WORKING PAPERS

OF THE

NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS

(Established by Congress in Public Law 89-801)

VOLUME II

Relating to
Chapters 14-36
of the
Study Draft
of a new
Federal Criminal Code

July 1970

WORKING PAPERS
OF
THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS

VOLUME II

Relating

to

Chapters 14 to 36

(Sections 1401 to 3605)

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 Subcommittee 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

INTERNAL REVENUE

(TAX) OFFENSES: SECTIONS 1401–1409*

(Duke; October 2, 1969)

INTRODUCTORY STAFF NOTE

The proposals here reflect an effort, apparently the first, to integrate the multitude of criminal tax provisions in the Internal Revenue Code into the Criminal Code and to consider whether the principles which apply to the definition and grading of other Federal offenses should apply to tax offenses as well. This same question obtains with respect to the statute of limitations: whether the present difference in the period for tax evasion and for other frauds upon the government is justified? Some of the issues arising from the draft here are also aspects of the question whether the nature of tax evasion and the difficulties in its enforcement are such that tax offenses should have special treatment.

It should be noted that the focus of the draft is not on violations where the taxing power has been used for purposes other than raising money, *e.g.*, firearms. Adjustments to these offenses based on nonrevenue considerations, *e.g.*, penalties for trafficking in nontax-paid firearms, are made elsewhere, as appropriate.

1. *Tax Evasion (Section 1401).*—The present tax evasion felony is defined in terms of willfully attempting "in any manner" to evade or defeat any tax or the payment thereof. The draft reflects the view that this is unnecessarily broad, particularly for a felony. Under present law, for example, oral falsehoods to investigating agents are regarded as felonious in themselves, rather than merely as evidence of guilty intent in understating income. Section 1401 seeks to identify the felonious means of evasion. Note that while tax evasion itself still requires tax to be owing, *e.g.*, it is not evasion if the would be evader neglected to take an offsetting deduction, falsely reporting income would constitute an attempt, being a substantial step.

One question is whether section 1401 should carry forward the judicially imposed but vague requirement that it be a substantial understatement. Another question is whether various means of tampering with administration, which would otherwise be only misdemeanors under general provisions in the new Code, should be felonious when the intent is to evade taxes? It would only be needed where the return

*No working paper on section 1411 (smuggling) has been prepared. *See* the Study Draft comment for discussion of this section.

was truthful and bribery (also a felony) was not involved in covering up the failure to pay.

2. *Misdemeanor Tax Evasion.*—An aspect of the question of substantiality of the understatement is whether small evasions should be classed as misdemeanors, paralleling the value distinctions made in the grading of thefts. The line could be drawn at $100 or $50. Present practice, which leaves appropriate discrimination in treatment of minor evasions to administrative determinations could be continued. A similar question is whether there should be *any* lesser-included offense to a charge of felonious evasion, as there will be under our proposal that the general false statements offense be a Class A misdemeanor whenever the evasion is by a false statement in the return. A related question, posed in the comment, is whether huge evasions might be graded as Class B felonies. (*Cf.* section 1735 making $100,000 thefts Class B felonies.)

3. *Failure to File.*—A significant issue is whether failure to file a return at all, even with intent to evade assessment of the tax, ought to be a felony. Appropriate resolution of the question is more difficult than it appears on the surface. (*See* the discussion in the Consultant's Report, *infra.*)

4. *Disregard of Obligations (Section 1402).*—Although one course in dealing with offenses would be to leave everything less than a felony to the Internal Revenue Code as regulatory offenses, there is value in keeping the major violations together, and Professor Duke has sought to identify the Class A misdemeanors in section 1402. Should the violations defined be in *this* category or only under our regulatory offense provision (section 1006) under which a knowing violation is only a Class B misdemeanor?

5. *Excise Taxes.*—A principal area of crime in the tax field is the evasion of taxes on liquor because the tax comes roughly to 20 times the cost of production and liquor is relatively easy to produce. Section 1403 is intended to consolidate a number of fragmented but necessary regulatory prohibitions (dealing with registration, bonding, permits, affixing stamps, *etc.*) into one offense. Liquor violations are singled out for felony treatment. Various presumptions which have been found to be both rational and necessary are continued in section 1405. Subsection (3) will be helpful in determining whether a possessor of substantial quantities of liquor is a trafficker. Some suggest the amount should be even less than 5 gallons.

6. *User of Nontax-paid Alcohol.*—Section 1404 would continue to make mere possession of nontax-paid liquor an offense, but not a felony. Since it punishes the user, its purpose is to deal with him as with a receiver of stolen goods, whom he resembles, in order to deter violations by eliminating the market.

Consultant's Report

1. *Introduction.*—As the principal source of the nation's revenue, the self-assessment system of income taxation is the most vital concern of the criminal tax sanctions. The typical target of a criminal tax prosecution is a person who has willfully filed a false income tax return.

There are, however, numerous other exactions by the Federal Gov-

ernment which rely on self-assessment, *e.g.*, the estate and gift taxes, or which are enforced by the Internal Revenue Service, or the criminal sanction for which is contained in Title 26. Some of these exactions can fairly be regarded as revenue measures and others as prohibitive exactions designed to provide Federal jurisdiction or to justify Federal investigation or enforcement. As a consequence, Title 26 contains a hodgepodge of overlapping or obsolete provisions, the meaning and purpose of some of which are virtually forgotten.

The provisions of this draft are largely limited to criminal sanctions which are designed and administered to assure compliance with the self-assessment of revenue taxes.

The draft attempts to isolate and define serious misconduct which is peculiar to the administration of the revenue laws and aims at eliminating overlapping, unnecessary provisions and correlating what is left with other sections of the proposed Code.

2. *Tax Evasion; Present Law.*—The key criminal provision under existing law is 26 U.S.C. § 7201, which subjects to a maximum of 5 years in prison and a fine of $10,000: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by [Title 26] or the payment thereof . . ."

The typical offender prosecuted under section 7201 is a person who has willfully filed a false income tax return which greatly understates his taxable income and his tax due. Such misconduct is plainly the gravest of threats to the revenue. As the language of section 7201 suggests, however, an attempt to evade taxes can be accomplished in ways other than filing false tax returns. According to the Supreme Court, the crime may be committed by:[1]

> Keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or conceal.

Despite the broad language of the statute, and the liberal court interpretations placed upon it, however, there are virtually only three kinds of conduct with respect to income taxes which have given rise to prosecutions under section 7201, other than the filing of false returns:

(a) *Telling lies to an Internal Revenue agent.*—Lying to an Internal Revenue agent has occasionally been asserted as a separate attempt under section 7201 against a taxpayer whose prosecution for filing a false return is barred by the statute of limitations, or as a separate count in a multiple count indictment which also alleges a false return.

(b) *Concealment of assets.*—Successful prosecutions have also been had against taxpayers who, after being convicted of filing false tax returns, persist in their efforts to avoid paying their taxes and engage in conduct designed to keep the government and its power of levy and seizure away from substantial assets.

(c) *Embezzlements by tax consultants.*—A crooked lawyer or tax accountant makes out a tax return for a client, accepts from the client

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[1] *Spies* v. *United States*, 317 U.S. 492, 499 (1943).

the money with which to pay the taxes, and then absconds with the money. The government's efforts to convict such persons under section 7201 have had only limited success; some courts have held that section 7201 is inapplicable to such conduct.

The reasons why prosecutions under section 7201 for misconduct other than filing a false tax return are rare should be plain. One who is bent on cheating the government can hardly hope to succeed without filing a false tax return. The taxpayer who would choose instead to file a correct return and then try to defeat collection of the taxes which he admitted owing is a wholly hypothetical figure.

3. *Basic Ancillary Provisions and Lesser Offenses; Present Law.*

(a) *False statements.*—18 U.S.C. § 1001, the general false statement provision, is frequently invoked in tax cases. Specific false statements provisions, however, include 26 U.S.C. § 7204, which makes a misdemeanor of providing a false statement of taxes withheld to employees; section 7205, which defines as a misdemeanor the execution by an employee of a false exemption certificate; and section 7207, which makes a misdemeanor the filing or submission of any false return or document.

Felony treatment is provided for one who signs any return or document which states that it is made under penalties of perjury (as tax returns normally do) in section 7206(1). This section is useful against persons who file false returns which do not understate tax obligations, and persons who file fictitious returns for the purposes of fraudfilently inducing payments of refunds.

Aiding in the preparation or presentation of a false document is also a felony, whether or not the person aided was aware of the falsity. 26 U.S.C. § 7206(2). This section is chiefly employed against dishonest tax return preparers and persons, who, for a fee, cash winning race track tickets of others and thereby induce the racetrack innocently to make a false information return with respect to the winnings.

(b) *Omissions.*—It is a felony willfully to fail to collect, account for and pay over a tax (26 U.S.C. § 7202) and a misdemeanor willfully to fail to: file a return, keep required records, supply information, or pay tax (26 U.S.C. § 7203); provide a statement of taxes withheld to employees (26 U.S.C. § 7204); provide information to an employer relative to withholding (26 U.S.C. § 7205); collect, account for, and pay tax after formal notice of previous failure (26 U.S.C. § 7215).

(c) *Offenses related to specific taxes.*—Virtually every tax imposed under the Code has its own set of criminal provisions, duplicative in part of the provisions mentioned above. There is, for example, a separate felony provided for attempts to evade tax on cotton futures, section 7233, a felony for false packaging or branding of oleomargarine, section 7234, and another for selling white phosphorous matches without a tax stamp, section 7239.

The basic scheme with respect to distilled liquors—which is similar to the schemes applicable to other taxes—is to impose an occupational tax on the manufacture of the product, another on certain dealers therein, and another on the product itself, or the sale thereof, then to declare violations of any of the regulations imposed pursuant to the taxing provisions a crime. As will be explained hereafter, it is probable that some of these provisions are necessary; that reliance upon sanctions for violations of tax return requirements will not suffice.

4. *Tax Evasion; Draft Section 1401.*—The proposal departs from

existing law by specifying with particularity the conduct which constitutes tax evasion, and by limiting it to that kind of conduct which has actually been found to threaten the revenue.[2]* Subsection (a) proscribes filing a false tax return; subsection (b), concealment of assets; and subsection (c), failing to pay over tax monies previously received. Lying to an Internal Revenue agent will not be an offense under this section. Rather, since lies to Internal Revenue agents are not significantly different from lies to the F.B.I., such misconduct is relegated to the definitions and penalties proposed in the draft on false statements (section 1352).

Keeping false books and generally acting suspiciously will not be offenses under section 1401. If a taxpayer files a correct tax return and makes no calculated effort to avoid collection of the taxes reported by him to be due and owing, his idiosyncratic bookkeeping should not be a felony.[3] If he files a false return and then goes about concealing his assets or preparing false books, his conduct is part of an overall scheme and the concealments and subterfuges are not separate offenses. Elimination of the long list of suspicious conduct as separate acts of tax evasion merely deprives the government of the rarely exercised opportunity to multiply counts and sentences for what is essentially a single offense.

It is possible, of course, to conjure up fraudulent schemes which do not involve false tax returns, concealment of assets, or false statements to Internal Revenue agents. A taxpayer, for example, could file a correct tax return, without accompanying payment, and then arrange to steal the return from the files of the Service, or to bribe an agent to falsify the files or the computer cards. In the first case, however, he would be guilty of theft and probably physical obstruction of government function. (*See* draft section 1301.) In the latter, he would be guilty of bribery (draft section 1361) and conspiracy (draft section 1004). I have been unable to conceive of a scheme which would not constitute a felony of some sort. Moreover, the schemes which might be imagined would not seem uniquely related to the revenue laws but would involve a threat to the integrity of government operations as to which tax evasion was almost incidental.

Section 1401(d) is included, however, in the event it is thought desirable to include a specific provision against such conduct, even though it is prohibited under more general provisions. Section 1401 (d) makes a felony of any physical destruction, mutilation, or alteration of government property, if done with intent to evade tax. It is applicable whether the taxpayer does it directly or indirectly, through an agent or by corrupt influence.

The draft also departs from existing law in eliminating the concept of "attempt" from the proscribed offense. Section 7201 is anomalous in that it defines as a crime an attempt to evade and thus

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[2] The draft also departs from present law in removing the limitation of section 7201 to attempt to evade any tax imposed by Title 26. The draft applies to evasion of any tax, as broadly defined in draft section 1409(d).

*Study Draft section 1401 specifies the prohibited conduct, as does the consultant's proposal, but unlike the proposal, it also contains a general clause, subsection (f), which provides:

> (f) he otherwise attempts in any matter to evade or defeat any income, estate or gift tax.

[3] Research has not disclosed a single prosecution under section 7201 for maintaining false or incomplete income tax records.

arguably leaves no room for application of the general principles of attempt. The present draft, in defining specific conduct as the completed crime, is consistent with the overall design of the proposed new Code and leaves room for the application of general concepts of attempt provided in chapter 10.

Under the decisions interpreting section 7201, for example, a prerequisite to conviction is the existence of a tax deficiency.[4] Thus, if the defendant understated his gross income by $20,000, but produces evidence at trial that he forgot to take a $20,000 deduction, his evidence is inconsistent with guilt—even though he plainly thought he was cheating when he prepared and filed his return. Likewise, if he filed a false return but comes up with an omitted tax carryforward from previous years, he is innocent.[5] Under the proposal,* he will not be guilty of tax evasion—because his return does not "substantially understate the tax due or owing"—but he would be guilty under the general attempt statute if the jury finds that his conduct constituted "a substantial step toward commission of the offense" (*see* draft section 1001). Indeed, the general attempt provision would seem to be perfectly apt.[6]

It would also seem possible to prosecute for an attempt under draft section 1001 a taxpayer who files a false estimated tax return (which is excluded from the definition of "tax return" for purposes of this group of offenses by draft section 1409(e))** if the purpose of such false filing was to evade tax and the conduct was "a substantial step . . . ." Of course, if the taxpayer abandoned his scheme before filing the false year-end return, he could probably rely on the defense of renunciation provided in section 1001, and the only remedy against him would be under the general false statements provision.

Subsection (a) does not otherwise substantially depart from existing law. While not employing the word "willfully," the draft, in re-

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[4] *See Sansone* v. *United States*, 380 U.S. 343, 351 (1965); *Lawn* v. *United States*, 355 U.S. 339, 361 (1958).

[5] *See Willingham* v. *United States*, 289 F. 2d 283, 285 (5th Cir.), *cert. denied*, 368 U.S. 828 (1961).

*The proposal referred to in the text contained the following in lieu of subsection (a) of Study Draft section 1401: "with intent to evade assessment of any tax, he executes, mails, files or delivers a tax return which [substantially] understates the tax due or owing;" Subsection (a) of Study Draft section 1401 states: "with intent to evade any tax, he files, or causes the filing of, a tax return or information return which is false as to a material matter;" Under the Study Draft, the defendant would be guilty of tax evasion because his return was filed with the intent to evade tax and the existence of a tax deficiency is not an essential element. If his plan to file a false tax return did not reach fruition he could be guilty under the general attempt provision (draft section 1001) if his conduct constituted "a substantial step towards the commission of the offense." For further discussion, *see* the appendix.

[6] Under present law, a person described in the examples above could be prosecuted under 26 U.S.C. § 7206(1), which makes a 3 year felony of subscribing to a document which contains a declaration that it is made under penalties of perjury (which a tax return does contain) which the subscriber does not believe to be true in every material matter. Under this draft, section 7206(1) would seem unnecessary.

**Note that the consultant's proposal set forth in the immediately preceding asterisked note did not cover information returns and under that proposal the comments would be applicable to both information and estimated tax returns. Study Draft section 1409(e) includes information returns, but does not include estimated tax returns.

quiring "intent to evade" does not alter the mens rea of tax evasion. Under section 7201, the defendant must know, at the time he engages in the proscribed conduct (here, execution, mailing, filing or delivering his return)[7] * that his return is false, *i.e.*, that it understates his tax obligations, and he must intend thereby to evade his obligations. That is what is meant by "intent to evade" in the draft.

Section 1401(a)** includes the word "substantially" in brackets. The issue thus flagged is whether it is appropriate to codify a requirement which the courts have already read into section 7201, namely that no one can be guilty of tax evasion who did not understate his tax obligations "substantially."[8] The word is provisionally excluded from the proposal however, because its inclusion may be misleading. Arguably, the only function of the so-called substantiality requirement is as proof of intent to evade. A deficiency "insubstantial" in one context will be substantial in another.[9]

Concealment of assets after assessment.—Prosecutions under section 7201 for concealment of assets are infrequent, since concealment will be merely part of a plan which includes the filing of a false return and prosecution for the latter offense is sufficient. Occasionally, however, a taxpayer will admit that a return was false, or will be convicted of tax evasion by filing a false return, then will continue in his efforts to prevent the government from collecting the taxes which he tried to evade via the false return. He may transfer assets to friends, relatives, or dummy corporations, hide them in safe deposit boxes or in foreign banks. Typically, he will tell a number of lies in the process, each of which, if made to an Internal Revenue agent, is a separate attempt under section 7201.[10]

There is little room to doubt that a criminal sanction should be applicable to such conduct. On the other hand, existing law is unrealistic in making every step in the process of one integrated operation a sep-

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[7] Defining the crime as the execution, mailing, filing or delivering of the return is designed to avoid venue problems. The taxpayer typically will, and typically should, be prosecuted where he resides or, in any event, where the return was prepared. The proposal is designed to permit this.

*Note that Study Draft section 1401(a) eliminates "execution, mailing . . . or delivering," and "preparing, subscribing or mailing." Inclusion of such conduct as part of the definition of the completed offense would make an offense of mere preparation of a nonfiled return with intent to evade taxes. Despite the position that a return is not a "return" until filed, the more direct approach which avoids close questions of construction would be to amend existing law with respect to venue of offenses begun, continued or completed in more than one district, by adding the following to subsection (a) of 18 U.S.C. § 3237:

> An offense under section 1401(a) of Title 18, may be inquired of and prosecuted in any district in which the return was prepared, subscribed, mailed or filed, or in which the preparation or filing thereof was caused or aided, with the culpability specified in section 1401(a).

***See* the consultant's proposal, note *, p. 748, *supra*.

[8] *See Canaday* v. *United States*, 354, F. 2d 849, 851 (8th Cir. 1966); *United States* v. *Nunan*, 236 F.2d 576, 585 (2d Cir. 1956), *cert. denied*, 353 U.S. 912 (1957).

[9] *See Janko* v. *United States*, 281 F.2d 156 (8th Cir. 1960), *rev'd on other grounds*, 366 U.S. 716 (1961).

[10] *See Cohen* v. *United States*, 297 F.2d 760 (9th Cir.), *cert. denied*, 369 U.S. 865 (1962); *United States* v. *England*, 376 F.2d 381 (7th Cir. 1967).

arate attempt to evade. Section 1401(b)* attempts to resolve the problem by making concealment of assets a felony, but only after assessment.[11] The theory reflected in the proposal is that until assessment is made, any concealment of assets is directed at evading assessment, *i.e.*, preventing discovery of the falseness of the return. But when the assessment occurs, the deficiency has presumably been discovered, and subsequent concealments are aimed at preventing collection rather than assessment.[12]

Even as limited, section 1401(b) contains troublesome vagueness. What of the taxpayer who files a correct return but does not make full payment and who subsequently conceals assets from a greedy ex-wife? His primary motive is not to cheat the government, but concealment of his assets tends to prevent the government from executing a lien. And what of the taxpayer who does not trust banks, keeps all his money under his mattress in cash? Is he guilty of tax evasion if he files a correct return unaccompanied by full payment and thereafter stashes some cash? What if he stashes no new cash but keeps the tin box under the mattress? Present case law is not clear on these questions, and subsection (b) does not add any substantial light. Perhaps answers to these questions cannot be articulated without risking the possibility that a nefarious scheme might go unpunished.

Failure to pay over.—Present law defines as a felony the willful failure of one who is required to collect, account for or pay over Title 26 taxes, to collect, account for, or pay over same. 26 U.S.C. § 7202. Draft section 1401(c) preserves felony status for one who collects but, with intent to evade payment, fails to account for and pay over such taxes. Knowing failures to collect are relegated to misdemeanor status under draft section 1402.

Willful failures to collect or withhold taxes do not seem to be appropriate conduct for felony treatment. Civil penalties are adequate in most cases.[13] Where they are not, misdemeanor treatment is surely enough. The failure to collect a tax lacks the strong element of acquisitive or fraudulent intent which accompanies tax evasion and justifies felony treatment, and there have been virtually no prosecutions of employers for failure to withhold income tax or of businessmen for failure to collect excise taxes under present law.

One who collects but keeps taxes is in a different category. His conduct resembles embezzlement and threatens the integrity of the system. If his failure to pay over is intentional and acquisitive rather than

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*Study Draft section 1401(b) replaces the proposal's reliance on "assessment" with "intent to evade payment of any tax which is *due*." *See* the appendix, *infra*. The proposal stated:

> With intent to evade payment of any tax which has been assessed, he secretes or conceals assets.

The Study Draft also substitutes "removes" for "secretes". *See* the appendix, *infra*.

[11] Assessment is the recording of liability for the tax. The Secretary of the Treasury determines the mechanics and modes of assessments via regulation. *See* 26 U.S.C. §§ 6201–6203. The taxpayer is supposed to receive notice of an assessment (other than for taxes due as shown on the return) within 60 days after the assessment. 26 U.S.C. § 6303.

[12] As earlier noted, false statements in the course of concealments will be covered by the general false statement (draft section 1352).

[13] Anyone required by Title 26 to collect a tax who fails to do so is subject to a civil penalty equal to the tax he should have collected. 26 U.S.C. § 6672.

accidental, due to negligence, or the result of financial disaster, then, of course, he would be guilty under this section.[14]

The draft would also clarify present law in making a felon of anyone who receives money from another with the understanding that it will be paid over to the Treasury and then permanently pockets it. Prosecutions of tax consultants who accepted money from clients with the representation that it would be paid over and then kept the money have been unsuccessful in the Seventh and Ninth Circuits, where it has been held that such conduct is not an attempt to evade taxes under section 7201 because there was no affirmative act of deception directed at the government and the wrongdoer was neither evading his taxes nor assisting his client's evasion.[15]

Plainly, such conduct is more than a simple embezzlement and is a threat to the Federal taxing system. No reason, apart from statutory lacunae, appears why it should not be regarded as a Federal felony.

Willful failure to file tax returns (draft section 1401(e)).—Under present law, willful failure to file a tax return is a misdemeanor only.[16] Misdemeanor status is preserved in this draft. However, numerous observers regard as anomalous and indefensible the fact that filing a false return is a felony but filing no return at all is a lesser offense, even if the purpose of not filing is permanently to evade all taxes. Accordingly, an alternative provision, section 1401(e), making nonfiling a felony, is included in the draft.

A recent study, using data supplied by the IRS, estimates that there are 5,000 willful nonfiling cases per year which would be appropriate for criminal sanction. While this is not an insignificant number, it is dwarfed by the numbers—possibly in the millions—of willfully falsified returns. There is good reason to assume, moreover, that nonfiling is rapidly diminishing. New data processing techniques, computerized cross-checking of information, taxpayer identification numbers and other new devices have made it increasingly difficult for nonfiling to go undetected. Moreover, today's typical citizen has grown up with the income tax, having filed his first return as a teenager, to get a refund of taxes withheld. Once having filed a return, it is difficult to stop. Most citizens who might be tempted to cheat would not even consider nonfiling.

The main argument for elevating failure to file to felony status is that while most nonfilings are noncriminal, some are as reprehensible as the most glaring false filing cases and ought to be penalized accordingly. Though there are numerous explanations for lapses in filing which are inconsistent with criminal intent, if such explanations are entirely absent why should the miscreant be treated gingerly?

A possible answer might be that the conduct itself is equivocal. Nonfiling does not itself corroborate or supply proof of mens rea, whereas false filing is an affirmative act which is evidence of a resolute purpose to evade taxes. By making willful nonfiling a felony, the risk is greater than in the false filing case that innocent taxpayers will be branded criminals.

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[14] Employers withholding income tax and retailers collecting excise tax are not under a general duty to segregate such funds from the moment of collection.

[15] *United States* v. *Mesheski*, 286 F.2d 345, 347 (7th Cir. 1961); *Edwards* v. *United States*, 375 F.2d 862, 867 (9th Cir. 1967).

[16] 26 U.S.C. § 7203; *Spies* v. *United States*, 317 U.S. 492, 493 (1943).

Yet false filing is also equivocal conduct. For every tax evader who knowingly files a false return, there are dozens whose returns are inaccurate for innocent reasons. Intent to evade is proved in false filing cases by all the surrounding circumstances, not by the mere falseness of the return, and it could be established in nonfiling cases in the same manner.

Still, there does seem to be merit in the argument. Furthermore, it is questionable that even a significant fraction of nonfilers should be equated with false filers. A lawyer or businessman who suddenly stops filing his tax returns is probably sick. He may well have intended to avoid paying taxes, but he chose a method which is so unlikely to succeed as to suggest serious psychological problems. His intent is simply different from that of the careful, deliberate crook who falsifies books, hides assets and files false returns.

It would seem likely, in any event, that the mens rea necessary to justify felony treatment could seldom be established in nonfiling cases whereas a broader definition, appropriate for a misdemeanor, would frequently cover the nonfiling case. Thus, if the choice is regarded as between a felony or a misdemeanor for nonfiling (rather than overlapping offenses),[17] the latter sanction would be a more realistic, viable deterrent than the former.

If nonfiling is to be made a felony, then the felony should probably be restricted to nonfiling of income tax returns.* The duty to file other types of tax returns is not well enough known to justify criminal punishment for failures to file. Reliable proof that the taxpayer knew of his duty to file would seldom be available.

5. *Other Possible Reforms Not Included in Section 1401.*

(a) *Class B felony for huge evasions.*—Attempts to evade hundreds of thousands of dollars worth of income taxes have been uncovered in the past; that similar attempts will be made in the future continues to be a realistic possibility. Should such high bracket, extravagant evaders—many of whom are connected with organized crime—be treated as Class C felons or should a higher grade of offense be defined? Attempts to evade in excess of $10,000 or $25,000 might well be treated more severely.[18]

If such a grading scheme were promulgated, the prosecution would presumably be required to prove that the intent to evade applied to the total amount, *i.e.*, if the Class B level was $10,000, the prosecution would make out a case only if it proved that the defendant knew he had a deficiency of $10,000 or more. It would not suffice to show (i) that he filed a false return which he knew to contain some deficiencies and (ii) he had a tax deficiency of in excess of $10,000. Mens rea would therefore be more difficult to establish than for the basic offense. The occasions in which the penalty could be successfully invoked would be infrequent. The main function of the penalty would probably be to help produce guilty pleas to the Class C offense.

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[17] Treasury and Justice Department officials, in related contexts, have opposed such an approach, as indicated, *infra*.

* The consultant's proposal was limited to intent to evade income taxes:

> (e) with intent to evade assessment of income tax, he knowingly fails to file an income tax return.

Study Draft section 1401(e) covers intent to evade any tax by failing to file income, estate or gift tax returns. *See* the appendix, *infra*.

[18] A similar issue is raised in the comment on theft offenses.

Arguably, such a scheme would tend to undermine the deterrent force of the basic sanction in that the presence of the higher grade offense would suggest that the lesser offense was not very serious. If such were the consequence of the grading scheme, it would clearly be undesirable from a revenue standpoint, since the frauds which take the largest toll on the fisc are the smaller but far more numerous variety. Only a small fraction of taxpayers have large enough incomes to make huge evasions possible.

It is unrealistic, moreover, to assume that in a typical tax prosecution the maximum penalties are those provided for Class C felonies. In the great bulk of tax evasion cases, the defendant has not merely strayed from the straight and narrow in one year but has been cheating for several years. An investigation which produces proof of evasion in one year will often establish a pattern of evasion over three or four years. If convicted, the taxpayer will be subjected to consecutive sentences, if appropriate. Prison terms of 15 years have occasionally been imposed under section 7201. If a longer term is thought appropriate its justification must be found outside the basic objective of criminal tax sanctions—prevention of tax evasion by general deterrence.

It is also a mistake to assume that those who attempt to evade $1,000 in taxes are treated identically, under present law or the draft, with those who cheat on larger sums. Severe civil fraud sanctions are routinely imposed upon persons convicted of tax evasion. The civil penalty is 50 percent of the total deficiency if "any part" of the deficiency was due to fraud. 26 U.S.C. § 6653(b). This is in addition, of course, to the tax deficiency itself and to the interest on both the deficiency and the penalty.[19] There is, moveover, no statute of limitations on deficiencies due to fraud or penalties thereon.

(b) *Voluntary disclosure or defense of renunciation.*—From 1945 until 1952, the Internal Revenue Service publicly maintained a policy of nonprosecution of tax evaders who voluntarily disclosed their deficiencies before any investigation was undertaken. The policy produced considerable litigation, primarily over the question whether a disclosure had been "truly voluntary" or had been motivated by fear of detection. Though abandoned in 1952, the policy has occupied several study groups from Treasury and Justice and several congressional committees since that time. The Tax Section of the American Bar Association has frequently urged its reinstatement and numerous proposals have been made to meet the administrative difficulties encountered under the old policy.

It is doubtful that any such policy would promote tax compliance. While there would be some "truly voluntary" disclosures which would not otherwise have been detected, it seems unlikely that the revenue thus brought in would equal the revenue lost as a result of the diminution of the basic sanction which would follow from legislating a locus penitentiae provision. In any event, the matter is so fraught with controversy and has been under such continuous study, with negative results, that it does not seem appropriate to include such a policy in the new Code.

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[19] Interest on the penalty begins to accrue after notice and demand therefor. 26 U.S.C. § 6601(f)(3).

It should be noted, however, that proposed section 1001, the general criminal attempt provision, contains a defense of renunciation which is similar to the old voluntary disclosure policy. Thus, voluntary disclosures will be defenses whenever taxpayers are prosecuted under section 1001, *e.g.*, conduct preparatory to filing a false return or for filing false returns which do not result in deficiencies. If the approach taken in this proposal is accepted, however, there will be no such defense for tax evasion itself.[20]

6. *Intentional Disregard of Tax Obligations: Section 1402.*—Present law makes willful failure to file a return, supply information, or pay a tax a misdemeanor. 26 U.S.C. § 7203. This section is second in frequency of invocation only to section 7201. However, most persons prosecuted under section 7203 are nonfilers, suggesting that failures to pay taxes or failures to supply information are regarded as inappropriate for the criminal sanction.

The formulation in section 1402 retains the criminal sanction for nonfiling, but relegates to civil sanction or regulatory offense (proposed section 1006) failures to pay taxes or supply information.[21]* One who files a correct return but merely fails to pay his tax, making no efforts to conceal or mislead regarding the amount or location of his assets, is simply a delinquent debtor, undeserving of the criminal sanction. The government's powers of levy and seizure are formidable enough to protect the revenue from such persons and no reason appears why failure to pay a tax debt should be regarded as a crime.

Nor does the remainder of section 7203, penalizing failures to keep records or supply information, seem deserving of inclusion in Title 18. A criminal sanction for such derelictions is intolerably vague and raises serious fifth amendment problems.

Reasonably accurate records are needed to conduct business efficiently. Moreover, a taxpayer who keeps inadequate records risks a civil deficiency assessment which is presumed correct and which he cannot effectively overcome. He is also in jeopardy of a criminal prosecution for filing false returns. If he is willing to disregard these risks, he is unlikely to respond to the threat of a criminal sanction for keeping inadequate records, especially since mens rea would be very difficult to prove.[22]

A criminal sanction is also seldom necessary or effective in facili-

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[20] Even if the approach taken in section 1401, defining certain conduct as tax evasion, is replaced with that taken under 26 U.S.C. § 7201, proscribing "attempts . . . to evade," the defense of renunciation will not be available. Even though tax evasion would be characterized as an "attempt," the prosecution would be under section 1401, and the defense applies only to a prosecution under section 1001.

[21] Inasmuch as a few Federal taxes are collected by means other than filing returns, the draft may leave a gap if it does not punish nonpayment of taxes. Section 1402(b) is therefore added to provide some criminal sanctions for failures to register or buy tax stamps. If bracketed alternatives (f) and (g) of section 1402 (relating to failures to pay and to furnish information or keep records) are made part of the draft, however, section 1402(b) would seem superfluous.

*Subsections (f) and (g) of the consultant's proposals referred to in note 21, *supra*, stated:

> (f) fails to pay any tax; or (g) fails to supply information or keep records which he is required to supply or keep by regulation.

These provisions were not included in the Study Draft.

[22] *Cf. United States* v. *Murdock*, 290 U.S. 389 (1933).

tating disclosure of information necessary to ascertain tax liability. The threat of civil deficiencies will produce disclosure from most taxpayers. If it does not, the chances are good that the taxpayer has something to hide and has filed false returns or committed other crimes for which he can be prosecuted.

The major informational problem, at least in the income tax area, is the taxpayer who furnishes insufficient or misleading information in a tax or information return. To the extent that criminal sanctions may be appropriate, egregious cases can be prosecuted as false statements under draft section 1352 or, possibly, as attempted tax evasion under section 1001. Less blatant derelictions should be dealt with as regulatory offenses (draft section 1006).*

The viable portion of section 7203, making it a misdemeanor will fully to fail to file a tax return, is preserved in section 1402(a) of the draft, with the substitution of "knowingly" for "willfully." "Willfully" carries with it a judicial gloss of "evil motive" or "bad faith" [23] that may be too narrow for a misdemeanor. In the context of failure to file a return, one would "knowingly" fail to file his return if (a) he was legally obligated to file the return, and (b) he knew he was so obligated or at least held a firm belief that he was obligated,[24] and (c) he nonetheless decided not to file. This is arguably enough to make him deserving of the sanction.

Failure to furnish to employee a statement of tax withheld.—26 U.S.C. § 7204 makes it a misdemeanor for an employer willfully to furnish a false statement of tax withheld to his employee or willfully to fail to furnish such a statement. This sanction is in addition to the $50 civil penalty for such infractions. 26 U.S.C. § 6674.

Section 1402(e) of the draft preserves this offense as a Class A misdemeanor. "Knowingly" has been substituted for "willfully," however, and, in the interest of brevity, the offense has been defined as failing "to furnish a true statement to his employees." This would seem clearly to cover both the employer who furnishes no statement and the employer who furnishes a knowingly false statement.

Full compliance with the duty to provide timely and accurate statements of tax withheld to one's employees is vital to the administration of the withholding system. The employee cannot reasonably be expected to file a tax return without such a statement, and the tax assessed against him and the refunds paid rest upon the figures supplied in the employer's statement of taxes withheld.

Failure to withhold or collect any tax.—As indicated above, 26 U.S.C. § 7202 makes it a felony for one who is required by Title 26 to collect any tax willfully to fail to do so. Prosecutions under the statute are virtually nonexistent, although violations—chiefly among homeowners and small businessmen who fail to withhold from wages of domestic and other help—are widespread. Felony treatment is

*Note that there is strong sentiment among enforcement officials against a misdemeanor sanction for false statements which, in practice, it is argued would be lesser-included offenses in a prosecution under draft section 1401.

[23] *See United States* v. *Murdock*, 290 U.S. 389, 394, 395 (1933).

[24] *See* draft section 302(1)(b): "[A] person engages in conduct . . . (b) 'knowingly' if, 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."

manifestly inappropriate for such derelictions. Civil penalties should normally suffice, and misdemeanor treatment can be employed against persistent violators.

Section 1402(c) applies only to one who, knowing of his obligation to withhold or collect, fails to do so. As in other sections, strict liability is not imposed.

Failure to deposit collected taxes in special bank account.—There is a large area of misconduct between the person who collects taxes and then, with intent to evade payment, fails to pay them over (a felony under section 1401(c) of the draft), and the delinquent tax debtor (no crime under the draft). Typical is the employer who withholds employee taxes, or the retailer who collects excise taxes, then fritters away the money before it becomes time to file his return and pay over the taxes. Section 7512 of present law provides that any person required to collect and pay over taxes who fails to do so may be given a formal notice requiring him thereafter to collect the taxes and deposit them in a special bank account in trust for the United States. Section 7215 makes it a misdemeanor for any person receiving such notice to fail to comply therewith.

The draft preserves the substance of this sanction. Section 1402(c), as already noted, makes it a misdemeanor knowingly to fail to collect or withhold taxes. The notice given under section 7512 would certainly establish that any failures to collect taxes thereafter were knowing. Thus the only function of section 7215 which needs to be expressly preserved is the sanction for failure to deposit collected taxes in the special bank account, after receiving the notice as provided in section 7512. Draft section 1402(d) makes this a misdemeanor.

7. *Misdemeanor Tax Evasion (a Possible Provision Not Included).*—Under the draft, tax evasion is either a felony or not a crime. Arguably, however, the felony could be limited to evasions of $1,000 or more and a Class A misdemeanor could be created for lesser evasions. Under the administration of present law, and under the draft, petty chiselers go virtually untouched, even though they may constitute, dollarwise, a greater drain on the Treasury than more flagrant evaders. Misdemeanor prosecutions, moreover, would probably be easier and cheaper to investigate and to bring to judgment than felony cases. As a consequence, a larger portion of the huge pool of potential targets of a tax prosecution could be reached by the sanction, and would be taken from among the taxpayers who provide the bulk of the income tax revenues—the middle income taxpayers.

On the other hand, to prosecute petty tax evasion as a misdemeanor may tend to trivialize the offense, and to water down the deterrent effect of the felony sanction. Felony treatment is needed because a felony prosecution gets more publicity and more clearly conveys the government's commitment to enforce the tax laws fully and fairly against, and thus in favor of, all. If a misdemeanor were available, hard core evaders would use the misdemeanor as a plea bargaining device and, more importantly, would inject a choice of misdemeanor-felony into a great number of jury trials where the choice is inappropriate—where the defendant is either a felon or innocent and where the jury should not be invited to compromise.

The latter argument—or something akin thereto—is the view of

many Treasury and Justice officials who oppose the notion of tax evasion being a misdemeanor. Under existing law, there is a lesser-included offense under section 7207 for willfully filing false returns. Officials have tried to get section 7207 repealed, have resisted efforts of defendants to get lesser-included offense instructions under it, and have declined to use it as a means of obtaining more convictions of more violators at less expense. Prosecutions under section 7207 alone are virtually unknown. Tax evasion prosecutions under section 7201 are rare where the deficiency in tax is less than $1,000 and will presumably remain rare regardless of the statutory scheme.

It should be noted, however, that under the draft provision on false statements (section 1352), a false return will constitute a misdemeanor, and the opportunity for plea bargaining and lesser-included offense instructions will therefore be present whether or not petty tax evasion is made a misdemeanor. One must look elsewhere to justify rejecting grading by amount in tax offenses, while retaining it for theft.

A tax evasion case differs from a theft case in that there is seldom any difficulty in theft cases in determining the identity and quantity of items stolen. In a tax case, however, the size of the deficiency will be very much in doubt and the size proved will depend in large measure on the skill and perseverence of the agent who investigates the case. The presence of a misdemeanor tax evasion provision might lead some agents to quit investigating once they make the case for a misdemeanor (which presumably would not be as thorough a case, or involve as large a deficiency, as a felony prosecution even though there is no dollar minimum now specified for a felony), and, perhaps more important, might invite their corruption by taxpayers during the course of the investigation.

Grading tax evasion offenses according to the amount evaded also involves more complexity than is normally present in a theft case. The amount relevant for a rational grading scheme would not be the size of the actual deficiency but the size of the deficiency known to the taxpayer when he filed his return. Deficiencies due to ignorance or oversight should play no part in determining whether an evasion was or was not felonious.[25] Grading would therefore introduce an element of confusion into the investigation and trial of tax evasion cases.

It is also arguable that the size of the deficiency is less relevant in determining the culpability of a tax evader than it is in gauging the guilt of a thief. A taxpayer who claims a phony dependency exemption or charitable contribution would seem equally culpable whether he was in a 20 percent or 60 percent bracket, yet under a grading scheme dependant on amount evaded, the upper bracket taxpayer might be a felon and the lower bracket man a misdemeanant. A taxpayer who claims his poodle as a dependant—and knows better—should be a felon even if he thereby saves only $100 in tax.

8. *Unlawful Trafficking in Taxable Objects.*—A wide variety of ob-

[25] An argument *contra* can be made by analogy to theft, where the grade of the offense depends on the actual value of the item stolen rather than what the defendant believed the object was worth. Yet there is surely a far greater correspondence between the actual value of stolen objects and the market value which their thieves estimated for the objects than there is between the amounts of taxes which evaders think they are evading and the actual deficiencies which can be shown to have existed.

jects—from liquor, to guns, to corporate stock—are the objects of Federal taxation. In many cases occupational taxes are imposed upon manufacturers and others engaged in the production or trade of the taxable objects, the purpose of the occupational tax being primarily regulatory. There are, therefore, complex, comprehensive regulatory schemes supportive of most Federal taxes which virtually assure effective enforcement without resort to criminal sanctions. It is only when a very high tax is imposed on a staple product that serious enforcement problems occur—and they occur because the high tax on the product makes potentially profitable a bootleg business, the profit of the business being fundamentally derived from the successful evasion of all taxation thereon.

Of the nonregulatory taxes imposed by the United States, the one which presents the greatest enforcement problems, second only to the income tax, is that on distilled spirits. Although there is a comprehensive regulator scheme which makes noncriminal enforcement against lawful distillers effective, the gallonage taxes (26 U.S.C. § 5001) are high enough to make moonshining a profitable business. Felony sanctions are employed almost exclusively against moonshiners.

Section 5601(a), the basic felony provision, makes it a felony for one to engage in the distilling business without registering the still and giving a proper bond, or after giving a false bond, or after giving a notice of suspension of operations. It is also a felony to use or possess with intent to use any distilling apparatus in any but an authorized place, to make mash or produce distilled spirits on any but authorized premises; to use distilled spirits unlawfully in a manufacturing process; to bottle or rectify such spirits unlawfully with intent to evade tax thereon; to purchase, receive, rectify or bottle such spirits with reasonable grounds to believe the tax has not been paid; to remove such spirits unlawfully or to add any substance before the tax is paid with intent to create fictitious proof.

It is also a felony for one required to keep records to falsify such records, to fail to keep them, to fail to produce them, or to hinder an officer in inspecting them, if said falsifications, failures or obstructions were with "intent to defraud the United States." 26 U.S.C. § 5603(a). If such falsifications, failures or obstructions were done "otherwise than with intent to defraud the United States," the conduct is a misdemeanor ($1,000 fine, imprisonment up to 1 year).

There are also 19 felonies relating to stamps, labels and containers specified in section 5604. The conduct made felonious includes transportation or possession of liquor which does not bear the required stamps, emptying containers without destroying the stamps, and reuse, alteration or forgery of stamps or labels. Some of this conduct is a felony only if done "with intent to defraud the United States" and some of it is declared felonious regardless of intent.[26]

In addition, offenses relating to spirits withdrawn free of tax are separately declared felonious in section 5607, as are fraudulent claims relating to drawbacks and unlawfully relanding exported liquor. 26

[26] For example, emptying specified stamped containers without destroying the stamp is a crime only if done with intent to defraud (section 5604(a)(2)), whereas such emptying of other containers is declared a felony without reference to intent (section 5604(a)(3)); it is a felony to alter or counterfeit a stamp with intent to defraud (section 5604(a)(4)), but to possess such a stamp is a felony regardless of intent (section 5604(a)(5)).

U.S.C. § 5608. There is another felony of tampering with a lock placed by an internal revenue officer, (26 U.S.C. § 5682); another for possessing certain weapons and other property while violating the liquor laws, section 5685, another of possessing any property intended for use in violating chapter 51, section 5686; and still another for willful failure to pay an occupational tax, section 5691.

Misconduct relating to other items is dealt with more simply.[27] Violation of regulations with respect to wine is made a felony if done with intent to defraud, section 5661; and attempts to evade tax on beer or failures to keep and file true and accurate records and returns relating to beer tax is declared a felony, section 5761.

When it is noted that liquor taxes, like income taxes, are reported and paid by a tax return (26 U.S.C. § 5061), and therefore that virtually all the criminal sanctions applicable to the income tax, *i.e.*, section 7201, attempts to evade taxation; section 7203, failure to file return, supply information, or pay tax; section 7206, false statements; section 7207, fraudulent returns or statements, are applicable as well to liquor taxes. It is plain that the Internal Revenue Code still contains much useless, repetitious verbiage about crimes connected with distilled spirits. Many could be repealed or made regulatory offenses without adverse effect on compliance.

Still, there are special problems connected with liquor taxes. The chief difficulty in relying on prosecutions for false returns or for nonfiling is that moonshiners do not file returns and it is very difficult to establish who is liable to file a return or pay the tax. Because the business of operating unregistered stills is itself a crime, and because registration would make it difficult if not impossible to defeat the tax, moonshiners conceal their entire operations. Even when a still is found, it is difficult to ascertain who owns it and who is liable for the tax. Enforcement of criminal sanctions cannot be restricted to occasions when illegal stills are discovered, but must be possible whenever and wherever nontax-paid liquor is found.

Since everyone in the chain of production and consumption is usually motivated to cover up the crime—there are no victims—the enforcement problems are akin to those relating to dangerous drugs.

Section 1403, which is patterned after section 1822 of the draft on drug crimes, attempts to pull together in one provision the basic conduct of moonshiners which is most destructive of norms of tax compliance, constitutes the usual occasions for making arrests, and can frequently be proved. If successful, this section, together with section 1401, should render completely obsolescent the other felony provisions relating to distilled spirits.

The plethora of felony provisions Congress has provided for derelictions regarding distilled spirits suggests a firm Federal policy behind felony classification. The difficulty of enforcement and the commercial motivations behind most violations seem to justify preservation of felony status for the core conduct involved.

Section 1403 is designed to include within its felony prohibitions virtually everyone directly involved in moonshining activities, whether they be entrepreneurs or employees, plant workers or runners—anyone knowingly making a substantial contribution to the enterprise and deriving economic benefit therefrom. It is designed

[27] Some of the provisions relating to distilled spirits also apply to offenses regarding wine and beer; most do not.

to exclude from felony sanction ultimate consumers of the nontaxed product. Simple possession will not be a felony under the draft, nor will consumption, nor possession with intent to consume. Consumers are plainly less culpable than persons regularly engaged in the process for pecuniary benefit, and present a less serious or at least a less direct threat to tax enforcement. It is believed, however, that misdemeanor classification should apply to such persons to deter them from providing a market for the illicit product. Accordingly, section 1404 defines as a Class B misdemeanor [should it be a Class A misdemeanor?] the knowing possession of distilled spirits upon which all taxes have not been paid.[28]

The definition of trafficking—produces, manufactures, possesses with intent to transfer, *etc.*—should eliminate the necessity of proving the particular role that a defendant performed in the manufacturing or distribution process. It should no longer be necessary, for example, to prove that someone found at a concealed, illicit still, was in possession or control of the still. While an inference from presence to possession might be strained, if not irrational, an inference from presence to trafficking would seem quite reasonable.

Section 1403 can theoretically be violated although all taxes were timely paid on the object specified therein and on the business of manufacturing or dealing in the taxable object. Since the primary purpose of the regulations relating to distilled spirits and other taxable objects is to ensure payment of taxes, there is no point in making permanent contraband of any objects illegally trafficked in. The contraband nature of the product should be removable by payment of all taxes. The draft therefore provides an affirmative defense to a trafficker that all taxes on the object and on trafficking therein were paid prior to his becoming a trafficker.

It is believed that section 1403, together with sections 1401 and 1402, covers all conduct which is made a felony under the present Code, with the exceptions earlier noted relating to failures to keep records, supply information, or pay tax; and with the exception of offenses relating to stamps and labels. Of the omitted conduct, only the latter should be felonious and, when the draft on counterfeiting is submitted, it doubtless will appear as such.[29]

Section 1403 also makes a Class A misdemeanor of unlawful trafficking in any taxable object other than distilled spirits. Although the nonregulatory taxes on such items as wine, beer, tobacco, and capital stock are not so high as to have produced a chronic bootleg industry in such items, enforcement of the taxing scheme can probably not

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[28] Consumption of moonshine whiskey is somewhat analogous to receiving stolen property in that the purchaser is profiting from the tax evasion by the manufacturer through getting the product at a lower price than he could through legitimate channels. He differs from the consumer of illicit drugs in that he is not consuming a product that is prohibited; his culpability consists, rather, in encouraging a tax evading enterprise by purchasing its products. The possessor of illicit liquor can avoid conviction by raising a reasonable doubt as to whether (a) the tax was paid on the liquor or (b) he knew that the tax was unpaid. If his defense is lack of knowledge, he will surely establish it by showing that he did not buy the liquor at a discount from the market prices in legitimate outlets.

[29] Since counterfeiting is presently under study, it would be premature to attempt here simplification and pruning of the present proliferous provisions relating to tax stamps.

be left wholly to regulatory offenses or to prosecutions for violation of tax return requirements. For many of the same reasons mentioned with respect to distilled spirits, it is difficult to determine who is liable to file a tax return, to determine the amount of the tax evaded, and to prove willfulness. An additional sanction, for unlawful trafficking, would therefore seem warranted. Moreover, if a serious bootleg problem is shown to exist in any commodity analogous to that with distilled spirits, trafficking in that commodity can easily be elevated to a felony and unlawful possession can be made a misdemeanor under section 1404.[30]

9. *Presumptions.*—Many of the felony provisions relating to liquor seem to impose strict liability, while others, without apparent reason, require mens rea.[31] It is reasonably clear, however, that trafficking in nontax-paid liquor or engaging in unlawful manufacture thereof could be made an offense without proof of knowledge of the illegality.[32] In requiring knowledge of illegality, therefore, the draft definition of the trafficking offense imposes a burden on the government which is probably not constitutionally required. Yet it seems both unjust and unnecessary to depart from the requirement of culpability, since presumptions are available which will make proof of mens rea relatively easy once the specified conduct is established.

The felony for trafficking in illegally manufactured or removed distilled spirits normally applies only to persons engaged in some phase of the manufacturing or distributing process for profit. It is not irrational to assume that such persons know that stills must be registered, spirits must be packaged in regulated containers, and authorized labels and stamps must be affixed thereto. Section 1405 (1) and (2)(b) codifies this common sense into a presumption, the effect of which is to permit the inference of knowledge of illegality upon proof that the required labels, packages, stamps or signs were missing from the containers, in the case of possession of packaged liquor, or from the still, in cases where the still itself is discovered. It would seem both easy for the government to prove the fact—illegality—upon which the presumption is based and easy for the defendant to destroy the presumption of the presumed fact—knowledge of illegality is false.[33] *

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[30] Consideration might also be given to providing felony treatment for persistent violators, employing criteria similar to those proposed in section 1006 (regulatory offenses) (person guilty of misdemeanor if he persistently flouts penal regulations, provable by showing two or more infractions within 5 years). On balance, however, such criteria seem too vague for felony definition and the approach suggested above seems preferable.

[31] *See* note 26, *supra.*

[32] *See United States* v. *Balint*, 258 U.S. 250, 252, 253 (1922); *United States* v. *Dotterweich*, 320 U.S. 277, 281, 284, 285 (1943); *Hayes* v. *United States*, 112 F. 2d 676, 677 (10th Cir. 1940).

[33] The presumption is intended to have the effect prescribed for presumptions in section 103(4) of the new Code, namely, that proof of the basic fact—illegality—warrants submission to the jury of the question of the existence of the presumed fact—knowledge of illegality—unless the evidence as a whole clearly negatives the presumed fact (or, as preferred by the consultant on proof and presumptions and this consultant, unless the evidence as a whole clearly precludes a finding of the presumed fact beyond a reasonable doubt).

*Recent Supreme Court cases, the most recent of which is *Turner* v. *United States*, — U.S. —, 90 S. Ct. 642 (1970), raise issues concerning the constitutionality of the proposed presumptions, particularly with respect to the presumption concerning culpability.

Section 1405(2)(a) contains an adaption from existing law, which makes presence at a still sufficient to create a presumption that the person present was a trafficker. Present section 5601(b)(2) provides that presence at a still is sufficient to authorize conviction of carrying on the business of a distiller without having given bond. Its constitutionality was sustained in *United States* v. *Gainey*, 380 U.S. 63, 65–68 (1965). Section 1405(2)(a) is far less strained in its inference and far less consequential, since it merely creates a presumption of trafficking, not a prima facie case of guilt.

Section 1405(2)(a) should also do the necessary work of present section 5601(b)(1) (declaring presence sufficient to convict of possession of unregistered still), which was held unconstitutional in *United States* v. *Romano*, 382 U.S. 136 (1965). It does not contain the defect of section 5601(b)(1) because it is merely a presumption, and because it presumes trafficking, not possession or any specific act.

A third presumption is offered in section 1405(3), to the effect that one in possession of 5 gallons or more of distilled spirits is a trafficker. This provision has an analogue in present section 5691(b), where a sale of more than 20 gallons to one person is said to be *prima facie* evidence that the seller was a wholesale dealer, subject to tax as such on the sale. Although it would be dubious indeed to convict a person of a felony merely because he possessed 5 gallons of whiskey, such is not the effect of the presumption in section 1405(3). The possessor cannot be convicted unless the spirits are improperly packaged, labelled or stamped and the evidence as a whole fails to exclude the inference that he was aware of the illegality and that he possessed the liquor with intent to transfer it. Properly analyzed, the presumption seems quite reasonable.

The meaning and effect of these presumptions can best be explained by a few hypotheticals. If several persons are found at an active still which does not contain the required sign, they are all presumed to be traffickers per section 1405(2)(a) and are further presumed, by virtue of section 1405(1), to have known that the law required that a sign be posted (or, perhaps more precisely, that the still was being operated in violation of law).

If a "runner" for the still described above is arrested 10 miles from the scene in possession of 5 gallons of whiskey, section 1405(3) presumes him a trafficker. If the liquor is unlawfully packaged, stamped or labelled, section 1405(1) presumes that he knew of the illegality. If, however, the liquor found in his possession was all in proper containers, authentically stamped and labelled, the fact that it came from a still where no sign was posted would give rise to no presumption with respect to him.

Section 1405(1) operates on the misdemeanor of possessing nontax-paid spirits by presuming both that the tax was unpaid and that the possessor knew it from improper packaging, labelling or stamping. The presumption can be rebutted by simply showing that the liquor was purchased from a legitimate liquor store at or near the market price.

10. *Regulatory Taxes and Customs Regulations.*—Drugs, guns and gambling are under separate study. Very likely, the taxing power should not be the chief means of regulating traffic in such items and prosecutions for tax evasion should not be the principal means of im-

posing criminal sanctions on traffickers. Yet so long as taxes are imposed on such items and activities by Congress, there seems no reason to exclude evasion of the taxes related thereto from the provisions of this draft, and there are no such exclusions. The only conduct expressly excluded from this draft is evasion of customs duties, an exclusion accomplished by virtue of the definition of "tax" in section 1409 (d). When the study on customs violations is completed, it may be appropriate to remove even this exclusion from the concept of tax evasion, an amendment that is easily accomplished.

Appendix

[The following excerpts are from an informal letter dated October 22, 1969, from Robert L. Spatz, Esq., Staff Assistant to the Chief Counsel, Internal Revenue Service, to Professor Steven Duke, Yale Law School, consultant to the Commission on draft sections 1401–1409. The letter does not represent the official view of IRS, but is included because, although addressed to a preliminary draft of sections 1401–1409 that has been adjusted in many respects to accord with the views herein expressed, it highlights some of the issues and divergent view points on the subject matter.]

1. *General organization and approach.*—I hope that I have recognized and properly appreciated your design in [section 1401]. In essence, you aim felony treatment at specified acts and omissions intended to evade taxes. Conceptually, I like your breakdown into preassessment (by false or no return to understate liability) and postassessment (by hiding assets to understate ability to pay liability) offenses. I was glad to see that [subsection] (a) handles our venue problems under centralized filing and that [subsection] (c) would pick up [*United States* v. *Mesheski*, 286 F.2d 345 (7th Cir. 1961)]. I would guess that [subsections] (a) and (c) together would cover 95% of what we are presently prosecuting re income taxes.

Your "blunderbuss" label for 7201 may fairly fit, but that does not make it bad. As a matter of fact, I read your approach to Subtitle E as turning a patchwork of specific conduct crimes into a blunderbuss trafficking proposal.

If blunderbusses are not to be thrown out in principle, why should this particular (and adorably familiar) one fall? I don't think you can make much of an argument out of the anomaly of equating "attempt" to substantive misconduct. Take a hard look at the typical defendant under [section 1401(a)] and you will see an unsuccessful attempter (or attemptress?) who will be squaring dollar accounts with Uncle Sam someday.

* * *

2. [*Draft section 1401(a)*].— As we study the reach of your draft, we're going to have to remember that 7206(1) and (2) are in the ashcan as well as 7201.

Getting concrete, your keystone hits anyone if*—

> with intent to evade assessment of any tax, he executes, mails, files or delivers a tax return which [substantially] understates the tax due and owing.

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*The reference is to a preliminary draft of Study Draft section 1401(a).

How would this work, for example, to deter the race track ten percenters that have been a persistent headache in recent years? You allude to the problem, . . . indicating that the winners-taxpayers are the root of the problem and that the "others" cashing in the tickets for a fee are incidental instruments. To IRS, these "others" are the actual villains of the piece. They generate the racket. In moral terms, such a parasite on the tax system seems to me more culpable than the taxpayer himself. They have heretofore been prosecuted under 7206(2) as procurers of fraudulent Forms 1099. Moreover, 7206(2) empowers IRS to arrest them on the spot. It is the only way to put them out of business since they are long gone when the taxpayer eventually files his 1040 (winnings on a New Year's Day race need not be reported as taxable income for 470 days). Your keystone, in conjunction with the exclusion of information returns in your definition of tax returns, gives us no felony sanction against the ten percenters. (Similarly, it would not have reached the tax fraud involving information returns by a tax exempt union. See *Beck* v. *United States*, 298 F.2d 622 (9th Cir. 1962).)

Another abuse which 7206(2) plugs better than anything else involves fraudulent corporate business deductions for political contributions. . . . While there are many variations on the theme, the simplest is for the political fund raiser to pave the way for business deductions for the solicited corporations by providing misleading invoices from suppliers of campaign services. For example, if a candidate runs up a $50,000 bill with ABC Printers for campaign literature, the fund raiser pressures 10 corporations to pick up one tenth of the tab each via direct payments to ABC with Uncle Sam really paying half in the form of lost taxes. ABC sends $5,000 invoices "for printing services" to each of the corporations, vouchers are approved at a high level by a person not in bookkeeping (much less return preparing) channels, and the payments eventually creep into the corporate income returns as business deductions for corporate printing. With several echelons between the person who makes the arrangement for the corporation and the return preparer, IRS has a monumental task in proving knowledge and intent, especially where the corporation is a bona fide customer of the printer throughout the year. The fund raiser—the promotor of the practice and the principal enforcement target—is still one step further removed from the return. He may very well have little idea whether the deduction he contrived produces a (substantial) tax deficiency. 7206(2) is tailor-made for this abuse. Incidentally, your parenthetical "substantial" would give us fits in these cases involving corporate giants, multi-million dollar tax liabilities, and relatively small four or five figure tax deficiencies attributable to the fraudulent deductions.

Before dropping 7206(2), I'm not convinced that [section 1401(a)], read together with [Study Draft section 401 (accomplices)], covers the classic tax refund mill operation. Whereas 7206(2) specifies that the return preparer can be convicted even if the taxpayer is unaware that the return is false, [Study Draft section 401] arguably requires the taxpayer to have the same mental state as that required for the substantive offense. The following underscored language tends to support such argument:

> A person is guilty of an offense *committed by the conduct* of another person when [,] acting with the kind of culpability required for the offense, he causes or aids an innocent or irresponsible person *to engage in such conduct. . . .*"
>
> * * *

Turning to 7206(1), the reported cases furnish only a partial picture of the utility of a sanction reaching fraudulent returns where the government may not be able to carry the burden of proving the existence of a tax deficiency beyond a reasonable doubt. (It also reaches the multiple fictitious return filer, as does 18 U.S.C. § 287—but we won't worry about your [section 1401(a)] not reaching where there is no intent to evade a tax—as long as the new Code's theft provisions hit the multiple filer).

Additionally, 7206(1) fits the interest equalization tax arbitrage operator who caused the preparation of I.E.T. returns charging the unpaid taxes to uncollectible strawmen. A whole book could be written about that gimmick—but here suffice it say that we need a felony sanction which reaches cases of tax returns containing no provable understatement of the tax due and owing. . . .

Finally, with respect to [section 1401(a)], [I recommend] the elimination of "assessment" from the statute since I.E.T. friend, for example, never worried about assessment since he never intended to pay in any event.

The upshot of all of the above—ten percenters, political contributors, *Beck*, tax refund mills, [multiple fictitious return filers], I.E.T. arbitrage operators, etc.—is that if you are going to merge 7201, 7206(1) and 7206(2) into a single sanction, you must provide for more than the routine case of the taxpayer filing his own 1040 understating tax. *The fact is that we meet tax evasion situations involving persons other than the taxpayer, returns other than final returns, acts other than executing, mailing, filing or delivering, and falsities other than tax understatements.*

I suggest changing [section 1401(a)] to read—"with intent to evade any tax, he prepares, subscribes, mails, files, or causes or aids in the preparation or filing of, a tax return which is false as to a material matter." The rest of the foregoing problems could be handled by changing the second sentence of [section 1409(e)] to read—"The term includes reports of taxes withheld or collected, information returns, income tax . . . conjunction with a tax return, but does not include returns of estimated tax."

Some of the suggested word changes are merely to keep current terminology—e.g., substituting "subscribes" for "executes". I left out "delivers" because I never knew exactly what that means beyond "files" when the document in question is a tax return.

Before you put your critical eye on my suggestion, you might want to reread [draft sections 3206 and 703].

Without attempting as full an explanation for [the] suggestions [concerning other provisions] as I have made for [section 1401(a)], I'll just outline some of my thinking:

3. [*Section 1401(b)*].—Substitute "is due" for "has been assessed" to cover a fairly frequently met situation where the tax return is not provably fraudulent but the taxpayer runs for cover with his assets

when he learns that IRS is investigating and about to come assessing. Substitute "removes" for "secretes"—I don't see where "secretes" goes beyond "conceals" and I doubt that either "secretes" or "conceals" covers overt removal beyond U.S. tax jurisdiction.

4. [*Section 1401(d)*].—Leave it in; besides your pro-arguments, present 7212(b) is one we have to use every now and then to discourage dangerous self-help on the part of taxpayers whose property has been padlocked for delinquent taxes.

5. [*Draft Section 1401(e)*].—Leave it in, but it should apply to any tax, not just income taxes. I don't expect as much trouble as you do; the guy in gambling business knows all he needs to know about wagering tax return requirements. [Last week I heard the Solicitor General's representative (arguing the validity of a presumption) tell Justice Stewart that the heroin pusher knows that heroin is imported even if Justice Stewart didn't know it.]

6. [*False statements*].—I'm not sure we ever talked about the idea of enacting a narrow misdemeanor sanction for false dependants. This is strictly a pragmatic need—some 75% of our detected tax frauds involve wage-earners who seize about the only easy evasion opportunity for them in the self-assessment *plus withholding* system by listing one or more fictitious or unauthorized dependants on their 1040 or 1040–A. Judges don't have the stomach for these as felony cases, and prosecutors don't want to handle them under a catch-all misdemeanor sanction because of all the lesser included offense problems you know too well. As a consequence, there are next to no prosecutions for false exemption claims in final returns, although we prosecute under Section 7205 [what did you do with that, by the way?] for false W–4's. What we badly need, and have repeatedly urged, is a specific misdemeanor sanction.

If some basis other than practical necessity be needed for distinguishing the petty false exemption evader from other evaders, you might speak about punishment fitting crimes and the Sovereign recognizing its moral obligation to keep its citizenry honest by foreclosing opportunities for tax evasion. If it would disturb your "fails to" pattern of [1402] to include a sanction for affirmative wrongdoing, I am confident you can draft something as ingenious as your [section 1402(e)] which transmutes 7204's "supplies false information" into "fails to furnish a true statement". [Query—have you considered the continuing offense and concomitant statute of limitations implications of your phraseology?] In any event, however you work it in, the creation of a specific false exemption misdemeanor would contribute importantly—and reasonably, in my view—to tax administration.

One last item—the considerable damage that your evasion by false return statute would do to us if the proposed false statement statute remains as written to plague us as a lesser included offense. [The commission staff suggested considering] that the answer might lie in excepting tax returns from proposed [section 1352]. [There may well be an official contingent who] emphatically backs this idea, recognizing that it is not logically consistent with our proposal for a false exemption misdemeanor. Still, such an exception makes sense. In terms of nature and number, tax returns are just plain different critters from other dealings of the citizens with their Sovereign.

CONSULTANT'S REPORT

on

CIVIL RIGHTS AND ELECTIONS:

CHAPTER 15
(Dixon; October 7, 1969)

Directional Note on Discussion in Consultant's Report

The sequence of discussion in this Consultant's Report does not follow the sequence ultimately adopted for incorporating the material into the Study Draft. However to aid cross reference to the proposed statutory text, the proposed Study Draft section numbers have been inserted throughout the Consultant's text.

PARTS I AND II

After a general essay on background and development of Federal power in this field, there is first a long discussion of the proposed revision and retention of 18 U.S.C. § 245. This section, derived from the Civil Rights Act of 1968, is our most detailed and most recent civil rights statute relying on criminal sanctions. Section 245 incorporates all of our new theories of expanded Federal constitutional power, and has a broad substantive coverage. It partially covers the field already touched by earlier civil rights legislation, and will have an even broader coverage if the "force or threat of force" requirement is deleted. A consideration of 18 U.S.C. § 245 is a helpful starting point, therefore, in determining where we are in terms both of power and law in this field, and in determining what to do with such older statutes as 18 U.S.C. §§ 241–242, and the various regulations of the political processes attempted by the Corrupt Practices Acts and the Hatch Act. (Under the final numbering order, this material becomes Study Draft sections 1511–1515.)

PART III

This part identifies an area (protection of Federal programs and and Federally assisted programs) which is partly but not completely covered by existing law or Study Draft proposals. An issue is whether there is a need for an additional law in this field.

PART IV

At this point there is a discussion of 18 U.S.C. §§ 241–242, the old Reconstruction Era civil rights acts which for almost a century were virtually the only statutes under which the United States could initiate action. The discussion focuses on their continued relevance in the light of 18 U.S.C. § 245, and in the light of additional proposals in

subsequent parts of the Consultant's Report for new language designed to achieve more effectively some of the purposes underlying these two historic sections. The conclusion is reached that 18 U.S.C. § 242 is no longer needed because it already has been largely amalgamated with 18 U.S.C. § 241 by the Supreme Court, and overlaps with proposed new language.

The proposed new statutory language, other than the retention and revision of 18 U.S.C. § 245, touches several areas. First, it is recommended that there be one broad "constitutional rights" statute subject to judicial expansion as perceptions of constitutional rights develop, even though this leads to great overlap with other statutes. This purpose is achieved by retaining 18 U.S.C. § 241, revised to delete obsolete language. (Because of its general character this revised statute has been numbered section 1501 and heads the list of the proposed statutes on civil rights and elections.) Second, there is a new statute (section 1521) on abuse of official authority designed to carry forward and make more effective the role of 18 U.S.C. § 242 in this field. Third, there is a sequence of statutes on political processes (sections 1531–1535, and 1541–1542) designed to clarify the traditional use of 18 U.S.C. § 241 in the areas of election fraud, and to update and clarify those parts of the Corrupt Practices and Hatch Acts which are neither obsolete nor already covered by the revisions of 18 U.S.C. §§ 241 and 245.

Part V

This part explains the retention and revision of the open-ended "violation of constitutional rights" language of 18 U.S.C. § 241, with section 242 amalgamated into it. (Study Draft section 1501).

Part VI

This part explains the problems and alternatives in attempting to devise a clearcut statute on abuse of official authority, an area covered somewhat awkwardly in the past by the loose language of 18 U.S.C. § 242. (Study Draft section 1521.)

Part VII

Gathered together in this part under the general heading "Protection of the Political Processes" are a series of proposed sections covering several quite different matters loosely related to elections or abuse of political authority. Section 1531 continues Federal criminal penalties for vote fraud, a matter now dealt with largely by use of 18 U.S.C. § 241, and provides language specifically directed to fraudulent election practices. (The broad language of 18 U.S.C. § 241 is retained elsewhere for other purposes: *see* part IV above and proposed section 1511.) The remaining proposals, sections 1532–1535, 1541–1542, update and revise those parts of 18 U.S.C. chapter 29, sections 592–613 which are deemed appropriate for retention in Title 18. This part of Title 18 is at present largely a mixture of Corrupt Practices legislation and Hatch Act provisions, and much of it is either unneeded or should be transferred to Title 2, chapter 8, sections 241–256 or Title 5, sections 1501–1508 and 7321–7327 where other material of this essentially regulatory type is found.

I. Introduction and Overview

A. *Development of Civil Rights and Voting Legislation With Criminal Sanctions*

Our oldest meaningful statutes in the fields of civil rights and voting date from the Reconstruction Period, the best known being sections 241 and 242 of Title 18. After Reconstruction there was almost a century of legislative nonaction on civil rights and racial discrimination issues. In the field of Federal elections, per se, some corrupt practices acts were passed, including the Hatch Act of 1939, most of which are codified as 18 U.S.C. §§ 591–613.

Beginning with the Civil Rights Act of 1957, Congress has enacted civil rights and voting legislation with increasing frequency, *e.g.*, the Civil Rights Act of 1957, 1960, 1964, 1968, and the Voting Rights Act of 1965. However, the great bulk of this legislation centers on use of the administrative process and civil injunctions for enforcement rather than criminal sanctions. Most of it is codified to Title 42 of the United States Code. In approaching this field it is important to realize that although civil rights and voting matters are an integral whole, from the perspective of the total Federal governmental response, the National Commission on Reform of Federal Criminal Laws perforce must deal with only a part of the problem. We deal here only with those criminal penalties, in the civil rights voting area, properly allocable to the Federal Criminal Code.

For example, except as reached tangentially by some parts of 18 U.S.C. § 245 (derived from the Civil Rights Act of 1968), such areas as desegregation of schools and other public facilities, equal employment opportunity, equal opportunity in access to housing, nondiscrimination in use of Federal grants, and Negro enfranchisement are being approached by the Federal government today primarily through noncriminal sanction techniques. Where violence or fraud are used to deter equal participation in benefits and opportunities, or to undermine the integrity of governmental processes including voting, criminal sanctions are an appropriate, necessary response.

The primary criminal statutes touching civil rights and voting which now exist may be briefly noted. From the Reconstruction Period derive the extremely open-ended 18 U.S.C. §§ 241–242, whose breadth and generality have been a major impediment to their effective use, even though on their face they would seem to be a sovereign remedy for all wrongs. Section 241 makes it illegal to conspire to injure or intimidate any citizen in the free exercise of any right secured by the Constitution or Federal laws. In practice it has been primarily a vote fraud statute for Federal elections, although its potential application is now much broader under more recent theories of Federal constitutional power, noted below. Section 242 makes it illegal for anyone acting under color of law to deprive another of rights secured or protected by the Constitution or laws of the United States. In practice its major use has been in connection with the improper use of violence by State-local police or prison officials, although the volume of prosecution is not great.

A major problem under both of these provisions, and especially the latter, has been a lack of specificity, and hence a lack of warning to

possible defendants of the kind of conduct prohibited, thus making them impermissibly vague under due process standards. In the famous case of *Screws* v. *United States*, 325 U.S. 91, 101–107 (1945), the Supreme Court saved the constitutionality of section 242 by reading into it a none-too-clear specific intent requirement, *i.e.*, that the defendant Sheriff who had abused and killed a Negro in the course of an arrest be shown to have acted with reference to the victim's constitutional rights, and not solely from private pique. On retrial, Screws was acquitted by the jury. But in a later case a jury convicted several policemen who had physically abused certain alleged thieves, and the Supreme Court found no constitutional defect, under a jury charge which read in part as follows:[1]

> The law denies to anyone acting under color of law . . . the right to try a person by ordeal: that is, for the officer himself to inflict such punishment upon the person as he thinks the person should receive. Now in determining whether this requisite of willful intent was present in this case . . . you gentlemen are entitled to consider all the attendant circumstances; the malice, if any, of the defendants toward these men; the weapon used in the assault, if any; and the character and duration of the investigation, if any, of the assault, if any, and the time and manner in which it was carried out. All these facts and circumstances may be taken into consideration . . . for the purpose of determining whether the acts of the defendants were willful and for the deliberate and willful purpose of depriving these men of their Constitutional rights to be tried by a jury just like everyone else.

Long continued efforts of the Department of Justice and others dating back to the 1950's to add clarifying language to sections 241 and 242, especially the latter, thus easing the specific intent requirement and making prosecutions easier, finally culminated in 1968 in Title I of the Civil Rights Act of that year dealing with violent interference with certain Federally protectible activities. It is codified as 18 U.S.C. § 245. It is an extremely detailed, complicated statute, with potentially a very broad reach. A separate housing violence provision with analogous language and penalties (42 U.S.C. § 3631), although codified separately, should be read with it. In the first year of experience with these new provisions (April 1968 through June 1969), however, there were only a handful of actions and no significant comment can yet be made.

Other provisions with criminal sanctions affecting civil rights are comparatively minor and specialized in nature. They include 18 U.S.C. § 1509, making it a misdemeanor to interfere with a court order, added

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[1] *Williams* v. *United States*, 341 U.S. 97, 102n. (1951). For references, *see* CUMMINGS AND MCFARLAND, FEDERAL JUSTICE (1937); Shapiro, *Limitations in Prosecuting Civil Rights Violations*, 46 CORNELL L. Q. 532 (1961); Putzel *Federal Civil Rights Enforcement: A Current Appraisal*, 99 U. PA. L. REV. 439 (1951); Caldwell and Brodie, *Enforcement of the Criminal Civil Rights Statute, 18 U.S.C. Section 242, in Prison Brutality Cases*, 52 GEO. L. J. 706 (1964); Ellif, The United States Department of Justice and Individual Rights, 1937–1962 (1967) (unpublished Ph. D. dissertation, Harvard University); Dixon, *The Attorney General and Civil Rights*, 1870–1964, in ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES 105 (1968).

by the Civil Rights Act of 1960, in order to permit immediate use of the arrest power against mob action obstructing desegregation orders, and some older, seldom used provisions concerning improper search and seizure (18 U.S.C. §§ 2234–2236), transportation of strikebreakers (18 U.S.C. § 1231), seamen and stowaways (18 U.S.C. §§ 2191–2199), peonage and slavery (18 U.S.C. §§ 1581–1588). Section 1509 on interference with court orders relates to the Commission's materials on physical obstruction of governmental function (section 1301), and criminal contempt (sections 1341(1)(c), 1345). The peonage-slavery provisions, to the extent that they need to be retained at all, should be related to the kidnapping materials (sections 1631–1639).

It may be noted, however, that a recent Supreme Court decision concerning 18 U.S.C. § 241, which seems applicable also to 18 U.S.C. § 242 with its similar "any federal law" focus, indicates that these criminal statutes can have a broad outreach to civil regulations in the United States Code. In *United States* v. *Johnson*, 390 U.S. 563 (1968), the Court sustained an 18 U.S.C. § 241 prosecution of persons who had interfered with Negroes in their access to public accommodations covered by the Civil Rights Act of 1964. The Act has an exclusive remedy provision (42 U.S.C. § 2000a–6), which confines enforcement of the rights created by the Act to injunctive relief.

The majority of the Court construed this to bar criminal actions only against proprietors or owners of the public accommodations, and not to foreclose criminal actions against outsiders who assault Negroes for exercising their right to equality in public accommodations. The opinion of the Court by Mr. Justice Douglas creates a presumption that 18 U.S.C. § 241 is to be accorded "a sweep as broad as its language," unless there is clear indication of a contrary congressional intent. The dissent of Justices Stewart, Black and Harlan rested on statutory interpretation grounds, turning not on any limiting principle found in 18 U.S.C. § 241, but solely on their reading of the exclusive remedy language that Congress had inserted in the 1964 Act.

It would seem, therefore, that any civilly phrased regulation anywhere in the United States Code *which creates a personal right* and is not exclusively tied to a civil remedy could be the basis for a section 241 (and if "under color," section 242 also) prosecution against any one who injured or deprived the person exercising the statutory right.

Voting and Vote Fraud.—Voting and vote fraud matters do not constitute a category wholly separable from the general civil rights materials because of the significant degree of statutory overlap. For example, 18 U.S.C. §§ 241 and 242 may apply to voting matters as well as to other civil rights deprivations, and indeed the primary use of section 241 has been in the vote fraud area. The Voting Rights Act of 1965, although erecting essentially a civil system of Negro voter registration, included some criminal sections which overlap not only 18 U.S.C. §§ 241 and 242, but also 18 U.S.C. § 245, derived from the Civil Rights Act of 1968. Regarding the Voting Rights Act of 1965, 42 U.S.C. § 1973i touches on vote fraud. Subsection (a) of section 1973i penalizes improper performance of official duties regarding voting and counting; subsection (c) deals with various combinations of private fraud, and is more specific but less broad than 18 U.S.C. § 241. Section

1973j(a) of Title 42 specifies criminal penalties supportive of various other parts of the Act; section 1973j(b) penalizes destruction of certain voting records; and section 1973j(c) penalizes conspiracies to violate various parts of the Act.

The various corrupt election practices provisions, and the Hatch Act provisions, are brought together in 18 U.S.C. §§ 591–613. They are shot through with jurisdictional breadth inconsistencies. Most have little use.

B. *Constitutional Bases for Civil Rights and Voting Legislation*

The Federal structure of our government and the limited range of powers delegated to the national government have traditionally been viewed as significantly limiting the range of Federal *legislative* power in the civil rights and voting fields. Dramatic Supreme Court decisions of the past 5 years may now have ended this era. Certainly, few fields of constitutional doctrine have changed more rapidly in the 1960's than this field of Federal authority over civil rights and voting. As a consequence, Congress may now possess virtually plenary power—and hence concurrent power—with the States. Future debates therefore may center as much or more on the need for a given provision, and the proper scope of exercise of Federal jurisdiction auxiliary to State power, rather than on the question of the constitutional validity of various kinds of possible Federal action.

In a wide range of areas it is now difficult to perceive any *constitutional* inhibition on Federal enactment and enforcement of whatever policies seem needful to Congress, *e.g.*, Negro equality and compensatory or preferment questions, integrity of Federal or Federally assisted programs, excessive force by State law enforcement officials, access to and participation in all benefits and enterprises significantly related to the national economy, and the like.

Thirteenth Amendment.—Heading the list of new constitutional developments, with the total implications not yet clearly perceived, is the newly resurrected thirteenth amendment. In *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Court upheld the constitutionality of 42 U.S.C. § 1982, a Reconstruction Era statute which gave all citizens the "same right" as white citizens to purchase property, and applied it in favor of a Negro petitioner whose offer to buy a home in a private development in St. Louis County had been denied solely because he was a Negro. Although for a century the statute had been viewed as having no constitutional foundation adequate to support its literal outreach because it was not bounded either by interstate commerce concepts or the State action requirement under the fourteenth amendment, the Court found an adequate basis in the thirteenth amendment. Literally, the thirteenth amendment provides only that neither "slavery or involuntary servitude . . . shall exist" in the United States. But the congressional power to implement this substantive language can include, said Mr. Justice Stewart for the Court, legislation to abolish "all badges and incidents of slavery." [2] And he went on to speak of congressional power, derived from the thirteenth amend-

[2] 392 U.S. at 439.

ment, "to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man." [3]

There is no natural or logical limit to the "badge" or "continuing aura" of slavery concept, once applied to residential property purchased in 1968. Arguably, the thirteenth amendment may now be read to confer upon Congress a plenary police power regarding all Negro racial discriminations, inequalities of opportunity, either personal or commercial, and the like. Regarding private clubs, if the Court's equal "dollar" sentence is to be taken literally, Negroes may not be barred solely as Negroes, although non-Negroes may be barred if there is insufficient State action to bring them under the fourteenth amendment, and if commerce concepts are inapplicable. The peripheries of the meaning of the *Jones* case must be left for case-by-case elaboration. It is obvious that at least where Negro victims or litigants are involved, we have a new perspective for viewing the outreach of such statutes as 18 U.S.C. §§ 241, 242, 245, and others.

Commerce Concept.—The interstate commerce concept, which expanded greatly in the 1930's, achieved additional breadth in 1964 in the cases sustaining the public accommodations title of the Civil Rights Act of 1964: *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964). The more interesting of the two is the *McClung* case. Despite some broad language in the opinion, the *Heart of Atlanta* case could rest simply on a finding of inconvenience to a demonstrable class of interstate travelers. But in the *McClung* case, concerning a restaurant 11 blocks from an interstate highway which had not been shown to have served or denied service to interstate travelers, the Court's rationale is more interesting.

The restaurant did serve some food which had moved in commerce, but one branch of the Court's rationale is broad enough to cover restaurants serving wholly local food to wholly local customers. The Court pointed out that restaurant segregation diminishes national demand for food products, and that the situation should be viewed in the aggregate, rather than in terms of a single restaurant. This thought is analogous to the ruling in *Wickard* v. *Filburn*, 317 U.S. 111 (1942), that home grown wheat consumed on the farm may still be subjected to national acreage quotas because such consumption constituted twenty percent of the national demand.

The Court in *McClung* further pointed out that restaurant segregation discourages population mobility which in turn adversely affects industry location, with a consequent adverse effect on the dynamism of the national economy. In a way this is a more particularized, more forthright version of the murky "national economy" opinion with which the Court supported the constitutionality of the Wages and Hours Act in *United States* v. *Darby*, 312 U.S. 100 (1941). Once "interstate commerce" is read as "national economy"—on the ground it better serves the apparent Founders' purpose to place at the national level plenary power in economic affairs—and is defined in terms of such elements as population mobility, a power without obvious logical limits emerges.

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[3] *Id.* at 443.

Travel Concept.—In 1969, with dissents by Chief Justice Warren and Justices Black and Harlan, an independently articulated "right of interstate travel" *plus* a right to favorable conditions for travel, emerged as part of our constitutional principles, related to but independent of the commerce clause. The Court, in *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), nullified the practice of several States and the District of Columbia of requiring 1 year's residence as a pre-condition to eligibility for certain types of public assistance. The residence requirement, said the Court, deterred "in-migration of indigents," a "constitutionally impermissible" purpose in the light of the fundamental nature of the "right of interstate movement." [4] The matter had been presented by the opponents of public assistance residence requirements as essentially an equal protection of the laws case. But the Court's opinion seems to rest heavily on a broad concept of "travel," either operating independently as an intrinsic element in our Federal system, or as justifying an unusually strict application of the equal protection clause.

Earlier cases foreshadowed this development, but none are as forthright as *Shapiro* and as suggestive of other possible offshoots of a "travel-related" concept. For example, *Edwards* v. *California*, 314 U.S. 160 (1941), involved a State ban on private inducements to indigents to come to California. And *United States* v. *Guest*, 383 U.S. 745, 757–760 (1966), in its travel aspect, involved a private slaying of a Negro traveling on an interstate highway. Writing the opinion of the Court in *Guest*, Mr. Justice Stewart said that not all interferences with travelers abridge a Federal right, and that a conspiracy to rob an interstate traveler would not, by itself, violate 18 U.S.C. § 241. In *Shapiro*, of course, travel was unimpeded, and at issue were peripheral State policies which make one State more or less attractive than another to an indigent on the move. Like the revived thirteenth amendment and the new commerce clause, the ultimate outreach of a "favorable conditions for travel" concept is obscure. But it obviously enhances Federal power.

Discriminatory "State" Action.—Despite a steady judicial attenuation of the "State action" requirement for triggering either the fourteenth or fifteenth amendments, it was until 1966 thought that private discriminatory action without State involvement lay outside the reach of these amendments. But dicta in two Supreme Court opinions in that year—apparently supported by a majority of the Court—indicate that proof of "State action" may be unnecessary if the *impact* of the private act affects access to and enjoyment of "State facilities." The true meaning of these two cases—*United States* v. *Guest*, 383 U.S. 745, 755–756 (1966), and *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966)—must await cases which squarely raise such questions.

Guest, as noted above, could rest solely on a right of travel concept. In the alternative, Mr. Justice Stewart rested the Court's affirmance of Federal power to prosecute the defendants (all private citizens) on a special theory of "State action" unlikely to be repeated. He took at face value one allegation in the indictment—which on the face of it would seem not to have the slightest relevance to the facts at issue—that the brutal night highway slaying of the Negro was part of a

[4] 394 U.S. at 631, 638.

conspiracy to cause "arrest of Negroes by means of false reports that Negroes had committed criminal acts."

However, six concurring Justices in *Guest*, in opinions written by Justices Clark and Brennan, took a much broader view of Federal jurisdiction under the fourteenth amendment (and by implication the fifteenth amendment). Simply stated, the dictum was that if private action, even conceding it to be wholly private action, is aimed at interference with "fourteenth amendment rights," it falls within Federal power under that amendment. And both Justices in nearly the same words gave the same example of a fourteenth amendment right—"the right to equal utilization of state facilities." [5]

Broadly conceived, the "State facility" concept would embrace all activities and programs provided by the State (with or without significant Federal financing), and perhaps all "private" activities and programs significantly financed by the State. It may be noted that this "State facility" idea, if developed without benefit of particularizing legislation under broad 18 U.S.C. § 241–type language, will turn on questions of intent and motive, and continue the *Screws* problem of separating out wholly private violence from acts done to deprive one of a "Federal right."

Katzenbach v. *Morgan*, 384 U.S. 641 (1966), does not speak so directly to the question of reaching private action via the fourteenth amendment; it did not have to, because on the facts there was no "State action" problem. At issue was the constitutionality of that portion of the Voting Rights Act of 1965, which invalidated New York's requirement that a voter be literate in English—concededly "State action." But in working out a rationale for its opinion that New York's provision was sufficiently discriminatory to lie within congressional power to enforce the fourteenth amendment, the Court developed a theory seemingly applicable to the "State action" element as well.

The essence of Mr. Justice Brennan's opinion for the Court is the theory that whenever Congress acts under section 5 to clarify the meaning of section 1 of the amendment, a strong presumption of validity attaches to the congressional determination. This is very close to a generic police power concept in the field of "equal protection." [6]

Federal Remedial Power.—To our traditional overall classification of Federal power as being either "express" or "implied," we seem to have added in 1966 a new category—Federal remedial power. Except as limited by the race, sex and equal protection concepts of the fifteenth, nineteenth and fourteenth amendments, voting qualifications for both State and Federal elections are allocated to the States by article I, section 2, and the seventeenth amendment to the Constitution. However, in the Voting Rights Act of 1965, Congress turned from the case-by-case process of enforcing Negro voting rights in the South by litigation based on the fifteenth amendment, and—in operative effect—authorized a temporary Federal takeover both of voting qualifications and voting registration. Central to the plan was a "trigger formula" keyed to proof that fewer than half of the eligible

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[5] 383 U.S. at 761, 782, 784.

[6] For a general discussion, *see* Cox, *Foreward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

Negro voters were registered, and a consequent 5-year suspension of State voting laws (other than such innocuous, objective requirements as age). By direct action, as a permanent measure, such authority lies beyond the reach of Congress except by constitutional amendment. However, the Act was sustained in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), on a nominally temporary, remedial power theory. In other words, past abuse of State control over voting qualifications, in reference to Negro qualification justified a Federal takeover for a period necessary to correct the abuse and equalize Negro-White voter eligibility for the future.

The implications of this "remedial" power to correct past State de jure discriminations are fascinating, both as to areas which potentially could be covered in education, housing, administration of justice, zoning and planning, and as to the duration of the "corrective" period. Also, given the Federal "take-over," private discrimination or interference affecting the area could then be reached on a conventional theory of affecting a Federal function.

Summary.—The broadest constitutional theories supportive of Federal action are the thirteenth amendment (but logically for Negroes only), the developing "affecting travel" concept, and the familiar but still developing "affecting commerce" concept. Still in a developmental stage under the fourteenth and fifteenth amendments is the question of the extent to which Congress can reach private action (without even indirect State involvement) on a theory of curbing "private interference with fourteenth amendment rights." Under a theory that any private action which supports "ghetto-like conditions" is subject to Federal reach through the fourteenth amendment,[7] on the ground that it makes provision of equal *State* services more difficult, there is no meaningful limit on Federal jurisdiction other than the political process.

C. *Approaches and Policy Choices*

As observed at the outset, Congress' exercise of its potential power over civil rights and voting has been fragmentary, and largely confined to recent years. In terms of subjects, Federal attention was in the past largely confined to voting, plus some attention to police violence under 18 U.S.C. § 242. And by virtue of the open-ended quality of 18 U.S.C. §§ 241 and 242, there was authority to go after "dirty birds" generally who deprive others of "Federal rights," but were hard to identify under such loose language. More recently attention has been turned to education, public accommodations, employment, and housing. In terms of sanctional systems, the primary reliance in the newer fields has been on civil regulatory techniques. The proper role of criminal sanctions has been perceived to be discouragement of violent or fraudulent interference with Federally protectable interests.

As areas of Federal jurisdiction expand, there may be increasing appeal in the suggestion that the Federal Criminal Code be primarily a grading of common law and general regulatory offenses, similar to a State criminal Code, supported by a separate listing of jurisdictional bases for Federal action. But as applied to the civil rights field this idea would seem not to be workable, at least at our present stage of development.

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[7] Cox, *Forward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

Such a "special jurisdictional base-general crime definition" approach, would destroy the substantive open-ended, developmental quality of 18 U.S.C. §§ 241 and 242. Also, the jurisdictional bases for sections 241 and 242 are themselves not only quite varied, but quite developmental, as indicated in the above discussion of constitutional bases for civil rights legislation. Under the present approach, therefore, Federal criminal jurisdiction could expand not only by conscious congressional choice, but by Supreme Court evolution of "affectation" doctrines in the commerce and fourteenth amendment fields. Traditionally, the civil rights field has been more uniquely tied to constitutional, and hence jurisdictional, concepts, than, for example, business fraud.

As presently perceived, an appropriate approach for a revision of the criminal sanction statutes in the civil rights-voting field would be to categorize the statutes on a substantive basis which is more clearly defined than under existing law, to omit jurisdictional bases where the broadest possible outreach is desired, and to build into the substantive provisions the special jurisdictional features which are designed to limit coverage. Where jurisdictional bases are omitted they should be understood, through legislative history, to be an exercise of full Federal power under multiple jurisdictional bases, including constitutional doctrines of Federal jurisdiction yet to be articulated. Concededly this does little to clarify for the casual Code reader the single or multiple constitutional bases for a given provision, the bases themselves being noncoterminous—for example, the fourteenth amendment, the commerce clause. But this is implicit in our Federal system at its present stage of development. Through a substantive focus, some order may emerge, and the question of jurisdiction will be clear in some instances, subject to case-by-case development in others.

It also may be noted that virtually all Federal jurisdiction in these fields is *auxiliary* jurisdiction, the conduct in question also being subject to State power. This applies even to Federal elections, which are held by the States. Hence, some attention needs to be given to the question of inclusion of antipreemption provisions, and to the question of limiting the total possible range of Federal investigatory and adjudicative jurisdiction with provisions requiring a finding of need for Federal action.

A "cleaned up" civil rights and voting portion of the new Federal criminal Code, under the above approach, would include the following elements.

1. *A Detailed Section on Violent Interference With Specified Federal or Federally Protectable Interests.*—This section, based on present 18 U.S.C. § 245, could be expanded by Congress to cover additional interests in the future. In its present form it is designed to protect several interests—racial equality, access to Federal benefits, voting, freedom of expression in these areas.

2. *Protection Against Nonviolent Interference With the Same Interests.*—While this could be a separate section, such an approach would cause needless repetition of provisions. As presently drafted, the provision is part of the same section which reaches violent interference. One of the targets here is economic coercion, which is not directly covered by present civil rights legislation, and which would not be reached either by the general fraud provisions.

3. *A Section Retaining the Open-Ended Quality of 18 U.S.C. §§ 241 and 242, But Clarifying These Provisions in Two Directions: Voting Fraud, Which Has Been a Primary Area of Use of Section 241 Although Not Mentioned in That Section; Official Violence (in the Law Enforcement Context), Which Has Been a Primary Area of Use of Section 242, Although Not Mentioned in That Section.*—These two provisions pose the greatest conceptual problems. Dating from Reconstruction, they have been difficult to enforce, but for generations they were the only provisions available with any criminal utility. If they were to be simply repealed there would be some loss of breadth in Federal civil rights legislation, as well as loss of potential future growth as "constitutional" perceptions change. The solution attempted is to clarify their meaning in the light of their actual use, but also to retain broad language as a backstop for developmental constitutional rights.

4. *A Revised and Integrated Voting and Corrupt Practices Chapter.*—We approach voting from so many perspectives, and under so many different constitutional principles of coverage, that it has not proved feasible to sever all voting and elections matters from other civil rights provisions. For example, a ban on racial discrimination will touch voting as well as other fields such as education and housing, but a statute containing this provision will not reach ballot box stuffing, or more subtle forms of vote fraud or improper election influence. This chapter, with some overlap with more general civil rights sections, is designed to make certain that none of the following are unprovided for: (a) racial vote repression by any improper means, violent or nonviolent, but not interfering with freedom of expression; (b) nonracial vote fraud of all kinds; (c) interference with the integrity of the election process, per se; and (d) prohibition of such corrupt election practices as excessive expenditure, patronage promises, political activity on the part of government employees, *etc.* In some instances, and especially in the last named area, it may be more appropriate to use civil and administrative provisions rather than criminal sanctions, and a transfer of provisions to other sections of the new Federal Code may be in order.

II. Unlawful Interference With Participation in Specified Activities: Sections 1511–1516

A. *Derivation: Relation to Other Statutes*

These sections derive primarily from Title I of the Civil Rights Act of 1968 (18 U.S.C. § 245), which was debated and reworked in Congress and its committees for 2 years before its passage in April, 1968. It is by far the most extensive and detailed *criminal* sanction civil rights legislation ever considered and enacted by Congress. It started out as legislation primarily designed to protect civil rights workers against violence, inspired in part by the slaying of three civil rights workers in Mississippi which gave rise to *United States* v. *Price*, 383 U.S. 787 (1966). The aim was to reach private violence, to the extent constitutionally permissible, as well as violence in which State officials also were implicated. Primary but not exclusive reliance was placed upon the fourteenth amendment, as potentially amplified

by the dicta in *United States* v. *Guest*, 383 U.S. 745 (1966), and *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), discussed *supra*. For example, in the field of Federal elections, a theory of generic Federal power also could be relied on. However, regardless of the kind of activity in which the violent interference occurred, only violence which was motivated by considerations of race (or religion or national origin) was prohibited in the initial congressional draft.[8]

The legislation also had the more general purpose of aiding Federal prosecution of violators of constitutional rights by providing language more specific than the vague terms found in 18 U.S.C. §§ 241 and 242. In this aspect it was responsive to invitations from the Supreme Court to Congress to improve prospects for effective enforcement by improving the language of civil rights legislation.[9] Of course, insofar as 18 U.S.C. §§ 241 and 242 are retained, some overlap necessarily results.

In the Senate, however, Senator Sam J. Ervin, Jr., and others objected to the broad reading of the fourteenth amendment on which the House bill relied. Senator Ervin proposed a substitute which would be confined to those activities (or aspects of activities) over which the Federal government has direct authority—for example, programs related directly or indirectly to the Federal government, or to interstate commerce. Hence, the substitute dispensed with the need to prove motivation based on race.

The resultant 18 U.S.C. § 245 is a marriage of these two different approaches. There is one list of activities in regard to which generic Federal power is postulated to protect all persons: and a second list of activities in regard to which only racially motivated interference is prohibited either for policy reasons or for constitutional reasons.

This basic approach is retained in the proposed revision of 18 U.S.C. § 245 which underlies draft section 1511–1515. Although somewhat inartistic, it is responsive to the varied but nonplenary sources of Federal power in our Federal system, and to policy choices concerning the degree of need to exercise the range of potential power. For an example of such a policy choice see the discussion below of the "because" concept versus the possible "while" concept in relation to section 1511.

B. *Draft Section 1511*

1. *The Introductory Language.* (a) "*Whether or not acting under color of law*".—The statute is designed to reach both official and unofficial interference with activities which rest on a variety of constitutional justifications for Federal protective power. For example, "color of law" is irrelevant regarding prohibition of interference with Federally assisted programs, or commerce-connected activities. And even under the fourteenth amendment's equal protection of the laws clause, a broad reading of *United States* v. *Guest*, 383 U.S. 745 (1966), would allow Federal prosecution of private persons not acting under color of law (or in concert with State officials) if such persons force-

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[8] *See Interference with Civil Rights*, S. Rep. No. 721 on H.R. 2516, 90th Cong., 1st Sess. (1967).

[9] *See, e.g.*, Opinion of Justice Brennan in *United States* v. *Guest*, 383 U.S. 745, 786 (1966); opinions of Justice Douglas and Justices Roberts, Frankfurter, and Jackson in *Screws* v. *United States*, 325 U.S. 91, 105, 151, 153 (1945).

fully intimidated a Negro from sending his child to a desegregated public school.

Hence, the "whether or not . . ." clause performs only a clarifying function of highlighting the reach of the statute. Its omission would not affect the operation of the statute. However, it seems advisable to include the phrase because until recently the "State action" issue has dominated our approach, our theories of constitutional bases are still intricate, and people generally therefore may need help in understanding what Congress is doing in this new field.

(b) "[*By force or threat of force*]." *—This phrase is now in 18 U.S.C. § 245; hence such nonviolent interferences as economic coercion are not reached by section 245. The brackets indicate that deletion of the phrase, thus making the statute broader than a civil rights violence statute, is raised for discussion.

There is, of course, constitutional power (ignoring problems of proof) to repel any interference with Federally protected activities, and neither section 241 nor section 242 requires force or threat of force. Several policy choices are presented: (i) in our Federal system what is the desired scope of Federal auxiliary jurisdiction; (ii) to what extent should nonviolent conduct be subjected to criminal penalties instead of relying on Federal or private injunctive relief; (iii) would a broader statute raise problems of clarity and proof disproportionate to any gain; (iv) whether, if the choice is to cover economic coercion, it can best be done by simply eliminating the "force" clause, *or* by keeping the "force" clause and adding a phrase such as "or other means."

Regarding retention of the "force" requirement, it can be argued that the proper province of civil rights legislation with criminal sanctions is the violence field, plus the area of fraud which can be and has been reached by 18 U.S.C. § 241 regarding voting. And one could point to the relative lack of civil rights success via the criminal process over the years under 18 U.S.C. §§ 241 and 242, in contrast with the far greater success in voting, education, public accommodations, *etc.*, under the more recent civil regulation and injunction statutes.

A primary species of nonforceful interference would be economic coercion, against such rights as voting rights, an area attacked by Department of Justice unsuccessfully by means of a civil injunction suit in *United States* v. *Harvey*, 250 F. Supp. 219 (E.D. La. 1966). This case preceded the more expanded view of Federal power expressed in the Supreme Court's opinions in *United States* v. *Guest*, 383 U.S. 745 (1966), and *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), and failed both on Federal jurisdiction grounds and lack of proof grounds.

From the standpoint of civil sanctions, which may normally be more appropriate for economic and other forms of nonforceful interference, private injunctive relief is available under 42 U.S.C. § 1983. That section is worded in the broad vein of 18 U.S.C. § 242, but does require a showing of action "under color" of law.[10]

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*In the Tentative Draft, section 1511 began: "A person is guilty of a Class A misdemeanor if, whether or not acting under color of law, he [by force or threat of force] intentionally injures, intimidate or interferes with any person because . . ." The bracketed material is deleted in the Study Draft.

[10] *See* Note, *The Federal Injunction as a Remedy for Unconstitutional Conduct*, 78 YALE L. J. 142 (1968).

A variety of statutes confer injunctive power on the Attorney General, and can be revised or extended as Congress wishes. Concerning voting see, for example, 42 U.S.C. § 1971, derived from Civil Rights Acts of 1957, 1960, 1964; and 42 U.S.C. § 1973j, derived from Voting Rights Act of 1965. The Civil Rights Act of 1964 authorizes the Attorney General to seek injunctions concerning discrimination in places of public accommodation (42 U.S.C. § 2000a–5) (private suit also authorized in 42 U.S.C. § 2000a–3); concerning desegregation of public facilities (42 U.S.C. § 2000b); concerning desegregation of public education (42 U.S.C. § 2000c); concerning nondiscrimination in Federally assisted programs (42 U.S.C. § 2000d–1) (by the legislative history the phrase "by any other means authorized by law" refers to injunction suit by Attorney General); concerning equal employment opportunity where there is a pattern or practice of resistance (42 U.S.C. § 2000e–6).

The Civil Rights Act of 1968, in regard to the sale, rental or financing of housing, authorizes, under certain conditions, both private suits for injunctive relief (42 U.S.C. § 3610(d) and 42 U.S.C. § 3612), and suits by the Attorney General (42 U.S.C. § 3613).

Nevertheless, although problems of proof might make prosecutions more difficult regarding economic coercion than in cases where an objective act of force is present, there is in principle no strong argument for totally exempting from the criminal process nonforceful interferences with the interests covered by 18 U.S.C. § 245. They are not totally exempted now, because under 18 U.S.C. § 241 nonforceful conspiracies to deny Federal rights can be reached. But the vagueness in section 241 compounds problems of proof, because to save its constitutionality very specific intent on the part of the defendant must be proved.

Regarding the question of the best means to cover economic coercion, if that is to be attempted, a wholly separate statute is contraindicated. It would be duplicative and cumbersome. The purpose cannot be achieved by a short separate statute because: (i) all the specificity achieved by the listing of activities in the subparagraphs of section 245 is needed here, too; (ii) "afforders" should be reached; (iii) "aiders" should be reached; (iv) Attorney General approval of prosecution, to the extent it makes any sense, is even more pertinent in this peripheral area than in that regarding forceful interferences.

Alternatively, the phrase "or other means" could be added while retaining the "force" clause, leaving the "other means" concept to judicial elaboration of improper interferences with participation in the various specified activities. Semantically it might then appear that the statute would be broadened not merely to reach economic coercion and fraud, but also "vehement persuasion," which would raise first amendment questions. However, it is likely that this danger could be averted by the simple process of judicial limitation of the "other means" language so as not to invade other constitutional interests. And the phrase itself could be made to read "other improper means."

Simply deleting the "force" clause would open the way to some consideration of economic coercion and other nonforceful interferences as part of the meaning of the operative verb "intimidate," which is also part of the introductory language in the statute. This would not eliminate the possibility of prosecutions touching the area of intimidations by forceful speech, but perhaps would minimize it.

In short, the policy choice is whether to retain the "force" clause, which would conform to present 18 U.S.C. § 245, leaving economic coercion and fraud outside this statute, or to broaden the statute, either by eliminating the "force" clause or by adding to it the "other improper means" phrase.

(c) "*Intentionally*".—The proposal here is to delete the word "willfully" which now appears in 18 U.S.C. § 245 and substitute the word "intentionally." Consideration was given to having no qualifying word at all, or to substituting the word "knowingly." However, because 18 U.S.C. § 245 is designed to reach *purposeful* interferences with participation in specified activities, the word "intentionally" seems best to characterize the mental element contemplated.

Section 242 of Title 18 was amended in 1909 to add the word "willfully," and the word appears also in the 1968 Civil Rights Act, both in section 245 on forceful interference with designated Federal activities, and in 42 U.S.C. § 3631 on intimidation in fair housing cases. The 1909 addition was to make the statute "less severe." [11]

Given the generality and vagueness of 18 U.S.C. §§ 241 and 242, proof not only of harmful conduct but also of conduct with specific intent to deprive the victim of a particular constitutional right, *e.g.*, trial by jury, avoidance of summary punishment, *etc.*, is essential to the constitutionality of the statute and to a conviction under it. Viewed thusly, "willfulness" is simply another way of phrasing the specific intent which is essential to the statute's constitutionality.

The problem is discussed in *Screws* v. *United States*, 325 U.S. 91 (1945), where the Court said that to convict under the Act the government must prove that the defendant had "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." [12] However, *Screws* also seems to suggest that if a Federal right is defined by Congress with reasonable clarity, then conventional standards of proof are applicable, and a mere *knowing* violation of the enumerated right would be punishable. (*See* especially the dissenting opinion of Justices Roberts, Frankfurter, and Jackson, 325 U.S. at 151, 153.)

If the various rights listed in 18 U.S.C. § 245 are deemed to be clear, then it would seem possible to substitute the word "intentionally" for "willfully," or perhaps to delete the word entirely on the ground that a requirement of conscious action is implied. The risk that some court would misconstrue *Screws* and hold that the word "willfullness" is a necessary feature of the constitutionality of a statute creating criminal penalties for violations of civil rights would seem to be minimal. Regarding clarity, it may be noted that a requirement in section 245, or its successor, that the defendant's motivation be keyed to the victim's participation in or support of a particular activity, and of racial motivation too regarding certain activities, all help to particularize the right protected.

(d) *The penalty system.*—This comment applies also to sections 1512–1515. The proposed draft simply makes violation of the statute a Class A misdemeanor. By contrast, 18 U.S.C. § 245 specifies a misdemeanor penalty and then adds higher penalties if the interference results in bodily injury, or in death. In effect, a similar graduated penalty

[11] 43 CONG. REC. 3599.
[12] 325 U.S. at 104.

result is achieved in this draft by virtue of the general "piggyback" provision being proposed by the Commission. The provision is that anyone who assaults, murders, *etc.*, another in the course of violating any other provisions of the Code shall be punished directly as an assaulter, murderer, *etc.* Hence, this proposed revised 18 U.S.C. § 245 carries its own misdemeanor penalty, and operates as a jurisdictional base for all other "common law-type" criminal offenses defined elsewhere in the Code.

(e) "*Injures, intimidates, or interferes with.*" *—These terms, now in 18 U.S.C. § 245, seem to give adequate coverage, and to be unobjectionable on grounds of clarity. Alternative terms such as "discourage," "menace" *etc.*, which were considered in the course of congressional consideration of section 245, are unnecessary.

The above revision omits the following added phrase which does appear in 18 U.S.C. § 245: "or attempts to injure, intimidate or interfere with." The attempt phrase is not needed here because under the new Code, the attempt concept will be read into all other offenses, unless otherwise provided.

(f) "*Any person because he is or has been, or in order to intimidate such person or any other person from.*"—The vital word here is "because." This language introduces a defendant-purpose element, in the "because" clause, and applies it to past, present, or possible future conduct on the part of the victim. It also, by the "any other person" phrase, covers the situation where a defendant intimidates *X* in order to discourage *Y* from participating in a Federally protected activity.

An *alternative* which was contained in an early draft of section 245, would be to eliminate the special defendant-purpose element by dropping "because" and substituting "while." In other words, it would be necessary only to show that the victim was injured *while* participating in a defined activity, and under the (b)(1) part of section 245, racial motivation would not need to be shown either.

Such a "while" concept would yield a very broad statute covering, for example, a simple assault on a person receiving social security benefits. If a little old lady was jostled and twisted her ankle it would be a Federal offense. Similarly, interstudent assaults would be a Federal offense if the victim was a Federal grantee. Even assuming no constitutional power problem, such a broad overlap with State police jurisdiction seems neither needed from the standpoint of victims nor desirable from the standpoint of Federalism.

Conversely, however, it may be argued that the "because" requirement may make it needlessly difficult (although perhaps not impossible) to use this statute against forceful interferers (for example, the SDS) with Federally assisted programs such as ROTC, the general classroom introduction in Federally assisted colleges and universities. These are Federally assisted *action* programs, and are distinguishable from the passive nature of the social security recipient, or the peripheral nature of the interstudent clash mentioned in the preceding paragraph. Arguably, the Federal interest is sufficiently great in all of the section 245(b)(1) subparagraphs to warrant using the "while" concept rather than the "because" requirement. Petty matters could still be screened out by a requirement of Attorney General approval of prosecution. The proposed new physical obstruction of government

*The term "interferes with" is deleted in the Study Draft.

function statute apparently would not fill the gap because it may not reach Federally assisted programs.

Section 245 adds to the above language the phrase "or any class of persons". Omission of this phrase is recommended on the ground that it serves no function not already covered by the phrase "any other person". This latter phrase permits coverage of the situation where a defendant hits a particular victim, *X*, in order to intimidate *Y* (*i.e.*, "any other person"). Apparently the "class" was added so that "*Y*" would not have to be a particular identifiable person, but Negroes generally, *i.e.*, a threat to lynch *X*, a particular Negro voter, in order to intimidate all potential Negro voters in the area. But it is unlikely that "any other person" would be read so narrowly as to require the government to identify the defendant, the immediate victim, and then—with equal particularity—a particular *Y*.

2. *Subsection (a) of Section 1511 on Voting; Note on Overbreadth Issue.*—The part in brackets is new.* The present statute confines protection to voters, candidates, election officials, and such party poll watchers as are permitted by local practice and custom. But why should not the campaign managers, door bell ringers, *etc.*, likewise be protected from violence? And why should not the coverage include all elections issues—initiative, referendum, recall, voting on constitutional amendments, *etc.*?

There may be a problem of overbreadth in section 245 itself and this revision, because State action is not required, for example, nonracial private violence regarding a local election. (If the violence was racial, the thirteenth amendment would now apply, under *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), to provide an adequate constitutional foundation.) The opinion of the Court in *United States* v. *Guest*, 383 U.S. 745 (1966), might not reach this situation: the dicta of six Justices might reach this situation, because the election could be viewed as a State facility or function, access to which may be protected Federally if the State fails. *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), and its novel Federal police power theory may lend support.

However, even if there be overbreadth, in some possible applications of this language, the problem probably can be ignored under the authority of *United States* v. *Raines*, 362 U.S. 17 (1960), a voting case in which the United States sought an injunction. There the Court said it would consider overbreadth only when facts necessarily raising the issue appear, and would not allow a party whose acts clearly were within Federal power to plead statutory overbreadth regarding imaginary third parties on an imaginary set of facts. The Court reversed the Federal district court, which had allowed such a plea and voided the statute on its face for overbreadth. In the first amendment area, by contrast, the Supreme Court's overbreadth rule is exactly the same as the discredited approach of the district court in *Raines*. To avoid a

*In the Tentative Draft, section 1511(a) read:

voting or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher, or any legally authorized election official, [or participating in a political campaign supporting or opposing any candidate for elective office or any issue placed on or to be placed on the ballot,] in any primary, special, or general election:

The bracketed material was deleted in the Study Draft.

"chilling effect" on first amendment freedoms the Court will strain to find overbreadth, even though not presented by the facts of the case before it, and finding it, will void the statute on its face.[13]

Arguably, the *Raines* rule of ignoring overbreadth may not apply to a criminal statute. The district court in *Raines* had relied on two earlier overbreadth rulings of the Supreme Court in the voting field involving criminal sanctions, and the Supreme Court, in reversing, expressed a caveat about criminal statutes which give no intelligible warning of the conduct prohibited.[14]

This note on overbreadth is applicable also to other parts of section 245, and to the present draft, where the language defining the offense has an obviously permissible reach, and, literally, a possible outreach to areas where Federal constitutional power has not yet been made fully clear. For example, does Federal power, under our decided precedents, clearly reach the following situations, all literally within the language of draft section 1512, subsections (a), and (e): (a) private violence against a Negro entering a desegregated public school which is not under any court order to adopt any specific mode of desegregation: (b) private violence interfering with private employment not conventionally connected with interstate commerce, such as work as a domestic, or as personal typing assistant to a professor?

3. *Note on Omission of "Lawfully" as Qualifier of Victim's Conduct.*—This note applies not only to section 1511 on voting, but to all the activities listed in draft sections 1511 and 1512.

The word "lawfully" is not included in section 245 as enacted, nor in the proposed revision, to qualify the *victim's* conduct. If included, it would be another precondition to successful prosecution of a forceful interferer. The "lawfully" qualification was in the 1967 House bill, but was opposed by the Department of Justice.

In support of the omission it can be argued that an interferer who committed murder should not be sheltered from a section 245 prosecution merely because his victim was technically trespassing or committing some other nonviolent or petty breach of the law. Additionally, inclusion of the term would present certain problems of proof. Would it be necessary to show that the defendant *knew* his victim was acting lawfully? Also, would proof of racial motivation on the part of the interferer be more difficult if the victim himself was acting unlawfully or was bordering on unlawful conduct?

4. *Subsection (b) of Section 1511 on Federal Programs; Federally Aided Programs.*—The proposed language consolidates subparts (B), (D) and (E) of 18 U.S.C. § 245(b)(1), and also makes explicit the present ambiguous coverage of government contractors and of beneficiaries of Federal loans such as VA and FHA housing loans.

The two general concepts are Federal activities, and Federally assisted activities. Juror service is logically a subheading under Federal activities, and now becomes such, rather than being listed separately as in section 245.

The government contractor category is added, to clarify an ambiguity. Indeed, in section 245 there is a double ambiguity: Would

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[13] *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964); *NAACP* v. *Button*, 371 U.S. 415, (1963).

[14] 362 U.S. at 22. *See United States* v. *Reese*, 92 U.S. 214 (1875); *James* v. *Bowman*, 190 U.S. 127 (1903).

the government contractor be an offshoot of "Federal activity," or "Federally assisted activity?" Under the present draft the distinction is immaterial. The policy basis for including government contractors is that: (a) violence where it touches a Federally connected matter is a serious thing; (b) need can be shown: (c) the degree of overlap with State prosecution throughout this statute will be modified by a section calling for a special Attorney General certification of Federal interest before Federal prosecution.*

An example of need to include government contractors is a recent instance of the burning out of a Negro dry cleaner who had a concession to do the dry cleaning for a Federal military base in North Carolina.

The proposed loans guarantee clause, as already noted, clarifies an ambiguity in section 245 as enacted, because section 245 is silent on the question of including or excluding loans and guarantees from the meaning of the phrase "Federal financial assistance." There is an exclusion of activities Federally supported "by way of a contract of insurance or guaranty" from the coverage of Title VI of the 1964 Civil Rights Act, dealing with nondiscrimination in Federally assisted programs (42 U.S.C. § 2000d–4).

A similar exclusion regarding 18 U.S.C. § 245 was proposed in Senator Ervin's substitute bill, but was not accepted. Such an exclusion is not recommended in the revision of section 245, even though it would reduce considerably the degree of overlap of Federal auxiliary jurisdiction and State jurisdiction. The arguments against the exclusion are that forceful interference is a serious matter, that a loan or guarantee is only a slightly more attenuated form of Federal assistance than direct assistance, and that Attorney General discretion to refuse to permit prosecution can screen out the petty cases. Without the exclusion it is possible to apply section 245 against a violent interferer with an owner who wishes to sell an FHA–VA financed home to a Negro.

The loans guarantee clause would overlap present 42 U.S.C. § 3631, the criminal section of the housing title of The Civil Rights Act of 1968, insofar as housing is concerned, but is broader in two senses: no showing of racial motivation is required, and all loans and guarantees are covered, instead of just housing matters. The proposed loans guarantee clause is also narrower than section 3631 in that the latter covers violence regarding all housing, on a commerce theory, whether or not there be Federal financial assistance. In the draft, 42 U.S.C. § 3631 is transferred into section 1512, subsection (f).

5. *Note on the Federal Jurisdictional Base Concept in Relation to Subsection (b) of Section 1511 and Other Subsections.*—The loans guarantee matter discussed above, and the partial overlap with 42 U.S.C. § 3631, illustrate well the difficulty which would be encountered in trying to handle all civil rights matters (or even just civil rights *violence* matters) by entirely separating Federal jurisdictional bases from substantive matters, and handling the latter as a State Code would be handled.

From the "State law" substantive standpoint the only important element is violence: all of it is covered: and the main drafting task

*This section was deleted. ***But see*** section 207.

consists of matching various gradations of penalty with various degrees of violence. From the Federal standpoint, however, we start with the premise that not all violence in the nation is, can be, or should be, a Federal offense. We decide that we do want to cover *all* Federal or Federally assisted activities, without regard to any other factor. We decide also that we want to cover through the commerce clause *not* all private business activities—even though virtually all might be reached through the commerce clause—but *selected* ones.

Title 42 U.S.C. § 3631 represents such a selection, and it has three elements: (a) violence, (b) housing, and (c) racial motivation. From the standpoint of Federal constitutional power, any of these "substantive" limitations might be dropped out or adjusted. For example, under the thirteenth amendment all Negro matters could be nationalized under a "badge of slavery-compensatory" theory, thus dropping out limitations (1) and (2). Under the commerce clause all three limitations could be discarded, yielding a statute prohibiting any impediment to any commerce-related activity, whether violent or nonviolent and regardless of motivation. Under the Federal assistance theory the commerce nexus could be dropped, and if the "assistance" idea should become as attenuated as the "affecting commerce" theory, something close to a plenary police power might result.

But in drafting actual Federal statutes, assuming we do not want to exercise potential power to scrap the Federal system, how can the policy choices mentioned above be effectuated except through multiple statutes with some overlap unavoidably flowing from the disuniform concepts implicit in the policy choices? For example, although 18 U.S.C. § 245(b)(1)(E) and 42 U.S.C. § 3631 each accept the limiting concept of forceful action, they use dissimilar classification concepts. Housing is one of a wide variety of possible *consumption* aspects of life. Racial prejudice is one of a variety of possible personal *feelings*, conscious or unconscious, which may impel violent action. Federal assistance is one of a variety of means of *financing* any area of life. So in these two statutes Congress is regulating selected aspects of *consumption*, of *motivation* impelling antisocial action, and of *financing* any area of life. And all three of these elements have a unique, or at least disuniform, relationship to a variety of noncoterminous federal constitutional bases.

6. *Subsection (c) of Section 1511 on Federal Employment.*—There is no change from 18 U.S.C. § 245(b)(1). Consideration was given to the possibility of covering employment in the preceding overall "Federal activity"-"Federally assisted activity" subsection, and eliminating employment as a separate heading. However, if this was done, coverage would extend to employment in apartment houses where loans are Federally guaranteed, in colleges receiving Federal assistance, in government contracting in general, *etc.*, and without any need to show racial motivation in the forceful interference. All of these kinds of employment *are* covered, apparently, under a commerce theory, in section 245(b)(2)(c) but only on a showing of racial motivation.

Again the policy issue is one of need, and degree of overlap with customary State powers in the Federal system. So far as need is concerned, it is difficult to imagine a *non-racially* motivated assault on one simply "*because*" he is seeking or holding public or private employment of any kind.

To an extent this problem pervades many of the section 245(b)(1)(B) through (E) offenses, and was not present in the initial bill, where racial motivation qualified all categories. However, where the relationship to the United States is close enough, it may be well to have criminal sanctions, even though cases will be few. Regarding employment only peripherally related to the United States the separate section keyed to racial motivation is adequate to presently demonstrated need.

Arguably, Federal employment would be covered automatically under the general language of the preceding proposed subsection (b). Stating it separately here, as is done in section 245 itself, performs the function of rebutting this idea, and by rebutting it preventing implied coverage as well of nonfederal but Federally assisted employment.

7. Subsection (d) of Section 1511 on Travel.—The suggested inclusion of subsection (d) on travel in draft section 1511 represents a change from the treatment of travel in 18 U.S.C. § 245, where it falls in section 245(b)(2) and is subject to a requirement of proof of racial motivation.* None of the activities covered by draft section 1511 (or by section 245(b)(1)) are subject to this requirement; it suffices to show that the interference occurred *because* the victim was participating in the specified activities.

In terms neither of constitutional power nor of policy does it make sense to limit the protection of the travel right to racially motivated interferences. As already noted in this report, in the opening discussion of constitutional bases for civil rights legislation, a right of interstate travel has emerged as a generic Federally protectable right, inherent in the concept of our Federal union. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). It is not based on or limited by the fourteenth amendment.

And in policy terms, why should not a person have Federal protection against forceful interference with his taking a journey even though no racial factor is present? The Supreme Court has called this right fundamental, in both *Guest* and *Shapiro*. He could be a disenchanted member of a crime syndicate, flying to a Federal official or congressional committee to "spill the beans." Of course, he could also be a spouse seeking to fly to Nevada for a divorce, but such a case, though within the terms of a broad statute, could be taken out by lack of Attorney General approval of prosecution.

In the actual wording of the "travel" right, one change has been made, and a possible additional change is raised for discussion. The change consists of adding the "among the States" phrase in recognition of the fact that the interstate travel right is not limited by the commerce clause and may be broader than "interstate commerce" in some instances, *e.g.*, in regard to a hiker.

The possible additional change, indicated by the brackets, would be to expand the commerce phrase to include foreign commerce.** Interference with travel in foreign commerce is not now covered by 18

*Tentative Draft subsection (d) appears as Study Draft section 1512(g); proof of racial motivation is thus required under the Study Draft provision.

**Tentative Draft section 1511(d) included "[or foreign]" between "interstate" and "travel". The words "[or foreign]" are deleted in the Study Draft.

U.S.C. § 245. There may be constitutional power to make the expansion under *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964). There seems however to be no need to make the expansion. If it were made it might raise peripheral problems of defining those aspects of foreign travel—and interferences therewith including interferences by aliens —properly within the criminal jurisdiction of the United States. There have been related problems regarding interferences in foreign commerce with our antitrust policies.[15] In the light of the practical uncertainties, and apparent lack of need, the inclusion of the foreign commerce concept is not now recommended.

In closing this discussion of draft section 1511, it may be noted that by revising and coalescing, the number of subsections has been reduced from the number listed in 18 U.S.C. § 245(b)(1).

C. *The Section 1512 Provisions*

1. *Introductory Language.*—Those parts of the introductory language which follow the introductory language in section 1511 have been discussed already. Comment is needed on three new elements: (a) the "in order to" language; (b) continuance of the racial motivation requirement as a necessary element of proof; (c) the possibility of adding proof of political motivation as an alternative to racial motivation for bringing the statute into play.

(a) *The "in order to" phrase.*—The draft section 1512 language follows 18 U.S.C. § 245(b)(2), but *adds* the "in order to" phrase which appears in section 245(b)(1) and covers conduct on the part of the defendant designed to discourage possible future conduct on the part of the victim. Why section 245(b)(2) itself does not read this way is not clear. Section 245(b)(4)(A) fills the gap, but in doing so creates an unneeded overlap with section 245(b)(1). Putting the phrase in the draft will permit shortening section 245(b)(4). (*See* the discussion of section 245(b)(4)(A), appearing as part of the comment on draft section 1513.)

(b) *Requirement of proof of racial motivation (or religion or national origin).*—A more important policy question is whether or not to continue the racial motivation requirement for the present section 245(b)(2)(A)–(F) offenses. (Although phrased in the *alternative* along with color, religion and national origin, racial motivation covers most of the anticipated instances of violence and is discussed here as the key requirement. However, to be technically correct the ensuing discussion should be read as encompassing the other three alternative motivations too. The conclusions would be the same.)

Section 245 started out as a statute to protect civil rights workers from racially motivated violence. Racial motivation qualified all of its provisions, and many of them rested on a broad view of the fourteenth

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[15] *See British Nylon Spinners, Ltd.* v. *Imperial Chemical Indus., Ltd.*, (1952) 2 All E. R. 780, regarding prior American decree; *United States* v. *Imperial Chem. Indus., Ltd.*, 105 F. Supp. 215 (S.D. N.Y. 1952); BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD (1958); FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS (1958).

amendment to reach private action, as presaged by the *Guest* and *Morgan* cases.[16] Senator Ervin proposed a substitute measure in order to "generalize" the protections of the statute, and to get away from the fourteenth amendment and its possible outreach even to non-commerce-connected private action. It eliminated racial motivation and listed a number of protections which could be supported by the commerce concept or the direct Federal activity-Federal assistance concept. One result of this approach was present section 245(b)(1)(A)–(E) as already analyzed above, with my suggested further revisions.

Present section 245(b)(2)(A)–(F) represents in a sense a continuation of the original section 245 concept of a list of race motivated acts of violence to Negroes, to civil rights workers, and to officials working in the civil rights field. However, the requirement of racial motivation is not essential to the constitutionality of each of the subparts of section 245(b)(2). Subparts (C), (E) and (F) rest either on the commerce clause or the inherent national right of interstate travel (divorced from the commerce clause in *Guest* and *Shapiro* v. *Thompson*, 394 U.S. 618 (1969)). They deal respectively with employment whether public or private, traveling in commerce or using any interstate commerce facility, and access to and enjoyment of public accommodations.

Racial motivation is irrelevant to the constitutional basis for reaching these areas. To be sure, nondiscrimination on ground of race, color, religion, or national origin is an element of the public accommodations sections of the Civil Rights Act of 1964, which Congress and the Court supported by the commerce clause. But the racial motivation there is simply part of the definition of the target aimed at by Congress. From the standpoint of the present violence statute the policy question becomes: should all persons have a Federal right to be free from violent interference, from whatever source and for whatever reason, in patronizing any commerce-connected public accommodation?

Nor is racial motivation an essential component of the constitutional basis for the other subparts of section 245(b)(2), namely, (A) dealing with public schools and colleges, (B) dealing with State and local governmental programs, and (D) dealing with State court jury service. Arguably, a great many programs under (A) and (B) would also be receiving Federal financial assistance, and could be covered under section 245(b)(1)—and my proposed revision—without a showing of racial motivation. (Here, again, we have an overlap problem caused by the different scope of different constitutional bases regarding a given genus of activity.) The fourteenth amendment is the basis for reaching any programs under (A) and (B) which are not Federally assisted, and also State jury activities under (D). This fourteenth amendment approach requires a showing of State action, whatever that may now mean, but the amendment by itself does not require a showing of racial motivation.

The equal protection clause of the fourteenth amendment can be viewed as a general intrastate antidiscrimination clause. It is operative whenever any "State" connected particularized differential treatment is shown. As a practical matter, however, it may be easier to articulate

[16] *United States* v. *Guest*, 383 U.S. 745 (1966); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966).

a charge of interference—especially "private" interference—with equal enjoyment of State functions if race motivation is present, rather than just personal animosity. *Snowden* v. *Hughes*, 321 U.S. 1 (1944), is instructive, and puzzling, on this question. The Court denied relief to one who had been refused a certification as nominee for the Illinois legislature, even though he had received enough votes. The reason was that a mere denial of a right conferred by a State does not violate equal protection, "even though the denial of the right to one person may operate to confer it on another."[17] There must be an "element of intentional or purposeful discrimination." [18] This seems to suggest that at a minimum there be a showing not only of wrongful action, but of different treatment of two identifiable persons or classes. From this standpoint mere nonracial personal animosity, however arbitrary and even though it affects access to a State activity, might not qualify as a violation of "equal protection."

It may be, however, that *Snowden* v. *Hughes*, 321 U.S. 1 (1944), is no longer relevant on the question of articulating a violation of a Federal right under the equal protection clause of the fourteenth amendment. A Commission staff memorandum supportive of the present discussion (prepared by Mrs. Judy Brody) indicates that lower courts are still aware of the *Snowden* case, but feel that it has been eroded if not overruled sub silentio by the more flexible—or casual—approach toward articulation of an equal protection right in such cases as *Baker* v. *Carr*, 369 U.S. 186 (1962).[19] Hence, under the equal protection clause, there may no longer be a requirement of proof of intentional or purposeful discrimination particularized in terms of different treatment of identifiable classes.

Alternatively, the due process clause could be appealed to as a basis for articulating Federally protectable rights under the fourteenth amendment. The assertion could be made that any violence directed toward a person for whatever reason and even by another private person amounted to summary punishment, and thus interfered with the State's prerogative to control punishment. Stated thus baldly, this latter theory would make Federal offenders of every assaulter, murderer, or other perpetrator of personal violence—and falls of its own weight, politically, if not constitutionally.

Even as narrowed, as in section 245(b)(2), by a required showing that the force was motivated by the victim's participation in a particular activity, such a statute would be extremely broad in its overlap with the State police power. Additionally, prosecutors under such a statute, resting on a *derivative* rather than direct theory of Federal power, might encounter problems of proof of defendant intent similar to those which saved Mr. Screws. Yet the central purpose of section 245 or its successor is to particularize and objectify the rights protected, thus minimizing proof problems. Intent is normally proved by circumstantial evidence. It would seem to be easier to articulate a theory of presumed violation of the fourteenth amendment flowing from a beating of a Negro than from a beating of a non-Negro.

For the foregoing reasons, it may be thought advisable to retain racial motivation in the proposed revision of section 245(b)(2),

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[17] 321 U.S. at 8.

[18] *Id.*

[19] *See Hornsby* v. *Allen*, 326 F.2d 605, 611 (5th Cir. 1964); *Note*, 4 HARV. CIV. LIB.-CIV. RIGHTS L. REV. 176 (1968).

regarding present subparts (A), (B), and (D) even though not constitutionally required. These subparts relate to public schools, State-local government programs, and State jury service. And in any event, the broader area still could be reached under a generally worded successor to sections 241 and 242, as discussed in part III, *infra*.

More difficult is the question of retaining the racial motivation qualification for section 245(b)(2) subparts (C), (E) and (F) which, as already discussed, rest on direct rather than derivative theories of Federal power. The activities covered, all commerce related, are employment, interstate travel, and access to public accommodations. These subparts are not affected by the problems of vagueness and proof of particularized intent which affected the *Screws* case, and which affect derivative Federal power under the fourteenth amendment generally. Elimination of the requirement of racial motivation would have little effect, therefore, on prosecutorial success. It would, as already noted, give the Federal arm a broad reach, overlapping the State police power. But if the basic target is the race problem, why should the bore of the Federal rifle be broader than the target?

With regard to subpart (F) of section 245(b)(2) concerning public accommodations, the problem is almost exclusively racial, so that little would be lost and clarity would be gained by preserving the requirement of racial motivation. Hence, it is suggested that for public accommodations the race motivation requirement be retained, and therefore this activity is allocated to section 1512 in the draft statutes. But with regard to interstate travel, its character as a right now called fundamental in *Shapiro* points toward dropping the race motivation requirement and moving the travel right to section 1511 of the draft statute. (*See* the comment on section 1511, *supra*.)

This leaves subpart (C) of Section 245(b)(2), concerning employment for allocation. Here, policy considerations touching on division of functions in the Federal system would seem to point in the other direction, to retention of the racial motivation limitation, unless special need be shown. One effect of dropping racial motivation would be to bring subpart (C) into play in labor situations, or general protest situations by students or others, where forceful tactics, or perhaps even aggressive picketing is designed to prevent access to employment by dissident unionists, nonunionists, or persons not sharing the social philosophy of the demonstrators. However, if working is as basic a right as travel, then perhaps this should be transferred to the draft section along with the travel proviso. Further thought is needed on this question.

(c) *Possible political motivation requirement as a further alternative to the racial motivation requirement.*—Section 245(b)(2) as enacted, and the presently proposed revision of it with the exception of the travel right, both require proof of racial motivation on the part of the defendant. This excludes coverage of violence motivated solely by such other factors as political affiliation. In section 245 as it passed the House "political affiliation" motivation was included as an additional motivation to trigger the statute even if there were no concurrent racial motivation. Opposed by the Department of Justice on the ground of no showing of need, it dropped out in the Senate, in regard to what became the section 245(b)(2) offenses when the

offense list was divided between subsections (b)(1) and (b)(2). Hence, regarding the section 245(b)(1) offenses, political affiliation motivation, or *any* motivation can be reached because the opening clause of subsection (b)(1) is broadly worded. But regarding the section 245(b)(2) offenses the specification of certain motivations excludes others.

The policy question remains whether political affiliation should be added as a coexisting and alternative motivation category to race regarding draft section 1512, which derives from the subsection (b)(2) offenses. Is there any need for thus further expanding the overlap of Federal auxiliary jurisdiction and State jurisdiction? Practically speaking, would political affiliation be a likely motivation factor for any section 245(b)(2) offenses? A negative answer may seem indicated for the section 245(b)(2) (A), (B), (D), and (F) offenses dealing respectively with public schools, State programs generally, State juries, and public accommodations. And yet, concededly the current "politicization" of our culture is eroding the foundations for this statement.

In regard to subsection (b)(2) (C) and (E), dealing with employment and travel, politically motivated violent interference may be more likely, more readily conceivable. Travel is already recommended for transfer to the open-ended section 1511 of the revised statute.* Employment might be considered for transfer too, but is not now recommended. Need is uncertain. The term "political affiliation" is itself uncertain. Would White Panthers, the white supporters of Black Panthers, be covered? (Black Panthers would fall in the racial category, thus avoiding a determination of whether they fit the "political affiliation" category too.) Political strikes arguably would be covered, thus raising the larger question of Federal labor policy.

More critically, a political motivation coverage, *plus* expansion of 18 U.S.C. § 245 from violent interferences to interference by "any other means," logically would put in question all political considerations for all positions, governmental and private. In regard to the private sector this would be unmanageable, if not unthinkable. In regard to the public sector, political considerations are proper considerations for various kinds of public employment at certain levels; indeed such considerations, allied to the party system, are part of our other goal of majority rule.

In short, if this revision of 18 U.S.C. § 245 is expanded beyond the category of violent interferences, the further addition of coverage of all politically motivated denials of participation in nonvoting activities would seem to have too broad a reach. If the statute is to be confined to violent interferences with participation in the specified activities, coverage of political affiliation—as an adjunct to existing State power—may have instinctive appeal. However, would it be possible to define what was meant by "political affiliation?" Would it extend beyond Republican and Democrat, beyond formally organized minor parties, to all organized pressure groups? In any event, in the context of this statute, the focus would be on the political affiliation of the *victim*, not the defendant. In the light of these several uncertainties, possibilities for overreach, and lack of demonstrated need,

*Tentative Draft section 1511(d) on travel is Study Draft section 1512(g).

the addition of "political affiliation" to the motivation list is not now recommended.

(d) *Note on other motivation requirements.*—As mentioned above retention in the new draft section 1512 of the color-religion-national origin alternative motivation requirements seems to be in order if the revised section 245 is to continue to be a statute dealing with forceful interference with participation in specified activities. However, if the "by any other means" language is to be added in order to reach such things as economic coercion, would there be a problem of over-reach—as just discussed in regard to the possible addition of "political affiliation" motivation?

Although difficult cases may be imagined, in broad perspective the color-religion-national origin categories regarding possible victims may be more objective and self-defining than "political affiliation." Fuzziness of meaning is not a major problem. The overreach issue would turn therefore on whether or not there are analogies, in regard to these three kinds of motivation, to the private or public employment situation where for some positions political affiliation is a relevant criterion. If the answer is no, then there would be no objection to retaining these three motivation categories even if the revised section 245 were extended to include nonforceful interferences.

The sexual motivation category—motivation based on desire to discriminate against women—is not in section 245 and does not seem needed. Indeed, *forceful* action against women to discourage their participation in specified activities would be downright ungentlemanly.

2. *Subsections (a), (b), (c) of Section 1512 (Schools, State Facilities, State Juries).*—These subparts pose no special problems, and it is recommended that all three, which are now in section 245(b)(2) be retained in the draft section 1512. All three rest at least in part on derivative Federal power under the fourteenth amendment. To minimize constitutional and "*Screws*-type" problems in prosecution, it seems advisable to retain a requirement of racial motivation. The racial motivation question has been treated at length in the preceding discussion of the introductory language to draft section 1512.

3. *Subsection (d) of Section 1512 (Public Accommodations).*—As already discussed, the racial motivation requirement may appropriately be retained for this subsection. The only special problem concerns the exemption clause question.

In section 245 as enacted, following the penalty provisions, there is a "Mrs. Murphy" exception to section 245 (b)(2)(F) and (b)(4)(A) regarding participants, but not for the "affording" and "aiding" provisions in (b)(4)(B) and (b)(5). This was added as a floor amendment and the purpose and meaning are not clear. If there were to be an exception, it would make more sense to attach it directly to the substantive provision; it is shown in brackets in the draft statute.* However, because the proviso serves no important purpose, I recommend its deletion.

We are dealing after all with a statute whose main focus is violence. Why should its coverage be limited at all in this area? The narrowest reading of the existing proviso, which seems to be the view of the Department of Justice and may be the best reading, is as follows: the

*Brackets deleted in the Study Draft.

clause only bars criminal prosecution of a "Mrs. Murphy" or her employees when *they* use violence against persons who—unsupported by the Civil Rights Act of 1964—are seeking to desegregate a boarding house. This reading would leave prosecution available against: (a) a third party who was interfering with a Negro applicant even in regard to an exempt establishment; (b) a third party who was interfering with the aider of a Negro in the same circumstance; (c) a third party who was interfering with a "Mrs. Murphy" who wanted to desegregate.

Excision of this provision would not mean that, contrary to the 1964 Civil Rights Act, "Mrs. Murphy's" no longer could exclude Negroes. It would simply mean that they too would be subject to Federal criminal prosecution if they used selfhelp amounting to force against a Negro who was insisting on being given a room, or perhaps even moving into a room. But why would a "Mrs. Murphy" need this kind of selfhelp? The Negro having no right under the Civil Rights Act of 1964, to a "Mrs. Murphy" type of room, Mrs. Murphy could enlist the aid of the State-local authorities against personal abuse, abuse of her property, or trespass.

However, if for the sake of clarity it is determined that some exemption language should be placed in this statute, it should be attached directly to the substantive provision.

4. *Subsection (e) of Section 1512 (Employment).*—The only important issue concerning this subsection is whether to retain it in section 1512, with its special requirements of a showing of racial motivation or other special motivation, or to transfer it to section 1511 where the only motivation requirement is a purpose to bar the victim's participation in specified activities. The question is treated at length in the foregoing discussion of the introductory language to section 1512. It was suggested there that the travel provision be transferred to section 1511, but that the employment provision be retained in section 1512.*

As noted in the foregoing discussion, the importance of employment might warrant elimination of the racial motivation requirement, so as to protect against all violent interferences with access to or enjoyment of employment. But with race eliminated, this section would then apply to certain situations of picketing and demonstrating to keep persons away from certain employers, both in labor protest situations and social protest situations.

5. *Subsection (f) of Section 1512 (Housing).*—This language simply picks the housing intimidation section, 42 U.S.C. § 3631 out of Title 42 and moves it to Title 18, as part of the proposed successor to section 245, where it belongs.

The constitutional base is the commerce clause plus the "domino" theory of *Katzenbach* v. *McClung*, 379 U.S. 294 (1964), that even discrimination in noncommence housing affects the general availability of housing for workers, and hence affects interstate mobility of workers and employers and impedes national economic flexibility. This is the same constitutional base that supports the general private-public employment subpart.

Again the issue can be raised whether or not to retain the require-

*Both are contained in section 1512 of the Study Draft.

ment of racial motivation. The answer seems to be yes, because this is very closely analogous to the public accommodations subpart, and the same reasons given there for retaining racial motivation apply here.

6. *Concluding Comment on Sections 1511 and 1512.*—It may be observed that section 1512, and also the preceding section 1511 where racial motivation is not required, are open-ended. In other words, additional substantive provisions can be added to either section, regarding forceful interferences with Federally protectible interests, as desired.

It also may be observed that neither section 1512 nor section 1511 cover what is popularly called "police violence." Such conduct does not properly fit in these statutes, even though force is present in police cases too. This statute's thrust centers on the "*because* he is or has been, or in order to intimidate" language, and is designed to protect *participation* in various activities. A police violence statute must focus on a particular kind of *official misconduct*, in the nature of summary punishment. Insofar as arrestees and prisoners are concerned, a prohibition on official misuse of force is an aspect of procedural due process. A further distinguishable category is *official harassment*, such as aggressive police patrol to break up incipient gatherings, although this latter may be merely an offshoot of the police violence concept. (For these matters, *see* part III, *infra.*)

D. *Question of Repealing Section 245(b)(3) (Federal Protection of Businessmen in Riot Situations)*

Neither present section 245(b)(3), nor any revision of it, is recommended for inclusion in these sections. If something is to be saved out of section 245(b)(3), further study is needed, and any replacement provision would be attached more properly to 18 U.S.C. § 2101 or its successor (riots) than to Civil Rights.

Deletion of the existing provision is raised for discussion. This provision was the product of a floor amendment to section 245. It is designed to supplement local law enforcement, like most of section 245, by adding Federal protection for persons engaged in a business in commerce or affecting commerce against violent interference during or incident to a riot or civil disorder.

The present language has several uncertainties in it. For example, what is the geographic scope of the "during or incident to a riot" phrase? If there were a riot in downtown Washington would concurrent intimidation of a White store owner in the outskirts—such as Chevy Chase—be covered? ("Riot," of course, is defined in 18 U.S.C. § 2102.) Also, in view of the victim focus of the statute—"intimidates . . . any person"—would looting without personal injury to the store owner be covered? Suppose the store owner had already fled before the looting occurred? Also, in view of the phrase, "engaged in a business" would store employees be covered?

The argument against including this provision in the Code revision, even with the ambiguities cleaned up, is that we are dealing here with auxiliary Federal jurisdiction, and the targets are those areas where race prejudice may make local law enforcement ineffective, or those areas where Federal interest is so dominant that full concurrent jurisdiction should exist. In the Negro riot situation, however, it is unlikely

that local law enforcement forces would be deficient in protection of White store owners. And if the situation gets out of hand because of problems of mass, there already is provision for use of Federal troops to pacify and protect; and this has occurred in Detroit, Washington, and elsewhere.

There may be, of course a recognizable Federal interest in curbing the spread of riots by preventing use of interstate facilities, and this is provided in 18 U.S.C. § 2101, and the proposed revision of that section.

The counterargument, in favor of retaining some version of section 245(b)(3) is partly political—political symmetry if you will. In an essentially pro-Negro statute, why should there not also be provisions designed to discourage recognizable Negro excesses in the cause of civil rights—or conduct which in some instances might better be described as incipient race warfare? In some instances the White store owner in the Negro ghetto may even be viewed as an exposed prize in a guerilla warfare situation. Even if this be conceded, we still are dealing with a "hit and run" situation where there is no on the scene Federal detection force, where primary reliance has to be placed on local police detection and private complaints, and where the private complaints can be expected to be received sympathetically by the local prosecutorial forces.

There may, of course, be situations where the general intimidation and tension is such that White store owners may feel they must put up with periodic pilfering in order to avoid worse conduct—a sort of extortion situation. However, except where incident to a "riot," this kind of pilfering, even if bordering on looting, lies outside the present statute anyway. It is a law enforcement problem of the sort traditionally handled locally, unless a conspiracy significantly affecting commerce and the national economy is involved.

So far as the Department of Justice is concerned, there has been no action under this section, apparently none is anticipated, and apparently it is disfavored. Hence, in addition to other objections, the section promises more than it delivers.

E. *The Section 1513 Provision Concerning "Affordors" of Opportunities to Participate in Specified Activities*

Sections 1511 and 1512 deal with participants in specified activities, or general victims through whom the defendant seeks to intimidate a participant. Section 1513 focuses on a special class of victims—persons who are "affording" civil rights opportunities. It protects both governmental officials, *e.g.*, election officials or public school officials, and private persons, *e.g.*, landlords or employers, regarding the specified activities. Because the word "affording" is used here to carry such a heavy load, and its meaning may not be clear on first reading, the new phrase "in official or private capacity" has been added, in an effort to contribute to clarity.

The language of present section 245(b)(4)(A) is deleted from the revised draft. This language is clearly redundant in regard to section 245(b)(1). Its only purpose is to create the "in order to" category for section 245(b)(2) because this language is not in section 245(b)(2). However, "in order to," language has been inserted in the revision of

section 245(b)(2), where it seems to belong. (*See* the above discussion of the introductory language to draft section 1512.)

More importantly, there is a major policy question to be resolved here regarding the use or nonuse of the racial motivation requirement to qualify interferences with "afforders." (Contrast the location of the "without discrimination . . ." clause in section 245(b)(4)(A) and (B) and (b)(5) as enacted, with its location in proposed section 1513.) As enacted 18 U.S.C. § 245 is anomalous in this regard. Because of the location of the "without discrimination . . ." clause, racial motivation qualifies *all* interferences with afforders (and aiders too). Note that the "without discrimination . . ." phrase in section 245(b)(4)(A) is carried into subsection (b)(4)(B) by the "so participate" phrase.

Regarding interferences with afforders in relation to the activities listed in draft section 1512, this limitation is appropriate, because in regard to these offenses racial motivation must be shown even in regard to the participants. Regarding interferences with afforders in relation to the activities listed in draft section 1511, this is inappropriate because in regard to these offenses protection for the participants is general, without need to show racial motivation.

This anomalous situation regarding section 245(b)(1) offenses (draft section 1511)—participants being protected without showing of racial motivation, but not afforders or aiders—can be explained in terms of legislative history, but it has no logical foundation. Section 245 started out as essentially a South-oriented statute, requiring racial motivation in all subparagraphs The anomaly arose when the offense list was separated into two subsections. One way to solve the anomaly would be to revert to the original section 245 draft, yielding simply a *racial violence* statute with a single list of offenses. This is unappealing. Although racial violence may be a primary legislative target, there is a strong Federal interest in giving the participants in the draft section 1511 type of activities protection from all kinds of violence. After all, we are dealing here with voting, and travel, and direct Federal activities.

Once the decision is made to protect participants in certain kinds of activities without regard to racial motivation on the part of the defendant, it would seem to follow that for the protection to be complete, the "*afforders*"—and also the "*aiders*"— should likewise be protected. To be sure, this increases, pro tanto, the overlap with the State police power, but that bridge has been crossed already in making the initial decision to give Federal protection to participants in specified activities. It would hardly make sense to authorize Federal prosecution of a defendant motivated only by *political* affiliation who assaulted a voter in a Federal election, using section 245(b)(1)(A), while at the same time denying Federal prosecution of the same defendant—because of lack of racial motivation—when he assaults the official who allows the voter to vote, or the friend who assists in getting the voter to the polls. The same considerations should apply to "afforders" under all other subsections of draft section 1511 (based largely on section 245(b)(1)). Indeed, because Federal officials would be the assaultees under some other subsections, there is all the more reason to dispense with the racial motivation requirement.

Once the policy choice is made to eliminate racial motivation regarding participants, afforders, and aiders in relation to draft section

1511 activities, and to retain the limitation in relation to draft section 1512 activities (based largely on section 245(b)(2)) the remaining problem is draftsmanship. It cannot be solved simply by eliminating the "without discrimination . . ." phrase altogether from section 245(b)(4) and (b)(5), and the Commission redrafts, because this would eliminate the racial motivation requirement regarding afforders and aiders of draft section 1512 activities. The racial motivation requirement embedded in section 245(b)(2) and in draft section 1512 would not be picked up by cross reference from section 245(b)(4) and (b)(5)—which are redraft sections 1513 and 1514—if the cross reference is read to be a reference *only* to the subparagraphs of section 245(b)(2) excluding the opening clause of section 245(b)(2). The Department of Justice reads the present 18 U.S.C. § 245 statute this way. Hence, for clarity, and to avoid elimination of the racial motivation requirement regarding the activities in the subsections in draft section 1512, the "without discrimination . . ." phrase is retained, but is moved so that it qualifies only the section 1512 activities in relation to afforders, and not the section 1511 activities.

If the "employment" and "travel" provisions were to be left in draft section 1512 where racial motivation is required, there would be no protection of employers or of providers of interstate travel (or the participants either) against politically motivated assaults. It already has been proposed that the "travel" provision be transferred to draft section 1511, which would eliminate the question regarding that kind of activity.* The employment provision however, for reasons given above, has been kept in draft section 1512.

F. *The Section 1514 Provision Concerning "Aiders" of Participants in Specified Activities*

This section like section 1513 focuses on a special class of victims—persons who are "lawfully aiding or encouraging" civil rights opportunities. It derives from 18 U.S.C. § 245(b)(5).

In this revision the "without discrimination . . ." phrase is retained but shifted so as to qualify only the kinds of activities listed in section 1512. This involves the racial motivation question, and has been fully discussed in the comment on section 1512.

Another change is to substitute the word "person" for the word "citizen," which is in 18 U.S.C. § 245(b)(5) as enacted by virtue of a floor amendment (No. 572 by Congressman Miller). This section, obviously, relates to civil rights workers, whose protection was one of the main impetuses for 18 U.S.C. § 245. The word "persons" was used in the initial draft. Congressman Miller also proposed an even more restrictive coverage than United States citizen, *viz.*, that only those workers would be protected from violence who were citizens of the State where the violence occurred, or who were out-of-State citizens certified by the United States Civil Service Commission to be civil rights workers of "good moral character." These were amendments 597 and 598, applicable also to the housing violence statute.[20]

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*Tentative Draft section 1511(d) on travel is section 1512(g) in the Study Draft.

[20] *See* Library of Congress Legislative Reference Service, Index of Amendments Adopted and Rejected by Senate (Vincent Doyle, March 4, 1968–March 8, 1968), containing citations to the Congressional Record.

Despite local feelings about "outside agitators," it is customary in the Anglo-American system to legislate in terms of "persons," not "citizens," and no good reason is seen to warrant a change here. If alien agitators become a problem, the problem is more appropriately handled by official action rather than by exempting from Federal purview private vigilante action. The only plausible justification for confining Federal protection to citizen "aiders" would be to argue that efforts by foreigners in the civil rights field, directed against American citizens (however wrong headed the latter may be), exacerbates rather than eases the problem and should receive no Federal protection. Nevertheless, the operating result of such an approach would be to let the availability of Federal protection in certain situations depend solely on the factor of citizenship and not the quality of the acts.

G. *The Section 1515 Provisions Concerning Interference With Speech and Assembly Promoting Specified Activities*

Section 1515 continues, at greater length but in clearer form, the provision in 18 U.S.C. § 245(b)(5) concerning protecting against forceful interference with a "speech or peaceful assembly" in support of the various substantive activities covered by draft sections 1511 and 1512. One change is a shift from "citizen" to "person," in coverage, for the same reasons given above in the comment on section 1514. Two additional possible changes may be considered: (1) elimination of the word "lawfully;" (2) elimination or reduction of the racial motivation requirement (and corollary alternative special motivation requirements).

The word "lawfully" may be redundant, because most prosecutors probably would give the statute that effect anyway, except in extreme situations. It raises irrelevant issues because in criminal laws we do not normally concern ourselves with the question whether the victim has clean hands, apart from self defense concepts. If taken literally the "lawfully" requirement could even prevent prosecution under 18 U.S.C. § 245 of a murderer whose "peaceful assembly" victims were operating in violation of a valid permit requirement, although it is very unlikely that a court would give the word "lawfully" this effect. The utility of the word "lawfully" may appear in different lights, depending on whether this draft revision of 18 U.S.C. § 245 is to be confined to forceful interferences, or is to reach interferences by "any other means." We may not want to exempt from Federal prosecution violent "self help" against lawful speech: but we may feel differently about use of subtle more-difficult-to-isolate influences such as economic pressures against unlawful demonstrators. We are dealing with a criminal statute and high standards of proof for effective prosecution, not civil regulation. Hence, if draft sections 1511–1515, replacing 18 U.S.C. § 245, are expanded to reach nonforceful interferences with enjoyment of certain activities as queried in the introductory part of the comment, retention of the word "lawfully" may have some appeal. And yet here too it may suffice to let the matter be handled by prosecutorial discretion.

From the standpoint of concurrent State jurisdiction over the general speech-assembly area, there is an additional interesting facet of

the "lawfully" qualifier on Federal prosecution. Whether the word is retained in the draft or not, Federal auxiliary jurisdiction will not displace the local role in protests and demonstrations because the Federal government in any event would not be expected to concern itself with stopping or punishing interference with *illegal* demonstrators. The Federal focus would be on those using force (or other pressure if the force requirement is dropped) against *lawful* demonstrators supporting activities of Federal concern. The State focus would be on stopping *illegal* demonstrations. However, the line between "lawful" and "unlawful" demonstrations not being clear, the interesting situation might arise of two concurrent proceedings in Federal and State court—and the possibility of inconsistent determinations of the jurisdictional fact of lawfulness. Retaining the word "lawfully" would bring out into the open the possibility of such inconsistent determinations, because "lawfulness" would then be an element of proof in the Federal case. If the word is deleted from the statute, Federal prosecutors in practice probably would proceed only against defendants who interfered with lawful protest, but the lawfulness of the protest would no longer be a statutory element of proof.

The issue of racial motivation (or the alternative special motivations based on color, religion, national origin, and possibly political affiliation) is more involved. Regarding *direct* interferences with participants in specified activities we have two sets of provisions: the draft section 1511 activities where there are no special motivation requirements other than a basic purpose to interfere; the section 1512 activities where a showing of some special motivation—race, *etc.*—is required. Regarding interferences with "*afforders*" (draft section 1513) and with "aiders" (draft section 1514), this same two category approach to Federally protected activities is continued.

In this draft section 1515 we come to another indirect, peripheral interference—interference with "speech-assembly" supportive of these two lists of Federally protected activities—and the symmetry is broken. Draft section 1515, like 18 U.S.C. § 245(b)(5) from which it derives, retains the race or other special motivation requirement regarding interferences with speech-assembly directed to section 1512 activities, but also *extends* it to speech-assembly directed to section 1511 activities.* Thus, a direct interference with a section 1511 participant can be prosecuted without a showing of race or other special motivation; but an indirect interferer who breaks up an assembly supportive of section 1511 activities can be reached only by a showing that he acted from a race or other special motivation.

The apparent purpose of Congress in making the race motivation requirement apply generally to interferences with the designated kinds of speech-assembly was to limit the range of Federal auxiliary jurisdiction overlap with local jurisdiction over local violence. Also, as discussed at greater length in the introductory comment to section 1512 on the race motivation question (which should be referred to at this point), inclusion of the race or other special motivation requirement may perform a clarification function, and also a function of

*Study Draft section 1515 has the same two-category approach as sections 1513 and 1514.

making it easier to articulate a constitutional base for Federal jurisdiction under the fourteenth amendment. Whether to continue this congressional choice in the wording of draft section 1515 is a close question.

The options are (1) to confine the reach of draft section 1515 to those interferences with section 1511 and section 1512 activities where a race of other special motivation can be shown, which is the present approach; (2) to remove the special motivation requirements regarding section 1511 activities as has been suggested regarding "afforders" and "aiders" (see comment to draft sections 1513 and 1514 above); (3) to remove the special motivation requirements regarding *all* of the designated Federally protected activities where the issue is interference with a supportive speech or assembly. As between the first and second options, the first has been tentatively chosen in this draft, but the choice is supported by little more than a general feeling of lack of need to have broader coverage.

The third option would yield very broad coverage. Such a statute also would raise the question of Federal action against any unlawful police interference with demonstrations, whether or not specially motivated. This matter is perhaps better handled in the revision of 18 U.S.C. § 242, regarding interferences with constitutional rights generally. See part V, *infra*.

Note on a possible "first amendment" statute.—Having gone as far as the third option, if that be done, one might raise the question of going further and devising a statute designed to be coextensive with the reach of the first amendment. It should be remembered that the speech protection provision in 18 U.S.C. § 245(b)(5) is not based on the first amendment. The focus is on activities Federally protectible under other theories of congressional power. Interference with "speech," like an assault on a participant, afforder, or aider, is reached on a theory that coverage is necessary and proper to effectuate the principal purpose of safeguarding travel, employment, voting, equal access to government programs, and the like. Indeed, far from being a jurisdictional base, the first amendment—in the context of draft sections 1511, 1512 and 1515, if they be extended to reach nonforceful interferences—could enter in as a *defense* to a Federal prosecution for advocating by nonviolent means a policy of segregation, or repeal of antidiscrimination legislation, or election of a candidate pledged to these views.

If an attempt were made to devise a statute based on the first amendment, an immediate constitutional question to be resolved would be whether any kinds of *private* interferences with speakers could be reached as well as governmental ("state action") interferences. This would bring us back again to the true meaning of *United States* v. *Guest*, 383 U.S. 745 (1966), and *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), and the question whether a broad reading of the dicta in these cases, if appropriate, could expand congressional power under the first amendment which opens with the phrase "Congress shall make no law . . . ." If such a first amendment based approach were taken, coupled with a broad reading of those cases which weaken or nearly eliminate the "State action" requirement, the Federal reach would be very extensive—*if* found to be constitutional. Arguably,

any user of force against any speaker or demonstrator in any subject matter filed would be subject to Federal prosecution.[21]

It may be noted that the National Commission on the Causes and Prevention of Violence has devised a draft of a statute supported by civil sanctions only designed to deter forceful interferences with speech and assembly. However, this statute, worded so as to reach all forceful private interferences with all private assemblies seems to rest on a very tenuous, if not untenable, constitutional foundation. It seems to rest on the assumption that Congress now possesses a "police" or regulatory power coextensive with the powers reserved to the States. *See also* S. 2677, 91st Cong., 1st Sess. (1969), introduced by Senator McClellan, which would create criminal penalties for disruption of programs or damaging of property, of Federally assisted institutions of higher education.

H. *Note on Elimination of 18 U.S.C. § 245 Special Definition of "Lawfully"*

A further provision in 18 U.S.C. § 245 as enacted attempts to define the term "lawfully" as follows: "the term . . . shall not mean the aiding, abetting, or inciting of other persons to riot or to commit any act of physical violence upon any individual or against any real or personal property in furtherance of a riot." This language should be deleted. It is not included in the draft. Riot matters should be handled centrally in the riot statute. The kind of advocacy defined is unlawful and not constitutionally protected without need for an attempted statutory definition. The definition might even boomerang, and be the basis for an argument that mere error about the meaning of a permit was not intended to be "unlawful" for the purpose of immunizing an interferer from prosecution under section 245 or its successor.

I. *The Section 1516 Provisions Concerning Preservation of State Jurisdiction; Attorney General Approval of Federal Prosecution; Federal Investigative Jurisdiction**

The antipreemption provision, and the Attorney General approval provision, is continued unchanged from 18 U.S.C. § 245. The Federal investigative jurisdiction provision has been reworded to try to express the thought that there is no mandate for Federal agencies to

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[21] *See e.g.*, the fact situations illustrated by the following cases: *Feiner* v. *New York*, 340 U.S. 315 (1951); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Gregory* v. *Chicago*, 394 U.S. 111 (1969).

*Section 1516 was deleted in the Study Draft. It read:

Conditions of Federal Prosecution; Federal Investigation.

(A) No prosecution of any offense described in this section shall be undertaken by the United States except upon the certification in writing of the Attorney General or the Deputy Attorney General that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice, which function of certification may not be delegated.

(B) Nothing in this section shall be construed to limit the authority of Federal officers, or a Federal grand jury, to investigate possible violations of this chapter, but investigation may be withheld where it appears to the investigating agency that concurrent State or local action adequately serves the public interest.

investigate all "Federal" offenses created by this statute which greatly expands Federal auxiliary jurisdiction over matters where State and local police agencies have the initial or primary responsibility.* The antipreemption language expresses sound policy. It probably would not be needed were it not for the tendency of the "Warren Era" Court, in contrast to past precedent, to create preemption as a basis for voiding on nonconstitutional grounds local laws it did not like.[22]

The requirement of Attorney General approval in this statute is analogous to the requirement of approval by him in certain instances as a precondition to a grant of Federal immunity from prosecution. Some thought was given to conforming the language of revised section 245 to the language of the immunity bill, but it did not seem worthwhile.

On the merits, however, the question can be raised whether the exercise of auxiliary Federal criminal jurisdiction should be limited by this nondelegable requirement of Attorney General certification of "public interest and necessity." Much of Federal criminal jurisdiction is auxiliary, *e.g.*, section 245 jurisdiction, but is not similarly limited. This certification requirement is preferable, however, to a proposal, while the bill is before Congress, to attempt to define conditions of Federal abstention, or to postpone Federal jurisdiction for a specified period.

The final provision designed to preserve full Federal investigatory jurisdiction may be unneeded, but helps clarify the degree of restraint flowing from the certification requirement.

J. *Note on Justification; Deletion of 18 U.S.C. § 245 (c) and (e) Exemption Provisions*

The provisions concerning justification and excuse in chapter 6 of the Commission's proposed revision are intended to apply to prosecutions of Federal or State or private persons under this chapter. These justification provisions serve most, if not all, of the purposes designed to be served by the special "exemption" provisions inserted by Congress in 18 U.S.C. § 245 (c) and (e). Hence, the 18 U.S.C. § 245 exemption language is not included in this draft.

In 18 U.S.C. § 245(c) it is provided that the section shall not be construed so as to deter any law enforcement officer from lawfully carrying out the duties of his office. In bill form it was opposed by the Department of Justice as superfluous. It may have been politically necessary to include it to achieve the passage of the principal provisions.

Under this legislation a policeman would not be guilty unless he was acting with the purpose of preventing participation in one of the specified activities, and in regard to some of the activities he would have to be racially motivated to be within its coverage. Further, the fact that the law under which a policeman made an arrest (assuming an "arrest" to be use of "force") was subsequently declared unconsti-

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*See Study Draft section 207.

[22] *See, e.g., Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956); Note, "*Pre-emption as a Preferential Ground: A New Canon of Construction*," 12 STAN L. REV. 208 (1959).

tutional would not open up liability.[23] Indeed even if a policeman participated in a racial lynching he would not be violating this legislation unless the purpose was to prevent the victim from participating in one of the enumerated protected activities. Of course, such an act would violate 18 U.S.C. § 242 or its successor.

In 18 U.S.C. § 245(c) it is provided that the section shall not apply to acts or omissions of law enforcement officers who are engaged in suppressing a riot or civil disturbance. This section thus expands further on the "law enforcement" exemption and applies it specifically to riot situations. It includes military action as well as action of civilian officers.

Some of the comments just made concerning deletion of 18 U.S.C. § 245(c) apply here. In riot situations civilian or military officers would be even less likely to be acting within the coverage of this legislation than in general law enforcement, *e.g.*, they would be less likely to be acting with the purpose of preventing participation in the list of specified activities.

However, the exemption may be harmless because—as is the case with the preceding exemption it only limits a possible section 245 prosecution. and would not affect a *Screws*-type prosecution under section 242 or its successor regarding official deprivation of constitutional rights.

III. Protection of Federal Programs, Federally Assisted Programs: Consultant's Proposed Section 1517*

The comments made above on the introductory language to section 1511 concerning the sanctional system apply here also. Although specified as a misdemeanor, draft section 1517 like other sections will itself be a jurisdictional base for invoking other portions of the Code, *e.g.*, murder. That is, if a murder occurs in the course of violating a civil rights provision it will be Federally prosecutable. The word "intentionally" is preferred over the word "willfully," also for the reasons given in section 1511 comment.

The more important question is whether this provision is needed at all, and if so how it comes to be proposed as part of these civil rights materials. Although the section may not fit at this point, it was inspired by thoughts generated in the course of clarifying 18 U.S.C. § 241, and in the course of dealing with Federal programs in revising 18 U.S.C. § 245.

Having amplified and clarified section 241 regarding its coverage of interference with the conduct of elections (as discussed *infra*, sections 1531–1535), symmetry and imaginable need, if not actual need, suggests adding similar coverage regarding Federal programs and Federally assisted programs. (The latter coverage may be more questionable, depending on one's notions concerning the desirability

[23] *Ray* v. *Pierson*, 386 U.S. 547 (1967).

*Section 1517 is deleted in the Study Draft. It read:

Protection of Federal Programs, Federally-Assisted Programs.

A person is guilty of a Class A misdemeanor if, whether or not acting under color of law, he intentionally obstructs the conduct of or otherwise interferes with the conduct of any program, facility, service, or activity provided or administered by the United States or receiving Federal financial assistance.

of such extended overlap of Federal auxiliary jurisdiction and State power, and could be deleted.)

Federal programs, and Federally assisted programs, are covered in section 245 (b) (1) as revised for the benefit of *participants* (*see* section 1511, *supra*) and afforders and aiders also are safeguarded against interferers. However, just as in regard to elections, disruption of the *program per se* arguably is not covered. If there is physical obstruction, then the proposed physical obstruction of government function statute *partially* fills the gap. But it does not reach nonphysical interference, whether conspiratorial or nonconspiratorial, or Federally-assisted programs.

Hence, there are various civil rights applications of section 1517, not clearly covered by sections 1511–1515 derived from 18 U.S.C. § 245 or in the Commission's physical obstruction of government function draft. It could reach, for example, racially motivated sabotage of a Federally assisted ghetto neighborhood assistance program, or harassment of the staff of a Federally assisted community action program, or politically motivated disruption of lectures in a Federally assisted college program.

To be considered in this connection is the question of the extent to which the new bill proposed in July 1969 by Senator McClellan (S. 2677, 91st Cong., 1st Sess.) relates to, or overlaps with, draft section 1517, or the Commission's physical obstruction of government function draft. The McClellan bill would make it a Federal offense to disrupt or obstruct the operation of Federally aided colleges.

If the proposed additional outreach is deemed meritorious in principle but there are fears of undue overlap with State power, a precatory clause could be added to the statute, as in the proposed revision of 18 U.S.C. § 245, requiring specific Attorney General approval of Federal prosecution.

As an alternative, the coverage designed to be created by draft section 1517 might be achieved by a modification, in several particulars of the Commission's draft statute on physical obstruction of government function.

IV. Introductory Note on 18 U.S.C. § 241 and 18 U.S.C. § 242 and Relation to Draft Sections 1501, 1521 and 1531

A. *Overview of Proposed Statutory Scheme.*

The several purposes to be achieved by sections 1501, 1521, and 1531 may be succinctly stated. The effective capturing of these purposes in statutory language is more difficult. This revision seeks:

(1) to clarify 18 U.S.C. § 241 in regard to vote fraud—one of its primary present utilities;

(2) to delete the outmoded and never used (at least in recent times) "highway-disguise" clause of the statute, because both terms are unduly limiting, and the preserved general constitutional rights clause covers the same area and more;

(3) to amalgamate 18 U.S.C. § 241 with 18 U.S.C. § 242, thus replacing section 242;

(4) to preserve the traditional open-ended character of present sec-

tions 241–242 so that their use may continue to expand as "Federal rights" are clarified by constitutional interpretation or statute;

(5) to clarify through the list of subpoints in section 1521 the coverage of official violence ("police brutality")—one of the primary present utilities of section 242;

(6) to substitute "person" for "citizen" for the same reasons as given in the comment to section 1514, *supra.*

Note: The question of overlap with 18 U.S.C. § 245 regarding voting is discussed below. The question of overlap with criminal provisions in the Voting Rights Act of 1965, and with certain old provisions of the Corrupt Practices Act and Hatch Act will be treated separately. One possibility may be to reduce to misdemeanor level those penalties uniquely tied to the administration of the Voting Rights Act, and exclude them from Title 18, and to repeal the separable felony grade penalties on the ground that they are or can be adequately covered in either section 245 or section 241, as revised, plus updated provisions from the Corrupt Practices Act.

B. *Introductory Note on 18 U.S.C § 241.*

What is now codified as 18 U.S.C. § 241 (and this much applies also to 18 U.S.C. § 242) was enacted by a Congress with a broad but uncertain view of the reach of the Civil War Amendments, and of Federal power. The conquered province theory, rather than precise legal analysis, was dominant.[24] Traditionally section 241, for lack of any State action requirement, and to avoid the vice of the overbreadth, was viewed as unsupported by the fourteenth amendment, and as being applicable only to those generic "Federal rights" concerning which Congress had a general police power to reach private or official interferers. Voting in Federal elections and travel are the best examples of such rights. This developed constitutional theory is well summarized in the *Williams* cases.[25]

This construction was abandoned in 1966 in *United States* v. *Price*, 383 U.S. 787, and in *United States* v. *Guest*, 383 U.S. 745. Section 241 was interpreted to reach any Federal rights, including Federal rights articulated under the fourteenth amendment, hence opening the way to the use of section 241 with its felony grade penalty against the Mississippi officials (and private persons acting in concert with them) in the 1963 slaying of three civil rights workers. Of course, when section 241 is linked to the fourteenth amendment, the "State action" element must be proved by virtue of the amendment itself, even though section 241 does not contain the "under color" language.

This broad construction of 18 U.S.C. § 241 makes it overlap with 18 U.S.C. § 242, which with its "under color" phrase traditionally has been viewed as tied to the fourteenth and fifteenth amendment. This broad construction was reinforced in 1968 in *United States* v. *Johnson*, 390 U.S. 563, 565–567 in which section 241 was applied also as a

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[24] *See* CUMMINGS AND MCFARLAND, FEDERAL JUSTICE 248 (1937); DIXON, *The Attorney General and Civil Rights 1870–1964*, in ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES, 106–110 (1968).

[25] *United States* v. *Williams*, 341 U.S. 70 (1951); *Williams* v. *United States*, 341 U.S. 97 (1951).

criminal sanction backstop to the "Federal rights" created in the 1964 Civil Rights Act, which itself contains no criminal sanctions. Citing *Price*, Justice Douglas for the Court said that section 241 should be read literally, so that the phrase "laws of the United States" embraces any personal right created or to be created by any Federal statute. This reading makes section 242 obsolete: its only remaining function being to provide a misdemeanor grade penalty for the same field now covered by section 241 with its felony grade penalty. (For the full potential sweep of section 241, or a similarly worded revision, *see also* the discussion of constitutional bases for civil rights legislation in the introduction to these materials on civil rights and elections, in part I, *supra*.)

C. *Deletion of the "Disguise on the Highway" Paragraph of 18 U.S.C. § 241*

The proposed revision deletes entirely the second paragraph of section 241 concerning going "in disguise on the highway, or on the premises of another." Nothing significant is lost by the deletion; indeed, there apparently have been no significant prosecutions under this section.

Lack of disguise should be no defense to a prosecution for harming another's Federal rights. Deletion of the word highway also is unimportant. Under the fourteenth amendment, which now can support section 241, "State action" apparently can be satisfied by the "State facility" concept under the dictum in the *Guest* case. And "State facility" includes, but should not be limited to, the highway idea. Also, under *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), we now have a plenary right of interstate travel not limited to highways.

The repeal of the phrase "premises of another" sacrifices nothing. Indeed, it repeals a possible overbreadth because going on the premises of another, per se, violates no Federal right, outside Federal enclaves where ordinary trespass concepts apply. Further, if there is a violation of a generic Federal right, *e.g.*, conspiracy to prevent Federal voting, the violation is unaffected by the factor of locating some element of the conspiracy on the premises of the victim. For example, going onto a victim's premises, and beating him so that he cannot get to a Federal election would violate section 241. But so would such a beating, so motivated, if done off the premises. And going onto a victim's premises to threaten him not to send his children to an integrated school violates section 241 (and also section 242 if done "under color"); but making the same threat off the premises also violates section 241.

D. *Note on Repeal of 18 U.S.C. § 242 and Amalgamation With Sections 1501, 1521 and 1531*

The extension by the *Price-Guest* cases of 18 U.S.C. § 241 to overlap the area covered by 18 U.S.C. § 242 has been explained above in the introductory note on 18 U.S.C. § 241. Hence it would seem that little or nothing would be lost by deleting 18 U.S.C. § 242. Two words in section 242 which are not picked up in the proposed revision are "deprivation" and "protected." Regarding the former, the other verbs in draft section 1501 (*see* comment, *infra*) seem to cover all imaginable

situations, *e.g.*, the section 242 primary area of forceful misuse of official authority ("police violence").

Deletion of "protected" likewise seems inconsequential. There is no accepted distinction to date between rights "secured" and rights "protected." At one time some viewed these as words of art so that "secured" meant rights like Federal voting and travel in regard to which Congress could bar private as well as public interference; and "protected" meant the fourteenth amendment rights in regard to which Congress could bar only "State action" interference. As discussed at length in the constitutional powers essay in the introduction to this material on civil rights and elections (part I, *supra*), we are beyond that point now. In 18 U.S.C. § 245 Congress totally ignored these terms.

V. Comment on Section 1501 on Personal Rights; Preserving the Open-Ended Character of 18 U.S.C. § 241 and 18 U.S.C. § 242

The first paragraph of the comment on proposed section 1517 (part III, *supra*), also applies here.

Section 1501 of the proposed revision retains the language, dating from the reconstruction period, which very loosely and vaguely says that anyone is a "dirty bird" and subject to Federal criminal prosecution if he is unnice to anyone else in an unconstitutional way or in a way interdicted by any valid Federal law now enacted or to be enacted. It is doubtful, absent a Civil War, a novel problem of the dimensions of the American racial problem, and a conquered province approach, that any modern legislature would ever consider enacting language of this sort as a criminal statute. It violates virtually every canon of criminal law draftsmanship, and also invites perpetual disputation on the definition of a "constitutional right." But it does exist, and for two reasons probably should be preserved.

The first and perhaps more debatable reason is that such a statute allows coverage, with a criminal sanction, of violations of constitutional rights not yet reduced to specific statutory language, and perhaps even difficult to reduce to precise statutory language. Consider for example the following "rights": the right to be free from illegal restraint of the person; the right to be immune from exactions of fines or deprivations of property without due process of law; the right not to be subjected to illegal summary punishment; the right to freedom of speech, press, assembly, or religion; the right to be immune from punishment for crime or alleged criminal offenses except after a fair trial and upon conviction and sentence pursuant to due process of law; the right to the free exercise of the rights, privileges, and immunities of United States citizenship. Various aspects of some of these "rights" are covered in 18 U.S.C. § 245 as revised in sections 1511–1515. Other aspects are covered in draft sections 1531 and 1521 of the proposed amalgamation and revision of sections 241 and 242, and in draft section 1517 which for example could reach racially motivated obstructions of Federal programs. When *need* arises, on particular fact situations, it is easier to draft reasonably clear criminal statutes than to attempt to forecast on a broad basis unknown kinds of possible invasions. At best, broad language of the traditional sections 241–242 type can be supported as an interim measure, to avoid a total lack of criminal penalty coverage of rights which being "constitutional" are "fundamental," although woefully vague under traditional criminal law standards.

The second and perhaps irrefutable reason is political. Repeal of sections 241 and 242 could be seized upon and misrepresented for political purposes. It would be a basis for characterizing the Congress which repealed them as a reactionary, antebellum body bent on wiping out the gains of more than a century.

VI. Comment on Section 1521 on Unlawful Official Violence

The comment on the sanctional system in the first paragraph of proposed section 1517 (part III, *supra*), applies here also.

The most difficult part of the proposed amalgamation and clarification of 18 U.S.C. §§ 241 and 242 is draft section 1521. It is designed to clarify draft section 1501, which is in part the successor to 18 U.S.C. § 242 in regard to unlawful official violence, such as the extreme situation in *Screws* v. *United States*, 325 U.S. 91 (1945).[26] Section 1501 itself has been left vague and open-ended for the reasons given in the comment to section 1501 (part V, *supra*). Circumstances covered by section 1521 include excessive force in making an arrest, or during pre-trial custody, or in prison after conviction.*

"Move-on" orders, threats of arrest to induce persons to leave parks or street corners, *etc.*, are not now covered in draft section 1521 because of difficulties of draftsmanship, of enforcement, and because of the extent of daily Federal interference with local policy which would result. However, such acts, on a strong enough record, could still be reached under section 1501 as the successor to the 18 U.S.C. § 242 language on which all past unlawful official abuses of civil rights have been based (whether violent or nonviolent). It may be noted that the new section 18 U.S.C. § 245 added in 1968 achieves some clarification, but it does *not* cover the area of *general* unlawful official interference with Federal rights.

There have been frequent suggestions in the past that the general "constitutional rights" phrase common to 18 U.S.C. §§ 241–242 should be clarified by an enumeration of particular kinds of prohibited conduct. This is a suggesstion more easily made than effectuated.

Some staff members of the Department of Justice a few years ago envisioned simply listing a series of rights in terms more specific than 18 U.S.C. §§ 241–242, but still too general to be of much utility in

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[26] *See also Shapiro, Limitations in Prosecuting Civil Rights Violations*, 46 Cornell L.Q. 532 (1961); Caldwell and Brodie, *Enforcement of the Criminal Civil Rights Statute*, 18 U.S.C. Section 242, in Prison Brutality Cases, 52 Geo. L.J. 706 (1964); Dixon, *The Attorney General and Civil Rights*, 1870–1964, in Roles of the Attorney General of the United States (1968).

*The Tentative Draft version of this proposed section, which has since been slightly altered and condensed, and to which the following comments are directed, reads as follows:

Unlawful Official Use of Force

A person acting under color of law is guilty of a Class A misdemeanor if, with intent to deprive any person of his right to be free from punishment or restraint except as authorized by lawfully constituted authority exercising lawful powers, he

(A) subjects any person not under arrest to any assault or other physical force or injury;

(B) subjects any person under arrest to any assault or other physical force or injury;

(C) subjects any prisoner in a penal institution to any assault or other physical force or injury;

(D) knowingly arrests any person on a false charge.

prosecution. The proposal included such general phrases as the right to be free from illegal restraint of the person, and the right to be immune from exactions of fines or deprivations of property without due process of law.

The approach now suggested is modest, but reasonably specific. The focus of section 1521 of this revised version of 18 U.S.C. §§ 241–242 is confined to the area popularly known as police or prison violence. Without narrowing the general "constitutional rights" language of 18 U.S.C. §§ 241–242, which is retained in section 1501, section 1521 seeks to make specified official misuses of force at the pre-arrest, post-arrest, and post-conviction stages unlawful. Official means "under color" of law or acting in association with one "under color." Racial motivation is not required.

Subsection (D) of section 1521 regarding abuse of the power of arrest is more questionable. Although submitted for discussion purposes, I have great doubts about it. It is vague, could be a basis for interfering with merely vigorous police action, could exacerbate Federal-State relations, and could involve Federal prosecutors in voluminous petty cases and the sifting of many unfounded complaints. Compare in this connection the experience of police review boards.

At the same time, however, consideration might be given, in some future report, to instituting a system of citation—analogous to our system of handling traffic violations—for minor violations by the police of constitutional rights. This could be linked not to the Federal district courts but to the new United States Commissioner-Trial Magistrate system. Such a citation provision could reach such incidents as a police order to a Negro youth, when seen in the company of White girls, to separate and leave.

The main clause in section 1521 exempts all use of lawful force. The operative clause in subsections (A)–(C) which reads "assault or any other physical force or injury" may need tightening up. "Assault" is defined elsewhere in the proposed new Code. "Other physical force or injury" is a phrase designed to relate to the Code definitions of more serious types of physical force. The "or injury" phrase may not be needed. Also, it may arguably be subject to overbreadth if construed to reach unintentional injury resulting from an accidental act. Although included for discussion purposes, it probably should be deleted, if it cannot be tightened up.*

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*Further consideration and consultation between the consultant and the staff produced the shortened version which appears as section 1521 of the Study Draft. This language carries forward the purposes of the original draft, as discussed above, and also incorporates unlawful search and seizure. Specifically, subsection (1) makes a specific offense of the kind of misbehavior on the part of police or prison officials that has been most often dealt with under the vague terms of 18 U.S.C. § 242. It also covers all other official misuse of force. It dispenses with the need for proving the *Screws*-type specific intent to deprive the victim of Federal constitutional rights. It applies equally to Federal and State officials, or those purporting to exercise official authority, or those private persons acting in concert with officials as worked out by the Supreme Court in *United States* v. *Price*, 383 U.S. 787 (1966), and *Williams* v. *United States*, 341 U.S. 97 (1951).

Subsection (2) retains in a more generalized form the misdemeanors regarding searches and seizures presently found in 18 U.S.C. §§ 2234–2236.

General penal provisions against official oppression found in some States (*cf.* section 243.1 of the Model Penal Code (P.O.D. 1962)) do not appear to be required in view of our retention of the flexible provisions of old 18 U.S.C. §§ 241–242 in proposed section 1501.

VII. Protection of Political Processes

The first paragraph of the comment on proposed section 1517 (part III, *supra*), also applies here.

A. *Safeguarding Elections* (*Proposed Section 1531*)

Over the years 18 U.S.C. § 241 has become the basic vote fraud statute for Department of Justice prosecutions involving Federal elections, primarily congressional elections, although the word voting does not occur in it. Because of the body of vote fraud law built up under section 241 it seems inadvisable to repeal it entirely. For the sake of clarity, however, voting should be mentioned. Hence, while 18 U.S.C. § 241 is being retained in essence as proposed section 1501 (and is retained for additional reasons going beyond vote fraud), new language specifically directed to vote fraud is created in proposed section 1531.

Regarding the voting coverage of section 241 and proposed section 1531, it may be noted that there is not a complete duplication of 18 U.S.C. § 245(b)(1)(A) as revised above in section 1511(a). The latter statute is directed at interference with *participation* in the election process, and contemplates identification of particular victims. The draft section 1531 language focuses on the *conduct* of the election and reaches such acts as ballot box stuffing or any other act jeopardizing the accuracy and integrity of the election process in any of its elements. (Of course, under section 1531 there may be overlap with section 245 in regard to participants, but that is unavoidable if we are to retain particularized statutes such as section 245 to ease problems of proof, and also open-ended statutes such as an updated section 241 which creatively grow with the Court's stretching of constitutional concepts of Federally protectable rights.)

The section 1531 language regarding "conduct" of elections is designed to clarify what is now supported only by case law under the loosely worded 18 U.S.C. § 241 which speaks only of interference with personal constitutional rights. The change bears on burden of proof of specific intent. Under neither 18 U.S.C. § 241 nor 18 U.S.C. § 242 is it necessary to prove that the defendant was thinking in constitutional terms. But a specific Federal right must exist, and the defendant must have specific intent to interfere with that Federal right. For example, if the defendant interferes with a Federal voter *as* Federal voter he can be prosecuted whether or not he knew that the Federal voter status was constitutionally protected.[27] And in *Screws* v. *United States*, 325 U.S. at 106 (1945), the Court said: "The fact that the defendants may not have been thinking in constitutional terms is not material where their aim was . . . to deprive a citizen of a right and that right was protected by the Constitution."

However, how the Federal voting right is articulated may make some difference regarding the level of proof in a section 241 vote fraud prosecution. If the right centers on protecting citizens as Federal voters, then the government may have to prove not only an intent to

[27] *United States* v. *Nathan*, 238 F.2d 401 (7th Cir.) *cert. denied*, 353 U.S. 910 (1957).

affect a Federal election but also specific intent regarding *particular voters*, or *votes*, and that certain voters' rights to cast a ballot had been affected by the defendants' election fraud. By contrast, if the right centers on protecting the *integrity* of the *election process*, it may be enough to show that defendants had specific intent to affect the election, and that they were merely reckless with respect to personal voting interests of particular citizens. Regarding a mixed election—Federal and State—the more flexible view which is supported by the proposed language would permit prosecution where defendants' specific intent was directed to the State aspect of the election, and they carried out their purpose with reckless disregard of the effect on Federal candidacy. And this would be so even if a narrow view should be taken of Federal power to reach private interference with wholly State-local elections.

The view that section 241 even as presently drafted can reach generalized interference with the integrity of the Federal election process was taken in the *Nathan* case, *supra*, but to give fair warning, and place the interpretation on a firm basis, the rule should be particularized in statutory language. In *Nathan* the defendants conspired to cast false ballots in favor of the Democratic candidate for Congress, and cast 71 such ballots. Overruling the defense that defendants lacked specific intent regarding particular voters, the court said.[25]

> [I]t is immaterial that the defendants were without knowledge of the constitutional rights of citizens. When they acted in concert to pollute the ballot box they acted in reckless disregard of such rights and must be held to the consequences.

In other words, the proposed language reaches the *election process* in all its elements. It can reach situations where there has been neither any intent nor any act relating to *any voter* or even any official, *e.g.*, simply destroying or putting out of order election machinery or supportive property. Such conduct is not reached by section 245, even as revised. It is true that election machinery and supportive property is a "State facility" because States finance and conduct all elections. Section 245(b)(2)(B), revised as section 1512(b), reaches State facilities generally, but only in the special context of interference with "any person because of race" in relation to enjoying State facilities.

Under the proposed language there would be an offense: (1) whether or not racial motivation could be shown, (2) whether or not any particular "participant," or "afforder," or "aider" were identifiable or interfered with, and (3) whether or not "under color" could be shown.

It would suffice to show a conspiracy (or simple act) to affect adversely—even indirectly—the election process. Under a broad view of Federal constitutional power, any aspect of any election could be reached. Under a more narrow reading of the *Guest* and *Morgan* cases Federal jurisdiction could reach private action directed to the State portion of a mixed election if impact on the Federal portion could be shown. Further, the proposed language reaches some situations not now reached by section 241 even as stretched by the *Nathan* case. Under *Nathan* it still is necessary to show that there were acts linked to *par-*

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[25] *Id.* at 407. *See also, United States v. Weston*, 417 F.2d 181, (4th Cir. 1969), *cert. denied*, — U.S. —, 90 S.Ct. 756 (1970): upholding conviction of Lee County, Virginia officials for absentee ballot irregularities.

ticular ballots. Under the proposed revision, particularity drops out, making unnecessary any showing that ballots were cast by virtue of the conspiracy or affected by the conspiracy.

By dealing with election bribery, section 1531 transfers this concept into this revision of section 241, enables repeal of 18 U.S.C. § 597 and updates section 597 to make it applicable to primary elections as well as general elections. The language reaches both direct bribery and conspiracy to bribe, *e.g.*, the third party situation of paying *X* to influence *Y's* vote. Section 597 does not reach the third party situation on its face, but can reach it when linked to the general conspiracy statute, 18 U.S.C. § 371.

The addition of this language to the revised version of section 241 would not be needed, and 18 U.S.C. § 597 simply could be repealed, were it not for a questionable Supreme Court case, resting on statutory interpretation grounds, which held that a conspiracy to bribe voters was not within section 241.[29] The theory of *Bathgate* was that when Congress repealed bribery statutes in 1894 it impliedly also excluded bribery from section 241.

In summary, this section accomplishes three things. First, it makes a specific offense of vote frauds typically prosecuted under the general language of 18 U.S.C. § 241; second it encompasses present 18 U.S.C. § 597 (vote bribery); and third it encompasses in its general language the obstruction of elections penalties of the Voting Rights Act of 1965, 42 U.S.C. § 1973i(c).

The following special elements may be noted. The proposed section is not confined, as is section 1973i(c), to Federal elections, but reaches all elections as does existing 18 U.S.C. §§ 241, 245(b)(1)(A). Subsection (b) is worded to reach the third party situation, where *X* is paid to induce the vote of *Y*, which is not covered now by the language of section 1973i(c). Arguably, this narrow language in section 1973i(c) could be construed to cut down on the traditional breadth of 18 U.S.C. § 241.

Subsection (c) omits solicitation, which is now included in 18 U.S.C. § 597 because it may raise constitutional problems regarding soliciting money for ordinary "get-out-the-vote" campaigns.* Certain political contributions are regulated by proposed sections 1534, 1541 and 1542. However, the point is a close one, and perhaps "solicits" should be restored to subsection (c) at least in regard to conduct prohibited by subsection (a).

Subsection (d) is directed toward the basic integrity of the election process, and reaches interference with the election process even if an impact on a particular voter's ballot cannot be proved, *e.g.*, general ballot box stuffing, tampering with machines, absentee ballot irregularities, interference with election officials, *etc.*[30]

B. *Overview and Policy Choices on Political Activity Legislation Other than Vote Fraud*

Once we turn from vote fraud, and the recommended section 1531

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[29] *United States* v. *Bathgate*, 246 U.S. 220, 224–227 (1918); *see also United States* v. *Saylor*, 322 U.S. 385 (1944).

* Study Draft subsection (c) includes solicitation.

[30] *See United States* v. *Weston*, 417 F.2d 181 (4th Cir. 1969), *cert. denied*,—— U.S.——, 90 S. Ct. 756 (1970).

to continue and particularize the traditional role of 18 U.S.C. § 241 in this field, a complex picture emerges. We encounter a myriad of anachronistic, overlapping, unenforced and unenforceable provisions, interspersed with a few nuggets worth preserving. Some of the legislation is related to outmoded work relief concepts of the 1930's. Some of it is the product of spasmodic congressional attempts to deal with corrupt practices in elections, including the problem of political expenditure. Much of it should be repealed or transferred outside of Title 18 pending integrated study from a political regulation point of view rather than a criminal law point of view.

Political activity legislation, overlapping regulation of voting and elections per se, is spread over several titles of the United States Code, most of it being found in Title 2, chapter 8, sections 241–256 (corrupt practices legislation), Title 5, sections 1501–1508, and 7321–7327 (Hatch Act provisions concerning Federal and State employment), and Title 18, chapter 29, sections 592–613 (mixture of corrupt practices legislation, Hatch Act provisions, and other provisions). Much of this legislation, including parts of 18 U.S.C. §§ 592–613, deals with matters more appropriately handled administratively as regulatory offenses rather than as penal offenses. The whole area is in need of further study and integrated development.

The approach of the Commission has been to select for retention in Title 18, with criminal penalties, those political prohibitions which seemed to touch on conduct reprehensible enough and also clear enough to be effectively handled through the penal process. The result is a series of proposed sections on protection of political processes (sections 1531–1535) and on prohibition of political contributions from specified entities (sections 1541–1542). Matters covered are safeguarding elections (section 1531); deprivation of Federal benefits for political purposes (section 1532); misuse of personnel authority for political purposes (section 1533); political contributions of Federal public servants (section 1534); troops at polls (section 1535); political contributions by specified organizations and others (section 1541); political contributions by agents of foreign principals (section 1542).

Several existing sections in Title 18, chapter 29, are not continued, because the matter is better handled as a regulatory offense and should be transferred to Title 2 or Title 5, or because the former section is adequately covered by proposed new sections, or because the former section is outdated.

1. *Regulation of Amounts of Political Expenditure.*—Sections 608 and 609 of Title 18 seeking to regulate the *amounts* of political expenditure are substantially unenforceable as criminal measures because it is possible to pass money around among several committees. They should be transferred to Title 2, chapter 8 and either be reduced to misdemeanor level, or supported with the provision that violations shall be punishable as provided in proposed section 1006 regarding regulatory offenses. This transfer would bring the matter before the proper congressional committees, leaving to the Judiciary Committees matters truly penal in nature.

There should be further study of this area, eventuating in a thorough overhaul of Title 2, chapter 8, using a mixture of civil and misde-

meanor level sanctions. The political expenditure problem already has received much study, but has not yet come to fruition in legislation.[31]

In 1966 Congress passed the Presidential Election Campaign Fund Act of 1966 (80 Stat. 1539, 26 U.S.C. §§ 6001–6091) as a rider to the Foreign Investors Tax Act. It was popularly called the "Christmas Tree Bill", and was designed to distribute public funds to political parties, thus minimizing the need to rely on private contributions. Subsequently a resolution was passed providing that no money should be appropriated until a formula for distribution had been enacted. 81 Stat. 57 (1967).

The 1967 Election Reform Bill, passed in the Senate but not in the House, was essentially an expenditure disclosure act (S. 1880, 90th Cong., 1st Sess.). *See also Hearings before the Senate Comm. on Finance*, 90th Cong., 1st Sess. (June 1, 2, 6, 7, 9, 1967); *Hearings before the Senate Comm. on Rules and Administration*, 90th Cong., 1st. Sess. (June 28, 29, 1967); President's Message, Federal Election Reform, May 25, 1967.

The related area of political activities by government employees also has received extensive study recently, from a regulatory rather than a penal approach, but has not yet produced new legislation. *See* I–III Report of Commission on Political Activity of Government Personnel (1967); Yadlosky, *The Hatch Act* (Library of Congress Legislative Reference Service Study, October 31, 1966).

In contrast to these several areas which do not lend themselves to the penal approach, it may be noted that flat prohibitions on *any* political contributions by specified entities, as in 18 U.S.C. § 610, have proven to be enforceable. Section 610 therefore is retained as proposed section 1541, and an attempt has been made to revise and amalgamate it with 18 U.S.C. § 611 concerning government contractors.

2. *Prohibition of Anonymous Political Campaign Publications in Federal Elections.*—It is recommended that 18 U.S.C. § 612 also be reduced to misdemeanor grade penalty (or regulatory offense) and transferred to Title 2, chapter 8, for some of the same reasons given above for sections 608–609. In certain applications the section might encounter problems under the first amendment. *See Zwickler* v. *Koota*, 389 U.S. 241 (1967); *Talley* v. *California*, 362 U.S. 60 (1960).

3. *Miscellaneous Provisions of Title 18, Chapter 29, Not Continued.*—Section 591 deals with definitions for now-abandoned chapter 29, and should be repealed. In its present form it is too narrow because it exempts primary elections and political party conventions. Definitions, as needed, are now part of each provision (except perhaps the sections proposed for transfer).

Sections 593, 594 and 597 may be repealed because the matters they deal with, insofar as they should be part of the penal Code, are now

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[31] A helpful background study is Alexander and Denny, *Regulation of Political Finance* (pamphlet jointly published in 1966 by the Institute of Governmental Studies at Berkeley and the Citizen's Research Foundation at Princeton). Other studies published by the Citizen's Research Foundation include: No. 14, National Convention Finances (Bibby, Alexander, McKeough 1968); No. 9, Financing the 1964 Election (Alexander 1966); No. 6, Money for Politics: A Miscellany of Ideas (Alexander (ed.) 1963); No. 1, Money, Politics and Public Reporting (Alexander 1960). *See also* Report of President's Commission on Campaign Costs (1962).

fully or adequately covered by proposed section 1511 and proposed section 1531.

