifying official inspection certificate of poultry: $3,000 and/or 6 months—1st offense: $5,000 and/or 1 year—2nd offense: then $10,000 and/or 2 years

515b False statement regarding manufacturing of narcotic drugs: $2,000 and/or 1 year

Title 22 Foreign Relations and Intercourse

Sections

618 False statement in registering as agent of foreign principal, or falsifying record that registered agent is required to keep: $10,000 and/or 5 years; Alien: deportation sections 1251–1253 of Title 8

1200 Consul's false certification that foreigner's property belongs to United States citizen: $10,000 and 3 years

1203 False statement and perjury to any foreign officer authorized to perform notarial acts: $3,000 and 3 years

Title 26 Internal Revenue Code

Sections

5601 False application by distiller and false bond by distiller: $10,000 and/or 5 years

5603 False entry in required documents: $10,000 and/or 5 years

7204 False statement dealing with employees deductions and withholdings: $1,000 and/or 1 year

7205 False information to lower tax: $500 and/or 1 year

7206 Perjury and falsification of documents required by the Internal Revenue Service: $5,000 and/or 3 years

7207 Delivery of and false information in returns and documents to the Secretary: $1,000 and/or 1 year

7232 False statement by manufacturer of gasoline: $5,000 and/or 5 years

7241 False certification of American ownership in connection with equalization tax: $1,000 and/or 1 year

7263	False statement to Secretary of Agriculture regarding dealings in cotton futures: $500

Title 29 Labor

Sections

439	False statement or entry in records required of labor organizations and employers: $10,000 and/or 1 year
461(d)	False report concerning labor union trusteeships: $10,000 and/or 1 year

Title 30 Mineral Lands and Mining

Section

689	False statement to procure payment in lead and zinc stabilization program: $5,000 and/or 2 years

Title 31 Money and Finance

Section

231	False claim to defraud United States government: $2,000, forfeiture, and double the amount of damages caused

Title 33 Navigation and Navigable Waters

Sections

931	False statement to obtain payment under longshoreman's compensation: $1,000 and/or 1 year
990	False entry to defraud St. Lawrence Seaway Corp.: $10,000 and/or 5 years
1008	False statement to St. Lawrence Seaway Corp. concerning oil discharge: $1,000 and/or 6 months

Title 38 Veterans' Benefits

Section

787	False statement in application for or in claims under United States government life insurance: $1,000 and/or 1 year

Title 39 Postal Service

Sections

2210	False statement by postmaster: withholding of compensation
6419(c)	False statement by surety on bond of bidder for transportation of mail: $10,000 and/or 5 years

Title 42 Public Health and Welfare

Sections

408	False statement for payment under Federal Old-Age, Survivors, and Disability Insurance Benefits: $1,000 and/or 1 year
1307	False representation to get information, about an individual: $1,000 and/or 1 year

1368	False statement for increase in unemployment compensation for Federal employees: $1,000 and/or 1 year
1400f, s	False statement for payment under temporary Unemployment Compensation Program: $1,000 and/or 1 year
1713	False statement in application for payment or claim filing for injury or death of employees of contractor of United States: $1,000 and/or 1 year
2515	False statement to obtain financial assistance under area redevelopment program: $10,000 and/or 5 years

Title 43 Public Lands

Sections	
1191	Falsifying instrument concerning land and minerals in California in order to make claim against United States: $10,000 and 10 years
1192	Falsifying evidence of title under Mexican authority to lands in California in order to make claim against United States: $10,000 and 10 years
1193	False evidences of title to land in California in order to make claim against United States: $10,000 and 10 years

Title 45 Railroads

Sections	
228m	False statement or report for payment under railroad retirement plan: $10,000 and/or 1 year
359	False statement for payment under railroad unemployment insurance: $10,000 and/or 1 year

Title 46 Shipping

Sections	
22	False oath as to citizenship in registering: $1,000
58	Officer making false certificate of registry or false description of vessel to be registered: $1,000
91	False manifest by master of vessel bound to foreign port without clearance: $1,000; if narcotics or alcohol: $5,000
170(13)	Falsely sworn information to customs officer that a ship is carrying dangerous substances: perjury penalty
229e	Oath by applicant for license for radio telegraph operator—If false, perjury: $2,000 and/or 5 years
231	False statement under oath for license as ship's officer: $2,000 and/or 5 years
239(i)	Inducing witness to testify falsely in connection with a shipping casualty: $5,000 and/or 1 year
321	False description of vessel to be enrolled or licensed: $500
403	False certification by inspector of steam vessel: $500 and/or 6 months

408	Affixing of false stamp on boiler plate which is authorized by Coast Guard official: $5,000 and/or 5 years
410	False stamping of plates subject to inspection: $2,000 and at discretion of court 2 years
643(G)	False statement in seaman's application for certificates of identification: $1,000 or 1 year
672(d)	If person gives false statement to cause muster of crew it is perjury: $500 and/or 1 year
820	False report filed with Federal Maritime Board: $1,000 and/or 1 year
838	False statement to customs collector as to bill of sale of vessel: $5,000 and/or 5 years
839	False statement for Secretary of Commerce's approval of licensing of vessel or transfer of shipping facilities during national emergency: $5,000 and/or 5 years
1171(b)	False statement under oath as to need for operating—differential subsidy: misdemeanor
1277	False statement to get credit to offer Secretary of Commerce for insurance or extension of loan: $10,000 and/or 5 years; if corporation $25,000

Title 47 Telegraphs, Telephone and Radio Telegraphs

Section

220	False entry in documents required to be kept by FCC: $5,000 and/or 3 years

Title 49 Transportation

Sections

20	False entry in accounts and false reports which are filed with the ICC: $5,000 and/or 2 years
322(g)	False report to ICC involving motor carrier: $5,000
917(d)	False reports to ICC by water carrier: $5,000
1021(d)	False report to ICC by freight forwarder: 5,000
1118	False statement or report as to quality or cost of material used in projects (airport development) to defraud United States: $10,000 and/or 5 years
1472(e)	False report by air carrier: $5,000
1472(m)	False information concerning aircraft piracy, interference with flight crew members, crime aboard aircraft, and carrying weapons on aircraft: $10,000 and/or 1 year If willful and malicious: $5,000 and/or 5 years

Title 50 War and National Defense

Sections

210	False representation to get license for transportation of goods into State in insurrection: $5,000 and/or 3 years
794(b)	False statement in registration statement or annual report to Subversive Activities Control Board: $10,000 and/or 5 years

855(a)		False statement in registration statement of persons trained in foreign espionage systems: $10,000 and/or 5 years

Title 50 Appendix

Sections

19		False statement in affidavit in connection with translations dealing with newspapers or publications in foreign language: $500 and/or 1 year
462(a)		False statement or classification under Selective Service System: $10,000 and/or 5 years
(b)		Use of false certificate or statement to violate Act: $10,000 and/or 5 years
520		False statement in affidavit under Soldiers' and Sailors' Civil Relief Act: $1,000 and/or 1 year
1191(C)	(5)(a)	False information or record by contractor or subcontractor under War and Defense Contract Act: $10,000 and/or 1 year
1193(h)		False information dealing with renegotiation of airplane contracts: $10,000 and/or 1 year
1215(e)(1)		False financial statement to Renegotiation Board by those holding defense contracts: $10,000 and/or 1 year
2255		False swearing in loyalty oath under Civil Defense: $1,000 and/or 5 years

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COMMENT

on

OFFICIAL BRIBERY: SECTIONS 1361–1365, 1368, 1369 (Dean, Green; June 11, 1968)

Official Bribery: Section 1361

1. *Introduction: Background and Advantages.*—Section 1361 penalizes bribery of persons engaged in government service. The title "official bribery" is used to distinguish the offense in section 1361 from bribery of persons engaged in nongovernmental activities,[1] which will be covered elsewhere in the proposed new Code.

Official bribery is presently punishable under sections 201(b), (c), (d) and (e) of Title 18.[2] This basic statute was adopted in 1962 when Congress revised the bribery and conflicts of interest chapter of Title 18. The 1962 revision combined into a single section, section 201, the numerous bribery prohibitions of Title 18 relating to persons engaged in government service. This consolidation and standardization rendered the provisions in Title 18 dealing with official bribery and penalties uniform. Note, however, that the 1962 revision was restricted to Title 18. There are a number of statutes with varying elements and penalties scattered throughout the United States Code prohibiting bribery of specified officers and employees of the government.[3] It is recommended that these statutes be repealed as they are unnecessarily duplicative, outdated and inconsistent with the proposed comprehensive section 1361.

The recently revised 18 U.S.C. § 201 represents a great improvement over the pre-1962 laws covering official bribery. Nevertheless, there are many additional improvements that should be made in the law. Proposed section 1361 embodies these improvements, which are summarized as follows:

(a) Gaps and arbitrary distinctions in prohibiting bribes paid or arranged before a public servant assumes office are eliminated.

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[1] *E.g.*, bank officers and employees (18 U.S.C. §§ 215 and 216), sporting contests (18 U.S.C. § 224), and commercial bribery (27 U.S.C. § 205(c)).

[2] 18 U.S.C. § 201 is severable into two parts: (b), (c), (d) and (e) dealing with official bribery, and (f), (g), (h) and (i) dealing with unlawful rewards. The proposed new Code will treat unlawful rewards in section 1362.

[3] 7 U.S.C. § 85 (grain inspectors), 7 U.S.C. §§ 473c–1 and –2 (cotton samplers), 7 U.S.C. §§ 511i(d) and 511k (tobacco inspectors), 18 U.S.C. § 152 (bankruptcy proceeding), 18 U.S.C. § 217 (officers or employees of Department of Agriculture engaged in adjusting farm indebtedness), 18 U.S.C. § 1912 (officers or employees of U.S. engaged in inspecting vessels), 19 U.S.C. § 1620 (*re* customs informers), 21 U.S.C. § 90 (meat inspectors), 33 U.S.C. § 447 (navigation inspectors) and 46 U.S.C. § 239(i) (witnesses in marine casualty investigations).

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(b) The burden on the prosecution is lightened by eliminating the necessity of proving the bribe recipient's status at the time of the bribe.

(c) The element of the existing law which merely requires an intent to influence has been replaced by a requirement of intent that official conduct be "as consideration for" the bribe, but a prima facie case of the latter is made when the thing of value passes or is to pass between persons who should be dealing at arm's length.

(d) Log-rolling is dealt with realistically by virtue of the definition of "thing of value" in section 1369, excluding legitimate compromises among public servants from the strictures of criminal bribery law.

(e) Unnecessary duplication has been eliminated. For example, the paragraph of 18 U.S.C. § 201(b)(2) prohibiting bribery to cover up a government fraud is deleted since it will be covered either by the principal official bribery provision or specific provisions of the proposed Code dealing with fraud and complicity. (*see, e.g.* section 1732.)

(f) The requisite mental state necessary to violate the prohibition has been clarified by using the term "knowingly," which has been defined in the new Code, in place of the uncertain and undefined term "corruptly," which is used in the existing law.

(g) The existing inconsistent provisions and the anomalous penalties of the various official bribery laws presently scattered outside Title 18 would be replaced by the proposed section 1361.

2. *Relationship to Existing Law.*—Proposed section 1361 considerably simplifies and clarifies existing law. In part, simplification has been made possible by reason of section 102 of the new Code, which modifies the rule of strict construction. Simplification has also been accomplished by increased use of definitions as substitutes for lengthy phrases which are repeated throughout the statute.

New definitions have been added to codify and clarify existing law. For example, "thing of value" is defined in section 109(ac) as including "a gain or advantage or anything regarded, or which might reasonably be regarded, by the beneficiary as a gain or advantage, including a gain or advantage to any other person."* A collateral effect of defining anything of value in such a manner is further simplification of the statute by eliminating such phrases as now found in the existing law to cover indirect recipients, *i.e.*, "an offer or promise [to] any public official . . . to give anything of value to any other person or entity."

The most significant changes in the existing law are the elimination of the need to define the bribe recipient in terms of his status at the time of the bribe (*see* paragraph 4, *infra*), and the incorporation of a prima facie case that certain gratuities are tantamount to bribes unless the defendant can prove that the gift was not in fact a bribe. (*See* paragraph 8, *infra.*)

3. *Classes of Persons Covered: Public Servants.*—The proposed section 1361 is concerned with essentially the same conduct as is cov-

* The effect of the interaction between the general definition in section 109 and the definition in section 1369 applicable to sections 1361 through 1367 is that in section 1369 "thing of value" includes any gain or advantage except regular compensation and legitimate compromise.

ered by existing Federal law. This is defined by the proposal in terms of the "recipient's official action as a public servant" in section 1361(1)(a) and the "known legal duty as a public servant" in section 1361(1)(b). "Official action" is defined in section 109(u) and discussed in paragraph (9), *infra*, of this comment. "Known legal duty," discussed in paragraph (10), *infra*, of this comment, is not specifically defined because of the variety of its forms.

"Public servant" is defined generally in section 109(x) and includes the following persons engaged in serving the "government:"[4]

(a) *Officers of a government.*—Examples of government officers run from the President of the United States to a United States Army lieutenant and countless others: Cabinet Members, department heads, regulatory commission members, United States Commissioners, FBI agents, Internal Revenue agents, Immigration Inspectors, and Postal Inspectors—to mention but a few. As is true under present law, any person appointed by the President, appointed by a Cabinet Member, department or agency head, or appointed by a Federal court, is an officer of the government.[5] Note that Members of Congress and State legislators, Resident Commissioners, judges, and jurors are officers of the government, and are specifically mentioned in the definition to illustrate the term's comprehensiveness and its extension beyond the executive branch.

(b) *Employees of a government.*—The inclusion of government employees follows the present law and means that however lowly the public servant's position may be, his conduct must be free from the corrupt influence of bribery. As one court has observed:[6]

> Final decisions frequently, perhaps generally, rest in large part upon the honesty and efficiency of preliminary advice . . . [H]onesty at the top is not enough; it must begin at the bottom and run through the whole service.

(c) *Persons authorized to act for or on behalf of a government.*—This category includes persons charged with a responsibility for carrying out governmental orders, even though they may not be paid directly for such services by the Federal government. Examples of such agents drawn from cases interpreting the similar provision of existing Federal law include: an examining physician appointed by a local Selective Service Board;[7] an examining surgeon appointed by the Commissioner of Pensions;[8] an employee (who was also an agent of New York State) of the Market Administrator for the New York Metropolitan Area;[9] and civilian employees of the European

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[4] The term "government" is defined generally in proposed section 109(h) so as to include both Federal and local government. "Local" is defined in section 1368(2) to mean any unit of government within the territory of the United States, other than the United States government, thereby covering State, county, municipal and parish governments as well as those of territories and possessions of the United States (*e.g.*, Puerto Rico, Guam, Samoa, Virgin Islands).

[5] *United States* v. *Davis*, 80 F. Supp. 875 (M.D. Tenn. 1948); *see also United States* v. *Mouat*, 124 U.S. 303 (1888).

[6] *Sears* v. *United States*, 264 F. 257, 261 (1st Cir. 1920).

[7] *Kemler* v. *United States*, 133 F. 2d 235 (1st Cir. 1943).

[8] *United States* v. *Van Leuven*, 62 F. 62 (N.D. Iowa 1894).

[9] *United States* v. *Levine*, 129 F. 2d 745 (2d Cir. 1942).

Exchange System which operated facilities for European based servicemen for the Department of the Army.[10]

Several of the modern State Criminal Codes specifically include advisers and consultants when they are performing governmental functions.[11] The Federal government frequently uses or employs such advisers and consultants,[12] but specific definition is unnecessary. Such persons would be covered under the proposed definition of a public servant whenever they are acting "for or on behalf of" the government. There appears to be no reason to extend coverage of advisers and consultants beyond those occasions when they are serving as government agents, for to do so would result in their being subject to prohibitions which cannot properly be extended to persons serving the government in such a capacity. For example, advisers and consultants who are retained by the government, but also continue to receive compensation from a nongovernmental entity, would not be acting in violation of the proposed provision unless they were also charged with conflicting responsibilities under their duties to act "for or on behalf of" the government. This would depend on the circumstances in a given case. Accordingly, the proposed section is comparable in coverage to the aforementioned State Criminal Codes.

The requirement under section 109(x) that agents be "authorized to act for" the government is an abbreviated statement of the present law which requires that they act "under or by authority of any . . . department, agency or branch of government." It does not appear necessary that such authority be specified by statute, rule or regulation. It is intended to include inherent or established practices. Such authority may be delegated from an employee or officer of the government to an agent. It is not a defense that a person "authorized to act for or on behalf of the government" has exceeded his authority, nor is it necessary that such an agent be engaged in an official function to be within the statute.

(d) *Jurors.*—Following present law, jurors are included in section 109(x).

4. *Classes of Persons Covered: Status at Time of Bribe.*—Some of the gaps and difficulties one finds in existing Federal law on official bribery result from the approach the statute takes in defining the status or capacity of the bribe recipient at the time the bribe is offered or solicited. Clearly, a basic Federal interest exists in prohibiting corrupt action by the recipient when he actually occupies the position of a public servant. To fully effect this basic interest, it is necessary to

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[10] *Harlow* v. *United States*, 301 F. 2d 361 (5th Cir.), *cert. denied*, 371 U.S. 814 (1962).

[11] *E.g.*, MICH. REV. CRIM. CODE § 4501(c) (Final Draft 1967); PROPOSED DEL. CRIM. CODE § 708(4) (Final Draft 1967); and MODEL PENAL CODE § 240.0(7) (P.O.D. 1962).

[12] For example: the Presidential Transition Act of 1963, Pub. L. No. 88-277, § 3(a)(3), 78 Stat. 153, authorized the President-elect to hire consultants and experts: 15 U.S.C. § 637(b)(13), *as amended* (Supp. IV, 1963), authorizes Small Business Advisory Boards and Committees: 22 U.S.C. § 2386 authorizes employment of consultants and experts to carry out the Foreign Assistance Act; 42 U.S.C. § 2036 (1964) creates a General Advisory Committee to the Atomic Energy Commission; 42 U.S.C. § 2039 creates an Advisory Commission; 42 U.S.C. § 2039 creates an Advisory Committee on Reactor Safeguards to the Atomic Energy Commission; 50 U.S.C. APP. § 2272 creates a Civil Defense Advisory Council.

extend the prohibition to bribes (a) offered or solicited prior to the time the recipient has attained that position and (b) regardless of any mistaken notion as to whether the recipient is or will be qualified to act as intended.

With regard to defining the time when the prohibition applies, the approach of existing law is to try to define the status of the recipient in terms of some event signifying how close he has come to actually occupying a government position. For example, bribery of a "public official" is prohibited when he has been "selected to be a public official," which is defined in 18 U.S.C. § 201(a) as when he "has been nominated or appointed" or "officially informed that he will be so nominated or appointed." A Member of Congress, who is a "public official" under the definition, is covered either "before or after he has qualified." Such provisions are obviously ambiguous. What constitutes being "officially informed?" Does a Member of Congress "before qualification" mean only a Member-elect? [13]

These provisions are also unnecessarily arbitrary in distinguishing between potential office holders. They prohibit bribery of persons nominated for appointive office, but not those nominated for elective office. Many legislators nominated to run for office in a one party district—not to mention those who run without opposition—are as certain of holding office as the nominee for appointive position. Many potential appointees have an "inside track" or are "unofficially" informed that they will be appointed to Federal office and are certainly as vulnerable to bribery as the person who is "officially" informed prior to appointment.

Proposed section 1361, by virtue of section 109(x), avoids these problems by taking the view that there is a Federal interest in punishing bribery regardless of how remote the contingency may be that the bribe recipient will occupy the position in which he can effect the intended action. This is accomplished by defining the bribe receiver merely as "another [person]" and focusing on the fact that the bribe has been offered or solicited for his official action "as [when or if he becomes] a public servant." Thus, the prohibition under section 1361 would cover, as it is believed it should, bribes offered or solicited by persons at a point when they are merely seeking a public office in which, if they are successful, they could exercise an improper influence.

This approach is made explicit in section 1361(2) which provides that it is no defense that "the recipient was not qualified to act in the desired way whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason." This provision also makes it explicit that the corrupt intent, coupled with the bribe offer or solicitation, is to be punished, regardless of whether the recipient is able, even as a public servant, to accomplish the intended result. This result is consistent with existing law.