Section 592 forbids bringing troops to the polls unless necessary to repel armed enemies, and apparently has never been invoked. It is retained however, as section 1535 (*see* discussion, *infra*, part VII, C, 4) even though proposed section 1511 also reaches any interference by force (or without force under the Study Draft version) with participation in any election, and even though proposed section 1531 also covers any interference with the administration of any election. Section 593 forbids various armed forces interferences at the polls, overlaps section 592, and is unneeded. Section 594 deals with intimidation of voters, in Federal elections only, and deals with an area now adequately covered by sections 1511 and 1531. Section 597 deals with expenditures to influence voting, a matter now covered by section 1531.

Section 595 dealing with Federal election interference by officials supported in whole or in part by Federal money is adequately covered by the broader voter protection and election integrity provisions now found in proposed section 1511, section 1531, and also proposed section 1532 prohibiting deprivation of Federal benefits for political purposes.

Section 596 prohibiting political polling of the armed forces may infringe on the first amendment, and seems to serve no essential purpose. Simple repeal is suggested.

Sections 599 and 600 prohibiting promises of employment by candidates or by others for political purposes deals with a matter better handled by civil service regulations concerning job qualifications. As presently worded the sections also are too broad, because some political rewards to worthy persons for political activity are conventional, even desirable, both in executive service and in congressional service. Simple repeal is suggested.

Section 604 deals with political solicitation by anyone—public servant or private person—of a person on "work relief or relief." Insofar as this relates to the deprivation or threatened deprivation of Federal benefits for political purposes, the evil is covered by proposed section 1532. Insofar as it relates to general political solicitation without official coercion it may raise a first amendment problem, which would be even more serious if the prohibition were extended logically to all Federal beneficiaries, *e.g.*, retired persons on social security or supplemental old age assistance. There apparently have been no litigated cases or any use of this statute. Simple repeal is suggested.

Section 605 deals with disclosure for political purposes of the names of persons on "work relief or relief." This statute, like some of the foregoing, relates to the bygone era of work relief in the 1930's, and seems to have no current need. Here again, the imaginable evils seems to be adequately covered by the other proposed statutes. If the disclosure is for the purpose of opening the door to vote buying among the needy, the conduct would be covered by section 1531. If the disclosure has any aspects of official pressure on a Federal beneficiary, the conduct would be covered by section 1532. If the disclosure led to interference with participation in an election, with or without force, section 1511 would be applicable. For all of these reasons, and because it has never been invoked, simple repeal is suggested. If there *is* a problem, it would be better handled by administrative regulations requiring Federal

administrators or poverty service corporations (*e.g.*, Job Corps contractors) to keep certain information of this sort confidential.

C. *Implementation of Recommended Policy Choices Concerning Political Activity Legislation.*

1. *Deprivation of Federal Benefits for Political Purposes (Proposed Section 1532).*—This section replaces sections 595, 598, 601 and 605 of Title 18, which should be repealed. The focus is on the *granting, depriving* or *withholding* of the benefit, or its *use* either by grantor or recipient, for the defined political purposes, and not just on "politicking" by a person who happens to be a beneficiary. The racial clause of 18 U.S.C. § 601, which is not picked up here, is already covered in proposed sections 1511–1515. The purpose is to depoliticize the granting or withdrawal of Federal benefits. The coverage is expanded from work relief to all Federal benefits, and government contracts. However, the language is not as broad as the phrase in 18 U.S.C. § 598 which speaks of "any authority conferred by any appropriation act." The exemption clause of section 595 is dropped.

Regarding OEO Community Action Programs, the language would cause no more problem than existing sections 595 or 598 which have not been enforced in this area. The proposed language does not reach general political uplift, only activity regarding specific candidates or issues.

An alternative disposition would be simply to transfer these sections to Title 2, chapter 8, and provide that violations shall be punishable as provided in proposed section 1006 regarding regulatory offenses.

2. *Misuse of Personnel Authority for Political Purposes (Proposed Section 1533).*—The section and the closely related section which follows continue and revise existing law concerning protection of public servants from improper political pressures. Proposed section 1533 derives from 18 U.S.C. § 606.

An alternative wording would be to replace the last clause "for giving or . . . purpose" with the simple phrase "for any political purpose." The latter would reach more improper conduct with regard to personnel, but is subject to the objection—considered overriding—of vagueness and overbreadth. For example, a faithless employee who leaked material to the press to embarrass his immediate superior or the Administration could be protected automatically under the broader wording, without regard to the actual facts of a given case.

3. *Political Contributions of Federal Public Servants (Proposed Section 1534).*—This section touches on a matter of perennial public concern and public employee concern and is based primarily on 18 U.S.C. § 602. The following corollary sections should be repealed: 18 U.S.C. § 603 concerning soliciting in any place where a Federal employee is on official duty because the place concept is broad and vague and there may be a constitutional right to receive mere solicitation: 18 U.S.C. § 604 concerning solicitation from persons on relief, again because of constitutional considerations (which would be even more serious if the section were expanded logically to all welfare beneficiaries) and because the true evil is covered in proposed section 1532 above; 18 U.S.C. § 607 because it is already covered either by this proposed section 1534, or by separate bribery provisions if bribery

is the intended thrust of this unclear provision. Also, 18 U.S.C. § 607 would appear to make it criminal for any Federal employee to make a voluntary political contribution to any other Federal employee or to a Senator or Congressman.

Regarding the ban on solicitation, per se, there may be a constitutional problem, depending on the facts of a given case, under recent decisions of lower courts invalidating on first amendment grounds the "little Hatch Acts" of certain States. Mere "solicitation" may be within the range of constitutionally protected political participation discussed in these recent decisions. They may presage an eventual Supreme Court narrowing of the ruling in *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947), which is the present constitutional foundation for regulations of this sort. *See, e.g., Bagley* v. *Washington Twp. Hosp. Dist.* 55 Cal Rptr. 401, 421 P.2d 409 (1967); *Fort* v. *Civil Service Comm.* 38 Cal. Rptr. 625, 392 P.2d 385 (1964). At the same time protection of Federal public servants from political coercion is a legitimate public concern.

The definition of Federal officer and employee has been narrowed from the version which appears in 18 U.S.C. § 602 in order not to reach parttime consultants, government contractors, *etc.*, who would be covered if the broad phrase "compensation . . . derived from the Treasury" were continued. (Regarding the problem of government contractors, *see* the discussion below accompanying proposed section 1541 on political contributions by specified organizations and others.)

4. *Troops at Polls (Proposed Section 1535).*—This section carries forward and modifies existing 18 U.S.C. § 592. It is designed to prevent intimidation of the electorate by the armed forces. It overlaps with proposed sections 1511(a) and 1531(d), which safeguard against intimidation of voters or interference with the conduct of an election. It was thought desirable to retain a specific safeguard against unnecessary military presence at the polls, even though section 1535 may be surplusage in view of the overlap with sections 1511(a) and 1531(d).

Under 18 U.S.C. § 592 the only exception to the prohibition of military forces at the polls is where "such force be necessary to repel armed enemies of the United States." It seems essential to permit use of troops also where necessary to suppress violent interference with the election process, and this exception has been added in section 1535.

Retention of 18 U.S.C. § 592 in this form, and the overlap with proposed sections 1511(a) and 1531(d) already noted, make unnecessary the retention of 18 U.S.C. § 593 concerning interference by armed forces in elections.

5. *Political Contributions by Specified Entities (Proposed Section 1541).*

(a) *Derivation and rationale.*—This section derives from 18 U.S.C. § 610, and substantially incorporates also 18 U.S.C. § 611 by including and defining "government contractors." Consideration was given initially to transferring all of the Title 18, chapter 29 sections dealing with political contributions to Title 2, chapter 8, on the ground that they were seldom invoked and dealt with regulatory matters not well suited to the penal process. Recent prosecution experience in 1969, however, indicates that section 610 can be an effective penal weapon against political expenditures by specified entities.

Specifically, 18 U.S.C. § 610, proposed for revision as new section 1541, is quite unlike 18 U.S.C. §§ 608 and 609, although all deal with political contributions. Sections 608 and 609 limiting the *amounts* of expenditure have not been enforceable because it is too easy to pass money around among several committees. Hence, the Department of Justice reports no case or enforcement. Likewise, 2 U.S.C. § 248 limiting the amount of expenditure by candidates for Congress has proven unenforceable. Hence 18 U.S.C. §§ 608 and 609 have been recommended for transfer out of Title 18 to Title 2, for restudy as a regulatory rather than penal offense. By contrast, section 610 articulates a flat prohibition against any contribution by specified entities. It does not require a regulatory approach. In practice it has been found to be enforceable. The small number of cases under it (until the Nixon Administration in 1969) is attributable more to the degree of vigor of enforcement policy than to intrinsic difficulties in the statute.

The recent enforcement figures are startling. Prior to 1969 there had been only two indictments against corporations under section 610 and its predecessors, one in 1916 and one in 1962. Both apparently were successful. *United States* v. *U.S. Brewers' Ass'n*, 239 F. 163 (W.D.Pa. 1916) (overruling a motion to quash the indictment); *United States* v. *Lewis Food Co.*, 366 F.2d 710 (9th Cir. 1966) (reversing a dismissal of the indictment). However, between May 27, 1969 and December 2, 1969 indictments were filed against nine corporations, all of which pleaded guilty and were fined. Two additional corporation indictments were pending. In addition, one union was indicted, convicted, and an appeal is pending. (Tabulation by Edgar N. Brown, Department of Justice Government Operations Section, in Commission file.)

Prior to 1969 there had been five other union indictments, only one of which apparently was successful.

(b) *The specific language.*—Like 18 U.S.C. § 610 from which it derives, section 1541 articulates a flat prohibition against any contribution by specified entities. It is broader than section 610 in two respects: it adds Federal savings and loan associations and government contractors to the list of entities; it applies to all elections regarding all entities, rather than limiting the restraint on nonfederal corporations and unions to Federal elections, as does section 610. In reaching all elections it follows 18 U.S.C. § 245(b)(1)(A), revised as proposed section 1511, and follows the same rationale. Specifying Federal savings and loan associations may be unnecessary, but was thought by some Department of Justice observers to add clarity.

Specifying government contractors in the list of entities covered, and specially defining them, fulfills three purposes: it amalgamates sections 610 and 611; it corrects an overbreadth in section 611; and it breathes fresh life into section 611. The overbreadth in section 611 lies in its application, if taken literally, to noncorporate contractors such as ordinary government consultants, thus barring them from making ordinary political contributions. The moribund character of present section 611 stems from its legislative history, which as interpreted by the Department of Justice excludes corporate contractors from section 611, leaving them reachable only via section 610.

6. *Political Contributions by Agents of Foreign Principals (Pro-*

posed Section 1542).—This section carries forward 18 U.S.C. § 613 which, analogous to 18 U.S.C. § 610, is another flat prohibition against any political contribution or expenditure from a specific source. The recent experience under 18 U.S.C. § 610, as noted above, in the discussion of proposed section 1541, indicates that a total ban on political contributions from a defined source may be criminally enforceable. By contrast, where the aim is limiting amounts on contributions by legitimate contributors the criminal process has proven totally ineffective, *e.g.*, the experience under 18 U.S.C. §§ 608–609. In this latter situation, better results may be achieved by requiring total disclosure of expenditures, and setting up an administrative process to elicit and collate the information. The Senate-passed Election Reform Act of 1967 contemplated this approach.

Despite the fact that proposed section 1542 takes the form of a total prohibition on foreign based expenditures, and thus seems analogous to proposed section 1541, an issue is raised as to the utility and enforceability of section 1542. The difficulties encountered over the years in identifying improper domestic expenditures are compounded when the source of the money is outside this country. Identification of "foreign" principals or the agents may be especially difficult when the money is passed through transnational enterprises operating with parent companies, subsidiaries and special agents. Hence, it may be preferable to transfer this section out of Title 18 for reconsideration under some appropriate administrative process.

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COMMENT

on

HOMICIDE:

SECTIONS 1601–1609

(Stein; April 9, 1968)

1. *Background; Existing Federal Homicide Law.*—The principal Federal statutes dealing with criminal homicide are sections 1111 and 1112 of Title 18. These sections classify criminal killing into four categories:

Murder in the first degree, punishable by death or life imprisonment.

Murder in the second degree, punishable by up to life imprisonment.

Voluntary manslaughter, punishable by up to 10 years.

Involuntary manslaughter, punishable by up to 3 years.

It is possible to regard murder in the first degree as comprising two categories: capital and noncapital. Although the penalties differ radically, there is no legislative difference in the definition of these "two offenses" and no required finding by the court or jury to differentiate capital from noncapital murder in the first degree: the choice is left to the discretion of the jury. When common law murder was first divided into degrees by legislative action in the 18th century, all murder was capital, and the objective of the legislation was to limit the category of capital murder and to require the special findings of the first degree statute as a prerequisite to the death sentence.

Thereafter, three developments tended to undermine the degree system as a useful line between capital and noncapital murder: (a) amendment of the first degree statutes to make capital punishment discretionary: (b) sharp decline in death sentences imposed and carried out in first-degree murder cases; and (c) a tendency of the courts to obliterate the distinction between first and second degree murder. "Premediation" was virtually read out of the first degree statute by treating any intentional killing as premeditated if the design to kill preceded, however briefly, the actual killing.

The line between murder in the second degree and voluntary manslaughter has also been obscured, depending as it does on the distinction between "malicious" killings and killings "in the heat of passion." This in turn depends, although the statute does not say so, upon whether the homicide was "provoked" by behavior that is regarded as legally sufficient under somewhat arbitrary common law rules.

"Involuntary manslaughter" under section 1112(a) of Title 18 is defined in terms of "due caution." The language suggests that any death

resulting from the sort of negligence that gives rise to civil liability also gives rise to criminal liability for this felony. The courts, however, have properly drawn a line between civil and criminal negligence, which line should be reflected in the statute.

Federal murder-manslaughter law is further complicated by special provisions of other statutes dealing with death causing behavior in a manner different from the general scheme of sections 1111 and 1112. Thus section 1115 of Title 18 penalizes one kind of involuntary manslaughter—in operating a "steamboat or vessel"—with up to 10 years' imprisonment rather than 3. Sections 32, 33, and 34 of Title 18 in effect create a special kind of first degree murder embracing some types of reckless killing through tampering with air and motor carriers. Sections 1991 and 1992 of Title 18 deal similarly with deaths caused by tampering with railroad facilities.

The salient issues presented by the proposed draft are briefly discussed under appropriate headings below.

2. *Grading Scheme; Capital Punishment Issue Deferred.*—The proposed draft follows the grading plan presented by Professor Low at the January 1968 meeting of the Commission and Advisory Committee. Thus the homicide offenses are distributed among three classes of felony. Maximum penalties for these classes have not been agreed upon, but the following ranges can be kept in mind in considering the propriety of the grading:

Class A felony: Up to life imprisonment.

Class B felony: Maximum ranging between 8 and 20 years.

Class C felony: Maximum ranging between 3 and 10 years.

It seems advisable to postpone debate on the death penalty because that issue will arise in connection with treason, kidnapping, rape, and other offenses. There will be common issues, for example, as to jury discretion and separating trial of guilt from hearing on sentence. If the death penalty should be retained for selected murderers, it will be feasible to insert appropriate provisions later.*

3. *Consolidation of First and Second Degree Murder.*—Since the death penalty is actually carried out in a very small proportion of first-degree murder cases, the principal basis for the distinction between two degrees of murder has virtually disappeared. In addition, the line between the two degrees has been blurred by judicial decision, as noted in paragraph 1, above. The line operates arbitrarily to the extent that it makes premeditation the dominant or exclusive test. Some impulsive killings are more heinous than some premeditated killings. For example, the wanton impulsive shooting of a stranger evinces greater cruelty and disregard for human life than the decision to provide a fatal quantity of barbiturates to a loved one slowly dying of cancer, however "premeditated" the agonized decision in the latter case. Illinois, New York, Great Britain, and others have opted for the single class of murder in recent reviews of the question.

4. *Replacing "Malice Aforethought" as the Test of Murder.*—"Malice" is an ancient term of uncertain meaning. It has been eliminated

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*See provisional chapter 36 of the Study Draft.

from the law of murder in recent codifications.[1] It may be that "malice aforethought" originally meant something not too different from the deliberate and premeditated design to take life, which later became the touchstone of first degree murder. However, over centuries of decisions it came to be that malice could be found without intention to kill. An intention to inflict serious bodily harm would suffice. Indeed, extreme recklessness without any intent to harm could be enough.

The proposed draft uses terms of modern definite meaning to delineate the offense of murder, viz: intentional, knowing, reckless.

One issue of substance, although it may not rise very often, is whether a person who intends to kill *A* but accidentally kills *B* should be guilty of murder. Section 1111 of Title 18 explicitly calls this murder even if the victim happened to be the offender's beloved brother, whom the offender was very far from wishing to kill, or even if the offender's shot, going wild, killed a person in another room whose presence the offender had no reason to suspect. The draft would leave homicide liability for such unintended killing to be decided on the ordinary basis of whether the offender had acted recklessly or negligently. The New York and Illinois Codes retained the traditional position reflected in the Federal law, sometimes referred to as the doctrine of "transferred intent."

5. *Modification of the Felony-Murder Rule.*—At common law, the "malice" necessary for murder could be found from the fact that the offender was engaged in robbery, rape, burglary, arson, or other common law felony. The effect of the felony-murder rule was to permit capital punishment for certain unintended and even quite accidental killings in the commission of crimes which of themselves entailed considerable risk of physical violence. Since the common law felonies were themselves subject to capital punishment, the impact of the common law felony-murder rule was not great. As the death penalty for these other felonies was eliminated the question arose why a miscreant who engaged in a noncapital offense should be subject to capital punishment for a death in respect to which he had no culpability or only such culpability as would ordinarily lead to manslaughter rather than murder liability.

Some have called for the elimination of felony-murder as imposing penalties unrelated to specific culpability. They would argue that, while killings do occur in the course of robberies, arson, and so forth, these killings are almost always intentional or reckless and should be proceeded against on that basis. Where a true accident occurs, as where robbers driving to the scene of the planned holdup are involved

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[1] Modern Criminal Codes dispensing with reference to "malice" in their homicide definitions include: WIS. CRIM. CODE c. 940 (1955); ILL. REV. STAT. art. 9 (1961), and N.Y. REV. PEN. LAW art. 125 (McKinney 1967). Proposals to adopt similar provisions for State Criminal Codes are pending: CALIFORNIA PENAL CODE REVISION PROJECT §§ 1410–1425 (Tent. Draft No. 2, 1968); PROPOSED CONN. PEN. CODE §§ 56–61 (West 1969), and PROPOSED CONN. PEN. CODE, Comments at 124–128 (Comm. Report 1967); PROPOSED DEL. CRIM. CODE §§ 410–414 (Final Draft 1967); MICH. REV. CRIM. CODE c. 20 (Final Draft 1967); and PROPOSED CRIM. CODE FOR PA. art IX (1967). *See also* MODEL PENAL CODE art. 210 (P.O.D. 1962). "Malice aforethought" has been so difficult and technical a concept that an often-used standard homicide charge was rejected in a recent case, and a murder conviction reversed, because the charge had erroneously explained the difference between the two degrees of murder in terms of "malice aforethought." *Beardslee* v. *United States*, 387 F.2d 280 (8th Cir. 1967).

in a collision resulting in death, perhaps to one of the conspirators, it is arbitrary to punish for murder.[2] Others favor retention of felony-murder as a kind of contingent additional penalty for the underlying felony, for example, capital punishment for rape if a death, however, accidental, is involved. This is deemed to have a deterrent effect: felons may risk a term of imprisonment for committing their crime, but not life imprisonment or death. Others would retain the rule to help the prosecutor carry the burden of proof of culpability for murder. This view contemplates that the felony-connected killings probably do involve homicide culpability, but the prosecutor may not be able to prove it beyond a reasonable doubt.

Proposed section 1601(b)* adopts a middle position close to the last one stated above. The fact of engagement in a violent or dangerous felony is made sufficient to warrant conviction of murder on the basis of extreme recklessness, but the presumption is rebuttable. A defendant need not, by affirmative defense, bring forth a preponderance of evidence to show that he was not, in fact, reckless in the extreme. If there are sufficient facts to raise a reasonable doubt as to his recklessness, for example, if it appears that he did not know that his accomplices were armed or expected to use deadly force, then he will not be guilty of murder. But, absent any reason for such doubt, those who cause or bring about the death of another while in the course of committing a dangerous or violent crime are deemed guilty of murder, even if the death was unintended.

Note that the proposed draft embraces more felonies than the existing enumeration in section 1111. For example, the proposed draft would include treason, felonious kidnapping, sabotage, train wrecking, aircraft piracy, escape, and armed resistance to the execution of the laws. The provision raises the issue whether accomplices to the commission of a dangerous felony should be deemed recklessly responsible for any killing occurring in the course of the felony even though they do not particiapte in the killing. Present Federal law holds all accomplices responsible under the felony-murder rule.[3]

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[2] *Cf. Lee* v. *United States*, 112 F.2d 46 (D.C. Cir. 1940), sustaining a felony-murder conviction for a death incurred in an automobile accident. The defendant was fleeing at high speed from agents chasing him for carrying untaxed liquor.

*Alternative A.

[3] In *United States* v. *Boyd*, 45 F. 851, 862 (W. D. Ark. 1890), *rev'd on other grounds*, 142 U.S. 450 (1892), the common law basis of the felony-murder rule is fully explained. Concerning its application to robbery, the Court stated:

> The very demand of a man who robs, "your money or your life", implies that human life is in jeopardy, so that when a number of persons agree to, and enter upon the commission of, the crime of robbery, and a person is killed, who is an innocent person, in the execution of that purpose to rob, all the partners who have entered into the agreement, and upon the execution of the purpose to rob, are equally responsible.

This concept includes accomplices who play no role in the killing, such as getaway drivers. *See, e.g., Long* v. *United States*, 360 F.2d 829, 835 (D.C. Cir. 1966), concerning a felony-murder conviction, in which a robbery victim was killed when a culprit's gun went off in a struggle with the victim.

> Appellant Huff's case is somewhat different from that of the other two appellants. Huff drove the others . . . stayed nearby in the car while Earle and Long were attacking the victim; Huff then drove the car away from the scene, fully aware of what had taken place. This was abundant evidence of Huff's aiding and abetting the others.

The provision also raises a related question as to whether participants in a felony should be held responsible for the death of any person, including any of the felons, resulting from resistance to their crime, even when the deadly blow was not inflicted by one of the felons—as when a police officer, or the victim of the crime, kills someone while shooting it out with the felons.[4*]

6. *Manslaughter: Reckless.*—Proposed section 1602 postulates manslaughter liability based on recklessness. Recklessness is defined in the general part of the proposed Code (section 302). It exists where there is conscious disregard of excessive danger to life. Note that recklessness "manifesting extreme indifference to the value of human life" leads to murder liability under section 1601(b). On the other hand "criminal negligence," which may exist where the offender did not know of the risk to life but was gravely derelict in failing to recognize it, leads to liability for negligent homicide, a Class C felony, under proposed section 1603.

Recognition of three grades of unintentional homicide follows modern Code precedents, and changes existing Federal law which presently draws no legislative distinction between criminal negligence and recklessness.[5] The maximum penalty would be increased for conscious recklessness, which would put the homicide at the Class B felony level.

7. *Manslaughter Under Excusable "Emotional Disturbance."*—The common law and existing Federal law,[6] carve out of murder certain intentional killings resulting from "sudden quarrel or heat of passion," affording a lower range of penalties for such cases. The rationale is that persons who behave homicidally only under serious provocation do not present so great a threat to general security. Also, it has been argued, if the offender was beside himself with anger or other emotion, it is useless to employ the gravest sanctions against him, as one might hopefully try to deter a coldblooded killer with the threat of

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[4] "[O]ne who engages in such crimes as robbery, or rape, or arson, or larceny, must contemplate the probability of resistance from his victims. The risks taken by such criminals are notoriously dangerous not only to the participants therein, but to innocent victims who may be in the vicinity. *Lee* v. *United States*, 112 F.2d 46, 49 (D.C.Cir. 1940).

Some States have had great difficulty with this concept of causation, however. *See United States ex rel. Almeida* v. *Rundle*, 255 F. Supp. 936 (E.D. Pa. 1966), *cert. denied*, 393 U.S. 863 (1968), for an account of Pennsylvania's changes in case law on this subject. New York, in adopting a new penal law, has specifically provided that one is responsible for felony-murder only if he or another participant in the crime "causes the death of a person other than one of the participants," and makes it an affirmative defense for an accomplice that he "did not commit the homicidal act or in any way solicit, command, importune, cause, or aid the commission thereof . . ." N.Y. REV. PEN. LAW § 125.25(3) (McKinney 1967).

*A second alternative, proposed in the Study Draft, would be to adopt the "felony-murder" provision of the New York Penal Law (section 125.25). The New York provision is more specific in its application, but establishes stricter standards of responsibility and provides defenses only for accomplices. *See* Study Draft comment.

[5] "[T]he amount or degree or character of the negligence to be proven in a criminal case is gross negligence . . . 'Gross negligence' is to defined as exacting proof of a wanton or reckless disregard for human life." *United States* v. *Pardee*, 368 F.2d 368, 374 (4th Cir. 1966) (citation omitted).

*18 U.S.C. § 1112(a).

capital punishment. The violently moved killer is beyond such calculations. Therefore, considerations of humanity and "economy in punishment" call for mitigation.

Existing Federal law is, however, defective in several respects. The "sudden quarrel or heat of passion" formula may have been adequate when all murder was punishable by death, but it is too loose in the present day legal context. One who intentionally and coldbloodedly kills another with whom he is quarreling is a proper candidate for a murder conviction. "Heat of passion" is an antique phrase misleading to a jury without qualifications about what caused the passion, which the courts have read into the statute. On the other hand, the judicially created rules need revision too. They too narrowly circumscribe the admissible provocations as follows:

(a) Words, it is said, cannot constitute sufficient provocation. Thus racial slurs, sexual taunts, reflections on the chastity of women relatives and the like, are apparently excluded, regardless of the passion they arouse.[7]

(b) It appears that misdirected, passionate reaction, resulting in the death of somebody other than the provoker, does not mitigate.[8]

(c) It appears that deeply felt affronts such as seduction of a sister, betrayals in friendship, and the like, however violent and blinding the reaction to the affront, do not count.[9]

(d) Powerful but delayed reactions seem to be excluded by a requirement of impulsive and immediate response: thus the man

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[7] "It is well settled by the authorities that mere words, however aggravating are not sufficient to reduce the crime from murder to manslaughter." *Allen* v. *United States*, 164 U.S. 492, 497 (1896).

[8] "[The passion] must spring from some wrongful act of the party slain at the time of the homicide . . ." *Collins* v. *United States*, 150 U.S. 62, 65 (1893).

[9] *E.g.*, in *Andersen* v. *United States*, 170 U.S. 491 (1898), affirming the murder conviction of a crewman who had killed a ship's officer, the Supreme Court upheld a ruling of the trial court refusing to admit evidence of events prior to the day of the killing. The Supreme Court stated:

> [N]o overt act on the mate's part provoked the evil intent with which Andersen sought him out on this occasion [the time of the killing]. . . . We are not insensible to the suggestion that persons confined to the narrow limits of a small vessel, alone upon the sea, are placed in a situation where brutal conduct on the part of their superiors, from which there is then no possible escape, may possess special circumstances of aggravation. But that does not furnish ground for the particular sufferer from such conduct to take the law into his own hands . . ." (170 U.S. at 509).

Cf. Fisher v. *United States*, 328 U.S. 463 (1946). The Supreme Court upheld the first degree murder conviction of a man who was mentally deficient, but not legally insane. Mr. Justice Frankfurter, dissenting, contended that insufficient consideration had been given to the effect of the deceased's provocation upon the defendant.

> On the fatal morning, Miss Reardon told Fisher that he was not doing the work for which he was being paid, and in the course of her scolding called him a "black nigger". This made him angry—no white person, he claimed, had ever called him that—and he struck her. She ran screaming towards the window in the back of the room . . . The importance of the screaming is a key to the tragedy. It is difficult to disbelieve Fisher's account that he never wanted to kill Miss Reardon but wanted only to stop her screaming. (328 U.S. at 479) (dissenting opinion).

who is put in a passion by "brooding" over his affront is excluded from mitigation.[10]

In addition, the traditional rule describes the emotional state necessary for mitigation in psychologically unrealistic terms. It is said that the offender must be so aroused as to be "beyond the control of reason" or "unable to resist the impulse." [11] Few psychiatrists could testify honestly and confidently on such an issue.

In place of these arbitrary limitations, the proposed draft substitutes a more flexible test of extreme emotional disturbance for which there is some excuse. Note that it is not the homicide that is excusable (it remains, in fact, a grave felony although punishable by lesser penalties) but the emotional disturbance. The reason for requiring that the disturbance be excusable is to exclude situations where the offender has culpably brought about his own emotional state, for example, by drugs, by sexual aggression, by involving himself in a crime which is itself the cause of his excitement.

Further, the Model Penal Code formulation for manslaughter—a homicide "committed under the influence of extreme mental or emotional disturbance, for which there is reasonable explanation or excuse" [12]—has been modified in the proposed draft by deleting reference to "mental" disturbance for which there is reasonable "explanation." We do so precisely in order to eliminate from the class of intentional killers whose culpability may be mitigated those who calculate that some grievance can be redressed by a calmly premeditated killing or by assassination. We would confine the lesser culpability for manslaughter to those who, when they kill, act under extreme, overwhelming emotion, those who are at the time on the border line of rationality.

8. *Negligent Homicide.*—As pointed out in paragraph 6, above, Federal law does not have a distinct offense of negligent homicide. Negligent behavior leading to death is, however, proscribed in special homi-

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[10] *Andersen* v. *United States*, 170 U.S. 481, 510 (1898):

> The law in recognition of the frailty of human nature, regards a homicide committed under the influence of sudden passion, or in hot blood, produced by adequate cause, and before a reasonable time has elapsed for the blood to cool, as an offense of a less heinous character than murder. But if there be sufficient time for the passions to subside, and shaken reason to resume its sway, no such distinction can be entertained.

In *Bell* v. *United States*, 47 F.2d 438 (D.C. Cir. 1931), the woman with whom defendant had lived for over a year returned to her first husband. The defendant loved her. Shortly after she left him, he drove to her office, confronted her when she was alone, and shot her. The Court held that these facts did not warrant consideration of a manslaughter charge.

[11] "An unlawful killing in the sudden heat of passion—whether produced by rage, resentment, anger, terror or fear—is reduced from murder to manslaughter only if there was adequate provocation, such as might naturally induce a reasonable man in the passion of the moment to lose self control and commit the act on impulse and without reflection." *Austin* v. *United States*, 382 F.2d 129, 137 (D.C. Cir. 1967).

"The rule is that provocation, in order to be sufficient, must be such as is calculated to produce hot blood, or irresistible passion in the mind of a reasonable man or of an average man of ordinary self-control." *Hart* v. *United States*, 130 F.2d 456, 458 (D.C. Cir. 1942).

[12] MODEL PENAL CODE § 210.3(1) (P.O.D. 1962) [emphasis added].

cide statutes: 18 U.S.C. § 1716 (death resulting from the mailing of poison or other dangerous articles); 18 U.S.C. §§ 832, 833, 834 (death resulting from the shipment of explosives or other dangerous articles in interstate commerce); 18 U.S.C. § 1115 (death resulting through the negligence of ship's officers). A negligent homicide in the latter two instances is presently punishable by up to 10 years' imprisonment: one who causes death through the mailing of a dangerous article is punishable, under 18 U.S.C. § 1716, by death or life imprisonment. Further, manslaughter as presently defined in 18 U.S.C. § 1112 embraces both reckless and negligent homicide without penalty distinction. By the proposed statutes, penalties will be distinguished in accordance with whether the crime was reckless or negligent. Negligence is defined in the general part of the proposed new Code so as to make clear, as 18 U.S.C. § 1112 does not, that criminal negligence requires gross negligence, *i.e.*, a substantial and not merely a marginal default such as suffices for civil liability.

9. *Misdemeanor-Manslaughter Rule Repealed.*—Section 1112(a) of Title 18 defines involuntary manslaughter to include killing resulting from "an unlawful act not amounting to a felony" or from performance of a lawful act "in an unlawful manner . . . which might produce death." In other words, the section purports to extend manslaughter liability quite beyond the bounds of negligence or behavior which unreasonably risks life. If taken at its fact value,[13] this would wholly undermine the distinction between civil and criminal liability. Every person who drives a car in an "unlawful manner," *i.e.*, in violation of any provision of the motor vehicle code, would become guilty of manslaughter were he involved in a fatal accident, whether or not his behavior could be considered negligent or reckless. In some instances, a fatal accident would make a man guilty of a felony, although apart from the death he would have been guilty of no crime at all. This would be so, for example, where defendant operated a machine other than an automobile in a manner violating a valid civil regulation, or in a careless manner sufficient to give rise to civil liability.

10. *Disposition of Special Homicide Statutes.*—The special homicide laws would be repealed. They are useful only for jurisdictional purposes, both investigative and prosecutive, and beyond that provide for penalties and definitions of culpability inconsistent with each other

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[13] It has not been: "[M]ore is necessary to establish the regulation-violation as an unlawful act essential to sustain a conviction of involuntary manslaughter under 18 U.S.C. § 1112. We do not agree with the government's contention that any unlawful act proximately causing the death is sufficient to fulfill the demand of the statute that death be the result of an unlawful act. . . . Doubtless [the trial court] was of the opinion, and not illogically, that under the facts of the case the [defendant's] wrong way driving in itself proved the knowingly and needlessly doing of an act in its nature dangerous to life, or a wanton or reckless disregard for human life; therefore, potential danger or recklessness was not made an issue by the evidence. Nevertheless, we think resolution of this question should have been left to the jury. For this determination the jury would be told to measure the conduct of the defendant against all of the existing circumstances and determine therefrom whether what he did was in its nature dangerous to life or grossly negligent." *United States* v. *Pardee*, 368 F.2d 368, 373, 375 (4th Cir. 1966).

and with the homicide provisions.[14] They perform no useful function if the general homicide statute, including a properly comprehensive jurisdictional base, is properly drafted. For example, 18 U.S.C. § 1115, which provides a maximum of 10 years where death results from misconduct in the operation of a vessel, is too severe as respects misconduct where injury was not foreseeable, and not severe enough where the misconduct was reckless, manifesting extreme indifference to the value of human life. Also, its provisions with respect to liability of an owner, charterer, *etc.*, will be covered by a proposed general section on accessories and other accomplices. If there were any special virtue in 18 U.S.C. § 1115, its principle would have to be extended not only to air and surface carriers but to innumerable other situations in modern life where industrial and military research and operations entail high risks. It is notable that the operating misconduct dealt with under 18 U.S.C. § 1115 is not punishable at all if death does not result. This deficiency in the law will be corrected by a proposed statute dealing generally with activities endangering life.

Section 34 of Title 18 authorizes capital punishment or life imprisonment where death results from any of a long list of offenses that may be collectively described as sabotage of air and motor carriers. It is submitted that the section adds nothing useful to the proposed homi-

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[14] The special homicide statutes, for the most part, serve only to needlessly specify various instances in which the Federal jurisdiction will be invoked in homicide case. *See* discussion in paragraph 11, *infra*. Most Federal homicide prosecutions are for crimes committed within the Federal territorial and maritime jurisdiction, *i.e.*, under chapter 24 of the District of Columbia Code (D.C. CODE ANN. §§ 22-2401 2405 (1967)), Indian reservations, military bases, Federal prisons, and ships on the high seas. Beyond this there are some prosecutions for homicides of Federal law enforcement officers; however, though assaults on such officers occur with some frequency, the killing of Federal agents is quite rare.

Other homicides which can be prosecuted Federally include any killing of the President or Vice President (18 U.S.C. § 1751); death resultnig from the mailing of poisons or other dangerous articles (18 U.S.C. § 1716); death resulting from shipment of explosives or other dangerous articles in interstate commerce (18 U.S.C. §§ 832, 833, 837); death resulting through the negligence of persons charged with caring for the safety of a ship (18 U.S.C. § 1115); death occurring as a result of deliberately wrecking or damaging a motor vehicle, airplane, or train used in interstate commerce (18 U.S.C. §§ 34, 1992); the death of a kidnapped person (18 U.S.C. § 1201); and killing during the commission of a bank robbery (18 U.S.C. § 2113(e)). Though homicide prosecutions under these statutes are quite infrequent, the statutes provide important jurisdictional bases for the use of Federal investigative facilities. For example, investigations of suspicious airplane crashes—a type of investigation which would be difficult for a local law enforcement agency to conduct—are invariably undertaken by Federal authorities.

Further, some notable Federal prosecutions for negligent homicide have arisen from ship disasters. *E.g.*, *United States* v. *Van Schaick*, 134 F. 592 (S.D. N.Y. 1904), concerned a fire aboard the excursion boat *General Slocum* in the East River of New York in which 900 victims, mostly children, died; it was charged that the ship lacked proper life preservers. *United States* v. *Abbot*, 89 F.2d 166 (2d Cir. 1937), concerned the *Morro Castle* fire, when 100 persons died; the crew was able to board lifeboats but some passengers were not.

It might be also noted that the killing of persons trying to exercise constitutional or Federally protected rights has been prosecuted Federally, though the prosecution is based on a violation of a civil rights statue (18 U.S.C. § 241), rather than a homicide provision; legislation currently under debate in Congress (H.R. 2516) would explicitly extend homicide jurisdiction to this area.

cide draft and should be repealed. It is a special instance of the felony-murder rule discussed in paragraph 5, above.

Similar considerations apply to section 1992 of Title 18 (death in railroad sabotage). It should be repealed.

Section 2112(e) of Title 18 deals with death in the course of a bank robbery. It is probable that this provision like others noted above, was basically intended to confer Federal jurisdiction over the homicide to parallel the Federal jurisdiction assumed over the bank robbery. We propose to deal with the jurisdictional issue directly in a separate provision. Accordingly, 18 U.S.C. § 2112(e), with its anomalous sentencing and felony-murder provisions, should be repealed.

11. *Federal Jurisdiction.*—Federal jurisdiction over homicide has been exercised and is in force in the following situations:

(a) within the special maritime and territorial jurisdiction:

(b) when death results from sabotage, or certain cases of reckless or negligent destruction of "Federal" transportation facilities;

(c) when the victim is the President of the United States, the Vice President, or successors to the office;

(d) when the victim is engaged in performing Federal functions;

(e) when the victim was killed "on account of the performance of his official duties:"

(f) when death occurs in connection with a federally punishable bank robbery.

It is proposed to extend Federal jurisdiction of homicide to the following situations:

(a) when death occurs in connection with any Federally punishable robbery or burglary, for example, of a Post Office or under the Antiracketeering Act (18 U.S.C. § 1951);

(b) when death occurs in connection with any Federally punishable obstruction of justice, for example, intimidating witnesses and jurors (18 U.S.C. § § 1503 and 1505);

(c) when death occurs in connection with Federally punishable conspiracies against civil rights [15] (18 U.S.C. § 241).

It should be observed that the recommended extensions would simply provide homicide jurisdiction where Federal jurisdiction already exists for what amounts to assault, *i.e.*, the intimidations involved in robbery, extortion, threatening witnesses, coercing electors, *etc.* It seems anomalous to make lesser offenses a Federal responsibility while entrusting the gravest and most difficult cases exclusively to the States. Perhaps the principle could be stated as broadly as:

(d) when the death occurs in connection with any other Federal (offense) (crime of violence).

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[15] Federal jurisdiction now exists over homicides occurring during an offense defined by the Civil Rights Act of 1968 (18 U.S.C. § 245).

COMMENT
on
ASSAULTS, LIFE ENDANGERING BEHAVIOR, AND THREATS: SECTIONS 1611–1616
(Stein; Apr. 10, 1968)

1. *Background; Present, Federal Law.*—Criminal "assault" is not defined by the existing Federal Criminal Code, just as the crime is undefined in the majority of State Criminal Codes. Section 113 of Title 18 simply states the punishment for anyone who is "guilty of an assault" within the special maritime and territorial jurisdiction of the United States. The penalties range from not more than 3 months' imprisonment for assault "by striking, beating, or wounding," to crimes of aggravated assault which are felonies. The three types of assault are (a) assault with intent to commit murder or rape (imprisonment up to 20 years), (b) assault with intent to commit any other felony (up to 10 years' imprisonment), and (c) assault with a dangerous weapon, with intent to do bodily harm (up to 5 years' imprisonment). Additionally, "maiming" (the common law crime of "mayhem") is proscribed by 18 U.S.C. § 114. That crime is defined as the cutting, biting, or slitting of the nose, ear, or lip; or the cutting out or disabling of the tongue; or the putting out or destroying of an eye; or the cutting off or disabling of a limb or any other member; or the throwing of scalding water, corrosive acid, or caustic substance upon anyone, with intent to maim or disfigure.

Absent statutory definition of "assault," existing Federal law rests on common law definitions of the crime. At common law, actually striking or unlawfully touching another person is termed a "battery"; an attempt to commit the "battery" would be "assault." Assault includes:

> An attempt with force or violence to do a corporal injury to another; and may consist of any act tending to such corporal injury, accompanied with such circumstances as denotes at the time an intention, coupled with present ability, of using actual violence against the person.[1]

But "assault" can also be committed "merely by putting another in apprehension of harm, whether or not the actor actually intends to inflict, or is capable of inflicting that harm." [2] Thus, one can commit an assault on a person simply by pointing a gun at him and putting him in fear, even if the gun is not loaded.[3]

In present Federal law, the term "assault" refers both to assault and to battery, as in 18 U.S.C. § 113(c) ("assault by striking, beating,

[1] *Guarro* v. *United States*, 237 F.2d 578,, 580 (D.C. Cir. 1956).
[2] *Ladner* v. *United States*, 358 U.S. 169, 177 (1959).
[3] *Price* v. *United States*, 156 F. 950 (9th Cir. 1907).

or wounding"). The crime of assault, therefore, has three aspects: (a) the commission of acts which actually inflict injury upon another, (b) the commission of acts in an effort to inflict injury upon another which, however, do not succeed (shooting and missing, for example), and (c) the commission of acts in order to put another person in fear, even though there is no real intent to injure him. As presently defined, the crime of assault need not involve violence or the threat of violence. The touching of another for sexual purposes—a stolen kiss, perhaps, or a homosexual advance—constitutes assault.[4]

In addition to the basic Federal assault statute, 18 U.S.C. § 113, there are a good number of other statutes in the Federal Code dealing with assault.[5] These other statutes define jurisdiction and punishment, not the crime. Typical is 18 U.S.C. § 111, punishing anyone who "forcibly assaults, resists, opposes, impedes, intimidates, or interferes with [a Federal officer or employee] while engaged in or on account of the performance of his official duties. . . ." Aside from assaults on Federal soil, this is the most common type of assault in the Federal jurisdiction. Other Federal statutes in the area of criminal assaults proscribe the commission or threat of "physical violence" or doing acts with an "intent to injure."[6]

2. *Grading.*—There are absurd inconsistencies of punishment resulting from the hodgepodge of Federal statutes dealing with assaultive behavior. At present, maiming is punishable by up to 7 years' imprisonment (18 U.S.C. § 114). But an assault on a public officer, regardless of the injury actually inflicted, is punishable by only 3 years' imprisonment if no dangerous weapon is used, and up to 10 years' imprisonment if a dangerous weapon is used (18 U.S.C. § 111). Imprisonment up to 10 years is the maximum present penalty for a civil rights assault (18 U.S.C. § 241). But assaults on witnesses in Federal courts and administrative proceedings can be punished by 5 years' imprisonment as a maximum (18 U.S.C. §§ 1503, 1505). And an assault on a server of Federal process can lead to but 1 year's imprisonment (18 U.S.C. § 1501). On the other hand, if any injury results from the wrecking of interstate transportation facilities or from an attack on the operator of the facilities, the crime may be punished with up to 20 years' imprisonment (18 U.S.C. §§ 32, 33, 1992, 2275). And an assault on a person during the commission of a bank robbery can lead to 25 years' imprisonment (18 U.S.C. § 2113(d)). Any assault on a crewmember of an airplane, including a stewardess, while the plane is in flight can be punished by 20 years' imprisonment (49 U.S.C. § 1472). An assault on the President of the United States, however, is punishable by a maximum of 10 years' imprisonment, regardless of the extent of injury (18 U.S.C. § 1751(e)). Further, one who "obstructs, delays, or affects commerce" by robbery or extortion and "commits or

[4] ". . . [N]on-violent actions involving sexual misconduct may constitute assaults. In such a case, 'threat or danger of physical suffering or injury in the ordinary sense is not necessary. The injury suffered by the innocent victim may be the fear, shame, and mental anguish caused by the assault.'" *Guarro* v. *United States*, 237 F.2d 578, 580 (D.C. Cir. 1956), *quoting Beausolicl* v. *United States*, 107 F.2d 292, 296–297 (D.C. Cir. 1939).

[5] The statutes are described in the appendix, *infra*. *See* paragraph 6, *infra*.

[6] *E.g.*, 18 U.S.C. § 837 (transportation of explosives with intent to injure); 18 U.S.C. § 1716 (mailing injurious articles, with intent to injure); 18 U.S.C. § 1951 (interference with interstate commerce by violence); 18 U.S.C. § 1952 (traveling or using communications facilities for the purpose of committing a "crime of violence" to further gambling or certain other unlawful activities).

threatens physical violence" in furtherance thereof is punishable by up to 20 years' imprisonment (18 U.S.C. § 1951), but one who "travels in interstate or foreign commerce" to "commit any crime of violence" to further certain unlawful activities (gambling, prostitution, *etc.*), risks but 5 years of Federal imprisonment (18 U.S.C. § 1952).

It is suggested that these unreasonably inconsistent penalties be eliminated. A racketeer who travels across the country to beat up, maim, or torture a person in order to take over local gambling operations commits as serious a crime as a gangster who beats up a truck-driver to further some extortionate plan. It is proposed that the different circumstances be treated for what they are—bases for jurisdiction—and not for differentiating the available maximum penalty.

In the draft, assault is graded as either a Class C felony or a misdemeanor, depending on the nature of the injury inflicted, risked, or threatened. There will be assaults punishable more severely, but these will be punished as attempted murder or rape, or as composite crimes, such as robbery or extortion. Perhaps, however, any intentional infliction of a crippling injury upon another should be graded as a Class B felony, regardless of whether robbery, rape or another crime was intended.

3. *Assault; Actual Infliction of Injury.*—Sections 1611 and 1612 define assault as "causing" bodily injury. Therefore, the crime of assault, as defined in the draft, refers only to the completed battery: other assaults are dealt with either as separately defined crimes of menace or endangerment, or as attempted assault.

Under section 1611 infliction of bodily injury is a misdemeanor. If the injury is serious, the crime is a felony under section 1612. There is no reason to distinguish, as present Federal law does, between a serious injury resulting from a severe beating (now merely a misdemeanor under 18 U.S.C. § 113(d)) and injury resulting from an act of maiming.

In present Federal law, reckless infliction of injury is punishable on the same level as intentional inflict of injury.[7] The draft retains this rule. This concept may seem harsh when applied to statutes which would distinguish between felonious and simple assault in accordance with whether or not serious injury was inflicted. The distinction is most meaningful when one intended or knew he was inflicting serious injury. A distinction between reckless behavior which leads to serious injury and reckless behavior which, through fortunate happenstance, does not, may seem too small to punish the former as a felony and the latter as a misdemeanor.

The distinction between felony and misdemeanor, however, is made to depend upon result, rather than upon the defendant's behavior.[8] We

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[7] "The law has regard for personal safety and human life and if one with reckless indifference to results injures another it holds him to have intended the consequences of his act and treats him as if he had done an intentional wrong." *Fish* v. *Michigan*, 62 F.2d 659, 661 (6th Cir. 1933).

[8] Present law does make such distinctions. *E.g.*, 18 U.S.C., § § 832 and 833 proscribe the transportation of explosives or other dangerous items in a common carrier or in violation of ICC regulations. One who violates the statutes may be imprisoned by up to 1 year's imprisonment, but if death or bodily injury results from the violation he may be imprisoned up to 10 years. *But cf.* 18 U.S.C. § 1716, proscribing the mailing of dangerous items; violation of this section is punishable by up to 1 year's imprisonment. However, if one mails such items, intending to kill or injure another or to damage property, he may be punished by up to 20 years' imprisonment.

cannot avoid basing some statutes on result: measurement of a person's misconduct is clearest when one sees the actual results. Reckless homicide statutes, for example, necessarily depend on whether a person lives or dies. The draft deals similarly with assault. However, reckless behavior is also dealt with separately, in a reckless endangerment statute, in which reckless conduct generally is punishable as a misdemeanor, but extreme recklessness is made felonious, regardless of whether injury is actually inflicted.

Negligent infliction of injury is, under section 1611, punished as a misdemeanor if a weapon is used. The draft here is designed to discourage improper handling of weapons. Negligence in handling weapons is especially culpable because the potentiality of danger is manifest. Further, under section 1612, as in present Federal law (18 U.S.C. § 113(c)), knowing use of a dangerous weapon against another is a felony, regardless of the nature of the injury actually inflicted.

The proposed definition of simple assault does not include the old assault concept of "offensive touching." This type of "assault," where bodily injury is neither intended nor inflicted, generally arises as a punishable act only in cases of sexual offense. Such cases should be dealt with in the area of sexual offenses, rather than in crimes involving personal injury, so that necessary differentiations concerning those convicted can be made for treatment and statistical purposes.

4. *Reckless Endangerment.*—An unsuccessful effort to injure someone is properly handled, as under existing Federal law, as a form of assault.[9] A separate statute, however, is needed to cover reckless risk of serious injury. Section 1613 defines a crime of "reckless endangerment," distinguishing between extreme recklessness risking life and recklessness risking serious injury.

Recklessness so extreme as to "manifest extreme indifference to human life" is made a felony. Such extreme recklessness would be indicated by recklessly risking the lives of a number of persons—shooting aimlessly into a crowd, for example, or damaging an airplane. Such acts manifest, at least, gross moral impairment. Or it would be indicated by behavior which creates so high a probability of a person's death that for ordinary, reasonable people the proper inference would be that the person intended the consequence or knew it would follow. One who shoots in the direction of another person but misses, or mails to him an explosive device which fails to go off, would be guilty of reckless endangerment, if not attempted murder. The defendant would be guilty of a Class C felony, and not the higher crime, if evidence of intent to kill is lacking. Under the draft, lesser instances of recklessness are misdemeanors.

It would not be necessary that the defendant actually place another in danger in order to be guilty of reckless endangerment. The pro-

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[9] An unsuccessful attempt to hurt someone seriously, but not to kill him (*e.g.*, throwing acid at another, and missing) is an attempted assault. Attempted aggravated assault will be either a Class C felony or a misdemeanor, depending on how close the assaultive acts come to actually injuring a person (section 1001). Thereupon, when a weapon is directed against a person under circumstances indictating "an intent or readiness to inflict serious bodily injury" (section 1612 (1) (b)) the offense is a felony.

posed statute deals with prospective risks, as do statutes in present Federal law dealing with certain types of reckless behavior.[10]

5. *Terrorizing and Menacing.*—Sections 1614 and 1616 are intended to cover that area traditionally considered "assault," in which a person is deliberately put in fear, regardless of whether the defendant may actually intend bodily harm.[11] The threat may be a prank, or may be made in anger; while there may be no intent to inflict actual injury, such acts can be intended to cause fear.[12] Such deeds have been traditionally punishable as misdemeanors.

But there can be deeds deliberately designed to instill fear in a large number of people, or to so affect an individual as to disrupt normal life patterns. In short, the proposal conceives of a type of assault, in form of threat, which warrants more than a misdemeanor punishment.

Present Federal law already recognizes that some forms of threat can be quite serious. Section 871 of Title 18 punishes, by up to 5 years' imprisonment, the making of threats against the President or Vice President. Sections 876 and 877 of Title 18 proscribe the mailing of communications to any person threatening to injure that person or another; this crime, too, is punishable by up to 5 years' imprisonment. These laws make no distinction, however, between the relatively harmless expression of anger and a threat more serious in its impact.[13] The proposed statutes would permit differentiation between a serious and a relatively minor threat against an individual.

Insofar as public inconvenience is concerned, present law not only recognizes the seriousness of making threats against the President, but also proscribes such deeds as making false reports that there are bombs planted in public buildings (18 U.S.C. § 837(d)), or in airplanes, trains, ships and the like (18 U.S.C. § 35; *see also* 49 U.S.C. § 1472(m)). As in present Federal law, it is the making of such threats that will be illegal under the proposed statute, regardless of whether the defendant actually plans to carry out the threat.[14]

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[10] *E.g.*, 18 U.S.C. §§ 832–833, 1716, discussed *supra*, note 8. "Common to all of these statutes is a legislative judgment that the specified conduct entails a serious risk to life or limb, a risk out of proportion to the possible utility of the conduct." MODEL PENAL CODE § 201.11, Comment at 86 (Tent. Draft No. 9, 1959).

[11] These provisions are not intended to cover threats motivated by another criminal purpose, such as robbery, extortion, or blackmail, which will be dealt with separately.

[12] As in pointing an unloaded gun; *see* note 3, *supra*. Remote or merely verbal threats are excluded from the menacing statute by requiring that the victim be menaced with imminent serious injury.

[13] *E.g.*, in *Michaud v. United States*, 350 F.2d 131 (10th Cir. 1965), and *Pierce* v. *United States*, 365 F.2d 292 (10th Cir. 1966), it might appear that threats made against the President were one-time-only, stupid and reckless pranks, while in *Reid* v. *United States*, 136 F.2d 476 (5th Cir.), *cert denied*, 320 U.S. 775 (1943), the evidence indicated that the defendant's threats against the President were constant, consistent, and motivated by real political hatred. Both types of threats may be considered "reckless," at least, and any threat, even a prank, which could cause serious disruption or inconvenience may be prosecuted as a form of terrorizing. If, however, a foolish prank produces or threatens no real inconvenience, it would not be a crime under the proposed draft.

[14] *E.g.*, *Michaud* v. *United States*, 350 F.2d 131 (10th Cir. 1965), and *Pierce* v. *United States*, 365 F.2d 292 (10th Cir. 1966), discussed at note 13, *supra*. If evidence indicates that there were plans actually to carry out the threat, the crime could be prosecuted as an attempt or conspiracy to do whatever deed was planned.

6. *Federal Jurisdiction; Disposition of Special Assault Statutes.*—As indicated by the table of Federal statutes in the appendix, *infra*, a good number of Federal statutes deal with assaultive conduct. These special statutes, like the special homicide statutes, are useful only for jurisdictional purposes; beyond that they are inconsistent in penalties and definitions of culpability and sometimes unduly limited in scope. They can be eliminated when a comprehensive jurisdictional statute is drafted.

Section 111 of Title 18 deals with those who "assault, resist, oppose, impede, intimidate, or interfere with" certain specified Federal public servants.[15] To the extent that these officials are injured, endangered, or menaced, their assailants can be punished under the provisions of the proposed chapter. But the interest in punishing assaults on these officials goes beyond protection of the individual from injury; the government has a special interest in "assur[ing] the carrying out of Federal purposes and interests." [16] Conduct not amounting to an assault, or assaultive conduct substantially interfering with government operations, will be punishable under provisions in chapter 13 of the new Code, dealing with resistance to and obstruction of justice, legislation, and Federal functions.

Section 913 of Title 18 proscribes arrests or searches by a person under the guise of being a Federal officer. Since there is a Federal interest in protecting Federal credentials, this jurisdictional basis could be extended to assaults as well as other serious crimes committed under purported Federal authority.

Additionally, as proposed in the commentary on homicide, homicide jurisdiction should be made coextensive with assault jurisdiction, thereby assuring that foreign diplomats and officials, witnesses in Federal proceedings and congressional inquiries, and other persons presently protected by Federal law shall be federally protected from attack regardless of whether they live or die.

Finally, consideration might be given to extending Federal jurisdiction over crimes of reckless endangerment to cover serious injuries resulting from any, or specified, regulatory offenses. At present, this would include offenses such as the reckless transportation of explosives or other dangerous items, or the reckless mailing of such items. (*See* paragraph 4, *supra*.) This might be done by a statute conferring jurisdiction when injury is caused by conduct prohibited by any criminal provision—or specified criminal provisions—of the Federal law.

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[15] The list of public servants covered, it may be noted, is overly specific and incomplete. Officials such as cabinet members and military officers are not covered. Each time a governmental reorganization takes place, the list becomes outdated. It would seem to be much better simply to apply Federal jurisdiction to all cases where a Federal employee is attacked in the course of or on account of his duties.

[16] *Ladner* v. *United States*, 358 U.S. 169, 176 (1958). "Clearly," the Supreme Court commented with respect to this statute, "one may resist, oppose or impede the officers or interfere with the performance of their duties without placing them in personal danger." *Id.*

APPENDIX

TABLE OF FEDERAL CRIMINAL STATUTES CONCERNING ASSAULT AND RELATED CRIMES

Nature of offense	(A) Territorial or maritime jurisdiction	(B) Government or official as victim	(C) Use of mails, telephone, *etc.*	(D) Transporting across or crossing State lines	(E) Introducing into or "affecting" commerce	(F) Use of national security exchange	(G) Federal financial backing
Assault	18 U.S.C. § 113, assaults; 18 U.S.C. § 114, maiming; 18 U.S.C. § 1153, assault by Indian in Indian country; 18 U.S.C. § 1655, piracy; seaman assaulting his commander to hinder his defense of his vessel; 18 U.S.C. § 1859, forceful interference or prevention of a survey of public lands or a private land claim which may be confirmed by the United States; 18 U.S.C. § 1991, entering railroad train on Federal territory to commit violence upon a passenger or railroadman; 18 U.S.C. § 2191, shipmaster's cruelty to seaman; 18 U.S.C. § 2193, mutiny; 46 U.S.C. § 701 merchant seaman assaulting ship's officer.	Numerous [1]	18 U.S.C. § 1716, mailing injurious articles with intent to injure; 18 U.S.C. § 1952, using communication facilities for purpose of committing a crime of violence to further certain unlawful activities.	18 U.S.C. § 837, transportation of explosives with intent to injure a person; 18 U.S.C. § 1231, transportation of strikebreakers to forcefully disrupt peaceful picketing or collective bargaining; 18 U.S.C. § 1952, traveling for purpose of committing crime of violence to further certain unlawful activities.	18 U.S.C. § 1951, interference with interstate commerce by violence.	----------	18 U.S.C. § 1860, intimidation of person bidding for public lands offered for public sale; 18 U.S.C. § 2113, assault on any person while robbing a bank.

[1] See footnote at end of table.

TABLE OF FEDERAL CRIMINAL STATUTES CONCERNING ASSAULT AND RELATED CRIMES—Continued

Nature of offense	(H) Article or vehicle in interstate commerce	(I) Misrepresentation of Federal authority; impersonation	(J) Perpetrated by Federal official	(K) Federal judicial process	(L) Civil rights Federal; elections	(M) Bankruptcy	(N) Foreign government
Assault	18 U.S.C. §32, incapacitating member of aircraft crew engaged in commerce; 18 U.S.C. § 33, incapacitating driver of motor vehicle engaged in commerce.	18 U.S.C. § 913, arrest, detention or search in guise of Federal official.	18 U.S.C. § 593, interference by force of officer or member of U.S. Armed Forces in State elections; 18 U.S.C. § 2234, executing a search warrant with unnecessary severity.	18 U.S.C. § 1501, assaulting process server executing a Federal judicial writ or process; 18 U.S.C. § 1502, obstruction or resistance to U.S. extradition agent executing his duties; 18 U.S.C. § 1503, injury of party, witness, juror in Federal judicial case and injury of judicial officers, commissioners, or magistrates on account of official duties; 18 U.S.C. § 1505, injury of a party or witness before Federal agency or in connection with a congressional investigation; 18 U.S.C. § 1509, forceful interference with performance of a Federal court order.	18 U.S.C. §241, 245, conspiracy to injure or intimidate person to prevent his exercise of civil rights; 18 U.S.C. § 594, intimidation or coercion of a voter in any election for Federal offices.	----------	18 U.S.C. § 112, assaulting heads of government, ministers, and diplomatic officials of foreign governments.

[1] 18 U.S.C. § 111, assaulting specified officers and employees in the course of or on account of their duties; 18 U.S.C. § 372, conspiring to injure public officer on account of this duties or while in the course of his duties; 18 U.S.C. § 1501, assaulting process server executing a Federal judicial writ or process; 18 U.S.C. § 1502, obstruction or resistance to U.S. extradition agent executing his duties; 18 U.S.C. § 1751, assault on the President, Vice President, President-elect, Vice-President-elect or any person lawfully acting as President; 18 U.S.C. § 1859, hindrance of person assigned to make land survey in accordance with instructions of Director of Bureau of Land Management; 18 U.S.C. § 2116, assault on a postal clerk in discharge of his duties in a railroad car or portion of steamboat used for Post Office, 18 U. S.C. § 2114, assault (with intent to rob) on any person in custody of mail, money, or property of United States; 18 U.S.C. § 2231, assault on person authorized to execute search warrant or making a search in performance of his duties; 7 U.S.C. § 60 (agriculture), assault on an employee enforcing Federal cotton standards; 7 U.S.C. § 86, assault on an employee enforcing Federal grain standards; 46 U.S.C. § 324 (shipping), assault on an officer executing ship's registry laws.

COMMENT

on

CRIMINAL COERCION: SECTION 1617

(Staff, Stein; September 25, 1968)

1. *Background: Present Federal Law.*—The proposed provision combines several present sections dealing with forms of threat that warrant criminal punishment. The most serious forms of threats will be appropriately covered in separate provisions. Terroristic threats to bodily security, for example, are dealt with in the proposed assault provisions; such threats are criminal regardless of motive. Threats made to obtain money, property, or services will be dealt with in extortion provisions; threats made to obtain sexual satisfaction constitute rape; threats against government officials, jurors, *etc.*, designed to influence their conduct may be dealt with as forms of obstruction of justice. In the provision now proposed, however, we provide a catch-all for miscellaneous situations where the nature of the threat or the object of the threat might not alone be enough to warrant criminal penalties, but in combination be serious enough to call for sanctions.

At present, the subject is dealt with primarily by 18 U.S.C. §§ 873 ("blackmail"), 875 ("interstate communications"), 876 ("mailing threatening communications"), and 877 ("mailing threatening communications from foreign country").[1] The blackmail statute proscribes any demand or receipt "of money or other valuable thing" under "a threat of informing, or as a consideration for not informing, against any violation of any law of the United States." The other cited provisions, insofar as relevant here, proscribe threats "to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime" with intent to "extort any money or other thing of value." Imprisonment of up to 1 year may be imposed for violation of 18 U.S.C. § 873; up to 2 years for violation of the quoted provisions of 18 U.S.C. §§ 875, 876, and 877. In addition, 18 U.S.C. § 872 proscribes acts of extortion by Federal officers or employees, but it seems to be limited, in its terms, to extortion of money or property.

Though the present statutes primarily cover demands for property, the phrase "thing of value" has been interpreted to include matters that do not involve ready pecuniary measurement. For example, a person

[1] Title X of the recently enacted Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, 82 Stat. 197 (1968), added a provision to the District of Columbia Code making it criminal to threaten to "kidnap any person or to injure the person of another or physically damage the property of any person or of another person" and to "transmit . . . any communication containing any threat to injure the property or reputation of the recipient or of another or the reputation of a deceased person or any threat to accuse the recipient of the communication or any other person of a crime. . . ." D.C. CODE ANN. § 22-2306-07 (1968).

may "blackmail" another in order to obtain a job.[2] So, too, he may put pressure on another in order to obtain an unlawful competitive advantage.[3] Federal prosecutions have also arisen in cases concerning threats of both economic and physical harm made for the purpose of securing managerial control of a prizefighter,[4] and threats made to a prosecuting witness for the purpose of preventing the witness from testifying.[5]

2. *Substantive Provisions; Scope of Prohibited Threats.*—Criminal coercion, as defined, may be considered both as a type of assault (threats) and a type of unlawful restraint, since it concerns deprivation of a person's freedom of action. Definition of this crime, therefore, is included in the chapter of the proposed Code dealing with crimes against the person. The proposed "coercion" provision works no great change from existing law. The breadth presently given to the meaning of "thing of value" in Federal courts probably makes existing law equally comprehensive with our proposal. We are, then, basically combining present sections dealing with such offenses, perhaps marginally broadening the threats covered—for example, threats to "expose a secret" as well as "publicize an asserted fact" tending to injure reputation or credit are explicitly made criminal—and articulating defenses that would probably be recognized under present law either through prosecutorial discretion or judicial decision if the question arose.

Under the present statutes, the prosecution must prove an "intent to extort . . . a thing of value" when a criminal threat to ruin reputation or accuse another of a crime is alleged. The proposed statute replaces the vague reference to "thing of value" and applies to any compelled conduct.[6]

There are, of course, many types of common threats designed to compel conduct which ought not be punishable at all. For example: "I won't marry your daughter unless you give us a house;" "Give me a partnership, or else I'll go into business competing with you;" "Admit

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[2] In *United States* v. *Smith*, 228 F. Supp. 345 (E.D. La. 1964), an indictment for blackmail, charging a union representative with threatening to disclose a company's fraud unless certain discharged employees were reemployed, was upheld.

[3] *Cf. United States* v. *Miller*, 340 F.2d 421 (4th Cir. 1965), in which defendant bribed a government officer in order to maintain an advantageous business concession on governmental property. The defendant claimed that he was "extorted" by the official. The court found no extortion in this case, though it noted that, in some cases, the threat of economic harm can be extortion.

[4] *Carbo* v. *United States*, 314 F.2d 718 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964). Threats, both economic and physical, were made by the defendant who was seeking control of a boxing champion, apparently as part of a scheme to control the sport on the West Coast. Defendant was convicted of racketeering (18 U.S.C. § 1951).

[5] Though the memorandum opinion does not discuss the matter, this was apparently the motive behind the threats for which defendant was convicted in *Friedman* v. *United States*, 190 F.2d 364 (6th Cir.), *cert. denied*, 342 U.S. 825 (1951).

[6] If one compels another to engage in criminal conduct, however, the crime of the person compelling the action will be more than "criminal coercion." Acting to compel another to commit a crime itself may constitute an attempt to commit the crime (or a solicitation). *See* the draft definitions of "attempt" and "solicitation." If the crime is completed by the person compelled to do so, the person compelling its commission would be equally culpable as an accomplice. *See also* Professor Weinreb's discussion of causation in the comment on basis of criminal liability; culpability; and causation.

my son to the law school, or I'll change my will." The scope of a criminal coercion statute must, therefore, be carefully limited. The requirement that the threat be with "intent to compel" another works some limit on the scope of the proscription. The actor's belief that the other is in an equal bargaining position would negate compulsion. Further, the proposed statute explicitly provides for defenses that would exculpate well intentioned or socially acceptable types of threats, and provides, as in present law, that only certain types of threats—those normally associated with extortion, blackmail, or official misconduct—may be criminal.

Most of the recent State revisions, enacted and proposed, including the Model Penal Code, contain a similar provision.[7] The present proposal, however, rejects efforts in these Codes to further limit the scope of the statute by describing the conduct sought to be coerced. Thus, section 212.5 of the Model Penal Code proposes a coercion statute that would proscribe threats made "to restrict another's freedom of action to his detriment." But there may be instances in which the conduct unlawfully compelled is not actually detrimental to the person compelled to act. A person, for example, may be compelled to employ someone who is, in fact, a good worker, or may be compelled to use a product that is, in fact, of good quality. Nevertheless, if he is forced to do so by unlawful threat, the compulsion should be criminal.

Alternatively, the New York criminal coercion statute proscribes threats made to compel conduct that the threatened person "has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which he has a legal right to engage."[8] But the requirement of proof in every case of a victim's right to engage in, or abstain from, the behavior compelled by the defendant might best be eliminated from the prosecution's case, since it is an unnecessary burden. In any case where the converse is true—if a person is compelled to abstain from illegal conduct or to engage in conduct from which he may not lawfully abstain (obey a proper superior order, for example)—the person compelling him to act may readily defend against any charge of coercion.

3. *Defenses: Benevolent Purpose.*—Given the broad meaning we propose to give coercion in this statute, it is necessary to set forth explicitly the type of coercive conduct that should not be considered criminal. A definition of privileged "coercion" is set forth in the proposed statute as an affirmative defense, for which the defendant will carry the burden of proof. It is an affirmative defense because

[7] MODEL PENAL CODE § 212.5 (P.O.D. 1962); *See* N.Y. REV. PEN. LAW §§ 135.60–135.75 (McKinney 1967); MICH. REV. CRIM. CODE, § 2125 (Final Draft 1967); CALIFORNIA PENAL CODE REVISION PROJECT § 1533 (Tent. Draft No. 1, 1967). PROPOSED DEL. CRIM. CODE §§ 460–461 (Final Draft 1967); PROPOSED CRIM. CODE FOR PA. § 1105 (1967); TEXAS PENAL CODE REVISION PROJECT § 212.5 (October Report 1967). But note that the constitutionality of Illinois' general "intimidation" statute (Illinois Criminal Code of 1961, section 12–6) is now under consideration by the Supreme Court (*Boyle* v. *Landry*, 280 F. Supp. 938 (N.D. Ill. 1968), *prob. juris noted*, 393 U.S. 974 (1968), *case restored to calendar for reargument*. — U.S. —, 89 S. Ct. 2095 (1969)). The Illinois statute has been attacked as overbroad and impinging on first amendment rights. The Illinois statute, however, does not have the defenses which are designed to limit the scope of the statute proposed here.

[8] N.Y. REV. PEN. LAW § 135.60 (McKinney 1967).

the defendant is in the best position to show that an overtly malicious threat was well motivated.

The defenses provided in subsection (2) of the proposed statute reach behavior that, though threatening and coercive, is not blatantly immoral or normally understood as criminal. Threats, especially threats to reputation, may come up in the course of legitimate bargaining; in context, these threats would ordinarily not appear to be compulsive. But, even if compulsive, threats may be made in an honest effort to "straighten out" the person threatened. For example, a candidate for public office may threaten to attack his opponent's reputation unless his opponent refrains from slandering him in the campaign; a young man may threaten to expose a potential rival's reputation if the latter tries to seduce his girl friend; a parent may threaten to "get arrested too" if his son participates in an unruly demonstration.

The proposed provision provides for exculpation when a person can show that he sought, by his threats, either to compel another into conduct which he truly believed to be for the other's own good, or to require another to make amends for prior wrongful behavior or to avoid future misbehavior. But if the behavior sought by the defendant goes beyond these limits, the crime of coercion has been committed. In cases in which it is claimed that the purpose was to cause the other to conduct himself in his own best interests, the accused must show that this was his primary purpose. There is no exculpation for a coercive scheme which only incidentally benefited the victim—as in the example of an official who coerces another to employ a hard working relative of the official. Where the accused claims that his threats were based on his efforts to require the other to make amends for past misdeeds, avoid future misdeeds, or withhold action in areas in which the other is disqualified, the accused must affirmatively show his belief in those misdeeds or disqualifications. If the party making the threat has no honest complaint of his victim, but issues his threat only so that he may dictate and gain his own demands, he remains criminally liable.[9]

Moreover, an employer who discovers that an employee has stolen funds may, without incurring criminal liability, offer not to expose the crime or make a criminal complaint if the employee returns the amount believed stolen (but no more). The employer commits criminal coercion, however, if he uses his threat to make the employee work for him indefinitely, succumb to him sexually, or otherwise makes demands going beyond the purpose of "making good a wrong done."

The reasons why the proposed provision would, as do other modern codes, permit a victim to obtain legitimate restitution by threat of exposure, is aptly explained in the commentary to section 461 of the Proposed Delaware Criminal Code:[10]

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[9] *E.g.*, *Keys* v. *United States*, 126 F.2d 181 (8th Cir.), *cert. denied*, 316 U.S. 694 (1942), in which defendant threatened to distribute an "educational" pamphlet concerning the dangers of aluminum in cooking unless he received contributions from the aluminum association. Judgment of conviction was affirmed. The proposed provision could also apply to threats to reveal trade secrets or otherwise unfairly ruin a rival business unless the rival refrained from competition. Such monopolistic acts would not constitute legitimate bargaining. *Cf.* 15 U.S.C. § 1, *et seq.*, proscribing illegal conspiracies in restraint of trade, and imposing penalties of imprisonment up to 1 year.

[10] PROPOSED DEL. CRIM. CODE § 461, Comment at 263 (Final Draft 1967).

> It is important to note that this section does not preclude the State from proceeding against the person who has committed the underlying crime. Thus, if an employer catches his cashier with his hand in the till, and offers to forget the matter if full restitution is made, this compromise does not affect the State's right to proceed against the employee for theft. We think it is a natural, and not unreasonable, human motive to try to recover a loss caused by criminal activity, and we do not think that a person who is only trying to secure reasonable restitution for a wrong done to him should be branded a criminal. We therefore do not make such action any sort of a crime. It would be criminal, however, to make an unreasonable demand for restitution, such as triple indemnity.

As in present law, the proposed statute does not provide that truth of the allegations which a person threatens to publicize is a defense; exposure of true secrets and publicity of true but derogatory information can be just as coercive as the spreading of falsehoods. Falsification has its own sanctions—libel or slander suits, for example. Of course, truthful publication of another's secret is, in itself, no crime; it is the effort to force conduct by threat that is the offense. For similar reasons, that threatened official conduct may be justifiable is no defense if the threat is made for coercive purposes. On the other hand, if the threatened official conduct is not lawfully justifiable though made for benevolent purposes, the official may be guilty of a separate offense involving official misconduct. But, for purposes of a criminal coercion statute, the significance of the threat lies in whether it is used to improperly coerce conduct from another.

4. *Grading.*—Criminal coercion, as defined in the proposed provision, is graded as a Class A misdemeanor. This grading roughly approximates grading of such crimes in present law. (*See* paragraph 1, *supra.*) While a few modern Code revisions do grade some forms of criminal coercion as low grade felonies,[11] we believe that any grading of this "catchall" crime higher than a misdemeanor is vulnerable, since it deals with much threatening conduct, the seriousness of which is often difficult to measure. Consider: "I, a public servant in the department of sanitation, won't collect your garbage until the end of the route unless you vote for my daughter as queen of the Labor Day festival:" "I'll knock your teeth out if you mess around with my girl."

Of course, as noted in paragraph 1, above, particular categories of threats for serious purpose—extortion, terrorizing, and the like—

[11] Section 212.5 of the Model Panel Code (P.O.D. 1962) grades criminal coercion as a felony when "the threat is to commit a felony or the actor's purpose is felonious." Section 212.5 of the Texas Penal Code Revision Project (October Report 1967) makes a similar distinction. The New York Revised Penal Law, section 135.65 (McKinney 1967), grades criminal coercion as a felony when the crime is committed by instilling a fear of physical injury or property destruction or when the victim is compelled to commit a felony, injure a person, or violate a duty as a public servant. The proposed California, Delaware, Michigan, and Pennsylvania provisions do not grade criminal coercion above the misdemeanor level. *Cf.* tit. X, Pub. L. 90–351, 82 Stat. 197 D.C. CODE ANN. § 22–2306–07 (1968), making acts of criminal coercion committed in the District of Columbia punishable by up to 20 years' imprisonment!

will be given felony status. The need for felony penalties is obvious in such cases. Thus, threat to commit certain felonies—for example, violent injury to person, or arson—is a form of terrorizing another person and is, moreover, a hallmark of professional racketeering. A public official's threat to take adverse action unless some favor is done for him is tantamount to soliciting a bribe for "a thing of value" and may be punished as a felony. Any overlaps of definition in criminal coercion and extortion (or bribery, or rape) do no more than offer the prosecutor a choice; double punishment for the same act as different crimes will be precluded.

Further, the need for more severe penalties where coercive acts are committed in furtherance of an organized criminal enterprise will be dealt with under other provisions of the new Code which are being developed to provide special treatment for the managers of such enterprises.

5. *Jurisdiction.*—At present, Federal jurisdiction over blackmail and threat offenses exists whenever the threat is communicated by mail (whether domestically of from abroad) [12] and whenever the threat is transmitted, by any means, in interstate commerce.[13] This jurisdiction would be retained, since Federal investigative facilities are most useful in such cases.

Federal jurisdiction also exists when a threat is delivered personally, or in any other manner, if the threat is to inform against any violation of any law of the United States.[14] This complete jurisdiction over such threats should be retained by reference to a specific clause in the proposed catalog of Federal jurisdictional bases, which would confer jurisdiction when information concerning the violation, or alleged violation, of a law of the United States is involved. The Federal interest in this area is obvious.

Complete Federal jurisdiction also exists, under the present statutes, when an extortionate threat is made by an officer or employee of the United States or by any person representing himself to be a Federal officer or employee.[15] This jurisdiction must, of course, be retained in order to effectuate subsection (1) (d) of the proposed provision.

Any threat against the President of the United States or his successors is a matter for Federal jurisdiction under present law.[16] In addition to retaining this jurisdiction, it would seem to be wise to extend jurisdiction to protect any Federal employee against coercive threats. Since the proposed section is so closely related to the proposed assault provisions, it would, indeed, be proper to make jurisdiction here coextensive with the proposed jurisdiction in the assault area with respect to all persons to be protected by Federal law.[17]

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[12] 18 U.S.C. §§ 876, 877.
[13] 18 U.S.C. § 875.
[14] 18 U.S.C. § 873.
[15] 18 U.S.C. § 872.
[16] 18 U.S.C. § 871.
[17] The criminal coercion provision should apply to threats against civil rights victims, foreign diplomats and officials, and all others now protected from assaults by Federal law. Witnesses in Federal proceedings could also receive protection under this section, but threats to intimidate witnesses may be dealt with specifically in obstruction of justice provisions.

Finally, it should be noted that, in order to reach acts of extortion by racketeers, present 18 U.S.C. § 1951 confers Federal jurisdiction in any case of extortion which "obstructs, delays, or affects commerce." Jurisdiction over the proposed coercion section, when it is a lesser offense to extortion, should be conferred to the same extent that it will be conferred in any Federal statute dealing with extortion, since racketeers do operate by use of methods proscribed by the proposed section.[18]

[18] The racketeering statute (18 U.S.C. § 1951) carries a far higher penalty—up to 20 years' imprisonment—than do the other Federal extortion statutes. Of course, professional racketeering warrants the higher penalties. Problems of dealing adequately in the proposed Code with racketeering practices will be dealt with in a future report. (*See* discussion of grading, paragraph 4, *supra*.)

COMMENT
on
CONSENT AS A DEFENSE: SECTION 1619
(Stein; October 29, 1968)

There is scant Federal law on issues concerning consent to unlawful conduct, perhaps because the problem is initially resolved by the definition of the crime itself, at least under the requirement of criminal intent,[1] or by exercise of prosecutorial discretion not to proceed in such cases.

Ordinarily, the significance of a victim's consent depends on the particular crime which has been committed, and issues of consent, where relevant, can be dealt with in the definitions of each particular crime. Crimes such as larceny and rape cannot, by their definition, be committed if the victim consents to turning over his property,[2] or to the sexual encounter, unless elements of force or deceit are involved in obtaining the consent. These are matters which will necessarily be dealt with in defining the crimes themselves. On the other hand, some crimes, such as murder, riot, gambling, prostitution, breach of the peace, or public lewdness, cannot be consented to by the persons immediately involved because it is a general public interest that is at stake, which the definitions of these crimes seek to secure. Here, the lawfulness of the activity depends upon the definition of the crime; consent is irrelevant.[3] A consent provision applicable to all crime therefore states the principle of consent in a tautological manner, to account for those cases in which a crime cannot, by definition, be committed because consented to, or where a public interest is not at stake; for example:[4]

> The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent

[1] *See Morissette* v. *United States*, 342 U.S. 246, 250, (1952), distinguishing "public welfare offenses" which do not require proof of a mental element of culpability from the "universal and persistent" concept that "an injury can amount to a crime only when inflicted by intention."

[2] *See e.g., United States* v. *Oates*, 314 F.2d 593, 594 (4th Cir. 1963); *Ackerson* v. *United States*, 185 F.2d 485 (8th Cir. 1950); *Hite* v. *United States*, 168 F.2d 973, 975 (10th Cir. 1948), concerning the peculiar doctrine that if a victim consents to passage of title, as well as possession, of his property, there is no common law larceny, even if the victim was induced by false pretenses to yield title. Such outmoded concepts can best be dealt with simply by defining a crime of larceny by deception, irrespective of the victim's "consent" *See* proposed section 1732, (P.O.D. 1962).

[3] *See* PERKINS, CRIMINAL LAW 852–861 (1957), for a general discussion of the significance of the victim's consent in criminal law.

[4] MODEL PENAL CODE § 2.11 (P.O.D. 1962). The Model Penal Code provision has been proposed for several of the revisions and proposed revisions of State Criminal Codes. PROPOSED DEL. CRIM. CODE §§ 260–262 (Final Draft 1967); PROPOSED HAWAII PENAL CODE §§ 233–235 (Tent. Draft No. 1, 1968); MICH. REV. CRIM. CODE § 330 (Final Draft, 1967); and PROPOSED CRIM. CODE FOR PA., § 211 (1967).

negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.

Even though unnecessary, it may be useful to include this general rule in a penal code as a statement of one of the general defenses available in a criminal prosecution. But it seems especially inadvisable to do so in the Federal Criminal Code, because, in many Federal crimes, the government is the victim. To include a general consent provision could lead to the defense being raised whenever a government official incorrectly consents to an unlawful course of conduct. In many cases, the person taking unlawful action should know better, despite the improper advice of a government official. If truly misled, the actor should be able to show a "mistake of law," not consent of the "victim."[5] Moreover, many Federal statutes are designed to prevent both individual and public harm, and it cannot always be clear who the true victim is. If a person recklessly mails dangerous explosives, is the government the "victim" because its property may be damaged, or the individual mailmen who handle the package and may be harmed, or the general public whose mail service may be slowed, or just the person to whom the package is mailed? A consent defense which is based on the "harm or evil sought to be prevented" by a particular Federal law could lead to unanticipated and unwarranted interpretation. Proper defenses in the area may include lack of the requisite culpability, or mistake of law; but a general consent provision would merely confuse the proper issues in a case.

However, it is necessary to deal specially with consent to crimes involving infliction of bodily harm or endangerment of others, and proposed section 1619 is offered as a provision to be added to the chapter dealing with such crimes. A consent provision is necessary here because we propose to define assaults as intentionally, knowingly, or recklessly causing bodily injury (proposed sections 1611 and 1612) and reckless endangerment as recklessly risking bodily injury to others (proposed section 1613). Without providing explicit exceptions for consent situations, ordinarily acceptable acts in our society might come within the definition of a crime if our proposed provisions were taken literally. A participant in a football game or boxing match must deliberately "assault" his opponent. A supervisor of employees in a hazardous profession—bridge construction, for example—must ask his men to perform tasks which are clearly dangerous. A doctor or scientist must perform experiments with human volunteers willing to take risks.

Therefore, it is proposed, in section 1619(1)(a), that consent be a defense if the bodily harm consented to is not serious. As well as dealing with many normal participatory risks of work or play, this provision would primarily affect prosecutions for assault in cases of consensual fistfights or scuffles or in cases of private sadomasochistic relationships, if no participant suffers substantial harm. These petty and personal affairs are not of such public interest or Federal concern

[5] *See* Professor Weinreb's discussion of mistake in the Working Paper on basis of criminal liability; culpability; causation.

as to warrant Federal criminal prosecution.[6] The performance of consensual medical operations such as hysterectomies or vasectomies, which are not necessarily justifiable as "promot[ing] the physical or mental health" of the patient (*see* proposed section 605(d) in the chapter on justification and excuse), would also be excluded from criminal liability under the proposed consent provision. Beyond this, if legislation is sought which would make behavior punishable though no harm is caused to the subject—as, for example, in cases of petty scuffles with Federal officials which delay governmental operations or, in the area of medical operations, in cases of abortion—the legislature should give special consideration to the scope of the penal prohibition, and not deal with such specific problems by subsuming them under general assault law.

Section 1611 of our proposed assault provisions declares assaults committed "in an unarmed fight or scuffle entered into by mutual consent" to be a petty misdemeanor. The result of the proposed consent provision, when read with proposed section 1611, would be to exclude from Federal criminal liability those persons who engage in relatively harmless "sparring matches," while preserving the possibility of petty prosecution in cases of bad blood fights "by common consent," which result in substantial, though not permanent, injury to a participant. Infliction of permanent injury as a result of such a fight would be an aggravated assault under proposed section 1612.

Further, subsections (1)(b) and (c) of proposed section 1619 would specifically provide a defense to criminal prosecution whenever the injury inflicted or risked is a "reasonably foreseeable hazard" of a sports competition, occupation, or medical, or scientific experiment. Of course, malicious or grossly negligent acts resulting in serious injury still remain criminal even in a sports, professional, or scientific endeavor. Beating an opponent to obtain the ball, or deliberately or recklessly creating the conditions for an employee's certain injury or death, would not be "reasonably foreseeable hazards." It is also required that the participant in a hazardous occupation or in an experiment be made aware of the particular danger involved. While a participant in a sport is normally as aware of the rules as any fellow

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[6] State courts generally are divided on the issue as to whether such minor affairs should be held criminal:

> The courts generally take the view that an act cannot constitute a criminal assault, a criminal battery, or a criminal assault and battery, if the person on or against whom the act is committed has consented thereto, was legally capable of consenting to the particular act, and the consent has not been obtained by duress or by fraud. But consent to an act otherwise amounting to an assault or battery crime is not a valid defense where the act is one that is prohibited by law, as for example, a mutual combat, or is otherwise against public policy, and thus not only against the interest of the alleged victim, but also against the interest of the whole community.
>
> It has been held that where blows are administered at the request of the person beaten, the person inflicting the blows is not guilty of an assault and battery. However, the opposite view has been taken, based on the reasoning that if a person requests another to beat him, the request is void since it is against the law. (6 AM. JUR. 2D *Assault and Battery* § 66 (1963)).

player, an employee, or volunteer in an experiment may not know as much about the job as the person supervising the job or experiment, and should be informed of the risks he faces.

Proposed subsection (2) of section 1619 establishes that it is no defense to obtain the consent of a person manifestly unable to give his valid consent—either because of mental or physical incompetence or because the consent is obtained by force, duress, or deception. It remains criminal to trick or force a person into doing a dangerous act, or to order a person into a physically dangerous situation, knowing that he is incapable of properly dealing with it.

COMMENT

on

KIDNAPPING AND RELATED OFFENSES: SECTIONS 1631–1639

(Stein; June 17, 1968)

1. Background; Present Federal Law.—The present Federal law regarding unlawful restraint is encompassed in a few statutes: the basic kidnapping [1] statute, known as the "Lindbergh Law," (18 U.S.C. § 1201); kidnapping associated with bank robbery (18 U.S.C. § 2113(e)), and statutes dealing with peonage, slavery, and involuntary servitude (18 U.S.C. § 1581–1588). The principal change to be made by the statutes proposed here is to discriminate more carefully than do the present laws among the various kinds of unlawful restraint. Congress will thus have a larger role in determining what criminal conduct of this nature should be subject to the high penalties generally assigned to kidnapping. Such a course has strong support in the approach of all modern States Code revisions and in Federal court decisions.

The basic kidnapping statute, 18 U.S.C. § 1201, prohibits the transportation in interstate or foreign commerce of any person who has been "unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted or carried away." As originally enacted in 1932, this crime was limited to such unlawful taking of a person for ransom or reward, a specific intent requirement which considerably restricted the extremely broad definition of the proscribed conduct. Within 2 years, however, Congress, concerned about other serious forms of kidnapping, such as the kidnap-murder of racketeers by their rivals, added "or otherwise" to the intent requirement without any change in the language regarding the conduct, thus making any unlawful taking of a person across State lines a major Federal crime.[2] (Until the Su-

[1] In the present Federal statute, the crime is spelled "kidnaping." The Model Penal Code and other Modern Penal Code revisions spell the crime "kidnapping," which seems the more natural way to spell the word, and is adopted here.

[2] The legislative history of the Lindbergh law is summarized in *Gooch* v. *United States*, 297 U.S. 124, 128 (1936), which concerned the kidnapping of arresting officers who were transported to another State by the defendants and there released in order that the defendants might avoid arrest. The Supreme Court stated: "Evidently, Congress intended to prevent transportation in interstate or foreign commerce of persons who were being unlawfully restrained in order that the captor might secure some benefit to himself. . . . If the the word 'reward,' as commonly understood, is not itself broad enough to include benefits expected to follow the prevention of an arrest, they fall within the broad term, 'otherwise'." *See also United States* v. *Parker*, 103 F.2d 857, 861 (3d Cir.) *cert. denied*, 307 U.S. 642 (1939), concerning a conspiracy to kidnap a New York man, take him to New Jersey and induce him to confess there to the Lindbergh kidnapping; the purpose of the conspiracy was to enhance the defendant's reputation as a detective. This was a Federal crime, within the meaning of 18 U.S.C., § 1201: "We think that Congress by the phrase 'or otherwise' intended to include any object of a kidnapping which the perpetrator might consider of sufficient benefit to himself to induce him to undertake it."

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preme Court recently declared unconstitutional the provision that the death penalty could be imposed by a jury only, violation of this statute was subject to capital punishment, unless the victim was freed unharmed. All violations, even the most minor, are still subject to punishment by life imprisonment.)

Although, in 1946, the Supreme Court was able to note that, under this broad statute, ". . . Federal officials have achieved a high and effective control of this type of crime," it also discerned difficulties with the literal scope of the statutory definition. *See Chatwin* v. *United States*, 326 U.S. 455, 462–464 (1946). In holding that an elderly widower who married a 15-year-old girl and removed her from her home State against her parents' wishes had not "kidnapped" her within the meaning of the statute, the Court stated:

> The act of holding a kidnapped person for a proscribed purpose necessarily implies an unlawful physical or mental restraint for an appreciable period against the person's will and with a willful intent so to confine the victim. . . . But the broadness of the statutory language does not permit us to tear the words out of their context . . . to apply them to unattractive or immoral situations lacking the involuntariness of seizure and detention which is the very essence of the crime of kidnapping. . . . In short, the purpose of the Act was to outlaw interstate kidnapping rather than general transgressions of morality involving the crossing of state lines. (326 U.S. at 460, 464).

Nevertheless, in the absence of a lesser Federal crime of felonious restraint (*see* proposed section 1632), criminal acts which do not have the elements of long-lasting terror and great danger to the victim have been prosecuted under the capital offense kidnapping provisions. These have included persons who mistakenly arrested another and took him to another State, believing the arrested person to have committed a crime in that State;[3] of an elderly man who, given a lift part of the way home from a friend's house, forced the driver to drive him over an interstate bridge, closer to home;[4] of a babysitter who took the baby she was caring for, apparently because she wanted a baby of her own.[5] The present kidnapping statute also could be used to prosecute a youth who drives a girl across a State line and tries to neck with her, against her will, or youths who "kidnap" another in a fraternity initiation.[6]

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[3] *United States* v. *Parker*, 103 F.2d 857 (3d Cir. 1939). In *Collier* v. *Vaccaro*, 51 F.2d 17 (4th Cir. 1931), a case arising before enactment of 18 U.S.C. § 1201, the defendant, an informer, arrested a Canadian narcotics smuggler at the border and forcibly brought him into the United States. This was common law kidnapping—a forcible abduction and carrying away of a person from his own country—and extradition of the defendant for kidnapping was proper. The court held that it was no defense that the defendant thought he had a right to arrest the smuggler and take him out of Canada.

[4] *Wheatley* v. *United States*, 159 F.2d 599 (4th Cir. 1946). The conviction was reversed, however, for error in the charge to the jury on intoxication.

[5] *United States* v. *Varner*, 283 F. 2d 900 (7th Cir. 1961). This conviction was reversed for failure to allege and prove the purpose of taking the baby.

[6] In *De Herrera* v. *United States*, 339 F.2d 587 (10th Cir. 1964), the court stated that an indictment charging the defendant with detaining a woman for the purpose of taking "indecent liberties" was sufficient to state a violation of 18 U.S.C. § 1201.

Apart from the Lindbergh law, another primary jurisdictional basis for Federal kidnapping prosecutions is the bank robbery statute, 18 U.S.C. § 2113. That statute provides (subsection (e)) that one who, in stealing from a bank, "forces any person to accompany him without the consent of such person, shall be imprisoned not less than 10 years. . . ." The statute applies not only to those who kidnap another while stealing from a bank, or escaping from the crime, but also to those attempting to free themselves "from arrest or confinement for such offense." [7]

Most Federal kidnapping prosecutions in this area concern those who take hostages, or stop drivers on the road and seize them and their car in escaping from a bank robbery or from imprisonment. There is no difficulty in such cases in distinguishing the kidnapping from the underlying robbery, but problems can occur in distinguishing an act of kidnapping which occurs as part of the act of robbery. A bank messenger who is forced by robbers to step from the street into an alley is, for example, unlawfully moved as well as forcibly detained and may therefore be considered to be "kidnapped" while he is being robbed. Indeed, there has been a tendency in the States to prosecute for kidnapping in cases where an insignificant but forceful movement of the victim occurred as part of the commission of another crime, such as robbery or rape. Kidnapping is charged in such cases because it carries higher penalties than the underlying crime. This practice has been strongly criticized.[8] Apparently, the practice has not been followed by Federal prosecutors in cases of bank robbery. Kidnapping is charged in Federal bank robbery cases only when some substantial movement of the victim has occurred.[9]

Another form of prolonged compulsory detention presently proscribed by Federal law is involuntary servitude, dealt with by chapter 77 of Title 18. The statutes in chapter 77 (§§ 1581–1588) concerning peonage and slavery were enacted to effectuate the thirteenth amendment to the Constitution, which provides that, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the

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[7] There are no such special kidnapping provisions for those who take a prisoner while escaping from Federal prison if the defendants were convicted of a Federal crime other than bank robbery. *See* chapter 35 of Title 18 (18 U.S.C. §§ 751–757) dealing with the Federal crime of escape. Prosecutions for kidnapping in such cases, in contrast to section 2113 cases, depend on whether State lines were crossed during the kidnapping.

[8] It has been a too-common practice to prosecute for kidnapping, when the victim is moved or detained as an incident to the crime, rather than the substantive crime which was actually committed. For examples of such cases, *see* MODEL PENAL CODE § 212.1, Comment at 13–15 (Tent. Draft No. 11, 1960). However, such prosecutions do not often occur under the Federal law, in part because the requirement of transportation across State lines usually imports transportation for some substantial distance. *Cf. Davidson* v. *United States*, 312 F.2d 163 (8th Cir. 1963). The defendant enticed a 6-year-old girl into his car, drove her about the city, at one point molesting her sexually, and then returned her. During the drive, State lines had been crossed (Kansas City, Mo., to Kansas City, Kans.). Defendant was originally arrested for molestation, but was tried for Federal kidnapping. The Eighth Circuit affirmed the conviction, but "not without some misgivings." 312 F.2d at 166.

[9] *See, e.g., United States* v. *Fox*, 97 F.2d 913 (2d Cir. 1938) in which a bank messenger was seized on the main street of a village, pushed into a car, robbed, and pushed out of the car at the outskirts of the village; this was held to be both bank robbery and kidnapping, within the meaning of 18 U.S.C. § 2113. *See also United States* v. *Bax*, 261 F. 2d 807 (3d Cir. 1958), in which the bank manager was forced to accompany the robbers in their getaway.

party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

The statutes forbid holding a person in peonage or involuntary servitude, arresting a person with intent to sell him into involuntary servitude, transporting slaves, and other acts in the slave trade. Peonage means "compulsory service to secure the payment of a debt." [10] The term "involuntary servitude" has been narrowly defined. Holding a person in involuntary servitude means "causing the servant to have, or to believe he has, no way to avoid continued service or confinement . . . not a situation where the servant knows he has a choice between continued service and freedom, even if the master has led him to believe that the choice may entail consequences that are exceedingly bad." [11] Under this definition, a Connecticut farmer who hired a Mexican family to work for him, kept them on his farm under onerous living conditions, and threatened the family with deportation if they left his farm, was not guilty of holding the family to involuntary servitude since the family was not physically confined to the farm.[12]

2. *Kidnapping; Abduction for Criminal Purposes.*—The proposed kidnapping statute, section 1631, together with the definitions in section 1639, carefully delineate the crime so as to exclude the possibility that the innocently motivated transportation of another person, or relatively minor instances of unlawful detention, can be punished as maximum felonies. The proposed provision is similar to kidnapping statutes adopted or proposed in modern American penal codifications.[13] Kidnapping is defined as a crime involving the secret or prolonged detention or transportation of another for criminal purposes, or involving situations in which the detained person is intentionally dealt with in such a way as to greatly endanger him.[14]

The word "abduct" is used to emphasize the complete control of the victim involved in a kidnapping. The victim is not merely restrained by being moved a substantial distance, or confined for a substantial period of time, as in the definition of "restrain" alone (section 1639(a)), although restrain is included in the definition of abduct. He is restrained "with intent to prevent his liberation" either by holding him in a place where he is not likely to be found or by explicit threat to his safety. The culprit, however, need only intend to hold his victim under such circumstances. Thus, if the victim has been lured into a car, but not yet threatened or secretly confined, the crime will nevertheless be complete if it can be shown that the culprit was transporting his victim with the intent to threaten him or secretly confine him, and that the threat or confinement was intended to accomplish one of the purposes specified in the statute.

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[10] *Clyatt* v. *United States*, 197 U.S. 207, 216 (1905), upholding the constitutionality of statutes forbidding peonage, which is a type of involuntary servitude.

[11] *United States* v. *Shackney*, 333 F.2d 475, 486 (2d Cir. 1964).

[12] Id.

[13] *See* N.Y. Rev. Pen. Law §§ 135.00–135.75 (McKinney 1967); Mich. Rev. Crim. Code §§2201–2215 (Final Draft 1967); Cal. Penal Code Revision Project, §§ 1530–1532 (Tent. Draft No. 1, 1967); Proposed Del. Crim. Code, §§ 450–455 (Final Draft 1967); Proposed Crim. Code for Pa. §§ 1101–1105 (1967); Tex. Penal Code Rev. §§ 212.1–212.5 (1967 Draft). These revisions are based on art. 212 of the Model Penal Code, sections 212.0–212.5 (P.O.D. 1962). *Cf.* Ill. Crim. Code of 1961, art. 10, Ill. Rev. Stat. § 10–1 to 10–3 (1965); Iowa Crim. Code Rev. §§ 706.1–706.2 (Draft of June 15, 1967); and Crim. Code of Ga. § 26–1311 (1969), which make less substantial changes in the law of kidnapping.

[14] See section 1639(b).

Moreover, as set forth in section 1631, an additional purpose is required if the abduction is to constitute kidnapping. Thus, a relative who takes a child from any other person having lawful custody of the child, believing the child to be mistreated, and secretly confines the child so that the other party cannot regain custody, will not be liable to imprisonment for kidnapping. Nor will a person who mistakenly restrains another upon the threat of force in order to take him to the police be so liable.

The purposes specified in proposed section 1631 cover all the situations in which it is believed that a criminal should be subject to high penalties for the abduction of another.[15] They include all the serious situations in which Federal kidnapping convictions have been obtained. Of course, the type of kidnapping which originally prompted Federal intervention—secreting a person in order to obtain ransom—leads the list. But a person may be taken, and hidden, for the purpose of rape, other sexual abuse, or assault,[16] or for the purpose of terrorizing the victim or those who would fear for the victim's safety,[17] or for the purpose of keeping the victim from performing an official duty: [18] and these acts, too, constitute kidnapping.

Further, a person may be taken and held, not to secretly confine him, but to openly hold him, as a hostage.[19] This would constitute kidnapping, since it would involve another element of "abduction," that the hostage's safety is endangered or threatened.

Generally, any abduction of another in connection with commission of a felony, or facilitating escape from the scene of the crime, or from prison—as in taking a bank guard a long distance in order to rob him, or taking a guard as prisoner—is kidnapping.[20] Here, distinctions

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[15] But the broad list of kidnapping purposes beyond kidnapping for ransom is based on the assumption that the victim suffers a substantial loss of liberty from the culprit's acts, not just a brief restraint imposed for the purpose of committing another crime.

> It should be emphasized that every extension of kidnapping beyond kidnapping for ransom depends for its justification on the strict definition of remove and confine, the moderation of the basic penalty here proposed, and the provisions of this Code restricting cumulation of punishments. In any other circumstances, it might be desirable to confine kidnapping to seizure for ransom. Model Penal Code § 212.1, Comment at 18 (Tent. Draft No. 11, 1969).

[16] *See United States* v. *Bazzell*, 187 F.2d 878 (7th Cir.), *cert. denied*, 342 U.S. 849 (1951), in which a prostitute ran away from her boss, the defendant, who came after her, beat her, and forced her to go back; *Eidson* v. *United States*, 272 F.2d 684 (10th Cir. 1959), in which defendant took an 11-year-old girl across State lines and raped her.

[17] In *Brooks* v. *United States*, 199 F.2d 336 (4th Cir. 1952), kidnapping convictions of KKK members who seized a couple, took them across the State line, flogged them, and warned them to go to church, stop living together, and stop making liquor were affirmed.

[18] *See Gooch* v. *United States*, 297 U.S. 124 (1936), concerning the kidnapping of officers who had come to arrest the defendants.

[19] See *United States* v. *Bux*, 261 F.2d 807 (3d Cir. 1958).

[20] *E.g.*, *Hess* v. *United States*, 254 F.2d 578 (8th Cir. 1958) (victims forced to drive defendant while he looked for place to hold up); *United States* v. *Dressler*, 112 F.2d 972 (7th Cir. 1940) (escaping State prisoner forced driver to take him out of State); *United States* v. *McGrady*, 191 F.2d 829 (7th Cir. 1951), *cert. denied*, 342 U.S. 911 (1952) (same); *Sanford* v. *United States*, 169 F.2d 71 (8th Cir. 1948) (victim held, driven through Kansas City, while being robbed); *Reed* v. *United States*, 364 F.2d 630 (9th Cir. 1966), *cert. denied*, 386 U.S. 918 (1967) (interstate transportation of owners of car used in escape from an armed robbery).

concerning transportation of the victim for a "substantial" distance or confinement of the victim in a dangerous place, or a place in which he is not likely to be found, will be critical. If, for example, the victim is required to step into an alleyway, in order to rob him, or asked to step across the room in order to open his safe, he cannot fairly be deemed to have been "kidnapped." It is only substantial movement, outside the environs in which the victim is normally found, that will render the crime a "kidnapping." Similarly, if the victim is restrained in his home or place of work while the culprits make their escape, he is not ordinarily to be considered "kidnapped." But if the victim is locked for a substantial period in a place from which it is not likely he can be rescued in time—an airless vault, for example—the culprits can be charged with kidnapping in that the victim's safety is intentionally endangered by the imprisonment. The crime is also "kidnapping" if the victim is intentionally confined in a place in which "he is not likely to be found." This might include the victim's own property, if it is a secret place, not known by others, and the culprits, premising commission of the crime on that fact, either transport the victim there, or hold him there.

3. *Skyjacking.*—The forceful commandeering of an airplane in flight may be seen as a form of "kidnapping." [21] The act involves great danger over long distances to the pilot and to innocent passengers. However, airplane hijacking does not involve an intent to hold others on the airplane captive as much as it does an intent to obtain transportation. The pilot and passengers of a forcefully commandeered airplane in flight have no alternative but to stay on board, under the actor's command. The offense of skyjacking, therefore, is best dealt with explicitly, in a statute separate from the general kidnapping statute. Accordingly, section 1635 would substantially re-enact existing air piracy legislation (49 U.S.C. § 1472(i)), insofar as present law proscribes the use of force or threat of force to take control of an airplane. The act of unlawfully taking control of an airplane is described in the skyjacking statute by use of the term "usurps" which has a legislative and judicial history with respect to mutiny aboard a vessel (18 U.S.C. § 2193). *Cf.* section 1805 in the proposed Code.

4. *Felonious Restraint; Involuntary Servitude.*—Proposed section 1632 (a) and (b) deals with substantial restraints which, while not motivated by the criminal purposes set forth in section 1631, do endanger the person restrained. This would include any abduction. It

[21] *E.g., United States* v. *Healy*, 376 U.S. 75 (1964), in which defendant compelled a private airplane pilot to transport him to Florida and the Supreme Court held that the crime was kidnapping, regardless of whether the defendant's purpose was illegal; *Bearden* v. *United States*, 320 F.2d 99, 103 (5th Cir. 1963), in which the defendant attempted, at gunpoint, to direct a commercial airliner to fly to Cuba, but was convinced by the airplane crew that the plane had to land first at its scheduled destination, El Paso, in order to refuel. The court held that while there was substantial evidence from which a properly instructed jury could have found the defendant guilty of transporting a kidnapped victim (18 U.S.C. § 1201) and transporting a stolen aircraft (18 U.S.C. § 2312), it was reversible error for the trial judge to fail to instruct the jury that in order for the defendant to have "transported" the plane and passengers within the meaning of the statutes "he must have been in actual control or command of the aircraft and . . . the acts of the crew [must not have been] of their own volition but done at his discretion."

would also include any unlawful restraint, whether or not it amounted to an abduction, where the victim is knowingly exposed to risk of serious bodily injury, when he has been taken, lured, frightened, or trapped into a dangerous situation from which he cannot readily escape. Examples are given in paragraph 1 of this commentary: any taking of a child, or mistaken arrest, attempted seduction, or fraternity initiation where a risk of serious injury is knowingly imposed upon the victim. Regardless of the cause of an unlawful restraint—whether honest mistake or practical joke—a person who knowingly restrains another takes upon himself a high responsibility for the safety of the person whom he has deprived of freedom: and felony punishment seems warranted when the restrained person is knowingly kept in conditions dangerous to him.

Another type of criminal restraint—holding another to involuntary servitude—has a special place in Federal criminal law. Proposed sections 1631(1)(c) and 1632(c) are intended to replace the present provisions of chapter 77 of Title 18 (§§ 1581–1588), concerning peonage and slavery. As at present, the proposed section would make felonious any enticement, taking or arrest of another person with intent to hold him in bondage.[22] With these general provisions in the new criminal Code, present outdated specific provisions—concerning the fitting of vessels for the slave trade, service aboard slave ships, and other historic aspects of slave trading—may be deleted. Similarly, present 18 U.S.C. § 2194 ("shanghaiing sailors"), dealing with the ancient practice of forcing or tricking seamen to go aboard a merchant vessel, can be deleted. This, too, would be a restraint with intent to hold the sailor to involuntary servitude.[23]

Subjection to involuntary servitude, it has been held, can be accomplished by "law or force that compels performance or a continuance of the service." [24] The proposed statute would make it clear that it is un-

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[22] In *United States* v. *Gaskin*, 320 U.S. 527 (1944), the indictment charged that the defendant arrested another, on claim of debt, "with intent to cause [the person arrested] to perform labor in satisfaction of the debt, and that he forcibly arrested and detained [the person arrested] against his will and transported him from one place to another within Florida". The Supreme Court held that this stated the crime of peonage. Arrest with intent to hold another to labor is enough, even though no labor is actually performed.

[23] "The essential element of the offense [denounced by express terms of the statute] is taking aboard any person to the service of the vessel who had been procured or induced by force or threats or by false representations to enter such service. . . ." *United States* v. *Domingos*, 193 F. 263 (C.C. N.D. Fla. 1911).

[24] *United States* v. *Shackney*, 333 F.2d 475, 487 (2d Cir. 1964). Examples of laws which "compel performance or continuance of the service" are statutes making it a prima facie crime to fail to do work after one has obtained money for the work and statutes authorizing reimbursement for any person's payment of court fines of a convict by requiring the convict to work out the fine for the person paying it. Such statutes have been declared unconstitutional, under the thirteenth amendment. *Taylor* v. *Georgia*, 315 U.S. 25 (1942); *Pollock* v. *Williams*, 322 U.S. 4 (1944); *Bailey* v. *Alabama*, 219 U.S. 219 (1911); *United States* v. *Reynolds*, 235 U.S. 133 (1914).

> Whatever of social value there may be, and of course it is great, in enforcing contracts and collection of debts, Congress has put it beyond debate that no indebtedness warrants the suspension of the right to be free from compulsory service. This congressional policy means that no state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor. *Pollock* v. *Williams*, 322 U.S. 4, 18 (1944).

lawful to obtain another's involuntary labor by intimidation or deception, as well as by force.[25]

Further, there is no requirement, in the proposed definition of restraint, that a person kept in involuntary servitude be secretly confined. The proposal recognizes, as does present law, that a person may be kept working quite openly, even though he is in a condition of involuntary servitude.[26] It is because such forced labor does not necessarily involve isolation, terrorization or danger of death to the victim that punishment of the crime as a lower grade felony seems adequate.

5. *Unlawful Imprisonment.*—Unlawful restraint of another person, absent the special requirements of kidnapping (proposed section 1631) and felonious restraint (proposed section 1632), is made a misdemeanor under proposed section 1633. The line between criminal and noncriminal restraints is therefore drawn in proposed section 1639 (a), which defines "restrain." Any removal of a person, unlawfully and without consent, from his residence or place of business would be criminal; but otherwise he must be moved a "substantial distance" from one place to another or confined for a "substantial period," whether by physical force, intimidation or deception.

All intentional and unlawful restraints on a person's freedom of movement are therefore not covered by this general provision. This does not mean that they may not be protected by other provisions of the proposed Criminal Code. Many acts which unlawfully produce such restraints will be prohibited under provisions dealing with assaults, terrorizing, menacing, coercion, extortion, *etc.* This section is intentionally limited to those restrictions which are connoted by the word "imprisonment," although such imprisonment may involve movement as well as confinement. On the other hand, the requirement of substantiality of both movement and confinement is intended to distinguish criminal conduct of this kind from less serious conduct which might nevertheless be actionable under civil concepts of unlawful imprisonment, such as the brief period of restraint of a person believed to be guilty of shoplifting.

It will be noted that criminal restraint may be accomplished by any means, including acquiescence of the victim, if he is a child less than

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[25] *See Miller* v. *United States*, 123 F.2d 715 (8th Cir. 1941), *remanded with instructions on another point*, 317 U.S. 192 (1942), in which a married girl was lured from Arkansas to Texas by her step-father, and there held in involuntary servitude. This was held to be kidnapping under the Lindberg law. In *Bernal* v. *United States*, 241 F. 339 (5th Cir. 1917), *cert. denied*, 245 U.S. 672 (1918), a girl, offered a job, refused it when it turned out to entail prostitution but was made afraid to leave because of fear of jail for illegal immigration, and was told she could not leave until she paid back the cost of her fare; *cf.* the discussion of the *Shackney* case in section 1 of the commentary. Under the proposed provision, the defendant's threats, in *Shackney*, of deportation if the family that worked for him refused to work and left his farm would constitute a form of intimidation (the threat of criminal action) or deception.

[26] *E.g.*, *Pierce* v. *United States*, 146 F.2d 84 (5th Cir. 1944), *cert. denied*, 324 U.S. 873 (1945) (roadhouse owner held girls in peonage by threat; made the girls work for him "filling dates" with men to pay an alleged debt); *Bernal* v. *United States*, 241 F. 339 (5th Cir. 1917); *Davis* v. *United States*, 12 F.2d 253 (5th Cir.), *cert. denied*, 271 U.S. 688 (1926) (men kept on turpentine farm against their will, in fear of physical punishment and criminal prosecution; whipped when they tried to leave); *United States* v. *Ancarola*, 1 F. 676 (C.C. S.D. N.Y. 1880) (boys brought over from Europe for involuntary service as street musicians).

14 years old or an incompetent and if the parent, guardian or person or institution having lawful control or custody of him has not acquiesced in the restraint. (*See* proposed section 1639(a).)

Exception is provided for a parent who takes his own child, less than 18 years of age. The intent of this exception is to exclude custody battles from the reach of a statute dealing with unlawful imprisonment. Persons other than parents who stand in an equivalent relation to the child, for example, foster parents, relatives who have been in loco parentis, should be subject to the same exception. Whether conduct of this kind should be dealt with in the Federal criminal law is discussed below in paragraph 6.

6. *Custodial Interference.*—One special area related to kidnapping concerns the taking of children in disputes over custody. At present, under 18 U.S.C. § 1201, a parent who unlawfully takes a child out of State does not commit the Federal crime of kidnapping. However, foster parents, grandparents, close relatives or other persons who have raised a child, but, finding themselves in a custody dispute, remove the child from the home State in violation of a court order, are not excepted from the reach of the present Federal kidnapping law.

Under the proposed kidnapping, restraint, and imprisonment statutes, it would not be criminal for a parent to take (restrain) a child, even if his intent is only to obtain custody of him for the parent's benefit, so long as the child is not thereby endangered. Thus, taking a child in a dispute over custody would be excluded from the reach of these provisions. Disputes over a child's custody evince strong emotion, perhaps irrationality; they do not normally evince criminal behavior. There may be reason, however, to retain some Federal criminal penalty for a person who takes a child from lawful custody, not only to enforce judicial decisions as to proper custody, but because taking a child from lawful custody may be a form of terrorizing, seriously frightening, or coercing the lawful custodian.

Three alternatives may be considered for dealing with custody cases in Federal law. One would be use of the Assimilative Crimes Act, under which residents of a Federal enclave would be subject to State laws on the subject. Federal district courts ordinarily play no role in determining child custody or family disputes. These issues are normally dealt with by family courts, or other State courts. Thus, the matter of punishing violations of their custody orders criminally may approximately be left to the State and territorial courts. Except possibly for residents of Federal enclaves, Federal investigative and prosecutorial resources need not be expended in these matters primarily of local concern. Federal interstate investigations would be limited largely to cases in which it appears that the child is endangered (under the proposed "felonious restraint" provision).[27]

Alternatively, a broad custodial interference provision, such as section 212.4 of the Model Penal Code, may be adopted for the proposed Federal Criminal Code. This would make any taking or enticement

[27] We have been informed by a representative of the Justice Department that one of the problems most often faced under 18 U.S.C. § 1201 concerns the use of Federal resources in custody matters. As a matter of policy it is preferred that interstate "kidnapping" investigations take place only when there is reason to believe that the child is in danger, perhaps because of the mental instability of the person who has taken custody.

of a child or incompetent person from the person having lawful custody of him a Federal offense. In the case of taking a child, however, it would be a defense that the child was taken because the actor believed it necessary for the child's own welfare or that the child himself, if over 14 years old, instigated the taking and was taken without a criminal purpose. Anyone unlawfully taking the child, including a parent not having lawful custody, would be guilty. But a person who is not a parent or who has not been raising the child in a parental relationship, would be guilty of a more serious offense if he takes the child away "with knowledge that his conduct would cause serious alarm for the child's safety, or in reckless disregard of a likelihood of causing such alarm." The offense, then, would constitute a form of terrorizing the person who has been caring for the child.

The Model Penal Code type of provision would bring the Federal government into any custody cases involving the crossing of State lines, which the Federal government could, at its discretion, investigate and prosecute. It should be adopted for the Federal Criminal Code only if it is decided that the Federal government should play a broad though discretionary role in enforcement of State custody orders.

Finally, a provision could be adopted which would leave enforcement of State custody orders to the State courts, but very narrowly define a Federal crime when a custodial interference amounts to a form of terrorizing. Custodial interference, under this provision, would be a crime if a person has taken the child in a deliberate effort to intimidate or frighten another person. The crime would be a misdemeanor, rather than a felony, because no harm is threatened to the child (*cf.* proposed section 1614 (terrorizing)). Any person within the Federal interest who takes a child with this intent will be guilty of the crime, including a natural parent, if he does not have lawful custody of the child.[28]

7. *Age of Maturity.*—It may be noted that, under the proposed definition of restraint, the "age of consent" at or over which a person may acquiesce to a substantial and otherwise unlawful restraint on his liberty is 14. A person 14 or over may freely agree to leave home and go off with another without rendering the other subject to kidnapping charges—though, of course, if the 14-year-old is beaten, raped or recklessly endangered, the assailant will be guilty of the assaultive crime. Fourteen is the age at which the common law presumed capacity to make rational decisions. The Supreme Court has recognized that age as a proper cut-off point for presuming consent, with respect to the Federal kidnapping law.[29]

[28] Though this discussion concerns children, the same may be true of incompetent persons, dependent upon others.

[29] *Chatwin* v. *United States*, 326 U.S. 455, 461 (1946):

> [T]here is no competent or substantial proof that the [15-year-old] girl was of such an age or mentality as necessarily to preclude her . . . from exercising her own free will, thereby making the will of the parents or the juvenile court authorities the important factor. . . . There is no legal warrant for concluding that such an age is *ipso facto* proof of mental incapacity in view of the general rule that incapacity is to be presumed only where a child is under the age of fourteen. 9 Wigmore on Evidence § 2514 (3d Ed.).

In *Chatwin*, the Supreme Court held that, though the defendant married against her parents' wishes and apparently had a mental age of 7, she was, at 15, presumptively old enough to consent to the marriage; she was not held against her will, and therefore, was not "kidnapped."

8. *Grading.*—As noted above, the Supreme Court has deleted the capital punishment provision from 18 U.S.C. § 1201 because it could only be imposed by a jury, thus making the assertion of the constitutional right to a jury trial a potentially costly one.[30] Until that decision the policy of the statute was to make death available to the jury as a possible punishment only "if the kidnapped person has not been liberated unharmed." Otherwise the available punishment was, and continues to be, any term of years or life.

The bank robbery-kidnapping provisions in 18 U.S.C. § 2113(e) are more severe. The death penalty provision, defective for the same reason as that in the kidnapping statute, was available for any forcing of a person to accompany the robber without that person's consent, whether or not he was released unharmed. Moreover, while a life sentence is still available, a conviction of such a forceful taking requires imposition of a prison sentence of at least 10 years. The reason for such penalties may be the fact that both this kind of kidnapping during a bank robbery and the killing of someone during a bank robbery are lumped together in one subsection and have the same penalties.

While it is not intended to go into the general questions of capital punishment and mandatory minima at this time, a tentative sentencing scheme is proposed for the kidnapping provisions of proposed section 1631. The highest penalty would be available in the case where the victim has not been voluntarily released alive and in a safe place. It would apply whether or not the kidnapper caused the death of the victim. The reason for resting the distinction on the victim's being alive, rather than unharmed, as in present law, is to avoid giving an incentive to a kidnapper who may know the law to kill his victim if any harm, even minor, shall befall him. The highest penalty would otherwise still be available; and the kidnapper would be running the risk of identification by his living victim.[31] If the harm which came to the victim was caused by an independent criminal act, such as assault,

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[30] *United States* v. *Jackson*, 390 U.S. 570 (1968). In any event, imposition of the death penalty in kidnapping cases was rare. Last year, there were 39 convictions under 18 U.S.C. § 1201. No death penalties were imposed. Nine sentences of life imprisonment were imposed, five of them resulting from one case (a case in Kansas City involving repeated rapes of the victim).

[31] In *Robinson* v. *United States*, 324 U.S. 282 (1945), the kidnap victim was hit on the head, and his wounds were not yet healed when he was liberated. But the injury was completely healed by the time of trial. Imposition of the death penalty was upheld, the Supreme Court stating that the language of 18 U.S.C. § 1201 means that the kidnapped person shall not be suffering from injuries when liberated, and that a permanent injury is not necessary in terms of the statute. In a dissenting opinion, Mr. Justice Rutledge stated: "Is the death penalty to be imposed for the identical cut or abrasion, whether minor or serious, inflicted during the act of taking the victim, merely because in one case the kidnapper releases or abandons him quickly, perhaps because forced to do so, but forbidden in another because he holds the victim until the injury heals? Is reward thus to be given for prolonging the agony . . . ? Once injury has taken place, the inducement held out by the statute necessarily is either to hold the victim until cure is effected or to do away with him so that evidence, both of the injury and of the kidnapping is destroyed." 324 U.S. at 288, 289. *See also* MODEL PENAL CODE § 212.1, Comment at 18–20 (Tent. Draft No. 11, 1960); *United States* v. *Jackson*, 390 U.S. 570 (1968), for criticism of grading kidnapping on the basis of whether the victim is harmed.

rape, or robbery, the perpetrator would be subject to greater punishment as a multiple offender.[32]

No good reason appears for continuing a mandatory minimum sentence for a kidnapping somehow connected with a bank robbery and not for other kinds of kidnapping. In line with the arguments in favor of decreasing the number of, or eliminating, legislatively fixed minimum sentences in the Federal system (*see* Preliminary Sentencing Memorandum), it has been deleted here. It may be noted, however, that the bank robber-kidnapper would be subject to punishment as a multiple offender.

Under proposed section 1632, a restraint of a person with intent to hold him for involuntary servitude, but not amounting to kidnapping, would be a Class C felony. The maximum penalty for commission of this crime would, therefore, be slightly less than the level as is fixed under the present peonage statutes, 7 years' imprisonment.[33] Any restraint of a person under circumstances exposing the person to risk of serious bodily injury would also constitute a class C felony; this would be analogous to the misdemeanor of reckless endangerment, raised to a felony because the victim is knowingly restrained and endangered.[34] Other unlawful restraints are graded as misdemeanors in the proposed statutes.

9. *Jurisdiction: Disposition of Present Kidnapping Statutes.*—Primary Federal jurisdiction in kidnapping cases is based, under present 18 U.S.C. § 1201, on transportation of persons across State lines ("in interstate or foreign commerce"). Federal entry into kidnapping investigations depends on the presumption, in the present statute, that a person who has not been released for 24 hours has been transported in interstate or foreign commerce. This key jurisdictional basis is retained;[35] the presumption is transformed into an explicit authorization for judicial investigation of abductions.

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[32] This would resolve a problem which has existed under the present bank robbery statute, 18 U.S.C. § 2113(e). It has been held that kidnapping while escaping from bank robbery, or attempting to free oneself from arrest or confinement for bank robbery, is not an aggravation of the robbery, but a separate crime. *United States* v. *Parker*, 283 F.2d 862 (7th Cir. 1960). But there is an issue whether the kidnapping is a separate crime when performed to effectuate the robbery. In *Clark* v. *United States*, 281 F.2d 230 (10th Cir. 1960), it was held that kidnapping is a separate crime from the bank robbery, for which a separate (and greater) sentence may be imposed. *United States* v. *Drake*, 250 F.2d 216, 217 (7th Cir. 1957)) is to the contrary, holding that the bank robbery statute "creates a single offense with various degrees of aggravation permitting sentences of increased severity."

For a detailed discussion of the rationale for the grading scheme envisioned, *see* MODEL PENAL CODE § 212.1, Comment at 18–20 (Tent. Draft No. 11, 1960).

[33] *See* Study Draft section 3201.

[34] *See* proposed sections 1611–1619 (assaults, life endangering behavior and threats).

[35] Crossing of State lines is a jurisdictional basis for Federal prosecution; it is not an essential element of the crime that the culprit knows he is crossing State lines, as long as he volitionally does so. *United States* v. *Powell*, 24 F. Supp. 160 (E.D. Tenn. 1938). "It was enough to show affirmatively that he knowingly set in motion the interstate trip; that he intentionally went to the place of his own selection; and that in doing so, he crossed the State line with the kidnapped victim in his custody." *Eidson* v. *United States*, 272 F.2d 684, 687 (10th Cir. 1959).

Federal jurisdiction over kidnappings committed in the course of robbing a bank, or escaping from the robbery, will also be retained (*see* 18 U.S.C. § 2113(e)). But there seems no reason to limit Federal kidnapping jurisdiction only to escapes from commission of bank robberies or from imprisonment for bank robbery. Jurisdiction should be extended to kidnappings occurring while the perpetrators are escaping from any Federal penal institution, or from commission of any Federal crime.

18 U.S.C. § 1202 makes unlawful the knowing possession, receipt or disposition of ransom money. This deals with accessories to the kidnapping—persons who have played no role in the commission of the kidnapping, but help in collecting, handling or disposing of the proceeds of the crime. General statutes, dealing with the various roles accessories can play after a crime is committed, and setting penalties in accordance with the grade of the principal crime, are provided in proposed sections 1303 and 1304.[36]

Similarly, 18 U.S.C. § 1201(c), setting the penalty for a conspiracy to commit kidnapping at the same level as kidnapping itself, will be replaced by the general conspiracy and attempt provisions of the proposed Code. There is no reason to treat a conspiracy to kidnap differently from a conspiracy to commit murder, or any other major crime. Nor is there reason to deal with a conspiracy to kidnap, but not an attempt to kidnap.

Because many present Federal assaultive-type crimes are defined in terms of "assaulting, resisting . . . impeding, intimidating, or interfering" with others there is, in fact, an extensive Federal jurisdiction over acts of kidnapping or unlawful imprisonment. But penalties are unduly limited without regard to the nature of the crime. For example, a Federal agent who, while investigating a case, is kidnapped and held until the person he is after can effect an escape, has been "resisted" or "impeded" under 18 U.S.C. § 111. But, if he has been abducted and held without the use of a deadly weapon, the penalty for this kidnapping is a maximum of 3 years' imprisonment (unless State lines have been crossed, in which case 18 U.S.C. § 1201 applies). Similarly, there is a present Federal jurisdiction when foreign officials (18 U.S.C. § 112), racketeers (18 U.S.C. § 1952), witnesses in Federal cases (18 U.S.C. §§ 1501–1510), or motor vehicle operators (18 U.S.C. § 33) are kidnapped or imprisoned regardless of whether State lines are crossed, but penalties are limited in accordance with the applicable "assault" statute, and without regard to the

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[36] In the major reported case involving disposition of ransom money, *Laska* v. *United States*, 82 F.2d 672 (10th Cir.), *cert. denied*, 298 U.S. 689 (1936), the defendant, an attorney, after the ransom had been collected and the kidnap victim returned, advised the kidnappers on how to hide and dispose of the ransom money, taking much of it for himself as a fee. The statute concerning receipt of ransom money had not been enacted at the time of defendant's acts; the defendant was convicted as a conspirator in the kidnapping itself, the court holding that the disposal of ransom money, changing it to unmarked bills, was part of the substantive crime. *Cf.* present 18 U.S.C. § 3, defining an accessory-after-the-fact as one who "receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension. . . ."; *see also* MODEL PENAL CODE § 242.3 (Hindering Apprehension or Prosecution) and § 242.4 (Aiding Consummation of the Crime) (P.O.D. 1962).

nature of the kidnapping or imprisonment. It would be best simply to make Federal jurisdiction over kidnappings and unlawful imprisonments, as defined by the proposed provisions, coextensive with Federal jurisdiction over crimes of physical assault.

A kidnapping of the President is, at present, punishable by death or life imprisonment "if death results" to the President. Similarly, the maximum penalty (life imprisonment) under the new civil rights statute (18 U.S.C., § 245) may be imposed if a person is forcefully "interfered with" in order to prevent him from exercising certain specified civil rights, and "death results from the "interference." In both of these cases, the maximum penalties can be imposed only on proof of death of the victim. If the jurisdictional bases of these statutes are separated and the substance of the crime defined under the proposed provisions, kidnapping would be punished as a Class A felony if the victim is not voluntarily released alive; proof that the kidnapping victim's death resulted from the kidnapping would not be required.

Because of the nature of the crime of kidnapping—the terrorization of those close to the victim as well as the victim himself—it would be wise to extend Federal jurisdiction over crimes in this area to cases in which the victim is a child, spouse, or other close family member of the President or other high Federal officials.

Finally, one special jurisdictional fact must be noted. Under the thirteenth amendment to the Constitution, Federal jurisdiction exists over all crimes of involuntary servitude anywhere in the United States and any place subject to the jurisdiction of the United States.[37] This complete jurisdiction will be stated in a separate clause of the jurisdictional provisions for the proposed chapter.

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[37] *Clyatt* v. *United States*, 197 U.S. 207 (1905).

COMMENT

on

RAPE, INVOLUNTARY SODOMY, SEXUAL ABUSE, AND RELATED OFFENSES: SECTIONS 1641–1650

(Stein; November 20, 1968)

1. *Background; Present Federal Law.*—The existing Federal rape provision, 18 U.S.C. § 2031, is grossly obsolete and indiscriminate. Contrary to the law of most States, the death penalty is available for rape. "Rape" is not defined in the Federal statute and would probably be given the common law scope including such acts as having intercourse with a child under 10 or with a woman who has been drugged or intoxicated without her knowledge, or intercourse with a mental incompetent, an unconscious woman, or a woman otherwise unable to resist sexual advances. There is no legislative distinction between violent ravishment by strangers and less brutal schemes to take advantage of an initially consensual relationship, as for example, between adults who may have been dating. On the other hand, if Federal rape does not encompass such acts of nonconsensual intercourse, these serious offenses will go unpunished in areas of exclusive Federal jurisdiction. The proposed provision distinguishes these forms of rape, differentiating the penalties for each.

Title 18 of the United States Code also contains a "statutory rape" provision. 18 U.S.C. § 2032 provides that one who "carnally knows any female, not his wife, who has not attained the age of 16 years, shall, for a first offense, be imprisoned not more than 15 years, and for a subsequent offense, be imprisoned not more than 30 years." These high penalties are available without regard to whether the offense was committed as part of a teenage love affair, or, indeed, whether a promiscuous girl had seduced the boy. The proposed provision excludes such situations from criminal punishment.

Except for a curious provision concerning seduction of passengers by any crewmember of a ship (18 U.S.C. § 2198), and legislation dealing with prostitution (which is dealt with in a separate report), there are no other statutes in Title 18 dealing with sexual conduct other than rape as Federal crimes. Prior to the 1948 revision of Title 18, Federal legislation proscribed adultery and fornication. The Supreme Court noted that:[1]

> Legislative history shows an increasing purpose by Congress to cover rape and all related offenses fully with penal legislation. . . . It has covered the field with uniform Federal legislation affecting areas within the jurisdiction of Congress.

[1] *Williams* v. *United States*, 327 U.S. 711, 723–724 (1946), holding that the crime of "statutory rape," since it has been defined in the Federal Code, cannot be redefined and enlarged in accordance with a State definition of the crime; the Assimilated Crimes Act, 18 U.S.C. § 13, did not apply to rape and related crimes.

In the 1948 revision, however, the crimes of fornication and adultery were deleted from the Criminal Code. The Advisory Committee on the revision suggested that these minor sex crimes were not properly a subject of Federal law. Indeed, criminal provision such as these were being dropped from many State codes. These provisions were, therefore, "omitted and repealed because local laws apply." [2]

Today, except for rape and "statutory rape," criminal liability for sexual misconduct of persons on Federal enclaves depends on State laws, which vary widely.[3] Major crimes, such as forcible sodomy, are assimilated from State law, as are more minor sexual misdeeds.[4] Local law is applicable with respect to consensual homosexuality as it is with respect to adultery or sexual intercourse between unmarried persons. Given the frequency and necessity of travel by Federal personnel and others from one Federal enclave to another, in a different part of the country, it might be well to formulate once more a complete set of statutes on sex crimes, rather than subject persons to very different criminal laws as they enter new Federal enclaves. Moreover, the present dearth of Federal statutes in the area leads to inadequate coverage of such crimes as they are committed in areas of exclusive Federal jurisdiction—on a ship at sea, for example.[5] In such cases, sexual attacks not amounting to rape may be dealt with as assaults. But intercourse or perverse acts accomplished by threat warrant greater penalties than a general assault or threat statute can provide. Further, for treatment and statistical purposes, sexually motivated encounters should be distinguished from other assaults.

The proposed provisions therefore contain statutes proscribing sexual assaults upon a person without his consent. Perverted acts of intercourse accomplished by force are treated as seriously as rape; insofar as the Federal Criminal Code proscribes rape it should as well proscribe equally brutal acts of sodomy. Similarly, unnatural acts of intercourse accomplished without the consent of the victim, where

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[2] H. Rep. No. 304, 80th Cong., 2d Sess. A–213 (1948). Information on the views of the Advisory Committee to the Chief Reviser was obtained from Dr. Charles J. Zinn, law revision counsel for the House Committee on the Judiciary.

[3] "Under existing American legislation, maximum punishment for illicit intercourse ranges up to three years for fornication, five years for adultery, and twenty-five years (*e.g.*, in Iowa) for some quasi-incests. . . ." MODEL PENAL CODE § 207.1, Comment at 216 (Tent. Draft No. 4, 1955). The District of Columbia itself has an ill-defined, harsh, and antiquated scheme of legislation in this area (*see* note 5, *infra*). Most other nations do not have such extensive criminal regulation of sexual conduct. *See* MODEL PENAL CODE § 207.1, Comment at 204–205 (Tent. Draft No. 4, 1955).

[4] *See United States* v. *Gill*, 204 F.2d 740 (7th Cir.) *cert. denied* 346 U.S. 825 (1953), a prosecution based on a State sodomy law, and *United States* v. *Davis*, 148 F. Supp. 478 (D.C. N.D. 1957), a prosecution based on a State incest law.

[5] The District of Columbia does have a complete set of criminal legislation on sexual misconduct, which is itself in dire need of reform. By its statutes, rape, including "statutory rape" of a girl under 16, may be punished by up to 30 years' imprisonment or, if the jury so decides, by the death penalty, D.C. CODE ANN. § 22–2801 (1967). Sodomy is punishable by up to 10 years' imprisonment; up to 20 years if the act is with a person under 16 (section 22–3502). The statute makes no distinction between consensual and forceful sodomy. Enticement of children (under 16) into "indecent acts" is punishable by up to 5 years' imprisonment; commission of or an attempt to commit such acts is punishable by up to 10 years' imprisonment (section 22–3502). The District of Columbia Code also contains antiquated seduction (section 22–3001—up to 3 years' imprisonment for intercourse with a girl under 21) and adultery (section 22–301—punishable by imprisonment up to 1 year) statutes.

violence is absent, are treated equivalently to nonviolent rapes. In order to cover this area of crime completely for Federal enclaves, we additionally propose to proscribe nonconsensual sexual acts which do not involve intercourse. Private consensual intercourse or homosexuality, however, would not be Federal crimes.

2. *Forcible Rape; Drugs; Intercourse with Children.*—Proposed section 1641(1)(a) substantially restates existing Federal law on rape. "[T]he federal crime of rape carries with it the requirement of proof of the use of force by the offender and of an absence of consent by the victim." [6] The use of force includes threats to cause death or serious bodily harm to the victim,[7] or to another.[8] Proposed section 1641(1)(b) explicitly includes in the category of "forceful" rape intercourse obtained through the drugging of an unwitting victim. This crime is retained because of potential physical danger as well as the gross bodily violation of the victim.

In section 1641(1)(c) we propose to include explicitly in the definition of rape any sexual intercourse, whether or not force is used, with a child less than 10 years of age. The potential physical and psychic injury which an act of sexual intercourse may cause to a prepubescent child is great. Moreover, the act of engaging in sexual relations with a young child is indicative of a mental aberration known as pedophilia which may necessitate prolonged incarceration.[9] Thus, anyone so subjecting a child should be made susceptible to a lengthy term of imprisonment. However, choosing the proper age below which we may condemn nonforceful intercourse with a child as a major crime is difficult; there is no agreement on such an age, even in current law reform proposals in the States.[10] We here propose to set the crucial age at 10 years,

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[6] *Williams* v. *United States*, 327 U.S. 711, 715 (1946). An approved definition of the crime to a jury is that "rape is the carnal knowledge of a woman forcibly and without her consent." *United States* v. *Marshall*, 266 F.2d 92, 95n.2 (7th Cir. 1959).

[7] "Whatever it may have been in other times, it is generally settled now that consent is not shown when the evidence discloses resistance is overcome by threats which put the woman in fear of death or grave bodily harm, or by these combined with some degree of physical force." *Ewing* v. *United States*, 135 F.2d 633, 635 (D.C. Cir. 1942), *cert. denied*, 318 U.S. 776 (1943).

[8] In *Hughes* v. *United States*, 306 F.2d 287 (D.C. Cir. 1962), a conviction for rape was affirmed where the victim offered no resistance to the attack, because of a threat to kill her daughter, sleeping in the same room.

[9] *See* MODEL PENAL CODE § 207.4, Comment at 250–52 (Tent. Draft No. 4, 1955). But pedophilia is not necessarily accompanied by psychosis. *See, Snider* v. *Smyth*, 187 F. Supp. 299 (E.D. Va. 1960), concerning the rape of a 9-year-old.

> The petitioner was not and is not psychotic . . . [T]hat he has a strong antisocial personality and is blunted morally and ethically affords no legal defense for his atrocious crime.

For a fascinating fictional rendition of the thoughts and acts of a pedophiliac, *see* the novel *Lolita* by Vladimir Nabokov, concerning the character "Humbert Humbert."

[10] The crucial age is set at 11 in New York. N.Y. REV. PEN. LAW § 130.35 (McKinney 1967). Eleven is also proposed in Connecticut and Michigan. PROPOSED CONN. PEN. CODE § 75 (West 1969); MICH. REV. CODE § 2310 (Final Draft 1967). Colorado proposes to set the age at 12, as does Delaware. PRELIM. REV. OF COL. CRIM. LAWS § 40–10–1 (Research Pub. No. 98, 1964); PROPOSED DEL. CRIM. CODE § 435 (Final Draft 1967). California proposes that 14 be the age, and Pennsylvania has proposed 15. CALIFORNIA PENAL CODE REVISION PROJECT § 1601 (Tent. Draft No. 1, 1967); PROPOSED CRIM. CODE FOR PA. § 1202 (1967). Texas does not propose to set a distinction as to age with respect to rape. TEXAS PENAL CODE REVISION PROJECT §§ 100–101 (October Report 1967). The Model Penal Code sets the age at 10. MODEL PENAL CODE § 213.1 (P.O.D. 1962).

as it was in the common law, because "despite the indication that twelve is the commonest age for the onset of puberty, it seems wise to go well outside the average or modal age, and it is known that significant numbers of girls enter the period of sexual awakening as early as the tenth year." [11] Moreover, the age at which puberty is attained is steadily declining in our society.[12] Intercourse with girls over the age of 10 will be criminally punishable, but not at the maximum levels set for rape. Intercourse with a girl under 16 by an adult, and intercourse with a girl unaware of the sexual nature of the act will constitute Class C felonies under proposed sections 1645 and 1642(b) respectively.

Rape is graded as a Class A felony [13] if the crime has its most feared effects—that is, if the victim suffers serious physical injury or is attacked by a stranger.[14] Physical assaults by a companion which do not result in serious injury are graded as Class B felonies. Further, any person who forces a child to succumb to him should be susceptible to maximum punishment, and such behavior is graded as a Class A felony.

3. *Sexual Imposition Upon a Nonconsenting Female.*—Acts of sexual intercourse with nonconsenting females without the use of force, are dealt with in proposed section 1642. This includes having intercourse with a mental incompetent, incapable of giving her consent, or by deceiving a woman into thinking the act is nonsexual or one of marital relations. Obtaining intercourse by a threat, other than one of violence—a threat of exposure of reputation, for example—is also included if the threat is one which would "render a female of reasonable firmness incapable of resisting." So is intercourse with an unconscious woman, or a woman otherwise unaware that the sexual act is being committed upon her.

Though we find no reported case of rape under any of the above circumstances in the Federal law, such acts have been considered rape when they arise in State jurisdictions.[15] If such acts occur on Federal enclaves within States where such conduct constitutes a crime, they will

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[11] MODEL PENAL CODE § 207.4, Comment at 252 (Tent Draft No. 4, 1955). *But see* Comment, 39 NOTRE DAME LAW. 314–318 (1964), suggesting that a subjective test regarding the child's capacity to give consent would be better than an arbitrary selection of a prepubescent age, which is necessarily either too high or too low. The proposal rejects a subjective test ,however, because it seems most unwise to base liability for a crime punishable by maximum penalties on necessarily uncertain evaluation of the victim's mental attitude.

[12] "[A]ll the studies show that many girls now are reaching sexual maturity at age 11 and many boys at 12, where the average used to be a year or two later." Statement of Dr. William V. Lewit, professor of psychiatry and pediatrics, quoted in N.Y. Times, Oct. 7, 1968, at 49, col. 4.

[13] The grading distinction here proposed is a combination of those proposed in California and the Model Penal Code. *See* CALIFORNIA PENAL CODE REVISION PROJECT §§ 1600–1610 (Tent. Draft No. 1, 1967); MODEL PENAL CODE § 213.1 (P.O.D. 1962).

[14] *See* MODEL PENAL CODE § 207.4, Comment at 246 (Tent. Draft No. 4, 1955): "The community's sense of insecurity (and consequently the demand for retributive justice) is especially sharp in relation to the character who lurks on the highway or alley to assault whatever woman passes, or who commits rape in the course of burglary."

[15] *See* the discussion of these forms of nonconsensual intercourse, considered as rape, in PERKINS, CRIMINAL LAW 119–127 (1957).

be punishable under the proposed provision. (*See* section 1648(6)). We do not propose the maximum penalties for these acts, however. Intercourse obtained under the circumstances proscribed by the proposed section is graded as a Class C felony. Compared to the other felonious sexual conduct dealt with in the proposed provisions, such behavior "does not lead to a general sense of insecurity in the community, as does the forceful rape, and the harm done is not as great, if outrage to the feelings of the victim be regarded as the essential evil against which we legislate." [16] Such conduct does, however, constitute a substantial physical and psychological abuse of another human being. Obtaining intercourse by deception, trick, or nondeadly threat is therefore graded equivalent to the penalty for a serious assault.

4. Deviate Sexual Intercourse.—Proposed sections 1643 and 1644 define crimes of forceful and/or nonconsensual acts of deviate intercourse, and provide penalties equivalent to those for rape or nonconsensual intercourse with a woman. The danger to society of persons who perform such acts and the physical and psychic danger to victims is not very distinguishable from the danger posed by rapists. The proposed sections, therefore, deal with such acts of sodomy, making the same distinctions of degree as, and providing equivalent grading to, rape.

5. Corruption of Minors.—The rationale for "statutory rape" laws is that adolescents, though they may have attained physical capacity to engage in intercourse, remain seriously deficient in comprehension of the social, psychological, emotional, and even physical significance of sexuality; it is still realistic to regard such youngsters as victimized by sexual seduction.[17] But it is well known that sexual knowledge tends to be gained rapidly by youngsters in our society and that teenage love affairs and sexual experimentation are commonplace. Indeed, sexual curiosity is not the monopoly of one party alone in such affairs; it is hard to determine which of a young couple is the "seducer." If adult morality cannot prevent adolescent sexuality, perhaps inevitable maturity can. Imprisonment of youngsters for such affairs, however, can do no good in "reforming" them, or in preventing sexual curiosity. Criminal penalties for youngsters in these matters are senseless.

However, there remains reason to provide criminal penalties for an older person who seduces someone significantly younger than himself. This manifests not an equivalent sexual curiosity, but deliberate corruption of an immature person. Here, the rationale for criminal "statutory rape" statutes, such as 18 U.S.C. § 2032, applies. Proposed section 1645 therefore provides for criminal penalties for any person who has sexual intercourse with a minor less than 16 years of age if that person is at least 5 years older than the minor. If the crime is committed by an adult over the age of 21, it is a Class C felony. For persons under 21, the crime is graded as a misdemeanor to avoid the possibility of escalating the crime into one of kidnapping for felonious sexual purposes in cases of "abductions" involving young persons engaged in consensual acts.

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[16] MODEL PENAL CODE § 207.4, Comment at 249 (Tent. Draft No. 4, 1955). The quoted statement specifically concerns sexual intercourse with a mentally deficient person, but seems applicable as well to the other acts of nonforceful intercourse discussed here.

[17] *See* MODEL PENAL CODE § 207.4, Comment at 251–254 (Tent. Draft No. 4, 1955).

Since the purpose of this antiseduction legislation is to enforce a social policy with respect to the sexual mores of young persons, and no basic Federal interest is involved, proposed section 1648 includes a provision which would render its proscriptions inapplicable in any locality where State law tolerates such sexual behavior. For example, if State law protects youngsters from seduction up to the age of 14, but not beyond, it would be no crime under the proposed section to seduce a 15-year-old in a Federal enclave within the State; seduction of a person 14 years old or under would still be a crime on that enclave, if the seducer were at least 5 years older than the youngster seduced.

6. *Minor Sexual Crimes.*—Adoption of proposed sections 1646 and 1647 would provide legislation covering the entire field of sexual misconduct on Federal territory. Section 1646 proscribes sexual intercourse with a person if it is imposed by reason of the existence of the special relationship of one person over another—a parent over his child, a guardian over his ward, or a custodian over a prisoner. Sexual relations in such cases, even though consensual, constitute a breakdown in social order and an abuse of legal responsibility. In the case of prison wards, such relationships would destroy necessary discipline.

Incestuous parent-child relationships are here punished as misdemeanors. Incestuous acts will be punished feloniously when they constitute felonious sexual abuse, or rape, under the proposed provisions.[18] Otherwise, consensual adult incestuous relationships constitute a special psychological problem, which should best be dealt with by breaking up the relationship, and rendering the parties amenable to psychiatric help, perhaps through probation. And beyond the parent-child relationship, the degree of consanguinity which makes a relationship incestuous varies and is patterned after prevailing local mores.[19] Therefore, State crimes of incest not based on sexual imposition of one person over another may be assimilated for application on Federal enclaves, but made punishable at no greater level than that of misdemeanor.[20]

Section 1647 deals with the sexual forms of criminal assault—offensive physical contact of a sexual nature imposed on another without consent or imposed on a person incapable of giving his consent. The provision parallels the proposed felonious provisions on sexual misconduct, the substantive difference being that the absence of sexual intercourse, normal or abnormal, or an attempt at such intercourse, reduces the crime to a misdemeanor.[21] Private acts of sexual deviation between consenting adults (except for defined situations where unfair advantage is taken) are not declared criminal under these proposed provisions. Persons involved in such relations might be required to leave a Federal area, for security, administrative, or other reasons.

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[18] *E.g.*, intercourse with a child (proposed section 1641(1)(c)), or with a youth unaware of the sexual nature of the act (section 1642(b)) or with a youth who has not yet attained the age of 16 (section 1645).

[19] Some States define illicit relationships to include marriage between cousins, but some do not. One State, in fact, makes explicit exceptions depending on the religion of the parties involved. *See* MODEL PENAL CODE § 207.3, Comment at 231 (Tent. Draft No. 4, 1955).

[20] *See* section 209.

[21] If the victim is beaten in a sexually motivated sadistic attack, where there is no effort at intercourse, the crime would constitute the felony of aggravated assault (proposed section 1612), as well as the misdemeanor of sexual assault.

However, there appears to be no reason to impose Federal criminal penalties for such acts.[22] Indecent exposure and public solicitation of sexual relations are dealt with, however, as forms of disorderly conduct, sections 1852 and 1853.

7. *General Provisions.*—Crimes of sexual misconduct have special problems of definition and proof. We propose to establish specific provisions which would clarify and codify the substantive law in this area.

(a) *Definitions.*—Specific definitions of sexual intercourse, deviate sexual intercourse, and sexual contact are provided. The definition of sexual intercourse codifies, without change, the existing rule that sexual intercourse occurs upon penetration,[23] and that the slightest penetration is sufficient to constitute the crime.[24]

(b) *Mistake as to Age.*—Proposed section 1648(1) provides that a mistake as to age is no defense to imposition of sexual acts upon a child when the child is in fact below the age of 10. Any error that is at all likely to be made concerning the age of a child so young would still have the child below the age of puberty.[25] As the child attains puberty, however, bona fide mistakes in age can be made. Therefore, with respect to consensual sexual acts made criminal because the partner was below the age of 16, a defense that the accused reasonably mistook the youth's age is permitted, though the defendant must prove the claim by a preponderance of the evidence. A person who believed he was having sexual relations by consent with someone over the age of 16 does not pose the danger to society sought to be proscribed by the corruption of minors statute.

(c) *Spouse Relationships.*—No sexual relations between persons voluntarily living together as man and wife are made criminally punishable under the proposed provisions. However, spouses who have been legally separated are not considered man and wife for purposes of these criminal provisions; a wife who has left her husband, though she may have been unable to divorce him, has a right to be free from forceful or nonconsensual sexual attacks by him. A judicially obtained separation is required to show dissipation of the marital relationship; otherwise, there is, concerning a separated couple, "the substantial possibility of consent in the resumption of sexual relations, coupled with the special danger of fabricated accusations." [26]

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[22] A statistical analysis of the criteria adopted by police officers investigating rape cases, indicating in large measure that they are the same as those embraced in the proposed grading provision, appears in Comment. *Police Discretion and The Judgment That a Crime Has Been Committed—Rape in Philadelphia*, 117 U. PA. L. REV. 277 (1968).

[23] "Just as there cannot be rape without penetration, there cannot be sexual intercourse without penetration," *Laughlin* v. *United States*, 368 F.2d 558, 559 (9th Cir., *cert. denied*, 386 U.S. 1041 (1966).

[24] "Carnal knowledge means penetration of the sexual organ of the female by the sexual organ of the male and the slightest penetration is sufficient." *United States* v. *Marshall*, 266 F.2d 92, 95n.2 (7th Cir. 1959).

> There can be no dispute that by definition it is fundamental that penetration by the male organ is necessary to constitute the crime of rape or carnal knowledge. But, by the overwhelming weight of authority, it is not necessary to prove full penetration. The crime of rape is committed if it enters only the labia of the female organ.

Holmes v. *United States*, 171 F.2d 1022, 1023 (D.C. Cir. 1948).

[25] *See* MODEL PENAL CODE § 207.4, Comment at 253 (Tent. Draft No. 4, 1955).

[26] MODEL PENAL CODE § 207.4, Comment at 245 (Tent. Draft No. 4, 1955).

Further, the proposed provision on spouse relationships makes it clear that no person may require his spouse to submit to the sexual advances of another. If he does so, he will be an accomplice in the other's crime.

(d) *Promiscuity.*—Proof of reputation for chastity of the purported victim of a sexual attack has probative value in judging the likelihood of consent to the conduct.[27] But a promiscuous person, too, is entitled to protection from forceful sexual acts, or sexual acts not consented to.[28] However, proposed section 1648(3) would make promiscuity a complete defense to those sexual acts made criminal, not because of a lack of consent on the "victim's" part, but because of the presumed immaturity of the purported victim—that is, to the crimes concerning corruption of minors. A promiscuous person does not need special protection from seduction in those situations.[29] The burden, however, is on the "seducing" party to prove the other's promiscuity by a preponderance of the evidence, since he has otherwise violated his responsibilities to society by having intercourse with a minor.

(e) *Prompt Complaint.*—A prompt complaint by the victim of a sexual attack is "one of the most universally accepted forms of corroboration." [30] We propose to make prompt complaint more than a corroborative factor; failure to bring complaint in such matters within 3 months of the occurrence would be an absolute bar to prosecution.

> The possibility that pregnancy might change a willing participant in the sex act into a vindictive complainant, as well as the sound reasoning that one who has, in fact, been subjected to an act of violence will not delay in bringing the offense to the authorities, are sufficient grounds for setting some time limit upon the right to complain. Likewise the dangers of blackmail or psychopathy of the complainant make objective standards imperative." [31]

A special rule is established, however, when the alleged victim is a minor less than 16 years of age. Since young victims may fear adult anger if they reveal that they have been sexually assaulted, or on the other hand may not realize the significance of a sexual seduction, they may maintain silence on the matter for a prolonged period of time.[32] Prosecution in such cases is not foreclosed, therefore, if the matter is reported within 3 months after an adult, other than the alleged offender and especially interested in the child's welfare, learns of the offense.

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[27] "[T]he character, i.e., the reputation, of a rape complainant as to chastity in the community in which she lives is of substantial probative value in judging the likelihood of her consent. *Hicks* v. *Hiatt*, 64 F. Supp. 238, 243 (M.D. Pa. 1946).

[28] In *Packineau* v. *United States*, 202 F.2d 681, 685 (8th Cir. 1953), the court held that the complainant's credibility was very much at issue, especially because of her delay in reporting the crime, and that a reasonable test of credibility required that evidence of prior unchastity be permitted at trial. The court noted, however: "It might be that there are cases where a woman has been set upon and forcibly ravished by strangers coming out of ambush or the like and any inquiry as to her chastity or lack of it is irrelevant."

[29] If the malfeasor takes advantage of the other party's immaturity to obtain intercourse by threat, he will be guilty of gross sexual imposition under proposed sections 1642 or 1644.

[30] *Hughes* v. *United States*, 306 F.2d 287, 289 (D.C. Cir. 1962).

[31] MODEL PENAL CODE § 207.4, Comment at 265 (Tent. Draft No. 4, 1955).

[32] *Id.*

(f) *Complainant's Testimony.*—It is a general rule concerning sex crimes that the jury should be told "that the testimony of the complainant ought to be scrutinized carefully. . . ." [33] In the majority of American jurisdictions, however, "no evidence corroborating the prosecutrix' story is required for conviction, save where her story is inherently incredible or is rendered improbable by other evidence." [34] Federal law is not clear. Corroboration of a complainant's testimony with respect to an allegation of a felonious sex crime is required in the District of Columbia, as it is in some other State jurisdictions,[35] but is not required in the Fourth Circuit.[36]

Because of the inherent danger of mistaken conviction in felonious sex crimes—occasioned, perhaps, by the hysterical accusations of a spurned lover, and even the "special psychological involvement, conscious or unconscious, of judges and jurors in sex offenses charged against others" [37]—the proposed provision, section 1648(5), includes a requirement of corroboration, as well as of instruction to the jury that the complainant's testimony must be evaluated with special care. Recognizing, however, that extrinsic evidence of the commission of such crimes may be difficult to gather, the proposed section provides that proof of corroboration may be circumstantial.[38] Such factors as immediate report of the crime by a complainant in disarray and in a nervous and crying condition,[39] or a child's "free and spontaneous" revelation of the crime,[40] or the demeanor of the accused [41] have been accepted as corroboration.

As in present law, no requirement of corroboration is proposed for the minor sex offenses.[42] The "offensive touching" or seductive situa-

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[33] *United States* v. *Smith*, 303 F.2d 341, 342 (4th Cir. 1962).

[34] *Walker* v. *United States*, 223 F. 2d 613, 619 (D.C. Cir. 1955) (dissent).

[35] *See* discussion in dissenting opinion, *Walker* v. *United States*, *id.* Both corpus delecti (penetration by force) and the identity of the accused must be corroborated. *Franklin* v. *United States*, 330 F.2d 305 (D.C. Cir. 1964).

[36] *See United States* v. *Smith*, 303 F.2d 341 (4th Cir. 1962); *United States* v. *Shipp*, 409 F.2d 33 (4th Cir. 1969); MODEL PENAL CODE § 207.4, Comment at 264 (Tent. Draft No. 4, 1955).

[37] MODEL PENAL CODE § 207.4, Comment at 264 (Tent. Draft No. 4, 1955).

[38] That corroboration can be circumstantial is the rule in the District of Columbia. *Clemens* v. *United States*, 314 F.2d 278 (D.C. Cir.), *cert. denied*, 374 U.S. 845 (1963). *See Ewing* v *United States*, 135 F.2d 633, 636 (D.C. Cir. 1942), *cert. denied*, 318 U.S. 776 (1943):

> . . . [C]orroboration, in the sense that there must be circumstances in proof which tend to support the prosecutrix' story, is required . . . But to safeguard the defendant by requiring corroboration in this sense is one thing. To throw around him a wall of immunity requiring the testimony of an eyewitness or direct evidence which is more than circumstantial in support of the prosecutrix' story is another.

[39] *McGuinn* v. *United States*, 191 F.2d 477 (D.C. Cir. 1951).

[40] *Colon-Rosich* v. *Puerto Rico*, 256 F. 2d 393 (1st Cir. 1958).

[41] In *Walker* v. *United States*, 223 F.2d 613, 618 (D.C. Cir. 1955), the court found corroboration, in part, in the defendant's attitude under questioning in the courtroom: "Highly important further were the circumstances attendant upon the appellant's taking the witness stand."

[42] *See Fountain* v. *United States*, 236 F.2d 684 (D.C. Cir. 1956), holding that unless an attempt at carnal knowledge is shown and corroborated, the case is one of offensive touching, an "indecent liberties" case; *see also Hammond* v. *United States*, 127 F.2d 752, 753 (D.C. Dir. 1942), concerning the touching of a girl's private parts:

> In the instant case, it can just as well be assumed that appellant's purpose was to look or to fondle or to have intercourse if consent were forthcoming, rather than to ravish. That he should be punished goes without saying—but not for attempted rape.

tions which are involved in these crimes do not always occasion the victim's outcries, shock, disarray, or other corroborative behavior.

8. *Jurisdiction.*—Essentially, of course, the proposed statutes on sex crimes would apply to the Federal enclaves. In addition to the Federal territorial jurisdiction, however, a vital jurisdiction over these crimes exists with respect to kidnapping. An intent to commit a crime of rape or sexual abuse as defined in this proposed chapter would be the basis for a kidnapping charge, where a person is abducted to violate or abuse him sexually.[43] In order to avoid charges of "kidnapping" when a girl is transported to a secluded spot in the hope of necking with her, the kidnapping section specifies that only felonious conduct in the course of an abduction will constitute kidnapping.[44]

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[43] *See* proposed kidnapping provision, section 1631(1)(e).

[44] If the victim is kept prisoner for a prolonged period of time in order to commit sexual acts not involving intercourse, the culprit will be chargeable with kidnapping under proposed section 1631(1)(d), in that he abducted and terrorized another.

COMMENT

on

ARSON AND OTHER CRIMES OF PROPERTY DESTRUCTION: SECTIONS 1701–1709

(Stein; June 26, 1969)

1. *Background; Basic Scheme.*—Present Federal provisions dealing with property destruction are designed to protect not only Federal property and property on Federal enclaves, but also property moving in interstate or foreign commerce, communications facilities, defense facilities, and property (churches, schools, *etc.*) used by persons in the exercise of their civil rights. The proposed sections would serve to consolidate the numerous provisions in the present Code which, generally speaking, are stated in separate sections only because of the different Federal interests involved.

The draft follows the pattern of existing law in dealing with acts of destruction of, damage to or tampering with property, considering the danger to human life posed by the destructive act, as well as the nature, extent, and cost of the damage.[1] A major new crime is proposed to deal with modern forms of extreme and swift destruction—release of radioactivity, breaking of a dam, poisoning of a water reservoir.

The grading in the proposed provisions treats severely those forms of destruction which are likely to endanger life as well as property, as does present Federal law. Most property destruction statutes in the present Code explicitly set higher penalties when injury results or life is endangered by the act of destruction (*see* the appendix, *infra*); but despite this pattern, inconsistencies in penalty abound. For example, arson or malicious mischief against property, including buildings, on Federal enclaves (18 U.S.C. §§ 81, 1361) carries a less severe penalty, if no person is endangered, than does damaging property moving in interstate commerce (15 U.S.C. § 1281). Discharging explosives on the grounds of the Capitol (40 U.S.C. § 193f(a)) is less serious in terms of penalty than placing an explosive near a truck (18 U.S.C. § 33), regardless of extent of damage caused or intended. Setting fire to a vessel "within the special maritime jurisdiction of the United States" is punishable by up to 5 years' imprisonment, under 18 U.S.C. § 81, if no person is endangered; the same act when done "with the intent to injure or endanger the safety of the vessel or of her cargo" is

[1] Similar revisions of criminal provisions on arson and property destruction appear in the New York Penal Law of 1967, arts. 145, 150; California Penal Code Revision Project—Tent. Draft, sections 2800–2805; Michigan Revised Criminal Code—Final Draft, c. 27, 28; Ohio Criminal Law Revision, Draft No. 36; Proposed Crimes Code for Pennsylvania, art. XIII; Texas Penal Code Revision Project—c. 20; Model Penal Code, art. 220.

punishable by up to 20 years' imprisonment under 18 U.S.C. § 2275. Mailing a letter with intent to incite arson (18 U.S.C. § 1461) is a more serious crime, under present law, than is arson itself, or attempted arson (18 U.S.C. § 81, 1952). These distinctions would be eliminated by the proposed consolidation of the crimes of property destruction.

2. *Arson: Destruction by Burning or Explosion.*—Intentional use of fire or explosives[2] to damage or destroy property is qualitatively different from other means that may be used to damage property. In addition to endangering any persons who may be on or about the premises, fire and explosion tend completely to destroy property, rendering it irreparable and useless. The scope of destruction by such means is not easily controlled. Unleashing of fire or explosion requires community response, to keep its effect limited; the need to put out the fire and cope with its after-effects itself results in further risk of life to firemen and other members of the community. In short, misuse of fire and explosives is unusually costly, and those who would use such means for criminal purposes are particularly dangerous to society.

Therefore, in the view that the intentional setting of a fire or explosion in order to destroy the property of others must be severely dealt with, the proposed arson provision proscribes such conduct when destruction of buildings, inhabited structures, and vital public facilities is intended. These are properties which, if irreparably destroyed, would, at the very least, create substantial pecuniary loss or public inconvenience and perhaps, as in the case of dwellings, cause immeasurable personal loss. When the defined properties are involved, it would not be necessary to establish that people might have been hurt thereby. It is enough that the actor intended such destruction. For example, bombing a store would be serious in itself, even if the explosion occurred at a time when no people were in it.

We define inhabited structure in section 1709 to include all structures ordinarily used by persons in their daily lives—places of work as well as temporary and permanent homes and living quarters. Places of assembly, used by persons in the exercise of basic civil rights, as well as in mutual commerce and communication, whether or not buildings, such as stadia, markets, passenger terminals, passenger trains, ships, air planes, are included. We further define vital public facilities in section 1709 specifically to include sites which, if destroyed, would cause substantial economic loss or a general disruption of public activity. This includes bridges, tunnels, dams; inclusion in the definition of facilities for launching spacecraft is intended to cover rocket launching sites for guided missiles, satellites, and other space vehicles. Of course, destruction of such property for demolition and reconstruction purposes will not constitute arson, if no one is knowingly injured or endangered, since their destruction by fire or explosion is proscribed

[2] Because dangers from explosion are the same as those from fire, and many present statutes deal with fire and explosion together—*e.g.*, 18 U.S.C. § 1364 (injury or destruction of exports by fire or explosives), 18 U.S.C. § 1992 (setting fire to or placing explosives near railroad); 40 U.S.C. § 193f,h (setting fire to any combustible, or discharging explosives, on Capitol grounds)—we explicitly include causing an explosion as "arson," though traditionally "arson," as exemplified in the Federal enclave statute (18 U.S.C. § 81), concerns fire alone.

only so long as the place is used as an inhabited structure or vital public facility. If it is permanently closed to such use, the property does not retain the characteristics defined.

However, there are possible faults with the proposed provision's reliance on a list of properties, destruction of which would be either costly or might endanger life. We cannot imagine all such properties, and some cases of intentional destruction by fire or explosive which should be considered arson may therefore not be covered. This problem might be resolved by leaving the definitions open ended. By defining vital public facility as "including" (rather than "meaning") the listed sites, we would provide room for judicial expansion of the definition.* However, expansion of the list—for example, to include as a "vital public facility" "structural aids or appliances for navigation or shipping" (buoys, harbor lights), as in present 18 U.S.C. § 81—might well become overbroad. It could cover many objects the destruction of which might cause great difficulty or danger, but the fact that they are destroyed by fire or explosion would not be enough to consider such destruction as arson, on its property destruction foundation. Destruction by explosion or fire of small items which are intrinsically important to safety might recklessly endanger others (*see* paragraph 3, *infra*); but, if it does not, the crime carries none of the special culpability entailed by willingness to cause a substantial amount of destruction by use of fire or explosives. Indeed, even intentional destruction of the listed properties—buildings, inhabited structures, vital facilities—can occur under circumstances not warranting aggravated punishment: the burning of a small bridge over a stream, for example, or a camper's tent, with no one in it.

We might deal with this problem by grading arson in terms of the value of the property destroyed. Thus, intentional destruction by arson of any dwelling house or of any inhabited structure or public facility worth more than a certain sum, perhaps $100,000, might be graded as a Class B felony, and lesser destruction, even intentional, might be a Class C felony. But this distinction does not seem to deal adequately with the culpability of the offender who, after all, is willing to use especially destructive means to destroy significant items of property. The real cost of this act, in terms of rebuilding a home or of disruption of personal business or community endeavors, may not be measurable in terms of the objective value of the property destroyed. If we wish to discourage intentional use of fire or explosives for criminally destructive purposes, it would seem best to retain the proposed definition and grading, leaving sentencing for minimal acts of destruction to judicial discretion.

3. *Endangerment by Fire or Explosion.*—Proposed section 1702 proscribes intentionally starting a fire or causing an explosion and being reckless as to the consequences when the act results in *recklessly* placing another person in danger of injury or death, or when it *recklessly* risks destruction of the kinds of property concerned in the arson provisions or *recklessly* causes damage to another's property constituting a pecuniary loss in excess of $5,000. This offense recognizes the seriousness of setting fires or causing explosion, even when

* The term "including" is used in the Study Draft.

there is no intent to destroy the kinds of property listed in the arson provisions.

The draft would reach fires and explosions intentionally set, even under lawful circumstances, *e.g.*, a person setting off a blast in a construction operation or a mine—if the actor is reckless as to injury to persons or property. This is considered appropriate because our general definition of recklessness reaches only gross disregard of the risks and explicitly rejects the standard used for tort liability (*see* the definition of recklessness, section 302(1)(c)). A person who sets off an explosion in gross violation of accepted procedures, and endangers others, should be culpable. If it is regarded as more desirable, however, to reach use of fire or explosion when such use is clearly unlawful, the proposed section could be modified to penalize only the setting of unlawful fires or explosions.

The scope of this provision reflects several policies. First, it covers intentional settings of fires or explosions to one's own property as well as another's, because recklessness as to the consequences is the key factor rather than, as in the arson provision, intent to destroy.

Fire and explosion are exceptionally difficult to control and may pose dangers to persons and other property; the destructive effect may be severe. This is true even when fire or an explosive is intended to be used only to damage a limited amount of one's own property. It is quite different, that is, to destroy a piece of furniture by taking an axe to it than by burning or exploding it.

Second, the draft upgrades the general reckless endangerment provision (proposed section 1613) when endangerment to persons is the result of an intentional use of fire or explosives, since the use of these sudden and exceptionally disruptive means represents a great, perhaps uncontrollable danger to all persons in the vicinity. When a fire or explosion is set and another person's life or any bodily injury to another person is thereby recklessly risked the crime is graded as a Class C felony. If the fire or explosion is set under circumstances manifesting an extreme indifference to the value of human life, the crime is graded as a Class B felony.[3] This special concern with the dangers posed to life is consistent with present law. The present Federal arson statute (18 U.S.C. § 81), applicable to enclaves, provides a 5 year penalty for "willful and malicious" burning of property, but raises the penalty to 20 years if a "dwelling" is burned or "if the life of any person be placed in jeopardy." Other property destruction statutes in the present Code also indicate differentiations in penalty between simply damaging property, and damaging under circumstances which cause injury, or risk death, to others.

It should be noted, however, that the proposed provision is not tied to specified property. Setting a fire or causing an explosion under life-endangering circumstances is sufficient, regardless of whether a building or other structure is involved. Thus, contrary to traditional concepts of arson, this provision would embrace the set-

[3] Under the general reckless endangerment provision, proposed section 1613, any endangerment of human life under circumstances manifesting an extreme disregard for human life constitutes a Class C felony; and conduct recklessly risking death or *serious* bodily injury (*e.g.*, reckless driving) would be a Class A misdemeanor.

ting of forest or grass fires and the throwing of hand grenades and Molotov cocktails.[4]

Third, the draft covers the reckless destruction of property other than buildings, structures or public facilities, *e.g.*, forests, and includes damage to any property, *e.g.*, furnishings within buildings, but is limited only to such destruction or damage when it constitutes a loss of over $5,000. This would cover any serious consequences resulting from reckless use of such destructive means. Since the requisite culpability is recklessness, it is appropriate to limit the felony punishment to risk of destruction of the property protected by the arson provision or to actual causation of substantial property damage. Reckless destruction by other means, or by these means when destruction is less substantial, is dealt with in the criminal mischief provisions.

4. *Failure to Control or Report Dangerous Fire.*—A present statute, 18 U.S.C. § 1856, protects Federal forest land from persons who start a fire on or near the land and fail to put it out or otherwise keep it from spreading, even though the fire may have been started in the first instance without recklessness. In short, a person starting a fire, even on his own property, has an obligation to keep it from spreading to other property. "The danger depends upon the nearness of the fire, not upon the ownership of the land where it is built. . . . Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests."[5]

Proposed section 1703 would extend application of the present statute to any public property and property on Federal enclaves. The obligation is only to put out or control a fire which one knows is endangering life or property, when one "can do so without substantial risk to [one's] self." Otherwise, one is obligated simply to give a prompt fire alarm. It is, then, only gross misfeasance which is proscribed, a proscription which seems quite reasonable when weighed against the risk of allowing a fire to go out of control.

Though consideration might be given to extending liability under the proposal to any person who is, in fact, under a duty to prevent or combat a fire on premises but recklessly disregards that fact, the proposal limits criminal liability to those who set the fires or authorize setting the fires. The crime is one of omission; and overextension of criminal liability for nonperformance of conduct is disfavored in our jurisprudence (*see* the discussion of crimes of omission in the comment on basis of liability, culpability and mistake). Moreover, to extend the provision would create a harsh sanction for default in employment responsibilities. Though the mistake of law defense (proposed section 610) could be claimed by a person who mistakenly believed he had no lawful obligation in this regard, the utility of the defense would be too limited in the situation with which the proposed provision is concerned. A mistake of law defense would require resort to expert opinion on the issue of law; and such inquiry could not be

[4] But note that some heavy penalties are presently applied regardless of the circumstances, where damage to the property is likely, in itself, to be great as well as dangerous to persons, as with damage to airplanes and ships. 18 U.S.C. §§ 32, 2275 (up to 20 years' imprisonment under either of these provisions). Property damage alone is dealt with by the arson and criminal mischief proposals.

[5] Holmes, J. in *United States* v. *Alford*, 274 U.S. 264 (1927).

expected in the emergency situation contemplated by the provision proposed here.

5. *Release of Destructive Forces; Culpability for Disaster.*—Proposed section 1704 would create a major new crime, dealing with modern situations in which a single deliberate destructive act—breaking a dam, releasing radioactive material into the air—can cause widespread serious personal injury or property damage. When such acts result in death, they are likely to be punishable as murder. But situations can arise in which a great amount of human suffering results from the criminal act, suffering so great as to warrant high criminal penalties, even though no death results. We define such situations as those in which 10 or more persons are seriously injured, 10 or more separate structures substantially damaged, or more than $500,000 damage occurs. Since the Federal government exercises control of many facilities in the nation which, if damaged, can create such destruction—dams, factories producing radioactive materials, poison gas and germ warfare laboratories, *etc.*—and since the gross destruction posited may well reach across State lines, a proscription of such destructive acts is appropriate for a Federal Code.[6]

Beyond those property damage statutes in the present Code which set high penalties when the proscribed damage endangers life, present law does not explicitly proscribe acts of wholesale destruction. Thus, for example, 18 U.S.C. § 832 proscribes the unregulated interstate transportation of explosives, radioactive materials or "etiologic agents" (meaning, no doubt, disease producing), and sets penalties of up to 10 years' imprisonment if death or injury results from violation of the section, without regard to the extent of damage or injury actually caused by release of such destructive agents. Destruction of dams and poisoning of reservoirs is tied to acts of sabotage of national war or defense efforts (18 U.S.C. § 2153), not to any harm such conduct could create under peacetime conditions. Similarly, violations of the Atomic Energy Act are keyed, in penalty structure, to an "intent to injure the United States or [an] intent to secure an advantage to any foreign nation" (42 U.S.C. § 2272), not to criminal culpability involved in extreme harm caused to the civilian population.

Major culpability under proposed section 1704 is based on actual causation of widespread injury or damage. Intentional release of destructive forces causing such injury or damage would constitute a Class B felony. Willful causation of such destruction would be a Class C felony. The Class C felony would be parallel to that proposed for reckless endangerment in the assaults chapter except that extreme recklessness here is based on the use of destructive substances and resulting destruction. Willful creation of such risks, without disastrous result, would be a Class A misdemeanor. Additionally a crime equivalent to that of failing to report or control a dangerous fire is proposed for failure to prevent widespread destruction where the de-

[6] Though several States have considered inclusion of a "catastrophe" provision in their proposed Criminal Code revisions, only one State, Pennsylvania, seems, at this date, to have proposed inclusion of such a statute in a new Criminal Code. *See* PROPOSED CRIM. CODE FOR PA. § 1302; *cf.*, other property crimes revision proposals, note 1, *supra*. The States, apparently, see no serious need for such a provision. *See* TEXAS PENAL CODE REVISION PROJECT § 220.2, Comment at 23–24.

structive forces were set off by the actor; the crime would be a Class A misdemeanor.

6. *Property Damage for Fraudulent Purposes.*—Some Criminal Codes contain statutes imposing a high liability where one destroys any property, including his own, for fraudulent purposes. Since insurance fraud is the most common motive for arson, consideration has been given to including such a provision in this Code. Authorization of a Class B felony penalty for fraudulent property destruction might serve to deter acts of cupidity committed in disregard of the danger to others; acts of destruction for fraudulent purposes import a high degree of professionalism and deliberate criminal action, which may be deterrable. However, to differentiate the offense from other acts of fraud, in warranting very high penalties, the property destruction offense must be based on the danger posed by the act to other persons or the property of others. Where no danger to other persons or the property of others results from the fraudulent burning, and only one's own property is affected, the means of destruction has no special significance; it is the same crime whether one damages one's own valuable painting, or one's own country house by fire or other means, in order to collect the insurance on it. Since provisions of the proposed Code authorized Class B felony penalties for thefts of over $100,000 as well as for arson, endangering by fire, and other crimes of gross property destruction, a special provision on arson committed for fraudulent purposes seems unnecessary.

7. *Criminal Mischief; Malicious Property Damage.*—Proposed section 1705 is a general criminal statute proscribing wanton damage to property of another, or tampering with such property so as to endanger persons or property. Unlike arson, the emphasis in the proposed general crime is not on employment of highly destructive methods, but on resultant damage no matter what means are employed to cause such damage.

Beyond consolidation of the existing statutes protecting from wanton damage property in which there is a Federal interest, the proposed provision makes no substantial changes except with respect to rationalizing the grading scheme.

The key difference between arson and the general property damage provision, in terms of grading, is that an intentional setting of fire or use of explosives is enough to hold the actor feloniously responsible if serious damage is *recklessly* risked thereby: the criminal mischief draft imposes felony liability for property damage, generally, only when large-scale property damage or danger to others is *intentionally* caused. Reckless property damage is graded as a misdemeanor.

Except for this difference, the proposed grading scheme for criminal property damage is similar to that proposed for arson, and generally follows present policy as expressed in existing statutes. Intentional commission of acts causing serious property damage is graded as a Class C felony. When pecuniary loss is the prime criterion, $5,000 is set as the break-off point between felony and misdemeanor. This relatively high figure is set because property damage, even intentional property destruction, not accompanied by any motive to sabotage, steal or commit another crime, usually manifests no more than vandalism or "malicious mischief" on the part of the perpetrator. Such acts should

not be considered felonious unless a desire to cause a large amount of damage is manifest. In contrast, present law punishes as a felony willful damage to Federal property where the loss is in excess of $100 (18 U.S.C. § 1361). This policy, a relic of the distant noninflationary past, is unwarranted today; the revision reflects current monetary values.[7] However, we also impose felony penalties when the operation of public communications, utilities or other vital services is intentionally and substantially disrupted, regardless of the amount of monetary damage, because of the actual or potential harm to many persons caused by such events.[8]

Also considered was the possibility of explicitly making a felony of the intentional infliction of damage to national treasures, such as Plymouth Rock, the original copy of the Declaration of Independence, *etc.*[9] This would avoid the necessity of having to prove that the

[7] In *Edwards* v. *United States*, 361 F.2d 732 (8th Cir. 1966), defendant was sentenced to 3½ years' imprisonment for taking some items (lead pipe, medicine cabinet, face bowl) from a vacant home owned by the United States government; the taking of the property had caused something more than $100 in damages. In *Brunette* v. *United States*, 378 F.2d 18 (9th Cir.), *cert. denied*, 389 U.S. 961 (1967), defendant, arrested on an Indian reservation, became angry and dented the fender of the police car with his car. Luckily for him, however, the cost of repair was only $32.50. His conviction for damaging United States property was affirmed.

[8] There is a distinction, however, between damage to one's own property causing public disruption, and damage to another's property causing such disruption. The proposed property damage provision, unlike the arson and release of destructive forces provisions, concerns only damage to another's property.

In *Marchese* v. *United States*, 126 F.2d 671 (5th Cir. 1942), Italian crewmen, whose ship was docked in American waters, damaged the ship's machinery and navigation equipment so as to make her useless upon Italy's entry into World War II. This act was held to violate the provision against damaging foreign vessels (18 U.S.C. § 2275), even though the damage was done with the owner's consent.

> [A] legislature can prevent destruction of private property by its owner, or its injury, when the public interests are concerned. . . . The statute before us was not made to protect shipowners against the acts of others, but to protect the public interest in ships as vehicles of foreign commerce, with their cargoes and persons on board, against injury or danger by the acts of any person, whether owner, crew, or outsider. (126 F.2d at 675.)

Similar cases decided the same way, were *Giugni* v. *United States*, 127 F.2d 786 (1st Cir. 1942); *Bersio* v. *United States*, 124 F.2d 310 (4th Cir. 1941); and *Polonio* v. *United States*, 131 F.2d 679 (9th Cir. 1942).

The interest of the United States in such cases, as an aspect of foreign relations, may be dealt with in statutes concerning foreign relations. As a general principle, however, in the property destruction statutes proposed here, defendants would not be criminally liable for destroying property upon request of the owner, unless the damage, in turn, caused damage to other property—as, for example, in blocking public harbor facilities. Or, if persons were endangered by the owner's authorized property destruction, defendants would be guilty of reckless endangerment. Otherwise, defendants, under the proposal, would be guilty of no crime. A telephone company, for example, would not be liable for recircuiting its own wires, even if telephone service is disrupted thereby. *Cf. Dacche* v. *United States*, 250 F. 566 (2d. Cir. 1918), upholding a conviction of Germans who conspired in World War I (while the United States was neutral) to blow up allied cargo ships leaving New York harbor; *United States* v. *Tanner*, 279 F. Supp. 457 (N.D. Ill. 1967), concerning firing at a vessel, moving in interstate commerce in Chicago harbor, during a union fight for control of maritime labor. Such acts, of course, would be covered by the proposed statutes.

[9] *See United States* v. *Bowe*, 360 F.2d 1 (2d Cir.) *cert. denied*, 385 U.S. 961 (1966), concerning a plot to blow up the Statute of Liberty and other national monuments.

pecuniary loss from damage to treasured things of inestimable symbolic significance constituted more than $5,000. But this saving proved to be outweighed by the difficulty in finding language that was not overly broad. We considered, for example, declaring acts of damage which "intentionally deprive the public of enjoyment of a venerated thing of national significance" to be felonious, thereby limiting the felony penalty, where value of the property is not proved, to significant property and to infliction of substantial damage. But efforts to prove what things are "venerated" and of "national significance" and to prove a person's intent in this regard seemed dangerously vague, for a criminal statute. It would seem better, therefore, simply to rely on the more objective test of valuation of the loss; it is likely that losses of such significance could be established in terms of money value.

Note on Flag Desecration.—18 U.S.C. § 700, a statute added to the Criminal Code by P.L. 90–381, on July 5, 1968, proscribes "knowingly cast[ing] contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it." The statute has a maximum penalty of 1 year. At about the time this statute was in the process of enactment, the Supreme Court, in a decision upholding a conviction for burning a draft card, held that a recently enacted selective service provision proscribing draft card mutilation or destruction was valid, based on the government's "substantial interest in assuring the continuing availability of issued Selective Service certificates;" the statute was not, the Court held, explicitly aimed at suppressing communication. *United States* v. *O'Brien*, 391 U.S. 367, 381–382 (1968).

Similarly, the government's interest in protection of the flag might be expressed, without interference with first amendment rights, if the flag is compared to other governmental symbols, use of which may be regulated. Customary regulations for use of the flag now appear in chapter 10 of Title 36 of the United States Code, and a proscription against abuse of the flag now appears in section 3 of Title 4 of the United States Code. (The proscription in 4 U.S.C. § 3 is unnecessarily limited, applying only to the District of Columbia). Proscription against mutilation of the flag more properly belongs with these regulatory provisions, and transfer of the section from Title 18 to Title 4 or Title 36 of the United States Code is therefore recommended.

8. *Destruction of One's Own Property: Mistake as to Ownership.*—Destruction of one's own property, not entailing risk of life or property of another, or public inconvenience or disruption, will not be punishable as a crime under this group of offenses. Property is one's own to act on, under the proposed definition of section 1709(b), only if no one else has a proprietary or possessory interest in it, or, if he has, has consented to the actor's act of damage or destruction. Mistake as to ownership or consent may be shown under the proposed general mistake provision (*see* proposed section 304). If the mistake is unreasonable, the actor will not be culpable for intentionally destroying another's property, but will be responsible for recklessness if recklessness suffices for culpability.

9. *Criminal Possession of Destructive Substances.*—Present 18

U.S.C. § 832 proscribes the transportation of destructive substances—explosives, radioactive materials, "etiologic" (disease producing?) agents—on interstate carriers unless regulations of the Interstate Commerce Commission are complied with. A penalty of up to 1 year's imprisonment is provided for violation of the statute; a greater penalty is provided if injury or death results from the violation.

18 U.S.C. §§ 2277 and 2278 prohibit unlawfully bringing or possessing explosives on board ships. Bringing destructive substances on an airplane with intent to damage the plane is proscribed in 18 U.S.C. § 32; a similar proscription applicable to railroads is in 18 U.S.C. § 1992. Illegal use or possession of explosives for the purpose of interfering with another person's exercise of civil rights is proscribed by 18 U.S.C. § 837, and transportation of explosives for use in civil disorders is proscribed by 18 U.S.C. § 231. Mailing destructive substances in violation of postal regulations is proscribed in 18 U.S.C. § 1716. And the manufacture, possession and distribution of explosives generally is regulated by chapter 8 of Title 50 of the United States Code. Generally, where no damage results, violation of these proscriptions is punishable by up to 1 year's imprisonment.

The draft deals with these provisions insofar as reckless violation of these regulations may risk extensive personal injury or property destruction and, therefore, constitute Class A misdemeanors under proposed section 1704(2). Otherwise, violations of regulations can be dealt with by our proposed regulatory offense provisions; knowing violations of regulations in this area are serious and, as at present, may warrant the criminal misdemeanor penalties set for them (*see* draft and commentary on regulatory offenses, section 1006). Still more grievous aspects of dealing with explosives or other dangerous substances—*i.e.*, possession, manufacture or transportation with intent to commit a crime—would constitute criminal attempt or solicitation (*see* proposed sections 1001, 1003), or complicity (*see* proposed section 401). Possible explicit treatment and special grading for dealing in such substances, where there is intent or knowledge that a crime will be committed with them, will be considered with provisions dealing with weapons and criminal tools generally.[10]

10. *Jurisdiction; Property Warranting Protection by Federal Law.*—In addition to covering all property, public and private, on Federal enclaves and in the maritime jurisdiction, present law provides Federal jurisdiction over crimes of property destruction when the property involved is moved in interstate or foreign commerce, or is an instrument of such commerce, *i.e.*, ship, plane, railroad, motor vehicle, or if a person travels in interstate commerce to commit such a crime, or if facilities of interstate commerce are used to commit the crime.[11]

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[10] Some Codes have provisions dealing with explosives alone. *See e.g.*, MICH. REV. CRIM. CODE, § 2810 (Final Draft 1967)—Criminal Possession of Explosives:

(1) A person commits the crime of criminal possession of explosives if he possesses, manufactures, sends or transports any explosive substance; and

(a) Intends to use that explosive to commit any offense; or

(b) Knows that another intends to use that explosive to commit an offense.

(2) Criminal possession of explosives is a Class C felony.

[11] *See* the appendix, *infra*.

Such jurisdiction should be preserved, concurrent with State jurisdiction over crimes of property destruction, not only as an aid to local investigations of crimes having interstate or foreign aspects, but also to express the Federal interest in criminal conduct involving organized crime (18 U.S.C. § 1952),[12] violations of civil rights (18 U.S.C. § 837),[13] and aggravation of civil disorders (18 U.S.C. § 231).[14] Conduct involving such interstate aspects would, however, be graded in terms of the amount of property damage and danger to life caused by the criminal act, as if committed in an enclave, rather than vary according to the basis of Federal jurisdiction.

Further, enforcement of the proposed release of destructive forces provision (proposed section 1704) would be enhanced if Federal jurisdiction over this crime were conferred whenever resultant damage was caused or threatened to a multi-State area, since the crime is premised on the risk or existence of widespread destruction.

Of course, Federal jurisdiction would continue to exist when Federal property is damaged or endangered. Destruction of any property, whether publicly or privately owned, which causes damage to Federal property or facilities would be covered, as would damage to any property, publicly or privately owned, which causes impairment to the national defense or to other vital Federal services.[15]

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[12] *See* the comment on organized crime.

[13] *See* the comment on civil rights.

[14] *See* the comment on riot offenses.

[15] For cases concerning damage to private property which interfere with the national interest, *see, e.g., Roedel* v. *United States*, 145 F.2d 819 (9th Cir. 1944), concerning an attempt to burn a warehouse containing war materials. That defendant intended to interfere with the war effort was proved, in that case, by the fact of his membership in the Nazi party. But, even had defendant attempted to burn the warehouse for nonwar-related reasons—for example, to collect insurance on goods he owned in the warehouse—the United States still should retain jurisdiction, at least to investigate. *See also Abbate* v. *United States*, 247 F.2d 410 (5th Cir. 1957), *aff'd*, 359 U.S. 189 (1959), in which defendants, during a labor dispute against a telephone company, dynamited cable installations. Federal jurisdiction was established in that case because Federally-owned circuits were among those destroyed or damaged (18 U.S.C. § 1362). Note, however, that 18 U.S.C. § 1362 specifically excludes from Federal jurisdiction cases of interference with interstate communications lines as a result of lawful strike activity, unless the lines are used by the Federal government for military or civil defense functions. But the crimes proposed in this article—malicious property damage—would not preclude lawful strike activity, *i.e.*, refusal to operate interstate communication facilities. The Federal interest in maintenance of a privately owned, but nationally necessary, interstate communications system, therefore makes suitable Federal jurisdiction over crimes in this group of offenses affecting interstate communications.

APPENDIX

TYPES OF PROPERTY PROTECTED UNDER PRESENT FEDERAL LAW

Present Federal law protects different classes of property against different damaging conduct through different sanctions:

(1) Buildings (5 years and $1,000 for "willfully and maliciously" burning, destroying, or injuring; if a dwelling, or if any person's life jeopardized, 20 years and $5,000 [18 U.S.C. §§ 81, 1363]):

(2) "building[s] or other real or personal property . . . use[d] for educational, religious, charitable, residential, business, or civic objectives" (1 year + $1,000 for interstate transportation of explosives with knowledge or intent to damage or destroy; if personal injury results, 10 years + $10,000; if death results, death penalty permissible [18 U.S.C. § 837]);

(3) "any property of the United States" (10 years + $10,000 for "destruction" or "willful injur[y]" [18 U.S.C. § 1361]):

(4) "any property" in interstate or foreign commerce by railroad, motor vehicle, or aircraft (10 years + $5,000 for willful destruction or injury [15 U.S.C. § 1281]);

(5) exports (20 years + $10,000 for injury or destruction by fire or explosives to articles being exported from United States when coupled with intent to obstruct their exportation [18 U.S.C. § 1364]);

(6) structures ([parentheses in item "1"]);

(7) machinery (5 years + $1,000 for "willfully and maliciously" burning, destroying, or injuring; if any person's life jeopardized, 20 years + $5,000 [18 U.S.C. §§ 81, 1363]);

(8) "building materials *or* supplies" [emphasis added] (5 years + $1,000 for "willfully and maliciously" burning; if any person's life jeopardized, 20 years + $5,000 [18 U.S.C. § 81]);

(9) "building materials *and* supplies" [emphasis added] (5 years + $1,000 for "willfully and maliciously" destroying or injuring [18 U.S.C. § 1363]);

(10) military or naval stores, munitions of war ([parentheses in item "7"]);

(11) "works or property or material of any submarine mine or torpedo or fortification or harbor defense system owned or constructed or in the process of construction by the United States" (5 years + $5,000 for willful injury to, destruction of, or interference with [18 U.S.C. § 2152]);

(12) war material, war premises or war utilities (30 years + $10,000 for willful injury, destruction, contamination or infection, during war or national emergency, when coupled with intent to obstruct U.S. or allied war activities [18 U.S.C. § 2153]):

(13) national defense material, national defense premises, or national defense utilities (10 years + $10,000 for willful injury, destruc-

tion, contamination, or infection, when coupled with intent to obstruct U.S. national defense [18 U.S.C. § 2155]);

(14) civil aircraft (20 years + $10,000 for willfully setting fire to, destroying, damaging, disabling, or wrecking [18 U.S.C. § 32]);

(15) civil aircraft parts, facilities and cargo (20 years + $10,000 for willfully setting fire to, damaging, destroying, disabling, wrecking, placing any "destructive" substance near, or otherwise causing hazard to work or use when coupled with intent to damage, destroy, disable, or wreck any aircraft [18 U.S.C. § 32]);

(16) motor vehicles, motor vehicle facilities, motor vehicle cargo (20 years + $10,000 for willfully damaging, disabling, destroying, tampering with, or placing explosives near, when coupled with intent to endanger, or reckless disregard for, anyone on board [18 U.S.C. § 33]);

(17) railroad trains (20 years + $10,000 for willfully derailing, disabling, or wrecking; if death results, death penalty permissible [18 U.S.C. § 1992]);

(18) railroad facilities (20 years + $10,000 for willfully setting fire to, placing explosives near, or "undermining" with intent to derail, disable, or wreck a train; if death results, death penalty permissible [18 U.S.C. § 1992]);

(19) vessels and their goods (10 years + $10,000 for "willfully and corruptly" conspiring to destroy, when coupled with intent to defraud underwriter; life imprisonment for "willfully and corruptly" destroying own vessel, when coupled with intent to defraud underwriter, shipper, or co-owner; 10 years for nonowner "willfully and corruptly [to] cast away or otherwise destroy" United States vessel "to which he belongs"; 10 years + $10,000 for willfully causing or permitting destruction or injury to private vessel; 20 years + $10,000 for setting fire to or placing explosives on, when coupled with intent to endanger vessel, cargo, or persons aboard; 1 year for loss, destruction, or "serious damage" to a merchant vessel if caused by employee's drunkenness or "willful breach of duty," or if employee's drunkenness, willful breach of duty, or "neglect of duty" "tend[s] immediately" to endanger "life or limb;" 10 years + $5,000 for whoever "plunders, steals, or destroys" goods from vessel in distress; 5 years + $1,000 for maliciously destroying any cable fixed to anchor or moorings; 1 year + $1,000 for possession of explosives aboard registered vessel without master's permission, or for master's carriage of explosives "likely to endanger" vessel or passenger; $2,000 for shipping certain explosives, or for shipping other explosives not in accordance with Coast Guard regulations, or 10 years + $10,000 if death or bodily injury results [18 U.S.C. §§ 1658, 2196, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278; 46 U.S.C. § 170]);

(20) "structural aids or appliances for navigation or shipping" ([parentheses in item "7"]);

(21) U.S. Capitol Grounds (60 days + $100 for discharging firework or explosive, or setting fire to any combustible; if damage to public property exceeds $100, 5 years [40 U.S.C. § 193f,h]);

(22) timber and grasses (1 year + $1,000 for "wanton" destruction of timber; 5 years + $5,000 for "willfully and without authority" setting fire to timber, underbrush, grass "or other inflammable material"; 6 months + $500 for, after kindling fire, leaving it not totally

extinguished, or "suffer[ing] said fire to burn unattended" [U.S.C. §§ 1852, 1853, 1855, 1856]);

(23) wildlife (6 months + $500 for willful injury to or destruction of United States property on land or water reserved as sanctuaries for birds, fish, or wild animals [18 U.S.C. § 41]);

(24) communications (10 years + $10,000 for willful or malicious injury to, destruction of, or interference with communications systems controlled or operated by United States [18 U.S.C. § 1362]);

(25) mail (3 years + $1,000 for "willful or malicious" injury to or destruction of mailbox, or destroying or injuring mail within; 1 year + $100 for unauthorized destruction of mail [18 U.S.C. §§ 1703, 1705]).

In addition, Federal stautes protect unspecified property by generalized prohibitions:

(1) interstate commerce with intent to "promote or facilitate" arson in violation of law of U.S. or State law, followed by attempt (5 years + $10,000 [18 U.S.C. § 1952]);

(2) mailing an article "tending to incite arson" (5 years + $5,000, or 10 years + $10,000 for subsequent offenses [18 U.S.C. § 1461]);

(3) mailing of explosives, except as permitted by Postmaster General (1 year + $1,000 [18 U.S.C. § 1716]);

(4) introducing misbranded packages of hazardous substances (including substances which are "flammable or generate pressure through decomposition, heat, or other means") into interstate commerce is punishable by 90 days + $500, or, if done intentionally to mislead (or nonintentional subsequent offenses), by 1 year + $3,000 (15 U.S.C. §§ 1261, 1263, 1264).

COMMENT

on

BURGLARY AND OTHER CRIMINAL INTRUSIONS:

SECTIONS 1711–1719
(Stein; September, 1969)

1. *Background; Policy.*—There are at present no offenses of burglary or trespass generally applicable to Federal property or to Federal enclaves. Present Federal law regarding unlawful entries deals with specific properties—Post Offices, for example, but not Federal office buildings generally. Federal enclaves rely, for burglary provisions, on local law, yet burglary provisions vary more widely from State to State than do most other criminal statutes.[1]

Moreover, the present Federal burglary provisions are inconsistent in penalty. Thus, breaking and entering into railroad cars, airplanes, vessels, trucks and other vehicles moving interstate "with intent to commit larceny therein" carries a sentence of up to 10 years' imprisonment (18 U.S.C. § 2117); breaking and entry into a vessel within the maritime jurisdiction with intent to commit any felony, or described forms of malicious mischief, leads to no more than 5 years' imprisonment (18 U.S.C. § 2276). A "forcible" breaking into a Post Office in order to commit "any larceny or other depredation" is punished by up to 5 years' imprisonment (18 U.S.C. § 2115), though any entry "by violence" into a railway or steamboat Post Office warrants no more than 3 years' penalty (18 U.S.C. § 2116). But, *any* entry into a bank with intent to commit any felony may be punished by up to 20 years' imprisonment (18 U.S.C. § 2113).

The proposed draft is designed to provide carefully graded offenses

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[1] For cases in which Federal courts, under the present Assimilative Crimes Act (18 U.S.C. § 13) were required to delve into the intricacies of local burglary law to resolve cases arising on Federal property or in Federal enclaves, *see, e.g., Bayless* v. *United States*, 381 F.2d 67 (9th Cir. 1967), concerning the law on "breaking," and *Dunaway* v. *United States*, 170 F.2d 11, 12 (10th Cir. 1948), an assimilated crimes case involving the breaking and entry into a building owned by the United States, on land within exclusive Federal jurisdiction, and interpreting the State law on burglary as applied to the Federal building. *See also, United States* v. *Brandenburg*, 144 F.2d 656, 661 (3d Cir. 1944):

> [T]here is no State in which the offense of breaking into the dwelling house of another in the nighttime with the intent to commit a felony therein would not be a crime . . . [but] each State has erected numerous statutory offenses which include such crimes as breaking into a dwelling house, a warehouse, a ship, an office, a freight car or even a boat with the intent to commit a felony therein.

See MODEL PENAL CODE § 221.1 (P.O.D. 1962), and the discussion of State burglary laws in Tent. Draft No. 11, at 54–61 (1960). The former District of Columbia "housebreaking" statute for example, (22 D.C. CODE, § 1801 (1967)), added to "dwellings" a long list of commercial premises which could be the subject of "housebreaking."

covering unlawful intrusions which can be made applicable to all Federal interests, providing uniformity of treatment whenever such intrusions are Federally prosecuted. In addition, the draft eliminates the element of the manner of entry from the offense of burglary, a matter presently subject to inconsistent treatment in Federal law. The elimination of "breaking" as an element is in accord with other modern criminal law revisions.[2] The draft also deals explicitly in criminal trespass, with problems as to defining, in terms of grading, the relative seriousness of a trespass—from trespassing upon a dwelling or a highly secured government area to a much more innocuous trespass on posted land.

2. *Burglary; Substantive Provision.*—There is some question whether a burglary provision is needed at all in a reformed Criminal Code. Entry into premises with intent to commit a crime inside is, after all, a substantial step toward commission of the crime and under our proposed general attempts provision (proposed section 1001) constitutes an attempt to commit the crime. However, we propose to retain a burglary provision in the Federal Code, as do revisers of recent State Criminal Codes. We do so, not only because of the strong roots the concept of burglary as a separate crime has in Anglo-American law, but also because the fact of entry into another's private premises for the purpose of committing a crime constitutes serious criminal conduct in itself. Any such entry, to begin with, displays a degree of deliberation and commitment to criminal action on the part of the culprit which presents a terrorizing aspect to any person properly within the premises. It is, in itself, an invasion of secured property and privacy. Further, it may not be clear, at the time of the culprit's entry, exactly what crime he intends to commit inside, though there may be ample evidence manifesting an intent to commit some crime.[3] For example, an opponent in a business or labor

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[2] Proposed State revisions of burglary and criminal trespass laws, similar to those here proposed, include: N.Y. REV. PEN. LAW §§ 140.00–140.35 (McKinney 1967); PRELIM. REV. OF COLORADO CRIM. LAWS §§ 40–5–1 to 40–5–3, 40–6–4 (1964); PROPOSED CONN. PEN. CODE §§ 110–120 (1969); PROPOSED DEL. CRIM. CODE §§ 510–518 (1967); MICH. REV. CRIM. CODE §§ 2601–2615 (Final Draft 1967); PROPOSED CRIM. CODE FOR PA. §§ 1401–1403 (1967); DRAFT OF TEXAS PENAL CODE REVISION § 221.1 (1967). The proposals derive from MODEL PENAL CODE art. 221 (P.O.D. 1967).

[3] *See, e.g., Hiatt* v. *United States*, 384 F.2d 675 (8th Cir. 1967), *cert. denied*, 390 U.S. 998 (1968), holding that evidence of the defendant's breaking into a sealed railroad car, his effort to flee on warning from an accomplice, his false story, and his possession of pliers and a flashlight were enough to prove his entry with intent to steal; *Washington* v. *United States*, 263 F.2d 742, 745 (D.C. Cir. 1959), *cert. denied*, 395 U.S. 1002 (1959), holding that the fact defendant accosted a girl in the house he illegally entered did not preclude a jury finding that his original intent was to steal: "[T]he unexplained presence of appellant in the darkened house near midnight, access having been by force and stealth through a window, is ample without more to allow an inference that he was there to steal." Both of these cases might more easily have been resolved if the required proof of intent was not limited to proof that the intended crime was, specifically, larceny. Further, reliance on a burglary provision, rather than the law of attempt, makes it easier to deal with concepts such as impossibility of successful commission of the crime. *Cf. Pinkney* v. *United States*, 380 F.2d 882, 885 (5th Cir. 1967): "It was not necessary to prove the contents of the safe, nor would it make any difference if the safe had been proved to be empty. The elements of the offense charged are the entry and the holding of an intent to commit larceny at the time of entering. Success or failure of the venture is immaterial."

dispute, found surreptitiously entering his rival's property, may be there to commit theft, malicious mischief or assault. A person breaking into a Post Office, armed with weapons and explosives, is probably there to "crack open" a safe, though he may be there to commit arson and destroy the surrounding property. The proper charge, in these cases, would simply be burglary. Moreover, in retaining the crime of burglary, we need not fear abuse of sentencing, as by sentencing the culprit to serve consecutive sentences for both burglary and the completed crime, since our provisions on multiple prosecutions and on sentencing protect against such double punishment. (*See* proposed sections 703, 3206.)

Retention of the crime of burglary does, however, result in one form of escalation of punishment. While it is true that most burglaries are with the purpose of committing theft, and some present Federal provisions define the crime as an unlawful entry with intent to commit larceny (*e.g.*, 18 U.S.C. §§ 2115, 2117), the draft follows modern revisions in defining burglary as an unlawful entry with intent to commit *any crime*. This covers those situations in which the specific criminal purpose of the unlawful intrusion is not clear. The draft, therefore, includes entry with intent to commit a misdemeanor—as, for example, criminal mischief.[4] The problem of thereby creating a felony out of what would otherwise be a misdemeanor cannot easily be resolved. On balance, however, the felony penalty for any criminally motivated intrusion appears to be warranted, because of the added factor of the invasion of enclosed premises.

The proposal, however, seeks to prevent overbroad coverage of the burglary provision and escalation of minor crimes into felonies, by limiting the types of premises which are the subject of burglary. The provision covers entries only into enclosed structures. Buildings and occupied structures, as defined, are types of premises in which individuals seek most to be secure in person and property.[5] Some modern revisions limit burglary proscriptions entirely to this type of premises. New York, for example, limits burglary to unlawful incursions into "buildings," which are defined to include "any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein." (New York Revised Penal Law § 140.00 (McKinney 1967)). However, one of the few present Federal statutes on the subject (18 U.S.C. §2117) proscribes breaking and entering into railroad cars, vessels, airplanes, trucks and other vehicles carrying interstate freight. Though intrusions into such property do not involve special dangers to persons, some States, in revising their burglary laws, continue to include unlawful entries into such property as burglary. Illinois, for example, defines burglary to include an unlawful intrusion into a "watercraft, aircraft, motor vehicle . . . , railroad car . . ." (Illinois Criminal Code § 19–1 (1961)). Because present Federal law has a special interest in such storage structures and because of the likelihood of large property loss from criminal intrusions on such premises, consideration has been

[4] But entry into the structure with intent to commit a trespass would, under proposed section 703(3), not automatically become a burglary.

[5] *See, e.g., Henderson* v. *United States*, 172 F.2d 289 (D.C. Cir. 1949), holding that entry of an enclosed porch constitutes entry of the victim's apartment.

given to possible inclusion of storage structures in the burglary provision, even though the reasons for maintaining a separate crime in such situations are not as strong. Storage structures are excluded from burglary coverage under the draft, as are passenger cars and enclosures such as fenced yards, on the view that the reasons for a separate burglary offense are too far attenuated for unlawful entry into such property. There is no great need to declare such intrusions automatically felonious, without specific consideration of the crime attempted. Note, however, the special treatment of concealment in or breaking into vehicles. (*See* paragraph 6, *infra*.)

With the concept of burglary limited to those enclosed premises in which protection of the sanctity of persons and property is of prime consideration, there is no need to retain, as an element of the crime, the traditional requirement that the property be broken into to constitute burglary. The culprit who enters an open window or uses a key he has improperly obtained is just as dangerous. Indeed, even in common law, the requirement of proof of a "breaking" has been so broadly interpreted as to become merely of symbolic significance.[6] The draft, therefore, proscribes entry, by whatever means, with intent to commit a crime.

On the other hand, persons properly entering upon premises—whether by virtue of invitation, authorization or because the premises are normally open to the public—are not, under the proposal, considered burglars, even when they enter with intent to commit a crime. When a person comes onto property by lawful means, he remains criminally accountable only for the acts he thereafter performs on the property, but his entry in itself imposes no special terror or invasion of privacy on the property holder so as to render the culprit guilty of burglary. A bank employee who enters his bank with intent to embezzle from it, or a customer who intends to commit a theft by false pretenses, can no more be considered a "burglar" than can a man who enters his own house intending to have a violent argument with his wife, or a government employee entering his office intending to accept a bribe.[7]

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[6] *See* MODEL PENAL CODE § 221.1 (P.O.D. 1962) and Tent. Draft No. 11 at 58 (1960).

[7] *See Wyche* v. *Louisiana*, 394 F.2d 927 (5th Cir. 1967), concerning a State charge of aggravated burglary in that defendant entered public premises with intent to assault another, and did so assault him. The Fifth Circuit held that the entry could not be deemed unlawful, because it was authorized under the Federal law, *i.e.*, the Civil Rights Act. At most, therefore, defendant committed a simple assault, and could not be held for burglary. *See also Mills* v. *United States*, 228 F.2d 645 (D.C. Cir. 1955), holding that if defendant entered an office and took property from it believing he had the owner's permission to do so, he could not be guilty of "housebreaking." *But cf. Alford* v. *United States*, 113 F.2d 885, 887 (10th Cir. 1940), holding that a scheme to take funds from a bank customer's safety deposit box, by false representations, "is an offense in the nature of burglary, entry of a bank with intent to commit a felony or larceny therein, except that forcible entry is not made an element." If Federal jurisdiction is applied to all crimes of larceny against Federally-insured banks, the described crime would be Federally prosecutable as an attempted larceny but, under the proposal, it could not be considered burglary. Neither would a prospective robber, entering the bank during business hours, be guilty of burglary; his crime, at that point, would be attempted robbery. In this sense, the meaning of present 18 U.S.C. § 2113, proscribing "enter[ing] or attempt[ing] to enter any bank . . . with intent to commit . . . any felony" would be limited by the proposed provision.

For similar reasons, some modern Codes limit burglary proscriptions only to intrusions accomplished by unlawful entry.[8] That is, a person who properly enters into property but remains there past the time when he properly can be there, even with intent to commit a crime, is not considered to be a burglar. Indeed, the present Federal statutes are worded in terms of unlawful entry. Other modern Codes, however, include, as burglary, *remaining* on premises without privilege to do so and with intent to commit a crime (*e.g.*, the New York Revised Penal Law § 140.00 (McKinney 1967), and the Illinois Criminal Code § 19–1 (1961)). This eases the burden of proof in burglary cases, when an intruder is discovered upon premises. For example, a prowler may be apprehended in a public building after closing hours, under circumstances indicating criminal intent; he may be breaking into a file cabinet. Although his intent upon entering the building may be inferred therefrom, it is nevertheless simpler to show that he was at the time of apprehension, in the premises, without privilege and with criminal intent. This provision may be helpful in prosecuting burglaries of Federal office buildings where access is open during normal business hours but restricted to authorized personnel at other times. However, its inclusion may overly broaden the scope of the burglary statute. A visitor to one's home, for example, who becomes involved in an argument with his host, threatens to punch him in the nose, and is asked to leave, would no longer be privileged to remain on the premises; if he does not leave, but continues his threatening argument, he would, if simply "remaining" without privilege is included in the proposed definition, be guilty of burglary. For this reason the provision is limited to acts of "surreptitiously" remaining on premises. Note, however, that the principal reason for having a separate burglary statute—the fear engendered by unlawful entry alone, is absent if original entry was lawful.

Entries upon abandoned property, even with intent to commit a crime, would not constitute burglary under the draft. Though the culprit may intend to act criminally, his entry poses none of the dangers to any property holder which would warrant consideration of the culprit as a burglar. Entries upon abandoned property are excluded from the scope of the burglary provisions under the definition which describes "occupied" structures as structures which are *used* by persons. Similarily, by "buildings," the proposal means to indicate permanent structures, still in use. Entry into a structure so broken down or dilapidated as to clearly have no further usefulness would not constitute burglary since the structure would no longer be "built for permanent use" within the ordinary meaning of the word "building."[9]

3. *Burglary: Grading.*—The major danger posed by the crime of burglary is the risk of a violent encounter with an intruder who is bent on criminality upon enclosed private premises, and the proposal grades the crime in accordance with the degree of accentuation of that

[8] *See* MODEL PENAL CODE § 221.1 (P.O.D. 1962).

[9] Webster's Dictionary defines "building" as "a roofed and walled structure built for permanent use." (NEW COLLEGIATE DICTIONARY (7th ed. 1967).) In *James v. United States*, 238 F. 2d 681 (9th Cir. 1956), a burglary conviction was reversed on a holding that an unoccupied house, in which the owner did not live and did not intend to live, was not a dwelling house.

possibility. All burglaries are felonies. But burglary of a dwelling house at night is an invasion of the home at a time when the occupants are most vulnerable, and is graded as a Class B felony. So is any burglary in which the intruder harms or attempts to harm another or menaces another with serious injury, or in which he carries a dangerous weapon. This is an area in which aggravation of the crime because of weapons possession has deterrent value, since burglary is a crime for which the culprit is likely to plan and to prepare. Grave penalties may induce the culprit to take measures to avoid dangerous confrontations with other persons.

Several State reforms and proposed reforms of burglary statutes grade the crime still higher when the above factors are combined, that is, when the burglary is committed by an armed intruder in a dwelling house at night. The draft refrains from grading this a Class A felony, despite the increased terror to the householder and culpability of the burglar, because the other Class A "common law" crimes in the Code involve actual violent confrontation of the culprit and the victim—*i.e.*, murder, robbery, rape. Insofar as our grading scheme may serve some deterrent value, reserving severest penalties for such confontations may provide the most clear cut grading criterion for distinguishing between Class A and other felonies.[10]

On the other hand, one of the problems in grading burglary has been that burglary is considered a crime separate and independent from the crime which the burglar, upon his entry, intends to commit. Therefore, cumulative sentences have been heaped upon burglars, to a disproportionate degree.[11] The proposal treats burglary as a most serious offense in itself. An undesirable accumulation of charges and sentences will be avoided by application of the proposed provisions on sentencing and multiple prosecutions. (*See* proposed sections 703, 3206.)

4. *Possession of Burglar's Tools.*—The District of Columbia has, as do most of the States, a provision proscribing possession of tools which are designed for use in commission of burglary (22 D.C. Code § 3601

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[10] New York grades this worst form of burglary as a Class B felony (N.Y. REV. PEN. LAW § 140.30 (McKinney 1967)), reserving its highest grade of offenses for the violent confrontation crimes. Michigan, following New York's lead, proposes to upgrade burglary when the culprit is armed and the offense is in a dwelling house (MICH. REV. CRIM. CODE § 2610 (Final Draft 1967)). But Michigan proposes, as we do, to use only 3 grades of felony classification; its first degree burglary provision, therefore, is graded as a Class A felony. We believe Michigan in error in so proposing to equate burglary with the worse crimes of robbery, kidnapping, rape, *etc.*

[11] In *United States* v. *Carpenter*, 143 F.2d 47, 48 (7th Cir. 1944), the defendant received separate terms for entering an interstate freight car, larceny, receiving and conspiracy. Despite the apparent harshness of the sentence, the court held:

> Congress defined and penalized every conceivable form of act, every gradation of the process of burglarizing interstate commerce, when it enumerated these many acts. It intended to make criminal any act therein recited. If two of the acts in any category were disclosed, two crimes were committed.

Similarly, breaking into a Post Office with intent to commit larceny has been held to be a separate crime from larceny itself. *Morgan* v. *Devine*, 237 U.S. 632 (1915). Under the bank robbery statute (18 U.S.C. § 2113), however, it has been held that entry of a bank with intent to commit robbery or larceny is a lesser-included crime to completion of a robbery or larceny in the bank. *Prince* v. *United States*, 352 U.S. 322 (1957).

(1967)). It has been held that possession of such tools may not constitutionally be made criminal unless the prosecution proves an intent to commit a crime with such tools.[12] New York, in its recent revision, has retained a burglar's tools offense, explicitly requiring proof of such intent (New York Revised Penal Law § 140.35 (McKinney 1967)). However, there is no such crime defined in the present Federal Criminal Code, and there seems to be no need for an explicit provision of this kind. Possession of such instruments with such intent constitutes an attempted burglary. (*See* the general statute on attempts, proposed section 1001.)

Prosecutors in the District of Columbia and in New York inform us that they find the offense of possession of burglar's tools useful as a lesser-included offense to burglary, to which lesser pleas of guilt can be taken, but the crime of attempted burglary would serve the same purpose. Further, in some instances the crime of possession of burglar's tools has been useful in prosecuting efforts to break into locked cars; the crime is not an attempted burglary, since illegal entry into a passenger automobile does not constitute burglary. But we prefer to deal with such conduct more directly, and provide an explicit provision dealing with breaking into vehicles in proposed section 1713. (*See* paragraph 6, *infra*).

5. *Criminal Trespass.*—It is indisputable that the government, as well as private owners, has the right to control and regulate the use of its real property.[13] But there is no general trespass statute applicable to all government property. Rather, present Federal trespass statutes cover only specific items of Federal property. Present statutes vary from trespass upon fortifications, harbor defenses or defensive sea areas (18 U.S.C. § 2152), which carries penalties of up to 5 years' imprisonment and trespass upon Atomic Energy Commission installations (42 U.S.C. § 2278a), with penalties of up to 1 year's imprisonment, to trespass into a national forest when it is closed (18 U.S.C. § 1863), which may be punished by up to 6 months' imprisonment, trespass on the Bull Run National Forest (18 U.S.C. § 1862), which also carries a penalty of up to 6 months' imprisonment, and trespass in Crater Lake National Park (16 U.S.C. § 122), Glacier National Park (16 U.S.C. § 161), Mount Rainier National Park (16 U.S.C. § 91), Sequoia National Park (16 U.S.C. § 41), Yosemite National Park

[12] The District of Columbia statute has been held unconstitutional insofar as its proscription of possession of implements which "reasonably may be employed in the commission of any crime" takes from the prosecution the burden of proving intent to use an ordinary implement unlawfully. *Benton* v. *United States*, 232 F.2d 341 (D.C. Cir. 1956).

[13] "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. . . . The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose." *Adderly* v. *Florida*, 385 U.S. 39, 47–48 (1967). This is true, even as against the Constitutional rights to free speech and assembly: "[W]here property is not ordinarily open to the public, this Court has held that access to it for the purpose of exercising First Amendment rights may be denied altogether. . . . Even where municipal or state property is open to the public generally, the exercise of First Amendment rights may be regulated so as to prevent interference with the use to which the property is ordinarily put by the state." *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 315 (1968).

(16 U.S.C. § 61), or on public lands and grounds in the District of Columbia (40 U.S.C. § 19), for which the penalty is ejection.

Proposed section 1712 provides a general criminal trespass statute, which may be applied to all Federal property and to private property within the Federal territorial or maritime jurisdiction. The present piecemeal pattern of trespass legislation, covering specific pieces of property, is inadequate in drawing discriminations concerning the nature of the trespass. For example, section 2278a of the Atomic Energy Act (42 U.S.C. § 2278a) was intended to furnish "a sound legal basis for prosecuting trespassers on [Atomic Energy] Commission property in the absence of any Federal trespass statute of general applicability. . . . [T]his new section was meant to deal with simple trespasses *per se*, as well as those involving dangers to health and security." [14] But there are no adequate statutory standards in 42 U.S.C. § 2278a to distinguish between a simple trespass into an AEC building and a dangerous breach of a secured area. The proposed offense is graded in accordance with the nature of the property intruded upon, as in present law, with additional consideration as to the nature of the intrusion.

The basic remedy for any trespass upon open property, or violation of regulations for use of the property where the actor has some initial right to be on the property, is ejection. The trespass itself does not become criminal until the actor knows he has no license or privilege to remain on the land, and yet enters or remains there. That is, a person with no notice that he is improperly on the property or is violating a regulation on use of the property does not become a criminal trespasser until he received such notice and thereupon defies it. [15] Even when a person, knowing he is not licensed or privileged to do so, enters on posted property or defies an order to leave given by

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[14] *Goldberg* v. *Hendrick*, 254 F. Supp. 286, 290 (E.D. Pa. 1966), *cert. denied*, 385 U.S. 971 (1967).

[15] In *Bouie* v. *City of Columbia*, 378 U.S. 347, 358 (1964), reversing a State trespass conviction because defendants had no notice of the law at the time they acted, the Supreme Court quoted BISHOP, CRIMINAL LAW § 208 (9th ed. 1923):

> In civil jurisprudence, when a man does a thing by permission and not by license and after proceeding lawfully part way, abuses the liberty the law had given him, he shall be deemed a trespasser from the beginning by reason of this subsequent abuse. But this doctrine does not prevail in our criminal jurisprudence, for no man is punishable criminally for what was not criminal when done, even though he afterward adds either the act or the intent, yet not the two together.

And in *Martin* v. *City of Struthers*, 319 U.S. 141, 147–148 (1943), declaring a local ordinance forbidding door-to-door distribution of literature an unconstitutional abridgement of free speech, the Supreme Court commented:

> Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off . . . We know of no state which . . . makes a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command from the owners to stay away.

See also Buenaventura v. *United States*, 291 F.2d 86 (9th Cir. 1961), holding that defendant could not be guilty of unlawfully entering a military defense area when he was stowing away on a ship which docked at the base, since he was arrested as a stowaway prior to the ship's entry into the military area.

an authorized person, the offense does not warrant serious criminal penalty, unless the offender proceeds to harm person or property. Such trespasses may concern petty disputes as to use of the property.[16] They include trespasses in National Parks. If the trespasser's conduct in the park is such as to endanger persons or property the more serious penalties of the proposed arson and criminal property destruction provisions will come into play. Absent such conduct, such trespasses are graded as infractions. This should, in any event, permit immediate arrest and eviction of the trespassers, which is the penalty presently provided for most such trespasses in National Parks.[17]

A more serious trespass is one in which the trespasser enters into any enclosed place manifestly designed to exclude intruders. The breach of property so secured is enough to raise apprehension on the part of the property holder as to the safety of his person or property. Moreover, the affirmative conduct of the trespasser in breaching secured property adds to his culpability for his defiance of rights to privacy and property. Proposed section 1712(2) grades such trespasses as Class B misdemeanors.

For similar reasons, acts of entering, hiding or otherwise unlawfully remaining in buildings, occupied structures or commercial structures by persons knowing they are not licensed or privileged to do so are also graded as Class B misdemeanors. This is a lesser crime to buglary: the intruder, perhaps a vagrant, cannot be shown to have intended to commit any crime in the property, but his presence may be quite unsettling to the property holder.

Again, in terms of danger to the property holder the worst form of trespass is an unwarranted intrusion into a private home. The act of intruding in another's home, without permission or privilege, is very serious even if the trespasser intends no other crime and is graded as a Class A misdemeanor.

So, too, illicit entry, concealment or intrusion in an area plainly restricted for national security purposes is very serious, even if the intruder is there for relatively innocuous reasons—as a curiosity seeker or a vagrant. The risk to government security may be great. Persons who intrude on manifestly restricted government security areas, therefore, commit a Class A misdemeanor under the proposed provision. We define such areas as those places maintained by the Federal government which are continuously guarded and where a display of visible identification by persons on the premises is required at all times (proposed section 1719(c))—factors usually or easily perceived by the actor. This adequately describes the government's high

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[16] *E.g.*, *United States* v. *Reeves*, 39 F. Supp. 580 (W.D. Ark. 1941), holding that violation of a rule of the Secretary of Agriculture requiring leashing of dogs in a national forest constitutes a criminal trespass.

[17] Some forms of trespasses—*i.e.*, those where ejection of the trespasser is not a sufficient remedy—are best resolved by civil injunctive relief rather than criminal law legislation, *See, e.g.*, *United States* v. *Tygh Valley Land and Live-Stock Co.*, 76 F. 693 (C.C. Ore. 1896), concerning the pasturing of sheep on an unenclosed Federal forest reservation:

> The acts complained of are . . . not criminal, under the laws of the United States. It does not follow that the government is without civil remedies to protect its property from the threatened injury.

security areas.[18] It may well be that the mere presence of an unauthorized person in such a place is a strong indication that his purposes are not innocuous, but the circumstances of the trespass should be considered in all cases. Where the circumstances do indicate an intentional and hostile effort to obtain information, the entry will constitute espionage (*see* proposed section 1113(3)); and, of course, an intention to commit any crime will constitute burglary.

The proposed provision provides general defenses to a charge of criminal trespass in situations where the trespass poses no danger to anyone's privacy or property. Specifically, it is a defense to criminal trespass that the property was abandoned or that the premises were open to the public and the actor complied with all lawful conditions for entering and remaining on the property. Occupied structures and storage structures, however, cannot be "abandoned," since they are defined as premises which are in use. The former defense is necessary insofar as the trespass can be committed on *any* premises. The latter defense would apply in situations in which unlawful discriminations are made by a private property holder, as in the civil rights "sit-in" cases, or by the government, as in refusal to allow peaceful exercise of the right to assembly in public areas, which the law cannot properly enforce.[19]

6. *Breaking Into or Concealment Within a Vehicle.*—Proposed section 1713 is new, and is intended to deal explicitly with two modern types of criminal conduct: one in which the perpetrator lies in wait in an automobile or other vehicle with the purpose of attacking the driver or passenger; another, in which the perpetrator breaks into the car in order to obtain property from within it. The crime is distinguished from burglary because mere unlawful entry of a vehicle—as, for example, entry through an open door in order to filch something on the seat of the vehicle—or merely remaining in a car—as for example, to take it on a joyride—does not present the same dangers as burglary, even when the culprit, in entering or remaining, intends to commit a crime. But, it is not always clear what a person

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[18] The validity of this description of highly secured government premises has been confirmed in conversations with attorneys for the Department of Defense and the Atomic Energy Commission.

[19] In *Marsh* v. *Alabama*, 326 U.S. 501, 506 (1946), the Supreme Court, reversing a trespass conviction based on defendant's distribution of literature on the streets of a company owned town, stated: "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." In *Amalgamated Food Employees' Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 315 (1968), upholding the right of persons to picket a business in a public shopping center, the opinion states: "[S]treets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." *Cf. Breard* v. *City of Alexandria, La.*, 341 U.S. 622 (1951), upholding a local ordinance forbidding door-to-door commercial solicitations. *See also Hamm* v. *City of Rock Hill*, 379 U.S. 306 (1965), and *Blow* v. *North Carolina*, 379 U.S. 684 (1965), reversing criminal trespass convictions of Negroes who sought admittance into segregated restaurants, because the convictions were abated by passage of the Civil Rights Act of 1964, which removed peaceful attempts to be served in a public place on an equal basis from the category of punishable activities.

breaking into a car, or *hiding* in it, with criminal purpose, intends to do. The breaking, per se, indicates greater culpability than entry of an open vehicle. Concealment, whether or not entry is obtained by breaking, indicates a desire to commit a serious offense, whether it be assault, robbery, rape or kidnapping of the user of the vehicle. In any event, breaking into a vehicle, or concealment within it, is something more than a trespass; the fact of breaking or of concealment excludes the possibility of innocuous conduct. The crime is, therefore, graded as a Class C felony whenever the culprit is armed, thereby manifesting an ability to confront and harm the user of the vehicle: otherwise, it is a Class A misdemeanor. Of course, if the culprit, even unarmed, having achieved entry or having successfully concealed himself, commits or attempts to commit a large theft or a robbery or other assaultive crime against the user of the vehicle, he will be guilty of the greater crime.

7. *Stowing Away.*—Present Federal law has a provision against stowing away on a vessel or aircraft: a penalty of up to 1 year's imprisonment may be imposed (18 U.S.C. § 2199). An explicit provision against stowaways is retained under proposed section 1714. We continue this distinction between stowing away and other forms of criminal trespass because stowing away, unlike other forms of trespass, necessarily contains a larcenous element (theft of passage). In addition, once the vessel or aircraft has departed, the offense cannot be dealt with simply by ejection. Further, the practice of stowing away may create special dangers in that the stowaway may hide near and unwittingly damage equipment necessary to the proper operation of the ship and plane. Accordingly, it is made a Class A misdemeanor in all cases. Note also that the offense of stowing away has a special jurisdictional base, since the offense may be committed not only on American owned ships and airplanes but also on foreign ships and planes headed for an American port.[20] Retaining that base would require special treatment of this form of trespass in any event.

8. *Jurisdiction.*—Present Federal jurisdiction over burglary cases extends to burglaries of interstate vehicles (18 U.S.C. § 2117), banks (18 U.S.C. § 2113), Post Offices (18 U.S.C. §§ 2115, 2116),[21] and ships in the Federal maritime jurisdiction or on the high seas (18 U.S.C. § 2276). There is no general provision for burglaries committed on Federal enclaves. 18 U.S.C. § 1153 applies State burglary laws to Indians living in areas within the exclusive jurisdiction of the United States. Present Federal trespass statutes, as noted above (paragraph 5, *supra*), apply to national forests, to certain national security areas,

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[20] Federal jurisdiction includes stowaways on American ships and stowaways on foreign ships destined for American waters, even when the stowaway on the foreign ship is apprehended while the ship is still on the high seas. *United States* v. *Menere*, 145 F. Supp. 88, 90 (S.D. N.Y. 1956).

[21] It is a Post Office burglary even when private premises, in addition to the Federal property, are involved. 18 U.S.C. § 2115 "forms the basis for countless prosecutions all over the United States involving the breaking into or attempted breaking into of branch post offices situated in drug stores, variety stores, grocery stores, general stores and the like." *Pinkney* v. *United States*, 380 F.2d 882, 885 (5th Cir. 1967), *cert. denied*, 390 U.S. 903 (1968).

and to stowaways on ships or planes; there is no general Federal trespass statute. In addition to present jurisdiction over banks and interstate vehicles, there appears to be no reason why the proposed burglary and trespass provisions should not apply generally to all Federal property, as well as to all such crimes on Federal enclaves and within the exclusive Federal territorial and maritime jurisdiction.

COMMENT

on

ROBBERY: SECTION 1721
(Stein, September, 1969)

1. *Introduction.*—The draft on robbery makes no radical substantive change in present law. The element of force, more than the crime's larcenous element, is still the significant fact, both in definition and in grading of robbery. The proposal offers a uniform definition of the crime, replacing various descriptions of the crime scattered through a number of robbery provisions in the present Code. The scope of the crime is somewhat extended, in the draft, to include use or threat of force in effecting an escape from the scene of a theft, even if force has not actually been used in taking the property.

High penalties are presently provided for robbery, and the draft continues to grade the crime severely. Grading distinctions are made, however, with respect to actual employment of force, menacing with serious injury, possession of weapons, use of accomplices as distinct from commission of the crime unarmed and alone. Some of these distinctions are made in present law. But the draft changes Federal law to the extent that present statutes base penalties on relatively unimportant differences as to the types of property or places being robbed, rather than the dangers posed to the victims.[1]

2. *Robbery: Substantive Definition.*—Unlike some current proposals for revision, which would define robbery as any infliction of or threat to inflict "serious bodily injury" upon another in the course of a theft,[2] the draft, as in present law, merely requires an attempt or threat to, or

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[1] Recently enacted or proposed robbery statutes containing similar substantive changes include: N.Y. REV. PEN. LAW §§ 160.00–160.15 (McKinney 1967); PRELIM. REV. COLO. CRIM. LAWS §§ 40–9–1, 40–9–2 (1964); PROPOSED CONN. PEN. CODE §§ 19–20, 91–6 (Comm. Rep. 1967); PROPOSED IOWA CRIM. CODE REV. § 711.1 (1967 Draft); MICH. REV. CRIM. CODE §§ 3301–3310 (Final Draft 1967); OHIO CRIM. LAW REV. PROJ., Draft of Robbery Statute, Memo No. 38–1, Oct. 10, 1968; PROPOSED CRIM. CODE FOR PA. § 1501 (1967); MODEL PENAL CODE § 222.1 (P.O.D. 1962).

[2] The Model Penal Code, for example, states that: "A person is guilty of robbery if, in the course of committing a theft, he: (a) inflicts serious bodily injury upon another; or (b) threatens another with or purposely puts him in fear of immediate serious bodily injury; or (c) commits or threatens immediately to commit any felony of the first or second degree." MODEL PENAL CODE § 222.1 (P.O.D. 1962). The statute proposed here, insofar as it differs from the Model Penal Code, is similar to that enacted in New York. N.Y. REV. PEN. LAW § 160.00 (McKinney 1967).

actual infliction of bodily injury.[3] Limitation of the crime to threats or infliction of serious bodily injury would eliminate from the scope of the crime forceful takings from the person such as "muggings," acts which are ordinarily and properly considered as robbery.

The threat proscribed is a threat of imminent bodily injury upon another. This is to distinguish the crime from exortion, which concerns theft by threat of infliction of harm *at some later time*.[4] Threats of harm in the future may pose a somewhat lesser danger of violence and are dealt with in the general theft provisions, where defenses—such as a proper demand for restitution—may be available which are not available with respect to the crime of robbery.[5] Some State proposals seek to tighten the distinction even further. The proposed Michigan Revised Criminal Code, for example, defines robbery in the third degree as the use or threat of imminent use of force "against the person of anyone who is present." (Section 3307, Final Draft 1967). This seems too restrictive, however, since threats of imminent force against a person present at the scene might be narrowly interpreted to exclude threatening immediate force against a person held hostage elsewhere or forcing a person, at gunpoint, to telephone instructions for the delivery of property located at another place. The draft would include, as robbery, any theft of property accomplished by placing the holder of the

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[3] Robbery within the special maritime and territorial jurisdiction of the United States is now defined simply, in common law terms, as a taking from the person or presence of another of anything of value "by force and violence, or by intimidation," 18 U.S.C. § 2111.

> This has been accepted as an accurate and authoritative definition of robbery from Blackstone, book IV, p. 243 (Cooley's ed.), to Bishop's New Criminal Law, Vol. II, §§ 1177, 1178. Taking property from the presence of another feloniously and by putting him in fear is equivalent to taking it from his personal protection and is, in law, a taking from the person. (*Collins* v. *McDonald*, 258 U.S. 416, 420 (1922).)

See also Norris v. *United States*, 152 F.2d 808 (5th Cir.) *cert. denied*, 328 U.S. 850 (1946): Robbery, in its usual and ordinary sense "means the felonious taking of property from the person of another by violence or by putting him in fear."

This definition has been expanded somewhat in other Federal robbery statutes. Thus, the bank robbery statute (18 U.S.C. § 2113) includes an "attempt to take" property by force and violence, as well as an actual taking, in its definition of robbery. Similarly, unsuccessful efforts to take property by force and violence are proscribed, under the statute dealing with mail, money or other property of the United States, as "assaults . . . with intent to rob." 18 U.S.C. § 2114. The Hobbs Act (18 U.S.C. § 1951), proscribing interference with commerce by threats or violence, defines robbery still more generally, to include taking or attempting to take property "by means of actual or threatened force, or violence, or fear of injury, *immediate or future*" (emphasis added). And the District of Columbia Code defines robbery to include not only taking of property by force, violence or fear, but also "by sudden or stealthy seizure or snatching." D.C. CODE ANN. § 22–2901 (1967).

[4] *Cf.* present 18 U.S.C. § 1951 which, while defining robbery to include threats of future as well as immediate force, additionally proscribes extortion, which is defined to include the obtaining of property by use or threat of force. One purpose of the present proposals will be to distinguish clearly between robbery, extortion, and forceful crimes not involving theft. *See United States* v. *Nedley*, 255 F.2d 350 (3d Cir. 1958), holding that the forceful harassment of a trucker, during a strike, is not robbery, though the trucker was temporarily deprived of his truck.

[5] *See* section 1739 of the proposed theft provisions. Extortion, of course, is in itself a serious crime and, under proposed section 1735 of the theft provisions, constitutes a Class B felony, where the threat is to inflict serious bodily injury.

property in fear of immediate physical harm to himself or another human being.[6]

As in present law, the proscription of threats to use immediate force includes nonverbal and implicit threats. Silent display of a weapon, brandishing of a fist while taking the victim's property, surrounding the victim with hostile persons, even a hostile tone of voice accompanied by a demand for property, can be sufficient to prove a threat of the use of force for the purpose of overcoming resistance to relinquishment of the property.[7]

The draft proscribes the use or threat of force only if someone is actually injured or threatened with injury, or actual injury is attempted in the course of stealing property. This eliminates from the scope of the crime, "forceful" takings from another person such as pickpocketing, where the victim is not aware of the crime, and no conduct is compelled from him.[8] Absent coercion of the victim, the theft poses no special dangers of violence and its seriousness may be measured in terms of the amount of property taken under theft, rather than robbery, provisions.

3. "*Course of Committing a Theft.*"—The most substantial reform of present law under the proposal lies in the definition of the phrase "in the course of committing a theft." We define it to include "an attempt to commit theft, whether or not the theft is successfully completed" and to include "immediate flight from the commission of, or an unsuccessful effort to commit, the theft." Thus, the emphasis is on the use of force, rather than the successful taking of property. Robbery—not "attempted robbery" or "assault with intent to rob," but the crime of robbery itself—under this definition, occurs at the

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[6] The important considerations should be whether the actor intends to coerce the owner into parting with his property by the threats he uses and whether under the circumstances the threat is or might be effective. There is no purpose served by calling it robbery if threats are directed against the wife or child of the owner, but something else if the same threats are directed toward the owner's fiancee or a child of a complete stranger who happens to be present. (MICH. REV. CRIM. CODE § 3310, Comment at 258 (Final Draft 1967).)

Cf. present 18 U.S.C. § 1951, defining robbery as taking property by force or threat directed against a person, or against "property in his custody or possession or the person or property of a relative or member of his family or of anyone in his company at the time of the taking. . . ." 18 U.S.C. §§ 2111 and 2113 define robbery as a taking of property from the person or presence of another "by force and violence or by intimidation," without specifying whether threats to another constitute intimidation of the property holder.

[7] *See, e.g., United States* v. *Baker*, 129 F. Supp. 684, 687 (S.D. Cal. 1955), holding that defendant's demand to a bank teller, when asking for the teller's cash, to "do as I say and there won't be any trouble," constituted an attempt at robbery. PERKINS, CRIMINAL LAW 239 (1957), *quoting* 4 BLACKSTONE, COMMENTARIES 242, states: "[It] is enough that so much force or threatening by word or gesture be used as might create an apprehension of danger, or induce a man to part with his property without or against his consent."

[8] District of Columbia courts have apparently had some difficulty applying robbery proscriptions to pickpocket cases, though the statute defines robbery to include "sudden or stealthy seizure or snatching." D.C. CODE ANN. § 22–2901 (1967). *See Hunt* v. *United States*, 316 F. 2d 652, 657 (D.C. Cir. 1963), reversing a robbery conviction:

> There is here no substantial evidence to show that the offense committed was robbery as distinguished from larceny. . . . The jury should not have been allowed to speculate as to whether the wallet was picked from [the victim's] purse or whether it dropped to the ground in the jostling of the crowd.

moment the threat is made or force is used to obtain property.[9] Further, even if no force is used to obtain property, the crime is still robbery, under the draft, if the perpetrator uses or threatens force to escape from the scene. That the scope of the crime is not over-extended to include forceful resistance to arrest for the crime at an indefinite period in the future is assured by reference to "immediate flight." By this the proposal means to refer to the period of "asportation"—the period of time between the point at which the robber has taken the property until the point at which "hot pursuit" is broken off, or the perpetrator has, temporarily at least, secured his loot.[10] The extension of the crime to this point is warranted because "the thief's willingness to use force against those who would restrain him in flight strongly suggests that he would have employed it to effect the theft had there been need for it." [11]

4. *Grading.*—Robbery is one of the few crimes that carries very high penalties in our Criminal Code.[12] The theory here underlying the high

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[9] Thus, it would not be robbery, under the draft, if the culprit, motivated by a purpose other than that of theft, renders an opponent unconscious in an assault, and, belatedly deciding to take the victim's money, does so without further use of force. This would be theft added to the aggravated assault, but not robbery. *Cf. Carey* v. *United States*, 296 F.2d 422 (D.C. Cir. 1961), holding to the contrary.

[10] *See Carter* v. *United States*, 223 F.2d 332, 334 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 949 (1956), holding, in a case of felony-murder, that a robbery was still in progress though there was a slight interval between the time money was taken by force and a policeman was informed of the robbery, began his pursuit, and was shot by the robber:

> We have no doubt that the appellant had not secured to himself the fruits of the robbery, but was still feloniously carrying away the stolen money when [the policeman] began the chase. The delay was so slight that the bandit had not been able to reach a place of seeming security.

Our proposal extends this concept so as to establish that the crime of robbery can *begin* at some time during this point of escape as well as continue until the escape is successful.

[11] MODEL PENAL CODE § 222.1, Comment 2 at 70 (Tent. Draft No. 11, 1960).

[12] Under present statutes, heavy penalties are provided for robbery, but the penalties vary in accordance with the type of property being robbed rather than the actual danger to victims posed by the commission of the crime. Robbery of property of the United States, 18 U.S.C. § 2112, robbery on Federal territory, 18 U.S.C. § 2111, and robbery in the District of Columbia, D.C. CODE ANN. § 22–2901 (1967), carry penalties of up to 15 years' imprisonment. But bank robberies—the most common Federal crime in which heavy penalties are imposed—are punishable by up to 20 years' imprisonment, 18 U.S.C. § 2113, as is robbery under the Hobbs Act, 18 U.S.C. § 1951. And, while robbery of a Post Office or the Federal mail ordinarily carries a sentence of up to 10 years' imprisonment, a mandatory sentence of 25 years' imprisonment must be imposed if the robber wounds the victim or "puts his life in jeopardy by the use of a dangerous weapon," or has previously robbed the mails, 18 U.S.C. § 2114. While we maintain high penalties for robbery where deadly force is used or serious injury is threatened, we do away, in accordance with our general sentencing policy, with the mandatory minimum penalty in the mail robbery statute.

The mandatory penalty imposed by 18 U.S.C. § 2114 is an historic relic. The original mail robbery statute, enacted in 1810, imposed the death penalty, which was later reduced to life imprisonment, and in 1909, was reduced to 25 years. *See Costner* v. *United States*, 139 F. 2d 429, 432–433 (4th Cir. 1943). The 1948 revisers left this penalty untouched but noted:

> The attention of Congress is directed to the mandatory minimum punishment provision . . . of section 2114 . . . . [This was] left unchanged because of the controversial question involved. Such legislative attempts to control the discretion of the sentencing judge are contrary to the opinions of experienced criminologists and criminal law experts. They are calculated to work manifest injustice in many cases. (Reviser's Note to 18 U.S.C. § 2114 (1964 ed.)).

penalties is that the great potentiality for violence and human harm is the most outstanding characteristic of the crime. A proper grading scheme may serve to deter conduct which can readily lead to the victim's bodily harm. Moreover, when violence actually does take place, whether or not property is taken, and in what amount, is not so significant. It is the willingness of a robber to use or threaten immediate injury for pecuniary gain and the inability of the ordinary citizen to defend himself against a sudden encounter with such violence which make robbery one of the most terrifying crimes with which we must deal.

In grading the crime, we define three levels of culpability. The ultimate evil in commission of the crime of robbery is the robber's displayed willingness to carry out his threat of death or serious injury. If the robber actually uses deadly force—that is, as we define it, "fires a firearm or explodes or hurls a destructive device or directs the force of any other dangerous weapon against another"—he will be guilty of a Class A felony.[13] This, of course, includes an effort of the robber to seriously injure his victim, regardless of whether he succeeds in doing so. When the robber actually shoots at his victim, it is irrelevant, for purposes of measuring culpability, whether he kills, seriously injures, or misses the victim.[14]

Accomplishment of a robbery by menacing another with serious injury is graded as a Class B felony. While the perpetrator's culpability is not manifestly as great when he obtains property upon his threat, as it is when he actually must resort to force to overcome his victim's reluctance, an overt threat of great injury displays a willingness and readiness to hurt the victim which evidences the dangerous character of the culprit. The penalty for threatening immediate serious injury in the commission of a robbery parallels the penalty for such threats in theft by extortion (proposed section 1735).

The draft also grades as a Class B felony any commission of a robbery in which the culprit is in possession of a firearm or any other weapon "the possession of which under the circumstances indicates an intent or readiness to inflict serious bodily injury." Upgrading of crimes committed with firearms is in accord with the policy of Congress, as recently expressed in the Gun Control Act of 1968,

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[13] This poses the interesting question why an attempt to kill in the context of a robbery should be a first degree felony, while an attempt to kill out of vengeance or to remove a rival in love or business would be only second degree. The justification lies in . . . the severe and widespread insecurity generated by the bandit, indiscriminately assailing anyone who may be despoiled of property. In addition, we believe that the requirement here that the assault be 'in the commission of theft' has the effect of restricting the first degree penalty to a narrow class of attempted killings and injuries, viz, those which come close to accomplishment. (MODEL PENAL CODE § 222.1, Comment at 72 (Tent. Draft No. 11, 1960)).

[14] At present, the bank robbery statute, 18 U.S.C. § 2113, and the statute dealing with robbery of mail, money or other property of the United States, 18 U.S.C. § 2114, provide aggravated penalties when the robber assaults the victim, "or puts his life in jeopardy by use of a dangerous weapon." *Wilson* v. *United States*, 145 F. 2d 734 (9th Cir. 1944); *Simmons* v. *United States*, 162 F. 2d 314 (6th Cir. 1947); *Peeler* v. *United States*, 163 F. 2d 823 (10th Cir. 1947); *Kanton* v. *United States*, 345 F. 2d 427 (7th Cir.) *cert. denied*, 382 U.S. 860 (1965), *cert. denied*, 386 U.S. 996 (1967); *Whalen* v. *United States*, 367 F. 2d 468 (5th Cir. 1966), Other Federal robbery statutes do not provide for such aggravating factors (*e.g.*, 18 U.S.C. §§ 1951, 2111, 2112).

and may serve to deter the carrying of firearms.[15] In addition, possession of a firearm or other dangerous weapon under such circumstances manifests the dangerousness of the robber, even if the weapon is not displayed.

Possession of unloaded guns, toy pistols, pen knives and the like would not in itself indicate an intent or readiness to inflict serious injury. Display of such items, however, or a pretense that one has a dangerous weapon available for use in order to accomplish the robbery, or to escape from it, would constitute a form of menacing with serious injury. Moreover, the victim cannot assume that the pretended weapon is safe. Further, if the robber escapes from the scene, there is no way of telling whether the weapon he possessed or claimed to possess was, in fact capable of inflicting serious bodily injury at the time. Such pretense is, therefore, graded as a Class B felony.[16] The heightened fear created in the victim by the display of the apparently dangerous weapon is sufficient to warrant aggravation of the penalty.[17]

The draft also grades as Class B felonies robberies in which the culprit is aided by a person present at the scene. It may be that a robbery committed by two or more persons is not so dangerous as a robbery committed by one armed culprit. It may also be that a potential robber cannot as readily be deterred from bringing along an accomplice as he may be deterred from bringing along a weapon. Nevertheless, "where two or more persons commit the crime it indicates greater planning and therefore a greater likelihood that the criminals

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[15] 18 U.S.C. § 924, enacted as part of the Gun Control Act of 1968, provides: "Whoever (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years . . . ." For comments on the utility of this legislation as applied to the crime of robbery, *see* the consultant's report on firearms and Federal criminal law.

[16] Presently, a jury may infer, upon display of a gun in a robbery, that the weapon is loaded and, consequently, that serious injury is threatened. *United States* v. *Roach*, 321 F. 2d. 1 (3d Cir. 1963); *Wheeler* v. *United States*, 317 F. 2d 615 (8th Cir. 1963); *Wagner* v. *United States*, 264 F. 2d 524 (9th Cir.), *cert. denied*, 360 U.S. 936 (1959); *Lewis* v. *United States*, 365 F. 2d 672 (10th Cir. 1966), *cert. denied*, 396 U.S. 945 (1967). The Model Penal Code would go no further in grading armed robbery more seriously than ordinary robbery, because "it is the employment of a weapon that should be significant in the grading of theft, rather than the discovery, for example, of a switchblade knife in the culprit's pocket." MODEL PENAL CODE § 222.1, Comment 5 at 71 (Tent. Draft No. 11, 1960). Our proposal, however, uses a terminology suggested for our proposed crime of assault with a dangerous weapon (section 1612(1)(b)). In defining dangerous weapons as any weapon "the possession of which under the circumstances indicates an intent or readiness to inflict serious bodily injury," we may reasonably provide that possession of such a weapon, even without its display, warrants as serious treatment as an overt threat of serious harm.

[17] *Baker* v. *United States*, 412 F. 2d 1069, 1072 (5th Cir. 1969), held that display of a gun in a bank robbery constituted use of a dangerous weapon, an aggravating factor under the bank robbery statute, regardless of whether the gun was loaded. The court stated:

> We believe that Congress did not envision putting on the government so stringent a burden of proof as that which appellant urges [requiring proof that the gun was loaded], a burden very difficult to meet if the robber does not fire his gun and leaves the bank with it still in his possession. This would seriously restrict the effectual operation of the statute in its coverage of the most usual weapon employed in robberies.

are professionals. There is also more likelihood that violence will erupt, since each criminal reinforces the other."[18] These factors warrant the higher grading proposed by the draft. Note, however, that if the robber requires one of his victims to aid him, for example, in collecting loot from the other victims, his crime will not thereby be aggravated to the Class B felony level.

Of course, anyone who undertakes to commit theft by application or threat of immediate injury acts feloniously, regardless of the amount of property he steals thereby. This includes the "mugger" who seizes his victim and restrains him, knocks him down, or threatens some injury in order take property in the victim's possession. It includes a harmless looking person demanding money from a bank teller "or else." When no actual injury is inflicted, and no serious injury is menaced, this form of robbery is graded as a Class C felony under the proposal.[19] Though the crime is serious enough, it is unlikely that anyone committing it without attempting or threatening to seriously injure another, without a weapon and without accomplices, deserves the highest penalties. If, however, the robber succeeds in obtaining a large amount of property thereby, the crime will constitute a Class B theft, under grading provisions contemplated for the theft chapter (proposed section 1735).

5. *Jurisdiction.*—Under present statutes the Federal law has a vast jurisdiction over crimes of robbery committed in the United States. The bank robbery statute, 18 U.S.C. § 2113, applies to robberies of substantially all banks and savings and loan associations in the nation. But, more than this, the Hobbs (Anti-Racketeering) Act, 18 U.S.C. § 1951, applies to any robbery which "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce." By its terms, then, the Hobbs Act can be taken to confer Federal jurisdiction, not only over every bank robbery, but over almost any robbery of any business concern in the nation.

The makers of Federal law enforcement policy determine to what extent this broad jurisdiction is exercised. Concerning banks, there has been little exercise of jurisdictional restraint, despite the fact that when broad jurisdiction was conferred, it was said to be only for the purpose of aiding the States.[20] Although the actual Federal interest in

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[18] MICH. REV. CRIM. CODE § 3310, Comment at 258 (Final Draft 1967).

[19] Under the present bank robbery statute, 18 U.S.C. § 2113, mere entry into a bank with intent to commit a robbery is punishable by a penalty as high as that for a completed robbery. Such entry, under our proposal, would be treated as an attempt, up until the point when a threat is made or force is used, when it would become a completed crime. *See* the proposed attempts statute, section 1001. *See also Price v. United States*, 352 U.S. 322 (1957), holding that, under the statute, entry of a bank with intent to commit robbery merges into the completed crime, if the intent is carried out.

[20] It was not intended, when Congress extended jurisdiction under the bank robbery statute, that the Federal government intervene in almost every case of bank robbery.

> The bill specifically provides that jurisdiction shall not be reserved exclusively to United States courts. There is no intention that the Federal Government shall supersede the State authorities in this class of cases. It will intervene only to cooperate with local forces when it is evident that the latter cannot cope with the criminals. . . .

(Statement of the Attorney General, *quoted in* H.R. REP. No. 1961, 73d Cong., 2d Sess. (1934).)

most banks (for example, government insurance through the Federal Deposit Insurance Corporation) cannot really be said to be as great as is the local interest in protecting local businesses, including banks, from robbery,[21] State prosecutors throughout the nation have deferred to the Federal government in prosecution of bank robbery cases, and bank robbery is regarded as primarily a Federal crime. While there seems to be little reason to narrow this jurisdiction, its exercise could be considerably restricted. The prime interest in enforcement of robbery laws lies with the States; and Federal jurisdiction, as a matter of policy, need not be exercised wherever State law enforcement resources are enough to apprehend and prosecute the offenders.[22]

The experience under the Hobbs Act (18 U.S.C. § 1951) has shown that extremely broad Federal jurisdiction can be sparingly exercised—only when there is some demonstrable need for Federal involvement in the case. Reported cases indicate that the Hobbs Act, covering any robbery "affecting commerce," has been very rarely used, despite its apparent nationwide coverage of robbery of any business, for example, a liquor store.[23] The Hobbs Act, then, is an example of how broad jurisdictional coverage can be given to a Federal law, thus obviating the frustrating possibility that a Federally prosecuted case may fail because of nonsubstantive jurisdictional distinctions, while exercise

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[21] Indeed, the FDIC does not directly insure member banks from robbery. FDIC insurance is payable to depositors upon the failure of a member bank. 12 U.S.C. § 1821. Each bank is required to obtain its own indemnity insurance against "burglary, defalcation and other similar losses." 12 U.S.C. § 1828(e). Further, each bank is obligated to maintain its own security devices "reasonable in cost, to discourage robberies, burglaries and larcenies." 12 U.S.C. § 1884. The average loss in a bank robbery is about $6,000 (figure given in McDonald, *Crimes of Violence Against Banks*, 1 THE LAW OFFICER 30, 32 (April 1968)) [hereinafter cited as McDonald]. It is quite unlikely, except perhaps in a very small country bank, that a robbery will cause sufficient loss so as to cause a bank to fail and thereby require payment of insurance by the FDIC.

[22] Though the number of bank robberies is on the rise today, unlike the bank robbery gangs of the 1930s, today's bank robber is, in more than 70 percent of the cases, a lone bandit, often acting impulsively. *See* McDonald, *supra* note 21. These are crimes which could very well be investigated and prosecuted by local authorities.

[23] Almost all cases arising under the Hobbs Act are prosecutions for extortion. An occasional robbery case does arise, however, when organized underworld figures are involved. Here, there have been Federal prosecutions, though the act of robbery, of course, is specific and local in nature. The recent case of *United States* v. *Caci*, 401 F. 2d 664 (2d Cir. 1968), *cert. denied*, 394 U.S. 917 (1969), involved a conspiracy, formed in New York, to rob an armored car messenger in Los Angeles, California. Concerning the application of the Hobbs Act to robbery cases, the court stated:

> [T]he legislative history clearly indicates that Congress deliberately enacted a broad statute designed to apply to *all* robbery and extortion which affected commerce . . . . In *United States* v. *De Sisto*, 329 F. 2d 929 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964), we affirmed the conviction under the Hobbs Act of a defendant guilty of a crime similar to that planned by appellants. De Sisto was accused of hijacking a truck loaded with silk from Japan by means of threats of violence addressed to the driver . . . . [T]he language in the Act relating to interstate commerce is extremely broad, 'manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence.' *Stirone* v. *United States*, 361 U.S. 212, 215 (1960). It is sufficient under the Act that the proposed robbery would 'affect' commerce.

of the jurisdiction can be very limited as a matter of government policy. Thus, insofar as the Federal government retains an interest in the racketeering aspects involved in commission of robbery, coverage of the crime as it affects commerce may well be retained.

The robberies in which the Federal government clearly has the prime interest, as compared to the States, are covered by 18 U.S.C. § 2111 (robberies within the Federal maritime and territorial jurisdiction), 18 U.S.C. §§ 1153, 3242 (robberies by Indians on reservations), 18 U.S.C. § 1991 (entering a train in Federal territory for the purpose of committing robbery) and 18 U.S.C. §§ 2112, 2114–2116 (robbery of any mail, money or other property of the United States).[24] As with coverage of the mail, it might be well to extend Federal judisdiction to robbery of other property which, while not Federal property, is within proper Federal custody and control—for example, contraband seized by Federal officials.[25]

Since robbery is defined as the threat or use of force in the course of committing a theft, a simple and rational approach is to make their jurisdictional elements coextensive. Unless the exercise of very broad jurisdiction is restrained, this approach will present certain issues for consideration, however, stemming from the proposed unification of theft offenses, *i.e.*, treating all unlawful acquisitions of property as theft, regardless of the means. Thus, while theft-by-taking from a bank is presently a Federal offense, indeed proscribed in subparagraph (b) of the so-called "bank robbery" statute (18 U.S.C. § 2113), it is not clear that all thefts-by-fraud from a bank are—or ought to be—matters of similar Federal concern.[26] It should be noted, however, that, if the mails are used—as is common when checks are presented at one bank for collection at another, there presently is Federal jurisdiction under the mail fraud statute.

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[24] Another peculiarly Federal jurisdiction over the crime extends over robbery on the high seas, and robbery ashore, as piracy. 18 U.S.C. §§ 1652, 1661. A staff report is being prepared on the jurisdictional, as well as substantive, aspects of piracy.

[25] *See Patmore* v. *United States*, 1 F. 2d 8 (6th Cir. 1924), reversing a robbery conviction in which an illegal whiskey still, seized by government agents, was retaken at gunpoint by the defendant; the property retaken, it was held, was not "property" of the United States. Jurisdiction over the robbery of any property within the custody of the government or its agents would prevent unnecessary distinctions, such as that in *Norton* v. *Zerbst*, 83 F. 2d 677 (10th Cir. 1936), *cert. denied*, 299 U.S. 541 (1936), which held that the statutes proscribing robbery of government property and assault with intent to rob mail matter stated two different crimes, each requiring different elements to be proved.

[26] The extent of jurisdiction now, under the theft provisions of the Federal bank robbery statute, is unclear. *See LeMasters* v. *United States*, 378 F. 2d 262, 266 (9th Cir. 1967):

> [I]t is hard to believe that Congress [in enacting the bank robbery statute] was willing to involve the United States in the multiplicitous bad check, forgery and other fradulent transaction cases which occupy so much of the attention of local law enforcement authorities but which, so far as appears, have no aspects of interstate gangster activities, and which present no danger that state law enforcement will be lacking in diligence.

Contra, Thappard v. *United States*, 354 F. 2d 735 (5th Cir. 1965), *cert. denied*, 383 U.S. 958 (1966), affirming a conviction for larceny by false pretenses under the theft provisions of the bank robbery statute.

COMMENT

on

THEFT OFFENSES: SECTIONS 1731–1741
(Low, Green; June 27, 1969)

Introductory Note

There are well over 100 separate statutes now in Title 18 that deal with theft or some other theft-related activity. The purpose of the group of theft provisions proposed here is to consolidate and simplify these existing statutes, and to propose in their stead a relatively straightforward group of sections covering the various ways one can misappropriate what belongs to another.

Four sections of the proposal deal with matters of substantive coverage:* (1) Section 1732 collects in one section most of the common forms of theft of property, such as larceny, embezzlement, false pretenses, blackmail, extortion, and the like. This section also deals with receiving stolen property. (2) Section 1733 relates to the problem of theft of services, *i.e.*, theft of such matters as mail service, use of government labor for private purposes, use of rental cars without paying, and so on. (3) Section 1734 deals with the theft of property that has been lost, mislaid or misdelivered. (4) The final section (section 1736) covers unauthorized use of motor vehicles.

There are also five general sections dealing with matters common to all of the different forms of theft. (1) Section 1731 addresses the fact that theft is treated by these proposals as a single unified offense, which can be committed in a wide variety of ways. The legal consequences of this consolidation are spelled out in this section. (2) Section 1735 relates to the subject of grading theft offenses, *i.e.*, providing which sanctions shall apply to the various ways in which the substantive offense of theft can be committed. (3) Section 1739 relates to several special defenses, *i.e.*, claim of right to the property or services appropriated, and the problem of interspousal theft.** (4) Section 1741 contains definitions of the major terms that are used in the main provisions, and thus in large part controls the substantive scope of the theft complex. (5) The last section of these proposals relates to the grading of the offense of unauthorized use of a vehicle.***

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* Two sections, misapplication of entrusted property (section 1737) and defrauding secured creditors (section 1738) have been transferred from the forgery group of offenses to the theft group in the Study Draft.

** These two elements of proof appeared in section 1732 (theft of property) in the Tentative Draft and have been transferred to this section in the Study Draft.

*** The separate section in the Tentative Draft dealing with grading of unauthorized use of a vehicle has been inserted as subsection (3), into Study Draft section 1736 which defines and provides a defense for that offense. A fifth general section on jurisdiction over the theft offenses (section 1740) was also added.

The commentary is designed to set forth the reasoning that led to the specifics of each section. The commentary is not organized by section, but rather is organized according to substantive topic. Each topic is numbered and briefly described in a heading, however, which should permit, through use of the Table of Contents, easy discovery of the place where any given problem is discussed.

Specific Commentary

1. *Introduction.*—There are a number of advantages to be gained by a unified theft provision such as is advanced by these proposals. Present Federal law includes a wide and unmanageable variety of overlapping and confusing terms to deal with various forms of acquisitive conduct—"embezzle," "steal," "purloin," "convert," "conceal," "retain," "take," "carry away," "abstract," "misapply," "use," "buy," "secrete," "possess," "receive," "obtain by fraud or deception," "take by device, scheme or game," "obtain, dispose of, commit or attempt an act of extortion"—and so on at considerable length. Such variety adds nothing but color to the law, and at the same time builds in serious disadvantages. It is practically impossible to develop an overview of the kinds of conduct reached by Federal law, for the purpose of measuring the extent to which it is in accord with modern economic circumstances or for the purpose of assuring consistency of sanction for comparable conduct. Such diversity is an open invitation to the technical defense—to the argument that "the indictment charges stealing but what I was really doing was purloining and therefore my conviction should be reversed."[1] There are undoubtedly hidden gaps in coverage as well, gaps which would be apparent if there were some consistency of language and approach.[2]

It is the purpose of these proposals to simplify and unify as much as is consistent with the breadth of coverage deemed desirable in a group of sections dealing with various forms of theft. At the same time, the present scope of Federal law—though perhaps slightly broader here and narrower there because of the attempt to remove inconsistencies—is not measurably changed, except in one area noted below.[3] Proposed section 1732 is the major workhorse in this effort. As will be seen below, it embraces practically all of the forms of conduct covered now by the colorful list of words reproduced above.

2. *Taking or Exercise of Unauthorized Control.*—These terms are intended to bear the major burden now included within concepts such as larceny, embezzlement, stealing, purloining, and the like. They are

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[1] *See, e.g., Bennett* v. *United States*, 399 F.2d 740 (9th Cir. 1968), where an offender was saved from a conviction for "stealing" because he swindled the bank instead. *See also United States* v. *Kubacki*, 237 F. Supp. 638 (E.D. Pa. 1965), where a conviction under 18 U.S.C. § 1951 for extortion was set aside because the defendant proved that he was guilty of bribery rather than extortion.

[2] In addition to the cases cited in note 1, *compare* 18 U.S.C. § 659 ("with intent to convert to his own use") *with* 18 U.S.C. § 641 ("converts to his own use or the use of another").

[3] Namely, those forms of "embezzlement" which now do not contain an element of conversion or intent to convert by the actor. Merely to "misapply" the funds or to "fail to account" represents the completed offense, whether due to negligence or other cause or due to the intentional conversion by the actor to his own use. These offenses are discussed in paragraph 12, *infra*.

borrowed from the original draft of the Model Penal Code,[4] and can be found in substance in the proposed Michigan Code[5] and in the present Illinois law.[6]

The object of the defendant's conduct is unauthorized control, *i.e.*, any form of control over property which exceeds the permissible range of control attributable to any legal interest he may have in the property or to authority given by someone entitled to give it. "Taking" unauthorized control is meant to include the typical larceny situation, where the defendant at the time of acquisition of property is engaging in unauthorized conduct. "Exercising" unauthorized control is meant to include the typical embezzlement situation, where the defendant already has lawful control of the property but where he exceeds his authority in some material way. Between the two terms—between taking and exercising unauthorized control—all of the major forms of acquisitive behavior are meant to be covered, without inquiry into essentially irrelevant factors such as whether a caption or asportation has occurred, whether the defendant committed a trespassory taking or had custody of the property, and the like. The debate is meant to be shifted to the issue of whether the defendant had control over the property, and whether that control was authorized. These are the criminologically significant elements. The circumstances which led to the particular form of unauthorized control are relevant to his culpability—to the existence of the required mental elements and to the grading of the particular offense—but are not relevant to the issue of whether the objective conduct—the actus reus, to use the technical term—has occurred.

3. *Unauthorized Transfer of an Interest.*—This language is included in proposed section 1732(a) in order to remove any doubt that the unauthorized transfer of property over which one has authorized control is meant to be included within the theft provisions.[7] Thus, a trustee in bankruptcy who sells personal property belonging to the estate and retains the proceeds for himself will be guilty of theft. So would a government employee who used government stores as his source of supply and entered the retail selling business.

As with theft of property by deception or by threat, it is possible to construe such conduct as the exercise of unauthorized control over the property of another and thus to hold that it is already covered by proposed section 1732(a). It is separately stated for two reasons, however: in order to make it abundantly clear, as pointed out above, that such conduct is meant to be included, and in order to support a distinction made in the definition of "property" between real and personal property.[8]

It should also be noted that both making the transfer and attempting to make the transfer are included within the prohibited conduct.*

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[4] *See* MODEL PENAL CODE § 206.1 (Tent. Draft No. 2, 1954), and particularly the commentary at 61–62.

[5] *See* MICH. REV. CRIM. CODE §§ 3201–3206 (Final Draft 1967).

[6] *See* ILL. REV. STAT. § 16–1 (Additional Supp. 1969).

[7] Of course, if the control is unauthorized then the offense has already been made out.

[8] *See* paragraph 4 ("Property"), *infra*.

* Attempts were deleted from section 1732 in the Study Draft; section 1735(6) was added to deal with attempts generally.

This reflects the judgment that in this instance the grading of the completed conduct and the attempt should be at the same level. A failure for the transfer to be effective because, unknown to the seller, the buyer is not a bona fide purchaser and thus cannot cut off the owner's interest in the property, is hardly a basis for mitigating the seriousness of the offense. The seller is surely as culpable as the thief who succeeds. Moreover, an attempted transfer of an interest in property would in many instances involve an exercise of unauthorized control over the property, and thus would be included within the section anyway.

Finally, it should again be emphasized that the important inquiry is not the particular legal category of theft with which the offender can be tagged. The attempt is to describe comparable and essentially fungible conduct and to attach a single label—theft—to the offender who engages in it. Whether the legal conclusion is that he exercised unauthorized control or that he made an unauthorized transfer is itself insignificant in terms of the degree of culpability of the defendant and the extent to which there are legitimate societal interests in assuming control over him for correctional purposes.

4. *Property.*—The subject matter covered by proposed section 1732 is "property" as defined in section 1741(f). It is of course intended that money and other tangible personal property of value be included. But the scope of the concept is meant to be much broader. Credit is included, although it is expected that the main context in which the theft of credit will be involved is deception, to be dealt with below. It also means contract rights, including insurance, guarantees, and other obligations that are acquired, again, usually by deception. The definition is broad, and is meant to be so. No change in existing Federal law is expected as a result, however.

Two other observations should be made. The first is that there are a number of other items which are included in the definition of "property" in other Codes structured similarly to these proposals. Section 223.0(6) of the Model Penal Code, for example, includes admission or transportation tickets, captured or domestic animals, food and drink and electric or other power. These items are omitted from the definition proposed here, not because they are meant to be excluded but because it is not viewed as necessary that they be included in order to be covered. Transportation tickets, animals and the other items fit comfortably, it would seem, within the concept of an "article or thing of value of any kind." At least such is the intent behind the use of such inclusive terminology.

The second observation that needs to be made relates to real property. It has two aspects. First, distinctions between what is real property and what is personal property designed for other purposes are not meant to be invoked in trying to determine whether an offense has been made out under these provisions. The operative issue is the extent to which the property, though perhaps "real" in technical property parlance, is movable. If its location can be changed, then for the purposes of these provisions it is "property" which can be the subject of a charge of theft. Second, if its location cannot be changed, then it is not meant to include exercises of unauthorized control unless they involve a transfer or attempted transfer of an interest in the property.

Thus, a trustee who manages (or attempts) to sell the land of another for his own benefit could be prosecuted for theft. But the bully who excludes the owner from his land or the landlord who unlawfully evicts the tenant from his leasehold cannot be prosecuted for exercising unauthorized control over the property of another. This is because of the exclusion in the definition of "property," namely that immovable property cannot be the subject of theft unless the underlying conduct involves a transfer or an attempt to transfer an interest in it. Other forms of unauthorized conduct in relation to immovable real property must therefore be dealt with under trespass laws and other traditional real property remedies.

5. *Property of Another.*—In order for a violation of proposed section 1732 to be made out, the property involved must be "property of another" within the definition of that term in proposed section 1741(g). This definition is also intentionally broad, and is designed to include diverse kinds of invasions of property interests of other people. The operative concept is an interest which the actor is not privileged to infringe without consent. This would obviously include an ownership or a possessory interest. It is also meant to include situations such as sales tax money collected by a merchant and held for the government (the government would have an "interest" which the merchant would not be entitled to infringe), income taxes withheld by an employer to be transmitted to the government (again, the government would have such an "interest"), and other similar arrangements where property is withheld or transferred under a specific reservation that it, or equivalent property out of the actor's own funds, will be dealt with in a particular way.

It is worth pausing on this latter point. The Model Penal Code suggests a separate section to deal with "theft by failure to make required disposition of funds received." [9] The commentary to an earlier draft states the objective of the section: [10]

> This section extends theft liability to a class of cases with which the courts have had difficulty because they seem to involve only breach of contract rather than misappropriation of identifiable property belonging to the victim. For example, an employer has an arrangement with his employees pursuant to which he withholds part of their pay on the understanding that the money withheld will be used to pay certain obligations of the employees to third persons. He fails to pay, and uses the funds withheld for his own purposes. The courts are likely to say, even under the broadest of present statutes dealing with fraudulent conversion of 'property of another,' that the employer is not guilty of stealing since he neither received nor held anything [11] belonging to the employees. The artificiality of this reasoning can be seen from the fact that if the employees had drawn full pay at one window and passed part of it back to the employer's cashier at the next window, there would be no difficulty in holding the employer guilty of

[9] *See* MODEL PENAL CODE § 223.8 (P.O.D. 1962).

[10] MODEL PENAL CODE § 206.4. Comment at 80–81 (Tent. Draft No. 2, 1954).

[11] Nor, would it seem, has he "obtained" anything. The Model Penal Code nevertheless uses the term "obtain" to describe the offense. *See* MODEL PENAL CODE § 223.8 (P.O.D. 1962).

> embezzlement for converting these funds to his own use. The physical manipulation of greenbacks can have no criminologic significance. The important problem in both cases is to avoid putting the force of criminal law behind transactions which are in fact credit transactions. The text does that by excluding liability where the transaction involved only a 'promise or other duty to be performed in the future.'[12] Liability is imposed only where the understanding or obligation was to 'reserve' an amount of assets for the performance of the obligation.

Such a section is not included within these proposals because it is not thought to be necessary. The issue sought to be raised is the distinction between an ordinary credit transaction—a housewife buying a refrigerator on credit—and an arrangement where money or other property is obtained or withheld for a special purpose. There is no intention to punish the housewife for theft if she subsequently fails or is unable to pay for the refrigerator: there is an intention to punish the employer who fails to pay withheld income taxes and who uses the withheld money for his own purposes.

Before describing the approach of these proposals to this situation, it would be helpful to address a related issue. The definition of "property of another" in proposed section 1741(g), contains a bracketed sentence, the effect of which is to exclude security interests from the class of interests the infringement of which can be theft.* If this sentence is retained, it therefore would not be theft for the purchaser of a car on a conditional sales arrangement to sell the car with the intent to defraud the seller.[13] Nor would it be theft to deprive another or attempt to deprive another of a security interest he held in property in possession or control of the actor.

Whether this bracketed sentence should be retained is an issue meant to be put to the Commission for resolution. There now is a statute, it should be noted, that speaks to such transactions and treats them as theft. Section 658 of Title 18 speaks of whoever "with intent to defraud, knowingly conceals, removes, disposes of, or converts to his own use or to that of another, any property mortgaged or pledged to" the Farm Credit Administration, or any one of a long list of other related entities. The sanction is up to $5000 or 5 years' imprisonment, or both, the same level provided for many forms of theft.[14]

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[12] This language was deleted from the present version of the provision in the Proposed Official Draft. As now worded, there would seem to be nothing (except intent, perhaps) to keep it from being interpreted to cover ordinary credit transactions.

* The brackets have been deleted in the Study Draft, so that a security interest is not "property of another." *See* section 1738 (defrauding secured creditors).

[13] As will be noted, it may on the other hand be desirable to draft a nontheft statute, presumably graded with less severity, to deal with people who act fraudulently with security interests. *See, e.g.*, MODEL PENAL CODE § 224.10 (P.O.D. 1962). Such a provision could be included in the provisions on forgery and other fraudulent activity, yet to be drafted.

[14] For an example of the application of this statute, *see United States* v. *Coleman*, 259 F. Supp. 394 (N.D. Miss. 1966), *aff'd.*, 383 F.2d 989 (5th Cir. 1967), where a farmer was prosecuted for selling 14 of his cows with intent to defraud the Farmers' Home Administration, which had lent him money and retained a security interest in the cows. In effect, therefore, he appropriated the security interest of the Administration, though in form all he did was sell his own cows.

Deletion of the bracketed language would have the following effect. The term "interest," which is the operative legal concept underlying the notion of "property of another," would then include security interests, as well as any other legal interest which the seller of property yet unpaid for would retain in that property. The housewife who sold her refrigerator with the appropriate intent, or the farmer who sold his cows with the appropriate intent,[15] could thus be prosecuted for theft. Retention of the bracketed language would exclude such persons from criminal liability for theft, although it may be that a separate statute, graded less severely, should be drafted for such situations. The decision to be made is therefore one between three choices: retain the bracketed language and not punish such conduct as criminal, retain the bracketed language and draft another statute (either substantive or grading) to deal with such conduct, or delete the language and treat the conduct as theft.

It is now appropriate to return to the situation meant to be included by the Model Penal Code section referred to above, namely the employer who withholds pay from his employees for a specific purpose and then converts the money to his own use. The belief is that the distinction between ordinary debt and segregated property for a special purpose is one that, if the bracketed language is retained, could easily be read into the term "interest" in the definition of "property of another." If the pay is withheld for the payment of an obligation of the employee, then the employee surely has an "interest" in money in the hands of the employer, just as he would have an "interest" if he accepted his entire check and returned part of it at the next window. The fact in the latter case that specific property could not be identified in the hands of the employer would not prevent a charge of embezzlement; similarly that fact should not prevent a charge of theft under these provisions. The conclusion, therefore, is that a section comparable to Model Penal Code section 223.8 is not necessary, whatever the disposition of the issue as to the bracketed language dealing with security interests. In the pay withholding situation, either the employee or the third party to whom the money is owing would presumably have an "interest" in property which the actor would not be entitled to infringe; in the security arrangement, the issue would be controlled by the retention or deletion of the bracketed language; in the ordinary debt situation, *i.e.*, where the seller extends open credit without retaining an interest in the property sold, the actor would not infringe an interest of the seller if he dealt with the property entirely as his own.

6. *Knowingly.*—The general requirements of culpability (proposed chapter 3, section 301 *et seq.*) define the term "knowingly" as applicable to an actor who "knows or has a firm belief unaccompanied by substantial doubt" that he is engaging in the proscribed conduct. It is also provided in the cited materials that a prescribed culpability level provided for an offense is applicable to every element in the offense unless otherwise specifically provided.

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[15] It must of course be remembered in all such instances that an important ingredient of any theft charge under these proposals is an intent to deprive or an intentional deprivation. Thus, the offense is not simply failure to pay a debt or default on a security arrangement; the offense is a deliberate attempt to deprive the seller of his interest in the property. There is a very real sense, therefore, in which it would seem appropriate to treat such conduct as theft.

This would therefore mean that an actor in order to be guilty of violating proposed section 1732(a) would have to "know" that he was taking or exercising control over property, that his control was unauthorized, and that he was infringing an interest of another that he was not entitled to infringe without consent. Similarly, if the charged offense was unauthorized transfer, he would have to "know" that he was transferring property, that he was not authorized to do so, and that in so doing he was infringing an interest of another which he was not privileged to infringe without consent.

While the proposal is broken down in a more analytical fashion, it is believed that this is substantially the law today in most systems oriented towards common law notions of larceny, embezzlement, and the like.[16]

7. *With Intent to Deprive the Owner Thereof.*—The last element required in order to make out a violation of proposed section 1732(c) is an intent to deprive the owner of the property interest involved. Both the words "deprive" and "owner" are specially defined in the proposal. (*See*, respectively, subsections (b) and (g) of proposed section 1741.)

"Owner" is the easiest to dispose of. It is meant to include any interest of another person in property, be it ownership, possession or some other recognizable concern, such that the property meets the definition of "property of another." "Owner" is thus a conclusory term which can be used to describe the person (or government) who has the interest in property that the actor is not entitled to infringe.

It of course should not have to be said that the owner of property who is deprived of his interest need not be the party who is actually dealing with the actor. Thus, one who takes government property from a government employee and sells it is infringing both the possessory interest of the employee and the ownership interest of the government. If the employee voluntarily gives up the property without authority, his possessory rights would not be invaded, but the ownership rights of the government of course still would be.

"Deprive" must next be discussed. It is this term which adds the element of permanency about the acquisition that normally is associated with the concept of theft. "With intent to deprive" thus includes, but (as will be seen) is not limited to, a purpose permanently to appropriate the property to the actor's own benefit. In so requiring, of course, the language merely records a traditional element of larcenous conduct.

The definition recognizes, however, that there are several other forms of intention that in effect are fungible with an intent permanently to deprive another of his property for purposes of measuring the culpability of the actor. There are basically three additional situations provided for.

The first is where the actor cannot be said to have intended to take the property permanently, but where he has taken it under circumstances which amount to an appropriation of its major value to the owner. An example might be the "borrowing" of a battery, motor, tube, or other device which has a limited useful life. The actor may intend to return the property as soon as it starts to wear out, but in the meantime has appropriated most of the value it would have to its

[16] *See, e.g., Morrissette* v. *United States*, 342 U.S. 246 (1952).

owner. There is no realistic sense, therefore, in which he has not appropriated the property permanently, even though the shell will be returned when it is no longer valuable.

The second situation is where the intent is to ransom the property back to the owner. If the owner must pay for his property in order to get it back, in effect he has been deprived of an interest which is tantamount to a permanent deprivation of his stake in the property. In effect, therefore, an intent to take and hold for ransom is of the same order of culpability as an intent to take and permanently keep.

The third situation is exemplified by the typical embezzlement by a betting bank teller. He does not have an intent permanently to deprive the bank of its funds; he is only "borrowing" them for purposes of temporary capitalization. He fully intends to restore the money to the bank as soon as his horses start to come in.

The approach to this type of case is intended to be as follows. A section analogous to section 224.13 of the Model Penal Code (misapplication of entrusted property) is to be included in the provisions dealing with forgery and other fraudulent practices.* It will reach offenders who deal with entrusted property in a manner that is known to be unlawful and that involves a risk of loss. The definition of "deprive" also includes a use or disposition of entrusted property that involves a risk of loss, specifically a use or disposition "under circumstances that make its restoration unlikely." The intent is then to grade the misapplication section at a lower level (probably a Class A misdemeanor) and the theft section at a higher level (probably a Class C felony). The issue between them will then turn on the degree of risk of loss to which the actor exposed the property. It will be criminal for him to deal with the property in an unauthorized manner and expose it to *any* risk of loss. It will be a more serious offense if he takes the property for a purpose which involves such a high risk that its restoration is unlikely.

The intent is therefore to leave to the jury in the individual case the judgment about the extent of the risk involved in the particular use of the property. This, it is believed, puts the debate where it ought to be, and turns the culpability of the actor on precisely the right issue, namely the extent to which he created or intended to create a danger to the property that it would be permanently deprived from its owner.

Finally, it should be noted that it is of course intended that the test for whether the "circumstances" are such as to entail the likelihood that the property will not be restored is intended to be objective, *i.e.*, it will be for the jury to draw the conclusory judgment that the circumstances of the transaction as intended by the actor were such that the necessary risk was invoked.** The crucial factual inquiry will be exactly what use the actor intended when he took or exercised the unauthorized control with which he was charged, whether he intended merely to flash a bankroll to look important or to spend the money at the track in the hopes of doubling it and keeping the difference.

The judgment for the jury then will be the degree of risk that such conduct involved, in other words, the degree of culpability manifested

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* Misapplication of entrusted property is section 1737 of the Study Draft.

** Culpability is not required as to the likelihood of restoration, because of the words "in fact." *See* section 302(3)(e).

by the actor in exposing the property to the risk he created. Parenthetically, it should be noted that the same is intended to be true of the "circumstances" language in proposed section 1741(b)(i), namely that the factual question about the defendant's frame of mind will be limited to what it was that he intended to appropriate, the use to which he expected to put the property involved. The judgment about whether a major portion of its economic value would be appropriated by such conduct is then intended to be for the jury.

8. *Obtains or Deprives.*—It is now appropriate to turn to the proposal in section 1732(b). The objective there is to deal with conduct that falls under the traditional labels of obtaining money or property by false pretenses, blackmail and extortion. What the defendant must do in order to violate this proscription is obtain the property of another or deprive another of his property. He must do this intentionally, and he must do it in a particular way, namely by deception or by threat. Each of these elements will now be elaborated upon to explain their purpose.

It should first be noted, however, that it would be possible again to read "exercises unauthorized control" of subsection (a) of section 1732 as including the activity dealt with here. As with transfers, the main reason for providing separately for this type of conduct is to assure that it is included. In addition, there are several limitations on the kinds of threats and the kinds of deception that are meant to suffice for criminal liability of this type. Except where specifically limited, however, the intent between subsection (a) and (b) is to be broadly inclusive of the many different kinds of schemes one man can devise to come up with another man's property. Again, the main point is to deal with unauthorized control over the property of another, and to treat it as essentially one type of legally recognizable conduct, labeled simply "theft."

The word "obtain" is defined in section 1741(e). In relation to property, it means to bring about a transfer of an interest in property, whether to the actor or to another. "Deprive" is also defined in that section, in subsection (b). It means, as discussed above [17] to withhold property permanently or to do any of a number of equivalent acts.

As can readily be seen, the combination of "obtain" and "deprive" amounts essentially to the same coverage as "takes or exercises control." "Obtains" corresponds to "takes control" in that it is the initial acquisition of property that is meant to be covered. "Deprives" corresponds to "exercises control" in that both concepts relate to the actor's conduct after he has initially acquired the property in a lawful manner. Between the two terms—"obtain" and "deprive"—the entire range of conduct between an initial acquisition and a withholding after a proper initial acquisition is included.

Moreover, these terms build into this type of theft the same degree of permanent deprivation as is envisaged by subsection (a). "Obtain" means a transfer or purported transfer of an interest, and the term transfer carries the implication of a permanent disposition.* One who obtains a transfer of property to himself, in other words, obtains all the transferor has to give in that property. "Deprives" means, on

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[17] *See* paragraph 7, *supra*.

* The implication was made explicit in the Study Draft by the addition of the words "with intent to deprive the owner thereof."

the other hand, a withholding of property either permanently or in such a manner as to amount to the same thing.

Finally, it should be noted that the provision in subsection (b) includes attempts to obtain or to deprive as well as the completed act.* There are several reasons for this. The judgment is that an attempt to acquire property by deception or by threat is just as culpable as the completed act. One who mails a threatening letter demanding payment is just as culpable whether the payment is made or not: the pliability and gullibility of the victim is not a measure of the need for societal control over the defendant; success or failure is as much the result of chance in most such schemes as it is an index of the defendant's need for correctional or rehabilitative treatment. This judgment is presently reflected in the mail fraud statute (18 U.S.C. § 1341) and is meant to be retained here by the inclusion of attempts as well as completed swindles. It is also reflected in the many fake claim statutes now on the books.[18]

In addition, a careful analysis of subsection (a) will reveal that it speaks to conduct that could easily be classified as an attempt permanently to deprive another of his property. In traditional terms, the specific intent to deprive is required, together with conduct—the taking or exercise of unauthorized control—that is sufficiently along the road toward that end so that criminal sanctions are justified. Traditional theft, in other words, has always spoken to conduct that could just as easily have been characterized as attempted theft—the taking and carrying away with intent in effect is an attempt to assume permanent control. The inclusion of attempt to obtain or attempt to deprive in the definition of theft in subsection (b) really does no more than say that both subsection (a) and subsection (b) are intended to apply to contexts where conduct short of a successful assertion of absolute dominion over property has been shown. It is therefore quite consistent with the coverage of subsection (a) to provide that attempts will be covered in subsection (b).[19]

*Attempts were deleted from section 1732 in the Study Draft. Section 1735(6) was added to deal with attempts generally.

[18] *See* paragraph 12, *infra*.

[19] Of course, it is not meant by this discourse to get into the nonquestion of whether it is possible to have an attempt to attempt. General sections on attempt have been drafted, and it is assumed that they would be fully applicable to subsection (a), *i.e.*, that even though "taking . . . with intent" is in substance an attempt, it is quite possible to have an "attempted taking . . . with intent." The issue is how far back into the preparation for theft it is appropriate to extend the criminal law. This issue will be dealt with in the general attempt section, and presumably will govern the problem in the theft context. Care must be taken in the wording of the general section, however, else language such as "except where otherwise provided" will give rise to the argument that this is a situation where it is "otherwise provided." That is to say, it could be argued under such a provision that because subsection (a) in substance proscribes conduct that amounts to an attempt to acquire permanent control, an "attempted taking" would not be a crime. Presumably, such is not the intent. Any possible ambiguity can be cleared up by amending the general attempt provisions to make it clear that the "except where otherwise provided" language does not speak to substantive coverage but is intended to refer to the *grading* of an attempt only. Another possibility would be to include "attempt" language in subsection (a). Both are defensible changes.

Parenthetically, it should be noted that the same rationale for including attempt language in subsection (b) is applicable to including attempt language in the transfer provisions of subsection (a). A transfer is a completed exercise of control; reaching an attempt is only consistent with what is already done with the "taking or exercising . . . with intent" part of the subsection.

Finally, it should be noted that making an attempt to obtain or an attempt to deprive criminal to the same extent as the completed conduct eliminates a troublesome and irrelevant causation issue from such cases. If "obtaining" property by deception or threat were punished at one level of seriousness and the attempt at another level, the word "by" would undoubtedly introduce into the case the issue of whether the deception or threat was the operative cause of the victim's decision to part with his property. If not, then it could not be said that the property in fact was obtained "by" deception or threat. This, of course, is irrelevant to the level of culpability that the actor has manifested. Whether the victim parted with his property because of the misrepresentation or the threat or because the actor had blue eyes is not a significant measure of the extent to which he is a suitable subject for criminal sanction. In both cases, he has tried to obtain the property by deceptive or threatening practices: whether his method was successful is largely the product of chance. Making both the attempt and the completed act criminal to the same extent, therefore, will prevent cases from turning on the essentially irrelevant factor of whether the deception or the threat caused the victim to part with his property. If he made the misrepresentations for the required purpose, he is guilty of theft in either event.[20]

9. *Intentionally.*—The term "intentionally" has been defined in proposed section 302(1)(a). The definition provides that one engages in conduct "intentionally" if it is his purpose to engage in that conduct. Again, section 302 provides that the required culpability level applies to each of the elements of the offense unless otherwise specifically provided.

This would therefore mean that an actor would have to have a purpose to obtain the property of another, *i.e.*, a purpose to bring about a (permanent) transfer of an interest in property which he knew he was not entitled to infringe without consent.* Or he would have to have a purpose to deprive another of his property,[21] *i.e.*, a purpose to withhold permanently (or an equivalent) an interest in property which he knew he was not entitled to infringe without the owner's consent. As can readily be seen, except for the additional elements of deception or threat on the one hand and authority on the other there is substan-

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[20] This is of course a good reason for prosecutors to charge both attempted theft by deception and theft by deception (or the same with threats), even though it appears that the actor successfully completed his scheme. This will preclude a defense on the theory that, though the property was obtained, the deception was not successful. This may also be a reason for modifying the definition of theft by deception so that an error in charging cannot lead to the result of permitting such a defense by inadvertence. It may be that *only* attempted theft by deception should be dealt with, with the completed act treated as an a fortiori case.

*Tentative Draft section 1732(b) used the words "intentionally obtains" and "intentionally deprive" and did not include "intent to deprive the owner thereof." Changes were made to its present form so it would more closely parallel subsection (a). Consolidation (section 1731) means that the three subsections of section 1732 define one offense. Three subsections are used only to provide a clear listing of all that is included; not to provide different elements for different kinds of conduct.

[21] Perhaps this is an appropriate opportunity to make the obvious point that "another of his property" is meant to be the exact equivalent in content of "property of another" as defined in proposed section 1741(g). The reason for the different wording is solely the grammatical one caused by the different requirements of the verbs "obtain" and "deprive."

tial identity in the type of conduct required to be shown in order to make out a violation of either subsection (b) or subsection (a).

10. *By Deception.*—The remaining elements of proposed section 1732(b) are "by deception" and "by threat." "Deception" is defined by section 1741(a).

That definition lists six* different types of conduct or representation that can amount to a deception which will support a theft conviction. As is apparent, the term is very broadly defined to include a wide variety of different forms in which one can attempt to bilk another of his property. Each will be briefly commented upon.

(a) *Creating or reinforcing false impressions.*—This language is meant to include all of the varities of false impressions that one can create or reinforce in order to induce another to part with his property. Illustrative (but not exclusive) types of misrepresentations are given: false representations as to fact or law or value are three common types of misrepresentation. "Status" is meant to refer to impersonation situations, where, for example, the actor obtains property on the false representation that he is an Internal Revenue Service agent sent to collect the taxes (a gambit presently covered by 18 U.S.C. § 912). "Intention or other state of mind" is meant to refer to the false promise situation, now explicitly included in several Federal statutes (for example, 18 U.S.C. § 1341.). The evidentiary limitation, that a false promise shall not be inferred from the fact alone of nonperformance, is a recognition of the dangers of such a provision; it is not, of course, the intention to substitute prosecution for theft by deception for all breach of contract suits. By the same token, the fact of this potential problem is not a reason for preventing all criminal liability for a false statement as to intention or other state of mind.

(b) *Preventing acquisition of information.*—The judgment here is that affirmatively preventing another from acquiring relevant information is tantamount to creating or reinforcing a false impression in the first instance.

(c) *Failing to correct a false impression.*—The general assumption on which this language was drafted was that it should not be the obligation of one dealing for property to have to correct every false impression which he fears his adversary may be operating under. It is the obligation of the adversary to watch out for himself in this respect. There are two situations, however, where the criminal law is justified in reaching a failure to act in this context. The first is where the actor has himself created the false impression on a previous occasion. The second is where he stands in a fiduciary or confidential relationship. In both instances it is felt that the actor has a special duty to correct any false impressions under which he knows his adversary is laboring.

(d) *Failure to disclose a lien or other impediment.*—This is also a self explanatory inclusion. It is based on the judgment that there is an implied representation in a sales transaction that the actor is entitled to sell what he appears to be selling. Failure to disclose a known lien or other encumbrance is inconsistent with this implication, and thus justifiably can be made the touchstone of criminal prosecution. Furthermore, the validity vel non of the lien would not seem material; the

*Subparagraph (iv) has been added in the Study Draft to cover failure to correct an impression created by the actor which has subsequently become fake.

seller has a duty to apprise the victim that he may be buying a lawsuit just as he does that he may be buying only a part of what he thinks he is getting.

(e) *Use of credit cards.*—The Model Penal Code includes a special section, section 224.6, on the fraudulent use of credit cards, for the following reasons: [22]

> This is a new section to fill a gap in the law relating to false pretence and fraudulent practices. Sections 223.3 and 223.7 cover theft of property or services by deception. It is doubtful whether they reach the credit card situation because the user of a stolen or cancelled credit card does not obtain goods by any deception practiced upon or victimizing the seller. The seller will collect from the issuer of the credit card, because credit card issuers assume the risk of misuse of cards in order to encourage sellers to honor the cards readily. Thus it is the non-deceived issuer who is the victim of the practice.

These proposals are designed to deal with this problem in a more direct manner. Unauthorized use of a credit card to obtain property is specifically defined as a type of deception that will support a conviction of theft. Thus, though it may be that the seller doesn't care and the issuer is not deceived, one who obtains property in this manner is guilty of theft by deception. This is consistent with the view noted above that it is not meant by these provisions to focus on the impact of the actor's conduct on the victim, or on technical notions depending upon the precise relationship between a seller and an issuer of credit cards. The focus of these provisions is the actor's conduct, measured from the point of view of the conduct he thought he was engaging in. From the point of view of the user of the card, he is surely obtaining property by a misrepresentation, just as though he wrote a bad check for the property or misrepresented his ability to pay. He is just as culpable, and just as responsible for his conduct. The fact that the seller may not care whether the card is being validly used because of his relationship with the issuer is simply irrelevant to a proper analysis of the situation. No trouble would be had with the analogous case of a seller who is not deceived by false statements of fact because he had enough insurance so that he didn't care about such matters: in such a case it would be the "nondeceived" insurer who would be the real victim. Surely, the actor should not have a defense to theft in such a context, just as he should not have a defense where he uses a credit card under the circumstances described in the definition of this form of deception.

(f) *Other scheme or artifice.*—This language is taken from the existing mail fraud statute, 18 U.S.C. § 1341. The reason for its inclusion is that there is a significant body of case law which has given content to these terms, content which it is the specific intention here to retain. The terms have been broadly construed to reach a wide variety of different types of fraudulent acquisition of property. Retention of these terms is the best way to assure that theft and attemped theft by deception will continue to have the broad meaning that they now have in the Federal law.

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[22] Model Penal Code § 224.6, Comment at 179 (P.O.D. 1962).

(g) *Puffing.*—Finally, there is an exclusion from the concept of deception of a kind of seller's talk that is commonly permitted, both by custom and by current Federal case law.[23] The typical television commercial might well provide the basis for a prosecution for theft by deception were it not for an exclusion of this sort. Hawking of wares has traditionally been permitted in exaggerated terms, and it is not the intent that a new form of theft by deception should grow out of this kind of conduct.

(h) *Mental element in deception.*—It is also important to note with respect to each of these different forms of deception that the modifier "intentionally" would apply to the elements of deception as well as the other elements of the offense.* Thus, one must *know* that the statement is false, that the credit card is forged, that the lien is on the property, that he stands in a fiduciary or confidential relationship, and so on. Only if one is aware of these elements of his conduct can he have a purpose to obtain the property *by deception.* And only if he is aware of the deception can he have that purpose.

11. *By Threat.*—Proposed section 1732(b) can also be violated if the actor obtains the property or deprives another of his property by threat. This offense is designed to cover the various forms of extortionate conduct that should be reached by the criminal law. Eleven specific kinds of threats are mentioned, in section 1741(k) as well as the twelfth general category. Most of the types of threats are self explanatory, and hence they will not be commented on individually. Several points should be made, however.

(a) *Dismissal from employment.*—The present "kickback" statute (18 U.S.C. § 874) covers inducing a public works employee to part with a portion of the compensation to which he is entitled under his contract of employment "by force, intimidation, or threat of procuring dismissal from employment, or by any other manner whatsoever." The language in proposed section 1741(k)(xi) was added to assure that the definition of "threat" was not interpreted so as to narrow the coverage of this important provision. It was felt, however, that the coverage of "threat of procuring dismissal from employment" was overbroad, since literally it covers a threat to cause an employee to be fired if he does not pay his union dues on a closed shop job. The language is therefore modified in these proposals to exempt property demanded or obtained for lawful union purposes. The language "for lawful union purposes" is also used for a specific reason. In *United States* v. *Carbone*, 327 U.S. 633 (1946), the Supreme Court read the present statute in conformity with the exclusion now proposed, *i.e.*, not to cover collections of union dues in a closed shop context. It is not clear, however, whether collection of such dues would be criminal if the purpose of the collection was to line the pockets of the collectors, or in other words, if the dues were not designed to be put to legitimate use by union officials. As now worded, the intent of the provision is to exempt coerced payments of this sort by union officials *only* when the collection is for lawful union purposes.

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[23] *See, e.g., United States* v. *South Farm & Home Co.*, 241 U.S. 64 (1916); *Babson* v. *United States*, 330 F.2d 662 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964); *Deaver* v. *United States*, 155 F.2d 740 (D.C. Cir.), *cert. denied*, 329 U.S. 776 (1946).

*The Study Draft phrase is "knowingly obtains . . . with intent to deprive."

A conversion of the dues as the result of an intention formed after the collection could thus be reached as exercising unauthorized control under proposed section 1732(a); and a conversion as a result of an intention formed at the time of collection could be reached as theft by threat (or perhaps by deception). The coverage of these provisions is thus consistent with the general theme of this group of proposals—to include both wrongful takings and subsequent misappropriation. As will be seen,[24] the purpose is to divert attention from traditional concern over the precise legal category of theft which can properly be charged. Theft is designed as an inclusive and consolidated offense, the purpose of which is to assure coverage of all of the various forms in which misappropriation can take place.

(b) *Any other act.*—The present "kickback" statute, it will be recalled, also literally covers inducing an employee to part with his wages "by any other manner whatsoever." Thus, one who solicits contributions to the community chest has, in literal terms, committed extortion. The language is thus obviously over-inclusive, and yet it does reflect the legitimate concern that an exclusive list of means by which theft by threat can be committed runs the risk of excluding some form of conduct which the inventiveness of the criminal mind can devise as a way around the proscription.

It was therefore concluded that it was sound to retain the idea of the "any other manner" language, stated, however, in a fashion designed to put the issue that should govern inclusion or exclusion within the criminal law. If a football player threatens to play out his option and thereby induces his general manager to raise his pay, there surely would be no intention to subject him to a charge of extortion. There are all sorts of other bargaining positions where similar conduct ought to be permitted, and indeed encouraged by a free market economy. The principle of the matter, attempted to be stated in proposed section 1741(k)(xii), is believed to be that threatened acts which are for the purpose of benefitting the actor should be tolerated within our system: threats to engage in conduct which will not so benefit the actor, on the other hand, and which are designed solely for the purpose of inducing another to part with his money, should not be tolerated. It is this principle which is reflected in the definition.

It should be noted also that again, the modifier "intentionally" will be applicable to the threats as well as to the other elements of the actor's conduct.* It would therefore follow that the actor must believe that the threatened conduct would not be of benefit to himself, and must also believe that it will do substantial harm to the victim. It is this belief, together with the objective conduct, that will justify criminal prosecution in such contexts, and that will serve to eliminate from the criminal docket cases of normal arms-length bargaining.

(c) *Claim of right.*—While it is premature at this point to examine in detail the so-called claim of right defense, it is pertinent to point out that a belief by the actor that he is entitled to obtain property (or to deprive another of it) in the manner in which he is acting will be a defense to the theft of any kind.**

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[24] *See* paragraph 22, *infra.*

*The Study Draft phrase is "knowingly obtains . . . with intent to deprive."

**_See_ proposed section 1739(1)(a), discussed in paragraph 20, *infra.*

Thus, if the victim of an automobile accident threatens to press criminal charges if his damages are not promptly paid, or if a semi-belligerent actor threatens to use physical force if "his" property is not returned immediately, the conduct cannot be punished as theft.[25] This specific defense serves to reinforce the point made in connection with "any other act" (subparagraph (b) above) that a belief that the actor will be benefitted by the threatened conduct and that he is entitled to make threats of the sort he is making will not be punished as criminal.

(d) *Relation to bribery.*—The basic difference between bribery and extortion is that in one instance the victim voluntarily parts with his property and in the other he is coerced. From the point of the view of the culpability of the person who receives the property, there is little difference. If he is a public official, it is just as wrong for him to seek out "voluntary" payments for influencing his official conduct as it is for him to coerce such payments by threat. Moreover, it is often difficult to tell, in the reconstruction of events that must take part in the criminal process, which of the two forms of conduct has actually taken place.

One thing is clear, however, and that is that the existence of criminal liability should not be made to turn on testimony from the victim about the extent to which he "voluntarily" parted with his property as opposed to was "coerced" by the threat into paying. The public official who says "I will do thus and so if you pay me money" is just as criminally culpable irrespective of the construction placed on the statement by the person who pays. Whether the payor is overjoyed because that is just what he wanted or is intimidated because he fears the consequences if he doesn't pay is irrelevant.

The last sentence of the definition of "threat" therefore deprives a public official of the defense of voluntary payment by the victim, and also makes irrelevant to criminal liability an inquiry into who it was that started the whole thing. Again it is not relevant—except perhaps to the sanction to be employed—whether the victim initiated the idea or the public official. In effect, therefore, if a public official is charged with theft by threat, he cannot defend on the basis that he should have been charged with bribery instead.[26] The fact of his status as a public official and that he is willing to consider accepting money for the performance of official duties is the functional equivalent of coercion on the victim. And again, criminal liability is measured from the actor's point of view rather than from the effect on the victim.

(e) *Extortionate extension of credit.*—In May of 1968 Congress added a new chapter to Title 18 to deal with extortionate credit transactions.[27] It would appear that the coverage of these sections is not completely included within the present proposals, nor, it is suggested,

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[25] Of course, he may be subject to prosecution for other types of criminal conduct, as for example in one of the situations posed, he may be guilty of assault or battery though not of theft. The "claim of right" defense is only a defense to theft; it is not an excuse for violating statutes designed to protect the person of another as opposed to his property.

[26] *Compare United States v. Kubacki*, 237 F. Supp. 638 (E.D. Pa. 1965), discussed note 1, *supra*.

[27] *See* 18 U.S.C. §§ 891–896.

should they be. If they are to be retained, it will therefore be necessary to add them elsewhere.*

Three types of substantive conduct are covered by the provisions, making extortionate extensions of credit, supplying money for that purpose, and enforcing collection by extortionate means. The extension of credit would not be covered by these proposals because it is the *giving* of property with threatening overtones rather than the *taking* that is sought to be covered. Similarly, supplying money for use in an extortionate credit racket could not be construed as theft, although it perhaps could be brought under a conspiracy or aiding and abetting charge in some limited contexts. Finally, enforcing collection by extortionate means could be reached as theft by threat, provided of course that no claim of right defense could be offered. If the particular amount of credit involved was not illegally high (if the interest rates were not within the usury law, and the reason for the use of this source was the high risk of noncollection), then it might be possible under these provisions to argue that no "theft" had occurred, even though threats had been used. Under the approach of these proposals, the proper charge in such an instance would be for an offense such as assault or criminal coercion.

The judgment here is of course not that conduct of this sort should be excluded for the proposed new Code. The only point is that these statutes are not absorbed by the proposals under discussion, and that if they are to be retained another home will have to be found for them, perhaps in an organized crime chapter.

12. *Misapplication, Failure to Account, Wrongful Deposit, False Claim, and the Like; Relation of Proposals to Present Provisions.*—It is perhaps at this point, now that the basic ingredients of the ordinary theft provisions have been commented upon, that a brief look should be taken at how the proposals correspond with several aspects of the present theft provisions in Title 18. Four points should be made.

First, those forms of theft which now require proof of some form of scienter are retained without much change of substance. Where words such as "embezzlement," "larceny," and "extortion" appear, their content has been retained—in less technical and in consolidated form, to be sure, but nevertheless retained in terms of basic objective and content.

Second, there are a number of existing Federal statutes that include—undoubtedly because of ease of proof—forms of diversions or loss of property that cannot properly be denominated "theft." For example, section 643 of Title 18 covers one who "fails to render his accounts;" section 646 covers one who "fails to deposit promptly;" section 649 covers similar conduct; section 650 covers one who "fails to keep safely" public money entrusted to him, and so on. In each of these instances, the conviction is for "embezzlement," and the potential sentences reach up to 10 years in prison. A similar problem is presented by statutes which speak of the "misapplication" or "use" of property, or of "concealing" or "secreting" property.[28]

The difficulty in each instance is that the error may not be due to a purpose to appropriate the property permanently (or its equivalent).

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*See proposed section 1759.

[28] *See, e.g.*, 18 U.S.C. §§ 656, 644, 657, 659, 642.

While in many instances of the use of such language, defenses can be based on the contention that the conduct was wholly innocent of any wrongdoing, it is apparent that the degree of culpability required by these provisions is significantly lower than is required by the proposals under discussion.[29]

As also discussed in paragraph 7, *supra*, the assumption underlying these proposals is that three layers of criminal provisions will be available for use in this kind of case. The most severe will be those proposals which in effect speak to cases where the actor intended to make a permanent acquisition of the property. The intermediate level of severity will be formed by a section to be drafted into the chapter on forgery and other fraudulent practices based on section 224.13 of the Model Penal Code (misapplication of entrusted property).* The least severe stage will be based on departmental regulations dealing with the conduct of those who handle Federal property, to be enforced, in accordance with the general scheme outlined elsewhere, as infractions or perhaps as misdemeanors if the violation is willful or repeated. The coverage of this approach will thus be as broad if not broader than at present, but will introduce varying grades of offenses where now there is but one. The purpose of this is the judgment that it is not appropriate to treat as fungible conduct that amounts to an intentional acquisition of government property and conduct that amounts to an accidental error which produces a shortage. At least as a matter of defense, it is submitted, the issue of intentional misappropriation should be allowed to be injected into the case and the jury required to make an affirmative finding of such an intent in order to form the predicate for a severe felony sentence. Lesser misdoings can still be treated as serious crimes, without any dilution of the deterrent force of the law.

In addition, and third in the list of observations to be made about the correlation of these provisions with present law, there is the provision in proposed section 1739(2)(a) that a failure to account for entrusted property or a shortage or falsification revealed by an audit shall be a prima facie case of guilt under sections 1732–1734, in effect a prima facie case of embezzlement. This is in accord with the thrust of the statutes under discussion, as well as with the explicit provision in 18 U.S.C. § 3487. And it is designed to retain the deterrent force of provisions such as those under discussion without, at the same time, excluding highly relevant issues from the trial of the case. The prima facie case applies to governmental officials and employees, as well as employees and officers of financial institutions. Those who regularly handle the money of others, in other words, are all placed under a high duty of care and exposed to the possibility of a successful theft prosecution if they cannot account for the money entrusted to them.

Finally, reference should be made to another class of statutes which are very common in the present Federal Code. Those who make a false claim on the government in a variety of different ways are generally treated as though they had completed a theft.[30] These offenses are included in the draft as attempted theft by deception.** Proof that

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[29] For an interesting case involving this matter, *see Shaw* v. *United States*, 357 F.2d 949 (Ct. Cl. 1966).

*Section 1737 in the Study Draft.

[30] *See, e.g.*, 18 U.S.C. §§ 287, 288, 289, 550.

**See proposed sections 1732(b), 1735(6).

a claim was made on the government through the creation of a false impression as to whether the actor was entitled to it rather easily makes out a case of attempted theft by deception, which, as noted in paragraph 8, *supra*, is treated as seriously as is the completed theft.

It should be noted in this connection, however, that there still may be certain types of related offenses that should be retained in another chapter. For example, 18 U.S.C. § 285 prohibits the use of a false document to collect a claim against the government. It may not be possible in such a context to prosecute successfully for theft, because it might be that the actor honestly believed himself entitled to the claim, but merely used the false document in order to assure that he would get it. In such a context, there is surely a proper governmental interest in preventing such activity, although just as surely it is not proper to convict the offender of stealing property. The intention in this regard is to draft into the chapter on forgery and other fraudulent practices a provision dealing with the using of false information to reinforce a claim against the government.* Coupled with the possibility of prosecution for theft by deception, this should adequately cover such activities.

13. *Prima Facie Case; Financial and Government Employees.*— Proposed section 1739(2)(a) provides that it is a prima facie case of theft under sections 1732–1734 if governmental officers or employees, or if employees or officers of a financial institution, are found to be short in their accounts, to have falsified their accounts or if they fail to pay or account for money or property entrusted to them upon lawful demand. The purpose of the provision has already been discussed in paragraph 12, *supra*.

Two further points should be noted. First, both the terms "government" and "financial institution" are defined ("government" in section 109(h), "financial institution" in section 1741(d)). The definitions are intended to be broadly inclusive of the parts of government and the types of institutions that should be covered by such a provision. Second, the term "prima facie case" is a term of art, with the meaning assigned to it in the proposals in chapter 1, section 103(5) of the draft (proof and presumptions). Essentially, the term means that a sufficient case has been made to take the matter to the jury. The jury is not told, however, that it may or must draw any particular inferences because of the statute, nor in fact is the jury even made aware of the statutory provision for a prima facie case.

14. *Receives, Retains or Disposes of.*—It is now appropriate to turn to the elements of proposed section 1732(c). Three terms are used, which together cover as inclusively as possible the entire range of conduct from the initial acquisition of property, through holding on to it, to the point of disposing of it. "Receiving" covers the conduct of one who initially acquires property; "retains," the conduct of one who holds onto it; and "disposes of," the actions of one who ends his control over it. The only term thought to need further elaboration is "receives;" it is defined in subsection (h) of proposed section 1741 as the acquisition of possession, control or title of property, or the lending on the security of the property. "Retaining" plainly would consist of maintaining possession or control of property, or keeping title

*See the proposed false statements statute (section 1352).

to it, or continuing an original security arrangement. "Disposing of" would of course cover the ending of these various forms of possession or control.

The reason for using multiple terms in this context instead of simply using the term "receiving" is that the requisite knowledge that the property has been stolen can be acquired at any time during the course of one's dominion or control over property. The judgment is that one who acquires property innocently is as culpable if he later learns that it is stolen and in the face of that knowledge continues his control over it or disposes of it, as he would have been if he had initially received it with such knowledge. The "unless" clause, of course, protects the actor who in good faith receives, retains or disposes of property with the intention of returning it to the owner as soon as practicable.*

Finally, the rationale behind consolidating the offense of receiving with the other basic forms of theft of property is worth noting. Aside from the fact that the present Federal Code commonly speaks of such conduct in the same section and provides essentially the same pattern of sanctions for it,[31] it makes sense both analytically and practically to do so:[32]

> Analytically, the receiver does precisely what is forbidden by Section 206.1, namely, he exercises unauthorized control over property of another with the purpose of applying or disposing of it permanently for the benefit of himself or another not entitled. From the practical standpoint, it is important to punish receivers in order to discourage theft. The existence and functioning of the "fence," a dealer who provides a market for stolen property, is an assurance especially to professional thieves of ability to realize the unlawful gain.
>
> Consolidation of receiving and other forms of theft affords the same advantages as other aspects of the unification of the theft concept. It reduces the opportunity for technical defenses based upon legal distinctions between the closely related activities of stealing and receiving what is stolen. One who is found in possession of recently stolen goods may be either

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*In the Tentative Draft subsection (c) did not require "intent to deprive the owner thereof," but ended with a clause which read: "unless the property is received, retained or disposed of with the intention of returning it to a person entitled to have it." The words "intent to deprive the owner thereof" were added in the Study Draft to make subsection (c) parallel subsection (a) and (b). This made the "unless" clause superfluous.

[31] *See, e.g.*, 18 U.S.C. § 659.

[32] MODEL PENAL CODE § 206.8, Comment at 93–94 (Tent. Draft No. 2, 1954). The proposed Delaware provision handles the problem of the receiver defending on the basis that he was the thief by providing simply that it is not a defense to so argue. The same is provided for the converse situation. And it is also provided that the actor cannot be convicted of both theft and receiving with regard to property appropriated in the same transaction or series of transactions. *See* PROPOSED DEL. CRIM. CODE § 543 (Final Draft 1967).

The first result—that theft and receiving cannot be used as defenses to one another—is achieved under these proposals by a more generalized version of Delaware's section 543, stated in proposed section 1731(1). The second result—that theft and receiving convictions cannot both result from the same transaction—is a necessary implication of the consolidation of theft represented by the entire proposal. The issue presumably will also be dealt with in a general provision relating to all crimes, and hence no special provision is included in these proposals.

the thief or the receiver; but if the prosecution can prove the requisite thieving state of mind it makes little difference whether the jury infers that the defendant took directly from the owner or acquired from the thief. Consolidation also has a consequence favorable to the defense by making it impossible to convict of two offenses based on the same transaction, as has occasionally happened under existing law, when a man is held guilty as a principal in the original theft because he helped plan it and also of the "separate" offense of receiving because he took his share of the proceeds.

15. *Mental Element in Receiving.*—The objective conduct one must engage in in order to commit the crime of theft by receiving is simply to receive, retain or dispose of the property of another. The rest of the elements of the offense relate to the mens rea which must accompany such conduct. There are a number of observations that should be made about the mental element.

First, the term "intentionally" describes what the defendant's attitude must be toward this conduct—he must have a purpose to receive, retain or dispose of the property of another.* He must therefore know not only that he is exercising control over property, but that in doing so he is infringing an interest of another in the property that he is not entitled to infringe without consent.

Second, he must also know that the property is stolen or believe that it probably has been stolen.** Note that the property does not in fact have to have been stolen; the critical inquiry is whether the defendant *thinks* it has been.[33] This is a change from the typical receiving statute.[34] In addition, the typical receiving statute speaks only of one who "knows" the property has been stolen, and in effect leaves to the jury the inference of such knowledge from such facts as the recent possession of stolen goods. The proposed draft, following the lead of the Model Penal Code on the point, would permit in the alternative the inference that the defendant believed that the goods probably were stolen. The extent of the defendant's culpability should not turn, it is felt, on the extent to which he inquired into whether the particular goods actually were the subject of theft. If he holds himself out to receive stolen goods, and if he is essentially indifferent to whether in fact particular goods have been stolen, then the law is entitled, it is submitted, to treat him as a receiver if it can be concluded that he believed that they probably were stolen.

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*The culpability element was changed in the Study Draft to "knowingly . . . with intent to deprive" to parallel subsections (a) and (b).

**Impossibility is not a defense in attempt (*see* section 1001(1)) and so the "believing that it has probably been stolen" clause has been deleted in the Study Draft, Section 302(b) defines "knowingly" to include "a firm belief."

[33] Thus, the impossibility situation that has somewhat mysteriously given rise to so much difficulty cannot arise. *See People* v. *Jaffe*, 185 N.Y. 497, 78 N.E. 169 (1906), where an attempted receiving charge was successfully defended on the ground that the goods had lost their character as stolen by the time they reached the defendant. Even though he believed them to have been stolen at the time he received them, he was thus acquitted. Under the proposal here, whether they were in fact stolen would be irrelevant both to the attempt and the completed offense, except, of course, for its evidentiary significance on issues such as the defendant's state of mind.

[34] *See, e.g.*, 18 U.S.C. § 662.

Third, it should be noted that the term "stolen" is also defined in the proposal, specifically in subsection (j) of section 1741. It refers to property which has been the subject of robbery or any form of theft under these proposals, or which is received from a person then in violation of the unauthorized use of a vehicle provisions of proposed section 1736.

The final aspect of the mental element that should be commented upon is that which speaks to the intention of the actor to return the property to a person entitled to have it. It is this aspect of the mental element that protects the actor who knowingly comes into possession of stolen property, but does so in good faith and with the intention of restoring the property to its owner or to the authorities. Proof of an intention permanently to deprive the owner of his property, it will be noted, is thus not required as an element of the receiving offense.* The judgment is that one who receives property known to have been stolen is sufficiently culpable to merit a theft prosecution, unless he has the affirmative intent to restore added by the phrase under discussion.

16. *Presumption; Receiving.*—Subsection (2) (b) of proposed section 1739 states three sets of circumstances which can be shown in order to establish a presumption that the requisite knowledge or belief exists in a case of receiving stolen property.** They are derived from two sources: first, the presumption of knowledge from possession of recently stolen property has been a widely acknowledged part of the Federal case law for a considerable period of time: the remaining provisions are derived from the Model Penal Code.[35]

Two issues need to be addressed in this area. The first is whether these rules should be stated at all, and if so whether the proper formula is to make them a prima facie case of knowledge or belief or a presumption that such knowledge or belief exists. In the proposed provisions on proof and presumptions,[36] the terms are distinguished as

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*Such intent was added in the Study Draft so that subsection (c) would parallel subsections (a) and (b). The three subsections define one offense. It is not intended that a prosecutor should be able to charge one who has taken property with retention thereof and to argue that despite consolidation he thus need not prove "intent to deprive" because subsection (c) does not include such words. There are three subsections only to insure that everything is included, not to provide different elements for different kinds of conduct.

**Section 1739(2) (b) of the Tentative Draft reads:

> (b) *Presumption:* It shall be presumed that the actor knows the property has been stolen or believes that it has probably been stolen if it is shown that:
>
> (i) he is in possession or control of recently stolen property or of property stolen from two or more persons on separate occasions; or
>
> (ii) he has received stolen property in another transaction within the year preceding the transaction charged; or
>
> (iii) being a dealer in property of the sort received, retained or disposed of, he acquired it for a consideration which he knew to be far below its reasonable value.

Only (b) (iii) was retained in the Study Draft. It was changed to prima facie evidence of the fact of knowledge, because no special expertise or amassed empirical evidence indicates the necessity that Congress, rather than the jury draw the inference of knowledge. A definition of dealer was added in the Study Draft.

[35] *See* MODEL PENAL CODE § 223.6 (P.O.D. 1962).

[36] Chapter 1, section 103.

follows: Prima facie case means that enough evidence has been submitted to take the case to the jury; the jury is not, however, told about any special rules governing the inferences they are to draw from the evidence. Presumption means that enough evidence has been submitted to take the case to the jury on the presumed fact; *and* it means that the jury will be told about the presumption and that they may, though they should base their conclusion on the evidence as a whole, arrive at the conclusion that the presumed fact exists on the basis of the presumption alone. The difference between the two concepts, therefore, is in what the jury is told: a prima facie case provision does not result in an instruction that the facts established have any special probative force beyond what they naturally establish; a presumption in effect warrants an instruction that the facts established are especially probative and that they alone are a sufficient basis, though not necessarily compelling, for concluding that the presumed fact exists.

The question for resolution here, then, is which if either of these devices should be employed. The proposal uses the term "presumption," though mainly because that is the way most of the courts seem now to treat the factor of recent possession of stolen goods. The criteria for choice, as suggested in the proof and presumptions section, would appear to be whether the purpose is simply to induce uniform submission of such cases to juries, or whether the purpose is to codify a finding based on special knowledge about the problems of proof in the area and the kinds of evidence that are likely to establish a case against the offender. As stated in the cited draft with respect to presumptions,[37] "Use of the procedural device is appropriate when Congress on the basis of special expertise and amassed empirical evidence decides that certain facts are strong evidence of a crime and that these facts should be given proof significance to assist the government in prosecuting the crime." It would seem in light of these criteria that a presumption would be the warranted device. The factors are sufficiently probative of guilt, it would appear, to pass constitutional muster; receiving stolen property is an offense which is difficult to prove; the fact that the courts have used the presumption device for so long a time in receiving cases is evidence of its value and necessity.

On the other hand, it is not absolutely clear that presumptions of this sort are necessary. Judges are likely to let cases which establish the facts recited in the proposal go to the jury. And juries are likely anyway to make the inferences which these provisions suggest can be drawn. All that the presumption does, it could be argued, is attach special significance to these factors—significance which on a particular set of facts might not be warranted—and create extra pressure on the defendant to come forward to explain himself, pressure which in some circumstances might be felt unnecessarily to emphasize the fact that the defendant chose not to take the stand. Cases which preclude comment on the defendant's failure to take the stand are not far, it would seem, from cases which preclude placing such special emphasis on facts which might not be significantly probative in the particular situation and which only serve to highlight the defendant's failure to come forward.

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[37] Comment on Proof and Presumptions: Section 103.

The conclusion is tentatively and somewhat hesitatingly advanced that it is nevertheless sound to continue use of presumptions in the area. On the different question of what the content of the presumptions should be, the second issue adverted to above, conclusions are even more hesitatingly advanced. The main purpose of including the three presumptions listed in the proposal is to expose them for the Commission's judgment. They have been endorsed by the American Law Institute (with the exception of the inference from possession of recently stolen property), and in various forms by most of the other recent law reform efforts.[38]

The idea behind subsection (2)(b)(i) is that the possession of property stolen on two different occasions begins to establish a pattern that is far more than ordinary coincidence. Whether the same is also true of the possession of property that has recently been stolen, the present presumption in the Federal law, is another matter; indeed, it may be that the present Federal presumption is the least justified of the ones stated here. Subsection (2)(b)(ii) presents a situation similar to the repeated theft situation of (2)(b)(i), namely where it can be shown that the actor received stolen property in another transaction within a year of the one with which he is now charged. Again, it pushes the logic of ordinary coincidence that the same person would on two different occasions have received stolen property. The third situation, posed by subsection (2)(b)(iii), relates to pawn shops and other dealers in the type of property involved who buy the items in question for a price well below their clear market value. This again is thought to be a tip-off to irregularity, and a more easily provable fact than the state of mind of the actor. The discrepancy between actual value and what is paid for the property thus can be thought to justify a presumption that the dealer knew or believed that the property had been stolen.

17. *Theft of Services.*—Proposed section 1733 follows the lead of most modern reform efforts in suggesting a general theft of services provision for the Federal criminal law.[39] Generally speaking, the present Federal criminal law does not include services among the items that can be the subject of theft. There are, however, a few such stat-

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[38] In Delaware, the proposals contain only one presumption, which in substance is the dealer presumption contained herein in proposed subsection (2)(b)(iii). *See* PROPOSED DEL. CRIM. CODE § 540 (Final Draft 1967). In Michigan, the proposals contain a combined version of proposed subsections (2)(b)(i) and (2)(b)(ii) (excluding the presumption of knowledge from possession of recently stolen property), together with a slightly different version of the dealer provision of subsection (2)(b)(iii) (purchase by a dealer who did not make reasonable inquiry of the right of the seller to sell). *See* MICH. REV. CRIM. CODE § 3250 (Final Draft 1967). In New York, there are two presumptions: that the possessor of property known to be stolen is presumed to have the intent to benefit himself or another other than the owner, or to impede recovery by the owner (required by the New York analogue to the receiving proposal here advanced); and that a dealer who fails to make reasonable inquiry to see if the seller had a right to sell is presumed to know that the property was stolen. *See* N.Y. REV. PEN. LAW § 165.55 (McKinney 1967).

As can readily be seen, there have been as many conclusions about how to put this matter as there have been attempts at reform. There is agreement that *some* presumptions in this area are appropriate, but the consensus ends there.

[39] *See* MODEL PENAL CODE § 223.7 (P.O.D. 1962); PROPOSED DEL. CRIM. CODE § 534 (Final Draft 1967); MICH. REV. CRIM. CODE § 3220 (Final Draft 1967).

utes. Use of the mails without paying proper postage is one example.[40] No reason is seen why there should not be a general provision. Theft of government labor, for example, surely should be a Federal offense. So should theft of interstate transportation, theft of accommodations while in the course of travelling, use of rental cars to travel interstate without paying the expected rental, and so on. The term "services," defined in proposed section 1741(i), includes each of these items (though not the jurisdictional elements), as well as a variety of other types of services which are normally rendered for pay and which therefore can be appropriated in quite the same sense that money or other tangible property can be.

There are two ways in which this offense can be committed. The first is intentionally to obtain services known to be available only for compensation by deception, threat, false token or by some other means to avoid payment. "Obtain" is specially defined in proposed section 1741(e) for use in this context, meaning to secure the performance of the service. The term "intentionally" is of course defined in the general culpability provisions. "Threat" and "deception" are defined in proposed section 1741 for use in all of the theft provisions. "False token" is included in addition to deception in order to cover situations where the services are not obtained directly from another person; "deception" contains the idea of creating a false impression for the purpose of inducing another to give up the services "voluntarily." There is also a catch-all phrase designed to encompass other means by which payment for the services might be avoided.

The second way in which services can be stolen under the proposal is by one who has control over the disposition of services to which he is not personally entitled and who diverts those services to his own use or to the use of another who also is not entitled to them. The government employee, for example, who uses government electricians to wire his new house on government time would violate this section if he knowingly did so and if he had control over the disposition of the labor he so diverted to his own use.

The final feature of the theft of services proposal that should be noted is the provision on prima facie evidence of deception. The purpose of the provision is to assure that the case can get to a jury when it is shown by the prosecution that the facts stated in the proposal exist, *i.e.*, that the service involved is one that is usually paid for immediately upon rendition (like a meal in a restaurant), that the actor obtained the service, and that he absconded without payment or making provision to pay. This then would be prima facie evidence that he obtained the services by deception, for example, that he created the false impression that he intended to pay for the goods and obtained them under that assumption. Again, of course, since the procedural device of a "prima facie" case is used instead of a "presumption," the jury would not be told of the special provision on the subject. The purpose, as noted, is to get the case to the jury if such facts can be shown and to let the jury draw whatever inferences the evidence will support without special instructions based on this statute.

18. *Theft of Property Lost, Mislaid, or Delivered by Mistake.*—The lead of other reform efforts is again followed in the suggestion of

[40] *See* 18 U.S.C. §§ 1720, 1725.

proposed section 1734 relating to the theft of property which has been found by the actor or which has been received through mistaken delivery. Again, it has not been the general pattern in present Federal law to include such conduct. Indeed, no statute dealing explicitly with this subject has been found in Title 18.

There is very little difference in character between an actor who picks up money he finds lying on a table in someone's house (ordinary larceny) and one who keeps a $100 bill handed to him when he knows he is entitled only to $10 and that the victim thinks he is giving him only $10. Nor is there much difference between these two offenders and the actor who "finds" money lying on the counter in a bank and who helps himself to it. The point, of course, is that the actor is just as culpable if he intends to appropriate property he knows to belong to another whether he takes it, finds it, or discovers it as it is being mistakenly delivered to him. And it is just as clear that the extent of his criminal liability should not turn on technical differences between whether the money was lost, mislaid, or simply placed somewhere for safekeeping. This, in any event, is the premise of the proposal to make appropriation of found or discovered property theft just like any other kind of theft.

Several things should be noted about the proposal. The first is that the timing of the discovery that the property is not one's own is not critical. Whenever one discovers that he has in his possession property that belongs to another, the provisions of this section (or of subsection (a) of section 1732) can come into play. The critical issues then are whether the actor had the intention to deprive (as defined in proposed subsection (b) of section 1741), the owner (as defined in proposed subsection (g) of that section) of it and whether he took reasonable measures to restore the property to a person entitled to have it. "Reasonable measures," in turn, are elaborated upon in subsection (2) of section 1734, and are stated to include notifying the owner if he can be identified or notifying a peace officer that he has the property.* Of course the actor need not take these steps if he has no intention of appropriating the property to his own use or to that of another. It is only if he intends to appropriate the property that he must first take reasonable steps to locate the owner. As far as the criminal law is concerned, he is thus entitled to keep property whose owner cannot be located and is under no affirmative duty to assume control over lost property and seek out its owner.[41]

19. *Unauthorized Use of a Vehicle.*—Most of the new theft provisions which are being drafted across the country also include a provision on unauthorized use of motor vehicles. Proposed section 1736 is very close in this respect to the proposal in Delaware[42] and to the new law in New York.[43]

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* Subsection (2) deleted in the Study Draft as unnecessary and limiting. It cannot be said that notifying *any* police officer is always reasonable. And yet, given the widely varied situations which may arise, it is difficult to define the phrase precisely.

[41] For examples of other typical lost property statutes, *see* MODEL PENAL CODE § 223.5 (P. O. D. 1962); PROPOSED DEL. CRIM. CODE § 531 (Final Draft 1967); MICH. REV. CRIM. CODE § 3215 (Final Draft 1967).

[42] *See* PROPOSED DEL. CRIM. CODE § 541 (Final Draft 1967).

[43] *See* N.Y. REV. PEN. LAW § 165.05 (McKinney 1967).

The ease with which stolen and "borrowed" cars can be transported from State to State these days creates an obvious base of potential Federal jurisdiction in such cases. The Dyer Act (18 U.S.C. § 2312) presently treats as a felony any transportation of a "stolen" vehicle across State lines. The word "stolen" has been construed with increasing liberality in recent years, however, to the point that it now can probably be taken to include substantially what this proposal is suggesting as "unauthorized use." [44]

The purpose of the proposal in a Federal context is to agree with the validity of extending Federal jurisdiction in automobile cases to borrowings as well as to genuine thefts, but at the same time to suggest that the conduct should not be treated as a felony if there is no "intent to deprive" as the term is used in proposed section 1732. The effect of that section and section 1736 together is thus that the offense can be a misdemeanor or a felony, depending on the existence of an intent to make what amounts to a permanent deprivation of the property from its owner, an intent which of course will as a practical matter be inferred in large part from what it is that the actor does with the vehicle, *i.e.*, whether he abandons it, leaves it at a place where it is easily returnable, *etc.*

The substantive coverage of the proposal relates to three different types of situations.* The first is the simple unauthorized taking of the described type of vehicle. The second is exemplified by the garage mechanic who "borrows" a car for his personal use that he is supposed to be repairing. The third is exemplified by the parking lot attendant who retains the car, for use or otherwise beyond the time when it was to be returned to the owner. In the last two types of cases, the use or retention must be a "gross deviation" from the custody agreement in order for the conduct to be criminal. Whether this has occurred is of course a judgment for the jury.

In all three instances, the actor must know that the owner has not consented to the conduct in question. In addition, subsection (2) provides that it will be a special defense even if it is known that the owner did not consent, if the actor reasonably believed that he would have consented had he known what was contemplated. Thus, one who takes another's car for a joyride can defend on the basis that he had reason to believe that the owner would have consented to the taking if he

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[44] *See, e.g., McCarthy* v. *United States*, 403 F.2d 935, 938 (10th Cir., 1968): "As have other courts, we conclude that a vehicle may be 'stolen' within the meaning of the [Dyer] Act, whether the intent was to deprive the owner of his rights and benefits in the vehicle permanently, or only so long as it suited the purposes of the taker."

* The first is subsection (1) of section 1736. The other two were deleted in the Study Draft as essentially redundant of subsection (1). They read:

(b) having custody of such a vehicle pursuant to an agreement between himself or another and the owner thereof whereby the actor or another is to perform for compensation a specific service for the owner involving the maintenance, repair or use of the vehicle, he intentionally uses or operates it, without the consent of the owner, for his own purposes in a manner constituting a gross deviation from the agreement; or

(c) having custody of such a vehicle pursuant to an agreement with the owner thereof whereby it is to be returned to the owner at a specified time, he intentionally retains or withholds possession thereof, without the consent of the owner, for so lengthy a period beyond the specified time as to render the retention or possession a gross deviation from the agreement.

had known of it. Of course, the reasonableness of the belief will also be a question for the jury. It is not enough that the actor honestly believed that the owner would have consented: the belief must have had a reasonable foundation.

20. *Defenses; Claim of Right.*—Many of the more recent Codes [45] have included a section creating a special defense for a "claim of right" in a context of theft. The philosophy underlying such provisions is clear: it should not be theft for the actor to take property which he honestly believes is his. There is a problem with how this defense has been handled in some Codes, however, which must be understood in order to avoid bestowing difficult problems of interpretation on the courts.

The claim of right provision suggested in the Michigan Code will serve to make the point. Section 3240 of the Michigan statute carefully provides that the defense is available only in most kinds of theft situations. Extortion is intentionally excluded, on the premise, that: [46]

> The complainant should not be coerced into handing over property by most of the varieties of threat listed . . . [in the extortion provision]. The defendant is not to be permitted to use this kind of leverage whether or not he may believe he is legally justified in receiving or holding the property he demands.

What the Michigan revisers have overlooked, however, is an important ambiguity. Extortion is defined as "knowingly to obtain by threat control over property of the owner, with intent to deprive the owner permanently of the property." [47] "Owner" is in turn defined as a person other than the defendant who has an interest in the property "without whose consent the defendant has no authority to exert control over the property." [48] Since "knowingly" modifies all the elements of the offense "unless a legislative intent to limit its application clearly appears," [49] one must, in order to extort property, know that he does not have authority to take control of the property. If he believes that he does have such authority—if he affirmatively believes that the property is his and that the victim has no interest at all in the property—then by definition he cannot "knowingly" obtain property of the owner. A "claim of right" defense is therefore built into the definition of extortion according to the ordinary usage of the terms employed.

This then poses a difficulty of statutory construction. Is this one of those situations where "knowingly" should not be taken to modify "owner" because the legislative intent to the contrary clearly appears? Does it modify "owner" if the crime is ordinary larceny, but not if it is extortion? Suppose the defendant says "give me my property or I'll thrash you." Is he guilty of *extortion* if the victim complies and it turns out the defendant was wrong about his purported ownership interest in the property? He has not met what appears to be the defini-

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[45] *See, e.g.*, MODEL PENAL CODE § 223.1(3) (P.O.D. 1962); MICH. REV. CRIM. CODE § 3240(1) (Final Draft 1967). *See also* N.Y. REV. PEN. LAW § 155.15 (McKinney 1967).

[46] MICH. REV. CRIM. CODE §3240, Comment at 249 (Final Draft 1967).

[47] MICH. REV. CRIM. CODE § 3245 (Final Draft 1967).

[48] MICH. REV. CRIM. CODE § 3201(g) (Final Draft 1967).

[49] MICH. REV. CRIM. CODE § 315(1) (Final Draft 1967).

tion of extortion, yet it is also clear that a "claim of right" defense is meant to be withheld in such a context.

Leaving out reference to such special defenses avoids confusing problems of this sort. The lesson to be learned from the Michigan statute is that whenever a defense is dealt with in two different places, it is possible—and perhaps likely—that one will get a different answer to a given situation depending on which place he looks. The example discussed above is illustrative of just this situation.

It might be added parenthetically that the proper solution to the hypothetical posed above—where the defendant demands property he believes to be his by threat of physical injury—would seem to be that it is not a theft situation at all. If the defendant honestly believed that the property was his, it should not be theft for him to take it. He may, on the other hand, be guilty of assault or some other serious crime. Whether a claim to property provides a defense to assault, battery or other physical interferences with the person of another is of course quite a different issue than the one under discussion here. The point, however, is that the proposed theft statutes should exclude liability for theft in such a context, but would not deal with the question of liability for other criminal conduct based on interference with the person rather than his property.

These proposals yield an analysis similar to that illustrated by the definition of extortion in the Michigan proposals. Proposed Section 1732(a), for example, states that one must "knowingly" take or exercise control over "the property of another." "Property of another" is in turn defined as property in which any person other than the actor has an interest which the actor is not privileged to infringe without consent. And since "knowingly" modifies each of the elements of the offense, one must, in order to violate the statute, know that he is not privileged to infringe the interest of the other person in the property without consent. An actor who believes simply that he is reclaiming his own property, on the other hand, knows no such thing; his belief is that the victim does not have an interest which he is not entitled to infringe. Quite the contrary, he believes he has every right to infringe any interest the victim may have in the property.

It is apparent upon examination of each of the other theft provisions in the draft that the same analysis will supply the actor with a so-called claim of right defense. It could thus be concluded that special provision for such a defense is redundant and that it would be best not to invite difficulties of interpretation by providing for the defense twice.

Yet there are several classes of cases where such a defense would not be provided by the analysis illustrated above, and where at the same time the defense should be provided. The general situation is where the actor believes that he has a claim against the victim, but where the claim cannot realistically be translated into a claim of right to specific property. The claim is not that you have my property, but that you have injured me and that therefore I have a right to some of your property by way of reparation.

Consider the following example. *A* and *B* are involved in an auto accident. *A* claims that *B* was at fault, and threatens to press criminal charges if *B* doesn't pay him $500 for his damages. *B* pays the $500. Is it extortion? The actor has obtained the property of another by

threat: he makes no claim that the money is his or that he has a right to any specific property, only that he is entitled to some of *B*'s property in exchange for the wrong done to him. The money is thus "property of another" in the sense that it belongs to *B* and *A* knows perfectly well that unless *B* parts with it as a result of the threat, he is not privileged to infringe *B*'s interest in it. *A* knows full well that it would be larceny (or a violation of proposed section 1732(a)) if he took $500 from *B*'s safe.

The conclusion is that the basic elements of the crime of extortion are made out in such a situation. *A* has intentionally obtained the property of another by threat. The definition of "obtain" has clearly been met; so has the definition of "property of another." The "threat" is of a kind specified in the definition of that term; the required mental element ("intentionally") has been met. The crime is completed.

Yet clearly *A* should not be criminally punished for such conduct. The reason why he shouldn't, and the reason that is codified as a special defense in proposed section 1739(1)(a), is that he was acting under a claim of right to the property, and he believed that he was entitled to act as he did in order to get it.[50] It will be noted that the statement in proposed section 1739(1)(a) is somewhat broader than the example given. It would apply to any situation in which the actor thought he had a claim of right to the property, even where he would also have the defense based upon the analysis illustrated above. There is thus an element of redundancy built into the defense. On the other hand, no particular harm is seen in such redundancy in this case. The proposal is carefully worded so that either an interpretation of the special defense or the analysis illustrated above will produce the same result in any given case. Moreover, special provision for the defense insures that the illustrated analysis will not be overlooked to deny a defendant entitled to the defense the advantage of it. On balance, therefore, it seems sound to state the defense more broadly than it has to be in order to assure its inclusion in the thinking of those who must administer these statutes.

There is a possible procedural consequence, however, that also should

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[50] Interestingly, having taken the defense away in extortion cases generally, the Michigan proposal builds it back in again for a case like the one under discussion. *See* MICH. REV. CRIM. CODE § 3247(2) (Final Draft 1967). The Model Penal Code also excludes such cases from extortion. *See* MODEL PENAL CODE § 223.4 (P.O.D. 1962).

Here again is an example of redundancy in the use of the defense. In the example discussed in the text, *A* would appear to have a defense under the Model Penal Code under either section 223.4 (last paragraph) or section 223.1(3)(b). But if *A*'s threat was not to press criminal charges for the accident but to tell everyone that *B*'s wife had been unfaithful if *B* didn't make restitution for the accident and pay *A* what he owed him, would *A* have a defense under the Model Penal Code? Section 223.1(3)(b) would seem to say yes: *A* acted under an honest claim of right to the property involved, and also acted under an honest claim that he had a right to acquire it as he did. Section 223.4 (last paragraph) seems to say no, however: the exposure of the "secret" was unrelated to the circumstances for which restitution is sought.

The redundancy involved in giving the defendant the defense twice has thus again resulted in confusion over just exactly what it was that he got. This example points up the reason, incidentally, why these proposals do not include a special defense to extortion based on the Model Penal Code and the Michigan statutes cited in this footnote. The defendant already has the defense under proposed section 1739(1)(a).

be considered. The proposal states that a claim of right is a "defense." Procedurally, this has the consequences, as set forth in section 103 (proof and presumptions) of not requiring the prosecution to disprove the defense unless and until the issue has been raised by evidence which is sufficient to raise a reasonable doubt on the point. With respect to proof that the defendant knew that he was dealing with property of another, on the other hand, the prosecution has the obligation from the beginning of proving beyond a reasonable doubt that such knowledge existed.

As a practical matter, however, the defendant would have to inject a claim of right into the case (although, of course, in some cases prosecution evidence might raise the point) in order to carry such an issue to the jury, whether or not it technically qualifies as defense. Very little would seem to turn, therefore, on whether the defense is injected because it negatives an element of the offense or because it is a special defense. In both instances, the defendant will have to offer some proof of the defense in order to get an instruction and in order to get the jury to consider the matter seriously; and in both instances, once the issue is in the case, it is the prosecution that must bear the burden of proving beyond a reasonable doubt that the defendant knew he was dealing with the property of another and that he had no right to act as he did.

Nevertheless, one of the costs of the overlap mentioned above—of the redundancy involved in building in the defense twice for some cases—might involve confusion because of these procedural issues. Presumably the defendant would be entitled to take the best of either world if he could have the defense both ways. No example comes to mind, however, of how this could lead to prejudice to the prosecution. Thus, the conclusion again is that the redundancy will do no harm.

21. *Defenses; Theft From Spouse.*—It is also common in the newer Codes to include special provision for the situation where the victim is the actor's spouse.[51] The problem could arise in a Federal context in connection with the unauthorized use or theft of an automobile, thefts occurring in interstate travel, and so on. On the other hand, there is no such provision now in Federal Criminal statutes, and the problem does not seem to have been a serious one in the administration of the present Federal laws. It may be, therefore, that such a provision is unnecessary. It is included here in brackets, in any event, for the purpose of focusing the Commission's attention on the problem and getting a judgment on the question.*

22. *Consolidation of Theft Offenses.*—One of the major reforms sought to be accomplished by these provisions relates to the unification of theft as a single offense. The different provisions are descriptions of the several ways theft can be committed, and are designed to cover the wide variety of means by which the inventiveness of the criminal mind can operate. Proposed section 1731 is designed to state the legal effect that is sought to be accomplished by consolidation. There are three different problems.

(a) *Construction.*—The purpose of these provisions is to bring

[51] *See* MODEL PENAL CODE § 223.1(4) (P.O.D. 1962); MICH. REV. CRIM. CODE § 3240 (Final Draft 1967).

*The brackets have been deleted from the Study Draft version of the section.

together under one roof conduct which has previously travelled under a wide variety of labels. Subsection (1) states this as the intent of the new provisions so that the courts will be given guidance in dealing with what will be new and unfamiliar language. Where it can be supported by a fair reading of the theft provisions, it is intended that the coverage of the provisions be at least as inclusive of the various forms of theft as the statutes now in effect. This objective, it is hoped, will be advanced by a statement such as is made in subsection (1).

(b) *Indictment.*—There is also a question of what the indictment must charge in order to lay a case under the theft provisions, a question which contains both constitutional and policy ramifications. The judgment is that a charge of "theft" is sufficient, if the indictment further specifies what the defendant did in a manner that contains enough information fairly to apprise him of the case he must meet. It is not felt to be necessary, or advisable, that the indictment also specify the conclusory legal terms that can appropriately be attached to the conduct in question. Thus, an error by the prosecutor or the grand jury about whether a given theft can be reached as an exercise of unauthorized control as opposed to theft by deception will not, and should not, provide the basis for a defense to the criminal charge. As emphasized throughout this commentary, the purpose is to denominate in an inclusive manner the different ways in which essentially fungible conduct can be engaged in. It is irrelevant to the fact of criminality, and normally to its degree, whether particular conduct is fitted within one provision or another. The ingredients of each form of theft are substantially the same, generally with only one characteristic to distinguish the coverage of one subsection from the coverage of another. It would be unfortunate indeed if the technicalities involved in the distinction between the various forms of common law theft were imported into these provisions by overtechnical treatment of the differences between the several theft provisions.

The focus of the indictment, therefore, will be on what the defendant is thought to have done, and on the conclusory judgment that it fairly can be fitted within the concept of theft as developed in these materials. This should accomplish the constitutionally required purposes of having an independent assessment of the defendant's conduct prior to the initiation of formal criminal proceedings, apprising the defendant of the case he must meet in court, and laying a basis for a defense of former jeopardy if the defendant is subsequently proceeded against for related conduct. This should also accomplish the law enforcement objectives of excluding the technical defense based on miscategorization and increasing the efficiency of the criminal process consistently with its fairness.

These goals are sought to be accomplished in subsection (2) by two sentences. The first describes what the indictment should contain; the second what offenses can be based on an indictment so framed. On the first point, the indictment, as noted, should contain a factual description of the defendant's conduct in sufficient detail to inform him of what he is accused of having done, together with a charge that the conduct amounts to theft under this group of provisions. On the second point, the defendant can be convicted of any form of theft as defined in the several sections of this group on the basis of such an indict-

ment, provided of course that there is not sufficient variance between the conduct charged and the conduct proved as to have unfairly surprised the defendant about the case he was required to meet.[52] The combination of these two provisions, it is expected, will preclude the absurdity of a defendant successfully securing an acquittal on the argument that he is a thief rather than a receiver.

(c) *Multiple offenses.*—It also should be noted that it is a necessary implication from consolidation of theft offenses that a conviction and sentence for one form of theft excludes a conviction and sentence for another form of theft. Thus, the same transaction will not support a sentence for both receiving and taking, just as it will not support a sentence for both taking and attempting to take. No explicit provision is included to require this result on the premise that it is a necessary implication from the treatment of theft as a single, unified offsense. If it is thought that this conclusion does not necessarily follow from what is provided in the proposed statutory text, then a provision requiring this result should be drafted. Care should be taken in such a proposal, however, not to confuse the question of how different two occurrences must be in order to support two convictions for theft. Stealing tires from an automobile one day and shoplifting three weeks later are sufficiently different transactions to support two criminal charges. Stealing both the tires and the hubcaps on the same occasion, however, should not support two charges, just as stealing and receiving the

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[52] The Delaware proposals contain a provision similar to the one under discussion. *See* PROPOSED DEL. CRIM. CODE § 542(2) (Final Draft 1967). They also contain (in section 543) specific provisions designed to assure that a receiver cannot defend on the basis that he was really the thief. Such a provision was omitted from the materials here (although there is agreement with the result) because it was the thought that subsection (2) of the draft alone was sufficient to assure that this would not happen. If the indictment is properly drawn and the defendant is not unfairly surprised, a charge of theft will support a conviction of either receiving or taking unauthorized control. The conduct, as explained in the commentary on receiving, is substantially identical anyway.

It also should be noted that the Model Penal Code contains a proposal with the same objective as the one under discussion. *See* MODEL PENAL CODE § 223.1(1) (P.O.D. 1962). The Code language was not adopted because it does not explicitly recognize the principle that there must be a relation between the charge in the indictment and the case proved against the defendant such that the defendant is not unfairly surprised. If such surprise does not result, then it is fair to say that the grand jury made the determination that the case should go on as it did. If such surprise did occur, and even if it was cured by a bill of particulars, then it would be possible to argue that a conviction could not constitutionally be sustained because the grand jury did not pass on what the defendant was actually convicted of doing. The principle can be illustrated by a couple of extreme examples. If the grand jury charged theft and the prosecutor, supplemented by a bill of particulars to insure fairness, proved murder, then surely the case could not constitutionally stand under the grand jury requirement: the grand jury did not pass on murder. If the grand jury charged that the defendant committed theft in that he was found to have unauthorized control over property belonging to another that he was using for his own purposes, then a conviction of either "retaining" under proposed section 1732(c) or "excercising unauthorized control" under section 1732(a) would seem appropriate. The line between the two cases, it is suggested—and the line which proposed subsection (2) seeks to draw—is the point where the offense proved is so different from the offense charged that the defendant is unfairly surprised by the case that he is expected to meet. If such surprise occurs, then it is also fair to say that the grand jury has not authorized a prosecution like the one attempted. Without such authority, of course, there is a constitutional impediment to proceeding.

same tires should not. Presumably, general provisions on this type of problem will be adopted, since of course it is not a problem peculiar to theft.[53] The point of this comment, however, is to assure that attention is given to the fact that different forms of theft are understood by these provisions to be different ways of describing the same offense, rather than distinct and separately punishable offenses.

23. *Grading of Theft Offenses.*—Proposed section 1735 deals with the complex and important subject of authorized sentences for theft offenses. As will be recalled, one of the major reasons the present effort was undertaken was to bring into some semblance of uniformity the many divergent sanctions now available under the Federal criminal law. These proposals are advanced with this thought in mind, as well as in an attempt to mirror the present grading of most existing Federal theft offenses. These proposals are thus a combination of what is and what ought to be. Each subject raised by the proposal will be discussed in turn.

(a) *Threat to inflict serious bodily injury.*—The cue for this provision is the presently existing Hobbs Act, 18 U.S.C. § 1951, which provides that any extortion which affects commerce carries a maximum sentence of $10,000 or 20 years, or both. The judgment is that the Act is overbroad in speaking to all extortion with such severity. Organized crime, which uses the threat of violence as its major enforcement weapon, is rather clearly the main object of the provision, although the language includes every kind of extortion for any amount of money. As has been done in other areas, the effort here is to separate out the really serious from the comparatively trivial and break down the existing offense into a number of discreet levels for grading purposes. The proposal is thus that extortion be divided into three categories: that which involves threats to inflict serious bodily injury (the terms are chosen for their consistency with the robbery proposals) which is treated as a Class B felony:* that which involves extortion by a public servant (as defined in section 109(x) to include all government officers and employees) or which involves an amount in excess of $50, which is graded as a Class C felony; and that which is left over (*i.e.*, not by a public servant and $50 or less in value), which is treated as a Class A misdemeanor. This is felt to be a more realistic breakdown of the offense of extortion, still retaining it as a serious offense in most instances, and as a very serious offense in what is likely to be the organized crime context.[54] The subject matter of sections 875–877 of Title 18 (transmission of ransom notes), are treated the same way by these proposals, and is subject to the same analysis.

(b) *Possible Class B grading on value.*—Consideration might be given to whether thefts which involve more than $100,000 (or a higher amount) might be graded as Class B felonies.** The purpose of such

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[53] *See* the comment on multiple prosecutions: sections 702–708.

*Theft by threat to commit a Class A or B felony (*e.g.*, arson) was added to the Class B felony group in the Study Draft.

[54] It may be that attention should be devoted to adding language to proposed section 1735(1) to the effect that it will always be applicable to extortion used in the context of organized crime. Whether or not this is deemed sound, provisions have already been drafted to increase penalties on leaders of organized crime enterprises, as well as for extended sentences for such offenders.

**Such a value grading was made in Study Draft section 1735(1).

a provision, which so far as is known has no counterpart in present Federal law, would be simply the judgment that a theft which involves such an amount is an extremely serious offense, much more so than the ordinary theft that is thought serious enough to merit treatment as a felony. It is expected that widespread frauds, thefts of large sums of money, and other similar large scale schemes would be included, and that the value should be both low enough to include such grand schemes and high enough to exclude what might be characterized as more ordinary thefts. Recognized penal purposes such as deterrence or rehabilitation, however, do not clearly warrant such grading, although the desirability may be enhanced by the proposed provision which would bar consecutive sentences for different thefts in the same scheme.

(c) *Value exceeds $500.*—The dividing line now in common use in Title 18 for denoting the difference between felony and misdemeanor in a theft context is $100.[55] Recent proposals in other revision efforts have suggested the raising of this figure to $300, $500 or some similar amount.[56]

While of course the matter is one of a judgment that is not subject to quantification, the recommendation is that $500 is an appropriate level to invoke the consequences of a felony conviction for theft.

It should perhaps be noted parenthetically that there is no inclination to depart from the traditional method of using value as one index of the severity of a theft. The interest protected by the theft offense is to a large extent a property interest, which is traditionally measured by our society in terms of dollars. This is not to say that theft provisions do not protect other interests: many of the other grading provisions deal with such questions. But it is to say that value is one measure that is appropriate for the evaluation of the culpability of a thief. There is a sense in which rehabilitative and other correctional objectives might suggest that all thieves be treated alike, at least as measured by this index. For example, the rehabilitative process is as likely to be as long (if not longer) in the case of the petty thief as in the case of the major swindler. On the other hand, moral judgments supply a limit to the extent to which one should be sanctioned for the violation of law, and the judgment here is that value of the property involved is still an appropriate factor in such a judgment. It would be unconscionable to subject a first offender who stole $5.00 to a felony sentence simply because he seemed to need rehabilitation.

(d) *Firearm, automobile, airplane or other vehicle.*—The Dyer Act, 18 U.S.C. § 2312, makes transportation of a stolen motor vehicle or aircraft a felony with possible sentence up to $5000 or 5 years, or both. The combination of proposed section 1735(a)(d), making theft a Class C felony if its object is a firearm, automobile, airplane or other motor propelled vehicle, will (with appropriate jurisdictional language) retain in substance the Dyer Act provision. It should also be noted, however, as observed in the commentary on the unauthorized use of a vehicle proposal (section 1736), that temporary takings which do not involve a substantial risk of loss of the property to its owners, will no

[55] *See, e.g.*, 18 U.S.C. §§ 643–659.

[56] *See, e.g.*, MODEL PENAL CODE § 223.1(2)(a) (P.O.D. 1962) ($500); PROPOSED DEL. CRIM. CODE § 530 (Final Draft 1967) ($300); MICH. REV. CRIM. CODE § 3208 (Final Draft 1967) ($250).

longer be treated as a felony. Thus, some classes of cases that can now be prosecuted as a felony under the Dyer Act are broken to misdemeanors under these provisions, with the issue between felony and misdemeanor whether the actor intended to make a permanent appropriation of the property or to do a series of acts [57] which amount to the same thing. The judgment is that this is an appropriate place at which to draw such a line.

On the question of firearms, there is no known Federal theft statute which draws particular distinctions based on the involvement of firearms as the object of the theft.* The rationale is that theft of firearms often forms the predicate for more serious criminal ventures, and usually manifests a willingness to use the weapon in a criminal enterprise of some sort. The Model Penal Code includes theft of a firearm as a felony, as well as of cars and other vehicles.[58]

It should be noted finally that making stealing a car a felony avoids a difficult, and essentially irrevelant, issue of valuation in such cases. Whether the car is stolen for its resale value and is hence of an expensive type, or whether it is stolen for transportation and abandoned and is hence not necessarily an expensive model, there is a substantial invasion of the ownership rights of the victim that is felt to justify the existing Federal law making such acts felonious.

(e) *Government documents.*—It is also a Class C felony if government documents are the object of the theft. There are presently at least two provisions which reflect a similar judgment. Stealing papers related to claims against the government is a felony under 18 U.S.C. § 285, with a possible maximum sentence of up to $5,000 or 5 years, or both. Stealing records from any court of the United States, or from any other public office or government employee, is also a felony under 18 U.S.C. § 2071, punishable by a maximum of up to $2,000 or 3 years, or both. These provisions are justifiable on the theory that the disruption of normal government functioning, as well as the possibility of misleading the government or the public, or both, by making away with public records, is a serious invasion of an important interest. In addition, it is important to retain as a serious offense conduct of this sort by public servants, in whom a trust is reposed to keep such documents safely. While it is thus somewhat easier to come to the judgment that public officials who steal records reposed to their trust should be subject to serious sanctions, no basis is seen for concluding that it is measurably less serious for a nonpublic official to do the same thing in this context.

(f) *Property received by a dealer in stolen property.*—The organized "fence" is of course the main target of the receiving provisions of proposed section 1732(c). The ability of a thief to dispose of the objects of his thievery in a profitable way, an ability that depends to a large extent on the existence of those in the business of receiving and disposing of stolen property, is of course one of the major inducements that encourages theft. Because of its effect on other crimes, therefore, it is the judgment that the business of dealing in stolen goods is one

[57] The acts are set forth in the definition of "deprive" in proposed section 1741(b).

*Ammunition, and explosive or destructive devices were added to Study Draft section 1735(2)(d).

[58] *See* MODEL PENAL CODE § 223.1(2)(a) (P.O.D. 1962).

that should be treated as felonious, irrespective of the property values involved in the particular incident.[59] Note should be taken, incidentally, of the possibility of enhanced sentences based on the fact that one is in the business of engaging in criminal activity. The argument that a defendant subjected to the raising of his offense to a felony and the imposition of an enhanced sentence too, both on the basis that he is a dealer in stolen goods, is being punished twice for the same conduct, is not persuasive. The enhanced term is not mandatory on the court, it is a comparatively small increment for a Class C felony, and the ultimate sanction is one that could be directly provided in one step rather than two in order to achieve the same result. What this does is build in additional flexibility depending on the size of the defendant's operation. On this point, incidentally, the question of when dealing becomes a "business" of buying and selling stolen property is intentionally left to the courts to work out in the light of experience under the provision.

(g) *Counterfeiting paraphernalia.*—Present 18 U.S.C. § 642 treats as a felony, subject to a maximum term of up to $5,000 or 10 years, or both, stealing a long list of items related to the making of money, stamps, bonds, notes, and similar objects of government obligation or unique government responsibility. The attempt in this provision is to retain the general principle on which this section seems to be based, but again to get away from the overkill aspect which the statute seems to represent. For example, stealing an ordinary screwdriver from the United States Mint would be a serious felony under this section, equated with stealing a plate from which money is printed or paper which is specially prepared for the purpose of its use for making money. A line is sought to be drawn in this proposal between such thefts, the issue turning on the extent to which the object of the theft is "uniquely associated" with the making of such documents. Thus, it will remain a felony to steal the plates, the paper or other similar items which greatly facilitate the practice of making counterfeits of the types of instruments and documents involved. It will not remain a felony to steal those items of small value which can be purchased from an ordinary hardware store, or which are otherwise freely accessible in other places. It will be noted that it does not matter from whom the objects which make the offense a felony are stolen. It may be that this point should be continued in the jurisdictional provisions, so that theft from a manufacturer of a specialized item to be used in the making or preparation of money would be within the Federal jurisdiction (*compare* 18 U.S.C. § 641), as well as thefts from government custody.

(h) *Extortion.*—As noted in the discussion of extortion as a Class B felony, it is a Class C felony under these proposals for a public servant to commit extortion (theft by threat) as well as for any other individual within the Federal jurisdiction if the amount exceeds $50. The Hobbs Act, 18 U.S.C. § 1951, is thus broken down into three levels of offense, rather than retained as a single offense with a potential 20-year sentence for even the most petty kinds of conduct. A customs official who threatens to impose a penalty if an amount is not paid directly to him has committed a serious breach of the public trust which has been reposed in him, and is justifiably treated as a felon

[59] *Compare* MODEL PENAL CODE § 223.1(2) (P.O.D. 1962).

for having done so. He will not be subject to a 20-year term under these proposals, however, as he would be (assuming his conduct "affects commerce") under the present wording of the Hobbs Act.

(i) *Keys.*—Present 18 U.S.C. § 1704 makes it a felony to steal a key which can be used to open a variety of types of locks maintained by the postal authorities (on mail boxes, lock drawers, mail bags). The sentence can be up to $500 or 10 years, or both. The idea again is that this demonstrates a propensity for using the key, hardly suited to any other purpose, for committing a serious offense, as tampering with the mail now is. This thought is generalized in these proposals, so that theft of any key or other instrument which is so uniquely associated with entry into a place where valuables are kept is a felony. Thus, stealing a key to a room where paper for making money is stored (proposed subsection (2)(g)) or where mail is stored (proposed subsection (2)(i)) is uniformly treated as a felony.

(j) *Mail.*—Theft from the mails is now treated as a felony with a maximum sentence of up to $2000 or 5 years, or both. 18 U.S.C. §§ 1708, 1709. The 1948 revision of Title 18 added to this provision the $100 line found for distinguishing between felonies and misdemeanors in many other provisions of the criminal statute, but in 1952 the provision was deleted, thus again making all thefts from the mails felonious. The rationale was that the public interest being protected was as much the integrity of mail service as it was the value to the victim of the lost property. Moreover, the value of letters is frequently not measurable in dollars and, even if it is, is generally not known to the thief when he takes the letter or other object. It thus is as much accident as well as anything else if a particular package happens to be worth $99 as opposed to $102, and in any event is not of criminological significance. Finally, there is a deterrent force to the making of such conduct a felony, particular with regard to public servants on whose integrity the success of the mail system of course depends. These arguments are summarized in the House Report on S. 2198 (the amending legislation), H.R. Rep. No. 1674, 82d Cong., 2d Sess. (1952).

The judgment the present law reflects is retained here, even though a substantial case could be made, it is believed, for retaining a category of petty theft for stealing from the mails.* A very common case is the public servant without a prior record who feels coins placed in a "test" letter and steals them. Whether he should be saddled with a felony record, in addition to the loss of job that correctly will follow and the substantial sanction of a misdemeanor conviction, is highly questionable. There apparently were serious enforcement problems with treatment of this offense as a misdemeanor, however, which can be depended upon to induce substantial resistance to inviting the same difficulties again. And in addition, such conduct by an official who has

*This was changed somewhat in the Study Draft. Section 1735(i) of the Tentative Draft read: "the property consisted of any letter, postal card, package or other item exclusive of newspapers, magazines, and advertising matter stolen from the United States mail." Under the Study Draft stealing first class mail will always be felonious. Stealing second class (magazine) and third class (junk mail) mail will be a misdemeanor (rarely will value be high enough for a felony). Stealing fourth class mail (*e.g.*, packages) will be a felony or a misdemeanor depending on other factors such as value or what was stolen (*e.g.*, gun).

been sufficiently warned and who does stand in a position of public trust is of a high level of gravity in any event. Perhaps the best solution, therefore, is to retain the offense at the felony level, and rely on the ameliorative devices of the new proposals—reduction of the offense to a misdemeanor under section 3004 and expunging the record if probation is successfully completed *—to handle the hardships that might be produced.

Finally, it should be noted that there is an exception to the felony grading of mail theft, notably where the object of the theft is a newspaper or magazine or consists of advertising matter. The origin of the thought that led to this exception can be found in existing 18 U.S.C. § 1710, which treats as a misdemeanor the theft of newspapers. The point of the present statute has been generalized to include items which, though it may be better to substitute more technical language, are thought to be comparable. The point, of course, is that such matters do not involve the same loss of value to the victim as a personal letter or sealed package, although the interference with the operation of the mails still justifies treatment of the offense by the criminal laws. Nor, it should be added, is there the same incentive to discover valuable property involved in the theft of such items.

(k) *Receiving.*—It should perhaps be noted in passing that in general, receiving has been graded at the same level as the original theft. The exception, of course, is the dealer provision of proposed subsection (2)(f). But except for that case, and under a rationale set forth in the commentary on receiving, *supra*, no reason is seen to differentiate between the gravity of the offense of receiving stolen property and stealing it in the first place. Both represent substantially identical invasions of the owner's interest in his property. This judgment is generally reflected in the present Federal law [60] but not uniformly.[61]

(l) *Class A misdemeanor.*—As is apparent from a reading of subsection (3) of proposed section 1735, this is the catch-all grading provision, the level at which all theft offenses which are not otherwise provided for will fall. This is of course a matter of structure, and different judgments about what this category of offense should contain can be implemented by changes in the other subsections of this section.

(m) *Class B misdemeanor.*—The structure of this subsection (4) deserves brief comment. Four factors are isolated, all of which must concur if the offense is to be treated as a Class B misdemeanor. There are two ways in which the judgment can be made that they do concur. The first is by the prosecutor, who can charge an offense as a Class B misdemeanor and perhaps thereby avoid the necessity of a jury trial. The second is for the court to find that they exist, on the basis of a case made by the defendant at the time of sentencing.

Two points should be made about this latter device. The first relates to the possible jury trial and self incrimination arguments that could be advanced in opposition to placing the burden of persuasion on the defendant on these issues. The answer to such contentions, it is believed, is that Congress is perfectly free to adopt ameliorative devices

*There is no section on this in the Study Draft. *But see* proposed section 1827 on drugs.

[60] *See* 18 U.S.C. §§ 659, 660, 1708.

[61] *See* 18 U.S.C. §§ 661–662.

and place them in the hands of the courts to be triggered by the defendant's initiative. The jury in this class of cases will have found the defendant guilty of a Class A misdemeanor. There is no principle written in the jury trial or self incrimination provisions of the Constitution that forbids the *reduction* of that conviction to a lower level if the defendant can then come forward with a satisfactory case. If there were, the defense role at sentencing would assume a peculiarly different stance than it now appears to have.

The second point is that the general sentencing provisions now contain a positive grant of authority to the court to ameliorate a conviction in unusual circumstances by reducing the grade of the offense to a lower level. It could be argued that subsection (4) and that provision are inconsistent. They are not, it is believed, for the following reasons. Subsection (4) states reviewable criteria which *must* be used by the court to reduce the level of the offense if the defendant makes out a proper case. The general provision is a discretionary device designed for use in unusual cases where an injustice might be caused by the normal operation of the law. The purposes of the two provisions are thus drastically different, and there is no implication meant to be advanced that because these mandatory criteria are stated in subsection (4) the court is deprived of its general authority to act in other cases where special hardship is evident. In a nutshell, subsection (4) in designed to provide the normal result; the general grant of authority is designed to provide necessary latitude to the court to act in the unusual case.

Finally, the four conditions should be briefly commented upon. The first is that the property or services cannot exceed $50 in value. The purpose of this is to recognize a category of petty theft. The second excludes all forms of extortion from such a reduction in grade. Reading this with subsection (2)(b) of section 1735 will therefore produce the result that extortion of a sum of $50 or less will be a Class A misdemeanor, and all other forms of extortion will be a felony of either Class B or Class C as discussed above. The third provides that theft by deception by one in a confidential or fiduciary relationship to the victim is excluded from such reduction in grade. The judgment is that preying on such a relationship is sufficiently serious not to warrant a reduction in the normal course. And finally, public servants and officers and employees of financial institutions are excluded. The element of public trust violated by any criminal act by such an official is believed to justify this exclusion.

(n) *Infraction.*—The final grading category utilized by these proposals is the infraction, reserved for use in one type of offense. The analogue of this provision in the present law is found in sections 1719, 1720, 1722, 1723, and 1725 of Title 18. These provisions in effect treat as solely fineable offenses the theft of mail service. Thus, mailing a letter without a stamp is the theft of six cents worth of service (or perhaps slightly more if a different standard of valuation is used). The purpose of the proposal is to continue the practice of treating this at the infraction level, with one exception, however, and that is the limit of $10. Thus, an actor who engages in a continuous scheme to defraud the post office of revenues and manages to accumulate substantial sums in avoided postage can be reached as a serious offender,

at the felony level if the scheme is large enough. This would not be the case under the cited statutes. It should also be noticed that public servants are excluded from the infraction level. Theft of mail service by those involved in running the mails is believed to be of its nature a more serious offense than theft of such services by the public. Finally, it should be noted that while the origin of these provisions is the present mail statutes, the principle has been generalized to apply to all forms of theft of services. Thus, theft of a meal on a train can be an infraction if its value is less than $10, as could similar thefts of services—such as a short ride on the train itself—of small value.

(o) *Valuation.*—The final provision in proposed section 1735 deals with how to measure the monetary amounts that are listed as the dividing lines between several grades of the theft offense. The provision is borrowed, with slight modification, from the Model Penal Code.[62] The idea is that the highest reasonable value shall be used (*compare* 18 U.S.C. § 641), measured against any standard that is fair under the circumstances. There are also several standpoints from which the value can be measured: what the actor actually stole, *i.e.*, the actual value of the property involved; what the actor believed he was stealing, *i.e.*, the value of the diamonds he thought he was stealing rather than the rhinestones he actually stole; what the actor hoped he was stealing, *i.e.*, the $500 he hoped was in the mail bag rather than the $30 that was actually there;* or what the actor could reasonably have anticipated to be there, even though he never particularly addressed the value issue in planning his theft. The last three of these measures deserve further brief comment: they are designed to include the actor who is after all he can get; the judgment is that the accident of what was in fact obtained should not serve as a limitation on the extent of his culpability. Any one of three ways will suffice in such a case: what the actor thought he was getting, what he wanted to get, or what the jury concludes was a reasonable measure of the scope of his operation based on the facts as he knew them. The converse question—of whether the culpability of the actor who by accident realizes more than he counted on should be measured by actual value as opposed to what he thought the value to be—also can pose some difficult problems. Normally, however, the defendant will treat the windfall as good fortune, and appropriate the entire amount when he finds out what it is worth. In substance in such a case, he has therefore stolen the actual value. In those rare cases where he never realizes what his booty is worth, it will still normally be appropriate to measure his culpability by the value of the interest he has invaded. In the still rarer cases where this is inappropriate, there is judicial authority in the proposed sentencing part to deviate from what are intended here as the normal operating principles to govern the vast majority of the cases.

Finally, attention should be drawn to the last sentence of the proposal. The provision there is that amounts involved in related thefts may be added together to get valuation. The thefts must of course be proved as part of the conviction in order to be so used. The idea is

[62] *See* MODEL PENAL CODE § 223.1(2)(c) (P.O.D.) 1962).

*This provision was deleted in the Study Draft.

that instead of pyramiding misdemeanor sentences, for example, because of a series of related but different thefts of small amounts, the court should be entitled to impose one felony sentence considering the related transactions as a whole. The court is not being permitted to aggregate unproven offenses; what is being permitted is for the court to consolidate six misdemeanor charges, for example, into one felony sentence.

24. *Grading of Unauthorized Use of a Vehicle.*—As explained in the commentary on unauthorized use of a vehicle *supra*, the purpose of proposed subsection (3) of section 1736 was to permit differential grading of automobile "borrowings" turning on the issue of the permanency of the deprivation. The one case where this principle was not thought to be operable was in instances of borrowing an airplane. Such conduct, even though no property may be permanently lost, does involve elements of risk to the aircraft which justify treating it at the felony level.

25. *Jurisdiction.*—One of the most complex issues that will have to be dealt with in drafting the final theft provisions will be the question of jurisdictional scope. In keeping with the practice to date, no specific language is suggested in these materials on this subject.* There follows, however, a list of 10 different jurisdictional headings under which, it is believed, each of the existing theft or theft-related provisions can be grouped. Under each heading, the sections which—at least as a starting point—can be grouped together for jurisdictional purposes are listed.

Several problems, however, should be pointed out first. One is undoubtedly going to be the question as to when property assumes a character such that Federal jurisdiction can appropriately attach and when it ceases to assume such character.

A few examples will make the point. When theft from the mails is the offense, at what point does "the mails" begin? And when does it end? If property is stolen from an area of special Federal territorial jurisdiction, is it an offense to receive it outside the Federal jurisdiction? When does commerce begin and end for the purposes of the exercise of Federal criminal jurisdiction? It may be that the answer to these questions should be left for ultimate resolution by the courts. It will nevertheless be required that at least some attention be given to them when the jurisdictional provisions are drafted.

A second, and perhaps more difficult, problem is what to do about present inconsistencies in jurisdictional reach. Extortion, for example, is much more widely covered (18 U.S.C. § 1951) than is obtaining property by false pretenses (18 U.S.C. §§ 1341–1343). Receiving goods which have been stolen while moving in interstate commerce (18 U.S.C. § 659) is an offense, while receiving goods taken from within the Federal maritime jurisdiction is not. There also, of course, are more subtle variations. For example, the commerce power is used to reach the receipt of stolen vehicles which "constitute" commerce or which have been a part of commerce; it is used to reach extortion if the activity "affects" commerce.

A third kind of problem that will have to be faced is how to translate certain offenses into the format of new Title 18. For example, the

*See section 1740, drafted for the Study Draft.

Dyer Act focuses on transportation as the operative element of the offense to which it speaks. Under the approach of these materials, it will be the actual culpable conduct—the theft of the car—that constitutes the offense, with the interstate aspects of the case used as the jurisdictional peg. This problem of removing the presently definitional elements of the offense which are purely jurisdictional will be common, however, to many different types of offenses as transition into a new format is made.

It is the present belief, in any event, that these problems can be addressed within the framework of the 10 jurisdictional headings under which the present reach of Federal theft and theft-related law can be grouped. They are as follows.

(a) *Property in which the United States has an interest.*—There are a number of different ways in which the heading could be expressed. For example, the term "interest" as used in the definition of "property of another" in proposed section 1741(g) could be used in this context as well, so that any theft which invaded an interest of the United States without its consent would be covered. Another approach might be to use concepts such as ownership, control and custody to describe the type of property to which the Federal jurisdiction will reach. In any event, this would seem to be a large and important segment of the Federal jurisdiction over theft. The following sections of Title 18 can, it is believed, be fitted under such a heading: sections 285, 286, 287, 288, 289, 550, 641, 642, 643, 644, 645, 647, 649, 651, 652, 653, 663, 1001, 1002, 1003, 1506, 1852, 1861, 1901, 2071. Several of these offenses, it should be noted (for example, section 1861) relate not to a fraud on the United States, but the use of property in which the United States has an interest (for example, public land) to defraud a member of the public. It may be that these sections would have to be classified elsewhere for this reason.

(b) *Conduct by an officer, employee or agent of the United States, or by one who purports to be such an officer, employee or agent, which appears to be under color of office or which involves property coming into his hands in his official capacity.*—This will be another major jurisdictional heading. The present statutes in Title 18 which can be fitted under this topic are as follows: sections 290, 643, 645, 646, 648, 649, 650, 651, 652, 653, 654, 663, 872, 912, 1017, 2073.

(c) *Conduct involving banks and other credit-related or financial institutions, as well as the Federal Reserve System, the employees of each such institution, and so on.*—The language of this head of Federal jurisdiction will undoubtedly have to be drafted in consultation with appropriate financial officials of the government. Many of the present statutes are very technically worded, with careful definitions and exclusions that may well have to be retained in the proposed new code. The present sections of Title 18 which probably can be grouped under a heading such as this one are as follows: sections 655, 656, 657, 658, 1004, 1005, 1006, 1007, 1008, 1009, 1013, 1014, 1026, 2113.

(d) *Mails and the post office.*—This heading can cover the following presently existing Title 18 statutes: sections 876, 877, 1341, 1342, 1691, 1692, 1704, 1707, 1708, 1709, 1710, 1711, 1712, 1713, 1719, 1720, 1721, 1722, 1723, 1725, 1726, 1727, 1728, 1733.

(e) *Interstate or foreign commerce.*—This heading, which will be difficult to draft consistently with present coverage because of the

differing ways it is now handled, can probably include the following sections of Title 18: sections 659, 660, 875, 1343, 1951, 1952, 2311, 2312, 2313, 2314, 2315, 2316, 2317.

(f) *Special maritime and territorial jurisdiction.*—There are three present statutes keyed to this heading: sections 661, 662 and 1025 of Title 18.

(g) *Military.*—There are presently two sections in Title 18 dealing with property related to the military enterprise: sections 1023 and 1024.

(h) *Bankruptcy.*—There are also two sections related to the bankruptcy powers of the Federal government: sections 152 and 153 of Title 18.

(i) *Designated Federal programs.*—There are a number of present statutes that are keyed to specifically designated Federal programs, such as various forms of employee benefit plans, projects financed by the United States, and so on. The following present sections could probably be included under such a heading, although each would undoubtedly have to be specially listed by exact topic: sections 664, 874, 1010, 1011, 1012, 1020, 1919, 1920, 1921, 1922 and 1923 of Title 18.

(j) *Miscellaneous.*—There are a number of other provisions in Title 18 which do not conveniently fit under any generic label, but which do reflect decisions to assert Federal authority in legitimate areas of Federal concern. They include the following provisions, with the subject matter in parenthesis after the citation: sections 873 (threat to accuse of violating Federal law), 914 (impersonation of one to whom Federal money is owing), 915 (obtaining money by impersonating a foreign diplomat), 916 (obtaining money by impersonating a 4–H club member), 917 (obtaining money by impersonating a Red Cross agent), 1163 (theft from Indian tribe).

COMMENT

on

FORGERY AND FRAUD OFFENSES: SECTIONS 1737, 1738, 1751–1758 (Low; November 1, 1969)

1. *Introduction; Forgery.*—The first section in these materials (proposed section 1751) represents an attempt to collect in a single statute offenses which are now found scattered throughout present Title 18. The tendency for offenses relating to the false making of documents, as in other areas in the present law, has been to draft a different offense for each type of document and each different jurisdictional justification for Federal intervention. The pattern is thus that the forgery of United States obligations and securities is covered by 18 U.S.C. § 471; forgery of foreign obligations and securities by 18 U.S.C. § 478; forgery of foreign bank notes by 18 U.S.C. § 482; forgery of official passes by 18 U.S.C. § 499; and so on. The first objective of the forgery draft is to combine these essentially identical offenses in accord with the overall plan of the proposed new Code and to set out in one section a description of the conduct sought to be covered, leaving to separate study the question of when Federal jurisdiction should be available.

A second objective of the draft on forgery is to bring together in a single section certain other types of related offenses. It has been suggested by some of the recent State Code reform efforts that the offenses of uttering, possession, and the like be dealt with in the same section that covers the underlying forgery offense itself.[1] This plan has been followed here, and thus it has been possible to consolidate in a single section offenses such as 18 U.S.C. § 472 (uttering counterfeit obligations or securities of the United States), 18 U.S.C. § 479 (uttering counterfeit obligations and securities of a foreign government), 18 U.S.C. § 483 (uttering counterfeit notes of a foreign bank), and so on. In addition, as discussed in more detail below, certain other offenses, not usually combined with forgery, have been included in the belief that they involve crimes of great similarity to, and of equivalent culpability with, the other forgery offenses.

It should also be noted at the outset that the main vehicle through which this consolidation has been effected is the definitional section included in the draft as section 1754. By defining the main terms, much as was done in the New York[2] and Michigan[3] efforts, it has been

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[1] *See, e.g.*, PROPOSED DEL. CRIM. CODE § 550 (Final Draft 1967); MODEL PENAL CODE § 224.1 (P.O.D. 1962).

[2] N.Y. REV. PEN. LAW § 170.00 (McKinney 1967).

[3] MICH. REV. CRIM. CODE § 4001 (Final Draft 1967).

possible to draft the criminal statute itself in a much more simple and straightforward fashion than now appears in most of the related Title 18 offenses.

Finally, it may be helpful to catalogue the offenses which can be substantially displaced by the provisions of proposed section 1751. There are at least 42 basic forgery offenses in Title 18 that are thus substantially covered: 18 U.S.C. §§ 335, 471–473, 478–480, 482–483, 485–486, 490, 493–502, 505–507, 508, 701, 704, 706–707, 1002, 1005–1006, 1008–1009, 1017, 1158, 1426, 1543, 1546, 2314–2315. In addition, the offense of uttering a deceptive document reaches at least 9 other present provisions in Title 18: 18 U.S.C. §§ 334, 1001, 1015(c), 1016, 1018–1019, 1021–1022, 1541.

2. *Falsely Make, Complete or Alter.*—The first judgment to be made is as to the scope of conduct that will suffice to give rise to a charge that an instrument has been "forged." The present language in a typical Title 18 offense, 18 U.S.C. § 471 speaks of one who "falsely makes, forges, counterfeits, or alters" the covered instruments. The Model Penal Code includes alteration without authority, as well as making, completing and executing an instrument without authority.[4] New York and Michigan define as separate concepts "false making," "false completion," and "false alteration," [5] much as is done in the draft proposed in these materials.

The purpose of including "making," "completion" and "alteration" as separate concepts is to be sure that the entire range of conduct that gives false authenticity to an instrument is included. Instruments as to which essential terms have been changed (as by raising the amount of a check), or which have been completed without authority (as by inserting an amount beyond the authorized sum) seem in every respect to present the same type of harm and the same qualities of culpability as the "forgery" of the entire instrument. The focus of the offense, it is believed, should be on the purposes of the actor, rather than the precise method by which he affected the authenticity of the document. The idea is thus that the underlying conduct should be broadly inclusive, and that criminal liability should turn, in the main, on the objectives toward which the conduct is aimed.

The three terms—making, completion and alteration—are separately defined in proposed section 1754. Whether it is better to include completion and alteration within the definition of "making," or whether to define the terms separately as has been done in the draft, is essentially a matter of taste, although keeping them separate may prove helpful when it comes to articulating differences in grading. One could make the judgment, for example, that "making" a document from whole cloth involves a higher degree of professionalism and hence is a more culpable act than is the alteration or completion of an instrument that is genuine in some respects. Whether to reflect differences of this sort in the grading levels or to leave such matters to the sentencing judge controls the desirability of keeping three con-

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[4] MODEL PENAL CODE § 224.1 (P.O.D. 1962).

[5] N.Y. REV. PEN. LAW § 170.00 (McKinney 1967); MICH. REV. CRIM. CODE § 4001 (Final Draft 1967).

cepts separately defined or consolidating the definitions into a single provision. It seems clear, in any event, that the range of conduct covered by the suggested terms should be included within the basic concept of forgery.

The specific definitions, as noted above, are derived from the provisions in New York and Michigan that have been cited above. An attempt has been made to simplify the language considerably, however, from the language that those two proposals have employed. The essential ingredients in a false making are twofold: (a) that the writing purport to have been made by someone other than the actor: and (b) that such other must either not exist or not have authorized the writing. To make something which purports to be a copy of the genuine, but which is not either because the apparent maker is fictitious or because the copied writing was made without authority, is also included. The essence of the offense, therefore, is conduct which affects authenticity by making it appear to be the product of another hand than that which actually is responsible for its execution.

Before turning to what constitutes a false completion or a false alteration, two additional observations should be made. The first is the technical point that attention must be directed to the definition of "writing" before the full implications of the concept of a writing "falsely made" will be appreciated. For example, a signature is a "writing," and thus one who forges the signature of another on a document has made a "false writing" within the concept of forgery as defined in these materials. The combination of the definitions of "false making" and "writing," in other words, is intended to be broadly inclusive of the kinds of forgeries which deserve criminal sanction. Questions of appropriate grading, of course, are left for separate treatment in accordance with the overall plan of the proposed new Code.

A second point that needs to be noticed is that it is necessary in determining which offenses to include within a separate concept of forgery to pay some attention to the previously defined offense of theft proposed for the new Code. It would be possible to take the position that the false making of documents is normally but one step in an attempt to obtain property by deception. A prosecution for theft by deception (which includes attempts) would thus be possible in many instances where a separate forgery prosecution might also be possible.

On the other hand, distinct interests are involved, for example, in the counterfeiting of currency. Tampering with the authenticity of money is typically viewed as a much more serious offense, particularly at the highly professional level at which it is sometimes practiced, than the theft of property. This is reflected in the current grading of these offenses [6] as well as in the grading scheme proposed for theft and for forgery. Beyond such offenses where there is a clearly identifiable purpose in retaining separate crimes, however, there are many cases where it is simply redundant to include a separate superstructure of forgery and theft offenses. If no grading distinctions are sought to be made, in other words, and if the substantive reach is substantially the

[6] *Compare* 18 U.S.C. § 471 (counterfeiting money: 15 years) *with* 18 U.S.C. § 1001 (false statement; 5 years).

same, it adds to the complexity of the law with no countervailing rewards to have two offenses—attempted theft by deception and falsely making a document for the purpose of deceiving or injuring another—where one would do the job. Nevertheless, there is a strong tradition supporting separate offenses, and most recent reform efforts have succumbed to that tradition.

The provisions that are submitted here have been drafted on the premise that such redundancy is not a major concern in this area of the law. To the extent that this premise should be retreated from, the concepts of "false making," "writing," and the like should be narrowed.[7] They have been broadly drafted in this submission in the belief that the Commission is likely to want to maintain some large degree of overlap between these two offenses both to insure coverage and for the separate reason that careful delineation of the distinct areas where forgery and counterfeiting offenses are not redundant might lead to the introduction of technical distinctions of the sort that have been sought to be avoided in the theft draft as well as elsewhere in the new Code. With proper limitations on multiple charging and consecutive sentencing and with attention to the problem of consolidating offenses for indictment purposes, the question becomes more one of arrangement than of substance. In this posture, it is probably better to continue the tradition of separate treatment.

The definitions of "falsely completes" and "falsely alters" are included, as noted above, to be sure that the concept of forgery is broadly implemented. The authenticity of a document is just as materially affected by the raising of the sum from $500 to $5000 as it is by a false signature at the bottom. The underlying principle turns on the creation of the appearance of authenticity where it does not exist, of the appearance that the main terms of the instrument represent the undertaking of the one who appears to stand behind it. Alteration of the terms, or completion without authority, affects the instrument in this way just as much as putting a false signature to it.

It is possible that a requirement of materiality should be added to the definitions of alter and complete, so that only "material" alterations or completions would be included. This has not been done, however, because of the intent requirement that must accompany the conduct involved. The defendant must intend to deceive or injure another person in order to be convicted under section 1751: the thought is that if he makes an alteration or a completion with this intent, it matters little to the propriety of a criminal sanction whether the change was "material" in some legal sense. It is the intent to deceive or injure, accompanied by this method of carrying out the intent, that justifies the criminal sanction.

3. *Writing.*—As noted above, there are presently at least 42 separate statutes in Title 18 dealing with the offense of forgery. The definition of "writing" in proposed section 1754(b) is intentionally very broad so as to include the range of conduct to which these statutes

[7] Perhaps limiting forgery to the making of such items as money or securities from dies, plates, *etc.*, would be the best approach to eliminating all redundancy, leaving to laws on other subjects the problems of attempts to commit other crimes. A strong case could be made for this approach, although it would, as noted in the text, be a considerable departure both from tradition and from most other reform efforts.

apply. This definition is therefore the main vehicle through which the consolidation of these many statutes is made possible.

This consolidation is effected at some cost in stretching the language. To speak of a coin or a medal as a "writing" is to use the words other than in their common meaning. The practice is borrowed from the Model Penal Code, the New York statute and the Michigan proposal.[8] It can be defended on the ground of simplification of the statutes, so that it becomes unnecessary to draft a separate "forgery" provision to deal with such tangible objects. In addition, essentially the same features make a coin as appropriate a subject of forgery as paper money. The law is of course full of instances where words are consciously used as tokens with content quite different from their dictionary definitions.

4. *Knowingly.*—It is also required for the offense of forgery to be made out that the actor know that he is falsely making, altering or completing a writing. "Knowingly" is defined in proposed section 302(1)(b). As there provided, it of course modifies each of the elements of the offense.

5. *With Intent to Deceive or Harm.*—It is also required for conviction of forgery that the defendant act with intent to deceive or harm the government or another person, or that he know that he is facilitating such deception or harm by another person.

The words "intent to deceive or harm" are substituted for the familiar but obscure "intent to defraud" on the ground that they are clearer terms and at the same time inclusive. If the actor's purpose involves neither deception nor harm, in other words, it would not seem possible to make the case that he nevertheless intended to defraud.[9] The object of the deception or harm—the government or another person—need not, of course, be the party with whom the actor is immediately dealing.

The alternative formulation of the necessary intent ("with knowledge that he is facilitating") is designed to cover the case where the actor does not intend to use the forged material himself in a deceptive or harmful manner, but where he is making, altering or completing the writing for use by another person. In either instance, it is clear that he is an appropriate subject for criminal sanction.

6. *Forgery or Counterfeiting.*—This is perhaps an appropriate point to emphasize the fact that the draft makes it legally irrelevant

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[8] See MODEL PENAL CODE § 224.1 (P.O.D. 1962); N.Y. REV. PEN. LAW § 170.00 (McKinney 1967); MICH. REV. CRIM. CODE § 4001 (Final Draft 1967).

[9] One potential problem of over inclusion should be noted. "Defraud" seems to carry some connotation of deprivation of property or other somewhat tangible rights. "Intent to defraud" might, therefore, exclude the actor who falsely makes a document for the purpose of harming another in his reputation or deceiving another in a context of little immediate pecuniary impact. "Intent to deceive or harm," on the other hand, might include such conduct.

This is not thought to be a matter of concern, however, for three reasons. First, it seems inappropriate to turn criminal liability for the false making of documents on fine distinctions as to what constitutes an intent to deprive of a "property" right. Second, the grading provisions would make such extraordinary uses of a forgery provision a misdemeanor, which seems an appropriate measure of the degree of criminality of such conduct. And third, the attempt to develop a limiting concept would be likely to introduce more problems than it would resolve.

which of two terms is used to refer to a particular criminal offense. By definition in proposed section 1754(g), "forgery" and "counterfeiting" are synonymous terms. They can be used interchangeably without any legal effect.

The purpose of this somewhat unusual recommendation is again to aid the objective of consolidation. Forgery and counterfeiting, as commonly understood, involve essentially the same conduct with different instruments as their vehicle. Both offenses are clearly covered within the provisions of section 1751(1)(a). It makes little sense as an a priori proposition to have two separate offenses, one speaking to the false making of money and other securities and the other speaking to the false making of other kinds of documents. Such distinctions invite the "technical defense," as it has been referred to in other contexts, *i.e.*, defense to an indictment for forgery on the basis that the actor did not forge the document, he counterfeited it. Care would have to be taken were the two offenses separated to be sure that such a defense would be precluded.

On the other hand, "counterfeiting" and "forgery" are part of the vocabulary, and there is no particular reason why they should not continue to be used. Short of inventing a new generic term that would displace both (compare the theft materials), the best solution appears to be to continue to permit either term to be used, but to remove the possibility that any legal consequences will follow the choice of one word over another.

7. *Utter.*—Section 1751(1)(b) follows the lead of recent reform efforts in also consolidating the offense of uttering a forged writing into the basic forgery statute. The extent to which distinctions between the two offenses are warranted can, of course, be reflected in the grading provisions. Such distinctions aside, treatment of uttering as a subsection of the forgery provision becomes a matter of arrangement rather than one of substance. The term "utter" is broadly defined in proposed section 1754(h) to mean, in effect, any use of a writing which has the effect of giving it currency. Since one must know that he is uttering a falsely made, altered or completed writing, and must further have the intent to deceive or injure another (or know that he is facilitating such deception or injury), the possibility of convicting for the innocent use of such a document is precluded by its mens rea elements.

8. *Possess.*—Section 1751(1)(b) of the proposal under discussion includes the offense of possessing forged documents (and section 1753 includes the offense of possessing deceptive writings). "Possess" is defined in proposed section 1754(i) to include receiving, concealing or any other exercise of control over the writing in question. Lawful possession is not included within the offense as defined because of the requirement that the possession be for the purpose of deceiving or harming another. Other uses of the term in related sections of this proposal also require a mens rea that will exclude innocent conduct.

Questions should be raised about the need for a possession provision. It has, of course, certain dangers, not unlike those which attend an attempt provision too loosely drafted. Most criminal statutes contain some minimal protection of the innocent by requiring that conduct go far enough toward the criminal objective so as to "speak for

itself" at least to the extent of providing some corroboration of the criminal objectives that are sought to be proved. Possession statutes, because possession itself is normally ambiguous in terms of supporting an inference of criminal intent, reach inchoate criminality at a point where the danger of convicting the innocent might be thought too high to warrant their separate inclusion (in addition to attempt provisions) in the criminal law. Indeed, unless their purpose is to reach conduct that occurs before an attempt has occurred (preparatory conduct, rather than an attempt, in classical terms), or unless their purpose is to introduce significant grading distinctions (which is not proposed here), there would seem to be no clear purpose supporting their inclusion in a Criminal Code. Inclusion either poses the dangers noted above by reaching conduct that has not yet matured into an attempt or is simply redundant with the offense of attempting to utter the writing. It is therefore the conclusion of the Consultant that such an offense should not be included in the final text. It has been included in the draft, however, to raise the issue and because it is presently an offense in the Federal Criminal Code.[10]

9. *Indictment.*—This may be the point at which to raise the possible desirability of inclusion of a provision similar to proposed section 1731 of the theft materials. The thrust of the recommendation there is that an indictment which charges theft (here forgery) should be sufficient if it describes the alleged conduct in a manner that will fairly apprise the defendant of the case he must meet. It is not material, under that recommendation, for the indictment also to resolve the potentially difficult legal question of which legal category of theft may have occurred. It is sufficient to preserve for him the question of whether *any* legal category of theft is met, so long as he is told what it is that he is suspected of doing.