This new approach has made it possible to greatly simplify the definition of public servant by eliminating language relating to the pre-qualification or pre-appointment status, and will greatly—and properly—lessen the burden on the prosecutor of establishing the statutory status of the bribe recipient at the time of the bribe.

5. *Persons Not Covered: Voters.*—Consideration was given to in-

[13] *See* 18 U.S.C. §§ 203 and 204, which apply to a "Member of Congress elect."

cluding voters in Federal elections under the proscriptions of section 1361 by inclusion in section 109(x). Bribery of voters is presently covered by section 597 of Title 18 (expenditures to influence voting). However, bribery of voters raises unique problems which require separate treatment. For example, an election contest usually involves promises or offers of benefits to the voters. Such a promise might involve a technical violation of bribery law unless the law were drafted with a number of exceptions which might unknowingly create new gaps in the law's coverage. Also it is unrealistic to believe that a person charged with bribing a voter has only bribed *one* voter. Thus, the statute should be drafted to account for such behavior and the grading should be designed to provide an appropriate sanction for such conduct. Reasons such as these have led to separate treatment of voter bribery. (*See* the proposed sections of the new Code dealing with election laws.)

Similarly, bribery of witnesses and informants raises special issues requiring separate treatment. (*See* sections 1321 and 1322). Although witnesses (but not informants) are presently covered by 18 U.S.C. § 201, it will be noted that the statute in effect gives them independent treatment. (*See* 18 U.S.C. § 201 (d), (e), (h), (i), (j) and (k)).

6. *Prohibited Conduct: Giving or Accepting a "Thing of Value;" Log-rolling.*—The offering, giving, soliciting, accepting or agreeing to give or accept an extraneous inducement constitutes the gravamen of official bribery. Proposed section 1361 uses the phrase "thing of value" to designate such an inducement which is virtually the same as the existing law—"anything of value." When Congress adopted this phrase in the 1962 revision it was noted that "the words 'anything of value' comprehend anything that conceivably can be offered or given as a bribe."[14] Explicit definition of "thing of value" has codified its meaning; and, by its being placed in a separate definitional section, the proposed bribery provision itself has been shortened and simplified. For example, the references appearing throughout the existing statute to "directly or indirectly" giving or giving "to any other person or entity" are deleted by reason of the new definition in section 109(ac) (which includes any gain or advantage to any other person) and by the clear import of the language of section 1361. (*See also* proposed section 102 dealing with fair construction of the proposed Code.)

The problem of using the phrase "thing of value" is that its breadth[15] prohibits and makes criminal "log-rolling," (*i.e.*, trading

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[14] HOUSE COMM. ON THE JUDICIARY, BRIBERY, GRAFT, AND CONFLICTS OF INTEREST, H.R. REP. No. 748, 87th Cong., 1st Sess. 18 (1961). The phrase "anything of value" or "thing of value" is used frequently in Title 18; *see, e.g.*, 18 U.S.C. §§ 210, 211, 214, 215, 491, 591, 603, 607, 611, 875–877, 912, 915, 1025, 1081, 1954, 2111, 2113, 2386.

[15] The Federal courts have had only limited occasion to determine the applicability of this phrase (or the similar phrases—"valuable thing" and "thing of value")to nonmonetary or nonpecuniary offers or exchanges. *See e.g., United States* v. *Lepowitch*, 318 U.S. 702 (1943). Nevertheless, identical language has been used in State bribery statutes and interpreted to have extremely broad application. For example, the Ohio Supreme Court found its bribery statute applicable to a police officer who solicited sexual relations with a young lady in turn for overlooking illegal behavior by her father. *Scott* v. *State*, 107 Ohio St. 475, 141 N.E. 19 (1923). A New York court found an alderman had received a "thing of value" under his agreement to vote for a new street cleaning plant if the Commissioner of Street Cleaning would reinstate an employee. *People ex rel, Dickinson* v. *VanDeCarr*, 87 App. Div. 386, 84 N.Y. Supp. 461 (1903).

votes and favors by public officials and legislators). This raises the question of whether it is realistic to make such bargaining, which frequently occurs in the legislative and quasi-legislative process, criminal. Such accommodation may be essential to the processes of government, such as when Senator *A* votes for Amendment No. 1 in return for Senator *B*'s vote for Amendment No. 2. Even where such political or other compromises cannot be regarded as essential, they must be recognized as a frequently used technique to bring persons of different views together in order to achieve necessary action.

The following methods of handling this problem in a bribery statute have been considered:

(a) *Draft a specific exemption for log-rolling.*—The drafters of the Model Penal Code attempted to draft such an exemption, but ultimately rejected this approach "because such an explicit exception might be interpreted as an affirmative approval of log-rolling and similar practices, and because of the difficulty of drafting a proper line of separation between the criminal or exempt activities." [16] It is also difficult—if not impossible—to determine what classes of persons should be exempt: just legislators? or legislators and administrators in quasi-legislative activities? How about the Chief Executive? His Deputy? Delegates to the United Nations? Members of the Federal Reserve Board? Members of special governmental commissions?

(b) *Draft no specific exemption for log-rolling with the realization that prosecutions for such technical violations of the bribery law are very unlikely.*—This is the approach of the existing Federal law which technically makes log-rolling criminal. It will be noted that there has never been a Federal prosecution for log-rolling under the bribery laws and it is very doubtful that the Department of Justice would ever institute such a suit absent flagrant conduct extending beyond the normal give and take of compromise. However, failure to provide a specific exemption for log-rolling in section 1361 would result in the Commission recommending a law imposing a criminal sanction on conduct which is currently tolerated and often desirable. Failure to provide an exemption also raises the potential for pernicious application of the proposed statute.

(c) *Define the inducement of bribe in terms that will not encompass the quid pro quo of log-rolling.*—For example, if the bribe is defined in pecuniary (as opposed to nonpecuniary) terms, a prohibition against giving or receiving a *pecuniary* benefit to influence the recipient's official action would not include the nonpecuniary bargaining of log-rolling. This approach has been endorsed by the Model Penal Code and proposed in the final draft of the Michigan Revised Criminal Code. The fact that all the reported Federal official bribery cases have involved pecuniary inducements suggests that substitution of the term "pecuniary benefit" for "anything of value" would not result in a significant change from the present law.

Even though this last approach might not represent a significant departure in fact from the operation of the present law, in theory (and potential application of the statute) it is a radical departure. To limit the nature of the bribe to pecuniary inducements creates as many

[16] MODEL PENAL CODE § 208.10, COMMENT at 104–05 (Tent. Draft No. 8, 1958).

problems as it solves in that officers, employees, agents, jurors, advisers and consultants of the government could never be bribe recipients if the inducement for corrupt conduct was nonpecuniary. Thus, a college administrator seeking government funds could not be prosecuted if he promised a grant-making Washington official that such official's dropout son would be admitted to that college. There is an abundance of conceivable examples of such gaps arising from limiting the bribe to pecuniary inducements.

This is not to say that bribery cannot be defined in a manner that exempts log-rolling without exempting others who should be fully covered. Proposed section 1369, in conjunction with section 109(ac) defines the bribe, *i.e.*, anything of value, in terms of any gain or advantage to the beneficiary, but excludes concurrences in official action in the course of legitimate compromises among public servants from being considered as a gain or advantage. This definition of the bribe will preclude application of the proposed bribery statute to bargaining among public servants, without creating unnecessary gaps.

7. *Bribes "As Consideration For" Official Action.*—Existing law defines official bribery as "corruptly" giving anything of value "with the intent to influence" or "induce" the prohibited action. Use of the word "corruptly" has two effects: first, it broadly defines the requisite state of mind,[17] and, secondly, it distinguishes gifts from bribes.[18] Proposed section 1361 does not require that the intention of the bribe giver be "corrupt." The characterization of an offer as corrupt is nondescriptive, ambiguous and unnecessary to establish the improper intentions of a person.[19]

In place of the word "corrupt," proposed section 1361 seeks to define the prohibited conduct more accurately and to distinguish by definition bribes from gifts given with a mere hope of influencing official action. This is accomplished by defining the offense in terms of an exchange "knowingly" given "as consideration for" the recipient's conduct. "Knowingly" means that the actor was aware of his conduct, *i.e.*, the thing of value was offered or solicited with either a tacit or express understanding or purpose at the recipient engage in certain conduct. Thus, the phrase "as consideration for" means that the inducement is offered or given in exchange for the recipient's decision, opinion, recommendation, vote or other exercise of discretion as a public servant or for violating his known legal duty.

It will be noted that the phrase "as consideration for" and variants of this phrase have been similarly used in many existing provisions of Title 18. For example, 18 U.S.C. § 205 prohibits officers and employees of the government from receiving any gratuity "in consideration of" assistance in the prosecution of a claim against the United States:

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[17] H.R. REP. No. 748, 87th Cong., 1st Sess. 18 (1961), states: "The Word 'corruptly'... means with wrongful or dishonest intent."

[18] 18 U.S.C. § 201(b), (c), (d), and (e) require proof of corrupt intent, while (f), (g), (h), and (i) require no such proof. *See United States* v. *Kenner*, 354 F. 2d 780, 785 (2d Cir. 1965), *cert. denied*, 383 U.S. 958 (1966), and *United States* v. *Irwin*, 354 F. 2d 192 (2d Cir. 1965), *cert. denied*, 383 U.S. 1967 (1966).

[19] "The word 'corrupt' is capable of different meanings in different connections." *Bosselman* v. *United States*, 239 F. 82, 86 (2d Cir. 1917); *United States* v. *Cohen*, 202 F. Supp. 587, 588 (D. Conn. 1962). Criminal states of mind are treated in proposed section 302 of the new Code.

18 U.S.C. §§ 210 and 211 prohibit the payment of anything of value "in consideration of" support or influence in obtaining appointive office; and 18 U.S.C. § 600 prohibits the promise of employment, compensation, or other benefit made possible by any Act of Congress to any person "as consideration . . . for" political activity or political support. *See also* 18 U.S.C. §§ 431, 441, 873, and 1734 for related uses of the term "consideration."

The phrase "as consideration for" is intended to denote a quid pro quo between the donor-donee, promisor-promisee or, in case of offers and solicitations, an intention on the part of the actor to offer to purchase or sell official conduct. The existing law of 18 U.S.C. § 201 prohibits the offering, giving or promising of anything of value with an intent to "influence" official action or "induce" violation of a lawful duty. The principal distinction between the proposed formulation and the existing law is that under the proposal it must be shown that there was an intention, agreement or arrangement to purchase or sell an official's conduct while under the existing law there need only be an intention to influence or induce conduct. Except with regard to gifts, the distinction between these formulations is probably more theoretical than practical. In contrast to existing law, the bribery sanctions under the proposed formulation would not apply to situations where gifts are given in the mere hope of influence or inducement, without any agreement or understanding by the recipient that the gift is expected to influence or induce official conduct.[20]

Gifts to public servants would be dealt with as follows: First, gifts from certain persons who have direct governmental dealings with the public servant and whose interests could thereby be directly affected by the public servant's action are harmful to the integrity and effectiveness of governmental operations and virtually indistinguishable from bribes. Such gifts—even assuming arguendo they are given with the best of intention and with no thought of influencing or purchasing conduct—would tend to distract a public servant, might unwittingly influence the public servant, could breed bitterness among other government employees who are not recipients and would certainly create an unhealthy public suspicion and lack of trust in governmental operations. In fact, however, it is difficult to imagine that a person in such a position would not give the gift to favorably influence the public servant in his disposition of the matter in which the donor is directly interested. Accordingly, under proposed section 1361(3) once it is shown that a gift was offered, given, or promised as consideration for the recipient's official conduct, a prima facie case of bribery is established. (*See* paragraph 8, *infra*, for a full discussion of section 1361(3)).

Secondly, gifts offered, given or promised to a public servant for his past action—having engaged in official action or having violated a legal duty—are made a misdemeanor under proposed section 1362.

Thirdly, acceptance of gifts by public servants in general are covered by a comprehensive body of rules and regulations that effectively

[20] Note that there need be no actual agreement or understanding under the proposal by the recipient in cases of offers. In cases of offers and solicitations the actor violates the provision if he sought such an arrangement in making the offer or solicitation.

employ noncriminal sanctions as a means of proscribing certain undesirable exchanges.[21]

8. *Prima Facie Case of Bribery: Unlawful Gratuities.*—Section 1361(3) provides that proof of a gift of pecuniary value to a public servant from a person having an interest in an imminent or pending (a) investigation, arrest or judicial or administrative proceeding, or (b) bid, contract, claim or application, which could be affected by the manner in which the recipient performed his duties shall constitute a prima facie case that the thing was given "as consideration for" the recipient's conduct and thus in violation of section 1361(1).

This provision in section 1361(3) is designed to serve two purposes:

(a) It would give the prosecutor a necessary assist in cases where it might be extremely difficult for him to prove that an exchange was in fact given as consideration for official conduct yet the circumstances strongly indicate impropriety. It is noted, however, that this evidence is likely to create a circumstantial prima facie case anyway, but stating it in this fashion will assure, unless manifestly disproved, that the issue will go to the jury. (*See* section 103(5).) In the gratuities situation it would be very easy for a defendant to contend that the government's evidence failed to show that the exchange was any more than a mere gift, with no understanding, agreement or quid pro quo involved. Under section 1361(3) the case would be submitted to the jury and conviction affirmed, upon proof of the following facts:

> (a) that the gift was a thing of *pecuniary* value, *i.e.*, money, property, commercial interest or anything the primary significance of which is economic gain;[22] and
>
> (b) that the person who offered the gift (or that the person from whom the gift was solicited) had an interest in an imminent or pending (i) investigation, arrest or judicial or administrative proceeding, or (ii) bid, contract, claim or application; and
>
> (c) that such person's interest could be affected by the recipient's performance of his official duties.

Alternatively it might be provided that proof of these facts creates a presumption (in contradistinction to a prima facie case) of violation. The principal effect of a presumption provision is that the jury would be instructed that a finding of guilty is warranted should they find the underlying facts to have been proved beyond a reasonable doubt, whereas under the prima facie case provision, such instructions would not be authorized.[23]

To illustrate the operative effect of employing a presumption, assume that the prosecution proves that the defendant was an accountant

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[21] For example: Exec. Order No. 11,222, 3 C.F.R. § 306 (Supp. 1965), contains broad prohibitions against receipt of gratuities by all government officers and employees. Practically every agency and department has its own regulations of gratuities. The House of Representatives and the Senate have recently adopted rules regulating campaign contributions and other gifts. *See* REPORT OF THE COMM. ON STANDARDS OF OFFICIAL CONDUCT. H.R. REP. No. 1176, 90th Cong. 2d Sess. (1968), and SELECT COMM. ON STANDARDS OF CONDUCT FOR MEMBERS OF THE SENATE AND OFFICERS AND EMPLOYES OF THE SENATE, S. REP. No. 1015, 90th Cong., 2d Sess. (1968).

[22] The term "thing of pecuniary value" is defined in section 109(ac).

[23] *See* proposed subsections 103(4) and (5) defining, respectively, "presumption" and "prima facie case."

who gave an Internal Revenue Service agent $200 at a time when a client of the accountant's was subject to an IRS tax audit. In the course of the trial the accountant proves that the IRS agent had actually extorted the payment of the $200. Under such circumstances the courts could prevent the case going to the jury on the presumption. However, if the issue were submitted to the jury, there would be a charge that the presumed fact must be proved on *all* the evidence beyond a reasonable doubt, but the jury may regard the facts giving rise to the presumption as sufficient evidence of the presumed fact. A second alternative might be to create a "conclusive" presumption: where the defendant presented no evidence contrary to the presumed fact, the presumed fact that a gift was as consideration for the recipient's conduct could be treated as established by proof beyond a reasonable doubt of the facts which gave rise to the presumption. In such a case there would be no issue for the jury as to the existence of the presumed fact, but only as to the facts which engendered the presumption. Note that in the first alternative for use of a presumption the effect of the presumption is that the jury would be permitted to infer the presumed fact from the basic facts if they are disposed to do so, while in this latter situation where the defendant has not rebutted the presumed fact the presumption would actually be conclusive. *See* the Model Penal Code commentary (at 115, 116, Tent. Draft No. 4, 1955), for a discussion of the pro and con arguments for these alternatives.

(b) The second advantage of using either prima facie case or presumption is that either will serve to replace the need for an unlawful gratuity statute in the proposed Criminal Code. Congress, after extensive consideration in 1962, rejected the adoption of an unlawful gratuities statute. Aside from the question of renewing the possibility of enacting such a statute, under our general classification, we must consider an unlawful gratuity statute as basically a prophylactic or preventive statute.[24] As such it may be asked whether there is a need for such a statute in the proposed Code. There are presently ample and extensive regulations covering unlawful gratuities in the Executive Branch. Congress has recently adopted a Code of Ethics covering the legislative branch. The judicial branch is generally subject to the American Bar Association's Code of Judicial Ethics which covers this matter. The provision in section 1361(3) only deals with those exchanges with persons having a relationship to the government or a government official that must remain "above suspicion." All other gratuities would be left to the existing regulatory scheme or to future regulatory schemes under the proposed penalty provision structure in section 1006, but section 1361(3) should have a deterrent effect in the most potentially serious gratuities cases.

A presumption can be just as narrowly drawn as the coverage for prima facie case, *i.e.*, to cover selected situations that standing alone are strongly probative of the presumed fact. It is submitted that such a presumption would not cast an unfair burden on the defendant. Accordingly, it is believed that there is no constitutional question regarding the use of such a presumption under *Tot* v. *United States*, 319 U.S. 463 (1943).

9. "*Official Action.*"—Subsection (1)(a) of proposed section 1361

[24] *See* paragraph 2 of the comment on proposed section 1006 ("regulatory" distinguished from traditional offenses.)

protects "official action" from bribery. The definition of "official action" in section 109(u) is substantially similar to the existing definition of "official act" in 18 U.S.C. § 201(a). It covers conduct ranging from high decision making to minor ministerial actions within the public servant's discretionary powers.

10. *Violation of a Known Legal Duty.*—Subsection 1361(1)(b) of the proposal prohibits inducing public servants to violate their known legal duty. This subsection follows the existing provision of 18 U.S.C. § 201(b)(3) which prohibits inducement of an official "to do or omit to do any act in violation of his lawful duty." In contrast with subsection (1)(a) of the proposal, which deals with official conduct, this subsection reaches the petty misdeeds outside the decision making or discretion exercising province of the public servant. The addition of the requirement that the duty be "known" assures that the public servant or person seeking to induce the public servant understands the seriousness of the bribe. This is consistent with the thrust of proposed section 1361 in its effort to distinguish bribery from gratuities.

11. *Grading.*—Little thought has been given to the appropriate sanctions for violations of the existing official bribery laws. Although the existing law (18 U.S.C. § 201) was studied in depth at the time of the 1962 revision, the penalties were given only cursory review.[25] The 1962 revisers merely adopted the highest maximum penalty under the then existing laws as the penalty for the consolidated statute. Prior to this consolidation, penalties ranged as follows:

FEDERAL CONFLICT OF INTEREST LEGISLATION, STAFF REPORT TO SUBCOMM. NO. 5 of the HOUSE COMM. ON THE JUDICIARY, 85th Cong., 2d Sess., pt. 2 at 68 (Comm. Print 1958).

Public servants	Maximum penalty (years)	Maximum fine
Officers, employees, and agents	3	3 times bribe.
U.S. attorneys	5	$500.
U.S. marshals	5	$500.
Members of Congress	3	3 times bribe.
Judges	15	$20,000.
Judicial officers (jurors, commissioners, referees, etc.):		
Offers	15	$20,000.
Acceptances	2	$2,000.
Witnesses	2	$2,000.
Revenue officers	2	$5,000.
Customs officers	2	$5,000.

Further analysis reveals that the 15-year penalty for judges and judicial officers became a part of the law with a similar lack of consideration. Bribery of a judge appears to have been the earliest form of bribery law and was an offense once punishable by death.[26] The first Federal criminal laws enacted in 1790 contained a prohibition

[25] In reporting on the provisions prohibiting bribery, the House Judiciary Committee noted:

> Because the present study is primarily concerned with substantive integration of . . . (the bribery laws), and not with the question of penalties, the recommendations made in part I, without discussion, propose preservation of existing penalties where practicable.

[26] PERKINS, CRIMINAL LAW 396, 397 (1957).

against bribery of a Federal judge with a penalty of fine and imprisonment "at the discretion of the court" (*i.e.*, up to life imprisonment).[27] In the 1909 revision of the criminal laws, Congress specified the maximum penalty for official bribery, and other theretofore unspecified maximum penalties, at not more than $20,000 fine or not more than 15 years' imprisonment or both. (*See* 18 U.S.C. § 201(e)). This change was made with virtually no explanation of why 15 years was chosen.[28]

Several factors suggest the need to reexamine the existing penalty for all official bribery. As the above table indicates, the adoption by the 1962 revisers of the 15-year penalty for all forms of official bribery represented a substantial departure from the prior thinking as to the appropriate penalty for the offense. Several guide posts in existing law suggest that the 15-year penalty is excessive, to wit: (a) when considered in relation to the official bribery statutes outside Title 18 with penalties running from a $500 fine and 6 months' imprisonment to a $10,000 fine and 5 years' imprisonment; (b) the average court-imposed sentence for bribery (under all Federal bribery statutes) is 17.1 months; [29] (c) the 15-year penalty for official bribery is anomalous when considered with 18 U.S.C. § 1952, which punishes with a penalty of 5 years the use of interstate or foreign commerce with intent to engage in the "unlawful activities" of either Federal bribery or bribery under the laws of any State.

Proposed section 1361 carries a Class C felony penalty. Under the proposed sentencing scheme, this will return the penalty for official bribery to the general range existing for most official bribery prohibitions prior to the 1962 revision. No justification can be found for either retaining the exception of a 15-year penalty for judges and judicial officers or increasing all official bribery sanctions to the level prescribed by Congress in 1909.

A serious effort was made to legislatively grade different kinds of bribery in recognition of the fact that some violations of the law are not as corruptive of government as others.[30] For example, a petty offer to a United States Park policeman to overlook a camping violation is certainly not in the same category as offering a substantial sum of money to a high government official for a matter involving

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[27] Act of April 30, 1790, c. 9, 1 Stat. 117.

[28] SPECIAL JOINT COMM. ON THE REVISION OF THE LAWS, REVISION AND CODIFICATION OF LAWS, S. REP. No. 10, 60th Cong., 1st Sess., pt. 1, at 14, 18 (1908).

[29] FED. BUREAU OF PRISONS, STATISTICAL REP. 36 (1966).

[30] The January 2, 1968 Tentative Draft of an official bribery provision contained the following grading scheme:

An offense under this section constitutes a Class B felony if the public servant involved is the President, the Vice President, a Judge, a Member of Congress, a Resident Commissioner or a public servant appointed by and with the advice and consent of the Senate pursuant to article II, section 2 of the Constitution. An offense under this section constitutes a Class C felony if:

(1) the public servant involved is a juror; or

(2) the public servant involved is entitled to compensation equivalent to an annual rate of $15,000 or more; or

(3) the official action involved an amount in excess of $100,000; or

(4) the bribe exceeded $1,000 in value; or

(5) the bribe was to obstruct law enforcement against a felony.

All other offenses under this section constitute a Class A misdemeanor.

the general public welfare. It would seem appropriate to accommodate for such reality by providing for a range of penalties reflecting the relative seriousness of the violation. Indeed, such an approach could facilitate prosecution by classifiying minor offenses as misdemeanors.

It was found that drafting such legislative grading criteria is extremely difficult and raises more new problems than it solves. It is arguable that morally there is no such thing as a trivial bribe. Therefore, there should be no concern about reducing the penalty lower than the range proposed. It is possible, however, that there may be circumstances justifying a more severe sanction. Such cases can be contemplated in the general sentencing scheme.

UNLAWFUL REWARDING OF PUBLIC SERVANTS: SECTION 1362; UNLAWFUL COMPENSATION FOR ASSISTANCE IN GOVERNMENTAL MATTERS: SECTION 1363

1. *Introduction.*—Proposed sections 1362 and 1363 are designed to complement the official bribery provision, proposed section 1361. They are distinguishable from bribery in that the bribery provision is directed at prohibiting the purchase or sale of official conduct or exercise of legal duty by a public servant, while these sections are concerned with rewarding a public servant's past exercise of official conduct or past violation of a legal duty, and payments for services outside the scope of his official duties, but over which he is likely to have official responsibility.

Proposed section 1362 is a specific gratuities prohibition against soliciting or accepting payment for past official action or for having violated a legal duty. Section 1362 will have the effect of foreclosing the difficulty a prosecutor could be confronted with under the official bribery section when a defendant contends that he did not offer or solicit anything until *after* the public servant had performed his official action or violated his legal duty.

Section 1362(1), paragraph (a) is based on the rationale that payments for past official action should be discouraged for several reasons: (a) positions of public employment or public trust should not be used for personal gain; (b) rewards for past action imply a promise of similar compensation for future action; (c) those who do not offer such rewards are under subtle pressure to follow suit or risk disfavor; and (d) such rewards generally undermine governmental integrity and effectiveness.

Similar provisions are found in the Illinois Criminal Code of 1961, section 33–3(d); the New York Revised Penal Law, sections 200.30 and 200.35; the proposed Michigan Revised Criminal Code, section 4710 (this provision is not as broad as our proposed section 1362(1)); the Proposed Delaware Criminal Code, sections 704 and 705; the Proposed Crimes Code for Pennsylvania, section 2004; the Model Penal Code, section 240.3; and the preliminary draft of the Texas Penal Code Revision, section 240.3. It will be noted that some of these provisions are deemed unlawful rewards, while others are deemed bribery, unlawful gratuities or official misconduct. Despite the differences in denomination the thrust of the prohibitions appears similar, with the differences being primarily in the penalty for violations. (*See* paragraph (7), *infra.*)

Section 1362(1), paragraph (b), which prohibits the rewarding of violations of a legal duty by a public servant, is a counterpart to the provision of the proposed official bribery statute prohibiting the purchase or sale of such conduct. It is necessary because, as in present Federal law, there will be no general criminal statute prohibiting the violation of a legal duty by a public servant.[31]

Section 1363 prohibits the compensation of public servants for advice or assistance with regard to any matter that the public servant has or is likely to have under his discretionary authority. This provision seeks to prevent public servants from committing themselves to promoting private interests within their official jurisdictions. This provision will also preclude a possible evasion of the bribery law where the briber contends that he made a payment to a public servant as consideration for his advice or assistance, rather than his official conduct.

2. *Relationship to Existing Law.*—The prohibition of section 1362 (1)(a), payment for past official action, is presently punishable under 18 U.S.C. § 201(f) as bribery. The reasons given for enactment of this of the existing law as bribery are similar to the reasons for enactment of this section,[32] but the Justice Department expressed doubt at the time of enactment as to whether it ought to be the equivalent of bribery.[33]

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[31] Examples of such general criminal statutes are: ILL. REV. STAT. § 33-3 (1965); N.Y. REV. PEN. LAW § 195.00 (McKinney 1967); and MICH. REV. CRIM. CODE § 4805 (Final Draft 1967).

[32] The prohibition against rewards for past official action was added to the 1962 law on the rationale that:

> The new section should also uniformly prohibit all payments and receipts "for" official action. This means that the payment or receipt of anything of value in appreciation of, or as a reward for an official act would be outlawed irrespective of any intent to influence or induce, or to be influenced thereby.
>
> On reflection, it seems desirable to include such a prohibition generally. While it may at first blush seem harsh to impose a severe penalty for making or receiving a gift for which no corrupt consideration has been given, it is readily apparent that a practice of tacitly "rewarding" public officials for their official acts could undermine the public service as effectively as if the payments were the fruit of express corrupt agreement. This is as true for Government employees as for Congressmen and as appropriately remediable in the case of a briber as to one who accepts a bribe. It is accordingly recommended that payments to and receipts by public officials for their official acts be prohibited as bribery.

FEDERAL CONFLICT OF INTEREST LEGISLATION, STAFF REPORT TO SUBCOMM. NO. 5 OF THE HOUSE COMM. ON THE JUDICIARY, 85th CONG., 2d SESS., pt. 2, at 72 (Comm. Print 1958).

[33] In 1960 when the House Judiciary Committee was holding hearings on legislation to revise the conflict of interest laws, the Department of Justice was asked to submit an analysis of the principal pending bill (H.R. 2156). With regard to the language that ultimately became 18 U.S.C. § 201(f), the Department observed:

> The substantive provisions of the proposed new section 201 add a new concept to the present bribery laws. The payment of something of value will become criminal not alone when the payment is made with intent to influence an official act, but also when the payment is made merely "for or because of" such act. The basis for this new approach is that payments in such circumstances give the appearance of having been made for the purpose of influence, and this very appearance is itself improper. On the other hand, actual intent to influence, although present, might be difficult to prove. We are not prepared to say, on the basis of our experience with the

At least one court has described the existing law as an unlawful gratuities provision.[34] The offense is treated here as a distinct and lesser offense than bribery because it is not bribery, the corrupt *bargain* being absent and, therefore, the potential for harm less.

Section 1362, paragraph (1)(b), has no counterpart in the existing Federal law. It is based largely on a provision of the New York Revised Penal Law similarly proscribing unlawful rewards for official misconduct.[35]

Section 1363, which prohibits payment to public servants for promotional advice or assistance with regard to matters over which the public servant has discretionary authority, is a distillate of prohibitions presently found in existing Federal law. There are presently a number of provisions designed to restrict public servants in being paid or receiving outside compensation for serving or assisting outside parties in dealing with the government. These existing regulatory provisions—principally 18 U.S.C. §§ 203, 205 and 209—constitute a part of the Federal conflict of interest laws. 18 U.S.C. § 203 prohibits compensating public servants (including Members of Congress) for "any services" in matters affecting the government. 18 U.S.C. § 205 prohibits public servants (excluding Members of Congress) from acting as "agent or attorney" for a private interest in connection with a governmental matter regardless

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bribery laws, that proof of intent is such an insurmountable barrier as to justify the elimination of this element. Nor are we prepared to say that the same stringent penalties should attach when intent to influence merely appears to be present but cannot be proved as should attach when actual intent can be demonstrated. *Footnote:* There is also a question whether all payments made to public officials by outsiders "because of" their official acts are necessarily improper and give even an appearance of evil. Private parties might offer such payments in full belief that they were proper, and hence without warning of their illegality. One example is the private offer of a reward, collectible by public officers among others, for the apprehension of a criminal.

Hearings on H.R. 2156 Before the Antitrust Subcomm. of the House Comm. on the Judiciary, 86th Cong., 2d Sess., ser. 17, pt. 2, at 613 (1960).

[34] In *United States* v. *Irwin*, 354 F. 2d 192, 196 (2d Cir. 1965), the court noted:

> The behavior prohibited by § 201(f) embraces those cases in which all of the essential elements of the bribery offense (corrupt giving) stated in § 201(b) are present except for the element of specific intent to influence an official act or induce a public official to do or omit to do an act in violation of his lawful duty. The iniquity of the procuring of public officials, be it intentional or unintentional, is so fatally destructive to good government that a statute designed to remove the temptation for a public official to give preferment to one member of the public over another, by prohibiting *all gifts* 'for or because of any official act,' is a reasonable and proper means of insuring the integrity, fairness and impartiality of the administration of the law. It is clearly within the power of Congress to enact such a statute. (Emphasis added.)

[35] N.Y. REV. PEN. LAW, §§ 200.20, 200.25 (McKinney 1967). The Proposed Delaware Criminal Code contains a similar prohibition but treats the reward as bribery per se on the rationale that it is an equally culpable offense, even though it is basically a gratuities prohibition. *See* PROPOSED DEL. CRIM. CODE § 700(3) (Final Draft 1967). The Michigan revision notes that the revisers considered adoption of a provision similar to the New York statute, but "felt that the policy underlying [the provision] should not be made applicable to public servants generally." MICH. REV. CRIM. CODE § 4710, Comment at 376 (Final Draft 1967).

of compensation. 18 U.S.C. § 209 prohibits payment or receipt of any salary supplementation for any services of an officer or employee of the executive branch of the government. A general discussion and recommended disposition of these and other conflict of interest laws (*i.e.*, that they be removed from the Criminal Code per se and keyed to the regulatory violations sentencing scheme of section 1006) is found in Extended Note A, *infra*.

These provisions of the existing law are extremely broad and employ severe criminal sanctions to regulate conduct that can adequately and effectively be controlled with lesser sanctions. In the existing law, however, one form of conduct has been identified which it is believed poses a greater danger—thus meriting more serious treatment—than the others. This is the payment of money to a public servant for services closely related to his public work, a form of conduct which, if not symptomatic of bribery, appears so much like it that it cannot be regarded as merely a regulatory offense.

3. *Persons Covered: Public Servants.*—Sections 1362 and 1363 will bring a uniformity, presently lacking in existing laws, in the application to *all* public servants of the proscriptions regarding payment or receipt of rewards for official conduct and the assisting of private interests. The term "public servant" is defined in section 109(x) and is discussed in detail in the comment on section 1361, official bribery.

It will be noted that section 1363 does not cover the situation where a public servant shares payment with a private partner or business organization in which he holds an interest. Such parties are outside the scope of the proposed statute; and only the public servant or the payor can be prosecuted for violations. To extend this provision to cover such situations would involve the problems that arise in regulating conflict of interest generally. The existing conflict of interest law which regulates such conduct will remain in effect outside the Criminal Code. (*See* Extended Note A, *infra*.)

4. *Exchanges of Pecuniary Value.*—Sections 1362 and 1363 are limited to exchanges of pecuniary value rather than to anything of value as in section 1361. The term "thing of pecuniary value" is defined by section 109(ac) as "money, tangible or intangible property, commercial interests, or anything else the primary significance of which is economic gain." While it was believed desirable to define a bribe inducement broadly,[36] the same reasoning does not apply to controlling unlawful rewards and compensation. Nonpecuniary gifts are generally trivial in nature and would not seem seriously to threaten governmental operations outside of the bribery context. Furthermore, nonpecuniary gifts can be dealt with effectively through the issuance of rules and regulations. In an effort to narrow the focus of sections 1362 and 1363 by defining conduct that is directly or potentially harmful to governmental operations, the prohibited exchanges have been restricted to those of a pecuniary nature, excluding, of course, legitimate government compensation and compromise as provided in section 1369.

5. *Prohibited Conduct: Rewarding Past Official Action or Viola-*

[36] *See* the comment on proposed section 1361, official bribery, *supra*, paragraph 6.

tions of Duty.—The "official action" for which reward is prohibited under section 1362(1)(a) embraces those activities of a public servant within his discretionary authority, for example, decisions or opinions, recommendations, and votes as defined in section 1369. (*See* the comment on official bribery, *supra*, paragraph 9.) The reward is prohibited whether the discretion was exercised honestly or not, so long as it is tied to some official or discretionary action.

Section 1362(1)(a) prohibits rewards for having violated a legal duty. Since "legal duty" covers many kinds of diverse conduct, it is not defined by the statute, but since it is confined to *violations* of legal duty, no further definition would seem to be needed. Unlike the bribery statute, the legal duty need not be a "known" legal duty. If the conduct was not known to be a violation of a legal duty when engaged in, there is, nevertheless, no excuse for soliciting or accepting a reward for it at a later time.

6. *Prohibited Conduct: Giving or Accepting Payments for Promoting Private Interests.*—Proposed section 1363 is directed at payments to public servants for their advice or other assistance, but is limited to those promotional activities where the public servant exercises discretionary authority. Narrowing the provision to promotional-type activities raises the question whether nonpromotional activities should also be covered. The American Law Institute was faced with a similar issue in approving section 240.6 of the Model Penal Code, which is the basis for this recommended provision. The unpublished draft of the commentary to that section reports:[37]

> Initial drafts of this section applied to compensation for any 'services in relation to any matter' as to which the official had a discretion. In the course of the debates, members of the Institute pointed out that this made the section applicable to all supplementary private compensation to officials exercising discretion, whether or not the payment was designed to secure favorable action on particular proposals of the payor. The old language would also have encompassed compensation for nonpromotional services such as were involved in *United States* v. *Drumm*, 329 F. 2d 109 (1st Cir. 1964), where a government poultry inspector was secretly retained by large suppliers to advise them on their packing and shipping practices. The Court held that the government might recover payments the inspector had received in breach of his fiduciary relationship, saying 'A jury might well wonder whether inspector Drumm was likely to condemn as unsanitary and violative of Federal standards a method of packaging instituted as a result of advice given by private consultant Drumm.' Whether criminal penalties should be added to the civil remedies illustrated in the Drumm case is a difficult question. Perhaps a rule requiring employees to disclose such a conflict of interest relationship for appraisal by their superiors, with dismissal or minor penalty for violating the rule, would be the best solution. At

[37] Professor Schwartz, co-reporter on the Model Penal Code, has made this draft available for the Commission staff.

any rate, in deference to the apprehensions expressed at the Institute meeting and following our general policy of conservatism in the use of criminal sanctions. Section 240.6 has been restricted to advice and assistance in promoting legislation, claims against the government, and the like.

Section 1363, however, does not present an all-or-nothing situation with regard to nonpromotional activities. The existing criminal provisions which contain several prohibitions regarding nonpromotional activities will remain in effect as regulatory proscriptions with violations subject to the regulatory penal scheme of section 1006.

Section 1363(2) requires that private citizens who pay public servants for their promotional advice or assistance "know" that the public servant is likely to have authority over the matter and that he is not entitled to the payment. This requirement of culpability is based on the reasoning that a private citizen cannot be expected to know the discretionary authority or the rules and regulations governing public servants, but when they are aware of such restriction criminal liability can properly attach. Public servants, on the other hand, should know their authority and the applicable rules governing their conduct. Accordingly, section 1363(1) does not require that the public servant "know" he was acting contrary to law in soliciting or accepting the payment; "recklessness" will suffice. (*See* the draft provision on culpability, section 302.)

7. *Grading.*—The offenses under proposed sections 1362 and 1363 are classified as misdemeanors. Several factors have led to recommending this classification. Bribery has been deemed a Class C felony. The conduct prohibited in sections 1362 and 1363 is not commensurate with official bribery where a public servant exchanges a public performance for private gain. Section 1362 involves conduct occurring after an official transaction or exercise of official duty and poses a less serious harm to governmental operations than the harm of bribery where there is a direct effort to influence a public servant's conduct. Section 1363 does not involve official conduct or duties performed by a public servant; rather it involves nonofficial conduct and as such is a less serious threat to governmental operations. Sections 1362 and 1363 are lesser—although related—offenses and, therefore, contain penalties distinguishable from bribery.

Most of the modern State revisions, or proposed revisions, with statutes substantially the same as proposed here, also prescribe misdemeanor penalties or less.[38]

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[38] *See generally* N.Y. REV. PEN. LAW §§ 200.35, 70.15(1), 80.05(1, 5) (McKinney 1967) : 1 year and a fine double the amount of gain for committing unauthorized official act *with intent to obtain* a benefit. Although section 200.25 (accepting any benefit for *having* violated duty as public servant), is a low grade felony, court has choice between a maximum sentence of 4 years or 1 year (sections 70.00, 70.05) and fine double the amount of gain (section 80.00) ; PROPOSED DEL. CRIM. CODE §§ 704, 1005, 1006, 1003 (Final Draft 1967) : 1 year and $1,000 fine. PROPOSED CRIM. CODE FOR PA. §§ 2004, 2007, 601, 605 (1967) : 1 year and $500 fine or fine double the amount of gain: MICH. REV. CRIM. CODE §§ 1415, 1505 (Final Draft 1967) : 90 days and $500 (section 4710) or 1 year and $1,000 fine (section 4715) or fine not to exceed double defendant's gain. *See also* MODEL PENAL CODE §§ 240.3 and 240.6, 6.08, 6.03 (P.O.D. 1962) : 1 year and fine not exceeding $1,000 or double amount of gain.

Trading in Public Office and Political Endorsement: Section 1364

1. *Introduction.*—Proposed section 1364 prohibits the purchase or sale of positions or promotions in public service and endorsements for Federal elective office. The provision seeks to prevent the substitution of purchased influence for considerations of ability and integrity in appointing and employing officers and employees in government service and nominating or designating candidates for Federal elective office.