Such a provision has not been included here for the reason that its inclusion at multiple points throughout the proposed Code would seem unwarranted. The problem, essentially that of precluding the technical defense that might arise out of a prosecutor's mistake of law during the indictment process, would seem to extend beyond the theft and forgery materials to a number of other areas. It would seem to be one, in other words, more appropriately solved by a general provision than by a number of ad hoc provisions scattered throughout the Code. In any event, the problem is one that should be noticed in this context as well as in theft, although to be sure it is not so critical here because the range of conduct covered by the forgery provisions is considerably narrower than is addressed by the recommendations on theft.

10. *Grading of Forgery Offenses.*—Forgery offenses are proposed to be graded at the Class B felony level in two instances: where the actor's conduct involved the forging of obligations or securities of the United States, or where his conduct was taken pursuant to a plan which he knew to involve money or property of a value in excess of $100,000. The latter category is included to achieve consistency with the parallel provision in the theft materials. The former category raises two issues that deserve consideration.

[10] *See, e.g.*, 18 U.S.C. § 472.

The first is whether simply the making of the listed items should be included, or whether, as proposed, making, altering and completing should be included, or whether all offenses dealing with such items—including uttering and possessing—should be included. The judgment made in the proposal is that any act of forging such items is very serious though it is the *maker* of government obligations who poses the most significant threat and who is the true professional. Alterations of money or false completions are unlikely to be of the same volume or to manifest the same degree of professionalism as does making money. Certainly, acts of uttering or possessing forged money are not nearly so serious as actually forging the money and do not seem to warrant Class B felony treatment.

The second issue is whether the category of writings classified at the Class B level should be further limited to money, or some concept designating legal tender. The terminology (*see* 18 U.S.C. § 471) is "obligation or other security of the United States" for the comparably graded forgery provision presently in the Federal Criminal Code, and there appears to be no need to change that language, except by deletion of existing terminology in reference to "bills, checks or drafts for money drawn by or upon authorized officers of the United States." Forgery of the latter items is simply not equivalent, for grading purposes, to the counterfeiting of money, government bonds, or other instruments negotiable on their face.

There are five categories of Class C felony, each of which deserves a brief comment. The first occurs where the actor is a public servant or an officer or employee of a financial institution and his conduct was taken under color of office or was made possible by his office. The combination of breach of trust and holding a position which can be so easily capitalized on to commit offenses of this character is believed to justify such a classification.

The second Class C felony includes the actor whose conduct involves counterfeited foreign money or other legal tender, or who utters or possesses forged United States obligations or securities. This category is designed to include all of the remaining offenses that involve money or other legal tender and that are not included as a Class B felony by section 1751(2)(a).

The third category of felony classified at the Class C level refers to the actor who makes writings from plates, dies, or other similar instruments designed for multiple reproduction. The effort here is to distinguish the professional from the amateur. If the amateur forges in volume, he will be classified as a felon by clause (2)(b)(v). The judgment is that one who possesses the skill to make distinctive writings from whole cloth and who uses that skill in a manner that constitutes a forgery should be graded at the felony level no matter what the volume. He poses a threat quite different from the casual thief who completes a check drawn on another's account.

The fourth category of felony graded as Class C relates to the actor who deals in government documents. The judgment is that the integrity of government is a chief value to be served by forgery provisions, and that it is a value unrelated to the monetary amount involved in the particular transaction. It should be noted that while "government" is defined (in section 109(h)) to include State and local government as well as Federal, the jurisdictional provisions will govern

when this offense is triggered. Thus, forgery of Federal documents will undoubtedly be within the Federal jurisdiction, but forgery of State and local government documents will only be Federally punishable if they become involved in interstate transactions, or if some other specific jurisdictional peg activates the statute.

The final category of Class C felony specifies a dollar amount as the line between felony and misdemeanor. The figure of $500 is set to correspond with the figure used for theft. The judgment is that the volume of criminal activity is an appropriate index to its level of culpability, a judgment reflected in many places in the present Federal Code although, curiously, rarely so in forgery and related offenses.

Finally, it should of course be noted that the catch-all provision in subsection (2)(c) provides that all other offenses not specifically classified elsewhere will be Class A misdemeanors. The vast majority of offenses that are included by the broad definition of terms like "writing," *etc.*, are thus classified as misdemeanors.

11. *Facilitation of Counterfeiting.*—The proposal in section 1752 represents an attempt to consolidate a number of different provisions now in Title 18. Subsection (1) is aimed at the possession or control of dies, plates, and other similar implements uniquely associated with the making of securities, tax stamps or other writings which purport to be made by the United States or any foreign government.[11]

Subsection (1) is meant to cover substantially the same territory now included in the present provisions. The "securities" and "tax stamp" language is carried forward from existing 18 U.S.C. §§ 2314–2315. The rest of the items now covered would seem to fit within the concept of a writing which purports to be made by the United States or a foreign government. The theory of the subsection is that it should only apply to implements which are uniquely associated with the preparation of such documents, implements which are not normally put to legitimate uses. The present language of some provisions (*e.g.*, 18 U.S.C. § 2314) seems to include any tool that can be used in making such documents (including an ordinary pencil or a screw driver): there is thus a conscious attempt to narrow the language.

Subsection (2) deals with similar conduct, and is included also because of the present coverage of such conduct in Title 18. Its focus is upon the making of impressions of dies, plates, *etc.*, or the making of impressions of certain items which can be the subject of counterfeiting.[12]

Subsection (2) is slightly narrower than the present law. The statutes as now drafted include obligations or securities of a foreign bank or corporation (but not a domestic bank or corporation), and also include a form or request for government transportation and a naturalization or citizenship blank.[13] These are excluded from the proposal as unnecessary. The term "obligations or securities" of the United States is carried forward from present law and is meant to retain the accumulated meaning it has come to have.

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[11] Present offenses which cover such conduct include the following sections of Title 18: 474, 481, 487, 488, 503, 509, 1426(d), 1426(g), 1546, 2314 and 2315.

[12] Present sections of Title 18 which cover such activity include: 474, 476, 477, 481, 509, and 1426(h).

[13] *See* 18 U.S.C. §§ 481, 509, 1426(h).

Subsection (3) provides a defense for exception to the proscription authorized by statute or by regulation. Present 18 U.S.C. § 504 explicitly permits the taking of certain types of photographs that otherwise would be prohibited. This regulatory provision is omitted from this section and from the Criminal Code and will be placed instead in another more appropriate title of the Code. Subsections (1), (2), and (3) require that the conduct must be engaged in "without authority" in order to be criminal. If present 18 U.S.C. § 504 were transferred to another title of the Code, it could thus still provide the authority necessary to defend against a charge of violating these provisions.

Subsection (4) grades these offenses by analogy to the grading of the main forgery offenses. Since the making of money or other legal tender is graded at the Class B level, it is thought to be sound to grade these offenses at the same level if they involve, in essence, an attempt to make the same items. The remainder of the offenses in this category are classified as Class C. This is roughly correspondent to present grading levels.

It should be noted in conclusion that it is of course possible to argue that this entire section should be omitted, for essentially the grounds argued above in relation to a number of other sections. In most instances, violation of these provisions would amount to attempted forgery. If attempts are to be graded at the same level as the completed offense (as, in the main, they should be), there would seem no purpose in a separate statement of this sort. There is the same redundancy here, in other words, that has been of concern in other contexts. Moreover, if the conduct covered by these sections for some reason has not proceeded far enough towards the objective of forgery to constitute an attempt, then questions could be raised either about the soundness of the general attempt provisions (if the conduct *should* be criminal) or about whether the conduct should be made criminal.

12. *Issue Without Authority: Deceptive Writing.*—Section 1753 contains two new but related ideas regarding other types of documents that should perhaps come under the forgery umbrella. The first idea is that it might make sense to treat documents issued without authority as essentially similar for purposes of the criminal law to uttering forged documents. The second is that there are types of writings other than forged or counterfeited writings which should perhaps be similarly treated as criminal utterings. Each is considered below.

(a) *Without authority.*—First, however, it is necessary to make some preliminary comments about the basic offense of forgery. The term "without authority" is defined in proposed section 1754(c). The main purpose of the definition is to assure that "authority" in the definitions of "falsely makes," "falsely completes" and "falsely alters" is construed to refer to apparent authority as well as real authority. Suppose, for example, that an agent is generally authorized to execute notes on behalf of his principal, but that a particular note is knowingly executed in breach of authority. It could be argued that the note is "authentic" because made by one generally authorized to make notes on behalf of the principal. To be more specific, it could be argued

that the note was not "falsely made" because it was made by one generally authorized to make such documents.

While this argument may have its place in other contexts (such as the allocation of loss between principal and innocent victim), the argument should be rejected as an accurate measure of the criminality of the actor's conduct. Knowingly acting in excess of authority given is the functional equivalent of acting without authority in a context where no such general authority exists. The agent who executes a note in knowing violation of his principal's instructions for the purpose of deceiving or injuring another, in other words, is no less criminal than the stranger who knowingly executes such a note for the same purpose. In fact, a case could be made that the agent is *more* deserving of criminal sanction because of the breach of trust involved in such conduct.

(b) *Issue without authority.*—As noted above, section 1753 introduces the thought that the act of issuing an instrument without authority should be covered along with uttering forged or counterfeit documents. The basis for the recommendation is a logical extension of the agency situation discussed immediately above.

As there pointed out, an agent who draws a check or other instrument in breach of his instructions (assuming that he knowingly does so, and that he intends to deceive or injure another) is guilty of a forgery whether or not he is generally authorized to issue checks on behalf of his principal. The fact that he is an agent and that he has such general authority, in other words, does not insulate him from liability if he decides on a given occasion to write a few checks for himself. Similarly, one who knowingly uses such a falsely made instrument can appropriately be sanctioned as one who has uttered a forged writing.

The language "knowingly issues a writing without authority" is based on the same principle. It takes the same case a step further. An agent who possesses a validly drawn instrument, with instructions as to when it is to be used, is really no different from the utterer if he issues the instrument in breach of that authority. The fact that the instrument happens to be genuine, in other words, is not a material basis for distinguishing his case: in both instances, the actor fraudulently takes advantage of his principal; in both instances, the victim can probably make good on the check (because of the apparent authority of the agent, or perhaps the negligence of the principal); in both instances, the essence of the offense is the breach of authority and the misuse of documents that purported to be something they were not.[14]

One could argue that the offense in such a case is not really akin to forgery since the authenticity of the document is not affected; people who rely on such documents will not get hurt; it is the principal who has been harmed, and the offense of forgery is not really concerned with protecting principals from breach of authority. The argument, however, proves too much, for it also casts doubt upon the propriety of including the agent who executes an instrument in breach of authority within the offense of forgery. And, as noted above, it is

[14] For an analogous offense in present Title 18, *see* 18 U.S.C. § 334 (issuance of Federal reserve notes in breach of authority). *See also*, 18 U.S.C. §§ 500, 1005.

not clear why the fact of an agency relationship should insulate from criminal liability one who would clearly be a forger if that relationship did not exist.

The main point of the submission goes beyond this, however. It is that such conduct is essentially of the same level of culpability as the ordinary uttering, and that for grading purposes it makes sense to think of these various types of conduct as of the same order. If this much is accepted, it then becomes a matter of arrangement rather than substance whether a separate offense is drafted to cover this kind of conduct, or whether it is drafted into the main forgery offense. The impetus towards consolidation of related offenses might tip the scales in favor of inclusion of the "deceptive writings" offense in the general forgery provision, rather than putting such conduct into a separate offense. But, since the concept of deceptive writing is somewhat different from what is ordinarily thought of as forgery, it seems best to define this offense in a separate provision. The additional question of whether it is necessary to speak specifically to such conduct in addition to the general coverage of the theft provisions is discussed below under the heading "(d) *Overlap with theft.*"

(c) *Deceptive writing.*—The new concept of a "deceptive writing" refers to two types of documents: a writing which has been procured by deception, or a writing which has been issued without authority (section 1754(m)). The main idea is that use of documents of this character for fraudulent purposes is essentially indistinguishable from the use of forged or counterfeited documents for fraudulent purposes. The same can be said for possession.

The appropriate measure of culpability for the utterer is the fact that he has given currency for fraudulent objectives to a document which is false in some material sense. Either it has been falsely made, or altered in some respect, or completed in a manner other than contemplated by its maker. The submission is that it makes little logical sense to limit criminal liability to fraudulent uses of these types of documents when precisely the same injury, and precisely the same level of culpability, is involved in fraudulent uses of the documents described above as "deceptive". Use of a document issued without authority, in other words, would appear to be only technically different from use of a document which is known to have been falsely completed. The difference may turn on whether issuance of the instrument was "authorized" by the maker. Surely this difference makes no difference when it somes to assessing the accountability of the actor who uses the document to perpetrate a fraud on another. If the purpose of the forgery provisions is to collect in one place offenses of comparable culpability so that they will be assured of comparable treatment by the law, a strong case for inclusion of this offense can be made. For present Title 18 offenses which address offenses of this sort separately from comparable forgery provisions, *see* 18 U.S.C. §§ 334, 1001, 1015(c), 1016, 1018, 1019, 1021, 1022, 1541.

(d) *Overlap with theft.*—The main question put by including the issuance of writings without authority and the use of deceptive writings along with other uttering and possession offenses is whether an undesirable overlap with already drafted theft offenses is created. Although the present United State Code contains a number of separate offenses which address conduct of this type distinctly from either

theft or forgery, a case could be made that the present Code is redundant, and that the redundancy should not be continued here. It is unlikely that uttering a deceptive document cannot be reached as an attempt to obtain property by deception. The extent to which it cannot be may well turn on the extent to which "intent to deceive or harm" will be applied in contexts where obtaining property is not the objective of the actor. These are not statistically important uses of an uttering statute, however, and to the extent that appropriation of property is the object of conduct covered by these sections, a substantial degree of overlap between these provisions and the provisions included in the theft materials does in fact exist.

The question, then, comes down to a judgment about the extent of such overlap that should be included. As pointed out in several places above, there will necessarily be a high degree of overlap between forgery and theft offenses in general, and the attempt to eliminate it completely may well introduce more technicalities than its retention. Moreover, the proper approach to such overlap would seem to be through limitations on multiple charging and consecutive sentencing. The offense under discussion is included here in order to raise these questions, in any event, and the suggestion is that it be retained for the reasons stated. It is difficult to discern a principle that sees the need for an offense to cover the uttering of some kinds of documents and yet does not see the need for an offense for documents which can do the same kinds of harm and which involve the same degree of culpability by the actor.

13. *Making or Uttering Slugs.*—Slugs are presently dealt with in a long and confusing fashion in 18 U.S.C. § 491. Proposed section 1755 is meant to raise the issue of whether that section, or something like it, should be retained.

The approach of the proposal, based on the New York and Michigan counterparts, represents a substantial departure in format from the present Federal law, but for the most represents little change in substance. The gravamen of the offense as it is proposed, and as it exists, is the making or using of slugs with the intent to deprive another of goods or services provided by putting a coin in a vending machine, passing through a coin-operated turnstile, *etc.* The argument against inclusion of such a provision is that it is redundant; there already are provisions which address the subject of theft of goods or services, as well as attempts at such thefts. Separate inclusion of this provision appears necessary, however, because its principle jurisdictional base (machines designed to receive United States currency) goes beyond general Federal jurisdiction over theft offenses.

On the assumption that such a section will be retained, however, several other points need to be made. Subsection (b) of the present law speaks separately to the manufacture of objects that can be used as slugs. This would seem to be sufficiently covered by the inclusion in the proposal of "making" "with knowledge that he is facilitating such a deprivation by another person." Subsection (c) of the present law provides that a warning to a manufacturer of goods that his product is being used as slugs may suffice to show such knowledge. The wisdom of this provision is subject to serious question. In substance, it gives to law enforcement officials the power to remove a wide range of objects from the market on the ground that they can be or have

been used as slugs. More safeguards for the legitimate interests of the manufacturer would seem to be warranted, but the job of drafting them into criminal legislation accompanied by the necessary administrative machinery to see to their fair operation would seem uncalled for. Rather, the best alternative would seem to be to omit the subsection and leave the matter to development as a regulatory matter if it is serious enough to warrant such special treatment.

The grading of the proposed provision departs from present law. Section 491 of Title 18 provides that the offense is a misdemeanor, no matter the amount involved. In order to achieve consistency with the grading of theft offenses, a $50 limit is stated in the proposal before an offense becomes a Class A misdemeanor. Surely using a slug to get a soft drink falls into the classification of a petty offense, and is comparable to a petty theft. It may also be that the device adopted in the theft materials of making the defendant prove that the value was below $50 in order to reduce the offense should also be included here. It was not, however, on the ground that slug offenses are more frequently going to involve petty amounts and that the definition of "value" will make the determination fairly straightforward in most cases. This may nevertheless be an inconsistency that should be removed if this offense is separately retained.

14. *Bankruptcy Fraud.*—Proposed section 1756 is designed to retain that part of 18 U.S.C. § 152 that is not already covered by parts of the proposed Criminal Code already drafted. Its sufficiency for this purpose is essentially a technical question on which the advice of those charged with enforcing this law should be sought. The definitions are taken from present 18 U.S.C. § 151.

Only one change has been consciously made. Present law requires that the defendant act "knowingly and fraudulently" on some occasions, and on others that he must intend "to defeat the bankruptcy law." The word "fraudulently" is not used here because of its imprecision. The "intent to defeat" language is not included because it does not seem necessary or appropriate to require that the actor know what the bankruptcy laws are and affirmatively intend to undercut them. It is enough if the defendant knowingly engages in the described conduct with an intent to deceive the court or its officers, or with an intent to injure creditors of the bankrupt. This description of the required mens rea is thought to be more appropriate than the present law.

15. *Rigging a Sporting Contest.*—Proposed section 1757 is included because of the existing provision on the subject in 18 U.S.C. § 224. The proposed section, based on section 224.9 of the Model Penal Code (P.O.D. 1962) is somewhat more elaborate than the present statute, although it is doubtful if the coverage is substantially affected. The proposal is, in any event it is submitted, clearer than the existing law, and warranted for that reason.

One possible substantive expansion of existing law might be considered—specifically punishing those who knowingly take part in a rigged event. Existing 18 U.S.C. § 224 would not appear to punish mere participation. Neither do the New York or Michigan proposals, which are substantially more elaborate than the proposal advanced here. Nevertheless, it would seem that those who participate in such an

event are engaging in a fraud on the public as well as those who directly receive or offer the bribe. That there is a difference in culpability could be reflected in grading distinctions, which would make participation in the bribe itself a felony and knowing participation in the event a misdemeanor.

It could of course be argued that such a section is unnecessary because the conduct to which it refers could be reached under the general complicity provisions. But mens rea for complicity requires an active purpose to promote the illegal venture (section 401). It would seem that mere knowing participation in a rigged event would not be criminal under the complicity provisions, and it would then seem necessary to reach it separately here if it is thought that it should be criminal. The case for inclusion is that the actor is actively and knowingly participating in a fraud even though he may derive no personal benefit, and is also based on the desirability of creating an incentive for doing something about a rigged event, if only refusing to participate. The case against would argue that this is an overreaching of the criminal law, and that incentives which do not naturally exist cannot in fact be induced by this method. On balance, the case for leaving the subsection out would appear to have the better of it.

16. *Commercial Bribery.*—Proposed section 1758 is based on section 224.8 of the Model Penal Code (P.O.D. 1962) and on present offenses such as 18 U.S.C. §§ 212–214. The offense of bribery as defined elsewhere includes only situations involving attempts to influence the conduct of public officials. The effort here is to extend the same type of coverage to three other relationships: employer-employee, principal-agent, and fiduciary-beneficiary. Substantial questions could be raised, and are meant to be raised, about whether conduct of this character should be made the subject of criminal legislation. One could argue that only private relationships are involved, and in the main the breach of duties involved can be redressed by resort to the civil law. There is, nevertheless, the possibility of widespread harm if, for example, the bribery relates to union affairs or to a fiduciary who otherwise is engaging in matters which involve some public trust, responsibility or impact. Presumably the jurisdictional provisions drafted for this section will address such questions, particularly in the context of any *Federal* interest in prosecution, and for that reason the provision is included with the recommendation that it remain a part of the Code.

17. *Defrauding Secured Creditors.*—Since it was determined in the theft complex of offenses to exclude security interests from the definition of "property," it is necessary here to include some provision if it is determined that interference with security interests is a proper subject for the criminal law. Present Federal law includes at least one such offense.[15] Also, it should be noted that a Model Penal Code provision states the required intent somewhat differently than the proposal advanced in section 1738; the former requires that the actor intend "to hinder the enforcement of [the security] interest."[16] The intent required by the proposal (that the actor intend "to prevent

[15] *See* 18 U.S.C. § 658; *see also* MODEL PENAL CODE § 224.10 (P.O.D. 1962).
[16] MODEL PENAL CODE § 224.10 (P.O.D. 1962).

collection of the debt represented by the security interest") is thought to be preferable since it focuses the offense more towards theft-like conduct than towards conduct which has the appearance of steps taken to postpone the payment of a debt.

Note should also be taken of the grading decision taken by the proposal. The offense is graded as a misdemeanor in light of the discussion of the problem in relation to the theft materials. If the offense is thought appropriately graded as a felony, then the way to handle it, it would appear, would be to redefine the notion of "property" in those materials. The conclusion that supports the present treatment is based on the judgment that interference with security interests is essentially different from theft—that resisting the collection of debt is not to be classed as of the same order as appropriation of the property interests of another. Whether it should be criminal at all is of course a further question that should be raised.

18. *Misapplication of Property.*—The offense proposed in section 1737 involves one who deals with entrusted property in an unauthorized manner that exposes the property to a risk of loss. This offense is the second step in the three-tiered approach suggested by the theft materials for the problems posed by the mishandling of funds by public employees.

The first step involves the offense of theft, and in particular the definition of "deprive," which provides that an employee "deprives" the government of property if he disposes of it in a manner such as to make its restoration, in fact, unlikely (section 1741(b)). This was supplemented by the provision that a failure to account upon demand amounts to a prima facie case of theft (section 1739(2)(a)).

The second step—taken by proposed section 1737—is to treat as a misdemeanor any disposition of entrusted property that is not authorized and that at the same time exposes the property to a risk of loss or detriment.[17] The idea is thus that a theft is made out if the actor uses or disposes of entrusted property in a manner that involves a loss of his control over its use. The misdemeanor of misapplication is made out if his use or disposition of the property does not involve a loss of control, but on the other hand does involve exposure of the property to a risk of loss.

The third step, is to rely on various regulatory offenses involving breach of duty with regard to entrusted funds (*e.g.*, 18 U.S.C. §§ 1911, 1913, 1915, 1916). Thus, for example, depositing money in an authorized depositary could subject the employee to serious sanctions of a civil nature, but would not become truly criminal unless the offenses of misapplication or theft could be made out. It is believed that this three-tiered approach, described more fully in the commentary to the theft proposal, more accurately poses the significant issues on which the degree of criminal liability should turn, while at the same time retaining the salutary deterrent effect of the present law.

It should be noted finally that while the discussion above relates primarily to the use of government funds, no reason is seen why the principle should not apply equally to any other forms of entrusted

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[17] *Compare* MODEL PENAL CODE § 224.13 (P.O.D. 1962), which requires a "substantial" risk of loss or detriment.

property. The term "property" is thus used in the definition of the offense rather than "funds."

APPENDIX A

AFFECTED SECTIONS

Reproduced below is a list of those sections which in whole or in part are covered by the provisions contained in this submission. The representation is that the sections covered are either completely replaced by one or more of the proposals or are in part replaced by these proposals and in part by other drafts which have already been placed before the Commission. In other words, the statutes cited below have been covered in substantial effect either by this draft or by some other draft (usually theft or false statements) which has been previously discussed. Appendix B discusses statutes which are related to these materials but for one reason or another have not been retained, either in this draft or some other.

18 U.S.C. § 151. Definitions.
18 U.S.C. § 152. Concealment of assets; false oaths and claims; bribery.
18 U.S.C. § 212. Offer of loan or gratuity to bank examiner.
18 U.S.C. § 213. Acceptance of loan or gratuity by bank examiner.
18 U.S.C. § 214. Offer for procurement of Federal Reserve bank loan and discount of commercial paper.
18 U.S.C. § 215. Receipt of commissions or gifts for procuring loans.
18 U.S.C. § 216. Receipt or charge of commissions or gifts for farm loan, land bank, or small business transactions.
18 U.S.C. § 224. Bribery in sporting contests.
18 U.S.C. § 334. Issuance of Federal Reserve or national banknotes.
18 U.S.C. § 335. Circulation of obligations of expired corporations.
18 U.S.C. § 471. Obligations or securities of United States.
18 U.S.C. § 472. Uttering counterfeit obligations or securities.
18 U.S.C. § 473. Dealing in counterfeit obligations or securities.
18 U.S.C. § 474. Plates or stones for counterfeiting obligations or securities.
18 U.S.C. § 476. Taking impressions of tools used for obligations or securities.
18 U.S.C. § 477. Possessing or selling impressions of tools used for obligations or securities.
18 U.S.C. § 478. Foreign obligations or securities.
18 U.S.C. § 479. Uttering counterfeit foreign obligations or securities.
18 U.S.C. § 480. Possessing counterfeit foreign obligations or securities.
18 U.S.C. § 481. Plates or stones for counterfeiting foreign obligations or securities.
18 U.S.C. § 482. Foreign bank notes.
18 U.S.C. § 483. Uttering counterfeit foreign bank notes.
18 U.S.C. § 484. Connecting parts of different notes.
18 U.S.C. § 485. Coins or bars.
18 U.S.C. § 486. Uttering coins of gold, silver or other metal.
18 U.S.C. § 487. Making or possessing counterfeit dies for coins.
18 U.S.C. § 488. Making or possessing counterfeit dies for foreign coins.
18 U.S.C. § 489. Making or possessing likeness of coins.
18 U.S.C. § 490. Minor coins.
18 U.S.C. § 491. Tokens or paper used as money.
18 U.S.C. § 493. Bonds and obligations of certain leading agencies.
18 U.S.C. § 494. Contractors' bonds, bids, and public records.
18 U.S.C. § 495. Contracts, deeds, and powers of attorney.
18 U.S.C. § 496. Customs matters.
18 U.S.C. § 497. Letters patent.
18 U.S.C. § 498. Military or naval discharge certificates.
18 U.S.C. § 499. Military, naval, or official passes.
18 U.S.C. § 500. Money orders.
18 U.S.C. § 501. Postage stamps and postal cards.

18 U.S.C. § 502. Postage and revenue stamps of foreign governments.
18 U.S.C. § 503. Postmarking stamps.
18 U.S.C. § 504. Printing and filming of United States and foreign obligations and securities.
18 U.S.C. § 505. Seals of courts; signatures of judges or court officers.
18 U.S.C. § 506. Seals of departments or agencies.
18 U.S.C. § 507. Ship's papers.
18 U.S.C. § 508. Transportation requests of government.
18 U.S.C. § 509. Possessing and making plates or stones for government transportation requests.
18 U.S.C. § 656. Theft, embezzlement, or misapplication by bank officer or employee
18 U.S.C. § 657. Lending, credit and insurance institutions.
18 U.S.C. § 658. Property mortgaged or pledged to farm credit agencies.
18 U.S.C. § 660. Carrier's funds derived from commerce; State prosecutions.
18 U.S.C. § 701. Official badges, identification cards, other insignia.
18 U.S.C. § 1001. Statements or entries generally.
18 U.S.C. § 1002. Possession of false papers to defraud United States.
18 U.S.C. § 1005. Bank entries, reports and transactions.
18 U.S.C. § 1006. Federal credit institution entries, reports and transactions.
18 U.S.C. § 1008. Federal Savings and Loan Insurance Corporation transactions.
18 U.S.C. § 1010. Department of Housing and Urban Development and Federal Housing Administration transactions.
18 U.S.C. § 1015(c). Naturalization, citizenship or alien registry.
18 U.S.C. § 1016. Acknowledgment of appearance or oath.
18 U.S.C. § 1017. Government seals wrongfully used and instruments wrongfully sealed.
18 U.S.C. § 1018. Official certificates or writings.
18 U.S.C. § 1019. Certificates by consular officers.
18 U.S.C. § 1021. Title records.
18 U.S.C. § 1022. Delivery of certificate, voucher, receipt for military or naval property.
18 U.S.C. § 1023. Insufficient delivery of money or property for military or naval service.
18 U.S.C. § 1163. Embezzlement and theft from Indian tribal organizations.
18 U.S.C. § 1426. Reproduction of naturalization or citizenship papers.
18 U.S.C. § 1506. Theft or alteration of record or process; false bail.
18 U.S.C. § 1541. Issuance without authority.
18 U.S.C. § 1542. False statement in application and use of passport.
18 U.S.C. § 1543. Forgery or false use of passport.
18 U.S.C. § 1546. Fraud and misuse of visas, permits, and other entry documents.
18 U.S.C. § 1901. Collecting or disbursing officer trading in public property.
18 U.S.C. § 1954. Offer, acceptance, or solicitation to influence operations of employee benefit plan.
18 U.S.C. § 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting.
18 U.S.C. § 2315. Sale or receipt of stolen goods, securities, moneys, or fraudulent State tax stamps.

APPENDIX B

SUGGESTED DISPOSITION OF RELATED SECTIONS

This appendix is devoted to a number of sections of the present Code which are related in one way or another to the statutory language that has been proposed, but which are not included within the scope of the provisions as drafted. The purpose of the discussion here is to explain why this is so, and to make recommendations as to what should be done with the respective sections.

18 U.S.C. § 154. Adverse interest and conduct of referees and other officers.

This is excluded from coverage because it is thought appropriate to move it to Title 11 as a regulatory offense.

18 U.S.C. § 155. Fee agreements in bankruptcy proceedings.

This section likewise is not included on the ground that it is appropriate for removal to Title 11 as a regulatory offense.

18 U.S.C. §§ 331–333, 336, 337. Coins and Currency.

There are some aspects of these offenses which involve fraudulent activity. For example, section 332 includes the embezzlement of metals, an offense covered in the theft sections. But to the extent that these sections deal with the mutilation or defacing of money, *etc.*, their content is not covered in either the theft or the fraud materials, nor is it deemed appropriate for it to be. If these offenses are to be retained, in other words, the principle which calls for their retention does not seem to involve any theft or fraudulent activity. If they are to be retained, perhaps the provisions on the destruction of government property would be the appropriate place for their inclusion. In this respect, *see also* 18 U.S.C. § 507 (mutilating seal of United States.

18 U.S.C. § 475. Imitating obligations or securities; advertisements.

This section is omitted on the ground that it too is appropriate for inclusion in another title as a regulatory offense. It is now so graded.

18 U.S.C. § 492. Forfeiture of counterfeit paraphernalia.

This section speaks to the enforcement of the noncriminal sanction of forfeiture of certain types of property. Presumably the subject should be dealt with in another title. The offense of failure to surrender such property upon an order to do so can be treated as a regulatory offense without any loss. It is criminal under the proposal to utter or possess such instruments, and an additional offense for failure to surrender them would seem unnecessary, except perhaps as a regulatory offense which can receive misdemeanor treatment under some circumstances.

18 U.S.C. § 1004. Certification of checks.

To the extent that this offense invokes a felony sanction for a mere violation of rules, the penalty would seem disproportionate. It is therefore recommended that the sanction be reduced to the level of an infraction and that the offense be removed from Title 18. To the extent that a *fraudulent* breach of authority is involved, on the other hand, the offense is covered in the proposal, either as a forgery (making without authority) or as a criminal utterance (issuing without authority). (*See* proposed section 1751.)

18 U.S.C. § 1024. Purchase or receipt of military, naval, or veteran's facilities property.

This offense is omitted on the theory that it could more properly be handled, along with a host of other offenses, under another approach. The suggestion is that a section be drafted to be included in the general aiding and abetting chapter dealing with civilian complicity in military offenses. It should be an offense, to be tried in the civilian courts as it would constitutionally have to be, for any civilian to aid and abet the commission of a military crime. If there were such an offense, a crime like the one under discussion would not have to be included as a separate substantive offense. The criminality of the civilian conduct would then turn on the extent to which military law punished the conduct involved. This would seem to be the proper principle on which to resolve such liability.

18 U.S.C. § 1025. False pretenses on high seas and other waters.

This statute deals with a multitude of sins as they occur upon any waters or vessel within the special maritime and territorial jurisdiction of the United States. Many of them are already covered, either under the forgery and fraud proposal under discussion or under the previously submitted theft draft. There are two types of offenses which are included in 18 U.S.C. § 1025 and which are also sometimes found in State Codes. Since they appear to be Federal crimes now only in this narrow area, the issue for resolution is whether they should be preserved simply for this narrow purpose, whether the Federal interest is such that jurisdiction over these kinds of offenses should be extended, or whether they should simply be omitted. The recommendation is that the latter course be chosen, and hence the offenses are not included within the proposed draft.

The first area is procuring a writing by deception, expressed in 18 U.S.C. § 1025 by the following language: "Whoever . . . by any fraud, or false pretense, . . . procures . . . the signature of any person, as maker, endorser, or guarantor, to or upon any bond, bill, receipt, promissory note, draft, or check, or any other evidence of indebtedness. . . ." The Model Penal Code contains a provision on this subject which, at least for purposes of discussion, might serve to focus the issue of whether such a provision should be continued. Section 224.14 (P.O.D. 1962) provides:

> A person commits a misdemeanor if by deception he causes another to execute any instrument affecting or likely to affect the pecuniary interest of any person.

Another potential use for a provision such as this, beyond procuring instruments which have pecuniary significance, might be in the area of procuring government documents by deception.

This latter area, however, would seem sufficiently covered by the already drafted materials on false statements. In addition, the offense of obtaining property by false pretenses as included in the theft draft would certainly have relevance to conduct which results in the deceptive acquisition of negotiable paper. It is therefore not seen as necessary to include a provision based on section 224.14 of the Model Penal Code in this draft. The underlying conduct is basically covered and the existing Federal jurisdiction is narrowly drawn.

The second area is the utterance of worthless instruments. It is covered in 18 U.S.C. § 1025 by the following language: "fraudulently sells, barters, or disposes of any bond, bill, receipt, promissory note, draft, or check, or other evidence of indebtedness, for value, knowing the same to be worthless. . . ." The following proposal is offered for the purposes of discussion as a way in which an offense of this character might be posed if it were decided to include it within the group of offenses under discussion:

> (1) *Offense defined.* A person is guilty of a Class A misdemeanor if he utters a check or other negotiable instrument knowing that it will not be honored or paid.
>
> (2) *Presumptions.* For the purposes of this section, as well as in any prosecution for theft committed by means of a worthless instrument, a person who utters such an instru-

ment is presumed to know that it will not be honored or paid if the instrument is a check or other draft drawn by him and if:

(a) he had no account with the drawee at the time the instrument was uttered; or

(b) the instrument was not honored or paid by the drawee for lack of funds in his account upon presentation within 30 days after the instrument was uttered and he has not paid the instrument within 10 days after receiving notice of the drawee's refusal to pay.

The reason for doubt about whether this should be carried forward into Title 18 as redrafted is that it is unclear why such conduct, if it cannot be reached under ordinary theft provisions, should be criminal. If there really is no intent to pay for the goods for which the check is uttered, then a simple theft has occurred. If there is an intent to pay, but at the same time some doubt about ability to pay, then the situation is close to a number of credit sales transactions. It is of highly doubtful propriety to inject the criminal law into such contexts for conduct of this character short of theft. Since it is doubtful that such legislation is proper, and since the present scope of Federal jurisdiction is so narrow, it is recommended that such a provision not be included in the forgery and fraud materials.

18 U.S.C. § 1158. Counterfeiting Indian Arts and Crafts Board trade-mark.

This provision, now graded as a misdemeanor carrying a maximum sentence of 6 months, includes several types of conduct, including an offense analogous to false or deceptive advertising. These elements of the offense are not included in the group of offenses under discussion on the ground that false advertising is a matter that can be handled as a regulatory offense. There is still a forgery offense, it should be remembered, which on some states of fact now included within this section could be made out under the provisions as drafted.

18 U.S.C. § 1159. Misrepresentation in sale of products.

This offense is similar to 18 U.S.C. § 1158 discussed above, and is not included within the present proposals for the same reasons.

18 U.S.C. § 1704. Keys or locks stolen or reproduced.

To the extent that this provision relates to the stealing of keys, it is now covered in the theft draft. But the provision also speaks to the reproduction of keys, in effect to the "forgery" or "unauthorized making" of keys that will open Post Office locks. The false copying or making of physical objects is not included within the draft as now written.

This section has been omitted, and it is recommended that it should remain so, on the ground that the conduct at which it is addressed is most likely subject to criminal prosecution anyway (as an attempted theft) and on the additional ground that it does not make sense to have such a provision for Post Office keys and not many other different types of keys, if not indeed many other different types of physical objects. Since the present jurisdiction is so narrow, in other words, and since there are other theories available to reach conduct of this

character, it is not seen as necessary to retain a prohibition of this type. It is correct, of course, that an analogous argument can be made for the omission of offenses such as making or using slugs (because that is close to an attempted theft), and indeed perhaps for much of the offense of forgery (in contexts other than counterfeiting money), on the same theory: it is an attempt to steal property that is often the gravamen of the action. But the difference is that Federal law now contains comprehensive coverage of such provisions, and it is difficult to make an affirmative case that harm is done by their inclusion. By the same token, this should not be a basis for the unnecessary expansion of the Federal law by the endless enumeration as separate offenses of additional steps preparatory to theft.

18 U.S.C. § 1712. Falsification of postal returns to increase compensation.

This section can appropriately be treated, it is submitted, as a regulatory offense. It is not included in the present proposals for this reason.

18 U.S.C. § 1921 (Supp. IV, 1966). Receiving Federal employees' compensation after marriage.

This offense involves conduct very close to obtaining money by false pretenses, and if it is sought to be retained, should be added to the theft complex. 18 U.S.C. § 1921 speaks to the case where the defendant is the legitimate recipient of employee compensation, but fails to advise the government of a change of status that will affect his continued right to the payments. The situation is thus very close, though technically distinguishable from, simply obtaining government benefits by false pretenses.

The present definition of "deception" in the theft materials would seem not to include conduct of this type. It now provides that it is a deception to fail to correct a "false impression which the actor previously created or reinforced." On the facts to which present section 1921 applies, the impression was not "false" when created, and thus the theft section would seem not to create a duty to act affirmatively to undo the misconception caused by a later change in status. To include a case such as this, the definition of "deception" should be amended to include a duty to correct an impression previously created or reinforced by the actor, whether the impression was false when made or later becomes false. Language such as "failing to correct an impression which the actor previously created or reinforced and which the actor knows to have become false due to subsequent events" would seem to cover the case.

There is still the question, though, of whether it is desirable to add such a general principle to the theft definitions. Present section 1921 is a narrow provision, applying only to a particular context in which this general type of conduct can occur. The principle would nevertheless appear to be sound. Because it is so closely related to conduct that has been deemed appropriate for inclusion in the general definition of "deception," it is recommended that the definition as previously drafted be changed to include such a principle.*

*Subparagraph (iv) was added to section 1741(a) in the Study Draft to cover this point.

APPENDIX C

JURISDICTIONAL BASES

This appendix is an attempt to recite the jurisdictional bases that should be established for some of the offenses set forth in the draft if they are determined to have approximately the same scope as they presently have in Title 18. Because the precise form in which they are to be included within the Code has not yet been resolved, no attempt has been made to put these in appropriate statutory language. Each of the proposed offenses is discussed in turn.

§ 1751. Forgery or counterfeiting.

The present headings of Federal jurisdiction included in this area fall into three broad categories: (1) offenses which focus on the type of writing which is the subject of the forgery; (2) offenses which focus on the status of the actor; and (3) offenses which focus on the victim of the conduct. A jurisdictional provision which set up these three categories, and implemented them with the specifics listed below, should suffice for this proposal.

(1) The first category, therefore, should include offenses where the writing involved purported to have been made by or on behalf of, or to have been issued under the authority of:

(a) *The United States.* At least 14 different types of documents fitting within this category can presently be found in Title 18: obligations or security of the United States (section 471); U.S. coins (sections 485, 490); letters patent granted by the President (section 497); customs documents (section 496); military discharges (section 498); naval permits (section 499); Post Office documents—stamps (section 501), money orders (section 500), postmarking stamps (section 503); court documents (sections 505, 1506, 2071); government seals (section 506); shipping documents (section 507); transportation requests (section 508); naturalization or citizenship documents (sections 1015, 1426); passports (sections 1541, 1542, 1543, 1546); documents relating to bankruptcy matters (section 152).

(b) *A national credit union* (*see* proposed section 213(e)): any writing issued by such an organization (18 U.S.C. § 493).

(c) *A foreign government, bank or corporation,* if the offense occurs within the United States. Again, several types of writings are included: bonds, certificates, obligations or securities (18 U.S.C. §§ 478, 482, 483); coins (18 U.S.C. § 486).

(d) *Or where the writing is a security or tax stamp which is transported in interstate commerce.* (18 U.S.C. §§ 2314–2315).

(2) The second category should include offenses where the actor was acting within the apparent scope of his official authority, and he was an employee of:

(a) *A national credit union. See* 18 U.S.C. §§ 334, 1005, 1006, 1008.

(b) *A corporation created by the United States, whose charter has expired. See* 18 U.S.C. § 335.

(3) The third category should include offenses where the person sought to be deceived or injured by the actor's conduct is:

(a) *The United States. See* 18 U.S.C. §§ 494, 495, 1001, 1002.

(b) *A national credit union. See* 18 U.S.C. § 1010.

§ 1752. Facilitation of counterfeiting.

The existing jurisdictional pegs dealing with this type of conduct all relate to the kind of document which can be made by the implements involved. They include obligations or securities of the United States (18 U.S.C. § 474), coins of the United States, (18 U.S.C. § 487), notes, bonds, obligations or other securities of any foreign government, bank or corporation (18 U.S.C. § 481), foreign coins (18 U.S.C. § 488), postage stamps (18 U.S.C. § 501), post marking stamps (18 U.S.C. § 503), naturalization papers (18 U.S.C. § 1426), and securities or tax stamps where the implements have been transported in interstate commerce (18 U.S.C. §§ 2314–2315). As noted in the commentary to this provision, the jurisdictional pegs have in effect been written into the main proposal as a limit on the kinds of documents to which it will apply. It would therefore seem unnecessary to draft a separate jurisdictional provision for this proposal, except as regards securities or tax stamps in interstate commerce.

§ 1756. Bankruptcy fraud.

18 U.S.C. § 152 is the source of this provision, which should need no separate jurisdictional base. It obviously in terms applies to bankruptcy transactions, which are of course clearly within the Federal power.

§ 1738. Defrauding secured creditors.

18 U.S.C. § 658 involves conduct of this character where the victim of the fraud is a national credit union. It may also be appropriate to extend the coverage of this provision to all those areas to which general theft jurisdiction is extended.

§ 1737. Misapplication of entrusted property.

There are numerous references to this kind of conduct, generally in connection with theft offenses relating to public funds or other funds held under some fiduciary arrangement. For examples, *see* 18 U.S.C. §§ 656–657 (actor is employee of national credit union), 660 (actor is employee of common carrier), 1163 (property belongs to Indian tribal organization), 1901 (officer of United States handling public funds). The jurisdiction should presumably be as broad as theft.

§ 1757. Rigging a sporting contest.

18 U.S.C. § 224 provides the present coverage of this conduct. The jurisdictional base is interstate commerce. Federal jurisdiction attaches to any "scheme in commerce" of the character described, defined as "any scheme effectuated in whole or in part through the use in interstate or foreign commerce of any facility for transportation or communication."

§ 1758. Commercial bribery.

There are at least two present jurisdictional bases for this type of conduct: *see* 18 U.S.C. §§ 212–215 (officer or employee of a national credit union the subject of the bribe) and 1954 (listed officials connected with employee benefit plans the subject of the bribe).

§ 1755. Making or uttering slugs.

18 U.S.C. § 491 presently speaks to this kind of conduct. Its jurisdictional base is a "coin machine" (as defined in the proposal) designed to receive United States currency.

COMMENT

on

CRIMINAL USURY: SECTION 1759
(Stein; April 6, 1970)

1. *Background; Present Federal Law.*—Section 1759 is proposed as a substitute for the recently enacted but complex provisions of chapter 42 of Title 18 (sections 891–896), dealing with extortionate credit transactions. Both chapter 42 and this draft have as a goal the tightening of the laws against "loansharking," a racket which depends upon illegal harm, or the fear of such harm, to recover the loan and interest and which involves exceedingly high charges for the loan service. It tends to thrive because, by virtue of the means of collection and the anticipated profit, the loanshark will take "risks" which do not appeal to legitimate lenders. Traditional offenses, such as assault or extortion, are regarded as inadequate to deal with this racket because actual use of force or the making of threats are rarely necessary, and even more rarely are susceptible to legal proof.

The scheme of existing chapter 42 is to outlaw all extensions of credit made upon an understanding between the creditor and debtor that failure to make timely payments could result in violence or other criminal harm. Since proof of such an understanding is also exceedingly difficult to obtain, the offenses rely upon definitions of what constitutes a prima facie case: civil unenforceability plus 45 percent interest plus a reasonable belief by the debtor as to the creditor's use, or reputation for use, of extortionate means of collection. If direct evidence of the debtor's belief is not available, evidence of the creditor's reputation in the debtor's community may be used. Further, evidence showing that the creditor had previously used extortionate means to collect the loans he made may be introduced "for the purpose of showing an implicit threat as a means of collection" (18 U.S.C. § 894). The legislation has not been fully utilized (current prosecutions comprise cases where overt acts of extortion can be shown), apparently because of doubts as to the constitutional validity of its special evidentiary provisions.[1]

2. *Replacement of Emphasis on Extortion With Emphasis on Usury.*—The approach of proposed section 1759 is to narrow the gap between the definition of the offense and the facts which are considered sufficient to prove it. This is accomplished by avoiding reliance on the element of implicit threat or of force and treating the offense conceptually: as inherently a fraud, even though the debtor may not be deceived as to the facts, because the transaction itself falsely

[1] *See Turner* v. *United States*, —— U.S. ——, 90 S. Ct. 642, 646 (1970) (". . . a statute authorizing the inference of one fact from the proof of another must be subjected to scrutiny by the courts to prevent conviction upon insufficient proof").

treats the obligation as enforceable whereas it is unenforceable in law. The draft is thus closer to New York's recently enacted anti-loansharking offense, which simply makes it a felony to charge interest at a rate higher than 25 percent, unless authorized by law to do so.[2] In order to avoid setting a *national* legal rate of interest, the draft borrows from existing law the notion of unenforceability in the jurisdiction where the debtor resides as the gist of the offense, and keys the presumptions either to local rates or the 45 percent limit in the existing Federal law. Since the element of threat or fear is no longer required, the draft focuses more sharply on loansharking by requiring that the illegal lending be engaged in as a "business," a concept which has been given content through judicial construction with respect to Federal gambling legislation.[3] It would include dealing with strangers or a number of unrelated persons, devoting substantial time to such transactions, hiring others to aid, but would exclude making an isolated loan or an accommodation for a friend or business associate at excessive interest.

In this form, however, the proposal unavoidably takes on aspects of economic regulation; in effect, the proposal represents a Federal aid to enforcement of State usury laws. Compare proposed section 1832 (protecting State antigambling policies). There are serious weaknesses with this approach. The national economic impact of such legislation is not entirely predictable. There may be much acceptable business lending in which sanctions for default on the loan involve loss of business reputation and relationships, rather than enforcement through legal process. There may, in fact, be no economic reason to discourage high risk business loans. Moreover, some States have outmoded and unrealistic usury laws. It was apparently for such reasons that anti-loansharking legislation along the lines proposed here, although passed by the House of Representatives,[4] was ultimately replaced by the present law proscribing extortionate credit transactions. Note, further, that the effort to attack organized crime through anti-loansharking legislation may be dissipated if organized crime changes its methods, *e.g.*, by buying into businesses, rather than extending loans.

Nevertheless, if loansharking practices are effectively to be proscribed, legislation such as that proposed here—permitting proof of the offense solely by evidence of the loan, rather than proof of future intent as to method of enforcement of the loan—would seem to be the best means to that end. Where existing State usury laws are unrealistic, Federal legislation would provide an impetus to revision of these laws. Significantly, in seeking to effectively combat loansharking practices, New York, an economic center, has chosen this route.

3. *Financing Criminal Usury.*—Present 18 U.S.C. § 893 forbids the advancement of funds to another "with reasonable grounds to believe that it is the intention of [the person to whom the funds are advanced] to use the money or property so advanced directly or indirectly for the purpose of making extortionate extensions of credit." This activity would be covered by section 1759 when the actor advances funds

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[2] N.Y. PEN. LAW § 190.40 (McKinney 1967).

[3] *See, e.g., Evans* v. *United States*, 349 F. 2d 653 (5th Cir. 1965); *Kahn* v. *United States*, 251 F.2d 160 (9th Cir. 1958).

[4] House Amendment to S. 5, passed Feb. 1, 1968, 114 CONG. REC. 1850.

knowing that the funds are being used to make loans at illegal rates of interest, a matter easier to prove than knowledge that the loan he finances will be collected by force, if necessary.

4. *Jurisdiction; Grading.*—Because the legislation is designed as an attack on organized crime, Federal jurisdiction to prosecute violations of these provisions is extremely broad. Jurisdiction in the existing legislation is based on the Congress' power to make "uniform laws on the subject of bankruptcies" (article I, section 8 of the Constitution), and on a finding that the proscribed acts substantially affect interstate commerce.[5] These statutes therefore reach every extortionate loan made in the nation. It may be that such total Federal jurisdiction is unnecessary; and Federal jurisdiction over this offense need reach no further than it does over illegal gambling. *See* sections 1831–1832. In any event, State laws in the area are not preempted; and proposed section 207 provides a discretionary restraint on Federal action. Where overt extortion is shown, proposed section 1735 will apply, and where the existence of an organized criminal enterprise is shown, proposed section 1005 will apply. The acts proscribed here will then be Class B felonies. Without such features, the offense is graded here as a Class C felony.

[5] Pub. L. 90–321, § 201.

COMMENT

on

RIOT OFFENSES: SECTIONS 1801–1804
(Schwartz, Goldstein; February 7, 1969)

STAFF MEMORANDUM

This introductory memorandum will refer to the Consultant's Report, immediately following, at various points to guide the reader to more extensive discussion. That report was intended to provide a basis for policy review prior to submission of any draft statute. It seemed, however, that it would be helpful at the present juncture to have a draft, however preliminary, on which to focus thinking. The Consultant did not participate in making the draft, and it does not follow his recommendations in all respects. Staff views on this difficult problem are by no means definitive.

Note that proposed section 1803 (engaging in a riot) is a Federal offense only upon Federal enclaves and that section 1804, dealing with disobedience to police orders in a riot, is similarly confined. The focus of the draft's riot provisions is not upon riot itself as a Federal offense, but upon aggravated conduct ancillary to a riot, *e.g.*, inciting, leading, and conspiring where the riot itself is of proportions exceeding the capabilities of local law enforcement (section 1801) and arming rioters (section 1802). A most important innovation is the creation in section 1804 of a specific obligation of persons to obey reasonable police orders when authorized by superior officers in furtherance of riot control. Disobedience to such orders is made an "infraction," *i.e.*, basis for arrest, summary conviction, and fine, but not imprisonment. This capitalizes on one of the great lessons of recent riot experience: the need for expediting the handling of large numbers of minor participants. The second lesson of recent riot experience, *viz.*, that unauthorized excesses by individual policemen can fuel the fire of mob violence, alienate the larger community, and discredit law enforcement is dealt with in draft section 1521. There, knowingly subjecting another to unlawful violence, arrest or search is penalized as a Class A misdemeanor.

To a considerable extent, proposed sections 1801–1804 are an effort to integrate recently enacted Federal riot legislation into the general framework of the new Federal penal Code.

1. *Need for Federal Riot Law.*—The Federal Criminal Code had no riot provisions prior to 1968, and it has been argued that there is no great need for Federal provisions on this subject because State laws and enforcement facilities are adequate.[1] However, it seems desirable to draft Federal riot provisions for the following reasons, aside from the fact that Congress has so recently manifested legis-

[1] The Consultant's Report (part III) represents this view, as does the import of present Federal riot legislation. *See also* the addendum following the Consultant's report.

lative concern in this area. The Assimilative Crimes Act (18 U.S.C. § 13) would, in the absence of positive Federal law, make antiquated and diverse State laws applicable to Federal enclaves and it seems appropriate to declare a uniform Federal policy. It is also important that the proposed new Federal Code, which is likely to be used as a model, should offer modern guidance to the States and the District of Columbia. Even if riot, as such, is not to be made a distinct substantive offense, Federal law would need a definition of "riot" or "civil disturbance" as the basis for penalizing certain ancillary offenses like inciting to riot or providing arms for rioters where Federal facilities are used.

2. *Riot Defined: Numbers.*—Section 1801 defines riot as "a public disturbance involving an assemblage of five or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons or substantially obstructs a government function." This would replace *two* different definitions of "riot" and "civil disorder" in the 1968 legislation. These definitions do not depart significantly from common law and other ancient formulations of the offense. (*See* Consultant's Report, *infra.*) Notably, under these definitions, no more than three participants are required to make a riot, although as early as 1714 the British Parliament had legislated in terms of 12 or more. The proposal in section 1803 to limit Federal riot law to mobs of five or more rests on the following reasoning: the development of professional urban police forces and mobile State police forces is almost wholly a product of the past century; riot control is essentially a matter of swiftly mobilizing and deploying counterforces: it made sense to speak of a "three-man-riot" when the available counterforce was most likely to be a lone unarmed constable. The critical number in the 20th Century should be the number of participants that would constitute a nonroutine mob confrontation problem for the typical urban police force. Otherwise, the ordinary array of penalties for assaults, property offenses, and disorderly conduct should suffice. It seems especially appropriate to set a reasonably high minimum in a Federal Code where the national concern is to back up State law enforcement.

3. *Inciting and Leading Riots.*—The Civil Rights Act of 1968 makes it a felony to travel in interstate or foreign commerce or to use commerce facilities with intent:

(A) to incite a riot: or

(B) to organize, promote, encourage, participate in, or carry on a riot: or

(C) to commit any act of violence in furtherance of a riot: or

(D) to aid or abet any person in inciting or participating in or carrying on a riot or committing any act of violence in furtherance of a riot:

if the actor "either during the course of any such travel or use or thereafter performs or attempts to perform any other overt act" to carry out those purposes. Some of the constitutional and practical problems with this legislation are discussed in the Consultant's Report, part II–A, *infra.*

Proposed subsection 1801(1) would restrict Federal responsibility for local riots to organizers and leaders, leaving mere "participants" to be dealt with by the State and municipal authorities. It should be noted, however, that certain acts of participation are brought within

the definition of "inciting," *e.g.*, commission or solicitation of acts serving as the beginning of or signal for a riot.

4. *Arming Rioters.*—Section 1802 derives from the riot provisions of the Civil Rights Act of 1968, 18 U.S.C. §§ 231–232. (*See* Consultant's Report, part II(B), *infra.*) The substance of subsection 1802 (1)(b) appears in the 1968 statute. Consideration must be given to whether to include this provision in view of the first amendment problems (need for "clear and present danger") that arise in connection with any proscription of "teaching," and the practical consideration that, whenever a punishable riot is actually facilitated by such teaching, the teacher will be implicated as an accomplice or criminal facilitator.

The 1968 legislation applies not only when defendant knew or intended that his arming would further a civil disorder, but also when he acted "having reason to know." This would be an extraordinary authorization of felony sanctions against mere negligence, where no actual riot or unlawful use of the dangerous devices ever ensued. Consideration must be given to whether to include within Federal responsibilities "any act to obstruct, impede, or interfere with any fireman or law enforcement officer [during a civil disorder]" as provided in the riot provisions of the Civil Rights Act of 1968.

5. *Law Enforcement Riot Powers.*—There is no general obligation of the citizen to obey a policeman's order. The prevailing view is that a policeman's direction to a citizen to take a designated course of action is in effect a warning that the citizen will be violating some law or ordinance by his action in disregard of the advice. Thus, disregard of a traffic policeman's directions may constitute violation of an ordinance requiring autoists to stop at red lights or of a State law against reckless driving or obstructing highways. A patrolman's order to a corner gang to "break it up" has only the force of whatever law, *e.g.*, disorderly conduct, may be applicable to the misbehavior which the policeman's order seeks to end. The resistance to making criminal disobedience of police orders a criminal offense fits into the general Anglo-American tradition against penalizing "omissions." (Compare the common irritated response to indiscriminate police orders to "move on": "I ain't doin' nothin'!") It also reflects concern that an individual policeman would have it within his power to make whatever behavior he didn't like into an offense merely by ordering that it cease.

It was against this background that the British Riot Act of 1714 undertook to make it a felony for groups of rioters exceeding 12 in number to fail to disperse within an hour after being called on to do so by high authority.

Proposed section 1804 recognizes the case for special expansion of police powers under riot circumstances. In the emergency of riot circumstances it is unusually difficult to discriminate guilty participants from sympathizers, mere onlookers, or even private citizens who actually are opposed to the mob, although located within it or at its edge. The main police tactic in dealing with riotous mobs is to break it into smaller segments which can be shifted apart. Disregard of orders under these circumstances should give rise to an arrest power. The significance of the safeguards in section 1804 surrounding exercise of this power to issue orders and compel obedience is self evident.

More serious offenses can easily be committed as the recalcitrance of a mob member moves beyond mere disobedience. He may quickly

come within the scope of our provisions against resisting arrest. He may commit an assault on the officer. He may by commands addressed to those about him, or by committing a "signal" crime, become an inciter or leader of a riot. To sustain any such charges, however, will require the law enforcement officer to individualize among the crowd, and properly so.

It is contemplated that the Federal jurisdictional base for prosecutions under section 1804 will be restricted, probably to Federal enclaves.

6. *Crimes Committed During Riots.*—The Study Draft does not include any provision similar to that in the Civil Rights Act of 1968, 18 U.S.C. § 245(b)(3),[2] which may be viewed as ambiguous and a seemingly farreaching Federalization of local crime. It is not clear whether the provision is confined to personal injury or extends to injuries to the business; from the fact that the penalty increases to 10 years "if bodily injury (regardless of seriousness) results," one might conclude that nonpersonal injuries (regardless of scale? *e.g.*, $100,000 arson) are covered by the misdemeanor provisions. It is not clear why only businessmen are protected. It is not clear why the ordinary processes of extradition and the Federal Fugitive Felon Act do not suffice as assistance to State law enforcement against arson, burglary, murder, *etc.* Congressional hesitation about this section is also suggested by the unusual provision that Federal prosecution can occur only if the Attorney General certifies that it is in the public interest and necessary to secure substantial justice.

7. *Grading of Riot Offenses.*—The serious riot offenses of arming sizable mobs, instructing rioters in the use of arms, and employing arms in a riot have been graded as Class C felonies. This is comparable to present grading in some State riots laws.[3] The Consultant's Report

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[2] Section 245(b)(3) presently provides for escalation of the penalty from a fine of $1,000, and imprisonment for 1 year to a fine of $10.000 and 10 years' imprisonment if bodily injury results, and to life imprisonment if death results. The drafts of section 1801 and 1802 do not specifically provide for the increased penalty in cases where death occurs, for in such cases the proposed Code's provisions on murder would apply and permit Federal prosecution (*see* section 201(b)).

[3] *Cf.* N.Y. REV. PEN. LAW § 240.05 (McKinney 1967) ("riot" is a Class E felony (4 years)); MICH. REV. CRIM. CODE § 5510 (Final Draft 1967) ("riot" is a Class C felony (5 years)); MODEL PENAL CODE § 250.1(1) (P.O.D. 1962) ("riot is a felony of the third degree (5 years)); PROPOSED CRIM. CODE FOR PA. § 2401 (1967) (riot is a felony of the third degree (7 years)); ILL. REV. STAT. c. 38, § 25–1 (1963) (participant in "mob action" which by violence inflicts personal or property damage subject to 5 year penalty). The penalties for inciting to acts of violence or riots in other State riot statutes range from a maximum of 20 years (OKLA. STAT. ANN., tit. 21, § 1312(4)) to 6 months and $600 (ALA. CODE ANN., tit. 14, § 407(1)). Many of the State statutes provide a 5-year penalty for persons who, being unlawfully assembled cause damage to a building (*e.g.*, ALA. CODE ANN., tit. 14, § 409; FLA. STATS. ANN., tit. 11, § 870.03; IOWA CODE ANN. § 743.9; ME. REV. STATS. ANN., tit. 17, § 3355; PA. STATS. ANN., tit. 18, § 4402; VT. STATS. ANN. tit. 13, § 905). State laws providing for increased penalties for participants in riots who are armed or disguised, or who solicit violence by another include ALASKA STATS. ANN. § 11.45.010(2) (3–15 years); MINN. STATS. ANN. § 609.705 (5 years); N. DAK. CENTURY CODE § 12–19–04(3) (10 years); OKLA. STATS. ANN., tit. 21, § 1312(3) (10 years); ORE. REV. STATS. § 166.050(2) (15 years); S. DAK. CODE § 13.1404 (10 years if armed or disguised, not less than 3 years if solicited violence); REV. CODE OF WASH. § 9.27.050(1)(2) (15 years if armed or disguised, 2 years if solicited violence).

(part IV, *infra*) includes a pioneering analysis of the riot context as an aggravating or mitigating circumstance in relation to sentences for property offenses.

8. *Use of Deadly Force to Control Riots.*—Draft section 607(2)(f) includes a provision declaring the use of deadly force by a public servant justified when necessary to prevent certain serious crimes, *e.g.*, robbery and burglary in the course of a riot. Three alternatives are available to deal with the use of deadly force by a public servant in the course of a riot: (a) eliminate subsection 607(2)(f)(ii) and leave the matter entirely to the normal justifications of self-defense, prevention of felonious intrusion on premises, and effecting arrests and preventing escapes as provided in the balance of section 607(2); (b) leave subsection 607(2)(f)(ii) as presently drafted, meaning that deadly force would be justified to suppress riots even though some of the people against whom it is employed, albeit not necessarily directed, might turn out to be nonparticipants or even opponents caught in the mob, or might be mere participants rather than leaders and so subject to the most minor sanctions of law; (c) create a more restricted privilege to use deadly force in a riot, for example, limiting its justification to situations where it is necessary to prevent only murder or manslaughter.

Among the points to be made about the second alternative presently embraced subsection 607(2)(f)(ii) are these. It goes beyond the standard privileges of self defense, etc., for those require that the deadly force be directed against the specific source of the threat or the specific suspect to be arrested. It is of the essence of the riot situation that danger may reasonably be apprehended without power to isolate the specific source. The requirement of superior orders eliminates individual officer discretion in shooting, but leaves him with his traditional justification of self defense, *etc.* Under the culpability and justifications provisions protection would also be accorded where the officer makes a nonreckless mistake about his situation or his orders, and also where his action is improperly hasty or marginally excessive because he was confronted with an emergency precluding adequate appraisal or measured reaction. This might well be too liberal a defense; but final judgment upon it must recall that the availability of defenses to serious charges like murder is not equivalent to a total denial of culpability on the part of the officer, meriting, for example, discharge from the force.

9. *Curfew and Other Emergency Measures.*—The National Advisory Commission on Civil Disorders (1968) called attention to emergency measures which would, in the opinion of many police departments, contribute to maintaining order. Among the measures discussed were curfew, sealing off troublesome districts, and restrictions on the sale of liquor and gasoline. It is suggested that legislation authorizing local executives to institute such measures, closely adapted to local conditions, is beyond the province of the Study Draft.

Consultant's Report

Introduction

This study is an examination of the role a Federal Criminal Code should and can play in the prevention, regulation, and reduction of riots. The criminal law, whether State or Federal, so far as it is di-

rectly concerned with riots, however defined, can play only a limited role. As with other kinds of crime, only more so in the case of riots, government must rely on public and private vehicles of social control, other than the criminal law, to reach underlying causes. Criminal law enforcement itself can at best reduce only a fraction of the frustrations and pent-up forces that are so easily catalyzed into riot. The error must be avoided of attributing to the criminal process too much responsibility either for achieving or for failing to achieve a social goal such as the deterrence of riots. A criminal Code therefore should not be tailored to meet the often irrational demands that follow a particularly disturbing event. Rather, decision makers should be encouraged to focus with a cool and precise eye on those characteristics of an event, in this case a riot, which require proscription, and on the means most likely to reduce, not exacerbate them.

It is with these premises in mind that the following questions are examined in an effort to determine what riot provisions, if any, should be promulgated for the proposed Federal Criminal Code:

I. What State criminal laws deals directly with riots?

II. What does the present Federal Criminal Code provide for riots?

III. How is a riot to be distinguished, for criminal law purposes, both from lawful conduct and from other conduct (both individual and group) for which individuals are already subject to criminal liability—either under the State or Federal substantive criminal law? Posed another way, is there a need for a special substantive offense, "riot?"

IV. Should a crime committed during or in furtherance of a riot be subject to the same, greater, lesser, or somehow different sanctions from those authorized for the same offense committed during more "normal" periods?

V. What gaps exist either in State and local law enforcement or in substantive criminal Codes which require supplemental Federal "riot" provisions?

VI. What Federal criminal laws should be promulgated? Under what circumstances and under what Federal power should they be invoked?

Without here attempting to define "riot," peaceful civil disobedience and revolutionary conduct (insurrection, treason, and mutiny), while excluded from examination, serve as rough boundaries to the area of concern.

I. What State Criminal Law Deals Directly With Riots?

By statute or common law all 50 States and the District of Columbia prohibit riotous conduct. Forty-seven States reach such conduct by explicitly proscribing unlawful assembly and participation in or incitement to riot. Such behavior may also be reached under common law "breach of the peace" or statutory "disorderly conduct." The common law vaguely defined "breach of the peace" as "any behavior which disturbs or tends to disturb the tranquility of the citizenry." [1] "Disorderly conduct" occupies generally the same ground but with a num-

[1] Model Penal Code § 250.1, Comment at 4 (Tent. Draft No. 13, 1961).

ber of specific though equally vague modifications which vary from State to State. Many States, in addition, make it a separate misdemeanor to "willfully and wrongly commit any act which seriously disturbs or endangers the public peace or health."[2]

"Unlawful assembly," "rout," and "riot" were misdemeanors at common law. Apparently relying on common law constructions, many States simply make it a misdemeanor to participate in a riot, rout, or unlawful assembly, without defining the terms. Other jurisdictions use these terms and define them along common law lines.[3] These common law terms are defined in Perkins on Criminal Law as follows:[4]

> (1) *Unlawful Assembly:* an unlawful assembly is a meeting of three or more persons with a common plan in mind which, if carried out, will result in a riot. In other words, it is such a meeting with intent to (a) commit a crime by open force, or (b) execute a common design, lawful or unlawful, in an unauthorized manner likely to cause courageous persons to apprehend a breach of the peace.
>
> (2) *Rout:* a rout is the movement of unlawful assemblers on the way to carry out their common design.
>
> (3) *Riot:* a riot is a tumultous disturbance of the peace by three or more persons acting together (a) in the commission of a crime by open force, or (b) in the execution of some enterprise, lawful or unlawful, in such a violent, turbulent and unauthorized manner as to create likelihood of public terror and alarm.

This category of statutory offense, in keeping with its common law origin, is a misdemeanor.

The other major category of State statutory riot offenses is modeled on the English Riot Act of 1714 which made it a felony for 12 or more rioters to continue together for one hour following a proclamation to disperse.[5] By raising the offense to a felony, legislatures empowered the police to use deadly force, which they were not authorized to use for the prevention of misdemeanors. Also, under the Riot Act officials and private citizens were obligated to help suppress riots, and local authorities were made liable for riot-related damages.[6]

The Report of the National Advisory Commission on Civil Disorders (The Kerner Report of 1968), following a survey of these State provisions, concluded that many require revision, not because of gaps in the range of the conduct proscribed, but rather because of their overinclusiveness:[7]

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[2] *Id.* at 5.
[3] *Id.* at 19.
[4] PERKINS, CRIMINAL LAW 344–349 (1957).
[5] 1 Geo. I, st. 2, c. 5 (1714). "Our sovereign Lady the Queen chargeth and commandeth all persons being assembled immediately to disperse themselves and peaceably to depart to their habitations or to their lawful business, upon the pains contained in the Act made in the first year of King George for preventing tumults and riotous assemblies. God save the Queen." The making of this proclamation is commonly, but very inaccurately, called reading the Riot Act. (1 J. F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 203n.1 (1883)).
[6] MODEL PENAL CODE § 250.1, Comment at 18, 19 (Tent. Draft No. 13, 1961).
[7] REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 289 (G.P.O. ed. 1968) [hereinafter cited as KERNER REPORT].

> Some that deal with incitement to riot are so broad that they may improperly inhibit the constitutional right of free speech. Some that provide no definition of incitement or comparable terms are dangerously vague. Those that define a riot in terms of groups containing as few as three persons may be applied in situations where nothing even approaching truly riotous activity is taking place.

But, while finding no substantive gaps in State criminal codes, the Kerner Report did find severe deficiencies in planning the deployment of police and the administration of the court system during riots. Partially in response to these findings some States and municipalities have legislated, or are in the process of legislating, special emergency powers for use in riot situations. In New York, for example, the chief executive officer of any local government is authorized to proclaim a state of emergency during periods of civil disorder and to promulgate orders which:

(1) establish a curfew,
(2) close places of amusement and assembly,
(3) prohibit the sale and distribution of alcoholic beverages, and
(4) regulate and control possession, storage, display, sale, transport and use of firearms, explosives, flammable materials, and other dangerous weapons and ammunition.[8]

Other regulations establish special procedures for the administration of criminal law during an emergency. In New York such plans provide, for example, a streamlined arrest and arraignment procedure so that the police may remain at the riot scene, and a simplified bail procedure to assure early release and to prevent overcrowding of detention facilities.[9]

Emergency powers and procedures are augmented by provisions for the loan of State and Federal personnel to supplement local law enforcement forces.[10] Some States—California, for example—have a master law enforcement mutual aid plan providing for extensive interjurisdictional support during a natural disaster or riot.[11] The State forces available to assist local law enforcement agencies are the State police and the National Guard. Most State police are unable to mobilize enough men to be of help. But the National Guard, as a State militia organized, trained, and equipped to preserve order and

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[8] N.Y. GEN. MUNIC. LAW, § 209-m (McKinney Supp. 1968).

[9] *See, e.g.*, N.Y. CODE CRIM. PROC. §§ 150–e, 152–g (McKinney Supp. 1968), N.Y. COUNTY LAW § 702-a (McKinney Supp. 1968). *See also* N.Y. Times, Aug. 5, 1968, at 32, col. 4. During the Detroit riot of July 1967, similar emergency measures, already enacted, were employed. In addition to the curfew, the governor prohibited sales of beer and liquor, closed theatres and places of amusement, and limited sales of gas to five gallons per individual and gatherings of persons in the streets to five at one time. V. SAUTER & B. HINES, NIGHTMARE IN DETROIT 197 (1968) [hereinafter cited as SAUTER & HINES].

[10] "Because a national police force is contrary to the American tradition and because the use of Federal forces in domestic violence is limited by the Constitution, governing statutes, and precedent, in this country state forces alone will be available in the great majority of civil disorders." KERNER REPORT, *supra* note 7, at 274. The remainder of the text in this paragraph is based upon, and draws heavily on the language of the Kerner Report, Supplement on Control of Disorder 283–284.

[11] *Id.* at 283–284.

public safety within its State, generally can furnish effective assistance.[12] The Guard is under the control of the Governor.[13]

There are two additional rarely used sources of aid: State forces from other States and Federal troops. Interstate agreements for the commitment of National Guard forces of more than one State require congressional approval and present delicate and complex problems of Federal-State relations, of purpose, and of policy. The commitment of Federal troops to aid State and local forces in controlling a disorder is an extraordinary act. Only twice in the last 35 years have governors requested Federal troops to help quell civil disorders.[14] The following letter by the United States Attorney General describes the constitutional and statutory authority for the use of Federal troops in the event of domestic violence:[15]

The requirements are simple. They arise from the Constitution. . . .

The underlying constitutional authority is the duty of the United States under article IV, section 4, to protect each of the States "on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence."[16] This pledge is implemented by chapter 15 of Title 10, U.S.C. and particularly 10 U.S.C. § 331, which derives from an act of Congress passed in 1792.[17]

There are three basic prerequisites to the use of Federal troops in a State in the event of domestic violence:

(1) That a situation of serious "domestic violence" exists within the State. While this conclusion should be supported with a statement of factual details to the extent feasible under the circumstances, there is no prescribed wording.

(2) That such violence cannot be brought under control by the law

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[12] *Id.* at 274, 275.

[13] Most States have specific laws setting out who can call the National Guard or the State police but many States do not have laws specifying who has the authority to request State assistance, and some laws do not specify the conditions under which State assistance will be authorized whether or not requested. Although most police departments, surveyed by the Kerner Commission, understood how to request State help, the question of command, if the Guard or State police was called in, was largely unanswered. In some States, command responsibilities are spelled out in the State statutes: in others, it is left to agreements, formal or otherwise, or to executive directives. *Id.* at 286.

[14] Both times, the call came from the Governor of Michigan; first in 1943, and more recently in 1967. KERNER REPORT, *supra* note 7, at 279, 293.

[15] Dated August 7, 1967, and reproduced in KERNER REPORT, *supra* note 7, at 292, as Exhibit A.

[16] "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."

[17] "§ 331. Federal aid for State governments.

Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.

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"§ 334. Proclamation to disperse.

Whenever the President considers it necessary to use the milita or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time."

enforcement resources available to the governor, including local and State police forces and the National Guard. . . .

(3) That the legislature or the governor requests the President to employ the armed forces to bring the violence under control. . . .

These three elements should be expressed in a written communication to the President, which of course may be a telegram, to support his issuance of a proclamation under 10 U.S.C. § 334 and commitment of troops to action. In case of extreme emergency, receipt of a written request will not be a prerequisite to Presidential action. . . .

Upon receiving the request from a governor, the President, under the terms of the statute and historic practice, must exercise his own judgment as to whether Federal troops will be sent, and as to such questions as timing, size of the force, and Federalization of the National Guard.

Preliminary steps, such as alerting the troops, can be taken by the Federal government upon oral communications and prior to the governor's determination that the violence cannot be brought under control without the aid of Federal forces. Even such preliminary steps, however, represent a most serious departure from our traditions of local responsibility for law enforcement. They should not be requested until there is a substantial likelihood that the Federal forces will be needed.[18]

To conclude, and without further commenting on the adequacy of existing substantive riot provisions to safeguard the legitimate exercise of speech or on the adequacy of restraints to minimize the use of excessive force by law enforcement personnel, there is no lack of State legal tools—either substantive or procedural—available to deter or control riots.[19]

II. What Does the Existing Federal Criminal Code Provide for Riots?

Until passage of the Civil Rights Act of April 11, 1968 (Public Law 90–284), and the Omnibus Crime Control and Safe Streets Act of June 19, 1968 (Public Law 90–351), the Federal Criminal Code contained no provisions aimed directly at riot prevention and control.[20] Without preempting State law these new provisions, which are examined in detail immediately following their enumeration, make it a Federal offense:

(1) to incite a riot,

(2) to teach the use of explosive or incendiary devices or to transport or manufacture such devices knowing, having reason to know, or intending that they be unlawfully employed to further civil dis-

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[18] Kerner Report, *supra* note 7, at 292, Exhibit A, Letter of August 7, 1967, from the Attorney General to the Governors.

[19] In order to obtain an overview of the mechanism by which a local government makes use of the wider control resources available to itself during acute civil disorder, *see* an account of the 1967 Detroit riot. Sauter & Hines, *supra* note 9, at 21, 40–41, 58–59, 64, 73, 98, 102, 112–113, 119, 181, 185, 197, 198, 200, 222.

[20] There is however a long history of anti-insurrection legislation. *See generally* B. Rich, The Presidents and Civil Disorder (1949); U.S. Adjutant-General, Federal Aid in Domestic Disturbances 1787–1903, S. Doc. No. 209, 57th Cong., 2d Sess. (1903); Note, *Riot Control and the Use of Federal Troops*, 81 Harv. L. Rev. 638 (1968).

order; and to obstruct or attempt to obstruct the performance of firemen or law enforcement officers performing official duties incident to civil disorders which in any way affect commerce or the performance of any Federally projected function,

(3) to willfully injure or interfere with or attempt to injure by force or threat of force during a riot any person engaged in a business affecting commerce.

The sanctions authorized, depending upon the severity of physical injury to the victims, run from fines of not more than $1,000 to not more than $10,000 and/or to imprisonment for not more than 1 year, to not more than 10 years, to any term of years up to life. In addition a general post-conviction sanction makes:

(4) any person convicted of a State or Federal offense (for which imprisonment of 1 year or more is authorized) committed in furtherance of or while participating in a riot or civil disorder ineligible to hold any position in the Federal government for 5 years.

A. *Incite To Riot—18 U.S.C. §§ 2101, 2102*

The Civil Rights Act of 1968 provides in pertinent part:

§ 2101. (a) (1) Whoever travels in . . . commerce or uses any facility of . . . commerce . . . with intent—

(A) to incite a riot; or

(B) to organize, promote, encourage, participate in, or

(C) to commit any act of violence in furtherance of riot; or

(D) to aid or abet any person in inciting or participating in or carrying on a riot or committing any act of violence in furtherance of a riot;

and who either during the course of any such travel or use or thereafter performs or attempts to perform any other overt act for any purpose specified in subparagraphs (A), (B), (C), or (D) of this paragraph—

Shall be fined not more than $10,000, or imprisoned not more than five years, or both.

* * * * *

(c) A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts.

(d) Whenever, in the opinion of the Attorney General . . . any person shall have violated this chapter, the Department shall proceed as speedily as possible with a prosecution of such person hereunder and with any appeal which may lie from any decision adverse to the Government resulting from such prosecution; or in the alternative shall report in writing, to the respective Houses of the Congress, the Department's reason for not so proceeding.

(e) Nothing contained in this section shall be construed to make it unlawful for any person to travel in, or use any facility of, interstate or foreign commerce for the purpose of pursuing the legitimate objectives of organized labor, through orderly and lawful means.

(f) Nothing in this section shall be construed as indicating an intent on the part of Congress to prevent any State . . . from

exercising jurisdiction over any offense over which it would have jurisdiction in the absence of this section; nor shall anything in this section be construed as depriving State and local law enforcement authorities of responsibility for prosecuting acts that may be violations of this section and that are violations of State and local law.

* * * * *

§ 2102. (a) As used in this chapter, the term 'riot' means a public disturbance involving (1) an act or acts of violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or shall result in, damage or injury to the property of any other person or to the person of any other individual or (2) a threat or threats of the commission of an act or acts of violence by one or more persons part of an assemblage of three or more persons having, individually or collectively, the ability of immediate execution of such threat or threats, where the performance of the threatened act or acts of violence would constitute a clear and present danger of, or would result in, damage or injury to the property of any other person or to the person of any other individual.

(b) As used in this chapter, the term 'to incite a riot,' or 'to organize, promote, encourage, participate in, or carry on a riot,' includes, but is not limited to, urging or instigating other persons to riot, but shall not be deemed to mean the mere oral or written (1) advocacy of ideas or (2) expression of belief, not involving advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts.

The statute is designed to reach primarily those, not necessarily participants in a riot, who incite, promote, organize, encourage or otherwise further the incidence of a riot; participants who commit acts of violence are also covered. By the definition of "incite" the proscribed conduct includes speech and writing. A "riot" is defined as a public disturbance involving violence or a threat of violence by one person part of an assemblage of five or more, where the act presents a clear and present danger of injury to life or property, or where the threat is immediately capable of execution. Thus, when one of three people assembled for any purpose threatens to commit an act of violence, a "riot" has taken place by force of statute.

Although the crimes sought to be prevented are inciting, organizing, or furthering a riot, the occurrence of a riot is not a requisite for conviction. Broken down into its elements, the crime requires two acts: first, travel in interstate commerce or use of an interstate facility; and second, any other overt act for any of the purposes specified, performed during or after the interstate use. An attempt to perform any such other overt act during or after use is punishable as an attempt. The requisite mental element is "with intent . . . to incite a riot . . . ," *etc.* This mental element, however, attaches to the travel or use, and not to the second overt act. This poses no problem when the second act is performed during travel or use, for the element of intent would attach to both contemporaneous acts. When the second act follows travel or

use, however, there is no indication from the statute what mental state, if any, must accompany the second act. It may be that "for any purpose specified" refers to the accompanying mental state—*i.e.*, "performs any other overt act purposefully." More likely, however, the phrase refers merely to a causal connection between the second act and the specified activities. If the latter interpretation is adopted, then a crime may be committed under the statute where the act and intent are widely separated. Thus, travel across a State line with intent to incite a riot, followed some weeks later by another wholly innocent overt act which is construed to promote a riot, could be prosecuted as a crime under this statute. Whatever the construction, the statute is vague as to the degree of culpability which must accompany the requisite second act.

Thus the statute is basically an attempt statute. First, no result—*i.e.*, no riot or injury to person or property—need be proved. Second, the substantive offense is completed merely by interstate travel with a specific intent, plus some overt act, any act, in furtherance of that intent. This is the traditional means for defining an attempt—a specific intent to commit the object crime plus some overt act in furtherance of that intent.[21] The completed substantive offense is at most an attempt. Moreover *an attempt to achieve that attempt* constitutes the same offense, punishable by the same sanctions: 5 years' imprisonment, or a $10.000 fine, or both.

The statute was apparently intended to allow a number of specific defenses or immunities. First, a conviction or acquittal on the merits in a State trial for the same act or acts is a bar to a Federal prosecution. The effectiveness of this provision as a prohibition of double prosecution for substantially the same criminal conduct is open to serious question. First, the statute does not speak to the situation where a Federal conviction or acquittal is followed by the State prosecution for the same act. When the Federal trial comes first, therefore, the defendant's sole hope of avoiding functional double jeopardy in a subsequent State prosecution (unless there exists prohibitory State law) is the due process clause of the fourteenth amendment. However, the Supreme Court has held that the fourteenth amendment does not bar successive Federal-State (or State-Federal) prosecutions.[22] A second difficulty is that the statute uses the imprecise terminology "same act" to describe the instances where reprosecution in a Federal court is barred. The courts which have addressed the question of when two indictments charge the "same act" have been notably unsuccessful.[23] It is entirely possible, for example, that a court would hold that even though a State and Federal indictment charge

[21] *See* proposed subsection 1001 (1).

[22] *Abbate* v. *United States*, 359 U.S. 187 (1959); *Bartkus* v. *Illinois*, 359 U.S. 121 (1959).

[23] For example, presenting a forged check to a cashier and accepting the cash are two "acts" in Virginia, *Bullock* v. *Commonwealth*, 205 Va. 867, 140 S.E. 2d 821 (1965), though they would certainly be one in California, where the test for whether conduct is one act is whether it was engaged in for a single objective. *E.g.*, *Neal* v. *California*, 55 Cal. 2d 11, 357 P.2d 389 (1960); *People* v. *Keller*, 212 C.A. 2d 210, 27 Cal. Reptr. 805 (1963). *See generally* Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 269–277 (1965).

the same underlying criminal event, the acts are different because the Federal one involves the additional element of interstate travel.[24]

Second, in an obvious effort to avoid constitutional difficulty, Congress defined "inciting a riot" to exclude advocacy or expression of ideas or belief, so long as acts of violence or the "rightness" of violence are not advocated or asserted. This hardly avoids first amendment difficulties. What is obviously lacking is any requirement that the proscribed *speech* pose a clear and present danger of violence. The statute does contain the phrase "clear and present danger," but that refers to the danger that the *violence* or threat of violence on the part of the *rioters* will cause injury to person or property. There is no requirement that the *speech* pose any danger of violence or injury.[25]

That the draftsmen saw the possible, indeed probable, encroachments upon free speech entailed by this statute, is shown by the specific exemption for organized labor. A defendant pursuing the legitimate objectives of organized labor is immune from the provisions of this act. It is probably reasonable to take this provision as a recognition that the statute would have a chilling effect on otherwise legitimate group protests and expressions of grievance.

The statute also establishes what appears to be a unique restriction on the traditional discretion of the Attorney General to invoke or not to invoke any provision of the Criminal Code. He is first admonished to proceed as rapidly as possible with prosecutions of violations of this act. Failure to prosecute requires the submission, by him, of a written report to Congress of the reasons for not prosecuting. No sanction or procedure for enforcing this mandate appears to be provided. In principle, however, this provision places a substantial burden upon the Justice Department in situations perhaps already the most trying and difficult for law enforcement agencies.

To conclude, the major effect of this statute, as a supplement to State law, would probably be to suppress free speech, restrict legitimate protest activity, and impede lawful discussion of grievances. So far as the intent requirements and the overall capacity of the statute to fulfill its function Attorney General Clark concluded:[26]

> Any [Act] . . . which requires you to prove the state of mind of an individual when he travels in interstate commerce

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[24] The limits or scope of an "act" cannot be determined until we determine the level of abstraction at which we want to parcel a course of conduct. Because of an inherent definitional circularity, jurisdictions employing a "same act" test for double jeopardy purposes have had to find another concept with which to give the term "act" content. Some jurisdictions have chosen "intent" as the proper standard; for each activity motivated by a distinct intent there is said to be a different act. *See, e.g., Fews* v. *State*, 1 Ga.App. 122, 58 S.E. 64 (1907); *Neal* v. *California*, 55 Cal. 2d 11, 357 P.2d 839 (1960). Other jurisdictions have defined "act" in less expansive terms. In Wisconsin and Virginia, for example, it seems that if an offense category contains one element not contained in another, a course of conduct which violates both, although motivated by a single intent, constitutes two acts. *See* WIS. STAT. ANN. § 939.71: *Bullock* v. *Commonwealth*, 205 Va. 867, 140 S.E.2d 821 (1965).

[25] For attempts to enunciate the limits which the requirement of public order sets for the exercise of free speech generally, *see* T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966); MODEL PENAL CODE § 250.1, Comment at 9–13 (Tent. Draft No. 13, 1961); *Terminiello* v. *City of Chicago*, 337 U.S. 1 (1949); *Feiner* v. *New York*, 340 U.S. 315 (1951); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951).

[26] From an interview on ABC television's "Issue and Answers" program, July 16, 1967, reported in XXVI CONG. Q. WEEKLY REPORT 393 (March 1, 1968).

> is very difficult to prove. I think it is also important that the American people not believe that a piece of legislation . . . empowering federal prosecution of people moving in interstate commerce to cause riots could really reduce riots.

Furthermore, not only may the proscription of the attempt to commit an attempt be unconstitutional but also, to the extent this statute proscribes simple attempts, it would be superfluous since general attempt provisions, applicable to every Federal offense, have been proposed for the Code.[27] This leaves one substantive offense—inciting an actual riot—as a possibly appropriate Federal offense.

B. *To Transport, or Teach the Use of, Weapons Knowing, Having Reason to Know, or Intending That the Same Will Be Employed in a Civil Disorder; Obstructing Police During a Civil Disorder.—18 U.S.C. §§ 231, 232*

Responding to recommendations of the Kerner Commission, Congress enacted the sections of the Civil Rights Act of 1968 which provide in pertinent part:

> § 231. (a) (1) Whoever teaches or demonstrates to any other person the use, application, or making of any firearm or explosive or incendiary device, or technique capable of causing injury or death to persons, knowing or having reason to know or intending that the same will be unlawfully employed for use in, or in furtherance of, a civil disorder . . . ; or
>
> (2) Whoever transports or manufactures for transportation in commerce any firearm, or explosive or incendiary device, knowing or having reason to know or intending that the same will be used unlawfully in furtherance of a civil disorder; or
>
> (3) Whoever commits or attempts to commit any act to obstruct, impede, or interfere with any fireman or law enforcement officer lawfully engaged in the lawful performance of his official duties incident to and during the commission of a civil disorder . . .
>
> Shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> * * * * *
>
> § 232. Definitions
>
> For purposes of this chapter:
>
> (1) The term 'civil disorder' means any public disturbance involving acts of violence by assemblages of three or more persons, which causes an immediate danger of or results in damage or injury to the property or person of any other individual.

The first two clauses proscribe the acts of teaching the use of, transporting, or manufacturing firearms or incendiary devices. Defendant must know, have reason to know, or intend that the weapon will be used in a civil disorder, though neither clause specifically requires the actual occurrence of such disorder. The third clause

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[27] *See* proposed section 1001.

proscribes *any* act or *attempt* to obstruct a fireman or law enforcement officer during a civil disorder. No special mental state need accompany this act and no actual obstruction or impedence need result, but a civil disorder which affects commerce in some way must in fact occur as an attendant circumstance. The penalty for the proscribed conduct, as well as an attempt, is a fine of $10,000, 5 year's imprisonment, or both.

The definition of "civil disorder" differs somewhat from the definition of "riot" contained in the incite-to-riot section. "Civil disorder" is defined as a public disturbance involving acts of violence by assemblages of three or more persons, which causes an immediate danger of, or results in, damage or injury to the property or person of any other individual. "Riot" requires an act of violence by only one person, not three. Since the statutes seek to prevent similar occurrences—riots—no distinction should be made in definition or in label. Moreover, choosing the cabalistic number "three" is arbitrary and is not responsive to the mob character of the event which prompts the promulgation of both sections. Without conceding the desirability of the offense of "incite to riot" or the offenses involved here, the invocation of such statutes should be restricted to events involving a "substantially large number of people," leaving the construction of this term to the courts. Furthermore, so far as attempt is concerned, it should be covered in the proposed Code by a separate general attempt provision.

The first two clauses of the statute leave vague whether a civil disorder must be in progress or even need occur. They fail to distinguish between manufacture or transport on the one hand, and teaching or demonstrating the use of weapons on the other. To the extent speech is proscribed by the teaching and demonstrating clause, first amendment issues are posed which could have been avoided by restricting its application to instances of clear and present danger of violence. And in the second clause, where speech is not involved, the deterrent function would be better served by specifically placing upon the defendant the burden of establishing the legitimacy of the manufacture and transport of potentially lethal devices. In a society anxious to reduce violence, this burden would place responsibility for guarding against misuse on those who can determine and control use.[28]

The third clause, which is designed to protect police and firemen, is also vague. It does not specify what mental state must accompany the act that impedes or interferes with the police. Given the con-

[28] *See, e.g.*, with regard to English law, I. BROWNLIE, THE LAW RELATING TO PUBLIC ORDER 75 (1968):

> There is some slight authority for the existence of a common law misdemeanour of making and selling arms knowing that they are to be used for an unlawful purpose . . . . The use of explosives to endanger life or property is dealt with by the Malicious Damage Act 1861, ss. 9, 10, 45, 46, 54 and 55, the Offences against the Person Act 1861, ss. 28, 29 and 30, the Explosive Substance Act 1883, ss. 2–9, and the Post Office Act 1953, ss. 11 and 60. In particular, s. 4 of the Act of 1883 provides a penalty of imprisonment not exceeding fourteen years for anyone making or knowingly having in his possession or control any explosive substance under circumstances which give rise to a reasonable suspicion that the making, possession or control is not for a lawful object, unless he can establish the existence of a lawful object.

fusion and disorder that inevitably accompanies a "public disturbance," accidental, innocent or even well motivated conduct might be held criminal.[29]

Finally, on a broader policy level, since local and State law covers any given activity that would actually interfere with the suppression of a disturbance there is no need for the provisions dealing with obstructing the police and other officials. To the extent interference with Federal officials might be involved, the proposed general provision of the new Criminal Code concerning interference with Federal officials, though not directly concerned with riots, should be sufficient. Likewise, a general "gun" control law could eliminate the necessity for the clause in this statute dealing with the manufacture and distribution of incendiary devices.

C. *To Willfully Injure, Intimidate, or Interfere With During a Riot, Any Person Engaged in Commerce.—18 U.S.C. § 245*

One section of the Civil Rights Act of 1968, 18 U.S.C. § 245, dealing primarily with civil rights violations, provides in pertinent part:

> (b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—
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> * * * * *
>
> (3) during or incident to a riot or civil disorder, any person engaged in a business in commerce or affecting commerce . . .
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> * * * * *
>
> shall be fined not more than $1,000, or imprisoned not more than one year, or both; and if bodily injury results shall be fined not more than $10,000, or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life . . .
>
> (c) Nothing in this section shall be construed so as to deter any law enforcement officer from lawfully carrying out the duties of his office; and no law enforcement officer shall be considered to be in violation of this section for lawfully carrying out the duties of his office or lawfully enforcing ordinances and laws of the United States, the District of Columbia, any of the several States, or any political subdivision of a State. . . .

Section 101(c) of the Civil Rights Act provides:[30]

> (c) The provisions of this section shall not apply to acts or omissions on the part of law enforcement officers, members of the National Guard, . . . members of the organized militia of any State or the District of Columbia, . . . or members of the Armed Forces of the United States, who are engaged in suppressing a riot or civil disturbance or restoring law and order during a riot or civil disturbance.

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[29] *See, e.g., Landry* v. *Daley*, 280 F. Supp. 938 (N.D. Ill. 1968).

[30] Act of Apr. 11, 1968, Pub. L. No. 90-284, § 101(c), 3 U.S. CODE CONG. & AD. NEWS 706 (1968).

Section 245(b) of Title 18 proscribes the commission of any act, accompanied by force or threat of force, which results in the injury or intimidation of, or interference with, a specified victim, a person whose business is in commerce or affects commerce. The requisite mental element is "willfulness" with respect to both the act and the result. "Riot" *or* "civil disorder," though both are undefined, is an attendant circumstance necessary for conviction under this section.

The sanctions authorized are graded according to the severity of bodily injury, if any, to the victim: (1) where no bodily injury results (*i.e.*, upon conviction for attempt,[31] intimidation, or interference), the maximum penalty is 1 year's imprisonment, fine of $1,000, or both; (2) where bodily injury results, the penalty is 10 year's imprisonment, $10,000 fine, or both; (3) where death results, the maximum is life imprisonment.

With the commerce clause as a jurisdictional peg, the statute is apparently designed to help protect businessmen during the course of a "riot" from injury, intimidation, or interference. It is difficult to conceive of any conduct covered by "injure," "intimidate," or "interfere" that is not otherwise covered by State and local offenses such as assault, burglary, and criminal trespass. However, this provision is designed to supplement rather than to supplant State and local protection. Local authorities are not relieved of responsibility for prosecuting conduct also violative of State and local law. Indeed, no prosecution under this section, unlike the incite-to-riot section, can take place without certification by the Attorney General that Federal prosecution is in the public interest and necessary to secure substantial justice.

The section by its initial terms is applicable to law enforcement personnel acting under color of law, but a subsequent provision, apparently inspired by the very understandable congressional concern over riots, exempts the police. The statute first provides the usual gratuitous and in all likelihood innocuous assurance that law enforcement personnel will not be subject to any special constraints so long as they abide by the Civil Rights Act to which they are explicitly subject. A second and unusual provision is neither gratuitous nor innocuous: it grants immunity for *any* acts or omissions by law enforcement officers, National Guard members, and members of the armed forces when they are engaged in suppressing a "riot or civil disturbance." Such a provision defeats the very goal, the reduction of violence, Congress sought to serve. Despite congressional objectives to the contrary, the exemptions may be perceived not only as opportunity but also as an explicit license for law enforcement personnel to violate any of the Civil Rights provisions. It can be used and construed to justify the use of excessive force during the course of a "riot," or a "civil disturbance."

"Civil disturbance," unlike "riot" and "civil disorder," is nowhere defined. At best, this unexplained textual discrepancy can be attributed to careless drafting; at worst, it might be read to grant immunity to

[31] The attempt aspect of this provision will not be analyzed since it is assumed that attempts will be covered by a general attempt provision.

police and military for any civil rights violation committed during peaceful civil disobedience.[32] The Kerner Commission warns that during a riot, "discipline of the control force is a crucial factor." [33] Rather than strengthen police discipline and reenforce their sense of professional responsibility, this statute encourages, however well intentioned, lawlessness on the part of "law enforcement officers." It makes their excessive use of force and their violations of civil rights privileged.

Finally, to the extent that the substantive provision itself is necessary to supplement protection of those engaged in business, there is no justification for limiting this protection to riotous periods. The right to engage in business ought to be protected in the same way as the other civil rights during peaceful periods as well, and ought not to be used as a means for introducing into the entire civil rights chapter of the proposed Criminal Code the pernicious exemption of law enforcement officers.

D. *Post-conviction Sanctions—5 U.S.C. § 7313*

The Omnibus Crime Bill of 1968 provides in pertinent part:

> (a) An individual convicted by any Federal, State, or local court of competent jurisdiction of—
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> (1) inciting a riot or civil disorder;
>
> (2) organizing, promoting, encouraging, or participating in a riot or civil disorder;
>
> (3) aiding or abetting any person in committing any offense specified in clause (1) or (2); or
>
> (4) any offense determined by the head of the employing agency to have been committed in furtherance of, or while participating in, a riot or civil disorder: shall, if the offense for which he is convicted is a felony, be ineligible to accept or hold any position in the Government of the United States or in the government of the District of Columbia for the five years immediately following the date upon which his conviction becomes final. Any such individual holding a position in the Government of the United States or the government of the District of Columbia on the date his conviction becomes final shall be removed from such position.

To the extent that riots are an expression of frustration over a sense of powerlessness and alienation on the part of those who are left out, such a statute serves only to exacerbate those frustrations. However narrow the definition of "riot" or riot-related offenses which would subject an individual to this sanction, the statute can only aggravate, not reduce, the likelihood of riots. "Riot," however, is not narrowly defined in either State or Federal legislation, and thus individuals may be deprived of government employment for exercising their right to free speech and for engaging in activity that never approaches a

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[32] In distinguishing "civil disobedience" from "riot," Allen makes use of the Ghandian conception: "the conduct of the actor, even though illegal, must be open and public; the means must be nonviolent; and the actor must willingly accept the penalties lawfully prescribed for his behavior." F. Allen, *Civil Disobedience and the Legal Order*, 36 U. CIN. L. REV. 1, 9 (1967).

[33] KERNER REPORT, *supra* note 7, at 174.

"riot" in terms of large numbers of people. Finally, power is placed in the hands, not of judges, but of agency heads who may arbitrarily apply this sanction. From any vantage point, this statute, despite its noble purpose, is bad.

III. How Is a Riot To Be Distinguished, for Criminal Law Purposes, Both From Lawful Conduct and From Other Conduct (Both Individual and Group) for Which Individuals Are Already Subject to Criminal Liability—Either Under the State or Federal Substantive Criminal Law? Posed Another Way Is There a Need for a Special Substantive Offense, "Riot"?

The Federal Convention, meeting in Philadelphia in 1787, was attended by men who had rebelled against England and who were themselves plagued with the threat of the rebellion by Shay in Massachusetts. These men were acutely aware of the importance of order on the one hand, and of the value of protest and dissent on the other. The viability of the union which they hoped to establish would depend on the ability to safeguard these values through law. The problem was to define the line past which dissent and protest became an intolerable burden on a minimum need for order.[34] Any definition of riot for purposes of establishing criminal liability must confront this never ending challenge.

Harold Laski defined the challenge in a way that is still relevant:[35]

> Those who speak of restoring the rule of law forget that respect for law is the condition of its restoration. And respect for law is at least as much a function of what law does as of its formal source. Men break the law not out of an anarchistic hatred for laws as such, but because certain ends they deem fundamental cannot be attained within the framework of an existing system of laws. To restore the rule of law means creating the psychological conditions which make men yield allegiance to the law. No limitations upon government can be maintained when society is so insecure that great numbers deny the validity of the very foundations upon which it is based . . . .
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> * * * * *
>
> Fear is the parent of revolution, for it inhibits that temper of accommodation which is the essence of successful politics.

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[34] [M]ass demonstrations, however peacefully intended by their organizers, always involve the danger that they may erupt into violence. But despite this, our Constitution and our traditions, as well as practical wisdom, teach us that city officials, police, and citizens must be tolerant of mass demonstrations, however large and inconvenient. No city should be expected to submit to paralysis or to widespread injury to persons and property brought on by violation of law. It must be prepared to prevent this by the use of planning, persuasion, and restrained law enforcement. But at the same time, it is the city's duty under law, and as a matter of good sense, to make every effort to provide adequate facilities so that the demonstration can be effectively staged, so that it can be conducted without paralyzing the city's life, and to provide protection for the demonstrators. The city must perform this duty. (Fortas, Concerning Dissent and Civil Disobedience 36 (1968)).

[35] Laski, Reflections On the Revolution of Out Time 16, 18 (1943): "In maintaining the rule of law we must be careful not to sacrifice it in the name of order" *quoted* in Kerner Report, *supra* note 7, at 171.

The criminal law is one, though only one, of the social controls by which we strive to keep our revolutions peaceful. While the criminal law defines behavior which is deemed intolerably disturbing to and destructive of community values, it also serves to protect the free expression of unusual, even deviant, ideas and conduct so essential to the growth of a democratic society. In defining specific conduct as offensive, a Criminal Code thereby excludes from liability—as is obvious once said—all other conduct. And while the criminal law prescribes sanctions which the government is authorized to impose upon persons convicted or suspected of engaging in prohibited conduct, at the same time, to foster conditions which assure a general continuity of allegiance, it restricts the extent to which the state can impose sanctions.[36]

At what point then does lawful protest become illegal activity? Put another way, how is a riot to be distinguished from lawful demonstrations, from the exercise of liberties which require and deserve protection? Whether perceived from an historical, sociological, political, or psychological vantage point, riots are often a form of protest, a dramatic reflection of dissatisfaction with either governmental or private institutions: [37] riots are often an expression of undefined but nonetheless real frustration and hostility, built up over generations, of the failure of society to offer certain segments of the population any hope or hope accompanied by adequate opportunities for fulfillment.[38]

To justify making criminally liable the participants or architects of group, crowd, or mob behavior, there must be something more than protest, more than vague or precise expressions of discontent. That "something more" is either:

(1) *Violence.*—the forceful exercise of power which results in injuries to person or damage to property, or which seriously threatens such injury or damage; or

(2) *Interference with lawful pursuit.*—unreasonable interference or serious threats of interference with lawful public or private activity, with constitutionally guaranteed rights, and/or with lawful efforts to safeguard these pursuits and rights.

The essence of a riot, for purposes of the criminal law, is a large

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[36] *See* Goldstein, J., *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L. J. 543 (1960) [hereinafter cited as Goldstein, *Police Discretion*].

[37] *See* Dynes and Quarantelli, *What Looting in Civil Disturbances Really Means*, 5 TRANS-ACTION 9 (May 1968):

> Looting during the course of riots may be a symbolic protest about the way property is allocated. According to this view, looting during 'racial' outbreaks has been a bid for the redistribution of property. That looting during riots is more widespread than in natural disasters, that it concentrates on prestige items that symbolizes the good life (i.e. color T.V. sets rather than basic necessities) and that it receives the support and approval of many within the deprived sectors who do not participate themselves, substantiates this view.

[38] "The cat on Twelfth Street can look a hundred yards away and see another black cat living in an eight-room house with a 1967 Pontiac and a motorboat on Lake Michigan." a Negro school teacher told a visitor to Detroit during the summer of 1967. "For that matter, General Motors itself is only a few blocks away. I've seen kids from my school walk over to the showroom and sit down in a new model Cadillac, sort of snuggle their little rear ends into the soft leather, slide their hands over the slick plastic steering wheel, and say 'Man, feel that.' It's all so close, and yet it's all so far away, and the frustration just eats them up." (SAUTER & HINES, *supra* note 9, at 122.)

group of people, organized or not, engaging over a relatively short span of time either in violent conduct or in other unreasonable forms of interference with legitimate private or public activity.

Justification for a separate substantive offense of "riot," particularly in a Federal Criminal Code, would rest initially on a determination that the existing body of State and Federal criminal offenses are insufficient to cover all forms of disturbing conduct that are the essence of a riot. An illustrative selection of substantive offenses which can be found in State Criminal Codes suggests the wide range of potentially riot-related conduct which is proscribed: disorderly conduct, breach of the peace, obstruction of traffic, arson, criminal possession of explosives, criminal trespass, burglary, possession of burglar tools, theft, assault, possession of illegal weapons, traffic in unlawful weapons, denial of civil rights, reckless endangerment, creating a hazard, obstructing public officials, giving false alarms or information to authorities, manslaughter, homicide, treason, and finally, conspiracies or attempts to commit all of the above offenses.[39]

In addition, as has already been noted, most State Codes do make special provision for riot, unlawful assembly, or civil disorder. With or without a riot provision the arsenals of State substantive offenses are sufficiently complete to enable State and local officials to invoke the criminal process against all persons who make, threaten to make, or are trying to make a "riot" something more than peaceful protest.

When there is added the Federal arsenal of substantive offenses, as it is or, more relevantly, as it is contemplated in revision, the need for a separate offense of "riot" becomes even more questionable. The

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[39] No effort is made here to enumerate the many additional and supplemental violations to be found in municipal Codes. *But see, e.g.*, the following from a form complaint charging violations of the *Chicago Municipal Code:*

> . . . Committed the offense of Disorderly Conduct in that he knowingly
>
> (a) Did any act in such unreasonable manner as to provoke, make or aid in making a breach of peace.
>
> (b) Did or made any unreasonable or offensive act, utterance, gesture or display which, under the circumstances, creates a clear and present danger of a breach of peace or imminent threat of violence.
>
> * * * * *
>
> (d) Failed to obey a lawful order of dispersal by a person known to him to be a peace officer under circumstances where three or more persons are committing acts of disorderly conduct in the immediate vicinity, which acts are likely to cause substantial harm or serious inconvenience, annoyance or alarm.
>
> (e) Assembled with three or more persons for the purpose of using force or violence to disturb the public peace.
>
> (f) Was begging or soliciting funds on the public ways.
>
> (g) Appeared in any public place manifestly under the influence of alcohol, narcotics or other drug, not therapeutically administered, to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity.
>
> (h) Carried in a threatening or menacing manner, without authority of law, any pistol, revolver, dagger, razor, dangerous knife, stiletto, knuckles, slingshot, an object containing noxious or deleterious liquid, gas or substance or other dangerous weapon or concealed said weapon on or about the person or vehicle.
>
> In violation of Chapter 193 Section 1D of the Municipal Code of The City of Chicago.

See also Landry v. *Daley*, 280 F. Supp. 938 (N.D. Ill. 1968).

proposed Code would cover, among other potentially riot-related offenses: treason: rebellion, sedition, organizing, or advocating overthrow; mutiny; impairing military effectiveness; attacks on diplomatic personnel and property; injury, trespass, tampering, or interference with Federal property: resisting or obstructing justice or Federal functions: contempt, disobedience of subpenas, administrative orders; defiance of Federal regulation: civil rights protection; threats and blackmail; homicide; arson: theft, robbery and burglary; assaults and life-endangering behavior; as well as conspiracy attempts and solicitation of these offenses. It is thus difficult to conceive of any violence or other unreasonable interference with public or private activity which arouses public concern about riots and which is not already proscribed.

The recitation of State and Federal substantive offenses leads to the conclusion that there ought not to be a separate offense of "riot" in the proposed Federal Criminal Code. Nevertheless there remains the other characteristic of "riot"—a substantially large number of violations over a short span of time—which prompts asking whether sanctions authorized for riot-related offenses should be different from those ordinarily authorized.

IV. Should a Crime Committed During or in Furtherance of a Riot Be Subject to the Same, Greater, Lesser, or Different Sanctions From Those Authorized for the Same Offense Committed During More "Normal" Periods?

The law has generally treated "riot" as an aggravating attendant circumstance justifying an increase in the authorized sanction for a given offense. These increased sanctions are of two types: pre-conviction and post-conviction. The common law authorized pre-conviction sanctions by relieving police officers of liability for homicides committed in quelling a disturbance.[40]

The Civil Rights Act of 1968, as has already been noted, also exempts police, "engaged in suppressing a riot" or "restoring law and order," from criminal liability for willfully and forcefully injuring or intimidating anyone exercising enumerated federally protected civil rights. "Riot" serves as an aggravating factor for the participant by simultaneously serving as a mitigating factor for the law enforcement officer who is relieved of liability for failure to exercise the restraint that would otherwise be demanded of him in the course of his duties. To the extent that the police would be deterred from using excessive

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[40] In the interpretation of [13 Hen. IV. c. 7] it has been held, that all persons, noblemen and others, except women, clergymen, persons decrepit, and infants under fifteen, are bound to attend the justices in suppressing a riot, upon pain of fine and imprisonment; and *that any battery, wounding, or killing the rioters, that may happen in suppressing the riot is justifiable.* [P. 1 Hal. P.C. 495; 1 Hawk. P.C. 161.] So that our ancient law, previous to the modern Riot Act, seems pretty well to have guarded against any violent breach of the public peace. (Blackstone, Commentaries on the Laws of England 155 (1962 ed.))

See also Mich. Rev. Crim. Code § 5510, Comment at 426 (Final Draft 1967). Michigan law also assigns to riot participants the liability for the death of one killed in trying to repress the riot. Mich. Consol. Laws § 750.527 (1948).

force were there no exemption, the existence of such an exemption operates as official authorization for increasing pre-conviction sanctions for "rioters." Congress has also treated "riot" as an aggravating circumstance which justifies an increased post-conviction sanction: following conviction for a State or Federal offense committed during or in furtherance of a riot the offender becomes ineligible for Federal employment for 5 years.[41]

"Committed during the course of a riot" is treated as an aggravating factor for two purposes, retribution and deterrence. The retributive purpose is often unacknowledged and becomes camouflaged by the label and language of deterrence. Increased sanctions undoubtedly serve some as an outlet for anger aroused against those who make life more dangerous by engaging in criminal activity when protective public resources (police, firemen, prosecutors, defense counsel, and the courts) are overtaxed and at a disadvantage.[42]

Conceptually, however, pre-conviction sanctions are not to serve a retributive function since there is no place for punishment prior to a finding of guilt. Such sanctions are to be kept at a minimum consistent with assuring an opportunity for the criminal process to run its course so that innocence, which is initially presumed for each individual, or guilt may be determined. Increasing post-conviction sanctions, *not* pre-conviction sanctions, for retributive purposes may therefore be an appropriate response, although there must be some collective point of diminishing returns even for vengeance. But retribution does not appear to be a goal of the proposed Criminal Code. Its general purposes section omits retribution as an official objective of post-conviction sanctions.[43]

The more significant and complex issue, even if retribution were a

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[41] 5 U.S.C. § 7313. Recent legislative history includes other proposals in the same spirit, *e.g.*, CONG. REC. H. 15067, 90th Cong., 2d Sess. § 1302, 114 CONG. REC. H. 7514 (1968) (to deny Federal aid to students involved in university disturbances) and CONG. REC. S. 2183, 90th Cong., 1st Sess. § 1, 113 CONG. REC. S. 20330 (1967) (to make any person convicted under either State or Federal law of rioting or of a riot-connected crime permanently ineligible to receive any Federal payment or assistance whatsoever).

[42] *See* J. Goldstein, *Psychoanalysis and Jurisprudence*, 77 YALE L.J. 1053, 1071–1072 (1968):

> [T]he meaning of an actual experience in giving direction to a person's life rests on countless internal and external variables. Not only may what appears to be a similar event have different significance for the same person at different stages in his development, but it may also have different implications for different people at similar stages of development. Implicit in this observation is an insight of substantial significance to anyone seeking to predict or to evaluate the consequences of decisions in law. . . . For example, in evaluating a decision to impose a criminal sanction against a specific offender for purposes both of satisfying the punitive demands of the community and of deterring others from engaging in the offensive conduct, the student of law must recognize that the decision may satisfy some demands for vengeance, exacerbate some, and have no effect at all on others; and may for some restrain, for some provoke, or for some have no impact on the urge to engage in the prohibited conduct. Recognition of the multiple consequences of every law-created event makes comprehensible the never-ending search for multiple resolutions of what is perceived to be a single problem in law and the resulting need to find an ensemble of official and unofficial responses which on balance come closest to achieving the social control sought.

[43] *See* Study Draft section 102.

goal, is whether more severe sanctions will serve to reinforce or to undermine the law's deterrent impact. Additional pre- and post-conviction sanctions, it is reasoned, will deter potential offenders by making them weigh the reduced risk of getting caught or convicted because law enforcement facilities are overtaxed against the risk of being treated more harshly if convicted or discovered. The argument rests on the assumption that more severe sanctions will foster greater consideration and foresight among "potential offenders" caught up in a crowd so that they will choose not to commit a crime or choose more "normal periods" for their criminal activity, *i.e.*, periods when the usual deterrent forces at work have not been weakened.

This assumption contains two concepts—"choice" and "normal periods"—which require examination. First, during "normal periods" law enforcement is selective, not full, enforcement. Society has generally been unwilling to provide, for financial and other reasons, enough police, prosecutors, defense counsel and judges to fully enforce the substantive criminal law.[44] To the extent that the breakdown, by riot, of an already overtaxed system of justice is a consequence itself to be deterred, and to the extent such a consequence triggers a geometric progression in violations, the most direct deterrent is to increase law enforcement manpower, not sanctions.[45] By establishing emergency procedures for utilizing extra police, prosecutors, defense counsel, judges, supportive staff, and facilities and by thus safeguarding the power of local and State authorities to determine priorities of enforcement, government can insure that the administration of justice is not paralyzed by a riot and that it can continue to function at the "normal" level of deterrence, and with due regard for constitutional safeguards.

Such contingency plans can also serve to reduce the likelihood of police panic and thus deter excesses of force. What Freud observed about the military applies as well to the police:[46]

> [E]ach individual is bound by libidinal ties on the one hand to the leader . . . and on the other hand to the other members of the group. [T]he essence of a group lies in the libidinal ties existing in it. . . . A panic arises if a group of that kind becomes disintegrated. Its characteristics are that none of the orders given by superiors are any longer listened to, and that each individual is only solicitous on his own account, and without any consideration for the rest. The mutual ties have ceased to exist, and a gigantic and senseless fear is set free. [I]t is of the very essence of panic that it bears no relation to the danger that threatens, and often breaks out on the most trivial occasions. . . .

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[44] *See* Goldstein, *Police Discretion*, *supra* note 36.

[45] For reports of efforts to increase law enforcement manpower and to establish streamlined procedures for emergencies such as riots, *see* N.Y. Times, Aug. 5, 1968, at 32, col. 4 (Report of the Mayor's Committee on the Administration of Justice Under Emergency Conditions); INTERIM REPORT, DISTRICT OF COLUMBIA COMMITTEE ON THE ADMINISTRATION OF JUSTICE UNDER EMERGENCY CONDITIONS (May 25, 1968).

[46] S. Freud, *Group Psychology*, XVII THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 95–96 (1920–22) [hereinafter cited as S. Freud].

Evidence of police brutality, such as that characterized by the Report to the National Commission on the Causes and Prevention of Violence as "police riot," may bear this out and would prompt the development of emergency plans and training designed to reinforce or at least keep intact the ties essential to a disciplined professional police department. Without such plans, or in failing to carry out such plans, the consequent weakening of mutual ties within the department releases each for membership in a new, possibly leaderless, group—a mob in which as Freud observed "individual inhibitions fall away and all the cruel, brutal and destructive instincts which lie dormant in individuals . . . are stirred up to find free gratification."[47] Of course a "police riot" may be evidence not of panic but rather of strong ties between the members of a police department and their leaders whose orders such as "shoot to kill" they obediently follow.[48] As Freud observed:[49]

> [E]verything that the object [the leader] does and asks for is right and blameless. Conscience has no application to anything that is done for the sake of the object; in the blindlessness of love remorselessness is carried to the pitch of crime.

But the law, particularly the administration of the criminal law, in a democratic society is to command respect for the dignity of each individual as a human being and thereby to assure his allegiance to the state. That is why the law authorizes the use of lethal force only when life is endangered and legitimizes force only when necessary and in accord with due process.

The deterrence argument for increased sanctions rests also on a mistaken assumption about the second concept, "choice." What is known about crowd psychology and the sociology of a riot suggests that increased sanctions, particularly pre-conviction sanctions involving physical force, will, on balance though not without exceptions, increase the frequency of riots or the extent of violence associated with them. The psychological and sociological theories that seek to explain the riot phenomenon hardly rise above the descriptive. Yet these theories, however limited, are adequate, first, to challenge the view that more severe sanctions will serve a deterrent function and, second, to cast doubt on voluntariness or mens rea, fundamental requisites of those offenses for which a rioter might be held criminally responsible.

Le Bon, in his now classic *Psychology of the Herd* (1895), made observations about the crowds of the French Revolution which remain relevant to collective behavior. Le Bon's major thesis was that once merged in a group, a law abiding person seems temporarily to lose his critical and moral standards and thereby becomes prone to violence and capable of other unlawful activity. What releases these hostile and aggressive forces in the "reasonable man" and why and how such forces can sweep through a crowd is yet to be understood. It is as if the anonymity which an individual acquires in a crowd loosens, like alcohol, the ties between the inner checks which constitute conscience and its many external nourishing forces (parents,

[47] *Id.* at 79.
[48] D. Walker, Rights In Conflict viii (1968).
[49] S. Freud, *supra* note 46.

friends, police, public opinion, *etc.*) which are a part of each man's reality.[50] More specifically, to the extent that a riot constitutes a breakdown of law and enforcement, external nutriments which, in psychoanalytic terms, are essential to the work on both ego and superego are weakened in their efforts to control hostile and aggressive id impulses. An example of the effect of this withdrawal of external nutriment is the uninhibited conduct of soldiers and travellers abroad.[51] More relevant is the attitude of a rioter facing a wide open store full of goods who remarks: "It would be a crime not to take something;" or of a police rioter who threatens newsmen with "you take my picture tonight and I'm going to get you," or screams of "get the ——— photographer and get the film." "In the group," as Franz Alexander observed, "the voice of the individual conscience is silenced." [52]

Related to anonymity and the breakdown of internal controls is a psychological defense mechanism called "dehumanization." [53] In its maladaptive form "dehumanization" allows a person to perceive other persons as if they lacked human attributes, to increase his emotional distance from them, and to experience conscious feelings of great fear and excessive hostility coupled with a blindness to or denial of actual and generally foreseeable consequences of his conduct.

Dehumanization can serve important adaptive purposes. In crises such as natural disasters, accidents, or epidemics, psychic mechanisms are called into play which divest the victims of human identities, so that feelings of pity, terror, or revulsion, which would otherwise inhibit constructive action, can be overcome. Certain occupations in particular require such selectively dehumanized behavior. Law enforcement is one such occupation, and it carries, therefore, the extra risk that the dehumanization it requires may become maladaptive, if taken to an extreme or used inappropriately.

Through dehumanization a person stops identifying with others. He no longer sees people as essentially similar to himself. His relationships become stereotyped and rigid. His usual feelings of concern become anesthetized, replaced by powerfully destructive forces within himself. The Nazis' capacity to perceive Jews as swine and to slaughter them by the millions is a dramatic illustration of this mechanism at work. In an urban setting, whites, including policemen, say: "The

[50] On reality and the meaning of average expectable environment, *see* H. HARTMANN, EGO PSYCHOLOGY AND THE PROBLEM OF ADAPTATION 13–32 (1958).

[51] *See* D. Rapaport, *The Theory of Ego Autonomy*, 22 BULLETIN OF THE MENNINGER CLINIC 13–32 (1958):

> We have long known this dependence on nutriment of certain structures, *e.g.*, those underlying the conscious superego. When a man pulls up stakes and moves far away where his past is not known, he is subject to temptations: In the course of his sea voyage, the mutt he left behind may grow into a Saint Bernard, or the painting by a local amateur which he owned may turn into a Rembrandt. The superego is a persistent structure, but its conscious parts seem to require stimulus nutriment.

[52] Alexander, *Introduction* to S. FREUD, GROUP PSYCHOLOGY AND ANALYSIS OF THE EGO at x (Bantam ed. 1960).

[53] Bernard, Ottenberg, & Redl, *Dehumanization: A Composite Psychological Defense in Relation to Modern War* in BEHAVIORAL SCIENCE AND HUMAN SURVIVAL 64–82 (M. Schwebel ed. 1965). *See also* A. FREUD, THE EGO AND THE MECHANISM OF DEFENSE (1946).

damn niggers are pushing us off the sidewalks, running down the value of property, and threatening our women." Among Negroes it may be: "The damn ofays hate us and will never give us our rights. We ought to do something about it." [54] These perceptions of individuals which indistinguishably lump them into groups labelled "black," "nigger," "whitey," "cops," and "enemy" [55] illustrate the dehumanization mechanism. They are more likely to lead to excesses of force in either direction than to sympathy and cooperation.[56]

This mechanism of dehumanization is further reflected in the monumental indifference of communities to: [57]

> Widespread violations of building regulations in the deprived communities, with their inevitable toll in loss of life, health, and human well-being, [which] have long characterized most of our large cities. The departments of city gov-

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[54] R. Brown, *Collective Behavior and the Psychology of the Crowd* in SOCIAL PSYCHOLOGY 709, 730 (1965) [hereinafter cited as Brown]. The origin of "ofay" apparently is "foe" in pig latin. WENTWORTH & FLEXNER, DICTIONARY OF AMERICAN SLANG 361 (1960).

> Negro community workers blame what they called the 'overpolicing' of the black community for three nights of racial disorders [in Syracuse]. . . . The Rev. Forest Adams, director of the Community Help Association, said: 'When the police normally see three or four black kids on the street, they shout, 'Niggers, go home.' And riding around last night with their shotguns sticking out of car windows—they're always more concerned with putting down the violence than with getting rid of the causes—too often they are themselves the causes.' Mrs. Inez Howard, a Negro mother of five, said: "They will approach black youths and say, 'We want this corner cleared, you black bastards. We won't take any more off of you people." (N.Y. Times, Sept. 12, 1968, at 35, col. 1.)

[55] The treatment of American citizens of Japanese descent offers another example of the dehumanization mechanism at work. *See Korematsu* v. *United States*, 323 U.S. 214 (1944), and DONNELLY, GOLDSTEIN & SCHWARTZ, CRIMINAL LAW 957–965 (1962).

> [56] The current 'loose talk of shooting looters' is likely to cause guerrilla warfare between Negroes and whites in American cities, Attorney General Ramsey Clark said . . . 'No civilized nation in history has sanctioned summarily shooting thieves caught in the commission of their crime,' he said. 'Will America be the first?' In a blunt speech to a group of state trial judges, Mr. Clark noted that nearly all the rioters and looters were Negroes and added: 'When order is restored, as it will be, we shall have to go on living together, black and white, forever on the same soil. Excessive force, inhumane action, a bloodletting can only lead to further division and further violence,' he said. 'A nation which permitted the lynching of more than 4,500 people, nearly all Negroes, between 1882 and 1930, can ill afford to engage in summary capital punishment without trial in our turbulent times,' he declared. (N.Y. Times, Aug. 16, 1968, at 14, col. 1.)

One of the most notorious incidents of alleged police brutality is the Algiers Motel Incident during the Detroit riot of 1967. Dehumanization may have been a crucial factor in the slaying by police of three Negroes during a search for snipers, thought to be operating from the motel. The incident is discussed in J. HERSEY, ALGIERS MOTEL INCIDENT (1968), and A. J. Reis, *How Common is Police Brutality*, 5 TRANS-ACTION 10 (July-August 1968). For an example of the dehumanization mechanism at work in the psychology of the Negro rather than the policeman, *see* N.Y. Times, Aug. 4, 1968 at 37 for an article entitled "Wounded Policeman is Certain Ambushers Wanted 'Any 2 Cops.'"

[57] F. Allen, *Civil Disobedience and the Legal Order*, 36 U. CIN L. REV. 1 (1967) [hereinafter cited as Allen].

> ernment charged with the inspection of dwellings and the enforcement of building regulations are typically understaffed, lackadaisical, inefficient, and devoid of ingenuity, even when (as is often true) they are not literally corrupt or amenable to political pressures. . . . But many members of that same community reveal anything but indifference to the noise, inconvenience, and incidental law violations associated with demonstrations organized to protest the conditions of life in the slum tenements.

Sociological theory focuses on man's external, rather than internal, reality and provides an anatomy of the social setting and atmosphere which foster and release those psychological forces which trigger riots. For one sociologist [58] the six determinants of a riot are: (1) *structural conduciveness*—social conditions permissive of certain collective behavior, *e.g.*, an atmosphere in which a large minority population perceives violence to be a possible means of expression, as in urban ghettoes; (2) *structural strain*—a conflict in the values or norms of two groups, *e.g.*, inequality of opportunity for education, employment, and housing between blacks and whites; (3) *the growth and spread of generalized belief*—attributing certain characteristics to the source of the strain, *e.g.*, visible manifestations of the dehumanization mechanism; (4) *a precipitating factor*—an incident which is interpreted in terms of the generalized belief, *e.g.*, perceiving a lawful arrest or an innocent remark in terms of the hostile belief; [59] (5) *the mobilization of participants*—someone or many assuming responsibility for spreading communication through the group (psychology of the crowd) about a real or imagined incident; and (6) *the operation of social control*—to the extent it is weakened or absent becomes a determinant, rather than a counterdeterminant *e.g.*, overtaxing the administration of justice.

The nature of the setting in which riots occur is eloquently set forth by Pope Paul in language freed of the jargon of both sociology and psychology: [60]

> There are certainly situations whose injustice cries to heaven. When whole populations destitute of necessities live in a state of dependence barring them from all initiative and responsibility, and all opportunity to advance culturally and share in social and political life, recourse to violence, as a means to right these wrongs to human dignity, is a grave temptation.

An appreciation of the psychology of a riot mob and its sociological determinants forces the conclusion that additional or more severe sanctions would on balance only defeat their deterrent purpose. Individual "choice," essential to effective deterrence, is destroyed or sub-

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[58] N. SMELSER, THEORY OF COLLECTIVE BEHAVIOR (1963) [hereinafter cited as SMELSER].

[59] "For instance, a racial incident between a Negro and a white may spark a race riot. But unless this incident occurs in the context of a structurally conducive atmosphere . . . and in an atmosphere of strain . . . the incident will pass without becoming a determinant in a racial outburst." SMELSER, *supra* note 58, at 269, reproduced in Brown, *supra*, note 54, at 733.

[60] Encyclical on the Development of People, N.Y. Times, Mar. 29, 1967, at 23, col. 8.

stantially impaired when a person naturally loses his moral and critical facilities in a crowd. Authorization of execessive or lethal force to apprehend looters, for example, exacerbates "the structural strain" of a highly explosive situation and manifests the dehumanization mechanism at work. Similarly the denial of government employment or Federal benefits contributes to the structural strain by increasing the sense of alienation and frustration.

At a conceptual level, the argument for increased sanctions is untenable because the contagious lawlessness of a crowd undercuts the very basis of criminal liability upon which authority for imposing any sanction rests. That the offender, whether a rioter or police officer, was caught up in a riot at the time he committed the offense may be perceived as evidence casting doubt on voluntariness or mens rea. It might also be perceived as a temporary insanity "defense" or as a provocation depriving a "reasonable man" of his "capacity to conform his conduct to the requirements of the law." Whether the contagion of lawlessness that sweeps through a crowd and turns it into a riot is explained in terms of "anonymity," "dehumanization," "withdrawal of external nutriments," or an exacerbating social setting, counsel for an "offender" could develop a defense based on such concepts with relevant evidence specifically applicable to a particular defendant or group of defendants in a particular urban setting. However, proof of "commission during the course of a riot" should not automatically relieve an accused of criminal liability or be given statutory recognition as a mitigating circumstance. Understanding the effect of a riot on a participant's internal controls may explain but does not justify the automatic withdrawal or weakening of existing external controls; an expectation of reduced sanctions may serve as an invitation to participate in a riot and be perceived, in advance, as a toleration of violence.[61]

On balance, the argument that attendant circumstances of riot should serve as a mitigating factor offsets the repressive argument for using riot as an aggravating factor.

These arguments, applied to the police, compel the conclusion that more severe sanctions should not be authorized for abuses of discretion or excesses of force which escalate violence during riots. But neither should policemen be relieved of criminal liability for such excesses even though they operate under severe psychological and physical stress during a riot. Moreover, because such abuse by a professionally trained force, when coupled with an inadequate opportunity for the redress of community grievances, real or imagined, causes riots, the

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[61] [W]idespread violence—whether it is civil disobedience, or street riots, or guerilla warfare—will, I am persuaded, lead to repression. It will provide the white community with a reason for refusing to endure the discomfort and burden of the vast job of restitution and reparation.

* * * * *

Punishment . . . involves risks. . . . [I]t should be undertaken only after all efforts to persuade, patiently applied, have been exhausted. But the toleration of violence involves, I think, even greater risks, not only of present damage and injury but of erosion of the base of an ordered society. The point, I think, is not whether the aggressor should be halted and punished, but how; and it is here that moderation, consideration, and sympathetic understanding should play their part. (A. FORTAS, CONCERNING DISSENT & CIVIL DISOBEDIENCE 39, 47 (1968)).

normal sanctions for such abuses must be strictly enforced if the riot problem is not to be further exacerbated.[62]

Similar reasoning leads to a middle position with regard to sanctions for riot-connected crimes committed by civilian members of the community. Again psychological and sociological explanations for stealing, burning, and assaults during a riot cannot serve to justify such conduct. But recognition of the debilitating effect of the riot environment on a participant's internal restraints and of the claim of rioters that the rule of law has taken precedence over the rule of justice does lead to the realization that a repressive reaction to riot-connected crimes, in the form of sanctions more severe than usual, would only aggravate the problem the law seeks to alleviate. In other words, an undue emphasis on the retributive function of the criminal law with respect to riots would be counterproductive and would defeat the more important function of deterrence.[63]

To the extent then that the criminal law has a role to play in riot control it must, in designing substantive offenses, procedures, and responses, be guided by a goal of achieving *justice* and order which is the guarantee of law and order.[64]

V. Where Does This Analysis Lead? Tentative Conclusions

Briefly, without detailed elaboration, and primarily for purposes of giving some focus to the deliberations of the Commission I conclude:

(1) There is no need for and there ought not to be a separate substantive offense of "riot" in the proposed Federal Criminal Code.

(2) An offense occurring during the course of a riot, however that word might be defined, ought not to carry with it authorization for more severe post- or pre-conviction sanctions than are authorized for the same offense during normal periods.

(3) The police should be held responsible for using excessive force under color of law during riot periods just as they are or should be during more normal periods. Thus chapter 6 on justification and excuse of the proposed Code should contain no special exception for relieving the police of their professional responsibility and obligation to avoid excessive force, including deadly force during riot periods.

(4) If the present scope of Federal jurisdiction employed in the Civil Rights Act is retained, it might be advisable to draft a statute that makes it a violation of the Code to refuse or fail to obey an order to disperse or move, where such movement is feasible and when made by a person known to be a policeman lawfully engaged in controlling, regulating, or preventing a riot.

Unlike any of the preceding proposals, this and those that follow would require a definition of riot. Riot, for this and the other suggested provisions, ought to be defined in functional terms, *i.e.*, in terms of substantially large numbers of persons, constituting a crowd or a mob, threatening or causing violence or threatening or causing unreasonable interference with lawful public or private activity, with con-

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[62] Kerner Report, *supra* note 7, at 157–168.

[63] The deterrent capacities of the criminal law rest, as has been noted, "on the moral authority of the law." Allen, *supra* note 57, at 120.

[64] "The source of police strength in maintaining order lies in the respect and good will of the public they serve." Kerner Report, *supra* note 7, at 272.

stitutionally guaranteed rights, and/or with lawful efforts to safeguard these pursuits or rights. Thus riot would be defined to include (a) public disturbance; (b) involving imminently serious personal or property damage, or obstruction of law enforcement or other governmental authorities; (c) by a substantial number of people, possibly set forth in terms of an assemblage of 12(?) or more persons. Except for the number involved, this follows the Federal definition of riot. Though I favor finding a form of words like "substantially large number of people" rather than a specific number, further research may lead to the conclusion that any such phrase would be too indefinite to be constitutional. In that event I would agree with those who currently favor the number 12 because a Federal concern with riot should be more restricted than State "riot acts" [where three is often the magic number] and because even State acts should contemplate disturbances of such an order as normal police patrols cannot handle.

Of course once the suggestion to create an offense of failure to obey lawful orders is scrutinized it becomes evident that, to the extent such a provision is desirable, it would be equally desirable with regard to all emergency settings, both natural and man made, in which police and firemen, for example, are being knowingly hindered in carrying out their duties. And once that point is reached it becomes even harder to distinguish the emergency setting from any other more normal setting in which law enforcement or other officials are being purposely hindered in carrying out their responsibilities to the community. The question thus remains whether that which is proposed is peculiarly suited to or required by riots. If the answer is that such a provision should cover more than riot situations, the need to define riot disappears.

(5) Likewise, involving the same jurisdiction, and in an effort to supplement the failure of State and local governments to police the police and to assist them in maintaining police performance at a high professional level in an effort to safeguard them, the police, from violence and to reduce the overall extent of violence, it would be advisable to consider a statute which makes it a violation of the proposed Code (*e.g.*, the crime might be called *abuse of power under color of law*) for law enforcement officials to use force during the course of a riot in excess of that justified in chapter 6 of the proposed Code. Here again, it becomes obvious that if such an offense should be established, its application need not be limited to periods of "riot," however that word will come to be defined.

Such a statute might take into account the recommendations in the 1961 Report entitled "Justice" of the United States Commission on Civil Rights. At pages 112–113, the Commission recommended:

> That Congress consider the advisability of enacting a provision of the United States Criminal Code which would make the penalties of that statute applicable to those who maliciously perform, under color of law, certain described acts including the following:
>
> (1) subjecting any person to physical injury for an unlawful purpose;
>
> (2) subjecting any person to unnecessary force during the course of an arrest or while the person is being held in custody. . . .

(4) subjecting any person to violence or unlawful restraint for the purpose of obtaining anything of value;

(5) refusing to provide protection to any person from unlawful violence at the hands of private persons, knowing that such violence was planned or was then taking place;

(6) aiding or assisting private persons in any way to carry out acts of unlawful violence.

That Congress consider the advisability of [making] any county government, city government, or other local governmental entity that employs officers who deprive persons of rights protected by that section, jointly liable with officers to victims of such officers' misconduct.

(6) Again relying on the jurisdictional base of the Civil Rights Act of 1968, it might be advisable to consider an offense of *incite-to-riot* which would be very tightly drawn to avoid infringements on freedoms of speech and assembly. It would be a felony for any person to incite or organize a riot having used interstate facilities with the intention to do so, and only if the riot occurs or the course of a preexisting riot is furthered by the person's activities. For example, had Reverend Abernathy appeared on television at the time of the Miami Convention riots and urged the rioters on rather than ask them, as he did, to "cool it," he would have violated such a statute. Here again, why should such a provision, if desirable, be restricted to riot situations; why not have it cover incitement to commit any violent crimes?

(7) It would be advisable to consider a provision which would make it a felony for any person to manufacture or transport incendiary devices for use in a riot, with the burden of establishing the existence of a lawful purpose on the defendant. Here again one would ask—if such a provision were drafted, why should its application be restricted to riot situations?

(8) It would be advisable to consider a provision not unlike that of the Riot Act of 1714, which made provision for the compensation of those who suffered damage as the result of a riot. A provision for *compensating victims, not otherwise compensated* for physical and property injuries resulting from violent crimes during the course of a riot, might serve a reduction-of-explosivity function by at least partially restoring the helpless victims of a riot to status quo ante and providing a hopeful outlet for legitimate grievance. It would be made clear that such a provision is not designed to compensate those who engage in violent activity but rather that it be seen as one way of reducing the likelihood of increased civil disorder and violence resulting from an increased sense of hopelessness, futility, and alienation that is so characteristic of those populations in which riots are triggered.

In setting forth these tentative conclusions, I have been guided not only by where my detailed analysis of existing legislation and the problem leads me but also by two goals which I believe any Code provisions ought to be designed to serve:

(1) prevention of activities likely to spark the explosive forces which have been building, primarily in crowded urban settings; and

(2) reduction of the explosive potential of these environments.

ADDENDUM

A. *There is No Need For and There Ought Not To Be a Separate Substantive Offense of "Riot" in the Federal Criminal Code* [*Part III*][1]

The following arguments are submitted to support this conclusion:

(1) Any definition of riot for purposes of establishing criminal liability must confront the challenge of having to define the line past which dissent and protest become an intolerable burden on a minimum need for order. How is a riot to be distinguished from lawful demonstrations, from the exercise of liberties which require and deserve protection? Riots are often a form of protest, a dramatic reflection of dissatisfaction with either governmental or private institutions: they are often an expression of undefined but nonetheless real frustration and hostility. To justify making criminally liable the participants or architects of group, crowd, or mob behavior, there must be something more than protest, more than vague or precise expressions of discontent. (*See Brandenburg* v. *Ohio*, 395 U.S. 444 (1969)).

(2) That "something more" is either violence or interference with lawful pursuit. Justification for a separate substantive offense of "riot," particularly in a Federal Criminal Code, would rest initially on a determination that the existing body of State and Federal criminal offenses are insufficient to cover all forms of disturbing conduct which are the essence of a riot. Yet, an illustrative selection of substantive offenses which can be found in State Criminal Codes suggests the wide range of potentially riot-related conduct which is already proscribed. In addition, most State Codes do make special provision for riot, unlawful assembly or civil disorder. Therefore, with or without a riot provision the inventory of State substantive offenses are sufficiently complete to enable State and local officials to invoke the criminal process against all persons who make, threaten to make, or are trying to make a "riot" something more than peaceful protest. And when there is added the Federal arsenal of substantive offenses, especially as it is contemplated in revision, the need for a separate "riot" offense becomes even more questionable. If there is a gap in State or Federal legislation, and there certainly is in practice, it is to be found in the failure of the process to police the police, to assure the orderly administration of justice during periods of mob action.

B. *An Offense Occurring During the Course of a Riot, However That Word Might be Defined, Ought Not To Carry With It Authorization for More Severe Post- or Pre-conviction Sanctions Than Are Authorized for the Same Offense During Normal Periods* [*Part IV*]

(1) Under the Civil Rights Act of 1968, law enforcement agents "engaged in suppressing a riot" or "restoring law and order" are exempted from criminal liability for willfully and forcefully injuring or intimidating anyone exercising enumerated Federally protected civil rights. To the extent that the police would be deterred from using excessive force were there no exemption, the existence of such an exemption operates as official authorization for increasing pre-conviction

[1] All bracketed references are to the Consultant's Report on riot offenses, *supra*.

sanctions for "rioters." Also, Congress has authorized increased post-conviction sanctions—ineligibility for Federal employment for 5 years. Such increased sanctions are not warranted either for retributive or deterrent purposes.

(2) Conceptually, pre-conviction sanctions are not to serve a retributive function since there is no place for punishment prior to a finding of guilt. Increased post-conviction sanctions for retributive purposes may be an appropriate response; yet, retribution does not appear to be a goal of the proposed Federal Code. Its general purposes section omits retribution as an official objective of post-conviction sanctions.

(3) More severe sanctions will tend to undermine the law's deterrent impact. The deterrence argument rests on the assumption that more severe sanctions will foster greater consideration and foresight among "potential offenders" caught up in a crowd so that they will choose not to commit a crime or choose more "normal periods" for their criminal activity, *i.e.*, periods when the usual deterrent forces at work have not been weakened.

To the extent that the breakdown, by riot, of an already overtaxed system of justice is a consequence itself to be deterred, and to the extent such a consequence triggers a geometric progression in violations, the most direct deterrent is to increase the availability of properly trained law enforcement manpower, not sanctions. Contingency plans and emergency procedures can insure that the administration of justice is not paralyzed by a riot and that it can continue to function at the "normal" level of deterrence and with due regard for constitutional safeguards. Such plans can also serve to reduce the likelihood of police, as well as judicial, panic and thus deter excesses of force like the police brutality characterized by the Walker Commission as "police riot."

There is also a mistaken assumption about the concept of "choice." What is known about crowd psychology and the sociology of a riot suggests that increased sanctions, particularly pre-conviction ones, would tend to increase over time the frequency of riots or the extent of violence associated with them. These theories also cast doubt on voluntariness or mens rea, fundamental requisites of those offenses for which a rioter might be held criminally responsible. Once merged in a group, a law abiding person seems temporarily to lose his critical and moral standards and thereby becomes prone to violence and capable of other unlawful activity. External nutriments that, in psychoanalytic terms, are essential to the work of both ego and superego may be weakened in their efforts to control hostile and aggressive id impulses. Related to anonymity and the breakdown of internal controls is a psychological defense mechanism called "dehumanization." Through dehumanization a person stops identifying with others: he no longer sees people as essentially similar to himself. His relationship becomes stereotyped and rigid, *i.e.*, perceptions of individuals lump them into groups labelled "black," "nigger," "whitey," "cops," and "enemy." They are more likely to lead to excesses of force in either direction than to sympathy and cooperation.

Hence, individual "choice," conscious or unconscious, essential to effective deterrence, may be destroyed or substantially impaired when a person naturally loses his moral and critical faculties in a crowd. Authorization for pre- and post-conviction sanctions exacerbates "the structural strain" of a highly explosive situation.

C. *Proposed Changes To The Existing Federal Criminal Code*

(1) *Incite to riot; 18 U.S.C. §§ 2101, 2102.*—The major effect of this statute as a supplement to State law would probably be to suppress free speech, legitimate protest activity, and discussions of grievances. Under the Supreme Court's recent decision in *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), as well as earlier decisions, it is doubtful if the provision would withstand attack under the first amendment of the Constitution. Even if constitutional, the intent requirement for proof of the state of mind of an individual when he travels in interstate commerce presents evidentiary difficulties which cast doubt upon the provision's capacity to fulfill its function. Furthermore, not only may the proscription of the attempt to commit an attempt—and this in fact constitutes the statute in question—be unconstitutional but also, to the extent that this statute proscribes simple attempts, it would be superfluous since general attempt provisions, applicable to every Federal offense, have been proposed for the revised Code. Only one substantive offense—inciting an *actual* riot—seems to be left as a possible appropriate Federal offense.

In the alternative, the following provisions should be amended as follows (added language is italicized; deletions are in brackets):

> § 2101. (a) (1) Whoever travels in . . . commerce or uses any facility of . . . commerce . . . with intent—
>
> (A) to incite a riot *which actually occurs;* or . . . and who either during the course of any such travel or use or thereafter *willfully* performs or attempts to perform any other overt act for any purpose specified in subparagraphs (A), (B), (C), or (D) of this paragraph—
>
> Shall be fined. . . .

As the statute reads, the mental element ("with intent . . . to incite," *etc.*) attaches only to the travel or use of any facility of commerce, but not to the second overt act. If the second act follows travel or use, there is no indication from the statute what mental state, if any, must accompany the second overt act.

* * * * *

> (c) A judgment of conviction or acquittal on the merits under the laws of any State *or under a federal prosecution* shall be a bar to any prosecution hereunder for [the same act or acts] *substantially the same act or acts or the same underlying conduct.*

This provision seeks to avoid the possibility of double prosecution for the same criminal conduct; yet, the statute does not speak to the situation where a Federal conviction or acquittal is followed by a State prosecution for the same act. Also, the statute uses the imprecise terminology "same act" to describe the instances where reprosecution in a Federal court is barred.[1]

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[1] In a Memorandum to the United States Attorneys, former Attorney General, William P. Rogers, while discussing prosecutions under both Federal and State law for the same act or acts, said: ". . . no federal case should be tried when there has already been a state prosecution for *substantially the same act or acts* . . ." (Emphasis added.) *See* Department of Justice Press Release, April 6, 1959, as reprinted in DONNELLY, GOLDSTEIN & SCHWARTZ, CRIMINAL LAW 398–399 (1962). *See also* MODEL PENAL CODE § 1.08 (Tent. Draft No. 5, 1956), dealing with method of prosecution when conduct constitutes more than one offense. Language is in terms of "*same conduct*" or "*single criminal objective.*"

Section (d) admonishing the Attorney General to proceed as rapidly as possible with prosecutions for violations of the Act, and in cases of failure to prosecute requiring him to submit a written report to Congress stating the reasons for not prosecuting, should be repealed. This provision constitutes an unwarranted restriction on the traditional discretion of the Attorney General to invoke or not to invoke the criminal process. Also, such a provision places a substantial burden upon the Justice Department in situations perhaps already the most trying and difficult for law enforcement agencies. In the alternative, some sanction or procedure for enforcing this mandate ought to be provided.

Section (e) exempting from the statute legitimate activities and objectives of organized labor should also be eliminated. Section (b) already exempts from prosecution advocacy of ideas or expression of belief not involving advocacy of violence. And specifically exempting the activities of organized labor might be taken to imply that other lawful activities are barred under this statute as to other organized interest groups, *e.g.*, students, black organizations, *etc.*

> § 2102. (a) As used in this chapter, the term "riot" means a public disturbance involving (1) an act or acts of violence by one or more persons part of an assemblage [of three or more persons,] *of a substantially large number of persons*, which act or acts shall constitute *incitement to imminent violence or other lawless action*, [a clear and present danger of] or shall result in, damage or injury. . . .

Riot ought to be defined in functional terms, *i.e.*, in terms of substantially large numbers of persons, threatening or causing violence or threatening or causing unreasonable interference with lawful public or private activity. If "substantially large number of people" is found to be too indefinite to be constitutional, the number of people could be possibly set forth in terms of an assemblage of 12 or more persons. A Federal concern with riot should be more restricted than State "riot acts" (where three is often the magic number) and because even State Acts should contemplate disturbances of such an order as normal police patrols cannot handle. The number "three" is arbitrary and is not responsive to the mob character that prompts the promulgation of such a statute.

> (b) As used in this chapter, the term "to incite a riot," or "to organize, promote, encourage, participate in, or carry on a riot," [includes, but] is [not] limited to, urging or instigating other persons to riot *when such riot is imminent;* [but] *it* shall not be deemed to mean the mere oral or written (1) advocacy of ideas or (2) expression of belief, . . .

In order to avoid first amendment difficulties, a requirement should be added that the proscribed *speech* be an "incitement to imminent lawless action." [2] The statute does contain the phrase "clear and present danger," but that refers to the danger that the *violence* or threat of violence on the part of the *rioters* will cause injury to person or property. Furthermore the opinion in *Brandenburg* v. *Ohio* 395 U.S. 444

[2] This is the language used by the Court in its most recent directly related decision: *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

(1969) implicitly (as do the concurring opinions explicitly) casts doubt on the "clear and present danger" test.

(2) *To transport or teach the use of, weapons knowing, having reason to know, or be intending that the same will be employed in a civil disorder; obstructing police during a civil disorder; 18 U.S.C. §§ 231–232.*

> § Sec. 231. (a)(1) Whoever teaches or demonstrates to any other person the use, application, or making of any firearm or explosive or incendiary device, or technique capable of causing injury or death to persons, knowing or having reason to know or intending that the same will be unlawfully employed for use in, or in furtherance of, a civil disorder *and which teaching or demonstration constitutes an incitement to imminent violence or other lawless action* . . . ; or
>
> (2) Whoever transports or manufactures for transportation in commerce any firearm, or explosive or incendiary device, knowing or having reason to know or intending that the same will be used unlawfully in furtherance of a civil disorder, *and who fails to establish the lawful object of the manufacture or transport of these potentially lethal devices;* or . . .

The first two clauses of the statute leave vague whether a civil disorder must be in progress or even need to occur. To the extent speech is proscribed by the teaching and demonstrating clause, first amendment issues are posed which could have been avoided by restricting its application to instances of "incitement to imminent lawless action." [3] And in the second clause, where speech is not involved, the deterrent function would be better served by specifically placing upon the defendant the burden of establishing the legitimacy of the manufacture and transport of potentially lethal devices. A general "gun" control law could eliminate the necessity for this second clause altogether.

The third clause, which is designed to protect police and firemen in the performance of their duties, should be repealed. On a broader policy level, since local and State law covers any given activity that would actually interfere with the suppression of a disturbance there is no need for the provision dealing with obstructing the police and other officials. And to the extent interference with Federal officials might be involved, the proposed general provision of the Federal Criminal Code concerning interference with Federal officials, though not directly concerned with riots, should be sufficient.

In the alternative, and to specify what mental state must accompany the act that impedes or interferes with the police and thus exempt accidental, innocent, or even well motivated conduct, the clause should read as follows:

> (3) Whoever commits or attempts to commit any act, *with the intent* to obstruct, impede, or interfere with any fireman or law enforcement officer lawfully engaged in the lawful performance of his official duties incident to and during the commission of a civil disorder. . . .

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[3] *See* note 2, *supra.*

Finally, no distinction should be made between "civil disorder" and "riot" in definition or in label in the incite-to-riot section. Thus, the section ought to be repealed in its entirety.

(3) *To willfully injure, intimidate, or interfere with during a riot, any person engaged in commerce: 18 U.S.C. § 245.* This statute should be repealed. It is apparently designed to protect businessmen during the course of a "riot" from injury, intimidation, or interference. It is difficult to conceive of any conduct covered by "injure," "intimidate," or "interfere" that is not otherwise covered by existing State, local, or Federal offenses such as assault, burglary, criminal trespass, *etc.*

In the event total repeal is unacceptable, the following amendments are suggested:

Eliminate subsection (b)(3) which limits the protection given by the statute to "riotous periods." The right to engage in business should be protected in the same way as the other civil rights during peaceful "normal" periods as well.

Eliminate subsection (c), of section 101 of the Civil Rights Act of 1968, specifically exempting the police from liability for any acts or omissions when they are engaged in suppressing a riot. Granting such immunity to law enforcement officers defeats the very goal, the reduction of violence, Congress sought to serve. Exemptions may be perceived not only as an opportunity, but also as an explicit license for law enforcement personnel to violate any of the Civil Rights provisions.

(4) *Post-conviction sanctions—5 U.S.C. § 7313.*—This statute ought to be repealed. Increased post-conviction sanctions, like ineligibility for Federal employment, would serve only to exacerbate the frustrations of the rioters over their sense of powerlessness and alienation. Also, since "riot" is broadly, if not vaguely, defined in both State or Federal legislation, individuals may be deprived of government employment for exercising their first and fourteenth amendments right to free speech. Finally, power is placed in the hands, not of judges, but of agency heads who may arbitrarily apply a sanction which more often than not is likely to conflict not only with the deterrent but also the rehabilitative goal.

B. *Suggested Revision of Proposed Provisions*

(1) *Commentary.*—As has been previously indicated, there is no need for a special substantive offense of "riot." Moreover, some of the proposed sections like section 1804(1) should not be restricted to "riots," but ought to be applicable as well to all emergency settings in which police and firemen, for example, are being knowingly hindered in carrying out their duties. Similarly, any section imposing liability on law enforcement agents for illegalities in their behavior should not be limited in its application to periods of "riot."*

In the event some statutory provisions directly related to riots are deemed desirable the following amendments to the proposed provision may be considered (additions are italicized; deletions are in brackets):

§ 1801. Riot Defined.—Instead of defining riot with reference to

*See proposed section 1521.

a specific number of people which is somewhat arbitrary, the statute may use "substantially large number of people" which interpretation could be left to the discretion of the courts. Were such language to make such a statute void for vagueness, 20 might be a sufficiently large number to restrict its application to "mob" action. Thus, the statute might read:

> For the purposes of this section, riot means a public disturbance involving a substantially large number of people, but not less than 20.

§ 1801(1)(a). Inciting to Riot.—Any statute along this line should be tightly drawn to avoid infringements on freedom of speech and assembly. A riot actually ought to take place before liability accrues or a riot ought at least to be "imminent." (*See Brandenburg* v. *Ohio*, supra). A provision to this effect should enhance the chances of successfully meeting a constitutional test. The language "and under circumstances presenting an immediate substantial likelihood" seems adequate to the task and as restrictive as the "imminent" language of *Brandenburg*. The statute might read:

> A person is guilty of inciting to riot if, with intent to cause, continue, or enlarge a riot, when a riot actually occurs, or under circumstances presenting an immediate substantial likelihood thereof. . . .

§ 1801(1)(b). Leading a Riot.—To the extent that speech may be involved, this provision is subject to the same comments made in reference to the statute above (*inciting to riot*). The provision omits language designating the required mental state apparently without any reason. Perhaps conciliatory language followed by an increase in riotous activity might be construed as "leading a riot." Thus, the statute might include "purposefully."

The identification of "leaders," for purposes of criminal liability, is very difficult even in more structured groups, as in a corporation or labor union; problems were confronted but never really resolved by the drafters of the Model Penal Code in its sections and commentaries concerned with corporate criminal liability. Any distinction between "inciting to riot" and "leading a riot" is bound to contribute to the ambiguity of an already ambiguous statute and should therefore be eliminated from the proposal.

§ 1802. Arming Rioters.—A distinction should be made between "manufacturing and transportation" of firearms, incendiary devices, *etc.* and "teaching" others to manufacture. In the former, for deterrence purposes, the burden should be put on the defendant to establish the legitimacy of the manufacture and transport of potentially lethal devices. In the latter, teaching others in "furtherance of a riot" is sufficiently imprecise to be open to constitutional challenge under the first amendment. The statute might read:

> A person is guilty of a Class C felony if he:
>
> (i) manufactures, transports, or sells firearms, explosive or incendiary devices for use by rioters, unless he establishes the lawful object of such manufacture, transport, or sale; or
>
> (ii) teaches others to manufacture or use such devices in furtherance of a riot which is imminent or which actually occurs.

My strong inclination in light of *Brandenburg* would, however, be to leave out (ii).

§ 1804. Law Enforcement Riot Powers.—This section should make knowing physical possibility of responding to requests to disperse a requisite of liability. Such a requirement comports with the tradition that a person is not held criminally responsible for an act of omission when it is impossible for him to perform. This is peculiarly relevant to riot situations during which escape or dispersal routes are either nonexistent, not visible to those ordered to disperse, or quickly closed in panic by the mob. A person who is either physically incapable of carrying out the order or is without knowledge that permits his following the order should not be subject to criminal liability. Further, the exemption granted to news reporters and photographers not physically obstructing law enforcement efforts to cope with the riot should be extended to *all persons* under similar circumstances:

> No such order or constraint shall apply to any person not physically obstructing law enforcement efforts to cope with the riot. Failure to obey any such valid order which it is knowingly possible to perform constitutes an infraction. . .

Illegalities in Riot Control.*—Law enforcement personnel liability for illegalities in their dealing with the public ought to be the same at all times—no distinction should be made between "normal periods" and periods of emergency. Lesser sanctions during riotous periods might be taken to imply an underlying license to use greater degrees of force during riots thus limiting the deterrence of violence. Greater sanctions are as well ill advised; riotous situations cast doubt on mens rea to the extent that the police, like the mob, are subject to the same breakdown of internal controls.

The proposed statute, as it now reads, tends to discriminate in favor of news reporters in relation to others. Police liability for excessive or otherwise unauthorized use of force has no relationship to the category of person abused, newspaperman or others, so long as that person is pursuing a lawful activity or if engaged in unlawful activities greater force than authorized is employed. Further, the statute has no intent or degree of culpability requirement; and it applies the same sanction to two offenses of substantially different degrees of seriousness—*i.e.*, destroying a photographer's equipment on the one hand, and employing a gun in a manner to cause death or serious injury on the other. This statute might read:

> A law enforcement officer is guilty of a Class C Felony if in connection with riot duty he purposefully:
>
> (i) assaults any person pursuing a lawful activity, with risk of serious bodily injury; or otherwise employs excessive force even against persons engaged in unlawful activity; or (the rest is deleted.)
>
> (ii) contrary to superior orders, shoots a gun or otherwise employs excessive force
>
> Superior officers who give such orders are subject to liability under this provision.

*The consultant is referring to an initial draft of a riot provision proscribing police excesses. The provision was eliminated from the Study Draft since it is blanketed by the proposed section 1521.

It should be noted that the suggested amendments to the proposed statute in no way eliminate traditional defenses, such as self defense, on the part of law enforcement agents.

(2) *Proposed Provisions Revised.*

I. *Riot Offenses*

(a) *Riot Defined.* For the purpose of this section, riot means a public disturbance involving a substantially large number of people, but no less than 20, manifestly endangering persons or property, or obstructing authorized law enforcement or other governmental functions.

(b) *Inciting to Riot.* A person is guilty of inciting to riot if, with intent to cause a riot, a riot actually occurs or if, with intent to enlarge a riot, he urges or provokes a group of 20 [12?] or more people to engage or continue in a riot, or if he participates in planning a riot which is imminent or which actually occurs, or if in the course of the riot he issues commands, instructions, or encouragements in furtherance of the riot. Inciting a riot is a Class C felony.

(c) *Arming Rioters.* A person is guilty of a Class C felony if he:

(i) manufactures, transports, or sells firearms, explosive or incendiary devices for use by rioters, unless he establishes the lawful object of such manufacture, transport, or sale.

(ii) teachers others to manufacture or use such devices in furtherance of a riot which is imminent or which actually occurs.

(d) *Law Enforcement Riot Powers.* Law enforcement authorities are empowered during a riot or when one is immediately threatened to issue reasonable orders to disperse, to move, or to refrain from specified activities in the immediate vicinity of the riot, and to enforce such orders by moving or restraining persons participating in the riot or indistinguishably mingled with the participants. Such orders shall be issuable only by an official having supervisory authority [over at least—men]. No such order or constraint shall apply to any person not physically obstructing law enforcement efforts to cope with the riot. Failure to obey any such valid order which is knowingly possible to perform constitutes an infraction. "Law enforcement authorities," for the purpose of this subsection, includes police, firemen, and military personnel ordered to riot duty.

(e) *Illegalities in Riot Control.* A law enforcement officer is guilty of a Class C felony if in connection with riot duty he purposefully:

(i) assaults any person pursuing a lawful activity, with risk of serious bodily injury; or otherwise employs excessive force even against persons engaged in unlawful activity; or

(ii) contrary to superior orders, employs any weapons or technique in a manner likely to cause death or serious injury. Superiors who give such orders to use excessive force are subject to liability under this provision; or

(iii) removes, covers up, or tampers with any official identification badge.

(3) *Postscript.*—At the risk of repeating a point, even a good one, too often, I urge again that the opportunity not be lost which a full scale revision of the Federal Criminal Code provides for presenting, if not enacting, an internally consistent document. Therefore, to the

extent any of the proposed provisions in paragraph (2), *supra*, as revised or otherwise, identify conduct which ought to be subject to criminal liability, it is conduct which is not peculiarly related to riot settings or to the threat or riot and therefore does not warrant separate treatment. The Court's decision in *Brandenburg* in many ways reenforces the argument which underlies the position taken in the report, *supra*.

CONSULTANT'S REPORT
on
FIREARMS AND FEDERAL CRIMINAL LAW
(Zimring; July 2, 1969)

The most basic distinction in any discussion of present or proposed Federal criminal laws dealing with firearms is between (1) the questions raised by conduct that might be prohibited by Federal law only because guns are involved and (2) the cluster of issues that involve gun use in conduct that would be considered criminal if guns were not used. Laws and proposals covered in the first category are those that attempt specifically to deal with the possession, manufacture, sale, or carrying of guns as an area deserving regulation. This category of laws can be considered regulatory only in the sense that Federal narcotics laws, as well as the pure food and drug laws, are considered in the category of regulation, because the conduct prohibited by drug and gun controls is considered to be seriously antisocial and the punishments that accompany conviction for regulatory offenses in this area may, accordingly, be severe. Crimes in the second category include all Federal crimes of violence.

I. The Federal Role in Firearms Regulation

A. *Federal Firearms Control Laws, 1927–1969*

Federal regulation of firearms has been the subject of congressional action on five occasions over the past 45 years. In 1927 Congress closed the mail to handguns.[1] Seven years later the National Firearms Act of 1934 imposed a fairly comprehensive Federal regulation of machineguns, short-barreled or sawed-off rifles and shotguns, silencers, and other unconventional concealable firearms.[2] That law imposed a heavy tax on the transfer of most such weapons and an occupational tax on the manufacturers, importers, and dealers of weapons covered by the Act. All manufacturers, importers, and dealers were required to register under this Act, as were all people who acquired covered weapons, unless their acquisition met with the other requirements of the Act, which meant that they would have to pay the transfer tax. In 1968, in *Haynes* v. *United States*,[3] the Supreme Court ruled that the fifth amendment privilege against self incrimination invalidated prosecution for failure to register or for possession of an unregistered gun under the National Firearms Act of 1934 because the registration provision compelled an individual to incriminate himself by admitting unlawful possession. Later in 1968, the 1934 Act was amended to provide that information submitted in registrations could not be used in

[1] 18 U.S.C. § 1715.
[2] C. 757, 48 Stat. 1236.
[3] 390 U.S. 85 (1968).

any prosecution against the registrant and the Act's coverage was extended to require everyone, not just the illegal possessor, to register covered firearms.[4]

The number of firearms in civilian hands in the United States covered by the National Firearms Act of 1934 is quite small; in some measure this may be a tribute to the success of that law in taking machineguns out of general circulation and probably reducing the production of short-barreled and sawed-off shotguns and rifles.

The Federal Firearms Act of 1938 [5] covered all firearms but superimposed only a thin veneer of Federal regulation on the sale and possession of firearms in the United States. As enacted in 1938, this law required firearms manufacturers, importers, and dealers to obtain a Federal license before shipping firearms in interstate commerce. The annual fee for such license was $25 for manufacturers and importers and $1 for dealers. Additional provisions barred dealers and manufacturers from knowingly shipping a firearm in interstate commerce to a felon, fugitive from justice, person under indictment, or anyone not having a license to purchase a particular form of firearm, if such a license was required by local law. Felons and others who were considered prohibited classes were also forbidden to ship or receive the firearms that were or had been in interstate commerce. The Act also prohibits knowingly shipping or receiving in interstate commerce any stolen firearms, or any firearms with altered serial numbers. In addition, licensed dealers under the Federal Firearms Act were required to maintain permanent records of firearms received and sold.

For 30 years this was the master plan of Federal regulation of firearms in the civilian market. By almost any criterion, the Act was not a success. Only a minority of the States have laws requiring firearm licenses, so that the attempt to use Federal standards to strengthen State regulation could only be, even in theory and with maximum enforcement, a partial success.[6] Even where local law required licenses for firearm purchases, any person who paid $1 for a Federal firearm dealer's license could be shipped a firearm without regard to such a State law. Even more important, the requirement that criminal liability under the statute should be based on the knowing shipment of a firearm to a prohibited person was not accompanied by a duty to inquire so that the effect of the law dissolved in its own mens rea requirement.

The only provision in the Federal Firearms Act of 1938 that was drafted in a manner that could have provided for effective regulation—the requirement that dealers keep records on firearms received and sold—also proved less than an unqualified success. Most records were sloppy, rarely used, and with respect to firearms such as .22-caliber weapons, for which serial numbers did not have to be provided, were of no use in the detection of crime. In 1957, the Treasury Department dropped its requirement that records be kept on ammunition sales.[7]

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[4] Pub. L. No. 90-618, 82 Stat. 1229, 1232 (1968).

[5] C. 850, 52 Stat. 1250 (1938), repealed, Pub. L. No. 90-351, 82 Stat. 234 (1968).

[6] *See* Newton and Zimring, Firearms and Violence in American Life 100 (1969) [hereinafter cited as Newton & Zimring].

[7] 23 Fed. Reg. 343 (1958).

In 1968, Congress passed two major pieces of firearm legislation. The first installment of recent congressional firearms control law was a section of the Omnibus Crime Control and Safe Streets Act of 1968,[8] which provided that the receipt, possession, transportation in commerce, or affecting commerce, of firearms other than shotguns and rifles by felons, veterans who are other than honorably discharged, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship is a Federal crime.[9]

In October of 1968, the Gun Control Act of 1968 [10] was passed, revising the omnibus crime bill firearms provision to extend the coverage of Federal regulations to all firearms (except antique firearms, hunting shotguns, *etc.*, found particularly suitable for sporting purposes) and further providing that no person except Federally licensed importers, manufacturers, and dealers could ship, transport, or receive any firearm or ammunition in interstate commerce. Other provisions of this new law, which retains some features of the old, include a tightening of the standards for Federal firearm licenses, a provision that Federal firearm licensees may not sell rifles or shotguns or ammunition therefor to anyone they know or have reason to believe is under 18, or handguns or ammunition therefor to anyone under 21, the requirement that all firearms must have serial numbers, and a ban on the sale of firearms to any person who the seller knows or has reason to believe is a nonresident of the State in which the sale is taking place.

In addition to these and other regulations dealing principally with the transfer of firearms from one owner to another and a ban on destructive devices, the Act contains a ban on the import of firearms unless the firearms are, to the satisfaction of the Secretary of the Treasury, particularly suitable for or readily adaptable to sporting purposes, a ban on the importation of surplus military weapons, and criminal penalties for the possession, receipt, or transfer of a firearm when the transferee intends to use it in crime.

Proposals for a national system of firearms regulation for firearms ownership licensing, or to establish minimum standards of licensing and regulation to be imposed on State governments have been discussed in the last few years but have not been enacted.

The present complex of Federal regulations would appear to have three objectives. With respect to machineguns and other destructive devices, the Federal role in the regulation of such weapons is primary, the objective is to remove such weapons from the civilian market, and efforts toward that objective seem to have been successful.

The theory behind the ban on interstate shipment of weapons and sales of firearms to nonresidents is that of Federal control as a support to State regulation. For many years, interstate movement of firearms has frustrated State efforts to enact rigorous systems of firearms control. In Massachuetts, where restrictive handgun licensing has been in effect for many years, a study showed that 87 percent of the firearms confiscated as a result of use in crime came from other

[8] Pub. L. No. 90–351, 197 (1968).
[9] *Id.*
[10] Pub. L. No. 90–618, 82 Stat. 1213 (1968).

States, and similar studies by the Task Force on Firearms of the National Violence Commission show a similar pattern to be true in New York City, with restrictive handgun licensing, and Detroit, Michigan, with a permissive handgun licensing system and a geographic vulnerability to the inflow of weapons from Toledo, Ohio.[11] Because purchasers can easily misrepresent their residence, present Federal provisions are far from leakproof. But if enforcement efforts are sufficiently energetic, this new pattern of Federal laws may have some depressant effect on the movement of firearms in interstate commerce.

The provisions banning certain classes from gun ownership are (1) an attempt to bolster local licensing requirements with the threat of Federal penalties for illegal receipt or possession of firearms that have been in interstate commerce and (2) an independent Federal effort to ban the possession of firearms by particular classes. Because present Federal law does not affect the number of most firearms in civilian hands or the generally easy accessibility of firearms, these provisions, in order to succeed in restricting rates of possession of firearms in the classes covered, must do so as a result of the deterrent effect of the law influencing decisions about gun ownership by felons and other subject groups.

B. *Where Do We Go From Here?*

The mix of motives and strategies apparent in the present Federal regulatory scheme cannot be evaluated in solely objective terms. Defining an appropriate Federal role in firearms control requires a determination of what type of firearms control is desirable and a decision about what part the Federal government, as only one of a number of responsible entities, should play in the process of reducing firearm violence.

The Task Force on Firearms of the National Violence Commission has advocated that the most certain and most substantial diminution of firearm violence in the United States would be produced by a system that substantially reduced the number of handguns in civilian hands, defining the term "substantially" as a reduction of 90 percent or more of the estimated 24 million handguns privately owned by American citizens.[12] The mechanism recommended to achieve this goal is a system of restrictive handgun licensing. This position was the product of several of the Task Force's conclusions: (1) firearms make a substantial contribution to the cost of violence in the United States: (2) handguns play a disproportionate role in firearms violence; (3) handguns are but a small part of the sporting use of firearms in the United States; and (4) if handguns were controlled, there is reason to believe that long guns would not become anywhere near the social threat that handguns now constitute.

This proposal is one of many that involve governmental efforts to screen all prospective gun owners. Other proposed systems would allow all but a few disqualified groups to own guns but would impose license requirements for all owners. Any proposal to screen gun ownership raises the issue of what part the Federal government should assume in this type of firearms control.

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[11] NEWTON & ZIMRING, *supra*, note 6, at 51, 91, 94.
[12] NEWTON & ZIMRING, *supra*, note 6, at 143–144.

One alternative answer to this question is that the Federal government should do nothing. State and local governments, under the traditionally local police power, have the primary responsibility for making decisions about the impact of firearms on violence and about appropriate countermeasures. The problem with this position is that firearms are seen by many as a national problem appropriate for a national solution. Further, the interstate leakage of firearms has been so great that complete Federal inaction would lead to substantial frustration of any State and local firearms control efforts.

A second possible Federal role in firearms control is illustrated by the backstop efforts that underlie the ban on interstate firearms shipments and firearms sales to nonresidents. This, it could be argued, will discharge the Federal government's primary responsibility in the area of firearms control—suppressing interstate movements of firearms so that the State and local governments charged with the primary responsibility of diminishing firearm violence can better enforce whatever systems of control they deem appropriate. A national firearms record center, existing without a national registration law, would be another type of backstop control.

One problem with the backstop approach is that, as long as some States permit large accumulations of handguns, it may be impossible to prevent the interstate leakage of firearms into States with more rigid control systems. Thus a system of national licensing may be the only method of achieving the goals of backstop regulations. A second problem with assigning the Federal government an exclusively secondary role in firearms regulation is that the national government may be unwilling to tolerate levels of firearms violence and firearms possession that particular State governments would allow.

A third alternative would be the establishment of minimum national standards that would allow the States a first option of implementing these standards through adequate State and local firearms control laws. Under this approach, if a State failed to enact legislation meeting these standards after a grace period, a Federally enforced system of firearms regulation would be substituted.

A fourth alternative is a national system of firearms regulation where the Federal government has the primary responsibility of administering, as well as establishing, standards for firearms control. Opponents of this alternative maintain that such a policy would generate an unpleasantly large Federal role in local law enforcement and might precipitate the advent of a major national police force.

Choosing among these alternatives is a matter of values and priorities. My own inclination is toward minimum national standards, with administrative responsibility vested in those States that write laws complying with the Federal guidelines.* Whatever one's preference, there is little doubt that any of the above possible Federal roles would be within the power of Congress in this area, because firearms possession constitutes a threat to the safety of the President of the United

*The consultant did not submit any statutory drafts for these directives. As pointed out in the Comment on Firearms Offenses, p. 1047, any new firearms provisions of such a regulatory nature would be placed outside Title 18 since they would be basically misdemeanors. Accordingly, consistent with the general approach taken elsewhere in the Code, no detailed statutory text was offered.

States and other Federal officers and elected officials, and firearms possession policies can be viewed as an influence on interstate travel. However, the fact that the potential in this area extends all the way to a fully Federalized system of standards and administration does not perforce mean it would be desirable to test this extreme.

Penalties for gun law violations.—Present Federal firearms laws regulations provide penalties on the order of Class C felonies under the proposed Federal Criminal Code. This penalty structure is probably too high, given the thrust of the Code's other sentencing reforms. Moreover, if the Federal government were to take a larger role in firearms regulation, a high penalty structure would probably impede enforcement as much as the extra measure of punishment might deter those who would otherwise violate the law.

At the same time, guns are a specially dangerous class of instruments, and gun regulation is very close to traditional concerns in crime control. On balance, it would seem wise to make unlawful possession of guns under Federal law a Class A misdemeanor, and trafficking offenses, when they involve a number of guns, should retain felony status. Because of the proximity of gun control to traditional crime, Title 18 might seem an appropriate placement for any fully Federalized gun regulation. However, if Federal standards and State regulation are to be mixed, placement in Title 18 would seem rather awkward.

C. *Federal Laws on the Placement and Manner of Firearms Use*

Many localities on the United States attempt to reduce firearm violence by restricting the place and manner in which firearms may be used with or without additional restrictions on possession of firearms or particular types of firearms. Thus, it is common to encounter laws prohibiting the carrying of concealable firearms on the person or the discharge of a gun in specified areas.[13] The Model Penal Code provides a slight twist on the conventional pattern by distinguishing between sporting firearms and other fierarms and presuming all other fierarms to be instruments of crime unless the gun is possessed in the actor's home or place of business, or the actor is licensed or otherwie authorized to carry the weapon in the manner in which the actor was carrying it at the time of his apprehension.[14]

The intention of most place-and-manner laws is to reduce firearms violence by restricting the number of situations in which a firearm carried on the person or in a motor vehicle will be used in either impulsive or planned criminal activity. By implication, the Model Penal Code goes a step further than the standard place-and-manner laws by presuming a specific criminal purpose to the possession of certain firearms and by categorizing its particular place-and-manner regulation under the article dealing with inchoate crimes.

This classification might indicate an assumption on the part of the draftsmen of the statute that the illegal carrying of a firearm is generaly accompanied by an intention to commit a crime of violence with that firearm. This assumption is ingenious, but as a matter of statistical probability it is grossly incorrect. In many areas, even where the carrying of a firearm on one's person or in a motor vehicle is illegal,

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[13] See NEWTON & ZIMRING, *supra*, note 6, at c. 13 and Appendix G.

[14] MODEL PENAL CODE, § 5.06 (P.O.D. 1962).

local custom promotes the carrying of guns for defensive purposes, real or imaginary, and this is generally done without the person forming a specific intention of violating any law other than the law against carrying a firearm. The theory is ingenious, however, because it points up the risk of the presence of a mobile firearm in a tense situation a presence which might well lead to a violent crime that would not otherwise occur.

Of all the roles Federal law might play in firearms control, nationwide regulation based on laws against carrying firearms is the least appropriate. Laws regulating the place and manner in which firearms may be carried can be enforced only by street contacts with individuals and are thus more intimately related with general police functions than any other kind of firearms regulation, because it is the ordinary policeman on the beat rather than any special enforcement official who is the first line of defense in the enforcement of such laws.

In areas where the Federal government has primary responsibility for criminal law enforcement, laws prohibiting the carrying of weapons without a conspicuously lawful purpose are appropriate and will assist the police by empowering arrests earlier in the scenario of crime than would otherwise be the case and by providing a means of taking a substantial number of firearms, when discovered, out of circulation. As a matter of theoretical nicety, it is my view that the risk generating characteristics of this behavior, rather than its presumed relationship to specific criminal intent, justify its criminalization.

D. *Federal Firearms Controls and Federally Controlled Areas*

The appropriate role of the Federal government in firearms regulation nationally is a large and controversial question. Defining appropriate measures of Federal firearms control in those areas where the Federal government has a primary policing responsibility is a smaller question but is to some extent related to the conclusions one reaches about the desirability of national firearms control.

Where primary Federal jurisdiction is exercised over large or isolated geographical areas, such as the District of Columbia or Federal territories, Federal laws aimed at direct regulation of firearms possession are appropriate, independent of nationwide Federal gun control. In areas where the United States has a primary lawmaking responsibility but local agencies are in charge of law enforcement, the Federal role can probably best rest in the creation of minimum standards to be administered by local authorities.

In Federal enclaves, themselves geographically insignificant, that are set apart from State jurisdiction because of Federal ownership, regulation of firearms possession, might be appropriate but in the absence of a nationwide control system, could easily be frustrated by inconsistent State policies. If firearms are easily available just outside Federal enclaves, no legal provision can make it physically more difficult for individuals to obtain firearms. Requiring special Federal firearm licenses in this situation can only be defended if the enclave is the residence of a significant number of people and the exercise of Federal authority in that enclave can be extended in a way that would allow inspection of individuals to determine whether they possess firearms.

II. Gun Use in Federal Crime

A. *Present Federal Policy: 18 U.S.C. § 924*

The only Federal law that distinguishes firearms use in Federal crimes is section 924 of Title 18, passed in 1968 as part of the Gun Control Act of 1968. Section 924(c) provides:

> Whoever—
>
> (1) Uses a firearm to commit any felony which may be prosecuted in a court of the United States, or
>
> (2) Carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States,
>
> shall be sentenced to a term of imprisonment for not less than 1 year nor more than 10 years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than 5 years nor more than 25 years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of such person or give him a probationary sentence.

The two situations covered in subsection (c) should be considered separately. Paragraph (1) provides separate sentencing provisions when an individual uses a firearm to commit a Federal felony. With the possible but unlikely exception of using a firearm to violate a Federal firearms regulation, such as illegal shipment or possession of a gun,[15] the scope of this provision would seem confined to Federal crimes of force, principally assault, robbery, and kidnapping, where guns play an active role in criminal conduct.

The impact of this law on the sentencing of first offenders guilty of Federal crimes of violence committed with firearms would be minimal if sentences imposed under section 924(c)(1) are concurrent.[16] First offenders, under section 924, remain eligible for suspended sentences and probation. The range of imprisonment options provided for first offenders is the same as those provided in sections 2231 (assaulting or resisting a Federal officer), and 112 (assaulting diplomatic personnel), Title 18, while penalties provided for bank robbery, kidnapping, and mail robbery far exceed those in section 924.

The second offender provisions of section 924(c) may also fail to play an important role in sentence determination. Second offenders under section 924(c)(1) must be sentenced to a minimum of 5 years and cannot receive suspended sentences or probation, under one reading of the provision. It is possible, however, to construe the mandatory provisions of section 924(c) as separate in effect and thus conclude that the total sentence imposed on a second offender cannot be suspended but that terms of actual imprisonment less than the 5-year minimum are not prohibited. This construction would not be popular with most of the Members of Congress who voted for section 924.[17]

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[15] *See, e.g.*, 18 U.S.C. § 922.

[16] *See* proposed section 3205(1).

[17] The second offender provisions originated in the House version of the bill, where the language applied to all convictions, and the tone of discussion clearly indicated that most proponents of the bill thought the full minimum sentence was to be mandatory.

Independent of such a construction, the ban on probation and suspended sentences may not be significant because this type of sentence is probably a rare occurrence when a person is convicted of a second Federal crime of violence. Even the 5-year minimum may be a fairly standard restatement of Federal sentencing practice with respect to second time violent offenders.

Moreover, no discussion of section 924(c)(1) would be complete without speculating about the effect that plea bargaining and other prosecutorial practices may have on the use of the separate provision when individuals can be charged with both an independent Federal felony and a violation of section 924(c)(1). As a matter of convenience and policy, prosecutors may proceed on the independent Federal felony and drop the section 924 charge in the way they are reputed to drop Federal firearms charges when the same activities that led to a Federal firearms charge also produce a conviction for a serious offense in a State court. Even if such unilateral charge dropping is not a standard practice, it may be that the possibility of prosecution under section 924 will function chiefly as additional leverage to help induce guilty pleas to Federal crimes of violence in exchange for nonprosecution under section 924(c)(1).

Section 924(c)(2) makes it a Federal offense if an individual carries a firearm unlawfully during the commission of a Federal felony. The distinction between this and paragraph (1) is that paragraph (1) requires that the gun play some instrumental role in the commission of the Federal felony, thus restricting its scope to crimes where force is used, while paragraph (2) speaks only of the coincidence of an unlawfully carried firearm and the commission of a crime, at the same time, chargeable to the same person. The firearm would be unlawfully carried under Federal law if the individual is carrying the firearm in violation of local law. In addition, persons who cannot legally receive weapons (section 922(h)) and persons who had received the firearm in interstate commerce with the intention of committing any offense (section 924(b)) would be independently liable for a violation of section 924(c)(2) if it is determined that unlawful receipt makes any subsequent carrying unlawful regardless of State law, a construction that is unlikely and that would be unfortunate.

Section 924(c)(2) barks much more ferociously than it bites. In order to establish that an individual carried a firearm in a situation where he did not use it, one has to catch him in the act or find a witness who observed him during the commission of the crime. Personal observations likely to produce reliable reports of the carrying of a firearm are not common in crimes of stealth, such as larceny, car theft, interstate shipment of stolen cars, or burglary. Most apprehensions under paragraph (2) would occur when an individual is apprehended while committing a crime of long duration, such as unlawful flight, and is found to be carrying a gun.

The fact that a first offense under paragraph (2) carries no bar to probation or suspended sentence means that the minimum penalty provisions become significant when an individual is in the unfortunate position of being caught twice in the act of committing a crime for which a firearm is not used or required but nonetheless possesses such a firearm.

Section 924(c)(2) is an attempt to dissuade criminals such as burglars from carrying guns that are not ordinarily used in their crimes but that might make an apprehended burglar, for example more dangerous to his victim or to law enforcement officers. The purpose of such a provision in honorable—to lessen the risk of gun use escalating the danger in apprehending Federal criminals [18]—but the prospects of achieving deterrent effectiveness with the law seem less than bright.

Moreover, if we assume that judges would, even without section 924, consider the possession and use of firearms as aggravating circumstances in the commission of crimes, the relevant question becomes whether these provisions operate as more efficient deterrents to gun use in crime than the use of gun criteria on a more informal basis by sentencing courts.[19] On this question no reliable data are presently available, but there is little reason to express high hopes.

Laws on the order of section 924(c) can produce costs. Such laws may add inflexibility to a sentencing structure and complicate the structure of the proposed Federal Criminal Code by creating interplay with other Federal criminal provisions and local law. More important, such laws may generate unwarranted feelings that this approach is likely to reduce firearm violence. It is when such provisions are viewed as alternatives to regulation of firearm possession that they appear to be most costly. If sterner measures along the lines of section 924(c) were adopted, the costs of the policy would be much higher. It could also be argued that the possibility of achieving a deterrent effect would be increased.

Thus, the prospect of longer mandatory sentences [20] and barriers to probation on first offenses raises questions about the potential of deterring gun crime more clearly than present Federal law in this area.

However, a discussion of this issue must be framed more specifically than the terms of section 924(c). It would be better to talk about deterring gun use in various specific crimes rather than "crime," the all-inclusive referent of present Federal law.[21]

B. *Assault*

Assault is a crime where the attack is the essence of the offense. In assault, both the extent of injury intended by the attacker and the instrument used in the attack may be significant in determining the

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[18] Between 1960 and 1967, 96 percent of all policemen murdered on duty were killed by gunshot wounds.

[19] A second possible function of section 924(c)(2) is to make evidence of possession of firearms admissible under circumstances where it may not be admissible because it has no bearing on the material elements of a crime where a firearm was not used. It is easy to conjure hypothetical situations where this issue was raised but difficult to imagine situations where the existence of a gun could not be brought to the attention of the court.

[20] In 1968, Representative Casey of Texas introduced an amendment, H.R. 5497, making gun use in State felonies a Federal crime. The House version of the Gun Control Act of 1968 barred suspended sentences or probation for first offenses with minimum 1-year terms. Other Members of Congress have indicated support for even longer minimum terms.

[21] *See* Zimring & Hawkins, *Deterrence and Marginal Groups*, J. RES. IN CRIME & DELIN., 100 (July 1968).

degree of crime committed or the proper sentence to be imposed upon conviction.

If we distinguished between serious bodily harm and less serious injuries, and between assaults without weapons, assaults with weapons other than guns, and assaults with guns, we produce a matrix with six kinds of assault.

	Weapon		
	No weapon	Deadly weapon (other than firearm)	Firearm
Intent:			
Nonserious injury			
Serious injury			

Analyzing the matrix, we have anywhere from one to six distinct crimes. The question becomes one of determining how many of the possible classes of assault the law should reflect.

How many grades of assault should the law define?

One basis for distinguishing between assaults that result in serious bodily harm and those that do not is that the former category presents a much more serious social danger. In fact, what evidence exists suggests that there may be a greater difference in quality of attack between simple and aggravated assault than exists between aggravated assault that produces serious bodily harm and most homicide.[22] Distinguishing further between attacks on the basis of the weapon used in aggravated assault can be defended (1) because choice of weapon has probative value in determining an attacker's intent and (2) because attacks with deadly weapons are much more likely, independent of intent, to cause death or serious injury than attacks with only personal force, and attacks with guns are more likely to cause deaths than attacks with other deadly weapons.

If we consider the weapon used only because choice of weapon has probative value in determining the attacker's intent, distinguishing between categories of assault on the basis of the magnitude of the injury intended while making separate distinctions in grade of crime based on weapon used appears to be redundant. To the extent that weapon choice is probative of intent, it is evidence of aggravated rather than simple assault, and perhaps evidence of sufficient magnitude to justify a conclusive presumption or classification of aggravated assault whenever deadly weapons are used. (*See* proposed section 1612.)

An independent basis for separate treatment of attacks based on weapons used is that the use of weapons rather than personal force and the use of firearms rather than other deadly weapons create an increased risk of victim death or serious injury that appears to function independently of an attacker's intent. For example, what data we have suggest that the same kinds of people in the same kinds of

[22] See Zimring, *Is Gun Control Likely To Reduce Violent Killings*, 35 U. CHI. L. REV. 721 (1968).

situation are five times as likely to cause death when they use firearms as when they use knives.[23]

If this is the basis for distinguishing grades of assault as a result of weapons used, the principal aim of any such distinction is differential deterrence, an attempt to increase the use of less lethal means of attack by those who are undeterred by the general legal prohibition of assault by threatening gun assault more severely than other assaults. By definition, the audience of such a threat is a group of offenders that has already displayed a rather remarkable immunity to the deterrent force of criminal sanctions in an area of behavior where the risk of apprehension is high. This immunity is manifested in two rather disheartening ways: first, this group is not dissuaded by the normal penalties imposed for aggravated assault, and, second, in committing assault with a deadly weapon, an individual is risking a far higher penalty if his victim should die than any special penalty a gun use provision could establish. Once these qualifications on the operation of differential deterrence are set out, we do not have data that speak in further detail to the question of whether laws that attempt to establish differential grades of deadly assault provide an extra measure of deterrence, thereby reducing the proportion of deadly assaults committed with guns.

If gun use were to be a separate grade of offense in the proposed Federal Criminal Code, this would require the creation of a Class B felony, the material elements of which would be "intentionally or knowingly causes bodily injury to another human being with a firearm."

The arguments against such a proposal operate at a number of levels. First, since we have no data available on which to base the conclusion that such a distinction would have any effect on the rate of gun use in deadly attacks, no data are available that can provide information about the extent of any extra measure of deterrence that such a distinction could produce. Against this unknown benefit, a separately graded category of firearm assault would have certain costs. Since aggravated assault could hardly be less than a Class C felony, a separate firearm offense would substantially reduce the options of the sentencing judge in a gun-assault case and add a group of lengthy sentences to a correctional policy whose proposed range of sanctions is already far from immodest. This may lead to extra public expense, misery, and perhaps, punishment generated aggressions that eventually lead to further crime. Also, to the extent that the possibility of differential deterrence is important, any increase in the gap between aggravated assault and firearms assault sanctions would result in a decrease in the gap between the penalties for nonfatal firearms assault and murder. Yet, because gun use is so much more deadly than attacks with other weapons, the argument can be made that the law should distinguish between gun and other assaults even at the risk of narrowing the marginal difference between gun injury and murder penalties.

In any event, the data clearly establish a basis for considering gun use as an aggravating circumstance in sentencing decisions even if gun assault does not emerge as a separately graded offense.

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[23] *Id.* at 728.

C. *Robbery*

A typical robbery combines elements of both property and personal crime because the robber uses personal force rather than stealth or trickery to obtain the property of another unlawfully. Force may be used against a victim in one of two ways: the robber can incapacitate his victim by inflicting an injury, or the robber may seek to obtain property without injuring his victim by threatening to use force. If only the threat of force is involved and a victim proves cooperative, the offense can be committed without an attack intended to produce serious bodily injury. Thus, many robberies, particularly those that occur on the street and involve only individual victims, or small groups of victims and larger groups of robbers, can be committed without the use of weapons. With respect to indoor robberies, where one or a group of robbers invade businesses or homes, the robber has fewer options about the weapons he will use because he will normally be at a disadvantage without either a knife or a gun. The majority of indoor robberies are committed with deadly weapons, and the handgun is the deadly weapon employed in most indoor robberies.[24]

Because robbery will often take place without an attack intended to produce serious bodily injury, one way of taking cognizance of the difference between aggravated assault and robbery would be to design a matrix distinguishing, on the one hand, between robberies that result in attacks intended to injure and robberies where only the threat of injury is invoked and, on the other hand, distinguishing between robberies on the basis of whether weapons were used and whether firearms were the weapons used.

	No weapon	Weapon (other than firearm)	Firearm
Attack to injure			
No attack			

As with assault, we produce six possible categories of robbery. The basis for distinguishing between robberies that result in attacks intended to produce injury and robberies without attack is that the former class of robberies presents a vastly greater danger of harm to victims. The aim of such a distinction would be to encourage robbers to avoid harming victims because of the greater penalties that accompany conviction for robbery with attack intending to injure.

The basis for distinguishing between robberies committed with and without weapons is that, while the risk of an attack on the victim may not differ in the two types of robbery (or indeed may be higher in robbery without weapons because of the closer proximity of robber and victim), the danger that any attack that might take place during a robbery will result in the death of the victim may be substantially higher if robbery is committed with weapons. The basis for distinguishing between robbery with firearms and all other forms of robbery may be twofold: robberies are much easier to commit with firearms than with

[24] NEWTON & ZIMRING, *supra* note 6, at 46–47.

other weapons, and gun robberies constitute a greater threat to the life of the robbery victim than other forms of robbery. In a study that covered 3½ years of New York City experience, it was found that the death rate of victims from nongun robbery was 1.5 per thousand robberies, while the death rate of victims of gun robbery was 5.5 per thousand robberies.[25]

The aim of any criminal law distinguishing between robberies committed with firearms and those committed with other weapons would be the process of differential deterrence discussed in relation to assault and mentioned above in the discussion of distinguishing between robbery with and without an attack on the victim. The issues raised in the assault discussion are similar to the issues raised by attempts to differentially deter gun robbery because in each case the law is dealing with individuals who are underterred by the base punishment provided for assault or robbery. However, the robbery situation is distinguishable from the assault situation in a number of ways that make the prospects for differential deterrence seem brighter. First, the robber who does not attack his victim, unlike the individual who commits aggravated assault with a weapon, has not yet demonstrated an immunity from the maximum threat of punishment by risking the penalty for murder. Second, the robber, unlike the assaulter, has not demonstrated that his principal objective is to injure his victim; rather, the objective of many robbers would seem to be material gain, a goal that may indicate that potential gun robbers would be more susceptible to differential threats. Third, robbery is, to a greater extent than assault, a professional or career crime, which involves elements of planning and experience with apprehension that may contribute to a greater awareness of the law and an increased motivation to minimize risks of punishment.

However, there is little leeway in a penal structure to experiment with processes of differential deterrence in the area of robbery because even the least serious robbery, that involving personal force without an attack intended to injure, is considered a serious crime. Under the proposed Federal Criminal Code, this offense at minimum would be a Class C felony and is usually considered closer to Class B. At the same time, since the law's primary goal, once a robbery is in progress, is to avoid a victim killing, every effort should be made to leave a penalty gap between robbery murder and the next most serious robbery offense to the extent that one subscribes to the viability of differential deterrence theories. It is clear, then, that the law cannot, as a definitional proposition, create six ascending categories of nonlethal robbery with ascending gradations of punishment great enough to enhance the prospects of differential deterrence yet far enough from maximum penalties to serve as an inducement away from robbery murder. If formal distinctions are to be made, two or three priority distinctions should be selected. The most important distinction would be between robbery where a deadly weapon is used in an attack intended to inflict bodily injury and all other forms of robbery. If robbery without aggravating circumstances is a Class C felony, then two ascending grades of aggravated robbery would be possible. Proposed section 1721 distinguishes the use of deadly force (Class A) and the threat of deadly force (Class B) from simple robbery. I agree with this choice of priorities. At the

[25] *Id.* at 47.

same time, under the proposed Code, the use of a firearm rather than a knife could be considered by the court as an aggravating circumstance for sentencing purposes with the Class B penalty range.

D. *Homicide and Kidnapping*

Homicide and kidnapping are offenses where distinctions based on the use of a firearm would be inappropriate. In the case of willful killing, the instrument of the crime is of little significance because the intention has been determined by other means, and because the means used to kill do not affect the dangerousness or harm achieved in homicides. Even if some basis for distinguishing gun use from other homicidal acts could be established, there is no room left in the drafting of a Criminal Code for ascending degrees of willful homicide because of the seriousness of the simple offense.

Kidnapping is a closer case. An argument can be made for considering different types of kidnapping as different grades of offense. The most important distinction would be between kidnapping that results in injury or death to the victim and kidnapping without injury. The aim of such distinction is to provide some measure of protection to victims of kidnapping by deterring kidnappers from attacking them. Because the kidnapper normally has a substantial degree of control over his victim during the course of the crime and because kidnapping involves extensive premeditation and a long period in which the kidnapper can make decisions about the way he will treat his victim, there is reason to believe that kidnappers might be responsive to differential threats.