2. *Relationship to Existing Law.*—Existing law contains prohibitions against trading in public office in section 3332 of Title 5, section 211 of Title 13, and sections 210 and 211 of Title 18 of the United States Code. There are presently no specific prohibitions in the existing law against the purchase or sale of political endorsements for Federal elective office.[39]

Section 3332 of Title 5 is a nonpenal statute that requires an officer within 30 days of his appointment to file an affidavit that he has not purchased his appointment. Although this provision carries no penalty, a violator might be charged, depending on the circumstances, with filing a false statement or perjury. No change is recommended with regard to this nonpenal provision.

Section 211 of Title 13 prohibits a person from receiving any payment for the appointment of any person as a supervisor, enumerator, clerk, or other officer or employee of the Bureau of the Census. Maximum punishment is a $3,000 fine and imprisonment for 5 years. It is recommended that 13 U.S.C. § 211 be repealed and replaced by proposed section 1364 and thereby render the law on this subject uniform.

Sections 210 and 211 of Title 18, the basic criminal prohibitions against trading in public office, prohibit any person from using his influence in exchange for something of value in securing or assisting in securing an appointment or place in the Federal government. Maximum punishment is a $1,000 fine and 1 year's imprisonment. Sections 210 and 211 of Title 18 would be replaced by proposed section 1364.[40] Note that the second paragraph of 18 U.S.C. § 211, dealing with employment agencies, raises separate and special issues. It is recommended that this part of section 211 be placed outside of the Criminal Code per se and keyed to the proposed regulatory sentencing scheme of proposed section 1006. (*See* Extended Note B, *infra.*)

3. *Scope of Coverage: Prohibited Conduct.*—Existing law makes it a crime for anyone, regardless of his connection with the government or his position of influence, to receive anything of value as consideration for exerting *any* influence—consequential or inconsequential—in behalf of another for an appointment, employment or advancement in public service. The language of the existing law, therefore, includes

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[39] Related existing prohibitions of Title 18 cover promises of employment or compensation or other benefit "provided for or made possible in whole or in part by any Act of Congress" as consideration for the "support of or opposition to any candidate." 18 U.S.C. §§ 599, 600. There are no reported convictions based on these statutes.

[40] Section 1365, the proposed special influence statute, will also partially replace 18 U.S.C. § § 210 and 211.

exercises of influence that pose no harm or threat of harm to operations of the Federal government as a result of an effort to peddle or exert such influence. Prosecutions, however, have been limited to persons who are in a position to exert a harmful influence.[41]

The section 1364 prohibition is primarily directed at purchase or sale of approval or disapproval by public servants and political party officials. Section 1364 defines both the kinds of prohibited influence (approval or disapproval) and those who are forbidden from exerting such influence (public servants and party officials). The terms "approval" and "disapproval" are defined in the provision.[42] The term "public servant" is defined in section 109(x) and discussed in the comment to section 1361, official bribery. The term "party official" is defined in section 1364(2)(d) and includes any person "who holds a position or office in a political party whether by election, appointment or otherwise." The definition of party official has been taken from State Codes which have similarly adopted it.[43] The inclusion of party official is necessary to provide full coverage of those persons who are in a position of influence with regard to appointments, employment and advancements in government service and particularly those in a position to corrupt the elective process by selling endorsements for the nomination or designation of candidates.

Proposed section 1364 is designed to reach solicitors or recipients other than those who may be in a position to exert the most harmful influence, *i.e.*, public servants and party officials. While it is the latters' influence which is being peddled, it would also be unlawful for *any* person, regardless of whether he has any special relationship to the public servant or party official, to solicit or receive a thing of pecuniary value on the promise, contingent or not, to deliver the influential public servant's or party official's approval

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[41] Typical cases prosecuted under 18 U.S.C. § § 210 and 211 are:

(a) Where certain *party officials* solicited contributions to the Mississippi Democratic Committee in return for promises to use influence to obtain for the contributors appointments in various Federal departments. *United States* v. *Hood*, 343 U.S. 148 (1952).

(b) Where a *Congressman's secretary* received money in return for a promise to use influence to obtain promotions in the Post Office. *United States* v. *Wall*, 225 F. 2d 905 (7th Cir. 1955), *cert. denied*, 350 U.S. 935 (1956).

(c) Where a person offered to donate $1,000 a year to the Republican Party in consideration of a *Congressman's use of his influence* to procure a postmastership. *United States* v. *Shirey*, 359 U.S. 255 (1959).

(d) Where two brothers, one of whom was a *postal employee*, solicited funds in consideration for use of influence to procure promotions in the Post Office. *United States* v. *Echeles*, 222 F. 2d 144 (7th Cir.), *cert. denied*, 350 U.S. 828 (1955).

(e) Where a *Congressman's son* solicited $1,000 in exchange for a West Point appointment. *Hoeppel* v. *United States*, 85 F. 2d 237 (D.C. Cir. 1936).

These cases would also be prosecutable under proposed section 1364.

[42] The definitions of "approval" and disapproval" were taken from section 240.7 of the Model Penal Code (P.O.D. 1962).

[43] *E.g.*, PROPOSED DEL. CRIM. CODE § 708(3) (Final Draft 1967); N.Y. REV. PEN. LAW § 200.40 (McKinney 1967); MICH. REV. CRIM. CODE § 4701(5) (Final Draft 1967).

or disapproval. This approach combines the diverse approaches of the modern State revisions.[44]

Section 1364 is also specifically designed to include third party practices like those which arose in *United States* v. *Shirey*, 359 U.S. 255 (1959), where the Supreme Court held by a vote of 5 to 4 that 18 U.S.C. § 210 (then 18 U.S.C. § 214) reaches cases where money is to be received by a political party in consideration of a public servant exercising influence to obtain appointive office for the contributor. In *Shirey*, an offer was made to a Member of Congress to contribute $1,000 a year to a political party if the Member of Congress would use his influence in securing a postmastership for the contributor. The difficulty in applying 18 U.S.C. § 210 arose because of the third party beneficiary situation. Although the Court found, over a vigorous dissent, that the statute covered such situations, it was necessary for the Court to strain the language of the statute to reach the intent of Congress. Section 1364 explicitly covers this situation to preclude such a problem and indicate clearly that such third party situations are within the statute.

Subsection (1)(a) of section 1364 prohibits the purchase or sale of an appointment, employment or advancement as a public servant. "Public servant" is defined in section 109(x) as any government employee or agent.[45] When 18 U.S.C. §§ 210 and 211 were first enacted [46] they were limited to "any appointive office" of the Federal government. The 1948 revision of Title 18 expanded the scope to include "any appointive office or *place*," which has been interpreted to mean "employment".[47]

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[44] N.Y. REV. PEN. LAW §§ 200.45 and 200.50 (McKinney 1967), PROPOSED DEL. CRIM. CODE §§ 700(2) and 702(2) (Final Draft 1967), and MICH. REV. CRIM. CODE § 4725 (Final Draft 1967), prohibit only payments to public officials and party officials, *i.e.*, those in a position to exert a meaningful and harmful influence. The Proposed Crimes Code for Pennsylvania (section 2008(a) (1967)) and the Model Penal Code (section 240.7(1) (P.O.D. 1962)) prohibit payments for specific kinds of influence, *i.e.*, approval or disapproval of an appointment or advancement in public service, but the statutes do not define who may or may not engage in such approval or disapproval. It is submitted that the New York, Delaware and Michigan approach is too restrictive, while the Pennsylvania and Model Penal Code approach is too broad. Proposed section 1364 has taken a middle course by combining the two.

[45] The statute does not contemplate situations regarding the sale of an imaginary position. The statute would, however, encompass the sale of endorsement in connection with a position which had been authorized by law and which, at the time of the sale, might reasonably be expected to be established but had not been actually established at the time of the offense. This is consistent with the Supreme Court's interpretation of existing law in *United States* v. *Hood*, 343 U.S. 148 (1952) (Justices Black, Reed, Douglas and Minton dissenting). The statute would also cover appointments to service academies, by reading the definition of "public servant" (officers) and "government" (Department of Army, Navy and Air Force) with the definition of public service.

[46] Act of December 11, 1926, c.3, § 2, 44 Stat. 918.

[47] Act of June 25, 1948, c.645, section 215, 62 Stat. 694. The reviser's note states that the term "or place" was inserted to broaden the scope of coverage. Subsequent judicial and legislative interpretations leave no doubt that it did. In *United States* v. *Wall*, 225 F.2d 905, 908, (7th Cir. 1955), it was held that "'Place' would include, in the broadest way, the relation of an employee to the government, such as janitors, typists, etc." When Congress amended section 211 in 1951, instead of using the phrase "any appointive office or place," it substituted the term "employment," which further suggests their synonymous meaning. H.R. REP. No. 784, 82d Cong. 1st Sess. 1,4 (1951).

The phrase "appointive office or place" of the existing law is ambiguous and awkward. It has been replaced by the phrase "appointment, employment or advancement or retention as a public servant." The new phrase also specifically states that "advancements" or promotions are included within the prohibition. This further codifies the court's interpretations of the existing law.[48]

Subsection (1)(b) of section 1364 prohibits the purchase or sale of political endorsements for Federal elective office, *i.e.*, approval or disapproval by a public servant or party official of the designation or nomination of candidates. The term "elective office" includes the President of the United States, the Vice President of the United States, and Members of Congress (Representatives and Senators).

4. *Grading.*—Proposed section 1364 follows both the existing Federal law and the recent State revisions which designate this offense as a misdemeanor.[49]

Special Influence: Section 1365

1. *Introduction; Prohibition; Scope of Coverage.*—Proposed section 1365 is designed to serve as a companion provision to proposed section 1363, which deals with unlawful compensation for assistance in governmental matters. Section 1365 prohibits the purchase or sale of special influence upon public servants. Special influence is defined by the statute as influence by reason of kinship[50] or by reason of a person's position as a public servant. To permit persons to exert such special influence where private interests prevail over public interests would be to jeopardize governmental operations. To permit persons to derive economic gain from their ability to influence a public servant through kinship or by reason of a position of influence as a public servant is unjustifiable.

It will be noted that section 1365 does *not* prohibit the exerting of special influence per se; rather, it prohibits the purchase or sale of such special influence. The general problem of lobbying is a matter properly left to specific regulatory laws. Nor does section 1365 cover influence exerted by one public servant on other public servants in the normal course of his duties as a public servant, unless he takes private compensation for it.[51]

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[48] *Id.*

[49] *See* Model Penal Code § 240.7(1) (P.O.D. 1962); Proposed Crim. Code for Pa. § 2008(a) (1967); Mich. Rev. Crim. Code § 4725 (Final Draft 1967). Note, however, that N.Y. Rev. Pen. Law § 200.50 (McKinney 1967) and Proposed Del. Crim. Code § 702.2 (Final Draft, 1967) designate the offense as bribery punishable as a low grade felony, although New York gives the court discretion to impose a sentence of less than one year (section 70.05).

[50] The primary and ordinary meaning of the word "kinship" is relationship by ties of consanguinity, but the word is sometimes used in a general sense to include relationship by blood or by marriage. The broader meaning is intended, but it may be desirable to define the term for reasons of precision. A suggested definition to add to the statute would be: "'Kinship' means relationship to the public servant by common ancestry or by marriage."

[51] The proposed statute precludes payments to public servants for exercises of influence in their normal course of duty by defining a "thing of pecuniary value" as excluding payments of salary or other compensation by the government. *See* definition of "thing of pecuniary value" in sections 109(ac) and 1369. A public servant will not have received a thing of value under this statute if he was acting within the scope of his duty.

Section 1365 covers any person who offers or solicits a thing of pecuniary value for exerting the prohibited special influence upon public servants. This prohibition runs beyond direct dealings or direct arrangements by a person with a kinsman of a public servant or with a public servant to situations where the recipient arranges to have such a special influence exerted. This intent is made explicit by adding the language "procuring another to exert," *i.e.*, procuring someone other than the recipient to exert a special influence. The scope of this provision is based on the rationale that a special influence is improper and should be punished regardless of the capacity of the recipient himself to exert the special influence. There would seem to be no reason to permit persons to indirectly trade in special influence with only kinsmen of public servants and public servants prohibited from directly engaging in the sale of such influence.

2. *Relationship to Existing Law.*—Present sections 203 and 205 of Title 18 prohibit a public servant from selling his services or acting as an agent or attorney with regard to matters in which the government is interested.[52] Existing law, however, is intended to prohibit more than the mere sale of services by public servants. As one court observed with regard to 18 U.S.C. § 203:[53]

> It is the trading for pay of the prestige or power which comes with the defendant's position in the government that is dealt with by this section.

This observation would also appear equally applicable to 18 U.S.C. § 205.

As with the proposed sections 1362, 1363, and 1364, section 1365 seeks to define only that conduct which poses a substantial threat of harm to governmental operations and integrity and is therefore appropriately regulated by a penal law. Accordingly, section 1365 covers those cases which have typically been prosecuted under the broad language of the existing law where a public servant has really, in effect, sold his influence in the course of selling his services.[54]

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[52] *See generally* Extended Note A. for a discussion of related existing law.

[53] *United States* v. *Reisley*, 35 F. Supp. 102. 104 (D. N.J. 1940).

[54] For example:

(a) In *Burton* v. *United States*, 202 U.S. 344 (1906), a United States Senator was prosecuted for receiving compensation for his services (influence) in obtaining information and persuading the Post Office Department that the payor had not violated the postal law.

(b) In *United States* v. *Dunne*, 173 F. 254 (9th Cir. 1909), a United States Senator was prosecuted for receiving compensation for services (influence) rendered in appearing before the Commissioner of the General Land Office to persuade the Commissioner to expedite and approve certain [fraudulent] applications and claims for tracts of public lands in which the payor was interested.

(c) In *May* v. *United States*, 175 F. 2d 994 (D.C. Cir.), *cert. denied*, 338 U.S. 830 (1949), a Congressman was prosecuted for receiving compensation for services (influence) rendered in calling upon and writing the War Department to assist the payor in obtaining contracts with the War Department and obtaining commissions, promotions, furloughs and the like for relatives of the payor.

(d) In *Opper* v. *United States*, 348 U.S. 84 (1954), the defendant was prosecuted for purchasing the services (influence) of an employee of the United States Air Force to recommend the approval and procurement by the Air Force of a certain type of sun goggles and ski goggles used in survival kits manufactured by the payor.

(e) In *United States* v. *Johnson*, 383 U.S. 169 (1966), and 337 F. 2d 180 (4th

The section 1365 prohibition against the sale of special influence over public servants derived by reason of kinship has no counterpart in the existing Federal law. This provision has been taken from section 240.7 of the Model Penal Code.

3. *Grading.*—Proposed section 1365 is a misdemeanor. This suggested sanction is consistent with related proposed sections 1362, 1363 and 1364 and the similar provisions found in the 1967 Proposed Crimes Code for Pennsylvania (sections 2008(b), 601, 605) and the Model Penal Code (sections 240.7(2), 6.03, 6.08). It also reflects the distinction from bribery, which involves payments in exchange for a public servant's official action or violation of his known legal duty.

JURISDICTION: SECTION 1368
(Bancroft; Dean; January 10, 1970)

1. *Jurisdiction Over Federal Matters: Subsection 1368(1).* This subsection provides Federal jurisdiction over the offenses in sections 1361–1367 whenever the subject matter of the offense is Federal, *i.e.*, whenever a Federal public servant, service or office is involved. The shorthand term "Federal" is used to encompass the operations of the various agencies, branches, or instrumentalities of the United States government. The authority for the exercise of Federal jurisdiction over these offenses is generally the same as that which presently obtains for 18 U.S.C. § 201: the inherent power of the Federal sovereign to manage and regulate the conduct of it's own officers, employees and proceedings. With respect to section 1364(1)(b) Federal jurisdiction rests upon Congress' power to regulate the Federal elective process.

2. *Jurisdiction Over State and Local Matters: Subsection 1368(2).*—Subsection (2) provides for Federal jurisdiction over bribery and intimidation of *State* and *local* officers. Before discussing in detail the operative effect of this subsection, policy considerations and presently existing law with respect to local bribery will be reviewed.

A. *Policy and present law.*—Federal concern with local corruption appears to be a function of two interrelated considerations:

(1) The Federal interest in preserving an essentially republican form of government for the Union and for each of the States (U.S. Constitution, art. 4, § 4); and,

(2) The Federal interest in defeating the national aspects of organized crime. Organized criminal enterprises characteristically operate interstate and enforcement of law against such enterprises transcends State law enforcement capabilities. The problem becomes particularly acute when there is dishonest State law enforcement.

Cir. 1964), a Congressman was prosecuted for the sale of his services (influence) in seeking to have the Department of Justice "review" an indictment against the payor. The Circuit Court noted with regard to section 203's predecessor that, "'It [section 281] was aimed at preventing Congressmen, officers and employees of the United States government from using the weight of their positions or their influence in connection with matters which were to be determined before any department, agency, court martial, officer or commission and was to assist in insuring the integrity of such department determinations.'" 337 F. 2d at 195, *quoting United States* v. *Adams*, 115 F. Supp. 731, 734–735 (D. N.D. 1953).

Recent Federal concern with organized crime is most clearly documented by present 18 U.S.C. § 1952, which makes it a Federal offense to travel in interstate or foreign commerce or use the facilities of interstate or foreign commerce including the mail, with intent to promote or carry on any "unlawful activity." "Unlawful activity" is defined, in part, as "bribery . . . in violation of the laws of the State in which committed or of the United States." This statute, enacted in September 1961, reflects Federal concern with organized crime as including the problem of corruption of local officials. In large measure, the theory underlying explicit recognition of a Federal interest in essentially local offenses such as gambling, liquor, narcotics and prostitution has been that local law enforcement with respect to these crimes is frequently lax or nonexistent because local officials have been "bought off." Thus, the statute includes these offenses, together with bribery, under its definition of "unlawful activity."

The Federal interest in local corruption is further demonstrated by recent Federal prosecutions. A recent conviction obtained in the Southern District of New York,[55] for conspiracy to violate 18 U.S.C. § 1952, was based upon violation of the New York bribery laws, the charge being that a high official (James L. Marcus) in the New York City administration was bribed to exercise his authority to let a contract. Despite the fact that, in this case, the local district attorney, a highly respected prosecutor, would have been quite able to have his office prosecute the matter, the Federal government proceeded with the prosecution, presumably because the case involved organized criminal activity, albeit that the interstate aspects of this particular case may have been slight.

Other recent Federal cases include the indictment of a former West Virginia governor and other high State officials for a bribery violation of 18 U.S.C. § 1952 [56] and the prosecution, under 18 U.S.C. § 1952 of the mayor of Reading, Pennsylvania, for soliciting a bribe in connection with a contract to supply the city with parking meters.[57] Recent Federal indictments against the mayor of Newark and others for local corruption are further evidence of Federal interest in the integrity of local government.

Evidence of a Federal interest in local bribery is also found in Federal prosecutions undertaken prior to enactment of 18 U.S.C. § 1952, when the mail fraud statute, (18 U.S.C. § 1341) was employed. Whether bribery of local officials comes within the meaning of a "scheme to defraud" in the mail fraud statute, i.e., whether it is a Federal offense, was a question raised in *Shushan* v. *United States* [58] involving a plan to arrange refunding of bonds issued by the Louisiana Levee Board by bribing a member of the Board and Chairman of its Finance Committee. The court said: [59]

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[55] *United States* v. *Corallo*, 413 F. 2d 1306 (2d Cir.), *cert. denied*, — U.S. —, 90 S. Ct. 431 (1969).

[56] *United States* v. *Barron* (Cr. No. 68–5, S.D. W.Va., Charleston Div. 2/68). Note that the same former governor was subsequently, in January, 1970, charged in State court, again with official misconduct.

[57] *United States* v. *Kubacki*, 237 F. Supp. 638 (E.D. Pa. 1965).

[58] 117 F.2d 110 (5th Cir. 1940), *cert denied*, 313 U.S. 574 (1941).

[59] *Id.* at 115.

> A scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public . . . . No trustee has more sacred duties than a public official and any scheme to obtain an advantage by corrupting such a one must in the federal law be considered a scheme to defraud.