It may be the case that kidnappings involving firearms are more dangerous than other forms of kidnapping, although there are no data available on this question. However, kidnapping in any form is a serious offense so that there is only enough leeway in a functioning system to provide, at maximum, for two grades of kidnapping. That being the case, harm to the victim rather than any differentiation based on the weapons used would seem to be the appropriate grading distinction.

38-881 O—70—pt. 2——22

COMMENT

on

FIREARMS OFFENSES: SECTIONS 1811–1814

(Bancroft, Schwartz; February 12, 1970)

1. *Present law—*

In 1968 Congress responded to a series of tragic assassinations and multiple murders by enacting two major pieces of Federal firearms legislation: Title VII of the Omnibus Crime Control and Safe Streets Act (18 App. U.S.C. §§ 1201–1203) and the Gun Control Act of 1968 (18 U.S.C. §§ 921–928 [Title I] (26 U.S.C. §§ 5091–5872 [Title II]).

The Omnibus Crime Control Act completely prohibits certain classes of persons deemed unfit by Congress to deal in guns, ammunition, and destructive devices, from possessing or transacting in such materials. Its purpose is to curtail violent crime, particularly assassination. Title I (State Firearms Control Assistance) of the Gun Control Act of 1968 restricts commercial, interstate and foreign transactions in guns, ammunition, and destructive devices generally. Its principal purpose is to curtail the interstate flow of such materials and thereby prevent the undermining of State firearms laws. Title II, by a comprehensive taxing and registration scheme, severely restricts possession of and trafficking in special firearms, their ammunition and accessories as well as explosive devices; *e.g.* machine guns, sawed off firearms, silencers and bombs. Its purpose is to strongly control private access to weapons of no legitimate private need and thereby halt criminal deployment of them. Together the Titles require national registration of all such materials, including some handguns, and complete identification of the parties and weapon involved in any commercial firearms acquisition. These Titles are implemented by extensive and overlapping licensing schemes administered by the Secretary of the Treasury, who is given important rule-making and exemption authority.

Remaining Federal firearms legislations can be found in provisions scattered throughout the various Code Titles: 18 U.S.C. § 231 (riots); 18 U.S.C. § 969 (exportation); 18 U.S.C. §§ 1715–1716 (mailing); 22 U.S.C. § 1934 (Mutual Security Act); 26 U.S.C. § 5865 (bootlegging); 49 U.S.C. § 1472 (airplane transportation) and miscellaneous regulations (*e.g.*, 36 C.F.R. 31 [possession in National Parks]).

2. *General Outline of Proposed Statutory Changes—*

Modifications of existing law, even though recently enacted, are required to reflect the penal policies embodied in the Study Draft. Among such general modifications embraced in sections 1811 through 1814 are the following:

(a) *Largely Regulatory Provisions Not Included.* It is proposed that all the largely regulatory firearms provisions be transferred out-

side Title 18, or at least outside that part of Title 18 defining specific offenses. In general, these largely regulatory provisions include highly detailed statutes for which non-compliance is criminal but which simply supplement other provisions more immediately concerned with the evil to be prevented. An example of these largely regulatory provisions would be the intricate licensing scheme of 18 U.S.C. §§ 921–928.* This proposal to transfer these provisions outside Title 18 follows the general principle which has controlled elsewhere in the proposed Code: all proposed felonies are kept within Title 18, on the theory that the employment of severe sanctions and the extensive use of the correctional system is particularly the responsibility of the Criminal Code and the Judiciary Committees of Congress; but any offense which has been determined, in the final analysis, to be integral with the regulatory structure can be found outside Title 18, among other regulatory provisions, where they will be more amenable to the expertise of both the administering agency and its counterpart committee in Congress. Thus, no revision of the essentially regulatory firearms provisions is submitted.

The elaborate licensing system of 18 U.S.C. §§ 921–928 might go either to Title 26, to be consolidated with the parallel registration provisions there entrusted to the Secretary of Treasury, or it might be transferred to Title 15 of the United States Code (Commerce and Trade). Alternatively, these regulatory firearms provisions could be placed in a subsequent part of the new Title 18 together with other regulatory provisions, *e.g.*, 36 C.F.R. 31 (possession of firearms in National Parks).

(b) *Some Present Felonies Not Included.* In addition to these regulatory provisions, some nonregulatory firearms felonies are not included in sections 1811–1814, either because they are blanketed by other draft provisions or because it is contemplated that they are more appropriately graded as misdemeanors and should, therefore, be placed outside Title 18, where they will be covered by proposed section 3007. They are as follows.

(i) The provisions of 18 U.S.C. § 924(c), increasing penalties for Federal offenses committed by means of a firearm or while unlawfully carrying a firearm, are not included in proposed sections 1811–1814, since this submission is confined to offenses concerning traffic in firearms. Thus, in the Study Draft, the crimes where a gun is likely to be a material part of the criminal behavior, *e.g.*, aggravated assault (section 1612) and armed robbery (section 1721) are already punishable with special severity as, variously, Class A, B, or C felonies. Murder (section 1601), rape (section 1641) and kidnapping (section 1631) carry penalties so high (at least Class B felony) that there is little gain in adding a term of years for illegal gun carrying.

Further, the appeal of the principle of 18 U.S.C. § 924 as a sentencing criterion can better be, and therefore is, reflected in the sentencing chapter of the proposed Code. For example, it is explicitly provided in section 3202(2) that being armed with a gun may justify the imposition of an extended prison term. This circumstance also can

*By contrast, an example of those central statutes to be retained in the substantive body of Title 18, would be the provisions prohibiting convicts from engaging in firearms transactions.

justify a judicially imposed minimum prison term under section 3201(4). As added recognition of the increasing and manifest danger that firearms present when they are used in, or carried during, the commission of a crime and the fact that such deployment is deliberate, premeditated, calculated and therefore deterrable, related sentencing provisions could easily be adjusted to more nearly reflect the penalty policy so recently expressed by Congress in 18 U.S.C. § 924(c). For example, it could be provided in proposed section 3004 that deployment of a gun in the commission of a felony precludes judicial reduction of that felony to a misdemeanor. More importantly, a subsection could be added to section 3101 providing that the use or carrying of a gun in the commission of a felony creates a presumption against probation, requiring the judge to sentence the offender to jail or otherwise to set forth in writing his reasons, which must comport with statutory guidelines, for placing the offender on probation. Section 3201(4) could be modified to provide that Class C felonies in which a gun was deployed be amenable to the judicially imposed minimum term; or variants in minimum terms of sentences may be devised for all classes of felonies in which guns are used. Section 3202, dealing with extended terms, could be similarly adjusted. Finally, these adjustments could be coupled with the proposed modification of 28 U.S.C. § 1291 to provide for appellate review by the government as well as the defendant, of sentences imposed under these modified provisions.

This discrimination between guns and other weapons seems justified. The grading of particular offenses in the Study Draft already reflects it. Thus, in section 1735(2)(d) the theft of any firearm or destructive device is a Class C felony, regardless of its monetary value. Further adjustments might be made. For example, theft of petty amounts could be classed as a felony if the offender was unlawfully carrying a gun.

(ii) The provisions of 18 U.S.C. § 922 (i) and (j) concerning stolen firearms are, as just mentioned, generally reflected in the Code's theft grading (section 1735(2)(d)). These grading provisions can easily be adjusted to provide felony treatment, regardless of monetary value, for theft of other articles defined in current Federal arms legislation, *e.g.*, ammunition, bombs, grenades, *etc.*

(iii) 18 U.S.C. § 922 (e) and (f) dealing with the interstate and foreign shipment of firearms by common and contact carriers are likewise not included in the proposed sections. To, the extent that delivery by or to a common carrier involves any serious misconduct, *e.g.*, shipment to "dangerous" persons or of weapons with obliterated serial numbers, that serious misconduct is independently covered by the felony provisions of the present submission, sections 1811 and 1814. The balance of those statutes is deemed more appropriate for misdemeanor classification, *e.g.*, proscription of shipment without notification of controls.

(iv) The importation and false entries provisions of 18 U.S.C. § 922 (l) and (m) are not separately covered since they are embraced by the general Code offenses, smuggling (section 1411) and false statements (section 1352), respectively.

(v) The munitions control provision in 22 U.S.C. § 1934 is not included since the grave versions of that offense receive felony treatment

under proposed sections 1204–05, and the balance of the conduct covered by section 1934 is deemed appropriate for exclusively misdemanor classification under proposed section 3007.

(vi) The handgun mailing proscriptions in 18 U.S.C. § 1715, presently carrying maxima of 2 years imprisonment and/or $1000 fine, would be graded as misdemeanors under draft section 3007. Serious transgressions of present section 1715 are covered by other proposed firearms sections. For example, the mailing of a firearm for use in a crime or to or from a person in any of the classes of persons precluded from possessing or transacting in firearms is covered by proposed sections 1811 and 1812. The draft's fine levels and persistent misdemeanant provision, section 3003, afford ample sanctions against the balance of offenders.

(vii) 18 U.S.C. § 1716 makes the mailing of guns or bombs which may explode in transit or upon receipt, punishable by maxima of 1 year imprisonment and/or $1000 fine. It also provides maxima of 20 years imprisonment and/or $10,000 fine if the mailing was with the intent to injure or kill another, or injure the mails, and life imprisonment or capital punishment if death resulted. Present section 1716 is not included in the proposed firearms statutes since it is contemplated that the misdemeanor provisions of section 1716 will be transferred outside Title 18, where proposed section 3007 will apply so as to effect essentially the same penalty. "Piggyback" jurisdiction under proposed section 201(b) provides coverage of more serious crimes stemming from the act of mailing, so that the aggravated varieties of the present offense (intent to injure or kill or reckless endangerment of person or property) can be covered by the draft provisions on attempt (section 1001); offenses involving danger to the person (chapter 16); and arson and propery destruction (sections 1701–5).

(viii) The provisions of Title 49 U.S.C. § 1472(h) and (l) prohibiting the shipment of firearms and explosives aboard aircraft, and prohibiting passengers from carrying such items on board, are not included in sections 1811–1814 for the same reasons and based upon the same proposed disposition, as contemplated in 18 U.S.C. § 1716.

(ix) The firearms proscriptions in the riot provision of 18 U.S.C. § 231 *et. seq.* are not included in the proposed firearms offense since those present sections are blanketed by proposed section 1802.

(c) *Present Petty Offenses Not Included.* Present law contains many petty offenses, such as 18 U.S.C. § 969 (exportation of arms to Pacific Islands) and 36 CFR 31 (firearms in National Parks). They are not included in sections 1811–1814 since, consistent with the scope of the draft (limited to felony provisions and such misdemeanors and infractions as directly implement these felony provisions) it is contemplated that these petty offenses, to be transferred outside Title 18, will be made amenable to proposed section 1006.

(d) *Classification to Felonies Remaining in the Draft.* As to the remaining present firearms felonies Class C felony grading is recommended both for the interstate commerce offenses presently found in Title 18 and for the tax-based offenses presently found in Title 26. The Title 26 felonies presently carrying up to ten years, while the basic Title 18 firearms felony carries a five year maximum. The

Class C felony status here proposed for both groups carries a maximum of seven years, including two years of mandatory parole supervision. If Class B felony classification were given to the Title 26 felonies, it would escalate the current level of penalties, with a 15 year maximum including a three-year parole component.

(e) *Some Aspects of Present Felony Provisions, Although Included, Are Reduced to Misdemeanors.* In addition to equalizing the felonies, it is proposed to be more discriminating than existing law in distinguishing between felony and misdemeanor. 18 U.S.C. § 924 makes it a felony to "violate any provision of this chapter." That includes some fairly innocuous and technical violations of the rules laid down by Congress and the Secretary. For example, failure of a licensed dealer to secure from a customer an oath as to his age would be felonious even if the customer was of proper age. (*See* 18 U.S.C. § 922(c)(1).) So also, it would be a felony if a dealer selling to an out-of-state customer failed to send "by registered mail (return receipt requested)" sworn notice of sale to the chief law enforcement officer of the customer's place of residence or failed to wait seven days for a response, even though the dealer sent telegraphic notice and received telephonic response from the law enforcement officer as the basis for delivering in six rather than seven days. Failure of a licensed dealer to "make an appropriate entry in . . . or properly maintain" required records is a felony under 18 U.S.C. § 922(m) however inconsequential the default. In many cases, a person may be guilty of a felony, punishable up to ten years, although his conduct would have been lawful but for some default of a prior possessor of the firearm. (*See* 26 U.S.C. § 5861, so treating possession of a firearm "made in violation" or "imported in violation" of the chapter.)

The significance of this blanket characterization of hundreds of "violations" as felonies is not merely that trivial defaults may be harshly penalized. One might, perhaps, rely on prosecutors and judges to exercise a discretion in such cases. But equally important is the needless burden on prosecutors and district courts when no misdemeanor is provided for expeditious handling of minor charges.

Accordingly, the proposed sections endeavor, with respect to those present firearms offenses which appear to be appreciably dangerous in and of themselves, to provide felony treatment for the basic offense, but a misdemeanor version where it is clear that the offense did not, in fact, involve any risk of physical harm or severe obstruction of firearms control measures. It is noted that proposed section 3003 permitting the sentencing of persistent misdemeanants as for a Class C felony provides a vehicle for appropriate treatment of the chronic offender. Since persistent violations of regulatory provisions would constitute Class A misdemeanors under proposed section 1006(2), the persistent misdemeanant provisions of section 3003 are also applicable to the purely prophylactic proscriptions in the regulatory Code.

(f) *Jurisdiction.* Present firearms legislation rests upon a variety of jurisdictional bases often "built into" the offenses themselves: taxing power for Title 26 provisions, interstate and foreign commerce for much of 18 U.S.C. § 922, and, for 18 U.S.C. App. §§ 1201–3, Congressional findings that certain activity "affects commerce." The jurisdictional bases of present legislation have been preserved so far as practicable.

A proposal is made, however, to enlarge jurisdiction so as to embrace Federal enclaves (section 201(a)) and to employ the "piggyback" provision (section 201(b)) in sections 1811 and 1812. While many of the offenses proposed in the Study Draft themselves include the use of a weapon in their definition and grading provisions (*see e.g.*, robbery in section 1721) and the other jurisdictional bases in sections 1811 and 1812 are quite broad (*e.g.*, that the firearms offense "affected commerce"), "piggyback" jurisdiction for proposed sections 1811 and 1812 nevertheless will be of some utility. First, it will often permit the trial of these firearms offenses without the necessity of litigating the intricacies of whether the offense "affected commerce", since the firearms offense will ride upon the more finite (*e.g.*, interstate shipment) jurisdictional "shoulders" of a companion Federal offense. Second, "piggyback" jurisdiction will permit, by affording trial on two offenses, the imposition of consecutive sentences where appropriate. Thus, where a previously convicted felon commits a bank larceny while carrying, but in no way using, a firearm, the "piggyback" jurisdiction provided in section 1811(5) permits the trial of the firearms offense in section 1811(1)(a) with the bank larceny offense in 1732, and the imposition of consecutive sentences under section 3206 up to the maximum for the extended term. If the bank larceny was under $500 and therefore a misdemeanor (section 1735), a Class C felony sentence may be imposed by virtue of the felonious firearms offense proposed in section 1811.

However, to avoid an unwarranted expansion of Federal jurisdiction, it is explicitly provided in each firearms section that where another offense defined in the Code has been committed, *e.g.*, armed robbery, that crime does not become a Federal crime simply by virtue of the fact that a Federally illicit firearm was used. Thus, use of an unregistered sawed-off shotgun in a local robbery would not confer Federal jurisdiction over the robbery, but when a robbery is committed over which there is Federal jurisdiction under the proposed robbery provision (*e.g.*, a bank robbery), use of a gun possessed in violation of section 1814 may be charged.

(g) *Culpability.* Current Federal gun legislation displays a range of required culpability. Sometimes it is implicit that the conduct be performed "knowingly," (18 U.S.C. § 922(d)); sometimes it is explicitly so required (18 U.S.C. § 922(e)); sometimes little more than "negligently" is sufficient (18 U.S.C. 922(b)(1)). The proposed sections standardize culpability to "recklessness" as defined in section 302. This is consistent with the general approach taken elsewhere in the proposed Code. Additionally, culpability is no longer required as to any jurisdictional fact (section 204).

(h) *Complicity.* The general provisions of the proposed Code with respect to accomplices (section 401), facilitation (section 1002) and solicitation (section 1003) apply. This results in some expanded liability insofar as such conduct is not presently covered by 18 U.S.C. § 2. The principal innovation is with respect to the uniform applicability of attempt (section 1001). Presently, there is very limited coverage of attempts in the Federal firearms statutes.

(i) *Definitions.* With the exception of several definitions in section 1811, these are all adapted from present law. Where the proposed

sections incorporate current Title 18 or Title 26 statutes by reference, no definitions are needed, and therefore are not supplied.

(j) *Two Fundamental Questions Raised by Sections 1811–1814.* This limited felony treatment, for an essentially regulatory offense, is consistent with the penal approach taken elsewhere in the Study Draft. Its application to firearms offenses poses two questions: Would enforcement of the present Federal regulatory scheme be adversely affected by the proposed grading? Should the present Federal role of regulating interstate and commercial firearms transactions so as to preserve and enhance the integrity of local firearms laws be continued, or is a broader role, assuming a more primary Federal responsibility in gun regulation, appropriate? *See* the Special Note preceding section 1811 in the Study Draft.

3. *Section by Section Analysis—*

(a) *Section 1811*—This section aggregates two of the major provisions of Title I of the Gun Control Act of 1968 (18 U.S.C. § 922(g) and (h)) and the main provisions of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968. (18 App. U.S.C. § 1202(a), (b) and § 1203.) The proposed section harmonizes these provisions and adapts them to other provisions and policies of the proposed Code.

(i) Jurisdiction and Grading. The essential differences between the pertinent provisions of the two Titles is that Title I proscribes firearms transactions in *interstate* and foreign commerce with respect to certain categories of disqualified persons and provides a five-year maximum penalty, whereas Title VII proscribes *intrastate* firearms transactions with respect to many of the same persons and provides a two-year maximum penalty. These differences have been resolved in subsection (5) of section 1811 by keying the grading as felony or misdemeanor according to which category of person was involved and by standardizing jurisdiction for all categories. With respect to those categories peculiar to 18 U.S.C. § 922(g) and (h) this effects a broader jurisdiction than presently obtains (movement in interstate and foreign commerce) since proposed section 201(g) pertains to transactions "affecting" commerce. In this connection, it should also be noted that the proposed section may effect a slightly narrower jurisdiction than presently obtains with respect to the categories peculiar to 18 App. U.S.C. § 1202. Apparently, that law proposes to exercise plenary jurisdiction, based upon the congressional findings in 18 App. U.S.C. § 1201 that such transactions inherently "affect commerce" dispensing with the necessity for proof of jurisdiction. Proposed section 1811(5), by including section 201(g) as a jurisdictional base, requires *proof* that the transaction affected commerce. Should broader jurisdiction be deemed appropriate, similar congressional findings can be substituted.

(ii) Intrastate dealings in ammunition by certain persons are proscribed. Presently, dealing in ammunition by persons in the designated categories is prohibited only if in interstate or foreign commerce. Logic and policy recommend intrastate restriction of such dealings. Persons deemed untrustworthy, *e.g.*, persons convicted of crimes of violence and drug addicts, should be deterred from dealing in such materials, just as they are forbidden to deal with firearms themselves.

(iii) Permanent disqualification is removed. Presently, some categories are drawn in terms that compel lifetime disability, *e.g.*, anyone

who *had ever been* in a mental institution. The proposed modification carries through a thought expressed in present law (18 App. U.S.C. § 1203) which, with respect to convicted persons, removes their disqualification in case of pardon. To maintain permanent disabilities in the law denies the realities of redemption. Thus, persons who have been in mental institutions are disqualified only for as long as they are declared to be incompetent.

(iv) The categories now require some official recognition of the disability. Presently, some categories define the disability by a simple listing of status, *e.g.*, anyone who *is* an "unlawful user" of drugs (18 U.S.C. § 922(f)(3)). Since, under present law, it is probable that it must be shown that the actor knew of his disability, it is appropriate to provide that there be some official, formal, or at least quasi-public declaration of it.

(v) Category (1)(a) is now limited to crimes involving physical harm, and offenses which are the hallmarks of organized crime. Presently, any felony except those relating to the regulation of business practices is disqualifying. By virtue of the definition of "crime" in proposed section 1811(3)(d) only felonies which indicate a propensity to violence by the defendant, or which are characteristic of organized crime and it's proclivity to violence, are included. However, the narrowing of the definition of disabling crime for the purposes of section 1811 does not affect the definitional aspects of 18 U.S.C. § 921(a)(14) and (20): by remaining in the regulatory law, they will still apply to the licensing provisions in 18 U.S.C. § 923.

(vi) Definition of fugitive includes a person fleeing from a contempt citation. Category (1)(b) (*see* definition in 1811(3)(h)) is adapted to embrace the provision in S. 30, an organized crime measure recently passed by the Senate, and the Study Draft's fugitive felon version of 18 U.S.C. § 1073 (proposed section 1310), to include one who is fleeing to avoid contempt, *e.g.*, for refusal to testify after having been granted immunity.

(vii) Defenses. The defenses in subsection 2(a) are adopted from present law. Since the proposed section completely replaces the equivalent current statutes, and does not delegate any remainder to regulatory provisions, all defenses applicable to the present statutes are explicitly included. The defense in subsection 2(b) is new. It is designed to exclude from coverage the person who although disabled, has a legitimate need to hire lawful security protection, *e.g.*, the store owner under outpatient mental care who hires a Pinkerton guard to prevent looting of his goods. Study Draft provisions on justification and excuse (chapter 6) provide other relevant defenses, *e.g.*, for the ineligible person who momentarily possesses a firearm to comply with the law or to defend against an imminent particular crime.

(viii) Definitions. Since section 1811 (1) and (2) completely replaces several present statutes, it is necessary to provide appropriate definitions. The term "ammunition" is presently used only in 18 U.S.C. § 922 (g) and (h) and is not included in 18 App. U.S.C. §§ 1201–1203. Thus, the definition of "ammunition" in proposed section 1811(3)(a) is that presently prescribed in 18 U.S.C. § 921(a)(17).

The definitions of "charge" and "court" are adapted from the corresponding definitions in 18 U.S.C. § 921(a) and 18 App. U.S.C.

§ 1203. In this connection, it is noted that proposed section 1811 omits explicit reference to dishonorably discharged persons, a category presently included in 18 App. U.S.C. § 1202, in the list of those precluded from dealing in guns. Insofar as such a discharge is predicated upon conviction in military court for a felony of violence, it is blanketed by proposed section 1811(1)(a) by virtue of the definitions in proposed section 1811(3)(b) (c) and (d) for "charge" "court" and "crime", respectively.

The definitions of dangerous or abusable drugs (proposed section 1811(3)(e)) incorporate those used in the Study Draft's drug provision (section 1829). The definition includes virtually the same substances which presently trigger firearms disability under present law, *e.g.*, heroin, cocaine, opiate derivatives, the potent hallucinogens (LSD, methadrine) and marijuana.

The definition of "firearm" in proposed section 1811(3)(g) has been taken from Title I [18 U.S.C. § 921(a)(3)], which is practically identical to the definition in Title VII (18 App. U.S.C. § 1201(c)(3)). In any event, by virtue of the bracketed reference to 18 U.S.C. § 921(a)(3) the technical aspects of the definition will remain a subject of the regulatory law and can be adjusted there in accordance with the technical expertise of the administering agency.

(b) *Section 1812.* This section consolidates two of the firearms mailing provisions in Title 18: sections 924(b) and 922(d): Present subsection 924(b) is reflected in proposed section 1812(1): present subsection 922(d) is reflected in proposed section 1812(2). "Supplies" is used in both subsections to cover the conduct now proscribed in sections 924(b) and 922(d) by the words "sells, disposes, ships, transports". 18 U.S.C. § 924(b) covers shipment of a firearm to oneself for purposes of crime. This conduct is covered in proposed subsection 1812(1)(b) by the word "procures." "Crime" as presently used in 18 U.S.C. § 924(b) includes essentially any felony. The proposal here is to restrict its meaning more appropriately to the disqualifying crimes as defined in proposed subsection 1811(3)(d), insofar as the offense concerns supplying arms to ineligible persons. However, some expansion of the present law, which proscribes supplying a gun to any person who intends to commit any crime with it, is effected by the provision in proposed subsection 1812(1)(a) that it is sufficient if the crime is to be committed while "armed therewith".

Proposed section 1812(2) covering any person who supplies arms to another ostensibly expands its progenitor 18 U.S.C. § 922(d) since the latter section covers only supplying by *licensed* persons. However, the use of the word "any person" in proposed section 1812(2) does not work any true expansion since a non-licensee would, under current law, be guilty of aiding and abetting an ineligible person under 18 U.S.C. § 922 (g) and (h).

The grading provision parallels its counterpart in proposed section 1811. It endeavors to embrace the distinction in present law that dealings in firearms by or supplying arms to certain categories of unsuitable persons is more serious than dealing by or supplying to persons in other categories. The only significant difference between the two grading subsections is that in this section, supplying a firearm to an

employee of an unsuitable person is a Class A misdemeanor although supplying to his principal would trigger felony treatment under proposed section 1811. Supplying to the employee is sufficiently attenuated from the evil to be prevented (access by the unsuitable employer) that uniform misdemeanor treatment is appropriate.

The jurisdictional provision in proposed subsection 1811(5) does not contain any significantly greater jurisdiction than obtains under present law except insofar as enclave and "piggyback" jurisdiction is provided.

(c) *Section 1813*—The provisions in present law enumerated in brackets in subsection (1) are the Title 18 firearms offenses which are not covered in proposed sections 1811 or 1812 or blanketed by other Study Draft sections of general applicability such as the false statements provision in section 1352, but which nevertheless deserve felony treatment. These present Title 18 sections cover interstate and foreign firearms transactions by any person, and intrastate commercial firearms transactions by licensees.

Proposed section 1813 incorporates the provisions in 18 U.S.C. §§ 922(k) and 923(i) which deal with obliterated or missing serial numbers. These Title 18 provisions are included since the serial number is the predicate for the essential control of firearms with respect to criminal elements. "Willfully" is included in section 1813 so as to insure application of proposed section 302(1)(e). (*See* section 302(2).)

A gap in the coverage of serial number offenses exists in present law which can be covered by adjustment in the regulatory law but is outside the scope of the Study Draft's undertaking. Presently, while licensees are required to place a serial number of each weapon (18 U.S.C. § 923(i)) and it is an offense to transport interstate a firearm with an obliterated serial number (18 U.S.C. § 922(k)) or to obliterate a serial number on a special weapon such as a machine gun or to receive or possess same (26 U.S.C. § 5861(g)-(i)) it is not presently illegal to obliterate a serial number on any other kind of firearm or to possess one without a serial number.

One issue posed by the affirmative defense-grading provision in section 1813(2) is whether the offense is 18 U.S.C. § 922(a) (engaging in the business of firearms without a license) incorporated into section 1813(1) should be amenable to misdemeanor reduction since licensing is the predicate for present Federal firearms control and the proscribed conduct is actually a course of conduct making multiple indictments or counts and consecutive sentences (equivalent to imposition of an extended term) improbable. (*See* Study Draft sections 703, 3202 and 3206). Pending agency comment and further Commission deliberation, it is formulated so as to permit reduction to a misdemeanor since its provisions are largely prophylactic and no immediate harm inevitably results from violating them.

The jurisdiction provision section 1813(3) by virtue of its reference to subsection (1) adopts the definition of interstate or foreign commerce in 18 U.S.C. § 921(a). By virtue of the second sentence of the opening paragraph of proposed section 201, jurisdiction over Title 18 offenses proscribing intrastate transportation of firearms, *etc.*, by licensees remains plenary.

(d) *Section 1814*—This section incorporates by reference the provisions of Title 26 dealing with machine guns, sawed off shotguns,

silencers, handguns without rifle bores, bombs and grenades. Essentially, this legislation requires application, registration and corresponding payment of taxes upon the making, transfer and importation of such particularly dangerous devices.

Selective coverage of the offenses now embraced in the various subsections of 26 U.S.C. § 5681 was considered, but not adopted. Much of that section appears already to be covered by other provisions of the proposed Code and would not ordinarily require separate treatment here. For example, the occupational, transfer, making and importation taxes are covered by proposed section 1403, the importation proscriptions in 26 U.S.C. § 5861(k) are blanketed by proposed section 1411, and the false entries provisions in 26 U.S.C. § 5861(l) are covered by draft section 1352. However, many of these other proposed offenses are, as general offenses, misdemeanors in all situations while the gravity of the special weapons firearms provision recommends a more discriminating uniform grading scheme, as provided in proposed section 1814(2). Moreover, all of these firearms offenses are so closely tied to the predicate tax provisions that to isolate them creates some confusion. Accordingly, all the offenses listed in the various subsections of 26 U.S.C. § 5861 are incorporated into proposed section 1814. Insofar as there may be double coverage by virtue of their inclusion for separate treatment in proposed section 1814, any aggravated result is avoided by the limitations on consecutive sentences in proposed section 3206. Consolidation into a separate statute of the serial number obliterations offenses in 26 U.S.C. § 5861(g)(i) and those in 18 U.S.C. §§ 922(k), 923(i) also proved to be impractical. Accordingly, for simplicity, clarity and uniformity of treatment all of the offenses in 26 U.S.C. § 5861 are included by reference in proposed section 1814.

Subsection (2) explicitly recognizes the exceptions in present law, since it is contemplated that they will remain in effect, as part of the regulatory law and outside the new Title 18. Present definitions are retained by virtue of the fact that 26 U.S.C. § 5861, embraced in proposed section 1814(1), itself incorporates them by reference.

The affirmative defense-grading provision in subsection 1814(2) poses the question of whether, at least with respect to those especially dangerous weapons so peculiarly amenable to criminal uses, any misdemeanor should be available. It is not anticipated that the proposed affirmative defense provision will undermine the effectiveness of the present regulations (which place the burden of supplying information on the predecessor in title or possession) in meeting fifth amendment difficulties. A broader issue is whether this offense should remain tied to a tax base, or instead be drafted as a ban, possibly including the exceptions of present law, based upon congressional findings similar to those in 18 App. U.S.C. §1201.

Since one of the incorporated subsections of Title 26 (§ 5861(j)) explicitly provides "interstate or foreign commerce" as its jurisdictional base, provision for it is made in a fashion similar to that provided in section 1813(3).

4. *The Fifth Amendment and Firearms Legislation—*

Recent Supreme Court cases have indicated that almost any system of firearms registration and licensing runs risks of constitutional in-

firmity under the fifth amendment. (*See e.g.*, *Haynes* v. *United States*, 390 U.S. 85 (1968); *Leary* v. *United States*, 395 U.S. 6 (1969)).

The risk of self incrimination arises, *inter alia*, whenever a law requires the citizen to furnish certain information in order to legally undertake conduct otherwise proscribed, and the required information is of a nature which might indicate that the citizen engaged in another kind of proscribed conduct.

These risks are acute both in any scheme of firearms registration, where certain persons are precluded from dealing in or possessing firearms, and in any restrictive licensing scheme which, in effect, requires the putative possessor to supply qualifying information. These schemes are the conventional forms of both existing and commonly urged firearms legislation.

The statutory resolution of these difficulties must be found in the details of the regulatory law underlying, but outside, the provisions of the Study Draft. Consistent with the approach taken elsewhere in the Study Draft with regard to regulatory provisions, no statutory text of regulatory law regarding record keeping, *etc.*, is submitted. Nevertheless, it is appropriate to outline a tentative approach.

With respect to registration provisions, the regulatory law could embrace "restrictive use" provisions similar to those presently included in 26 U.S.C. § 5848. This statute provides that none of the registration information required by the firearms statutes in chapter 53 may "be used directly or indirectly, as evidence against that person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with registration". Similar provisions could be incorporated into any regulatory law dealing with restrictive licensing.

Wherever feasible, the burden of providing the information could be placed upon the predecessor in possession or title so as to attenuate, as much as possible, the risks of self incrimination by the putative possessor. (*See*, 26 U.S.C. § 5801 *et seq.*: *United States* v. *Melville*, 6 CrL 2442 (S.D.N.Y. 3/3/70)). Variations of these proposals and alternatives, but again with no conclusive recommendations, and a summary of present law can be found in *Firearms and Violence in American Life*, A Staff Report Submitted to the National Commission on the Causes and Prevention of Violence, pp. 114–118, App. K (1969).

REPORT

on

DRUG OFFENSES: SECTIONS 1821–1829 (Schwartz, Rosenthal; January 14, 1969, revised November 20, 1969)

Introductory Memorandum

The draft of offenses dealing with dangerous, abusable and restricted drugs (sections 1821–1829) would replace existing Federal penal provisions in this field presently scattered among several Titles of the United States Code. The paragraphs below give a brief preview of innovations and issues, with references to the more extended notes in the excerpts from the consultant's report that follow.

1. *Federal Jurisdiction.*—The proposed provisions define the offenses directly and simply in terms of the undesirable behavior, *e.g.*, "trafficking," "possessing," rather than in terms of particular Federal jurisdictional bases, *e.g.*, interstate commerce, tax evasion. A vast development of Federal jurisdiction since the Harrison Narcotics Act of 1914 makes the simplification feasible. Congress in the Drug Abuse Control Amendments made findings as to the inextricable intertwining of interstate and intrastate commerce in certain drugs, and enacted prohibitions applicable without distinction to all commerce in certain drugs. The courts have sustained comprehensive Federal jurisdiction.

2. *Classification of Drugs.*—The proposal classifies drugs into three levels of dangerousness and makes corresponding sentence discriminations. Existing law irrationally treats marihuana offenses with approximately the same severity as heroin and cocaine offenses. The quite dangerous hallucinogens are presently treated more leniently. Present law fails to discriminate between ordinary smoking marihuana and the relatively dangerous separated resin of marihuana. The three classes of drugs provided for by the proposal contemplate discriminations along the following lines: (a) most "dangerous" drugs, entailing a relatively significant risk of serious physical or psychic harm, a relatively significant risk of addiction or "dependence," or a relatively significant risk of serious crime either under the influence of the drug or in order to obtain it; (b) "abusable" drugs, involving lesser but still substantial risks of impairment of health or associated criminality; and (c) "restricted" drugs in common use where distribution has been placed under administrative regulation and the main purpose of penal provisions is to assure observance of the regulations.

A major issue will be where to locate marihuana in this classification system. In effect, the proposal puts it in the intermediate group with the consequence that possession will be treated as a regulatory infraction. (*See* the note on unlawful possession and classification of drugs,

infra.) Possession with intent to distribute, however, will be treated as a felony.

The Attorney General is given power to allocate and reallocate drugs within the classification scheme in accordance with factors set forth in the regulatory law.

3. *Distinction between Commercial and Noncommercial Transactions in Grading of Offenses.*—Present statutes make no distinction between commercial exploiters of contraband drugs and the sorriest victim of the trade. "Receipt, concealment, and purchase" are banned on the same basis as "sale"—an equivalence which would be justified only where receipt, concealment, and purchase are by dealers in the course of commercial distribution. A miserable addict found in possession of a single dose of heroin violates the Narcotic Drug Import Act on the basis of a presumption from possession that he "knowingly imported" or received with knowledge of unlawful importation. On a first conviction he is subject to a *mandatory minimum of 5 years imprisonment; on a second to a mandatory minimum of 10 years. No greater punishment is authorized for organized international large-scale narcotics smuggling.* Although the exercise of decent discretion by prosecutors and judges can avert the worst abuses of such legislation, the law itself is a reproach to our system of justice and encourages cynical disrespect. Judges have felt compelled to evade the literal impact of such laws. The 1963 President's Advisory Commission on Narcotic Drug Abuse called for legislative distinctions of the sort here proposed. The question of whether or not it is unconstitutional (cruel and unusual punishment) to apply the 10-year mandatory minimum to an addict proved merely to have possessed narcotics for his own use is pending for decision in the case of *Watson* v. *United States*, 37 U.S. L.W. 1094 (D.C. Cir. 1968), *vacated* (April 18, 1969), *reargued en banc* (June 25, 1969).

4. *Distinction with Regard to Quantities of Drugs Involved in Transaction.*—Present law makes no provision for grading offenses according to the amounts of drug involved. Under the proposal, the Attorney General would publish regulations establishing "indicative quantities" for various dangerous drugs. The "indicative quantity" would be a quantity indicative of large-scale wholesale distribution. Trafficking in dangerous drugs in such quantities and sale for resale would be Class B felonies. Provision might be made in the regulations for aggregating quantities possessed over limited periods of time, or quantities possessed by associated persons, in the light of enforcement experience. Any doubts as to the constitutionality of such a delegation could be stilled by requiring the regulations to lie before Congress for a stipulated time before becoming effective.

Consideration has been given to employing presumptions in connection with "indicative limits" established by regulation. Thus, we might provide that possession of more than the indicative limit gives rise to a presumption that the possession was for the purpose of distribution. This was rejected on the ground that it would impede and complicate prosecutions with the need to litigate in each case whether the presumption was overcome. Although fixed quantity limits may possibly put some cases of personal use into the commercial Class B offense category, the manifest indication of congres-

sional and prosecution policy will encourage the exercise of discretion in law enforcement and correctional processes in favor of such cases.

5. *Possession Distinguished from Trafficking.*—"Trafficking" is defined in the proposal to include "possession with intent to transfer or otherwise dispose" (*see* the note on trafficking in dangerous or abusable drugs, *infra*), so that if the government can prove that the defendant is a distributor it need not prove an actual sale; possession will be enough to invoke the graver penalties for trafficking under proposed section 1822. The level of the offense may be reduced to a Class A misdemeanor *if defendant carries the burden of proof* that such further transfer as he may have had in mind was noncommercial and not to a child under 16. (Note that the basic definition of trafficking covers gifts, exchange, and every other transfer, thus necessitating special mitigating or exculpating provisions if desired.)

Bare possession of "dangerous" drugs without intent to transfer, *i.e.*, for one's own use, is a Class A misdemeanor. (*See* section 1824.) (Note that repeated commission of this misdemeanor will subject the offender to felony penalties under section 3003 on persistent misdemeanants.) Although many will find it difficult to accept misdemeanor classification for possession of dangerous drugs, others will question this proposal to retain any criminality for what is regarded as a private vice.

6. *Possession Offenses; Dependence as a Defense; Civil Commitment Policy.*—Section 1824(2) presents one of the most difficult issues in this field: should it be a defense to a charge of possessing addictive drugs that the possessor was "incapable of refraining" from use—and therefore possession—of the drug? The note on dependence as a defense to possession, *infra*, examines the conflicting considerations, among them the following: *Robinson* v. *California*, 370 U.S. 660 (1962), held unconstitutional a statute making addiction a crime; *Powell* v. *Texas*, 392 U.S. 514 (1968), sustained a conviction of an alcoholic for "public drunkenness," suggesting that the *Robinson* case might be confined to situations where the "status" of addiction or chronic alcoholism was made criminal. However, four dissenting justices took the position that "the essential constitutional defect here is the same as in *Robinson*, for in both cases the particular defendant was accused of being in a condition which he had no capacity to change or avoid;" (392 U.S. at 567–568) and that "a person may not be punished if the condition essential to constitute the defined crime is part of the pattern of his disease and is occasioned by a compulsion symptomatic of the disease" 392 U.S. at 569. And a fifth justice, though concurring in the result, suggested that it is unconstitutional to punish an addict for his use. Is possession by an addict for his own use so inextricable from addiction that *Robinson* stands as a constitutional mandate to recognize the defense? Section 1824(2) of the draft would not recognize any broader defense: it is not proposed to exculpate addict participation in "trafficking" or in other crimes which an addict might "compulsively" commit in order to secure funds with which to gratify his addiction.

As to possession by an addict for own use, there is much to be said for recognizing the defense even if it is not constitutionally required. As shown in the note on dependence as a defense to possession, *infra*,

addiction is authoritatively classified by the American Medical Association as a symptom of a psychiatric disorder and it is treated nonpunitively under Federal and State treatment programs. It seems barbarous to classify and treat a man as a criminal for behavior which is merely symptomatic of illness. *See Watson* v. *United States*, *supra*.

Related to the question whether addicts should be imprisoned for possessing is the availability of alternative dispositions of addicts: should they be involuntarily committed for treatment on a "civil" basis? The note on civil commitment, *infra*, reviews existing treatment programs, finds them to be of undemonstrated efficacy ("experimental"), expensive, and involving considerable hardship to both the substantial majority of addicts who do not respond to treatment and to addicts who present no significant threat to public safety. Although these relatively new treatment programs should be encouraged, it appears that their experimental and therapeutic capacities can be fully exploited with an inmate population consisting of those who voluntarily seek treatment or who have forfeited their freedom by criminal activity apart from possession and using drugs.

If involuntary commitment is rejected and the addiction defense is accepted, the community might be confronted with the paradox of jail for the least dangerous possessors (nonaddict experimenters and the like) while addicts go free. Perhaps this is consistent with notions of culpability—"the addict is sick, can't help himself"—but this would put great pressure on the criteria and practice of discriminating between addicts and nonaddicts, a discrimination apparently even harder to make than that between responsibility and irresponsibility of the "mentally ill."

Thus there appears to be a choice between allowing a defense coupled with an undesirable involuntary commitment, the existence of which would discourage resort to the defense in any event, and disallowing a defense which constitutional and humane considerations seem to call for. Perhaps this troublesome situation puts in question the anterior proposal to make it a misdemeanor or regulatory infraction (depending on the drug involved) to possess drugs for one's own use.

7. *Sentencing; Mandatory Minima.*—Existing law provides for *mandatory* minimum sentences of 5 and 10 years for first and second offenses relating to narcotics and marihuana, and probation is barred. Opportunity to avoid this severity is, however, afforded by the prosecutor's option to charge only a "tax offense," 26 U.S.C. § 4704(a) (purchase or sale of narcotics from an unstamped package or without a prescribed order form). Although that section provides for a minimum imprisonment term of 2 years, probation is available. Sale of quite dangerous hallucinogens (LSD) or the more potent forms of amphetamines carry no minima, and the maxima are also much lower than for narcotics, some of which are comparatively harmless.

The proposal is to grade offenses essentially by degree of danger and by scale of commercial exploitation. Mandatory minima are eliminated for reasons set forth at length in the preliminary sentencing memorandum of January 8, 1968. Consideration should be given to whether there are any special reasons for retaining them in relation to drug offenses. The President's Commission on Law Enforcement and

the Administration of Justice ("National Crime Commission") rejected minimum sentences as did the American Bar Association in approving the Sentencing Report of the Committee on Minimum Standards for Criminal Justice.

8. *Culpability.*—Under general provisions already presented, willfulness (embracing intention, knowledge, and recklessness) is an element of all crimes except regulatory infractions unless another degree of culpability is expressed. The application of this general provision to drug crimes would reverse the controversial decision of the U.S. Supreme Court in *United States* v. *Balint*, 258 U.S. 250 (1922), but accords with provisions of recent States Codes.* This return to the conventional position on criminal guilt seems to have occasioned no enforcement difficulties in New York. (*See* the note on culpability, *infra.*) A substantial gain on the law enorcement side is registered by the elimination of the pseudo-requirement of knowledge that contraband drugs have been illegally *imported*, because the proposed draft, unlike present Federal law, provides for plenary Federal jurisdiction over possession, regardless of importation. The controversial presumption of such knowledge with respect to marihuana was recently held unconstitutional. *Leary* v. *United States*, 395 U.S. 6 (1969).

9. *Distribution to Children.*—Under existing law distributions of drugs to minors subject the offender to more serious penalties than other distributions. Distributions of narcotics or marihuana by persons over 17 to minors under 18 are punishable by a mandatory minimum of 10 years and a 40-year maximum. Distribution to them of heroin may be punished by life imprisonment. Under the recent dangerous drug amendments, higher maxima—10 years for a first conviction, 15 for a second—are provided for transfers from a person over 17 to one under 21. These higher penalties reflect a fear that young persons can more easily be seduced or imposed upon to become drug-dependent. These provisions, however, are rarely used in Federal enforcement.

In the proposed draft the age of the recipient is not critical in a commercial distribution because the penalties for such distributions to anyone are already severe. Noncommercial distributions may be a different matter. Such distributions—trafficking where the offender can establish that it is not for profit or in furtherance of a commercial venture—is to be a lesser offense than commercial distribution, a Class A misdemeanor rather than a Class C felony. It may be reasonable to maintain noncommercial distributions to young children at the Class C felony level because of their particular vulnerability; and this is accomplished by making the mitigation defense to Class C trafficking unavailable if the recipient is less than 16 and the offender is at least 5 years older. (*See* section 1822(3).**

The draft's choice of 16 as the critical age of the recipient—rather than 18 or 21, as in existing law—is based on the view that minors 16 and older have shown at least as much familiarity with drugs as adults and are not likely to be any more vulnerable to seduction or imposition solely because of age. The "peer factor," *i.e.*, the requirement

*The culpability requirement was changed to "knowingly" in the Study Draft to accord with S. 3246 (Controlled Dangerous Substance Act of 1969) now before Congress.

** The age limit was changed from 16 to 18 in the Study Draft.

that the person who distributes have an age advantage over the child-distributor, carries forward the policy expressed in existing law, which excludes from the enhanced penalties offenders under 18 who distribute to minors. The policy is similar to that discussed in the statutory rape draft: youth of the victim is less significant when the age of the "offender" is close to that of the "victim." The draft increases the peer factor in some cases above 17; but this seems warranted in view of the fact that the distribution must be noncommercial and will still constitute an offense.

10. *Regulatory Laws.*—The Code provisions will tie in to regulatory laws located outside Title 18. Authorization of conduct by that law will constitute a defense (*see* section 1825). We shall not be dealing however, with much of what is contained in those laws: what constitutes legitimate production and distribution by the drug industry, prescribing by physicians, dispensing by pharmacists, research use, record keeping and other controls, definitions of what are controlled substances, *etc.* Our concern is primarily with penal treatment of conduct outside of lawful channels.

To some extent, what we contemplate should be contained in the regulatory law has shaped our draft. Thus we expect that the regulatory law will deal with the machinery for classification of drugs for the purposes of our provisions, as provided in section 1821, and will provide definitions for words such as "manufactures" used in the definition of "trafficking" in section 1829.

For some months the Justice Department has been preparing a comprehensive revision of the drug laws. Our consultant, Professor Rosenthal, has been using their regulatory provisions as a probable model of those to which our Code provisions would be tied. It will be noted that the Justice Department draft indicates that the regulatory law will contain many penal provisions relating to matters other than illegal distribution. Most—perhaps all—are suitable for treatment as provided in our regulatory offense provisions (section 1006), which would be incorporated in the regulatory law provisions by reference. Some may require close scrutiny, however, particularly where a felony classification is recommended, *e.g.*, counterfeiting drugs; but such offenses have attributes other than illicit distribution and are outside the scope of our proposed discussion draft.

Excerpts From Consultant's Report

NOTE

on

EXISTING FEDERAL LAW

Existing Federal criminal law dealing with mind- and mood-altering drugs and substances is a hodgepodge of statutes, some of which are based on the taxing power, and some on the power to regulate commerce, some of which punish transactions in more harmful substances less severely than others punish transactions in less harmful substances, some of which carry permissible sentences that are among the longest in Federal criminal law, provide for mandatory minimum penalties, and otherwise restrict the power of the trial judge to indi-

vidualize punishment, and further make these penalties applicable indiscriminately to minor violators as well as to substantial figures in the illicit traffic.

Because the laws governing opiates (including heroin), cocaine, and marihuana are similar, they will be discussed together.

1. *Opiates, Cocaine, and Marihuana.*

(a) *The narcotics laws.*—Although cocaine is a stimulant, it is inappropriately classified as a narcotic under Federal law;[1] and the laws regulating traffic in opiates and cocaine are known as the Narcotics Laws. Marihuana transactions are punishable under different but similar laws. While there are a number of special offenses for various dealings in or with respect to narcotics (as defined), the basic criminal offenses dealing with transactions in narcotics are found in the Harrison Narcotic Act of 1914 as amended, legislation based on the taxing power and codified in the Internal Revenue Code, and in the Narcotic Drugs Import and Export Act. Several of these offenses are characterized by presumptions (sometimes designed to enable the prosecution to prove the jurisdictional requirements of the statute) that permit the jury to convict on a showing that the defendant possessed the narcotics.

The Narcotic Drugs Import and Export Act.—Section 174 of Title 21 prohibits (i) fraudulent or knowing importation of narcotics and (ii) receipt, concealment, purchase, sale, and facilitation of the transportation, concealment, or sale of narcotics after importation and with knowledge of unlawful importation.[2] It also prohibits conspiracy to commit any of these acts. Moreover, while nominally punishing importation and acts committed with knowledge of unlawful importation, the provision makes possession alone sufficient to support a conviction by providing "possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." This presumption has been consistently upheld with respect to various opiates and cocaine,[3] despite claims that it violated the privilege against self incrimination, and, in the case of particular narcotic substances, that it is unreasonable to presume importation merely because of possession in the United States. The Supreme Court, however, has recently granted certiorari in a case raising the question whether the presumption conflicts with the privilege against self incrimination.[4]

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[1] 26 U.S.C. § 4731(a)(2).

[2] Although literally the statute reaches this conduct only when engaged in with *knowledge* of unlawful importation, it has been said that: "While negligence is not sufficient to charge a person with knowledge, one may not willfully and intentionally remain ignorant of a fact, important and material to his conduct, and thereby escape punishment." *Griego* v. *United States*, 298 F. 2d 845 (10th Cir. 1962) (dictum).

[3] The leading case is *Yee Hem* v. *United States*, 268 U.S. 178 (1925). However, the Ninth Circuit declared the presumption unconstitutional with respect to cocaine hydrochloride on the ground that the connection between possession and importation of that drug was too tenuous to support it. *Ervine* v. *United States*, 323 F. 2d 674 (9th Cir. 1963). The presumption is discussed in Sandler, *The Statutory Presumption in Federal Narcotics Prosecutions*, 57 J. CRIM. L., C. & P.S. 7 (1966).

[4] *United States* v. *Turner*, 404 F. 2d 782 (3d Cir. 1968), *cert. granted*, 5 Cr. L. Rep. 4063 (1969).

A first offense is punishable by a mandatory minimum term of 5 years' imprisonment and a maximum of 20 years' imprisonment, as well as by a maximum fine of $20,000. Subsequent offenses are punishable by a mandatory minimum term of 10 years and a maximum term of 40 years, as well as by a maximum fine of $20,000. Suspended sentence, probation, and parole are precluded even for first offenses.[5]

Despite the presumption in section 174, guilt still requires a finding that an accused who engaged in prohibited conduct with respect to a narcotic drug did so with knowledge that the drug was unlawfully imported or imported it himself. The culpability requirement with respect to possession is unclear, and few cases deal with the question at all. It has been said that in order to invoke the presumption it is not necessary for the government to prove that possession was knowing, but that if the government merely proves possession the defendant is required to come forward with evidence explaining it.[6] On the other hand, there are judicial statements to the effect that knowledge is necessary to the concept of possession.[7] Presumably, if possession is not knowing, the defendant cannot have acted with knowledge of unlawful importation.

By virtue of the presumption contained in section 174 almost all possession cases can be treated as importation cases. Unlawful possession of a drug can be viewed as creating a risk of unlawful distribution, and thus be appropriately punished more severely than use of the drug. However, every user must be a possessor. Consequently, to the extent that section 174 permits conviction upon proof of possession, it permits the conviction of a *user* for a crime which carries a 5-year mandatory penalty and a 20-year maximum for a first offense and a 10-year mandatory penalty and a 40-year maximum for a second offense. Moreover, even insofar as the statute may be directed at trafficking, it in effect punishes possession on the same level as actual distribution without requiring any proof that the possessor possessed to distribute.

Section 176b of Title 21 makes sales, exchanges, and gifts of heroin by persons 18 years of age or older to minors who are under 18 punishable by a fine of $20,000 and a mandatory minimum term of 10 years' imprisonment and a maximum of life imprisonment. It also requires imposition of the death sentence if the jury so directs. This last provision seems clearly to conflict with the decision of the Supreme Court in *United States* v. *Jackson*,[8] holding unconstitutional the similar provision of the Federal Kidnapping Act, because it operates as a restriction on the defendant's right to trial by jury and his right not to plead guilty. Suspension of sentence, probation, and parole are not available for violators of section 176b.[9]

The Harrison Narcotic Act.—While the Harrison Narcotic Act creates a number of offenses, the most significant are those appearing in sections 4705(a) and 4704(a) of Title 26.

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[5] 26 U.S.C. § 7237(d).

[6] *Roviaro* v. *United States*, 353 U.S. 53, 63n.14 (1957); *Arellanes* v. *United States*, 302 F. 2d 603 (9th Cir.), *cert. denied*, 371 U.S. 930 (1962).

[7] *Miller* v. *United States*, 347 F. 2d 797, 801 (D.C. Cir. 1965) (dissenting opinion).

[8] 390 U.S. 570 (1968).

[9] 26 U.S.C. § 7237(d).

Section 4705(a) makes it unlawful to sell, exchange, barter, or give away narcotics except in pursuance of a written order of the purchaser or recipient on an official treasury order form.[10] Since most illicit transactions are not supported by order forms, this provision reaches illicit distributions. A first offense under section 4705(a) is punishable by a mandatory minimum sentence of 5 years, a maximum sentence of 20 years, and a maximum fine of $20,000.[11] Subsequent offenses are punishable by a mandatory minimum term of 10 years, a maximum term of 40 years, and a maximum fine of $20,000.[12] Suspended sentences, probation, and parole are precluded even for first offenses.[13] Conspiracies to violate section 4705(a) are punishable in the same manner as substantive violations.[14] Dispositions by persons 18 years of age or over to persons under 18 and conspiracies to make such dispositions are punishable by a mandatory minimum term of 10 years' imprisonment, a maximum term of 40 years, and a maximum fine of $20,000.[15] Suspended sentence, probation, and parole are unavailable.[16]

Section 4705(a) states a strict liability offense; and it is irrelevant whether the accused knew that the substance he distributed was a narcotic.[17]

Section 4704(a), commonly known as a "tax count" or a "stamped package count," prohibits the purchase, sale, dispensation, or distribution of narcotics not in or from the original stamped package. The stamped package refers to a package to which excise tax stamps have been affixed by the importer, manufacturer, producer, or compounder.[18] The section also provides that the absence of the appropriate tax-paid stamps shall constitute prima facie evidence of violation by the person in whose possession the substance is found. As interpreted, possession of a substance not carrying tax stamps creates a rebuttable presumption of violation. The constitutionality of this presumption has also been consistently upheld.[19] The Supreme Court, however, has recently granted certiorari in a case raising the issue whether the presumption conflicts with the privilege against self incrimination.[20]

First offenses under section 4704(a) are punishable by a minimum prison term of 2 years, a maximum of 10 years, and by a maximum fine of $20,000.[21] In the case of a first offender, the trial judge may suspend sentence or place the defendant on probation; and the de-

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[10] The Supreme Court has granted certiorari in a case raising the question whether the privilege against self incrimination bars prosecution under section 4705(a). *United States* v. *Minor*, 398 F.2d 511 (2d Cir. 1968), *cert. granted*, 5 Cr. L. Rep. 4063 (1969).

[11] 26 U.S.C. § 7237(b).

[12] *Id.*

[13] 26 U.S.C. § 7237(d).

[14] 26 U.S.C. § 7237(b).

[15] *Id.*

[16] 26 U.S.C. § 7237(d).

[17] *United States* v. *Balint*, 258 U.S. 250 (1922); *United States* v. *Behrman*, 258 U.S. 280 (1922).

[18] 26 U.S.C. § 4701.

[19] The leading case is *Casey* v. *United States*, 276 U.S. 413 (1928).

[20] *United States* v. *Turner*, 404 F. 2d 782 (3d Cir. 1968), *cert. granted*, 5 Cr. L. Rep. 4063 (1969).

[21] 26 U.S.C. § 7237(a).

fendant may be placed on parole. However, these measures of individualization of punishment are not available for second and subsequent offenders.[22] Second offenses are punishable by a mandatory minimum term of 5 years, a maximum term of 20 years, and a fine of $20,000; third and subsequent offenses are punishable by a mandatory minimum term of 10 years' imprisonment, by a maximum of 40 years' imprisonment, and by a maximum fine of $20,000.[23] Conspiracies are punishable on the same level as the substantive offense.[24]

Despite the large number of reported cases dealing with section 4704(a), few discuss the culpability required for conviction. One court of appeals has stated that it is a strict liability offense.[25] However, there is also authority taking the position that while the government need not show that possession was knowing in order to invoke the presumption, the defendant may claim as a matter of defense that his possession was not knowing.[26] This is a question for the jury. Finally, there is a judicial statement that knowledge is necessary to the concept of possession, and the government may not invoke the presumption unless its proof shows that possession was knowing.[27]

By virtue of its probation and parole eligibility features and its lower mandatory minimum, section 4704(a) makes available to the government a "lesser" offense by which to prosecute both disposition and possession cases. A defendant may be charged under it as a result of his cooperation in disclosing sources or in acting as a special employee or where it is believed more severe treatment is inappropriate.

(b) *The marihuana laws.*—The marihuana laws closely parallel the narcotics laws both in operative criminal provisions and penalties. The same mandatory minimum penalties and restrictions on suspended sentences and probation that are found in the narcotics laws apply to violations of equivalent provisions of the marihuana laws.[28] Moreover, until late in 1966 parole was unavailable for violations of the marihuana laws to the same extent that it is unavailable for violations of the narcotics laws. The Narcotic Addict Rehabilitation Act of 1966 (NARA),[29] however, abolished restrictions on parole for marihuana violations.

Marihuana as defined in the narcotics laws includes, with an exception not here relevant, all parts of the plant Cannabis Sativa, its unsterilized seeds, derivatives, mixtures, and preparations of and compounds made from the plant.[30] In the United States, a mixture of the flowering tops, stems, leaves, and sometimes seeds is generally used, usually in smoking. While the potency of the preparation varies considerably, depending on climate, soil, the age of the substance at the time of use, and the concentration of flowering tops in the mixture, it

[22] 26 U.S.C. § 7237(d).
[23] 26 U.S.C. § 7237(a).
[24] *Id.*
[25] *United States* v. *Dillard*, 376 F.2d 365 (7th Cir. 1967).
[26] *Graham* v. *United States*, 257 F.2d 724 (6th Cir. 1958); *United States* v. *Chiarelli*, 192 F.2d 528, 531 (7th Cir. 1951), *cert. denied*, 342 U.S. 913 (1952).
[27] *Miller* v. *United States*, 347 F.2d 797, 801 (D.C. Cir. 1965) (dissenting opinion).
[28] 26 U.S.C. § 7237(d).
[29] The Act is codified in 26 U.S.C. § 7237(d).
[30] 26 U.S.C. § 4761(2).

is generally agreed that preparations of the plant itself are not nearly as potent as preparations made from the separated resin of the plant.[31] Despite this, the marihuana laws do not distinguish for purposes of grading between transactions involving the plant itself and transactions involving the generally more powerful separated resin. The same severe penalties are prescribed for all transactions involving the Cannabis plant or its derivatives.

The relevant provision of the Narcotic Drugs Import and Export Act applying to marihuana is section 176a of Title 21, which is virtually identical in language to section 174 of that Title, dealing with narcotic drugs. (There is no marihuana provision paralleling section 176b, with respect to selling heroin to juveniles.) Section 176a also provides that possession is sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury. This presumption, however, was recently declared unconstitutional by the Supreme Court.[32] The Court found that there was no rational connection between possession of marihuana and knowledge that the marihuana was imported.

Violations of section 176a are punishable in the same manner as violations of section 174.

Other offenses dealing with marihuana transactions are found in the Marihuana Tax Act, as amended, of 1937, codified in the Internal Revenue Code.[33] The Act is similar to the Harrison Narcotic Act, as amended, and purports to be a regulatory law as well as a criminal law as does the Harrison Act. However, since marihuana was excised from the United States Pharmacopoeia, there have been few legitimate transactions in it, and the Act is in effect almost entirely a criminal law.[34]

Section 4742(a) of Title 26 parallels section 4705(a), dealing with narcotic drugs. It prohibits transfers not pursuant to a written order of the transferee on the official treasury form; violations and conspiracies to violate are punishable in the same manner as violations of and conspiracies to violate section 4705(a).[35] Transfers to minors under 18 years of age and conspiracies to make such transfers of marihuana are punishable to the same extent as transfers of narcotics.[36]

Section 4744(a) of Title 26 parallels section 4704(a) in prohibiting a transferee required to pay the marihuana transfer tax [37] from acquiring or otherwise obtaining marihuana without payment of the tax, or from transporting, concealing or facilitating the transportation or

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[31] *The Dangerous Drug Problem—II; A Policy Statement by the Medical Society of the County of New York*, 24 N.Y. MEDICINE, No. 1, 3 (Jan. 1968); McGlothlin, *Cannabis: A Reference*, in THE MARIHUANA PAPERS 401 (Solomon ed. 1966).

[32] *Leary* v. *United States*, 395 U.S. 6 (1969).

[33] 26 U.S.C. § 7237(d).

[34] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 224 (1967).

[35] 26 U.S.C. § 7237(b).

[36] *Id.*

[37] Transferees in both licit and illicit transactions are liable for the tax. The tax on illicit transactions is much higher than the tax on legitimate ones. 26 U.S.C. § 4741(a).

concealment of any marihuana so acquired or obtained.[38] In two recent cases, however, the Supreme Court held that a proper claim of the privilege against self incrimination is a complete defense to a charge under this provision to a defendant who otherwise would stand in violation of it.[39] The Court stated that by requiring such a defendant to pay the tax, the statute required him to expose himself to a "real and appreciable" risk of self incrimination under State laws punishing the possession of marihuana.[40] The Court's action, coupled with its action in striking down the presumption in section 176(a) of Title 21, in effect precludes conviction of a defendant who properly claims the privilege merely on a showing that he possessed marihuana.

2. "*Dangerous Drugs*": *The Drug Abuse Control Amendments.*— While legislative and public concern about drug abuse began with the opiates and cocaine and then focused on marihuana, it eventually extended to other drugs. First, it focused on barbiturates and other hypnotics and sedatives. Then it focused on amphetamines and similar stimulants. Later concern extended to a number of newly developed sedatives and so-called "minor" tranquilizers which, while not barbiturates chemically, were capable of producing effects similar to barbiturates. Finally, concern focused on the so-called "hallucinogens," principally LSD (d-lysergic acid diethylamide) but including a growing and increasing number of substances, the principal ones being, in addition to LSD, peyote, mescaline, psilocybin, and DMT (dimethyltryptamine).[41] To distinguish these substances from opiates, cocaine, and marihuana, they are often called "dangerous drugs."

State laws of varying degrees of effectiveness were enacted to control barbiturates and amphetamines; some Federal efforts to tighten controls on the prescription of these drugs were made by amendments to the Federal Food, Drug and Cosmetic Act, but both proved inadequate.[42] Finally, Congress enacted the Drug Abuse Control Amendments of 1965 (DACA). These are amendments to the Food, Drug and Cosmetic Act, and as originally enacted they required registration of manufacturers and wholesalers (21 U.S.C. § 360(a)) and the keeping of rather specific records and inventories (21 U.S.C. § 360a (d)); restricted the filling and refilling of prescriptions (21 U.S.C. § 360a(e)); and prohibited unauthorized manufacture and distribution (21 U.S.C. § 360a(1)), and unauthorized possession not for personal household, or household animal use (21 U.S.C. § 360a(c)). As amended in October 1968, they prohibit unauthorized possession even for personal use.[43]

DACA explicitly controls barbiturates, amphetamines, and (as amended) LSD, and also gives the Attorney General (formerly the Secretary of Health, Education and Welfare) authority to control drugs which he determines possess "a potential for abuse because of"

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[38] Penalties for violations of section 4744(a) are the same as those for violations of section 4704(a), except that parole is available for section 4744(a) violations.

[39] *Leary* v. *United States*, 395 U.S. 6 (1969); *United States* v. *Covington*, 395 U.S. 57 (1969).

[40] *Leary* v. *United States*, *supra* note 39, 395 U.S. at 16–18.

[41] Marihuana too is generally regarded as a hallucinogen.

[42] *See* Rosenthal, *Dangerous Drug Legislation in the United States: Recommendations and Comments*, 45 TEXAS L. REV. 1037, 1062–1074, 1051n.86 (1967) [hereinafter cited as Rosenthal].

[43] Pub. L. 90–639, § 2.

their "depressant or stimulant effect on the central nervous system" or their "hallucinogenic effect." [44] Under this authority controls have been extended to more than 2,000 drugs, including a number of hypnotics, nonbarbiturate sedatives and minor tranquilizers, stimulants, and a number of hallucinogens, including peyote, mescaline, psilocybin, and most recently, a number of synthetic tetrahydrocannabinols (the active ingredients of marihuana).

As DACA was originally enacted, all offenses were prohibited acts under the Food, Drug and Cosmetic Act, punishable as misdemeanors by a maximum of 1 year's imprisonment, a $1,000 fine, or both for first offenses and by a maximum of 3 years' imprisonment, a $10,000 fine, or both for subsequent offenses.[45] In addition, dispositions by persons 18 years of age or over to persons under *21* were punishable by a maximum of 2 years' imprisonment, a fine of $5,000, or both for first offenses and by a maximum of 6 years' imprisonment, a fine of $15,000, or both for subsequent offenses.[46] There were no mandatory minimum penalties and no other special restrictions on individualization of punishment.

As amended in October, 1968, DACA for the first time prohibits possession of a controlled drug not pursuant to a prescription or delivered to the possessor by a practitioner acting in the course of professional practice ("simple possession").[47] First and second offenses are misdemeanors punishable by a maximum of 1 year's imprisonment and a $1,000 fine. [48] Subsequent offenses are felonies punishable by a maximum term of 3 years' imprisonment and a $10,000 fine.[49] There are no mandatory minimum penalties, and suspended sentence, probation, and parole are available.

The purpose of this provision is to aid law enforcement efforts against traffickers in controlled drugs and to provide some measure of deterrence.[50] Law enforcement officials desire a simple possession charge to prosecute persons believed to be traffickers when a sale or possession with intent to sell cannot be proved, and to provide leverage by which to induce possessors to disclose their sources of supply.[51]

While simple possession is an offense under the 1968 amendments, a defendant convicted of a first offense is to have his conviction automatically vacated and receive a certificate to that effect, if he is placed on probation and either discharged from probation prior to the expiration of the term of probation or satisfactorily complies with the conditions of probation.[52] The Report of the Senate Committee on Labor and Public Welfare states that this provision is designed "to minimize the long term adverse consequences upon a youth of a conviction for violation of the prohibition against possession of dangerous drugs." [53] The provision, however, contains no restriction as to the

[44] 21 U.S.C. § 321(v), as amended by Pub. L. 90–639, § 1.
[45] The Act is codified in 21 U.S.C. § 333(a).
[46] *Id.*
[47] 21 U.S.C. § 360a(c), as amended by Pub. L. 90–360, § 3.
[48] 21 U.S.C. § 333, as amended by Pub. L. 90–639, § 3.
[49] *Id.*
[50] S. REP. No. 1609 on H.R. 14096, 90th Cong., 2d Sess. 4 [hereinafter cited as S. REP.].
[51] Rosenthal, *supra* note 42, at 1109.
[52] 21 U.S.C. § 333, as amended by Pub. L. 90–639, § 3.
[53] S. REP., *supra* note 50, at 6.

age of offenders eligible for treatment under it. The Senate Report also states: [54]

> Testimony before Congress reflects concern among educators and social scientists that the indiscriminate enforcement of excessively severe drug laws increases disrespect for the law on the part of young people and tends to alienate them from society. . . . In one way or another every witness from the fields of science or medicine has expressed caution with respect to increased penalties for drug law violations.

The amendments to DACA also make distribution of and possession with intent to distribute controlled drugs felonies punishable by a maximum of 5 years' imprisonment and a $10,000 fine.[55] In addition, they increase the maximum penalty for a distribution by a person 18 years of age or over to a person under *21* years of age to 10 years and a $15,000 fine for a first offense, and 15 years and a $20,000 fine for a second offense.[56] Again there are no mandatory minimum penalties and no restrictions on suspended sentence, probation, or parole.

The Senate Committee on Labor and Public Welfare was hesitant about these penalties. Its Report states: [57]

> The bill as reported allows the Government to seek felony convictions for illegal possession or illegal transfer of drugs that might involve no more than the disposal of a single amphetamine or barbiturate pill by one person to another.
>
> The committee considers this an excessive penalty unless such illegal transfer of small amounts of drugs constitutes a commercial transaction.
>
> No effort was made to amend the bill in committee by providing different levels of penalties for commercial and noncommercial transfer of drugs because the Department of Justice claims that such a differentiation might create insurmountable problems for the prosecution in certain cases.
>
> Nevertheless, it should be made clear that based on the evidence before Congress the increased penalties proposed in this legislation are needed to prosecute the criminal traffickers in dangerous drugs but they should not be applied to the potentially large number of law abiding citizens who might occasionally pass on a small amount of drugs to a friend or an acquaintance.
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> In a letter dated September 30, 1968, Deputy Attorney General Warren Christopher has assured the committee that the Justice Department will continue a policy of instituting felony prosecutions only in those cases where such action would be in the public interest. The Department defines such cases as those involving what appears to be commercial activity or other aggravated circumstances.

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[54] *Id.* at 7.
[55] 21 U.S.C. § 333, as amended by Pub. L. 90–639, § 3.
[56] *Id.*
[57] S. REP., *supra* note 50, at 6–8.

> It is the intent of Congress that this policy be maintained in the process of enforcing the provisions of H.R. 14096.
>
> Without strict policy guidelines the proposed legislation could make a felon out of a mother giving one of her own sleeping pills to her 20-year-old daughter. Equally, it would apply a felony penalty to a college student passing one amphetamine pill to help a friend stay awake studying for an examination.
>
> In both cases the "offenders" could be sentenced to a 10-year prison term. . . .
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> * * * * *
>
> The heads of the major Federal drug law-enforcement agencies have claimed that minor violations particularly among college students are rarely if ever prosecuted and that their main effort is directed against the large-scale criminal trafficker in drugs.
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> * * * * *
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> Contradictions in testimony have made it imperative that we establish the clarification spelled out in this section both with respect to the enforcement policy and congressional intent regarding the provisions of H.R. 14096.

Like other provisions of the Food, Drug and Cosmetic Act, the Drug Abuse Control Amendments have been interpreted to create strict liability offenses.[58]

It should be emphasized that the penal provisions of the Drug Abuse Control Amendments are drafted in a manner similar to State legislation. They directly prohibit and make punishable unauthorized manufacture, distribution, and possession. While they are based on the commerce power, proof that the defendant's conduct in a particular case involved or affected commerce is unnecessary for jurisdictional purposes and is not an element of any offense. Several United States courts of appeal and district courts have upheld the Drug Abuse Control Amendments as within the reach of the commerce clause.[59]

3. *Title 18 Provisions.*—Although narcotics and dangerous drug prosecutions are a significant part of Federal law enforcement, only a few provisions governing them are located in Title 18, in chapter 68. Only two of the provisions define offenses. Section 1403 of Title 18, primarily provides a jurisdictional base—use of a communications facility—for prosecution of offenses the penalty for which is provided in section 7237(a) and (b) of Title 26, and sections 174 and 184a of Title 21; but each use of such facility is explicitly stated to be a separate offense. An offender is to "be imprisoned not less than two and not more than five years," and may be fined up to $5,000. The other substantive offense in Title 18 is contained in section 1407, and requires

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[58] *Rich* v. *United States*, 389 F. 2d 334 (8th Cir. 1968); *Roseman* v. *United States*, 396 F.2d 600 (9th Cir. 1968); *Whalen* v. *United States*, 398

[59] *Deyo* v. *United States*, 396 F. 2d 595 (9th Cir. 1968); *Del Giudice* v. *United States*, 396 F. 2d 600 (9th Cir. 1968); *Whalen* v. *United States*, 398 F. 2d 286 (8th Cir. 1968); *White* v. *United States*, 395 F. 2d 5 (1st Cir. 1968); *United States* v. *Erlin*, 283 F. Supp. 396 (N.D. Cal. 1968); *United States* v. *Freeman*, 275 F. Supp. 803 (N.D. Ill. 1967).

registration of narcotic violators and addicts crossing the national borders, penalizing entry or departure without registering by a fine up to $1,000, imprisonment for not less than 1 nor more than 3 years, or both.

Other Title 18 provisions dealing with narcotics provide for:

A procedure for surrender of heroin (18 U.S.C. § 1402);

Appeal by the government in a narcotics case from an order suppressing evidence (18 U.S.C. § 1404);

Special procedures for issuance and service of search warrants in narcotics cases (18 U.S.C. § 1405); and

The granting of immunity to witnesses before a grand jury or court in narcotics cases (18 U.S.C. § 1406).

4. *The Narcotic Addict Rehabilitation Act of 1966.*—The Narcotic Addict Rehabilitation Act (NARA) contains three procedures pursuant to which narcotic addicts may be placed in treatment programs. The treatment envisioned consists both of institutional treatment and supervised aftercare (parole) in the community; and both opiate addicts and persons dependent upon cocaine are eligible. Persons dependent upon barbiturates or other drugs are not eligible unless they are also dependent upon opiates or cocaine.

Under Title III of the Act [60] persons not charged with any criminal offense may volunteer for civil commitment or may be involuntarily committed on petition of a "related individual." [61] Commitment is initially for 6 months of hospitalization, followed by up to 3 years of supervised aftercare. If, however, a person fails or refuses to comply with conditions of aftercare or uses narcotics, he may be recommitted for an additional 6 months of hospitalization and 3 years of aftercare.[62] A patient who volunteers for commitment may not withdraw. A person is to be committed if it is determined he is an addict likely to be rehabilitated through treatment. If no such determination is made, he is not to be committed. At the commitment hearing an alleged addict is entitled to retain counsel or have counsel appointed for him, and is entitled to be present, to testify, to confront witnesses, and to demand a jury trial.[63] Final orders of commitment are reviewable.[64] The statute provides that a person is to be committed to the Federal program only if State or Federal facilities are not available for him.[65]

Title I of the Act [66] provides for voluntary civil commitment in lieu of prosecution for persons charged with crime. The trial judge has the sole discretion to offer an addict the choice of being committed rather than being prosecuted.[67] If the choice is offered and the addict elects commitment, and if it is determined that the addict is likely to be rehabilitated through treatment, the addict is committed to the

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[60] 42 U.S.C. §§ 3411–3424.
[61] 42 U.S.C. § 3412.
[62] 42 U.S.C. § 3413. The statute is unclear as to whether an addict may be continually recommitted if he repeatedly fails or refuses to comply with conditions of aftercare or uses narcotics.
[63] *Id.*
[64] 42 U.S.C. § 3414(b).
[65] 42 U.S.C. § 3412.
[66] 28 U.S.C. §§ 2901–2906.
[67] 28 U.S.C. § 2902(a).

custody of the Surgeon General for 3 years of hospitalization and aftercare if adequate treatment facilities and personnel are available.[68] The criminal charge is continued without final disposition.[69] If the Surgeon General is unable to make a determination that the addict is ready for release on aftercare within 24 months, he is to advise the court and the United States Attorney whether commitment should be continued. The court may either continue the commitment or terminate it and resume the criminal proceeding.[70]

The Surgeon General may order a conditionally released addict to return for institutional treatment. If the addict has returned to use of narcotics, the Surgeon General is to inform the court of the conditions under which use was resumed and make a recommendation as to whether the commitment should be continued. The court may continue the commitment or it may terminate it and resume the criminal proceeding.[71] If the Surgeon General certifies that the addict has successfully completed the treatment program, the criminal charge is to be dismissed.[72] If at the end of the 3 year commitment the Surgeon General is unable to make this certification, the criminal proceeding is to be resumed.[73] When a criminal proceeding is resumed, the addict is to receive credit against his sentence for time spent in *institutional* custody.[74]

Not all addicts are eligible for civil commitment in lieu of prosecution even if they are likely to benefit from treatment. Among those ineligible are persons charged with a crime of violence or with importing, selling, or conspiring to import or sell a narcotic drug, persons with two or more prior felony convictions, and persons who have been civilly committed under the Act, under State proceedings, or District of Columbia law on three or more occasions.[75] "Crime of violence" is defined to include voluntary manslaughter, murder, rape, mayhem, kidnapping, robbery, burglary or housebreaking in the nighttime, extortion accompanied by threats of violence, assault with a dangerous weapon or with intent to commit an offense punishable by imprisonment for more than 1 year, arson punishable as a felony, and attempt or conspiracy to commit any of the foregoing offenses.[76]

Title II of NARA [77] deals with sentencing to commitment for treatment. Under Title II the sentencing judge may permit an addict convicted of a Federal crime and who it is determined is likely to be rehabilitated through treatment to serve his sentence by participation in a treatment program for addicts involving both institutionalization and aftercare in the community. The addict is committed to the custody of the Attorney General for an indeterminate period of not more than 10 years but not to exceed the maximum period that could have

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[68] *Id.*
[69] 28 U.S.C. § 2902(c).
[70] 28 U.S.C. § 2903(a).
[71] 28 U.S.C. § 2903(b).
[72] 28 U.S.C. § 2902(c).
[73] 28 U.S.C. § 2903(c).
[74] 28 U.S.C. § 2903(d).
[75] 28 U.S.C. § 2901(g).
[76] 28 U.S.C. § 2901(c).
[77] 18 U.S.C. §§ 4251–4255.

been imposed as a sentence for the crime of which the addict was convicted.[78] He must serve 6 months in an institution before he is eligible for conditional release to aftercare. The decision to release on aftercare is a discretionary one made by the United States Board of Parole after an affirmative recommendation by both the Attorney General and the Surgeon General.[79] If the offender has violated the terms of conditional release, the Board or a member of the Board may issue a warrant for his return to custody. After a hearing before the Board, a member of the Board, or an examiner, the order of conditional release may be revoked.[80]

The exclusions are similar to the exclusions pertaining to voluntary civil commitment in lieu of prosecution, the chief difference being that an addict-seller is not automatically excluded from sentencing to commitment for treatment. An addict-seller is eligible if the court determines that the sale for which he has been convicted "was for the primary purpose of enabling the offender to obtain a narcotic drug which he requires for his personal use because of his addiction to such drug." [81]

NOTE

on

PHILOSOPHICAL BASIS OF THE DRAFT

The draft proceeds on the basis that trafficking in and possession of mind- and mood-altering drugs may be prohibited and regulated because of the risks of secular harm, including harm to self, posed by these drugs. While in a complex interdependent society risk of harm to self is usually accompanied by some risk of harm to others or to the community, the draft reflects the position that the prevention of risk of harm to self is a permissible goal of the criminal law. (Of course, the fact that conduct creates a risk of harm to self does not necessarily require the conclusion that it should be subject to either a criminal or civil sanction: this depends on a host of factors.)

With the exception of the questions of legalization of marihuana, and maintenance and stabilization of opiate addicts, no attempt has been made in this report to consider whether the present approach to the control of trafficking in mind- and mood-altering drugs by prohibitory laws should be retained, or whether any of the drugs should in some fashion be legalized. Although this question is a basic question of social policy and philosophy, legalization of the traffic in these drugs is not a politically viable alternative at the present time, and, again with the possible exceptions of legalization of marihuana, and maintenance and stabilization of opiate addicts, is not likely to be a realistic alternative in the foreseeable future.

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[78] 18 U.S.C. § 4253.
[79] 18 U.S.C. § 4254.
[80] 18 U.S.C. §4251(f)(2).
[81] 18 U.S.C. § 4255.

NOTE

on

FORMAT OF THE DRAFT

The draft contains criminal provisions that are designed to interlock with the regulatory provisions of an omnibus controlled dangerous substances regulatory bill that is currently being drafted by the Department of Justice, and will regulate, in one bill, drugs that are now regulated by the Narcotic Drug Import and Export Act, the Harrison Act, the Marihuana Tax Act, the Drug Abuse Control Amendments and other statutes. Thus, the draft would prohibit conduct not authorized by "the regulatory law." Although based on the commerce clause and the treaty power, both the omnibus bill and the draft are written in a manner similar to State laws—directly prohibiting distribution, production, importation, other conduct that creates a substantial risk of distribution, and possession, without any requirement that a drug be shown to have moved in commerce or that it be proved in a particular case that a transaction affected commerce. In this respect, the bill and the draft are modeled on the Drug Abuse Control Amendments. The constitutionality of the Drug Abuse Control Amendments has, in several cases, been upheld by United States courts of appeal and district courts as within the reach of congressional power to regulate commerce.[1]

NOTE

on

CLASSIFICATION OF DRUGS

1. *The Approach of the Draft.*—Section 1821 gives the Attorney General authority to classify and reclassify controlled dangerous substances (as defined in the regulatory law) as dangerous, abusable, or restricted drugs; it provides the criterion,* and, by reference to the regulatory law, the procedure for making such classifications and reclassifications.

The authority given to the Attorney General by section 1821 is in addition to the authority that the regulatory law will give the Attorney General to designate substances initially as controlled dangerous substances subject to the regulatory law in the first instance and further to classify controlled dangerous substances for regulatory

[1] *Deyo* v. *United States*, 396 F.2d 595 (9th Cir. 1968); *Del Giudice* v. *United States*, 396 F.2d 600 (9th Cir. 1968); *Whalen* v. *United States*, 398 F.2d 286 (8th Cir. 1968); *White* v. *United States*, 399 F.2d 813 (8th Cir. 1968); *White* v. *United States*, 395 F.2d 5 (1st Cir.), *cert. denied*, 393 U.S. 928 (1968); *United States* v. *Heiman*, 406 F.2d 767 (9th Cir. 1969); *United States* v. *Erlin*, 283 F. Supp. 396 (N.D. Cal., 1968), *aff'd*, 413 F.2d 1036 (1969); *United States* v. *Freeman*, 275 F. Supp. 803 (N.D. Ill. 1967).

* Section 1821 originally provided that the Attorney General should classify and reclassify substances "in accordance with demonstrated potential for harm." Section 201 of S. 3246 lists more explicitly some criteria intended to be encompassed by the phrase "potential for harm" and is thus referred to in Study Draft section 1821. Additional criteria might be added to the list.

purposes. The authority given by section 1821 relates solely to classification for purposes of criminal treatment.

Some substances will be designated as controlled dangerous substances in the regulatory act itself: other substances will be designated as controlled dangerous substances by the Attorney General pursuant to standards set out in the regulatory act. The existing narcotics laws and the Drug Abuse Control Amendments already give administrative agencies authority to subject new drugs to controls. The purpose of the regulatory law in giving the Attorney General authority to control substances is to permit a more expeditious determination than is feasible through the legislative process. The same holds true for determinations as to criminal classifications and reclassifications.

It is currently contemplated that the omnibus bill now being drafted by the Justice Department will give the Attorney General authority to classify and reclassify controlled dangerous substances in one of four classifications. Depending upon these classifications, both regulatory requirements (such as record keeping requirements and manufacturing quotas) and criminal treatment will differ. It is submitted that criteria that may be appropriate to distinguish drugs for regulatory purposes are not necessarily appropriate to distinguish them for the purpose of criminal treatment. For example, the writer believes that a lesser penalty is appropriate for trafficking or possession with respect to even a fairly potent drug if the costs of more stringent criminal treatment are likely to outweigh its benefits; yet regulatory requirements may still properly be stringent. Consequently, it is submitted that the proposed Criminal Code should contain its own provisions on classification and reclassificatiton for purposes of criminal treatment. The classifications in the regulatory law would be solely for regulatory purposes.

(a) *Procedure.*—Section 1821, by reference to the regulatory law, provides the procedure for making classifications and reclassifications. Tentatively it adopts the procedure that the regulatory law will provide for initial designations by the Attorney General of substances as controlled dangerous substances; that procedure, it is contemplated, will involve the appointment of an advisory committee of experts to aid the Attorney General. This provision may require change depending upon what changes are made, if any, in the procedure being recommended for the regulatory law determinations.

(b) *The criterion.*—Section 1821 provides that controlled substances will be classified and reclassified "in accordance with demonstrated potential for harm." It is contemplated that classification will be as a "dangerous drug" where potential for harm is relatively high, as an "abusable drug" where it is moderate, and as a "restricted drug" where it is relatively low. The potential for harm may be a potential for contributing to harm to the user, to other individuals or to the public health. Naturally, when potential for harm is determined, the decision is relative to that for some other drug. The potential for harm of a substance would include its potential for leading to or sustaining physical or psychic dependence, or both; its potential for contributing to other harmful physical or psychic effects on the user himself; its potential for contributing to harm to others—such as its potential for contributing to violent behavior by the user while he is under its influence; and its potential for contributing to harm

to the public health—such as any potential it may have for contributing to lack of productivity or the possibility that its potential for contributing to harm to the user or others will create a public health problem.

While "potential for harm" is, of course, related to the effects produced by a substance, such effects are not the only factors. Other relevant factors would be the absence or presence of organized crime in trafficking in a particular substance, the extent of illicit use and the consequent need for stringent sanctions to deter use, and whether the pattern of the illicit traffic and consequent enforcement problems require stringent regulation. However, it is not contemplated that a substance having only relatively mild or moderate effects could be classified or reclassified as a dangerous drug or a substance having only relatively mild effects could be classified or reclassified as a dangerous or abusable drug merely because of law enforcement or deterrent considerations. Thus, it would be inappropriate to classify or reclassify a substance having relatively mild effects as a dangerous or abusable drug merely because it had wide-scale illicit use; such a classification would be out of proportion to the seriousness of its use.

A further consideration would be whether the treatment might be so stringent that its costs are likely to outweigh its benefits. Thus, in cases of doubt, whether or not the substance has approved medical use in the United States and whether or not any such use is under severe restrictions or limitations would be relevant in deciding how seriously criminal conduct involving it should be treated. When a substance has approved use that is not severely restricted or limited, it is not likely to have extremely harmful effects on a large scale and, as is pointed out in the note on unlawful possession, some instances of illicit conduct involving such substances should not be heavily punished or perhaps punished at all, for example, the conduct of the harried housewife who secures a few tranquilizers from a pharmacist, the conduct of the person who gives a barbiturate to a friend who cannot sleep, or of the friend who accepts it.

Consideration of the costs of a particular degree of criminal treatment in determining "potential for harm" might thus on occasion result in restricted- or abusable-drug treatment for drugs having relatively serious effects or restricted drug treatment for drugs having moderate effects. This is a recognition that there are situations in which it may be better to regard the transactions as lesser offenses than to risk widespread disrespect and nullification. Thus, marihuana might be reclassified as a restricted drug if violation of the marihuana laws became as widespread as did violation of the Volstead Act and other prohibition laws, so that juries did not convict; or if people who did not otherwise commit crimes were prosecuted on a large scale; or if, because of changing public attitudes toward marihuana, stringent criminal laws were not being enforced; or if the financial, manpower, and other costs of law enforcement became inordinately high.

Section 1821 requires that the potential of a substance for contributing to harm be "demonstrated." It is contemplated that "demonstration" may be made on the basis of scientific testing or on the basis of experience with the substance in the community. While it may be

permissible to control a substance in the first instance and to accord transactions in it restricted-drug treatment on the basis of less information, classification of the substance for the more stringent dangerous- and abusable-drug criminal treatment should await a showing of a "demonstrated" relatively moderate or relatively high potential for harm.

2. *Drugs Effects and Classification of Particular Drugs.*—This section of the note has a twofold purpose. First, it states the rationale for initially classifying certain drugs as dangerous, abusable, or restricted drugs, as the case may be. Second, since the effects of particular drugs are quite relevant (though not necessarily controlling) to this classification, it contains sometimes in rather summary fashion descriptions of the effects of various drugs. These descriptions do not purport to be complete but are designed to give the Commission some information on drug effects and use. Other information on drug effects and on use in general is incorporated in the text of other notes.

Before proceeding to a discussion of the effects of particular drugs, several things must be emphasized.

First, when one speaks of drug effects and dangers, one is not necessarily speaking of necessary effects or dangers. Different drugs have different effects on different people with different expectancies at different times in different situations and with different dosages. As Dr. Richard H. Blum, Director of the Psychopharmacology Project of Stanford University's Institute for the Study of Human Problems, wrote in a consultant's report to the President's Commission on Law Enforcement and Administration of Justice:[1]

> In the first place, it is clear that our interest should be not in what drugs as such do, but rather in what people do after they take drugs. Drugs may modify behavior but they do not create it. Our focus must remain on the persons taking drugs rather than on the pharmaceuticals alone. The second fact to bear in mind is that no mind-altering drug, taken with the range of dosage that allows the person taking the drug any choice of actions (when the dosage becomes so great that choice behavior is eliminated, the outcome is then usually stupor, coma, shock, psychosis or death), ever has a single uniformly predictable behavior outcome. The general classifications used for these drugs, for example "sedatives" or "stimulants" are misleading; these only describe probable outcomes for certain persons under certain conditions. Within normal dosages ranges there will be among a group of persons or even for the same person on different occasions a variety of behavior outcomes. These outcomes will be partly and sometimes largely determined by factors other than the pharmaceutical substance itself, for example by the person's expectations of what the drug should do, his current moods and motives, the social setting in which the drug is used, the tasks he is performing and so forth. Consequently one must

[1] Blum, *Mind Altering Drugs and Dangerous Behavior: Dangerous Drugs* [hereinafter cited as Blum: *Dangerous Drugs*], PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 21, 22–23 (1967) [hereinafter cited as TASK FORCE REPORT].

> be careful not to assume that the popular terminology employed for classes of drugs is an accurate description of their effect. . . . Because of the great variability in behavior under drugs it is also necessary to keep in mind that there can be considerable overlap among drug classes in terms of outcomes or, put differently, different kinds of drugs can produce similar behavior, for example, an intoxicant (alcohol, marihuana), a sedative, and a tranquilizer may all appear to produce sleep in one subject under one circumstance (for example, at bedtime); these same drugs given to the same subject in a different setting (for example, a party) may all appear to produce stimulation.

Secondly, clinical descriptions of the effects of various drugs on the individual may be subject to misinterpretation by laymen merely because of the use of clinical language. Thus, in a paper submitted to the President's Commission on Law Enforcement and Administration of Justice, Professor Jerome H. Skolnick, of the University of Chicago and Senior Social Scientist to the American Bar Foundation; has written:[2]

> The very conception of effects is based upon a normative model rarely met in practice. This model is of the perfectly "healthy" person engaged in quiescent activity. For example, suppose we were to ask what are the effects of playing tennis on the individual? In response, we would have to describe a heightened pulse rate, facial flushing, sweating, marked adrenal activity and so forth. In some cases, we would observe loss of breath followed by feelings of dizziness and nausea; in some instances, death has even resulted. We could well conclude with a fairly frightened sounding clinical picture *for a reader who has never experienced a game of tennis.* The description would not be untrue, but out of context it would have a far different effect on our reader than it suggests to the tennis player. Thus, the very "objectivity" of a clinical description may result in an unintended distortion for the purpose of assessing social policy.

Further, when dealing with illicit or medically unauthorized use, it must be clear that the term "use" has many meanings. When it is estimated that illicit use of a drug is increasing or that there are a large number of illicit users, is the reference to all people who have ever used the drug, even once (and that once perhaps a long time in the past), to occasional users, to irregular users, to periodic use such as "weekend" or "fortnightly" use, to more regular use, or finally to habitual use which may or may not be accompanied by psychic dependence or, depending on the drug involved, by both psychic and physical dependence? *And perhaps most important, it cannot be assumed that all medically unauthorized use or use in excess of medical authorization is harmful.* People may take barbiturates, amphetamines, and tranquilizers without prescriptions with as much safety as

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[2] SKOLNICK, COERCION TO VIRTUE: A SOCIOLOGICAL DISCUSSION OF THE ENFORCEMENT OF MORALS 11 (1967): reprinted (in a somewhat different version in RESEARCH CONTRIBUTIONS OF THE AMERICAN BAR FOUNDATION, No. 7 (1968)) (emphasis in original).

people who take such drugs pursuant to prescriptions. A person may try marihuana without harmful results. Illicit use and abuse are not the same thing and must be distinguished. Although our laws seem to equate the two, illicit use need not involve abuse.

Opiates.—Many opiates (essentially those classified as "class A narcotics" under present law) will be treated as dangerous drugs. However, some (essentially those now classified as "class B narcotics") such as codeine in combination with other drugs, which have a lesser potential for leading to or sustaining addiction and which consequently are fairly widely prescribed or dispensed by practitioners, will be treated as abusable drugs, and exempt narcotics (which have such a low potential for leading to or sustaining addiction that they may be sold over the counter without a prescription) will be treated as restricted drugs.

Opiates are drive satiators. They are depressants rather than stimulants. They usually suppress violent impulses and sexual desire. They may also (but not necessarily) suppress motivation for engaging in activities that are generally considered productive.[3] However, some persons can be productive and function reasonably well while addicted to opiates if they have a steady source of supply,[4] and, to the extent that opiates relieve anxiety, it seems likely that *some persons* may function better while taking opiates than without them.

The use of opiates may lead to physical dependence. Withdrawal is unpleasant but rarely fatal. However, hepatitis may be transmitted from unsterile needles. Also, while it is generally believed that use of opiates does not in itself leave any permanent physical impairment, when opiates are obtained on the illicit market, impurities and the uncertainty of dosage may imperil the life of the addict and cause death, in the first case from the adulterant, and in the second, from an overdose unwittingly taken.[5] In addition, the Chief Medical Examiner of New York City has reported death from an unknown toxic reaction.[6] This reaction may be due to overdose, sensitivity to the substance injected, or other unknown causes. Further, especially when acquisition is unlawful, the addict may become so preoccupied with the drug and obtaining the drug that he becomes undernourished. This is not due to the pharmacology of the drug but to difficulties in obtaining it and to psychological factors.[7]

While many opiates have a very high potential for causing and sustaining physical dependence, and physical dependence may even result from therapeutic dosages, by no means do all users of these drugs become dependent, and even when physical dependence develops, psychological dependence is necessary to addiction. Many persons who

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[3] *See generally*, on the effects of opiate addiction, Jaffe, *Drug Addiction and Drug Abuse*, in THE PHARMACOLOGICAL BASIS OF THERAPEUTICS (c. 16) 285–311 (3d ed. Goodman & Gilman 1965) [hereinafter cited as Jaffe]; ELDRIDGE, NARCOTICS AND THE LAW, c. 2 (2d ed. 1967).

[4] Jaffe, *supra* note 3, at 292.

[5] *Id.*; Blum, *Mind Altering Drugs and Dangerous Behavior: Narcotics* [hereinafter cited as Blum: *Narcotics*], in TASK FORCE REPORT, *supra* note 1, at 40, 54 (1967).

[6] N.Y. Times, Aug. 15, 1968, at 1, col. 1.

[7] The relationship between opiate use and crime is discussed in the note on grading of trafficking in dangerous and abusable drugs

have become physically dependent on opiates as a result of medical administration are easily withdrawn and never return to use because they have not become psychologically dependent. On the other hand, many, if not most, addicts return to use after withdrawal and when (so far as is medically known) they have no physiological need for opiates because they have developed psychological craving for the drug. While there is no unanimity as to the causes of opiate addiction, the prevailing medical view is that there are persons who are psychologically predisposed to addiction and perhaps to use also, but that sociological factors are also relevant. Sociologists generally attribute greater importance to sociological factors but usually concede that personality too has a role in the process of addiction.

Most opiates have great medical value and are used in the practice of medicine. Many are pain relievers, and codeine is used extensively for suppression of cough. Heroin, the primary agent of opiate addiction in the United States, is a derivative of morphine, another highly addicting opiate. All transactions in heroin are prohibited by Federal law and its appearance in the United States is necessarily illicit; it may not be used for medical purposes in the United States.

It is unclear how many opiate addicts there are in the United States. The Bureau of Narcotics figure of approximately 60,000 has been challenged by many sources as far too low. Estimates range to over 200,000, but the President's Commission on Law Enforcement and Administration of Justice has stated that they "are without a solid statistical foundation." [8] The great majority of opiate addicts appear to be heroin addicts but some (particularly in the South) are dependent on other opiates.[9] Heroin addicts are concentrated in deprived urban areas, and minority groups are overrepresented. However, heroin use has been spreading to middle class urban and suburban areas also. Heroin addicts are usually in their twenties or thirties, but there are, of course, older addicts, and the number of juvenile addicts appears to be increasing.

This increase corresponds to the general increase in the use of mind- and mood-altering drugs among juveniles. Relative to population, opiate addiction is less of a problem than it was before the enactment of the Harrison Narcotics Act of 1914, and legislative restrictions on distribution and use are probably in large part responsible for this development. During World War I, 1 person out of 400 was rejected for military service because of opiate addiction; during World War II, only 1 out of 4,000 was rejected for this reason.[10] While opiate addiction decreased during World War II because of a shortage of drugs, it rose sharply after the war. It is unclear whether at the present time it is on the rise or is fairly stable relative to population.

It is suggested that some opiates be classified as dangerous drugs because they have a very high potential for leading to or sustaining

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[8] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 212 (1967) [hereinafter cited as THE CHALLENGE OF CRIME].

[9] Ball, Chambers & Ball, *The Association of Marihuana Smoking with Opiate Addiction in the United States*, 59 J. CRIM. L., C. & P. S. 171 (1968) [hereinafter cited as Ball, Chambers & Ball].

[10] Personal communication from Dr. Warren P. Jurgensen, Deputy Director, NIMH Clinical Research Center, Fort Worth, Texas, to the writer.

addiction and because their proper medical use has severe restrictions attached to it. While these drugs are sometimes prescribed or dispensed, they are generally administered directly to the patient. Drugs so treated include heroin, morphine, methadone, dilaudid, and demerol. All but heroin have medical use in the United States. Heroin is generally unlawfully imported into the United States, but on rare occasions may be manufactured in illicit laboratories in the country. Strict regulation of heroin is not only desirable because of its addictive properties but because it is established that organized crime is very heavily involved in the traffic in the drug. Most illicit use of other opiates is as a result of thefts and other diversion of drugs from legitimate channels.

On a number of occasions it has been suggested that opiate addicts should be lawfully maintained or stabilized on opiates. Sometimes this is suggested as a humane method of treating at least certain addicts, given the poor prognosis for abstinence from opiates. Sometimes it is suggested purely as a crime control measure: if addicts are given opiates free or at a low price, crime committed by addicts to maintain their habits will be eliminated or reduced, and organized crime's market for opiates will be diminished.

In Great Britain a physician is permitted to supply an addict with opiates if it is determined that the addict, while unable to live a useful and relatively normal life without the drug, is capable of doing so when it is regularly administered to him.[11] Until 1968 any British physician could do so, but since then only certain especially licensed physicians are permitted to prescribe heroin and cocaine (not an opiate) to addicts.[12] There is much to be said for the British approach. However, problems connected with the operation of the system in Great Britain [13] suggest that such a course should be pursued with caution. Research should certainly be encouraged, but at the present time it would seem research should be limited to the use of methadone (and similar drugs) (because it does not produce the "high" that heroin produces and may block the effects of heroin, and may therefore make it easier for an addict to live a normal life); also, perhaps, researchers should be limited to physicians working under the auspicies of public health agencies and teaching hospitals.

It is unclear to what extent supplying addicts with drugs as a crime

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[11] *See* JOINT COMMITTEE OF THE AMERICAN BAR ASSOCIATION AND THE AMERICAN MEDICAL ASSOCIATION ON NARCOTIC DRUGS, INTERIM REPORT, APPENDIX B (1958), in DRUG ADDICTION: CRIME OR DISEASE 132–133 (Lindesmith ed.)

[12] STAT. INSTR. 1968, No. 416. The especially licensed physicians are normally those on the staffs of hospitals where special treatment centers for addicts have been created. Letter from K. I. Jones of the British Home Office to the writer, July 1, 1968.

[13] In recent years there has been quite a substantial increase in the addict population in Great Britain. The Second Report of the Interdepartmental Committee on Drug Addiction of the Ministry of Health (the "Brain" Committee) in 1965 concluded that the major source of supply for the increasing number of users was a small number of physicians who prescribed drugs to addicts in excessive amounts. Some addicts would then sell their extra supplies to other persons. In order to remedy the situation, the Report of the Second Interdepartmental Committee on Drug Addiction in 1965 recommended, inter alia, that only physicians on the staff of treatment centers be permitted to prescribe heroin and cocaine to addicts. This recommendation resulted in legislation in 1967 (Dangerous Drugs Act 1967) and in regulations embodying it in 1968 (STAT. INSTR. 1968, No. 416).

control measure would reduce the incidence of those crimes often committed by addicts,[14] and it is also unclear whether (and if so, to what extent) such a course might result in an increase in use and addiction. Again, research should be encouraged, but caution is in order. At present research should be limited to the use of methadone, and possibly also the class of researchers should be limited as above suggested.

Cocaine.—Cocaine is a powerful stimulant. While it does not cause physical dependence, a very strong psychological dependence upon cocaine can be developed. In the United States it is usually taken by heroin addicts in combination with heroin—as a "speedball," but occasionally people take it alone. It is not more often used alone because it may produce acute anxiety and may precipitate psychotic episodes. While aggressive and violent behavior during such psychotic states has been attributed to cocaine,[15] it has been suggested that the drug may only bring out what is already present in the individual.[16] The drug has only limited medical use, being used chiefly as a local anesthetic,[17] particularly for conditions of the eye and skin. While it may be diverted from illicit channels, it is generally unlawfully imported from Latin America. Its price in the illicit market is usually extremely high. It should be classified as a dangerous drug because it may precipitate acute anxiety and psychotic episodes, and there is a strong possibility that such episodes may involve aggressive or violent behavior.

Hallucinogens.—All hallucinogens other than marihuana and peyote should be classified as dangerous drugs. The term hallucinogen includes such drugs as LSD, psilocybin, mescaline, and DMT. LSD is many times more potent than any of the others.

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[14] The President's Commission on Law Enforcement and Administration of Justice stated:

> The simple truth is that the extent of the addict's or drug user's responsibility for all nondrug offenses is unknown. Obviously it is great, particularly in New York City, with its heavy concentration of users: but there is no reliable data to assess properly the common assertion that drug users or addicts are responsible for 50 percent of all crime. . . . Since there is much crime in cities where drug use is not thought to be a major problem, to commit resources against abuse solely in the expectation of producing a dramatic reduction in crime may be to invite disappointment.

THE CHALLENGE OF CRIME, *supra* note 8, at 222. *See also* Arthur D. Little, Inc., *Drug Abuse and Law Enforcement* 98, 99 (1967) (Consultant's Report to the President's Commission on Law Enforcement and Administration of Justice):

> [E]ven if *all* larceny (including robbery and burglary) were committed by addicts, the take would suffice to pay for only 40 percent of their drug bill. Either there is a great deal more larceny occurring than the FBI reports indicate, or a large number of the U.S. addicts are *not* supporting their habits by crimes against property.
>
> It is obvious that all larceny is not perpetrated by addicts. . . .
>
> There is clearly a large amount of money used to buy narcotics which does not come from reported stealing. This suggests that, since addicts are *not* responsible for the majority of crimes against property, making drugs available at low cost would not strongly reduce such crimes. It would, however, reduce the profits of organized crime. (Emphasis in original)

[15] *See* Blum: *Narcotics*, *supra* note 5, at 61.

[16] *Id.*

[17] *Id.*

Users claim that LSD has consciousness-expanding effects. However, the Medical Society of the County of New York describes its effects in different terms.[18]

> After the cubes, containing 100–600 mcg. [a microgram is one-millionth of a gram] each, are ingested a startling series of events occurs with marked individual variation. All senses appear sharpened and brightened; vivid, panoramic visual hallucinations of fantastic brightness and depth are experienced as well as hyperacusis [abnormal acuteness of hearing]. Senses blend and become diffused so that sounds are felt, colors tasted; and fixed objects pulsate and breathe. Depersonalization also occurs frequently so that the individual loses ego identity; he feels he is living with his environment in a feeling of unity with other beings, animals, inanimate objects and the universe in general. The body image is often distorted so that faces, including the user's, assume bizarre proportions and the limbs may appear extraordinarily short or elongated. The user is enveloped by a sense of isolation and often is dominated by feelings of paranoia and fear. If large doses are ingested (over 700 mcg.) confusion and delirium frequently ensue. During LSD use, repressed material may be unmasked which is difficult for the individual to handle. Duration of the experience is usually 4 to 12 hours but it may last for days.

Like other hallucinogens, LSD has no approved medical use in the United States and may be used only by authorized researchers. It has, however, been used experimentally in research dealing with treatment of alcoholics and the mentally ill. Use of LSD or other hallucinogens does not result in physical dependence, but some persons may become psychologically dependent on these drugs. (It should be remembered that people can become psychologically dependent on anything—candy, an afternoon swim, or sex.) Crime associated with use of LSD or other hallucinogens appears to be minimal.[19] LSD can precipitate both acute and long-term psychotic reactions in predisposed persons, and apparently it can cause transient psychotic reactions in persons who are not predisposed to psychosis.[20] Whether it can cause prolonged psychotic reactions in such persons is not clear.[21] There are also a number of reports of return to the LSD state long after use without subsequent use of the drug.[22] Users who develop psychiatric symptoms can probably be adequately treated in conventional psychiatric settings.[23] Psychiatric symptoms are exceptional

[18] N.Y. Cty. Med. Soc'y., *The Dangerous Drug Problem—I: A Policy Statement with Recommendations*, 22 N.Y. MEDICINE, No. 9, 3, 5 (May 5, 1966), [hereinafter cited as N.Y. Cty. Med. Soc'y. Rep.—I], in TASK FORCE REPORT, *supra* note 1, at 5.

[19] Blum: *Dangerous Drugs*, *supra* note 1, at 28.

[20] N.Y. Cty. Med. Soc'y, *The Dangerous Drug Problem—II: A Policy Statement by the Medical Society of the County of New York*, 24 N.Y. MEDICINE, No. 1, 3, 6 (Jan. 1968) [hereinafter cited as N.Y. Cty. Med. Soc'y. Rep.—II].

[21] *Id.*

[22] *Id.*

[23] Cole, *Report on the Treatment of Drug Addiction*, in TASK FORCE REPORT, *supra* note 1, at 135, 142 (1967).

rather than normal consequences of use, but "there is no adeqaute estimate of the frequency of psychosis as a function of incidence of use." [24] Significantly, reactions to LSD are unpredictable, and a person, even if an experienced user, can never be sure that he will not suffer such a reaction.[25] While the conditions under and the atmosphere in which the drug is taken may have some influence on adverse reactions, good conditions and atmosphere cannot insure their absence.[26] Unlike the case of users of other mind- and mood-altering drugs, users of hallucinogens reported in a recent study conducted under a National Institute of Mental Health contract that they were most likely to suffer ill effects at the beginning of use rather than after long-term use.[27] Consequently, experimentation may be especially hazardous. While LSD to date is probably the most potent of the controlled hallucinogens, it appears that other hallucinogens can also produce LSD-type reactions. Mescaline psychosis has been verified,[28] and congenital malformation in fetuses of hamsters given that drug during pregnancy have also been reported.[29]

In addition to psychotic reactions and reappearance of the LSD state, the Medical Society of the County of New York reports that acting out of sociopathic character disorders and of homosexual impulses, suicidal or homicidal attempts, uncontrolled aggression, and convulsions are risks of LSD.[30]

It is unclear what the relationship of LSD use is to chromosome damage and to deformities in offspring. Some studies have found a significant number of chromosome breaks in LSD users; others have not.[31] Some of the breaks found resemble those which it is believed may cause physical abnormalities in both the persons in which they are found and in descendants. But scientists have generally been cautious in drawing conclusions from the investigations. Similarly, while at least one investigator has attributed deformities in children born to mothers who had taken LSD during an early stage of pregnancy to the drug, the scientific community has generally been cautious in drawing any conclusions as to cause and effect. Among those who have been cautious in making judgments is Dr. Stanley F. Yolles, Director of the National Institute of Mental Health.[32]

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[24] Blum: *Dangerous Drugs*, *supra* note 1, at 27. Dr. Blum has recently stated that "one report shows 3 percent of LSD users becoming psychotic (beyond the period of the trip itself)." BLUM ET AL., DRUGS I: SOCIETY AND DRUGS 286 (1969). *See also* BLUM ET AL. UTOPIATES 117n.7 (1964) (2 percent hospitalized for psychotic responses to LSD, 3.3 percent diagnosed as having psychotic responses but not all hospitalized).

[25] Statement of Dr. Thomas Ungerleider, Department of Psychiatry, U.C.L.A. Medical School. Los Angeles, California, Feb. 1968.

[26] *Id.*

[27] BLUM, HORATIO ALGER'S CHILDREN: OBSERVATIONS ON STUDENT DRUG USE (1968) [hereinafter citd as BLUM: STUDENT DRUG USE]. Marihuana was not considered as a hallucinogen in this study.

[28] Blum: *Dangerous Drugs*, *supra* note 1, at 27.

[29] Geber, *Congenital Malformations Induced by Mescaline, Lysergic Acid Diethylamide, and Bromolysergic Acid in the Hamster*, 158 SCIENCE 265 (1967).

[30] N.Y. Cty. Med. Soc'y. Rep.—II, *supra* note 20, at 6.

[31] *See* Testimony of Dr. Stanley F. Yolles, Director, NIMH, in *Hearings Before the Subcommittee on Public Health and Welfare of the House Committee on Interstate and Foreign Commerce on H.R. 14096*, 90th Cong., 2d Sess. 173 (1968) [hereinafter cited as *House Hearings*].

[32] Testimony of Dr. Yolles, *House Hearings*, *id.*, at 173–174.

Most hallucinogens should ze classified as dangerous drugs because of their unpredictable potential for psychic harm, the *possibility* of physical harm to self and to descendants, and because they have no established medical use in the United States. In addition, because they are illicitly manufactured or cultivated, there is more reason for a significant penalty for simple possession as a deterrent to trafficking.[33]

Peyote should be classified as an abusable drug. Peyote is a cactus that grows in the Southwestern part of the United States and in Mexico. One of its principal ingredients is mescaline. The drug is and has for many years been used very carefully by the Native American Church (an American Indian Church) in religious ceremonies. The Indians have not suffered ill effects from such use. Its chief effect is to produce color hallucinations or pictures in the mind's eye of the user. Peyote should be classified as an abusable drug because it often produces nausea on or shortly after ingestion and, at least in part because of this, is not used illicitly on any extensive scale.

Marihuana and Cannabis Preparations.—The term "marihuana" has more than one meaning. In common parlance in the United States it refers to the plant Cannabis Sativa (the Indian hemp plant) and to a mixture of the dried flowering tops, stems, and leaves (and sometimes also the seeds of the plant). In the United States this mixture is usually smoked, but on occasion a tea may be made of it or it may be orally ingested in confections and cakes. In common parlance in the United States the term usually does not refer to the more powerful separated resin of the plant (sometimes called hashish), the more powerful separated "red oil" of the plant which contains the active principles, or to other derivatives of or compounds made from the plant of the resin or oil. However, the Marihuana Tax Act includes in its definition of marihuana the plant, parts of the plant, and these compounds, derivatives, and extracts. The Uniform Narcotic Drug Act upon which 48 State laws are based contains virtually the same definition as does the Marihuana Tax Act, but instead of calling the substance marihuana, calls it "Cannabis."

It is proposed that the classification distinguish between the plant and parts of the plant (which are called "marihuana" in this document) on the one hand, and the separated resin and derivatives and preparations of the resin, on the other. The latter are called "cannabis preparations" in this document. "Marihuana" is treated as an abusable drugs, while "cannabis preparations" are treated as dangerous drugs. The distinction is in large part based on differences in potency. Synthetically produced tetrahydrocannabinols (the active ingredients of marihuana) as controlled hallucinogens should, because of their potency, be included with other hallucinogens as dangerous drugs.

While the cannabis plant and cannabis preparations have had medical use on and off over the centuries and have been extensively used in folk medicine, they have no medically approved medical use in the United States today. Various cannabis preparations were removed from the United States Pharmacopoeia because they were believed to be unpredictable and unreliable drugs.

It is difficult to assess the potential for harm of either marihuana or cannabis preparations. Earlier foreign studies have not generally

[33] *See* the note on unlawful possession.

been thought to be up to the standards required in modern scientific studies,[34] and it is not clear whether some studies involved marihuana or cannabis preparations. Complicating matters still further is the fact that the cannabis plant varies greatly in potency, depending in part on the geographical area in which it is grown, on the time of the year when it is harvested, and on the particular plant itself, and the fact that the potency of the parts of the plant used for their effects varies not only with these things but with what parts of the plant are used and how old the preparation is when used. Moreover, there is some indication that when marihuana is smoked it is more potent milligram for milligram than when it is ingested (on the other hand, apparently the effects are easier to control when smoked than when ingested,[35] and it is easier to obtain an overdose from eating than from smoking), and because of the varying strength of the plant, it is possible that a particular batch of marihuana may be stronger than the resin from a weak plant. Moreover, the potential for harm of marihuana may vary greatly from person to person and with the dosage, and extent, and frequency of use. Patterns of use are relevant to assessing its effects, but these do not remain constant.

The classification should distinguish marihuana from cannabis resin and other cannabis preparations because, although it varies in potency, it is generally much less potent than the resin and other cannabis preparations and is generally the least potent of the controlled hallucinogens. The Medical Society of the County of New York has stated that Indian ganga and hashish [36] are quite potent and "habitual and heavy use of these forms of cannabis has been associated with criminality, violence and psychosis. The marihuana used in the United States, the kif used in North Africa, and the bhang drunk in India are perhaps ⅕ the strength of hashish, and less dangerous." [37]

Similarly, Dr. William H. McGlothlin of U.C.L.A. and formerly of the Rand Corporation has stated that "from a consensus of several reports, the marihuana available in the United States is estimated to be one-fifth to one-eighth as potent as the charas resin in India, . . . and probably about one-third as potent as ganga." [38]

At the present time it is unclear how harmful marihuana is. The research to date is not considered definitive, and studies that are now being sponsored by the National Institute of Mental Health will hope-

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[34] CALIFORNIA LEGISLATURE, JOINT LEGISLATIVE COMMITTEE FOR REVISION OF THE PENAL CODE, PROPOSED TENTATIVE DRAFT AND COMMENTARY, DRUGS—PART I: MARIHUANA 115 (1968) (cited with permission) [hereinafter cited as Cal. Study].

[35] *Id.* at 95.

[36] Hashish is a powdered or sifted form of cannabis resin, or a preparation made from the resin. In India the resin is known as charas. Indian ganga is actually "marihuana" (as defined), but is made from the flowering tops of carefully selected high potency plants. Taylor, *The Pleasant Assassin: The Story of Marihuana*, in THE MARIHUANA PAPERS 3, 10 (Solomon ed. 1966) [hereinafter cited as THE MARIHUANA PAPERS]. As stated earlier, marihuana varies in potency. The vast bulk of the marihuana used in the United States (which is usually either imported from Mexico or grown domestically) is considerably less potent. *See* McGlothlin, *Cannabis: A Reference* [hereinafter cited as McGlothlin], in THE MARIHUANA PAPERS, *supra*, at 401, 408.

[37] N.Y. Cty. Med. Soc'y. Rep.—II, *supra* note 20.

[38] McGlothlin, in THE MARIHUANA PAPERS, *supra* note 36, at 402, 408.

fully in a few years' time present a clearer picture; however, even these studies will not give a definitive picture of the effects of long-term use. Virtually anything that one can say about the effects of marihuana is subject to challenge from one source or another. While it is generally conceded that cannabis preparations such as hashish are, because of their potency, more harmful than marihuana, there is much about them that is also disputed. *Candidly, we do not know how harmful marihuana is!*

Marihuana and cannabis preparations, while termed narcotics under virtually all State laws, are not essentially narcotics.[39] If they must be classified, they should be classified as hallucinogens, but they seem more often to cause intoxicating effects *somewhat* similar to alcohol rather than hallucinations.[40] In different people or in the same person at different times they may act as hallucinogens, depressants, or stimulants. It is generally agreed that they may distort depth perception while, unlike alcohol, not making the user aware that it is distorted and not incapacitating him.[41] Consequently, they may present a danger in the performance of certain skilled activities such as driving.

It is also generally agreed that both marihuana and cannabis preparations can induce hallucinations, impair memory and judgment, and cause confusion, anxiety, and disorientation, and that though use does not lead to physical dependence, psychological dependence can result.[42]

The areas of uncertainty are the relationship between these drugs and psychosis, violence and antisocial acts, and use of other drugs. Also the effects of long-term use of these drugs is unclear.*

Foreign studies have implicated heavy use of potent cannabis preparations in psychosis.[43] However, the validity of some of these studies has been criticized because of their methodology, and it has been questioned whether the psychoses are due to use of cannabis or to the effects of poverty and illness in the using population.[44] In addition, some statements relating psychosis to use do not state whether they speak of marihuana use or of more potent cannabis use.

A review of psychiatric literature states that cannabis smoking

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[39] While marihuana can have some narcotic effects (*id.* at 404), these are clearly overshadowed by its other effects.

[40] Blum: *Dangerous Drugs*, *supra* note 1, at 23.

[41] *But cf.* Weil, Zinberg & Nelson, *Clinical and Psychological Effects of Marihuana in Man*, 162 SCIENCE 1234 and n. 26 (1968).

[42] THE CHALLENGE OF CRIME, *supra* note 8, at 224.

* Since the preparation of this report a study *has* been published reporting congenital malformations in fetuses of hamsters and rabbits given cannabis resin during pregnancy, Geber and Schramm, *Effect of Marihuana Extract on Fetal Hamsters and Rabbits*, 14 TOXICOLOGY AND APPLIED PHARMACOLOGY 276 (1969). The authors conclude both that the types of malformation produced are essentially the same as those produced by LSD and mescaline, and that the capacity of cannabis resin to produce malformations in animals is, "by comparison on a milligram per kilogram basis" with those drugs, "relatively low." *Id.* at 281. It is not clear to what extent, if at all, these findings may be applicable to human beings.

[43] *See* Cal. Study, *supra* note 34, c. 4; McGlothlin, in THE MARIHUANA PAPERS, *supra* note 36, at 410–411.

[44] Cal. Study, *supra* note 34, at 115.

"probably produces a specific psychosis, but this must be quite rare, since the prevalence of psychosis in cannabis users is only doubtfully higher than the prevalence in general populations." [45] McGlothlin states, "it is well established that *transient* psychotic reactions can be precipitated by using the drug, and, in susceptible individuals, this may occur even with moderate or occasional use." [46] He further states that while chronic psychosis has in Eastern countries been attributed to use of cannabis, most Western authors have questioned the relationship of cannabis to chronic psychosis in users.[47]

In the United States the use of cannabis is with few exceptions the use of marihuana rather than cannabis preparations, and while most authorities believe there is some relationship between marihuana and psychosis, the extent and significance of this relationship are unclear, In 1966 the Medical Society of the County of New York stated that cannabis psychosis associated with the less potent forms of cannabis occurs mainly among those who use large amounts for a prolonged time and that there were few such users in the United States.[48] It also stated that "As a hallucinogen marihuana could produce all the untoward effects attributed to more potent hallucinogens, including aggressive behavior and psychosis." [49]

Since that time the Society has reported that "cannabis is an unpredictable drug and is potentially harmful even in its mildest form. Even occasional use can produce (although rarely) acute panic, severe intoxication or an acute toxic psychosis." [50]

Researchers, clinicians, and users have referred to psychotic reactions in American users.[51] There have usually been acute reactions and often panic states.[52] Moreover, they have usually been precipitated by excessive doses well in excess of normal "street" doses.[53] However, it is unclear what the relationship of these reactions is to use of marihuana. It is unclear whether marihuana triggers these reactions in otherwise predisposed persons, whether it may cause such a reaction in a person who is not predisposed, or whether these reactions have nothing to do with use of the drug.[54] Marihuana may be only one factor of many that contribute to such reactions. Moreover, even if marihuana has a significant role in them, these reactions seem to be

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[45] Murphy, *The Cannabis Habit: A Review of Recent Psychiatric Literature*, 15 BULL. ON NARCOTICS 15, 22 (Jan.–March, 1963) [hereinafter cited as Murphy].

[46] McGlothlin, in THE MARIHUANA PAPERS *supra* note 36, at 410.

[47] *Id.* at 411.

[48] N.Y. Cty. Med. Soc'y. Rep.–I, *supra* note 18.

[49] *Id.*

[50] N.Y. Cty. Med. Soc'y. Rep.—II, *supra* note 20.

[51] Cal. Study, *supra* note 34, c. 4; interviews between writer and clinicians and users. The relationship between use of marihuana and the "amotivation syndrome" ("dropping out") is also unclear. It is unclear whether use can cause this condition in a normal person who otherwise would not have been subject to it, whether use may precipitate it in a predisposed person, whether use is itself only a symptom of dropping out, or whether there is no relation. In addition, it is unclear how frequent dropping out is in relation either to the number of marihuana users in the United States or to frequency of use.

[52] *See* note 51, *supra*.

[53] Cal. Study, *supra* note 34, c. 4.

[54] *See id.*

quite rare.[55] While it is possible that some users suffering such reactions do not seek medical help so that their frequency cannot be judged by the numbers that physicians and hospitals see,[56] such reactions seem to be far less common than psychotic reactions to alcohol and to amphetamines. While the number of psychotic reactions to alcohol may at least in part be explained by the extent of the use of alcohol in our society as compared to marihuana, this would not seem to explain the number of psychotic reactions to amphetamines.

So few adverse reactions to marihuana by American users are probably seen because American users usually take small doses of the drug;[57] psychotic reactions to marihuana are in large part a function of dosage.[58] Thus, while it may be true that marihuana *in large enough quantities* can lead to the same reactions that LSD can, it is also beside the point.

There is also disagreement as to the relationship between use of cannabis preparations and marihuana and crime, aggressive behavior, and violence. One view is that there is a strong positive relationship. However, many studies come to the contrary view. Reviewing recent psychiatric literature, Murphy states that although aggressive or antisocial behavior can occur, it "is agreed to be less common with cannabis than with alcohol" and that "most serious observers agree that cannabis does not *per se* induce aggressive or criminal activities, and that reduction of work drive leads to a negative correlation with criminality rather than a positive one.[59] The President's Commission on Law Enforcement and Administration of Justice concluded that "differences of opinion are absolute and the claims beyond reconciliation." Its discussion is worthy of quotation:[60]

> One view is that marihuana is a major cause of crime and violence. Another is that marihuana has no association with crime and only a marginal relation to violence.
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> Proponents of the first view rely in part on reports connecting marihuana users with crime. One such report by the district attorney of New Orleans was referred to in the hearings on the 1937 act. It found that 125 of 450 men convicted of major crimes in 1930 were regular marihuana users. Approximately one-half the murders (an unstated number) and a fifth of those tried for larceny, robbery, and assault (again an unstated number) were regular users. However, the main reliance is on case files of enforcement agencies. Excerpts from these files have been used to demonstrate a marihuana-crime causal relation. The validity of such a demonstration involves three assumptions which are questioned

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[55] *Id.* at 104–106; interviews between writer and clinicians. In a recently conducted double-blind controlled clinical experiment dealing with the short term effects of marihuana smoking in man "no adverse marihuana reactions" occurred in any of the subjects. Weil, Zinberg & Nelson, *Clinical and Psychological Effects of Marihuana in Man*, 162 SCIENCE 1234, 1238 (1968).

[56] Statement of Dr. E. Bloomquist to the writer, at New Brunswick, New Jersey, June, 1968.

[57] Cal. Study, *supra* note 34, c. 4.

[58] *Id.*

[59] Murphy, *supra* note 45, at 16.

[60] THE CHALLENGE OF CRIME, *supra* note 8, at 224–225 (1967).

by opponents of the present law: (1) The defendant was a marihuana user. Usually this can be determined only by the defendant's own statement or by his possession of the drug at the time of arrest. (2) He was under the influence of marihuana when he committed the criminal act. Again a statement, perhaps a self-serving one, is most often the source of the information. Chemical tests of blood, urine, and the like will not detect marihuana. (3) The influence of the marihuana caused the crime in the sense that it would not have been committed otherwise.

Those who hold the opposite view cannot prove their case, either. They can only point to the prevailing lack of evidence. Many have done so. The Medical Society of the County of New York has stated flatly that there is no evidence that marihuana use is associated with crimes of violence in this country. There are many similar statements by other responsible authorities. The 1962 report of the President's Ad Hoc Panel on Drug Abuse found the evidence inadequate to substantiate the reputation of marihuana for inciting people to antisocial acts. The famous Mayor's Committee on Marihuana, appointed by Mayor LaGuardia to study the marihuana situation in New York City, did not observe any aggression in subjects to whom marihuana was given. In addition there are several studies of persons who were both confessed marihuana users and convicted criminals, and these reach the conclusions that a positive relation between use and crime cannot be established.

One likely hypothesis is that, given the accepted tendency of marihuana to release inhibitions, the effect of the drug will depend on the individual and the circumstances. It might, but certainly will not necessarily or inevitably, lead to aggressive behavior or crime. The response will depend more on the individual than the drug. This hypothesis is consistent with the evidence that marihuana does not alter the basic personality structure.

The significance of the relationship between use of marihuana and use of heroin and hallucinogenic drugs is also unclear. A majority of American heroin users who come to the attention of public authorities have tried marihuana before trying heroin: [61] they are likely to have also used tobacco and alcohol.[62] On the other hand, the great majority of persons who have tried marihuana do not go on to use of heroin; [63] the only figures coming to the attention of the writer state that 5 to 10 percent become heroin addicts.[64] A recent study of American opiate addicts [65] found that there were two patterns of opiate addiction in the United States; the Northern and Western pattern characterized

[61] *Id.* at 225; N.Y. Cty Med. Soc'y. Rep.—I, *supra* note 18, at 4.
[62] Blum: *Dangerous Drugs*, *supra* note 1, at 24.
[63] *E.g.*, THE CHALLENGE OF CRIME, *supra* note 8, at 225 (1967); Blum, STUDENT DRUG USE, *supra* note 27; N.Y. Cty Med. Soc'y. Rep.—I, *supra* note 18, at 4.
[64] *See* CALIFORNIA NARCOTICS REHABILITATION ADVISORY COUNCIL FOURTH ANNUAL REPORT 10 (1968).
[65] Ball, Chambers & Ball, *supra* note 9.

by addiction to heroin and prior marihuana experiences, and the Southern pattern characterized by addiction to other opiates and with a much smaller percentage of addicts having a history of marihuana use. This information suggests that there is no necessary connection between opiate and marihuana use. Possibly, part of the relationship between marihuana and heroin is that (both being contraband) they move in the same channels. They may also move in the same subculture. Possibly, there are some persons who move on from marihuana to heroin because marihuana fails to give them what they seek or because it gives them so much of what they seek that they want more. These speculations may also explain more recent impressions that use of LSD and other dangerous drugs is also often preceded by use of marihuana. However, a recent study prepared under a contract awarded by the National Institute of Mental Health discovered that in the college population studied use of amphetamines often preceded use of marihuana.[66]

It is generally agreed that use of marihuana in the United States is increasing. No one knows how many persons have tried the drug. In 1966 a publication of the Medical Society of the County of New York referred to "hundreds of thousands of persons who have had one or a few marihuana experiences." [67] Some estimates run as high as 20,000,000 but the Director of the National Institute of Mental Health has estimated that "it is much more likely in the neighborhood of 4 to 5 million persons [in the United States] have used it at least once." [68] While such estimates are cumulative use or cumulative incidence figures, usually dealing with persons who have used the drug at least once and not dealing with frequency of use or how frequent last use was, they are significant. Moreover, use has spread to the middle class, to young professionals, to college and university and high school students, and even to students of junior high school and grade school age. However, much use of marihuana in the United States appears to be experimental or occasional. Although experimental use may not be without dangers, it appears to be less harmful than regular or habitual use.

While marihuana should be treated as an abusable drug primarily because of its low potency relative to cannabis preparations and other hallucinogens (it is probably the least harmful and least potent of the controlled hallucinogens), treatment of it as an abusable drug is also desirable in order both to minimize the consequences of conviction for substantial numbers of persons, many of whom especially have something to lose by the consequences of conviction, and to avoid labelling large numbers of experimenters as a criminal class.

It is possible that an increase in use could follow reduction of marihuana penalties. It is submitted, however, that in view of the verified risks of use and the uncertainty as to other risks, greater penalties are not warranted. Harsher penalties would be out of proportion to the harmfulness of the conduct involved. Moreover, such

[66] BLUM: STUDENT DRUG USE, *supra* note 27.
[67] N.Y. Cty Med. Soc'y. Rep.—I, *supra* note 18, at 4.
[68] Testimony of Dr. Stanley F. Yolles, *House Hearings*, *supra* note 31, at 177. Dr. Yolles has since revised this estimate upward to between eight and twelve million. N.Y. Times, Sept. 18, 1969, at 47, col. 4.

penalties (as do existing penalties) would appear unjust in the eyes of the bulk of American users who have used the drug without ill effects or without effects they consider detrimental. Like existing penalties, they would probably lead to disrespect for the law prescribing them, and it is possible that this disrespect for law could become more generalized. At a time when there is so much disrespect for law and when large numbers of young people are alienated from significant aspects of American life, it would be undesirable to continue to punish simple possession heavily in order to deter use of marihuana; heavy penalties may only compound alienation. Such a course would be particularly undesirable when marihuana appears to be one of the less harmful of the controlled drugs, and when there is much uncertainty and debate as to how harmful it actually is. More severe punishment for possession should at the least await solid scientific information that marihuana is as harmful as some people believe it is and more harmful than other people believe it is. Deterrence, while of course important, cannot be the sole end of the criminal law. Punishment must also be related to the seriousness of the offense.

In connection with the draft's approach of ameliorating the marihuana law, it should be noted that the Council on Mental Health and the Committee on Drug Dependence of the American Medical Association and the Committee on Problems of Drug Dependence of the National Research Council of the National Academy of Sciences have, in a joint statement, advocated greater discrimination among different types of marihuana offenders, taking the position that penalties for violations of the marihuana laws are often harsh and unrealistic, and have suggested that "equitable penalties, insofar as they enhance respect for law, can contribute to effective prevention."[69] Dr. Dana Farnsworth of Harvard University, the principal draftsman of this statement, has suggested to the writer that both first and second convictions of unlawful possession of marihuana should be punishable only by a fine.[70] This view goes even further than the draft; under the draft, infraction treatment for unlawful possession of abusable drugs would be limited to first offenses. (*See* the note on unlawful possession, *infra.*)

Further, in 1968 both California [71] and Alaska [72] reduced penalties for unlawful possession of marihuana.[73]

Whether marihuana should be "legalized," much as alcohol, is subject to great dispute. Regardless of whether legalization would, at an academic level, be desirable, it is not at the present time a politi-

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[69] *Marihuana and Society*, 204 J.A.M.A. 1181 (1968).

[70] Statement of Dr. Dana Farnsworth to the writer, at New Brunswick, N.J., June, 1968.

[71] Cal. Laws 1968, c. 1465.

[72] Alaska Laws 1968, c. 225.

[73] The British Advisory Committee on Drug Dependence (the "Wooten" Committee) recently recommended reduction in penalties for possession of cannabis so as "to remove for practical purposes, the prospect of imprisonment for possession of a small amount and to demonstrate that taking the drug in moderation is a relatively minor offense." REPORT BY THE ADVISORY COMMITTEE ON DRUG DEPENDENCE: CANNABIS 28 (1968). The British Government, however, rejected the Committee's recommendations. N.Y. Times, Jan. 24, 1969, at 2, col. 3.

cally viable alternative,[74] and will thus not be treated in this report at length. While legalization might be justified by the uncertainty of the risks of marihuana and by the costs of the marihuana laws,[75] caution would dictate that the question of legalization be deferred until studies of the effects of marihuana now being conducted and planned under the auspices of the National Institute of Mental Health and other agencies provide more information as to the risks of the drug. While it can be argued that marihuana has not been

[74] In addition, legalization of marihuana (except for the seeds and leaves of the cannabis plant, when not accompanied by the flowering tops) would be inconsistent with the obligations of the United States under the Single Convention on Narcotic Drugs. Article 4–1(e) of the Convention obligates the signatories: "Subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs." Cannabis is a drug covered by the Convention. The Convention defines as cannabis "the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) from which the resin has not been extracted. . . ." Art. 1–1(b). The Convention also provides that "The parties shall adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant." Art. 28–3. Of course, Federal legislation legalizing marihuana would for domestic purposes supersede the treaty. But then the United States would be in default in its international obligations.

[75] On the costs of the marihuana laws, *see* PACKER, THE LIMITS OF THE CRIMINAL SANCTION 340–341 (1968):

> Another implication of the current trend in marihuana use is that the costs of our existing policy are mounting. On the one hand, if differential leniency obtains between enforcement activities in the slums and those in the suburbs, an existing source of alienation in our culture will be enhanced. If, on the other hand, the trend toward nullification is checked, it will be at the price of wholesale law enforcement intrusion at levels of our society that are not accustomed to it and will probably not welcome it. Quite apart from the question of police practices, the continued use of criminal sanctions against marihuana users is very likely to hasten the erosion of respect for the law among the younger generation. We seem to be faced today with a particularly severe crisis of confidence on the part of youth toward the society in which they live. Its causes range far beyond the ambit of this discussion, and its course may well be irreversible. We may in truth be living in a revolutionary age the equal of which has not been seen, at least in the Atlantic world, for almost two hundred years. But those of us who are not prepared to act on apocalyptic premises may well consider whether the erosion of belief in law-abidingness is a phenomenon about which we can afford to be complacent, whether the laws regarding marihuana are not now a substantial contributor to that erosion, and whether we would not do well to prove again what can never stay proven for very long: that the law is made for the people, not the other way around.

See also Kadish, *The Crisis of Overcriminalization*, 374 THE ANNALS 157 (1967); SKOLNICK, COERCION TO VIRTUE: A SOCIOLOGICAL DISCUSSION OF THE ENFORCEMENT OF MORALS (1967) (Consultant's Report to the President's Commission on Law Enforcement and Administration of Justice), reprinted in a somewhat different version in RESEARCH CONTRIBUTIONS OF THE AMERICAN BAR FOUNDATION, No. 7 (1968).

On the costs of the marihuana laws in California, *see* Cal. Study, *supra* note 34, *passim*; Kaplan, *Foreword to Marihuana Laws: An Empirical Study of Enforcement and Administration in Los Angeles County*, 15 U.C.L.A. L. REV. 1501 (1968); Project, *Marihuana Laws: An Empirical Study of Enforcement and Administration in Los Angeles County*, 15 U.C.L.A. L. REV. 1507 (1968).

proved sufficiently harmful to be restricted, it must be remembered that marihuana is already a restricted commodity rather than a free one. In this situation a decision to "legalize" distribution and use, though not so intended, could more easily be taken as social approval of use than would a decision not to restrict a free commodity.[76] Given that we know relatively little about the drug and that studies now being conducted or in the planning stage may find it more harmful than some of us believe it to be, the misinterpretation that is a risk of "legalization" should be avoided.[77] It should be remembered, however, that marihuana brings subjective feelings of pleasure to a considerable number of Americans. Consequently, if research should find that the drug is not particularly harmful, legalization would be in order. In addition, if the social costs of the marihuana laws continue to increase, legalization may also be proper.

Amphetamines.—Amphetamines do have medical use. They are used in medicine in treating narcolepsy and some minor depressions, and in efforts to control weight and fatigue. Self medication by persons seeking to combat fatigue, lethargy, and overweight is apparently widespread;[78] amphetamines are also used by students studying for exams, night workers, and truck drivers.[79] Amphetamines are stimulants, and in *very large* extra-therapeutic and often intravenous doses they produce a euphoria resembling that produced by cocaine.[80] This effect is longer lasting in the case of amphetamines than in that of cocaine, and is dependent on dosage.[81] While people can become psychologically dependent on amphetamines, it is unclear whether they produce physical dependence. Although it was generally thought that they do not produce physical dependence,[82] it now appears there is some opinion that they do produce a real but not very significant physical dependence.[83] Depression is also an after effect of an amphetamine high, and there is also a possibility that in large enough doses taken over a substantial period of time they may contribute to central nervous system damage. The effects of amphetamines depend greatly on dosage. The Medical Society of New York County has reported that "judgmental and intellectual impairment, aggressive behavior, incoordination and hallucinations all may occur during habituation."[84]

It is clear that large doses may produce paranoid psychotic reactions, especially when administered intravenously.[85] Amphetamines

[76] However, it should be noted that one study has come to the conclusion that in the shortrun people's moral judgments are only minimally affected by their knowledge or belief as to the state of the law. *See* Walker & Argyle, *Does the Law Affect Moral Judgments?*, 4 BRIT. J. CRIM. 570 (1964).

[77] While even lesser ameliorations of the marihuana laws might be "misinterpreted" by some, it is unlikely that such changes would be misinterpreted to the same extent as legalization. Moreover, to the extent the marihuana laws are at present unjust or undesirable, some changes may be in order even if they do result in misinterpretation.

[78] Blum: *Dangerous Drugs*, *supra* note 1, at 29.

[79] *Id.*

[80] Kramer et al., *Amphetamine Abuse: Patterns and Effects of High Doses Taken Intravenously*, 201 J.A.M.A. 305 (1967) [hereinafter cited as Kramer].

[81] *Id.*

[82] N.Y. Cty. Med. Soc'y. Rep.—I, *supra* note 18, at 4.

[83] Jaffe, *supra* note 3, at 298; Kramer, *supra* note 80.

[84] N.Y. Cty. Med. Soc'y. Rep.—I, *supra* note 18, at 4.

[85] Blum: *Dangerous Drugs*, *supra* note 1, at 31; Kramer, *supra* note 80.

have been implicated in motor vehicle accidents and aggressive behavior. However, on the basis of analysis of primary sources a consultant to the President's Commission on Law Enforcement and Administration of Justice found in 1966 that "research done to date directly contradicts the claims linking amphetamine use to crimes of violence, sexual crimes, or to accidents." [86] Despite this, anectodal reports of involvement of amphetamines in aggressive behavior growing out of paranoid episodes persist,[87] and it is certainly a possibility that amphetamines may contribute to such behavior. Such behavior would be consistent with the paranoid reactions the drugs sometimes produce.[88] The possibility of aggressive behavior, and other adverse effects, like the risk of psychosis, increases when amphetamines are taken intravenously rather than orally, and a greater high results from intravenous use than from oral use.[89] In the last few years intravenous amphetamine use has apparently increased. The source of the injectable drug was at first diversion from legitimate channels of amphetamines prepared for medical intravenous use, but more recently injectable amphetamines have been manufactured in illicit laboratories.[90] Methamphetamine (methedrine) is most often used for this purpose, because it is probably more readily available than other amphetamines.[91] Milligram for milligram it is also probably a little more potent than other amphetamines, but other amphetamines can produce the same effects.[92]

It is suggested that injectable amphetamines (including amphetamine powder) be classified as dangerous drugs and oral amphetamines as abusable drugs.[93] The distinction is made for several reasons. There is a greater risk of psychosis, aggressive behavior, and other adverse effects from intravenous use than from oral use. When amphetamines are taken intravenously there is a greater "high" than when they are taken orally, and hence greater desire to continue use. Moreover, injectable amphetamines have only limited medical use and that use is usually limited to in-patient administration and to administration by physicians directly to patients, while oral amphetamines (for example, pills, capsules, tablets) have relatively widespread medical use, are commonly prescribed, and are not uncommonly given to friends so that they can medicate themselves. Intravenous users sometimes "soak" amphetamine tablets and then inject the solution, causing effects similar to those produced by the injection of amphetamines produced for intravenous use, and it would be possible to take the position that because of this, all amphetamines should be treated alike. It is believed, however, that the distinction is

[86] Blum: *Dangerous Drugs*, *supra* note 1, at 30.
[87] Personal communication to the writer from Dr. John C. Kramer, Chief of Medical Research, California Rehabilitation Center, Corona.
[88] Personal communication to the writer from Dr. Jean Paul Smith of the Bureau of Narcotics and Dangerous Drugs.
[89] Kramer, *supra* note 80.
[90] *Id.*
[91] Personal communication to the writer from Dr. Kramer (*see* note 87, *supra*).
[92] *Id.*
[93] An official of the Bureau of Narcotics and Dangerous Drugs has suggested to the writer that the distinction should be drawn in terms of the strength of the drug rather than in terms of whether or not it is in injectable or oral form. Such a distinction may well be worth pursuing.

warranted by the undesirability of stringently punishing transactions in drugs, like oral amphetamines, which have widespread medical use, are commonly prescribed, and are commonly used for self medication and given to friends for self medication.

There are other drugs somewhat similar to amphetamines subject to the Drug Abuse Control Amendments because of their stimulant effect. They should be classified as amphetamines are classified; injectable forms of these drugs should be classified as dangerous drugs and oral forms as abusable drugs.

Barbiturates.—Barbiturates are most commonly prescribed to induce sleep, but they may also be prescribed to achieve daytime sedation or relieve anxiety.

Excessive use of barbiturates may lead to physical dependence, and, of course, there can also be psychological dependence; hence, barbiturates can be addicting. Withdrawal of the addict is more hazardous than withdrawal from opiates. Delirium, hallucinations, convulsions, coma, and death sometimes occur during withdrawal.[94] However, there is a greater margin of safety between the dosage that will cause physical dependence and dosages in the therapeutic range than in the case of many opiates.[95] Unlike the situation with respect to some opiates, dosages in the therapeutic range are not likely to produce physical dependence.[96] Physical dependence is a function of size of dose over a period of time.[97] Little is known about treatment of persons dependent on barbiturates. However, it has been indicated that the prognosis for treatment is poor, and that the problems presented are very similar to those encountered in the treatment of opiate addicts.[98]

While we do not know the extent of the problem, there are apparently more persons dependent on barbiturates than on opiates, and there are an unknown but apparently large number of nondependent persons who at times use them without or in excess of medical authorization. These persons usually obtain barbiturates upon prescriptions [99] but may also obtain them from illicit sources. Most barbiturates in illicit channels have been diverted from legitimate sources. There does not seem to have been any appreciable increase in illicit use of barbiturates in the period since the Drug Abuse Control Amendments went into effect, and involvement of organized crime in the illicit traffic appears to be marginal at most.

Dependence is not the sole risk attributable to barbiturates. People can become acutely intoxicated from using them.[100] This depends on

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[94] N.Y. Cty. Med. Soc'y Rep.—I, *supra* note 18, at 4.

[95] Statement to the writer by Dr. Warren P. Jurgensen, Deputy Chief, NIMH Clinical Research Center, Fort Worth, Texas.

[96] *Id.*

[97] *Id.*

[98] *See* Jaffe, *supra* note 3, at 305–306; Fraser & Grider, *Treatment of Drug Addiction*, 14 AM. J. OF MED. 571, 576 (1953); Isbell & Fraser, *Addiction to Analgesics and Barbiturates*, 2 PHARMACOL REV. 355, 390 (1950).

[99] *Cf.* Cole, *Report on the Treatment of Drug Addiction*, in TASK FORCE REPORT, *supra* note 1, at 135, 142 (1967). (Although adequate data are lacking, abusers of barbiturates and amphetamines probably include more medical (doctor-dependent) abusers and fewer street users than is true for opiate abusers.)

[100] *See* Jaffe, *supra* note 3, at 296.

the individual and the dosage. The intoxication resembles alcohol intoxication,[101] and it has been said that barbiturates are nonliquid alcohol. Intoxication is aggravated when the use of barbiturates is combined with the use of alcohol.[102] Although persons acutely intoxicated on barbiturates are sometimes aggressive, and acute barbiturate intoxication resembles acute alcohol intoxication, a study undertaken by a consultant to the President's Commission on Law Enforcement and Administration of Justice could not find any verified cases of "crimes against person or property occurring because of barbiturate ingestion." [103] However, it is likely that, especially when use of alcohol is also involved, there is a relation between barbiturate use and dangerous driving.[104] In addition, accidental overdose may lead to death because earlier doses may cause a state of confusion or drowsiness during which additional quantities are unwittingly taken.[105] Barbiturate overdose is one of the chief means of suicide in the United States.[106]

Barbiturates should be classified as abusable drugs. While barbiturate intoxication may, like alcohol intoxication, be more impairing than opiate intoxication, and while withdrawal is more hazardous than withdrawal from opiates, there is a greater margin of safety between the dosage likely to produce physical dependence and doses in the therapeutic range than in the case of many opiates. Further, barbiturates have widespread medical use, are commonly prescribed for outpatient use, and are not uncommonly given to friends so that they can medicate themselves.

In addition to barbiturates, there are other drugs controlled under the Drug Abuse Control Amendments because of their depressant effect. These consist chiefly of other hypnotics, sedatives, and some tranquilizers. Some have effects quite similar to barbiturates, while others have a lesser potential for causing intoxication or causing or sustaining dependence. They too should be classified as abusable drugs because they present problems somewhat similar to those presented by barbiturates. If the classification is inappropriate for any of them, the Attorney General may reclassify them consistent with section 1821.

NOTE

on

TRAFFICKING IN DANGEROUS AND ABUSABLE DRUGS

Section 1822 is the primary substantive section of the draft. It deals with trafficking in most drugs that are currently controlled under the narcotics and marihuana laws and under the Drug Abuse Control Amendments. Section 1823 (trafficking in restricted drugs) is intended for exempt narcotics and other drugs that by reason of a demonstrated low potential for harm do not require stringent criminal treatment for effective regulation.

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[101] *Id.*
[102] Blum: *Dangerous Drugs*, *supra* note 1, at 35.
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*

Trafficking includes actual distribution, conduct preparatory to distribution, and conduct that creates a substantial risk of distribution. Such conduct is prohibited in the single offense of trafficking rather than in separate offenses dealing with actual distribution, possession with intent to distribute, production, and importation. The draft takes this approach both to facilitate charging of the defendant and to make it clear that the essence of the conduct prohibited is distribution or the creation of a substantial risk of distribution.

1. *Distribution and Use.*—While narcotics and dangerous drug laws are ultimately directed at discouraging use, at both the Federal and State levels, they have actually been predominantly directed against distribution. Transfer and disposition in their various forms have been the central offenses created by American narcotics and dangerous drug laws. There are probably several reasons behind this emphasis on distribution. First, the distributor may be considered not only more seriously to affront the legislature's decision to discourage use, but also to pose a more serious threat to its efforts than the person who uses drugs but does not distribute them. The distributor by definition makes drugs available to others. While users often do distribute drugs, distribution is not an inevitable concomitant of use. Second, insofar as existing laws punish distribution, it is possible that they may recognize that, while drug transactions are consensual transactions and that detection and prosecution are consequently difficult, actual disposition may be considered a logical point in the pattern of distribution where detection is feasible. In the case of sale or commercial distribution at least, "It is at this point that contact must be made with persons whose motives are relatively unknown, and at which, not infrequently, one must act relatively publicly".[1] Third, although users of controlled drugs often distribute them to others and sometimes sell them, there are many people who feel pity or sympathy for the user (not always, of course, unmixed with less noble feelings to be sure), or otherwise view the user as a person for whom severe punishment or even any punishment is not appropriate. These feelings are induced by the view that he is alienated, misguided, foolish, disturbed, or presents a medical, psychiatric or social problem. When users do distribute drugs or commit other crimes, these benevolent feelings are sometimes strained. Fourth, the distributor is blamed more than the user because it may be believed that he is a business man (and he may well be one); and we tend to blame people who commercialize vice more than we do people who we regard as victims of vice or people who indulge in a vice.

In addition, it is often urged that while enforcement against traffickers is difficult, there is more to be gained from such enforcement than from enforcement against users. The argument is that by reaching traffickers—particularly significant traffickers—use is more likely to be decreased (at least temporarily) than by reaching users. This presupposes, however, that enforcement against traffickers is effective enough that at least some users must reduce use, or that traffickers must dilute the quality of the drug with the result that users do not in-

[1] Note, *Hallucinogens*, 68 COLUM. L. REV. 521, 553 (1968).

crease the number of doses they take, or that traffickers who would otherwise distribute drugs for which there is a demand are deterred from doing so. If enforcement against traffickers is not so effective, a greater reduction in use might be accomplished by isolating a single user from drugs than by incarcerating a trafficker.

In a report submitted to the President's Commission on Law Enforcement and Administration of Justice, it is suggested that even if use may be as effectively disrupted by reducing the supply of a drug (the selling side of the transaction) as the demand (the purchasing side of the transaction), in the case of some drugs at least, more may be gained by efforts aimed at reducing the demand than the supply.[2] The argument generally seems to be based on the characteristics of heroin users. It runs approximately as follows: Heroin is a commodity the demand for which is relatively inelastic as to price—as price goes up, demand does not appreciably fall off, but addicts pay the increased price; since addicts often commit fundraising offenses, an increase in price will result in increased addict-crime and cost the community more both monetarily and in terms of community security; therefore, activities directed to reducing the supply of the drug will, to the extent they succeed, raise the price and increase addict-crime; on the other hand, activities directed to reducing the demand (by imprisoning, jailing, or treating the addict, for example) will reduce use without leading to an increase in price. Whether to act on this analysis by incapacitating the addict would depend on a balancing of the financial and security costs of addict crime against considerations of personal liberty, and other humanitarian considerations which might weigh against incapacitating the addict for a substantial period of time.

The draft regards distribution as the central point of the control scheme. Distribution represents a greater affront and a greater threat to the system of regulation than does use, more directly involves other persons (even if only in a consensual transaction) and (especially when the distributor is profiting from the user) evokes less benevolent feelings than does use. In addition, to the extent that they, in fact, reduce supply, controls on distribution may have a greater potential for controlling use (even if they do create collateral problems) than controls on use itself.

2. *Actual Transfers and Other Distributions.*—Section 1829 (a) (i) (A) deals with the actual transfer or other disposition of dangerous and abusable drugs. Distributions vary in the threat they pose to the system of regulation and the gravity of harm they threaten, and the draft, for purposes of defining the offense, distinguishes between such distributions as commercial versus noncommercial distributions, distributions for profit versus other distributions, and distributions to minors versus distributions to adults, by means of the reduction mechanism included in section 1822(3).[3] However, all are included as traf-

[2] Arthur D. Little, Inc., *Drug Abuse and Law Enforcement*, Appendix D, D 1–19 (1967) (Consultant's Report to the President's Commission on Law Enforcement and Administration of Justice).

[3] The draft also utilizes this reduction mechanism in sections 1822(4) and 1823(2).

ficking. Under an alternative formulation the making of these distinctions would be left to the jury.[4]

3. *Sales to Minors.*—Unlike existing Federal law and the law of many States, the draft does not treat a distribution to a minor as a more aggravated offense than a sale to an adult. While distributions to minors are often serious matters, it would seem anamolous to treat noncommercial distribution to minors more seriously than commercial distribution to adults or to treat small-scale commercial distribution to minors more seriously than large-scale commercial distribution (most distribution to minors is small-scale).

Certainly, from the preventive point of view, large-scale commercial distribution must be considered the most serious, because it suggests distribution that is widespread (or through redistributions will become widespread) and usually regular also.

In addition, insofar as statutes creating an aggravated offense for distributions to minors rest on the assumption that minors are likely to be innocent or novices in the ways of drug using and are seduced into it, they probably proceed from a debatable premise. Many minors are wiser in the ways of drug use than adults, and it is unclear how often dispositions to minors anywhere approach seduction. Although the findings may be interpreted in several ways, a recent study of college student drug users in the San Francisco Bay area sponsored by the National Institute of Mental Health found that more students in the earlier years of college had drug experiences than did students in the later years or graduate students.[5]

Certainly, a disposition to a very young minor suggests a greater likelihood of vulnerability and/or seduction than does a disposition to an older minor. However, it is submitted that this circumstance is better considered as a sentencing consideration in the individual case rather than the basis for an aggravated offense, because it is still questionable whether such distributions are more serious per se than commercial distribution. It is so treated in subsection (3)(b) of section 1822 (discussed in the note on grading).

In addition, while statutes that make selling to a minor an aggravated offense do perhaps contribute to community and legislature security, it seems that in the Federal system at least they are rarely used. According to the Deputy Chief of the Narcotics Section of the United States Attorney's Office in the Southern District of New York, this is because most Federal cases are made through "buys" by undercover

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[4] Similar alternative formulations apply to sections 1822(4) and 1823(2).

Neither the main nor the alternative formulation is without problems. Under the alternative formulation the defendant would have to admit the lesser offense in order to avoid conviction of the greater. It could be argued that this is violative of the privilege against self incrimination. The main formulation avoids this difficulty. It could be argued, however, that, though drawn as a sentencing provision, it actually deals with the determination of guilt and consequently that unless there is a provision for a jury trial, it deprives the defendant of his right to a trial by jury. One cannot be certain how the courts would respond to either one of these arguments.

Insofar as both formulations place the burden of persuasion on the defendant, it is believed they are constitutional. *See* the comment on section 103 (proof and presumptions).

[5] BLUM, HORATIO ALGER'S CHILDREN: OBSERVATIONS ON STUDENT DRUG USE (1968).

agents, and it is very difficult to find an undercover agent who is under 18. Moreover, since the main Federal enforcement concern is and should be commercial distribution and especially large-scale commercial distribution, it would seem, particularly in view of the difficulties involved, a waste of valuable manpower to make cases against persons who distribute to minors unless there is some reason other than age for doing so.

4. *Purchasing Agent Doctrine.*—The regulatory provisions should contain a definition of "transfers or otherwise disposes of" which abolishes the purchasing agent doctrine of existing Federal law.*

Courts have interpreted the narcotics laws so that a defendant cannot be convicted of *selling* narcotics to the purchaser if he acted as the agent *of the purchaser.*[6] There is a division of authority as to whether he can be convicted of facilitating the sale of narcotics to his purchaser-principal, though by the prevailing view he can.[7] And although the cases are not unanimous,[8] under the weight of authority a defendant may be convicted of other offenses, such as those involving unlawful acquisition, even though he acts for the purchaser.[9] The theory of the purchasing agent doctrine is that the transfer by agent to principal is not, because of the agency relationship, a sale within the meaning of the narcotics laws and that by offering evidence of the relationship, the defendant seeks to negative an essential element of the offense.[10] The purchaser is usually an undercover agent and the claim that the defendant acted as an agent of the purchaser is often accompanied by an argument that the defendant was entrapped by the purchaser. Actually, the purchasing agent doctrine may in part be a judicial effort to ameliorate the harsh penalties of the narcotics laws and in part an effort to extend the defense of entrapment.

The draft abolishes the purchasing agent doctrine and treats the agent as a distributor. The purchasing agent does further or facilitate the distribution of the drug, and it is believed that he should be sub-

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**See*, the definition of "deliver" in S. 3246 (Controlled Dangerous Substances Act of 1969), section 102(h).

[6] *E.g.*, *Lewis* v. *United States*, 337 F.2d 541 (D.C. Cir. 1964), *cert. denied*, 381 U.S. 920 (1965); *Vasquez* v. *United States*, 290 F.2d 897, 899 (9th Cir. 1961) (dictum); *Adams* v. *United States*, 220 F.2d 297 (5th Cir. 1955); *United States* v. *Sawyer*, 210 F.2d 169 (3d Cir. 1954).

[7] Conviction permissible: *Cerda* v. *United States*, 391 F.2d 219 (9th Cir. 1968); *United States* v. *Simons*, 374 F.2d 993, 995 (7th Cir. 1966), *cert. denied*, 386 U.S. 1025 (1967); *Lewis* v. *United States*, 337 F.2d 541 (D.C. Cir. 1964), *cert. denied*, 381 U.S. 920 (1965); *Willis* v. *United States*, 285 F.2d 663, 665 (D.C. Cir. 1960); *Bruno* v. *United States*, 259 F.2d 8, 10 (9th Cir. 1958). Conviction not permissible: *United States* v. *Prince*, 264 F.2d 850, 853 (3d Cir. 1959).

[8] *Henderson* v. *United States*, 261 F.2d 909, 912 (5th Cir. 1959) (doctrine does not apply to charges of acquisition and concealment).

[9] *Cerda* v. *United States*, 391 F.2d 219, 220 (9th Cir. 1968) (doctrine does not apply to charge of facilitating possession); *Lewis* v. *United States*, 337 F.2d 541, 545 (D.C. Cir. 1964), *cert. denied*, 381 U.S. 920 (1965) (doctrine does not apply to charge of buying); *United States* v. *Sizer*, 292 F.2d 596, 599 n.4 (4th Cir. 1961) (dictum) (doctrine does not apply to charge of buying); *Vasquez* v. *United States*, 290 F.2d 897, 899 (9th Cir. 1961) (dictum) (doctrine does not apply to charge of facilitating transportation); *Washington* v. *United States*, 275 F.2d 687, 690 (5th Cir. 1960) (doctrine does not apply to charges of receiving or concealing, or of facilitating transportation).

[10] *Lewis* v. *United States*, 337 F.2d 541 (D.C. Cir. 1964) *cert. denied*, 381 U.S. 920 (1965).

ject to punishment for what he does. When he does not substantially facilitate a distribution, this may be considered in sentencing. When he does not act commercially, his offense is mitigated under section 1822(3)(a). Insofar as the purchasing agent doctrine has been designed to ameliorate penalties, the more flexible penalty structure of the draft makes resort to the doctrine for this purpose unnecessary. Insofar as the doctrine represents a judicial effort to extend the defense of entrapment, such an extension, if warranted, can be dealt with in the new Code's provisions on entrapment.

5. *Unlawful Prescriptions.*—Section 1829(a)(i)(B) deals with prescriptions issued in violation of the regulatory act—"not in the course of professional practice." It does not purport to state when a prescription goes beyond the bounds of medical practice.

Existing Federal law does not explicitly treat unlawfully prescribing a controlled drug as unlawful distribution. Under the case law, a practitioner who unlawfully prescribes a controlled drug is treated as an accomplice of the pharmacist filling the prescription if the pharmacist, in filling the prescription, would be guilty of unlawfully distributing a controlled drug.[11] If the pharmacist acts innocently in filling the prescription, the practitioner who issues it is guilty of unlawful distribution as a principal who acts through an innocent agent.[12] Theoretically, the practitioner is not guilty of any offense if the prescription is not filled, and there is language in the cases to this effect.[13] However, no cases have been found in which it is clear that the prescription was not filled. Apparently, when prescription cases are made against practitioners they are often made by undercover agents or informers operating as undercover agents;[14] and when the prescriptions are obtained, the agents have them filled.[15] In one case prescriptions were filled at the instance of informers and undercover agents even after the practitioner had been arrested, and this was held to complete the offense.[16]

Via the use of "prescribes," section 1829(a)(i)(B) includes the unlawful issuance of a prescription within the definition of trafficking. There are several reasons for this change. In the ordinary case where the prescription is filled, this approach will make it unnecessary to resort to complicity and innocent agent doctrines, and thus will sim-

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[11] *Jin Fuey Moy* v. *United States*, 254 U.S. 189, 194 (1920); *Manning* v. *United States*, 31 F.2d 911 (8th Cir. 1929).

[12] *Manning* v. *United States*, 31 F.2d 911, 913 (8th Cir. 1929); *United States* v. *Hipsch*, 34 F.Supp. 270, 274 (W. D. Mo. 1940).

[13] *United States* v. *Abdallah*, 149 F.2d 219, 221 (2d Cir.) (dictum), *cert. denied*, 326 U.S. 724 (1945); *United States* v. *Lindenfeld*, 142 F.2d 829, 832n.1 (2d Cir.) (dictum), *cert. denied*, 323 U.S. 761 (1944); *Strader* v. *United States*, 72 F.2d 589, 590 (10th Cir. 1934).

[14] *See United States* v. *Abdallah*, 149 F.2d 219 (2d Cir.), *cert. denied*, 326 U.S. 724 (1945); *United States* v. *Lindenfeld*, 142 F.2d 829 (2d Cir.), *cert. denied*, 323 U.S. 761 (1944).

The Bureau of Narcotics and Dangerous Drugs has informed the writer that the Bureau has not in recent years made any cases against practitioners which have proceeded to prosecution. The writer does not know whether informers and undercover agents have recently been used by the Bureau in cases which have not proceeded to prosecution.

[15] *See United States* v. *Abdallah*, 149 F.2d 219 (2d Cir.), *cert. denied*, 326 U.S. 724 (1945).

[16] *See id.* at 222.

plify the law. Moreover, it will make it easier to reach the practitioner in any case in which the prescription was not filled. It is possible that, given a Federal general attempt provision, merely issuing the prescription could be considered an attempt, but it seems undesirable to have the liability of the practitioner depend on the case-by-case resolution that characterizes the law of attempts. Practitioners generally issue prescriptions to have them filled; and issuance in itself can be considered conclusive of the practitioner's purpose. It also creates a great likelihood that the prescription will be filled.

Physicians may prescribe drugs for themselves. When a physician unlawfully prescribes a drug for his own use he should be treated as a user or possessor rather than as a trafficker. The draft accomplishes this by use of the reduction mechanism contained in subsections (3)(a) and (4) of section 1822.

6. *Agreements with the Transferee.*—Section 1829(a)(i)(C) of the draft defines the crime of trafficking to include the conduct of the distributor in agreeing with another to distribute the substance to him.* The object of this provision is to make clear that the distributor's agreement with the buyer or transferee to sell or transfer is punishable even if delivery is not made. It has been held that the transferor cannot be reached for conspiracy to distribute if he agrees only with the transferee, because the transferee is immune from liability for the conspiracy.[17] While the transferee is properly immune, there is no reason why the transferor should not be punishable. If the Code revision adopts a unilateral approach to conspiracy, the transferor could be held for conspiracy to traffic even though the transferee cannot be. However, at this time no decision has been made by the Commission whether the Code will adopt a unilateral theory of conspiracy. Moreover, it seems that the conduct of the transferor, in agreeing with the transferee that he will transfer the substance to him, both creates a significant enough risk of distribution and reveals the transferor to be a person so willing to distribute that it should be considered part of the substantive crime and punished on the same level as the completed transaction, even if delivery does not take place. When appropriate, the inchoate nature of the offense may be considered for purposes of imposing sentence in individual cases. Even if a unilateral theory of conspiracy is adopted, it is completely uncertain at this time whether a conspiracy to commit a crime will be punishable on the same level as the crime itself. Whether it is or not, the agreement of the transferor with the transferee should be. In addition, by including such agreements in the substantive crime, it would appear unnecessary to give the jury a conspiracy instruction, thus simplifying the charge.[18]

This provision of the draft does not affect the operation of normal conspiracy doctrine where the transferor agrees with someone in addi-

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*Section 1829(a)(i)(C) of the Tentative Draft reads "agrees with another person to transfer or otherwise dispose of a drug to such person;". This was deleted, and is covered by the general conspiracy section (section 1004) of the Study Draft. In S. 3246, *see* section 504.

[17] *Nigro* v. *United States*, 117 F.2d 624, 628–629 (8th Cir. 1941). *But cf. Richards* v. *United States*, 193 F.2d 554 (10th Cir. 1951), *cert. denied*, 343 U.S. 930 (1952).

[18] *Cf.* MICH. REV. CRIM. CODE c. 60, Comment at 456 (Final Draft 1967).

tion to or other than the transferee. Such an agreement can be prosecuted as a conspiracy to traffic.

In dealing with conspiracy, the draft does not go as far as the Narcotic Drugs Import and Export Act, which includes conspiracies within the substantive offenses it creates, or the Harrison Act and Marihuana Tax Act, as amended, which specifically state that conspiracies are punishable at the same level as substantive offenses.[19] It is submitted that as long as offenses involving significant personnel in organized crime are to be handled under Code provisions of general applicability (these offenses will involve conspiracies), other conspiracies to deal in drugs should be handled under the general conspiracy provisions of the new Code. They do not present problems that distinguish them from conspiracies to commit non-drug offenses sufficiently to warrant grading them differently from such conspiracies.

7. *Offers to Transfer or Otherwise Dispose.*—Under section 1829 (a) (i) (D) of the draft, the substantive crime of trafficking includes offers to distribute as well as completed distribution.* In including offers to distribute, the draft follows the proposed Michigan Criminal Code.[20] The proposed Michigan Code took this approach because "it is preferable to include preparatory and completed activity under the term 'sell' to reduce the possibility of technical objections to the charge being made at trial and to eliminate the need to instruct juries on the special doctrines of attempt. . . ." [21]

By including offers to distribute as part of the substantive crime of trafficking, the draft attempts to make clear that transactions which are not completed because of failure to agree on price or other terms, because of the suspiciousness of the seller, because enforcement personnel believe it necessary or desirable to make an early arrest, or for other reasons, will constitute trafficking.

Although, in light of the fact that the proposed draft on attempt moves attempt liability further back in time than is probably the case under existing law, offers to distribute would seem to constitute attempts, liability for such offers should not depend on the vagaries of particular applications of the law of attempt. Offers to transfer restricted drugs generally create a great enough risk of distribution or reveal the offeror to be a person so willing to distribute, or both, that they should be punishable as a matter of law. Moreover, they should for the same reasons be punishable on the same level as the completed transaction. As in the case of agreements between the transferor and transferee, when warranted by the facts of particular cases, the inchoate nature of the defendant's conduct may be considered in sentencing. Of course, if attempts are generally graded at the same level as the crime attempted, offers constituting attempts would be so graded

[19] The proposed Michigan Code revision defines "sell" with respect to narcotics offenses to generally include agreeing to sell, so as to make use of conspiracy doctrine unnecessary. MICH. REV. CRIM. CODE § 6001 (1) (f), and Comment to c. 60, at 456 (Final Draft 1967).

* Section 1829 (a) (i) (D) originally read "offers to transfer or otherwise dispose of a drug to another person;". This was deleted to be covered by the general section on attempt (section 1001) in the Study Draft. In S. 3246, *see* section 504.

[20] MICH. REV. CRIM. CODE § 6001 (1) (f) (Final Draft 1967).

[21] *Id.*, Comment to c. 60, at 456.

even if not included in the definition of the substantive crime; if attempts are not so graded, attempt liability would not result in what is believed to be the appropriate grading. In addition, as the commentary to the proposed revision of the Michigan Criminal Code points out, including offers in the substantive crime rather than prosecuting them as attempts (or on the theory of possession with intent to distribute) would facilitate prosecution and trial.

Of course, by treating offers to distribute as part of the substantive crime, it is not intended to affect liability for attempted transfer or disposition in situations where such liability would exist under the general attempt provisions of the Code. In such situations liability would be based on the theory of attempt.

8. *Possession with Intent to Distribute.*—Section 1829(a)(i)(C) includes within trafficking possession with intent to transfer or otherwise dispose, and thus, like subsections (a)(i)(B)–(D), reaches conduct preparatory to distribution.[22]

Although the existing narcotics and marihuana laws do not specifically punish possession with intent to distribute, the Drug Abuse Control Amendments [23] and the narcotics [24] and dangerous drug laws [25] of some States do. Such a provision should prove useful in cases where the quantities possessed are large enough to warrant an inference that they were possessed with intent to distribute and in other situations where there is evidence that the defendant possessed with intent to distribute.[26] Normally, where quantities are concerned, the quantities necessary to support the inference will be quite large.[27]

During the course of work on this report, consideration was given to the question whether the possession of quantities in excess of amounts established by the Attorney General should give rise to a presumption of intent to distribute. Such an approach was rejected, however, because quantity distinctions are difficult to make and are of necessity arbitrary and because, since in each case the question whether the presumption was overcome would be litigable, the presumption approach would not have any advantage over prohibiting possession with intent to sell and leaving the issue of intent entirely to all the relevant circumstances of the case.

Possession with intent to transfer or otherwise dispose is graded the same as other trafficking. Where appropriate, the inchoate nature of the defendant's conduct may be considered for purposes of sentencing in the individual case.

9. *Production. Growth or Cultivation.*—Section 1829(a)(ii) includes as trafficking unlawful manufacture.[28]

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[22] It is intended, for the purpose of subsection (a)(i)(C) as well as that of section 1824, that possession will include constructive possession.

[23] Pub. L. 90–639, § 2(a).

[24] *E.g.*, CAL. HEALTH & SAFETY CODE § 11500.5 (West 1964).

[25] CAL. HEALTH & SAFETY CODE § 11911 (West Supp. 1968); MASS. GEN. LAWS ANN. c. 94, § 187E (Supp. 1968); N.C. GEN. STAT. § 90–113.2(5) (Supp. 1967); VA. CODE ANN. § 54–441 (1967).

[26] Rosenthal, *Proposals for Dangerous Drug Legislation*, in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 80, 106–107 (1967).

[27] *See id.*

[28] "Manufacture" will be defined in the regulatory law. It should include such activities as growing and cultivating. In S. 3246, *see* section 102(0).

A person may manufacture a controlled drug either to distribute it to others or for his personal use. The draft distinguishes between manufacture for distribution and for personal use by means of the reduction mechanism contained in subsections (2) of section 1823 and (3)(a) and (4) of section 1822.[29] If the defendant prevails, his conduct is punishable on the same level as unlawful possession of a dangerous or abusable drug under section 1824. The offense of unlawful possession is at least in part intended to reach illicit users of dangerous and abusable drugs, and is the lowest offense in the draft dealing with these substances.

The draft makes the distinction by the use of the reduction mechanism (with the burden of persuasion on the defendant) rather than making unlawful manufacture with intent to distribute an element of the crime—because manufacturing is a source of drugs, and it is imperative to discourage such source activity, particularly when the likelihood is that there will be distribution. Proof of intent to distribute is often difficult, even though it is the fact. Because manufacturing is a source of drugs, there is greater risk in requiring the government to prove intent to distribute when such conduct is involved than when possession only is involved; and there is greater justification for relieving the government of the burden of proof in such cases than in the case of possession. Moreover, as a general matter, manufacturing is more likely to be for distribution than is possession; and this too supports relieving the government of this burden.

It is also urged that the regulatory provision contain a definition of "manufactures" to include "repackaging, encapsulating or otherwise changing the form of a drug." These activities should be included within the term "manufactures" because they involve a substantial risk that their object is distribution. Thus, heroin and methamphetamine may be placed in capsules or glasseine envelopes, and LSD may be placed on blotting paper or sugar cubes or in capsules, in each case for distribution. It is recognized that a person may repackage a controlled substance for personal use as well as for distribution, such as rolling marihuana into cigarettes for personal use. If in this situation the defendant proves by a preponderance of the evidence that he acted for personal use, the offense is punishable on the same level as unlawful possession; the quantity of the substance found in the defendant's possession will have a bearing on the purpose of his conduct. This solution should furnish some protection to the defendant who repackages for personal use, and at the same time permit persons who repackage for distribution to be treated as felons.

10. *Importation, Landing, and Receiving.*—Section 1829(a)(iii) includes within the definition of trafficking, unlawfully importing or landing a controlled drug, and receiving such a drug at the place where it has been landed in the United States or from a person who brought it from the place where it was landed in the United States. As in the case of manufacturing, a person may engage in such conduct either to distribute the substance involved or to use it himself. And as in the case of manufacturing, the draft treats the purpose of the im-

[29] Under an alternative formulation the making of this distinction would be left to the jury.

portation, landing, or receiving as a way to reduce the degree of the offense rather than making the fact that the defendant engaged in the prescribed conduct with intent to distribute the drug an element of the offense. The draft adopts this approach for the same reasons as it does in the case of manufacturing. Importing, landing, and receiving an unlawfully imported drug at the place where it has been landed or from a person who brought it from the place where it was landed are, like manufacturing, source activities, and also in the case of some drugs at least are probably more likely to be in furtherance of distribution than is possession.

Subsection (a)(iii)(A) of section 1829 includes importing itself in the definition of trafficking. As under existing law, a drug is imported into the United States when it is brought into the territory of the United States;[30] and it is irrelevant that the drug was not actually landed in the United States. Thus, the crime is complete when the drug is brought into the territorial waters of the United States even if it is not landed.

Subsection (a)(iii)(B) of section 1829 includes landing a controlled drug in the definition of trafficking, and is designed to reach the situation where a person who has not actually imported the drug lands an unlawfully imported drug in the United States. For example, a seaman may import heroin but have another person come on board to pick it up and take it off the ship. Under the existing narcotics and marihuana laws such a person could be reached for facilitating the transportation of a narcotic drug or marihuana by use of the presumption based on possession that these statutes contain.

Subsection (a)(iii)(C) of section 1829 includes in the definition of trafficking receiving an unlawfully imported drug at the place where it was landed or from a person who brought it from the place where it was landed, if the defendant had knowledge that it was imported. This provision reaches persons who do not unlawfully import or land controlled drugs but are closely connected with the completion of their introduction into the United States. It would reach persons who, with the requisite culpability, pick up unlawfully imported drugs at docks or where they have been dropped by airplanes; and it would also reach, if they possess the requisite culpability, persons to whom unlawfully imported drugs have been taken after landing. The draft adopts this approach to treating receivers of unlawfully imported drugs, rather than prohibiting receiving such drugs in all situations, because there is a point where a receiver of a drug that has been unlawfully imported should no longer be treated as an importer even if he knows that the drug has been imported. At this point, it is believed, he should be treated as an ordinary possessor (unless it can be shown he possessed with intent to distribute). A provision based upon knowledge of importation alone might result in treating nearly every heroin addict as an importer, when in fact he is not closely connected with the process of introducing the drug into the United States. Although

[30] *United States* v. *Morello*, 250 F.2d 631, 635 (2d Cir. 1957); *Palmero* v. *United States*, 112 F.2d 922, 924–925 (1st Cir. 1940); *Pon Wing Quong* v. *United States*, 111 F.2d 751, 756 (9th Cir. 1940); *United States* v. *Caminata*, 194 F. 903 (ED. Pa. 1912); *see Pineda* v. *United States*, 393 F.2d 139 (5th Cir.), *cert. denied*, 392 U.S. 943 (1968).

section 174 of Title 21, providing that possession is presumptive of knowledge of unlawful importation, currently permits this treatment, it is submitted that it is unjustifiable as a basis for determining the gravity of the offense, even though it was useful in Federal prosecutions as a jurisdictional base.

Although not all receivers of unlawfully imported drugs should be treated as importers, it is difficult to draw the line between those who should and those who should not. Any line must be fairly arbitrary. The solution of the draft attempts to confine importer treatment to receivers who are very closely connected with importation.

Subsection (a)(iii)(C) requires that the receiver have knowledge that the drug was imported. This requirement is believed essential to warrant holding the receiver as an importer. On the other hand, it is not required that the defendant know that the drug was *unlawfully* imported, as sections 174 and 176a of Title 21 nominally do. While it may be desirable in the case of substances whose use is not restricted, such as perfume, to have a requirement that an importer of, or one who receives an unlawfully imported substance, know that the substance was *unlawfully* imported, it would seem undesirable to have such a requirement in the case of substances like mind- and mood-altering drugs, whose use and distribution, when they are not contraband, are severely restricted. If knowledge of illegality is properly irrelevant to distribution, production, and possession of such substances, it is properly irrelevant to their importation.

11. *Exporting.*—Subsection (a)(iv) of section 1829 includes exporting within the scope of trafficking. While conduct which constitutes unlawful exporting may sometimes constitute unlawful distribution, possession with intent to distribute, or possession, it is believed desirable to refer explicitly to exporting. The United States has been at the forefront of international efforts to control traffic in many controlled drugs and receives cooperation in this effort from many foreign counties. Exporting from the United States is source activity as to other nations, whose interest in curbing the illicit traffic coincide with the United States and whose cooperation we seek.

NOTE

on

GRADING OF TRAFFICKING IN DANGEROUS AND ABUSABLE DRUGS

1. *Mandatory Minimum Penalties and Other Special Restrictions on Individualization of Punishment.*—As the preliminary memorandum on sentencing structure (Low; January 8, 1968) demonstrates (in a discussion that deals extensively with the existing narcotics and marihuana laws), mandatory minimum penalties are clearly undesirable. While mandatory minimum penalties and restrictions on probation and parole are defended as deterrents, the memorandum and other studies[1] point out that, as they actually operate, the certainty of

[1] A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, SENTENCING ALTERNATIVES AND PROCEDURES 150 (Tent. Draft 1967); Aronowitz, *Civil Commitment of Narcotics Addicts and Sentencing for Narcotic Drug Offenses*, in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 148, 157–158 (1967) [hereinafter cited as Task Force Report].

punishment they supposedly offer is illusory. As the memorandum states, offenders in all probability either do not recognize that these devices purport to promise certain imprisonment or realize that the punishment promised is not certain at all.

Another argument in favor of mandatory minimum sentences in narcotics cases in particular is that they provide leverage, which will induce a suspect to cooperate with law enforcement. It is submitted, however, that, if he fails to cooperate, it is inappropriate to subject him to punishment which is not warranted by the seriousness of his offense, the need to rehabilitate or incapacitate him, or by considerations of deterrence and general prevention. In addition, the decision that a suspect has failed to cooperate is a subjective decision of the prosecutor or of law enforcement officials, rather than a decision reviewable by a judge or jury. And finally, even suspects who do cooperate can be charged with offenses carrying mandatory sentences.

The President's Commission on Law Enforcement and Administration of Justice specifically rejected mandatory minimum penalties for violations of the narcotics and marihuana laws. The Commission took the position that "since the evidence as to the effects of mandatory minimum sentences is inconclusive, the Commission believes that the arguments against such provisions . . . are a firmer basis upon which to rest its judgment . . . ."[2] The Commission stated:[3]

> Within any classification of offenses, differences exist in both the circumstances and nature of the illegal conduct and in the offenders. Mandatory provisions deprive judges and correctional authorities of the ability to base their judgments on the seriousness of the violations and the particular characteristics and potential for rehabilitation of the offender.[4]

2. *Range of Sentence.*—The draft employs a multiple approach to the grading of trafficking in dangerous and abusable drugs. Generally, trafficking in these drugs is a Class C felony. However, under provisions relating to organized crime, Class A and B felony penalties would become applicable to organizers, leaders, and other significant personnel in criminal businesses involving several participants. (*See* sections 1005, 3203.) Under proposed section 1822(1) the Attorney General is empowered to designate quantities of dangerous drugs, trafficking in which is indicative of wholesale commercial distribution; and trafficking in such quantities will constitute a Class B felony.* Thus, even though the proof required for the organized crime may be lacking, proof of large-scale trafficking—usually indicative of highly

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[2] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 223 (1967) [hereinafter cited as THE CHALLENGE OF CRIME].

[3] *Id.*

[4] *See Watson* v. *United States*, 37 U.S.L.W. 1094 (D.C. Cir. 1968), *vacated*, (April 18, 1969), *reargued en banc*, (June 25, 1969), where the question for decision is whether or not the 10-year mandatory minimum for second offenders, as applied to an addict who merely possessed narcotics for his own use, violates the cruel and unusual punishment clause of the eighth amendment.

*Sale of a dangerous drug for resale purposes has been added as a Class B felony in the Study Draft, regardless of amount.

organized and continuing criminal activity—will nevertheless subject the offender to a very serious penalty.[5]

In employing a multiple approach, the draft seeks to discriminate between those traffickers whose conduct is such that the imposition of substantial sentences should be permitted and those traffickers whose conduct is such that they should not. By and large, existing law does not do this, but in the case of offenses involving cocaine, opiates, and marihuana, indiscriminately permits the imposition of long sentences for all traffickers as well as for persons who are not traffickers.

In the case of trafficking in opiates, cocaine, and marihuana, the draft represents a departure from existing law in the direction of flexibility and amelioration of permissible penalties for most, though not all, traffickers. In the case of trafficking in drugs subject to the Drug Abuse Control Amendments, the draft permits penalties for some trafficking which exceed those permitted by that legislation and penalties for other trafficking which are roughly equivalent to those permitted by it. The draft's basic approach of Class B and Class C penalties for trafficking is similar to the penalty structure for trafficking in narcotics in many foreign countries. Information obtained by the Staff from the Library of Congress reveals that the maximum penalty for trafficking in narcotics in Great Britain, France, Australia, Japan, Austria, South Korea, and Uganda is 10 years; in Italy, it is 8 years; in the Philippines, it is 6 years; in Switzerland, Brazil, and the Republic of South Africa, it is 5 years; in Finland, the Netherlands, and Sweden, it is 4 years; in West Germany, it is 3 years; and 2 years or less in Belgium, Denmark, Argentina, Norway, Tasmania, The Central African Republic, and Gabon.

In view of the Class A and B felony penalties contemplated for organizers, leaders, and significant personnel in criminal businesses and the Class B felony penalties here prescribed for traffickers in dangerous drugs in quantities indicative of large-scale commercial distribution, it is submitted that other trafficking in dangerous or abusable drugs, though a serious offense, is not sufficiently serious to warrant more than Class C felony penalties. When organized crime considerations are separated out, both Class A and Class B penalties are properly reserved for such extremely grave offenses as murder and treason and for conduct involving actual danger or serious risk of danger to the person that does not involve willing participation of the "victim."

If small-scale trafficking in dangerous or abusable drugs were treated as a Class B felony, it would be punished on the same level as such offenses as unaggravated kidnapping, unaggravated forcible rape, and unaggravated robbery. Currently, the narcotics and marihuana laws punish it at least as severely. It is submitted that such treatment is not justified by the risks posed by these drugs. Depending on the drug involved, use (and therefore, indirectly, trafficking also) may involve some risk of harm to health or even life. It is unclear, however, how great the risk is; and, in any event, the distri-

[5] Another alternative approach that is being considered is to confine Class B treatment for trafficking in quantities in excess of those designated as indicative of large-scale distribution to trafficking in "dangerous" *opiate* drugs; the large-scale organized crime involvement in drugs is mainly confined to the traffic in heroin, an opiate. Other dangerous opiates would be included with heroin, because of the possibility that if heroin alone were singled out, organized crime would move into other drugs.

butor does not act against the wishes of his "victim" but satisfies his "victim's" demand.

Because the public probably fears opiate addiction more than abuse of other controlled substances, the proper grading of trafficking in opiates probably presents the most difficult grading question in the draft.

Opiates are depressants; they are drive satiators and generally quiet the user rather than promote aggressive activities,[6] and there is some evidence that addicts commit relatively less violent crime than do non-addicted criminals.[7] This does not mean that addicts do not commit crime. While some reports attributing to opiate addicts a large percentage of certain crimes in particular areas seem quite questionable,[8] a substantial number of opiate addicts commit crimes of the fund raising variety. They engage in these crimes either to obtain funds for drugs (the price being beyond their reach largely because of the very laws directed against trafficking) or merely because criminals are overrepresented among opiate addicts. At present many opiate addicts have criminal or delinquent records before their addiction becomes known to public authorities;[9] and it is believed that many have histories of delinquent or criminal behavior before first use.[10] Possibly, the need to obtain funds or drugs to maintain the habit causes some to shift from one type of crime to another. While addicts do commit crime to maintain their habits, it is unclear to what extent addict criminality is in fact attributable to this need. In addition, while some addicts do commit robberies and burglaries, not all do. Addict criminality extends from these crimes to selling drugs to less serious crimes such as shoplifting, prescription forging, and in the case of women, prostitution. In view of these circumstances, to punish trafficking on the same level as burglary or robbery on the theory that the trafficker contributes to these crimes is not justified.

Whether opiates do have significant debilitating effects is unclear. Addicts are often poorly nourished, but this is due to psychological problems and preoccupation with obtaining the drug rather than to any effect of the drug itself. Psychosis is not attributable to opiate addiction, and the abstinence syndrome from opiates, while discomforting, is rarely life endangering. Among the physical risks of intravenous opiate use is viral hepatitis, which is not due to the drug but is transmitted by unsterile hypodermic needles. This too is rarely

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[6] *See generally*, on the effects of opiate addiction, Jaffe, *Drug Addiction and Drug Abuse*, THE PHARMACOLOGICAL BASIS OF THERAPEUTICS, c. 16 at 285–311 (3d ed. Goodman & Gilman 1965); ELDRIDGE, NARCOTICS AND THE LAW c. 2 (2d ed. 1967); THE CHALLENGE OF CRIME, *supra*, note 2, at 212 (1967).

[7] *See* Finestone, *Narcotics and Criminality*, 22 LAW & CONTEMP. PROB. 69, 71 (1957). Another study showed that heroin users studied had only a slightly higher percentage of arrests for violent crime than a combined population of both users and non-users. *See* THE CHALLENGE OF CRIME, *supra* note 2, at 222 (1967).

[8] *See* the criticisms in the authorities cited in note 7, *supra*; Arthur D. Little, Inc., *Drug Abuse and Law Enforcement*, App. B. B 2–5 (1967) (Consultant's Report to the President's Commission on Law Enforcement and Administration of Justice; Aronowitz, *Civil Commitment of Narcotics Addicts*, 67 COLUM. L. REV. 405, 416n.66 (1967); Note, *Civil Commitment of Narcotic Addicts*, 76 YALE L. J. 1160, 1177 and n.56 (1967).

[9] Blum, *Mind Altering Drugs and Dangerous Behavior: Narcotics*, in TASK FORCE REPORT, *supra* note 1. at 40, 57.

[10] *See id.* at 55–57.

fatal. Of more concern is death from overdose or an unknown acute reaction. Death from overdose usually occurs when the addict takes a higher dosage than his body can tolerate. Usually, the addict unwittingly takes such a dose when he is furnished a mixture of heroin and adulterants which unbeknownst to the seller contains more heroin (is "cut" less) than that which the addict has recently been taking. An addict almost never takes pure heroin; rather, he takes a mixture of heroin and adulterants. Heroin is "cut" at the various stages of distribution to the addict in order to maximize profits. In the illicit market the cutting may unwittingly be done unevenly, and if the heroin is cut too little for the addict's tolerance, he may die of an overdose. While death from overdose is reputed to be a major cause of addict death, it is rare that it can be clearly established that death was due to an overdose.

Of particular concern is death from an acute reaction, the cause and nature of which are not understood. Dr. Milton Helpern, Chief Medical Examiner of New York City, has recently stated that in the first half of 1968, 450 persons in the City of New York suffered opiate-related deaths.[11] This figure is an increase over 1967 when 670 persons in New York City suffered such deaths during the entire year, and is to be compared with the figure of 57 such deaths for the year 1950.[12] In recent years, the great majority of these deaths were diagnosed as caused by an acute toxic reaction to the "substance injected" (a mixture of heroin and adulterants).[13] However, in an earlier period "acute toxic reaction" was diagnosed as the cause of death in only a minority of cases.[14] While overdose was not ruled out as the cause of death in cases of death due to acute toxic reaction, it cannot be established that it was the cause, and death may have been due to other causes. An article written by Dr. Helpern in 1966 leaves open the question whether death is due to relative or absolute overdose or "is an expression of a specific hypersensitivity to the drug." [15] Dr. Helpern has stated that the cause of death could not be confirmed by chemical or toxicological analysis in all cases, but does not believe that this is significant.[16] Until the cause is determined, Dr. Helpern is willing to

[11] N.Y. Times, Aug. 15, 1968, at 1, col. 1.

[12] *Id.*

[13] Helpern & Rho, *Deaths from Narcotism in New York City*, 66 N.Y. STATE J. OF MED. 2391 (1966).

[14] *Id.*

[15] *Id.*

[16] Dr. Helpern has written:

> The relatively lower incidence of narcotic deaths in boroughs other than Manhattan and the Bronx, out of all proportion to the total number of deaths from all causes in these boroughs, is subject to question and in part may be explained by a reluctance of the local medical examiner to attribute a death to narcotism in the absence of confirmation by chemical analysis. This reluctance may also account for the lack of positive reports of such deaths from other jurisdictions. It is the authors' considered opinion and that of their close associates that a diagnosis of acute death from narcotic addiction is more reliably arrived at from the investigation of the circumstances under which the body is found and the findings of the complete postmortem examination than from the toxicologic analysis, which has proved revealing in less than half the cases. The discovery rate of these deaths would have been considerably lower if one had insisted on chemical verification. It is also probable that many deaths from acute narcotism have gone unrecognized because of failure to study the scene of death and recognize the subtle findings which are easily overlooked or misinterpreted by the inexperienced observer. (*Id.* at 2399.)

assume that the increase in opiate related deaths is due to nothing more than to an increase in addiction.[17] Official estimates, however, show no comparable increase in addiction in New York City.[18]

Dr. Helpern's report is significant because it shows that narcotics-related deaths were the leading cause of death in New York City for persons in the 15–35 age group in the first half of 1968.[19] Given the Bureau of Narcotics figure that there are 32,000 active addicts in New York City, they show a significant death rate. Even given local New York estimates of 50,000 to 100,000 addicts in the City, the death rate is still significant. However, the difference in the figures for 1950 and later years requires explanation. The City Medical Examiner's Office was conducting autopsies even then. It is possible the difference is in part due to changing diagnoses; [20] or possibly due only to an increase in addiction. It is not clear whether the figures on opiate-related deaths reported by Dr. Helpern for recent years are a relatively permanent aspect of opiate use or are due to transitory causes. Irving Lang, Chief Counsel to the New York State Narcotic Addict Control Commission, speculates that the increase is due to increases in death by overdose, and that the increase in such deaths is attributable to the presence in the distribution apparatus of new groups who are not as skilled at cutting heroin as older groups.[21]

While the New York figures indicate that death attributable to opiate use has been underestimated, their ultimate significance is not yet clear. Dr. Helpern has himself stated that there are differences of opinion as to when a diagnosis of narcotics-related death is warranted. Additional studies are in order to determine whether the extent of opiate related death generally is as great as the New York figures suggest and whether or not the recent figures signify something permanent. Even if they are borne out in the future, it is still questionable whether—considerations pertaining to organized crime aside—small-scale trafficking in opiates should be punishable on the same level as unaggravated forcible rape, unaggravated kidnapping, and unaggravated robbery. Such crimes are committeed in opposition to the desires of the victim, whereas traffickers in opiates supply a demand of their "victims." This is true even when distribution is to an addict. If an addict is tentatively defined as a person who (by reason of dependence) has lost substantial capacity to refrain from use, the addict's capacity to consent may be considered impaired, so that the transaction is in one sense not as consensual as a distribution to a non-addict. However, an addict's capacity to refrain from use is rarely totally impaired, and buying opiates is not forced on the addict by the seller; rather the distributor supplies a demand.

Nor do the risks of harm to persons from use of other controlled drugs warrant more than Class C felony treatment for trafficking. While overdose of barbiturates is a major cause of suicide and while

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[17] N.Y. Times, Aug. 15, 1968, at 1, col. 1.
[18] *Id.*
[19] *Id.*
[20] Dr. Helpern has informed the writer that in earlier years some medical examiners in New York City required confirmation by chemical analysis before they would attribute a death to narcotics.
[21] Statement to the writer.

persons may die from unwittingly taking overdoses of barbiturates when intoxicated by the drug, it is unclear to what extent this is attributable to illicit distribution and to what extent it is attributable to misuse of medically prescribed barbiturates. And although the abstinence syndrome that characterizes barbiturates and similar drugs is more life endangering than that of opiates, given the general availability of such drugs, it is questionable to what extent this constitutes a substantial risk. The barbiturate withdrawal syndrome often occurs unknowingly when persons who have been taking large quantities of barbiturates pursuant to medical direction are taken off the drug by medical direction or when persons who are addicted to barbiturates are hospitalized for other reasons and are not given barbiturates because it is not known that they are addicted. It is unclear to what extent barbiturate withdrawal occurs "in the street." Moreover, it is likely that substantial numbers of people take barbiturates and similar drugs extratherapeutically without becoming intoxicated or addicted.

Similarly, psychosis and aggressive behavior are not even probable consequences of the use of cocaine, amphetamines, or the hallucinogens. Much depends on the dosage, the personality of the user, and, in the case of cocaine and amphetamines particularly, on frequency of use. It is not clear what the relationship is between use of marihuana and psychotic episodes in marihuana users. In any event, even if it should be established that marihuana substantially contributes to these episodes, these episodes seem to be quite exceptional when compared to the wide use of the drug. The relationship of marihuana to aggressive behavior is unclear. It may be that marihuana, by releasing inhibitions, may bring out aggressive behavior in people who are otherwise disposed, but this is unusual. Marihuana usually has something similar to a sedative effect. Aggressive behavior following the use of alcohol is more common.[22] While marihuana does impair driving skills, the risk that persons under the influence will drive and will have accidents is not sufficient to warrant more than Class C treatment for distribution.

Although hallucinogens such as LSD are unpredictable in their effects and though a single "trip" may for some persons lead to either an acute or prolonged psychotic episode, bad "trips" and longer lasting psychotic reactions are the exceptional case.[23]

The effects of chromosome breaks on LSD users are still unclear. Some studies have not found a statistically significant increase in chromosome breaks in LSD users compared to nonusers.[24] While some of

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[22] Murphy, *The Cannabis Habit: A Review of Recent Psychiatric Literature*, 15 BULL. ON NARCOTICS 15, 16 (Jan.-Mar. 1963).

[23] "One report shows 3 percent of LSD users becoming psychotic (beyond the period of the 'trip' itself)." BLUM ET AL., DRUGS I: SOCIETY AND DRUGS 286 (1969). *See also* BLUM ET AL., UTOPIATES 117n.7 (1964) (2 percent hospitalized for psychotic responses to LSD: 3.3 percent diagnosed as having psychotic responses but not all hospitalized). Another study found that in the case of medically supervised use by screened subjects the percentage of persons suffering prolonged psychotic reactions was appreciably smaller. S. Cohen, *Lysergic Acid Diethelmyde: Side Effects and Complications*, 130 J. NERVOUS AND MENTAL DISEASE *30 (1960)*; S. COHEN, THE BEYOND WITHIN 210–211 (1964).

[24] *See* Testimony of Dr. Stanley F. Yolles, Director, NIMH, in *Hearings on H.R. 14096 Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. 173 (1968) [hereinafter cited as *House hearings*].

the chromosome breaks reported appear to be of a kind that when due to excess radiation creates a risk of physiological damage to self and to descendants, most responsible scientists have declined to make final judgments on the basis of available information. Damage to the fetus when LSD is taken in the earliest stages of pregnancy has been attributed to LSD, but most scientists have again declined to make final judgments. It is noteworthy that the Director of the National Institute of Mental Health and other scientists connected with the Institute have been very cautious in making judgments.[25]

While the risks and possible risks of hallucinogen use and the uncertainty as to the risks of marihuana use are great enough to support prohibition of nonmedical distribution of these substances, they do not warrant more than Class C felony treatment for trafficking. Certainly the risks of danger to the person are not as great as the risks of such danger in other crimes assigned to the Class B or A felony category; and the fact that the "victim" has voluntarily taken the risk argues further against hallucinogen trafficking being regarded as equal to kidnapping, rape, and robbery, absent organized crime elements.

Although the control of narcotics and other mind- or mood-altering substances may be based on their ability to cause or contribute to physical and psychic harm, in fact it is at least partly an effort to control morals. Of course, the dividing line between psychic harm and morals is not a clear one. Notions of psychic harm are often, if not always, based on moral judgments of a picture or norm of psychic health. However, much of the opposition to use of these substances is avowedly on moral grounds. We are in the midst of a jurisprudential debate as to whether it is appropriate for society to use the criminal law as a weapon to control morals.[26] Whether or not it is appropriate to use the criminal law to legislate morality, to the extent that narcotics and dangerous drug laws are based on efforts to control morality it would seem undesirable to visit their violation with sanctions similar to those that are visited on traditional common law felonies against the person, particularly when it is obvious that there is no general social agreement as to the morality the law is attempting to impose.

While existing penalties permit incapacitating major traffickers for long periods, even occasional noncommercial violators may be sentenced for periods of up to 20 years for a first offense and 40 years for a second offense. Since community attitudes towards drug offenders vary around the country, long sentences may be imposed even for small traffickers. Moreover, the longer the sentence available, the greater chance there is of disparity in the sentences imposed. There is, of course, great disparity among the various districts and circuits in the sentencing of drug offenders.[27]

In addition, while existing maximum penalties are sometimes justified as deterrents, they are permissible penalties only and do not

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[25] Testimony of Dr. Yolles, *House Hearings*, *id.*, at 173–174.

[26] *Compare*, *e.g.*, H. L. A. HART, LAW, LIBERTY AND MORALITY (1963), *with* P. DEVLIN, THE ENFORCEMENT OF MORALS (1965).

[27] *See* FEDERAL BUREAU OF PRISONS, STATISTICAL REPORT: FISCAL YEAR 1966, Table B–7, at 46–47.

purport to be certain. Consequently, they would seem to have less deterrent value than mandatory minimum sentences, and, as has been discussed, the deterrent effect of the latter is questionable. Certainty of apprehension is particularly low in the drug area, because of the difficulties of enforcing laws dealing with consensual conduct.[28]

During the preparation of this report the writer considered recommending misdemeanor treatment for trafficking in such drugs as marihuana (as defined in the draft), peyote, amphetamines, barbiturates and other sedatives, and tranquilizers. While there are reasons to support such treatment, on balance, it is submitted that trafficking in such drugs should also be a Class C felony.

A misdemeanor classification could be supported on several grounds. With the exception of marihuana and peyote, and possibly methaphetamine also, these drugs are usually illicitly distributed through or as a result of diversions from legitimate channels rather than as a result of illicit manufacture or importation, and there seem to be fewer significant distributors than in the case of opiates, cocaines, and the hallucinogens. Even in illicit use, these drugs may be used with somewhat greater safety than opiates, and marihuana, peyote, and the controlled minor tranquilizers apparently can be used with considerable safety. While these tranquilizers are capable of producing physical dependence, such dependence seems to be rare. And there is great doubt and conflict as to how harmful marihuana is.

On the other hand, in the absence of extended term provisions for misdemeanors, it would not be possible to reach effectively such significant distributors as there are without felony treatment, and felony treatment may also have some greater deterrent value. Of course, this deterrent value is unclear, but it is more appropriate to choose a longer penalty in the hope of achieving deterrence, even though the likelihood of increased deterrence is more uncertain when the choice is between misdemeanor and felony treatment than when it is between low degree and high degree felony treatment: the policymaker is balancing a lesser deprivation of liberty against his goal of additional deterrence. Another alternative is to make a first offense a misdemeanor and subsequent offenses felonies. This would meet the needs of sentencing for the casual seller and might have more deterrent value than providing for misdemeanor treatment for all violations. However, a substantial sentence could be imposed on a significant trafficker only for a second offense.

3. *Subsections (3) and (4) of Section 1822; Mitigation: Misdemeanor Trafficking and Offenses Not for Transfer or Disposition.*— Not all persons who traffic in controlled drugs should be subject to the same punishment. Commercial distributions should be punished more severely than noncommercial distributions [29] because commercial distribution is generally more widespread and usually more regular

[28] *See* SKOLNICK, COERCION TO VIRTUE: A SOCIOLOGICAL DISCUSSION OF THE ENFORCEMENT OF MORALS (1967), reprinted (in a somewhat different version) in RESEARCH CONTRIBUTIONS OF THE AMERICAN BAR FOUNDATION, No. 7 (1968).

[29] This is recognized (with respect to marihuana) in a joint statement of the Council on Mental Health and the Committee on Alcoholism and Drug Dependence of the American Medical Association, and the Committee on Problems of Drug Dependence of the National Research Council, National Academy of Sciences, in *Marihuana and Society*, 204 J.A.M.A. 1181 (1968).

than noncommercial distribution. Persons who distribute to young persons should probably be subject to the same range of punishment as commercial distributors even if they do not act commercially. As discussed in the note on trafficking in dangerous and abusable drugs, the draft makes these distinctions via a reduction mechanism. Alternatively, however, the distinctions could be made by way of defense if the defendant could prove the mitigating factors by a preponderance of the evidence.

While the defendant whose conduct comes within the mitigation criteria is to be treated as a lesser offender, it should be noted that the trial judge nevertheless has full discretion to sentence the defendant as he deems appropriate even though the criteria are not met. Thus, the defendant in any case will be eligible for full probation or a split sentence.

Section 1822(3) contains two criteria which if met require that the offense be treated as a misdemeanor. Both criteria must be met before such treatment is available.

Under section 1822(3)(a) it must be found that the defendant did not act for profit or to further commercial distribution. Thus, if a commercial distributor gave a drug away to introduce a person to it, his conduct would be to futher commercial distribution even though the transaction itself was donative. On the other hand, if the gift was not in furtherance of commercial distribution, the offense would be a misdemeanor if the other criterion was met. However, the application of section 1822(3)(a) would not be limited to gifts. If the defendant establishes that he did not sell or exchange for profit, the criterion would be met. Similarly, if it is established that other conduct included within the scope of trafficking by section 1829(a) was not engaged in for profit or to further commercial distribution, the offense would be treated as a misdemeanor. Thus, a person importing marihuana as a gift for a friend would have the benefits of misdemeanor treatment if commercial distribution was not involved and the other criterion is satisfied. Moreover, if it is established that a person prescribed, imported, landed, received, produced, or exported a dangerous drug for the purpose of using it himself, the offense would a fortiori be treated as a misdemeanor and he would thus be treated as if he had been convicted of unlawfully possessing such a drug under section 1824(1). Persons who engage in these activities for personal use with respect to an abusable drug would come under section 1822(4) and be treated as if they had been convicted of unlawfully possessing abusable drugs under section 1824(1).

Under section 1822(3)(b) the judge must be satisfied that the defendant did not transfer or dispose of a drug to a child under 16.* The reasons for this provision have already been discussed in the note on trafficking in dangerous and abusable drugs.

The choice of 16 years of age as a dividing line is somewhat arbitrary. The choice represents a reduction from the 18 and 21 years of age dividing lines embodied in the narcotics and marihuana laws and the Drug Abuse Control Amendments, respectively. The change is

*This was raised to 18 years to accord with S. 3246 and present law regarding narcotics, and to make the dividing line correlate more closely with graduation from high school.

based on the fact that in today's world older minors are likely to be as sophisticated—or more—in the ways of drugs as are adults.[30] Also, since the element of seduction or imposition seems less likely to be present if the trafficker is close in age to that of the young recipient, it is desirable to take a tack similar to that incorporated in the statutory rape offense and make an exception from aggravated treatment when the trafficker is less than a few years older than the recipient.

Section 1822(4) in effect provides that trafficking based on prescribing, producing, importing, landing, receiving, or exporting of an abusable drug shall be treated as unlawful possession if it is established that there was no intent to transfer or otherwise dispose of the drug. While the offense of unlawfully possessing an abusable drug may sometimes be used against traffickers, it is primarily directed against users and thus represents an attempt to deter illicit use and declare that it is socially disapproved in order to internalize negative attitudes toward use. When it is established that a person has prescribed, produced, imported, landed, received, or exported such a drug with the intent to use it, he should be punished only as a user is punished. However, mitigation is not confined to engaging in such activities for personal use. Section 1822(4) applies to these activities when they are not intended for the purpose of transfer or other disposition to another person. Strange as it may seem, there are apparently persons who possess controlled drugs with the purpose neither of distributing them nor of using them, but with the purpose of collecting them—much as souvenirs. These persons should be treated as users.

No provision similar to section 1822(4) is included for dangerous drugs. Under section 1824(1) possession of those substances is a Class A misdemeanor. Consequently, prescribing, producing, importing, landing, receiving, or exporting for personal use should be treated as Class A misdemeanors. Subsections (a) and (b) of section 1822(3) accomplish this result.

4. *Suspended Entry of Judgment.*—It is recommended that the Code in effect provide that when a person is, by a jury verdict, finding of the court, or plea, found guilty of trafficking in dangerous or abusable drugs and the sentencing judge decides to place him on probation, the judge shall, if the defendant consents, defer the entry of the judgment of conviction and place him on probation.* In such a case the defendant shall be treated as if he had been sentenced to probation. The judge may at any time discharge him from probation and shall dismiss the proceedings at the end of the "probation" period if the defendant satisfactorily complies with the conditions of probation. The judgement of conviction will be destroyed and the defendant will not have a record of conviction for the purpose of any disqualification or disability imposed by law upon conviction of a crime. If the defendant fails materially to comply with the conditions of probation, the judge can have the judgment entered and the defendant can be sentenced. He should, however, receive full credit for the time he spent on probation.

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[30] *See* BLUM, HORATIO ALGER'S CHILDREN: OBSERVATIONS ON STUDENT DRUG USE (1968).

* Such a provision, applicable to misdemeanors, appears as Study Draft section 1826.

Such a provision is not contained in the text of the draft because it is possible that the sentencing part of the Code may contain a more generally applicable similar provision. If it does not, such a provision should be included in the sections dealing with drugs.

The provision is somewhat similar to the provision of the Federal Youth Corrections Act which provides that, upon the unconditional discharge of a committed youth offender before the expiration of the maximum sentence imposed upon him or upon the unconditional discharge of a youth offender from probation prior to the expiration of the maximum period of probation set by the court, his conviction is automatically set aside and he is to receive a certificate to that effect.[31] A provision similar to that provision is included in the recently enacted amendment to the Drug Abuse Control Amendments.[32] That Act provides that when a defendant is convicted of a first offense of possession and the trial judge places him on probation, after satisfactory service of probation or if the judge discharges the defendant from probation earlier, the conviction is to be set aside and he is to receive a certificate to this effect. By this provision Congress desired to provide a device by which drug users, particularly young experimental users, could avoid having a criminal record.

A provision similar in principle to that contained in the Drug Abuse Control Amendments is desirable. It may both provide additional incentive for rehabilitation and also help to minimize the consequences of conviction. This last feature is very significant in drug cases, because as drug use has spread to students, young people, and even professionals, it has spread to groups who especially have something to lose by a conviction of crime. A conviction may adversely affect educational and employment opportunities. Moreover, as drug use increases, as marihuana use has, the number of people who are subject to conviction increases.

The provision contained in the Drug Abuse Control Amendments applies only to cases where the defendant has been convicted of possession and only to first offenses. It is submitted that the principle should be extended to trafficking and should not be limited to first offenders. Many different types of persons fall within the definition of trafficking. They vary from professionals to amateurs. The amateurs are generally users who give away a drug to a friend or who supply a drug to a friend as an accommodation, charging their cost or cost plus a small amount to compensate for expenses incurred in obtaining the drug. Many of these people stand a good chance of rehabilitation. The world of drug traffickers is no longer exclusively the world of the professional trafficker.

Drug-taking is often a social activity, and drugs are distributed among users much as a good host offers alcohol to his guests. Even the pattern of heroin use is changing. Students and dropouts who have become part of the drug world sometimes try heroin as they try other drugs, and they may occasionally obtain some for a friend. These people especially have something to lose by conviction, and if their conduct and characters are such that it is deemed that probation is the best disposition for them, they too should, if they satisfactorily comply with their probation, have the benefit of having their conviction

[31] 18 U.S.C. § 5021.

[32] *See* the note on existing law, *supra*.

set aside or, if judgment has not been entered, having the proceedings dismissed.

It is also undesirable to limit this treatment to first offenders. Again, both the conduct and personalities of persons who may be convicted of trafficking are too diverse to admit of such a limitation. The matter should be left to the discretion of the sentencing judge.

While under the Federal Youth Corrections Act and the recently enacted amendments to the Drug Abuse Control Amendments the judgment of conviction is entered and later vacated, it would be preferable to suspend entry of the judgment if the defendant agrees to be placed on probation, rather than to enter it and then vacate it. If a conviction is entered but then vacated, the defendant may run the risk of perjuring himself if he states, in answer to a question on a governmental form whether he has ever been convicted of a crime, that he has never been convicted. If judgment is never entered, he should run no such risk. (Of course, the ingenuity of those who write forms is almost limitless, and forms can be written so that the defendant has to disclose that he has gone through the procedure suggested, but it would be preferable to make the effort to set up the procedure in a way that the defendant never has a judgment entered against him.) Because no judgment is entered, the provision must make the procedure applicable only on the defendant's agreement or consent, but this should not be likely to create significant problems. If the defendant materially fails to comply with the conditions of probation, the judge can have the judgment entered and the defendant can be sentenced. He should, however, receive full credit for the time he has spent on probation. Of course, such a procedure should a fortiori be applicable to defendants convicted of trafficking in restricted drugs.

NOTE

on

TRAFFICKING IN RESTRICTED DRUGS

Under the draft, trafficking in restricted drugs is a Class A misdemeanor unless the defendant did not act for profit or to further commercial distribution, in which case it is a Class B misdemeanor. Penalties are not stringent because the restricted drug classification is intended for those drugs for which stringent criminal treatment is undesirable.

At the present time it is contemplated that so-called exempt narcotics (opiate preparations which are considered safe enough to be sold over-the-counter without a prescription) will be classified as restricted drugs. If such drugs are safe enough to be lawfully sold without prescription, it would not seem that stringent criminal treatment is necessary. However, other drugs can be added or reclassified to restricted drug status by the Attorney General. Some of these drugs may well be prescription drugs that have only a low potential for harm relative to other controlled drugs.

When a prosecution for trafficking in restricted drugs is based on prescribing, producing, importing, landing, receiving or exporting, it is an affirmative defense that the defendant did not intend to transfer or otherwise dispose of the drug involved to another person. Thus

it would be an affirmative defense that, for example, the defendant produced or imported a restricted drug for personal use. Since simple possession of restricted drugs is not punishable under the draft, and a simple possession offense is primarily intended as a preventive to unlawful use, conduct such as producing or importing restricted drugs should not be punishable when its object is personal use.

NOTE

on

UNLAWFUL POSSESSION

Under section 1824(1) a person who possesses a dangerous drug in violation of the regulatory law is guilty of a Class A misdemeanor; a person who possesses an abusable drug in violation of the regulatory law is guilty of an infraction upon a first offense, a Class B misdemeanor upon a second offense and a Class A misdemeanor for a third or subsequent offense.* Persons who possess restricted drugs commit no offense unless they possess with intent to transfer or otherwise dispose to another person, in which case they are guilty of trafficking in restricted drugs.

Since the regulatory law will prohibit possession of substances that the draft classifies as dangerous or abusable drugs by persons who are not authorized to produce, grow, cultivate, or distribute them, section 1824(1) will reach possession of dangerous or abusable drugs for personal use if the substance was not obtained pursuant to a prescription or from a practitioner of the healing arts.

Under the proposed classification of drugs, it will be a Class A misdemeanor unlawfully to possess drugs such as heroin, morphine, and many other opiates (but not including exempt narcotics and some other opiates that do not possess a comparatively great potential for leading to or sustaining addiction), cocaine, injectable forms of amphetamines and other stimulants, cannabis preparations (including the resin of the cannabis plant and derivatives of the resin but not including the plant itself and parts of the plant), and LSD and most hallucinogens (but not "marihuana" as per the suggested definition of peyote). Other opiates (particularly some in combination with other drugs), oral (or possibly less potent) forms of amphetamines and other stimulants, barbiturates, tranquilizers, sedatives, hypnotics, and other controlled depressants, marihuana (as per suggested definition [1]), and peyote will be treated as abusable drugs.

1. *The "Simple Possession" Offense: General Considerations.*—The offense created by section 1824 is the offense of "simple possession." It differs from trafficking possession in that the government need not prove intent to distribute. It need not be limited, however, to cases of possession for personal use since a charge of simple possession may be employed against traffickers [2] or when it is unknown what the pur-

*Section 1824(1) has been changed in the Study Draft so that subsequent offenses involving marihuana are infractions.

[1] *See* "Marihuana and Cannabis Preparations" in the note on classification of drugs, *supra*.

[2] *See generally* Rosenthal, *Proposals for Dangerous Drug Legislation*, in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 80, 101, 106 (1967).

pose of the possession was. Consequently, such offenses may be viewed as punishing conduct both preparatory to use and preparatory to distribution. In addition, they may be viewed as punishing the possessor for his conduct in acquiring the drug. However, acquisition offenses may themselves be viewed as prophylactic to either subsequent use or subsequent distribution. Use, of course, could be more directly reached by punishing use itself or punishing being under the influence of a drug; and some State laws so provide. However, most American statutes are content to punish possession. If simple possession is punishable, there would seem to be no reason for directly prohibiting either use or being under the influence unless these things are to be graded differently from simple possession. The crime of simple possession can reach virtually every situation that can be reached by crimes of use and being under the influence of a drug.[3]

Almost all American narcotic and dangerous drug laws punish simple possession. However, until recently amended, the Drug Abuse Control Amendments did not punish possession of a controlled drug for personal use even if the possessor obtained the drug unlawfully. Because a simple possession offense inevitably reaches conduct preparatory to use even if directed against trafficking and distribution, such an offense raises two policy questions: Should a user be subject to punishment for such possession? If he should, should it be so provided in a Federal Code, as well as in a State Code?

In considering whether the user should be punished for his use, it must be recognized that the division between traffickers or distributors and users is not as clear cut as the use of the different terms would imply. Certainly not all drug users who obtain drugs by unauthorized means distribute drugs, but apparently a substantial number of illicit users do engage in some form of distribution. Some heroin addicts at one time or another sell drugs in order to obtain funds to maintain their habits, to support themselves, or for other reasons. While such conduct is less prevalent in the case of persons addicted to those opiates having legitimate medical use, some of these persons may also sell drugs. Users of other drugs may also sometimes sell them. Moreover, illicit users may also give drugs away. Some illicit users of hallucinogens, amphetamines, and barbiturates take their drugs in social situations where they may sell, exchange, or give them away. They often buy drugs for friends or share them with friends. Such conduct is apparently particularly common among marihuana users.[4] Even heroin may be given away by users.[5]

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[3] To directly punish being under the influence of a drug would conflict with proposed section 301 (1) of the new Code because it would make punishable a status rather than an act or omission.

[4] *See* CALIFORNIA LEGISLATURE, JOINT LEGISLATIVE COMM. FOR THE REVISION OF THE PENAL CODE: PROPOSED TENTATIVE DRAFT AND COMMENTARY: DRUGS—PART I: MARIHUANA 153 (1968) ("Our data indicate that over 20% of the users of marihuana have sold the drug on occasion in small quantity, to friends who tacitly agree they will return the favor if the drug becomes available to them in the future.")

[5] *See* CHEIN, GERARD, LEE & ROSENFELD, THE ROAD TO H: NARCOTICS, DELINQUENCY, AND SOCIAL POLICY (1964).

Of course, users (who usually have obtained the drug legitimately) give commonly prescribed barbiturates, sedatives, tranquilizers, and amphetamines (in capsule and tablet form which are medically intended for oral use) to household members and friends much as they give aspirins to such persons. In addition to selling or giving away drugs, users sometimes proselytize and help to create a climate favorable to use. Users (though certainly not all users) do help to spread use. Consequently, use and being a user cannot be entirely divorced from trafficking and distribution.

Although there may be special reasons for not punishing the use of particular drugs, generally the main reasons for not punishing use are that the user (a) presents less of a threat to efforts to prevent use than does the distributor or trafficker, (b) is less culpable than the trafficker, (c) perhaps cannot profit from and may even be harmed by exposure to the penal-correctional process, and that even to label users as criminals *may* make them think of themselves and others think of them as criminals or outsiders, thus alienating them from society, or in the case of those already alienated, alienating them further from society. To the extent that users do distribute, encourage use by others, and help to create a climate hospitable to use, the first reason is somewhat weakened. Moreover, neither this reason nor the second reason necessarily leads to the conclusion that use or users should not be punished; they may only lead to the conclusion that simple possession should be treated as an offense less serious than trafficking. Similarly, while users can be seen as less culpable because their conduct is so often essentially self destructive and because many (but not all) of them are disturbed, alienated, or present psychiatric problems, this lessened culpability need not necessarily exempt them from punishment. The criminal law punishes many people who are disturbed, alienated, or present psychiatric problems if they do not thereby meet general standards governing lack of criminal responsibility. Even the possibility that substantial numbers of users cannot profit from the penal-correctional process, and even the possibility that labeling users as criminal may alienate or further alienate them from society, may mean only that they should not be made subject to punishment unless other goals of the criminal law require that they be made subject to punishment.

While, again, there may be special reasons for not punishing the use of particular drugs, as a general matter probably all that can be said is that the criminal law, being such a strong social weapon, should be used only cautiously and that society should be particularly cautious before punishing persons whose conduct is essentially self destructive, and who may be disturbed, or alienated, or present psychiatric problems. Whether to punish simple possession, then, involves consideration of such factors as: (a) to what extent can it be expected that use may directly be deterred by the offense? (b) to what extent can it be expected that distributions by users and by trafficking non-users will be deterred by the offense? (c) to what extent can it be expected that other crimes committed by users can be deterred or otherwise reduced by the offense and by sentences under it? (d) to what extent is the offense needed to manifest and internalize society's attitude toward use (a factor that is in part dependent on the rela-

tive harmfulness of particular drugs and the relative distaste society holds toward use of particular drugs)? (e) to what extent is use common? (f) to what extent does use indicate that the user varies from what is deemed normal in our society? (g) to what extent may use of a particular drug carry with it a potential for harm either to the user, to other people, or to society generally? (h) to what extent may the penal-correctional process offer rehabilitative or treatment programs that may be helpful to some users (and how many users), or, on the other hand, to what extent may exposure to the process be harmful to users? (i) to what extent is the offense necessary for effective law enforcement (for example, in making it easier to investigate cases involving suspected traffickers and to prosecute such persons, and in giving police and prosecutors leverage by which to induce a user or trafficker to lead them to sources of supply)? (j) to what extent are such law enforcement needs legitimate, and (k) what value is to be placed on the user's desire to pursue his own inclinations and on his privacy? The ultimate answer must be the result of balancing the costs and benefits to be expected from the offense. The balance may well be different for different drugs or different classes of drugs. And complicating the matter still further is the absence of factual data on many of the things that go into the balance. For example, we do not know what we can expect in the way of deterrence; we do not know enough about the risks of some of the drugs; and while it seems clear that a simple possession offense makes law enforcement against traffickers easier, we do not know how much it adds to the effectiveness of law enforcement.

The writer believes that the balance is different for the different groups of drugs, and consequently the draft distinguishes among them.

The draft also reflects the position that it is appropriate for the Federal government to punish simple possession of drugs. The proposed Federal revision is on the whole being drafted as a State Criminal Code would be drafted, defining offenses as a State Code would define them. When, as is usually the case, the Federal interest is limited, the revision expresses those limitations as limitations on Federal jurisdiction rather than in the definition of offenses. Certainly, simple possession should be punished when it occurs in the special territorial and maritime jurisdiction of the United States as it would be punished under a State Code. Unlike the situation in the States, the Federal government is sole sovereign within that jurisdiction. However, it is submitted that Federal law should also reach simple possession occuring within State borders. While the paramount concern of the Federal government is and should be enforcement of the law against substantial traffickers, and prosecutions against users based on use are primarily a State concern, it does not follow that the Federal government has no interest in punishing users for their use. Persons who violate other Federal laws may be found in possession of controlled substances; and it would be desirable if these cases could be completely disposed of in a Federal court rather than split between State and Federal courts.

Moreover, to the extent that a simple possession offense may be utilized against persons believed to be traffickers, Federal prosecution becomes more appropriate. Consequently, the draft takes the posi-

tion that Federal jurisdiction over unlawful possession should be plenary, extending to transactions within State borders and would make jurisdiction coextensive with that of the regulatory bill now being prepared by the Justice Department. If, however, the Commission is of the opinion that Federal jurisdiction over unlawful possession should be more limited, it could be restricted to the special territorial and maritime jurisdiction of the United States, or to any or all of the other bases listed in section 201, *e.g.*, section 201(j) (movement of the drug in interstate commerce during the possession).

2. *The Approach of the Draft.*

(a) *Restricted drugs.*—Simple possession of restricted drugs is not an offense under the draft. This is in keeping with the function of the restricted drug classification as a classification for those substances for which stringent criminal treatment is undesirable.

(b) *Dangerous and abusable drugs.*—The draft reflects the position that, on balance, simple possession of dangerous and abusable drugs should be subject to sanction, but that the sanction should not be severe. The objects of the sanction are to state a judgment that society disapproves of use, which may be internalized in the population and consequently influence conduct, and to more directly deter use and user distribution.

Admittedly, it is not clear to what extent either simple possession offenses or their enforcement are a substantial deterrent to use. Our experiences with illicit use of mind- and mood-altering drugs show that a great many persons are not deterred by making possession of them against the law. Probably the major deterrents are appreciation of the dangers of the various drugs and reduction of the supply by enforcement against traffickers. Reduction in use may also follow from improved social conditions and treatment that helps drug prone persons develop more stable personalities. It is possible that some persons may be attracted to use by the fact that "it's illegal." [6]

Moreover, such offenses may foster a negative self image in the user and alienate him or further alienate him from society by branding him a criminal or deviant.[7] However, while such offenses cannot by definition deter persons who have lost control over their use and do not deter many others who have not lost control over their use, it is not clear that they cannot and do not help to deter still other persons from use and, perhaps more important in the long run, that they do not help to internalize negative attitudes toward use. Given the relative seriousness of the risks involved and that may be involved in use of dangerous and abusable drugs, it is submitted that simple possession should be subject to some sanction. While it may be that educational efforts may help to deter use and internalize negative attitudes toward it, on balance this function should not at the present time be left to such efforts alone. Effective education is a delicate task, and it

[6] It is unclear, however, whether such persons would cease to be attracted to use if possession were not an offense but trafficking still was. The attraction of the forbidden would still be present. Moreover, it might be present even if trafficking were lawful but use was still socially disapproved.

[7] *See* Fort, *Social and Legal Response to Pleasure-Giving Drugs*, in BLUM ET AL., UTOPIATES 205, 221 (1964).

is not clear how effective even the best educational efforts can be.[8] Educational efforts would seem to be particularly difficult with respect to a drug like marihuana of which the risks are disputed and which does not seem to produce adverse effects on most American users in the patterns in which it is used in the United States. Education is to be encouraged and is necessary, but it is questionable whether at the present time it is desirable to place exclusive reliance on it. While the objections to punishing illicit use are serious, it is not believed that they are sufficient to preclude it. Much, however, depends on the severity of the sanction. It is submitted that the objections to punishing illicit use are sufficiently substantial to preclude penalties for simple possession which are more severe than those contained in section 1824(1) of the draft.

The selection of particular drugs for inclusion as dangerous drugs rather than as abusable drugs (and vice versa) for purposes of grading unlawful possession is based on a number of factors, including potential and pattern of abuse, risk to public health and potential for physical or mental dependence.[9] The relative effect of different drugs must be considered. For example, LSD is more potent than marihuana (as defined). While there is some reason to believe that if a person took enough high potency marihuana over a short enough period of time, he might suffer effects similiar to those produced by LSD. LSD is much more likely to have more harmful effects than marihuana. Although it is recognized that the relative harmfulness of different mind- or mood-altering substances is often debatable, since one's judgment depends on what types of harm concern him most; nonetheless, a judgment must be made.

Consideration should also be given to whether a drug has approved medical use in the United States without severe restrictions or limitations. Drugs having such use are not likely to have extremely harmful effects on a large scale, and illicit use of such drugs, while not desirable, does not necessarily indicate that the illicit user appreciably departs from what is normal in our society. It is not uncommon for people occasionally to obtain prescription drugs, whether mind- or mood-altering or not, from a pharmacist without a prescription. This practice is undesirable and may sometimes involve barbiturate-, sedative-, or amphetamine-dependent persons who may "work" pharmacists in this way; but it may also involve the nondependent housewife who is harried or cannot sleep and who seeks to medicate herself rather than to seek medical advice. She may believe that a drug prescribed at some time in the past will help her again, or she may follow the suggestion of friends, relatives, or even her pharmacist. While this practice is undesirable, it is questionable whether it is serious enough to be sanctioned at all. Possibly, the sole sanction should be on the pharmacist, who is a "gatekeeper" [10] and has a position of special responsibility. However, if the recipient is to be penalized in order to manifest the undesirability of the practice and to discourage it, the sanction for a first offense should be limited to treatment as

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[8] *See* Testimony of Dr. Richard H. Blum, Director, Psycho-Pharmacology Project, Institute for Human Problems, Stanford University, in *United States* v. *Mutrux*, Crim. No. 5527 (W.D. Mo. 1967) (mimeographed).

[9] *See* the note on classification of drugs, *supra*.

[10] The word is Dr. Blum's.

an infraction. As an infraction it will not involve deprivation of liberty or constitute a conviction of a crime.

In addition, where a drug which has medical use without severe restrictions or limitations is given to a friend for relief of tension or depression, it would be undesirable to punish the recipient for more than an infraction for a first offense. This is another situation where it is questionable whether the conduct is serious enough to warrant any sanction, but because of difficulties in discriminating such conduct from other situations which have a greater potential for harm, section 1824(1) reaches it. While undesirable, such conduct is quite common and is not necessarily harmful.

Finally, consideration of the degree of sanction necessary for effective regulation is also involved, and the selection is in part based on those drugs that appear in illicit channels usually as a result of illicit cultivation, production, or importation, as opposed to those drugs that appear in the illicit traffic usually as a result of diversions from legitimate channels. A simple possession offense may be desirable in order to deter illicit traffickers as well as to deter and announce disapproval of use. Insofar as a simple possession offense is directed against trafficking rather than use, greater penalties for violations are appropriate. However, when illicit drugs are generally diverted from legitimate channels rather than illicitly cultivated, produced, or imported, the need for a simple possession offense carrying a substantial penalty for this purpose would appear less acute. Diversions from legitimate channels may be reduced by such auxiliary devices as record keeping, inventory, and inspection requirements. These measures are unavailable when drugs in illicit channels have been illicitly produced, cultivated, or imported.

In every case the selection of a drug for inclusion as an abusable drug has been based on a balancing of these factors. By making unlawful possession an infraction for a first offense, the law may attempt to deter and to announce disapproval of use without stigmatizing the offender with a criminal conviction or permitting him to be deprived of his liberty. Later offenses are treated as either Class B or Class A misdemeanors. Enhanced treatment for such offenses is intended as a deterrent.

The stigma of criminal conviction and the branding of a person as a criminal ought to be avoided to the extent that it is possible to do so. Many persons who illicitly use drugs have much to lose by being convicted even of a Class B misdemeanor. Also, the mere existence of laws that label users as criminals may compound their alienation from society. These considerations are particularly important as the number of illicit users in the population becomes substantial. Although infraction treatment still involves labeling the user as deviant, it is a lesser label than the label of criminal. Moreover, we should be quite hesitant to label as criminal that conduct which often is essentially self destructive. While these considerations would also support infraction treatment for unlawful possession of dangerous drugs, it is submitted that the character of the drugs to be classified as dangerous may present a different balancing of considerations.

Unlawful possession of dangerous drugs is treated as a Class A misdemeanor in an effort to express disapproval of use, to deter use

and user distribution, and also to provide a greater deterrent to non-user trafficking. Class A misdemeanor treatment should act as a greater deterrent to trafficking than treatment as an infraction and will permit a trafficker whom it is possible to convict only of unlawful possession to be sentenced to imprisonment.

While the sanction may not be sufficient to provide substantial leverage for inducing a possessor to reveal his source of supply, it is submitted that the need of law enforcement for leverage with which to induce cooperation is not a proper reason for raising the penalty for the offense or for prosecuting persons who do not cooperate. It is improper to subject a person to punishment and condemnation which is not warranted by the seriousness of his offense, his need for rehabilitation or incapacitation, or considerations of general prevention. Further, when the decision to prosecute for simple possession depends on whether the suspect has cooperated, it is based on purely subjective standards of the prosecutor or law enforcement personnel and is not reviewable by court or jury; the suspect is deprived of a judicial determination on a crucial issue. Finally there are risks that both suspects who have cooperated to the satisfaction of the prosecutor or law enforcement personnel and users also may be prosecuted as felons.

Unlawful possession of dangerous drugs is treated as a Class A misdemeanor rather than as a felony because the offense is primarily directed against use and user distribution. The same reasons which support not punishing use at all counsel against punishing it more severely than misdemeanor treatment would permit. Felony treatment should be reserved for those persons who actually traffic, including those who possess with intent to transfer or otherwise dispose. While the offense is in part directed against user distribution and non-user trafficking, it would be inappropriate to punish possession as a felony when intent to distribute cannot be established. Not all users distribute, and felony treatment for possession would in effect allow nontrafficking users to be punished as felons. While it might be argued that opiate addicts should be treated as felons because large numbers of addicts are engaged in fund raising crimes, such treatment is clearly inappropriate. They would then be subject to enhanced punishment based on a group propensity to engage in such crimes. Individual addicts should be punished for fund raising crimes as they commit them. Moreover, felony treatment for users cannot at the present time be justified on the ground that it permits a sentence long enough to serve a rehabilitative or treatment purpose. As explained in the note on civil commitment, *infra*, current treatment prospects for drug-dependent persons do not warrant long term incarceration for treatment, and if they did, it would be preferable to use a civil process in order to place such persons in treatment. The proper treatment for nondependent users is also unclear. It may vary from user to user. Outpatient treatment is probably appropriate for most, and it does not follow that merely because a person tries or uses a mind- or mood-altering substance he necessarily requires treatment.

The Justice Department intends to control certain precursors of mind- and mood-altering drugs in the omnibus bill it is currently preparing. It is premature at this time to make any decision as to whether offenses involving such precursors should be graded on the same level as offenses involving the drugs of which they are precur-

sors or on a lesser level. The decision will in large part depend on how inclusive the definition of "precursor" is in the omnibus bill. This definition is still being revised. In any event, when section 1829 is finally drafted, it will be necessary to draft it so that a substance like marihuana, which will be classified as an abusable drug, cannot be considered as a dangerous drug just because it is the source of more potent cannabis preparations which are classified as dangerous drugs. In the United States, marihuana is usually used for its own effects and is not often used as the source of more potent cannabis preparations.

In the case of unlawful possession of dangerous drugs and in those situations where unlawful possession of abusable drugs is a Class A or B misdemeanor, there should be provision for suspended entry of judgment, as discussed in the note on grading of trafficking, *supra*, in order that persons found guilty of misdemeanors may avoid judgment of conviction if they satisfactorily comply with conditions of probation or are discharged from probation.* Such a provision is not contained in the draft because of the possibility that a general provision will be contained in the sentencing part of the Code. There is particular reason for such treatment where possession is involved. Many possessors possess only for personal use. In addition, as discussed in the note on grading of trafficking, there is much variation even among traffickers, and certain traffickers may well deserve the opportunity to avoid having a judgment of conviction entered against them. If such a provision is desirable in the case of trafficking, it is a fortiori desirable in the case of unlawful possession.

NOTE

on

DEPENDENCE AS A DEFENSE TO UNLAWFUL POSSESSION

Section 1824(2) would create a defense to the offense of unlawful possession for persons so dependent on dangerous or abusable drugs that they lack substantial capacity to refrain from use and possess for personal use. This defense would not exculpate all persons commonly known as addicts or drug-dependent; rather, it would exculpate only those who are dependent to the extent that they have to a great degree lost their capacity to refrain from use. As will be explained later in this note, a person successfully raising this defense would be eligible for civil commitment for a period of approximately 3 or 3 and one-half years, and neither the prosecution nor the court could raise the defense if the defendant chose not to. The defense would not be available to drug dependent persons who commit other crimes such as trafficking in controlled dangerous substances or theft unless they suffer "mental disease or defect" coming within the Code's general provisions on responsibility. Addiction by itself would not of necessity constitute such a mental disease or defect.

The proposed defense may be characterized as one of lack of responsibility, of excuse, or of pharmacological duress. It is supported by the

* Such a provision appears as Study Draft section 1827.

strong possibility that it will be held by the Supreme Court to be constitutionally compelled as well as by considerations of policy. The constitutional dimension of the problem is discussed in the appendix to this note.

The basic arguments for exempting from punishment for his use the drug user who is so dependent on the drug he uses that he lacks substantial capacity to refrain from use of that drug are: (a) by definition, he is in his ordinary life situation unable to respond to the demands of the criminal law that he refrain from use and, hence, is nondeterrable; (b) there is growing recognition that he should not be viewed punitively; and (c) recognition of the defense would not substantially weaken (if at all) efforts to prevent use or protect the public from dangerous persons. In order to exempt such a person from liability it is also necessary that his condition not be unduly difficult to verify or define, and that this is so is not entirely clear. Hence, the value of the defense may be illuminated by additional opinions from the National Institute of Mental Health.

By definition the criminal law cannot constitute a significant restraining influence over the user who has lost substantial capacity to refrain from use of the drug he takes. He is essentially nondeterrable. While in all but extreme cases he will probably refrain from using the drug on which he is dependent when there is "a policeman at his elbow," he is nondeterrable in his everyday life. It is true that some opiate "addicts" do, after incarceration of several periods of incarceration, either abandon their habits permanently or cease use for varying periods of time. The reason for this is unclear. It may be that their loss of capacity to refrain from use was not in fact very substantial; it may be that for these persons incarceration has worked therapeutically; or it may be that for other reasons they have outgrown their habits or "matured out." Certainly, however, most addicts do not seem to respond in this way, and on them neither the threat of punishment nor punishment itself exerts any substantial restraining influence. For most addicts, criminal treatment has been the revolving door of arrest, conviction, imprisonment, and release, repeated over and over.

However, while decisions to exempt from criminal responsibility are usually justified on the ground that it is undesirable or unjust to punish nondeterrables, and perhaps this should be sufficient in itself to preclude conviction and punishment, we punish nondeterrables in a number of situations.[1] Sometimes we punish them because their disabilities are not gross enough to distinguish them from normal persons and sometimes because their disabilities are not easily verified.[2] However, it is submitted that they are sometimes punished because we blame them or regard them punitively despite the fact that they are nondeterrable.[3] At times a judgment that the actor is not blame-

[1] One example is where necessity and duress are not recognized as defenses or are given only limited recognition. *See Regina* v. *Dudley and Stephens*, 14 Q.B.D. 273 (1884).

[2] *See* MODEL PENAL CODE § 2.09 (duress as a defense). Comment at 2, 6. (Tent. Draft No. 10. 1960).

[3] *Cf*, H. M. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 414n.31 (1958).

worthy follows from the fact that he is nondeterrable; if he could not control his conduct, he cannot be blamed. But this is not always so. Part of the significance of the requirement that the actor have a "mental disease" or "defect" in order to invoke the insanity defense is that it sheds light on the extent to which the actor is regarded punitively or as blameworthy. We do not attach blame to disease. If a man is sick, he is not blamed or punished, although he may be confined for other reasons.

The culpability or blameworthiness of the addict presents a troublesome question. Normally, the addict begins use voluntarily, and his use is voluntary for an indefinite period. Only after a period of time has elapsed can he no longer substantially refrain from use. Consequently, he might be considered blameworthy despite the fact that at the time of the criminal act in question he could not conform his conduct (use or possession for use) to the requirements of the law; he would be blamed for earlier voluntary use. However, since he is being punished for use which he could not control, it is questionable whether blame should attach for earlier use. The addict's voluntary use may have occurred in the distant past, and he may even have been punished for it.[4] Even the insanity defense does not distinguish between insanity occurring through voluntary conduct of the actor and insanity resulting from involuntary causes.[5] For example, though intoxication is not generally a defense to crime, when a person has reached the state of "settled insanity" by reason of use of intoxicants he may, if he meets other requirements, invoke the insanity defense.[6]

Moreover, drug addiction and addict use are increasingly being viewed nonpunitively rather than punitively. The American medical profession has for many years officially recognized opiate addiction as a condition that it will treat.[7] The American Medical Association has said that opiate addiction is "a medical syndrome based on an underlying emotional disorder," and that it has "the characteristics of a chronic relapsing psychiatric disorder."[8] There is no basis for distinguishing dependence on other controlled substances from dependence on opiates in this regard. Many psychiatrists view certain personalities as addiction prone. Sociologists are more inclined to see the causes of addiction as social rather than psychiatric, but they too generally concede that personality plays a part. One can argue whether addiction is really a disease, a symptom of a disease, or a social phenomenon. What is significant is that it is increasingly being viewed nonpunitively.

Even though addicts, under existing American laws, are punished for use and possession for personal use, there seems to be a definite

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[4] *See* the discussion in Frankel, *Narcotic Addiction, Criminal Responsibility, and Civil Commitment* 1966 UTAH L. REV. 581, 604–605 (1966).

[5] Paulsen, *Intoxication as a Defense to Crime*, 1961 U. ILL. L. F. 1, 21–23.

[6] *Id.*

[7] AMERICAN MEDICAL ASSOCIATION DEPARTMENT OF MENTAL HEALTH, NARCOTICS ADDICTION: OFFICIAL ACTIONS OF THE AMERICAN MEDICAL ASSOCIATION (1963) (passim).

[8] *The Use of Narcotic Drugs in Medical Practice and the Medical Management of Narcotic Addicts*, Joint Statement of the American Medical Association Council on Mental Health, and the National Academy of Sciences National Research Council, 204 J.A.M.A. 1181 (1961).

trend to view the addict as something other than a criminal. Addiction may be characterized as a social problem, a public health problem, a disease, or a symptom of a disease, but it is gradually becoming recognized that it is not something the addict should be punished for. Of course, the decision of the Supreme Court in *Robinson* v. *California*[9] contributed to this attitude. And the various civil commitment programs reflect it. But this attitude antedates *Robinson*. California provided for treatment of addicts before *Robinson*. The medical profession officially recognized addiction as something that it should attempt to treat long before *Robinson*, and the Federal treatment facilities at Lexington, Kentucky, and Fort Worth, Texas, opened in 1935 and 1939, respectively. Certainly, physical dependence presents a medical problem whether or not psychological dependence does. In other countries addicts are regarded as ill and have sometimes been supplied with drugs by physicians; we had such an experiment in the United States. It is beside the point that it is not clear how effective supplying an addict with drugs is and that our experience with dispensing clinics may not have been satisfactory. It is also beside the point that at present treatment prospects for the addict are uncertain at best and more realistically, poor. What is significant is that we are increasingly moving away from viewing addiction punitively.

This change in view has apparently reached beyond professionals and into public attitudes. The only piece of empirical research on the American public's attitude toward addicts of which the writer is aware is contained in a survey conducted by Louis Harris and Associates for the Joint Commission on Correctional Manpower and Training in November, 1967.[10] Both adults and teenagers were asked how adult and teenage drug addicts arrested for *using* drugs should be treated. In the case of adult addicts, 2 percent of both the adults and teenagers sampled believed that they should be placed on probation, and 10 percent of the adults and 11 percent of the teenagers sampled believed that they should be jailed. However, 85 percent of the adults and 86 percent of the teenagers sampled believed that adult addicts should be placed in hospitals. Three percent of the adults and 1 percent of the teenagers were "not sure."[11]

In the case of teenage drug addicts, 3 percent of the adults and 5 percent of the teenagers sampled believed the addict should be placed on probation, while 5 percent of the adults and 12 percent of the teenagers believed he should be placed in Reform School. However, 88 percent of the adults and 80 percent of the teenagers sampled believed that teenage addicts should be placed in hospitals. Four percent of the adults and 3 percent of the teenagers were not sure.[12]

Louis Harris and Associates interpreted this data as follows:[13]

> Certain instances of antisocial behavior are recognized as illnesses, and there is overwhelming support for hospital treatment rather than a correctional solution.

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[9] 370 U.S. 660 (1962).

[10] The results of the survey are published in JOINT COMM'N ON CORRECTIONAL MANPOWER AND TRAINING, THE PUBLIC LOOKS AT CRIME AND CORRECTIONS (1968).

[11] *Id.*

[12] *Id.*

[13] *Id.* at 13.

> While teenagers think slightly more in terms of corrections than adults, among both groups it is understood that the alcohol or the drug addict properly belongs in the hospital.

In its summary of the findings, Louis Harris and Associates states:[14]

> Drug addiction and alcoholism are overwhelmingly considered illnesses which should be treated in a hospital. Over eight out of ten respondents felt this way.

The Harris Survey did not deal with whether drug addicts should be convicted as criminals for use, but only with disposition. Also, the results of the survey did not support freeing addicts: only small percentages of respondents considered probation appropriate. However, what is significant is that the great majority of respondents did not view addict use punitively—they saw addicts as fit subjects for hospital treatment, and probably viewed them as ill.

Of course, the views of the public toward the addict are ambivalent. Addiction is both feared and condemned. The public fears and vehemently condemns use, distribution, and addict crime. But this is not inconsistent with viewing the addict as a sick person or viewing addict use nonpunitively rather than punitively. With addiction and addict use being increasingly viewed nonpunitvely, the argument for exempting addicts from conviction and punishment for use and possession for personal use which they cannot substantially control becomes stronger. Not only are we dealing with persons who cannot substantially conform their conduct to the requirement of the law when the conduct in question is use or possession for personal use, but with persons whose conduct is more and more infrequently being viewed punitively. To the extent that addicted use is not viewed punitively, the fact that most addicts used drugs voluntarily at an earlier period loses its significance.

Exemption from conviction and punishment for possession when possession is for personal use would constitute an exemption from conviction and punishment only for the least serious crime that the drug-dependent person is likely to commit. The drug-dependent person would still be punishable for trafficking or for other crimes against person or property—crimes which, without denigrating the significance of use, are more serious than possession for personal use and for which society can less afford to permit excuses. While the distinction is in part based on the seriousness of the offense, it is also based on causal considerations. While impoverished opiate addicts may be required to steal in order to maintain their habits, many American opiate addicts have backgrounds of delinquency and criminality that predate their addiction,[15] and for these at least, it cannot always be said that criminality after addiction is a "result of" addiction. It would be possible to make the defense generally applicable and leave the causal question for adjudication in each case. However, it is submitted

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[14] *Id.* at 1.

[15] *See* the discussion in Blum, *Mind-Altering Drugs and Dangerous Behavior: Narcotics*, in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 40, 55–57 (1967).

that it is at the present time better to limit the defense solely to the offense of possession because the "causal" question is a difficult one which might be more difficult of accurate determination than the question of substantial incapacity to refrain from use; because it is doubtful if the public is yet ready to view addicts nonpunitively for crimes such as trafficking, theft, and robbery that affect persons other than the addict; and because these crimes are more serious than possession. Such defenses as necessity and duress are sometimes recognized as defenses to some crimes but not to more serious crimes.[16]

It is doubtful whether the defense would lead to any significant loss of deterrent or general preventive effect. Persons who have not lost substantial control over their use will be subject to punishment. And though there is a possibility that incapacity to refrain from use can be feigned, it is doubtful whether there will be much motivation to feign it because successful invocation of the defense will warrant the institution of civil proceedings as a result of which the addict could be committed for approximately 3 or 3 and one-half years.

While there would not seem to be much incentive to feign incapacity to refrain from use, the possibility that it can be successfully feigned does exist. Dr. Warren P. Jurgensen, Deputy Chief of the National Institute of Mental Health Clinical Research Center at Fort Worth, Texas, explained to the writer that an experienced opiate user may present to the medical examiner a false but convincing verbal picture of very severe addiction and be able to feign some symptoms of withdrawal. The success of these efforts, he stated, is likely to be at least in part dependent on the experience of the medical personnel who examine a person raising the defense, and unfortunately, the number of medical and psychiatric personnel who have extensive experience with drug-dependent persons is not great. Examining physicians at jails and lockups do not generally have such experience, although some intake physicians in detention centers that handle large numbers of addicts may be quite familiar with withdrawal symptoms.

In addition, Dr. Jurgensen pointed out that the examiner is very dependent on information obtained from the addict and that his information is often not verifiable. It is less verifiable than in the case of a homicide or assault in which the defendant raises the insanity defense. While because of the nature of the hypnotic withdrawal syndrome it would presumably be harder to feign symptoms of hypnotic withdrawal, the possibility that substantial loss of control over the use of hypnotics can also be feigned should not be discounted.

Perhaps the most significant problem with respect to the proposed defense is that substantial incapacity to refrain from use of dangerous or abusable drugs is not easy to verify. Difficulty of verification, while related to the possibility of feigning the defense, is a broader problem.

According to Dr. Jurgensen such a defense for opiate use would present several problems. A judgment that the defendant lacked substantial capacity to refrain from use of opiates at the time of his possession is a more difficult judgment than a judgment whether the de-

[16] *See* MODEL PENAL CODE § 3.02 (justification generally: choice of evils), Comment at 5 ff. (Tent. Draft No. 8, 1958); MODEL PENAL CODE § 2.09 (duress as a defense). Comment at 2 ff. (Tent. Draft No. 10, 1960).

fendant who has assaulted or killed another lacked substantial capacity to conform his conduct to the requirements of the law, because why a person used an opiate at a particular time is not as easily explained by his life history and personality dynamics as why he assaulted or killed another person. Even a person with great clinical experience with addicts could only make an intelligent guess as to the extent that the capacity to refrain from use was impaired at the time of the use or possession in question: persons with less experience could not guess as accurately. Even the determination of an expert would become more difficult as the time between the examination and the offense increased. Visible signs of addiction such as needle marks often disappear with time. And needle marks merely establish use; they do not necessarily establish addiction, much less addiction to the point of substantial incapacity to refrain from use. Similarly, certain symptoms of withdrawal are consistent with conditions other than withdrawal—a running nose may be due to hay fever as well as withdrawal. In addition, withdrawal symptoms do not necessarily signify substantial incapacity to refrain from use. And merely because the addict was undergoing withdrawal when arrested or when examined does not always mean he was physically dependent at the time of the offense. Much depends on the elapsed time between arrest or examination and the commission of the offense. Finally, physical dependence is not essential to substantial incapacity to refrain from use. An addict who has not used opiates for a substantial length of time may, when he takes his first dose upon returning to use (a time when he is not physically dependent), have as little or even less control as during the earlier period when he was physically dependent and using regularly.

Dr. Jurgensen suggested that a defense based on substantial incapacity to refrain from use of other controlled drugs would present verification problems similar to or greater than those presented by such a defense for opiates.

The difficulties of verifying substantial incapacity to refrain from use suggested by Dr. Jurgensen deserve further examination, and it is submitted that before the Commission endorses the defense contained in section 1824(2), additional views should be secured from the National Institute of Mental Health. If the Commission does endorse the defense, it should recommend that persons desiring to raise it should be examined at the National Institute of Mental Health Clinical Research Centers at Lexington, Kentucky, or Fort Worth, Texas, or in State facilities approved by the National Institute of Mental Health. It must, however, be recognized that this can involve considerable expense to the government, and that such expense may not be warranted when the offense of unlawful possession is only a Class A misdemeanor with respect to dangerous drugs and an even lesser offense in the case of most violations involving abusable drugs. However, the possibility that the defense will be held by the Supreme Court to be constitutionally compelled might make the expense factor irrelevant.

It is anticipated that successful invocation of the defense will permit the government to bring civil proceedings for commitment of the defendant. It is not recommended that commitment be automatic because while substantial incapacity to control use at the time of the

offense is evidence that the defendant does not possess such capacity at the time of trial, it is not necessarily conclusive.[17] While the writer has concluded (in the note on civil commitment, *infra*) that at the present time involuntary civil commitment in light of current treatment prospects is undesirable for drug-dependent persons not charged with or convicted of crime, for drug-dependent persons charged with but not convicted of crime, and for commitment of drug-dependent persons convicted of crime for a period longer than the maximum sentence permissible for the crime of which the person was convicted, a commitment after successful invocation of the proposed defense has a voluntary element in that the defendant must choose to raise it. Bearing in mind that the proposed maximum sentences under the draft for possession of dangerous and abusable drugs are shorter than the maximum period of commitment contemplated, this voluntary element, it is submitted, is sufficient to hold the defendant to an election and warrant the institution of involuntary civil commitment proceedings when the defendant raises the defense. However, if the court, the prosecutor, or defense counsel were permitted to raise the defense when the defendant has chosen not to, the objections to involuntary civil commitment discussed in the note on civil commitment, *infra*, would apply. For this reason and also to avoid interference with the conduct of the defense, it is submitted that only the defendant may raise the defense. Moreover, it is also submitted that the term of commitment should not be completely indeterminate, but should be limited to a maximum period of approximately 3 to 3 and one-half years as under Titles I and III of the Narcotic Addict Rehabilitation Act.

Recent legislation dealing with civil commitment of addicts, unlike legislation dealing with civil commitment of the mentally ill, has not generally been characterized by completely indeterminate commitments but by commitments with determinate limits. When a person is by reason of the proposed defense acquitted of unlawful possession, there is no substantial reason why he should be committed for a longer period than the person who is civilly committed on petition of a related person or who voluntarily commits himself under the Narcotic Addict Rehabilitation Act. Moreover, as it is, it is not likely that many dependent persons will choose to raise the proposed defense because it carries with it the possibility of deprivation of liberty for a longer period than does the offense for which the addict is charged. To permit completely indeterminate or longer commitments would probably make it unlikely that the defense would be used at all. While the commitment would primarily be intended for treatment purposes, it would be justifiable, because the defense would be raised voluntarily, to commit persons who are not deemed treatable but who it is determined constitute a danger of committing crimes against person or property (even if they do not present an immediate danger of engaging in conduct involving great risk of harm to the person of another).

Because the proposed defense is a defense only to use and not to trafficking, and because even a person who is substantially incapable of refraining from use of an opiate or hypnotic may possess for distribution as well as for personal use, in order to obtain the benefits

[17] *Cf. Bolton* v. *Harris*, 395 F.2d 642 (D.C. Cir. 1968).

of the defense the defendant's possession must be for personal use. Both the elements of personal use and substantial incapacity to refrain from use are made matters of defense by section 1824(2).

APPENDIX

CONSTITUTIONAL CONSIDERATIONS INVOLVED IN THE DEFENSE PROVIDED FOR IN SECTION 1824(2) DEALING WITH SUBSTANTIAL INCAPACITY TO REFRAIN FROM USE

In 1962, in *Robinson* v. *California*,[1] the United States Supreme Court decided that it was a violation of the cruel and unusual punishment provision of the eighth amendment, made applicable to the States by the due process clause of the fourteenth amendment, for a State to make addiction to narcotics a crime. The Court did not deal with the question whether the Constitution barred a State from punishing use or possession of narcotics by an addict as a crime, and after *Robinson* most lower courts considering the question held it did not.[2] In 1966, however, the Court of Appeals of the Fourth Circuit held that it was unconstitutional for a State to punish a chronic alcoholic for the crime of public drunkenness,[3] and in 1968 the Supreme Court passed on this question in *Powell* v. *Texas*.[4]

In *Powell*, by a vote of 5 to 4 the Court upheld the conviction of a person whom the trial court had found to be a chronic alcoholic. Four Justices took the position that it was not cruel and unusual punishment for a State to punish a chronic alcoholic for the crime of public drunkenness. The fifth member of the majority upholding the conviction, Justice White, concurring in the result, took the position that even though, given *Robinson*, "the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk," nothing in the record supported the trial court's finding that Powell had a compulsion "to frequent public places when intoxicated." [5] Four Justices, in an opinion written by Justice Fortas, dissented on the ground that a person cannot be punished "for being in a condition he is powerless to change" [6] or for a condition that is "part of the pattern of his disease and is occasioned by a compulsion symptomatic of the disease." [7] The dissenting Justices saw no reason not to respect the findings of the trial court that a chronic alcoholic cannot resist "the constant, excessive consumption of alcohol," that "a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism," and that Powell was a chronic alcoholic.[8]

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[1] 370 U.S. 660 (1962).

[2] *See* Note, *Alcoholism, Public Intoxication and the Law*, COLUM. J. OF LAW & SOC. PROB. 109, 128n.142 (1966) (use of narcotics).

[3] *Driver* v. *Hinant*, 356 F.2d 761, 764 (4th Cir. 1966). *See also Easter* v. *District of Columbia*, 361 F.2d 50 (D.C. Cir. 1966) (one-half of the court concurring with *Driver* conclusion on constitutional grounds; the other half reaching the same conclusion by statutory interpretation).

[4] 392 U.S. 514 (1968).

[5] *Id.* at 549.

[6] *Id.* at 567.

[7] *Id.* at 569.

[8] *Id.* at 557.

The opinion for the Court by Justice Marshall read *Robinson* narrowly as holding only that "a state law which imprisons a person thus afflicted [with narcotic addiction] as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment." [9] Justice Fortas read *Robinson* more broadly. His opinion stated that *Robinson* stands upon the principle that "[C]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change;" [10] that "the essential constitutional defect here is the same as in *Robinson*, for in both cases the particular defendant was accused of being in a condition which he had no capacity to change or avoid;" [11] and that "a person may not be punished if the condition essential to constitute the defined crime is part of the pattern of his disease and is occasioned by a compulsion sympomatic of the disease." [12]

Similarly, Justice White read *Robinson* broadly. He stated: [13]

> If it cannot be a crime to have an irrestible compulsion to use narcotics, Robinson v. California . . . , I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu or epilepsy but permitting the punishment for running a fever or having a convulsion. Unless Robinson is to be abandoned, the use of narcotics by an addict must be beyond the reach of the criminal law. Similarly, the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk.

Justice White further stated: [14]

> Outside the area of alcoholism such a holding [that a person establishing the requisite facts could not, because of the Eighth Amendment, be criminally punishable for appearing in public while drunk] would not have a wide impact. Concerning drugs, such a construction of the Eighth Amendment would bar conviction only where the drug is addictive and then only for acts which are a necessary part of addiction, such as simple use. Beyond that it would preclude punishment only when the addiction to or the use of drugs caused sufficient loss of physical and mental faculties. This doctrine would not bar conviction of a heroin addict for being under the influence of heroin in a public place (although other constitutional concepts might be relevant to such a conviction), or for committing other criminal acts.

It is unclear whether, in stating that he would require that a drug be addictive in order to bar the punishment of a person having an

[9] *Id.* at 532.
[10] *Id.* at 567.
[11] *Id.* at 567–568.
[12] *Id.* at 568.
[13] *Id.* at 548–549.
[14] *Id.* at 552. n.4.

irresitible compulsion to use the drug, Justice White meant that the drug must have a capacity to produce physical dependence.

Obviously one cannot predict with certainty that in the future the Supreme Court will hold that a person who lacks substantial capacity to control his use of a drug cannot be punished for unlawful possession if his possession is for personal use. However, it is submitted that the views of five Justices in *Powell* v. *Texas* make this—especially for drugs such as opiates, and barbiturates and other hypnotics that can produce physical dependence—a sufficiently real possibility that the Commission must consider it in deciding whether to include such a defense in the Code. There would seem to be no basis for distinguishing a bar on punishment for the crime of use from a bar on punishment for unlawful possession when it is for personal use. It is unclear whether the Court would confine any decision barring punishment to persons who totally lack capacity to control their use or whether it would extend such a bar to persons who substantially lack capacity to control their use. However, when a person is unable to refrain from use in his everyday life, he is effectively beyond the control of the law even if he is able to refrain from use when there is a policeman at his elbow.

While both the dissenting opinion in *Powell* [15] and the opinion of Justice White [16] contain language addressing themselves to the effect of the eighth amendment upon punishment for other crimes committed by a person who cannot control his use of a substance, it would seem premature at this time to even in part rest a defense to addict selling or addict fund raising crime on any possibility that the Supreme Court will hold that such a defense is constitutionally required. The question has not been presented to the Supreme Court, and it is impossible to predict how the Court would decide it.

NOTE

on

CULPABILITY

The draft departs from at least some provisions of the existing Federal law [1] by requiring that in order to be guilty of trafficking or unlawful possession, the defendant must act willfully (as that term is defined in section 302(1)(e) of the proposed revision).* This

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[15] Justice Fortas wrote:

> 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 intoxicated, assault, theft, or robbery. Such offenses require independent acts or conduct and do not typically flow from and are not part of the syndrome of the disease of chronic alcoholism. 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. (392 U.S. at 559 n. 2.)

[16] *See* text at note 14, *supra*.

[1] *See* the note on existing Federal law.

* The culpability requirement was changed in the Study Draft to "knowingly" (section 302(1)(b)) to accord with S. 3246.

is accomplished by subsection (2) of section 302 which makes willfullness the basis of culpability unless a provision provides otherwise. A person who does not willfully traffic does not present a significant threat to efforts to control mind- and mood-altering drugs and does not warrant imposition of the penalties prescribed for trafficking. Defendants who act without culpability or who act negligently will probably violate the regulatory law and may be amenable to prosecution for reguatory offenses.

The culpability requirement proposed is somewhat broader than the culpability requirements of the New York revision and the proposed Michigan revision. Those revisions reach only defendants who act knowingly.[2] The draft reaches persons who act willfully, in order to reach persons who, while aware of a risk that the substance they dealt in was a substance that is controlled or of other material elements, are not sufficiently certain of its character or of such other elements to have acted knowingly. In the case of certain offenses, such as conduct injuring others or creating a risk of injuring others or criminal homicide, persons who acted recklessly may appropriately be treated differently from persons who act knowingly or intentionally; but in the case of trafficking in or possession of a controlled drug the difference between those who act knowingly and those who act recklessly is not great enough to warrant such a distinction.

While the proposed Michigan revision reaches only knowing violations, it provides that: "Proof of transportation or possession of any narcotic drug, dangerous drug or LSD is prima facie evidence of the transportation or possession of the substance with knowledge of its character." [3] This provision is explained by its reporters as follows: [4]

> [In the case of sale] [t]he knowledge of what is being sold is so readily inferred from the sale transaction itself that no special provision establishing prima facie evidence standards is included . . . . However, [in the case of transportation or possession] enforcement requires that the burden of asserting non-knowledge of the narcotic character of the substance possessed by the defendant be shifted over to the defendant. This is done by § 6015, which makes proof of transportation or possession prima facie evidence that the defendant knew the character of the substance transported or possessed. The defendant can offer rebutting evidence, but since in all but rare instances this must come from his own testimony, it will be necessary for him to take the stand and undergo the test of cross-examination before he can hope to avoid the risk of a conviction.

Neither the New York revision nor the draft proposed here contain a similar provision. While knowledge of, or recklessness as to the character of the substance is more easily inferred when a transfer is involved, it is also often inferable when the defendant manufactures,

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[2] N.Y. REV. PENAL LAW, art. 220 (McKinney 1967); MICH. REV. CRIM. CODE, c. 60 (Final Draft 1967).

[3] MICH. REV. CRIM. CODE § 6015 (Final Draft 1967).

[4] *Id.*, comment to c. 60 at 456, 458.

imports, lands, receives, or exports a controlled drug. All of these activities necessarily involve possession, actual or constructive, and possession in itself will often warrant an inference of knowledge of, or recklessness as to the character of the substance possessed. In addition, circumtances surrounding the defendant's conduct will often also support an inference of knowledge or recklessness as to the character of the substance possessed. Consequently, the extent of the need of enforcement for a provision like the Michigan provision is questionable. According to Richard G. Denzer, Chief Counsel to the Temporary Commission on Revision of the New York Penal Law and Criminal Code, there is no substantial need for such a provision.[5]

NOTE

on

CONDUCT INCIDENTAL TO PRESCRIBING OR DISPENSING

It is recommended that the regulatory law include a provision excluding from criminal liability (1) the transfer to a member of the defendant's household, for use by a member of the household, of a drug prescribed or dispensed by a practitioner for the defendant or a member of his household, and (2) the possession, for use by a member of the defendant's household, or for personal use, of a drug prescribed or dispensed by a practitioner for the defendant or for a member of his household. Such a provision would deal with the common practice of intrafamily use of drugs prescribed or dispensed for one member of the family.

This is a drug taking nation.[1] Antibiotics, barbiturates, sedatives, tranquilizers, codeine and aspirin combinations, over-the-counter drugs, and numerous other drugs originally purchased or supplied for one member of a family are commonly taken by and given to other members of the family.[2] For over-the-counter drugs such as aspirin and exempt narcotics, no prescription is required. Other drugs require a prescription or, in its absence, may be dispensed only by a medical practitioner. Most intrafamily or intrahousehold use of mind- or mood-altering drugs requiring a prescription involves drugs which were legitimately obtained by prescription or from a practitioner.[3]

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[5] Statement of Richard G. Denzer to the writer.

[1] A consultant to the President's Commission on Law Enforcement and Administration of Justice has stated in a report to that Commission:

> Our own society puts great stress on mind-altering drugs as desirable products which are used in many acceptable ways (under medical supervision), as part of family home remedies, in self medication, in social use [alcohol, tea parties, coffee klatches, *etc.*]. *In terms of drug use the rarest or most abnormal form of behavior is not to take any mind-altering drugs at all.* (Blum, *Mind-Altering Drugs and Dangerous Behavior: Dangerous Drugs*, in THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 21, 23 (1967) (emphasis added)).

[2] A study conducted under the auspices of the National Institute of Mental Health revealed that a large percentage of the persons studied had first received barbiturates, tranquilizers, and amphetamines from members of their families. Address by Dr. M. Balter, Center for Studies of Narcotics and Drug Abuse, NIMH, Rutgers Symposium on Drug Abuse, June 4, 1968.

[3] Statement by Dr. Balter, *supra* note 2.

While intrafamily use of drugs, whether or not they are mind- or mood-altering drugs, is unwise, it should not be subject to sanction. Most of this use probably involves small quantities, and the taking of small quantities of those mind- and mood-altering drugs which are prescribed by physicians does not generally present a significant risk of harm. In addition, the practice is both widespread, and, in our society, constitutes "normal" conduct. It is very questionable whether the criminal law should be used against widespread and "normal" conduct, especially when it is not clear that that conduct creates a significant risk of harm. Furthermore, while the deterrent effect of the criminal law is always a somewhat speculative thing, it is extremely doubtful whether the criminal law can deter intrafamily use of drugs prescribed for one member of the family. Related to this is the fact that a criminal sanction is likely to be unenforceable, and infrequent enforcement is not, in view of how common and accepted intrafamily use is, likely to enhance respect for the law. Finally, even if a criminal sanction were more enforceable, it is unlikely that it would be enforced. If a case were singled out, prosecution might smack of unequal enforcement. As the Comments to the Model Penal Code state in another situation:[4]

> [E]xemption is the honest statement of the present and forseeable law enforcement, so that district attorneys and other responsible officials should not face the problem . . . as one of discretion.

While it is recognized that even a drug legitimately obtained by one member of the family on a prescription can be used by a dependent member of the family or a member of the family who is taking the drug "for kicks," it is believed that the undesirability of subjecting intrafamily use to sanction outweighs this risk.

Because language excluding transfer and possession within a "family" might be very difficult to apply, it is suggested that the exclusion be limited to transfer and possession within a "household." Although the term "household" may present some problems of application, it should still be easier to apply than "family."

Distribution and use of legitimately obtained prescription drugs, both mind- and mood-altering drugs and other drugs, by a person other than the person for whom the drugs have been prescribed or dispensed is not confined to members of the family or household. Such drugs are commonly given to friends as medications also.[5] A housewife may give a tranquilizer to a friend who is nervous or jumpy; she may give a barbiturate to a friend who cannot sleep. In addition, a nervous friend may raid his host's medicine cabinet for a tranquilizer. Exclusion of such conduct from criminal liability also could be justified. For several reasons, however, it is not clear that it should be excluded. A provision excluding transfers to friends or to intimate associates or possession for personal use of drugs prescribed for friends or intimate associates might be very difficult to apply. And as

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[4] MODEL PENAL CODE § 207.11 (self abortion, now section 230.3), Comment (Tent. Draft No. 9, 1959).

[5] Dr. Balter's study also revealed that a surprisingly large percentage of the persons studied had first received barbiturates, tranquilizers, and amphetamines from friends. Statement by Dr. Balter, *supra* note 2.

the protected circle is enlarged, the chance that the exclusion may protect transfer to or use by dependent persons or use "for kicks" probably increases. A provision permitting the transfer of an enumerated small number of dosage units of a legitimately obtained drug to any person (and correspondingly, the possession for use of this quantity by any person) is a possible alternative, because small distributions are not likely to involve a significant risk of harm. However quantity limitations are, of course, arbitrary, and by protecting transfers to and possession for use by all persons, the likelihood that such a provision may protect transfers to or use by dependent persons or use "for kicks" probably increases.

A provision protecting transfers of legitimately obtained drugs to others or possession of such drugs for "a medical purpose" would, in the case of drugs like barbiturates, tranquilizers, and amphetamines, which are medically used at least in part for their mind- or mood-altering effects, present extremely difficult problems of application. If one person gives another person an amphetamine because the latter feels depressed, is this a transfer for a "medical" purpose? If it is, suppose one person gives an amphetamine to a person who is dependent on a drug. Amphetamine dependent persons often say they take the drug, because life is a drag without it or because they are depressed. While such a distinction may possibly be easier to apply in the case of exempt narcotics, because exempt narcotics are usually used therapeutically to remedy clearly physical conditions (*e.g.*, for relief of cough), it would seem so hard to apply in the case of most mind- or mood-altering drugs that its efficacy would be very doubtful.

Although limiting the exclusion to drugs transferred to or possessed for members of the household, or obtained for personal use from supplies prescribed or dispensed for a member of the household, is somewhat arbitrary, it is submitted that on balance it is the most satisfactory solution.

Should a housewife who gives one of her barbiturates or tranquilizers to a nervous friend be prosecuted, an appropriate disposition could be made under a provision permitting or requiring the court to dismiss the prosecution when it is of the opinion that conviction of the defendant would not serve the purposes of the provision the defendant violated, or under a provision permitting or requiring the dismissal of *de minimus* violations. A somewhat similar provision is contained in the Model Penal Code.[6]

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[6] MODEL PENAL CODE, § 2.12 (P.O.D. 1962).

Since the regulatory law will deal with veterinary drugs, it is also recommended that an exclusion from criminal liability be made for (a) the transfer (for administration to the animal) of a drug prescribed or dispensed for an animal to a person who has been given care of the animal and the possession of the drug for this purpose; (b) the transfer of a drug prescribed or dispensed for an animal for administration to another animal in the transferee's care; and (c) the possession of a drug prescribed or dispensed for an animal for administration to another animal in the possessor's care. Otherwise, the person who has been asked to mind the dog while the owner is away, the dog owner who gives another dog owner a tranquilizer dispensed for the first owner's dog for administration to the second owner's dog, and also the second owner, could technically be guilty of trafficking or unlawful possession, as the case may be. While giving medication intended for one animal to another is unwise, it is probably not uncommon. It does not involve any risk to the person, and it is unlikely that it presents significant risk to the animal. It would seem likely that people are more likely to abuse mind- and mood-altering drugs in connection with themselves than in connection with their animals.

NOTE

on

CIVIL COMMITMENT

1. *Involving Civil Commitment of (a) Dependent Persons Not Charged With Crime, (b) Dependent Persons Charged With but Not Convicted of Crime, (c) Dependent Persons Convicted of Crime for a Commitment Period That May Exceed the Maximum Sentence Permissible for the Crime of Which the Person was Convicted.*—While civil commitment for opiate addicts is not a new idea, only in the last few years have extensive efforts at civil commitment become popular. The major programs are the California, New York, and Federal programs. They are based on the premise that the opiate addict can best be treated if he is kept under supervision—both in institution and community—for an extended period of time. The aim of treatment is usually to help the addict live a drug free life and also to rehabilitate him in a broader sense. The maximum period of commitment varies under different statutes: it is 7 years, and in some circumstances 10 years, in California; depending on the circumstances, 3 or 5 years in New York; and, again depending on the circumstances, 3 or 3 and one-half years under the Federal Narcotic Addict Rehabilitation Act. The consensus of opinion seems to be that 1 year is usually an inadequate period of time, and the major statutes provide for a commitment of at least 3 years. Civil commitment has been advocated for persons dependent on barbiturates and other controlled drugs as well as for persons dependent on opiates.

The Narcotic Addict Rehabilitation Act of 1966 (NARA) provides for several types of civil commitment as well as commitment for treatment for persons sentenced after conviction of a Federal crime for a period that may not exceed the maximum sentence permissible for the crime of which the addict was convicted.

Under the draft, a person convicted of unlawful possession of dangerous drugs such as heroin and other opiates with high dependence potential commits a misdemeanor and may be sentenced only to a maximum of 6 months' incarceration (or, if changed, to at most 1 year), and a person adjudged guilty of unlawful possession of abusable drugs such as barbiturates commits an infraction for the first offense and may only be fined. Moreover, it is unlikely that many persons will take advantage of the proposed defense to unlawful possession for persons who have substantially lost capacity to refrain from the use of a drug and possess it for personal use, because this defense carries with it a risk that the person who successfully raises it will be civilly committed for a period of 3 to 3 and one-half years.

Because the penalties for unlawful possession are not long enough to permit the supervision over the time period that is ordinarily believed necessary, at least for the treatment of opiate addicts, a commitment under a sentence and limited by the maximum sentence permissible for the crime of which the person was convicted (as under Title II of NARA) would not be worthwhile for most addicts convicted of unlawful possession. Consequently, it becomes a serious question whether general involuntary civil commitment is proper for dependent persons not charged with or convicted of crime on petition of a public

official or other person, of involuntary civil commitment of dependent persons charged but not convicted of crime, and of involuntary civil commitment of dependent persons convicted of crime (usually misdemeanors or lesser offenses) for a commitment period that may exceed the maximum sentence permissible for the crime of which the person was convicted. Given the penalty structure of the draft, such commitment is necessary to involuntarily treat dependent users who are not convicted of criminal conduct of felony status.

It is the writer's conclusion that given current treatment prospects, Federal law should not at the present time contain any provisions for such commitments for either opiate addicts or those dependent on other controlled drugs. Any analysis must begin with opiate addicts.

(a) *Opiate addicts.*—Three grounds have generally been urged to support long-term involuntary civil commitment of opiate addicts not charged with crime, those charged with but not convicted of crime, and those convicted of crime for a commitment period that may exceed the maximum sentence permissible for the crime of which an addict was convicted. First, such civil commitment has been supported as a device to get and keep addicts in treatment, many addicts having proved unwilling voluntarily to begin treatment and many addicts who, voluntarily having entered treatment, leave against medical advice. Secondly, it has been supported by analogy to the practice of compulsory commitment of mentally ill persons who are dangerous to themselves or others. It is argued that the addict presents a danger of commiting fund raising crimes against property or of engaging in such narcotics offenses as trafficking. A third, and related ground upon which it has been supported is by analogy to commitment or quarantine of those who have contagious diseases. This argument rests on the premise that addiction is a contagious disease spread by those addicts who introduce other persons to drugs and proselytize as well as traffic.

While treatment of opiate addicts is a matter of major concern and deserves encouragement, it is submitted that at the present time involuntary commitment of opiate addicts not charged with crime, those charged with but not convicted of crime, and those convicted of crime, for a commitment period longer than the maximum sentence that is permissible for the crime of which an addict has been convicted cannot, in light of the deprivation of liberty involved, be justified by the prospects for effective treatment.

Legislation providing for involuntary civil commitment of addicts merely sets the legal procedure for whatever treatment measures are available for him. The enactment of legislation is no guarantee either that personnel and facilities needed for treatment will be provided or that treatment methods with a reasonable probability of success exist. Both are, of course, matters of concern, but the latter is of particular concern, for it is probably easier to insure that addicts will in fact be treated than that they will be successfully treated. Even a commitment of resources furnishes no assurance of success. The hurried adoption of sexual psychopath laws, which have at least in part attributed to the treatment professions successful treatments they did not possess, should make us wary of attributing to those engaged in the treatment of opiate addicts the ability to generally successfully treat addicts

without thorough inquiry as to whether or not they have the ability to do so.

The results of efforts to treat addicts before the enactment of the California civil commitment legislation in 1961 are generally considered quite disappointing. The failure of these efforts to achieve significant success has been attributed not only to lack of power to hold voluntary patients who left against medical advice, but to the fact that, at the end of hospitalization, addicts were released into the community without any supervision of any kind. It was thus logical to assume that compulsory institutionalization combined with prolonged and intensive supervised parole or aftercare in the community (with the possibility of being returned to the institution for use of drugs or breach of other conditions of aftercare) might lead to improved treatment results. In addition, there was some empirical support for these assumptions,[1] and they are some of the assumptions on which existing programs of civil commitment rest.

Data shedding light on the effectiveness of the New York and Federal programs are unavailable. These programs have only been in operation long enough to be placing large numbers of addicts in aftercare status at the present time. However, the California program has been in existence since 1961, a significant number of addicts have been treated, and data are available. The data to the end of 1965 were reviewed in a report prepared by a consultant to the President's Commission on Law Enforcement and Administration of Justice in 1966:[2]

> Involuntary commitment is for a minimum period of 42 months and a possible maximum of 10 years. An addict can be discharged from the programs only if he completes at least 6 months of institutional care followed by 36 consecutive months of abstinence from drugs while on supervised outpatient status. Between September 15, 1961, and December 31, 1965, more than 5,300 addicts were committed to the program. Of this number, approximately 1,200 had been committed prior to January 1, 1963 making them potentially eligible for release by June 30, 1966, after a minimum of 42 months in the program. Of these 1,200 addicts, 56 or less than 5 percent, had been discharged by May 31, 1966, upon completion of a 3 drug-free years on out-patient status. It should be noted, however, that the 5 percent discharge figure does not take into account approximately 10 percent of the total number of those committed who are returned to the courts as undesirable, as well as a fairly large number who were discharged by the courts during the first two years of the program because of errors in commitment procedures. . . .

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[1] *See* Diskind, *New Horizons in the Treatment of Narcotic Addiction*, 24 FED. PROB., No. 4, at 56 (Dec. 1960), reporting on a New York parole experiment; Wood, *New Program Offers Hope for Addicts*, 28 FED. PROB., No. 4, at 41, 42, and n.1 (1964), referring to a California parole experiment begun in 1959.

[2] Aronowitz, *Civil Commitment of Narcotics Addicts and Sentencing for Narcotic Drug Offenses* [hereinafter cited as Aronowitz] in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 148, 150–151 (1967) [hereinafter cited as TASK FORCE REPORT].

> After lengthy institutionalization, only one out of five addicts released to out-patient status has remained drug-free in the community for 2 years or more, and one out of three for up to 1 year.

Later data dealing with the California program demonstrate some improvement. They show that 35 percent of addicts released to outpatient status (supervised aftercare in the community) are still in good standing on outpatient status 1 year following their first release to outpatient status,[3] and 17 percent are still in good standing on outpatient status three years following their first release to outpatient status.[4] When a person fails on outpatient status after his first release, he may be returned to institutionalization and then rereleased. The California experience has been that the group which initially fails on outpatient status and is then reinstitutionalized is less successful in remaining in good standing on outpatient status than those on their first release to outpatient status.[5] It should be noted, however, that detected drug use is only one of the grounds for removing addicts from good standing on outpatient status. Thus, although only 35 percent of a group of addicts were in good standing on outpatient status 1 year following their first release to outpatient status, drug use (other than excessive use of alcohol) was detected in only 56 percent of the group during their first year on outpatient status, and opiate use was detected in only 50 percent of the group.[6] The remaining use was use of marihuana or dangerous drugs.[7] Similarly, during three years following first release to outpatient status, opiate use was detected in 63 percent of the group and marihuana or dangerous drug use in an additional 7 to 8 percent.[8] However, the fact remains that many of these persons who were not detected using drugs were not considered sufficiently good risks at the time to be permitted to remain in the community and were reinstitutionalized.

Updating of data dealing with the percentage of those persons discharged from the program after a minimum of 42 months in the program also reveals a somewhat greater percentage discharged than do earlier data. By June 30, 1964, almost 3,100 persons had been committed to the program,[9] making them theoretically eligible for discharge from it after 42 months in it and a minimum of 3 drug free years on December 31, 1967. However, by that date only 284 or slightly more than nine percent had been dicharged after 3 drug free years on outpatient status.[10] This is an improvement over the earlier figure

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[3] Kramer et al., Civil Commitment for Addicts: The California Program 5 (1967) (mimeographed) (published in a slightly different version in the December, 1968, issue of the American Journal of Psychiatry) [hereinafter cited as Kramer, The California Program]. Dr. Kramer is Chief of Medical Research, California Rehabilitation Center, Corona, California.

[4] Personal communication to the writer from Dr. Kramer, Aug. 16, 1968.

[5] Kramer, The Place of Civil Commitment in the Management of Drug Abuse 7 (1968) (mimeographed) [hereinafter cited as Kramer, Drug Abuse]; personal communication to the writer from Dr. Kramer, Aug. 16, 1968.

[6] Kramer, The California Program, *supra* note 3, at 7 and Table 5.

[7] *Id.*

[8] Personal communication to the writer from Dr. Kramer, Oct. 7, 1968.

[9] Data supplied to the writer by Professor Dennis S. Aronowitz; compiled by him from data supplied to him by the California Rehabilitation Center.

[10] Personal communication to the writer from Dr. Kramer, Sept. 17, 1968.

of 5 percent and like it, it does not include those returned to the courts as undesirable or those discharged because of errors in commitment procedures. However, this is still a small figure. It may be somewhat unrealistic to judge the effectiveness of the program on the basis of this measurement because the average period of institutionalization in the California program exceeds 6 months, and consequently the average patient cannot complete institutionalized care and 3 years of aftercare in 42 months. However, it is still not reassuring that such a small percentage can be discharged on the basis of 3 drug free years in aftercare after being in the program at least 42 months.

A more realistic measurement may be the percentage of addicts placed on outpatient status who are discharged after 3 drug free years on outpatient status regardless of whether they succeed on their first release to outpatient status or on a subsequent release following reinstitutionalization. Apparently, approximately only slightly more than one addict out of five eventually completes 3 years in outpatient status,[11] although for some the third drug free year may not be completed until their sixtieth months in the program or later.[12] More significant is that it appears that as new "successes" are added, some persons who previously have completed 3 drug-free years on aftercare fail.[13] Some have been recommitted.[14] The result is that approximately only 20 percent have been both discharged after 3 consecutive years on outpatient status and have not been detected in drug use after discharge.[15]

The California data may show some improvement over prior efforts to treat addicts. Also the more recent California data show improvement over the earlier data. However, the Director of Medical Research for the California program has expressed "doubt that these results will change much within the framework of the present program....",[16] and even the recent data show that the California program has not succeeded in getting a substantial majority of addicts to refrain from use for the period that the legislature has deemed the minimum necessary for "success."

Many addicts have been returned to the institution several times after failures in aftercare, and the chances of success seem to decrease with each failure in aftercare and consequent readmission to the institution.[17] For these the revolving door in and out of jail or prison has been replaced with the revolving door of civil commitment—in and out of institutionalized treatment center, and even when out, subject to supervision. Dr. John C. Kramer, Director of Medical Research of the California Rehabilitation Center, has written:[18]

> If a fairly large majority succeed for prolonged periods of time in such a program then it would be a useful approach.

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[11] Personal communication to the writer from Dr. Kramer, Oct. 14, 1968.
[12] Personal communication to the writer from Dr. Kramer, Aug. 16, 1968.
[13] Personal communications to the writer from Dr. Kramer, Sept. 17 and Oct. 14, 1968.
[14] Personal communication to the writer from Dr. Kramer, Oct. 14, 1968.
[15] Personal communications to the writer from Dr. Kramer, Sept. 17 and Oct. 14, 1968.
[16] Kramer, The California Program, *supra* note 3, at 9.
[17] Kramer, Drug Abuse, *supra* note 5; personal communication to the writer from Dr. Kramer, Aug. 16, 1968.
[18] Kramer, The California Program, *supra* note 3, at 10 (emphasis added).

> When, however, a majority fail within a year, and the average periods of intermittent incarceration are about equal to the time spent on parole, we will probably find our patients spending about half a lengthy commitment incarcerated. It is obvious that a 35 percent success rate after one year and a 15 percent rate after three years in a commitment program has different consequences than an equivalent numerical result would in a voluntary program.
>
> The ultimate effect has been to produce a system into which a large number of addicts are locked, most of them shifting between approximately equal periods of incarceration and parole. Though a small percentage of the population are removed from the system by "succeeding," the majority will either remain in the system until the termination of their commitment or be extruded from the system following suspension in one of the several other ways, as by a writ of Habeas Corpus, by being excluded as unfit following a new conviction, or by death or disappearance. *The value of a program like this should not be viewed solely in terms of the number who succeed but also in terms of what happens to the majority who do not.*

It is often stated that addiction is a chronic disorder in which relapse is to be expected, and that permanent abstinence is not the sole measure of benefit because an addict may grow through treatment even if he returns to use, and that periodic abstinence even if followed by a return to use is progress. These things are true, and they certainly support voluntary commitment programs. However, more is required to support long-term compulsory commitment involving deprivation of and restrictions on liberty for substantial periods of time. Moreover, merely because California has not succeeded in getting the great majority of committed addicts to refrain from use for substantial periods of time does not mean that other programs cannot achieve better results or that California will not achieve better results in the future. However, it is submitted that better treatment prospects are required to support the extension of long-term compulsory treatment for addicts not charged with or convicted of crime or addicts who have been convicted only of misdemeanors or lesser offenses than past and present efforts at treatment are apparently able to promise at the present time.[19]

In the last analysis, whether and to what extent results like those being achieved under the California program (given the lack of knowledge as to the effectiveness of the New York and Federal programs) support involuntary commitment for substantial periods of time *for purposes of treatment* on any large scale of either noncriminal addicts, addicts charged with but not convicted of crimes, or addicts convicted only of misdemeanors or lesser offenses depends on how

[19] It can also be argued that (the likelihood of successful treatment aside) it is improper to commit addicts for involuntary treatment or to protect them from harm to themselves without a showing that a particular addict lacks the capacity to make a responsible decision as to his need for treatment. *See* Note, *Civil Commitment of Narcotics Addicts*, 76 YALE L. J. 1160 (1967).

great is the need of society and of the individual for such treatment and on the value placed on the individual's right to live even a life that is not generally deemed useful. There may be reason to require a majority to undergo treatment that is likely to benefit only an unknown minority if the harm of the condition requiring treatment is great enough. On the other hand, the value of an individual's freedom may make such a program inappropriate at least in the absence of a probability of success. These factors will be discussed in the following pages. However, it is submitted that at the present time they do not warrant the commitments under discussion. The President's Commission on Law Enforcement and Administration of Justice, although cautiously supporting civil commitment, stated in 1967 that "commitment of addicts began as an experiment, born less out of an established body of medical and scientific knowledge than out of a sense of frustration with orthodox procedures and a demand for new approaches." [20] This has not changed; civil commitment must still be viewed as experimental.

The needs of society for involuntary commitment of opiate addicts for a substantial period of time have dual significance. First, if the need is acute, compulsory commitment may be warranted in order to attempt to cure as many addicts as possible, even though the chances of success are not great or are speculative. Second, if the need is acute, compulsory commitment may be warranted in order to restrain, isolate, and supervise addicts, thus benefiting the community even though the chances of cure are small or unclear. Thus, commitment would be preventive detention. These two theories tend to blend somewhat, and proponents of involuntary civil commitment probably seek both cure and preventive detention.

Proponents of civil commitment justify it in part as a device to reduce addict criminality and the contagion of addiction by treatment or supervision, or both. However, none of the major civil commitment laws require a finding that a particular addict presents a danger of committing crime or spreading addiction. Rather, they base commitment solely on a finding of addiction and a likelihood that the addict can be rehabilitated through treatment, or on a finding of addiction alone. It is submitted that protection of the public does not justify the long-term civil commitment of an opiate addict under such circumstances.

The judgment that opiate addicts *must* engage in crime (other than acquisition) or promote the use by others of opiates or other controlled drugs seemed unwarranted. Opiate addicts are more likely to engage in fund raising crimes than assaultive or violent acts.[21] One study of offenses committed by addicts concluded that the addicts who were the subject of the study committed proportionately less violent crimes than nonaddicts.[22] It is likely that robbery, a fund-

[20] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE. THE CHALLENGE OF CRIME IN A FREE SOCIETY 228 (1967) [hereinafter cited as THE CHALLENGE OF CRIME].

[21] *Id.* at 222.

[22] Finestone, *Narcotics and Criminality*, 22 LAW & CONTEMP. PROB. 69, 71 (1957). Another study showed that heroin users studied had only a slightly higher percentage of arrests for violent crime than a combined population of both users and non-users. *See* THE CHALLENGE OF CRIME, *supra* note 20, at 222.

raising crime, is the crime involving risk to the person in which addicts are most likely to engage. However, another study based on empirical data concluded that there was only "an insignificant increase" in the number of addicts studied committing crimes against the person, including robbery, after addiction began as compared with before.[23] While substantial numbers of addicts do commit fund raising crimes or sell drugs to maintain their habits, it is not clear that all addicts do so. It is doubtful, despite law enforcement claims to the contrary, that all addicts come to the attention of public authorities.[24] It is even unclear what the addict population of the United States is. About the behavior of those addicts who do not come to public attention we can only speculate. Some may sell drugs or commit fund raising crimes: some may not.

Secondly, while under existing law virtually all addicts have to obtain their drugs illicitly, it need not follow that they must commit fund raising crimes or distribute drugs to maintain their habits. Physicians and other medical professionals are overrepresented in the addict population.[25] Many physician addicts are able relatively successfully to pursue their practices and keep their addiction secret and are also able to obtain drugs at moderate prices. While they obtain drugs through misrepresentation or other violations of the law, it is unlikely that they distribute drugs or resort to fund raising crime to maintain their habits. Moreover, with their desire to insure secrecy, it is also unlikely that they proselytize. Physicians are not likely to be dependent upon heroin: they are likely to be dependent on opiates in medical use, such as demerol. It is also likely that most addicts who do not sell or commit fund raising crimes (probably middle class addicts) are more likely to be dependent on opiates in medical use than on heroin because they may sometimes be unlawfully maintained on these drugs, or they may secure them from physicians or pharmacists at moderate prices or by other means such as forging prescriptions or simulating symptoms of conditions for which these drugs are prescribed. However, it is also possible that there may be a few relatively wealthy heroin addicts who can afford to support their habits without resort to selling drugs or committing fund raising crimes. Moreover, while female heroin addicts are often reputed to engage in prostitution to support their habits, supporting a habit in this way or obtaining drugs through deception are not serious enough to warrant long-term involuntary commitment for treatment purposes under the present prognosis, or to restrain addicts from such conduct; prostitution is often punishable as a misdemeanor.

Moreover, while the social and economic costs of addict crime are quite high, it is likely that addicts are not responsible for as much nondrug crime as is often sometimes attributed to them. Statements made before the revision of the New York commitment law in 1966 that addicts were responsible for 50 percent of the crime in New York City have been criticized as being unsubstantiated or as being accurate

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[23] O'Donnell, *Narcotic Addiction and Crime*, 13 Soc. Prob. 374, 384 (1966).

[24] *See* Aronowitz, *supra* note 2, at 150 and n.25.

[25] *See* Blum, *Mind-Altering Drugs and Dangerous Behavior: Narcotics*, in Task Force Report, *supra* note 2, at 40, 49 [hereinafter cited as Blum: *Narcotics*].

only if drug offenses are included.[26] The President's Commission on Law Enforcement and Administration of Justice, after reviewing such data as were available on the extent of addict involvement in nondrug offenses, concluded:[27]

> The simple truth is that the extent of the addict's or drug user's responsibility for all nondrug offenses is unknown. Obviously it is great, particularly in New York City . . .: but there is no reliable data to assess properly the common assertion that drug users or addicts are responsible for 50 percent of all crime. More broadly, the Commission's examination of the evidence on the casual connection between drug use and crime has not enabled it to make definitive estimates on this important issue. Since there is much crime in cities where drug use is not thought to be a major problem, to commit resources against abuse solely in the expectation of producing a dramatic reduction in crime may be to invite disappointment.

Proponents of involuntary commitment also attempt to analogize it to the practice of quarantining carriers of contagious diseases. The analogy is that addicts rather than nonaddicted pushers spread addiction by promoting use and by making examples available to others.

There are, however, several objections to quarantining addicts on the theory that they spread a contagious disease.[28] It is not clear that all addicts promote use, and commitment merely upon the ground of addiction would not distinguish between those who do and those who do not. Physician addicts, for example, usually try to keep their addiction secret, and it would seem logical that other middle class addicts would behave in the same way. Moreover, it is not clear that a large number of persons is susceptible to addiction or that a significant portion of those who are susceptible will in fact be exposed to opiates.[29] And finally, it is often hard to say that one addict is responsible for spread of addiction to another person. Usually, the responsibility would be fairly diluted, thus raising the question whether it is fair to commit an addict for a substantial period of time in order to prevent a result for which he holds only a perhaps widely shared responsibility.[30]

Even though the dangers presented to society by addicts do not warrant commitment on the mere finding of addiction, it would still be possible to commit particular addicts on the basis of findings that each individually presents a danger of engaging in crimes other than the crime necessarily committed in obtaining opiates, or of trafficking in or promoting use of controlled drugs. There are, however, several objections to such a course.

First, even if it may be possible to predict with some degree of ac-

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[26] *See* the sources cited in note 8 to the note on grading of trafficking in dangerous and abusable drugs.

[27] THE CHALLENGE OF CRIME, *supra* note 20, at 222.

[28] *See* the discussions in Aronowitz, *supra* note 2, at 151–152 and in Note, *Civil Commitment of Narcotics Addicts*, 76 YALE L. J. 1160, 1184–85 (1967) [hereinafter cited as Note, YALE L. J.].

[29] *See* Aronowitz, *supra* note 2, at 152.

[30] *See* Note, YALE L. J. *supra* note 28, at 1184–85.

curacy that an impoverished ghetto addict is likely to have to engage in fund raising crimes *or* trafficking *or* forging prescriptions *or* prostitution to support his habit, it is questionable whether such a distinction, being one based considerably on economic and social standing, should be made.[31] While it may be true that the deprived commit a relatively greater number of fund raising crimes than other economic groups and while they are punished for these crimes despite the fact that their economic position may play a part in their conduct, they are nonetheless punished for their conduct and not their propensities.

Second, even if a prediction that an impoverished ghetto addict is likely to engage in fund raising crimes *or* trafficking *or* forging prescriptions *or* prostitution to support his or her habit may be made with some accuracy, and while addiction may play some part in this prediction, it is unclear to what extent addiction would in fact contribute to any such crimes committed. At present, many addicts appear to be delinquents or criminals before addiction,[32] and the determination of the extent to which addiction is involved in their post-addiction criminal career is difficult. To the extent that future criminality might not be attributable to addiction, why should the addict be singled out for preventive detention when other dangerous persons are not singled out on the basis of their propensity to commit harmful or dangerous acts? Possibly the answer is that, at least in the case of the impoverished ghetto addict, there may be more of a basis for accurate prediction. But even a nonaddict who commits robberies every time he is released from prison and is equally as likely to continue to commit robberies again is not, unless he is incompetent within the meaning of statutes governing the commitment of the mentally ill, placed in preventive detention in advance of another criminal act.

Moreover, assuming that it is justifiable to commit the impoverished ghetto addict who has a history of committing violent robberies to a period of preventive detention, what of other addicts? While it may be possible to predict with some accuracy that an impoverished ghetto addict without a criminal record is likely to engage in fund raising crime *or* trafficking *or* forging prescriptions *or* prostitution if not placed in preventive detention in advance of such crime, we do not know whether he will forge prescriptions, traffic, engage in petty theft, burglarize, engage in robbery generally, or engage in violent robbery. It is submitted that even if we can predict that he will engage in *one* of these activities, as long as we do not know which one it will be, it is inappropriate to subject him to preventive detention. The reason is that even if preventive detention is appropriate to prevent some types of conduct, it is not appropriate to prevent all types of criminal conduct. In the writer's view, if preventive detention is ever appropriate, it is appropriate only to prevent conduct involving great risk of harm to the person of another when there is immediate danger of that conduct. Certainly, trafficking and promoting use, forging prescriptions, prostitution, and simple theft do not involve such harm. Robbery and burglary may or may not.

Preventive detention is not appropriate to prevent less serious harm in advance of its commission for the same reason that it is inappro-

[31] *See id.* at 1183–1184 and n.75.

[32] *See* Blum: *Narcotics, supra* note 24 at 55–57.

priate to sentence an offender who presents a great risk of continually repeating minor crimes for very long periods: though harmful, the conduct is just not that serious. This is all the more true when preventive detention involves predictions only and not conduct. It is unlikely that a prediction that an addict presents an immediate danger of engaging in conduct involving great risk of harm to the person of another can be made if he does not have a prior history of such conduct. Even then it may not be clear that this conduct is related to his addiction; and if it is not, there is no reason why addicts should be singled out from other dangerous persons. Even if the conduct of the addict who engages in violent robberies is related to his addiction, why should he be singled out when other dangerous persons are not? And even if we can predict with a fair degree of accuracy that the addict who engages in violent robberies will continue to do so if not convicted, can we predict it with sufficient certainty to preventively detain him when he has already been punished for his prior robberies and when he has not committed another one? If he has not been punished for his prior robberies he may, as long as addicts are responsible for such crimes, he punished for them. If he engages in another one he may be punished for it. While the mentally ill may be subject to civil commitment on the basis of predictions, it may be that even in that area we have attached too much weight to predictions.

Moreover, the danger of inaccurate prediction of harm requires that even in the case of those committed because they present an immediate danger of engaging in conduct involving great risk of harm to others, the period of detention be determinate and that provision be made for periodic review of the commitment within that determinate period.[33] A period longer than 3 or 4 years would seem inappropriate. Further, since it is possible that at least some addicts committed under such a standard might not be able to benefit from treatment or might disrupt treatment, such addicts might require different facilities and programs than are required for addicts committed to treatment under the Narcotic Addict Rehabilitation Act.

There is yet another argument supporting involuntary civil commitment of addicts. As stated in the note on grading of trafficking in dangerous and abusable drugs, the Chief Medical Examiner of the City of New York has reported a high number of deaths among heroin addicts attributable to an unknown "acute reaction to the substance injected."[34] He has stated that in the first half of 1968 these addiction-related deaths were the leading "cause" of death among persons in New York City between the ages of 15 and 35 and that the great majority were attributable to this unknown reaction, which may or may not be caused by overdose.[35] Perhaps, because the information discussed has only recently been widely publicized, proponents of civil commitment have not argued that the death rate from injection of heroin is a justification for involuntary commitment of addicts.

However, the significance of this information must be considered. If the Bureau of Narcotics' figures on the number of opiate addicts

[33] *Cf.* A. GOLDSTEIN, THE INSANITY DEFENSE 169 (1967) (release of persons committed upon acquittal by reason of insanity).
[34] N.Y. Times, Aug. 15, 1968, at 1, col. 1.
[35] *Id.*

in New York City are accepted and if the diagnosis is warranted, the figures cited by the Examiner would, if repeated, mean that the New York City addict population is dying off at the rate of 2 to 3 percent per year. Even under other estimates of heroin addiction in New York City, the rate would be 1 percent per year. It can be argued that this death rate is significant to warrant involuntary commitment of addicts *for treatment purposes*, even if the chances of success are not particularly great, because it increases the need to attempt to treat addicts. Given the negative social value generally accorded addiction, the argument is not without some appeal. However, in light of the deprivation of liberty involved, the writer is of the view that large-scale commitment on the basis of the addict death rate as reported in New York City would be premature. More information and study are desirable to determine whether this high death rate is something confined to New York City, whether it is due to something in the nature of heroin or to transistory causes, and whether the diagnosis is warranted [36] before large-scale long-term commitment of noncriminal addicts, addicts charged with crime, or misdemeanor addicts is adopted by the Federal government. (*See* note 19, *supra.*) If it should appear on the basis of further study that the phenomenon is generalized and relatively permanent, long-term commitment of such addicts for treatment purposes could be considered. Any commitment should follow the pattern of commitment under Titles I and III of NARA and last for a period of 3 to 3 and one-half years. In addition, there should be periodic judicial review of the commitment on petition of both treatment personnel and patient.

At the present time Title III of NARA already permits the involuntary commitment of opiate addicts not charged with crime on the petition of a related person. The objections to long-term involuntary commitment of persons not charged with crime, those charged with but not convicted of crime, and those convicted of misdemeanors, which have already been discussed, apply to such commitments also. The deprivation of liberty is as great when the commitment is on petition of a relative as when it is on petition of a Federal judge, United States Attorney, or Federal law enforcement official, and the chances of successful treatment are no better.

There may, however, be some basis for differentiating commitments on the petition of a relative from other involuntary commitments in that, since addicts may make life impossible for the persons they live with, relatives may have a special interest in committing them. In addition, while there are of course exceptions, relatives are more likely to be motivated by a desire to help the addicts than are some public officials. Some public officials may view the power to commit as just a device to keep addicts off the street. Further, if power is given to public officials to commit addicts, there might be an incentive for abusive enforcement practices in order to obtain information on which to base a commitment, which would not be present when a relative alone is entitled to commit the addict.[37] Also, the existing provision permitting commitment by related persons may furnish treatment

[36] *See* the discussion in the note on grading of trafficking in dangerous and abusable drugs.

[37] *See* Aronowitz, *supra* note 2, at 152–153.

personnel with experience in treating persons who are involuntarily committed when they might otherwise be free. Such persons may present particular treatment problems because they are unlikely to view the commitment benevolently, as they may when the alternative is a prison sentence. Consequently, they may be particularly resistant to therapy. With the possibility that death may be a significant risk of heroin addiction being at the least an open one, there may be a special need for gaining experience in the treatment of these persons, and the existing provision permitting involuntary commitment on the petition of a related person may provide this experience.[38] While the basic objections to compulsory commitment on the petition of public officials still remain, the interest of a relative in committing an addict may be a reason for retaining this provision even though to do so would be inconsistent with the views on involuntary commitment expressed in this report. If it is retained, however, Title III should be amended to provide for periodic judicial review of the commitment both on the petition of the treatment personnel and on the petition of the addict.

(b) *Persons dependent on other controlled drugs.*—The reasons that support the conclusion that involuntary civil commitment of opiate addicts not charged with or convicted of crime and of long-term commitment of opiate addicts convicted of misdemeanors or lesser offenses is inappropriate apply even more strongly to persons dependent on other controlled drugs.[39]

Dependency appears to be a significant problem with respect to barbiturates, some barbiturate-like sedatives, and amphetamines. Few people in the United States seem to be dependent on cocaine alone; usually cocaine is taken by opiate addicts in combination with heroin in the form of a speed ball. While there are apparently persons dependent on hallucinogens, it is questionable whether there are very many. Less is known about treatment of those dependent on non-opiates than is known about treatment of opiate addicts. However, it has been indicated that the problems of treatment of persons dependent on barbiturates and similar drugs are very similar to those encountered in the treatment of opiate addicts and that the prognosis for cure is poor.[40] Persons who suffer phychiatric reactions from amphetamines, cocaine, or hallucinogens (they may or may not be dependent) can probably be treated in conventional psychiatric set-

[38] It should be noted that this experience can sometimes be obtained in the treatment of noncriminal addicts who voluntarily commit themselves under Title III of NARA because after volunteering they may have a change of heart and become hostile to the commitment. Under Title III, however, they may not leave the program. In addition, persons convicted of crime who are committed under Title II of NARA may react hostilely to a commitment for an indefinite term with a maximum of 10 years if they believe that they would have received shorter sentences if they had been sentenced to prison.

[39] *See* Rosenthal, *Proposals for Dangerous Drug Legislation*, in TASK FORCE REPORT, *supra* note 2, at 80, 104–105, 131–132 (1967) [hereinafter cited as Rosenthal].

[40] Jaffe, *Drug Addiction and Drug Abuse*, in THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 305–306 (3d ed. Goodman & Gilman 1965); Fraser & Grider, *Treatment of Drug Addiction*, 14 AM. J. OF MED. 571, 576 (1953); Isbell & Fraser, *Addiction to Analgesics and Barbiturates*, 2 PHARMACOL. REV. 355, 390 (1950).

tings [41] and may, if psychotic, be eligible for commitment under statutes providing for involuntary commitment of the mentally ill.

Treatment considerations aside, there is less reason for involuntary commitment of persons dependent on nonopiates than of opiate addicts in an effort to protect the public.[42] Much less is known about the relationship between dependence on these drugs to nondrug crime and to selling to support a habit than in the case of opiates. Barbiturates and similar drugs and at least some amphetamines may, since they have significant medical use, often be secured by dependent persons through legitimate channels at moderate prices, thus making it unnecessary to commit crime to support a habit.[43] Also, it is questionable whether prices of these drugs on the illicit market are high enough to require dependent persons to generally engage in nondrug crime and selling to support their habits.[44] Nor has it been reported that persons dependent on hallucinogens resort to crime to finance their habits.

Involuntary civil commitment on the petition of a related person of persons dependent on barbiturates, barbiturate-like sedatives, or amphetamine drugs would be undesirable for the same reasons that involuntary civil commitment of such persons is generally undesirable.

Dependence on (as distinct from use of) hallucinogens does not seem to be a significant enough problem to warrant institution of a Federal civil commitment program at the present time.

2. *Voluntary Civil Commitment of Persons Not Charged With Crime. Voluntary Civil Commitment in Lieu of Prosecution, and Sentencing to Treatment.*—The writer's objections to long-term involuntary civil commitment of opiate addicts not charged with crime, of opiate addicts charged with but not convicted of crime, and of opiate addicts convicted only of misdemeanors or lesser offenses should not be taken as objections (a) to voluntary commitment of noncriminal addicts for a period to which at the time of volunteering the addict agrees he will remain in treatment, (b) to voluntary commitment in lieu of prosecution under Title I of the Narcotic Addict Rehabilitation Act (NARA), or (c) to sentencing to commitment for treatment under Title II of NARA. The first and second situations are voluntary and consequently the objections to involuntary commitment do not apply to them as long as the best possible treatment is offered and commitment does not become a pretext for imprisonment. In addition, there should be periodic judicial review of the commitment on petition of either treatment personnel or an addict.

In the third situation, sentencing to commitment for treatment under Title II of NARA permits an addict convicted of an offense to be sentenced to a treatment program for a period not to exceed the maximum sentence permissible for the crime of which he was convicted or for a period not to exceed 10 years, *whichever is shorter.* Since the addict could be sentenced to the penitentiary for the same period of time for which he may be committed, there is no objection

[41] Cole, *Report on the Treatment of Drug Addiction*, in TASK FORCE REPORT, *supra* note 2, at 135, 142 (1967).
[42] Rosenthal, *supra* note 39, at 104–105, 131–132.
[43] *Id.*
[44] *Id.*

to placing him in a treatment program unless treatment lasts substantially longer than the sentence that is likely to have been imposed on the addict had he not been committed for treatment.[45]

However, the elaborate procedures of Title II of NARA for sentencing to commitment for treatment are made necessary by the fact that otherwise addicts would be subject to minimum sentences and by other rigidities of the existing Federal sentencing structure. If there are to be no mandatory minimum penalties and if the sentencing structure is, as the Sentencing Part of the proposed Code provides, to be made more flexible, there would be no need for such procedures in order to dispose of a convicted addict for treatment. The following provision (already presented to the Commission) has been proposed in the Sentencing Part, and the writer of this report endorses it:

§ 3205. Commitment to Bureau of Prisons.

* * * * *

(3) Narcotics Addicts. If the court determines after a study by the Bureau of Prisons under section 3005 that an offender is a narcotics addict and that he can be treated, the court as part of its sentence may recommend that he be confined and treated in facilities established under chapter —— for the rehabilitation of narcotics addicts.

Professor Low explains this provision in his commentary which the writer endorses and which follows:[46]

> Present 18 U.S.C. §§ 4251 to 4255 contain an elaborate structure specially established for those suspected of narcotic addiction. The structure is available only for those convicted of particular types of offenses (generally speaking, offenses of violence and of narcotics selling are excluded; offenders who have two prior convictions or three prior civil commitments as an addict are excluded). An eligible offender may be committed by the judge for 30 days for study to determine whether he is an addict and whether he is likely to be rehabilitated through treatment. If the court finds him to be a treatable addict after such a study, it may commit him for an indeterminate period not to exceed 10 years, but in any event not to exceed the maximum otherwise authorized for the offense committed. Conditional release can occur after 6 months of treatment, after which the offender is treated like a normal parolee with the exception that the

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[45] *See United States* v. *Baughman*, 286 F. Supp. 269, 271 (D. Minn. 1968):

> It would be incongruous were defendant left in the position where had he not asked for treatment of a rehabilitative nature under the Narcotic Addict Rehabilitation Act his sentence would have been 3½ years, but because he asked for such treatment, his confinement is now ten years. Certainly this could not have been the intent of the law and the court has every confidence that the Attorney General and the parole authorities will be alert to the problem of this defendant and will justly administer the 'indeterminate' sentence.

See also Aronowitz, *supra* note 2, at 153–154.

[46] *See* the comment to the Sentencing Part, *infra*.

Bureau still has aftercare authority which may be contracted for to assist him in avoiding a return to his addiction.

The idea here too is that additional alternatives are not needed in the Sentencing Part of the new Code, although there will again be a need for an administrative chapter to authorize the Bureau to expend funds for the treatment and aftercare of narcotics addicts. As in the youth case, the judge would impose sentence on an addict just as he would in any other case. He could procure a study under section 3005, however, and if he finds that he is dealing with an addict, he could recommend treatment as part of his sentence.

What this would mean in terms of change in the sentences which the judge could impose would be three things: (1) treatment for addiction could be included for a conviction for any offense, even a crime of violence, although the sentence in such a case would not be any shorter than it otherwise would be; (2) a minimum sentence could be imposed in conjunction with an order that treatment as an addict be rendered; (3) the 6-month minimum for every case would be eliminated, with the normal parole structure substituted in its place.

Again, none of these changes is viewed as undesirable. And the gain of eliminating a complicated and cumbersome set of additional sentencing alternatives seems significant. It should be noted here too, however, that the reason such a change can be offered is the flexibility of the main sentencing provisions. If they become more rigid, particularly in the requirement of minimum terms for possessors of narcotics, for example, the advisability of retaining a separate narcotics chapter will have to be reconsidered.

With these qualifications, voluntary commitment of noncriminal addicts, voluntary commitment in lieu of prosecution, and the sentencing of addicts to treatment programs should be encouraged because they permit *attempts* to treat addicts and to improve treatment techniques. Even though treatment prospects are poor at the present time, treatment is to be encouraged when it does not unduly conflict with considerations of personal liberty.

(a) *Persons dependent on other controlled drugs.*—At the present time NARA applies only to opiate- and cocaine-dependent persons. It does not apply to those dependent on other controlled drugs. It is submitted that the Act's provisions dealing with voluntary civil commitment in lieu of prosecution and voluntary commitment for addicts not charged with crime, and the provisions of section 3205(3) of the proposed Sentencing Part should be extended to include persons dependent on barbiturates or similar depressants or amphetamines.[47] At the present time persons dependent on these drugs cannot be admitted to Federal treatment programs under the Act unless they are also dependent on opiates or cocaine. The only reservation to such an extension of the Act with respect to amphetamines is that amphetamine dependence is apparently more difficult to verify then dependence on

[47] *See* Rosenthal, *supra* note 39, at 131–133 (barbiturates and depressants; *contra* as to amphetamines).

opiates or barbiturates and similar depressants. Consequently, it may be feared that amphetamine users who are not dependent might attempt to secure the benefits of civil commitment in lieu of prosecution or sentencing to commitment for treatment because commitment may sometimes be viewed less onerous than responding to charges or serving sentences in a normal manner.[48] However, NARA already applies to cocaine-dependent persons, and cocaine dependency (though very rare) would seem to involve problems of verification similar to those presented by amphetamine dependence. Moreover, the difficulty of verification should not be a bar to voluntary civil commitment of amphetamine-dependent persons not charged with crime.

It is not recommended that NARA be amended to make persons dependent on hallucinogens eligible for commitment because there are apparently not enough hallucinogen-dependent persons to make such an extension of the Act practical.[49]

(b) *Exclusions from eligibility for voluntary civil commitment in lieu of prosecution.*—The exclusions from eligibility for voluntary civil commitment in lieu of prosecution under Title I of NARA are too broad, too inflexible, and in some measure defeat the purpose of the Act to provide treatment to addicts. This was recognized in 1967 by the President's Commission on Law Enforcement and Administration of Justice.[50]

Among those excluded from eligibility for voluntary civil commitment in lieu of prosecution under Title I are persons charged with crimes of violence, charged with unlawfully importing, selling, or conspiring to import or sell narcotic drugs, convicted of two or more prior felonies, or who have been civilly committed for narcotics addiction under NARA, under Federal, District of Columbia, or State law three or more times.[51] The term crime of violence is defined to include: voluntary manslaughter, murder, rape, mayhem, kidnapping, robbery, burglary or housebreaking in the nighttime, extortion accompanied by threats of violence, assault with a dangerous weapon or assault with intent to commit any offense punishable by imprisonment for more than 1 year, arson punishable as a felony, or an attempt or conspiracy to commit any of the foregoing offenses.[52]

It is submitted that eligibility of the addict for voluntary commitment in lieu of prosecution should as much as possible be left to a consideration of the factors that bear on a particular case, much as sentencing is.[53] The likelihood that the defendant will benefit from treatment and his suitability for treatment should be the prime consideration, but the community also has an interest in general prevention and in maintaining its values; consequently, the possibility that in light of the defendant's conduct, commitment in the particular

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[48] *See id.*
[49] *Id.*
[50] The CHALLENGE OF CRIME, *supra* note 20, at 229.
[51] 28 U.S.C. § 2901.
[52] *Id.*
[53] *See id.*; Aronowitz, *supra* note 2, at 155–156 and n.90. If sentencing of convicted offenders to treatment programs should not be handled under section 3205(3) of the revision, but is rather left to the provisions of Title II of NARA (sentencing to commitment for treatment), the recommendations herein will also apply to Title II of NARA.

case will depreciate the seriousness of the offense is also relevant. Title I of NARA should be amended to permit commitment for any offense, unless it is determined that he is not likely to benefit from or is unsuitable for treatment or that in light of the defendant's conduct commitment in the particular case would depreciate the seriousness of his offense. The purpose of NARA is to provide treatment for addicts. The decision to treat should be as individualized as possible.[54] Per se exclusions based on the crime the addict has committed, his number of prior offenses, or past failures in treatment may exclude addicts who are suitable for and can benefit from treatment and whose conduct was not so outrageous that commitment will depreciate its seriousness in the eyes of the community. As long as an addict is excluded from eligibility if it is determined that in light of his conduct commitment will depreciate the seriousness of his offense or that he is not suitable for or is not likely to benefit from treatment, the community is protected. Under the latter exclusion, persons who may present security problems may be found ineligible for treatment and be required to face charges or, if they have been convicted, sentenced to imprisonment.

The per se exclusion of persons convicted of three or more prior felonies is undesirable.[55] Narcotics felonies are included, and under existing Federal law and the law of many States most narcotic offenses are felonies. Even unlawful possession (an offense that most addicts cannot avoid committing) is a felony under many State laws and, in effect, under Federal law also. The result is that a sizable number of addicts would appear to be barred from treatment. This is in conflict with the Act's purpose of providing treatment. Moreover, to the extent that addicts are involved in nondrug felonies, this exclusion can also effect eligibility for treatment. Since many addicts apparently engage in fund raising crime to support their habits, Title I may be unrealistic in barring such addicts from treatment.[56] It would be better to rest a determination of eligibility for treatment on the circumstances of each case, giving due weight to whether the defendant's conduct is such that commitment would depreciate the seriousness of his offense and whether he is suitable for treatment.

Similarly, the exclusions from eligibility for voluntary commitment in lieu of prosecution of addicts who sell narcotics is undesirable. Certainly, the exclusion of addicts convicted of sale, who sell primarily to maintain their habits, from voluntary commitment in lieu of prosecution makes many addicts ineligible for commitment under the procedure.[57] Further, rather than exclude addicts who are convicted of sales not made primarily to support their habits, an individualized determination would be more desirable. An addict may sell well in excess of that needed to maintain his habit, and yet his selling activities may be so addiction related that if treatment is successful, they will cease. The determination should be made on a case by case basis, again considering whether in light of the defend-

[54] *See id.*

[55] THE CHALLENGE OF CRIME, *supra* note 20, at 229.

[56] *See* Aronowitz, *supra* note 2, at 156.

[57] THE CHALLENGE OF CRIME, *supra* note 20, at 229; Aronowitz, *supra* note 2, at 156.

ant's conduct commitment will depreciate the severity of his offense.

Likewise, the present exclusion for defendants who commit crimes of violence is undesirable. It excludes some burglaries and all robberies, both of which are fund raising crimes that addicts do commit. It thus has the potential for excluding large numbers of addicts from eligibility. Further, by excluding assaults with intent to commit any offense punishable by imprisonment for more than one year, it excludes from eligibility persons who have not necessarily committed very serious crimes; in effect, it excludes all felony assaults from its ambit even if the assault is punishable by imprisonment for only 2 or 3 years. Moreover, even a per se exclusion of more serious crimes like murder and kidnapping is undesirable. It would be preferable if each case were decided individually, taking into account whether given the defendant's conduct commitment would depreciate the severity of the offense.

Finally, the exclusion of those who have been committed three or more times in the past is undesirable.[58] Addiction is a chronic condition, relapse is to be expected, and just because an addict has failed even several times does not mean that he will not succeed and that treatment should be barred to him.[59] The question is one which is different from whether he can be compelled to enter a treatment program when he has not been charged with or convicted of a crime or whether he can be committed for a period longer than that for which he could be sentenced for the crime of which he was convicted.

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[58] THE CHALLENGE OF CRIME, *supra* note 20, at 229.
[59] *Id.*

COMMENT

on

GAMBLING OFFENSES: SECTIONS 1831–1832
(Schwartz, Morvillo, Sprizzo; October 27, 1969)

STAFF MEMORANDUM

As will be seen from the consultant's report, the Federal role in gambling is basically twofold: (1) to concentrate Federal law enforcement on organized crime where the scale of activities and the likelihood of corruption of local law enforcement makes the problem one of national concern, and (2) to prevent the use of Federally controlled facilities to undermine State antigambling policies. There is also the problem of gambling on Federal enclaves and in the maritime jurisdiction to be dealt with. Accordingly, the main outlines of an approach to gambling under our new Code would be as follows:

(1) *A statute outlawing the conducting of or participating in a gambling business, with a defense that the business was conducted solely within a State where such gambling was legal.*—The jurisdictional bases would be broad including: special maritime and territorial, use of the United States mail or the facilities of interstate or foreign commerce and interstate travel.

This would replace 18 U.S.C. § 1082 (gambling ships). 18 U.S.C. § 1084 (using wire facilities to transmit wagering information), 18 U.S.C. § 1952 (interstate travel in aid of gambling business).

Among the issues presented are:

(a) The proposal would be restricted to gambling "business" and so "players" would not be covered.

(b) The penalty is set at the Class A misdemeanor level, unless the gambling business was sizeable, in which case it would be a Class C felony. Present law which could be applied to small businesses ranges from misdemeanor penalties provided for failure to register under the Wagering Tax Act (26 U.S.C. § 7203) to felony penalties available under 18 U.S.C. § 1952. (*See also* 18 U.S.C. § 1082—gambling ships—2 years, and 18 U.S.C. § 1084—transmission of wagering information—2 years). Our consultant suggests that prosecutors need a felony penalty against even minor gamblers to turn them against their bosses to prove the existence of a large business. Is Class A misdemeanor treatment wise?

The offense would be a Class C felony if, *e.g.*, the gambling business (a) involved a significant albeit modest number of persons and (b) had a substantial gross revenue in any single day. Legislative findings would declare that such enterprises affect interstate commerce and other Federal concerns so generally that proof of a particular jurisdictional peg could be dispensed with. Proposed section 1005, and its alternative sentencing provision, section 3203 would raise this penalty for the leaders and organizers of businesses involving 25 or more

persons to a Class A felony. Our definition for the businesses which would be covered is taken from the Organized Crime Control Act of 1970, now before Congress.

This would replace the same statutes and take care of some "facilitator" statutes in present law—*e.g.*, 18 U.S.C. § 1083 (transporting gamblers to gambling ship—transporter is either a participant in the business or a facilitator of it); 15 U.S.C. § 1175 (manufacturing, repairing, *etc.* gambling devices in enclaves—person is guilty of facilitating the business).

Among the issues presented are:

(a) All participants in the business would be punished equally except insofar as the leaders are amenable to our organized crime section. Is this wise?

(b) Is it too difficult for the prosecutor to prove that a certain number (*e.g.*, 5) or more persons were involved and that the business grossed at least a certain amount (*e.g.*, $2,000) in any single day?

(c) 18 U.S.C. § 1306 (banks selling lottery tickets) would be repealed in States where lotteries are legal. In others, the bank would be guilty of facilitating an illegal gambling business. Is this wise?

(2) *A statute prohibiting the interstate transportation or mailing of paraphernalia or information to be used in gambling into a State where the gambling is illegal.*—This would be a type of facilitation statute but without the necessity of proving that any specific felony was being facilitated. It is intended to reach not those engaged in gambling businesses themselves, but their suppliers. A Class A misdemeanor penalty is contemplated. It would not, as some present statutes do, reach mere players.

This would replace 18 U.S.C. § 1084 (transmission of wagering information); 18 U.S.C. §§ 1301 *et seq.* (importing, carrying in interstate commerce or mailing lottery tickets); 18 U.S.C. § 1304 (broadcasting lottery information); 18 U.S.C. § 1953 (interstate transportation of gambling equipment, including numbers slips); 15 U.S.C. § 1171 (interstate transportation of gambling "devices," mainly slot machines and roulette wheels).

Among the issues presented are:

(a) Whether we should legalize the transportation of lottery tickets into States where lotteries are legal, unlike present law (18 U.S.C. § 1301).

(b) Should we have Class C penalties available for large-scale suppliers?

(3) *Ending the use of the tax power as a major or exclusive Federal weapon in dealing with gambling.*—The breadth of other jurisdictional bases makes it unnecessary to rely on the tax power which, in any event, was chiefly useful in connection with required registration that has now been held to be unconstitutional compulsory self incrimination. It is not suggested, however, that gambling be freed of taxation: the ordinary penal provisions (*see* proposed sections 1401–1403) with respect to taxation would apply. Thus, violation of the gambling tax provisions in present law, to the extent they are presently felonies (*e.g.*, evasion of the excise tax (26 U.S.C. § 4401)) would remain as felonies under proposed section 1401, while other related provisions (*e.g.*, failure to register (26 U.S.C. §§ 4412, 7272)) would be continued as misdemeanors under proposed section 1006.

(4) *The Commission may wish to give consideration to a proposal to take the profit out of gambling by civil remedies.*—Suits by or on behalf of losing players against the bet taker, his associates, anyone with whom a bet was "laid off," *etc.*, could be authorized. The suit could be for treble damages with an attractive minimum recovery and an attorney's fee. The United States Attorney might be authorized to bring class actions. It is not proposed that we draft such civil legislation, but the Commission might wish to make a general recommendation on the subject.

CONSULTANT'S REPORT

I. RECOMMENDATIONS

1. It is recommended that the following statute be enacted to replace 18 U.S.C. §§ 1084, 1952 and 1953.

2. It is recommended that sections 1081–1083 of Title 18 be retained in their present form but that their penalty provisions be revised in accordance with the sentencing policies of the Commission.

3. It is recommended that sections 1301–1306 of Title 18 be repealed.

4. It is recommended that sections 1172 and 1174 through 1178 of Title 15 be retained in their present form. It is recommended that section 1173 be repealed.

5. It is recommended that the wagering tax laws be re-enacted to meet the shortcomings described in this report and the constitutional requirements imposed by the *Marchetti* and *Grosso* cases.

II. DRAFT STATUTE *

Policy

Section 1. The Federal government is primarily concerned with those gambling ventures organized and operated by professional racketeers and organized crime syndicates. Studies of the illegal gambling business have revealed that even those ventures organized and operated by professional racketeers and organized crime syndicates have several levels. The lowest levels at which bets are actually placed and received are, in numerous instances, neither vast in scope nor substantial in size. However, such ventures when operated by or related to professional racketeers and organized crime syndicates have a deliterious effect upon the general population and interstate commerce. Consequently, the within statute has been drafted broadly to permit Federal authorities to enforce Federal gambling laws against all gambling businesses organized, operated or related to professional racketeers. The executive branch of the Federal government is instructed that the above statement constitutes the policy of Congress for the within legislation. It is not the policy of Congress to involve the Federal government in purely local gambling ventures which are not so related to professional racketeers and organized crime syndicates.

*The draft statute is that initially proposed by the consultants and contains some differences from the Study Draft provisions.

This portion of the statute is purely a statement of policy to give direction to the enforcement of this statute by the executive branch of the Federal government. It shall not be construed as creating any requirement of proof that any individual prosecuted under this statute must be shown to be a professional racketeer or member of an organized crime syndicate nor that the gambling business involved is so related nor shall it be used as a defense to any indictment or in the trial of any case brought under this section.

Findings

Section 2. The Congress finds:

(a) illegal gambling involves widespread use of, and has an effect upon, interstate commerce and the facilities thereof; and

(b) illegal gambling is dependent upon facilities of interstate commerce for such purposes as obtaining odds, making and accepting bets and laying off bets: and

(c) money derived from or used in illegal gambling moves in interstate commerce or is handled through the facilities thereof; and

(d) paraphernalia for use in illegal gambling moves in interstate commerce.

Section 3. Illegal Gambling Business Prohibitions.

(1) Whoever participates in, works for, aids or assists or has a proprietary or monetary interest in an illegal gambling business shall be guilty of a class felony.

(2) As used in this section, the term illegal gambling business means betting, lottery or numbers activity which:

(a) is a violation of the laws of a State or political subdivision thereof in which said betting, lottery or numbers activity is conducted or in which a bet is placed or transmitted; and

(b) involves two or more persons who operate, work in, participate in, or have a proprietory or monetary interest in said betting, lottery or numbers activity or has been or remains in operation for a period in excess of 30 days or has a gross revenue of $1,000 in single day.

(3) As used in this section "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(4) This section does not apply to any bingo game, lottery or similar game of chance conducted by an organization exempt from tax under section 501(c)(3) of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private, shareholder, member or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

III. CONSULTANT'S COMMENTS

A. *Policy Considerations Involved in Determining the Scope of Federal Involvement in Gambling*

Any analysis of the nature, scope, extent, and justification for Federal regulation of gambling raises complex problems of balancing the legitimate interests of the State and Federal authorities. The States have traditionally enacted laws proscribing gambling activity of one kind or another. As a result there is considerable historical support for the view that the matter should primarily be left for State regulation. Complicating an already difficult problem is the fact that anti-gambling laws have always to some extent been a consequence of a view that gambling is immoral. Thus, as is plain from a look at various State gambling statutes each State will vary in its approach to gambling activity, and the scope and severity of its prosecutions will of course depend at least in part upon its moral attitude toward gambling.[1] That moral attitudes are still strong factors in this area is made evident by the controversies that have ensued over proposals to legalize off-track betting, as a means of raising additional revenues.

Thus, even in the State of New York, which has a population mixture of ethnic, religious, and racial groups, and a diversity of ethical and religious views that is probably unmatched in any other place in the world, proposals for even limited legalization of off-track betting have met with substantial opposition on moral grounds.[2] The result of this opposition has been to prevent any such program from being adopted although a State lottery has been permitted by constitutional amendment.[3]

In addition, opponents of legalized gambling have advanced several other weighty arguments against the desirability of legalized gambling, such as (1) that it will increase off-track betting and in effect act as a tax upon the poor; (2) that it will not bring in the revenues its seekers claim: (3) that it will not deter illegal gambling activity since it could not provide the services that the illegal bookmakers can afford, *i.e.*, credit, special types of bets, anonymity, telephone services, *etc.*; (4) that it will not substantially deter organized crime;[4] and (5) that it will eventually injure track operations.[5]

On the other hand, proponents of legalized gambling have advanced a number of weighty arguments in support of their position. Among their leading contentions is that additional much needed revenue will be raised; illegal gambling will be eliminated or substantially diminished; the public will be protected from the fraudulent and unlawful

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[1] Thus some penalize bettors, whereas others penalize only acceptors of wagers. Some allow wagering at race tracks whereas others do not even permit such circumscribed gambling activity.

[2] *See, e.g., Report of the Select Bi-Partisan Committee on Off-Track Betting*, pp. 12–13 (1964); *Final Report of Mayor's Citizens Committee On Off-Track Betting* (1959). Even here, of course, the moral sensibilities of Congressmen in other parts of the country resulted in Federal legislation prohibiting the sale of such lottery tickets by banks. *See* 1967 U.S. CODE CONG. & AD. NEWS, 2228–2254.

[3] N.Y. TAX LAW § 1301 (McKinney Supp. 1968).

[4] The experience with legal gambling in Nevada tends to support this view to some degree.

[5] *See, Report of the Select Bi-Partisan Committee on Off-Track Betting* 10–18 (1964).

practices of bookmakers and its closely associated profession loan sharking; government should not legislate solely on the basis of morals; and, betting habits are so ingrained in American society from the stock market to church sponsored bingo that illegal gambling can never by eradicated or controlled.[6]

The complexities that exist in fashioning an appropriate State policy toward gambling become compounded on the Federal level where national attitudes toward gambling must be considered and where problems of undue interference with State action arise. An analysis of current Federal legislation regarding gambling makes it clear that the exercise of Federal jurisdiction has been neither consistent nor completely successful.[7] In part this has been due to the fact that such legislation has been largely the result of haphazard historical development in response to congressional concern with particular aspects of the gambling problem, rather than a product of rational analysis as to what extent and upon what basis the Federal government should regulate gambling. It is also significant that outdated notions of Federal jurisdiction, especially with regard to the power of Congress to regulate interstate commerce, have resulted in attempts to predicate gambling legislation on the revenue power, which has raised similar difficulties to those raised by analogous action with regard to dangerous drugs.[8]

A more rational approach to Federal gambling laws must start with a consideration of the ends that should be served by such legislation, so that those ends may be more effectively achieved. At the outset, it should be noted that the arguments for and against legalization of gambling on a State level are not of primary concern in fashioning appropriate Federal legislation. A due regard for our Federal system requires that the States be given the widest possible latitude in legislating regulatory gambling activity so long as such statutes are consistent with and do not frustrate Federal policy.

The wisdom of laws proscribing betting as well as bookmaking should not ordinarily be a matter of Federal concern. Nor should the Federal government concern itself with moral and ethical dogmas that have frequently impeded a rational approach in this area. In a pluralistic society with an increasing diversity of moral and ethical precepts it is not sound legislative policy to utilize moral and ethical views that are not shared by a great number of American citizens as a basis for proscribing gambling. Even on the local level the wisdom of such a policy is questionable. But at the Federal level no sound purpose could conceivably be served by allowing disputes over the morality of gambling to further confuse the already difficult problems of defining the limits of Federal power in this area.

However, it is now evident, that quite aside from the issue of morality, gambling presents substantial dangers to the administration of effective government which are in themselves sufficient to warrant Federal regulation. Thus, there can be little question that illegal gambling

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[6] *See, Mayor's Citizens Committee on Off-Track Betting* (1959); 38 N.D.L. 627 (1963).

[7] For example, the wagering tax statutes for all practical purposes have been invalidated by the Supreme Court in *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968).

[8] *See, e.g., Leary* v. *United States*, 395 U.S. 6 (1969).

is a primary source of funds for the organized criminal element. Although no exact figures are available, estimates of the amount of money which finds its way into the coffers of organized crime through gambling range from $7 to $50 billion dollars.[9]

The existence of so large a cache in the hands of the criminal element poses dangers to Federal, State, and local governments that cannot be ignored. It is and can be used to finance a wide range of criminal activities such as the narcotics traffic, and it provides the economic muscle by which racketeers take over legitimate businesses, corrupt public officials and dominate labor unions.[10] Indeed, through the use of Swiss banks and corporations the day may not be far off when some of our larger corporations might fall prey to attempts by racketeers to obtain control, utilizing their ill gotten gains as the means of achieving this objective.[11]

These dangers posed by the organized criminal element cannot be stressed too strongly and since gambling provides a principal source of racket funds, the Federal government must enact legislation to combat illegal gambling. Indeed, the long standing association between syndicated crime and gambling in the United States is one principal reason why the experience of other countries, such as England, France and New Zealand, with licensed gambling, may not be strictly relevant to the claim that gambling should be legalized in the United States.[12]

Since the criminal syndicate operates across State lines, both for purposes of transmitting wagers and information essential to the operation of a gambling business, *i.e.*, odds, lines, results, *etc.*, the States are not able to fully cope with the problem. In addition local enforcement has been severely hampered by the corruptive influence of gamblers. It is therefore imperative that the Federal power must operate in this area, regardless of one's sensibilities as to its morality. In 1961 an attempt was made to curtail syndicated gambling by the enactment of sections 1084, 1952 and 1953 of Title 18.[13] However, while these statutes, were a step in the right direction, they were not completely adequate to deal with syndicated gambling, as the discussion above indicates.

Since the principal dangers resulting from illegal gambling stem not from its intrinsic evil, but rather the hands into which its proceeds fall and its natural byproduct of local corruption, a rational gambling policy on the Federal level should be geared principally to alleviation of these problems. The Federal government should, therefore, attempt to regulate those gambling activities which are connected directly or indirectly with organized crime or which by virtue

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[9] *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE TASK FORCE REPORT: ORGANIZED CRIME 3 (1967) [hereinafter cited as TASK FORCE REPORT: ORGANIZED CRIME].

[10] *See* TASK FORCE REPORT: ORGANIZED CRIME, *supra* note 9. at 2–3; statement of Robert F. Kennedy, in *Hearings on H.R. 468 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 87th Cong., 1st Sess. (1961).

[11] Wilson, *Corporate Vulnerability to Crime*, 6 THE CONF. BD., REC., 14–16 (1969).

[12] *See A Study of Legal Off-Track Betting in New Zealand, England, Australia, France* (Offices of the Mayor and Comptroller of the City of New York, 1963).

[13] *See* Kennedy, *The Program of the Department of Justice on Organized Crime*, 38 N.D.L. 637 (1963).

of their size, scope and membership are likely either to be under the domination of the organized criminal element or a corruptive influence. As a consequence it would seem preferable to make Federal jurisdiction depend on the size and nature of the gambling operation and the nature of the individuals involved rather than upon whether a particular gambling activity crosses a State line, or whether a gambler travels in interstate commerce to further the gambling operation. The most recent pronouncements of the Supreme Court interpreting the commerce clause of the United States Constitution clearly support the exercise of Federal jurisdiction over large-scale operations as a valid exercise of the power of Congress to regulate interstate commerce.[14] It is apparent that horses, athletes, wagering odds and racing information all travel in interstate commerce to some degree.[15]

However, although the Congress has the power to proscribe virtually all gambling operations, the exercise of such sweeping power would not be consonant with sound principles of Federalism nor with the limited Federal goals regarding gambling as enunciated above. There must be a basis for separating out those activities which warrant Federal regulation and those that do not.

It would seem that this distinction could most rationally be drawn based on three considerations: (1) the size of the operation and the amount of business it does; (2) the number of persons involved in its operations; and (3) the nature of the individual or individuals involved, *i.e.*, individuals known to be members of organized crime syndicates. To some extent this approach is taken in bills presently pending in Congress.[16] The larger the operation and the greater the number of its members, the more likely it is that it will be connected directly or indirectly with syndicated crime.

It is not suggested that the Federal government should preempt the States in this connection but rather that jurisdiction should be concurrent. There are numerous advantages to such a plan. There will be discretion in the Federal government to decline to exercise its jurisdiction in cases that are more appropriately handled by the States, while at the same time affording Federal authorities the option of acting where the State authorities either cannot or will not act. A Federal jurisdiction in this area would also be desirable because experience has indicated that the likelihood of corruption is lessened when Federal rather than local officials have power to enforce laws against large scale gambling operations. Moreover, tying Federal gambling statutes to the commerce power rather than to a particular interstate call or specific interstate travel, would remove what on some occasions has resulted in extremely difficult problems of trial proof, while at the same time eliminating the sometimes ludicrous fact situations where the Federal jurisdictional peg appears somewhat strained. As noted above, while it is desirable to consider the nature of the individual involved in asserting Federal jurisdiction, it would be virtually impossible to draft an adequate and constitutional statute to achieve this objective. However, by substantially broaden-

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[14] *See* draft section 201.

[15] *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

[16] *See* the pending Organized Crime Control Act of 1969, S. 30, 91st Cong., 2d Sess. (1970).

ing the Federal jurisdictional base through use of the commerce power, better opportunities will be created for the government to net individuals with organized crime ties.

With regard to those particular individuals who do not warrant Federal attention, any information developed by Federal authorities could and should be turned over to local authorities.

Therefore, in utilizing the "affecting commerce" rationale as a jurisdictional peg rather than the interstate nature of a particular phase of the operation, it would be wise to provide that either the size of the business or the number of its members be sufficient to establish Federal jurisdiction. The bills presently pending do not take this approach and could conceivably fail to reach many cases which will be substantial enough to warrant Federal regulation.

The Federal gambling statutes now existing have at times contained extremely unsatisfactory definitions of what constitutes gambling activity. In our view the New York statutes present very sound definitions and may be useful in drafting definitions for Federal purposes. Federal gambling statutes should reach all participants in a gambling operation whether they be pick-up men, runners, stickmen, writers, principals, etc.[17] Of course, it may be desirable to graduate penalties in accordance with the size of and participation in the operation, but this is a matter that is more appropriately considered in the recommendations relating to sentencing.

Although it is the writer's view that, basically, Federal gambling laws should be tied to the commerce power, there are special reasons for retaining some current regulating statutes that deal with special problems, *i.e.*, laws forbidding interstate transportation of slot machines.

In addition, notwithstanding the undesirability of tying gambling statutes to the revenue power, there are some sound practical reasons for retaining statutes similar to the wagering tax laws. There is available a large reserve of agents skilled and experienced in enforcing the old wagering tax laws who are employed by the Internal Revenue Service. Using the commerce power as the sole jurisdictional base would give virtually exclusive gambling jurisdiction to the Federal Bureau of Investigation, and unduly strain that agency's already overtaxed resources. Thus, it would seem that strict logic should give way to the needs of efficient enforcement administration and it is recommended that the wagering tax statutes, with some modifications designed to conform to the Supreme Court decisions in *Marchetti* and *Grosso* and to eliminate some of the needless complexities obtaining under the old law, be reenacted so as to utilize to the maximum extent the resources available. Such a bill is presently pending and will be discussed in more detail below.

B. *Analysis of Present Federal Statutes Relating to Gambling*

(1). *Introduction.*—Presently, the Federal antigambling statutes are nearly as diverse and bifurcated as the Federal narcotics statutes.

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[17] For a good description of the various roles and echelons in gambling operations, *see* Ploscowe, *New Approaches to Gambling, Prostitution and Organized Crime*, 38 N.D.L. 654 (1963).

Some of the statutes are contained in Title 15, some in Title 18 and others in Title 26.[18] The potential sentences for violating the various sections range considerably.[19] In addition, several Federal agencies have concurrent jurisdiction in policing violations of some of the sections, while exclusive enforcement jurisdiction has been conferred with regard to other sections. Thus, both the Federal Bureau of Investigation and the Internal Revenue Service are permitted to investigate violations of 18 U.S.C. §§ 1084 and 1952, while only the I.R.S. investigates the Title 26 violations.

In some respects, the overlapping investigative jurisdiction has been beneficial as each of the aforementioned agencies has for the most part approached its assignment from a different perspective and consequently has utilized different investigative techniques. Thus, at least in New York, I.R.S. has in the past relied heavily on undercover infiltration and the majority of their cases involve betting on the part of an undercover agent. On the other hand, the F.B.I. is generally loath to use undercover agents and the majority of their gambling cases are made on the basis of interviewing bettors, analyzing toll slips and the like.[20]

Unfortunately, the overlapping jurisdiction has, due to very poor cooperation between the agencies at all echelons, sometimes impeded investigation. Thus, in some cases the F.B.I. has investigated, been unable to find an interstate violation and "neglected" to turn over information which could have been of assistance in making a tax case to the I.R.S. Vice versa, there have been occasions when the I.R.S. for some reason or other has been unable to follow up leads and failed to provide these leads to the F.B.I. While such a state of facts cannot be attributed to the statutes, it should be kept in mind in approaching the problem of Federal proscriptions upon gambling, that historically there has been as much competition as cooperation between the various Federal agencies. This has persisted in spite of the manifest policy of coordination behind the organized crime program and indeed, this writer is not convinced that such competition is completely undesirable.

(2) *Gambling Statutes Contained in Title 18.*—Chapter 50, sections 1081–1084, of Title 18 is captioned gambling and presumably form the core of the Federal antigambling laws.

Section 1081 sets out general definitions such as "gambling ship," "gambling establishment," "vessel," "American vessel" and "wire communication facility."

Section 1082 makes it a crime for anyone "who is on an American vessel or is otherwise under or within the jurisdiction of the United

[18] While the Supreme Court in a series of decisions has rendered the Title 26 sections ineffective. *Grosso* v. *U.S.*, 390 U.S. 62 (1968); *Marchetti* v. *U.S.*, 390 U.S. 39 (1968), these statutes are still constitutional and utilized from time to time.

[19] 26 U.S.C. § 7272—$50.00 maximum fine; 18 U.S.C. § 1952—5 years maximum.

[20] This difference in approach is also attributable in part to the role which each agency views itself as playing in enforcing antigambling statutes. Thus, since I.R.S. is basically interested in the statutes relating gambling to taxes, until recently, almost all bookmaking and numbers operations were fair game. The F.B.I., however, has restricted its activities to dealing with vast interstate syndicate type of operations.

States" to either directly or indirectly own, operate or assist in operating a gambling ship or to solicit or induce anyone to participate in the gambling activities conducted on such a ship. The penalty imposed by section (b) is a maximum prison term of 2 years, a $10,000 fine or both. In addition, the owner of the vessel will have it forfeited if it is used in violation of the section.[21] Needless to say the section has been rarely invoked.[22]

Section 1083 of Title 18 also deals with the problem of gambling at sea and is also rarely utilized. Subsection (a) makes it unlawful to operate or use or permit the operation or use of a vessel to carry passengers to or from a gambling ship not within the jurisdiction of the United States. A civil penalty of $300 can be imposed on the master or person in charge of the vessel and $200.00 per passenger on the owner or charterer.

Section 1084 of Title 18 was passed as part of the overall policy of combatting the operation of nationwide gambling syndicates. This section proscribes interstate transmission by wire or by telephone of bets, payoffs, or other wagering information by individuals "engaged in the *business* [23] of betting or wagering." The penalty imposed is a maximum of 2 years plus a $10,000 fine or both. The statute exempts information for use in news reporting of sporting events. It also exempts gambling information transmitted between states in which betting on the subject sports event is legal.

Subsection (d) provides that any common carrier subject to the jurisdiction of the Federal Communications Commission must discontinue service of its facilities to a subscriber upon written notification of any Federal, State or local law enforcement agency that the facility is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in volation of Federal, State or local law. Notification must be given the subscriber and a hearing will be afforded upon request.

Section 1084 has withstood a variety of constitutional challenges. Thus, courts have rejected arguments that it usurped power reserved to States, violated free speech rights accorded by the first amendment and is unconstitutionally vague and uncertain.[24]

One of the problems caused by the present wording of this statute is that the term "transmission" has been interpreted by some courts to mean "to send" but not "to receive." [25] Thus, under this interpretation the interstate receipt by a bookmaker of a bet, the very transaction

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[21] 18 U.S.C. § 1082(b).

[22] Discussion of issues likely to be raised under this section is contained in *United States* v. *Black*, 291 F. Supp. 262 (S.D. N.Y. 1968).

[23] As originally drafted by the Department of Justice, the bill proscribed all bettors from transmitting such information. This was revised by the Senate. *See* Pollner, *Attorney General Robert F. Kennedy's Legislative Program to Curb Organized Crime and Racketeering*, 28 BROOKLYN L. REV. 37, 46 (1961). Thus, the statute as presently worded has not been useful in aiding to combat wire services heavily relied upon by professional gamblers and bookmakers.

[24] *See Truchinski* v. *United States*, 393 F.2d 627 (8th Cir.), *cert. denied*, 393 U.S. 831 (1968); *United States* v. *Borgese*, 235 F. Supp. 286 (S.D. N.Y. 1964); *United States* v. *Smith*, 209 F. Supp. 907 (E.D. Ill. 1962).

[25] *See Telephone News System, Inc.* v. *Illinois Bell Tel. Co.*, 220 F. Supp. 621 (D. Ill. 1963), *aff'd*, 376 U.S. 782 (1964). *Compare Sagansky* v. *United States*, 358 F.2d 195 (1st Cir.), *cert. denied*, 385 U.S. 816 (1966).

sought to be prevented, is not a crime. Prosecutors have circumvented this shortcoming in the statute by charging the bookmaker in this situation with violating 18 U.S.C. § 2 (aiding and abetting), *i.e.*, causing the transmission.[26] Such an approach, however, is both cumbersome and confusing and involves rather complex instructions to the jury. Any new or amended statute should remedy this problem.

Another criticism with regard to the wording of the section has been directed to the term "bets or wagers." [27] In *Saganshy* v. *United States*. 358 F. 2d 195 (1st Cir. 1966), the court rejected an argument based on this plural term that a person had to be in the interstate gambling business. The Court read the phrase to mean "bet or wager" and ruled that Congress intended to reach a single use of interstate facilities by one otherwise in the business of betting. Again any revision of the statute should eliminate this ambiguity.

With the exception of the draftmanship problems listed above, section 1084 has assisted in the prosecution of bookmaking operations which are interstate in nature. However, it has proved to be difficult to uncover interstate calls and communications. Usually an almost current bettor must be located before prosecution can be had. The reason for this is that most of the telephone companies throughout the country retain their toll slips for only a limited period of time. Once the toll slips are destroyed, it becomes exceedingly difficult to establish the crime with sufficient specificity.

In addition there are many major organized crime-type bookmakers who rely heavily on the telephone but who conduct a purely intrastate business to avoid Federal law enforcement implications. There appears to be no good reason why the Federal government should default in this area especially in view of the policy that Federal enforcement helps in hindering local corruption.

Consequently, serious consideration should be given to rewriting this statute to proscribe intrastate as well as interstate telephone calls in the conduct of a bookmaking operation. As already indicated, an adequate jurisdictional base can be found in the power of Congress to legislate in areas affecting interstate commerce.

As noted above there is a substantial and extensive relationship between gambling and organized crime. Consequently, chapter 95 of Title 18, captioned "racketeering," also contains antigambling provisions. 18 U.S.C. § 1952, another statute passed under Attorney General Kennedy, makes it a crime to either travel in interstate commerce or use an interstate facility with intent (a) to distribute the proceeds of an unlawful activity, (b) commit a crime of violence to further any unlawful activity or (c) otherwise promote, manage, establish, carry on or facilitate the promotion, management, establishment or carrying on of an unlawful activity and, after travelling in interstate commerce or using an interstate facility with the requisite intent, to perform any of the acts specified in (a), (b) or (c).[28] Unlawful activity is de-

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[26] *See United States* v. *Kelley*, 395 F.2d 727 (2d Cir.), *cert. denied*, 393 U.S. 963 (1968).

[27] The statute reads "Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of *bets or wagers* . . ."

[28] The latter portion of requiring an overt act was added after doubts expressed by Senator Ervin as to the scope of the section.

fined to include gambling offenses in violation of the laws of the State in which they are committed or of the United States.

Unlike the other Federal gambling statutes, the penalty provisions for violating section 1952 are severe, and include a maximum of 5 years in prison, a $10,000 fine or both.

Again this statute has withstood a number of constitutional challenges, *i.e.*, due process, vagueness, encroachment upon powers reserved to the States, equal protection, abridgement of travel.[29]

Section 1952 is a rather clumsy and cumbersome statute to deal with and has raised a host of issues requiring Court interpretation. Problems have arisen with regard to the requirement that State law be violated.[30] The issue of the intent necessary to violate the statute has frequently been litigated.[31] No specific intent to violate Federal law has been imported.

While originally designed to combat interstate gambling syndicates, it has frequently been utilized where the interstate aspects are but incidental to the gambling. Thus, in *United States* v. *Barrow*,[32] a purely local gambling syndicate was prosecuted because several of its members happened to reside in a State other than where the gambling business was conducted. Thus, their commutation constituted interstate travel and exposed all members of the ring who knew of their residence to Federal prosecution.[33]

In another case, defendant who resided in the State where the gambling operation was conducted was convicted because on some occasions he visited his son in another State and on the return trip went directly to the gambling operation.[34]

In reaching conduct beyond the mere use of an interstate facility, however, section 1952 has helped to considerably expand Federal anti-gambling enforcement. Moreover, this statute, unlike section 1084 refers to use of an interstate facility rather than a call in interstate commerce. Thus, an argument could be made that section 1952 might encompass an intrastate use of an interstate facility, but no cases have yet so construed the statute in this fashion. It is, however, difficult to justify the disparite sentence structure for almost identical offenses when comparing section 1084 to section 1952, *i.e.*, 2 year maximum under section 1084 versus 5 year maximum under section 1952. There appears to be no good reason why the strictures of sections 1084 and 1952 should not be combined into a comprehensive statute with a wide jurisdictional base.

Section 1953 of Title 18 proscribes interstate transportation of wagering paraphernalia with certain exceptions carved out for trans-

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[29] *See Gilstrap* v. *United States*, 389 F. 2d 6 (5th Cir.), *cert. denied*, 391 U.S. 913 (1968); *United States* v. *Barrow*, 363 F. 2d 62 (3d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967); *United States* v. *Zizzo*, 338 F. 2d 577 (7th Cir. 1964), *cert. denied*, 381 U.S. 915 (1965); *United States* v. *Borgese*, 235 F. Supp. 286 (S.D. N.Y. 1964).

[30] *See United States* v. *Ross*, 374 F. 2d 227 (6th Cir. 1967), *vacated on other grounds*, 390 U.S. 204 (1968).

[31] *See United States* v. *Bash*, 379 F. 2d 483 (7th Cir.), *cert. denied*, 389 U.S. 930 (1967); *United States* v. *Izzi*, 385 F. 2d 412 (7th Cir. 1967).

[32] 363 F. 2d 62 (3d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967).

[33] *See also United States* v. *Zizzo*, *supra*. *Compare United States* v. *Hawthorne*, 356 F. 2d 740 (4th Cir.), *cert. denied*, 384 U.S. 908 (1966).

[34] *United States* v. *Carpenter*, 392 F.2d 205 (6th Cir. 1968).

porting parimutuel betting equipment, newspapers or similar publications and betting materials into a State in which betting is legal under the statutes of that State.

This section along with section 1952 opens the door to Federal enforcement in gambling areas other than straight bookmaking. Thus, card games, dice games and the numbers racket come within the purview of this section when interstate transportation is involved.

The interstate requirement has restricted Federal activities in these areas, however, and it is recommended that serious consideration be given to broadening the jurisdictional base to encourage additional Federal enforcement.

Sections 1301 through 1306 of Title 18 deal with various Federal proscriptions relating to lotteries. Thus, section 1301 makes it a crime to cause the interstate transportation of lottery tickets or other papers used in lotteries or to receive the same with knowledge that it has been so transported. A lottery is defined as any scheme offering prizes dependent in whole or in part upon lot or chance.[35] A maximum penalty of 2 years in prison plus a $1,000 fine is set forth. Section 1302 proscribes the mailing of such tickets and papers. In addition, it proscribes the mailing of any article described above. The maximum penalty is 2 years plus a $1,000 fine for a first offense and 5 years for any subsequent offense.

Section 1303 makes it a crime for postal employees to knowingly assist in the mailing of such tickets and papers. Postal employees face only a 1 year and $100 fine maximum sentence.

Section 1304 makes it a crime to knowingly broadcast or permit the broadcast of information concerning a lottery. The violator can be imprisoned for up to 1 year and fined $1,000.

Section 1305 exempts fishing contests not conducted for profit from the proscriptions of this chapter.

Finally, section 1306, enacted in 1967 makes it a crime punishable by a maximum of 1 year and $1,000 fine to knowingly violate certain sections of banks and banking statutes, the Federal Reserve Act, Federal Deposit Insurance Act and the National Housing Act. This statute prohibits Federally insured banks from selling lottery tickets and was passed in direct response to the sale of New York State lottery tickets by banks.[36] The proponents of the law argued that the Federal government has had a long standing policy to deny lotteries the use of Federal facilities as evidenced by sections 1301–1305.

The question of the continued vitality of the antilottery statutes in view of the fact that several States (New York and New Hampshire) sponsor such lotteries as fund raising devices can be questioned. The writer personally believes that the Federal government should remain neutral in this area and favors the abolition of the Federal restrictions, except insofar as lotteries may constitute unlawful gambling activity proscribed by other Federal statutes. If any State feels that it is desirable to protect its citizens from the lures of a sister States lottery appropriate State legislation would appear to be sufficient.

On the other hand, it should be remembered that lotteries are forms

[35] A good summary of the definitional problems involved and case law on this subject is contained in Note, 57 GEO L. J. 573, 574–580 (1969).

[36] *See* 1967 U.S. CODE CONG. & AD. NEWS 2228–2241.

of legalized gambling. Consequently many of the arguments expressed in part I of this report are applicable to support continuation of these statutes. If the statutes survive, however, they should be revised to provide uniform penalties. The writer also feels that they should be more narrowly drawn so that the summer tourist who visits New York and New Hampshire and purchases a lottery ticket will not commit a crime upon returning home with the ticket.

(3) *Title 15 Gambling Provisions.*—Title 15 contains several rarely used sections dealing with gambling. Chapter 24, titled "transportation of gambling devices" contains a provision which makes it unlawful to transport any gambling devices to any place in a State, the District of Columbia or a possession of the United States from any place outside of the State, the District of Columbia or possession of the United States.[37] Again, this section excepts transportation to States where gambling is legal in whole or in part.

The term gambling device is defined to mean various types of slot machines which return money, any other machine or mechanical device designed and manufactured primarily for use in connection with gambling,[38] or any nonattached subassembly or essential part of such a machine or device.

Section 1173 of Title 15 makes it a crime to manufacture, repair, *etc.*, any gambling device unless the manufacturer registers with the Attorney General. Since many State statutes make the possession of gambling devices a crime the recent Supreme Court cases on registration render doubtful the validity of this statute.[39]

Section 1174 of Title 15 requires that all gambling devices and all packages containing such be labelled and marked as to the shipper, consignee and nature of the article shipped.

Section 1175 outlaws the manufacture, possession, use, *etc.*, of gambling devices in the District of Columbia or other maritime and territorial jurisdiction of the United States.

Section 1176 provides a maximum of 2 years plus a $5,000 fine for violation of any of the above sections and section 1177 provides for confiscation of such devices manufactured, possessed or used in violation of the foregoing provisions.

Finally section 1178 exempts racetrack parimutuel betting machines and certain other types of devices not here relevant from the proscriptions of this statutory scheme.

While these provisions have not been as frequently employed as other Federal gambling statutes, there appears to be sufficient utilization of them to warrant their continued use as regulatory measures. It is recommended that the registration provision [40] either be eliminated or revamped to bring it up to date with the latest Supreme Court cases referred to above.

(4) *Gambling—Tax Statutes.*—Title 26 contains a scheme of provisions which, until recently,[41] gave Federal law enforcement officials

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[37] 15 U.S.C. § 1172.

[38] 15 U.S.C. § 1171.

[39] *See Grosso* v. *United States*, 390 U.S. 62 (1968); *Leary* v. *United States*, 395 U.S. 6 (1969).

[40] 15 U.S.C. § 1173.

[41] As noted above, these statutes were rendered ineffective in the cases of *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968).

the widest possible base upon which to attack bookmakers. Utilizing the taxing power, Congress mandated that a special tax of $50 be imposed upon any person engaged in the business of accepting wagers or engaged in receiving wagers for or on behalf of a person engaged in such a business.[42] In addition an excise tax of 10% is imposed on the bookmaker on the total of all wagers accepted.[43]

The statute also requires that the bookmaker register with the Internal Revenue Service by providing his name, home address, bookmaking address and the name and place of residence of each person engaged in accepting wagers in his behalf.[44] The bookmaker is also required to keep daily records showing the gross amount of all wagers on which he is liable, such books to be perpetually available for inspection [45] and to post the revenue stamps conspicuously in their principal place of business or on their person.[46]

The term "wager" is defined as including bets on sporting events or contests, wagering pools with respect to sports events or contests and any lottery conducted for profit.[47]

State licensed parimutuel wagering enterprises, certain coin operating devices and State conducted sweepstakes are exempted,[48] since they are generally taxed by the States or under other sections of the Code.

Certain other taxes are imposed under this scheme which have some bearing on gambling, but are not utilized frequently as law enforcement devices. They includes taxes on cards,[49] and coin operated amusement gaming devices.[50]

There is a wide choice of penalty provisions applicable to violations of the foregoing statutes. They range from a maximum 5 years imprisonment plus a $10,000 fine [51] to a maximum $50.00 fine.[52]

Section 7201 has been rarely invoked, however, in bookmaking prosecutions—the feeling apparently being that the requirement of willfulness was too difficult to prove. More commonly, a bookmaker was charged with violating section 7203,[53] a misdemeanor, which provided a maximum of 1 year in jail plus a $10,000 fine. In addition, violation of section 7262 [54] was frequently alleged exposing the bookmaker, in some jurisdictions [55] to a mandatory minimum fine of $1,000 and a maximum fine of $5,000.

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[42] 26 U.S.C. §§ 4411, 4401.
[43] 26 U.S.C. § 4401.
[44] 26 U.S.C. § 4412.
[45] 26 U.S.C. §§ 4403, 4423.
[46] 26 U.S.C. § 6806(c).
[47] 26 U.S.C. § 4421. Lotteries include numbers, policy and similar types of betting.
[48] 26 U.S.C. § 4402.
[49] 26 U.S.C. § § 4451–55.
[50] 26 U.S.C. §§ 4461–63.
[51] 26 U.S.C. § 7201.
[52] 26 U.S.C. § 7272. While this provision was included in many indictments and informations in the early years of the enforcement of this statutory scheme, it was later interpreted as a civil penalty and rarely charged in later years.
[53] 26 U.S.C. § 7203.
[54] 26 U.S.C. § 7262.
[55] The Courts have divided as to whether or not the imposition or execution of the fine can be suspended.

As noted, the wagering tax statutes have been rendered ineffective by the Supreme Court decisions which have held that no one may be prosecuted for violating them if an assertion of the constitutional privilege against self incrimination is made at trial. Since all bookmakers will, of course, invoke the privilege if prosecuted, there are no longer any prosecutions.[56]

Nevertheless, since the writer recommends that the wagering tax statutes be revised to bring them in line with the current interpretation of the Constitution,[57] analysis of the problems which existed in attempting to implement the "old" wagering tax law is warranted.

One of the factors which most often hampered effective enforcement of the law was the general inability of agents to arrest without a warrant because violation of the statutes was looked upon as a misdemeanor. In the absence of a valid warrant, an agent of the Internal Revenue Service is authorized to make an arrest for a misdemeanor related to the revenue laws which is "committed in his presence." [58] In gambling prosecutions gambling paraphernalia evidence is invaluable and sometimes crucial. All too frequently in the past, such evidence has been suppressed because a technically defective search and/or arrest warrant was issued. In these cases, it frequently was the case that during the investigation abundant evidence had been developed to justify the arrest but no crime was committed in the presence of the arresting agents.

The easy solution to this problem, of course, would appear to be to instruct prosecutors to be more careful in drawing their warrants. However, as noted above, the objections often have been based and sustained on pure technicalities which are difficult to guard against since the warrants are usually drawn under severe pressures of time.

The above problem is certainly not serious enough in and of itself to justify raising the status of the crime from misdemeanor to felony. To avoid the problem, serious consideration should be given to broadening the scope of the arrest powers of I.R.S. enforcement agents and authorizing them to make arrests if they have reasonable grounds to believe that a misdemeanor has been committed and the person arrested was the person who committed or aided and abetted the commission of a misdemeanor.

A second problem frequently encountered in the wagering tax cases was proving that the defendant was in the "business" of accepting wagers. As noted above, the I.R.S. usually had undercover agents bet with bookmakers to prove a violation. It was often too time consuming, expensive and hazardous to have more than one agent bet with a particular bookmaker. In several cases, juries believed the government agent's testimony of placing bets with the defendant but acquitted finding that accepting bets from one bettor does not prove that the acceptor is in the "business" of accepting bets.

A more significant problem limiting the effectiveness of the wagering tax laws in combatting gambling organizations was that the statute

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[56] Since the statutes are still constitutional, occasionally a bookmaker will waive the privilege and plead guilty to avoid a more severe sanction.

[57] *Compare Marchetti* v. *United States*, *supra*, *and Grosso* v. *United States*, *supra*, *with United States* v. *Kahriger*, 345 U.S. 22 (1953), and *Lewis* v. *United States*, 348 U.S. 419 (1955).

[58] Unfortunately most if not all of these cases are unreported.

only imposed the duty to register and pay the tax on those accepting wagers for themselves or receiving wagers on behalf of someone engaged in the business of accepting wagers. Thus, unless the government could establish that an individual either physically accepted a bet, had a proprietary interest in the gambling operation or had knowledge that those responsible had not paid the tax there was no liability. This resulted in exempting certain members of the operation, *i.e.*, pick-up men, runners, lookouts, guards.[59]

Finally, one of the most vexing problems faced by the prosecutor in a wagering tax case was proving that the violation was willful. This required the prosecutor to adduce evidence that the defendant had actual knowledge of the requirement that he register and pay the tax. Absent an admission or a prior Federal arrest for the same offense, the state of defendants' knowledge was difficult to establish. Occasionally, a court would permit the government to introduce its newspaper file containing numerous articles publicizing the wagering tax laws into evidence as circumstantial evidence of defendants' knowledge.[60]

More often the government introduced evidence of concealment to establish knowledge.[61] The probative force of such evidence is not very high, however, in view of the fact that the concealment could well have been from State rather than Federal prosecution.[62] Thus, in some prosecutions the government has been forced to introduce evidence to establish that the bookmaker was not afraid of or attempting to conceal its activities from local law enforcement agencies. In these cases a trial within a trial takes place with regard to local police corruption with the attendant danger that the major issues are not properly focused upon by the jury.[63]

Added to this problem is the fact that most informations and indictments include a lesser offense of nonwillful violation [64] sometimes placing the defendant on the horns of a dilemma. The writer viewed one trial in which the government could not prove willfullness on its direct case. The Court so found but refused to dismiss the indictment after the government's case since it contained in the same count a nonwillful charge. Had the defendant rested at this point he would have subjected himself only to a fine. Instead he attempted to beat the entire case, took the stand and in so doing established the missing link to the government's proof with regard to a willful violation and was convicted of the same.

There would appear to be little to support the perpetuation of such oddities. Thus, it is recommended that the element of willfulness be removed from the government's proof.

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[59] *See United States* v. *Calamaro*, 354 U.S. 351 (1957); *Ingram* v. *United States*, 360 U.S. 672 (1959); *Interbartolo* v. *United States*, 303 F.2d 34 (1st Cir. 1962); *United States* v. *Cooperstein*, 221 F. Supp. 522 (D. Mass. 1963).

[60] *United States* v. *Secor*, 280 F. Supp. 345 (S.D. N.Y. 1966).

[61] *United States* v. *Marquez*, 332 F.2d 162 (2d Cir.), *cert. denied*, 379 U.S. 890 (1964).

[62] *See Driscoll* v. *United States*, 356 F.2d 324 (1st Cir. 1966), *vacated on other grounds*, 390 U.S. 202 (1968).

[63] One court has lessened the government's burden by creating "a rebuttable presumption that defendant knew the law." *United States* v. *Edwards*, 334 F.2d 360 (5th Cir. 1964), *cert. denied*, 379 U.S. 1000 (1965).

[64] 26 U.S.C. § 7262.

C. *State Legislation*

Every State in the union has some statutes which outlaw different forms of gambling. As might be expected these statutes vary considerably in approach, degree and substance. For the most part the statutes are far more specific and comprehensive than the Federal laws in this area and are not of great value in drawing a Federal scheme. However, many of the definitional sections of these statutes are well drafted and helpful. For example, section 225 of the New York Statute [65] set out below contains many well thought out definitions useful to an overall statutory scheme:

§ 225.00 *Gambling offenses; definitions of terms*

The following definitions are applicable to this article:

1. 'Contest of chance' means any contest game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.

2. 'Gambling.' A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.

3. 'Player' means a person who engages in any form of gambling solely as a contestant or bettor, without receiving or becoming entitled to receive any profit therefrom other than personal gambling winnings, and without otherwise rendering any material assistance to the establishment, conduct or operation of the particular gambling activity. A person who gambles at a social game of chance on equal terms with the other participants therein does not otherwise render material assistance to the establishment, conduct or operation thereof by performing, without fee or remuneration, acts directed toward the arrangement or facilitation of the game, such as inviting persons to play, permitting the use of premises therefor and supplying cards or other equipment used therein. A person who engages in 'bookmaking', as defined in this section is not a 'player.'

4. 'Advance gambling activity'. A person 'advances gambling activity' when, acting other than as a player, he engages in conduct which materially aids any form of gambling activity. Such conduct includes but is not limited to conduct directed toward the creation or establishment of the particular game, contest, scheme, device or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of the playing phases thereof, toward the arrangement of any of its financial or recording phases, or

[65] N.Y. PEN. LAW § 225.00 (McKinney 1967).

toward any other phase of its operation. One advances gambling activity when, having substantial proprietary or other authoritative control over premises being used with his knowledge for purposes of gambling activity, he permits such to occur or continue or makes no effort to prevent its occurrence or continuation.

5. 'Profit from gambling activity.' A person 'profits from gambling activity' when, other than as a player, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of gambling activity.

6. 'Something of value' means any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge.

7. 'Gambling device' means any device, machine, paraphernalia or equipment which is used or usable in the playing phases of any gambling activity, whether such activity consists of gambling between persons or gambling by a person involving the playing of a machine. Notwithstanding the foregoing, lottery tickets, policy slips and other items used in the playing phases of lottery and policy schemes are not gambling devices.

8. 'Slot machine' means a gambling device which, as a result of the insertion of a coin or other object, operates, either completely automatically or with the aid of some physical act by the player, in such manner that, depending upon elements of chance, it may eject something of value. A device so constructed, or readily adaptable or convertible to such use, is no less a slot machine because it is not in working order or because some mechanical act of manipulation or repair is required to accomplish its adaptation, conversion or workability. Nor is it any less a slot machine because, apart from its use or adaptability as such, it may also sell or deliver something of value on a basis other than chance. A machine which sells items of merchandise which are of equivalent value, is not a slot machine merely because such items differ from each other in composition, size, shape or color.

9. 'Bookmaking' means advancing gambling activity by unlawfully accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcomes of future contingent events.

10. 'Lottery' means an unlawful gambling scheme in which (a) the players pay or agree to pay something of value for chances, represented and differentiated by numbers or by combinations of numbers or by some other media, one or more of which chances are to be designated the winning ones; and (b) the winning chances are to be determined by a drawing or by some other method based upon the element of chance; and (c) the holders of the winning chances are to receive something of value.

11. 'Policy' or 'the numbers game' means a form of lottery in which the winning chances or plays are not determined upon the basis of a drawing or other act on the part of persons conducting or connected with the scheme, but upon the basis of the outcome or outcomes of a future contigent event or events otherwise unrelated to the particular scheme.

12. 'Unlawful' means not specifically authorized by law. L.1965, c. 1030; amended L.1967, c. 791, § 31, eff. Sept. 1, 1967.[66]

D. *Analysis of Pending Legislation*

(1) *Department of Justice.*—As noted above, two significant statute [67] are presently pending in Congress, both of which attempt to expand Federal coverage over illegal gambling.

As noted above, the first part of this bill, which is to become section 1511 of Title 18 if passed, is aimed at combatting local corruption. As such it represents a solid step forward in the war against gambling. The Federal government has neither the funds nor the manpower to combat all phases of gambling. In addition for the reasons set forth in part A, *supra*, the Federal government as a matter of policy should not attempt to police all gambling. Thus, the control of gambling must in large part rely on local law enforcement. In the past the efforts of local law enforcement in this area have been severely impeded by the ability of gamblers to corrupt the enforcers.[68] New section 1511 if vigorously enforced should diminish this problem.

As presently structured new section 1511 makes it a crime to devise or participate in a scheme to obstruct or hinder the enforcement of local laws, if, with intent to facilitate, an illegal gambling business (as later defined),

(1) one of the participants does an act to effect the object of the scheme; and

(2) one of the participants is an official or employee responsible for the execution or enforcement of criminal laws; and

(3) one of the participants works in an illegal gambling business.

An illegal gambling business is one which is in violation of local law, involves 5 or more persons in its operation or revenue distribution and has been in existence for at least 31 days or has a gross revenue of $2,000 in any single day.

In the opinion of the writer this statute is ambiguous and unnecessarily narrow. For instance, if a scheme is developed to corrupt an official and an overt act performed by one of the participants prior to approaching or involving a local official or employee and the scheme is discovered at this stage no substantive offense has been committed and the only possible charge to be lodged is the rather abstruse conspiracy of conspiring. In effect, good police work is penalized for discovering the potential offense too early. Alternatively, if a local of-

[66] Several years ago the American Bar Association Commission on Organized Crime formulated a Model Antigambling Act. *See* King, *Model Gambling Act and Commentary*, 2 ORG. CRIME & LAW ENF. 57 (1953).

[67] Organized Crime Control Act of 1969, S. 30, 91st Cong., 2d Sess., Title VIII, B & C. (1970).

[68] *See* Gardiner, *Public Attitudes toward Gambling and Corruption*, 374 ANNALS 123 (1967).

ficial or employee is approached but refuses to participate in the scheme and fails to report the approach no offense is committed.

In addition, there seems to be no reason why someone other than a proprietor, operator or employee of a gambling business should be immune if he attempts to corrupt a local official with regard to a gambling business. Yet this is precisely what the statute does by requiring that one of the participants be a proprietor, operator or employee of the gambling business. It does not necessarily follow, especially in the organized crime area, that only people so connected with the gambling business will attempt to corrupt local officials.

Finally, proof of the scope of the gambling business will be exceedingly difficult to gather as it will require two investigations. Thus, the corruption itself will have to be investigated. Then after the corruption is established the scope and size of the gambling operation must be discovered to ascertain whether or not jurisdiction exists. This could require tracing the operation back from the corrupter which could be quite difficult. In addition it could prove both frustrating and a waste of time upon discovery that jurisdiction is lacking due to the size of the operation. There is no quicker way to diminish the activity of law enforcement agencies in enforcing statutes than to have them conduct a prolonged investigation only to find out that they have no jurisdiction and will receive little administrative credit. All Federal enforcement agencies rely heavily on statistics to justify their existence and budget and are loath to involve manpower on the contingency that there may be jurisdiction. Whatever can be said for limiting the definitions of gambling so that Federal agents will not chase petty gamblers, such limitations do not appear to be appropriate to an anti-corruption law. Moreover since local corruption is not likely to be coped with adequately on a local level and since corruption of public officials with respect to a local gambling operation increases the likelihood that a syndicate will also corrupt the same official, a broader interposition of Federal power is warranted.

The second part of the bill, which if passed will become section 1955 makes it a crime for anyone to participate in an illegal gambling business. The definition of illegal gambling business is exactly the same as that contained in what will be section 1511.

In requiring that a minimum of 5 persons be involved before the Federal government obtains jurisdiction, the law leaves uncovered many significant gamblers and bookmakers with organized crime ties. For instance in the last several years organized crime figures such as Pasquale Borgese, Nicholas "Jiggs" Forlano, Ralph Conti, Joseph Covello and John "Peanuts" Manfredonia have been convicted of violating various of the Federal antigambling statutes. In each case no proof was available as to the number of individuals involved in the bookmaking ring which they headed or that such ring involved at least 5 individuals.

Since neither section 1084 or section 1952 will be amended, the new statute retains the piecemeal approach to gambling along with the disparate sentence structure. Furthermore, the injection of still another standard in defining the proscribed illegal activity could create mass confusion in cases where violations of all sections are involved. Thus a jury would be instructed that different definitions adhere to and different standards must be utilized in analyzing sec-

tion 1084 violations (engaged in the business of betting or wagering), section 1952 violations ("business enterprise involving gambling in violation of the laws of the state in which committed"), and section 1955a violations ("illegal gambling business").

(2) *Department of Treasury.*—As noted, a bill to revise the wagering tax laws is presently pending.[69]

In the opinion of the writer the new law still has a number of deficiencies. The number of penalty sections applicable to violations of the Federal wagering tax laws together with their wide and disparate provisions is still retained. Thus, arguably, sections 7201 (5 years), 7203 (1 year), 7262 (3 months), and 7272 ($50.00 fine) could all be charged.

In addition both willful and nonwillful violations are retained. As noted above, the writer believes that willfullness be eliminated to avoid confusion and lessen the government's burden of proof. In the event, that the imposition of the penalties provided by section 7203 and 7201 be regarded as constitutionally too severe for nonwillful violations, the element of willfulness could be retained, but the statute could provide that proof that a defendant was engaged in the gambling business and failed to pay the required taxes be sufficient to authorize conviction, unless the evidence in the case establishes, to the satisfaction of the jury, that the failure to pay was inadvertent. The inference that one engaged in the business of gambling knows of the taxes applicable to that business is rational and should not raise any constitutional problems of the kind raised in the *Leary* case.[70] It would in effect be a codification of the rule adopted by the Fifth Circuit in the *Edwards* case.[71]

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[69] Wagering Tax Amendments of 1969, S. 1624, 91st Cong., 1st Sess. (1969), H.R. 322, 91st Cong., 1st Sess. (1969).

[70] *Leary* v. *United States*, 395 U.S. 6 (1969).

[71] *United States* v. *Edwards*, 334 F.2d 360 (5th Cir. 1964), *cert denied*, 379 U.S. 1000 (1965); *see also*, *Ingram* v. *United States*, 360 U.S. 672 (1959).

COMMENT
on
PROSTITUTION AND RELATED OFFENSES: SECTIONS 1841–1849
(Stein; January 13, 1969)

1. *Introduction.*—The provisions dealing with prostitution and related offenses contain basic features that are unlike those of provisions heretofore proposed for the Commission's consideration. First, they are based on the commonly held view that the act of the perpetrator of the underlying offense, that is the prostitute, is deserving of a lesser penalty than the act of an accomplice. Accordingly, most of the provisions deal with acts of complicity which ordinarily would be left to coverage by the general complicity provisions but are here dealt with as specific offenses in order to provide for more severe penalties. Secondly, the appropriate basis for Federal jurisdiction over the prohibited conduct, that is, the extent to which there is a Federal interest in prostitution or its abettors, has figured more significantly in the definition of the offenses than it has in other parts of the proposed Code.

Although faithful to the principle that jurisdictional bases will not be included in the definition of offenses (as they are in many existing Federal criminal statutes), these provisions have been separated into different sections upon the view that one offense—proposed section 1841, dealing with promoting prostitution—is primarily directed toward prostitution having interstate aspects (carrying forward the principal concerns of the Mann Act (18 U.S.C. § 2421 *et seq.*) and one of the antiracketeering statutes (18 U.S.C. § 1952)), and that the other offenses are suitable only for application in the District of Columbia and other Federal or Federally related areas. While this separation might be desirable in any Code, since it more particularly identifies the offender for purposes of treatment, *etc.*, it will also be useful here if the Commission decides not to make proposals regarding enclave prostitution problems or, if all provisions are retained, in facilitating the application of different jurisdictional bases to different conduct.

2. *Background; Present Federal Law.*—Present statutory provisions give the Federal government an extensive role in the suppression of organized prostitution. Insofar as the business of prostitution, like the other vice crimes of gambling and narcotics, has been and remains subject to organization or syndication on the interstate level, Federal legislation continues to be vital.[1] But the present Federal statutes are

[1] The existence of a modern form of "white slave traffic," involving the travel of prostitutes in "circuits" from city to city, is discussed in Thornton, *Organized Crime in the Field of Prostitution*, 46 J. CRIM. L.C. & P.S. 775 (1956):

> Generally speaking, the circuits seem to be a sort of informal, cooperative working arrangement between brothel-keepers, panderers, and prostitutes. However, they maintain extensive contact with one another in regulating the flow of prostitution from brothel to brothel, city to city, and State to State, and are prime long-distance customers of the telephone companies. . . [But] racketeers seemingly thrive in this climate and may move in whenever and wherever big profits can be tapped.

directed to jurisdiction rather than substance. We here propose to give substantive definition to crimes of prostitution, distinguishing, as noted above, between those organized prostitution enterprises for which Federal supplementation of local law enforcement efforts would be useful and proper, and more petty acts of prostitution which can be suppressed locally.

The well known Mann Act (18 U.S.C. § 2421 *et seq.*), enacted in 1910, is the basic Federal legislation in the area. Under the Mann Act, the transportation of women in interstate commerce for the purpose of prostitution, and the coercion and enticement of women across State lines for such purposes, is punishable by up to 5 years' imprisonment.[2] Though the Mann Act was directed against one of the first organized crimes in the nation—an interstate prostitution traffic—its language is outmoded. It reaches individual acts of transportation of women,[3] but not the more general aspects of the business, as it may be practiced today—such as, for example, controlling an interstate network of call girl services or a chain of houses of prostitution. Moreover, it reaches too far—transportation for the purpose of prostitution or debauchery, or for any other immoral purpose. Thus, an individual patron's act of driving a prostitute across State lines or such conduct by any person for any immoral purpose is graded as severely as is the act of a brothel owner recruiting a new employee. Since the act of transporting a woman across State lines is a neutral one, having only jurisdictional significance, its proscription does not directly attack the evil sought to be avoided; nor does it fully express a rational Federal interest in prostitution as an organized crime.

One of the antiracketeering provisions, the so-called Travel Act (18 U.S.C. § 1952), comes closer to expressing the Federal interest. The statute imposes a penalty of up to 5 years' imprisonment for traveling in interstate or foreign commerce or using any facility in interstate or foreign commerce, including the mails, to "promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity." Any business enterprise involving prostitution is explicitly included in the meaning of "unlawful activity." Prostitution offenses, however, are defined by the laws of the State in which they are committed or of the United States. The prosecution for a Federal felony, therefore, may depend on State law on the subject.

But State laws on prostitution vary widely. Some States proscribe prostitution itself, while others do not; some States not only proscribe prostitution, but include, in the definition of prostitution, promiscuous intercourse without hire. In many States, the customers of prostitutes

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[2] Up to 10 years' imprisonment is provided if the woman enticed or coerced is under 18 years old. 18 U.S.C. § 2423.

[3] "The constitutional basis of the statute is the withdrawal of the facility of interstate transportation . . . though, to be sure, the power was exercised in aid of social morality." *Bell* v. *United States*, 349 U.S. 81, 83 (1955) (holding that the transportation of two girls at the same time constitutes one violation); *see also Wilson* v. *United States*, 232 U.S. 563 (1914), holding that the women do not have to be transported by common carrier; any form of interstate transportation will do and the crime is complete upon the transportation across State lines, even if the culprit, upon arrival, abandons the purpose of prostituting the women.

are deemed to be criminals, though these individuals are rarely prosecuted criminally. Further, while penalties authorized for prostitutes typically range from 6 months to 1 year, the range is from no imprisonment (fine only) in Texas to 5 years in Iowa and Rhode Island, the severe maxima permissible under some of the statutes are not, in practice, often imposed.[4] The States usually reserve the higher penalties for the promoters, recruiters, and solicitors, but the differences in seriousness of the roles these actors play in commercialized prostitution—distinctions, for example, between the taxi driver who may direct a customer to a brothel and the person in control of the brothel—are not always well differentiated in State laws.[5]

Thus, reliance on the differing State laws on prostitution subjects Federal criminal law to the same weaknesses as in the Mann Act in failing to differentiate between acts supportive of an organized business and individual ventures into professional prostitution. Further, reliance on State law opens Federal indictments to the possibility of dismissal for misreading of the State law.[6] The substantive definition proposed here of promoting prostitution, which could be coupled with the jurisdictional base provided by present 18 U.S.C. § 1952, is intended completely to proscribe acts in promotion of organized prostitution as they affect interstate commerce, without subjecting Federal cases to dependency upon local variations in prostitution law, and without involving Federal law in purely local problems in the States.

A major innovation of the proposed prostitution statutes is a Federal formulation and gradation of prostitution law for Federal enclaves and other areas of special Federal interest, that is, those surrounding military bases. Presently, apart from the application of State laws to Federal enclaves under the Assimilative Crimes Act (18 U.S.C. § 13), Federal law explicitly proscribes acts of prostitution in one area of special Federal interest. 18 U.S.C. § 1384 broadly proscribes prostitution—keeping a brothel, procuring, aiding and abetting prostitution, *etc.*—in any area:

> Within such reasonable distance of any military or naval camp, station, fort, post, yard, base, cantonment, training or mobilization place as the Secretary of the Army the Secretary of the Navy, [or] the Secretary of the Air Force . . . shall determine to be needful to the efficiency, health, and welfare of the Army, the Navy, or the Air Force . . . .

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[4] *See* MODEL PENAL CODE § 207.12, Comment at 174–175, 179–182 (Tent. Draft No. 9, 1959).

[5] The great variety of State statutes on prostitution is discussed in an article by B. J. George, Jr., *Legal, Medical and Psychiatric Considerations in the Control of Prostitution*, 60 MICH. L. REV. 717, 719–730 (1962) [hereinafter cited as George]. The author notes (at 722): "[O]n occasion courts have applied such statutory language to include conduct unrelated to prostitution which the judges find morally repugnant, though this is no doubt a distortion of the legislative purpose."

[6] *Cf. Raymond* v. *United States*, 376 F. 2d 581 (9th Cir.), *cert. denied*, 389 U.S. 898 (1967), a prosecution for use of an interstate telephone for the promotion of prostitution, holding that the additional language in an indictment which charged "prostitution" as well as promotion of prostitution, when State law did not proscribe prostitution per se but only promotion of prostitution, was, in the circumstances, harmless surplusage.

A penalty of up to 1 year's imprisonment is provided. Under the proposed provisions, efforts to promote or encourage prostitution in these areas, as well as other areas of Federal jurisdiction, will be graded in accordance with the nature of the effort; the more egregious acts are graded as felonies, while prostitutes themselves would remain subject to misdemeanor penalties.[7]

3. *Promoting Prostitution; Proscription of Organized Prostitution.*—Though views differ as to whether the practice of prostitution may be tolerated, or subjected to administrative regulation, rather than dealt with criminally, prostitution as an organized activity run by underworld syndicates must undisputedly be suppressed. Proposed section 1841 focuses on the proscription of prostitution as an organized business. Activities essential to the promotion of prostitution as an organized commercial venture are defined, and made punishable as felonies. These include key operations such as ownership or control of a brothel or business of prostitution, procuring prostitutes for a brothel, or recruiting another to become a professional prostitute.

Interstate transportation of a prostitute, now proscribed by the Mann Act, is subsumed under the proposed provision, if the transportation occurs as an aspect of promotion of the business of prostitution, rather than the individual pleasure of the transporter. Those who order or induce a prostitute to go from one State to another, or recruit a prostitute to come to a brothel in another State, are promoting prostitution within the terms of the proposed provision. In addition, other acts, whether or not committed with intent to aid the operation of a brothel or prostitution business, such as inducing or otherwise causing a person to become a prostitute (as distinguished from inducing or causing a person to remain a prostitute, as in proposed section 1842(1)(d)) and procuring prostitutes for a brothel or prostitution business, are also regarded as promoting prostitution for purposes of severity of penalty and Federal jurisdiction.

By means of an explicit grading distinction only the owners, managers, and supervisors of a brothel or prostitution business would be guilty of a Class C felony. Those who knowingly play lesser roles in the enterprise—maids, errand boys, drivers, and so forth—would be guilty of a Class A misdemeanor only. An explicit provision is necessary to make such discriminations, for otherwise complicity provisions would make all aiders and abettors in the operation of prostitution enterprises guilty of a felony. In short, in defining complicity in the basic offense of prostitution as specific offenses of greater severity, it is believed unwarranted to raise all complicity to the level of a felony. The principle of imposing higher penalties for a managerial role is central to the current development of an organized crime offense, intended for general application. Accordingly, it will be necessary to

[7] Reforms in criminal prostitution laws, which are similar to the enactment here proposed in grading the crimes in accordance with the role of the actor in the business of prostitution, have been enacted or proposed in the following Codes: CAL. PENAL CODE REVISION PROJECT §§ 1800–1806 (Tent. Draft No. 2, 1968); PRELIMINARY REVISION OF COLO. CRIM. LAWS, §§ 40–19–1 to 40–19–7 (1964); PROPOSED DEL. CRIM. CODE §§ 821–829 (Final Draft 1967); CRIM. CODE OF GA. §§ 26–2012 to 26–2017 (1969); ILL. REV. STAT. §§ 11–14 to 11–19 (1965); WISC. STAT. ANN. §§ 944.30 to 944.35 (West 1968); PROPOSED IOWA CRIM. CODE REV. § 724–724.6 (1967 Draft); MICH. REV. CRIM. CODE §§ 6201–6225 (Final Draft 1967); N.Y. REV. PEN. LAW §§ 230.00–230.40 (McKinney 1967); PROPOSED CRIM. CODE FOR PA. § 2502 (1967); MODEL PENAL CODE § 251.2 (P.O.D. 1962).

coordinate the proposal here with those provisions when they have been completed.

It should be noted that subparagraph (b) of subsection (1) of section 1841 includes criminal coercion (as does subparagraph (d) of subsection (1) of proposed section 1842). This is consistent with the policy of regarding the offense of criminal coercion as a catchall, and dealing with specific forms of it, for penalty purposes, in the context of the specific conduct being coerced. Accordingly, coercing another to become (or remain) a prostitute is here to be treated as a Class C felony, rather than as a Class A misdemeanor, as it would be under criminal coercion.

For a discussion regarding Federal jurisdiction under proposed section 1841 over the operation of purely local prostitution enterprises, where an interstate facility is employed incidentally, *see* paragraph 8, *infra*.

4. *Prostitution and Aiding Prostitution.*—There is a longstanding controversy whether, rather than committing the resources of law enforcement to an impossible effort at complete abolition of prostitution, the practice of prostitution might better be tolerated and subjected to careful regulation.[8] But absent a clear demonstration of benefits from change, we assume a continuance of the system of repressing prostitution on Federal enclaves.[9]

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[8] That resort to prostitutes is quite common in our society is documented in KINSEY, POMEROY & MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE (1949). Those who support regulation of prostitution argue, therefore, that it cannot be totally suppressed and might better be regulated. Additionally, many experts contend that prostitution is a psychological problem, which cannot be cured criminally. *See* BARNES & TEETERS, NEW HORIZONS IN CRIMINOLOGY 99 (2d ed. 1951): "Prostitutes should not be sent to penal institutions . . . The money saved . . . could well be applied to paying the salaries of . . . case workers, psychiatrists, and medical physicians who would handle each case on its individual merits." Professor George also argues for psychological treatment of prostitutes but notes that:

> Whether one's basic premise be religious puritanism, humanitarianism, or concern for public health, the logical conclusion is that organized prostitution is immoral to an offensive degree, condemns women to a degrading existence which will make social derelicts of them within a relatively short period of time, and is a major source of disease. The United States, with other civilized nations, has determined that repression is the only acceptable policy to be embodied in legislation. (George, *supra* note 5, at 744.)

For a summary of the arguments for and against suppression, *see* the commentary on the Model Penal Code's proposed prostitution statute, which notes: "Many of the issues between those who favor repression and those who would tolerate some prostitution cannot be resolved on the basis of available evidence." MODEL PENAL CODE § 207.12, Comments at 173, 169–182 (Tent. Draft No. 9, 1959).

[9] Repression of prostitution has proved beneficial to the maintenance and supervision of military bases. *See* the statement of W. B. Miller, Administrator of the Federal Security Agency, in *Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary on H.R. 5234*, 79th Cong. 2d Sess. 35, 39 (1946), stating that abolition of tolerated houses in 700 communities near armed services camps in World War II was accompanied by reduction in rate of sex crimes, while the rate rose elsewhere (cited in MODEL PENAL CODE § 207.12, Comment at 172n.16 (Tent. Draft No. 9, 1959). Closing these houses of prostitution also, less surprisingly, led to reduction of venereal disease in these areas. *Id. See also* Turner, *The Suppression of Prostitution in Relation to Venereal Disease Control in the Army*, 7 FED. PROB. 8 (April-June 1943); Ness, *Federal Government's Program in Attacking the Problem of Prostitution*, 7 FED. PROB. 17 (April-June 1943) (cited in MODEL PENAL CODE § 207.12, Comment at 174n.21 (Tent. Draft No. 9, 1959).

Proposed section 1843 provides misdemeanor penalties for professional prostitutes. Promiscuous women who engage in several love affairs, mistresses who accept gifts from their boy friends, women who allow themselves to be picked up by a man for the purpose of dating are not included in the proposed section. The provision reaches only the person who makes prostitution her business, who manifests a willingness to give herself sexually to any stranger willing to pay for her services. This includes the inmates of a brothel, the call girls who work out of their homes or take appointments by telephone, and the streetwalkers who await monetary offers for sexual activity. Sexual activity is not restricted, in terms of the statute, to normal sexual intercourse. A person who hires himself out for homosexual purposes or for any deviate sexual relations, is guilty of prostitution. *See* proposed section 1849(a). The person who commits prostitution is guilty only of a Class B misdemeanor.

Other sideline aspects of commercial prostitution in a locality—solicitation of customers, procuring a prostitute for a customer, or leasing premises for prostitution purposes are proscribed by proposed section 1842 and graded as felonies or misdemeanors, depending on whether or not dominance over a child or ward or coercion is involved in the actor's encouragement of the prostitution of another. This thorough proscription of all aspects of the business of prostitution permits complete suppression of prostitution in Federal areas.

Concerning those who live off the earnings of a prostitute (pimps), a presumption is set forth that such persons knowingly cause a prostitute to remain in that line of work, and thus encourage prostitution in violation of proposed section 1842(1)(d). This presumption device is an alternative to the common provision in the States making it a substantive offense to live off a prostitute's earnings. To make this a substantive offense would fail to account adequately for those situations in which a person, though aware that the person he is living with is a prostitute, has no real role in encouraging her prostitution and no power over his mate sufficient to stop the acts of prostitution.[10] However, absent rebuttal, the most reasonable conclusion from the fact that a person is supported by the income of a prostitute is that the person is knowingly encouraging such prostitution as his source of income, and the matter certainly warrants consideration by a jury.

5. *Patronizing Prostitutes.*—Section 1844 of the proposed provisions proscribes hiring prostitutes or patronizing brothels. Those who do commit an "infraction," a minor criminal offense. In addition to establishing a degree of culpability for the customer, the provision serves as a practical aid in suppression of prostitution in Federal areas. Given this provision, any person found in a house of prostitution may be arrested; his role, whether customer or operator of the business, may later be sorted out.[11]

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[10] For the view that prostitution may be a psychological phenomenon, more than an economic one, *see* the works cited in note 8, *supra*.