A spate of other cases brought under the mail fraud statute, also from Louisiana during the 1940's and often referred to as "The Louisiana Cases," demonstrates that the Federal government has frequently prosecuted essentially local corruption.[60] The Supreme Court, through Mr. Justice Whittaker, relied on some of these mail fraud cases in commenting as follows upon the propriety of Federal prosecution for wrongdoing by local officials in connection with their offices; [61]

> The Government, with the support of the cases soundly argues that immunization from the ban of the [Federal mail fraud] statute is not effected by the fact that those causing the mailings were public officials. . . .

B. *Effect of proposed subsection 1368(2).*—Subsection 1368(2) expresses the Federal interest in local bribery by broadening the jurisdictional base of the proposed official bribery and intimidation statutes. This approach is adopted in lieu of continued reliance upon State definitions of the offense and related statutes, presently the approach of 18 U.S.C. § 1952, or reliance upon the inapposite jurisdictional fortuities of fraud by mail, wire, *etc.* under 18 U.S.C. §§ 1341–42. Providing Federal jurisdiction over local corruption by fashioning the jurisdictional bases of a general bribery statute will promote uniformity in the prosecution of local corruption in Federal courts by avoiding the unnecessary burden upon Federal courts of interpreting State statutes. It may be noted that Federal definition of the offense appears to have presented no problems when local bribery prosecutions were conducted under 18 U.S.C. § 1341, prior to enactment of 18 U.S.C. § 1952.

The opening phrase of subsection (2) provides selective Federal coverage of local corruption. Only some of the offenses in sections 1361–1367 are designated for treatment. The determination expressed in this selection is that only felony offenses involving an element of corrupt bargaining (section 1361) and offenses which can serve as "backstop" aids in the enforcement of such provisions, warrant Federal intervention in local corruption. Thus, section 1362, dealing with rewards to officials after their official action has been taken, albeit a misdemeanor, is included. The parties should not be able to escape all liability by

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[60] *See Leche* v. *United States*, 118 F.2d 246 (5th Cir.), *cert. denied*, 314 U.S. 617 (1941), involving the governor and the chairman of the highway commission in contract-letting bribes; *Bradford* v. *United States*, 129 F.2d 274 (5th Cir.), *cert. denied*, 317 U.S. 683 (1942), involving a city councilman also in contract-letting bribes, and *Steiner* v. *United States*, 134 F.2d 931 (5th Cir.), *cert. denied*, 319 U.S. 774 (1943), involving the chief clerk in the New Orleans office of the State tax commission in bribes to reduce property assessments.

[61] *Parr* v. *United States*, 363 U.S. 370, 390 (1960).

agreeing in successful secrecy that payment be delayed until after the official action is taken. Section 1363 (dealing with excess compensation for assistance in government matters), section 1364 (relating to misconduct in obtaining public employment) and section 1365 (concerning improper influence from kinship or superior position) are not covered since these acts do not necessarily involve corrupt bargaining and do not materially assist in the enforcement of other provisions against corrupt bargaining. However, Federal coverage over threats to local officials and retaliation against them (sections 1366 and 1367) is provided. The Federal interest in securing protection for the honest local public servant who may not be able, because of local corruption, to secure vindication from his own sovereign is a direct and substantial function of the Federal interest in the prosecution of local corruption itself.

Within the selected offenses, Federal jurisdiction is provided, for both elected and appointed officials, under all of the common jurisdictional bases enumerated in section 201. Further, for local corruption or intimidation involving *elected* officials, Federal jurisdiction is plenary. The reason for distinguishing between elected and appointed officials in the reach of Federal jurisdiction and providing for plenary jurisdiction over the former, but not the latter, is that prevention of corruption or intimidation of or by *elected* local officials is central to any viable republican form of State government. Federal authority for the exercise of this jurisdiction is founded upon article 4, section 4 of the Constitution, mandating Federal protection of the republican form of government in the States. But since this exercise of Federal jurisdiction is somewhat novel and largely untested (*See* Extended Note C, *infra*) the common jurisdictional bases of section 201 are also made applicable to elected officials. For example, the elected local official who receives a bribe through the mails (*See* section 201(e)), could be covered under either subparagraph (a) or (b) of section 1368(2).

This overlap is intended since, jurisdiction under section 201 can provide a useful "backstop" to reach local elected officials in light of the largely untested constitutional power of article 4, section 4. Of course, the reach of subsection 2(b) of section 1368 depends on the extent to which officials are elected, rather than appointed in a particular State. For example, in some localities some judges are appointed rather than elected. But, regardless of differences among the States as to which officials are elected, the basic quality of a republican form of government is that major officials must be elected; and it is on the preservation of free elections, untainted by corruption, that the Federal guarantee of the republican form of government rests.

In applying plenary Federal jurisdiction over elected local officials involved in bribery or related crimes, and in applying all the traditional Federal bases for jurisdiction listed in proposed section 201 to such crimes when committed by any local official, the Federal government could intervene in almost any case of local corruption in the nation. But this unattractive prospect is limited by the provision that no Federal prosecution can be instituted unless the Attorney General certifies that a substantial Federal interest in the case exists. The standards by which existence of a substantial Federal interest may be determined are described in proposed section 201. Note that

existing Federal jurisdiction over such crimes under 18 U.S.C. § 1341 (use of the mail) and 18 U.S.C. § 1952 (interstate travel) is also quite broad and, in practical effect, limited only by *ad hoc* prosecutorial discretion to enter into cases which appear to be of undefined "Federal interest."

If desired, narrower Federal jurisdiction could be afforded by specifying that the bribery or intimidation violation must involve the administration of laws pertaining to organized crime offenses, somewhat as is presently done under 18 U.S.C. § 1952, as follows:

§ 1368.

(1) . . .

(2) Local Bribery and Intimidation. There is federal jurisdiction over an offense defined in sections 1361, 1362, 1366 and 1367(a) under paragraphs (a), (b), (e) or (h) of section 201 whenever the offense, local official action, legal duty, proceeding or service as a public servant, witness or informant involves the enactment, enforcement or violation of federal or local laws on murder, kidnapping, trafficking in narcotics or other dangerous drugs, gambling, prostitution, counterfeiting, extortion (including extortionate credit transactions) or insurance fraud (by arson or otherwise), or (b) . . . .

Extended Note A

Conflict of Interest Provisions

In developing the proposed provisions of chapter 13 relating to the integrity and effectiveness of governmental operations, consideration must be given to the question of "conflict of interest" laws. This extended note contains in part I a brief descriptive analysis of the existing conflict of interest laws presently contained in Title 18 and in part II recommendations with regard to existing law.

I. *Existing Federal Conflict of Interest Laws*

For purposes of describing the existing Federal conflict of interest laws, it may be said that whenever the interest of a public servant[1] (or, broadly speaking, the public) in the proper administration of governmental affairs and the private economic interests of that public servant clash or appear to clash a conflict of interest situation exists. A conflict of interest situation does not necessarily mean that harm has resulted or will result to the government (or the public), nor does it presuppose that the public servant will resolve the conflict to his personal financial advantage. Rather it means that the *potential* for public harm exists or that the temptation for personal advantage to a public servant exists. It is the purpose of the conflict of interest laws to prevent these situations from arising.

At the outset, the conflict of interest statutes should be distinguished from related statutes also seeking to promote the integrity and effectiveness of governmental operations. In this latter group of related statutes are proscriptions against types of conduct which pose a substantial and

[1] *See* the definition of the term "public servant" in section 109(x).

relatively immediate harm to governmental operations. The conflict of interest statutes, on the other hand, seek to regulate conduct before the harmful event actually occurs. For example, bribery is prohibited because it subverts the public servant's judgment: while the outside compensation of a public servant for any services (a conflict statute: *see* classification "B," *infra*) is prohibited because it *may* have this effect and it gives the appearance to others of having this effect. The distinction between the types of harm resulting from the two offenses would appear to call for a distinction between the sanctions imposed upon the two types of conduct. The statutes proposed for inclusion in the new Criminal Code dealing with rewarding past official action (section 1362), unlawful compensation for assisting in governmental matters (section 1363), trading in public office (section 1364), and special influence (section 1365) seek to make such a distinction.

The existing Federal conflict of interest laws with criminal sanctions are found—for the most part—in chapter 11 of Title 18. Other statutes are found in chapter 23 of Title 18 and for purposes of discussion and analysis these statutes have been grouped into the following classifications:

A. *Self-dealing:* 18 U.S.C. §§ 208, 431, 432, 433, 437, 440 and442.

B. *Outside compensation:* 18 U.S.C. § 209.

C. *Assisting outsiders in governmental dealings:* 18 U.S.C. §§ 203, 204 and 205.

D. *Restrictions on former public servants:* 18 U.S.C. § 207.

The broad language of some of the existing statutes results in an overlapping of these classification categories, but the suggested categories represent the basic thrust of the statutes listed thereunder.

A. *Self-dealing*

Self-dealing here means that a public servant is in a position where his official duties enable him to act in some manner that may directly or indirectly affect his own private economic interests. Specific examples of self-dealing would be the tax auditor who audits his own tax return or the public servant who authorizes a government contract with his own company or a corporation in which he owns stock. The Federal statutes covering such situations seek to eliminate the potential for harm or personal advantage by restricting the public servant's official activities rather than his private activities. A public servant is not prohibited from acquiring private interests, but when a conflict arises he must disqualify himself from official action.

18 U.S.C. § 208: Section 208, based on a provision dating back to 1863 (12 Stat. 696, 698), is the basic Federal statute covering self-dealing. This statute prohibits an officer or employee of the *executive branch* of the government, or any independent government agency, or the District of Columbia, from acting for the government in any matter in which he has a financial interest. The prohibited financial interest may be an interest held personally by the officer or employee or by persons within the following designated relationships with the officer or employee: (1) spouse or minor child, (2) partners, (3) an organization in which he serves as officer, director, trustee, partner or employee, or (4) any person or organiza-

tion with whom he is negotiating or has any arrangement concerning prospective employment. The maximum penalty under section 208 is a fine of $10,000 and 2 years' imprisonment.

18 U.S.C. §§ 431, 432, 433, 437, 440 and 442: The prohibitions contained in these sections, relating to unlawful contracts by government officers and employees, also can be classified in the category of self-dealing, although they are generally not considered a part of the conflict of interest laws per se.[2]

Section 431 prohibits Members of Congress from directly or indirectly entering into or holding a contract with the United States or any agency thereof. A corollary provision, section 432 prohibits officers or employees of the United States from entering, on behalf of the United States, into a contract prohibited by section 431. Section 433 exempts certain types of contracts from the prohibitions of sections 431 and 432. Violations of sections 431 and 432 are subject to a maximum penalty of a $3,000 fine. These statutes, of Civil War vintage, were primarily designed to prevent Members of Congress from exerting the influence of their office either to obtain a personally advantageous contract or in any manner to affect the performance of a contract with the government.

Section 437 prohibits an officer, employee or agent of the government from having an interest in any contract regarding the purchase, transportation, or delivery of goods or supplies to the Indians. Violations are punishable by a maximum penalty of a $5,000 fine and 6 months' imprisonment and automatic removal from office.

Section 440 prohibits persons employed in the Postal Service from having an interest in any contract for carrying the mail or from acting as agent for any contractor or person seeking to become a contractor in any business with the Post Office Department. Violations are punishable by a maximum penalty of a $5,000 fine and 1 year's imprisonment.

Section 442 prohibits the Public Printer, superintendent of printing, the superintendent of binding or any of their assistants from having any interest in the publication of any newspaper or periodical or in any printing operations or in any contracts to supply materials for public printing. Violations are punishable by a maximum penalty of a $1,000 fine and one year's imprisonment.

B. *Outside Compensation*

The general purpose of restrictions on outside income is to prevent a private source from detracting from or diluting a public servant's loyalty by paying him extra compensation for doing what the government has hired him to do. It has been also pointed out that an

[2] A sufficient reason for such legislation is that it tends to preserve the independence of the legislative and executive branches of the government, and to free each from that influence which might come to be exerted over it by the other if the officers of the executive branch, acting on behalf of the government, could freely contract with members of and delegates to Congress. The purpose of the statute is to effectually close the door to the temptation which is incident to contractual relations between the government and members of Congress, (*United States* v. *Dietrich*, 126 F. 671, 673 (C.C. D.Neb. 1904)).

outside payor can exert unfair and self-serving pressure on a public servant who receives such payments by threatening to cut off the payments; a public servant receiving outside payments may tend to favor his outside payor vis-à-vis others dealing with the government; and any arrangement whereby a private individual supplements the income of a public servant has a questionable appearance that breeds bitterness among other government employees and creates public suspicion. The payment of extra compensation to a public servant is distinguishable from bribery in that it does not involve the intent to influence the public servant's official actions. In many situations, however, such payments are virtually indistinguishable from bribery.

18 U.S.C. § 209: Section 209 prohibits the payment or receipt of any salary or supplementation of salary "as compensation for the services" of an officer or employee of the United States or any agency thereof. Note that mere gifts or income paid for nongovernmental services would not be violations in that they are not compensation for services performed as a government officer or employee. Payments for governmental services are prohibited regardless of the intentions or actions of the payor and, subject to the exceptions of section 209(c), regardless of the relationship of the payor and recipient. Violations are punishable by a fine of $5,000 and 1 year's imprisonment.[3]

C. *Assisting Outsiders in Governmental Dealings*

It is a long standing policy of the Federal government to inhibit its employees from assisting outsiders in certain dealings with the government. Underlying this prohibition is the philosophy that the loyalty of the public servant is to the government and he should not serve two masters, particularly where their economic interests may be adverse. Note that the prohibition against assisting outsiders differs from the offense of bribery in that the former need not involve an effort on behalf of the outsiders to influence the "official actions" or to promote violation of a duty of the public servant; this prohibition may involve public servants outside their official duties.

18 U.S.C. §§ 203 and 205: Section 205 is the oldest Federal conflict of interest statute, having been first enacted in 1853. Section 203, which largely overlaps section 205, was enacted in 1864. Both sections 203 and 205 cover officers and employees in "the executive, legislative or judicial branches." Section 203 specifically includes Members of Congress, while section 205 does not apply to Members of

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[3] Section 209 should be distinguished from a related statute which places a general ban against employing persons for Federal public service without pay. 31 U.S.C. § 665(b) requires that a government employee be on the government payroll. Section 665(b) reads:

> No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law . . . .

Violation of section 665(b) is subject to appropriate administrative discipline, including suspension from duty without pay or removal from office. Knowing and willful violation of section 665(b) is punishable by a fine of $5,000 and 2 years' imprisonment.

Congress.[4] Section 203 prohibits offers to or acceptance by public servants of compensation for any services "in relation to" any "particular matter" coming before Federal departments or agencies. Section 205 forbids public servants to act as "agent or attorney," regardless of compensation, in the prosecuiton of any claim against the United States or in any particular matter in which the United States is a party or has a direct and substantial interest. The basic distinction between the sections is that section 203 applies to "any services" rendered for compensation and it includes Members of Congress, but excludes court proceedings. Section 205, on the other hand, applies to acting "as agent or attorney" regardless of compensation, excludes Members of Congress, but includes court proceedings. Both sections 203 and 205 have maximum penalties of a $10,000 fine and 2 years' imprisonment. Section 203, however, provides for the automatic forfeiture of public office or employment, while section 205 contains no such provision.

18 U.S.C. § 204: Section 204 prohibits Members of Congress from practicing before the United States Court of Claims. This prohibition, dating back to the Revised Statutes, carries a maximum penalty of a $10,000 fine and 2 years' imprisonment, plus automatic disqualification from holding Federal public office.

D. *Restrictions on Former Public Servants*

The following concerns are said to underlie the provisions restricting *former* public servants in their dealings with the government: inside information and inside connections may result in abuses; the aura of governmental influence generally survives the duration of a public servant's employment with the government; and there is some general attitude against "switching sides." The danger here is not only that a public servant might be tempted to join an adversary of the government after his employment but also that an indulgent attitude might encourage bidding for the loyalty of a government employee while he is currently in government employment.

18 U.S.C. § 207: Section 207 applies to former officers or employees of the executive branch, of any independent agency, or of the District of Columbia. Members of Congress are not subject to the statute. Section 207 permanently bars a former government employee from acting as agent or attorney for nongovernment interests in a matter on which he had done substantial work while employed by the government. A 1-year restriction is imposed on personal appearances by former employees before any court, department or government agency in connection with any matter that had been under his "official responsibility." Violations of Section 207 are punishable by a fine of $10,000 and 2 years' imprisonment.

II. *Recommended Disposition of Conflict of Interest Laws in the Proposed Criminal Code*

For the reasons stated generally in the comments on regulatory offenses, section 1006, the above-noted "conflict of interest" sections

[4] The 1853 Act (c. 81, 10 Stat. 170), on which section 205 is based, originally applied to Members of Congress, but this provision was deleted in the 1873 codification (R.S. § 5498), apparently because the 1864 Act (now section 203) adequately solved the need for such coverage.

should be removed from the criminal context of Title 18 and placed in appropriate titles of the United States Code.*

It is submitted that, basically, these prohibitions are regulatory in nature and in the malum prohibitum category of offenses. Since the proscribed behavior is not condemned by private morality, there is a good possibility of "innocent transgression" [5] and liability to criminal prosecution in situations where no "bad" or "evil" intent was present. This is not only repugnant to our general concepts of criminal liability,[6] but, more specifically, creates a strong deterrent to government recruiting.[7]

The fact that conflict of interest provisions are noted for their vagueness and technicality, thereby resulting in many definitional questions and ambiguities, adds to the problems of a government employee who is trying to "stay within the law." [8] The presence of these ambiguities, plus the fact that the need for conflicts provision varies depending on the particular government agency or position involved, are strong arguments for taking these out of the Criminal Code.

The general effect of the transfer of the conflict provisions out of Title 18 would be a reduction in grading of these offenses. These offenses, a few of which now are felonious, would be graded as regulatory offenses (Section 1006). This reduction appears justified and necessary for a number of reasons: (1) the conflict provisions are basically prophylactic in nature in that they are designed to prevent future or possible harms from occurring, rather than to punish perpetrators of actual harms; [9] (2) since we are dealing with conduct that is several steps away from an actual substantive offense, the ultimate weapons of the law, *i.e.*, criminal sanctions, should be used sparingly; and (3) the fact that prophylactic controls inevitably affect many more law abiding people than evildoers suggests a policy of relatively low maximum penalties. Furthermore, the fact that the present conflicts sections in Title 18 are little used gives rise to the inference that their sanctions are an inappropriate device for regulating conflicts of interest.

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* Sections 1371 (unlawful disclosure of confidential information) and 1372 (speculating or wagering on official action or information) retain a few aspects of "conflicts of interest" misconduct for treatment as crimes.

[5] *See* discussion in the comment on regulatory offenses, paragraph 2.

[6] *See* the comment on preliminary provisions, section 102.

[7] *See* Memorandum of Atty. Gen., February 1, 1963, 28 F.R. 985 (1963); *see also* Perkins, *The New Federal Conflict-of-Interest Law*, 76 HARV. L. REV. 1113, 1115 (Jan. 28, 1963), pointing out that this recruiting problem is more acute in light of recent developments such as (a) the growth in number of Federal employees, (b) the dependence of government on the expertise of private individuals, (c) the flow of individuals in and out of government service, and (d) the increased interest of individuals in the private economy through stock ownership, profit sharing, *etc.*

[8] The problem of vagueness, somewhat inevitable in conflict provisions, and the effect thereof on the prospective appointee is noted in THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, CONFLICT OF INTEREST AND FEDERAL SERVICE 163 (1960). Discussion with the General Counsel's office of the Civil Service Commission confirms the problems confronting Federal employees seeking to comply with the standards of the broad language of the conflict of interest laws. The Michigan Revised Criminal Code recommends civil remedies for the treatment of conflict because ". . . the standard of restriction involved is too vague and technical to appropriately be the subject of criminal sanctions." MICH. REV. CRIM. CODE § 4720, Comment at 379 (Final Draft 1967).

[9] *See* discussion in the comment on regulatory offenses, paragraph 2.