[11] Federal military personnel are presently subject to punishment for patronizing prostitutes. Though no article in the Uniform Code of Military Justice explicitly declares such conduct to be unlawful, penalties for such behavior may be imposed under article 92 (failure to obey order or regulation) for violation of "off-limits" restrictions imposed pursuant to 18 U.S.C. § 1384, as well as article 132 (conduct unbecoming an officer) and article 134 (conduct of a nature to bring discredit to the armed forces). Under the proposed provision, civilian patrons who are found with military personnel in Federally designated areas of jurisdiction would also be subject to arrest and criminal penalties.

6. *Special Rules of Evidence in Prostitution Cases; Testimony of Spouse.*—Many States have special rules of evidence, relating to prostitution cases, which expressly make evidence of "common repute" admissible to prove the character of an alleged place of prostitution, and some State criminal law revisions propose to codify such rules.[12] There appears to be no special need for introducing this relaxation of evidentiary rules into Federal law, however.[13] Nor do there appear to be any Federal cases (including cases in the District of Columbia) which, by unduly restricting proof in this area, render prostitution convictions difficult to obtain. Moreover, relaxation of traditional evidentiary rules to allow admission of hearsay evidence on reputation would present constitutional difficulties as, for example, in its effect on the constitutional right to confrontation.[14]

Present Federal law does recognize, however, an existing exception, with respect to proof of prostitution, to the general common law rule that a person's testimony against his spouse is not admissible in evidence. It has been held that a wife cannot invoke a spouse's privilege to refuse to testify concerning her husband's role in prostituting her:[15]

> As the legislative history discloses, the [Mann] Act reflects the supposition that the women with whom it sought to deal often had no independent will of their own, and embodies, in effect, the view that they must be protected against themselves.

This exception would be useful in cases of coerced prostitution; moreover, the exception "has special utility in prosecuting pimps who not unfrequently are married to the prostitute,"[16] and is explicitly preserved in proposed section 1848.

Previously, however, in a case involving a wife's testimony concerning her husband's transportation of another woman for prostitu-

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[12] *See* CAL. PENAL CODE REVISION PROJECT, § 1806, Comment (Tent. Draft No. 2, 1968); PROPOSED CRIMES CODE FOR PA. § 2502(f), Comment (1967); MODEL PENAL CODE § 251.2(6), Comment (P.O.D. 1962).

[13] A major ground for relaxation of such rules is the difficulty of obtaining testimony concerning the crime, since both patrons and prostitutes are unwilling to reveal the fact of the crime's commission. But, as far as prostitution around military bases is concerned, military personnel often do volunteer or are required to state the source of venereal infection, thereby providing evidence of the crime. *See* George, *supra* note 5, at 742n.180. Further, a general immunity provision, which will be included in the Federal Code, should aid in obtaining testimony as to illicit acts.

[14] *Cf. Bruton* v. *United States*, 391 U.S. 123 (1968), holding inadmissible at a joint trial the confession of one defendant which inculpates the other. The Supreme Court, quoting Wigmore on Evidence, noted:

> 'The theory of the Hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of Cross-examination' . . . The reason for excluding this evidence as an *evidentiary* matter also requires its exclusion as a *constitutional matter*. 391 U.S 136 n.12.

Mr. Justice Stewart, concurring, stated: "A basic premise of the Confrontation Clause, it seems to me, is that certain kinds of hearsay . . . are at once so damaging, so suspect, and yet so difficult to discount that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, *whatever* instructions the trial judge might give." 391 U.S. at 138.

[15] *Wyatt* v. *United States*, 362 U.S. 525, 530 (1960).

[16] MODEL PENAL CODE § 207.12, Comment at 181 (Tent. Draft No. 9, 1959).

tion purposes, the Supreme Court refused to overturn the general rule barring testimony against a spouse: [17]

> The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife, and children, but for the benefit of the public as well. . . . [W]e are unable to subscribe to the idea that an exclusionary rule, based on the persistent instincts of several centuries, should now be abandoned. As we have already indicated, however, this decision does not foreclose whatever changes in the rule may eventually be dictated by "reason and experience."

Since there appears to be no special reason to overturn the privilege concerning a spouse's testimony generally with respect to prostitution crimes not involving the spouse, we propose no change in the evidentiary rule beyond that now applicable to the Mann Act.[18]

7. *Federal Proscription of Acts of Private Immorality Excluded.*— Though Congress in enacting the Mann Act intended to deal with the national and international "white slave traffic," the legislation has been used to reach beyond the proper interest of the Federal law. The legislation makes it a felony to transport "any woman or girl for the purpose of prostitution *or debauchery, or any other immoral purpose*" (emphasis added). Because of the italicized wording, men who have taken their girl friends on interstate trips have been convicted of a felony.[19]

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[17] *Hawkins* v. *United States*, 358 U.S. 74, 77–79 (1958).

[18] *But cf.* 8 U.S.C. § 1328, abolishing the privilege generally with respect to the crime of importing aliens for prostitution purposes.

[19] This interpretation was first given to the Mann Act in *Caminetti* v. *United States*, 242 U.S. 470, 486 (1917), concerning a man who was prosecuted for taking his girl friend across a State line in a tryst:

> While such immoral purpose would be more culpable in morals and attributed to baser motives if accompanied with the expectation of pecuniary gain, such considerations do not prevent the lesser offense against morals of furnishing transportation in order that a woman may be debauched, or become a mistress or a concubine, from being the execution of purpose, within the meaning of this law. To say the contrary would shock the common understanding of what constitutes an immoral purpose when those terms are applied, as here, to sexual relations.

Since *Caminetti*, prosecutions have been successful, under the Mann Act, in cases involving a man vacationing with his girl friend (*United States* v. *Reginelli*, 133 F. 2d 595 (3d Cir.), *cert. denied*, 318 U.S. 783 (1943)); an adulterous affair (*Masse* v. *United States*, 210 F. 2d 418 (5th Cir.), *cert. denied*, 347 U.S. 962 (1954)); a "pick up" of a girl hitchhiker (*Mellor v. United States*, 160 F. 2d 757 (8th Cir.), *cert. denied*, 331 U.S. 848 (1947)).

This broad interpretation of the Mann Act has been severely criticized. In *Cleveland* v. *United States*, 329 U.S. 14, 28–29 (1946), upholding a Mann Act conviction of Mormons who transported plural wives interstate, the dissenting opinion noted:

> The framers of the Act specifically stated that it is not directed at immorality in general; it does not even attempt to regulate the practice of voluntary prostitution, leaving that problem to the various States. Its exclusive concern is with those girls and women who are "unwillingly forced to practice prostitution" . . . and "whose lives are lives of involuntary servitude". . . . The consequences of prolonging the *Caminetti* principle is to make the Federal courts the arbiters of the morality of those who cross State lines in the company of women and girls. They must decide what is meant by "any other immoral purpose" without regard to the standards plainly set forth by Congress.

Private affairs not involving national security, do not seem to be a proper subject for Federal investigation. But the Mann Act has, in the past, been used to prosecute targets of prosecutors and other law enforcement agents for these trysts when no evidence was obtained sufficient to prosecute for the crime actually under investigation.[20] This practice, however, is uncommon. There appear to be no Mann Act cases involving noncommercial prostitution in recent years.[21] Professional racketeers and other troublesome individuals can be dealt with without resorting to such methods. Indeed, Federal investigative resources with respect to interstate crime would best be conserved and properly concentrated if the prostitution statute is limited to organized, professional criminality. The proposed provisions, therefore, deal solely with professional prostitution.[22]

8. *Jurisdiction; Disposition of Existing Statutes.*—It is intended that the jurisdictional base for section 1841 (promoting prostitution) will be similar to that presently contained in the Travel Act (18 U.S.C. § 1952): traveling in interstate or foreign commerce or using any facility of interstate or foreign commerce, including the mail, to further or in connection with the crimes defined. It will thus reach acts of organized interstate crime.

With such a jurisdictional scope, it will also reach purely local prostitution enterprises where interstate travel or use of an interstate facility may be only incidental to the operation of the enterprise—obtaining services for a New Jersey brothel from a New York laundry, for example. Present jurisdiction under 18 U.S.C. § 1952 would permit Federal prosecutions in such cases. Although the unwarranted use of Federal resources for such prosecutions might be prevented through a restrictive definition of what constitutes a prostitution business or a brothel for Federal purposes, no attempt to do so has been made in this proposal. Under the principle that legal barriers to Federal prosecution in the proposed new Code should be held to a minimum, it is believed that the restrictions on Federal intervention when a prostitution enterprise is involved should result from the sound *exercise* of Federal jurisdiction, rather than from restrictions on its legal scope.

A different tack is taken with respect to the other crimes defined in sections 1841–1849. These are oriented toward total suppression of the vice, and are to be applied only to Federal enclaves and those areas around Federal military bases. Federal proscription of acts of prostitution around military bases already exists, and the proposed sec-

[20] Note, for example, *Masse* v. *United States*, 210 F. 2d 418, 419 (5th Cir. 1954). Discussing the defendant's confession of an interstate adulterous affair to a Federal agent, the opinion mentions that the Federal agent interviewed defendant "approximately 5 minutes after he was taken into State custody by the sheriff . . . on another charge."

[21] These observations were gathered in discussions with representatives of the Department of Justice.

[22] Another nonprostitution aspect of Mann Act prosecutions has involved cases of sexual assault upon girls taken across State lines. *See, e.g., Daigle* v. *United States*, 181 F.2d 311 (1st Cir. 1952) (intercourse with a young girl, taken out of State by defendant to avoid her testifying against him in a State impairment of morals prosecution); *Devault* v. *United States*, 338 F.2d 179 (10th Cir. 1964) (interstate rape in Kansas City). Such cases are dealt with, in our proposals, under the kidnapping, rape, and sexual abuse provisions.

tions serve to restate the law, raising more serious acts in aid of prostitution to the felony level. Although there is no apparent problem of prostitution on other Federal enclaves, or in the maritime jurdisdiction [23] application of the proposed section to all Federal enclaves is desirable because of the variations in State laws and because it is intended that certain acts—in proposed section 1842—should be subject to a felony penalty.[24]*

The special provision of present 18 U.S.C. § 1384, concerning prostitution near military bases, will therefore be unnecessary. Its jurisdictional provisions will be included in a contemplated codification of Federal jurisdictional bases. The provisions of the present statute not relating to jurisdiction, concerning the Federal role in cooperating with local law enforcement authorities in these areas, should be transferred to the Armed Forces chapters of the United States Code (Title 10).[25]**

Insofar as the Mann Act concerns interstate transportation of prostitutes and enticement of women interstate for prostitution purposes (18 U.S.C. §§ 2421, 2422), the Act will be replaced by the present proposals. Coercion of women and enticement of minors across State lines for prostitution purposes (18 U.S.C. §§ 2422, 2423) will constitute kidnapping—abduction with intent to commit any felony—under the proposed provisions.[26]

A special provision of the Mann Act requiring registration of alien females who are kept for prostitution "or any other immoral purpose" (18 U.S.C. § 2424), and providing penalties of up to 2 years' imprisonment for failure to register, is to be eliminated. The provision provides for Federal immunity from prosecution, but does not deal with the possibility of State prosecution. Recent Supreme Court decisions on the unconstitutionality of Federal registration statutes which effectively force one to incriminate oneself as to State crimes have rendered this statute of questionable validity.[27] The only way it could be effectuated would be to provide for immunity from pros-

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[23] Representatives of the Army inform us that in recent years it has not been necessary for Federal authorities to invoke the present Federal statute (18 U.S.C. § 1384). The statute may, however, serve a preventive function. *See also* 18 U.S.C. § 1082, proscribing gambling ships within the Federal maritime jurisdiction. There is no similar statute proscribing offshore prostitution ships, but the proposed section would forbid any such venture, should it ever be thought profitable.

[24] It is contemplated that the provision in the proposed new Code dealing with assimilated crimes will put a ceiling on the penalty of no greater than a Class A misdemeanor.

*See Study Draft section 209.

[25] By explicit provision of 18 U.S.C. § 1384, military personnel do not have authority to investigate or arrest civilians; cooperation of Federal authorities with local law enforcement authorities in enforcement of the statute is mandated. A jurisdictional statement referring to the areas around military bases should, therefore, explicitly provide that State prostitution laws are not preempted in these areas.

**See Study Draft section 206.

[26] *See* the proposed kidnapping provision (section 1631(1)(e)).

[27] *See Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968), concerning the unconstitutionality of Federal gambling tax registration provisions; *Haynes* v. *United States*, 390 U.S. 85 (1968), concerning the unconstitutionality of Federal provisions requiring the registration of illegal firearms.

ecution for any crime, State or Federal, revealed by the registration. But this, it is believed, would consitute drastic interference with State enforcement of prostitution laws, primarily a local matter. It would, therefore, be better to dispense with this registration requirement altogether.[28] Of course, importation of prostitutes in connection with the prohibitions in section 1841 continues to be proscribed.[29]

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[28] Representatives of the Justice Department have concurred in this appraisal. Moreover, although the registration provision appears to be required by an international commitment (it requires registration of alien prostitutes only from countries "party to the arrangement adopted July 25, 1902, for the suppression of the white-slave traffic"), the Department of State and the Immigration and Naturalization Service regard it as unnecessary to fulfill any international obligations. *See* Letter from Murray J. Belman, Acting State Department Legal Adviser, to Richard A. Green, Deputy Director of the National Commission on Reform of the Federal Criminal Laws, Dec. 5, 1968, on file at the Commission.

[29] 8 U.S.C. § 1328 prohibits the importation of an alien for the purpose of prostitution or other immoral purposes and provides for a maximum penalty of 10 years. It also embraces holding, keeping, or employing the alien for such purposes "in pursuance of such illegal importation" (a phrase included for jurisdictional purposes). Its forerunner was enacted in 1875; and, although never repealed, it has, in effect, been superseded by the Mann Act, even though the Mann Act penalty is less. (At one time both were 5 years.) To the extent that the Mann Act provisions have been carried forward into section 1841 of the proposed draft, the provisions of 8 U.S.C. § 1328 will also be carried forward. Under section 1841, inducing a person to come here to become a prostitute or procuring her for a prostitution enterprise would remain a Federal offense. Repeal of 8 U.S.C. § 1328 is recommended. We are informed by the Immigration and Naturalization Service that it deals with other matters involving the entry of prostitutes into this country through exclusionary provisions and general proscriptions against harboring illegal entrants, and that the Service sees no special need for retaining 8 U.S.C. § 1328.

CONSULTANT'S REPORT
on
OBSCENITY CONTROLS
(Bender; May 12, 1969)

I. Objectives of Penal Laws Against Obscenity

In 1957 the Supreme Court of the United States, in *Roth* v. *United States*, 354 U.S. 476, 485, held that "obscenity is not within the area of constitutionally protected speech or press." The reasons given for this holding were essentially historical, not behavioral. The Court found evidence to show that, at the time of the adoption of the first amendment, and up until the present day, it was widely assumed that obscene matter was not entitled to the amendment's protection: "[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." 354 U.S. at 484–485. The Court concluded that the amendment, therefore, should not be read to confer constitutional protection upon obscenity. The Court did not find independently that obscenity was harmful to its recipients or to others, nor did it assume that the legislatures which had passed obscenity statutes had reasonably found such harm as a basis for their legislation. From the historical perspective adopted by the Court's opinion, the actual social effect of obscenity was largely irrelevant.[1]

The question of the effect of obscenity, which may not have been of critical relevance to the Supreme Court's constitutional judgment, is obviously of central importance in any informed legislative decision regarding whether, and to what extent, to prohibit the distribution of obscene material.[2] Recognizing this fact, Congress has recently created

[1] The Court's decision in *Roth* that obscenity is not protected by the first amendment has, to some extent, been modified by the very recent decision in *Stanley* v. *Georgia*, 394 U.S. 557 (1969). In *Stanley*, the Court held that the first and fourteenth amendments prohibit a State from making mere private possession of obscene material a crime. As a result of this holding it is no longer accurate to say that the restrictions of the first amendment are invariably inapplicable once material is found to be obscene. In at least some contexts (in *Stanley*, in the context of mere private possession), the amendment restricts governmental limitations on even concededly obscene material.

[2] As a result of *Stanley* v. *Georgia*, *id.*, the effect of obscenity may now be relevant to the constitutional question as well. In holding that obscenity may be protected by the first amendment, the Court in *Stanley* appeared to emphasize the need for consideration of effect in making the constitutional decision whether prohibition in a particular context is permissible. The Court found prohibition of private possession not permissible. Three reasons were offered by the State for this prohibition; all three were rejected by the Court. The first, the asserted need to protect the individual's mind from the effects of obscenity, was rejected on the ground that such a purpose of controlling a person's private thoughts is wholly inconsistent with the philosophy of the first amendment. The second offered reason, that exposure to obscenity may lead to deviant sexual behavior or crimes of sexual violence, was rejected for lack of a sufficient empirical basis. The third reason offered by the State, that prohibition of possession is needed in order to effectuate prohibitions upon distribution, was rejected because such an unnecessarily broad solution would illegitimately invade the individual's private right to possess and examine obscene material.

a National Commission on Obscenity and Pornography, whose principal tasks are to investigate the distribution and effect of obscenity and to report to Congress and the President in 1970 on the legislative and other changes which appear appropriate in light of the information revealed by the Commission's investigation.

The scientific information presently available on the effect and distribution of obscene material is, at best, fragmentary. Attached as an appendix to this report is a review of recent research in the area of the effects of obscenity by Robert B. Cairns of Indiana University, which supplements the 1962 study by Cairns, Paul and Wishner in 46 Minnesota Law Review 1009. (The appendix is part of a study made for the National Commission on Obscenity.) There is, on the other hand, no shortage of undocumented assertions regarding the effect of obscene material and the consequent need for—or asserted lack of need for—governmental restrictions. Set out below is a list of the chief possible aims of obscenity regulation which has been drawn up after consideration of a range of responsible views on the matter. Following each possible aim is a brief discussion of whether, in view of existing knowledge and other factors, that aim appears to be a proper objective for a modern obscenity statute.

A. *Preventing Sexual Arousal in Adults*

Scientific investigations have indicated that sexual materials can and do cause sexual arousal or stimulation in adults. This effect is neither universal nor uniform (there is, indeed, evidence that in some persons exposure to sexual materials has an antistimulating effect), but it unquestionably exists to a significant extent. (*See* the appendix, *infra.*)

There seem, nevertheless, to be very substantial reasons for not including the prevention of the sexual arousal or stimulation of adults as one of the objectives of an obscenity statute. In the first place, it is by no means clear that the arousal of adult sexual desires is to be classed as a societal evil or harm. A portion of those adults who are aroused by sexual stimuli undoubtedly go on to engage in sexual activity as a result. There appears, however, to be no evidence indicating that sexual activity thus stimulated is harmful to those who engage in it or to others. Nor is there evidence that persons who are aroused, but who are not led into sexual activity as a consequence, suffer harm from the experience.

Moreover, even if sexual arousal through stimuli such as books and pictures were to be considered a socially undesirable result, what information we have indicates that there is very little that obscenity laws can actually accomplish in diminishing such arousing stimuli. The few studies which exist indicate that relatively nonobscene materials—such as pictures of partially clad members of the opposite sex—are as capable of causing sexual arousal as "hard core" materials (*see* the appendix, *infra*). In addition, the time and place in which such materials are seen and the mood of the viewer may be at least as important elements in determining the stimulating effect as the material itself or its sources. And an oral report delivered to the National Obscenity Commission by staff members of the Kinsey Sex Institute last year indicated that exceedingly intangible factors connected with the ma-

terial, such as the "provocativeness" of the pose, often wholly change its erotic character. Thus, no line dividing the obscene from the non-obscene which is likely to be legislatively drawn and to pass constitutional muster can be expected substantially to remove arousing stimuli from the environment.

In addition, some persons believe—and there is some historical basis for this suggestion—that what material arouses is itself a product of what materials society prohibits. Thus, if photographs of nude legs were legally prohibited and generally unavailable, such photographs—and photographs bordering on "leg" photographs—might well arouse in the same way that pictures of genitalia arouse some persons today. If this were found to be true, the existence of legal prohibitions for the purpose of preventing arousal might therefore be self defeating, as well as ineffective. As noted above, such prohibitions are likely, in all events, merely to shift the arousal line without lessening the arousal itself.

B. *Preventing Serious Criminal Activity in Adults*

Many persons—including some prominent law enforcement officials—believe that the distribution of obscene material for adults causes or encourages serious crime. These statements are often based upon the fact that persons engaged in crime—especially sex related crime—have obscene materials in their possession and that, when questioned, they may attribute their criminal activity to having been exposed to these materials.

A few scientific studies have been undertaken to determine whether this coincidence of crime and obscenity indicates a causal relationship. No causal relationship has been discovered in this manner and, indeed, there are some indications that perpetrators of various sex crimes are less affected by obscene stimuli than are other persons. (*See* the appendix, *infra.*) One "natural" experimental situation has existed recently in Denmark. In 1967 that country removed all legal restrictions upon written/verbal obscenity, while retaining restrictions on pictorial material. This legislative act was roughly contemporaneous with a significant increase since about 1965, in the total amount of explicit verbal and pictorial sexual materials available in Denmark. (The prohibitions upon verbal materials were frequently violated and poorly enforced prior to their repeal and the same has been and is true of the remaining prohibitions on pictures.) An investigation of crime rates in Denmark for the period before and during this change indicates that sex related crime actually has decreased coincidentally with the widespread dissemination of pornography.[3] Other natural experiments are conducted continuously as previously banned material—such as Henry Miller novels and Playboy-type nude photographs—becomes freely available and widely distributed in this country and elsewhere.

There seems, therefore, to be no present scientific basis for concluding that obscenity law may be useful in preventing criminal conduct through restricting the material available to adults. This state of

[3] R. Ben-Veniste, Pornography and the Danish Experience, 1968 (unpublished paper submitted as the basis for proposals for further research to the National Obscenity Commission).

present knowledge was, indeed, recently recognized by the Supreme Court of the United States in *Stanley* v. *Georgia* in holding unconstitutional State laws prohibiting private possession of obscenity.[4] Georgia had asserted to the Court "that exposure to obscenity may lead to deviate sexual behavior or crimes of sexual violence." The Court rejected this basis for laws penalizing possession in the following words:[5]

> There appears to be a little empirical basis for that assertion. Given the present state of knowledge, the State may no more prohibit mere possession of obscenity on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.

At the same time, some psychologists have felt—again, without systematic scientific confirmation—that the availability of explicit sexual material may actually help to prevent antisocial conduct by affording a nonviolent outlet for sexual curiosities and drives.[6] The strong interest among large numbers of mature adult persons in explicit sexual material which does not appear to contain sufficient artistic value to justify such interest—witness the recent attendance at the film "I am Curious—Yellow" and the very substantial sales of an exceedingly explicit, but otherwise entirely undistinguished, marriage manual entitled "Intercourse,"[7] indicates that such explicit material may also serve a socially useful educational function for adults.

The possibility that the distribution of obscene material to adults may have some socially useful functions and may, on the other hand, have no causal relationship to crime, may be borne out by data regarding the actual consumers of such material. The fragmentary studies which have so far been made and reported to the National Obscenity Commission indicate the typical consumer to be a male of middle age, in moderate or better economic circumstances, with little apparent connection with criminal activity.

C. *Preventing Unwarranted Offense to Others*

Many persons report the fact that they are offended by unwanted exposure to explicit sexual materials. For example, in the first 9 months of operation of the new Federal Anti-Pandering Act,[8] (which permits those who receive unwanted sexual material in the mail to remove themselves from the mailing lists of the sender), more than 100,000 complaints of the receipt of unwanted sexual material were made to the Post Office Department. Complaints are also often made to public officials and others about public displays of sexual material—in stores or in store windows, or theater billboards and the like—and, somewhat less often, about public broadcasts or telecasts.

The fact that material gives offense to some is not, of course, suf-

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[4] 394 U.S. 557 (1969); *see* notes 1 and 2, *supra*.
[5] *Id.* at 1249.
[6] *See, e.g.*, KRONHAUSEN & KRONHAUSEN, PORNOGRAPHY AND THE LAW (1959).
[7] Involved in *United States* v. *Miller*, S.D. Calif. (Dec. 14, 1968); (acquittal on Federal mailing charges).
[8] 39 U.S.C. § 4009.

ficient reason to prohibit its general distribution in society. Nor is any data presently available with regard to whether offensive communications cause any substantial or lasting harm to the recipient or to society. On the other hand, unconsented to distribution of offensive sexual materials does seem to conflict with strongly held notions of personal privacy in sexual matters. These feelings appear worthy of protection, as a matter of the freedom of the individual against unwarranted intrusions, so long as undue restraints are not placed upon others in order to afford this protection. Thus, where communication of sexual matters is made individually, as where the mails are used, there appears to be a basis for a system of controls which would permit persons to choose not to receive material which offends them, so long as such material may be distributed to others who do not object to receiving it. Where simultaneous communications to many persons are involved, as is the case in broadcasts or public displays, individual choice regrettably cannot control, for restrictions in this area designed to protect the more sexually inhibited part of society will, of necessity, prevent displays or broadcast to other persons, who might not be offended by and, indeed, might even welcome, the material. A fair compromise between competing interests, however, may lead to the conclusion that there is some material which is both widely held to be offensive and functionally unrelated to the accomplishment of any important social purpose, so that its general open display or broadcast can properly be prohibited: either absolutely, or without the attachment of a notice permitting persons who do not wish to be exposed to the material effectively to avoid it.

D. *Regulation of the Access of Juveniles to Sexual Materials*

The most difficult type of effect-of-obscenity data to obtain in a scientific manner is data regarding the effect of explicit sexual material upon children. Self reporting of such data is likely to be unreliable, and controlled experiments are ordinarily precluded by the objections of parents to the systematic subjection of their children to obscene stimuli. The children of parents who would not object to such procedures constitute, in all events, a distinctly atypical sample of children as a whole.

There are no existing scientific data to show either that exposure to obscene materials causes harm to juveniles or that it does not. There are, at the same time, hypotheses which, if substantiated, would lead to the conclusion that harm may be caused to juveniles by obscenity prohibitions. Attempts to make certain sexual topics or materials "off limits" to children may unnaturally and harmfully create a lasting feeling of shame about interest in sexual matters; it may also be that free distribution of explicit sexual material would be useful—either alone or in conjunction with explanatory material—in helping children reach mature attitudes toward sex and sex practices. It is likely, in all events, that whatever data are ultimately developed on these and related hypotheses will not be universally applicable, but will indicate that the harms or benefits of exposure of children to sexual stimuli vary considerably from child to child depending upon independent factors, such as home environment, social milieu, level of intellectual and physical development, *etc.*

Despite the lack of behavioral evidence, it is possible to make a tenable case for prohibitions designed to restrict the access of juveniles to explicit sexual materials, at least when that occurs without parental consent. The argument for this proposition is that, in light of the present state of uncertainty in both directions as to the effect upon juveniles of exposure to explicit sexual materials, their parents, rather than others, are entitled to make the choice of what material should be made available to them on the basis of the parents' evaluation of the competing hypotheses. Otherwise, the decision would be left to commercial distributors whose profit motive—rather than concern for the welfare of the child—would constitute the primary consideration in the choice of what material to make available.

In making the determination whether to enact a juvenile obscenity prohibition on this basis, one fact—and consequent danger—should be borne in mind. If material is prohibited for juveniles only, then, even if the prohibition works perfectly (which it will not), some prohibited materials—by either design or accident—will ultimately reach the hands of juveniles via adult purchasers. The harmful impact, if any, upon children of seeing such material (as well as the harmful impact of other, nonprohibited sexual material) may well be increased by the knowledge that such material is regarded as unsuitable for children. It may well be, therefore, that the wisest long-run way of dealing with the apprehended harm of obscenity to children is to expend primary effort to improve the sex education offered to juveniles at home, in school, at church, *etc.*, so that they can cope more satisfactorily with the sexual stimuli which will inevitably confront them, both as minors and in adult life.

E. *Prohibiting Commercial Exploitation of Interest in Sex*

One of the frequently mentioned evils of obscenity is that it constitutes commercial exploitation of the interest in sex. Commercial obscenity does, undoubtedly, constitute such an exploitation. Obscenity, however, is not alone in capitalizing commercially upon sexual interests. Sex is one of the principal marketing aids in use in the United States today, and it can be incorporated or insinuated into advertising in ways which defy legislative prohibition. It may appear anomalous to permit the sale of automobiles through appeal to sexual interests but to prohibit commercial capitalization upon the same interest through the sale of books or motion pictures. Moreover, the interest in sex is but one of many "weaknesses" whose commercial exploitation is widely tolerated. One thinks of sales of products based upon the desire of customers to have laundry as bright or brighter than one's neighbors, or the desire to appear cultured by being familiar with the surface, but not the substance, of works of art, or in the desire to win large prizes by using a particular product.

Our society does, it is true, draw certain lines between legitimate and illegitimate activity in this area of commercial exploitation of individual "weakness." Certain forms of gambling are prohibited, and the attempt to sell products through gambling or lottery appeals may also be deemed to be a prohibited unfair method of competition in some instances. The distinctions between the permissible and the impermissible made where gambling is concerned may not themselves

be wholly supportable; parimutual betting is, for example, permitted in many places which prohibit closely similar activity, and traffic in highly speculative securities, while regulated, is not only permitted but is even encouraged to some extent by favorable Federal tax treatment of the profits and losses of such speculation. Prohibited gambling, in all events, may often cause substantial financial detriment to large numbers of persons who are least able to afford such expenditures and whose families or well-being may suffer as a result; this may justify not only the existence of prohibitions, but also the legal distinctions which are drawn among various types of gambling activity. The fragmentary evidence which has so far been collected about the consumers of commercial obscenity and pornography, on the other hand, indicates, as noted above, that they are not primarily those in poorer economic circumstances, but that they tend to be among the older, less vulnerable and more affluent members of society. Further data to be gathered by the National Obscenity Commission about consumers of obscenity should bring additional light to bear on the existence or absence of an analogy between gambling and pornography in this respect. The Commission's investigations may also shed light on the possibility of distinguishing among the sexual appeals used as the bases for commercial gain. It may be that "hard core" obscene or pornographic stimuli have a more potent sales appeal—or have an appeal which commercially exploits more vulnerable or less fortunate persons—than the sexual stimuli used in ordinary commercial advertising. Evidence to this effect might support restrictions upon certain types of commercial exploitation of sex.

In view both of the state of factual knowledge and of existing related commercial activity, therefore, it is difficult to justify the present recognition of prevention of the commercial exploitation of sex as a proper aim of obscenity prohibitions. An additional factor is also present. The very fact that there *is* a universal interest in sex to be exploited suggests both that no prohibition upon commercial exploitation is likely to be successful, and that the attempt to impose such a prohibition is likely itself to have harmful consequences. The crime of distributing obscenity commercially would be a consenusual one, capable of being committed in relative privacy, and therefore very difficult to police in the face of a substantial desire on the part of many people to obtain such material. Persons seeking to satisfy this desire—as many would—would bring themselves into collusion with criminal activity, with harmful consequences upon the general respect for legal rules. At the same time, the business of catering to these substantial desires would be reserved for those willing to engage in crime for profit, thus opening up possibly fruitful areas to organized criminal activity, removing useful competitive influences, and providing incentive for corruption of law enforcement officials. These risks may not be worth encountering without some solid evidence as to the harm caused by commercial use of sexual stimuli.

F. *Maintaining Morality*

This may well be the single most important reason for prohibiting obscenity in the minds of the general public. The "moral" arguments for restricting obscenity appear to be of two sorts. First of all, many

people believe that the distribution of obscenity leads to increased sexual activity and they find such activity objectionable on moral grounds. Where the activity which causes concern is deviant sexual activity, the ground for societal objection is strongest. This, however, is one of the effects of obscenity which the Supreme Court in *Stanley* v. *Georgia*,[9] has said lack sufficient empirical foundation to justify prohibition, and the present state of empirical knowledge bears out the Court's conclusion. No stronger scientific evidence presently exists about the relationship of obscenity to more normal sexual activity. Even if the proposition is accepted that such a causal relationship does at times exist, however, evidence is still lacking as to whether the behavior thus induced is harmful sexual behavior or not. There is no present basis for knowing, for example, whether obscenity encourages, discourages, or is causally irrelevant to adulterous or premarital sexual relationships. A causal connection with sexual activity within the marriage relationship would most likely not be classed as harmful by most persons. A causal connection with masturbation, which may, perhaps, be the most easy of all relationships to demonstrate upon systematic investigation, would also raise a serious question with regard to whether such a result can be classed as harmful at all, or as sufficiently harmful to warrant penal legislation. (The moral grounds for restricting obscenity as a cause of sexual conduct may be deemed significantly stronger where children are concerned, thus affording an additional basis for the objective of limiting distributions to children, as discussed previously.)

The second aspect of the moral objection to obscenity is the belief that obscene material deleteriously affects individual and, hence, community attitudes toward sex. There is a serious constitutional question whether the regulation of such attitudes is a legitimate objective of criminal legislation. In *Stanley*, *supra*, the Supreme Court noted that the objective of "protecting the individual's mind from the effects of obscenity," while a "noble purpose" to some, "is wholly inconsistent with the philosophy of the First Amendment" which prohibits legislation premised "on the desirability of controlling a person's private thoughts." [10] Serious questions also exist as to the possibility and wisdom of achieving sound private and community attitudes toward sex through reliance upon prohibitions on the ideas and images which can be conveyed among adult human beings. Attitudes toward sex may have the firmest and most secure foundation—and be most likely to lead to desired behavior—when they are arrived at, not through ignorance or fear caused by repression of certain communications, but after consideration and rejection of the ideas and behavior depicted in those communications.

II. Proposed Section 1851: Existing Law Slightly Modified

Proposed section 1851 reflects existing law, with only minor changes in substance. Its principal contribution is to gather into a single provision, and to make explicit and as consistent as possible, the rules presently applied by the Supreme Court in cases under sections 1461–

[9] 394 U.S. 557 (1969), discussed *supra*, at notes 1 and 2.
[10] 394 U.S. at 565–566.

1465 of Title 18.[11] Greater explicitness and consistency are, at a minimum, required in a revision of the Federal obscenity laws. The offense is now dealt with in a series of statutes containing, without apparent reason, somewhat different substantive and penalty provisions. In addition, the language of the present statutes does not approach an accurate statement of the substantive definition of the crime which is actually applied in law enforcement proceedings.

Subsection (1), like present Federal law, is limited to distributional activity. This limitation may now be a constitutional requisite. *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

Subsection (1) then sets forth, with small modifications, the tripartite definition of "obscene" employed by the plurality opinion of the Court in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Massachusetts*, 383 U.S. 413 (1966), and apparently recognized as the prevailing view in the opinions of the Court in *Ginzburg* v. *United States*, 383 U.S. 463 (1966), and *Mishkin* v. *New York*, 383 U.S. 502 (1966). This tripartite definition requires, for a finding of obscenity, (1) dominant appeal of the material, taken as a whole, to a prurient interest in sex, (2) patent offensiveness in light of contemporary community standards, and (3) that the material involved be utterly without social value. The three cases cited, which were decided on the same day, are the most recent full Court opinions on the question of what material may be prosecuted as "obscene." The basic structure and substance of the test they reflect was announced by the Court in *Roth* v. *United States*, 354 U. S. 476 (1957), and the test was elaborated into its present form over the intervening years.

The test was originally based upon a formulation in the Model Penal Code of the American Law Institute [12] which did not, however, require lack of social value as a separate prerequisite for prohibition. The Model Penal Code formulation differed from prior law principally in its requirement that material be considered as a whole (some cases had permitted material to be judged out of context), in its rejection of the rule whereby material might be judged in terms of its effect upon the most susceptible persons in society, and in its requirement that prohibited material appeal, not merely to an interest in sex, but to a "prurient" sexual interest. The particular tripartite verbalization contained in proposed section 1851 has been explicitly adhered to by only three members of the recent Court—Justices Warren, Brennan and Fortas. These Justices, however, occupy the center of the Court on this issue and their verbalization is the one most commonly accepted and applied by lower Federal courts and Federal prosecutors.

A few points are noteworthy in the definitions of subsection (1).

Subparagraph (1)(a) states not only the general rule of *Roth* and succeeding cases that obscene material must appeal to a "prurient" interest in sex, but also includes the modification, introduced by *Mishkin* v. *New York*, *supra*, applicable to material which is appealing only to deviant sexual groups. The word, "prurient," is used without further

[11] These sections (comprising chapter 71—obscenity) proscribe the mailing of obscene or crime inciting matter; the importation or transportation of obscene matters; the mailing of indecent matter on wrappers or envelopes; the broadcasting of obscene language; and the transportation of obscene matters for sale or distribution.

[12] MODEL PENAL CODE § 251.4 (P.O.D. 1962).

definition. An alternative, more explicit, formulation might set out two aspects of "prurient" interest enumerated in the *Roth* opinion, *i.e.*, material which has a "tendency to excite lustful thoughts" and whose appeal is to "a shameful or morbid interest in" sex.

Subparagraph (1)(b) chooses a national standard of offensiveness. It thus does not permit Federal conviction for certain material in certain localities, but not elsewhere, caused by variations in community standards. Such a national standard seems most appropriate for a Federal statute, such as section 1851 which is not limited to use in aid of State or local laws (when practical or jurisdictional limitations make State or local enforcement difficult or impossible) but which is independently applicable as a matter of Federal policy regardless of local law or standards.

Subparagraph (1)(c) incorporates the most controversial part of the tripartite definition—that requiring that obscene material have no "social value." There are three significant aspects to this part of the overall standard: (1) it uses social value as an independently applied negative test of obscenity (the alternative would be to use only the prurient interest and offensiveness tests, and to conclude that all matter satisfying those tests has, necessarily, no social value); (2) it employs a standard which rejects material as obscene unless it is *utterly* without social value; and (3) it does not permit the social value of a work to be weighed against or cancelled by its prurient appeal or offensiveness—the presence of some social value thus creates an absolute immunity. These elements of definition are made explicit by the three-Justice plurality opinion in *Memoirs* and appear to be deemed necessary by them in order to avoid the prohibition of the first amendment upon censorship of socially useful speech. These three Justices are joined in requiring at least this social value exemption from prosecution by Justices Black and Douglas, who adhere to the view that all obscenity regulations of matter which would otherwise be "speech" contravene the first amendment. They are also apparently joined in their view on social value by Justice Stewart and, where Federal regulation is involved, by Justice Harlan as well.

One verbal change has been made in the draft as compared with the Supreme Court opinions. The Court has used the term "*redeeming* social value" in *Roth* and subsequent cases. The draft omits the "redeeming" modifier in order to eliminate confusion which might otherwise occur as to actual application of the test. Including "redeeming" in the test might appear—contrary to recent judicial explanations—to permit either the balancing of the social value of material against its prurience and offensiveness or to permit excluding value which was not sufficiently substantial. Omitting "redeeming," on the other hand, does not appear to change the meaning of the test as explained in the *Memoirs* plurality opinion. It was not believed necessary to make a further modification in the draft to make clear that material with social value could not be physically attached to obscene material in order to immunize the collection from prosecution where there is no functional relationship between the obscene and nonobscene parts; courts can be expected to reach this result as a matter of reasonable application of the statutory language. (*Cf. Ginzburg* v. *United States*, *supra*, where 18 U.S.C. § 1461 was held applicable although only 4 of 15 articles in a magazine were held to meet the test of obscenity.)

The sentence following subparagraph (1)(c) is designed to incorporate into the statute the "pandering" rule of *Ginzburg* v. *United States*, *supra*. That case held that, where the determination of whether material is obscene is a close one, "the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity. . . ." The draft permits such distributional setting to be used in determining the social value of material. The value of material, *i.e.*, the use to which it will be put, may with some rationality be viewed as varying with those to whom it is distributed and with the announced purpose of the distribution. An alternative formulation would make distributional setting relevant on the questions of the prurient appeal of material and its offensiveness. This alternative was not adopted because of the difficulty in perceiving how these two elements could be likely to vary according to the manner of distribution.

Subsection (1) by classifying obscenity offenses as Class A misdemeanors, substantially lowers the maximum term of imprisonment (from 2 to 10 years under the various existing statutes) while increasing the potential fine (a maximum of $5,000 to $10,000 under existing law) by permitting the recovery of up to double the profit made on the prohibited material. Obscenity offenses appear to be ones in which extensive confinement rarely, if ever, serves a useful social purpose and where potential monetary penalties may have to be quite large to constitute a significant deterrent.

Subparagraph (2)(b) is designed to make formal an exception to the scope of existing obscenity provisions which is presently a matter of prosecutional policy. In *Redmond* v. *United States*, 384 U.S. 264 (1966), a conviction was vacated, and the information dismissed, upon the representation of the Solicitor General that it was the policy of the Department of Justice to prosecute obscene private correspondence only if "aggravated" circumstances were presented. The draft would make this exception part of the statute where aggravation could not possibly be present, *i.e.*, where the private activities are noncommercial, consensual, and where minors are not involved. The practical difficulties of uniform law enforcement in such cases are enormous and the potential harm of such private communication seems miniscule at most.*

III. Possible Shortcomings of Section 1851

Present Federal obscenity law has a number of serious deficiencies which are not solved by the statutory explicitness, compactness and consistency which would be achieved by adoption of section 1851.

(1) The most obvious problem on the face of the draft statute is the extreme subjectiveness of the standard of what constitutes "obscene" material. In most areas of criminal law the law itself makes the judgment regarding what conduct is to be penalized; the primary question for the trier of fact in each case is whether the historical facts show that the prohibited conduct has been committed. Where this is not true—as with statutes penalizing conduct which is "unreason-

* Subparagraphs (2)(a) and [c] were added to the Consultant's formulation for Study Draft presentation.

able" or "reckless"—the conduct prohibited is ordinarily dangerous in the sense of its creating an immediate threat of physical danger. In such cases, while the trier of fact in an individual case must do more than ascertain what the defendant did, *e.g.*, he must predict what were the known likely physical consequences of such conduct and must evaluate the costs of preventing such dangers, the trier is aided in making such judgments by a core of common objective experiences in, for example, what kind of automobile driving conduct is productive of a great chance of injury to others.

Present Federal obscenity law, as expressed in proposed section 1851, differs radically from this pattern in that it leaves to the trier of fact in each case a vast judgmental function under a legal standard which does not call upon any common experience with objective phenomena but relies instead upon moral, aesthetic and psychoanalytic determinations by those charged with application of the law. The test is not whether materials bear certain specified contents, nor is it whether they have certain dangerous or harmful effects, common to human experience. Rather the tripartite standard evolved by the Supreme Court and incorporated into section 1851 calls for a judgment about the "appeal" of the material involved to those to whom it is addressed, (including an assessment of whether the material is of interest because of "lustful" and "shame" infected attitudes in the potential recipient), about the "social value" of the material, and about the way the material compares with standards of offensiveness prevalent in the community. It is probably not unfair to suppose that, in actual practice, application of this test more often than not comes down to the trier's individual conclusory judgment whether the particular work involved ought to be permitted in society, and that this judgment is frequently made primarily with reference to personal beliefs about the morality of certain sexual practices and the aesthetic appropriateness of publicizing or communicating about those practices.

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

(2) The elements of the tripartite test are unsatisfactory even aside from their extremely subjective quality.

(a) The prurient interest test is ambiguous. It is not clear whether material which merely tends to arouse lustful sexual desires meets this test, whether the arousal must be mixed with morbidity or shame, or whether appeal to a morbid or shameful interest alone—without arousal of lust—will suffice. The Supreme Court in the *Roth* case appeared to equate the two types of appeal, but they seem, in fact, to be quite different. In addition, to the extent that the interest appealed to must be a morbid or shameful one, the test may be circular. Morbidity or shame may become associated with an interest in material solely or principally because such material is prohibited by law and the social customs which develop under the influence of law. If so, the

law's prohibition in this area contributes to or causes the very element which is necessary to satisfy a test of illegality.

(b) The community standards test unduly favors the established national publisher or distributor of material as compared with his smaller, less established counterpart. An established national distributor or publisher can, through widespread exploitation in media which have become recognized as setting standards of taste, actually change community standards to a great degree by the time a prosecution can be finally decided. It is almost impossible to imagine that material distributed through such a source could ever be found to offend community standards as required by the test. Thus, to a significant degree, the community standards test delegates to certain established distributors the setting of the line between legal and illegal. The same immunity is not given to smaller or less established distributors or to those which do not seek a mass audience.

(c) The social value test either makes the law virtually unenforceable against any material or it creates distinctions which are extremely difficult to justify. The critical question in this regard is whether social value can include entertainment or amusement value as well as value in imparting information or "ideas." If it can, all material which has a market would appear to be excluded from the law by the test. If, on the other hand, entertainment or amusement value is *not* social value, then works of fine art would not have the protection accorded works of historical or philosophical interest—an unhappy result. In practice, works of fine art appear to be recognized as bearing social value. As a result, the test probably is applied to discriminate in an unjustifiable way against "low brow" amusements (as compared with "fine" art) although the functions served by each kind of art are basically the same. The Supreme Court's recent opinion in *Stanley* v. *Georgia*, *supra*, confirms the difficulties suggested here by indicating fairly plainly that social value does *not* include entertainment value: "The line between transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all." [13]

(3) Apart from its subjectiveness and uncertainties, the tripartite test is unsatisfactory because it is not coherently formulated to prevent any recognizable evil; it requires a combination of two negative elements—pruriency and offensiveness—the collection together of which as a standard for guilt does not appear designed to achieve any rational social purpose. Specifically, if the arousal of lustful instincts or appeal to shameful or morbid interests is harmful, it is not clear why a crime is committed only when this element is combined with affront to community standards of decency. Conversely, if excessive candor in the treatment of sexual matters is harmful, why is a crime committed only when the material appeals to prurient interest as well? Nor is it clear why, if these elements do not individually call for societal prohibition, their combination is an occasion for such prohibition.

(4) The tripartite test is both too broad and too narrow in its coverage. On the one hand, it applies to private sales of material to

[13] 394 U.S. 557 (1969).

consenting, mature adults who affirmatively seek such material. No known sociological or psychological facts have been uncovered which indicate that such sales are harmful to the community or to the individuals involved; indeed, a growing body of speculative opinion holds that such sales may even be helpful to the persons who consume the material. At the same time, because of the restrictions of the tripartite test, the prohibitions of present law do not apply to a body of explicit sexual material which, when distributed in certain ways—to juveniles or in a public or unsolicited manner—is widely thought to present a substantial basis for regulation. A per curiam Supreme Court decision, *Redrup* v. *New York*, 386 U.S. 767 (1967), has been relied on to reverse convictions in a number of cases [14] where the material involved would be classed as pornography by many—perhaps most—persons, because of a failure to satisfy all parts of the tripartite test. Under present Federal law, this material may not be restricted, even when deliberately distributed to juveniles or in a publicly offensive manner.

Finally, convictions are exceedingly difficult to secure under present law because of the requirement of proving scienter. In this regard, *Smith* v. *California*, 361 U.S. 147 (1959), makes conviction of distributors difficult because it requires, at the least, that they be shown to have knowledge or reason to know the particular contents of the specific material involved. Such knowledge is very often either not present or not provable. In addition, to an extent not yet explicitly explored in Supreme Court opinions, the Constitution may require that any defendant have knowledge not only of the factual character of the material, but also that it would be deemed obscene under the tripartite test. This would be an extremely difficult state of mind to establish in view of the intensely subjective nature of the present legal test.

(5) Present Federal law, as embodied in proposed section 1851 does not fully take advantage of the available constitutional power to enact prohibitions upon material which does not meet the tripartite test, where particular kinds of harmful distributions of that material are involved. In *Redrup*, the Court mentioned three types of distributional activity where explicit sexual material which does not meet the tripartite test may nevertheless be prohibited. These were (a) under statutes reflecting "a specific and limited state concern for juveniles;" (b) where there is "an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it;" and (c) where there is "evidence of the sort of 'pandering' which the Court found significant in *Ginzburg* v. *United States*." Pursuant to this invitation a number of States and localities have enacted "juvenile" obscenity statutes. The Supreme Court has affirmed a conviction under one such statute in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), even though the Court noted that "the 'girlie' picture magazines involved in the sales here are not obscene for adults." Present Federal law does not incorporate either of the first

[14] *Keney* v. *New York*, 388 U.S. 440 (1967); *Friedman* v. *New York*, 388 U.S. 441 (1967); *Ratner* v. *California*, 388 U.S. 442 (1967); *Cobert* v. *New York*, 388 U.S. 443 (1967); *Shepard* v. *New York*, 388 U.S. 444 (1967); *Avansino* v. *New York*, 388 U.S. 446 (1967); *Aday* v. *United States*, 388 U.S. 447 (1967); *Books, Inc.* v. *United States*, 388 U.S. 449 (1967); *A Quantity of Copies of Books* v. *Kansas*, 388 U.S. 452 (1967); *Schackman* v. *California*, 388 U.S. 454 (1967).

two of these three possibilities. Section 1851 does seek to incorporate into the law the third—pandering—category of special distributional situations mentioned in *Redrup*, reflecting the fact that the Court has already made pandering a part of the existing Federal statutes in the *Ginzburg* case.

(6) Section 1851 does not properly respond to the jurisdictional concerns of the Federal government in the obscenity area. Whatever harm is caused by the distribution of obscenity would appear similar to harms which are traditionally treated as primarily of local concern; it is doubtful if Congress would feel justified in drawing any affirmative legislative power granted to it in article I of the Constitution as a source of authority generally to regulate the distribution of obscenity in the United States. The exercise of Federal criminal jurisdiction, therefore, should, most appropriately, be connected with the inability of local law enforcement to be effective. Section 1851, however, sets standards of criminal liability which can be enforced against conduct whether or not it violates the law or policy of the place where the material involved is ultimately to be distributed, or of any other place—such as the place of production—whose policy is specially relevant. Nor does section 1851 utilize Federal power to achieve another objective which might be thought appropriate for Federal law—the encouragement of uniform local standards of obscenity so as to facilitate the free distribution of material protected from repression by the first and fourteenth amendments to the Constitution.

IV. Alternatives*

The alternatives represent an attempt to exercise appropriate Federal jurisdiction in the obscenity area, while avoiding the principal shortcomings of section 1851. They are four interrelated statutory provisions—sections I to IV. The three main structural and substantive features are:

(1) No attempt is made to regulate consensual distributions to adults. Prohibitions are imposed, instead, in two special areas where there appears to be both considerable public concern as well as substantial basis for regulation. These areas are nonconsensual or unsolicited distributions of potentially offensive sexual material and distributions to minors of explicit sexual material.

(2) The subjective and ambiguous tripartite test of obscenity is wholly abandoned. In its place are substituted explicit, objective tests tailored especially for the two kinds of prohibitions involved, *i.e.*, an attempt is made to define explicitly and objectively both the material which is capable of causing substantial offense if thrust upon unwilling recipients and the material which is widely believed to be unsuitable sexual material for minors. Much of the material so defined could not, under present standards, be constitutionally prohibited under a statute, like section 1851, which broadly covers all types of distributions, including those to consenting adults. The *Redrup* and *Ginsberg* cases, however, indicate that standards such as those employed in the alternatives are constitutional in narrowly drafted statutes directed to these two particular types of distributional activity.

* Alternatives I through IV are set forth in the comment following section 1851 in the Study Draft, as statutes 1 through 4.

(3) The Federal role in the two areas is not primarily that of direct prohibition through criminal sanctions upon the distributional activity sought to be regulated. Instead, Federal power is used to permit effective self regulation of material received through the mail, as the primary means of dealing with the problem of unsolicited offensive mailings, and to permit effective State, local and self regulation of distributions to minors, as the primary means of dealing with that problem. Direct Federal prohibitions upon distribution are used only where the Federal government has general legislative jurisdiction or where Federal intervention is necessary to vindicate local policies pertaining to distributions to minors and offensive nonconsensual distributions. The basic regulatory technique used is that of Federal labelling requirements which are placed upon the manufacturer, importer or mailer of material which comes within the definitional subsections of the provisions of the alternatives. These labeling requirements are enforced through Federal criminal penalties. In the mail area, a structure is then created whereby mail recipients may decline to receive labelled potentially offensive material if they so choose: labelled material may be freely distributed to other persons who do not choose to exercise their option not to receive such mail. Where distributions to minors are concerned, States and localities are given the option to enact criminal statutes forbidding the distribution to minors of Federally labelled material.

The Federal role in this area is to provide an objective definition of the material which is restricted to minors, to call for the application of that definition by the producer of material, who is fully informed as to the contents of the material and, through the label affixed by the producer, to provide clear notice to the retailer of material as to what he may or may not sell to minors. In both areas of regulation covered by the alternatives the present scienter problems in prosecution are largely avoided by the indirect regulatory approach through labelling because, (1) the labelling requirements of Federal law would apply to persons familiar with the contents of the material involved, (2) the standards for affixing labels are quite objective, and (3) the labels, once affixed, provide a clear basis for showing scienter in distribution.

A. *Alternative I: Unsolicited Mailings of Potentially Offensive Sexual Material*

Alternative I is designed to cope with the problem of the use of the Federal mails to engage in unsolicited distributions of explicit material—almost always in the form of advertisements for the mail order sale of such material—which distributions may cause serious offense to recipients who do not wish to be exposed to such matter. This is probably the principal obscenity problem presently falling within Federal jurisdiction. This alternative would be a supplement to the recently enacted Federal Anti-Pandering Act, 39 U.S.C. § 4009, which permits persons who have once received unwanted sexual advertising material in the mail to have their names removed from the mailing lists of the mailer responsible for the offending material. The Anti-Pandering Act, as noted, comes into play only after an offending mailing has been received, and it only applies to prevent future mailings from the particular source of the prior offending material. There will have been well over 100,000 complaints under the Act

during its first year of operation. (The Act became operative on April 14, 1968.) Alternative I would go further than the Anti-Pandering Act in protecting postal patrons, since it would screen them from unwanted material regardless of whether they had previously received material from the source involved, thus attacking the sizeable problem of initial offensive mailings from particular distributors.

Subsection (a) of Alternative I states its purpose. Subsection (b) imposes the labeling requirement upon mailers of explicit sexual material which falls within the definitional provision of subsection (h) of the section. The labeling requirement applies only to unsolicited material; it would not apply, for example, to magazines distributed to subscribers or to material distributed upon receipt of an order. The core of the material to which it would apply is that sent out as mail advertisements to persons whose names appear upon lists, which are ordinarily "rented" by the mail order house from mailing list brokers. As a consequence of this commerce in lists of names, persons who belong to certain organizations, who subscribe to certain publications, or who appear in other compilations—such as a compilation of licensed automobile drivers—may be solicited to buy explicit sexual material because a "pre-testing" of the list on which they appear by the mail order house indicates to it that a profit is to be made through solicitation of all persons on that list. Persons may thus be exposed to sexual materials coming into their homes because of some wholly sex unrelated activity of theirs which has resulted in their name being placed upon a list. These are the recipients of mail for whose benefit Alternative I is designed.

Subsection (b) does not itself prescribe the label which its terms require, but leaves this prescription to the Postmaster General. This is for the reason that subsection (f) requires the Postmaster to devise procedures for preventing the delivery of labeled mail to persons who announce their desire not to receive it; the content of the label may be relevant to the ease with which this task can be accomplished. Subsection (b) does require, however, that the Postmaster's decision as to the content and placement of the label not cause undue expense nor require mailers to label their material with a symbol expressing any adverse judgment as the quality or suitability of the material.

Subsection (c) provides for self enforcement of the purpose of Alternative I by giving mail recipients the option to refuse or destroy individual pieces of mail which are labeled in accordance with subsection (b). The concept of self enforcement includes the right of a parent to make the decision to return or destroy mail on behalf of minor children living with the parent.

Subsections (d), (e) and (f) provide an additional means of enforcement to that authorized by subsection (c). Under these provisions a mail recipient may "opt out" of receiving all mail which bears the label required by subsection (b) by requesting the Postmaster not to deliver such mail to him; a parent or guardian may, as in subsection (c), make this decision on behalf of a minor child residing in the home. These provisions for Post Office enforcement are included in the draft—in addition to the self enforcement procedures of subsection (c)—largely in response to the problem created by children in the

home. Where there are such children, it may not be a satisfactory solution to parents, who do not wish their children to see the material covered by the statute, to provide for self enforcement within the home, since the children may have unsupervised access to mail deliveries. In addition, there may be thought to be social value in permitting persons who object to the receipt of explicit sexual material the option not to be confronted with such material directly, even in the form of an unopened envelope indicating, but not openly displaying, its sexual content. One variation of Alternative I would be to omit subsections (d) through (f); another would be to include these subsections, but to make their operation discretionary with the Postmaster, rather than mandatory.

Subsection (g) provides the same Class A misdemeanor penalty as would be imposed by section 1851 for violations of presently existing substantive rules. This penalty is the key to the effective operation of Alternative I. Its deterrent effect is the means of compelling persons who mail unsolicited material to affix the label which permits the enforcement procedures of subsections (c) through (f) to be operative. Unless such labels are affixed, Alternative I does not act as a safeguard against unwanted offensive mailings. Subsection (g) also requires the personal certification of either the United States Justice Department's Attorney General or Assistant Attorney General for the Justice Department's Criminal Division, before a prosecution may be instituted. This provision enhances the uniformity and predictability of the standards set forth in subsection (h) of Alternative I; such centralized, high level review of the decision to prosecute seems appropriate where the national exercise of rights protected by the first amendment may often be involved.[15]

The definition of potentially offensive sexual material set forth in paragraph (ii) of subsection (h) was constructed after examination of a large range of material which has recently given rise to complaints to the Post Office Department both generally and under the recent Anti-Pandering Act. Each of the three parts of paragraph (ii) responds to a class of material productive of a substantial number of complaints; in each case an attempt was made to require a label not only for the precise type of material now being distributed through unsolicited mail campaigns, but also to require the label for similar types of material which might be distributed in the future and which would have the same potentiality to cause offense. Subparagraph (A) deals with pictorial material; subparagraph (B) with sexual "devices"; and subparagraph (C) with marriage manuals, sex novels and stories, and anthropological sexual accounts and similar material which may be exclusively textual or combine pictures with text. Each subparagraph applies to the complete material itself as well as to certain advertisements for that material. (It is probable that most and perhaps all of the actual application of the definitions of Alternative I will be to advertising material, since unsolicited mailings are ordinarily advertisements which do not usually contain a full sample of what is being offered.) Not all advertisements for material which would require a label are subjected to the labelling requirement, however; the

[15] *Cf.* 18 U.S.C. § 245(a)(1).

advertisement must, in each subparagraph, itself contain offensive matter beyond the fact that it offers offensive matter for sale. Thus, a bland "tombstone" type advertisement for a nudist publication or a marriage manual, which merely sets forth the fact that such a publication is offered, without presenting excerpts from the offered material or detailed descriptions thereof capable of causing affront, would not require a label.

The proviso paragraph to subsection (h) makes two classes of exemptions: (1) for matter which constitutes such a small part of a whole work, not generally sexual in nature, that its inclusion in the work would not be capable of causing significant offense, and (2) for material exempted by general regulation of the Postmaster from the requirements of the section because the language, but not the purpose, of the section is applicable to such material. The Postmaster is given the power to act to grant exemptions only with regard to general classes of material; not to particular mailings by specific mailers. Thus, he does not act as an arbiter about changes to be made in particular direct mail solicitation campaigns. This rule making power would be subject to the procedural requirements of the Administrative Procedure Act.

Subsection (i) prohibits compliance with Alternative I from being used against a person so complying. An absolute immunity from all prosecution is not accorded to persons who comply with the labelling requirements, since such persons may, despite their compliance, violate either Alternative II (prohibiting knowing distribution of certain material to minors) or valid State laws against the distribution of certain kinds of material. Fairness and, perhaps, the requirements of the self incrimination clause of the fifth amendment, however, would seem to require that the fact of compliance with the labelling requirement of Alternative I should not subject a person to an increased likelihood of prosecution as compared with persons who refuse or omit to comply with the labelling requirement.

B. *Alternative II: Labelling of Adult Sexual Material*

This proposal uses a structure parallel to that of Alternative I to permit effective local government and self regulation of the distribution of certain explicit sexual material to minors. The most important present problem confronting such effective local government and self regulation is the problem of knowledge on the part of the retail distributor of material that what he sells should not be sold to a minor. Existing local standards in this regard are patterned on the tripartite *Roth* test and are therefore significantly subjective and difficult to apply accurately to particular materials. Perhaps even more important, even if a retail distributor understands the law and is capable of accurately applying it to the material he sells, he is unlikely to be familiar with the contents of more than a small portion of the materials he handles. Thus, the constitutionally mandated scienter requirement of *Smith* v. *California*, *supra*, will make regulation through the criminal law exceedingly difficult, while a relaxation of that requirement would result in the potential conviction of innocent persons, with a consequently repressive effect upon the free distribution of material protected by the first amendment.

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Alternative II seeks to solve this problem by requiring the manufacturer or importer of material which meets its definitional subsection to affix a label to material indicating that it is within the area covered by the statute. When this requirement is complied with, a retailer will be put on clear notice as to the character of the material, and State law may, if it so chooses, forbid him from selling such material to minors. If this labelling requirement is not complied with by the manufacturer or importer, he will be subject to Federal criminal penalties. The requirement placed upon the manufacturer or importer is not thought to be onerous or unfair for three reasons: (1) he will, or can easily, have actual knowledge of all of the material which he handles; (2) the definitional provision of Alternative II is as explicit and objective as possible, thus making it much easier to apply accurately than is the subjective tripartite test; (3) a manufacturer or importer is likely to have experience with the actual application of the definitional provision by Federal law enforcement officials, thus aiding his predictive capacities.

Subsection (a) of Alternative II states its purpose. Subsection (b) imposes the labelling requirement. The label proposed to be required is "adult material." This label aims to be descriptive. It expresses no judgment that the material should not be viewed by minors—that choice is for the locality or the individual. The substance of the label also aims to contribute as little as possible in enhancing the appeal of the material to which it is attached to those seeking out explicit sexual material. The label should be in a uniform place on all material, so that the retail distributor may find it easily, and the subsection so requires.

Subsection (c) gives localities the option to use the Federal labelling requirement by making it a local crime to distribute labelled material to minors. It is likely that, with such an option available to them, local governmental units will use it rather than existing provisions of law which are made difficult of enforcement by the requirement of proving scienter.

Subsection (d) imposes Class A misdemeanor penalties upon those violating the labelling requirement of subsection (b). This penalty serves the same essential function as the penalty subsection of Alternative I, discussed above.

Subsection (e) is the definitional subsection. In defining minor, the age of seventeen is used as the cut-off, and additional exceptions are made for persons under 17 who live independently of their parents. The definition of "adult sexual material," upon which the whole section turns, was a difficult one to formulate. The most important guide in its formulation was the need to be as explicit and objective as possible, so as to enhance predictibility. Taste also played a principal part—it was believed that a statute like this should not itself be offensive or prurient, as has been the case with some recent statutes in this area. This consideration, of course, tended to limit the explicitness which could be achieved. The principal substantive guideline to the definitions was a consideration of the sort of sexual material which parents and others can legitimately object to being made available to minors in the marketplace. It was concluded that depictions

of intimate sexual acts and sex related violence came within this category, but that mere nudity did not. Pictorial depictions concentrating on genitalia were, however, included in the definition, although these might most logically be placed in the category of depictions of mere nudity. This was done because a large part of the material distributed in this country today over which there is concern where minors are recipients is such "genital" pictorial material. It seemed possible to view such pictures, not as depicting nudity as such, but as incorporating very selective—and especially sex related—nudity, which might be kept from minors if their parents so wish.

Subsection (f), like a parallel provision in Alternative I prohibits the use of compliance with the labelling requirement so as to place a person in a worse position vis-à-vis other obscenity laws as a result of such compliance. The proviso to subsection (f) would make an exception to this general rule for persons who both manufacture or import *and* distribute materials to retail customers. In such "factory outlet" situations, the compliance with the Federal labelling requirement would be an essential element of a charge under a State statute for selling labelled material to minors. This limited use of compliance with subsection (b) is permitted by subsection (f).

C. *Alternatives III and IV: Controls for Federal Enclaves*

These two sections are supplements to Alternatives I and II; they vindicate the policies of these two sections by applying them directly to distribution in areas where the Federal government has legislative jurisdiction. Alternative III supplements Alternative I by making it a Class A misdemeanor to engage in nonconsensual distribution of potentially offensive sexual material by means other than unsolicited mailings (which are covered in Alternative I)fl The definition of offensive material in Alternative III is identical to that in Alternative I where individual communications are involved. Where mass or several communications are involved—as with broadcasts or public displays—the definition is contracted to include only very explicit pictorial material which would appear generally unnecessary to the communication of messages or ideas of social utility and to include such material only where a warning either cannot or is not given so as to permit persons to avoid seeing the potentially offensive material if they so wish. Although Alternative III is theoretically applicable to a broad range of distributional activity falling within the jurisdictional limits of the proposed Federal Criminal Code, subsection (e) would direct Federal prosecutors to limit its actual application to those areas where Federal legislative jurisdiction is primary or to cases in which the exercise of Federal jurisdiction is necessary to vindicate valid State policies.

Alternative IV bears the same relationship to Alternative II as Alternative III bears to I. In addition, it acts as a Federal statute to exercise, in areas where the Federal government has general legislative jurisdiction, the option given State and local governments, by subsection (c) of Alternative II to forbid the distribution of labelled material to minors.

V. Other Pending and Possible Proposals

As noted above, the Supreme Court's current interpretation of the basic tripartite test for obscenity—requiring appeal to prurient interest, patent offensiveness and lack of redeeming social value—makes that test impotent to prohibit distribution of a great amount of explicit sexual material classed by many persons as pornography. Three basic sorts of legislative solutions to this situation have been suggested; one of these solutions would modify the tripartite test itself, the other two would add additional prohibitions in special areas where the Constitution permits departure from the tripartite test.

The suggested modification of the tripartite test is to eliminate the factor of redeeming social value in order to permit prosecution for obscenity, even if material has such value, so long as it dominantly appeals to prurient interest and is patently offensive. This modification is in response to a belief that it is the redeeming social value test which most often results in holding of nonobscenity under the present law. Recent cases finding nonobscenity in which full opinions have been written, such as *Memoirs*, *supra*, and *United States* v. *A Motion Picture Film Entitled "I am Curious—Yellow,"* 404 F.2d 196 (2d Cir. 1968), confirm that this observation upon the important role of the social value criterion in limiting the scope of present Federal law is probably accurate. Mere elimination of this test in a general obscenity statute would, however, most likely be held by the Supreme Court to be unconstitutional. A clear majority of the members of the Court have emphasized in recent opinions, including *Memoirs*, that any material with social value must be accorded protection from general Federal prohibitions not restricted to particular distributional contexts.

The most frequently proposed special legislation would prohibit a broad range of explicit sexual material—including much material not prohibitable under the tripartite test—from being distributed to juveniles. A New York State statute of this sort was upheld by the Supreme Court in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), and most of the legislative proposals would borrow or adapt the New York definition of material prohibited to minors. This definition is itself an adaptation of the tripartite test for use where minors are concerned. It lists a group of explicit sexual materials—*i.e.*, those depicting nudity or normal or perverse sexual activity—and then prohibits this material to be distributed to minors when it is "harmful" to minors. Material "harmful" to minors is defined as material which appeals to the prurient interest of minors, which affronts the community standard regarding the sexual material appropriate for minors to see, and which has no redeeming social value for minors. Early cases under statutes utilizing this test confirm that it will likely be interpreted to include within it significantly more material than is included within the ordinary tripartite test.

A large number of very similar or identical juvenile bills embodying the New York test and imposing prohibitions upon use of the mails or commerce to distribute to minors material which meets the test have recently been introduced into Congress.[16] They have two major draw-

[16] *E.g.*, H.R. 5171, 91st Cong., 1st Sess. (1969); S. 1706, 91st Cong., 1st Sess. (1969).

backs. First, despite their listing in explicit terms of the kind of sexual materials they may prohibit for minors, they continue to turn ultimate prohibition upon the very subjective criteria of interest, offensiveness and value contained in the tripartite test. Thus, they would not succeed in placing those persons who sell materials to minors on clear notice of what materials may not be sold to minors. Second, unless they contain a provision not present in the State laws from which they are adapted, they may be virtually unenforceable as regards distributions to minors through the mails, which is the principal class of retail distributions subject to Federal jurisdiction. The reason for this unenforceability turns on the requirement of the defendant's knowledge (scienter) that his customer is a juvenile. Unless proof of such knowledge is an element of the crime, application of the statute to a person who distributes to a juvenile through the mail without notice that the recipient was a minor would probably be unconstitutional.[17]

On the other hand, if knowledge that the distribution was to a juvenile is an element of the crime, such knowledge will almost always be impossible to prove in distributions by mail which are conducted without a face-to-face encounter between mailer and recipient. One of the proposed bills, S. 1706, seeks to resolve this dilemma by requiring all mail deliveries of explicit sexual material to be made by hand, and prohibiting such delivery to be made to a minor. This considerable extra workload upon the Post Office Department would be financed through a higher postal rate authorized to be imposed upon all mailers of such materials. A second type of proposed solution to the scienter dilemma is contained in the draft of the recently introduced Administration minors legislation.[18] This bill does not contain a scienter requirement, but it would afford an affirmative defense to a mailer showing evidence of a basis for a reasonable belief that the addressee was above the age of majority. Receipt of a signed purchase order from the addressee stating that he was not a minor would be grounds for such a reasonable belief. This proposal would appear to be too easily circumventable by addressees who falsely state their age, and it would create serious constitutional problems if applied to an unsolicited mailing to a minor where the mailer had no notice that the addressee was under age.

The second type of proposed special Federal legislation would seek to protect mail recipients from unwanted potentially offensive sexual material. One proposed direct solution, embodied in another Administration bill recently introduced,[19] would be to prohibit the use of the mails or facilities of commerce to send advertising material "designed or intended to appeal to a prurient interest in sex," thus eliminating the elements of offensiveness and lack of value where unsolicited advertisements are involved. This proposal suffers from extreme vagueness in the definition of the material it prohibits. The prurient interest test is probably the most ambiguous of the elements of the tripartite formulation. In present practice its vagueness is limited by the need to satisfy two other limitations as well; a distributor may be unclear whether his material appeals to prurient interest, but he may often

[17] *See Smith* v. *California*, 361 U.S. 147 (1959).
[18] H.R. 11031, 91st Cong., 1st Sess. (1969).
[19] H.R. 11032, 91st Cong., 1st Sess. (1969).

be certain either that it has social value or that it fits within current community standards of acceptability.

These touchstones would be removed by the proposal. The proposal may also face substantive constitutional difficulty because of its elimination of two of the three elements of the tripartite test. This may be justified, however, because of the application only to unsolicited "assault[s] upon individual privacy," *Redrup* v. *New York*, 386 U.S. 767 (1967), or because of special constitutional doctrines permitting greater governmental freedom in regulating "purely commercial advertising," *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942). A more indirect type of solution is to permit mail recipients to state in advance their desire not to receive sexual mail advertisements of certain types, and to devise procedures by which either the Post Office or the mailer would prevent delivery of such mail to persons announcing their desire not to receive it. The Post Office Department is presently formulating a proposal of this sort which would put the burden on the mailer to prevent mailings to persons who do not wish them; the National Commission on Obscenity and Pornography is considering a proposal which would authorize either the Post Office or the recipient to reject such mail, both of whom would be given notice on the mail itself that sexual material is contained within.

Appendix A

PSYCHOLOGICAL ASSUMPTIONS IN SEX CENSORSHIP: AN EVALUATIVE REVIEW OF RECENT (1961–68) RESEARCH*

(Robert B. Cairns, Indiana University)

In the summer of 1960 James Paul, Julius Wishner and I began a search for empirical studies relevant to the psychological assumptions underlying sex censorship laws. What prompted my initial interest in the project was its relationship to my primary research area: social behavior development in children and animals. It seemed reasonable to expect that psychological research could shed some light on the processes by which environmental events acquired the capacity to evoke and maintain sexual behavior patterns in children and adults.

Wishner, Paul, and I felt that investigations in the area could be of considerable import to both psychology and the law. Issues of interest to psychology include such questions as: "If 'pornographic' stimuli are sexual arousing to some persons but not to others, how do they acquire these capacities?" and "To what extent can the sexual arousal properties of an event be extinguished, or satiated, by recurrent exposure?" Questions of interest to both areas would be, "Are attitudes with respect to sex and sexual behaviors influenced by exposure to novel and/or proscribed activities?" And, "Does pornography sometimes elicit criminal or psychopathological behavior?"

We were disappointed to find that only meager relevant research was available. And much of the information that was at hand was

* An expanded version of a talk given at Indiana University on July 13, 1968 to the Commission on Obscenity and Pornography.

open to serious reservation on methodological grounds. So we took what was available, indicated what had been done, and roundly criticized most of it (Cairns, Paul, & Wishner, 1962). In the planning and the execution of the project, we did not feel a need to justify the current anti-obscenity laws. Nor did we feel a need to act as evangelists for a revision of the statutes as they now exist. We simply wished to find out whether the evidence from the behavioral science literature supported or contradicted the assumptions (implicit or explicit) of the current laws.

What we did find can be summarized rather briefly. The evidence indicated:

1. Pictures and words that depict various aspects of human sexuality serve to produce sexual arousal in a large proportion of the adult population.

2. The sorts of materials that elicit arousal differ according to the sex of the viewer. Females tend to be aroused by less direct, more subtle descriptions of sexuality; such material would include romantic stories and expressions of affection that could hardly be labeled obscene. Males, on the other hand, are much less likely to be sexually aroused by such "romantic" stimuli, but are highly responsive to stimuli which depict female nudity or sexual relations. In the case of males, the data suggest that the more obscene the heterosexual material, the more its arousal potential.

3. Sharp individual differences obtain among persons in their preference for, and response to, sexual stimuli. Homosexuals, for instance, show the greatest sexual arousal during the presentation of stimuli concerned with the performance of homosexual acts; the reverse holds for males that are oriented toward heterosexual behavior. Some important interactions between personality type and the arousal potential of sex-related materials have been reported. Apparently, for some persons, exposure to sexual stimuli can be a distinctly aversive experience and will lead to cognitive disruption and heightened anxiety.

4. The context in which the viewing occurs is a significant determinant of the extent to which the subject will be aroused by the materials. The same stimulus will have a different impact upon the individual, according to the setting in which it appears. The presentation of nudes under conditions of sexual-inhibition will elicit anxiety instead of arousal; under non-inhibiting conditions, the same stimulus elicits a state of heightened sexual arousal. Alcohol can reduce inhibitions, and, possibly, augment the behavioral expression of arousal.

We had hoped to find studies which were relevant to the long-term behavioral effects of exposure to "obscene" materials, and to learn whether these were correlated with changes in attitudes and behavioral standards. The latter effects have, of course, been widely presumed to occur. One of the more frequently cited justifications for anti-obscenity laws has been the expectation that the free distribution of such materials would lead to irreversible changes in the moral code and behavioral standards of the society. Unfortunately, there were no empirical studies of even the *immediate* or short-term behavioral effects of obscene or pornographic stimuli, much less the effects upon society

standards. Investigations of long-term effects were non-existent. In the conclusion of that paper (Cairns, Paul, & Wishner, 1962) it was necessary to conclude, somewhat apologetically, that:

> We need to know how long the conditions of arousal last and how this stimulation might affect overt behavior, attitudes governing behavior, and mental health. We cannot offer empirical evidence to answer such questions because no such evidence exists. The data simply stop short at the critical point.

It has been six years since the review was published: seven years since it was written. Has the situation changed any? Does available research come any closer to the "critical" issues. In accord with Dean Lockhard's request, I have taken the first steps in bringing the research review up to date. The same procedure was followed as in the preparation of the original article: a general screening of all potentially relevant papers cited in the Psychological Abstracts (1961–1968) and in current issues of journals likely to report relevant work. So far I've located approximately 80 papers that have appeared since mid-1961 that appear to be relevant to the topic (see attached bibliography). The research reported in these papers summarizes what psychology today has to offer with respect to the questions of how psychosexual stimuli influence behavior and attitudes. I will not attempt a comprehensive review and critique of each paper this morning. I will, however, summarize some representative studies and provide an overview of the current state of the research.

Self-reports of sexual arousal

The bulk of the studies published in this period have continued to use the self-report technique to determine the extent to which a particular stimulus was sexually arousing. Though the basic approach has been unchanged, the control procedures adopted and statistical analyses of the data have shown some significant gains. From the standpoint of methodological sophistication and analytic clarity, the work of Levitt, Brady, and their colleagues is outstanding (Brady & Levitt, 1965a; 1965b; Levitt & Brady, 1965, Levitt & Hensley, 1967). The problems that these investigators were concerned with included (a) the identification of the classes of pornographic visual material that was sexually arousing to young adult males, and (b) assessment of the role of various individual difference variables in determining responsiveness to psychosexual stimuli. In one of the studies (Levitt & Brady, 1965), various sets of stimuli depicting scenes ranging from nudity to homosexual and heterosexual intercourse and sado-masochism, were presented to subjects under standardized, counterbalanced conditions. The subjects, male graduate students, were asked to report the extent to which each picture was "sexually stimulating." The group judged the explicit descriptions of heterosexual activity to be the most sexually arousing of all stimulus pictures. One of the more interesting findings was the photographs of nude females, or even partially clad ones, were rated to be as sexually arousing as

frankly pornographic scenes (e.g., a male simultaneously stimulating two females).

Of course, not all subjects were equally responsive to the sexual stimuli. For instance, subjects who reported prior homosexual experiences indicated that they were more sexually stimulated by photos of partially clad men than subjects who reported no homosexual experiences. Interestingly, reported homosexuality was not correlated with the subjects' responses to blatantly homosexual stimuli (Brady & Levitt, 1965). Also somewhat surprising was the finding that a subject's responsivity (i.e., reported sexual stimulation) was poorly correlated with measures of personality dispositions. The one stable relationship that was obtained was between self-reports of sexual arousal and the trait labeled endurance, as measured by Edward's Personal Preference Inventory (Edward's verbal definition of "endurance" emphasizes the tendency to keep at a job until it is finished, to stick to a problem even though it may seem as if no progress is being made). Levitt and Brady (1965) suggest that the correlation can be interpreted to mean that the hard-working, persistent, plugging individual is less distracted by fantasy stimulation, or is less willing to report that he is. The remaining correlations between sexual arousal and personality factors as measured by a standard inventory were low or nonsignificant. Whether similar relationships obtain for a population of subjects that is not so highly select (adult male graduate students) cannot, of course, be answered by this research.

Another recent investigation has used frankly pornographic materials as stimuli, and self-reports of sexual arousal as the dependent variable (Jakobovits, 1965). Jakobovits obtained the evaluative reactions of college-age men and women to erotic literature. Following the distinction suggested by Kronhausen and Kronhausen (1959), the investigator proposed that there were at least two classes of literature designated as obscene: namely, "erotic realism" and "hard-core obscenity." The two classes are distinguished by three main criteria: "context (in works of erotic realism or *ER*, the proportion of nonsexual detail is larger than in hard-core obscenity or *O*); exaggeration (*ER* strives for realism whereas *O* contains unrealistic and so-called wish-fulfilling distortions); and third, the presence of anti-erotic elements in *ER* which are absent or very rare in *O*." (Jakobovitz, 1965, p. 985).

Using the above criteria, 20 short stories were written in such a way so that 10 had the characteristics of erotic realism, and 10 had the characteristics of hard-core obscenity. The stories were, on the average, 700 words in length. A sample of 20 adult judges, 10 male and 10 female, read each story and indicated whether they felt it to be an instance of erotic realism or obscenity. Agreement between judges was very high.

The primary study in the series was an attempt to determine whether males and females differed in their response to the two types of literature. The research design employed also permitted an evaluation of the cumulative effects of exposure to the sexual stimuli. Kronhausen and Kronhausen (1959) argue that the sexual arousal prop-

erties of obscenity diminish after repeated exposure to the materials. In a balanced factorial design, 40 college age adults (20 male and 20 female) rated whether a set of 10 erotic realism or hard-core obscenity were "sexually stimulating." The ratings are shown in Table 1. Statistical analyses of the data indicate that:

TABLE 1.—MEAN RATINGS ON DEGREE OF SEXUAL STIMULATION EVOKED BY THE STORIES[1]

Type and sex	Successive stories										Male
ER:											
Male	2.0	1.8	2.2	2.2	2.0	3.1	3.9	3.4	4.1	4.2	2.9
Female	1.5	1.8	1.6	2.2	2.8	2.9	2.7	3.6	4.1	3.9	2.7
O:											
Male	1.8	1.8	1.7	2.2	2.6	2.3	2.9	3.4	3.0	3.7	2.5
Female	3.0	3.6	3.7	3.7	3.0	4.6	4.5	4.9	4.5	5.3	4.1

[1] "1" represents "I find it only mildly sexually stimulating," and "7" represents "I find it very sexually stimulating." (from Jakobovitz, 1965, p. 991.)

a. the men and women in this sample did not differ in their responses to the "erotic realism" stories;

b. the women reported that "hard-core obscenity" was more sexually arousing than did the men;

c. both men and women report a cumulative effect in the reading of erotic materials. With only 10 stories, the materials apparently became increasingly more stimulating (the term "warm-up effect" seems descriptive), quite the opposite of a satiation phenomenon.

The last two findings contradict two of the more widely held beliefs regarding the effects of pornography. Indeed, the rest of the literature is near unanimous in the conclusion that women are less stimulated by direct accounts of sexuality than are males. Since the subjects were selected by a rather unique procedure ("Typically, a volunteer from the author's acquaintances would receive a few booklets . . . and would return them a few days later filled out by 'friends.'"), it is unclear how these results might be generalized. Subject sampling remains a critical problem in the analysis of sexual responsiveness (e.g., Kinsey, et al., 1948).

Two large scale interview—survey studies have appeared since 1962. Both provide information on one of the primary questions that has been put to the law, "Does pornography cause criminal behavior?" In the volume, *Sex-offenders, an analysis of types* (Gebhard, et al., 1965), we have the most extensive analysis that has yet appeared on the relationships between pornography and criminality. The basic procedure involved comparisons between the interview responses of 1,356 "white males convicted of sex offenses," and those of two control groups. One of the controls groups consisted of 488 white males selected through the procedures described in the previous volumes of the Institute for Sex Research (e.g., Kinsey, et al., 1948). The other control group consisted of 888 white men which were imprisoned but who had never been convicted for a sex offence. Among other questions, the subjects were asked, "Does it arouse you sexually to see photographs or drawings of people engaged in sexual activity?" They were also questioned about whether they had ever personally owned pornography.

One of the major findings of this work was that the three groups of subjects did not differ substantially among themselves in terms of reported arousal from depictions of sexual action. In the case of the normal control group, 32.8% reported little or no arousal, while 30.7% indicated that they were strongly aroused by depictions of sexuality. The corresponding percentages for the prison group (never convicted of sex crimes) were 37.7% no arousal, and 36.3% strong arousal. Surprisingly, the sex-offender groups were relatively unresponsive to pornography with 42.8% reporting little or no arousal, and only 27.7% admitting that they were strongly sexually aroused by pictures of overt sexual activity.

Furthermore, the various classification groups did not differ markedly in terms of their possession of pornographic materials. Gebhard, et al. indicate that, "About one third of the control group and one half of the prison group reported having personally owned pornography. . . . Between these two proportions lie those of the majority of the sex offenders. Summing up the evidence, it would appear that the possession of pornography does not differentiate sex offenders from nonsex offenders" (p. 678). The data are impressive in their consistency—and in their failure to demonstrate that sex-offenders as a group are overly responsive to sexual stimuli.

A recent series of studies by Thorne and his colleagues (1966) provide direct support for the findings of the Institute for Sex Research investigators. Thorne and Haupt (1966) compared the responses of 259 men convicted of sex crimes against females with those of 301 men convicted of property crimes. Each group was administered Thorne's *Sex Inventory*, a questionnaire consisting of such questions as, "I like to look at pictures of nudes," "Buttocks excite me," and "The thought of a sex orgy is disgusting to me." The reports of this research are marred by incompleteness, both in the reporting of the procedures followed and in the presentation of appropriate descriptive and inferential statistics. Nonetheless, on the basis of the data gathered, the investigators conclude that "In general, the property crime felons were very similar to the sex offenders and homicidal offenders in being conservative in sex attitudes but not as extreme (in conservatism) as the last two groups" (p. 397). That is, the sex-offenders tended to report less stimulation from pornography and to hold more rigid attitudes concerning sex than did normal control subjects.

Attempts to correlate pornography with criminal sex behavior thus far have yielded negative results. It would be premature, however, to conclude from these studies that obscene or pornographic stimuli play no role whatsoever in the elicitation and maintenance of anti-social sexual or aggressive acts. One of the obvious problems is that these data are based upon the self-disclosures of individuals after they have been incarcerated for criminal sexual behavior. Whether the self-reports faithfully represent the individual's response to pornographic stimuli in the extra-institutional setting remains to be determined. Even if the subjects were highly motived to accurately represent their subjective responses, it seems doubtful self-reports in such an area of personal conflict would be free of distortions. Indeed, perhaps one of the reasons that a proportionately high number of sex-offenders

fail to report that pornographic materials are stimulating is that these materials exacerbate conflicts that are highly disturbing to them. Such conflicts could be avoided or minimized by either avoiding the material altogether or by suppressing one's response to stimuli of sexual relevance (i.e., see Minard, 1965, and Loiselle, 1966, on perceptual defense). Another complication in these studies is that they were relatively insensitive to the possible eliciting or "triggering" functions that the pornographic materials might have served for the sex-offenders. The general body of information that is available on anti-social or criminal behavior indicates that the phenomenon has multiple determinants. At this juncture, the data do not permit us to reject flatly the possibility that pornography is one of the events that serves to facilitate the expression of socially disapproved sexual behaviors (see Levitt, 1968).

Experimentally induced changes in viewing behavior

One of the primary limitations of the studies cited in the earlier review was the paucity of studies dealing with the effects of erotic stimuli upon sex-related behavior (as opposed to verbal reports of "stimulation" or "arousal." In the past six years, a few studies which have been concerned with an analysis of overt behavior have appeared. Two of them (Walters, Bowen, & Parke, 1964; Martin, 1964) have used promising experimental techniques. Walters and his collaborators (1964) have found that sexually significant responses can be disinhibited by observing the behaviors of another individual. In this study, undergraduate men were shown a series of pictures of nude or almost nude men and women. The nudes were in poses that the investigators thought were "evidently designed to elicit erotic responses." In all experimental conditions, the subjects were told that a moving spot of light on the pictures indicated where the previous subject had focused. The experimenter, of course, controlled the light. The spot of light, for approximately half of the subjects, roved over the bodies of the nudes, and most of the time appeared in the vicinity of the breast and genital areas. For the rest of the subjects, the light appeared in the background of the picture, giving the subject the impression that the preceding observer had avoided looking at the nudes. Following exposure to one of the two conditions, each subject was permitted to view a set of pictures that was parallel to those used in the first part of the experiment. The subject's eye movements were traced by means of an eye-marker camera. The results indicates that subjects who followed an "uninhibited" observer when given the opportunity spent significantly longer looking at the nudes than did subjects who had followed an "inhibited" observer.

Apparently a primary outcome of seeing the results of an "uninhibited" viewer was to relax the subject's own inhibitions about viewing the erotic pictures. Furthermore, in an argument that is quite important for the issues confronting this Commission, Walters, et al. concluded that "observers who are emotionally aroused and uncertain how to respond in a social situation are readily influenced by the behavior of a model." The basis for this conclusion is that subjects tended to imitate the behavior of the preceding subject *only* in the case of emotionally arousing stimuli (i.e., pictures of nudes). The subjects

failed to imitate the behavior of the "preceding subject" when the pictures were non-threatening or unrelated to sex. Should this assertion be correct, then it would follow that the persons who are likely to be influenced by the sexual behavior of models are those who are least stable in their own sexual patterns. Such as children.

Barclay Martin at the University of Wisconsin reported two experiments in 1964 on the expression and inhibition of sex motive arousal in college men. He used as his primary dependant variable the time spent by subjects in the sorting of pictures of nude females of the *Playboy* type. Subjects in one group (Inhibitory) were given instructions designed to inhibit their viewing: and subjects in the "Permissive" condition were treated in an informal, friendly fashion. Those men given the "permissive" instructions performed as expected: they spent significantly more time looking at nudes than subjects given the inhibitory instructions. A second study assessed the effects of pre-arousal. Prior to performing on the criterion task (sorting pictures of attractive nudes, with no time limit), the subjects were shown either neutral pictures (classical paintings) or erotic pictures. Half of the subjects were given Permissive instructions prior to entering into the pre-arousal series, and the remainder of the subjects were given Inhibitory instructions. The results indicate that the effects of pre-arousal are conditional. If the situation is a permissive one, then the more the pre-arousal (erotic pictures vs. classical paintings), the stronger the expression of the sex motive. But if the instructions were inhibitory, the level of pre-arousal had no effect upon the subject's "sex motive" expression. These "cumulative effects" are consistent with those of Jakobovitz (1965) who presented erotic materials in a permissive context. Such studies underscore the importance of situational factors in determining the influence of a particular stimulus upon behavior. Erotic materials do not occur in a contextual vacuum. The settings in which they appear and the circumstances of viewing appear to play a crucial role in the extent to which sexual stimuli are arousing to the viewer or to the reader.

Conditioning of sexual responsiveness

Within the past five years, several important reports on the conditioning of sexual responsiveness in humans have appeared. Most of the work has been carried out with clinical groups, and hence has been directed at the extinction of anomolous behavior patterns. For instance, Bancroft and his colleagues (Bancroft, Jones, & Pullan, 1966) report a case where they were successful in inhibiting aberrant sexual responses in a pedophiliac by aversive conditioning (i.e., presenting electric shock whenever penile erections occurred to inappropriate stimuli). Solyom and Miller (1965) report similar results in the therapy of several cases of male homosexuality. Sex arousal by masculine stimuli was inhibited by aversive conditioning and, during the course of treatment, the patients showed an enhanced response to adult females. Though the work is limited, and still just a step removed from the level of clinical demonstrations, such research strongly indicates that responsiveness to "inappropriate" sexual objects can be extinguished.

Conditioning procedures are not limited to inhibiting sexual re-

sponsiveness. A recent report by Rachman (1966) indicates that sexual arousal can be conditioned to previously neutral objects. In an analogue to the classical (Pavlovian) conditioning of appetitional responses, chromatic pictures of various "neutral" objects such as boots were paired with photographs of attractive nude females. After a short training period, the three adult male subjects in Rachman's study demonstrated a strong sexual response to the neutral objects even when *they were presented alone*. However, because Rachman did not include the necessary controls to demonstrate the phenomenon was indeed associative as opposed to one of general arousal, the results cannot be unambiguously interpreted as an instance of conditioning. Nonetheless, the work represents a very important area of research which deserves to be vigorously pursued. It should be noted that parallel studies of conditioning of sexual arousal in infrahumans strongly support the assumption that sexual arousal can be conditioned to previously neutral cues (e.g., Hafez, Cairns, Hullet, & Scott, 1968).

Sexual conflicts and sexual fantasies

Recent studies have used thematic measures to identify some of the consequences of sexual conflict. In a doctoral dissertation completed at the University of Massachusetts, Leiman (1961) found that subjects could be reliably categorized in terms of sexual guilt by their responses to a self-report inventory. Those subjects who indicated that they experienced considerable sexual guilt failed to produce sexual fantasies even when they were exposed to materials that had high sexual relevance. That is, subjects who were conflicted with respect to sex apparently distorted materials that were blatantly sexual (cf. the results obtained with sex-offenders, Gebhard et al., 1965). These findings are also consistent with an earlier report which indicated that persons who were conflicted with respect to sex show considerable disorganization in problem solving following the presentation of nude pictures (Miller & Swanson, 1960).

In a related investigation, Byrne and Sheffield (1965) found that college students who differed in terms of their status on the personality dimension "repression-sensitization" also differed in their responses to erotic materials. Those subjects who characteristically "repress" threat reported significantly less anxiety after reading pornographic passages than did subjects who showed a "sensitization" to threat. It is of interest to observe that both groups of subjects reported subjective feelings of anxiety after reading the erotic passages. Differences between the two groups were obtained only because the "sensitizers" showed the *greatest* increase in anxiety. Apparently exposure to hard-core obscenity is a stressful experience, even for "sophisticated" normal young adults.

The influence of contextual stimuli and intrapersonal conflict in the control of sexual fantasy was discussed in our last review (Cairns, Wishner, & Paul, 1962), and also by Epstein (1962).

Advances in the physiological assessment of sexual arousal

In concluding this selective overview of the recent research, we must take note of some significant advances in the psychophysiological assessment of sexual arousal. Much of the work in the area has been instigated by the simple fact that sex is a pretty reliable stimulus to

use if one wishes to study physiological arousal patterns. Most physiological psychologists who have used sexual stimuli have *not* been concerned with the manipulation of the stimulus class, or even with understanding the situational and contextual factors which control the effectiveness of these events. Rather, they have been usually interested in the validation of a psychophysiological procedure, and determining patterns of central nervous system response. Some of the more noteworthy procedures that have been developed include:

a. Pupillary response. This procedure capitalizes upon the fact that pupil dilation occurs during periods of heightened autonomic arousal. E. Hess of the University of Chicago has concluded that the pupil changes in size in response to "emotionally toned or interesting visual stimuli" (Hess and Polt, 1960). Several studies support this contention. It has been shown, for instance, that male subjects' pupils dilate in response to pictures of nude women but show little change in response to pictures of nude men. And reverse effects are obtained with female subjects: they respond with dilation to pictures of males (Hess & Polt, 1960; Nunnally, Knott, Duchnowski, & Parker, 1967; Bernick, Borowitz & Kling, 1968). Hess (1965) has also asserted that stimuli that are unpleasant, or are otherwise negatively toned, lead to pupil constriction. The evidence with respect to this claim is less than conclusive (e.g., Peavler, Scott, and McLaughlin).

b. Penile plethysmography. This technique involves the monitoring of penile volume through a pressure transducer. The technique was developed by a Czechoslovakian physiologist, Karl Freund (1957), and has since been used in various laboratories. In a recent application of the method, Freund (1967) diagnosed by penis volumetry in various clinical groups (homosexual, pedophilia, etc.). Marked differences were obtained between the normal (heterosexual) controls and the several diagnostic groups when the subjects viewed pictures of males, females and children. McConaghy (1967) has obtained similar results in a partial replication of Freund's study.

c. Hormonal secretions. The technique used by Clark & Triechler (1950) to assess sexual arousal by analysis for acid phosphatase in the urine has been recently extended (Gustafson, Winokur, & Reichlin, 1963).

d. Galvanic skin response. Continued use has been made of GSR responsivity as a measure of sexual arousal. Ordinarily, the GSR technique is used in conjunction with other indices of sexual arousal (see, for example, Loiselle and Mollenauer, 1965, and Martin, 1964).

Because these psychophysiological procedures do not necessarily involve verbal reports from subjects, they have been widely adopted in laboratory investigations of sexual arousal. Considered separately, however, each of the techniques has its share of troublesome artefacts. One general problem is the nonspecificity of measures of central nervous system activation: they record not only sexual arousal but other forms of arousal such as anxiety, embarrassment, guilt, or fear (Hain & Linton, *in press*). Even the penile plethysmograph is subject to distortions, including movement artefacts, voluntary control, and adaptation effects.

The problems of construct validation are not uncommon ones in psychology, and certainly not unique to the analysis of sexual respon-

siveness. The present data suggest that no single measure should be considered *the* index of sexual arousal. If a subject reports that he is sexually aroused, but fails to show any of the physiological indices of arousal, one would be scarcely justified to conclude that he is in a state of heightened sexual responsiveness. What seems called for at this juncture is the use of multiple criteria in determining sexual arousal, when it is feasible to do so. To rely solely upon verbal reports, or upon a single psychophysiological or endocrinological measure, is likely to lead to deductions that are, at best, incomplete. It is mildly depressing to observe that systematic comparisons of these various measures have yet to be seriously pursued (but see Bernick, et al., 1968, and Hain & Linton, *in press*).

Related areas of research

Studies of aggression development and instigation.—Within the period since our last review appeared, several investigations of the exogenous control of aggression have been reported. In 1962, we noted a prepublication report of Albert Bandura's studies of aggressive imitation. The work has since been extended in a series of ingenious experiments by Bandura and his colleagues at Stanford which underscore the role of observation learning in the acquisition of social behavior patterns (Bandura & Walters, 1963, summarizes several of the studies). In addition, approximately a score of investigations have been concerned with the analysis of the process whereby social cues acquire the capacity to elicit hostility and aggression (see Berkowitz, 1964). The results of these two lines of research have been summarized adequately elsewhere and need not be covered here (see Brown, 1964; Hartley, 1964; and Zajonc, 1966 for a critical discussion of the issues). It should be observed, however, that the research has provided compelling evidence on the role of imitation in the learning and performance of aggressive behaviors. Children apparently learn a great deal by imitation, including techniques of aggressing against other persons and objects.

But it would be hazardous to extrapolate uncritically the findings of studies of aggression to the problems of sexual instigation and control. Because of the physiological augmentation of sexual arousal and its rhythmic expression, it could be the case that sex responsiveness is more easily instigated, maintained, and conditioned than are aggressive behaviors. In any event, while studies of aggression may provide hypotheses to be evaluated, and suggest guidelines for research in the area of sexual arousal, it seems critical to recognize that significant differences exist between the two response systems in terms of behavioral expression and physiology.

The ontogeny of sexual behaviors.—The other area of related psychological research that requires comment concerns the development of sexual behaviors in children and other animals. An excellent survey of the current state of research appeared in 1965, in the volume *Sex and Behavior*, edited by Frank Beach of the University of California. It is ironic that our best information on sexual behavioral development comes from studies of the response system in infrahumans. Studies of the development of sexual behaviors and orientations in humans have been limited, for the most part, to the analysis of sexual identification (adoption of masculine or feminine roles). As the studies of Hampson

and Money (1965) indicate, the psychosexual orientation of children with endocrine and/or hermaphrodite disorders is controlled by the conditions under which the children are reared. The pioneering work of Sears (1957, 1965) and his colleagues provides additional support for the assumption that the environmental experience of the child is a primary determinant of his sexual role orientation.

Much less is known about other aspects of the development of sexuality in the child. There have been, for instance, no investigations of the longitudinal evolution of sexual behaviors in children. From studies of infrahumans, it is obvious that sexual development is not an abrupt event that occurs at puberty in the absence of precursors. On the contrary, analyses of the play behavior of young, sexually immature animals indicate that their activities involve elements of the behavior sequences that are later involved in adult reproductive behaviors. Harlow (1965) for instance, has plotted certain of these behavioral precursors for monkeys. Further experimental analyses of infrahumans indicates that the sexual arousal patterns of young sheep and rodents can be markedly influenced by the conditions of rearing and early exposure (Cairns, 1966). The development of sexual behaviors in the child has yet to be the object of a systematic longitudinal analysis.

One further comment on the plasticity of sexual behaviors and patterns of arousal. Studies of various infrahuman species (dogs, monkeys, sheep, rodents) indicate that mammals are *not* innately responsive to the sexual cues provided by other members of their species. If, say, an adult monkey has been reared in isolation since shortly after birth, his response to a receptive female at maturity is highly disorganized. And, as noted above, "natural" cues can acquire the capacity to elicit sexual arousal for normal animals, if they have been repeatedly paired with primary sexual experiences. Apparently learning plays an exceedingly important role in (a) the kinds of behaviors exhibited in states of sexual arousal, and (b) the sorts of cues that have the capacity to elicit sex arousal in infrahumans.

SOME RESIDUAL QUESTIONS FOR RESEARCH

So we still have precious little information from studies of humans on the questions of primary import to the law. Part of the problem lies in the nature of the questions that have been asked. Analyses of the determination of complex social behavior patterns in humans (or infrahumans) indicate that a response is rarely elicited by a single event, acting alone. On the contrary, social behaviors and attitudes are typically multi-determined, and reflect an interaction between organismic, personality, societal, cultural, and early experience factors. Consider the question: "Does pornography cause delinquency?" Contemporary research has clearly demonstrated that the "delinquent" orientation is an outcome of a complex interaction of biophysical predispositions and experimental factors. The exogenous influences on behavior can be mediated through the child's family and the child-training practices of the parents, through the child's association with same-aged friends, through his sub-culture and its unique standards for behavior, and on. What is the role of pornography in this complex equation? Taken by itself, the exposure to erotica seems to play, at

most, a minor role in delinquency and criminal behavior (e.g., Gebhard, et al., 1965; Glueck & Glueck, 1950). But whether the availability of pornographic materials serves to augment pre-existing tendencies, provides directions for anti-social behaviors, or even acts to sublimate the direct expression of aberrant sexual behaviors, has yet to be determined.

Can more specific questions on the effects of viewing or reading pornographic materials be answered? At this point, it appears that the techniques *are* available to permit a programmatic attack on some of the critical issues. For purposes of organization, I will classify some of these "critical" questions into two general categories: whether they refer to the effects of exposure to pornography upon the behavior and attitudes of the viewer.

On the elicitation of sexual arousal

First, let's consider the research questions implicit in the general query, "What makes an event pornographic?" It has been commonly assumed—or feared—that children are more susceptible to the conditioning of responses to sexual stimuli than are adults. Is this true?—is there a correlation between age and the classical conditioning of sexual arousal to various "aberrant" stimuli. Or the related problem, "Are females less susceptible to the classical conditioning of sexual responses than men?" as proposed by Kinsey, *et al.*, in 1953? We do have preliminary evidence that sexual responses can be conditioned to "neutral" stimuli in adult males (Rachman, 1966). And we have conclusive evidence that animals must become conditioned to the "secondary" cues of sexuality in opposite-sex conspecifics. What, then, is the longitudinal course of the development of the cue properties of sex-related events in humans? *Such problems can be directly investigated in laboratory or in semi-naturalistic longitudinal analyses.*

Another set of problems that are of immediate relevance to the law involve the maintenance and extinction of the arousal properties of sexual cues. It has been widely assumed that persons will become "adapted" or "habituated" to particular expressions of sexuality, and that repeatedly presented stimuli diminish in terms of their arousal capacities. Then more and more extreme expressions of sexuality are required for arousal. If this assertion is true, then what is the time course of adaptation? And if there is a change in sex arousal threshold, will it be only temporary with a spontaneous recovery to the original level? Or will a change because of adaptation be relatively enduring? Such questions are particularly relevant for the practical issue of determining the probable effects of the widespread distribution of obscene materials in the society. Should a permanent change in adaptation level occur, then one might expect that the long-term effects upon behavior would be very slight.

But at least two of the studies that have appeared in the past six years (Jakobovitz, 1965; Martin, 1964) indicate that pre-exposure to sexual stimuli has a potentiating effect for later sexual arousal. Rather than satiation, exposure to sexual stimulation has a cumulative effect and enhances the influence of subsequent erotic material. These two effects (adaptation vs. facilitation) are not necessarily contradictory. The time-course of the two outcomes, and how they interact in the control of arousal, can be directly studied in both the laboratory and

in semi-naturalistic settings. The present data with respect to these issues are now only fragmentary.

A related matter concerns the extinction of the cue properties of sexual stimuli. Under what conditions, if any, can the arousal potential of a given environmental event be permanently reversed? Zing-Yang Kuo (1967) has demonstrated that the cue function of heterosexual stimuli can be manipulated in infrahuman mammals. Solyom and Miller (1965) have demonstrated that the cue function of events pertaining to homosexuality can be diminished. The issues of extinction and acquisition can be studied under controlled conditions.

Effects of pornography on attitudes and behavior

The second general question is, simply, "What effects do 'pornographic' materials have upon the behaviors and attitudes of the viewer?" Consider the problem of attitude formation and change. This is doubtless one of the primary concerns of those who press for anti-obscenity laws. It was argued, for instance, in *Roth* v. *US* that the free distribution of obscene materials "can hardly help but induce many to believe that their moral code was out of date." This proposition is a testable one. Under controlled conditions, the relation between age, strength of the previously established belief system, and the subject's susceptibility to attitude change by exposure to erotica. Such studies might employ either the standard attitude questionnaire procedures or, alternatively, attitudinal shifts in artificial micro-cultures formed in the laboratory (see Zajonc, 1966, or Brown, 1964). Indeed, it might be the case that some of the studies that have been reported in the literature, as a by-product of their experimental procedures, influenced the attitudes of the subjects with respect to the behaviors that they observed. The attitude shift isn't restricted only toward "the behavior depicted looks like fun" type of assertion. It could also include changes in the subject's attitude about whether it is permissible for him to use pornography as an aphrodisiac. Since the necessary pre- and post-test attitudinal assessments have rarely been included in laboratory investigations of sexual arousal, we have virtually no information on the attitudinal consequences of participation in such experiments. To obtain answers to questions that are put by the law, such studies should assess *both* the short-term and the long-term attitudinal shifts. As the early work of Thurstone and Peterson (1932) suggests, the attitudinal changes need not be in the direction of greater permissiveness.

A related issue concerns behavior changes which are induced by the viewing or reading of obscene materials. To what extent will a modeling effect occur, in that the viewer or reader imitates the behaviors that are depicted? Only two studies of the modeling of sexual behaviors of another person have appeared, and both have yielded positive results (Kobasigawa, 1966; Walters, Bowen, & Parkes, 1964). Children and adults do imitate the "sexual" behaviors if they watched another child perform such activities. That is, first-grade boys will play with girls' toys if, and only if, they view another boy perform such "feminine" behaviors. While one has to stretch his imagination to interpret such actions as "sexual," the findings are nonetheless suggestive. We might ask, on a more general level, whether the subjects in the modeling experiments learned a "new" behavior or whether they

were simply complying with the instructions that have been communicated to them implicitly through the model's behavior. That is, it is unclear whether the model serves to "teach" a new behavior or to "elicit" an old one. It might be the case that in an otherwise ambiguous situation (apparently an essential ingredient to the "imitation" experiment), the model serves primarily to communicate to the subject what behaviors are acceptable in that setting.

The empirical phenomena of observation learning (or elicitation) cannot be gainsaid. Nevertheless, it has yet to be shown that the effects produced in the laboratory tells us much about the control of behavior of children in extra-laboratory circumstances (but see Bandura, 1966). A programmatic analysis is called for on the following issues: (a) what is the nature of the "behavior modeling" effects in the learning or eliciting of "sexual behaviors" in children and adolescents? (b) what is the influence of the context of viewing in determining whether a given behavior will be imitated? (c) what are the inhibiting effects of previously established attitudes on imitation? (d) is there a differential susceptibility to modeling influences as a function of the age and personal stability of the viewer? (e) what are the long-term and transsituational effects of imitation learning? The answers to these questions are fundamental to the general query, "What effects does pornography have upon behavior?"

Some concluding remarks on research strategy

Most of the specific questions that have been posed can be approached by either laboratory-experimental or by interview-survey procedures. Each has its merits—and limitations. For basic research, the experimental method is usually the procedure of choice. What the experimental design lacks in generality, it can gain in precision of analysis. Questions concerned with the immediate impact of sexual stimuli upon behavior and attitudes, and questions concerned with the acquisition and satiation of sexual cue properties can probably be best (i.e., most efficiently and accurately) be explored in the laboratory. Experimental studies obviously need not be restricted to "normal" sample of college students or children. The groups studied might include neurotic, sexually deviate or pathologically aggressive subjects. Or, to determine the generality of a given effect, the research could include comparative analyses. Parallel investigations could thus be conducted, using samples of subjects that differ with respect to such characteristics as social-economic class, ethnic grouping, parent training practices, or cultural identification. The problem of the limited availability of "normal" populations of children in the U.S. could be solved, in part, by comparative research.

On the other hand, applied research cannot ignore the "natural" experiment. This term would include instances where exposure to obscene materials is not controlled by the experimenter but marked differences in exposure nonetheless occur. Though the problems of teasing out cause-effect relations are formidable in such "naturally occurring" differences, the procedure can yield significant information. As an initial step, persons that differ with respect to the use of pornography as a means of sexual stimulation can be compared in terms of personality, emotional, and behavioral factors. Such groups could be matched with respect to characteristics which the investigator

wishes to control (e.g., intelligence, social-economic status, marital status). Remarkably, no studies of this type have been reported.

Alternatively, the investigator might sample diagnostic groups which are generally assumed to differ in terms of attraction to pornography, and determine whether the assumption is a valid one. This is essentially the method of Gebhard, et al., (1965) and Thorne (1966). The dimension upon which comparisons are made need not be "criminal behavior," but might involve personality (e.g., anxiety, sex-conflict), age-maturation, or ethnic-subcultural characteristics. It should also be observed that the "natural" experiment is required to determine the long-term effects of pornography distribution upon the behaviors and attitudes of a sub-culture or a society. Such "natural" experiments are now underway in Scandinavia, and perhaps will be initiated soon in those locales of this country that are contemplating abrupt changes in the regulation of pornographic materials.

In conclusion, we must be aware that in 1968—as in 1962—our data "stop short of the critical point." Definitive answers on the determinants and effects of pornography are not yet available. But the research that has been completed over the past seven years confirms that some of the unanswered questions are not unanswerable.

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PRELIMINARY MEMORANDUM
on
SENTENCING STRUCTURE
(Low; January 8, 1968)

INTRODUCTION

This memorandum is designed to expose for preliminary consideration some of the most important judgments that must be made in the early stages of the drafting of a penal Code. It is intended to initiate the study which will permit the Commission to discharge its explicit duty, as stated in section 3 of its act of creation,[1] to recommend "such changes in the penalty structure [of the criminal laws of the United States] as the Commission may feel will better serve the ends of justice." *

The memorandum is divided into three parts. The first is an examination of the three most significant shortcomings of the present Federal sentencing structure and its practical administration. The second is an exploration of some of the alternatives which should be considered in fashioning a new sentencing structure, as well as an outline of the considerations which seem most relevant to a proper choice between them. The final part is a brief listing of the major areas of study which are not dealt with in the present memorandum and which hence are postponed for the future.

A word should be added about the raw material on which much reliance has been placed, both in exposing the present shortcomings and in devising and evaluating alternatives. The American Law Institute has nearly completed work on a Model Penal Code which began in earnest in the early 1950's. In 1963, the National Council on Crime and Delinquency published its Model Sentencing Act. The American Bar Association project on "Minimum Standards for Criminal Justice" published its tentative recommendations on sentencing matters in December of 1967.** The recently concluded studies of the President's Crime Commission also contain much of relevance to the present undertaking.

In addition, there has been an abundance of activity in the States which has an important bearing on the issues which must be considered

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[1] Act of Nov. 8, 1966, sec. 3, 80 Stat. 1516.

*The Comment on the sentencing system, *infra* pp. 1289–1337, discusses the manner in which the issues and recommendations raised in this Memorandum were resolved in the Tentative Draft of the sentencing chapters: asterisked footnotes in that comment indicate the changes the Study Draft made in the Tentative Draft.

**Both the Model Penal Code and the Model Sentencing Act are reproduced as appendices to the ABA project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures (Approved Draft 1968). References to the ABA Report refer to this document, which contains the Tentative Draft of December 1967 and the Supplement of September 1968. The standards in the Tentative Draft, with amendments as shown in the supplement, were approved by the ABA House of Delegates in August 1968.

in the sentencing area. New York has completed a new penal law which became effective on September 1, 1967. New Mexico, Minnesota, and Illinois also have new Codes. Michigan, Pennsylvania, and Delaware have published draft Codes which are presently under consideration. In addition, many States—California and Texas are two—are now engaged in efforts such as the present one designed to produce a new penal Code.

PART I. PRESENT SHORTCOMINGS

1. *Inconsistent Penalty Provisions.*—One of the major failures of the present Federal Criminal Code (and the same is true of most of the State Codes across the country) is the utter inconsistency and irrationality of its penalty structure. The major cause is undoubtedly the fact that criminal legislation, like most, is the product of ad hoc responses to particular situations extending over an enormous time period. Statutes are passed at one legislative session without a clear picture of the manner in which offenses of similar gravity have been dealt with in the past. There is little attempt to produce an integrated whole.

There have been two main results: The first, to be discussed immediately below, is the inconsistent evaluation of similar conduct and the irony of more severe penalties in one part of the present Code than the penalties provided for a comparable offense in another. The second, to be discussed thereafter, is the proliferation of different sentencing levels which, though they do not necessarily suffer from the inconsistencies noted above, nevertheless often reflect subtleties of moral judgment which are far more precise than would seem to be warranted by available information.

(a) *Inconsistencies*

(i) *Prison terms.*—There are many reasons why inconsistencies in penalty structure should not be tolerated. Most basic is the simple injustice of treating offenses of comparable culpability so differently. The principle of equality before the law is surely offended by the provision of a less serious sanction for a more serious offense. The practical result of such legislated disparities is disparity in imposed sentences, which induces a cynicism about the law in the public, in the bench and bar, and most importantly among the offenders themselves. An offender who is convinced that he was more harshly treated than others who have committed similar offenses is likely to be much more difficult to deal with in a correctional setting.

It is unfortunate that there are so many instances of the inconsistency of penalty structure in the present Federal Criminal Code. Anyone who picks up Title 18 will be apprised at a casual glance of the utter irrationality of the patterns of authorized sentences. Comparison of other titles in which criminal offenses can be found produces similar findings. The following are few of the many examples that could be cited:

> One who knows that an offense punishable by death has been committed and who "receives, relieves, comforts or assists" the offender in order to avoid his apprehension is punishable by a maximum of 10 years' imprisonment: 18 U.S.C. § 3. If an arrest warrant has been issued for such a person, however, one who

"harbors or conceals" him in order to avoid his arrest is subject to a maximum sentence of only 5 years; 18 U.S.C. § 1071.

One who "harbors or conceals" any person after he has been convicted of any offense is subject to a maximum term of 5 years; 18 U.S.C. § 1071. On the other hand, one who "harbors or conceals" any prisoner who has escaped from the custody of the Attorney General is only punishable by a maximum of 3 years; 18 U.S.C. § 1072.

Willfully damaging a spare part of an airplane (without reference to its importance or whether it is ever likely to be used) with intent to damage the part is punished in the same section of the United States Code by the same potential 20-year maximum as is placing a destructive substance in fuel to be used to operate an aircraft; 18 U.S.C. § 32.

Whoever "willfully injures or commits any depredation against any property of the United States" is subject to a maximum term of 10 years if the damage exceeded $100 and a maximum of 1 year if the damage was less than $100; 18 U.S.C. § 1361. On the other hand, one who "willfully injures, molests, or destroys any property of the United States" on a wildlife refuge is subject to a maximum term of 6 months; 18 U.S.C. § 41.

The crime of arson carries a 5-year maximum term, which is raised to 20 years if the building was a dwelling or if life was endangered; 18 U.S.C. § 81. Thus, if an unoccupied house is burned, the penalty can be as high as 20 years. If an unoccupied school or theater is burned—or if the Capitol of the United States is burned without endangering life—the penalty cannot exceed 5 years.

A conspiracy to defraud the United States "in any manner or for any purpose" is punishable by a maximum term of 5 years; 18 U.S.C. § 371. A conspiracy to defraud the United States "by obtaining . . . the payment or allowance of any false, fictitious, or fraudulent claim" is punishable by a maximum of 10 years; 18 U.S.C. § 286.

An act of extortion committed by a Federal official is punishable by a maximum of 3 years if it involves more than $100 and by 1 year if it involves less; 18 U.S.C. § 872. An officer who knowingly demands any fee beyond that to which he is entitled in connection with naturalization, citizenship, or the registration of aliens is subject to a maximum of 5 years; 18 U.S.C. § 1422. A postmaster who demands more than the authorized postage for mail matter can be imprisoned for a maximum of 6 months; 18 U.S.C. § 1726. A vessel inspector who "upon any pretense" receives a higher fee than is authorized by law is subject to a maximum term of 6 months; 18 U.S.C. § 1912.

False claims against the Post Office for losses in excess of $100 carry a maximum of 1 year; 18 U.S.C. § 288. False or fraudulent claims generally carry a maximum of 5 years; 18 U.S.C. § 287.

Whoever interferes with an officer in the execution of a search warrant is punishable by a maximum of 3 years, unless he used a deadly or dangerous weapon, in which case the maximum is 10 years; 18 U.S.C. § 2231. On the other hand, whoever interferes with or "assaults, beats or wounds" any officer engaged in execut-

ing any "legal or judicial writ or process of any court of the United States" is punishable by a maximum term of 1 year; 18 U.S.C. § 1501.

A conspiracy to prevent the discharge by a Federal officer of his official duty is punishable by a maximum term of 6 years; 18 U.S.C. § 372. A conspiracy to "prevent, hinder, or delay" the execution of any law of the United States was punishable by the same term until 1956, when the law was changed to raise the maximum prison term to 20 years; 18 U.S.C. § 2384.

Burglary of a Post Office is punishable by a maximum term of 5 years; 18 U.S.C. § 2115. Burglary of a railroad car or motor truck, presumably including one which is carrying mail or other Post Office property, is punishable by a maximum sentence of 10 years; 18 U.S.C. § 2117. On the other hand, entry "by violence" into a Post Office car or truck carries a maximum term of 3 years; 18 U.S.C. § 2116.

Armed bank robbery is punishably by fine, probation, or any term of imprisonment up to 25 years; 18 U.S.C. 2113(d). Armed robbery of a post office poses the single choice of probation or 25 years' imprisonment; 18 U.S.C. § 2114.

Robbery of a Federally insured bank carries a maximum prison term of 20 years; 18 U.S.C. § 2113(a). Robbery of a Post Office carries a 10-year maximum sentence; 18 U.S.C. § 2114.

Robbery of "any kind or description of property belonging to the United States" is punishable by a maximum term of 15 year; 18 U.S.C. § 2112. Whoever robs any custodian "of any . . . property of the United States" is subject to a maximum sentence of 10 years; 18 U.S.C. § 2114.

Perhaps the ultimate absurdity is provided by the last example cited above, which punishes exactly the same crime in essentially the same language by imprisonment for 15 years in one place and 10 years in another. These examples should sufficiently make the point, in any event, that a serious rationalizing effort is needed in order to make sense of the present Federal sentencing structure. Steps that can be taken to facilitate such a reform and to assure that the creation of future offenses in the years to come will not undo present efforts are explored in part II of this memorandum, particularly under the title "Sentencing Categories," p. 1258. *infra.*

(ii) *Fines.*—It perhaps can be taken to follow from what has been said that the present Criminal Code is in as disreputable shape in regard to other sanctions as it is with regard to terms of imprisonment. To cement the point, nevertheless, a few random examples of statutory disparities with regard to fines are produced below:

Conspiracy to defraud the United States or to commit any offense against the United States is punishable by a maximum prison term of 5 years and/or by a fine of up to $10,000; 18 U.S.C. § 371. On the other hand, a conspiracy to prevent a person from accepting Federal office or to prevent a Federal official from discharging his duties is graded more seriously in terms of the authorized prison term, which is 6 years. However, the maximum fine of $5,000—is less: 18 U.S.C. § 372.

Forgery of naturalization or citizenship papers (18 U.S.C. § 1426) carries the same 5-year maximum prison term as does

forgery of an entry visa; 18 U.S.C. § 1546. Yet the former offense carries a maximum fine of $5,000 and the latter a maximum fine of only $2,000. To compound the confusion, falsification of an invoice by a consular official carries a 3-year maximum prison term and thus, presumably, is conceived to be a less serious offense than the two cited forgery offenses; 18 U.S.C. § 1019. Yet, it provides for a $10,000 fine.

Robbery of a Federally insured bank can be punished by a fine of up to $5,000, as well as by a sentence to imprisonment; 18 U.S.C. § 2113(a). Robbery of a Post Office cannot result in a fine; 18 U.S.C. § 2114.

A postmaster who demands more than the authorized postage for mail matter (18 U.S.C. § 1726) and a vessel inspector who collects more than the authorized fee (18 U.S.C. § 1912) both are subject to a maximum prison term of 6 months. The vessel inspector can be fined up to $500, however, while the postmaster is only subject to a fine of $100.

One who injures property of the United States is subject to a fine of up to $10,000 if the damage exceeds $100 and a fine up to $1,000 if the damage is less than $100; 18 U.S.C. § 1361. One who injures property of the United States on a wildlife refuge, no matter how much the damage, is subject to a fine of $500; 18 U.S.C. § 41.

Conversion of funds, by a clerk of court, which have come into his hands by virtue of his official position may be punished by up to 10 years' imprisonment if the amount exceeds $100; 18 U.S.C. § 645. Conversion of funds by the clerk which belong in the registry of the court also carries a 10-year maximum sentence if the amount exceeds $100; 18 U.S.C. § 646. But in one case (the former) a fine can equal double the amount converted, while in the latter a fine cannot exceed the amount converted.

These examples make it clear that examination of statutory disparities cannot stop with authorized prison terms. Fines, as well as other sanctions, are also in a state of hopeless confusion and are equally in need of the rationalizing and ordering influence of a reform effort.

(iii) *Other sanctions.*—Samples of inconsistencies in the use of other types of sanctions could also be produced. For example, a vessel inspector who receives a fee in excess of the fee to which he is entitled is subject to a fine and/or imprisonment and in addition automatically forfeits his office; 18 U.S.C. § 1912. There are no forfeiture provisions for a postmaster who overcollects on postage or for any other Federal official who is guilty of extortion; 18 U.S.C. §§ 1726, 872. And, by comparison, the vessel inspector can only be punished by a maximum of 6 months' imprisonment, while the extorting Federal official is punishable by up to 3 years' imprisonment.

While this memorandum will focus primarily on the prison sentence, to a lesser extent on fines, and to an even lesser extent on other sanctions such as forfeiture of office, the point, nevertheless, should be made that as the types of sanctions available for crime increase, the possibility of inconsistency and confusion multiples rapidly. It would be well to keep this in mind as decisions as to how to structure the new Federal Criminal Code are taken.

(b) *Number of Authorized Sentences*

There is a second feature of the present Criminal Code which is usually symptomatic of such disorder, and which also reflects an equally fundamental malaise. If Federal offenses in Title 18 alone were classified in accordance with existing sentencing levels, there would at the start be at least 18 different maximum terms: Death, life, 30 years, 25 years, 20 years, 15 years, 10 years, 7 years, 6 years, 5 years, 4 years, 3 years, 2 years, 1 year, 6 months, 3 months, 90 days, and 30 days.

In addition, there are often different types of sentences with the same maximum limit. Armed robbery of a Post Office, for example, requires the imposition of a 25-year sentence if imprisonment is chosen as a sanction, whereas armed robbery of a bank permits the imposition of a fine and/or any prison term up to a maximum of 25 years. (*Compare* 18 U.S.C. § 2114 *with* 18 U.S.C. § 2113(d).) Some 5-year offenses permit the imposition of any term up to a maximum of 5 years, while others permit a sentence only in the range from 2 to 5 years. (*Compare* 18 U.S.C. § 1953 *with* 18 U.S.C. § 1403.) Some 3-year offenses permit the imposition of any term up to 3 years, while others permit a sentence only in the range of from 1 to 3 years. (*Compare* 18 U.S.C. § 1019 *with* 18 U.S.C. § 1407.)

The situation becomes even more absurd when fines are added to the picture. There are at least 14 different fine levels [2] authorized by the present Criminal Code: $25,000, $20,000, $10,000, $5,000, $3,000, $2,000, $1,000, $500, $300, $250, $200, $150, $100, and $50.

And, as would be expected, the severity of the fine does not necessarily correspond with the gravity of the offense. For example, there are some 150 offenses in Title 18 which carry a maximum prison term of 1 year. There are at least 8 different fine levels available for different offenses within that number category: $10,000, $5,000, $3,000, $2,000, $1,000, $500, $300, and $100. In addition, there is one offense which has no authorized fine. *See* 18 U.S.C. § 2196. Other similar examples are reproduced below:

10 years, 7 variations: $10,000, $5,000, $3,000, $2,000, $1,000, and $500; no authorized fine.

5 years, 8 variations: $20,000, $10,000, $5,000, $3,000, $2,000, $1,000, and $500; no authorized fine.

3 years 8 variations: $10,000, $5,000, $3,000, $2,000, $1,000, $500, and $100; no authorized fine.

2 years, 5 variations: $10,000, $5,000, $2,000, $1,000, and $500.

6 months, 7 variations: $5,000, $1,000, $500, $300, $250, $200, and $100.

As can readily be seen, the number of distinct penalty ranges which are available under the Federal system quickly multiplies. The combinations listed above—which by no means exhaust the total number of combinations that can be found in the present Federal system, and which are limited to offenses contained in Title 18—alone add up to 55 distinct and unique punishment categories. A complete listing of all

[2] In addition, some offenses involving money can result in fines equal to the amount involved (18 U.S.C. § 646), double the amount involved (18 U.S.C. § 645), or triple the amount involved (18 U.S.C. § 201(e)).

Federal crimes could easily produce some 65 to 75 different punishment levels, if not more.

If there is discoverable logic behind such a proliferation of sentencing levels, it does not readily emerge. The differences between them are often minute. It is simply arbitrary to provide that hunting on Indian land can be punished by 90 days' imprisonment and/or a fine up to $200, while publishing a false weather forecast justifies the same prison term of up to 90 days but an increased fine of up to $500. (*Compare* 18 U.S.C. § 1165 *with* 18 U.S.C. § 2074.) In addition, as though there were a discernible difference, the offense of supplying intoxicating liquor to aboriginal natives of certain Pacific islands is punishable not by "90 days in prison" but by a term of "3 months." And the fine may not exceed $50; 18 U.S.C. § 969.

Aside from the arbitrary element which is expressed by such statutory variations, however, there is an important point of principle that should be recognized. The legislature is simply not in a position to draw fine lines between the distinct penalties that should be available for different offenses. The reason is basically one of timing, and of information. The legislature does not have, and cannot have, information about the characteristics of future offenders and the circumstances under which particular offenses will occur. It must think in generalities about the relative gravity of the offenses and the extent to which the social costs of the offense may justify punishment of the offender. It is very easy to say, for example, that double parking and murder involve different social consequences, and thereby justify drastically different treatment in the creation of a sentencing structure. On the other hand, to draw lines between embezzlement and larceny, or robbery of banks and of Post Offices, or between conspiracies to commit a crime and conspiracies to interfere with performance of official duty invites a fineness of moral judgment which a legislature is not in a position to make.

This is not to say, however, that all embezzlers and thieves should be treated alike, or indeed that all embezzlers deserve the same treatment. It is to say that the job of grading different offenders within broad catergories of potential punishment is best performed by others in the process, specifically by the prosecutors, juries, judges, and parole officials. And it is to say that the properly exercised legislative judgment in the creation of a sentencing structure is one that attempts to draw broad lines between offenses of obviously different magnitude.

As is developed more fully in part II, in the section entitled "Sentencing Categories," the solution to which most recent efforts have come is that the legislative function is best discharged by the creation of a small number of distinct sentencing categories. The advantages of such an approach are numerous. It can materially assist in the reduction of inconsistency in the statutory sanctions which are available for comparable offenses. It offers hope of a logical and consistent order rather than the present chaos which characterizes the Federal system. And it can also serve to emphasize the futility of close line-drawing in an area where precision—to the extent that it can be achieved at all—must come from the efforts of those in a position to know and to judge the particular offender.

2. *Mandatory Sentences.*—One of the most difficult features of a discussion of sentencing is often the fact that the participants are using

an entirely different vocabulary. There are many words which carry a multitude of meanings, and which hence often serve more to confuse than to clarify.

The term "mandatory" is one of these words. It is used by some to describe, for example, the sentence prescribed in 18 U.S.C. § 2114 for armed robbery of a Post Office. The statute provides that any sentence to prison for its violation must be for 25 years. The sentence is thus "mandatory": the judge cannot impose a sentence, as he normally can, to a shorter term of years.

This is not, however, the sense in which the term "mandatory" is used herein. As will be seen, a sentence of the type presently exemplified by the postal statute can be defended as the type of sentence that ought be be prescribed for every case, although many would argue that the term of years is too long. (*See* part II, "Determination of Maximum," *infra.*)

On the other hand, the real bite of the mandatory sentence—and the reason that it has been subjected to such widespread criticism in the recent studies noted in the introduction to this memorandum—occurs at quite a different point. As illustrated in the present Federal Code by certain of the narcotics provisions, it denies to the sentencing court the power to place the offender on probation, prescribes a minimum term of years which must at least be imposed, and at the same time denies to the parole authorities the power to release the offender prior to the complete service of his sentence. It is the denial of discretion on the probation and parole issues which has invoked the vehement criticism of most of the Federal judges, prosecutors, and correctional personnel, as well as the criticism of studies such as those conducted by the American Law Institute in the drafting of the Model Penal Code, by the National Council on Crime and Delinquency,[3] and by the American Bar Association.[4]

It is fortunate that the Federal system is not characterized by a large number of offenses which carry a mandatory prison sentence in this sense. For all practical purposes, the narcotics crimes covered by section 7237(d) of Title 26 are the only ones which specify a minimum sentence and at the same time deny both the power to probate and the power to parole. Specifically, the required sentences under that section are from 5 to 20 years for a first offense and from 10 to 40 years for a subsequent offense or for an adult convicted of a sale to a minor.[5]

But while the number of offenses in the present Federal Code that carry a mandatory minimum sentence is not significant, the impact of this single narcotics provision is not insignificant at all. Of the 29,493 criminal cases filed by the Justice Department in fiscal 1966, 2,293 were for narcotics offenses. Of the 12,982 prisoners received in Federal institutions in fiscal 1965, 1,228 were imprisoned for violations of the drug laws. Some 10 percent of Federal prosecutions, in other words, involve an offense for which a mandatory minimum sentence is prescribed.[6]

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[3] ADVISORY COUNCIL OF JUDGES OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT (1963).

[4] ABA Report, *supra* note, ** p. 1245.

[5] *See* note 6, *infra.*

[6] It should be noted, of course, that section 7237(d) was amended in 1966 so that marihuana offenders are now eligible for parole in the normal manner. *See*

The most significant indictment of such sentencing provisions is the manner in which they work in actual practice. The conception which underlies them seems to be that those who administer the system on a day-to-day basis cannot be trusted to deal severely enough with offenders who deserve harsh treatment. This assumption ignores two recurring facts: not all of the offenders who violate a criminal statute, particularly one that does not necessarily involve serious physical consequences to another, will be proper subjects for the harsh treatment which the legislature envisages; and the prosecutor—and through him the judges—still retains discretion to determine what the charge will be, and thus the power to have the defendant sentenced under a more flexible provision.

That there will inevitably be offenders who do not deserve the harshness of the mandatory minimum can be testified to by the experience of practically every sentencing judge. It has been well documented in several sample State systems in a recent book by Professor Newman.[7] It can be illustrated in the Federal system by the west coast judge who recently sentenced a defendant on a charge that was not made, because he viewed the mandatory 5-year sentence as excessive and thought the 2-year sentence available under another statute which was also violated more appropriate.[8]

The fact that the system still retains discretion in spite of the mandatory sentence is also well documented. In the first place, the legislature cannot take away the power to acquit, and there are judges on record who would choose this alternative rather than perpetrate an obvious injustice. As a practical matter, however, there always are alternative charges that can be made which provide the sentencing flexibility desired in a given case. Indeed, Professor Newman reports one instance of the conviction of a defendant for going the wrong way on a one-way street which was obtained as an alternative to a speeding offense which would have resulted in automatic loss of his driver's license. Later investigation revealed that there were no one-way streets in the small town in which the offense occurred.[9] Closer to home, it appears that, prior to the 1966 amendment of 26 U.S.C. § 7237(d), it was fairly common to convict defendants who, in fact, had illegally smuggled marihuana from Mexico into Texas, of unlawful possession of drugs upon which a transfer tax had not been paid, an offense that permits both probation and parole. Ignored was the fact that the transfer necessarily occurred in Mexico, and hence was not a taxable event by the United States. The offense for which the defendants were convicted thus could not possibly have occurred.

As has been developed from interviews with a number of U.S.

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26 U.S.C.A. § 7237(d) (Feb. 1967 Supp.). The figures cited in the text are figures which were compiled before this amendment. It is nevertheless significant that of the 1,228 drug offenders received into Federal institutions in fiscal 1965, 1,021 were convicted of offenses which could have been charged under the mandatory provisions of section 7237(d), even as amended. It would thus appear that the magnitude of the problem has not significantly changed as a result of the amendment.

[7] NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1967) [hereinafter cited as NEWMAN].

[8] *See Ng Pui Yu* v. *United States*, 352 F. 2d 626 (9th Cir. 1965). The defendant was ultimately charged and sentenced for the lesser offense.

[9] *See* NEWMAN, *supra* note 7, at 101.

Attorneys, it is very common for the courts to be given an alternative count which provides more flexible sentencing alternatives. In both Massachusetts and the District of Columbia, offenders are typically charged both with a "hard count," that is, one that carries a mandatory sentence of at least 5 years and which denies both parole and probation consideration, and a "soft count," that is, one which normally requires a sentence of at least 2 years if prison is chosen as the sentence, but which does permit both probation and parole. If the offender pleads guilty, as most do, it is routine to dismiss the hard count and accept the plea to the soft one.

In other districts, the power to select the charge is used by prosecuting attorneys in effect to transfer the sentencing power to themselves. The court has no real alternative but to convict or acquit of the offense as charged, and the prosecutor, by selecting the cases where he will charge only the hard count, thus has the power to determine what sentencing alternatives the court will have. Most judges, on the other hand, place quite a bit of pressure on the prosecutors to charge both counts. Indeed, one has gone so far as to require that the government prove illegal importation in cases where the hard count is charged, rather than permit the government to take advantage of a statutorily prescribed presumption that proof of possession alone will satisfy its need to make out a prima facie case.

There are also districts in which the hard count is used to pressure defendants into turning informer. The defendant is orginally charged only with the hard count, and told that if he will cooperate by turning informer, he will be reindicted and permitted to plead guilty to a lesser count included in the superseding indictment.

Finally, the relation of Federal to State prosecutions should be noted. Often, lesser penalties are available in the States than are provided for the same offenses under even the "soft" counts of the Federal Code. For example, it is common in the District of Columbia to charge drug offenders—in the case of first offenders and where the amount of drugs involved is very small—under the District Code, where a misdemeanor carrying a maximum penalty of one year is available,[10] rather than under the United States Code which imposes a 5- to 20-year sentence for most first drug offenses.[11] Diversion of offenders into State systems and dismissal of Federal charges is a common technique in such cases.

Aside from the fact that it is perfectly clear that the purpose of the mandatory provisions is being thwarted, there are many bad features of these practices. The guilty plea process, supposedly resting upon the uncoerced consent of the offender, is clearly distorted when the prosecutor can hold the threat of a charge which guarantees at least 5 years without parole and the promise of a charge which provides much more flexible, and perhaps fairer, sentencing possibilities. And in some cases, the only effect of the mandatory provisions is to transfer the sentencing power from the courts, where it belongs, to the prosecutor, where it does not. Perhaps the most devastating point, however, is the commentary on the system provided by the fact that in some cases it is necessary to charge and convict an offender for an offense that could not possibly have occurred in order to produce a

[10] D.C. CODE ANN. §§ 33–423, 33–708 (1967).
[11] 26 U.S.C. § 7237(d). *See* notes 5 and 6 and accompanying text. *Infra*

fair result. The costs in respect for law which such a necessity carries are great indeed.

3. *Disparity.*—The President's Crime Commission reported that: [12]

> [A] common characteristics of American penal codes is the severity of sentences available for almost all felony offenses.
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> The statutory lengths of sentences are reflected in the sentencing practices of the courts. More than one-half of the adult felony offenders sentenced to State prisons in 1960 were committed for maximum terms of 5 years or more; almost one-third were sentenced to terms of at least 10 years. And more than one-half of the prisoners confined in State institutions in 1960 had been sentenced to maximum terms of at least 10 years. There is a substantial question whether sentences of this length are desirable or necessary for the majority of felony offenders. The experience of a number of other countries throughout the world that rely on relatively short prison sentences for most offenders supports the view that long sentences properly may be reserved for the special case. In addition there are indications that despite the long sentences initially imposed, the administrators of penal systems in this country in practice have relied on shorter periods of confinement. Of the approximately 80,000 felony prisoners released in 1960 from State institutions, the median time actually served before first release was about 21 months, only 8.7 percent of the prisoners released actually served five years or more.

More recent statistics have become available since the Crime Commission report and the figures are remarkably comparable. They show that for the year 1964, the average length of sentence of those received into State institutions was 5 years and 4.3 months. Some 52 percent were sentenced to terms in excess of 5 years; about 28 percent received sentences in excess of 10 years. During the same year, offenders who were serving sentences averaging 5 years and 0.8 months were released from State prisons, about 50 percent of whom had initially been sentenced to terms in excess of 5 years and approximately 23 percent of whom had been serving sentences in excess of 10 years. Yet, the average time actually served by those who were released during this period was 1 year and 9 months. Even more remarkably, only 8.6 percent actually served 5 years or more. In only one State (West Virginia) did more than 20 percent actually serve more than 5 years.[13]

Present Federal sentences seem to fit the same patterns, although the averages are somewhat lower. On June 30, 1965, the average sentence of the Federal prison population was somewhat in excess of 5 years and 9 months. Of the 22,346 Federal prisoners on that date, 40.5 percent had sentences in excess of 5 years; 16.8 percent had sentences in excess of 10 years. The average sentence of the prisoners received into Federal

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[12] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 16–17 (1967) [hereinafter cited as TASK FORCE REPORT: THE COURTS].

[13] *See generally* NATIONAL PRISON STATISTICS, STATE PRISONERS: ADMISSIONS AND RELEASES, (1964).

institutions during fiscal 1965, however, as 2 years and 11.2 months. Of the 12,982 sentenced offenders, only 16 percent received sentences of 5 years or more and approximately 4 percent were sentenced in excess of 10 years. By comparison, those who were released from Federal institutions during the same period were serving average sentences of 2 years and 8.6 months and actually served 1 year and 7.9 months. Grouped by offenses, only 117 out of 12,100 were in a group which averaged more than 5 years of time served before first release.[14]

The point, of course, is not that long sentences are never appropriate, nor that the average prisoner is serving a sentence which is too long. The point is that there is an enormous disparity between the sentence which the system authorizes and the sentence which it, in fact, exacts in most of the cases. There likewise are significant disparities between the sentences actually imposed and the time actually served, although a good part of that disparity can properly be attributed to the healthy operation of a parole system. At the very least, it would seem that these facts should raise doubts about the extent to which presently authorized sentencing levels are necessary or justifiable.

Perhaps an examination of a few specific offenses will serve to illustrate the point more sharply. The Bureau of Prisons reports that during fiscal year 1967, 598 prisoners were received after convictions of three related offenses: armed bank robbery (maximum term 25 years), unarmed bank robbery (maximum term 20 years), and armed postal robbery (maximum term 25 years). The average sentence of the group appears to have been slightly above 10 years. Some 37 percent received sentences of less than 10 years; about 29 percent between 10 and 15 years; and about 34 percent 15 years and above. Projections based on the 1965 release figures would seem to indicate, however, that the average time to be served by this group will be about 3 months short of 5 years. In 1965, 270 offenders convicted under these provisions were released. They were serving sentences which averaged 10 years and 7.8 months; they served an average of 44.5 percent of their imposed sentences, or 4 years and 8.9 months.

Certainly an average time served of approximately 5 years is a far cry from the 20- to 25-year terms authorized for these offenses. And it would appear to be dramatic testimony that in the opinion of those who are presently administering the Federal system, nothing like the severity reflected by the authorized maxima is needed in the average case.

As has been demonstrated time and again over the years, the practical consequence of such widespread disparity between authorized terms and exacted sentences is indefensibly disparate treatment of comparably situated offenders. As noted in the ABA Report [15] "if the range is 20 years for an offense where most offenders who should go to prison should get less than 5, the authorized range is an open invitation—and the results verify the hypothesis—to sentences which irrationally spread the whole gamut of the authorized term."

It may be helpful to approach the same point from another direction. It is perfectly clear that there are some offenders who commit

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[14] *See generally* FEDERAL BUREAU OF PRISONS, STATISTICAL TABLES, FISCAL YEAR 1965.

[15] ABA Report, *supra* note** p. 1245, at 61.

serious crimes such as armed bank robbery from whom the public needs the protection of a long, incapacitating prison sentence. The dangerous, perhaps mentally unbalanced, criminal, the professional gunman, the defendant who has repeated his robberies on numerous occasions—these are the offenders from whom protection is needed. And these are the offenders in whose name the authorized penalty for an offense is normally fixed.

And yet it is clear that the worst offender who is used as the model when penalties are fixed is actually present before the courts and the correctional authorities a statistically small percentage of the time. The point which is sought to be made in this section of the memorandum is that it would seem unsound to base the maximum terms which will dominate the entire sentencing structure on a generalized conception of an offender who is not going to be before the courts on most of the occasions when the structure will be used.

One result of such an approach occurred recently at a Federal sentencing institute. A simple, unaggravated bank robbery—unarmed—was posed for the consideration of the judges in attendance. Each was asked to choose the sentence he would impose, and the floor was then opened for discussion and evaluation of the differences between the judges. Most agreed that 8 years would be a reasonable sentence: some thought that 5 would be quite sufficient. But one judge objected on the ground that since Congress had set 20 years as the maximum sentence for the offense, the judges in his district—and he agreed with them—would begin their reasoning on the assumption that 20 years was the appropriate sentence and back off as mitigating factors appeared. By this process, he reached a sentence of 15 years, nearly double the sentence which the consensus of the other judges had resolved upon.

Quite apart from the out-of-line treatment which an offender would receive at the hands of a judge who took this approach, the incident serves also to illustrate the second way in which a large gap between authorized sentences and the sentence which is reasonable in most of the cases can have harmful effects. For understandable reasons, high authorized maxima—even though the legislature has the worst offender in mind in fixing the penalty—have a psychological tendency to drive sentences up in cases where such a tendency is unwarranted. Long, incapacitating terms can do great damage if imposed in the wrong cases, both in terms of injustice to the individual and in terms of positive, harmful effects to the public upon release of the prisoner. Long sentences imposed on the wrong people can lead to more offenses, rather than less.

The draftsmen of a penal Code are thus in a basic dilemma. It is perfectly clear, on the one hand, that long sentences need to be authorized for use in the case where the offender does indeed pose a serious risk to the safety of the public. The system badly needs to develop the capacity to identify, at the sentencing stage, offenders who pose such a risk so that errors on the side of leniency will be minimized. On the other hand, legitimate concern over such offenders should not be permitted to distort the entire penal structure. It must ever be kept in mind that most of the offenders who will violate most of the statutes cannot properly be dealt with in the same terms of reference as are appropriate for the unusual risks. How to best assure that the general

level of sentences is brought into more realistic ranges and at the same time to provide an outlet for the case where long-term imprisonment is called for is thus a fundamental dilemma confronting the choice of maximum prison terms. Potential resolutions of this quandry are explored in detail in part II of this memorandum, in the section entitled "Length of Sentences; Extended Terms."

There are two other aspects of the disparity problem that ought specifically to be noted. The first relates to the present authority under the Federal system to impose consecutive sentences without limit. There have been many examples in the past where this authority has been clearly abused, although it appears that the incidence of such abuse has been dropping in recent years, perhaps because of the successes of the Federal sentencing institutes. But in any event, there have been cases such as the one in which a 52-year sentence imposed on a 51-year-old defendant was the result of the cumulation of 14 counts of narcotics violations.[16] Mr. James V. Bennett, former Director of the Bureau of Prisons, is fond of using to illustrate this point the case of an accountant who was charged with 31 counts of a tax offense, and who was sentenced to consecutive terms of 1 year and 1 day for each count. Also, in *Gore* v. *United States*, 357 U.S. 386 (1958), where consecutive sentences on three counts of a narcotics charge were upheld, all three counts had grown out of the same sale and in effect the same offense was charged in three different ways.

The second aspect of the disparity problem that should be noted relates to fines, and raises problems both as to the propriety of using fines as a correctional measure and as to the measure of the fine if one is to be imposed. It is an obvious fact that the impact of a fine upon an individual defendant depends almost exclusively upon his total means. A wealthy defendant or corporation can pay a fine with ease, and in many instances is perfectly willing to treat the fine as a license tax for committing the offense. An impoverished defendant, or a defendant of limited means, either will not be able to pay the fine—in which case he may wind up in jail for that reason [17]—or will barely manage to pay, in which case the main burden of the sanction may fall on friends and relatives who assisted in the process of raising the money. In any event, it should be perfectly clear that consideration should be given, in the creation of a fine structure, to problems such as these.

Part II. Potential Solutions

1. *Sentencing Categories.* (a) *Prison Terms.*—There is a consensus among recent Code reform efforts that the best way to avoid inconsistencies of penalty structure such as those noted in part I of this memorandum is to systematize the sentencing provisions in a separate

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[16] *Smith* v. *United States*, 273 F. 2d 462 (10th Cir. 1959).

[17] Although firm statistics are not available, it does not appear that there is a significant problem in the Federal system of offenders who have been jailed solely for the reason that they cannot pay fines. However, in some State systems, as reported by the President's Crime Commission, as many as 60 percent of the inmates of local jails are there solely for the reason that they do not have the money to pay a fine. (*See* Task Force Report: The Courts, *supra*, note 12, at 18.) Officials at both the Bureau of Prisons and the Administrative Office of U.S. Courts recall only a handful of such cases in the Federal system within the past 12 years or so.

part of the Code by the use of sentencing categories which are intended to represent the entire spectrum of punishment that is to be available for crime. Such an approach has the effect of creating an internally consistent, carefully thought-out penalty structure which not only will assist the rationalization of penalties provided for presently existing offenses, but which also will help to assure that new offenses can be integrated into the existing structure in a manner consistent with what is already on the books. The existence of a distinct number of sentencing categories and a list of the offenses within each should be of great aid, in other words, in assuring consistency of treatment for present offenses and in determining the appropriate sentence levels for new offenses.

There is also consensus on the point that the categories of offenses should be small in number, and that they should reflect among them significant differences in the gravity of different offenses. The subtlety of judgment which has decreed that there should be maximum sentences of 1, 2, 3, 4, 5, 6, and 7 years for different Federal offenses, for example, is in all likelihood misguided. The legislature is not in a position to make such subtle judgments. It is one thing to say that armed robbery should justify the authorization of a higher sentence than simple larceny, or that car theft for commercial profit should carry an authorized sentence significantly higher than joyriding; it is a far different thing, on the other hand, to say that a conspiracy to defraud the United States should carry a 5-year maximum sentence while a conspiracy to prevent a Federal officer from discharging his official duties should have a maximum term of 6 years.[18]

Implementation of these principles in a new Federal sentencing structure perhaps should begin with an examination of the results of other efforts. Recent attempts to conform to the approach suggested here have produced the sentencing levels indicated in the immediately following tables:

TABLE 1.—SENTENCING CATEGORIES: MODEL CODES, PROPOSED CODES AND RECENTLY ENACTED CODES

Code	Number of levels	Description of levels	Maximum sentence
Model Penal Code (P.O.D. 1962)	6	1st degree felony	Life.
		2d degree felony	10 years.
		3d degree felony	5 years.
		Misdemeanor	1 year.
		Petty misdemeanor	30 days.
		Violation	$500 fine.
Model Sentencing Act (1963)[1]	3	Murder	Life.
		Atrocious crime	10 years.
		Felony	5 years.
Proposed Delaware Criminal Code (Final Draft 1967)	9	Class A felony	Life.
		Class B felony	25 years.
		Class C felony	15 years.
		Class D felony	7 years.
		Class E felony	4 years.
		Class A misdemeanor	1 year.
		Class B misdemeanor	3 months.
		Unclassified misdemeanor	Unspecified.
		Violation	$250 fine.

[18] For a further discussion of these general principles, *see* ABA Report, *supra* note**, p. 1245 at 48–52. *See also* TASK FORCE REPORT: THE COURTS, *supra* note 12, at 14–15.

TABLE 1. (Cont'd.)—SENTENCING CATEGORIES: MODEL CODES, Etc.

Code	Number of levels	Description of levels	Maximum sentence
Michigan Revised Criminal Code (Final Draft 1967)	8	Murder	Life.
		Class A felony	20 years.
		Class B felony	10 years.
		Class C felony	5 years.
		Class A misdemeanor	1 year.
		Class B misdemeanor	90 days.
		Class C misdemeanor	30 days.
		Violation	15 days.
New York Revised Penal Law (McKinney 1967)	9	Class A felony	Life.
		Class B felony	25 years.
		Class C felony	15 years.
		Class D felony	7 years.
		Class E felony	4 years.
		Class A misdemeanor	1 year.
		Class B misdemeanor	3 months.
		Unclassified misdemeanor	Unspecified.
		Violation	15 days.
New Mexico Code (1963)	7	Capital felony	Death.
		1st degree felony	Life.
		2d degree felony	50 years.
		3d degree felony	10 years.
		4th degree felony	5 years.
		Misdemeanor	1 year.
		Petty misdemeanor	6 months.
Proposed Crimes Code for Pennsylvania (1967)	8	Murder	Death.
		1st degree felony	20 years.
		2d degree felony	10 years.
		3d degree felony	7 years.
		1st degree misdemeanor	5 years.
		2d degree misdemeanor	1 year.
		3d degree misdemanor	6 months.
		Summary offense	Fine.

[1] The Model Sentencing Act does not deal with misdemeanors and other lesser offenses.

Note: It should be noted that the different maximum sentences, particularly for felonies, often reflect a different attitude as to the proper method of dealing with unusually dangerous offenders. The Model Penal Code, for example, would permit the doubling of the sentence for a 2d-or a 3d-degree felony if certain criteria of dangerousness are satisfied or if the offender is a professional criminal. The Michigan proposal, on the other hand, does not permit such special sentences for special types of offenders. And its sentence levels, it should be noted, are in some instances twice as high as the Model Penal Code would recommend. This matter will be fully discussed below in the section entitled "Length of Sentences; Extended Terms."

It is odd that there has been practically no attempt in the literature to justify the sentencing levels that are reflected in these examples. Professor Schwartz has suggested that present levels, usually 1 year, 5 years, 10 years, and so on in multiples of five, can perhaps be explained as well by resort to astrology, or in less sophisticated terms by reference to fingers and toes, as they can by their penological significance. In doing so, he has offered a competing scheme, the essence of which is summarized below:

Life: Saving the issue of capital punishment, the highest sanction available for the most serious offenses, such as murder or treason.

[Ten years]: The maximum sentence for the very serious offense, typically involving danger to the person. Armed assaults and armed robbery would be examples.

Three to 4 years: The shortest sentence to a Federal prison during which any meaningful program of rehabilitation or reform could be expected to take hold. It is doubtful that a shorter sentence will permit institutional authorities to develop and monitor a serious effort of this type. This would be the maximum sentence for most of the serious crimes.

Six months: The longest custodial sentence during which no serious rehabilitative effort would be expected to be made. An intermediate sanction between the petty offense justifying only a few days' incarceration and the serious offense justifying several years.

Thirty days: The most serious sanction for petty offenses, appropriate in cases where regulatory rules, for example, have been knowingly violated or where a knowing violation endangers the safety of others. The prison sentence in such an instance could be justified as a short, sharp shock, or as a taste of jail, with the hope that such a taste would have a beneficial impact on the future conduct of the offender. Obviously nothing of significance could occur during the incarceration by way of rehabilitative efforts.

Fine: This is the "summary offense" or "violation" category employed by some of the Codes in Table 1. Traffic offenses would be an obvious example, perhaps with some repeated offenses bumped up to a higher category.

The most obvious point where the above scheme may be deficient is at the level of the very serious offense, where the posited 10-year term has been bracketed to note the need for further thought. There are at least three variables which need to be considered before any definite stand can or should be taken on where this level should be fixed:

(i) The first variable involves problems that will be encountered in the definition of substantive offenses. The basic question is whether it will be thought sufficient to have only one category of very serious offense, or whether—as in New York, Michigan, New Mexico, and Pennsylvania (*see* table 1)—a need will be felt for several levels. Perhaps, for example, two levels of 7 and 15 years (or perhaps two levels of 10 and 20 years, or a single level set at 15 or 20 years) would be more easily coordinated with the efforts of those who will draft the substantive provisions. In any event, it is probably premature to resolve this point now, although it may be sound to adopt a tentative structure which can be changed if need develops later.

(ii) The Model Penal Code has recommended, for reasons which will be explored below in the section entitled "Separate Parole Term," that every person released from an institution should be on parole for a 5-year term. If this idea were adopted, it would mean, for example, that if the maximum sentence for the very serious offenses were fixed at 10 years, the maximum potential sentence would in fact be 15; if the offender did, in fact, present a serious risk and therefore was not paroled before the expiration of his maximum sentence, he would be released after 10 years and would be under parole supervision for an additional 5 years. If he then violated parole, he would be subject to additional incarceration for 5 more years.

It would seem clear that the setting of the various penalty levels, particularly for the higher categories of crime, should await consideration of the separate parole term idea, and if the idea is adopted, should reflect it in the levels actually chosen.

(iii) The final point that needs to be considered before precise sentencing levels (particularly for the higher categories) are chosen, is how the maximum is to be determined. This issue is explored fully in the section of this memorandum entitled "Length of Sentences; Extended Terms." However, the point should be noted here.

The Model Penal Code suggests that an "extended" term should be available for each felony offender, based upon whether he can be classified as an habitual offender, a dangerous offender, or a professional criminal. The effect for serious felonies is that the maximum sentence

can be doubled if such an offender is involved, and the idea is that this can lead to much more sensible sentence levels for use in the more ordinary cases. If this idea is adopted, it will have an obvious impact on the fixing of sentencing levels: they can be much lower, since there will be an outlet for the offender for whom the long, incapaciating sentence is appropriate. If the idea is not adopted, on the other hand, sentencing levels will have to be higher in order to permit a long sentence for those same offenders.

(b) *Fines.*—There have been two basic principles at work in recent reform efforts on the question of how fines should be structured in order to avoid the chaos which the present Federal fine provisions typify. First, as in the case of prison terms, the suggestions center on the idea of a small number of alternatives reflecting significant differences in gravity. Second, however, a basic distrust of the value of fines as a penal sanction in many contexts has placed limitations on the occasions when fines may be employed.

The provisions of the Model Penal Code are typical. The approach of that Code has been to adopt the same categories employed for the purpose of fixing the levels of prison terms and to assign to each a maximum fine that can be imposed. The structure can be represented as follows:

First-degree felony	$10,000
Second-degree felony	10,000
Third-degree felony	5,000
Misdemeanor	1,000
Petty misdemeanor	500
Violation	500

In addition, the Model Penal Code would permit, in lieu of the specified amount, any fine equal to double the amount of the pecuniary gain derived from the offense by the offender. There are thus five levels of authorized fines: four based on the severity of the offense, and a fifth based on the principle that a fine of double the gain from a property offense is appropriate whatever its category.

An additional section of the Model Penal Code is based on the premise that fines, in general, are insufficient to accomplish the purposes of a penal sanction, and indeed that they may tend to negate the purposes of the criminal law. The section provides, first, that a sentence should not consist of a fine alone unless the court is affirmatively of the opinion that such a sentence will suffice to protect the public interest. Next, the Model Penal Code would prohibit imposition of a fine in addition to some other sanction unless the offender derived a pecuniary gain from the offense or unless there were some special reason why a fine is particularly adapted to deterrence of the crime involved or to the correction of the offender. Finally, a fine which is beyond the means of the defendant to pay or which would interfere with his ability to make restitution or reparation to the victim of the offense would be prohibited.

The same principles are reflected in a different way in the new Code in New York. The New York revisers decided, first, that fines were not appropriate for felonies unless the offense was an economic one and the defendant made a profit. The structure of fines for individuals who commit felonies was thus based on this principle, whereas fine categories were retained for misdemeanors and for felonies committed by corporations.

The characteristics of the fine which may be imposed on individuals who commit a felony are as follows: First, a fine is not available unless the defendant has gained money or property from the commission of the offense. If he has, the amount of the fine can range up to double the amount of the gain. A further wrinkle is added through the definition of the concept of "gain." The term is used to mean net profit at the time of sentencing, or, phrased another way, the amount of money or property originally taken less the amount of money or property returned to the victim or to the authorities prior to sentencing. The possibility of a fine is thus used as a lever to force the defendant to disgorge his profits, and at the same time an attempt is made to minimize the extent to which the State and the victim are in competition over the defendant's assets.

The fines available in New York, in the event of felonies by a corporation or for misdemeanors and other lesser offenses, can be represented by the following:

Corporations:
- Felony (any class), $10,000 or double the gain.
- Class A misdemeanor, $5,000 or double the gain.
- Class B misdemeanor, $2,000 or double the gain.
- Violation, $500 or double the gain.

Misdemeanors and other lesser offenses for individuals:
- Class A misdemeanor, $1,000 or double the gain.
- Class B misdemeanor, $500 or double the gain.
- Violation, $250 or double the gain.

In addition, there are other provisions in the New York law designed to insure that a fine is not imposed in a case where the defendant cannot pay it.

For purposes of comparison, other structures which appear in recently reformed Codes are reproduced below:

Michigan Revised Criminal Code (Final Draft 1967):

Individuals—
- Felony (any class), $2,500 or double the gain.*
- Class A misdemeanor, $1,000 or double the gain.
- Class B misdemeanor, $500 or double the gain.
- Class C misdemeanor, $250 or double the gain.
- Violation, $100 or double the gain.

Corporations—
- Felony (any class), $10,000 or double the gain.
- Class A misdemeanor, $5,000 or double the gain.
- Class B misdemeanor, $2,000 or double the gain.
- Class C misdemeanor, $2,000 or double the gain.
- Violation, $500 or double the gain.

New Mexico Code (1963):

First-degree felony	$15,000
Second-degree felony	10,000
Third-degree felony	5,000
Fourth-degree felony	5,000
Misdemeanor	1,000
Petty misdemeanor	100

*The proposed Michigan Code incorporates the New York approach in the definition of gain for all classes of crimes.

Proposed Crimes Code for Pennsylvania (1967):
First-degree felony, $10,000 or double the gain.
Second-degree felony, $10,000 or double the gain.
Third-degree felony, $5,000 or double the gain.
First-degree misdemeanor, $1,000 or double the gain.
Second-degree misdemeanor, $500 or double the gain.
Third-degree misdemeanor, $500 or double the gain.
Summary offense, $100 or double the gain.

In addition, both in Michigan and Pennsylvania (although not in New Mexico), criteria similar to those discussed above in connection with the Model Penal Code are included; they are designed to restrict the occasions when a fine will be imposed, both with a view to its correctional significance and to the means of the offender.

In approaching the issue of what an appropriate fine structure for the Federal system would look like, it would seem sound as a starting point to begin with an assessment of the correctional value of the fine. In the first place, it should be noted that the impact of the fine on an individual is almost wholly dependent on a factor which is usually irrelevant to his culpability; namely, the depth of his pocketbook. For this reason, it would seem at the very least that a special search for justifying factors is appropriate prior to the imposition of a fine. Indeed, this seems to be the starting point for most of the provisions noted above: fines should not be routinely imposed, but should be imposed only after an examination of each particular case discloses special justifying reasons.

While, of course, this philosophy can be reflected in the manner in which particular fines are imposed and need not be reflected in the authorized structure of fines, examination of it at this point is relevant—as can be noted by a comparison of the Model Penal Code and the New York and Michigan structures noted above—for two reasons: it may be that fines should not be authorized except in special cases, such as where the defendant has gained from the offense; and, as in Michigan, doubts as to the correctional value of a fine may be reflected in the maximum fines which are authorized by the sentencing structure. It surely is a significant departure to suggest, as the proposed Michigan Code does, that $2,500 or double the gain be the maximum fine authorized for any felony by an individual.

A second matter in need of resolution before a position on the Federal fine structure is adopted, is the form the sentencing structure of the Code will take in other respects. If the categorizing approach is to be used in fixing authorized prison terms, it would surely seem sound to employ the same approach with respect to fines, and if practicable, to employ the same increments.

For a further discussion of these and other related issues, *see* the ABA Report.[19]

(c) *Other Sanctions.*—While extended discussion of other possible sanctions will not be undertaken at this time, it may nevertheless be

[19] ABA Report, *supra* note**, p. 1245, at 117–129. Note particularly the discussion (at 118, 127–129) relating to the possibility that fine maxima be stated in terms other than a dollar amount. The idea of day-fines, or fines which are keyed to the offender's daily wage scale, has been used successfully in several countries.

appropriate to point out that, as in the case of fines, it may be expected that the present Federal Code will suffer from inconsistencies which will need to be removed, and that the process will involve a combination of 2 ideas: first, an assessment of the extent to which the sanction ought to be limited in principle, as for example, forfeiture of office ought perhaps to be limited to cases where the offense bears a relation to the integrity with which the duties of the office need to be discharged; and second, a structuring of the sanction, perhaps through the use of the categorizing approach, in a manner which is consistent with the structure of the Code with regard to other sanctions.

2. *Range of Alternatives; Mandatory Sentences.*—There is above, all in the recent studies of sentencing, a consensus that one general principle ought to dominate the drafting of a sentencing Code. The principle is that the legislature should not attempt to specify with precision the sentence that should be imposed in a particular case.

Whatever the offense, and no matter how grave it is in the normal course, there will be an enormous range of circumstances under which it will be committed and an equally wide range of people who will commit it. A proper sentencing judgment necessarily must account for the particular circumstances and for the character of the offender.

On the other hand, it is clear that the legislature cannot have these facts, and that an attempt by the legislature to be specific about the appropriate sentence for a particular offense must therefore be based upon an inadequate foundation. The practical consequences of such legislative attempts to be specific are the inevitable and numerous cases where one of two alternatives is presented: the judge, prosecutor, or jury must ignore the law in order to produce a just result; or they must comply with the law and perpetrate an injustice. A sound system of criminal justice would not pose such a dilemma.

The conclusion is, thus, that the legislature must deal in certain generalizations about the types of offenses which pose the greatest social costs and the greatest risks to the safety of the public, and must make corresponding generalizations about the maximum penalties which those offenses will justify. The best sentencing structure is one which allocates to others in the process—mainly to courts and parole authorities—the function of making judgments which they are best qualified to make and which, because of the time when they act, they are in the best position to make. The job of grading offenders on a scale ranging from acquittal to imposition of the highest sanction belongs to those who must administer the system on a day-to-day basis.

For reasons such as these, there is practical unanimity among the recent reform efforts, noted in the introduction to this memorandum, on the following general principles:[20]

> The sentencing structure should permit a wide range of alternatives in each case in order to accommodate the innumerable variations in the cases that will arise.

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[20] For elaboration on each of these ideas, *see* ABA Report, *supra* note ** p. 1245, at 48, 52–56, 63–69, 74–80, 142–153, 156–158. *See also* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY, 142–143, 222–224 (1967).

Mandatory sentences should not be fixed by the legislature for any offense.

Probation and other forms of sentence short of commitment in a maximum security institution should be permitted for every offense, save perhaps the most serious such as murder or treason.

A substantial measure of indeterminacy should be built into every sentence in order to allow for the proper functioning of the parole system.

It remains to be considered whether there are specific arguments, perhaps peculiarly applicable to the Federal system, which can overcome this rather overwhelming consensus against the legislative foreclosure of sentencing alternatives.

Two related arguments are typically advanced in support of legislatively mandated sentences. The first is that a mandatory sentence is necessary in some instances to assure that the courts will not deal too leniently with a particular offender. The second is that the certainty of substantial punishment for the violation of a particular statute will act as a significant deterrent to the commission of that offense.

Neither argument, however, is persuasive. In the first place, there is clear evidence as a practical matter that the system does not function as the arguments would envisage. As is explored in part I of this memorandum, in the section entitled "Mandatory Sentences," there is no certainty of punishment for Federal narcotics offenders, nor are the courts prevented from dealing leniently with an offender if that is their desire.

There are affirmative disadvantages to such sentences as well. In some instances, a mandatory sentence results, as a practical matter, in a vesting of sentencing authority in the invisible and uncontrollable discretion of the prosecutor, perhaps the least desirable place for such authority to repose. There are always alternative offenses which could be charged. If they are charged, as they usually are, the result is that the judge has exactly the same discretion—by acquitting on the "hard" count and convicting on the "soft"—which the statute purports to deny. If they are not charged, then the prosecutor has effectively made the sentencing decision by deciding only to charge the one offense.

The same basic point (that it is impossible, as a practical matter, to entirely rob the system of discretion) also tends to nullify the unique impact of a mandatory sentence as a deterrent. It takes a reasonably sophisticated potential offender to know the difference between a statute which authorizes a 10-year sentence and a statute which requires a 10-year sentence. One with this degree of sophistication is also likely to know that most convictions are the result of a guilty plea, and that as often as not the plea can be the result of a bargain for a lesser charge than might be supported by the facts which could be proved at a trial. A potential offender with this degree of sophistication is also likely to know that it is not always possible to manipulate his case so that he will be sentenced by the "soft" judge at which the mandatory sentence seems primarily to be aimed.

The basic point, however, is that a sentencing structure which is built upon such a distrust of those who will administer it is bound to be self-defeating. Judges who are convinced that a legislatively mandated sentence is too severe for a particular case have manipulated and truncated the system, and will continue to do so, in order to achieve

results which they think to be fair. The system would be far better off if it turned its efforts to the ways in which those who impose sentences can be helped, rather than to the ways in which decisions can be foreclosed. A structure which opens up alternatives and which concentrates upon the development of skills and of informational facilities can make a constructive contribution to the effectiveness and the fairness of Federal criminal justice. A rigid and confining structure that makes a futile attempt to decide particular cases before the acquisition of essential information would be a retrogression.

3. *Probation.*—One type of mandatory sentence is the provision which denies to the court authority to place the offender on probation if he has been convicted of certain offenses. The narcotics statutes discussed in part I, "Mandatory Sentences," provide an example of an exemption from probation for a specific offense. The general probation statute itself [21] also exempts from consideration for probation all offenders who have been convicted of an offense which carries a possible sentence of death or life imprisonment.

As noted in the immediately preceding section of this memorandum, there is general agreement that the availability of probation should be maximized. The commentary to the Model Penal Code supports this position with the observation that: [22]

> No legislative definition or classification of offenses can take account of all contingencies. However right it may be to take the gravest view of an offense in general, there will be cases comprehended in the definition where the circumstances were so unusual, or the mitigations so extreme, that a suspended sentence or probation would be proper. We see no reason to distrust the courts upon this matter or to fear that such authority will be abused.

It could be added as well, that if those who administer the system desire probation in a particular case, a form of charge can be made which will permit such a disposition even though properly charged the offense might be an exempted crime.[23]

On the other hand, it should in fairness be noted that many recent Codes—undoubtedly for practical, political reasons—have departed from this principle to the limited extent of exempting a very few particularly heinous crimes. The Model Sentencing Act, for example, would exempt murder from eligibility for probation. New York exempts murder and kidnapping. Each of these efforts is in agreement, however, that the number of such exemptions should be very few and that unless limited to offenses of great severity the distorting effect on the system would be of significant and damaging proportions.

There is one other aspect of the sentence of probation which should be considered for possible inclusion in a new Federal Penal Code. The Model Penal Code provision on probation is worth quoting in full to make the point: [24]

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[21] 18 U.S.C. § 3651.

[22] MODEL PENAL CODE § 6.02, Comment at 13–14 (Tent. Draft No. 2, 1954).

[23] *See generally* ABA Report, *supra* note**, p. 1245 at 63–67, where additional support for this view, including that of the President's Crime Commission, is collected.

[24] MODEL PENAL CODE § 7.01 (P.O.D. 1962).

(1) The Court shall deal with a person who has been convicted of a crime without imposing a sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character, and condition of the defendant, it is of the opinion that his imprisonment is necessary for the protection of the public because:

(a) there is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or

(b) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or

(c) a lesser sentence will depreciate the seriousness of the defendant's crime.

The section is then followed by a list of factors which should be considered in making a determination to withhold a sentence of imprisonment.

The purpose of this provision is to suggest for the proposed Criminal Code, for the guidance of those who will impose sentence, that probation, or some other form of nonincarcerative sentence, should presumptively be the appropriate disposition unless there are affirmative reasons specifically indicating that a prison term is necessary. The ABA Report has recommended the same thing, though it broadened the principle to suggest that every sentence should involve the least amount of incapacitation of the offender as is compatible with other, necessarily overriding, interests of the public.[25]

There are two major reasons for this attitude. The first is a conviction, supported by the limited empirical research that has been conducted on the subject and by the experience of many Federal and State judges, that probation is likely to be the most effective form of sentence in a great many cases—perhaps a majority—because it does not involve the complete dislocation of the offender from the community in which he will ultimately have to learn to live. All but a very few offenders will return to the open society, whatever their sentence, and it clearly should be one of the most important objectives of the sentence to assure the greatest extent possible that the return will not be accompanied by renewal of a criminal career. Of course, it may be that the best thing for the offender, as well as for the public in a particular case, would be to reorient the offender in a different community or incapacitate him for a substantial period of time until he no longer presents a great danger to the safety of the public. It is precisely factors such as these which the quoted section of the Model Penal Code would recognize as legitimate reasons for the imposition of a prison sentence. But the important point is that in the absence of such factors—that is, where the defendant does not pose a significant public danger, where there is no particular rehabilitative reason for sentencing him to prison, or where a sentence to probation will not unduly depreciate the seriousness of the offense—it would seem clear that a sentence to probation should be used.

The second reason for the attitude which is shared by the Model Penal Code and the ABA Report is economic. Probation as presently

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[25] ABA Report, *supra* note**, p. 1245 at 64, 72–73, 74, 80, 71, 107–108.

administered in the Federal system costs less than one-tenth of the cost of institutionalization. The annual costs in fiscal 1967 averaged $285 to supervise an offender on probation as opposed to $3,100 for his institutionalization.[26] These figures do not include the substantial costs of construction of prison facilities or the more intangible costs represented by the earnings which an inmate could produce for his family if he were on probation, the welfare payments made to his family which could be eliminated, and so on.

As was observed by the President's Crime Commission,[27] it may well be that a properly administered probation service should involve greater expenditures of funds than are now available, and that for that reason the ratio of one-tenth, though it accurately reflects current expenditures, is not what it ought to be. But even if it cost half as much to supervise a probationer as to send an offender to prison, the economic gain would be significant. Coupled with the prospect that probation can in many cases be a much more effective sentence than incarceration, the economic argument is persuasive support for the position of the Model Penal Code, the ABA Report, and others that probation should be a disposition to be employed in the absence of affirmative countervailing reasons, and that a new penal Code should state the preference as a criterion to guide the judges who will administer it.[28]

4. *Length of Sentences; Extended Term.*—As is noted in the section on Disparity in part I of this memorandum, there is concern among many that authorized prison terms are too high and that in many instances imposed prison terms are too high. There is at the same time, however, recognition of the fact that there are cases where long sentences are called for, and that the system will not adequately protect the public unless such sentences are available on the occasions when they are needed.

The problem is how to assure that the long sentences are available, if needed, and at the same time to avoid unfortunate effects on sentences in other cases. The structure which is now employed in the Federal system gives to the courts a single spread, in effect, ranging from acquittal through probation, a fine and prison up to a stated maximum. It is then the job of the courts to place a given offender at some point on the spread. And as noted in Part I, the fact that the highest point on the spread is placed high enough to accommodate the unusually serious cases can have an undesirable impact on sentences in other cases.

Of the innumerable possibilities that could be suggested as alternatives to the present Federal approach, three suggest themselves as the most plausible. Each alternative, with some of its advantages and disadvantages, will now be discussed.

(a) *Extended Term.*—The basic idea underlying the extended term proposal is that authorized sentences ought basically to be de-

[26] The figure of $3,100 does not include offenders who were placed in local jails under special contract. Inclusion of such offenders produces an average annual cost of $2,900. The figures were supplied by the Administrative Office of the U.S. Courts.

[27] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS, at 28, 175–176 (1967).

[28] Further discussion can be found in TASK FORCE REPORT: THE COURTS, *supra* note 12, at 15–18.

signed for the offender who is going to be before the courts most of the time. It is thus an attempt to avoid the distorting effect on most sentences of a sentence structure aimed primarily at the offender who will come up only a statistically small percentage of the time. At the same time, however, it is an attempt to authorize an appropriate sentence when such an offender does appear.

Perhaps the best way to develop a picture of what an extended term sentence structure would look like is to examine in tabular form the provisions recommended by the Model Penal Code:[29]

Felonies	Ordinary term (years)		Extended term (years)	
	Minimum	Maximum	Minimum	Maximum
1st-degree	1 to 10	Life	5 to 10	Life.
2d-degree	1 to 3	10	1 to 5	10 to 20.
3d-degree	1 to 2	5	1 to 3	5 to 10.

Offenses are defined in other parts of the Model Penal Code, and each felony is assigned to one of the three categories described above. Only four offenses have been assigned to the first category: murder and aggravated forms of kidnapping, rape, and robbery. The basic sentencing structure for most offenses is therefore fixed around the conception that sentences in the 5- to 10-year range are perfectly adequate for the vast majority of offenders committing the vast majority of offenses. Both the Model Sentencing Act and the ABA Report agree in substance with this conclusion.

There remains the possibility, however, of a more severe term in certain types of cases. The Model Penal Code has recommended that this term be available for the habitual offender, the professional criminal, the dangerous, mentally abnormal offender, and also as a limit on the aggregate cumulation of consecutive sentences. Detailed criteria are specified in the Model Penal Code[30] in order to indicate the conditions which are thought to support the imposition of the extended term. The Model Sentencing Act, the ABA Report, and the proposed Pennsylvania statute recommended essentially the same structure.[31]

There are three basic advantages to such an approach:

(i) The sentencing decision in the vast majority of cases will be made in a context which reflects much more realistic and desirable limitations. There is no need for a sentence of more than 5 or 10 years in the overwhelming majority of cases, nor any point in suggesting—as a 1- to 20-year range does—that the court should be thinking in more severe terms.

(ii) Such a structure should have a rationalizing effect on sentences, and should sharply reduce the impact of the disparity problem. By pro-

[29] The table as here represented is somewhat oversimplified, but can serve the purpose of the present discussion. For a more complete table, see ABA Report, *supra*, note**, p. 1245 at 85. The minimum term as here depicted is synonymous with the parole eligibility date. Thus, a sentence for a second-degree felony carrying a minimum prison term of 2 years and a maximum of 10 would mean that the defendant could be released on parole at any time after serving 2 years and that he must be released after serving 10.

[30] Model Penal Code § 7.03 (P.O.D. 1962).

[31] For detailed discussion, in addition to representation of the suggested structures in tabular form, *see* ABA Report, *supra*, note**, p. 1245, § 2.5 and Comments *c* through *g* at 85–91.

hibiting long-term commitments unless certain specified criteria are satisfied, the incidence of unnecessary long-term commitments caused by the personal predilections of an individual judge should be reduced.

(iii) The focus on certain types of individuals who need long-term commitment—or as to whom society requires long-term commitment for its own protection—should, when coupled with the development of resources to identify those offenders, do a better job of reducing the occasions when an overly lenient sentence is imposed on a highly dangerous offender. Public protection is increased in direct proportion to the capacity of the system to identify the offender who poses the greatest risk.

On the other hand, there are at least three possible disadvantages to an approach which is based on the extended term:

(i) The development of criteria which are sufficiently detailed to guard against the misuse of the higher term and yet which do not create overly difficult problems of proof is an extraordinarily complex problem which we may not at this time be able to solve.[32]

(ii) There is a practical difficulty, which in fact materialized in the Proposed Crimes Code for Pennsylvania. The attractiveness of the extended term turns on its acceptance as a method by which ordinary sentencing limits will be sharply reduced below presently existing levels. Yet there remains the danger that reductions of ordinary limits will not be acceptable to the legislature and that at the same time an extended term will be added on top of present limitations. It would be regressive if this were permitted to happen in the proposed new Federal Code.

(iii) Some have expressed the fear that use of the extended term would introduce the need for basic procedural changes in the way sentences are imposed, such as the need for direct confrontation of witnesses in the case of all evidence considered on such a sentence. This was the reason why the extended term device was not adopted in the recent revision in New York. However, such fears should not materialize under present or anticipated Federal constitutional limitations.[33]

(b) *Diagnostic Study.*—There is a variation of the extended term idea which may prove more practical to implement in the Federal setting. There is present authority granted by section 4208(b) of Title 18 to commit a convicted offender to the custody of the Attorney General for study and examination. Within 3 months, with the possibility of one extension, a detailed report is returned to the sentencing court and the defendant is then returned for sentencing. The court may then impose any sentence which it could originally have imposed, with the significant advantage of much more detailed information about the offender and the risks he poses than is normally available at the time of sentencing.

Simply put, the idea is that sentence limits be fixed much as they now are, and that such a commitment for study be required in any instance in which the court is considering a sentence in excess of a fixed amount, perhaps 5 or 10 years. If it could be coupled with appellate review of the sentence in order to guard against capricious disregard

[32] *See* ABA Report, *supra* note**, p. 1245 at 88, 93–99.

[33] For an elaboration of the reasons for this conclusion, *see* ABA Report, *supra* note**, p. 1245 at 262–266. For a complete treatment of the extended term idea, *see* ABA Report, *supra* note**, p. 1245 at 56–61, 83–107, 137–141, 258–268.

of the recommendations of the special study, such an approach should be able to provide most of the advantages of the extended term without involving many of the disadvantages. Specifically:

(i) Sentencing limits could be fixed, as they are now, high enough to accommodate the unusually dangerous offender but flexible enough to serve in the normal case. There would thus be a minimum of change involved from one system of fixing sentence maxima to another.

(ii) There would be no need to become embroiled in the difficult task of developing criteria for the occasions when an extended prison term would be appropriate. If a sentence to 20 years were imposed on an offender with the concurrence of the trial court, the Bureau of Prisons after special study, and perhaps a reviewing court, the safeguards which the criteria are designed to provide would seem adequately afforded. And perhaps, in the process, criteria could be developed in the best of the common law tradition which would be much more practicable than the criteria which have heretofore been suggested. Only in the case where the Bureau recommended a short sentence and the trial court imposed a long one would there appear to be any significant problem. And provision for appellate review of such a sentence should be able to resolve the difference satisfactorily.

(iii) The procedural difficulties envisaged by some in connection with the extended term would not be a problem under such a system, because of the absence of specified statutory criteria for the imposition of a long sentence. The procedural posture of a case under the suggested system would be exactly as it is now with regard to the imposition of a long prison sentence.

(iv) Each of the advantages of the extended term idea would seem to be retained. The sentencing decision in most cases would be made in terms of more realistic limits, since it would take a special effort and a special concern by the judge in order to impose a particularly long sentence. The case, discussed in part I, of the judge who started at the maximum sentence and worked down, could not happen under the envisaged system. Such a structure should also have a rationalizing effect on sentences, and should sharply reduce the disparity problem. And perhaps most important, the expertise that would be developed over the years in spotting the dangerous offender from whom the public needs protection should materially decrease the chances of sentences which are too lenient.

Perhaps the major disadvantage to such a system would be its expense. But, in comparison with the funds spent on other matters and with the importance of developing the capacity to accurately isolate the truly dangerous offender, it may well be that the expense should be of small concern.

(c) *Presumptive Parole.*—The final suggestion, advanced by Professor Schwartz, basically involves the proposal that every offender should be automatically paroled after service of a certain portion of his sentence, unless an affirmative showing were made by the parole board that the defendant posed such a risk that his continued detention was advisable. Perhaps, for example, a defendant who received a 6-year sentence should be eligible for discretionary release on parole at any point up to 4 years, or perhaps from a range of 2 to 4 years. If he were still incarcerated after serving 4 years, however, he would then be automatically entitled to parole unless an affirmative showing were made

to keep him in. The burden would shift, in other words, from his obligation to justify himself as a fit subject for parole up to the 4-year point to the state's obligation to justify his retention.

While such a system would have significant advantages in terms of reducing the possibilities of injustice to the individual as the result of a long sentence, there are disadvantages which ought to be noticed. Most importantly, such a system would not seem to strike directly at the problem with which this portion of the memorandum is mainly concerned. The point of the extended term suggestion and the diagnostic study alternative is to reach the initial sentencing decision—to improve that decision both by causing most offenders to be dealt with in terms of more realistic limits and by increasing the capacity to recognize the unusual case when it arises. The presumptive parole idea is designed only to have an impact after the offender has been sentenced. It thus would not reach the initial sentencing decision, and would not solve the dilemma posed in the discussion of disparities in part I.

It, perhaps, should be added as a final note that there is nothing about the presumptive parole idea that would make it incompatible with one or another of the other alternatives which have been explored. If the present Federal system is retained, the addition of the presumptive parole idea would perhaps be a forward step as an additional protection against the unwarranted long sentence. One difficulty might be, however, that judges may tend, under such an approach, to raise their sentences and thus nullify most of the protection it is designed to afford. If either of the other two structures were adopted—the extended term or the diagnostic study—the presumptive parole idea could again be added. A diagnostic study as a prerequisite to a long sentence and presumptive parole after, perhaps two-thirds of the term, could well provide the twin advantages of improving initial sentencing decisions and providing a significant safeguard against prejudice to the individual through mistake.

5. *Determination of Maximum.*—Once decisions have been taken as to where the maximum levels of punishment will be fixed, there still remains an important issue as to how these levels should be applied in concrete cases. Specifically, the question is whether the courts should have complete discretion to impose a maximum term in a specific case at any point up to the legislatively stated maximum, or whether the legislature should exercise more control over that decision either by requiring the imposition of a stated maximum or by permitting judicial control within stated limits.

It should be noted at the outset, however, that there are a number of discrete issues to be faced in the proper allocation of sentencing functions. Confusion is often engendered by not keeping these issues clearly separated.

There are essentially three decisions which must be made prior to the imposition of a prison sentence, and there is no necessary relation between them in terms of allocating decisional authority.

(a) The first is whether imprisonment or some other sanction, such as probation, is to be used. This decision is unanimously allocated to the sentencing judge in this country, even in States such as California, where there is a minimum of judicial control over sentencing.

(b) The second decision is what (if prison is to be employed) the maximum length of the term is to be, that is, when the offender must,

at all events, be released from prison. This is the issue to be dealt with in this section of the memorandum.

(c) The third decision is when the offender will be eligible for discretionary release on parole, that is, what his parole eligibility date will be, or in the terminology which is becoming more and more common, what his minimum sentence will be. This issue is to be dealt with in the next section of the memorandum.

Resolution of the issue put in this section of the memorandum, then, properly has nothing to do with whether an offender will be eligible for probation, whether he should be placed on probation, or when he will be eligible for parole. The question is solely the one of when he must be released from prison once it has been decided that he will be imprisoned, and who it is that should make the decision fixing that limit.

In terms of current practice in this country, opinion is nearly unanimous that determination of the maximum sentence is properly a decision for the trial court. The overwhelming majority of Federal sentences are determined in this manner, for example, by authorizing a sentence of imprisonment "for not more than 5 years" and by permitting the judge to select any term which does not exceed the stated limit. A few Federal statutes, on the other hand, attempt to control the discretion of the court in a limited fashion by providing that a sentence to prison shall be for a term, for example, of "not less than 2 nor more than 5 years" (as in 18 U.S.C. § 140) and by permitting the judge to select an actual maximum in a specific case at some point within the stated range. And finally, there is at least one provision (18 U.S.C. § 2114) which states that an offender who is sentenced to prison "shall be imprisoned for 25 years," thus denying to the sentencing court authority to fix any other maximum than the stated term. Again, it should be noted that the issues of parole and probation are separate problems that are not necessarily affected, that certainly need not be affected, and that are not in fact affected as the Federal structure now exists, by any of these three formulas for stating the maximum sentence levels and the extent of judicial control.

Evaluation of these three methods of stating the extent to which there should be judicial control over the maximum must start with the arguments which are advanced by the proponents of each system. Those who argue that the judge should not have control over the maximum, that is, that all sentences should be of the form illustrated by the 25-year example cited above, have essentially two reasons for their position:

(a) The first turns essentially on the matter of timing. Any determination by the judge at the time of sentencing as to when it will be appropriate to release an offender must of necessity be a guess, based at least partially on a prediction as to how he will react to the correctional setting. Corrections and parole authorities, on the other hand, are in a much better position to determine the types of risks an offender will present if he is released, because they need not act until the time when release becomes an issue. Their judgment can thus be based on the best information about the offender that can be available, and it thus should not be foreclosed by a judicial decision that the defendant must be released at some point prior to the expiration of the maximum set by the legislature.

(b) One of the most difficult of current sentencing problems is how to control the indefensible disparities that crop up from court to court and judge to judge. If judges were denied the authority to determine the length of the maximum term, a single agency—the parole authorities—could then exercise more control to equalize the sentences imposed on different offenders, saving those cases where there were justifiable differences. The application of a single set of criteria by a single agency should reduce the incidence of unjustifiable differences, at least with respect to the length of prison terms.

The arguments of those who prefer the type of sentence which gives complete discretion to the sentencing court over the maximum term to be imposed, that is, the form of sentence illustrated above by the language imprisonment "for not more than 5 years," proceed as follows:

(a) The legislature necessarily speaks in generalities when it makes the essentially moral judgment that an offense should under no circumstances be punished for a period in excess of a specified maximum term. Particular cases do not fit these generalizations all of the time, and there is thus the need for someone to be able to express such a judgment rooted in the facts of the particular case. The best person to do this—the person who is closest to the offense and to the community in which it was committed—is the trial judge. He should thus be given control over the length of the maximum term when he imposes a prison sentence.

(b) The second argument is an attack on the argument advanced in favor of no judicial control based on the timing of the parole decision. As stated in the ABA Report: [34]

> The proposition that parole authorities are in a better position than judges to assess the readiness of the defendant to return to society needs more support than merely the advantage of more favorable timing. In particular, such a system would seem to call on more highly developed and more adequately funded correctional and parole facilities than many states [35] have to date provided. In addition, the fact that judicial sentencing occurs in open court following an opportunity to present a case with the assistance of an attorney affords a visibility to the process which is normally absent before parole authorities, as well as greater procedural protection.

There is also the point that minor transgressions within the prison are likely to impair parole consideration of the inmate, and though not really serious, may result in service of a long term more for his reaction to prison discipline than for the nature of his original offense or how he would be likely to conduct himself if he were released.

(c) The third argument begins from the premise that sentences are already too long in this country, and that the effect of a system which denies judicial control over the maximum is to make them longer. Whatever the theoretical soundness of this argument, the best that can be said for it statistically is that the results of comparisons of the two systems seem to be inconclusive.

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[34] ABA Report, *supra* note**, p. 1245 at 135.

[35] Whether the Federal parole system is subject to this criticism may, of course, be another matter.

(d) The fourth argument is an expression of concern over the effect of no judicial control on the well-entrenched process of plea bargaining. If the judge does not have the power to control the length of a maximum term, the result will inevitably be, so the argument goes, an increased pressure on the prosecution to grant charge concessions in return for guilty pleas. On the other hand, if the judge does have control over the length of the maximum, then the prosecutor has the additional offer of a sentencing recommendation to make in exchange for a guilty plea. Retention of judicial control over the maximum thus has the twofold advantage of increasing the visibility of the plea-bargaining process and of retaining for the judge a more important role in keeping it within proper bounds.

(e) Finally, it should be noted that judicial control is firmly entrenched in the present Federal system and that the judges can be expected strongly to favor it. There is great question whether the arguments in favor of a change are persuasive enough to justify the political battle that would have to be waged in order to produce it.[36]

What the structure of the new Federal Criminal Code should look like on this point is genuinely debatable. It would seem rather clear on the one hand that if sentence levels, particularly for the very serious offenses, are to be retained close to their present points, the present system of judicial control has more to commend it. The idea that every offender who robs a Post Office at gunpoint must receive a 25-year sentence if he is to go to jail very much overstates the moral stigma that should be attached to many offenders who commit that crime; it also is the imposition of a sentence that will actually be served by only a very few particularly dangerous offenders.

On the other hand, it may be that the best system would be one that exercised some control over the sentencing judge, at least to the exent of requiring a sentence in the range of 3 to 4 years if the sentence is to be served in a normal prison. Shorter sentences, while perhaps they should be permitted within the discretion of the judge, tend to be merely custodial and perhaps should be served in local institutions or jails if the quality of such institutions is sufficiently high, or in special Federal custodial facilities where no formal and sustained rehabilitative effort would be expected to be undertaken.

6. *Minimum Term.*—There is an initial terminological difficulty which is always encountered whenever the impact of a sentence is under discussion. Terms like "indeterminate" and "definite" are frequently used without any clear understanding of what is meant.

The fact remains that both of these terms can be used to describe a sentence which functionally has exactly the same effect. Practically every sentence in this country, by whatever name it is called, has a maximum term beyond which the offender can in no event be detained and a parole eligibility date, which occurs significantly prior to the expiration of the maximum and which signals the beginning of the period during which the parole board can consider discretionary release. The clearest terminology in which to describe this process is to speak both of a maximum term and a minimum term as part of every sentence: the maximum is the date by which the offender must be released; the minimum is the date after which the offender may

[36] For further development of these issues, *see* ABA Report, *supra* note**, p. 1245 at 129–137.

be released on parole. The purpose of this section of the memorandum is to deal with the manner in which this minimum term should be determined.

There are numerous ways in which the minimum term is determined under existing sentencing laws. Basically they fit into two categories.

The first consists of those provisions where the legislature has taken it upon itself to fix the minimum term for all offenses or for certain particular offenses. Commonly, for example, a life sentence carries with it the automatic minimum term of 10 or 15 years. In California, numerous offenses have minimum terms fixed by the legislature which must be served before the adult authority can consider parole. In some States—Virginia is an example—the minimum term is automatically fixed at a certain percentage (one-fourth in Virginia; one-third in many other States) of the maximum term actually imposed. In Florida, there is a 6-month minimum term for every sentence; in Minnesota, there is no minimum except in cases where a life sentence is imposed.

The second type of statute gives to the sentencing judge authority to determine the minimum within a legislatively prescribed range. Alaska and Illinois are examples of States where this practice is in effect. As can be seen by reference to the table reproduced on page 1270 of this memorandum, the Model Penal Code has recommended this type of structure. As a result, it has been adopted recently in New York and has been proposed for adoption in Pennsylvania. It is also recommended by the American Bar Association.[37]

The present Federal practice is in some respects a hybrid, but in effect is much like the alternative which gives to the court the authority to determine the minimum term. Section 4202 of Title 18 sets parole eligibility at one-third of the maximum sentence imposed or at 15 years for life sentences and other sentences in excess of 45 years. However, section 4208(a) specifically authorizes the court to set the minimum term at some lower point, and indeed to impose no minimum at all. The effect is therefore that an automatic, legislatively prescribed minimum is built into every sentence unless the court takes the initiative specifically to provide otherwise.

In considering how the minimum term should be imposed, it is helpful to consider the legislative and the judicial roles separately.

There is a clear consensus among the Model Penal Code, the Model Sentencing Act and the ABA Report to the effect that it is inappropriate for the legislature to fix a minimum term for any offense.[38]

The reasons for this view have been discussed in the section of this memorandum entitled "Range of Alternatives; Mandatory Sentences," *supra*, but perhaps bear recapitulation here. The major reason advanced in favor of legislatively fixed minimum terms has two aspects: The basic purpose of the criminal law is the protection of the public. The public cannot be protected effectively unless it can be assured that dangerous offenders will be kept off the streets for at least a minimum period of time. In addition, the certainty of punishment provided by a known and mandatory minimum sentence is likely

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[37] ABA Report *supra* note**, p. 1245. § 3.2(b) and commentary at 142.

[38] There is one exception to this statement, to be discussed below. The Model Penal Code would provide that there be an automatic 1-year minimum in every prison sentence.

to act as a significant deterrent to conduct against which society needs the best protection we can afford.

As expressed in the ABA Report, however, those who support this position frequently lose [39]

> sight of the fact that it is at most only some offenders from whom the public needs this protection, and that the legislature is not in a position to identify the precise individuals who pose the feared risk. It is perfectly apparent that *every* robber and *every* mugger, and indeed *every* murderer, does not pose the same type of future danger to the community. The young adult who panics because he cannot find work and who robs to feed his starving family does not pose the same potential danger to the community as the sociopath who robs because his twisted values find that as convenient a way as any to make a living.
>
> The Advisory Committee holds no sympathy for the offender who poses a significant public danger and is just as anxious as anyone else to get him off the streets for a period of time sufficient to neutralize the danger. But this position does not and should not lead to the conclusion that offenders who do not pose such a danger should be committed for a substantial period of time because the offense they committed happens to be one that is often committed by dangerous people. The evil of the mandatory term is that it robs the system of the capacity to discriminate between offenders who do and offenders who do not deserve the harsh treatment which the minimum signifies. A far better way to attack the problem would be to arm the system with the funds and the facilities to enable it to identify the particular offenders from whom society legitimately needs protection.