Extended Note B

18 U.S.C. § 211 (2d paragraph)

The second paragraph of 18 U.S.C. § 211, added to the law in 1951, reads as follows:

> Whoever solicits or receives any thing of value in consideration of aiding a person to obtain employment under the United States either by referring his name to an executive department or agency of the United States or by requiring the payment of a fee because such person has secured such employment shall be fined not more than $1,000, or imprisoned not more than one year, or both. This section shall not apply to such services rendered by an employment agency pursuant to the written request of an executive department or agency of the United States.

This provision was advanced by the Civil Service Commission on the basis that:

> No American citizen should have to register with an employment agency and no American citizen should have to pay a fee in order to obtain a job with his own government.
>
> The Commission believes that there is a violation of democratic principles inherent in any procedure under which an applicant is required to pay a fee, either directly or indirectly, for securing Federal employment. The Commission has done everything that it could to stop the practice. Whenever we have delegated authority to agencies to do their own recruiting we have instructed them not to use the services of commercial employment offices which charge applicants a fee for placement in Federal employment. Every examination announcement that we have issued for the past several years has contained a notice to applicants that it is not necessary to secure the services of a private employment agency in order to obtain Federal employment. We have, however, succeeded in stopping neither the practice nor the complaints.
>
> Administratively the Commission can do no more. The law as it stands at present applies only to the solicitation or receipt of money or anything of value in consideration of the promise or support or use of influence in obtaining any appointive office or place under the United States. Normally there is no attempt on the part of an employment agency to use any influence to secure appointments. Consequently there is no violation of law as it stands at present. Enactment of amending legislation seems to be the only solution. (H.R. Rep. No. 784 at 1770 (1951).)

It is recommended that this section be transferred from the Criminal Code, (Title 18), to Title 5, which contains similar regulatory provisions. (*See* 5 U.S.C. § 3301 *et seq.* (chapter 33—examination, selection and placement) (Supp. II, 1964)). This provision properly belongs under the regulatory area of the United States Code, rather

than in the new Criminal Code. *See generally* the comment to section 1006. The second paragraph of 18 U.S.C. § 211 is not a malum in se offense; rather it is a malum prohibitum offense. Characteristic of its regulatory nature is the absence of reported criminal prosecutions; its prophylactic purpose, *i.e.*, to prevent unfair business practices by private employment agencies in securing Federal employment; its limited application to a narrow, very specific situation or class of persons, *i.e.*, employment agencies; and the lack of need for a severe criminal penalty to prohibit the practice sought to be controlled.

Extended Note C

The Guarantee Clause

Article 4, section 4 of the Constitution provides as follows:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.

It apppears that this clause can be used as authority for Federal enactment of a local corruption and intimidation statute. Although it has been used explicitly by Congress only rarely as a jurisdictional basis for Federal legislation and such use has never been judicially tested, the history of its enactment demonstrates that it does provide a plausible basis for the Federal government to enact legislation.[1]

The clause was first used as authority for legislation during Reconstruction: initially as a basis for the Wade-Davis bills (vetoed by the President) and then as a basis for the Reconstruction Acts (which the Supreme Court declined to rule upon, characterizing the matter as a political question). Shortly after the passage of those Acts, the 14th amendment was adopted, giving explicit statement to much that is implicit in the clause, and from then on the enactment and adjudication of the constitutionality of legislation was undertaken pursuant to the amendment.[2] Since Reconstruction, the clause has been contemplated for use as a basis for Federal legislation at least once. President Roosevelt proposed to enact legislation which would, in effect, depose Governor Huey Long of Louisiana but was advised by the Justice Department that the clause was too ambiguous to employ with any substantial prospect of success.[3] When it has been employed as authority for Federal jurisdiction, it is tendered as only

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[1] Much, if not most, of the material herein is taken from Bonfield, *The Guarantee Clause of Article 4, Section 4: A Study in Constitutional Desuetude*, 46 Minn. L. Rev. 513 (1962) [hereinafter cited as Bonfield], the only known 20th century analysis of the clause.

[2] *Bonfield*, *supra* note 1, at 538–541. *But see, Barsky* v. *United States*, 167 F. 2d 241 (D.C. Cir.), *cert. denied*, 334 U.S. 258 (1944) [Guarantee clause held to be a valid constitutional basis for a Congressional resolution establishing H.U.A.C.].

[3] Schlesinger, The Politics of Upheaval 250 (1950). Virtually all litigation under the clause since Reconstruction has been undertaken to declare invalid some State action which allegedly impaired republican government. The uniform judicial response has been that this raises a nonjusticiable political question, solely within Congress' power to determine. *See., e.g., Baker* v. *Carr* 392 U.S. 218 (1962).

one of several more conventional bases [4] and its use therefore remains judicially untested.

Nevertheless, the history of the enactment of the clause demonstrates that it provides an express power of the Federal government to enact legislation, and that it is not simply a limitation upon its express or implied powers. It was enacted to protect the Union against erosion by subversion should any State become a monarchy or autocracy by usurpation perpetrated by either its constituted authority or a renegade faction.[5] Some historical comment clearly indicates that the clause was understood to cover only violent usurpation. Other such comment and usage suggests otherwise.[6] In any event it is noteworthy that violence, as such, is given separate treatment in the last phrase of the clause. This possible limitation (that the clause only guarantees against violation usurpation) is the principal reservation against using it to cover nonviolent corruption and intimidation.

The following is an analysis of each pertinent phrase of the clause, based upon its history of enactment and the contemporary meaning and logical implication of the words used: [7]

> "The United States"—the Federal government as a whole is designated rather than a specific branch. Accordingly, Congress' power to act under the clause seems clear;
>
> "guarantee"—to protect, not just to restore or expel after a debacle;
>
> "every State"—the clause would reach local, *e.g.*, municipal government as such governments are instrumentalities of the State; [8]
>
> "republican"—rule by the majority through delegated power to representatives with reversion directly to the people at elections;
>
> "form of Government"—not simply formal structure of State government but its quality as it operates in practice and in substance.

Thus, article 4, section 4, may be read to establish a protective duty on the part of all branches of the Federal government to insure the Union and each of the States, including their instrumentalities, against intrusion by autocratic, unrepublican government. As such, it would appear to be a proper albeit largely unrecognized, basis for Federal jurisdiction over local corruption and intimidation especially should Congress explicitly find that bribery of elected local officials of all variety poses a danger to republican government.[9]

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[4] *See, e.g.*, 18 U.S.C. APP. § 1201(4).

[5] *Bonfield, supra* note 1, at 518–522; 531–532.

[6] *Id.*

[7] *Id.*

[8] *See Reynolds* v. *Sims*, 377 U.S. 533 (1964); *contra*, *Johnson* v. *Gennissee Co.*, 232 F. Supp. 567 (D. Mich., 1964).

[9] It at least seems clear that such action would not be repugnant to article 4, section 4 of the Constitution. As the Supreme Court noted in *Baker* v. *Carr*, 369 U.S. 186, 224–228 (1962), it has consistently held that "challenges to Congressional action on the grounds of inconsistency with [article 4, section 4] present no justiciable question."

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COMMENT

on

MISUSE OF GOVERNMENT INFORMATION: SECTIONS 1371 AND 1372 (Stein; October 10, 1969)

1. *Unlawful Disclosure of Official Information.*—Proposed section 1371 derives from present 18 U.S.C. § 1905, generally prohibiting disclosure by public servants of confidential information concerning private business affairs. The prohibition is designed to protect those members of the public required to make disclosures to the government.[1]

A fundamental issue is whether there should be a general prohibition against revealing such information. It may be an improvidently severe restriction upon a public servant acting in the public interest, for example, in the area of nondisclosure of government-held information pertaining to consumer safety. It may be best to protect legitimate business secrets from disclosure only by specific provision, so that Congress may carefully determine what types of information should be privileged, rather than rely on the wholesale prohibition. There are, as shown by the appendix, *infra*, many existing specific provisions currently in effect.[2]

On the other hand, the Federal government is engaged in extensive regulation of industry and the Federal government requires private citizens to submit a considerable amount of private information to the government as a necessary concomitant of governmental opera-

[1] Other existing unlawful disclosure statutes are designed to protect information concerning specific governmental operations, usually in the national security area. *See* the appendix, *infra*. To the extent that these provisions are more than regulatory in nature, they are covered by the draft's provisions on national security concerning revelation of classified information, *see* section 1113. *See also* proposed section 1372 of this draft concerning speculation based on government action. Note that, beyond these areas, government policy generally, as expressed in the Public Information Act (5 U.S.C. § 552, enacted in 1967), encourages disclosure of agency rules, opinions, orders, records and proceedings.

[2] *Cf.* MICH. REV. CRIM. CODE § 4810, Comment at 387 (Final Draft 1967): Michigan also has several provisions that make it a crime for public servants to disclose specific confidential information for any except a public purpose. These provisions are varied in nature, depending in large upon the specific nature of the information involved, and cannot appropriately serve as a basis for a general provision.

The Michigan revisers pointed out that Michigan has seven such statutes with specific prohibitions covering disclosures of information gained by city investigation; information contained in reports by assessors; information obtained from official examinations of lands; information obtained from examination of savings associations; information obtained in examination of saving and loan institutions; information relating to examination of applicants for marriage license; information obtained in judicial inquiry by grand jury.

tions. Further, the Federal government has, in addition to extensive accumulations of confidential information, innumerable public servants with access to that information. Accordingly, it may be desirable to carry forward some general criminal restriction on improper disclosures of information collected by the government.

The proposed section prohibits a person from disclosing confidential information "in knowing violation of a duty imposed on him as a Federal public servant." This is similar to the prohibition in present 18 U.S.C. § 1905 of disclosures "not authorized by law." A government employee is thereby bound to observe those specific regulations pertaining to confidentiality of information obtained by his governmental unit. But use of the phrase "knowing violation of a duty" would permit a defense for those revealing information in the public interest. This limitation on the scope of a general statute seems necessary, considering its criminal sanction. Absolute prohibitions on revelation of information must be left to specific regulations.

The proposed provision does, however, expand on present law in its definition of "confidential information." Present 18 U.S.C. § 1905 is limited to prohibition of unlawful disclosure of trade secrets and other business information. But some present regulatory provisions cover personal confidentiality as well (*see* the appendix, *infra*), and there is no reason why such information should be treated differently from business secrets.

The proposed section retains present language forbidding a person from either "disclosing" or "making known in any manner" any confidential information. Thus, leaving confidential documents in improper places knowing they will be discovered by unauthorized persons is within the prohibition of the statute, though such an act is not an affirmative act of "disclosure."

Limitation of the scope of the criminal statute to public servants who profit by their disclosure was considered. The limitation seems unworkable, however, since wrongful disclosure of information can be quite serious even if no immediate profit is derived therefrom. A public servant, for example, may subsequently be offered a job because of the knowledge of confidential business relationships which he previously revealed. Moreover, revelation of confidential information is quite harmful to the person whose confidences are destroyed, even if the revealer does not directly profit from his deed.

2. *Speculation or Wagering on Official Action or Information.*— Proposed section 1372 greatly extends present law in that it makes the acquisition of a financial interest in property affected by (or speculation on the basis of) official information or governmental action a misdemeanor if done by *any* prospective, present or former Federal employee with respect to *any* information regarding *any* property. Presently, only a relatively small number of Federal personnel are punishable criminally for such conduct, and the conduct for which they are punishable is rather limited. For example, Small Business Administration personnel are specifically prohibited from speculating in the securities of companies receiving SBA assistance (15 U.S.C. § 645(b)(4)); Internal Revenue employees (26 U.S.C. § 7240) and Agriculture Department employees (7 U.S.C. § 1157) are specifically prohibited from speculating in the sugar market or companies involved therein.

The proposed section derives from the Model Penal Code (section 243.2, P.O.D. 1962) and recent State revisions. The conduct may be generally proscribed since it constitutes taking undue and partisan advantage of a public position and is, therefore, a serious breach of the integrity of government operations.

In order to avoid such behavior by public servants, the provision proposes to extend its proscriptions to actions by public servants not only while they are actively employed for the government but for some period (1 year) thereafter. This should prevent a public servant from simply quitting the public service in order to speculate on the basis of information he acquired by virtue of his government employment. However, after a while, the speculative advantage to be derived from such information becomes attenuated, and the former public servant should be permitted to carry on his private affairs on an equal basis with anyone else. The proposed provision therefore seeks to extend its sanctions beyond the period of governmental employment, but only for a finite and modest period of time.[3]

Disposition as well as acquisition of a pecuniary interest in any property prompted by information acquired through one's government employment may seem appropriate for criminal proscription, since the evils which prohibit the *acquisition* of an interest in the proscribed manner also exist in the *disposition* of such an interest. But it is difficult to brand a person's normal impulse to cut losses, even if his information is derived from his public employment, as criminal behavior. Neither existing Federal law, nor modern revisions, so extend the proscription; and the draft does not do so.

3. *Grading.*—Presently there is considerable inconsistency among the penalties for unlawful disclosure or use of official information. By and large, however, the principal existing provisions treat offenses of disclosing confidential information as misdemeanors. It may be a closer question as to whether section 1372 should carry felony penalties, since many existing offenses of speculating or wagering by use of inside information are treated more severely than mere unlawful disclosure. But since deterrence is the principal objective of the penalty here and since the authorized fine would be double any gain, the misdemeanor jail maximum should be sufficient.

4. *Regulatory Offenses.*—There are a number of provisions in existing law which prohibit disclosure of confidential information by persons other than public servants. (*See* the appendix, *infra.*) These provisions are carefully defined and concern special areas of government regulation (*e.g.*, 18 U.S.C. 1906–1908, prohibiting certain disclosures of information by bank examiners, without specific authorization by described banking officials). It is proposed that such proscriptions be treated as regulatory offenses; those now in Title 18 would be trans-

[3] A similar provision might be considered for proposed section 1371, concerning revelation of confidential business information. However, it seems ineffective and unrealistic to set an arbitrary cut-off date, after which confidential information may be revealed. Some confidences are such as to last a lifetime or longer; others may last for less than a year. As noted in the discussion above (paragraph 1) the best way to deal with the different types of confidential information obtained by the government is by specific regulation.

ferred to appropriate titles of the United States Code, concerning regulation of the particular matter involved.[4]

APPENDIX

DISPOSITION OF EXISTING LAW

EXISTING PROVISIONS WHICH WOULD BE ABSORBED IN SECTION 1371*

7 U.S.C. § 135a(c)(4)—Revealing or using product formulas of economic poisons.
7 U.S.C. § 472—Communication by Agriculture employee of information provided for cotton statistics and estimates.
7 U.S.C. § 608d(2)—Disclosure by Department of Agriculture employee of information received from commodity benefits investigation.
7 U.S.C. § 610(g)—Dealing or speculating in agricultural products by Agriculture official.
7 U.S.C. § 1157—Sugar investments by officials of Agriculture administering sugar production and control program.
12 U.S.C. § 1141j(b)—Speculation by employee of Farm Credit Administration in agricultural commodities.
12 U.S.C. § 1141j(d)—Prediction of cotton prices in governmental reports by government employee.
15 U.S.C. § 78x(c)—Disclosure of information not available to the public by SEC employee.
15 U.S.C. § 79v(c)—Disclosure of information not available to public concerning public utility holding companies by SEC employee.
15 U.S.C. § 80a–44(a) [second sentence] (same as 15 U.S.C. § 79v(c) concerning investment companies).
15 U.S.C. § 80b–10(b) [second clause (from; to.) of second sentence]—Disclosure of information obtained from investigation of investment advisers by SEC employee.
15 U.S.C. § 645(b)(4)—Disclosing of information concerning future action of the Small Business Administration which might affect value of securities; speculating with such knowledge.
15 U.S.C. § 1263(h)—The use by any person of information concerning trade secrets obtained under HEW inspection.
16 U.S.C. § 825(b)—[second sentence]—Disclosure by FPC employee of information obtained as a result of Commission examination.
18 U.S.C. § 1901—Collecting or disbursing officer trading in public property.
18 U.S.C. § 1902—Disclosure of crop information and speculation thereon by government employee.
18 U.S.C. § 1903—Speculation in stock or commodities affecting crop insurance.
18 U.S.C. § 1904—Disclosure of information or speculation in securities affecting Reconstruction Finance Corporation.
18 U.S.C. § 1905—Disclosure of confidential information by public officers or employees.
21 U.S.C. § 331j—Use by any person of information obtained concerning trade secrets under 18 U.S.C. §§ 344, 348, 355, 356, 357 or 374.
21 U.S.C. § 458h—Use by any person of information received through poultry products inspection concerning trade secrets.
22 U.S.C. § 286(f)(c)—Disclosure of information furnished to International Monetary Fund by government employee.
26 U.S.C. § 7213(a)(1),(b)—Disclosing by Federal employee (a) of information contained in income tax returns, or (b) of manufacturer operations obtained as a result of employee's visit.

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[4] The appendix describes existing law and makes recommendations regarding its disposition in the new Code, by designating which provisions should be repealed because they are replaced by sections 1371–1372, which provisions should incorporate the provisions of section 1006 (regulatory offenses) and which provisions are treated under other sections of the new Code.

*And could hence be repealed subject to saving the provisos authorizing disclosure.

26 U.S.C. § 7240—Administrator of sugar tax investing or speculating in sugar.
42 U.S.C. § 1306(a)—Disclosure of information in possession of HEW or Department of Labor employees.
42 U.S.C. § 3220(b)(4)—Unauthorized giving of information concerning future action of Secretary of Commerce which may affect value of securities; speculation with knowledge thereof.
47 U.S.C. § 220(f)—Divulging information received during examination of records of communications carriers by FCC employee.
49 U.S.C. § 20(7)(f)—Divulging information gained during inspection of carrier records by ICC inspector.
49 U.S.C. § 322(d)—Divulging information received from carrier reports by inspector for ICC.
49 U.S.C. § 917(e)—Divulging information received from water carriers, lessors, and associations from reports by ICC inspector.
49 U.S.C. § 1021(e)—Divulging information received from reports of freight forwarders by ICC inspector.
49 U.S.C. § 1472(f)—Divulging information received from examination of air carrier records by Civil Aeronautics Board employee.
50 U.S.C. § 139—Disclosure of information regarding business of explosive manufacturer or distributor by Department of Interior employee.
50 U.S.C. § 2160(f)—Disclosure of confidential information or speculating therewith by government employee.
50 U.S.C. App. § 643a [last sentence]—Disclosure of confidential information obtained from inspection of war contractor records.
50 U.S.C. App. § 1152(a)(4) [last sentence]—Disclosure of confidential information obtained under War and Defense Contract Act.
50 U.S.C. App. § 2026(c)—Disclosure of confidential information obtained under Export Controls Act.
50 U.S.C. App. § 2155(e)—Disclosure of confidential information obtained by President under Defense Production Act concerning trade secrets.

EXISTING PROHIBITIONS WHICH WOULD NOT BE ABSORBED IN NEW SECTION 1371, BUT WHICH COULD BE MADE REGULATORY

Title 26

26 U.S.C. § 7213(a)(1)—To the extent that it prohibits any person from printing or otherwise publishing, in any manner not provided by law, any income return, or any part thereof, or source of income, profits, losses, or expenditures appearing in any income return.
26 U.S.C. § 7213(a)(2)—Disclosure by State or local official of information acquired by him pursuant to inspection permitted him under section 6103(b).
26 U.S.C. § 7213(a)(3)—Disclosure by shareholder permitted inspection of corporation's return under section 6103(c).
26 U.S.C. § 7213(c)—Use by any person of film or reproduction of information therefrom in violation of regulations under section 7513(b).
26 U.S.C. § 7237(e)—To the extent that it prohibits *any person* from disclosing (except for law enforcement as specified) information contained in statements and returns filed by manufacturers, importers of marijuana and narcotics.

Title 42

42 U.S.C. § 1306(a)—To the extent that it prohibits unlawful disclosure by any person of records and other information obtained from HEW or Labor Department employees.
42 U.S.C. § 1975a(e)—To the extent that it prohibits disclosure of information taken in executive session of the Civil Rights Commission by *any person.*

Title 12

12 U.S.C. § 1141j(c)—Which prohibits cooperative associations and their employees from disclosing information imparted to them in confidence by the Farm Credit Administration.

Title 18

18 U.S.C. § 1906–1908—Disclosure of information by bank examiners, without authority from the bank or Federal Reserve officials.

EXISTING PROVISIONS DEALT WITH IN NATIONAL SECURITY COMPLEX OF OFFENSES

18 U.S.C. § 798—Disclosure by *any person* of classified information.
18 U.S.C. § 952—Disclosure of diplomatic codes by Federal employees.
35 U.S.C. § 181—Disclosure of information regarding invention for which grant of patent is ordered to be withheld in the interest of national security.
42 U.S.C. § 2274—Disclosure by *any person* of restricted data.
42 U.S.C. § 2277—Disclosure by present and former government employees, contractors and licensees and their employees.
42 U.S.C. § 2273—Violation of AEC regulations regarding use of Restricted Data.
42 U.S.C. § 2181(e)—Unauthorized disclosure of patent applications and required reports regarding inventions relating to atomic and nuclear materials.
50 U.S.C. § 783(b)—Disclosure of classified information by government employees or employees of corporations in which the government owns stock.

COMMENT

on

IMPERSONATING OFFICIALS: SECTION 1381
(Green, Hogan; January 12, 1968)

1. *Introduction; Background; Advantages.* Section 1381 is a provision designed primarily to maintain respect for and confidence in the authenticity of Federal credentials. Collaterally it will also prevent the use of Federal credentials to impose by way of fraud or otherwise upon others.[1] Here we are penalizing the impersonation of Federal officials and employees and, as under present law, officials of foreign governments accredited to the United States. The proposed section has been logically extended to foreign officials accredited to the United Nations and Organization of American States, international governmental organizations based in this country. Other provisions[2] will be drafted to deal with unauthorized wearing of government uniforms and the unauthorized use of Federally-protected credentials such as names, emblems, seals, insignia, symbols, and other such means of falsely pretending to have a connection with the government and with other organizations in which the government has an interest or indicating authorization, endorsement or approval by them.[3]

The principal provision of existing law prohibiting impersonation of Federal officials is contained in section 912 of Title 18. Originally enacted in 1884 to prohibit frauds on the government by those claiming to be entitled to Federal pensions,[4] this provision has mainly been used for prosecutions in which victims other than the government have been imposed upon by the impersonation. It has been used to prosecute, for example, one who sent a telegram in the name of a U.S. Senator to the warden of a State penitentiary ordering a stay of execution [5] and

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[1] The purpose of such a statute has been stated by the Supreme Court as follows: ". . . not merely to protect innocent persons from actual loss through reliance upon false assumptions of Federal authority, but to maintain the general good repute and dignity of the service itself." *United States* v. *Barnow*, 239 U.S. 74, 80 (1915). In *Honea* v. *United States*, 344 F.2d 798, 802 (5th Cir. 1965), it was said that "one of the vital interests" such a statute seeks to protect is "the dignity, prestige and importance of federal office."

[2] *See* special jurisdictional bases for theft offenses in section 1740(4) and for forgery in section 1751(3). To the extent such crimes are not covered by section 1381, forgery or theft, they will be transferred outside Title 18, *e.g.*, to Title 10—Armed Forces.

[3] Many of the existing provisions dealing with uniforms, emblems, insignia and names can be found in Chapter 33 of Title 18, § 701–713.

[4] Act of April 18, 1884, 23 Stat. 11. Although legislative history is scant, the purpose of protecting the government from fraudulent practices affecting pension claimants was ascribed by the Supreme Court in *Pierce* v. *United States*, 314 U.S. 306, 307 (1941).

[5] *Thomas* v. *United States*, 213 F.2d 30 (9th Cir. 1954).

one who defrauded private persons in the guise of a United States Congressman.[6] The kinds of impersonation cases most common today involve private investigators, claims adjusters, debt collectors and the like who impersonate an FBI Agent or other Federal investigator to obtain information or access to private files which would not otherwise be made available,[7] and former Federal employees or non-employees who assert that they are Federal employees and, by these means, obtain credit, goods or services or cash checks.[8]

There is an unusual aspect of the crime of impersonating Federal officials which should be recognized at the outset. This is the fact that, while the primary purpose of an official impersonation statute is to protect the Federal government from injury, the commission of that crime may—and, in most instances, will—be the basis for obtaining Federal jurisdiction over another, essentially local crime. Clearly, the basic interest in making the impersonation of Federal officials a Federal crime is the injury to effective functioning of the Federal government which could result from the mistrust of Federal credentials if such impersonations were not punished or deterred. Most often, however, impersonation is merely a device for inflicting a more direct and perhaps more serious harm, one possibly punishable under other Federal statutes but frequently not. This presents no problem if the other harm is covered by another Federal statute, such as those dealing with espionage, larceny of articles in interstate commerce, larceny of government property, fraud against the government, or fraud by use of the mails. In such circumstances impersonation need not be charged; but, if it is, it need only be another count in the indictment. The gravity of the other offense will be recognized in the other charge.

If the other harm is purely a local crime and it is to be prosecuted Federally, the impersonation statute under which the offender is charged must carry the burden of penalizing not only the injury to the Federal government but also the local crime. This may not be a problem if the local crime is one of lesser gravity. But if it is more serious, such as a purely local kidnapping or a large local fraud, the fact that in the course of its commission a Federal official was impersonated may be regarded as only a jurisdictional peg for Federal prosecution of the more serious offense.

General problems regarding jurisdiction in drafting a Federal criminal Code are discussed in a separate paper on the subject, but there is a unique problem in drafting a Federal impersonation statute, which has already been adverted to above. This problem stems from the fact that the jurisdictional peg in this case, unlike the neutral act of crossing State lines, using the mails or making an interstate telephone call, is itself recognized as an act harmful to the Federal government. Accordingly, in drafting a Federal impersonation statute, we must ask how far we must go, if any distance at all, toward accommodating the

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[6] *Lamar* v. *United States*, 241 U.S. 103 (1916).

[7] *See, e.g., United States* v. *Lepowitch*, 318 U.S. 702 (1941); *United States* v. *Napolcone*, 349 F.2d 350 (3rd Cir. 1965); *Whaley* v. *United States*, 324 F.2d 356 (9th Cir. 1963), *cert. denied*, 376 U.S. 911 (1964), and *United States* v. *Legget*, 312 F.2d 566 (4th Cir. 1962).

[8] *See, e.g., Littell* v. *United States*, 169 F. 620 (9th Cir. 1909); *United States* v. *Ballard*, 118 F. 757 (W.D. Mo. 1902). *See*, in Appendix A, *infra*, statements of Department of Justice policy regarding such prosecutions. *See* footnote 10, *infra*, for cases in which such prosecutions have been dismissed.

probability that it can be used to prosecute local offenses of a possibly more serious nature.

Existing Federal law appears schizophrenic on the matter. It covers both harms, but inadequately. On the one hand, 18 U.S.C. § 912 makes official impersonation a felony, although it is considered a minor offense in other jurisdictions.[9] On the other hand, it has no grading as to the type of harm inflicted; and the maximum imprisonment of three years is applicable regardless of whether the harm be to the Federal government because a person pretended to be a Federal official to perpetrate another offense or the harm be to the victims of, say, a kidnapping perpetrated by impersonation of a Federal official.

Failure to take a clear view of this problem in the drafting of 18 U.S.C. § 912, it is believed, has been the source of recent difficulties in its interpretation by the courts. The so-called "second part" of 18 U.S.C. § 912 purports to deal with impersonations which are among the least injurious to the welfare of the government, those in which the impersonator does not do an act related to his pretended capacity, *i.e.*, does not act as an official, but merely identifies himself as such in a situation where someone else may rely to some extent upon that identification, *i.e.*, to extend credit, to cash a check or even to marry him. This second part prohibits obtaining anything of value, a phrase which is broadly construed, "in [the] pretended character." In what appears to be no more than an effort to avoid making a Federal felony case out of such transgressions, some courts have, in effect, read the second part of the statute, construing it to require that the offender pretend to be acting under the authority of the government in obtaining the thing of value.[10] This has led the Department of Justice to suggest an amendment of 18 U.S.C. § 912 counteracting such decisions.[11]

Another court, also attempting to limit the scope of the second part of 18 U.S.C. § 912, has read back into it an element clearly, if erroneously, deleted by Congress in the 1948 revision, *i.e.*, the intent to defraud or to wrongfully deprive another of property.[12]

Proposed section 1381 would avoid many of these problems. It is based on the approach that the impersonation statute itself, like the State statutes, should try to deal primarily with the harm to the government and not other possible harms. This approach would leave to alternative solutions the prosecution of more serious crimes in which Federal officials were impersonated. One such solution might be to make impersonation of a Federal official an explicit jurisdictional peg for Federal prosecution of those other crimes, as defined else-

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[9] *See, e.g.*, PROPOSED DEL. CRIM. CODE § 597 (Final Draft 1967)—Class A Misdemeanor (1 year); ILL. REV. STAT. c. 38, § 32–5 (1961)—$500 fine or 6 months; PROPOSED MICH. CRIM. CODE § 4545 (Final Draft 1967)—Class B Misdemeanor (90 days); MINN. STATS. ANN. § 609.475 (1963)—$100 fine or 90 days; N.Y. REV. PEN. LAW § 190.25 (1967)—Class A Misdemeanor (1 year); PROPOSED CRIM. CODE FOR PA. § 2110 (1967)—2nd Degree Misdemeanor (1 year); MODEL PENAL CODE § 241.9 (P.O.D. 1962)—Misdemeanor (1 year).

[10] *United States* v. *Greece*, 242 F.Supp. 826 (W.D. Mo. 1965); *United States* v. *York*, 202 F.Supp. 275 (E.D. Va. 1962); *United States* v. *Martin*, Crim. No. 31902 (S.D. Cal., July 16, 1963) (unreported).

[11] *See* Appendix A, *infra*, for the Department's recommendation.

[12] *Honea* v. *United States*, 344 F.2d 798 (5th Cir. 1965). *Contra, United States* v. *Carr*, 194 F.Supp. 144 (N.D. Cal. 1961); *Mecker* v. *United States*, 110 F.Supp. 743 (D.C. Alaska 1953).

where in the Code. Another solution would be merely to leave prosecution to local officials if the other crimes are regarded in the locality as more serious than the affront to the Federal government.

The proposed revision offers the following improvements, some of which result from the rationalization of purpose discussed above:

1. The penalty structure is rationalized. Existing impersonation penalties range from 6 months (18 U.S.C. § 916) to 10 years (18 U.S.C. § 915). Grading will reflect the gravity of the impersonator's conduct in relation to the injury to the authenticity of Federal credentials and will permit prosecutions before United States Commissioners for petty offenses.

2. Coverage is rationalized. Protection of the authenticity of the official credentials of other nations will extend to such officials accredited to the international organizations based in the United States. Nongovernment organizations are excluded.

3. The law is simpler, clearer and briefer. Confusing and purposeless variations in expressing elements of essentially similar offenses are eliminated. Presently there are *eight* different phrases used to describe the *same* basic element of impersonation.[13] Who the offender must be impersonating is broadly defined in a separate definitional section, avoiding the present problem of confusing the act required with the definition of official or employee.[14]

4. Unnecessary impersonation provisions will be eliminated: several existing sections are combined in the one proposed section (18 U.S.C. §§ 912, 913, 915) and others will be covered by statutes dealing with other offenses. See paragraph 8, *infra*.

2. *The Pretense and Federal Officials Covered.* Proposed section 1381 covers the same range of official Federal pretenses as covered by existing law,[15] but extends the coverage, or at least makes the coverage explicit,[16] as to judges, a person authorized to act for or on behalf of the government, and a person serving the government as an adviser or consultant. This is accomplished by replacing the phrase in 18 U.S.C. § 912 "an officer or employee acting under the authority of the United States or any department, agency or officer thereof" with the term "public servant," defined in proposed section 109(x).[17] It is believed that the proposed definition of "public

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[13] *See, e.g.*, 18 U.S.C. § 912 ("falsely assumes or pretends to be"); 18 U.S.C. § 913 ("falsely represents himself to be"); 18 U.S.C. § 914 ("falsely personates"); 18 U.S.C. § 916 ("falsely and with intent to defraud, holds himself out as or represents or pretends himself to be").

[14] *See* cases cited in footnote 10, *supra*, and Appendix A, *infra*; see general definition of "public servant" in proposed section 109(x).

[15] At one time there was a problem as to coverage partly because of the limited definition of officials and partly because of the rule of strict construction. This led to the Supreme Court's reversal of a conviction because 18 U.S.C. § 912 did not cover government-owned corporations, in this case the Tennessee Valley Authority. *Pierce* v. *United States*, 314 U.S. 306 (1941). Even before the case was decided, Congress amended 18 U.S.C. § 912 to include such agencies of the government. The statute was simplified in the 1948 revision when the word "agency," as defined in 18 U.S.C. § 6, was submitted.

[16] The explicit reference to Members of Congress in proposed section 109(x) merely codifies the holding that they were officers of the government under an early impersonation statute. *Lamar* v. *United States*, 241 U.S. 103 (1916).

[17] "Public servant" has the same meaning as in proposed section 1361, the official bribery provision, and other sections dealing with governmental operations.

servant" covers all conceivable impersonations injurious to the authenticity of Federal credentials.

Since this will be a new statute and because the language defining the pretense is being changed, we consider it desirable to make explicit a notion which was added to existing law by judicial construction. In *United States* v. *Barnow*, 239 U.S. 74 (1915), the Supreme Court held that the predecessor of 18 U.S.C. § 912 was violated even though the individual impersonated or the official position assumed never existed.[18] Accordingly, subsection (2) of proposed section 1381 provides that it is no defense to a prosecution under the section that the pretended position did not exist or that the pretended authority could not legally or otherwise be exercised or conferred.[19] The need for the word "conferred" is to cover the case of a person not pretending to be someone other than himself but claiming to have Federal authority for what he is doing.

Whether the pretense of being a former official should be prohibited is discussed below, in paragraph 5, in the context of activity not involving a purported exercise of official authority. The impersonation by one Federal official of another is believed to be covered without the necessity of doing so explicitly.[20]

3. *Foreign and Other Officials.* In addition to officials of the Federal government, existing Federal law also covers:

A "diplomatic, consular or other official of a foreign government duly accredited as such to the United States" (18 U.S.C. § 915); a member or agent of the 4–H Clubs; a member or agent of the American National Red Cross (18 U.S.C. § 917); and a member or agent of the United States Olympic Association "or its subordinate organizations" (36 U.S.C. § 379).

The variety is bewildering, particularly when one recognizes that, when it comes to protection of emblems and insignia, the 4–H Clubs, Red Cross and United States Olympic Association are bracketed with veterans' organizations incorporated by an Act of Congress and their recognized auxiliaries.[21] It is appropriate to question whether the existing line for protection against impersonation has been properly drawn.

There seems to be clearer justification for bringing foreign governments within the line than for the others. The statute prohibiting impersonation of foreign officials was originally enacted in 1917, during World War I, ". . . to punish acts of interference with the foreign rela-

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[18] *See also Thomas* v. *United States*, 213 F.2d 30 (9th Cir. 1954) and *Elliott* v. *Hudspeth*, 110 F.2d 389 (10th Cir. 1940). In *Barnow*, the Supreme Court stated, at pp. 77-78:

> Why should it be deemed less an offense where the assumption or pretense is entirely false, as where the very office or employment to which the accused pretends title has no legal or actual existence? . . . Now, the mischief is much the same, and the power of Congress to prevent it is quite the same, whether the pretender names an existing or non-existing office or officer.

[19] A slightly different version of this provision has been recommended in section 4545 of the Michigan Revised Criminal Code (Final Draft 1967).

[20] It was so held without any explicit coverage in a predecessor of 18 U.S.C. § 912. *Russell* v. *United States*, 271 F. 684 (9th Cir. 1921).

[21] *See* 18 U.S.C. § 706 (Red Cross insignia), 18 U.S.C. § 707 (4–H Club insignia), 36 U.S.C. § 379 (United States Olympic Association insignia) and 18 U.S.C. § 705 (veterans' organizations insignia).

tions, the neutrality, and the foreign commerce of the U.S., to punish espionage, and better to enforce the criminal laws of the U.S. . . ." [22] It carries a penalty of up to 10 years in prison, 7 years greater than that for impersonating a Federal official, probably because of its purpose to punish espionage. See paragraph 7, *infra*, on grading. Maintenance of good foreign relations is a matter of exclusive Federal concern, and probably should not depend on the ability or discretion of local law enforcement officials. Foreign governments should be able to look to the Federal government, rather than to the States, for protection of the good repute of their officials, and hold the Federal government accountable for lax enforcement. Moreover, protection of the credentials of foreign officials in this country provides a basis for obtaining protection of credentials of Federal officials abroad.

Proposed section 1381 would thus include foreign officials and, in line with much of the above rationale, include, in addition to officials accredited to the United States as provided in 18 U.S.C. § 915, those accredited to the United Nations and the Organization of American States. Both of these are international governmental organizations with headquarters in the United States to which foreign governments send representatives who have diplomatic status. The line has been drawn at accredited officials, as suggested by existing law, because the Federal interest in protecting the repute of employees of a foreign government having lesser status also appears to be less. Under the view that not all impersonations need to be prosecuted under this section, it would appear appropriate to leave such prosecutions to other Federal statutes where they result in other Federal crimes or to local impersonation statutes. Similar reasoning would apply to exclusion of officials and employees of the UN and OAS and to representatives of NATO, SEATO, WHO and the like, who are not granted full privileges and immunities and would be treated the same as any other foreign citizen.[23] "Foreign official" is defined in proposed section 1381(3).

Upon the basis of present analysis, it is much more difficult to justify inclusion of the American National Red Cross, 4–H Clubs and the United States Olympic Association and the exclusion of other non-public organizations in which the Federal government has an interest. All three organizations, it is true, were created by the Federal government, the 4–H Clubs being established by the Extension Service of the Department of Agriculture (see 18 U.S.C. § 916) and the other two being incorporated by Congress. See 36 U.S.C. § 1, 371. But 36 U.S.C. § 1101 lists 47 other organizations which are Federally chartered, not to mention all of the national banks and other private corporations such as COMSAT which are Federally chartered.[24] There

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[22] Act of June 15, 1917, Chap. 30, Tit. VIII, § 2, 40 Stat. 226. This provision was transferred from 22 U.S.C. § 232, dealing with Foreign Relations and Intercourse, to 18 U.S.C. § 915 in the 1948 revision of Title 18.

[23] For a fuller discussion of the kinds of officials to be covered, *see* Appendix B, *infra*.

[24] *See* 12 U.S.C. § 21, *et seq.*, for provisions regarding national banks. *See* 47 U.S.C. § 731, *et seq.*, for creation of the Communications Satellite Corporation.

are also other organizations in the maintenance of which the Federal government has or will have a clear interest.[25]

It is true that the 4–H Clubs, Red Cross and United States Olympic Association perform functions which might otherwise be undertaken by the Federal government, respectively, promoting an interest in agriculture among youth, providing aid in time of disaster and armed conflict, and handling United States representation in the Olympics and Pan-American Games. It is also true that many other Federally-chartered organizations do not perform such functions, *e.g.*, various patriotic societies and veterans' organizations. But some others *are* actively engaged in promoting quasi-governmental interests, *e.g.*, Civil Air Patrol, COMSAT, National Academy of Sciences, National Safety Council.[26] There are undoubtedly also many other organizations which would qualify under a test based on the nature of their activity but have never bothered to obtain a Federal charter.

Assuming that a rational line can be drawn, *e.g.*, including only Federally-chartered organizations or including only those whose insignia are presently protected, the question remains as to what protection should be given by the Federal criminal laws. There are several possible courses; but prior to further development of the overall approach which the Code should take toward definition of Federal jurisdiction, only one course will be discussed here: whether the officials of these various organizations should be bracketed with officials of the Federal and foreign governments in the proposed impersonation statute.

The proposal here is that they should be excluded. It rests upon the principle that the Federal impersonation statute derives from an interest in the viability of governmental operations, rather than an interest in protecting the authenticity of credentials generally, albeit only those in which the Federal government has an interest. This principle can perhaps be better illustrated than explained. Except perhaps to some extent for national banks, Congress has yet to express an interest in the general protection of the viability of all these various organizations. Thefts of or trespass upon their property, misconduct or bribery of their officials, false keeping of their records or false statements to them are not regarded in themselves as Federal crimes.

Unless such organizations are to be bracketed with the Federal government for all purposes, there does not appear to be a good reason for bracketing them with the Federal government in the impersonation

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[25] One example in the criminal law context involves defense of indigents. In New York City this function has been performed for years by the Legal Aid Society. Originally a private organization supported entirely by donations, it is now partially funded by the New York City government because of the latter's statutory responsibility to see that the function is performed. Elsewhere in the State it is performed by government offices. If defender offices were to be created in the Federal system, there would likely be a similar solution. Should the credentials of Legal Aid Society officials be protected?

[26] It is interesting to note that, of all the Federally chartered organizations, only two—American National Red Cross and National Academy of Sciences, including the National Academy of Engineering and the National Research Council organized by the National Academy of Sciences—are listed as "Quasi-official Agencies" in the United States Government Organization Manual 1967–68, prepared by the Office of the Federal Register.

statute alone. If someone should impersonate a Red Cross representative to solicit funds and, for reasons which would apply to any fraudulent scheme, Federal prosecution should be undertaken, other statutes should suffice. If he merely goes from door-to-door in a particular community, there appears to be no reason why local prosecution should not be relied upon, just as when the impersonation is that of a representative of any charitable organization, local or national in scope. There are reasonable arguments to the contrary; but they appear to be the same as those which would apply to having Federal criminal jurisdiction embrace any case "affecting commerce," a discussion carried on elsewhere in broader terms in the report on Federal criminal jurisdiction.

If it should be considered desirable to continue protection against impersonation of representatives of these organizations, one clear improvement over existing law could be made by using the term "Federally-protected organization" in section 1381, and defining it to include all such organizations in another section. Handling it in this manner would permit a listing of the organizations or merely a cross-reference to 36 U.S.C. § 1101. Future additions to the list would thus require minimal amendment, perhaps even none to the Criminal Code itself.

4. *The Activity: Acting as if to Exercise Authority.* In subsection (1)(a) of proposed section 1381, an element is required in addition to that of the false pretense, *i.e.*, acting as if to exercise the authority of the pretended capacity. Requirement of some additional element to that of the false pretense is found in modern impersonation statutes, except those in Illinois.[27] It is found in 18 U.S.C. § 912 in two forms: one is the common law phrase "acts as such"; the other is "in such pretended character demands or obtains any . . . thing of value." Originally 18 U.S.C. § 912 contained the requirement of "intent to defraud"; but that phrase was interpreted by the Supreme Court to mean, in this context, only that the offender ". . . by artifice and deceit, sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct." *United States* v. *Lepowitch*.[28] The phrase "intent to defraud" was deleted in the 1948 revision, because, in the revisers' opinion, the *Lepowitch* decision had rendered it "meaningless."

Not all existing Federal statutes dealing with the authenticity of public or other Federally-protected credentials require anything in addition to the false pretense or, if they do, define that element as an act. The provision on impersonation of 4–H Club members and agents, 18 U.S.C. § 916, punishes merely the false pretense "with intent to defraud."[29] Punishment of the mere unauthorized wearing of an armed forces uniform may be regarded as not requiring an act in addition to the pretense, 18 U.S.C. § 702, if one equates donning the uniform with the mere verbal claim to being a Federal official. Both

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[27] *See* ILL. REV. STAT. c. 38, §§ 17–2, 32–5. *See* note 9, *supra*, for citations to other modern impersonation statutes.

[28] 318 U.S. 702, 704. *Lepowitch* involved defendants who had posed as FBI Agents in order to elicit information from one person as to the whereabouts of another.

[29] Since there are no reported cases under this provision, we do not know whether that phrase has the *Lepowitch* or some other meaning here.

of these sections, it should be noted, authorize maximum imprisonment of only six months.

Proposed section 1381 follows 18 U.S.C. § 912 both in requiring an element in addition to the pretense and in defining that element as an act.[30] This does not preclude the possibility that, after further study of the multitude of provisions dealing with emblems, insignia and the like, the simplest way to draft a prohibition against unauthorized use of such Federal indicia will prove to be in terms of false pretenses, without requiring any act but penalizing such pretenses at the lowest possible level.

Acting "as if to exercise the authority of his pretended capacity" is preferred over acting "as such" because it is somewhat clearer. Furthermore, it is consistent with the explanation made by the Supreme Court in *United States* v. *Barnow*, 239 U.S. 74, 77 (1915), where it was said that:

> . . . to 'take upon himself to act as such' ["take upon himself" was deleted in the 1948 revision as surplus] means no more than to assume to act in the pretended character. It requires something beyond the false pretense with intent to defraud; there must be some act in keeping with the pretense.[31]

The proposed formulation is also preferred over "acts in the pretended capacity" because the latter phrase, at least until recently, has been used as set forth in the second part of 18 U.S.C. § 912, to embrace conduct in which the offender merely identifies himself as a Federal employee in the course of obtaining something of value, *e.g.*, obtaining credit, cashing a check, *etc.*[32] It is the purpose of this part of proposed section 1381 to reach—in the language of the *Barnow* court—only "some act in keeping with the pretense".

There should be noted here the intention to delete an existing section, 18 U.S.C. § 913, which presently makes it an offense to impersonate an officer, agent or employee of the United States and, in such assumed character, arrest or detain any person or in any manner search the person, building or other property of any person. Such conduct would be covered by proposed section 1381(1)(a), as it always has been by the first part of 18 U.S.C. § 912.[33]

5. *The Activity: Obtaining Anything of Value.* In defining the activity, major questions to be faced are whether acts in connection with impersonation of a Federal official which do not purport to be an exercise of authority should be penalized in the Federal statute; and, if so, how they should be treated.

Two factors which support including such impersonations in the

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[30] There is no clear pattern in the recent revisions as to defining the additional element as an act or in terms of intent. Michigan requires an act in the pretended capacity, MICH. REV. CRIM. CODE §§ 4545, 4550 (Final Draft 1967). New York and the Model Penal Code require an intent to induce another to submit to the pretended authority or otherwise to act in reliance on the pretense. N.Y. REV. PEN. LAW § 190.25 (1967); MODEL PENAL CODE § 241.9 (P.O.D. 1962). The broad scope of the latter statutes is indicative of the fact that State codes need not be concerned with whether impersonation statutes widen jurisdiction.

[31] *Accord, Lamar* v. *United States*, 241 U.S. 103, 113–16 (1916).

[32] *See* footnote 8, *supra*.

[33] *Redd* v. *United States*, 252 F. 21 (2d Cir. 1918).

statute should first be noted. One is that such impersonations have been embraced by the Federal impersonation statute—at least until recent court decisions—for as long a time as acts purporting to exercise official authority.

The second factor is the present view of the Department of Justice as expressed in its proposal to amend 18 U.S.C. § 912. See Appendix A. *infra.* The recent District Court decisions which this amendment would counteract nullified, in effect, the second part of 18 U.S.C. § 912. That result was reached by construing the definition of employee—one acting under the authority of the United States—as applying to both parts of 18 U.S.C. § 912, so that when one acts "in such pretended character" to obtain something of value, he must be pretending to act under the authority of the United States.[34] The Department of Justice ascribes a drop in impersonation convictions from 113 in 1962 to approximately 75 annually in fiscal 1965 and 1966 to 45 in fiscal 1967 to such constructions of the statute, believes that such cases should still be Federally prosecuted, and would remedy the situation by an amendment which clearly avoids any implication that the impersonator, when he obtains something of value, must be exercising official authority.

While it is clear that acts purporting to be an exercise of authority injure the operations of Federal government, it is also clear that what might be called "private frauds", *i.e.*, reliance upon official identification for check-cashing, extension of credit, *etc.*, do not do so to the same extent. The false pretense, depending upon whether the reliance is justified, may, of course, impair the authenticity of Federal credentials; but this would be true in *any* case where the false pretense is made, *e.g.*, in barroom bragging, although not by itself presently subject to Federal penalties. Moreover, while there is a demonstrable need for the Federal government to vouch for exercise of official authority, it is far from clear that it must always vouch for the financial standing or honesty of its employees. Why, it may be asked, should the Federal government intervene if a person, with intent to commit a larceny, falsely identifies himself as a Federal employee and not intervene if a true Federal employee commits a larceny, obtaining possession of the article he wants by inducing reliance upon a false financial statement?

Arguably the fact that a Federal employee commits such a crime impairs the dignity of the Federal service as much as, if not more than, when someone falsely pretends to be a Federal employee to commit a crime. Viewed in this light, the primary concern would be seen as the injury to the victim, rather than maintaining authenticity of Federal credentials. Such impersonations might thus be considered only as a peg for Federal criminal jurisdiction over the ultimate crime, and punished accordingly. They would not be included in the impersonation statute.

There are other ways of dealing with such coverage. One, which proceeds from the view that the impersonation statute is to deter impersonations and not attempt to punish the harms to individuals which they might cause, would recognize that impersonators who do not purport to be exercising official authority pose a lesser threat to Fed-

[34] *See* cases cited in footnote 10, *supra.*

eral governmental operations than those who do. Accordingly, such impersonations would be classified as a lesser offense.

Another approach is suggested by the view of the Court of Appeals for the Fifth Circuit. In *Honea* v. *United States*,[35] that court refused to approve a conviction under the second part of 18 U.S.C. § 912 which did not include a finding that the defendant had the "intent to defraud", meaning "an intent to wrongfully deprive another of property", even though Congress, whether or not on erroneous grounds, had explicitly deleted that element in the 1948 revision. Such an intent could be restored in proposed section 1381 as an essential element of the second part, and could be combined with the notion that the second part be a lesser offense or with the notion that it be punished in accordance with the penalties prescribed elsewhere in the Code for any larceny.

Existing law, in the second part of 18 U.S.C. § 912, brackets "anything of value" with "money", "paper" and "document". The definition in proposed section 109(ac), it is believed, would cover these, and more, including things of value obtained by another. The word "demands" in present 18 U.S.C. § 912 will no longer be necessary under the proposed provisions which will govern attempts to commit a crime.

One final note on this subject: just as the Federal interest becomes attenuated when the impersonator is not purporting to exercise official authority, it is perhaps even more attenuated when he pretends only to be a former official, but is nevertheless not far different. The authenticity of Federal credentials is still being degraded: and whatever mantle of honesty or financial standing is implied by Federal employment falls to some extent on the shoulders of the ex-employee. Indeed, there may well be greater opportunity to undermine the integrity of the Federal service by a person claiming to be an ex-official, since the false pretense could, and may well, be often used to secure new employment, perhaps even positions of trust. Accordingly, if impersonators not exercising authority are to be covered here, there would appear to be good reason to include impersonation of former officials, at least in a lesser offense.

6. *Criminal Intent.* An honest belief that a person held the office or the authority which he purported to exercise would relieve him of criminal liability. "Falsely pretends" itself implies the necessity of a finding for conviction that the person who exercised the authority of a Federal official knew that he did not actually possess that authority.[36] In any event it is intended that the proposed Code will contain, for general application, provisions defining the general requirements of culpability, including the required states of mind. These provisions are expected to require awareness of the nature of one's conduct or that the attendant circumstances exist to be held criminally liable for such a crime as this one. They will also permit a defense based upon ignorance or mistake as to a matter of fact or law, when such ignorance or mistake negated the awareness noted above.[37]

7. *Grading.* The proposed revision places the offense of official impersonation, for punishment purposes, no higher than the category

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[35] 344 F.2d 798, 803 (5th Cir. 1965).

[36] *See United States* v. *Achtner*, 144 F.2d 49 (2d Cir. 1944) for a discussion as to the meaning of "falsely" in impersonation of a citizen.

[37] For examples of the provisions described here, *see* MODEL PENAL CODE §§ 2.02, 2.04 (P.O.D. 1962).

of a Class A misdemeanor. Although the determination as to the jail term for that category has not been made, it would certainly be no more than one year, the dividing line between felony and misdemeanor under existing Federal law, and possibly less—in the neighborhood of six months. The considerations involved in selecting the maximum period for the highest misdemeanor category are discussed in the report on sentencing structure.

The sentencing maximum here recommended represents a reduction from the maximum of three years presently authorized for 18 U.S.C. § 912. (It will be noted in the sentencing report that three years is suggested as the appropriate maximum for the lowest category of felony, the next level above the category now recommended.) This reduction proceeds from the view, as noted earlier in this comment, that punishment for official impersonation should be in accordance with the injury to the government, rather than in accordance with the harm to the victim.

If the contrary view were to be taken, the present maximum would also be unsatisfactory. Perhaps the undesirability of taking the contrary view is best seen by following it to its logical conclusion. If the impersonation statute is intended to provide appropriate punishment for the harm caused in which official impersonation might occur, it would be appropriate to assign to it among the highest penalties in the Federal sentencing structure, in order to take care of treason, espionage, kidnapping and, possibly, murder.

The suggestion that the maximum be the highest misdemeanor category pursuant to this view, rather than the lowest felony category, can be supported in several ways. First, it could well be regarded that among the most serious acts which a person could perform in the guise of a Federal official are those associated with law enforcement, taking another into custody and searching him or his property. In addition to the crimes of kidnapping, assault and unlawful entry which are perhaps inevitably committed by such acts, they might also be only a first step in committing burglary, robbery or larceny. Yet, when first enacted in 1921 and continuing to the 1948 revision, the specific provision dealing with impersonations for the purpose of arresting and searching carried a maximum of only one year.[38] In the 1948 revision the maximum penalty was raised to three years to bring it into harmony with 18 U.S.C. § 912, which embraced the same conduct.[39]

Second, in none of the modern criminal Codes is the maximum penalty for official impersonation any greater than one year.[40]

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[38] Act of November 23, 1921, c. 134, § 6, 42 Stat. 224, *See also* Act of August 27, 1935, c. 740, § 201, 49 Stat. 877.

[39] It should be noted that the revised criminal Code proposed in Michigan makes impersonation of a peace officer a Class A misdemeanor (one year) (§ 4550) and the impersonation of other public servants a Class B misdemeanor (90 days) (§ 4545). The commentary states the justification as follows: "The Draft has separated these crimes, and imposes a higher punishment for the impersonation of peace officers. That crime apparently represents a more serious practical problem. It also carries greater potential for serious injury because it affects the reputation of an agency that must rely in large part on an excellent public image to promote essential citizen cooperation. It should be remembered, of course, that § 4545 is aimed solely at general injury to the reputation of public administrators that results from false impersonation. Various other provisions are aimed at protecting the victims of theft and fraud arising out of impersonations (*see, e.g.*, §§ 3205, 4055)."

[40] *See* note 9, *supra*, for penalties authorized in recent and proposed revisions.

Third, the most common type of prosecution for acting with the pretended authority of a Federal official is that of the person engaged in the business of investigation attempting to obtain information which would not otherwise be made available to him. In 1959, Congress enacted 18 U.S.C. § 712 to deal specifically with that kind of activity. It prohibits the use of a name or insignia, by a person engaged in the business of debt-collecting or in furnishing private police, investigation or other private detective services, which would convey the impression that the business in any manner represents the United States. The maximum jail term authorized is one year.

An example of the fact that long imprisonment is not necessary to deal with this kind of activity is found in *Whaley* v. *United States.*[41] There the defendant, engaged in the business of repossessing mortgaged boats and automobiles, had falsely represented himself to be an FBI Agent in order to obtain information on at least three occasions over a period of approximately seven months. Upon conviction under 18 U.S.C. § 912, the District Judge, one not known for leniency, sentenced the defendant to probation, but made it a condition of probation that he stay out of the repossession business, a condition held to be reasonable and proper by the Court of Appeals.

8. *Disposition of Other Impersonation Provisions.* Not all existing impersonation statutes deal with impersonation of officials. One of the earliest, enacted in 1825 (present 18 U.S.C. § 914), prohibits impersonation of a creditor of the United States. Others deal with impersonation in falsely obtaining visas (18 U.S.C. § 1546) and in the course of naturalization proceedings (18 U.S.C. § 1424). It is clear that the draftsmen had merely identified impersonation as one of the means by which some governmental action can be induced by fraud. Such statutes are already obsolete, the prohibited conduct being embraced within more general statutes dealing with frauds upon the government. *See, e.g.*, 18 U.S.C. § 1001. It is intended to discard these impersonation provisions in the new Code in favor of dealing with frauds on the government in more general terms.

Another impersonation provision—a curious one—will, to the extent it is not covered by proposed section 1381, also be dealt with in other statutes. That provision is contained in 18 U.S.C. § 499, dealing with forgery and fraudulent use of official passes and permits, and penalizes one who "personates or falsely represents himself to be or *not to be*" a person to whom such pass or permit has been duly issued.

The statute which makes it a crime to impersonate a citizen, 18 U.S.C. § 911, is primarily related to making false statements to State agencies, *e.g.*, to obtain a license. Proposals as to its disposition will be postponed until false statements provisions are drafted.

Appendix A

Impersonating Officials—Department of Justice Proposed Revision

In a letter to the Director of this Commission, dated January 10, 1968, the Chief of the Legislative and Legal Section of the Department of Justice has called the Commission's attention to a revision of 18 U.S.C. § 912 which "the Department believes would be desirable."

[41] 324 F.2d 356 (9th Cir. 1963).

The letter states:

> As presently interpreted by the courts, an impersonator must pretend to be "acting under the authority of the United States" when he obtains in the guise of an officer or employee of the United States, money or a thing of value. The Department of Justice cannot prosecute the person who in applying for credit, registering for lodging, or cashing a personal check, merely represents that he is a government employee or a member of the military. In a typical impersonation case, through such a representation the impersonator causes others to believe he is of good character and integrity. He thereafter runs up charges on the credit established, or cashes fraudulent or bad checks. In most cases there is no pretense whatsoever that the transactions are in any way connected with the supposed government employment. Therefore, the existing statute does not reach the vast majority of impersonation cases investigated by the FBI and other governmental agencies.

The court interpretations referred to, cited in note 10 *supra*, caused a complete about-face in official Department policy for prosecution of impersonation cases. Whereas Department policy had been to prosecute when the actor obtained something of value while impersonating, that policy changed to prosecuting only when the actor pretended to be acting under Federal authority.

The amendment which the Department was considering would clearly divide 18 U.S.C. § 912 into two components, eliminating any possibility of reading into the second part a requirement that the impersonator be exercising his pretended authority when obtaining something of value. That would be accomplished as follows:

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such; or
>
> Whoever falsely assumes or pretends to be an officer or employee of the United States or any department, agency or officer thereof and demands or obtains any money, paper, document, or thing of value—
>
> Shall be fined not more than $1,000 or imprisoned not more than three years, or both.

Appendix B

Impersonating Officials—Foreign Officials

The following information was obtained from the Office of the Legal Counsel for Administration of the State Department.

The term "accreditation" has not been officially or judicially defined and could be interpreted to cover several various types of recognition of foreign officials.

First, as to the accreditation of diplomats: all diplomatic officials formally present their credentials to the State Department and, if recognized, are then "duly accredited as such" to the United States Government. This would include ambassadors, "secretaries," *etc.*, the gamut of diplomatic posts existent in the various embassies.

The next category, and distinct from those officials classified as diplomats, are consuls. A different procedure is used to recognize them. Consuls present their "assignment and commission" to the State Department and receive in return an "exequatur," which is their official recognition of consular capacity. Two treaties give special status equivalent to diplomatic status, *i.e.*, full privileges and immunity, to consuls from certain preferred countries. The "Headquarters Agreement," Sec. 15, lists the countries whose consuls have special status; and the new Russian consular treaty, not yet ratified by the Soviets, provides for special status of Soviet consuls.

Finally, a third type of official recognition exists. This is the official "notification" by a foreign government of the arrival of various officials of theirs for work in the embassy, or various trade commissions, *etc.* The State Department protocol office then acknowledges that they have been "duly notified" and grants certain limited privileges and immunities to these foreign officials.

As to the United Nations, there are officials accredited to the United Nations but not to the United States, *e.g.*, Cuban. United Nations representatives have an immunity status similar to that of diplomats accredited to the United States, *i.e.*, freedom from arrest and prosecution, civil liability, *etc.* All official representatives to the Organization of American States also have full diplomatic status.

TABLE OF REFERENCES TO STUDY DRAFT PROVISIONS

The following table relates the Study Draft provisions, set forth in the left hand columns, to the pages of the Working Papers where they are specifically discussed. Major references appear in boldface type. Incidental references appear in lightface type.