In addition, of course, there is the fact that the minimum term truncates and distorts the system by attempting to deny discretion to do the right thing. Prosecutors, judges and juries are above all motivated—if they are doing their job properly—to do justice in the individual case. A mandatory, legislatively prescribed minimum term either robs them of the capacity to do justice in some cases, or forces them to search for alternatives ranging from conviction of another offense to outright acquittal.

There is a second aspect of the legislatively prescribed minimum term which must also be considered. The Model Penal Code recommended, and the New York statute followed suit, that each sentence to prison carry with it an automatic minimum of 1 year. The judge is then free to raise the minimum if that is called for in the particular case.

There are two arguments which have been advanced to support this provision: (a) a short minimum term is an institutional necessity in order for any valid correctional program to get underway; (b) given this de facto need, stating the minimum in the sentencing part of the Code will serve to emphasize to the sentencing court the nature of the choice being made between probation and incarceration and will thus assist him in that determination.

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[39] ABA Report *supra*, note**, p. 1245 at 148; *See generally id.* at 144–53.

In response, it should be noted that there is nothing about the lack of a minimum term which interfere with the needs of the institution. The basic point behind sentences which do not include a minimum is to increase the flexibility open to institutional authorities. If it is their determination that an offender needs a year or 2 years or whatever in order for a meaningful correctional and rehabilitative program to take hold, then there is no reason why a mandatory 1-year term is needed to secure that result. They are free to go right ahead.

As to the impact of the 1-year legislative minimum on the sentencing court's choice between probation and prison, it would seem far better for the court to acquaint itself with the time which different institutions in fact take in order to classify an offender and begin a significant correctional program. The issue would seem much more sharply presented if it were put in terms of the time an institution in fact needed than if it were put in terms of an arbitrary, legislated period which soon may become out of date.

It remains to consider the judicial role in the determination of a minimum term. At least two issues are posed in this connection: (a) whether there should be a minimum term at all, *i.e.*, whether the judge should be authorized to impose a minimum sentence; and (b) if so, the extent to which his discretion to do so should be limited by legislative bounds. Each of these issues will be separately considered.

(a) There is a significant split between the Model Penal Code and the Model Sentencing Act on the first issue. The Model Sentencing Act permits no minimum terms; the Model Penal Code does within a specified range. The American Bar Association sides with the Model Penal Code on the issue, with emphasis, however, on the need for careful consideration of the legislative limitations which should be placed on the judicial discretion to impose a minimum term and on the need for an outlet in the case of error.

There are four basic arguments advanced by the opponents of the minimum term:

(i) The most fundamental is that the minimum term freezes mistakes. The court at the time of sentencing is not in a particularly good position to know what the status of the offender will be 5 years hence. The provision of a high minimum unduly shackles the parole authorities from releasing the offender at the optimum time.

(ii) Closely related is the point that the issue in most cases is not whether an offender is ever going to be released, but when. And that question should be resolved by bringing our best resources to a determination of the best time for release in terms of protection of the public from future offenses by the defendant and in terms of the best judgments of which we are capable as to the most likely time when he will successfully reintegrate himself into the community. A minimum sentence which requires the continued detention of an offender beyond this time—and neither judge nor legislature can accurately predict in advance when, or indeed whether, it is going to occur in a given case—can substantially impede the offender's progress, can embitter him, and can reinforce the tendencies toward crime which led him to prison in the first place. Put more directly, a misplaced minimum term can increase the danger of a new and serious offense by the defendant rather than decrease it.

(iii) One of the most difficult problems that exists in sentencing as it is practiced at present is the much-discussed problem of disparity.

Too many defendants who ought to get similar sentences are treated in vastly different ways by the present system. One way to attack the problem is to give parole authorities the power to even off disproportionate sentences by treating similarly situated offenders in the same way with respect to release on parole. The power to impose a high minimum sentence, in other words, is the power to freeze a disparate sentence in a manner which cannot later be undone.

(iv) Finally, proponents of minimum terms argue that parole board conservatism will be induced by leaving the release decision entirely in the hands of the parole board. It is more likely that a proper release decision will be made if both judge and parole board participate in the decision. Whatever the merits of this argument, those who oppose the minimum term answer that its thrust would not seem to require that the judge be empowered to make a binding decision on when release should first be considered. A recommendation by the judge would give the parole authorities the benefit of his perspective and at the same time not carry with it the disadvantages of freezing an error into the sentence should the judge turn out to have been too severe.

The proponents of the minimum term respond in the following manner:

(i) A judicially fixed minimum is a desirable means of sharing the release responsibility between the judge—with his roots in the community where the offense occurred—and the parole authority—which tends to be somewhat removed from the context in which the crime was committed. For reasons of general deterrence and in order to maintain community respect for law, there needs to be a method by which the judge can assure the public that a particular defendant will be imprisoned for at least a minimum period of time.

(ii) Clearly the worst of all possible worlds is the legislatively prescribed minimum. To advocate that the opposite extreme be embraced, however—that the legislature prohibit minima—is likely to be self-defeating. The motives which have produced so many legislatively prescribed minima are not going to disappear easily. But they can for the most part be accommodated by a system which permits the judge to impose a minimum. Since this is a far better alternative, it is politically more realistic to strive for the intermediate position of judicially imposed minima than it is to strive for the complete abolition of minimum terms. The California experience illustrates the difficulty: the original conception was that complete discretion over release date be given to the Adult Authority, that the judge have no control over the length of the sentence. Since then, however, numerous ad hoc enactments have specified minimum terms which must be served before the Adult Authority could act. This might not have happened if the pattern had permitted judicial imposition of minimum sentences in appropriate cases.[40]

(b) As was noted above, there are two issues which must be considered in connection with the judicial role in fixing minimum terms. The first—whether there should be any minimum terms—has been discussed. The second—what statutory controls there should be if the judge is to be authorized to impose a minimum—remains for consideration.

[40] For an elaboration of the points under discussion, *see* ABA Report, *supra* note**, p. 1245 at 142, 153–156.

There is a clear consensus on at least one point: the court should not be permitted to destroy the principle of indeterminacy through use of the power to impose a minimum term. In one State case, for example, a judge imposed an "indeterminate" term with a minimum of 199 years and a maximum of life. The judge should not be permitted to destroy the operation of the parole concept through the imposition of a minimum term which so nearly approaches the maximum in length. There should always be a significant spread between the time when the offender must be released and the time when he may be released.

For this reason, the Model Penal Code, the ABA Report and practically every jurisdiction which permits the imposition of minimum terms provide that the minimum should in no case be permitted to exceed a specified percentage of the maximum. One-third is the most common provision and is the present Federal limit.

In addition, the ABA Report contains five further recommendations which should also be considered:[41]

(i) Minimum sentences should be considered to be rarely appropriate and should be reasonably short, never to exceed 10 to 15 years (and of course never to exceed one-third of the maximum actually imposed). The present Federal limit of 15 years conforms to this recommendation.

(ii) Imposition of a minimum sentence should require the affirmative action of the sentencing court. This is exactly the reverse of the present Federal practice, where affirmative action is required in order for the sentence not to contain a minimum.

(iii) A minimum sentence should not be permitted without detailed study of the defendant through a presentence report and a further diagnostic study under a provision similar to present section 4208(c) of Title 18.

(iv) The court should be required to consider prior to the imposition of a minimum term whether a nonbinding recommendation would adequately serve the purposes which would be served by a minimum term.

(v) The court should be authorized to reduce an imposed minimum term at any time on motion of the corrections or parole authorities. The District of Columbia presently has a statute to this effect.

It would seem that there are only two manifestly clear changes which ought to be made in present Federal law. The first is the elimination of provisions such as 26 U.S.C. § 7237, which couple denial of parole eligibility with the requirement that a certain minimum sentence be imposed. The second is a change in the emphasis of the present minimum term provisions in order to provide that a sentence will contain no minimum; *i.e.*, that the offender will be immediately eligible for parole, unless the judge specifically imposes a minimum. In addition, there is a strong argument that the present Federal limit of 15 years, which is the longest minimum term that may now be imposed, should be reduced at least to 10. Many correctional administrators have commented to the effect that deterioration is a common reaction to imprisonment for more than 10 years, and that after such a

[41] For an elaboration of these recommendations and the reasoning behind them, *see* ABA Report, *supra* note**, p. 1245, §§ 3.2, 6.2 and accompanying commentary, particularly at 156–160, 280–281.

long sentence the chances of an offender ever resuming a useful and productive life become increasingly remote. A limit of 10 years would not interfere with the purpose of a substantial minimum, and at the same time would permit the avoidance of such harmful consequences to the individual in cases where parole would be compatible with the public safety.

Aside from these rather obvious changes—obvious at least in the sense that they are clearly dictated by an overwhelming consensus among other recent Code reform efforts—there remain important issues of policy which, as outlined in the discussion above, need to be resolved. The two most important are whether there should be a minimum at all and, if so, whether any of the ABA recommendations as to limitations which should surround the power to impose a minimum should be adopted.

7. *Consecutive Sentences.*—There is a consensus between the Model Penal Code, the ABA Report and the New York statute to the effect that it is desirable that a penal Code place an upper limit on the extent to which consecutive sentences may be cumulated. All agree that within such a limit, whether prison terms for multiple offenses should be served consecutively or concurrently should be a matter for the discretion of the court.

A related problem must first be noticed. In *Gore* v. *United States*, 357 U.S. 386 (1958), the defendant made a single sale of drugs on a given date, and was charged with a sale not pursuant to a written order on a prescribed Treasury form, with a sale of drugs not in the original stamped package, and with a sale of drugs with knowledge that they had been illegally imported. The defendant was convicted of all three counts and given consecutive sentences, even though each count was in fact a different method of reaching by criminal prosecution exactly the same sale.

Some recent proposals would strike at this by providing as does section 22 of the Model Sentencing Act, for example, that "separate sentences of commitment imposed on a defendant for two or more crimes constituting a single criminal episode shall run concurrently." In New York, the related provision is more narrowly phrased: sentences must run concurrently if "more than one sentence of imprisonment is imposed on a person for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other . . ." [42] The Model Penal Code, on the other hand, does not contain a similar provision, nor does the ABA Report; but both, as will be discussed, would place limits on the extent to which consecutive sentences could be cumulated.

There are basically two ways to deal with a case such as *Gore*. The first is through provisions in the law defining offenses which in effect prohibit conviction of more than one offense in such a situation. Whether the robbery of two people on a single occasion or the theft of money and of jewelry during a single burglary should constitute one or two offenses is at the first instance a question of interpretation of the statute defining the offenses of robbery and of larceny.[43] The

[42] N.Y. REV. PEN. LAW § 70.25(2) (McKinney 1967). *Compare* ILL. REV. STAT. c. 38, § 1–7(m) (1967 Supp.).

[43] *See, e.g., Ladner* v. *United States*, 358 U.S. 169 (1958).

second is through such a provision as the Model Sentencing Act or the New York proposals quoted above—a provision which, even though it is determined that there can be two convictions in such an instance, prohibits the cumulation of sentences. A choice between these two methods—or perhaps the adoption of some combination of them—should be part of a new Federal Criminal Code. It is clearly indefensible to permit the fragmentation of a single offense so that a sentence in excess of the legislative maximum can be imposed.

This still leaves for resolution the major problem with consecutive sentences, namely whether—given a case where there clearly are two separately punishable criminal acts—consecutive punishment should be permitted and if so under what circumstances. Each of the recent proposals has concluded that there should be no limits on cumulation where the second offense is an escape or where it is committed while the offender is in prison. For other cases, there have been several suggestions.

The solution of the new proposal in Michigan is a simple one. Multiple sentences imposed upon an offender "shall be served concurrently." [44] The solution in New York, on the other hand, is to adopt a stated term of years as the limit to which consecutive sentences can reach: if one of the offenses was a Class B felony, the limit is 30 years; if all of the offenses are less than Class B, the limit is 20 years; in the case of misdemeanors, the limit is two years; there is also a provision prohibiting the cumulation of fines in certain circumstances.[45] The Model Penal Code has adopted still a third alternative. As was developed in the section on "Length of Sentences: Extended Terms," *supra*, the Model Penal Code suggests an extended term for use in the case of certain types of particularly dangerous offenders. It also suggests that the extended term should serve as the limit on the extent to which consecutive sentences may be cumulated. The cumulated sentence may not exceed the extended term for the most serious of the offenses of which the defendant stands convicted.

It is fairly clear that a new Federal Code should contain at least a limitation of the sort contained either in the New York statute or the Model Penal Code. In the past, ridiculously cumulated sentences have been a major source of unjustified disparities and have produced some of the clearest injustices among the Federal prison population. It is rare indeed when multiple criminality will justify a sentence beyond limits such as those stated in either the New York statute or the Model Penal Code.

Clearly, the question of a choice between the New York and the Model Penal Code formulae will have to await determination of whether the extended term recommendation of the Model Penal Code is to be adopted. Either of these solutions, it should be noted, would comport with the recommendations of the ABA Report.[46]

8. *Separate Parole Term.*—There is an irony in the manner in which the concept of parole is now functioning in the Federal system. Those offenders who pose the best risks and thus are released early in their term must serve the longest periods under supervision. An

[44] MICH. REV. CRIM. CODE § 1420 (Final Draft 1967).
[45] *See* N.Y. REV. PEN. LAW § § 70.30(1) (c), 70.30(2) (b), 80.15 (McKinney 1967).
[46] For a further canvass of the consecutive sentence problem, *see* ABA Report, *supra* note**, p. 1245 at 171–181.

offender who received a 20-year sentence for bank robbery but who, because of a remarkable rehabilitative effort, is released on parole after he has served 5 years, remains subject to supervision on parole for an additional 15 years. And if he is an exemplary citizen for 14 years, but commits another offense before the 15 years is up, he thereby renders himself subject to sentence, not only for the new offense, but for the remainder of his prior sentence as well—in other words, for the entire 15 years.[47]

On the other hand, an offender who is really dangerous and who, because of the dangers he would pose to the safety of the public, is not released until the expiration of his maximum sentence, is not subject to parole supervision at all. Similarly, the marginal case—the offender who was sentenced to 20 years, and perhaps paroled after 17—serves only a short 3 years on parole.[48]

The Model Penal Code has suggested a provision that is premised on the view that each of these results is wrong. It provides, first, that every release from an institutional sentence will be on parole, irrespective of the point during the service of the sentence at which it occurs. Second, it provides that every release on parole shall be for a minimum of 1 year and a maximum of 5. The offender is subject to supervision and to reasonable conditions during this period, and it can be terminated at any time after 1 year within the discretion of the parole board. Finally, the Model Penal Code provides that a revocation of parole can result in a recommitment for a period which does not exceed the 5-year parole term, less the time between the release and the violation.

The Model Penal Code would thus change the results under the present Federal System in three important and beneficial ways: (a) it would require that the bad risks and the marginal risks also serve a period of supervision after their release, even though they had substantially served, or indeed completely served, their maximum sentences; [49] (b) it would substantially shorten the parole time that might be served by an offender with a long sentence who, because he was a good risk, was released early; (c) it would reward good conduct on parole by permitting such time to be deducted from the parole term if there is a subsequent recommitment, and thus reduce the possibilities of injustice which face an offender who has almost completed a long period of parole supervision and who violates parole without committing a new offense.[50]

Whether or not the entire Model Penal Code package on this point is accepted, it would seem clear that the basic idea is sound, particularly as it applies to the bad or the marginal risks. A major commit-

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[47] *See* 18 U.S.C. §§ 4203, 4207.

[48] For purposes of illustration, the possibility of good time credits has been ignored. The principle, in any event, remains the same.

[49] The present Federal practice of "conditional release" seems conceptually related. *See* 18 U.S.C. § 4164. By this practice, all offenders who are released because of the expiration of their sentence are required to serve on parole the amount of time by which their sentence was shortened by good-time credits, less 180 days.

[50] If the offender commits a new offense, then he can be punished for that offense. If he does not—or if his offense is only minor—recommitment for the original sentence less the time served prior to parole often will result in a sanction that is way out of proportion to the violation. While perhaps an offender on parole should always be subject to recommitment for 6 months or a year in order to assure compliance with conditions until the end, surely it is sound to prohibit a 15-year sentence after 14 years of good behavior.

ment of parole supervision resources toward the offender who poses the greatest risks of injury to the public at the very least should perform a preventive function, if only for the reason that an additional term of substantial length can be required of the offender who immediately demonstrates that he is not a suitable subject for release.

Finally, it should be noted that debate over the separate parole term is necessarily related to several other issues which will have to be resolved. The most obvious is in the fixing of maximum prison-term levels. There also is a relation to the presumptive parole idea discussed in the section entitled "Length of Sentences; Extended Term," *supra.*

9. *Fines.*—There remains one important matter with regard to fines that should be considered. It is the practice in many States to impose fines indiscriminately in terms of the offender's ability to pay and to treat imprisonment as an arbitrary response when the fine is not paid. It does not appear that this happens very often in the Federal system. Nevertheless, the Federal laws on the point are somewhat obsolete and should be improved as a part of any reform effort.

Present law permits a fine to be imposed and an order that the offender be imprisoned until he pays it.[51] It also permits probation to be accompanied by the imposition of a fine and to be revoked if the fine is not paid.[52] And it provides that an offender who has been imprisoned for 30 days solely because of the nonpayment of a fine can make application to the warden or to a U.S. Commissioner for a hearing on whether he should be released. He is then entitled to his release if it is found that he is unable to pay the fine and that he does not have any property exceeding $20 (except property that is exempted from being taken on execution for debt). The prisoner also must take an oath to this effect. Finally, it is provided that the Attorney General may intervene if the offender has more property than $20, and may cause his release if such excess property is found reasonably necessary for the support of his family. The Attorney General may also claim part of such excess property in partial satisfaction of the fine, and may similarly effect the prisoner's release.

There have been a number of suggestions as to how this problem should be handled and there seems to be general agreement that the pauper's oath proceeding outlined above has outlived its usefulness. Rather than undertake an extended discussion of each of the recent suggestions, they are summarized below with a minimum of elaboration. Each is commended for inclusion in a new Federal Code:

(a) A fine should not be imposed on any offender unless it is preceded by an inquiry by the court into ability to pay and unless the court is satisfied that the offender can or will be able to pay. This is recommended by the Model Penal Code and the ABA Report.

(b) Installment payments should be authorized on such terms as the court determines for each case. This is presently authorized in the Federal system if a fine is imposed as a condition of probation. It is in use in many States (collected in the ABA Report, *supra*, note**, p. 1245 at pp. 121–122). It is also recommended by both the Model Penal Code and the ABA Report. If the defendant can earn the fine and pay it over time, there seems little justification for jailing him now because he does not presently have the cash.

[51] *See* 18 U.S.C. § 3565.
[52] 18 U.S.C. § 3651.

(c) "Alternative sentences," that is, a sentence to "30 dollars or 30 days," should be prohibited. The general principle is that the court's response to nonpayment should be determined only after the fine has not been paid and after an inquiry into the reasons for nonpayment. Only if it is then found that failure to pay was not excusable should jail be an appropriate sanction for nonpayment. This is recommended by the Model Penal Code and the ABA Report.

(d) The court should be explicitly authorized to revoke or remit a fine or any unpaid portion at any time. Here too, the recommendation is contained in the Model Penal Code and the ABA Report. New York has a similar provision.

(e) The methods available for collection of a civil judgment should be available to the government for the collection of a fine. This is the present Federal law and is recommended by the Model Penal Code. The ABA Report would add the requirement that this collection technique not be permitted without the approval of the sentencing court, for the reason that it is the court's basic responsibility to assure an appropriate disposition. Foreclosure or garnishment might well be inconsistent with the desired effect of the court's sentence.

(f) Assuming a commitment for nonpayment, *i.e.*, assuming a defendant who could have paid but did not, there should be legislative limitations on the lengths of time which may be imposed. The recommendations vary on exactly how this principle should be effected. Both the Model Penal Code and the ABA Report suggest an outside limit of 1 year. The practices on this point are summarized in the ABA Report, *supra* note**, p. 1245 at 289–292.

The general subject of fines and the effect of nonpayment is dealt with in sections 2.7 and 6.5 of the ABA Report, *supra* note**, p. 1245, beginning at pages 117 and 284, respectively.

Part III. Postponed Issues

There remain for consideration in the sentencing area a great many other issues of importance. For the convenience of the Commission, a number of these are listed below:

1. *Special Sentences:* herein such matters as unique provisions for the sentencing of youthful offenders; the creation of special types of facilities for special types of offenders; *etc.*[53]

2. *Sentencing Procedures:* herein informational facilities to aid the sentencing court; use of the presentence report; procedures on imposition of sentence; *etc.* One general problem raised here, of course, is the extent to which these matters should be left to the courts to resolve through their rulemaking authority.[54]

3. *Capital Punishment:* the issue of whether to retain capital punishment in the Federal system is of course now under debate. The Justice Department has stated its opposition to this sanction. Senator Hart has introduced an abolition bill.

4. *Appellate Review of Sentences:* the Senate has passed a bill on this matter. The issue is of course very much related to the extent to which the sentencing court should be left at large in the imposition of

[53] *See* ABA Report, *supra* note**, p. 1245, § 2.6 and Commentary at 110–117.
[54] *See generally* ABA Report, *supra* note**, p. 1245, Pt. V, at 231–277.

sentences.[55] Parenthetically, it should be noted that the Bureau of Prisons seems to have a major problem with illegal sentences. Some four or five a week come to their attention completely at random, giving room for concern that the volume is actually quite high. Perhaps this problem can be substantially solved by a much more logical codification of sentencing provisions. Perhaps an appellate review provision can help too, although review in such cases would appear to be available now.

5. *Credit for Time Served:* there are many contexts in State systems in which an offender serves time for an offense which is not counted toward service of his sentence. The new Federal statute on this point (18 U.S.C. § 3568) probably will accommodate this problem without revision.[56]

6. *Resentences:* closely related to the credit problem is the question of whether an offender whose original conviction has been set aside should be eligible for an increased sentence upon reconviction. The Federal circuit courts are split on the issue and the Supreme Court recently denied certiorari in one of the cases.[57]

7. *Relation of Federal and State Sentences:* closely tied to the consecutive sentence problem discussed in part II, section 7, *supra*, is the issue of what relation service of a State sentence should have to the service of a Federal sentence for related and for disconnected offenses. There is also the reverse problem, whether service of a Federal sentence should have any required effect on subsequent service of a State sentence.[58]

8. *Felony-Misdemeanor Classification: whether the felony/misdemeanor* classification has any present or desirable utility and if retained, whether the lines should be drawn as they are presently drawn.

9. *Authority to Reduce the Conviction to a Lesser Category for Sentencing Purposes:* both the Model Penal Code and the ABA Report include provisions which would permit the sentencing court to impose the sentence authorized for a lesser category of offense than the category supported by the conviction. Such authority is no more than an explicit recognition of the result which can now be obtained by the plea bargaining process, and carries the added advantage of surfacing the practice.[59]

It should be noted that inclusion of such a provision would seem particularly desirable if the new Federal Code is to deny judicial control over the maximum term of a prison sentence. (*See* part II, section 5, *supra.*)

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[55] *Cf.* part II, section 3, *supra. See generally* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES (Approved Draft 1968).

[56] For general discussion, *see* ABA Report, *supra* note**, p. 1245, § 3.6 and Commentary at 186–197.

[57] For further consideration, *see* ABA Report, *id.*, § 3.8 and Commentary at 198–200.

[58] For suggestions, *see* ABA Report, *id.*, § 3.5 and Commentary at 181–186.

[59] *See* ABA Report, *id.*, at 197–198.

COMMENT
on
THE SENTENCING SYSTEM: PART C
(Low; October 11, 1968)

Introductory Note

I. structure of the report

The draft consists of an integrated set of recommendations for the sentencing chapters of the new Title 18. The major innovations are described briefly in the remainder of this introductory note. More detailed commentary keyed to each section of proposed statutory language follows the Introductory Note.

A word should first be said about the structure of the proposal. A single section of definitions is presented first, in a format which will permit their assimilation into the definitions of other terms in an early chapter of the proposed new Code.* Five** chapters of statutory material follow immediately.

The first—chapter 30—acts as home base, as it were. It establishes the major sentencing alternatives which are implemented in greater detail in subsequent chapters and it sets forth certain principles which are intended to apply to sentencing generally rather than to any specific sentencing alternative. It also establishes some of the major innovations in vocabulary.

Chapter 31 is the first of three succeeding chapters which are devoted to the incidents of particular types of sentences. It offers the details of probation and unconditional discharge. The specifics deal with such matters as the length of a probation sentence, its conditions, criteria for its employment, the consequences of revocation, and so on.

Chapter 32 deals with imprisonment and its incidents. Such matters as the length of imprisonment authorized for particular crimes, the role of the court in selecting sentence length, the court's role in fixing parole eligibility, concurrent and consecutive terms, and credit for time already served are among the subjects which are treated.

Chapter 33 performs the same function for fines. It speaks to the question of authorized dollar amounts, as well as to alternative methods of measuring the amount of a fine. It also details criteria for the imposition of a fine and addresses the question of what to do when the defendant does not pay.

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*The definitions proposed have been incorporated in section 109 of the Study Draft (general definitions).

**Two additional chapters have been added to the Study Draft: chapter 35—Loss of Federal Office and Restoration of Rights Lost Incident to Conviction (*see* Study Draft Comments to sections 3501–3504); and chapter 36—Imposition of Sentence of Death or Life Imprisonment—offered provisionally pending a determination of the capital punishment issue. *See* Comment on Capital Punishment, *infra; see also* Study Draft Comments to sections 3601–3605.

Chapter 34 treats the subject of parole. The specifics of parole eligibility and parole consideration are treated, as well as matters such as the time to be served on parole, criteria for its employment, the consequences of revocation, and so forth.*

The appendix to this comment offers draft language on good time provisions which, as an alternative to the scheme proposed in the main submission, perhaps should be included in the new Code.

A table indicating the sentencing alternatives available for the various classes of offenses is set forth here, not only for the assistance it may provide in the discussion which follows but also as a summary of many of the features of the draft.

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*Following chapter 36 in the Study Draft and the discussion of chapter 34 in these materials is an amendment to Title 28 which would permit appellate review of sentences.

SENTENCING ALTERNATIVES

	Length of probation term (years)	Shortest maximum term of imprisonment (imposable by court)			Special finding necessary for maximum term longer than—(years)	Longest maximum term of imprisonment			Fine: In all cases double the gain or loss caused victim; or—
		Total (years)	Prison component	Fixed parole component		Total	Prison component	Fixed parole component	
Class A felony	5	8	3	5	20	30 years	25	5	$10,000
Class B felony	5	6	3	3	7	15 years	12	3	10,000
Class C felony	5	5	3	2	5	7 years	5	2	5,000
Class A misdemeanor	2	--	--	--	--	1 year, 6 months, 3 months	--	--	1,000
Class B misdemeanor	2	--	--	--	--	30 days	--	--	500
Infraction	1	--	--	--	--	0	--	--	500

NOTES

(1) A jail term up to 60 days either straight or intermittently known as a "split sentence" is permissible during probation for all felonies and misdemeanors except the maximum is 30 days for a class B misdemeanor.

(2) The longest maximum term for class A felonies does not reflect a judgment as to the maximum penalty for the highest crimes such as murder.

(3) Parole eligibility for felonies is immediate unless a minimum term for a class A or B felony is set by the court at no more than ⅓ of the prison component. There is no parole available on misdemeanor sentences.

II. PROPOSALS DEALING WITH IMPRISONMENT

There are two major innovations which should be considered at the outset. The first relates to the structure of imprisonment authorized by the proposal; the second offers a new approach to the subject of parole.

Several general principles relating to prison sentences should first be set forth. Offenses are classified into three basic categories: felonies, misdemeanors, and infractions. Felonies are further broken down into Class A, which is most serious, Class B and Class C. Misdemeanors are subdivided into Classes A and B. Infractions are not further classified.

Felony sentences are all to be indefinite in character; *i.e.*, they are to have a maximum limit fixed by the court and either no minimum or a maximum which is also set by the court. All felony sentences are also to have two components, a prison component and a parole component. The function of the prison component is to state the maximum time the defendant can be retained in prison before his first parole. The function of the parole component is twofold: (1) to state the length of time which every offender sentenced to prison will serve on parole as a transition between prison and complete freedom; and (2) to state the "clean time," *i.e.*, the time on the street without a violation, which a paroled offender will normally serve before he is entitled to his complete discharge, no matter at what point during his prison sentence he is actually paroled.

The "parole component" concept is based primarily on the belief that parole as it now operates suffers from several serious shortcomings. The offender who is a good risk and who is released early in his term now must serve a very long time on parole. On the other hand, the offender who is released very late in his term, and who thus is presumably a rather poor risk, will serve only a very short time. And an offender who is kept until his sentence has expired, and who thus is presumably the worst risk, will serve no time on parole at all.

It is suggested that parole should be viewed as a necessary transitional process for every offender who is committed to prison, and that the length of time on parole should be developed as an independent proposition rather than as an inversely proportional function of the length of time actually served. It is therefore provided in these materials that every sentence will contain a separate parole term, the incidents of which are developed without regard to the actual time the defendant has served before his parole.

Before a further discussion of some of the advantages seen in the use of this approach, perhaps an example of the way it would work under the proposed structure would help to clarify the matter. Assume conviction of a Class A felony. If the court sentenced such an offender to a term with a maximum of 15 years, the effect would be that the sentence would contain a prison component of 10 years and a parole component of 5 years. The defendant could thus be imprisoned for 10 successive years, at which point he would be released on parole. If he committed no violations, he would be entitled to his discharge after 5 years. If he violated parole after 2 years on the street and it was revoked, he could be returned to prison for 3 years. The total of 15 years acts as the outside limit on the time the defendant spends in prison and the time he successfully serves on parole.

To pursue the example further, assume that our defendant were released on parole after serving 4 years. The parole component would then come into effect to determine the time which the defendant would serve on parole before he would be entitled to his discharge. If he served 5 years on parole without a violation, he would be entitled to his discharge. But if he violated his parole after 2 years and it was revoked, he would be reimprisoned for a term of 9 years, *i.e.*, 15 years less the 4 years already served and less the 2 years successfully served on parole. He could then be retained in prison for the full 9 years, or reparoled if the occasion arose. If he were reparoled after 3 more years, he would again be subject to the requirement that he serve 5 years of "clean time" on the streets before being entitled to his discharge. This process of parole, recommitment, reparole, recommitment, and so on, could then be continued until one of two things occurred: (1) the defendant served 5 consecutive years of "clean time" on the street; or (2) the total of his time in prison and his clean time on the street added up to 15 years.[1]

As can be seen by these examples, the system proposed here has several advantages over the present system. First, the defendant who served out his entire 10-year prison sentence would still have parole time to serve. This would provide the public the assurance that the offenders who posed the worst risks would nevertheless go through a transitional period between prison and outright release to determine their capacity to adjust and to assist them in the process. Demonstrated incapacity to adjust would be visited with additional time in prison. The result, in other words, is the possibility of long term control over the defendant who proves himself in need of such control.

At the same time, however, such a sentence does not necessarily carry such long term control over the defendant who turns out well. The defendant who is paroled after 4 years, in contrast to present-day prisoners, can effect an early discharge from his prison sentence by serving 5 successive years without a violation. The irony of long parole terms for the good risks and short terms for the bad risks is eliminated. And the time fixed as the parole term is long enough, it is believed, for a determination to be made as to the kind of adjustment that the defendant will make. As many have observed, parole will work or not, as the case may be, within the first few years; there is little need to drag it out beyond that in all but the very rarest of cases.

A final advantage which should be noted here is the effect of giving the defendant credit for his "clean time." Presently, an offender who violates parole may be resentenced for the remainder of the term which was unserved at the time of parole. The time that he successfully serves on parole is not necessarily credited against his potential maximum period of imprisonment. The proposal here recommends a change in that policy, primarily for two reasons: (1) the justice of the matter—the defendant has, after all, done what has been asked of him for the period of time in question; and (2) the incentive for good conduct on parole, which should be provided if the defendant knows

[1] Thus, in the example under discussion, if the defendant who was recommitted for his violation for a 9-year term were reparoled after serving 5 additional years, his parole term could only be 4 years, since that would be the remaining time out of the total 15 years for which the government would be entitled to assert its authority over him.

that, by behaving himself, he is reducing the time for which he is subject to control.

To recapitulate then, each prison sentence for a felony will have a prison component and a parole component. It remains here to discuss the range of judicial discretion within which these two concepts will operate for the various classes of felonies. The following table isolates this range from the larger table, *supra:*

	Shortest maximum term (years)	Longest maximum term (years)	Parole component (years)
Class A felony	8	30	5
Class B felony	6	15	3
Class C felony	5	7	2

What these limits mean, to take a Class A felony as an example, is that the *shortest* period of control to which a defendant would be subject if he is sentenced to prison would be 8 years; the longest, 30 years. It would be up to the court at the time of sentencing to pick within this range. The parole component for each sentence for this Class would be 5 years, and the prison component would be the sentence picked by the court less 5 years. Thus, if the court sentenced a defendant for a Class A offense to 8 years, the prison component would be 3 years, the parole component, 5 years: the defendant could be paroled at any point up to 3 years, and would have to be paroled at the expiration of his third year. To pick several other examples, if the court sentenced a defendant for a Class A offense to 20 years, the result would be a prison component of 15 years and a parole component of 5 years. A sentence of 10 years for a Class B offense would mean a prison component of 7 years and a parole component of 3 years. A sentence of 7 years for a Class C offense would mean a prison component of 5 years and a parole component of 2 years.

Several other features of this structure should also be noticed at this point. First, it can be seen that the shortest maximum prison component which can be utilized for any felony is 3 years: for a Class A felony, the shortest prison component is 3 years, plus the 5-year parole component; for a Class B felony, the prison component of the shortest permissible term is 3 years, with a 3-year parole component; and for a Class C felony, the prison component for the shortest sentence is again 3 years, this time with a 2-year parole component.

The reason for this 3-year term as the shortest prison sentence which can be imposed is the belief, confirmed by many with experience in the field of corrections, that it generally takes several years for a meaningful rehabilitation program to take hold. Short sentences in the main seem to have two functions: (1) to provide the defendant with a lesson, with a short, sharp shock to deter him from repeating his criminal conduct (and perhaps to deter others); and (2) to attempt a program of retraining or rehabilitation which is designed to help the defendant in his adjustment to society when he is released.

It is the recommendation here that 6 months is a quite sufficient term for the first purpose, and as will be developed below, such a term is thus the limit for the most serious misdemeanors* and is the longest

*Section 3204 of the Study Draft now presents three alternatives: 1 year, 6 months, and 3 months.

term which can be imposed as a split sentence for a felony defendant who belongs on probation after he has been subjected to a short term for this purpose.*

The second objective of a short sentence—to provide a period during which a rehabilitative process can take hold—may require some time; and it thus does not advance the purpose to permit the court to short-cut the time by sentencing a defendant to 1 year, or even 2 years. After consultation with various prison officials, a term of 3 years has been settled upon as a realistic maximum within which a program should be allowed to operate free of any arbitrary cut-off point fixed in advance by the court. This is the reason for the 3-year "minimum-maximum," as it were, or the 3-year prison component which is the shortest prison sentence for a felony (outside of the split sentence) which can be imposed.

A second major feature of this structure is the brake on long prison sentences which is supplied by section 3202 of the draft. In the first place, the court is required to state in detail its reasons for any sentence above the minimum imposable term for any felony. It is also contemplated that appellate review of such sentences will be available. In addition, a sentence for a Class A felony which is longer than 20 years (Class B, 7 years; Class C, 5 years), may not be imposed by the court unless two things occur: (1) the court is of the opinion that such a term is appropriate and desirable to protect the public because the defendant is a persistent felony offender, a professional criminal, a dangerous, mentally abnormal offender or manifested his dangerousness by using a firearm in the commission of the offense or flight therefrom, or for some other reason presents an exceptional risk to the safety of the public; and (2) the court, except in the most unusual cases, utilizes the informational resources at its command (presentence report and report from the Bureau of Prisons) to find out the extent to which the defendant satisfies the stated criteria.

These latter provisions stem from a commitment to the principle that long-term sentences serve mainly an incapacitative function and for that reason should be reserved for the defendant who poses exceptional risks to the safety of the public. The sentences which are authorized without special findings are believed to be long enough to accommodate all cases where the defendant does not seem to present unusual dangers to the public—long enough to serve the rehabilitative function noted above, together with incapacitative elements which properly can serve other legitimate objectives such as deterrence.

A third major feature of the proposal relates to the function of the court in fixing parole eligibility. The law presently states that a defendant will be eligible for parole after serving one-third of his sentence. It is also presently provided that the judge may take affirmative action to reduce this to a lesser percentage or affirmatively provide for immediate parole eligibility.

Postponed parole eligibility carries with it the possibility of numerous disadvantages, the most striking of which is the potential that it has for requiring prison officials to retain an offender past the optimum time for his release. It is difficult at best for a judge at the time of sentencing to predict what the defendant will be like 5 years later,

*The Study Draft split sentence provision (section 3103(4)) now contains a 60-day limitation.

after he has experienced both the rehabilitative efforts and the repressive aspects of a maximum security prison. For the judge to guess at the time of sentencing that the defendant will not be ready for parole until such a period has expired creates the danger that his guess will be wrong, and that he will require the retention of the defendant past the point at which it will do the most good to try to effect his readjustment in society.

On the other hand, there are elements which suggest the desirability of postponing parole eligibility in some cases. Community reassurance, that is, the idea that it is desirable to assure the community that certain defendants will be incapacitated for the sake of protection of the public, can be served by the announcement at the time of sentence that parole eligibility will be postponed for at least a fixed period of time. Deterrence is another principle that can be served by the imposition of a deferred parole eligibility date.

These conflicting considerations are resolved in this draft proposal by suggesting a change in the present law in two major respects. First, it is proposed that a minimum term (which is synonymous with parole eligibility date) will not be included within any felony sentence unless the court takes affirmative steps to include it. Second, it is suggested as a criterion for the imposition of a minimum sentence that it be employed only in exceptional cases, and then only after the judge has availed himself of informational resources and has stated his reasons for the record. It is again contemplated that appellate review be available in such cases, quite apart from the question of whether appellate review as a general principle is acceptable. The present one-third limit for eligibility is retained.

The final feature of the structure for authorized prison sentences which deserves special mention here is the provision of 30 years as the maximum period of incarceration for any crime. There are several reasons for the rejection of the life maximum.* For one thing, it is the very rare individual whose agressive tendencies can be maintained for longer than 25 to 30 years and from whom the public needs protection beyond that period. Such individuals undoubtedly would be subjects for civil commitment if dangers of this sort persisted beyond that period. In addition, a life sentence provides far more of a psychological set against any rehabilitative effort than does a term of years in the authorized range. Even long-term prisoners, since most will be paroled some day, need to be given rehabilitative treatment to the extent that it is possible. And, of course (leaving the death sentence aside) there is little by way of deterrent sanctions that can be imposed on the life termer in order to prevent further offenses in prison. The conclusion, in any event, is that life imprisonment as a sentence is not as desirable a way of stating the maximum authorized incarceration.[2] The remainder of the felony sentences are designed to permit the grading of serious crimes between the Class A limits and the Class C minimum.

This is the major outline of the provisions dealing with felony sentences. Other features of the proposal are left to the details of the

*The Study Draft contains a chapter 36, which provides for a sentence of death or life imprisonment for certain offenses. It is proposed provisionally subject to decisions regarding the death penalty.

[2] It should be noted that this conclusion is intended to be without prejudice to a subsequent judgment that life is a desirable maximum for one or two of the most serious offenses such as murder.

commentary to each section collected at the conclusion of this portion of the comment. For example, a quite complicated structure for dealing with consecutive sentences has been proposed, the detail of which is not necessary for an understanding of the basic approach of these materials. Matters such as credit for time already served, special commitments for youth offenders and narcotics addicts, and the effect of service of a State sentence following imposition of a Federal sentence are also dealt with by the draft, and are also left to development by the statute itself and its supporting commentary.

It remains, however, to round out the picture of sentences to imprisonment by referring briefly to the authorized sentences for misdemeanors. As noted above, 6 months is the maximum authorized sentence for a Class A misdemeanor,* on the rationale that such a sentence is long enough to provide the shock value of a short term sentence to the defendant or deterrent value to others. It is also reasoned that no particular purpose would be served by extending the sentence to the present 1-year limit for misdemeanors, or perhaps even longer. Such terms would still be too short for the implementation of a program of improvement for the offender and would represent little gain in terms of shock value. In any event the value to the system of the difference between 6 months and 1 year is doubtful enough to warrant considering the lower term if only because it may permit summary disposition of many more minor cases.

Sentences for a Class B misdemeanor are set at a maximum of 30 days. The purpose is to permit the grading of misdemeanors at two levels, and again to present the possibility of a short sentence for its value as a deterrent force to the defendant for offenses which are not very serious, yet serious enough to suggest the need for imprisonment in an attempt to avoid their repetition. Sentences for misdemeanors, both Class A and Class B, are for definite terms fixed by the court within the noted limits and do not carry such possibilities as parole, parole supervision, or recommitment.

III. PROPOSALS DEALING WITH PAROLE

The second major innovation offered by these proposals relates to the operation of the parole system. Presently, the Bureau of Prisons retains jurisdiction over prisoners from the time they are received in an institution until the time they are paroled, including time which may be spent at a community institution or on work release. The decision of whether to parole an inmate is made by the Board of Parole, as are decisions about conditions to be imposed, revocation, and reparole. Supervision of paroled prisoners is conducted by probation officers in the jurisdiction to which the prisoner is paroled.

The program offered here suggests two major changes in format. First, it is recommended that jurisdiction over the offender be maintained in the Bureau of Prisons through the parole decision and through such decisions as imposition of conditions, revocation, and reparole.** The basic reason for this innovation is the desirability of

*Section 3204 of the Study Draft now presents three alternatives: 1 year, 6 months, and 3 months.

**The Study Draft does not adopt this recommendation. Parole decisions remain in the jurisdiction of the Board of Parole.

the integration of closely related correctional functions. The Bureau, under present law and under these proposals, is charged with the determination of where a given prisoner will be housed and with the creation of the program of rehabilitation to which he will be exposed. It is charged with the development of the offender up to the point of parole and with such preparation for parole as it can provide, including part-time release decisions in connection with work-release programs.

The theory of this proposal is that it makes sense to continue the control presently in the Bureau of Prisons up through the parole decision itself, and through the incidents of parole which follow. No particular reason, save the inertia of the present system, can be seen for separating these two closely related functions. It is those who have worked with the prisoner in the Bureau who should be in the best position to estimate his chances of success on parole and to plan from the early stages a continuous program which leads up to his complete discharge from supervision.

The second feature of the proposal is to effect a corresponding modification in the function of the present Board of Parole. Simply put, the idea is that the present Board should become an appellate tribunal, with the power to review the denial of parole and the revocation of parole by the Bureau. The present proposals do not provide, but could easily be amended to do so, that the Board should be empowered to review decisions which go in favor of the prisoner as well as those which go against him.*

There are several important advantages in converting the function of the Board to that of an appellate tribunal. There is an element of desirability in the separation of the custodial function from the releasing function which is found in the present system and which can be retained if the Board is to hear appeals. A prisoner could well maintain, in some cases with justification, that the "benevolent" decision of the prison officials in resolving upon an additional year of a rehabilitative program was in fact inimical to his best interests. Secondly, the fact of an administrative structure with its own appellate process—staffed by experts in the subject matter of its business—makes much more palatable the present insulation of parole decisions, and particularly parole revocation, from review by the courts.

In addition to these two important and related innovations, the parole materials in this submission also suggest several other changes in the present law, changes which are not dependent upon the acceptability of those innovations.

First, the parole component idea is implemented as discussed in the previous section of this introductory note. It is thus provided that an offender must be paroled if he has continuously served the prison component of his sentence and that, whenever paroled, the period during which he will remain subject to revocation will be the duration of the parole component of his sentence. If he is revoked, however, the sentence to which he will then become subject will consist of the maximum term imposed by the court, less time already served in prison and less time served on the street prior to the violation.

A change is also suggested in the criteria which are to govern release on parole. Three different proposals are suggested, consisting of dif-

*The Study Draft retains the Board as the parole granting authority, not as an appellate tribunal.

ferent criteria to govern three different stages in the service of a prison sentence.

(1) In cases where no minimum term is imposed, prisoners should not be released on parole, except in the most unusual circumstances, during the first year of their sentence.

(2) Thereafter, or after the expiration of a minimum term if there is one, the prisoner should be presumptively entitled to his parole every time the issue is considered (which is at least once a year) unless affirmative reasons appear for the continuation of the offender in prison. Four such reasons are stated in the proposed statute: (a) there is a substantial risk that the offender will not conform to reasonable conditions of parole, including a condition that he not violate the law; (b) his release at the time in question would unduly depreciate the seriousness of his crime or promote disrespect for law; (c) his release would have a substantially adverse effect on institutional discipline; or (d) his continuation in his rehabilitative program would substantially enhance his chances of leading a law-abiding life if he were released at a later date. The effect of the proposal is thus that the prisoner should be paroled, unless a good reason for his retention can be advanced. The reasoning is one of economy as well as one of principle. Recent successes of lower cost, community-oriented programs in arresting recidivism would seem at the very least to support a desire to move offenders out of the prisons into a parole setting as soon as no further reason can be advanced for their continued retention.

(3) Finally, it is recommended that long-term prisoners (that is, prisoners who have served the longer of 5 years or two-thirds of the prison component of their sentence) be paroled, unless there is a high likelihood that they will engage in additional criminal conduct if they are paroled. As more time is served, the validity of some of the other reasons for retention loses its force and, unless there is fear that the prisoner will be a danger to the public, there is little reason for keeping him imprisoned. It should be added, as discussed above, that if a defendant has completed service of the prison component of his sentence without once being paroled, he must then be released on parole.

Finally, it should be noted here that good-time provisions have been eliminated from these proposals.* Good-time statutes seem to be historical remnants from the days when sentences were barbarically high, and perhaps even from the days before parole. They also are seen as positive contributors to prison discipline by providing an incentive toward good behavior while in confinement. Neither of these reasons seems operative now, however. The sentences offered in these proposals do not need good-time reductions in order for them to become civilized. And the prison discipline feature seems both not to work that way in fact and to be an unnecessary inducement in view of the parole possibilities presented by the draft. In addition, issues which arise on such questions as the forfeiture and reinstatement of good-time present administrative headaches which are far more severe than the benefits that seem to be gained. Good-time provisions are not included in the present youth corrections statute, which in many respects presents the model on which these recommendations are based and which in design and operation seem, on this point at least, to be working fairly well.

*Alternative statutes which would retain good-time provisions are contained in the Appendix, *infra*.

These are the major features of the recommended parole system. There are other items of change, but they are items less central to the basic concepts underlying the system and can thus await development in the statute itself and in the commentary to follow.

IV. OTHER IMPORTANT INNOVATIONS

The two major innovations of the proposed statute have been discussed in some detail above. Before turning to a discussion of the statute itself, it might be helpful to note several other significant changes in the present law made thereby.

First, more attention has been devoted to the development of statutory criteria for sentencing decisions than has been the practice in the past. For example, in the use of the sentence of probation (and probation is treated in these proposals as a sentencing alternative rather than as the "suspension" of some other sentence), it is suggested that the court should begin its thinking on the assumption that probation should be the sentence, and be moved from that assumption as factors in the case appear to indicate the propriety of some other sanction. Other cases in which criteria are stated beyond the content of present statutes are in the use of fines, the revocation of parole and probation, the imposition of consecutive sentences, and so on. The basic reason for the concern for legislatively stated criteria is to help the process of cutting into the problem of sentencing disparities. Judges who can discern the policy of Congress from a sentencing statute are far less likely to impose wildly different sentences in comparable cases.

Second, the split sentence, which is now a part of Federal law, has been made a good deal more flexible in order to develop a wider range of sentences between total custody and release on probation. Sentences of up to 6 months* can be imposed in conjunction with a probation disposition, to be served in any appropriate institution designated by the sentencing court at whatever intervals during the probation, consecutive or nonconsecutive, as the court determines. Thus, a judge who feels that the defendant needs the shock of jail as a deterrent but knows that the defendant will lose his job if even a short sentence is imposed may place him on probation with the provision that nights and/or weekends must be served in custody.

Finally, on the subject of fines, several important recommendations have been made. The first relates to the measure of the fine limits. In addition to the traditional dollar limits, and as an alternative, it is proposed that, in all applicable cases, the court be authorized to key the amount of a fine to the gain which the defendant acquired from the offense or to the loss which he caused the victim. The defendant can be fined twice the gain or twice the loss. In addition, a new structure is established to handle the problem, which does not appear to be a significant one in the Federal system, of the nonpayment of fines. The judge may not specify at the time of sentence the response that he will make if the fine is not paid, but is required to postpone that decision until after the default. If the defendant then does not pay, he is required to come forth with reasons which satisfy the judge that the failure to pay is excusable. If he cannot, then the judge is

*Under the Study Draft (section 3103(4)) the maximum period of confinement for a split sentence is 60 days.

empowered to employ a straight jail sentence of up to 6 months (30 days for a misdemeanor) for the failure of the defendant to obey the order of the court to pay the fine. It is provided in the criteria for fining, incidentally, that a fine should be proportioned as far as practicable to the burden that payment will impose in view of the financial resources of the defendant, and that it should not be imposed if it would prevent the defendant from making restitution or reparation to the victim. The conjunction of these criteria with the powers of the court in case a fine is not paid justifies the serious sanction of jail since, by definition, a nonpaid fine is one which the defendant could have paid, but chose not to. The analogy is to contempt, although the contempt concepts are not directly incorporated into the proposed provisions.

V. CONCLUSION

It should be noted in conclusion that in the development of these materials much reliance has been placed on both the ABA Sentencing Report [3] and the Preliminary Memorandum on Sentencing Structure dated January 8, 1968,[4] which was discussed at the Commission's meeting in January. Numerous references will be made to each of these documents for additional discussion of the reasoning behind many of the proposals. The Preliminary Sentencing Memorandum also contains summaries of present Federal practice on many of the issues that are dealt with here. Except for these specific cross-references, however, an attempt has been made to make this an independent document.

Two other matters should be noted. The draft does not deal with the question of capital punishment, an issue which will be presented for separate consideration by the Commission. Whether capital punishment is abolished or retained, nothing will have to be added on the point to these materials. The issue can be dealt with in the sections defining the offenses for which the sanction is retained, as will such collateral matters as the desirability of a bifurcated trial, submission of the issue to the jury, and so on.*

Finally, it should be noted that there are numerous administrative and procedural matters which are not dealt with in these materials, many of which will have to be addressed in other parts of the revision. Sections 4001 through 4011 of present Title 18, dealing with general provisions regarding prisons and prisoners, for example, should certainly be retained in some form, but really are not appropriate for inclusion within the provisions relating to the imposition and effect of sentences. There are many such provisions scattered throughout Title 18. The point to be noted here is that their omission from the present proposal should not be taken as a judgment that they should not be included at some point in the Federal statutes. Separate consideration of these issues will become appropriate at a later date.

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[3] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES (Approved Draft 1968) [hereinafter cited as ABA Report].

[4] Hereinafter cited as Preliminary Sentencing Memorandum.

*As noted *supra*, a provisional chapter, chapter 36, authorizing a sentence of death or life imprisonment, for certain offenses and providing the procedure for the imposition of such sentences has been added to Part C of the Study Draft, pending a final decision regarding the death penalty. The capital punishment issue is treated in a separate document, *infra*.

Commentary on Specific Sentences

I. Definitions (terms defined in section 109); "offense;" "infraction;" "misdemeanor;" "felony;" "crime."

1. There are now two classifications of Federal offenses, felonies and misdemeanors. The line between them turns on whether the offense carries an authorized maximum sentence in excess of 1 year.[5] Misdemeanors are further subdivided into ordinary misdemeanors and "petty offenses." A petty offense is a misdemeanor for which the sentence may not exceed 6 months' imprisonment and/or a $500 fine.[6]

2. The proposed definitions suggest the continued use of the terms felony and misdemeanor. There would seem little positive advantage in abandoning a terminology which is so familiar and which is still being preserved in all other modern Code revisions in this country. England, interestingly, has just abolished the distinction, for reasons which are not altogether clear.

3. The dividing line between felonies and misdemeanors in this proposal is different from the lines which are now operative. For reasons which will be developed below, the highest authorized sentence for a misdemeanor is 6 months,* whereas the lowest authorized sentence for imprisonment for a felony is 5 years (including a parole component).

4. There are three alternative sets of terms which could be adopted for the description of classes of misdemeanors. The present system using the terminology "misdemeanor" and "petty offense" could be retained. The Model Penal Code language of "misdemeanor" and "petty misdemeanor" could be substituted. Or the language of the New York Penal Law and the proposal in Michigan could be adopted, describing misdemeanors as "Class A" and "Class B." Some choice is relevant at this point because of the possible desirability, if words like "petty offense" or "petty misdemeanor" are to be used, of setting forth their definitions in the section on general definitions.

One reason for rejecting the Model Penal Code language is the possible confusion between the new "petty misdemeanor" and the old "petty offense." A reason for rejecting the present terminology is the possibility, recommended here, that the highest sentence for a misdemeanor may well be at the level now authorized for a petty offense. This could also lead to confusion. The matter is not, in any event, one of substance.

The terminology chosen here, largely for the reasons advanced above, is that of "Class A" and "Class B." Division of offenses into classes, which will be done for both felonies and misdemeanors, is a matter left to the sentencing chapters themselves rather than to general definitions.[7]

5. It should also be noted that the proposal adds a category of offense called "infraction." There is no comparable term in the present Federal vocabulary. The idea, however, is that there should be a category of offenses, largely regulatory in nature, which are not

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[5] *See* 18 U.S.C. § 1.

[6] *Id.*

*Section 3204 of the Study Draft now presents three alternatives: 1 year, 6 months, and 3 months.

[7] *See* proposed section 3002.

properly crimes and which, for procedural purposes as well as for purposes of labeling and punishment, are not treated as crimes. Such offenses now abound in number, and are commonly characterized by the imposition of absolute or strict liability.[8]

II. CHAPTER 30. GENERAL SENTENCING PROVISIONS

Authorized Sentences: Section 3001

1. There is no comparable provision in the present Federal law. That is, present law does not attempt to list in one place all of the various sentencing options available for a given offense. The lists presented in this section are intended to be exclusive lists which can be utilized for all offenses and which, absent subsequently enacted parts of other titles which are inconsistent, can be used as a referent for all sentencing for Federal crimes.

The incidents of each sentence listed in this section are developed in greater detail in succeeding chapters of the sentencing part of the Code. The section is thus "home base," as it were, for the potential sentence in any given case, with cross-references to the places where more detailed information can be found. It will be much easier to get around in a Code which is thus anchored to a single section than it is to maneuver in the present Code.

2. As noted in subsection (5), it is not proposed to deal with the subject of "civil penalties" in this draft. The intention of the provision on the point is thus that the sentencing chapters be entirely neutral on such questions as when they should be authorized and when imposed. If authority is elsewhere granted for the imposition of a civil penalty in addition to the normal criminal sanctions, in other words, this section would permit such penalties to be imposed along with the criminal sanction.

Classification of Felonies and Misdemeanors: Section 3002

1. There is no comparable provision in the present Federal law. As discussed in the Preliminary Sentencing Memprandum,[9] there are something in the range of 65 to 75 presently existing sentencing categories, with utterly chaotic results. The purpose of a classification scheme such as is presented in this section is to achieve a sense of order and yet, at the same time, permit legislative grading of offenses of different levels of severity within controlled limitations. The reasoning is elaborated upon in part II, section 1, of the Preliminary Sentencing Memorandum.[10] Subsequent sections of the proposal will set forth the sentencing alternatives which are available in each category. And each offense as it is defined will be assigned to a category for sentencing purposes.*

Reduction in Category: Section 3004

1. This provision is an explicit recognition both of the fallibility of legislative generalization and of a practice which is an everyday oc-

[8] *See* proposed section 1006 (regulatory offenses) and accompanying comment for the manner in which it is proposed to deal with such offenses under the new Federal Code.

[9] *Supra*, note 4.

[10] *See also* ABA Report, *supra* note 3, § 2.1(a) and Commentary at 49–52.

*Section 3003, authorizing Class C felony sentences for persistent misdemeanants, is included in the Study Draft at this point.

currence.[11] Power to cause this result is now lodged in the prosecutor, often with judicial acquiescence. The idea here is that the power is much more likely to be used with greater wisdom and equality if it is exercised in the open with a candid statement of reasons.

2. There are at least three ways of stating a provision of this type. The first, which is the way the Model Penal Code and the ABA Report have put it, would be to permit the reduction of any class felony to any lower class felony or to any class misdemeanor. A Class B felony could thus be reduced to a Class C felony or to a Class A or B misdemeanor.

The second is a modification of the first idea—only a one-step reduction, *i.e.*, the reduction of a Class A felony to Class B, a Class B felony to Class C, and so on. One difficulty with this approach is that it does not meet the full problem, because it still would be permissible for the court and/or the prosecutor to effect a charge reduction resulting in Class A misdemeanor conviction for what was really a Class B felony.

The third way, which is the one reflected in the proposal,* is to permit only the reduction of a felony to a misdemeanor. The reason for this is that no particular purpose is seen in reclassifying a Class B felony conviction as a Class C conviction. The sentencing alternatives are flexible enough so that such a reduction in the label of conviction would not make new sentencing alternatives available. The change from a felony to a misdemeanor, on the other hand, is more than just a change of labels in terms of effect on the defendant. For example, collateral disabilities, both under State and Federal law, could be avoided, as well as the possibility of subsequent recidivist charges under State laws.

A final alternative, which is really just another way of putting any one of the choices mentioned above, is to permit the judge to impose a sentence for any lower class offense and to have the imposition of such a sentence automatically result in the reclassification of the offense. A sentence of 5 months in jail for a Class C felony, in other words, would automatically have the effect of reducing the conviction from a felony to a Class A misdemeanor. Although some States use this approach, it would seem to have no particular advantage over the method of stating the point in the proposed draft, and would seem also to have the disadvantage of being less candid about the matter.

In any event, there is an issue to be resolved, assuming a provision such as this is desirable at all, about the extent to which changes by the judge should be openly permitted independently of the offense charged and as a substitute for charge reduction before trial.

Presentence Commitment for Study: Section 3005

1. There are three instances under present law in which the court can get additional help such as is envisaged by this proposed section: (a) it can make a commitment under 18 U.S.C. § 4208(b), which is really very much like the proposed draft; (b) it can, if the defendant has been convicted of certain types of crimes, make a commitment under 18 U.S.C. § 4252 for a determination of whether he is a narcotics addict and whether he is likely to be rehabilitated through treatment; and (c) it can, if the defendant is under the age of 22, commit him under 18 U.S.C. § 5010(e) to the Youth Correction Divi-

[11] *See* ABA Report, *supra* note 3. § 3.7 and Commentary at 197–198.

*The one-step reduction alternative is the one proposed in the Study Draft, so that any offense may be reduced to the next lower category of offense.

sion of the Board of Parole [12] for additional information, looking to the possibility of a sentence under the Federal Youth Corrections Act.

2. The proposed section is based on present 18 U.S.C. § 4208(b). There are two significant changes. (a) Section 4208(b) presently requires that the original commitment be "deemed to be" for the maximum sentence, which is then "reduced" if the court determines after the study that the offender should receive a shorter term. The proposal abandons this overly technical and artificial approach and provides, as is in fact the case as the present statute is used, that sentencing will be postponed until after the study has been made. (b) A presentence report is required by the proposal as a prerequisite to such a commitment. The reason for such a requirement is both to aid the court in determining whether to invoke the section and, more importantly, to aid the Bureau of Prisons in making the study by providing the commitment center with a solid informational base from which to begin its examination. Without such a report, the center must rely on inadequate facilities for the gathering of the same information and, under present staffing at least, cannot do the same quality job as can be done initially by a locally-based probation officer.

3. This section is also intended to make it unnecessary to have three separate statutes on the subject. The information sought under 18 U.S.C. § 4252, to determine whether an offender is a narcotics addict, is certainly one of the items which will be reported back, as will the defendant's prognosis and treatability. The same is true of the youth study under 18 U.S.C. § 5010(e). In fact, the Bureau is now conducting studies under 18 U.S.C. § 5010(e) in exactly the same manner as under 18 U.S.C. § 4208(b) studies, with the single exception that the signature at the bottom of the report returned to the sentencing judge is affixed by a different person.

The desire expressed here to integrate the provisions now found in three separate statutes follows a general principle used in formulating this draft, namely, that unnecessary duplication should be avoided and a simple, unified structure should be sought. The effect of following this principle is particularly striking, as developed further in the commentary to proposed section 3205, *infra*, in connection with the now separate provisions on youth offenders and narcotic addicts.

4. The credit provision in subsection (2) of the proposed draft* involves no change from present law.[13]

5. A word should also be added about the problem of the availability of the report to the defense. As an initial proposition, no particular reason is seen for distinguishing the disclosure of the contents of a report such as this from disclosure of the presentence report. Since the question of presentence report disclosure is presently covered by the Federal Rules of Criminal Procedure, it was thought likewise appropriate to relegate the issue of disclosure in this context to coverage in the rules. Thus no provision has been included in the statute.[14]

[12] *See* 18 U.S.C. § 5005.

*The credit provision is deleted in the Study Draft version of section 3005: subsection (2) of section 3207, providing that all time spent in custody as the result of an offense be credited against the maximum and any minimum term of imprisonment, covers the point.

[13] *See* 18 U.S.C. §§ 4208(b), 4252, 3568.

[14] The problems of disclosure are canvassed in the ABA Report, *supra* note 3, at §§ 4.3, 4.4, 4.6(d) and Commentary at 211–225, 231.

Resentences: Section 3006

1. This section combines two principles: that the defendant who successfully attacks a conviction or a sentence should not render himself subject to a higher sentence merely because he did so; and that the defendant in such a situation should receive credit against any new sentence for the portion of the old sentence previously satisfied.[15]*

CHAPTER 31. PROBATION AND UNCONDITIONAL DISCHARGE

Criteria for Utilizing Chapter: Section 3101

1. The present provision in 18 U.S.C. § 3651 permits probation following a conviction of any offense which does not authorize a sentence of death or of life imprisonment. There are, in addition, isolated statutes, very few in number, which prohibit probation for the offense which they define.[16] The provisions set forth in subsections (2) and (3) of the proposal have no counterparts in present Federal law. Case law on these matters is also very limited.

2. Present Federal practice also involves a different terminology than is offered here. A judge now imposes probation by suspending either the execution or the imposition of sentence. This means that either he imposes a prison sentence and suspends its execution for the period during which the offender will be on probation, or that he defers the imposition of sentence for the period. A subsequent revocation thus either results in the imposition of the sentence which was suspended or in the de novo imposition of a sentence. Probation, in any event, is not viewed as a sentence, but as an event which occurs instead of sentencing or while the sentence is held in abeyance.

While the matter is one of terminology rather than substance, no particular advantage is seen in retaining the present usage. Probation in these materials is viewed as a sentence just like a sentence to prison or to a fine. Its characteristics are different from other sentences, of course, and are spelled out in the remaining provisions of chapter 31. But the fact that probation is an affirmative correctional tool, just like correctional tools which take other forms, has induced this suggestion to get away from the metaphysics and the technicality of "suspending" some other step in order to get to a probationary disposition.

3. Subsection (2)** is designed to suggest as a principle that a disposition short of imprisonment should be employed, in the absence of some affirmative reason rooted in the particular facts of the case.

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[15] The arguments in support of these principles are canvassed in the ABA Report, *id.*, Commentary at 193–194, 198–200.

*Inserted in the Study Draft is section 3007, which reclassifies all Federal crimes defined outside the Code for which imprisonment for a term in excess of that available for a Class A misdemeanor is available as Class A misdemeanors, and provides for reclassification of other offenses outside the Code.

[16] *See, e.g.*, 26 U.S.C. § 7237(d).

**Subsection (1) of the Tentative Draft contained an "unless otherwise provided" clause which was intended to save the issue of exceptions from eligibility for probation for resolution as specific offenses were defined. Since probation has not been prohibited for any offense, that clause has been deleted in the Study Draft. *See* Preliminary Sentencing Memorandum, *supra* note 4, part II.3; and ABA Report, *supra* note 3, at § 2.3(a) and Commentary at 66–67, for a discussion of the issue.

The judge should start his thinking with probation in mind, in other words, and be moved from that sentence only as particular reasons appear from his study of the case.

The reasons which are listed in the subsection, it is believed, exhaust the legitimate reasons for employing imprisonment: a danger that the defendant will commit another crime, the use of imprisonment as a rehabilitative measure, or the deterrence of the defendant or others. The method of stating the deterrence point is derived from the efforts underlying the Model Penal Code and the proposed Michigan statute. The idea is that deterrence can best be effected at the sentencing stage by considering the extent to which a particular sentence will unduly minimize the seriousness of the offense and, in effect, amount to a license or an invitation to commit it.[17]

There are several reasons for this approach, not the least of which is the economy of probation as compared to imprisonment. It costs about one-tenth of the outlay, under present standards, to maintain an offender on probation as compared to maintaining him in prison. But of course, economy alone would not justify such a position if it were likely to result in less protection to the public from crime. The encouraging results of sentences which concentrate on helping the offender to live normally in the community also is believed to support the position taken in the draft.[18] All that is being said, it should be kept in mind, is that probation offers enough hope in enough cases so that the judge should consider it seriously in every case, and use it as often as he can without offending other principles which also demand recognition in the sentencing process.

4. Subsection (3) contains a nonexclusive list of factors which are believed to deserve consideration in favor of a disposition of probation. The objective, as with subsection (2) and the other criteria advanced in this draft, is to state the policy of the United States in a form that will lead to the more consistent and rational use of the sentence to probation. Such criteria also serve an educational function, both for judges—who may be new and inexperienced in criminal matters—and for lawyers—who may share such inexperience, particularly if appointed to represent an indigent.

Incidents of Probation: Section 3102

1. The present law is that the court may fix a period of probation at the time of sentence and may extend it during its service. The period may not exceed 5 years, however, including any extension.[19] The court is explicitly authorized to terminate a period of probation before its expiration and to discharge the probationer.[20] Modification of conditions, enlargement of conditions, and revocation are of course permitted.[21] On the question of what sentence may be imposed following a revocation, it depends on whether the imposition or the execution of sentence was suspended. If the imposition was suspended, then any alternative that was originally available can be imposed:

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[17] *See* MODEL PENAL CODE § 7.01(1) (P.O.D. 1962). *See also* ABA Report, *supra* note 3, at § 2.5(c).

[18] For documentation, *see* ABA Report, *supra* note 3, Commentary at 62–63, 72–73.

[19] 18 U.S.C. § 3651.

[20] 18 U.S.C. § 3653.

[21] 18 U.S.C. § 3651.

if execution was suspended, then the sentence is apparently limited to the sentence which was imposed and then suspended. Appeals presently can be made from judgments which include a sentence to probation.

2. There seems to be general agreement that probation, if it is to be effective at all, will prove to be so relatively early during the probation term. This is the rationale behind limitations on the length of the probation term of the sort now found in the Federal law and also found in many States.[22] There is also no particular reason to key the period of probation to the length of time for which imprisonment could result if a different form of sentence were employed. As pointed out in the commentary to the Model Penal Code on this point, "the length of the period [on probation] should be determined . . . by the time required to determine whether confidence has been misplaced and to give the supervisory regime adequate opportunity to be effective. The period for which an institutional commitment may be made, in dealing with offenders of a different type, is quite irrelevant to either purpose." [23]

There is also in this proposal the judgment that the length of time for which the defendant should be required to submit to the supervisory regime of probation should in some respects reflect the gravity of the offense. While the factors discussed above lead to the conclusion that no more than 5 years is necessary for any offense in order to give probation a chance to work, the lesser periods provided for misdemeanors and infractions are the result of conclusions about the relative seriousness of the respective offenses.

3. Subsection (2) retains from present Federal law the power of early termination of probation. The basic reason for probation in the first place is to permit the offender to adjust in the community. Offenders will adjust at different rates and with different successes, and the system should retain some method by which the sentence can be individualized to meet those differences. Particularly is this true if the change discussed in paragraph 4, *infra*, is adopted, *i.e.*, if the power of individualization is no longer retained at the time of imposition of the probation sentence.[24]

4. It should be noted that the proposal does not permit the court to adjust the period of probation at the time sentence is imposed. This is a change from present law, where the judge must act within the 5-year limit, but is free to do so by picking any lesser term he thinks desirable. The reason for changing from this position is to permit maximum control over the individual offender for a period which is clearly sufficient for a determination of whether the sentence was a success. Individualization can still be achieved through the powers of early termination, which may be exercised if warranted by the offender's conduct and otherwise consistent with the ends of justice. The point is thus that the judge is prevented at the time of sentencing from imposing a period which may turn out to be too short, but is not prevented from achieving the result of a shortened term if that remains his objective at the time he turns to the question of early termination.

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[22] For a summary, *see* ABA Report, *supra* note 3, Commentary at 70–71.
[23] MODEL PENAL CODE, § 301.2(1), Comment at 147 (Tent. Draft No. 2, 1954).
[24] *See* ABA Report, *supra*, note 3, Commentary at 282–283.

5. Subsection (3) deals with modification and enlargement of conditions, and revocation, but does not deal with the procedures which should be employed. That would seem more appropriately resolved in the Federal Rules of Criminal Procedure, rather than detailed in the proposed sentencing provisions; and we are advised that the Rules Advisory Committee is considering what should be done in that area.

6. Subsection (3) makes it clear that the entire range of sentences originally available remains available in the event of a revocation. As noted, this would not change present law in cases in which the judge suspends the imposition of sentence, but it might in cases in which he suspends its execution. The reason for such a provision is the belief that it is unsound for the judge to decide at the time of sentencing what he will do if the defendant does not abide by the conditions of probation. This decision should await a chance to evaluate what in fact has occurred. Nothing is lost by the wait in the sense of alternatives open to the judge, and much is gained in the sense that the judge is now able to operate on fresh facts.[25]

The proposal also contains the implication that imprisonment should not be the automatic response to the violation of a condition, but that other recourse should be considered. Continuation on the existing sentence with a warning might be appropriate if the violation were only minor; a warning accompanied by an enlargement of conditions might be appropriate if the violation were more serious. Imprisonment nevertheless remains in the background as the ultimate sanction in cases where it is deemed appropriate.

7. Subsection (4) is primarily intended to express the point that a judgment which includes a sentence to probation should continue to be considered a "final judgment" for the purpose of appeal. Such a result would probably follow even without such a provision, but no harm is done by cementing the point.

8. A final word should be added about the terminology of probation. The word "probation" in its common usage carries with it the connotation that the offender will be supervised by a member of the court's probation service. It is clear, however, that there are some cases where release on conditions would be appropriate, but where it would be an unnecessary expense—and perhaps detrimental to the objectives of the sentence—to require supervision. These factors have led to the provision in some statutes, most notably in New York and in the proposal being advanced in Michigan, of a dual terminology, reserving the term "probation" for use in cases where supervision is meant and adding the term "conditional release" where a release on conditions but without supervision is meant. This terminology was not adopted in this proposal because its implementation seemed unnecessarily cumbersome and seemed to complicate unnecessarily a number of the statutory provisions. Instead, the term "probation" is used to express both ideas. And supervision is thus a condition of probation which may or may not be imposed in a given case, and which will be picked by the judge as a condition just as he will determine the content of the other conditions.

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[25] *Id.*, § 23(b)(iii), and Commentary at 71–72.

Conditions of Probation: Section 3103

1. Present statutory law on appropriate conditions of probation is skimpy at best. It is now provided in 18 U.S.C. § 3651 that among the conditions, the defendant may be required to pay a fine, to make restitution or reparation, and to support persons for whom he is legally responsible. Several recently drafted Codes, most notably the New York Code and the proposed Michigan Code, have suggested the need for a more elaborate statement of the objectives of probation and the content of permissible conditions. The hope is that greater rationality and uniformity will be achieved by such statement, and that it will serve educational objectives as well. The list is of course nonexclusive so that probation, as it should be, can be tailored to the needs of the individual case.

2. It should be noted that the lists of permissible conditions in the New York and Michigan proposals, as well as in the Model Penal Code, contain a condition that the defendant "refrain from frequenting unlawful or disreputable places or consorting with disreputable persons." It was decided not to include such a condition in the list offered here for the reason that it was too vague and uncertain in its meaning (as has been quipped, it really means in many cases "don't go back to your friends and family") and because revocations on such a ground are very rare, at least in Federal practice, even though it is a commonly stated condition. Such a condition could easily be added to the list, but the recommendation here is that it not be.

3. It also should be noted that subsection 2(c) would require an amending statute in order to permit the Bureau of Prisons to expend its funds on parolees and probationers who use the community facilities of the Bureau. It would seem advantageous to permit this, and therefore to propose the necessary amendment.

4. The split sentence provision in subsection (4) is derived from 18 U.S.C. § 3651. The present statute states that if the maximum sentence for an offense is more than 6 months, the court may impose a sentence in excess of 6 months, provide that the defendant be confined in a jail-type institution for a period of up to 6 months, suspend the execution of the remainder of the sentence, and provide for probation after service of the jail time. The reason for such a provision is to permit parole-type supervision following short-term commitments to local facilities or to a unique local training center or institution. As elaborated upon in the introductory note to these materials, the objective is also to permit the shock of short-term commitment in cases where it is thought a valuable supplement to a disposition which looks mainly to probation. And as also pointed out, the possibility of such a disposition is particularly desirable given the structure of prison sentences suggested in this proposal. Any sentence to imprisonment must contain a prison component of at least 3 years' duration, designed to permit a rehabilitative program in the institutional setting. The split sentence remains for those cases where such a rehabilitative program is not as desirable as an attempt to keep the offender in the community, but where there is still advantage to a short term of imprisonment.

The proposal retains the essential features of the present split sentence law.* The changes are designed to make it more flexible. For

* In contrast to 18 U.S.C. § 3651, however, proposed section 3103(4) provides that the period of confinement shall not exceed 60 days.

example, permitting consecutive or nonconsecutive service of the short term available would allow weekend or evening service of jail time while the defendant continued to work and to support his family. The last sentence of the proposal, which awards credit if probation is subsequently revoked, is not contained in present 18 U.S.C. § 3651, but is consistent with Federal credit provisions in other contexts.*

5. Subsection (5) preserves the substance of present 18 U.S.C. § 3653 without change, although the proposal is reworded in a manner designed to be less cumbersome and more clear.

Duration of Probation: Section 3104

1. There is nothing in present Title 18 on either of these proposals. Both are believed to be important enough to deserve a legislative statement of policy.

2. Subsection (1) starts by fixing the time at which periods of probation begin to run. It also provides that multiple periods shall run concurrently. The reason for this is similar to the reason for providing independent periods of probation in the first place. If probation is to work, it will generally do so within a relatively short period of time, long before the maximum of 5 years permitted for felonies under proposed section 3102. No purpose would seem to be served by permitting courts to pile on consecutive periods of probation and thereby extend the term to 10, or even 15, years. Of course, the problem will arise only in unusual cases in any event, for it is unlikely that many multiple offenders will be subjects for probation.

3. Subsection (1) also provides that periods of probation shall run concurrently with jail or prison terms to which the defendant is subject at the time of sentencing, or to which he becomes subject during the period. Several reasons support such a provision. Under present practice, if the defendant commits a new offense and is imprisoned, say in a State institution, his Federal probation is tolled by the period of time he spends in the State prison. After he is released, he can then be continued under Federal supervision (which may raise problems of multiple supervision if the State release is on parole) or he can then be revoked. This is true even though a 5-year probation term is interrupted by a 10-year State prison term, most of which is actually served.

The purpose of the proposal is to prevent such a practice. Note, however, that in doing so it does not foreclose action against the defendant before his Federal probation term has expired and does not foreclose revocation and imprisonment based on the State offense. Thus, the thrust of the proposed change will put upon the court the burden of determining before the expiration of the probation term what the Federal response to the offense will be (the defendant can, of course, be reached even though he is in a State prison for this purpose). Such a result is both fairer to the defendant and more consistent with the principles of probation. If the court does revoke probation under such circumstances, incidentally, and if the defendant is then sent back to the State prison to complete his State sentence, then the time spent in the State prison will be credited under proposed section 3206(6) against the Federally imposed sentence. The rationale for such a result will be presented in the commentary to that section.

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* Section 3207(2) provides for credit generally, so credit provision deleted here.

4. Subsection (2) speaks to the situation where the defendant serves 3 years of a 5-year probation term, decides he has had enough, and leaves town. It is arguable that, without some sort of tolling provision, he would not be subject to revocation unless he were found within the original 5-year period. The subsection permits the tolling of the period in cases such as this, but at the same time requires that reasonable efforts be made to locate the defendant and to proceed against him within the period. Other delays which prevented a hearing within the period would also be permitted by this section, so long as some action were taken within the period and reasonable efforts were made to notify the probationer and to conduct the hearing before the expiration of the period.

This provision substantially conforms with present practice, although the limits imposed by the words "reasonably necessary" and the requirement that an effort be made to notify the probationer within the period and to conduct the hearing within the period are probably new.

Unconditional Discharge: Section 3105

1. This section is an explicit recognition of a power which the court will have anyway, and which the courts now have in the Federal system. Present law permits a sentence of 1 day on probation, as well as an outright acquittal. The court that sentences an offender under this proposal to an unconditional discharge would be doing openly what it now does less candidly by such techniques. It seems far better to recognize explicitly the power to employ the sanction of conviction without further penalty, and to make the process visible by requiring the court to explain itself when using such a sentence. A provision almost identical to the one proposed is now in effect in New York. It is also proposed for adoption in Michigan.*

Such a sentence should particularly be authorized if the provision of proposed section 3102(1) to the effect that all probations be for statutorily fixed terms, is adopted. While it would be possible for the court under the provisions of section 3102 to impose a 5-year probation term and then terminate it the next day, it again would seem far more desirable to expect the court to take direct action and to assume the burden of setting forth the reasons why such action is appropriate.

CHAPTER 32. IMPRISONMENT

Sentence of Imprisonment for Felony; Incidents: Section 3201

1. Subsection (1) establishes the principle that every sentence to imprisonment for a felony will be of an indefinite duration; *i.e.*, the exact release date of the defendant will not be fixed at the time of sentencing, but will be determined as an opportunity is gained to watch the defendant progress through the penal system. Each sentence will of course have a maximum limit beyond which the defendant cannot in any event be held. Each sentence may also have a minimum limit for which the defendant must be held before release on parole.**

*Proposed section 3105 limits the sentence of unconditional discharge to offenses other than Class A or Class B felonies.

**Under Study Draft section 3201(4), sentences for Class C felonies may not have a minimum term.

Both of these matters are elaborated upon in following subsections of this section.[26]

2. Subsection (1) also suggests a preference for the term "indefinite" as opposed to the more commonly used "indeterminate." As elaborated upon in the ABA Report,[27] the word "indeterminate" has at least three well accepted and inconsistent meanings. It originally meant a sentence with no limits—the defendant was released when he was "cured" of his criminal propensities. It is used in some States to describe a sentencing structure which gives the judge no control over sentence lengths: as in California, the judge sentences "for the term prescribed by law" and the parole officials take over from there. And it is also used to describe the existing Federal system, where the judge has control over both the maximum and the minimum sentence, but where a spread between them is guaranteed by the manner in which they are fixed. It is this latter type of system which is proposed in this draft; and it is believed that the term "indefinite" clearly describes the system and at the same time is not freighted with the confusion which would be engendered if "indeterminate" were used.

3. Subsection (2) establishes another fundamental principle underlying these materials. Each maximum term is to have two components, a prison component and a parole component. As developed in chapter 34, the prison component determines the maximum time for which the defendant may be held before his first release on parole. The parole component determines the time which he must successfully serve on parole, at whatever point during his sentence he is released. The total of the two determines the total time which the defendant may be under supervision if he is retained in prison for the maximum prison component or if he is released earlier on parole, violates, and is returned to prison. Further examples of how this operates are given in the introductory note and will also be given in the commentary to chapter 34.

Subsection (2) also establishes the proposition that it is the length of the prison component over which the judge has control. The decision is thus to perpetuate the present law on this point. As to the parole component, the decision not to give the judge control is based on the same philosophy which led to the denial of judicial control over the length of a probation term under proposed section 3102(1). The periods are seen as long enough to determine whether parole is to be a success and, as in the case of probation, a power of early termination can be exercised to individualize the period if the defendant's conduct and the ends of justice warrant such action.

4. Subsection (3) sets the maximum limits for felony sentences. As described in the introductory note, a sentence of 10 years for a Class A felony means a prison component of 5 years and a parole component of 5 years; a sentence of 15 years, a prison component of 10 years and a parole component of 5 years, and so on. There are a number of other points which should be focused on in order to completely understand the proposal.

First, while the judge still sets the maximum term as he does now, the suggestion is that the range be narrowed and that the court be

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[26] For a general discussion, *see* Preliminary Sentencing Memorandum, *supra* note 4, at part II.5,6.

[27] ABA Report, *supra* note 3, Commentary at 130–131.

authorized to impose no less than 3 years as the maximum limit on any prison component. Thus, for a Class C felony, the judge would have to impose a sentence of at least 5 years if he chose imprisonment as the sanction (3-year prison component and 2-year parole component), although he could impose more. The idea is that at least a potential of 3 years should be assured in every case so that a meaningful program of rehabilitation or reform can be initiated. Parole eligibility, of course, is another matter, and is dealt with in subsections (4) and (5).

Second, while the judge who is resolved to impose a sentence of imprisonment is thus restricted by this section to the imposition of a maximum prison component of at least 3 years, he may impose a sentence involving less jail time, under the split sentence alternative. If he thinks the 3-year term too long and thinks that the defendant does not need the rehabilitative regimen of the prison followed by a substantial parole period, he can impose a jail term of up to 6 months* (which can, if the defendant elects, be served in any Federal institution under present law) followed by a period of probation. The judge thus has the alternatives of the sharp shock which a short sentence in the 6-month** range can provide, or of an attempt to develop a program of rehabilitation in a prison setting. It would be futile if, for the latter purpose, he were permitted to impose a sentence of 9 months, 1 year, or even 2 years; this is the rationale behind the 3-year prison component as the shortest permissible term.

Third, the limits of the maximum terms for the various classes of felonies are set at 30 years, 15 years and 7 years. The respective maximum prison components are 25 years, 12 years, and 5 years. The motive in establishing such limits has been to permit the legislative grading of offenses within a relatively few, sharply differentiated, alternatives. There is of course an arbitrary element in choosing these particular numbers; but the theory has been to provide a very long term for the most serious offenses, an intermediate term for the offenses which are less serious, but still of great concern, and a relatively short term for the offenses which are the least serious, although they still deserve the felony classification.

Fourth, as stated in the introductory note, the life sentence has not been retained on the view that a sentence with a potential of 30 years' incarceration serves essentially the same function, and carries several advantages as well. It should also be noted, however, that this step has been taken without prejudice to the possibility that it may be necessary or desirable to retain the life sentence for one or two offenses. Murder might be one example.***

5. Subsection (4) performs several functions. The subject matter, of course, is the minimum term, which in translation means the time for which the defendant must be retained in prison before he can be paroled. "Parole eligibility date" would be another way to put it. This definition is advanced in the text of the statute in proposed section

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*Under Study Draft section 3103, 60 days. Note however that under section 3004, a judge can reduce a Class C felony to a Class A misdemeanor and sentence the defendant accordingly.

**Id.

***Proposed provisional chapter of the Study Draft, providing for a sentence of death or of life imprisonment for certain offenses is proposed subject to decision regarding the death penalty.

3401(1). The points which should be noted about the provisions under discussion are as follows:

First, it is provided that there will be no minimum term unless the court takes affirmative action to impose one. This is a reversal of the present status of the matter.[28] As developed in the introductory note, the reason for suggesting a reversal on this point is that the disadvantages of minimum terms are strong enough at least to suggest that care be taken in their imposition. The possibility that a minimum term can be imposed by accident, which now exists, should be avoided.

Second, the limit of the minimum term is stated as one-third of the "prison component" of the sentence. Stating the limit thusly preserves the present law, and also permits a minimum which does not exceed one-third of the time which the defendant can potentially remain in jail before his first release. Preserving such a limit, of course, is essential to the concept of an indefinite sentencing structure and to the very basis of having a parole system.

Third, subsection (4) advances criteria which must be satisfied prior to the imposition of a minimum term. The idea is that minimum sentences should be reserved for the exceptional cases, and again that the disadvantages of such a term are such that it is sound to discourage their use in most cases. The reasoning is elaborated upon in the introductory note to these materials, in the Preliminary Sentencing Memorandum,[29] and in the ABA Report.[30] What is required by subsection (4) to this effect is that the court (a) obtain a presentence report and a report following a presentence commitment in all but the most extraordinary cases; (b) form the opinion after considering these materials that the case is of such an exceptional nature that a minimum term is required; and (c) state in some detail the reasons for which this conclusion was reached. It is also contemplated that appellate review of sentences will be available at least in this context, although it is the suggestion in these materials that such review should be a great deal broader.

The reasons for each of these limitations may be summarized as follows. Acquisition of a presentence report is necessary in such cases purely as an informational resource; it is hardly desirable to impose any significant sentence until as much is known about the background and prospects of the defendant as can be acquired from such a source. The purposes of the Bureau of Prisons study is first of a supplementary nature in terms of information about the defendant, particularly from a medical and psychiatric point of view. But more important for this purpose, the Bureau will also set forth in such a report the program which it would envisage for the particular defendant, where he would be confined, what would happen to him, what his prospects for effective rehabilitation would seem to be, and so on. Information of this type would also seem indispensable, except in the rarest of cases, to a judgment that at least a minimum period of confinement—particularly where the one-third limit would permit a long minimum, as in Class A felonies—should be imposed. The reason for the conclusion

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[28] *See* 18 U.S.C. §§ 4202, 4208(a). *See also* Preliminary Sentencing Memorandum, *supra* note 4, at part II.6; ABA Report, *supra* note 3, § 3.2(c)(vi) and Commentary at 159–160.

[29] Preliminary Sentencing Memorandum, *supra* note 4, at part II.6.

[30] ABA Report, *supra* note 3, Commentary at 143–160.

about the exceptional nature of the case has already been set forth: the disadvantages of being wrong suggest that minimum sentences should not be routinely imposed. And finally, the reason for the requirement that the judge state his reasons in detail is threefold: to aid him in the process of rationalizing his sentence in his own mind; to aid the parole decision by making available the reasons for the deferred eligibility; and to provide a basis for appellate review. Review without knowing why the judge did what he did would be unfair to the judge and burdensome on the system.

Fourth, it should be noted that there is no flat term of years in this proposal which serves as the ultimate limit of any minimum sentence. The present statute provides that the one-third figure will serve as the highest permissible minimum, except that no minimum may exceed 15 years. No such figure is stated in this proposal because it is not needed. Life sentences are not provided *, and ceilings are suggested on consecutive sentences so that a 45-year term, permissible under present law, would not be possible. If either of these features of present law is restored, however, it will be necessary to state such a ceiling. It is proposed that the ceiling be placed at 10 years.

6. Subsection (5) advances two suggestions: that the judge should be permitted to recommend the deferment of parole eligibility without making a binding order; and that the judge should be able to reduce an imposed minimum to time served if a case is subsequently made by the Bureau of Prisons for that result. Both are designed to alleviate the difficulty caused by a minimum term which, though it may seem proper at the time of imposition, may turn out to have been ill advised many years later.[31]

The first suggestion is based on the principle that it is a proper judicial function for the court to concern itself with the release of the defendant on parole during the first third of his sentence; giving the court authority to impose a minimum term of up to one-third means at least this much. Given this, the idea is that the judge should have a complete range of alternatives to cover this period of time: he should be able to be silent, and leave the parole decision to the parole authorities unfettered by his interference; he should be able to state his opinion that the defendant should not be paroled within this period, though not bind the parole authorities if factors change over time; and he should be able to make an order which will bind the parole authorities if he has come to the proper conclusions under this section. As a corollary, of course, it should also follow that what happens after the one-third is over is properly the concern of the parole officials; the judge should not attempt to influence the decision beyond that point. The second sentence of subsection (5) is designed to suggest this as a principle.

The second suggestion—that the judge should have a continuing authority to reduce an imposed minimum sentence—is based upon the idea that the Bureau of Prisons should have the opportunity to make

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*See chapter 36 of the Study Draft providing provisionally for sentences of death or life imprisonment for certain offenses. It is suggested that the highest permissible minimum be 10 years. See Comments to section 3201 of the Study Draft.

[31] See ABA Report, *supra* note 3, §§ 3.2(c)(v), 6.2 and Commentary at 158–159, 280–281.

a case before the sentencing judge that a minimum term imposed 5 years before is unduly restricting the Bureau from doing the right thing. Practice under a similar District of Columbia statute [32] suggests that this opportunity will rarely be exercised; but that does not mean that the principle is unsound.

Sentence of Imprisonment for Felony; Extended Terms: Section 3202

1. The major reason for the provision in subsection (1) is to provide a foundation for appellate review. A statement of reasons in this context should also serve other values, in particular as an aid to improving the rationality of sentences, as an aid to corrections authorities in determining what to do with the defendant in prison, and often as an aid to the defendant himself, whose attitude as he leaves the sentencing stage is an important factor in how long he will in fact be imprisoned.[33]

2. As discussed at length in the Preliminary Sentencing Memorandum,[34] the maximum limit of the sentence authorized for almost every offense is fixed with an eye to the worst offender who is likely to commit it. The theory of the proposal here is that the range which faces the judge in the ordinary case should not be stated with an upper limit that has been determined in that manner. The range of 6 to 7 years (with a prison component range of 3 to 4 years) is thus regarded as far more appropriate for the consideration of the sentence to be imposed on most Class B offenders. There is still an additional increment avaliable for the "worst" offender, on the other hand, who presumably will fit one of the conclusory categories which are stated in subsection (2). To turn the matter around, unless the defendant is believed to fit within one of the broad categories set forth in the subsection, then the judge should approach the need for imprisonment of a Class B offender by thinking in terms of a 6- to 7-year range of the maximum term, rather than the 6- to 15-year range which is otherwise authorized.

3. The provision in subsection (2) is a variation of the extended term notion, which is discussed in detail in the Preliminary Sentencing Memorandum.[35] The major difference between this proposal and others that have been made is that it does not advance detailed criteria describing the types of offenders meant to be included within the section. The terms "professional criminal," "persistent felony offender," and the like, are not further elaborated upon in the statute itself.*

The reason for this is that an attempt to set forth such criteria is likely to become overly detailed and cumbersome and to bog down the procedural process of sentencing to a degree that outweighs the

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[32] *See* D.C. CODE ANN. § 24–201c (1961).

[33] For further discussion *see* ABA Report, *supra* note 3, Commentary at 270–271.

[34] *Supra* note 4, at parts I.3, II.4.

[35] *Id.* at part II.4. *See also* ABA Report, *supra* note 3, at § 2.5(b) and Commentary at 83–107.

*Bracketed subsections (3) through (5) have been added to section 3202 of the Study Draft to define "persistent felony offender," "professional criminal," and "dangerous, mentally abnormal offender." The issue posed is whether statutory definition is excessively rigid and development of the definitions is more appropriately left to the appellate courts.

advantages of precision which might be sought. And the goal of precision is at best an elusive target. It is believed that the major advantage of the extended term idea—which is to reduce the parameters of the normal sentencing decision—can be preserved without introducing these difficulties. The hope is also that the terms will develop more precise content through the normal common law process of adjudication, and that the meaning so developed will be far more satisfactory than if statutory definitions are set forth at this point. It is of course also contemplated that appellate review of the sentence will be available in this context, irrespective of whether the general concept of appellate review in all cases is accepted. It is in the unifying and rationalizing of particularly long sentences that the appellate courts can make their greatest contribution.*

Sentence of Imprisonment for Misdemeanor: Section 3204

1. This section completes the basic structure of the prison sentences which are authorized under the proposal. As set forth in the Preliminary Sentencing Memorandum,[36] and again in the introductory note to these materials, the purpose of the Class A misdemeanor limit is to state the longest custodial sentence of the structure during which no attempt at a serious rehabilitative effort will be made. The purpose of a short sentence without an attempt to improve the offender, in other words, can well be accomplished, it is submitted within the limit of 6 months.** The reason for the Class B limit of 30 days is to permit the grading of misdemeanors.

2. The present law is of course different. Misdemeanors are in the main not classified for the purpose of punishment, although the machinery is there within the concepts of misdemeanor and petty offense under the present terminology.[37] Although there is no classification, minor Federal offenses presently carry a variety of maximums within the limit of 1 year.

3. Comparative tables, reflecting the authorized sentencing structures advanced in other recent efforts, can be found in the Preliminary Sentencing Memorandum.[38] Both misdemeanors and felonies are included.

Commitment to Bureau of Prisons: Section 3205

1. Subsection (1) is based on present 18 U.S.C. § 4082(a). There is only one change, and this is a change of terminology rather than of substance. Throughout these materials the Bureau of Prisons is designated as the place which exercises authority over offenders sentenced to prison. The present statutes designate the Attorney General as the ultimate authority, and of course he has delegated his authority in the premises to the Bureau. No particular reason is seen for continuing this circuitous route, and thus the references in this proposal are to the Bureau itself in those cases where the Attorney General would not be expected to play an affirmative role.

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*The Study Draft contains at this point an alternative to section 1005 (which defines leading organized crime as a specific offense); section 3203 escalates the penalty which may be imposed if the offender is found at the time of sentencing to have been a leader of organized crime.

[36] *Supra* note 4, at part II.1(a).

**Section 3204 of the Study Draft now presents three alternatives: 1 year, 6 months, and 3 months.

[37] *See* 18 U.S.C. § 1.

[38] *Supra* note 4, at part II.1(a).

2. This may also be the point at which to mention the possibility of a change in the name of the Bureau. "Bureau of Prisons" is really not descriptive of the function which the Bureau is expected to exercise, particularly if the parole structure advanced in these materials is accepted. "Department of Corrections" or some similar phrasing would seem more appropriate. In order to avoid confusion, however, no such change is recommended at this time.

3. Present Title 18 contains an entire chapter devoted to the subject of the Federal Youth Corrections Act.[39] A separate Youth Correction Division is thereby established within the Board of Parole to receive "youth offenders," defined as persons under the age of 22 at the time of conviction. The very complicated sentencing alternatives provided by 18 U.S.C. § 5010 authorize, in effect, the same sentences as are authorized for everybody else, plus the additional possibility of a 6-year term with the Youth Division or any other term authorized for the offense with the Youth Division.

Separate institutions are maintained within the Bureau of Prisons system at which special programs are provided for youths committed under 18 U.S.C. § 5010. Those who have been committed under the 6-year sentence as youth offenders are eligible for "conditional release" under 18 U.S.C. § 5017 (which is the same thing as parole) at any time, and are required to be conditionally released after 4 years. Unconditional release must occur after 6 years have expired, and may occur sooner. The idea, as can readily be seen, is similar to the "prison component-parole component" idea which underlies the recommendations made here for all sentences.

Similar provision is made by 18 U.S.C. § 5017(d) for the offender who is given a sentence longer than 6 years. He must be released conditionally 2 years before the expiration of his term, and may be released any time before. In both cases, the conviction is automatically set aside if the youth offender is unconditionally discharged before the expiration of his maximum term. Such discharge may occur 1 year after conditional release, and as noted, must occur at some point prior to the expiration of the maximum sentence in order for the conviction to be set aside.

The judgment here is that nothing would be added to the proposed structure by retaining these youth offender provisions as a separate sentencing alternative. The same 6-year sentence is available following the conviction of a Class C felony, with a 4-year prison component and a 2-year parole component. Only the parole component need get longer as the level of seriousness of the offense increases. And in all cases the court will have the option, as it does now, of sentencing the defendant without a minimum term.

The important point underlying the existing youth offender provisions is that the Bureau of Prisons is directed to make special treatment provisions for young offenders and to make special efforts to put them back on the streets in better shape than when they came in. This feature of the present system would be retained in the separate chapter, not yet drafted, to which reference is made in subsection (2) of section 3205. What would happen under this proposal is thus that the judge would impose sentence on the youth offender just as he would on anybody else, but he would be empowered to recommend

[39] *See* 18 U.S.C. §§ 5005–5026.

as part of the sentence that the offender be confined and treated in these special facilities.

What this would mean in terms of change in the sentences which the judge could impose would be two things: (a) The court could not impose a sentence as long as 6 years on a misdemeanant or on a felony offender who comitted an offense punishable by less than 6 years; and (b) the parole component would be longer in those cases where the offender committed a crime more serious than a Class C felony.

Neither of these changes is viewed as undesirable and, of course, either could be prevented by adding to the provisions of subsection (2). It seems clear in any event, however, that an elaborate separate chapter is not needed as part of the sentencing Code, although an administrative chapter will have to be added in order to preserve the duty of the Bureau to maintain separate facilities and in order to accomplish certain other necessary administrative purposes.

It should also be noted in this connection that it is presently contemplated that a separate chapter of the new code will be devoted to the subject of the collateral disabilities of conviction and to such matters as when a conviction should be expunged by virtue of the satisfactory service of a sentence. It may be part of that chapter, for example, that all offenders who successfully complete a term on probation will be entitled to have their sentences set aside. The same may be desirable for those who are paroled early and who achieve discharge well before the expiration of their maximum term. In any event, it is at this point that the question of setting aside the conviction of youth offenders will be considered, and where the present law on this point can be continued in effect.*

It should be noted finally that this recommendation concerning how youth offenders should be handled is very much dependent upon the acceptability of many of the other recommendations in this draft. The thing that makes attractive the idea of abandoning a complicated set of additional alternatives is the flexibility of the present structure as regards adults. If the adult structure is made less flexible, as by the adding of exceptions from parole eligibility, mandatory minimum terms, and the like, then retaining a separate youth offender chapter in the sentencing Code would become desirable as an ameliorating device. It of course has this effect now, *i.e.*, it authorizes the 6-year term even though the youth is convicted of an offense which requires a much heavier term for adults. If such requirements are continued, then perhaps separate youth provisions should be continued as well.

4. Essentially the same proposal is made in subsection (3) as regards narcotics addicts. Present 18 U.S.C. §§ 4251–4255 contain an elaborate structure specially established for those suspected of narcotic addiction. The structure is available only for those convicted of particular types of offenses (generally speaking, offenses of violence and of narcotics selling are excluded; offenders who have two prior convictions or three prior civil commitments as an addict are excluded). An eligible offender may be committed by the judge for 30 days for study to determine whether he is an addict and whether he is likely to be rehabilitated through treatment. If the court finds him to be a treatable addict after such a study, it may commit him for an indeterminate period not to exceed 10 years, but in any event not to

*See chapter 35 of the Study Draft and the comments thereto.

exceed the maximum otherwise authorized for the offense committed. Conditional release can occur after 6 months of treatment, after which the offender is treated like a normal parolee with the exception that the Bureau still has aftercare authority which may be contracted for to assist him in avoiding a return to his addiction.

The idea here too is that additional alternatives are not needed in the sentencing chapters of the new Code, although there will again be a need for an administrative chapter to authorize the Bureau to expend funds for the treatment and aftercare of narcotics addicts. As in the youth case, the judge would impose sentence on an addict just as he would in any other case. He could procure a study under section 3005, however, and if he finds that he is dealing with an addict, he could recommend treatment as part of his sentence.

What this would mean in terms of change in the sentences which the judge could impose would be three things: (a) treatment for addiction could be included for a conviction for any offense, even a crime of violence, although the sentence in such a case would not be any shorter than it otherwise would be; (b) a minimum sentence could be imposed in conjunction with an order that treatment as an addict be rendered; (c) the 6-month minimum for every case would be eliminated, with the normal parole structure substituted in its place.

Again, none of these changes is viewed as undesirable. And the gain of eliminating a complicated and cumbersome set of additional sentencing alternatives seems significant. It should be noted here too, however, that the reason such a change can be offered is the flexibility of the main sentencing provisions. If they become more rigid, particularly in the requirement of minimum terms for possessors of narcotics, for example, the advisability of retaining a separate narcotics chapter will have to be reconsidered.

Finally, it should be noted that this change will of course have no effect on the civil provisions of the Narcotic Addict Rehabilitation Act of 1966. They are operative independently of criminal prosecution and would continue to be so.

5. Both subsections (2) and (3) state that the court may "recommend" as part of its sentence that youth offender facilities be employed or that treatment be provided for an addict. There are several reasons why "recommend" as opposed to "order" or "require" is used. In the first place, it is the basic responsibility of the Bureau, and not the courts, to make treatment decisions once a prisoner has been sentenced to imprisonment. This is the case now with regard to adults, and no particular reason is seen why it should be different in these cases. Second, if the court were empowered to order special handling of certain types of offenders, a whole series of collateral problems would be introduced: What would happen, for example, if subsequent developments made it advisable to move a youth offender into an adult facility or a narcotics addict from a special treatment facility into a hospital or a maximum security prison? Would the Bureau have to return to the sentencing court for permission to make such changes, and if so, what kind of a hearing would take place?

Concurrent and Consecutive Terms of Imprisonment: Section 3206

1. Subsection (1) confirms the existing authority of the Federal courts to impose concurrent or consecutive terms of imprisonment, both when sentencing a defendant who has been convicted of more

than one offense and when sentencing a defendant who at the time of conviction remains subject to an undischarged prison sentence.[40] The subsection also requires that the court act affirmatively in order to impose a consecutive sentence.

2. Subsections (2) and (3) are designed to address the issue of whether and where limits should be placed on the power of the court to impose a consecutive sentence. Subsection (3) deserves consideration first.

The basic idea underlying the provisions of subsection (3) is that consecutive sentences should not be permitted to accumulate endlessly and, moreover, that the function of the consecutive sentence should be similar to the long sentences imposed on dangerous or repeat offenders. The recidivist, the dangerous offender, and the offender who stands ready to be sentenced for multiple crimes all pose similar dangers to the public safety. The suggestion of subsection (3) is that the same ultimate sentencing limit should be applicable to both.

Thus, for example, an offender who had three prior felonies and who committed a Class B offense could be sentenced under sections 3201 and 3202 to a maximum term of 15 years, whereas the limit would be 7 years if he were a first offender who presented no special dangers. The effect of subsection (3) is to set the same 15-year limit if the defendant is subject to sentence for multiple crimes the most serious of which is a Class B offense. The relevance of his other offenses to a proper disposition, in other words, ought essentially to be the same as the relevance of factors such as unusual dangerousness, professional criminality, and a serious prior record.

3. The bracketed language of subsection (1) raises the question of whether an additional limitation is desirable, and also is intended to emphasize the need for another approach if the aggregate maximum provisions are not adopted.* There are some cases where the defendant has technically committed more than one offense, but where the purpose of providing limits for classes of offenses would be defeated if the fact that he has violated more than one statute permits pyramiding the sentences. The most obvious, perhaps, are cases involving lesser included offenses or even equal offenses where some overlap in definition is unavoidable. A similar situation would be a conviction of conspiracy, attempted robbery, and robbery for two offenders who planned and executed a single robbery. The principle starts to shade off when examples such as the robbery of four people as constituting four offenses is compared with the murder of four people by a single act as constituting four offenses.

The bracketed language of subsection (1) is an admittedly unsatisfactory attempt to state a principle which will preclude a consecutive sentence in some such cases. As observed in the ABA Report,[41] no satisfactory way of starting such a limit has been developed elsewhere, primarily because so many potential variations can arise. It would be

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[40] For discussion of the range of provisions which exist across the country, *see* ABA Report *supra* note 3, Commentary at 172–175.

* The bracketed language read: "The court shall not impose consecutive sentences for offenses which were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective." A new subsection (2) was inserted in its place. *See* paragraph 6 of the comment on Multiple Prosecutions, *supra*. Note that conviction of both an inclusive and its included offenses is prohibited by Study Draft section 703(3).

[41] ABA Report, *supra* note 3, Commentary at 175–176.

the recommendation here, however, that no such limit is needed if the general aggregate maximum limitation proposed is accepted. Both a sensible limitation and a constructive criterion are included within that approach. To attempt more is not seen as necessary or particularly desirable.

On the other hand, if the aggregate maximum recommendations are not adopted, more attention will have to be focused on developing a principle for inclusion within subsection (1). Surely the imposition of consecutive terms should not be entirely open-ended.[42] It may be also noted that the problem can be attacked through a provision preventing "conviction" of overlapping or included offenses. But it is the sentencing consequence which is the more significant, and the need to choose which conviction is the more desirable creates other problems which can be avoided by treating it as a sentencing matter.

4. The aggregate maximum limitation also clarifies the instances in which the general limitation is intended to apply. The most obvious and frequently recurring case, of course, is where the defendant stands ready to be sentenced for multiple offenses. Language is added, however, to assure that the limitation will also apply in cases where the defendant has already been sentenced for one offense and stands ready to be sentenced for another offense committed prior to the imposition of the first sentence. For example, the limit would apply if the defendant committed two offenses, was tried for both together, and was sentenced for both at the same time. It would also apply where the defendant was tried and convicted for one of the two offenses, sentenced for that offense, and later tried and sentenced for the other offense. The accident of the timing of the prosecution, in other words, would not affect the ultimate length of the sentences which could be imposed. It is also provided as a corollary that both Federal and State sentences should be counted in computing the limitation. The accident of jurisdiction, it would also seem, should also be irrelevant to the maximum sentence which can be imposed.[43]

It should also be noted, of course, that offenses committed after another sentence has been imposed—such as an escape or an assault on a guard—would not be subject to the limitations of the subsection. These cases of course present different problems, and there would be no limit on the extent to which a sentence for such an offense could be added on to an existing sentence.

5. Subsection (4) parallels the recommendations of proposed sections 3201 (4) and 3202 by treating the imposition of a consecutive sentence as an unusual measure and by requiring certain extra steps to insure that care is taken. The court is required to give reasons, and to conclude that the case is of an exceptional nature requiring the imposition of a longer-than-normal term. As in the cited sections, the court is also required in most cases to seek a diagnostic study from the Bureau of Prisons.

6. Subsection (5) is included for three reasons. First, if the defendant has both a 6-month sentence and a 5-year sentence to serve, it would seen under present 18 U.S.C. § 4083 that the 6-month sentence

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[42] *See, e.g.*, Preliminary Sentencing Memorandum, *supra* note 4, at part II.7.

[43] *See* ABA Report, *supra*, note 3, §§ 3.4, 3.5 and Commentary at 179–180, 182–184, for an elaboration of the reasoning underlying these provisions.

would be required to be served in a nonpenitentiary setting (unless the defendant consented to service in a penitentiary) and the 5-year sentence in a penitentiary. Subsection (5) would require the Bureau * to add the sentences together, and to treat the defendant as though he had received a single sentence of 5½ years. For correctional purposes, in other words, the total sentence should be considered as the sentence for which the commitment was made, rather than a series of shorter terms with independently developed incidents.

The second problem to which subsection (5) addresses itself is the manner in which minimum terms of consecutive sentences should be considered. It is possible to consider consecutive sentences as entirely separate units and not to permit the service of any part of a second sentence until the first has been completed. By this view, a defendant who was given two consecutive 8-year sentences, each with a 2-year minimum, could be held for 10 years until he first became eligible for parole; *i.e.*, the minimum term on the second sentence would not begin to run until the complete expiration of the first sentence. The purpose of subsection (5)(c) is to prevent such a case from occurring. In the example given, the defendant would be treated as though he had a 16-year term with a 4-year minimum. His parole component would be the parole component for the most serious of the offenses committed.[44]

The third problem which is treated by subsection (5) deals with the award of credit if one of several multiple sentences is set aside. Assume a defendant sentenced to consecutive terms of 5 and 8 years. After he has served 3 years, he successfully attacks the 5-year sentence, by habeas corpus or direct appeal, leaving only the 8-year sentence validly outstanding. Again it is possible in some jurisdictions to argue that the 8-year sentence was not to begin until the 5-year sentence was completed, and hence that the 3 years of time served against the 5-year term should not be credited against the remaining 8 years. Such a result is unconscionable and would be prevented by subsection (5). The defendant must be taken at all times to be subject to a single prison term consisting of the aggregate of all of the validly imposed terms. If one is later declared invalid, then the composite term would be reduced by the amount of the invalid term (in the example given, from 13 years to 8 years) and the defendant would automatically have received credit for the time already served.[45]

7. Subsection (6) states a corollary of the aggregate maximum limitation requiring consideration of all State sentences in the computation of the Federal consecutive sentence limit. Unless the court has explicitly stated that a Federal sentence is to be served consecutively to a State sentence, the Bureau is directed to give the defendant credit for all time served in a State prison since the commission of the Federal offense. This does not limit the discretion of the court, except to the extent provided by the overall limit on cumulation of sentences provided by aggregate maximum limitations. What it does is implement in this context the principle stated in subsection (1) that

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*The Board of Parole in the Study Draft.

[44] For further discussion, *see* ABA Report, *supra* note 3, Commentary at 181.

[45] For further discussion, *see* ABA Report, *id.*, at 194–195.

silence by the court will result in the concurrent service of multiple sentences.[46]

Calculation of Terms of Imprisonment: Section 3207

1. Subsection (1) is a retention of the substance of the first sentence of present 18 U.S.C. § 3568. No change is intended.

2. Subsection (2) is also derived from 18 U.S.C. § 3568, and again is not designed to effect any substantive change.

3. Subsection (3) is new. The main idea is to take care of the case in which the defendant is first arrested on a relatively minor charge, but subsequently prosecuted on a more serious charge for an offense which either was discovered after the arrest or, as often happens, was the undisclosed basis for the arrest in the first place. As pointed out in ABA Report (commentary at 196), New York presently has a similar provision, though somewhat narrower than the offered subsection. No system of compensation is available for those who are falsely arrested or who are arrested, held and not prosecuted. For essentially the same reason as credit is awarded under subsection (2) to one who is convicted of the offense for which he was arrested, it would seem sound to award credit in this context for all offenses committed *prior* to the arrest.

It should be noted, of course, that such credit statutes do not operate as a limitation on the sentencing court, except to the extent that the sentence the court wishes to impose plus the credit due would exceed the maximum for the offense. And it is in just this situation where the defendant would seem entitled to recognition of the fact that he has already served part of what could realistically be viewed as the sentence for the offense for which he is ultimately convicted.

CHAPTER 33. FINES

Authorized Fines: Section 3301

1. The need for rationalizing the authorization of fines by classifying offenses into a small number of categories is just as great in the case of fines as it is in the case of imprisonment.[47] The issue is more where the limits should be set than whether the approach of the section is desirable.

2. On the question of where the fine limits should be set, the Preliminary Sentencing Memorandum,[48] sets forth the range of fine levels now found in Title 18. As there shown, there are 14 different fine levels stated in terms of a specific sum, with a high limit of $25,000 and a low limit of $50. Authorized sums which have been recommended by other recent Code reform efforts are summarized in the discussion of the Preliminary Sentencing Memorandum.[49]

While the limits which are stated here may at first glance seem low, they were set at these levels for a specific reason. Fines are most valuable as a correctional measure in cases where the defendant has gained economically from his offense or where he has caused some measurable

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[46] *See* ABA Report, *id.*, at § 3.5(c) and Commentary at 184–186.

[47] *See* Preliminary Sentencing Memorandum, *supra* note 4, at part I.1(a)(ii), and .1(b), where the present chaos is catalogued. *See also* ABA Report, *supra* note 3, at 118–119.

[48] Preliminary Sentencing Memorandum, *id.*, at part I.1(b).

[49] *Id.* at Part II.1(b).

loss to the victim. In these cases, subsection (2) provides an overall limit of twice the gain or twice the loss which can be used as an alternative to the limits stated in subsection (1). Thus, if an offender gains $25,000 from an income tax violation, he could be fined up to $50,000; if a person's unlawful security manipulations caused losses of $50,000, he could be fined up to $100,000. The fine limits stated in subsection (1), therefore, are designed only to apply to those cases where economic gain or loss is not involved or is not easily measured. In the former cases, fines are normally not appropriate and will not be used. Murder, rape, assault, and the like, are not generally suitable offenses for the use of a fine. On the other hand, if there is some unique correctional value to be served by imposing a fine in such a case, no reason is seen why the limits posed will not be adequate.

3. Subsection (2) has its counterparts in the present Federal Code, but nowhere in such a generalized form as is offered here.[50]

4. Two further points which are not included in the section under discussion should also be noted. The first is the possibility of higher fine limits for corporations. No recommendation on this point is made now, both because the subject of appropriate sanctions for corporations is still under study and because it is felt that subsection (2) would normally come into play in such offenses and would authorize a sufficient fine. The second is the possibility of limiting fines, as has occurred in New York, to crimes where the defendant gained money or property through the commission of the offense. A less restrictive form of this proposal is offered in proposed section 3302(3) and thus the proposal is not recommended for inclusion here.

Imposition of Fines: Section 3302

1. There is no provision comparable to this section in existing Federal law.

Subsection (1) is designed to suggest both a general criterion for the assessment of fines and two important limitations. The general criterion suggests that it is always relevant to the issue of how much the fine should be to consider the financial resources of the defendant and the impact which the fine will have on his own particular economic situation. This consideration, of course, cuts both ways: a very small fine on an impoverished defendant may well have substantially the same effect as a very large fine on a well-to-do offender. The standard stated in subsection (1) thus may result in increasing the amount of the fine because of the wealth of the defendant as well as decreasing it because of his poverty.

The two limitations are stated as absolute prohibitions.* It is folly to impose a fine on an offender when it is known that he cannot pay it. And the thrust of this section is that the court must make itself aware of the defendant's economic situation and his ability to pay in order to make a judgment about whether he is or will be able to pay any

[50] For examples of specific offenses which authorize this method of computing the authorized fine, *see* 18 U.S.C. §§ 645 and 201(e). Notice also that many of the newer proposals discussed in the Preliminary Sentencing Memorandum, *id.*, permit this alternative method of stating the limit on the fine which can be imposed. *See also* ABA Report, *supra* note 3, at § 2.7(f).

*The clause prohibiting the court from sentencing a defendant to pay a fine unless "he is or will be able to pay it," has been deleted as unnecessary because there is no sanction under section 3304, for nonpayment against a defendant who is unable to pay.

fine that is imposed. The second limitation is based on the principle that it is unsound for the government to get into the business of competing with the victims of crime for the often meager resources of the defendant. Fines should not be used as a substitute for restitution or reparation to the victim. It may be appropriate, indeed, for general legislation to address itself to the diversion of fines into a fund for the compensation of the victims of crime.

A word should be added about the imposition of fines on those who cannot pay. The practice in many States is that no inquiry into ability to pay is made and that many fines—often most—are beyond the financial capacity of the defendant. Prompt commitment to jail for nonpayment is the frequent result. Aside from the analogies to debtors' prison which such a consequence invites, it seems particularly ironic that the sentencing judge determines on the one hand that jail is not necessary in correctional terms to protect the public or to rehabilitate the defendant and that a fine will suffice to meet these objectives, but on the other hand the result of the sentence is the very jail sentence which has been determined to be unnecessary.

This does not seem to be a particularly significant problem in the Federal system today, primarily because a criterion similar to the ability to pay clause seems to be in use in most Federal courts as a matter of practice. This reinforces its soundness and increases the value of adding it to Title 18 to promote unformity.[51]

2. Subsection (2) is designed to retard the routine imposition of a fine when other sanctions have been authorized. The idea is that fines are of sufficiently doubtful correctional utility that extra care should be taken if it is thought that the only sentence should be a fine.

3. Subsection (3) is aimed at the same general purpose when fines are used in conjunction with other sanctions. Again, the suggestion is that fines should be used only when some specific correctional purpose can be discerned, and that probation and imprisonment should be the staple of the correctional arsenal.

4. Subsection (4) makes explicit the authority of the court to permit installment payments when a fine has been imposed.[52]

5. The postponement of determining the consequences of nonpayment, required by subsection (5), involves a point very much the same as is involved in determining at the time of sentence the sanction to be employed if probation is violated. The judge at the time of sentencing, particularly if he has determined that the defendant can pay, is not in a position to guess about why a fine might not be paid and what he should do if it is not. It surely is sound for him to wait until he knows why payment was not made before he forms his judgment about an appropriate response. As observed by the ABA study, there simply is no sound correctional objective to be served by the often-heard (at least in State courts) "30 dollars or 30 days."[53]

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[51] For further discussion of the problem and a summary of present Federal statutes, *see* Preliminary Sentencing Memorandum, *supra* note 4, at part II.9. *See also* ABA Report, *supra* note 3, Commentary at 119–124.

[52] For a collection of State statutes which in terms permit this, *see* ABA Report, *supra* at 121–122; *see also* Commentary at 119–124.

[53] *Id.* at 127.

Revocation of a Fine: Section 3303

The principle that a fine should not be imposed on an offender who will not be in a position to pay should be flexible enough to accommodate changes in financial condition. For this reason, a provision authorizing the court to react to an altered financial condition is appropriate. Both the Model Penal Code and the proposed Michigan Code contain similar provisions.[54] Present Federal statutes are silent on the point.

Response to Nonpayment: Section 3304

1. Present Federal law dealing with the offender who does not pay a fine permits imprisonment until the fine is paid.[55] An offender who has been imprisoned for 30 days solely because of the nonpayment of a fine can make application to the warden or to a U.S. Commissioner for a hearing on whether he should be released. He is then entitled to his release if it is found that he is unable to pay the fine and that he does not have any property exceeding $20 (excluding property that is exempted from being taken on execution for debt). The prisoner also must take an oath to this effect (pauper's oath). Finally, it is provided that the Attorney General may intervene if the offender has more property than $20, and may cause his release if such excess property is found reasonably necessary for the support of his family. The Attorney General may also claim part of the excess property in partial satisfaction of the fine, and may similarly effect the prisoner's release.[56]

It seems to be generally agreed that these provisions are largely obsolete. It also seems to be the case that they are seldom used.

2. The basic idea underlying the substitute proposal contained in this section is that imprisonment is justified as a method of enforcing payment of a fine, but is not justifiable as a substitute for the fine. Imprisonment is therefore permitted only in the case where the defendant can pay (or could have paid) the fine, but will not pay it. Subsections (1) and (2) implement this idea by imposing on the defendant the obligation to justify his failure to pay a fine or an installment and by permitting the imposition of the specified prison terms if he fails in that effort. The prison terms are fixed at lengths which are deemed appropriate for the essentially contemptuous behavior involved in nonpayment of a fine; any issue about prison terms for the underlying offense would of course have been resolved at the time the initial sentence was imposed.[57]

3. Two further issues should be noted. The first is whether the service of the term of imprisonment imposed for nonpayment of the fine should discharge the obligation to pay. The recommendation here is that it should not, and therefore no mention is made of the point in the statute. The intention is that the civil collection methods of subsection (5) would remain available after the prison sentence was served and that the defendant not be permitted to exchange 6 months in jail for a heavy fine.

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[54] MODEL PENAL CODE, § 302.3 (P.O.D. 1962); MICH. REV. CRIM. CODE, § 1510(3) (Final Draft 1967); *see also* ABA Report, *supra* note 3, at § 6.5(a) and Commentary at 285.

[55] *See* 18 U.S.C. § 3565.

[56] *See* 18 U.S.C. § 3569.

[57] For an elaboration of the reasons behind such a structure and an examination of the alternatives employed in most States, *see* ABA Report, *supra* note 3, at § 6.5 and Commentary at 285–293.

The second issue is whether the defendant should be released from jail if he pays the fine after he has been committed but before his term is up. Arguments can be made both ways: the purpose of the imprisonment is to collect the fine, and once this purpose has been achieved release perhaps should follow; on the other hand, the defendant did not pay when he could have, and his term of imprisonment is in fact a commitment for willful violation of an order of the court. Release upon payment does not necessarily purge the contempt of such action. Rather than specify one of these alternatives in the statute itself, subsection (2) leaves this issue to the judge. This way the attitude of the defendant can be made a part of the judgment on whether he should be released if he pays.[58]

4. Subsection (3) presents the alternatives in the event the court concludes that the defendant has made a proper showing of excuse under subsection (2). More time, a reduction in amount, or a complete revocation would then seem appropriate, again consistently with the position that fines should not be sought from those who cannot pay.

5. Subsection (4) creates an obligation on organization officers to pay fines levied against organization assets, and subjects them to imprisonment under the foregoing subsections if they inexcusably refuse. Organizations would also be subject to the civil enforcement techniques authorized by subsection (5).

6. Subsection (5) permits the court to use the techniques available for the collection of money judgments in favor of the United States. A similar provision is now found in 18 U.S.C. § 3565. One change of substance is intended. The present provision simply authorizes the use of civil enforcement methods, without specifying who initiates the use of such collection techniques. The proposal in subsection (5) explicitly reserves this question to the court, on the ground that it ought to be part of the overriding correctional determination with which the court is otherwise charged.[59]

CHAPTER 34. PAROLE

Parole Eligibility; Consideration: Section 3401

1. Subsection (1) in effect states the definition of "minimum term" as it is used in these materials. The defendant is either immediately eligible for parole, or his parole eligibility is deferred for the period of time fixed by the sentencing court under proposed section 3201(4). The reasoning underlying the approach is set forth in paragraph 5 of the commentary to section 3201.

2. Subsection (2) sets forth the frequency with which it is mandatory for the Bureau of Prisons* to consider the question of parole for a given inmate. The first consideration must occur at least 60 days before the expiration of any minimum sentence. If there is no minimum, the period is at least 60 days before the expiration of the first year of the sentence. An order is then required to be entered granting or denying parole. If parole is denied, then further reconsideration

[58] For competing recommendations on both points, *see* ABA Report, *id.*, § 6.5(b) and Commentary at 292–293.

[59] For further discussion, *see* ABA Report, *id.*, § 6.5(c) and Commentary at 293–294.

*The Study Draft places jurisdiction over all parole decisions in the Board of Parole rather than in the Bureau of Prisons.

of the parole issue must take place at least once a year and further orders must be entered at the same intervals.

The reason for the formal orders denying parole is to trigger the right of the prisoner to appeal under subsection (3).* The Bureau of Prisons may of course consider the parole question at any time during the period of the prisoner's eligibility. But it is required to do so in a fashion which is subject to an appeal to the Board of Parole at least once a year.

The periods fixed by subsection (2) are not a substantial departure from present practice.

3. Subsection (3) implements the major change in function of the Board of Parole from that of the agency that considers parole in the first instance to an agency of review. The reasons for suggesting this change in existing practice have been set forth in the introductory note and need not be repeated here.

Timing of Parole; Criteria: Section 3402

1. Subsection (1) performs two functions. It states as the policy of the United States that offenders sentenced to the penitentiary for felony be retained for at least 1 year. This is the minimum period of institutionalization which is thought to be necessary for a rational process of classification to occur and for the beginning of a program of rehabilitation to be undertaken. Unlike several recent recommendations which have embraced this idea, however, the 1-year minimum is not stated as a limitation on parole eligiblity. It is a criterion to be applied in most cases, but at the same time does not tie the hands of the Bureau** if an unusual set of facts seems to call for earlier parole.[60] This of course is on the assumption that the court has not set a minimum term.

Once the year has passed, however, or once any minimum term has expired, the policy changes to one of presuming the desirability of parole in the absence of affirmative reasons for retention. The reasons for postponing parole which are recognized by the subsection are broad enough to encompass every legitimate desire to continue the detention of the prisoner. In the absence of a reason to keep him in, the section reasons, he should be released. The expense of his continued retention and the probability that his chances of rehabilitation are better the sooner he can be put back into the community would seem to justify such an approach.

It should also be noted that, as is the case now, it is not the suggestion that the application of these criteria to individual cases be subject to judicial review.[61] Review by the Board of Parole is contemplated at yearly intervals.

2. Subsection (2) narrows the range of retention criteria once the offender has actually served two-thirds of the imposed maximum term. The proposal is derived from the suggestion discussed in the Preliminary Sentencing Memorandum.[62] The idea is that an offender

*Subsection (3) providing for appeal from a decision of the Bureau of Prisons denying parole to the Board of Parole has been deleted. Under the Study Draft, all parole decisions are made by the Board of Parole.

**Board of Parole in the Study Draft.

[60] *See* ABA Report, *supra* note 3, Commentary at 151–153.

[61] *See* proposed section 3406.

[62] *Supra* note 4, at part II.4.

will be presumptively entitled to parole after the service of two-thirds of his sentence, unless it is the opinion of the Bureau* that he still poses a substantial and immediate risk of engaging in further criminal conduct. Protection of the public by incapacitation of the defendant, in other words, is suggested as the only legitimate basis for retention after two-thirds of a long sentence has actually been served. Since the device is designed to reduce the incidence of unjustified service of truly long-term sentences, the proposal would not make it applicable unless the time served amounted to at least 5 years.

3. Subsection (3) performs the function of present 18 U.S.C. § 4163 by defining the point at which discharge from prison is required. Once the defendant has without interruption served the entire prison component of his sentence, he must be released. As explained in the introductory note and in the commentary to proposed section 3201, the release in such cases is also on parole. Parole is conceived as the natural transition between every prison sentence and complete freedom and as an experience which should be utilized, no matter how long the offender is retained in prison.

Incidents of Parole: Section 3403

1. Subsection (1) implements the parole component concept by providing that the period during which revocation may occur after a prisoner has been paroled shall extend for the parole component of his sentence. Thus, a prisoner sentenced for a Class A felony will be subject to revocation for a period of 5 years; a Class B prisoner, for 3 years; a Class C prisoner, for 2 years. Satisfactory service of these periods without a violation will result in discharge, no matter at which point during service of the sentence the parole occurred. The sentence which may be imposed in the event of a violation, on the other hand, is treated as an independent matter in subsection (3).

2. Subsection (2) permits the early termination of parole at any time after the expiration of successful service for 1 year. The reason for permitting early termination closely parallels the comparable provision included for probation in proposed section 3102(2).[63] Once it is clear that an offender has adjusted properly, and in order to give him an incentive to adjust, there is little reason to maintain control over him. The reason for requiring 1 year before the power can be exercised is to assure compliance with the notion that parole is to be a transitional device for use in every case of imprisonment.

3. Subsection (3) confirms the power of the Bureau* to state the conditions of parole, to modify the conditions if it becomes necessary, and to revoke if conditions are violated.

4. Subsection (3) also states the powers of the Bureau once it has determined that a violation has occurred.

Continuation of the parole, with or without modification of the conditions, of course remains a possibility. If that is not appropriate and if revocation becomes necessary, the recommitment is for a fixed term, determined as follows: it consists of the maximum term of imprisonment which remained unserved at the time of parole, less the time served successfully on parole and less the time served in custody as a result of the violation. Thus, if an offender were sentenced to 10 years

*Board of Parole in the Study Draft.

[63] *See* paragraph 3 of the commentary to proposed section 3102(2), *supra*.

for a Class B offense and paroled after 4 years, he would have (under subsection (1)) a 3-year parole term to serve. If he committed a violation after 1 year and spent 30 days in custody as a result of the violation before parole was formally revoked, he would be reimprisoned upon revocation for a further term of 4 years and 11 months, or 6 years (the time remaining at the time of parole), less 1 year(successfully served on parole), less 30 days (spent in custody as a result of the violation).

This subsection represents a change in existing law in many respects, most of which are outlined in the introductory note. One additional change which should be noted is the fact that under 18 U.S.C. § 4207 the Board of Parole presently is entitled to fix the period of reimprisonment within a limit set by the remainder of the sentence at the time of parole. In addition to requiring credit for "clean time," the proposal here removes the authority of the revoking agency to impose a resentence shorter than the maximum permitted resentence. The reasoning is that reparole is still available and that the function of the resentence (particularly since the defendant has once demonstrated his unsuitability for release) is to state the maximum period for which control of the defendant may be maintained. It would not seem sound to shorten that period at the time of a violation, even though it were the intention that the parolee would be reparoled within a period of several years.

5. Subsection (4) deals with the question of reparole. Its effect is that the defendant may be paroled, reimprisoned, reparoled, reimprisoned, reparoled, and so on indefinitely until one of two things occurs: either he serves a continuous period of time equal to the parole component of his sentence on parole without a violation; or the total time during which he has remained subject to the jurisdiction of the Bureau reaches the maximum term of his sentence. Thus, a Class B offender who is sentenced to 15 years and who is paroled after 4 years will have a 3-year parole component to serve. If he violates 1 year later, he will be reimprisoned for a further term of 10 years. If he is paroled after 4 more years, he will again embark on the service of a 3-year parole component. If he violates after 1 year again, he can go back in for 5 years. If he then is paroled again after 3 more years of service, his parole component would have to be reduced to 2 years instead of the normal 3 years, because otherwise the total period during which he would have been subject to control would exceed 15 years. If he violated a third time, again after 1 year, he could be recommitted only for an additional 1 year, again because to require a longer term would exceed the 15-year period which represents the maximum period of control to which he is subject for his offense. And finally, if during any one of his paroles he served a continuous 3-year period without a violation, he would be entitled to a complete discharge.

6. Subsection (5) raises a problem which may not be appropriate for inclusion in these materials, but which nevertheless should not be permitted to go unnoticed. The question of what procedures should be developed for the parole revocation process is one which has been largely left to the courts for development. The present statute (18 U.S.C. § 4207) provides simply that the parolee is entitled to "an opportunity to appear." The incidents of that opportunity are not spelled out in the statute, but have in some instances been litigated in the courts.

The solution of inviting the attention of the Advisory Committee on the Criminal Rules, suitable in the case of probation revocation, is not satisfactory here because of the fact that the parole revocation process is not one which takes place in court. A more elaborate statutory solution has not been developed at this point, though perhaps it should be. For the moment, in any event, the present statutory language is continued in substance, with the idea that at the very least the present status of this issue should be preserved.

7. Subsection (6) establishes the second point at which the Board of Parole would, under these proposals, exercise an appellate function. The first, the denial of parole, is provided in proposed section 3401 (3).*

Conditions of Parole: Section 3404

Present Title 18 simply states that when an offender is released on parole, the Board in its discretion may allow the offender "to return to his home, or to go elsewhere, upon such terms and conditions, including personal reports from such paroled persons, as the Board shall prescribe." [64] The proposal here is an attempt, patterned after the recommendations with regard to probation, to be much more specific about appropriate parole conditions. Such a statement should do much to fortify the action of the Bureau.** The ability to point to an act of Congress as the explicit basis for appropriate action should prove valuable.

Calculation of Periods of Parole: Section 3405

This section exactly parallels proposed section 3104 with regard to probation. It would seem necessary and desirable for the same reasons advanced in the commentary to that section.

Finality of Parole Determinations: Section 3406

1. The purpose of this section is to preserve the benefits of providing more specifically in a statute for criteria to govern the action of parole officials, but at the same time to allay the fears of those who are concerned about interference by the judiciary with matters of prison administration.[65] Constitutional questions and procedural rights which are conferred by statute, regulation, or rule are left to the courts to enforce. Whether the prisoner received his annual reconsideration of parole with its concomitant right to appeal an adverse decision, whether venue regulations were complied with in a parole revocation proceeding, whether he was permitted to have a lawyer as required by Constitution or rule, *etc.*, would thus remain litigable matters as they are now. But the discretionary decision of the Bureau of Prisons or the Board of Parole on appeal*** in determining whether to award or to revoke parole and the like would not be subject to judicial review.

2. The phrase "but not limited to" is intended to assure that this specific provision is not by implication taken to mean that all matters

*Subsection (6) has been deleted in the Study Draft.

[64] 18 U.S.C. § 4203(a).

**Board of Parole in the Study Draft.

[65] *See* MODEL PENAL CODE, § 305.19 (P.O.D. 1962).

***Under the Study Draft the Board of Parole retains jurisdiction over parole decisions.

not specifically excluded from judicial jurisdiction are intended to be conferred on the courts. The statute is intended to leave matters to which reference in terms is not made as they are now. Thus, for example, decisions by the Bureau transferring an inmate from one institution to another, decisions involving matters of internal prison discipline, and a host of other purely administrative matters within the prison are not meant to be opened to judicial review by implication from this statute. The extent to which such matters become cognizable on habeas corpus because of excessive abuses is likewise not a matter with which this statute deals.

28 U.S.C. SECTION 1291 (AMENDED)

Appellate Review of Sentence

1. The emphasized portion of 28 U.S.C. § 1291 as reproduced in the Study Draft is suggested as a method of providing for appellate review of criminal sentences. Sentences are not generally subject to review now, although every other aspect of the criminal case, often a matter of trivial significance in comparison, is fully reviewable. Numerous proposals for Federal sentence review have been submitted by Senator Hruska and others, and at least one has passed the Senate.

2. Most of the proposals which have been advanced for Federal sentence review have been a good deal more detailed than the proposal offered here.[66] The amendment to 28 U.S.C. § 1291 offered here should adequately do the job, however, and at the very least should enable a full airing of the pros and cons of sentence review before the Commission.

3. There are many arguments in favor of sentence review. In summary, the major ones include the need for a check on seriously excessive sentences, the frequency of which is fortunately small but the effects of which, when they occur, can be disastrous to the victim. Sentence review can make a major contribution to the rationality of sentences as well, both by forcing sentencing decisions more into the open and by aiding the process of developing articulated principles to guide the sentencing of the future. There is also much to be gained by creating a system which not only is fair, but carries with it the appearance of fairness. The attitude with which the defendant views the sentencing system can have much to do with the kind of person he will be in his early prison days. Public respect as well is fostered by negating the image of the all-powerful trial judge who has the choice between enormously wide ranges (probation to 15 years for a Class B felony, for example) and who is accountable to no one for the way in which he exercises that power. The sentencing judge is one of the most powerful and autonomous officials of our government. No other judicial act of such importance is committed to the single discretion of one man. And finally, it should be noted that appellate review of sentences is available now in at least one unfortunate respect. Many present appeals are taken for the sole reason that the defendant is dissatisfied with the sentence he has received, and many present reversals can be traced to the fact that the appellate court is convinced that an injustice has been perpetrated. But the fact that such reversals

[66] *See* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES 86–90 (Approved Draft 1968).

must be articulated in the form of errors in the admission of evidence or other technicalities has an unfortunate effect on the principled growth of the law.

Overriding all of these considerations is the simple point that every other judicial decision of consequence at the trial level in both civil and criminal cases is subject to the review of appellate courts. Why the criminal sentence should be the one item which should be insulated from review is not immediately clear. That it is is one of the great ironies of the law.

4. The main arguments against appellate review are practical rather than matters of principle. Fears are expressed that the appellate courts would be flooded and that the congestion of the court system would be increased to unmanageable levels. This argument has led some to suggest that appellate courts should be given the power to increase the sentence of the trial court as well as reduce it. The proposal here does not include the power to increase, on the other hand, for several reasons. As a matter of principle, it could be argued rather convincingly that the government should be entitled to take an appeal seeking an increase if it feels that the sentence of the court is too low. It is clear, however, that such a provision would offend the constitutional prohibition against double jeopardy. The issue is thus more narrowly framed as whether, once the defendant has initiated an appeal, he should expose himself to an increase as well as a decrease in his sentence. For 60 years England lived with an increase provision in this context, and only recently abandoned it as unsound. The defendant in a sense is entrapped when he walks into court seeking a lesser sentence and winds up with a higher one. More importantly, there is no particular relation between those who deserve an increase and those who get one. The most flagrant cases of too lenient sentences will never get appealed by the defendant, and hence never get raised. Moreover, to the extent that the increase power acts as a deterrent to taking appeals there would seem little reason why good appeals as well as bad ones will not get taken. The device of an increase power as a deterrent, in other words, is not a response that is related in principle to the evil which is sought to be avoided. As suggested by the American Bar Association, expediting devices can meet the problems of volume without the costs of the increase provision. Finally, it should be noted that the spectre of constitutional problems also lies in the background when an increase provision is triggered by the defendant's appeal.

5. The arguments on the merits of sentence review itself are more elaborately set forth in ABA Standards, Appellate Review of Sentences.[67] The issue of whether to permit the appellate court to increase the sentence is also there debated.[68]

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[67] *Id.* at 1–6, 21–31.

[68] *Id.* at 55–63. *See also* the supplemental pamphlet, setting forth an amendment to the ABA Standards permitting the reviewing court to increase, as well as decrease, the sentence, an amendment approved by the ABA House of Delegates.

APPENDIX

GOOD TIME PROVISIONS

1. As explained in the introductory note, it is the recommendation that good time provisions not be included in Title 18 as revised. A draft is included at this point, however, in the event that there is disagreement with this recommendation and in order to aid the discussion of the point. As will be noted below, the draft is very close to existing provisions.

2. Subsection (1) of the draft is substantially identical to present 18 U.S.C. § 4161. The present statute states that, where the prisoner is serving consecutive sentences, his good time computations are to be based on the aggregate of the sentences. This provision is omitted here as redundant in view of the proposal in section 3206(5). Also present 18 U.S.C. § 4161 does not speak to the question of whether good time credits are to count in reducing the minimum term; that is, in advancing parole eligibility. The proposal here is that if good time is to be retained, they should.

3. Subsection (2) of the draft is identical to the relevant part of present 18 U.S.C. § 4162, except for the fact that the time is specifically credited against both the maximum term and any minimum term.

4. Subsection (3) is identical to the relevant provision of 18 U.S.C. § 4162, again except for the maximum/minimum point.

5. Subsection (4) is identical to present 18 U.S.C. § 4165 except that it makes more explicit that the forfeiture power extends to each of the types of good time award which may be made under the section.

6. Subsection (5) is identical to present 18 U.S.C. § 4166.

7. It perhaps should also be noted that the Model Penal Code recommends, contrary to present Federal law, that the concept of good time be employed with regard to time on parole as well. Commentary to the Model Penal Code section indicates that 18 States presently follow this practice. Such a section could easily be added to the Federal Code, and perhaps should be, if the concept of good time is thought to be sound.

8. Proposed section 3408 is included to raise the question whether proposed section 3406 should be amended if good time provisions are retained so that certain decisions about their award and forfeiture will also not be subject to judicial review.

Section 3407. Reduction of Prison Term for Good Behavior

(1) Good behavior. Every prisoner confined in a penal or correctional institution under an indeterminate sentence, whose record of conduct shows that he has faithfully observed the rules and has not been subject to disciplinary action, shall be entitled to a deduction from both the maximum term and any minimum term, beginning on the day the sentence commences to run, as follows:

(*a*) 5 days for each month if the sentence is not less than 6 months and not more than 1 year;

(*b*) 6 days for each month if the sentence is not less than 1 year and less than 3 years;

(*c*) 7 days for each month if the sentence is not less than 3 years and less than 5 years;

(*d*) 8 days for each month if the sentence is not less than 5 years and less than 10 years; and

(*e*) 10 days for each month if the sentence is 10 years or more.

(2) Industrial good time. A prisoner may, in the discretion of the Attorney General, be allowed a deduction from both the maximum term and any minimum term of not more than 3 days for each month of actual employment in an industry or camp for the first year or any part thereof, and not to exceed 5 days for each month of any succeeding year or part thereof.

(3) Exceptionally meritorius service. In the discretion of the Attorney General allowances of not more than 3 and 5 days as provided in subsection (2) may be allowed to a prisoner who performs exceptionally meritorious service or performs duties of outstanding importance in connection with institutional operations.

(4) Forfeiture. If during the term of imprisonment a prisoner commits any offense or violates the rules of the institution, all or any part of his earned good time under subsections (1), (2), and (3) of this section may be forfeited.

(5) Restoration. The Attorney General may restore any forfeited or lost good time or such portion thereof as he deems proper upon recommendation of the Director of the Bureau of Prisons.

Section 3408. Finality of Good Behavior and Parole Determinations

The Federal courts shall not have jurisdiction to review or set aside, except for the denial of constitutional rights or procedural rights conferred by statute, regulation, or rule:

(1) discretionary action withholding, restoring, or refusing to restore a reduction of a prison term for good behavior under section 3407 of this chapter; and

(2) discretionary action regarding, but not limited to, the release or deferment of release of a prisoner whose maximum term of imprisonment has not expired, the imposition or modification of conditions of a first or subsequent parole, and the reimprisonment of a parollee for violation of parole conditions during the parole period.

COMMENT
on
LOSS OF PUBLIC APPOINTMENT: SECTION 3501
(Green, Stein; April 15, 1970)

1. *Introduction; Significance of the Sanction.*—Dismissal and disqualification from public employment may be proper sanctions for commission of crimes in cases where the convict's crime was closely related to his function in the government and constituted a significant threat to governmental operation. Indeed, in cases where proscribed conduct is directly related to performance of public duties, dismissal and disqualification from public employment may serve as a more effective deterrent than the threat of imprisonment or other penal sanctions. On the other hand, mandatory disqualification from work can be a harsh and destructive sanction. Denial of employment, without consideration of the convict's attitude and abilities at the time he applies for work, runs counter to rehabilitative purposes, a basic principle of criminal reform; it becomes more difficult for an exconvict to regain a normal, noncriminal place in society. Draft section 3501 would retain some sanctions regarding dismissal and disqualification from Federal employment insofar as these sanctions presently relate to misconduct in office, but would limit their application to employees convicted of major offenses involving government activity, and would expand judicial discretion to impose, or not to impose, these sanctions as the facts may warrant.

2. *Present Federal Law.*—For the most part, present Federal law does distinguish those crimes which so seriously affect governmental functions as to warrant dismissal and disqualification from public office.[1] Note, however, that most of the present sanctions, where applicable, are mandatory while, under the draft, their imposition—except for forfeiture of office for commission of certain national security offenses or offenses related to official bribery—would be discretionary with the court.

Under present Federal law, no general sanction of forfeiture or disqualification from public employment is provided in the criminal statutes for a government employee who steals from the government. Theft from the government by a government employee may be of a

[1] Indeed, the Task Force Report on Corrections of the President's Commission on Law Enforcement and Administration of Justice cited present Federal law as a model for those cases in which statutes on mandatory disqualifications from public employment are deemed necessary, noting that "only certain relevant convictions will bar a person from holding Federal office." THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 90n.29 (1967) [hereinafter cited as TASK FORCE REPORT: CORRECTIONS].

petty nature, or, after serving his sentence, the thief may be truly reformed. In any event, the operations of government are not so directly threatened by theft of property as to warrant dismissal and disqualification of the thief, without any consideration of the possibility of reform. A bank examiner, however, stands in a different situation; honest examination of bank records is at the heart of the banking system, and a dishonest bank examiner may constitute a gross threat to the banking structure. Present 18 U.S.C. §§ 213, 655, 1907–1908 contain disqualifications for bank examiners committing thefts or frauds against banks. Draft section 3501 would extend discretion to impose such qualifications against any Federal employee serving in a fiduciary capacity who commits a felonious theft or fraud with relation to his duties. Similarly, almost all present criminal statutes containing disqualifications from public employment concern unlawful acts clearly endangering the effective and impartial operation of the government—bribery (18 U.S.C. §§ 201–204), forceful interference with elections (18 U.S.C. § 592), disclosure of confidential information (18 U.S.C. § 1905), concealment or mutilation of public records (18 U.S.C. § 2071), treason, sedition, and rebellion (18 U.S.C. §§ 2381, 2383, 2385, 2387). These seem to be reasonably defined circumstances in which forfeiture and disqualification from office might be warranted and judicial authority to impose disqualifications for such offenses is retained in the draft.

One exception to the existing pattern of Federal law which provides for mandatory employment disqualifications only when the convict's offense is related to his job activities is the recently enacted legislation making mandatory the disqualification from public employment of persons convicted of felonies resulting from participation in riots (5 U.S.C. § 7313). Such cases might best be handled through the exercise of discretion in the hiring agency; participation in a riot seems no worse than commission of homicide, rape, or any other felony with respect to consideration of whether one is, at the time he is employed, worthy and capable of public employment. The provision concerning disqualification for rioting is, therefore, not included in draft section 3501.[2]

We have considered whether there is, in fact, any need at all for even the few disqualification provisions in existing Federal law. The

[2] 29 U.S.C. § 504 is another apparent exception to the premise that mandatory disqualifications from employment should be based on misconduct which directly relates to the employment. This section of the Labor-Management Reporting and Disclosure Act disqualifies persons from holding executive office in a labor union if they have been members of the Communist Party or have been convicted of robbery, bribery, arson, narcotics violations, murder, rape or any of several other crimes listed in the statute. However, not only does this disqualification terminate automatically 5 years after the conviction or termination of membership in the Communist Party, but the statute provides for hearing and discretionary revocation of the disqualification within the 5-year period. Since, therefore, the statute in effect is discretionary, establishes its own administrative and regulatory procedures, and does not concern public employment, its provisions are not included in the proposed draft. 29 U.S.C. § 504 will be retained as is.

President's Commission on Law Enforcement and Administration of Justice, in its Task Force Report on Corrections, commented:[3]

> Although certain offenses are clearly related to fitness to hold such positions, it is rarely necessary to provide for automatic disqualification in order to protect society. Instead, where there is someone with authority to appoint or remove, or where the public has such authority through its own power to elect, it seems generally preferable to rely on their judgment. The relevance of particular convictions or terms of imprisonment to fitness for the particular position can then be considered. It may, however, be necessary to provide for forfeiture of elective office and any appointive office for a term, since there may be no more feasible means of removing an unfit officer.

Generally, prior criminal conduct provides a discretionary basis for loss or denial of Federal employment. For example, 5 U.S.C. § 7501 provides for dismissal of civil servants for cause, and a rule of the Civil Service Commission provides that criminal conduct is a basis for denial of an appointment to the Civil Service.[4] Although civil service rules, as well as security risk provisions concerning Federal employment,[5] might adequately protect government operations from misconduct in most cases, there remain many appointive Federal positions for which the statutory forfeitures and disqualifications from public service may remain the most effective sanctions, and maintenance of a general statute on the subject appears to be necessary.[6]

It may be, however, that since military personnel and civil service personnel are subject to separate systems of discipline, these public servants can be excluded from the scope of this general statute; judicial determination of the right to hold a job may not be necessary here. This seems especially true of public servants at a low level of responsibility; there employers and probation or parole authorities are in a better position than the court to know whether these employees must, in order to protect government functions, be disqualified from positions which may be their only source of rehabilitative employment. Note, however, that it would be difficult to set forth a definition distinguishing those "higher-level" employees who should be covered by the statute, and those "lower-level" employees who should not; it may be best, as proposed here, to rely on judicial discretion in a particular case.

3. *Transfer of Regulatory Provisions.*—There are some minor offenses in present Federal law which provide for dismissal upon conviction for official misconduct; it is in these minor cases that dismissal rather than the threat of imprisonment or fine is probably the

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[3] TASK FORCE REPORT: CORRECTIONS, *supra* note 1, at 90.

[4] 5 C.F.R. § 731.201.

[5] 5 U.S.C. §§ 7531–7533.

[6] Disqualifications for holding office as a United States Judge or Congressman are, it should be noted, set only by the Constitution, not by this statute. *See, e.g., Powell* v. *McCormack*, 395 U.S. 486 (1969), as to qualifications for holding office as a United States Congressman: *O'Donoghue* v. *United States*, 289 U.S. 516 (1933), as to qualifications for holding office as a Federal judge. The basic remedies in these cases are impeachment, or expulsion from Congress, U.S. CONST. art, I, §§ 3, 5; art. II, § 4.

most effective sanction for these offenses. These minor offenses will be retained, with their disqualification clauses, but because they are primarily regulatory in nature, they will be transferred to other titles of the United States Code. They include: lobbying (18 U.S.C. § 1913), striking against the government (18 U.S.C. § 1918), conflict of interest of bankruptcy referees (18 U.S.C. § 154) or officials dealing with Indian contracts (18 U.S.C. § 437), misconduct by claims attorneys (18 U.S.C. § 290) or customs officers (18 U.S.C. § 543), wrongful approval of sureties by postmaster (18 U.S.C. § 732), trading in public property by a revenue officer (18 U.S.C. § 1901), and receipt of unauthorized fees by a ship's inspector (18 U.S.C. § 1912).

4. *Changes From Present Law Under the Proposed Draft.*—The basic changes to be effected under the proposed draft are that judicial imposition of the sanctions of discharge and disqualification from public employment are, for the most part, made discretionary, rather than mandatory, for the sentencing court. Further, disqualifications may be limited to specific types of Federal employment, rather than all Federal employment.

The present statute on disclosure of confidential information (18 U.S.C. § 1905) provides dismissal from public office, but not disqualification from holding future office. An offense in public office serious enough to warrant dismissal might require at least some period of disqualification: otherwise dismissal may seem meaningless, if the offender immediately may be offered another government job. The draft, therefore, couples forfeiture of office with disqualification from office, allowing the court to impose both sanctions. In so doing, accomplices to the crime—nonpublic servants who receive such information—may be disqualified from holding public office.

The present bribery statute (18 U.S.C. § 201) provides that both the briber and bribe recipient *may* be disqualified from holding public office. Under the draft, the public servant involved in bribery *must* forfeit his office, although further disqualification is discretionary with the court.

Presently, disqualifications are provided for persons convicted of treason (18 U.S.C. § 2381) or sedition (18 U.S.C. § 2385), but not for persons convicted of espionage (18 U.S.C. § 793). This inconsistency is remedied by mandating forfeiture and permitting disqualification of persons convicted of any of these national security offenses.

Some present disqualifications are total: others, *e.g.*, disqualifications for sedition or for rioting, limit the mandatory disqualification to a 5-year period following conviction. Under section 3501(2), the maximum period of disqualification is limited to 5 years following completion of the offender's sentence. For persons serving maximum terms of imprisonment (*e.g.*, those convicted of treason) this provision has no practical effect, but for others, it would permit rehabilitation after a suitable period of time. This result will effectuate a recommendation of the President's Crime Commission that: [7]

> If it is found necessary to provide for some mandatory disqualifications, then the kinds of convictions and sentences resulting in such disqualification should be narrowly defined and disqualification should ordinarily be limited to relatively short periods of time.

[7] Task Force Reports Corrections, *supra* note 1, at 90n.29.

COMMENT

on

REMOVAL OF DISQUALIFICATIONS OR DISABILITIES: SECTIONS 3502–3504

(Green, Stein; April 15, 1970)

1. *Introduction, Present Law and the Need for Proposed Legislation.*—Present 18 U.S.C. § 5021 provides for complete and automatic setting aside of the conviction of a youthful offender upon his unconditional discharge from commitment before the expiration of his sentence.[1] Draft sections 3502–3504 would extend the remedy of vacating a conviction to adult Federal ex-convicts, but would do so on a much more conservative basis. The provision would serve as an aid to returning reformed persons to society by authorizing the removal, where reasonable, of many disqualifications or disabilities a convict might otherwise bear through his life. Though Federal law imposes very few disabilities on ex-convicts, there are many such disqualifications imposed by the States:[2]

To give a brief description of the law in this area is difficult because there is such variation between different jurisdictions, and often complexity and confusion within particular jurisdictions. Most of the rights and privileges in this area derive from the States, and it is primarily State statutes and constitutions which provide for their deprivation. The State statutes which provide for the blanket loss or suspension of "civil rights" are variously interpreted to include rights to sue; to contract; to transfer, devise or inherit property; to vote; to hold public office; to testify and to serve as a juror. States may, in addition, provide specifically for the loss of other rights. Many States have no such blanket statutes; each deprivation is specified. A few States provide that no civil rights are lost.

State statutes generally do not refer to specific convictions. Ordinarily, any felony results in forfeiture; sometimes any misdemeanor involving moral turpitude has the same effect.

Forfeiture of rights may depend on whether conviction results in imprisonment, probation or suspension of sentence—even on whether it was the imposition or the execution of sentence that was suspended. Rights may be merely suspended until discharge from the period of

[1] That provision will be retained without change, together with the other present provisions of the Federal Youth Corrections Act, dealing with the treatment of youthful offenders under the Youth Correction Division of the Board of Parole, in a separate chapter of the Criminal Code on youthful offenders. (*See* the suggestion to retain these provisions in the Working Papers on Sentencing.) A similar "suspended entry of judgment" provision is proposed for narcotics misdemeanors. *See* proposed section 1827.

[2] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 89 (1967) [hereinafter cited as TASK FORCE REPORT: CORRECTIONS].

imprisonment or supervision, or until satisfaction of the sentence, or for some other period of time. (This may be termed "automatic restoration.") Often, however, they are forfeited permanently unless restoration is obtained through some formal procedure.

Consequently, a procedure for removal of disqualification is necessary in the Federal law "simply because the offender's rights in other jurisdictions may be unjustly restricted unless he is able to obtain such a certificate in the convicting jurisdiction." [3] There appears to be a trend in the States to enact such legislation. Moreover, the type of provision proposed here is common in other nations. "The common law lawyer will perhaps be surprised to find that the importance of acts of clemency is in almost all civil law jurisdictions overshadowed by special procedures for the reinstatement of former convicts. Only in countries strongly influenced by the English legal system [do executive] clemency procedures remain the only avenue of relief." [4]

2. *Effect of the Proposed Legislation*—The draft provisions derive from section 306.6 of the Model Penal Code (P.O.D. 1962). They do not go nearly so far as some States have gone to remove disqualifications. Maryland, for example, has a procedure whereby a formal adjudication of guilt may be deferred through the period of probation and the defendant may then be discharged without any conviction having been imposed.[5] Some States permit withdrawal of a guilty plea and dismissal of charges following successful service of a term of probation, or for the annulment of the conviction upon the successful end of the probation period.[6] But the Task Force Report on Corrections of the President's Commission on Law Enforcement and Administration of Justice was critical of provisions which would completely annul convictions: [7]

> Some authorities have proposed establishment of an annulment procedure, whereby the offender's records would be expunged or sealed, and he would be entitled to say he had never been convicted, or, alternatively, private individuals and official agencies would be prohibited from asking about such convictions. [A] . . . dilemma is presented in this area. Logically, annulment procedures seem unnecessary to deal with problems of State-imposed disabilities and disqualifications. The convicting jurisdiction can accomplish the same

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[3] *Id.*, at 92. It is not clear whether the States would be bound by Federal law removing the disabilities of a Federal ex-convict. *Compare People* v. *Loomis*, 42 Cal. Rptr. 124, 231 Cal. App. 2d 594 (1965) (State court in holding a defendant for possessing a pistol after having previously been convicted of a felony, can disregard setting aside of conviction under 18 U.S.C. § 5021) *with Reina* v. *United States*, 364 U.S. 507 (1960) (immunity can be granted from State prosecution to effect enforcement of Federal policy against narcotics). In any event, Federal legislation enabling removal of disabilities may be necessary for the benefit of Federal exconvicts in States that do recognize the concept of removing disabilities.

[4] Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 59 J. CRIM. L., C. & P.S. 347 (Sept. 1968).

[5] MD. CODE ANN. art. 27 § 639 (1967).

[6] *E.g.*, TEX. CODE CRIM. PROC. art. 42.12. § 7 (1966); CAL. PEN. CODE § 1203.4 (1967).

[7] TASK FORCE REPORT: CORRECTIONS, *supra* note 2, at 92.

result by simply not depriving the offender of the rights or by restoring them in some appropriate fashion. Actually to expunge records removes all discretion from those legitimately concerned with previous convictions. Thus, while it may not be justifiable to deprive convicted felons of the right to hold public office, those in the position of electing or appointing should presumably know of such convictions. And it would be nearly impossible to determine in one annulment procedure that particular convictions had no relevance for any future decision. In addition to these practical problems, some would question the propriety of government telling an offender that he has a right to deny a prior conviction, and of removing from private individuals or other jurisdictions the right to consider for themselves the relevance of a prior criminal record. But some annulment procedure may be necessary to deal with problems of irrational discrimination against past offenders by licensing agencies, private employers, and society generally.

Given an absence of unreasonable disqualifications of ex-convicts in Federal law, the draft statute, providing for a limited alleviation of legal disqualification, appears to be quite suitable for the Federal Code.

The proposed statutes provide for different stages by which a convict may be freed of disabilities: subsection 3502(2) authorizes the sentencing court to issue an order removing some or all of the disqualifications or disabilities imposed by law as a consequence of the conviction. Subsection 3502(3) provides that a district court may issue such an order upon successful completion of his sentence and section 3503 provides that, in any event, legal disqualifications or disabilities imposed as a consequence of Federal conviction shall automatically terminate 5 years after completion of the sentence, provided the convict has not since been convicted of another crime. This last provision is needed for exconvicts who are too indigent to return to court to seek an order, or too ignorant of the opportunity to remove disqualifications, or who simply do not want to revive the matter of their former conviction; they should, for rehabilitation purposes, be entitled to automatic removal of disqualifications after the passage of a reasonable period of time.

The draft statutes do not, however, release a convict from all adverse consequences of his conviction. Judicial and official consideration of prior conviction, where relevant, is permitted. Further, the statutes operate prospectively only; an ex-convict is not entitled to restoration of a job he has forfeited, though he may, upon removal of his disqualification, be considered for rehire. Moreover, the ex-convict cannot disclaim prior conviction without reference to the order vacating his conviction.

It does not appear to be proper in a Federal Code to go beyond the draft provision in removing disqualifications imposed upon ex-convicts, since most such disqualifications and disabilities are matters of State law. The draft requires that courts, agencies and officials shall give due weight to an order alleviating or vacating Federal convictions. Beyond this, State courts and administrators must be left to

determine reasonable standards for disqualifications imposed on convicted persons. Similarly, Federal immigration policy as to deportation of aliens committing acts of moral turpitude is beyond the present undertaking reform of the substantive criminal law. Nor does there appear any need for the Federal Criminal Code to contain explicit statutes on the capacity of convicts to testify in Federal courts, or to appoint agents to manage their financial affairs,[8] since no such disabilities exist.[9]

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[8] *Cf.* MODEL PENAL CODE §§ 306.4, 306.5 (P.O.D. 1962).

[9] *See, e.g., Schoppel* v. *United States*, 270 F. 2d 413, 415–416 (4th Cir. 1959), concerning testimony of fellow inmates against a prisoner:

> [T]he trend in recent years has been to allow any person of competent understanding to testify and to let the jury take into account the character of the witness in determining his credibility and the weight to be accorded his testimony. The Supreme Court so held in regard to a convicted felon in *Rosen* v. *United States*, 1918, 245 U.S. 467. . . . Indeed, the practice of calling prisoners as witnesses is so common that the objection is now seldom raised and never upheld in Federal Courts, and in the states too the common law rule has generally been abandoned, except for those convicted of perjury. 2 Wigmore § 519, (3rd Ed. 1940). Even a convicted perjurer may competently testify in a Federal Court *United States* v. *Margolis*, 3 Cir., 1943, 138 F. 2d 1002.

As for a prisoner's right to protect his property, the Bureau of Prisons has informally advised that Federal prisoners are permitted to obtain agents to protect their economic interests, and the Bureau of Prisons is liberal in permitting such agents, usually relatives, visiting privileges to discuss personal financial affairs. Further, a long standing policy of the Bureau of Prisons is to permit "correspondence necessary to enable the inmate to protect and husband the property and funds that were legitimately his at the time he entered the institution. Thus a prisoner could correspond about refinancing a mortgage on his home or sign insurance papers, but he could not operate a mortgage or insurance business while in the institution" [from a manual of the Bureau of Prisons, quoted in *Stroud* v. *Swope*, 187 F.2d 850, 851, n.1 (9th Cir. 1951)].

See also 28 U.S.C. § 1865(b) (enacted as part of P.L. 90–274, § 101, the Jury Selection and Service Act of 1968), which provides, in part, that a person shall be deemed qualified as a juror in Federal court unless he "has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty." Draft section 3503 further limits this disqualification by, in effect, providing a means for obtaining judicial amnesty. *Cf.* MODEL PENAL CODE § 306.3 (P.O.D. 1962), proposing that disqualification of a convict as a juror last only until he has satisfied his sentence.

MEMORANDUM

on

THE CAPITAL PUNISHMENT ISSUE

(Dean, Clarkson; October 30, 1968)

INTRODUCTION

Mr. Justice Frankfurter once observed of journeys in the law that often "where one comes out on a case depends on where one goes in." This admonition appears to have particular relevance in discussing the issue of capital punishment. The attitudes and assumptions people bring to this controversy often color or determine the conclusions they reach or the resolutions they propose. As one activist in the capital punishment debate once stated:[1]

> Questions of this sort . . . are not settled by reason; they are settled by prejudices and sentiments or by emotion. When they are settled they do not stay settled, for the emotions change as new stimuli are applied to the machine.

This memorandum presents the capital punishment issue to the Commission. Part I sets forth a brief summary of the existing capital crimes in the Federal system. Part II sets forth a collection of the arguments for abolition and retention of capital punishment. Part III contains materials regarding public opinion on capital punishment. And part IV contains a discussion of procedures for imposition of a death penalty sentence should the Commission decide to retain or partially abolish capital punishment in the Federal system; that is, two-stage trials for capital cases.

The question before the Commission appears to be threefold:

(1) Should the Commission take any position on the capital punishment issue, since this is a highly controversial matter and can only be ultimately determined by the Congress?

(2) Should the Commission recommend retention or partial abolition and if so, which crimes should be capital and why?

(3) Should the Commission recommend total abolition and if so why?

The materials in this memorandum, while not specifically addressed to these questions, are intended to facilitate their resolution by the Commission.*

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[1] C. DARROW, A COMMENT ON CAPITAL PUNISHMENT, in preface to J. LAWRENCE, A HISTORY OF CAPITAL PUNISHMENT, xv (1st ed. 1963).

*Chapter 36 of the Study Draft, offered provisionally subject to decisions on the death penalty, provides that a sentence of life imprisonment or death may be imposed for certain offenses and formulates the procedure for imposition of such penalties.

PART I. FEDERAL OFFENSES PRESENTLY PUNISHABLE BY DEATH

An examination of the United States Code (excluding the District of Columbia Code [2] and the Uniform Code of Military Justice [3]) reveals 16 statutes containing the death penalty. However, of these 16 statutes it appears that in one-half of them the death penalty provisions are inapplicable and invalid under the recent Supreme Court decision in *United States* v. *Jackson*, 390 U.S. 570 (1968). In *Jackson* the Court struck down as unconstitutional the death penalty provisions of the Federal Kidnapping Act, 18 U.S.C. § 1201(a).[4] Since the death penalty under this statute is only applicable to cases of trial by jury, and not to guilty pleas or to cases of trial by a judge, the Court held that this sentencing provision placed an unconstitutional burden on the right to trial by jury. The defendant who abandons his right to trial by jury is assured that he cannot be executed; the defendant who selects a jury trial is forewarned that if the jury finds him guilty he may be executed if such is the jury's decision. The Court stated that: "[T]he inevitable effect of any such provision, is . . . to discourage assertion of the Fifth Amendment right not to plead guilty and to deter the exercise of the Sixth Amendment right to demand a jury trial." 390 U.S. at 581. It will be noted that the Court struck down only the death penalty; a term of years or life is still presumably possible under the Act.

While there have been few decisions to date applying *Jackson* to other statutes,[5] there is little doubt that the death penalty provisions of other statutes that use language very similar to the statute struck down in *Jackson* will similarly be ruled unconstitutional. Below are

[2] In the District of Columbia the death penalty is imposed only for murder in the first degree and rape, D.C. CODE ANN. 22–2404, § 2801 (1967 ed.).

[3] In the Uniform Code of Military Justice, Title 10 of the United States Code, the death penalty is imposed for the following offenses:

Section	Article	Offense
885	85(c)	Desertion in time of war.
890	90	Assaulting or willfully disobeying a superior commissioned officer in time of war.
894	94	Mutiny or sedition.
899	99	Misbehavior before the enemy.
900	100	Subordinate compelling surrender.
901	101	Improper use of countersign in time of war.
902	102	Forcing a safeguard.
904	104	Aiding the enemy.
906	106	Spying in time of war.
918	118(1)(4)	Murder.
920	120	Rape.

[4] The punishment provision of 18 U.S.C. § 1201(a) reads as follows:

> . . . shall be punished (1) by death if the kidnapped has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

[5] *See, e.g.*, *Pope* v. *United States*, 392 U.S. 651 (1968), in which the Court vacated a sentence of death under the Federal Bank Robbery Act (18 U.S.C. § 2113(e)), upon the concession by the Solicitor General that "this death penalty provisions 'suffers from the same constitutional infirmity' as that found in the Federal Kidnapping Act. . . ."

set forth the 16 existing capital statutes: first (a) those that appear unaffected by *Jackson* and second (b) those likely to be held unconstitutional under the *Jackson* rationale and the maximum penalty applicable should the death penalty provision be ruled invalid.[6]

(*a*) *Federal Statutes Retaining Valid Death Penalties:*

18 U.S.C. § 34. Destruction of motor vehicles or motor vehicle facilities where death results.

18 U.S.C. § 794. Gathering or delivering defense information to aid a foreign government.

18 U.S.C. § 1111. Murder in the first degree within the special maritime and territorial jurisdiction of the United States.

18 U.S.C. § 1114. Murder of certain officers and employees of the United States.

18 U.S.C. § 1716. Causing death of another by mailing injurious articles.

18 U.S.C. § 1751. Presidential and Vice-Presidential murder and kidnapping.

18 U.S.C. § 2031. Rape within the special maritime or territorial jurisdiction of the United States.

18 U.S.C. § 2381. Treason.

49 U.S.C. § 1472(i). Aircraft piracy.

(*b*) *Federal Statutes With Invalid Death Penalties:* (Remaining Penalty Noted)

18 U.S.C. § 837(b). Transporting in interstate or foreign commerce any explosive with the knowledge or intent that it will be used to damage or destroy buildings or other real or personal property, if death results. (Imprisonment for any term of years or for life.)

18 U.S.C. § 1201(a). Federal Kidnapping Act. (Imprisonment for any term of years or for life.)

18 U.S.C. § 2113(e). Causing death of another or kidnapping while engaging in bank robbery or incidental crimes. (Imprisonment for not less than 10 years.)

21 U.S.C. § 176(b). Sale of heroin to juveniles. ($20,000 fine or imprisonment for life or for not less than 10 years.)

42 U.S.C. § 2272. Violation of specific sections of the Atomic Energy Act. ($20,000 fine or imprisonment for not more than 20 years or both.)

42 U.S.C. § 2274. Communication of restricted data under the Atomic Energy Act. ($20,000 fine or imprisonment for not more than 20 years or both.)

42 U.S.C. § 2276. Tampering with restricted data under the Atomic Energy Act. ($20,000 fine or imprisonment for not more than 20 years or both.)

It may be that the death penalty provisions of 18 U.S.C. § 1992 (causing death to another by wrecking a train) will fall also. The penalty provision of this statute is as follows:

> Whoever is convicted of any such crime which has resulted in the death of any person, shall be subject also to the death penalty or to imprisonment for life, if the jury shall in its discretion so direct, or, in the case of a plea of guilty, if the court in its discretion shall so order.

[6] The conclusions for this classification are based in part on an analysis in DEPARTMENT OF JUSTICE MEMO No. 580 (May 24, 1968).

This statute does not mention the possibility of a death sentence if the defendant waives his right to trial by jury and is instead tried by the court. In such cases, it may be argued, the death penalty is unconstitutional because it can be avoided by waiving a jury trial. Also it can be argued that if the court can impose the death penalty in cases of guilty pleas, it has the power to do so when the case is tried without a jury. Accordingly, the validity of the statute would seem questionable under *Jackson*.

The appendix contains other provisions found in Title 18 of the United States Code relating to capital punishment.

PART II. ARGUMENTS FOR ABOLITION AND RETENTION OF CAPITAL PUNISHMENT*

As recently observed in testimony before the Senate,[7] the abolition versus retention debate on capital punishment has remained relatively unchanged since the debate between Caesar and Cato on what to do with the Catiline conspirators. Set forth in this part of the memorandum is a summary of the principal arguments that have been advanced by the abolitionists and retentionists.

By way of background, it must be noted that to date, nine States,[8] Puerto Rico, and the Virgin Islands have completely abolished the death penalty. Four States have partially abolished the death sentence by restricting its application.[9] Seven States have completely or partially abolished capital punishment and subsequently restored it.[10] Although the possibility of being punished by death for some crime or another exists in 41 States, as well as in Federal law, the probability of being executed is relatively minimal: the actual number of executions has been very low.[11] In short, it appears that while de jure abolition

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*The staff is indebted to materials gathered in THE DEATH PENALTY IN AMERICA: AN ANTHOLOGY (Bedau ed. 1967) and a Library of Congress monograph on capital punishment prepared by the Legislative Reference Service (Aug. 3, 1966).

[7] Testimony of Thorsten Sellin before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary (Mar. 21, 1968). Note: Hearings unpublished.

[8] Alaska (1957), Hawaii (1957), Iowa (1965), Maine (1887), Michigan (1963), Minnesota (1911), Oregon (1964), West Virginia (1965), and Wisconsin (1853).

[9] New York (1965): Death penalty retained for persons found guilty of killing a peace officer who is acting in line of duty, and for prisoners under a life sentence who murder a guard or inmate while in confinement or while escaping from confinement: North Dakota (1915): Death penalty retained for treason, and for first degree murder committed by a prisoner who is serving a life sentence for first degree murder; Rhode Island (1852): Death penalty retained for persons convicted of committing murder while serving a life sentence for any offense; and Vermont (1965): Death penalty retained for persons convicted of first degree murder who commit a second unrelated murder; for the first degree murder of any law enforcement officer or prison employee who is in the performance of the duties of his office; for kidnapping for ransom; and for treason.

[10] Note: First date is year of abolition and second date year of restoration. Arizona (1916–1918), Delaware (1958–1961), Kansas (1907–1935), Missouri (1917–1919), South Dakota (1915–1917), Tennessee (1915–1917) and Washington (1913–1919).

[11] U.S. BUREAU OF PRISONS, DEPAR'T OF JUSTICE, NAT'L PRISONER STATISTICS No. 42, Table 4 at 12 (June 1968). *See also* Chart 3 at 6, *id.*

has ebbed and flowed [12] a de facto abolition has practically become a reality in the United States.[13]

A. THE MORAL ARGUMENT

Abolitionists argue that it is morally wrong to kill another human being whether the killing be by a private individual or by the state.[14] While the moral argument, which is based on a belief in the sanctity of human life, leads some abolitionists to argue that capital punishment is wrong regardless of whether or not it benefits society, such an

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[12] The President's Commission on Law Enforcement and Administration of Justice noted:

> There has not been a uniform trend toward repeal of capital punishment laws, however. In 1961 the Delaware legislature reenacted the death penalty after having repealed it in 1958. Last year the voters in Colorado reenacted a proposed constitutional amendment which would have abolished capital punishment. In Indiana an abolition bill passed by both houses of the legislature was vetoed by the Governor. And in a number of States bills providing for repeal of the penalty have been defeated in the legislature. (TASK FORCE REPORT: THE COURTS 27 (1967)).

[13] The table below, albeit a partial listing, shows the trend of foreign nations toward de jure abolition.

Argentina, 1922
Australia:
New South Wales,[a] 1955
Queensland, 1922
Austria, 1945
Belgium,[b] 1867
Brazil, 1889
Bulgaria [b]
Canada[a]
Chile [b]
Colombia, 1910
Costa Rica, 1882
Denmark,[a] 1930
Dominican Republic,[a] 1924
Ecuador, 1897
Finland,[a] 1949
German Federal Republic, 1949
Great Britain,[c] 1965
Greenland, 1954
Iceland,[a] 1940
Italy, 1944
Liechtenstein,[b] 1798
Luxembourg [b]
Mexico,[c] 1931
Netherlands, 1870
Netherlands, Antilles, 1957
New Zealand, 1961
Nicaragua,[a] 1892
Norway,[d] 1905
Portugal, 1867
Republic of San Marino, 1865
Rumania,[a] 1865
Sweden, 1921
Switzerland,[a] 1937
Uruguay, 1907
Vatican City State
Venezuela, 1863

[a] Death penalty retained only for certain exceptional crimes, such as treason, piracy, war crimes, killing of policemen.

[b] Death penalty abolished by custom, but not by law.

[c] Dealth penalty abolished in Federal territory and in 25 of 29 States.

[d] Death penalty reinstated briefly after World War II for war crimes.

Sources: U.N. DEPAR'T ECON. & SOCIAL AFFAIRS, CAPITAL PUNISHMENT 7–9, U.N. Doc. ST/SOA/SD/9 (1962): 306 PARL. DEB., H.L. (No. 25) at 1120 (1969): N.Y. Times, Dec. 21, 1969 at 28, col. 3.

According to an editorial in the New York Times, Dec. 20, 1969, at 30, col. 1, with the 1969 permanent abolition by Great Britain, only the United States and France among Western nations retain capital punishment. "In France . . . President Pompidou, a convinced abolitionist, is pledged to eliminate the guillotine. . . . More than 70 countries have not put an end to [capital punishment]."

[e] The death penalty for murder was temporarily abolished in 1965 and permanently abolished in 1969. The death penalty is still available (although it has not been imposed for more than a century) for the crimes of wartime treason, piracy, and arson in the royal dockyards and arsenals. N.Y. Times Dec. 19, 1969 at 9, col. 1; N.Y. Times Dec. 21, 1969, at 28, col. 3.

[14] M. DISALLE, THE POWER OF LIFE AND DEATH 6 (1965) [hereinafter cited as DISALLE]

absolute stand is unusual. A more prevalent position recognizes that the sanctity of human life is not an absolute, but rather a highly cherished value that should give way only upon a persuasive showing that capital punishment serves a prime social purpose that cannot otherwise be served.[15] Abolitionists contend there has been no such showing (a view which will be discussed in the pages immediately following) and because of the moral and practical evils inherent in the death penalty, the burden of proving its necessity must rest with its supporters.

Retentionists argue in defense of capital punishment that the state has a moral responsibility to protect its law-abiding citizens. Retentionists contend that the death penalty is a superior deterrent to long-term imprisonment for major crimes, and that it is an essential protective measure against the incorrigibly dangerous killer. The retentionists believe that because of the state's responsibility to protect its citizens, the burden rests upon the abolitionists to prove conclusively that the death penalty is ineffective as a deterrent and unnecessary as a protective measure. Those who favor retaining the death penalty find that such conclusive proof is lacking; a position which will be discussed in the pages immediately following.

B. THE DETERRENCE ARGUMENT

The efficacy of the death penalty as a deterrent to or preventative of crime is the major factual issue in dispute between abolitionists and retentionists.[16] It will be noted, however, that this debate has principally focused on the relationship of the death penalty and the crime of murder. Abolitionists argue that the deterrent value of the death penalty is called into serious question by the available statistics, by the evidence of modern psychology, and by the manner in which the death penalty is administered. Retentionists argue, to the contrary, that the statistics are inadequate to draw any conclusions, that the psychological impact is significant, and that the evidence of practical experience attests to the efficacy of capital punishment.

1. *The Statistics*

A leading study of the deterrent impact of the death penalty was prepared by Thorsten Sellin in a report for the Model Penal Code project of the American Law Institute.[17] Sellin analyzes the four ways[18] in which the deterrent value of capital punishment would be statistically evident if it exists, but, in fact, the evidence is to the contrary and indicative of no measurable deterrent value. First,

[15] H. Packer, *Mr. Barzun and Capital Punishment*, 31 THE AMERICAN SCHOLAR 440 (Summer 1962) [hereinafter cited as Packer].

[16] THE DEATH PENALTY IN AMERICA: AN ANTHOLOGY 260–261 (H. Bedau ed. 1967) [hereinafter cited as Bedau].

[17] MODEL PENAL CODE § 201.6, Comment at 63 (Tent. Draft No. 9, 1959); T. SELLIN, THE DEATH PENALTY (1959) [reproduced in Model Penal Code (Tent. Draft No. 9, 1959) and hereinafter cited as SELLIN DEATH PENALTY].

[18] It seems reasonable to assume that if the death penalty exercises a deterrent or preventive effect on prospective murderers, the following propositions would be true:

(a) Murders should be less frequent in States that have the death penalty than in those that have abolished it, other factors being equal. Comparisons of this nature must be made among States that are alike as possible

studies of the homicide rates in contiguous jurisdictions[19] with and without the death penalty show that both States with and without the death penalty have virtually identical murder rates and trends.[20] Second, those studies conducted to determine if the homicide rate in a given jurisdiction increases with the abolition of the death penalty and decreases with its restoration show that there is no correlation between the status of the death penalty and the homicide rate.[21] Third, on the assumption that a well-publicized execution should have the greatest deterrent effect in that locale, studies have been made to test the effect of executions on the capital crime rate in the community where the executions occurred. These studies show that there was no significant decrease (or increase) in the murder rate following an execution(s).[22] Fourth, studies to determine if law enforcement and prison personnel are afforded greater protection by the death penalty show that police and prison homicides are virtually the same in abolition States as in death penalty States.[23] From these studies in the four above areas, Sellin concludes:

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in all other respects—character of population, social and economic condition, *etc.*—in order not to introduce factors known to influence murder rates in a serious manner but present in only one of these States.

(b) Murders should increase when the death penalty is abolished and should decline when it is restored.

(c) The deterrent effect should be greatest and should therefore affect murder rates most powerfully in those communities where the crime occurred and its consequences are most strongly brought home to the population.

(d) Law enforcement officers would be safer from murderous attacks in States that have the death penalty than in those without it.

SELLIN, DEATH PENALTY, *supra* note 17, at 21.

[19] *E.g.*, homicide death rates (1920–1955): in Maine, New Hampshire, and Vermont: in Massachusetts, Connecticut, and Rhode Island: in Minnesota, Iowa, and Wisconsin; and in Michigan, Indiana, and Ohio.

See SELLIN, DEATH PENALTY, *supra* note 17, at 25–34.

[20] SELLIN, DEATH PENALTY, *supra* note 17, at 34. Sellin notes, however, that existing statistics are something less than fully adequate but contends that:

> Students of criminal statistics have examined these data with some care and have arrived at the conclusion that the homicide death rate is adequate for an estimate of the trend of murder. This conclusion is based on the assumption that the proportion of capital murders in the total of such deaths remains reasonably constant. Accepting this assumption, we shall examine the relationship between executions and the rates of death due to homicide. *Id.* at 22.

[21] *Id.* at 34–50. *See also* U.N. DEPAR'T ECON. & SOCIAL AFFAIRS, CAPITAL PUNISHMENT 54, U.N. Doc. ST/SOA/SD/9 (1962), wherein it is observed that:

> All the information available appears to confirm that such a removal has, in fact, never been followed by a notable rise in the incidence of the crime no longer punishable with death. This observation, moreover, confirms the 19th century experience with respect to such offenses as theft and even robbery, forgery and counterfeiting currency, which have progressively ceased to be punishable with death: indeed, these crimes, so far from increasing, actually decreased after partial abolition.

[22] R. Dann, THE DETERRENT EFFECT ON CAPITAL PUNISHMENT, THE COMMITTEE OF PHILANTHROPIC LABOR OF PHILADELPHIA YEARLY MEETING OF FRIENDS BULL. No. 29 (1935): L. Savitz, *A Study in Capital Punishment*, 49 J. CRIM. L. C. & P. S. 338–341 (Nov.–Dec. 1958).

[23] In testimony before the Senate (note 7, *supra*), Sellin presented statistical studies to show that police and prison homicides are not related to capital punishment. *See* Sellin *The Death Penalty and Police Safety*, 22 PARL. 2D SESS. 718–728 (1955). APPENDIX F, MINUTES OF PROCEEDINGS AND EVIDENCE No. 20, JOINT COMM. OF THE SENATE AND HOUSE OF COMMONS ON CAPITAL PUNISHMENT, CORPORAL PUNISHMENT AND LOTTERIES (Ottawa, Queen's Printer, 1955); and CAPITAL PUNISHMENT 152–160 (Sellin ed. 1967).

> Anyone who carefully examines the . . . data is bound to arrive at the conclusion that the death penalty, as we use it, exercises no influence on the extent or fluctuating rates of capital crimes. It has failed as a deterrent.[24]

Retentionists argue that the deterrent value of the death penalty vis-a-vis imprisonment cannot be—and has not been—determined by statistical studies. First, there is the fact that those who are deterred do not show up as statistics.[25] Secondly, the available statistics are inadequate. There is no exact information as to the volume of capital crime in the United States, and the homicide rate figures used by the abolitionists are imprecise.[26] More specifically, most of the statistical studies of the deterrent impact of the death penalty rely on the "murder and nonnegligent manslaughter" figures reported by the FBI in its uniform crime reports. These figures do not distinguish between those murders which are punishable by death (for example, first degree murders) and the lesser nonnegligent criminal homicides punishable by imprisonment; instead they are all lumped together. Furthermore, the retentionists argue, it is questionable—and therefore inconclusive—to assume that the proportional relationship of capital murders to total homicide rates is relatively constant.[27]

2. *The Psychology of Deterrence*

Abolitionists argue that murders are either premeditated or they are not. In the case of unpremeditated murders, no punishment can be effective as a deterrent. Abolitionists note that considerable evidence exists that a great percentage of those who commit violent crimes are likely to be suffering from some form of mental illness or have acted in a fit of passion. Therefore, they are undeterrable and it is pointless to threaten such offenders with death.

The abolitionist's argument continues. Premediated murders are committed by people who either do or do not expect to be caught. With regard to those who expect to be caught, the threat of punishment by death will not control the behavior of such an individual. With respect to those who plan their murders on the assumption they

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[24] SELLIN, DEATH PENALTY, *supra* note 17, at 63.

[25] THE FLA. SPECIAL COMM'N FOR THE STUDY OF THE ABOLITION OF DEATH PENALTY IN CAPITAL CASES REPORT 13–14 (1965) [hereinafter cited as FLA. COMM'N REPORT].

> Superficial consideration might lead one to conclude that this question [whether the death penalty is superior to imprisonment in deterring those persons who would otherwise commit serious crimes] might be answered by scientific and statistical studies, but such is not the case. There is no reliable method for determining who has contemplated committing a capital crime but refrained due to the fear of the death penalty as distinguished from other forms of criminal punishment . . . It is probably impossible to subject deterrence to scientific study in any direct way. The facts cannot be ascertained so that they can be subjected to scientific analysis and interpretation.

[26] Bedau, *supra* note 16, at 56–57.

[27] *Id.* at 265–266. The Florida Special Commission comments:

> Perhaps it is fortunate that the judgment of most persons who have studied them is that they do not prove much: that while they do not prove that the death penalty is a superior deterrent, they do not prove that it is not . . . . J. Edgar Hoover, Director of the Federal Bureau of Investigation, favors retention of the death penalty, but he has charged that statistical comparisons [based on inferences from homicide rates to first-degree murder rates] are completely inconclusive. (FLA. COMM'N REPORT, *supra* note 25, at 17.)

will get away with it, a penalty is a meaningless deterrent; these persons can only be deterred by increasing the effectiveness of law enforcement and criminal justice.

Finally, there are presumedly those persons who are sane and cautious enough to weigh the risk of punishment (that is, life versus death sentence) and able to decide that while the risk of death is too great in consideration of the anticipated gain from the crime, protracted imprisonment is not such a great risk. But, the abolitionists ask, how many such persons are there in the total population? The abolitionists believe: [28]

> It would be most exceptional for a man to be insufficiently sane and normal to be deterred by the risk of a sentence of protracted imprisonment but yet sufficiently sane and normal to be deterred by the risk of his own execution, when both risks are at a level of contingency which he is doing his utmost to avoid.

Retentionists analyze the situation similarly but draw different conclusions. The fact that many murders are crimes of passion or acts of insanity is interpreted by the retentionists not as an indication of the uselessness of the death penalty as a deterrent, but rather as an indication of its success in deterring people from premediated murder.[29] Retentionists contend that the psychological deterrent impact of the death penalty is most effective in preventing large numbers of potential wrongdoers from ever reaching the state of criminality where their behavior becomes uncontrollable and impulsive. [30]

3. *Administration of the Death Penalty*

Abolitionists argue that the way in which capital punishment is administered undercuts whatever deterrent effect it might possess on those capable of exercising some degree of rationality. For punishment to have efficacy as a deterrent, the penalty must be imposed consistently, immediately and inexorably, and the general public must expect exactly this. It is argued that the practice in administering capital punishment does not satisfy any of these fundamental and requisite conditions. Only a small proportion of first degree murderers are sen-

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[28] Bedau, *supra* note 16, at 272, quoting a Ceylon report on capital punishment.

[29] The Canadian Parliamentary Committee's 1956 Report on Capital Punishment notes (at p. 14):

> One measure of its [the death penalty's] deterrent effect was afforded by an analysis of murders which indicated that a considerable proportion, probably in excess of half, are committed under the compulsion of overwhelming passion or anger where no deterrent could have been effective. This would seem to demonstrate that the death penalty, coupled with the excellent standards of law enforcement prevailing in Canada, has been successful in deterring the commission of deliberate, premeditated murders and reducing their incidence to minimum proportions. The deterrent effect may also be indicated by the widespread association of the crime of murder with the death penalty which is undoubtedly one reason why murder is regarded as such a grave and abhorrent crime.

[30] *See* MASS. SPECIAL COMM., ESTABLISHED FOR THE PURPOSE OF INVESTIGATING AND STUDYING THE ABOLITION OF THE DEATH PENALTY IN CAPITAL CASES, REPORT AND RECOMMENDATIONS (1958); the minority report is reprinted in CAPITAL PUNISHMENT 32 (McClellan ed. 1961).

tenced to death [31] and even fewer are executed.[32] The delay in convicting and executing capital offenders is increasing and notorious. Abolitionists conclude from these circumstances that "almost anyone who contemplates some horrible crime can see some chance in getting away with it, or at least in not having to pay the supreme penalty." [33]

4. *The Evidence of Experience*

Retentionists, in rejecting the statistical arguments for abolition as inconclusive, turn to the experience of the law enforcement profession as demonstrative and supportive of the deterrent value of capital punishment. FBI Director J. Edgar Hoover speaks for most of the nation's law enforcement officers when he states: [34]

> The professional law enforcement officer is convinced from experience that the hardened criminal has been and is deterred from killing based on the prospect of the death penalty.

In brief, law enforcement officers cite the following typical instances where the death penalty evidences its deterrent value: [35]

> (a) Criminals who have committed an offense punishable by life imprisonment, when faced with capture, refrained from killing their captor though by killing, escape seemed probable. When asked why they refrained from the homicide, quick response indicated a willingness to serve a life sentence but not to risk the death penalty.
>
> (b) Criminals about to commit certain offenses refrained from carrying deadly weapons. Upon apprehension, answers to questions concerning absence of such weapons indicated a desire to avoid more serious punishment by carrying a deadly weapon, and also to avoid use of the weapon which could result in imposition of the death penalty.
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> (c) Victims have been removed from a capital punishment State to a noncapital punishment State to allow the murderer opportunity for homicide without threat to his own life.[36] This in itself demonstrates that the death penalty is considered by some would-be killers.

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[31] *E.g.*, over the last 5 years there has been an annual average of 10,122 murders reported in the FBI's Uniform Crime Reports. Over the same period of time, the National Prisoner Statistics indicate there has been an average of nine persons annually sentenced to death for murder.

[32] *See* note 11 *supra*. *See also* Natl. Prisoner Statistics, *supra* note 31.

[33] Bedau *supra* note 16, at 270.

[34] F.B.I. UNIFORM CRIME REPORTS, 14 (1959).

[35] 1959 ABA CRIMINAL LAW SECTION 15 (1960) [hereinafter cited as ABA CRIMINAL LAW SECTION].

[36] The Attorney General of Kansas testified before the British Royal Commission that:

> One of the contributing factors leading to the reenactment [in the State of Kansas] of the death penalty for first-degree murder was the fact that shortly prior thereto numerous deliberate murders were committed in Kansas by persons who had previously committed murders in states surrounding Kansas, where their punishment, if captured, could have been the death penalty. Such murders in Kansas were admittedly made solely for the purpose of securing a sentence to life imprisonment in Kansas if captured.

Quoted in Bedau, *supra* note 16, at 336. More recently a letter was intercepted by the Delaware State Police in which a murderer wrote that he had known before he killed that the most he could get was 15 years. The murder occurred after Delaware had repealed capital punishment in 1958 and was a major factor in the restitution of the death penalty in that State is 1961 MD. COMM. ON CAPITAL PUNISHMENT, REPORT 30–31 (1962).

C. ARGUMENTS FOR THE DEATH PENALTY AS A PROTECTIVE MEASURE

Abolitionists do not disagree with retentionists that the death penalty is an effective protective measure against incorrigibly (that is, nonreformable) dangerous criminals. The debate as to the protective aspects of death penalty turns on whether, in fact, such an extreme measure is really necessary.

Abolitionists argue that life imprisonment is a completely adequate protective measure.[37] First, abolitionists contend that murderers generally make the the best prisoners; murderers commit a negligible percentage of the violent prison crimes.[38] Second, abolitionists contend that the danger of the paroled murderer is considerably exaggerated by the retentionists. There is considerable misconception in the assumption that the murderer who gets a life sentence or whose death sentence is commuted to life imprisonment can easily obtain his freedom. Furthermore, statistics indicate that the behavior of a first-degree murderer released on parole is "very good, much better than that of other prisoners who have been paroled, especially property offenders." [39] This is also true with those who have been pardoned.[40] Finally, abolitionists would argue that it is indeed misguided to release those who remain a danger to society, but that this indicates a need for reform of parole and pardon practices rather than a need for executions.[41] Many abolitionists believe that rather than execute the incorrigibly dangerous we should be studying him to determine how we can prevent others from such behavior.[42]

Retentionists do not accept the abolitionist position that life imprisonment is in all cases a sufficient safeguard. They argue that since some criminals are incorrigibly antisocial and will remain potential dangerous to society for the remainder of their lives, the death penalty is necessary. It must be remembered that these men constitute a danger to prison officials and to the other inmates, and there is always the chance that they may escape.

Furthermore, retentionists argue that, because the life sentence rarely means that an offender is in reality imprisoned for life, there is a serious possibility that dangerous men will be released on parole. Retentionists point out that it is impossible to be certain that a murderer has, in fact, been "cured." [43]

The retentionist's defense of the death penalty is bottomed on the argument that there is no satisfactory alternative sentence for those criminals who clearly constitute a continuing danger to society. The obvious possible alternative is the life sentence without the possibility

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[37] SELLIN, DEATH PENALTY, *supra* note 17, at 78–79.

[38] SELLIN, DEATH PENALTY, *supra* note 17, at 72. *See also* Bedau, *supra* note 16, at 400–401.

[39] ABA CRIMINAL LAW SECTION, *supra* note 27, at 24

[40] Bedau, *supra* note 16, at 397; *see* 397–399, *id.*, for State statistics.

[41] R. Caldwell, *Why is the Death Penalty Retained?* THE ANNALS 48–49 (November 1952).

[42] K. MENNINGER, THE CRIME OF PUNISHMENT (1968).

[43] Barzun, as quoted in Bedau, *supra* note 16, at 159, notes:

> The 'scientific' means of cure are more than uncertain. The apparatus of detention only increases the killer's antisocial animus. . . . Some of these are indeed 'cured'—so long as they stay under a rule. The stress of the social free-for-all throws them back on their violent modes of self-expression. At that point I agree that society has failed—twice: it has failed the victims, whatever may be its guilt toward the killer.

of parole. However, a number of penologists believe that this is a highly unsatisfactory solution. They argue that such a sentence removes all inducement to improve and thus greatly increases the difficulty and danger involved in handling the men so sentenced.

Several States which have generally abolished capital punishment have retained it for a person found guilty of murder who then murders again. The argument that the death penalty should be retained for those who murder a second time is a limited version of both the argument that the death penalty is necessary as a protective measure, and the argument that it is more effective than life imprisonment as a deterrent. Sidney Hook, professor of philosophy at New York University, comments: [44]

> . . . in a sub-class of murderers, *i.e.*, those who murder several times, there may be a special group of sane murderers who, knowing that they will not be executed, will not hesitate to kill again and again. For *them* the argument from deterrence is obviously valid. Those who say that there must be no exceptions to the abolition of capital punishment cannot rule out the existence of such cases on *a priori* grounds. If they admit that there is a reasonable probability that such murderers will murder again or attempt to murder again, a probability which usually grows with the number of repeated murders, and still insist they would *never* approve of capital punishment, I would conclude that they are indifferent to the lives of the human beings doomed, on their position, to be victims.

D. THE RETRIBUTION VERSUS VENGEANCE ARGUMENT

Abolitionists do not accept the argument that capital punishment is defensible on the grounds of retribution, apart from any benefit it may afford society either as a superior deterrent or as a necessary protective measure. According to many proponents of capital punishment, some criminals are simply unfit to live; they have committed acts so heinous that the only appropriate punishment is death. This function of the death penalty is commonly referred to on the retentionist side as retribution and on the abolitionist side as vengeance.

Abolitionists argue that the motivation behind this use of the death penalty is of the same order as the irrationality which provoked the criminal to the act for which he is being executed. As one abolitionist has commented: [45]

> Yet though easy to dismiss in reasoned argument on both moral and logical grounds, the desire for vengeance has deep, unconscious roots and is roused when we feel strong indignation or revulsion—whether the reasoning mind approves or not. This psychological fact is largely ignored in abolitionist propaganda—yet it has to be accepted as a fact. The admission that even confirmed abolitionists are not proof against occasional vindictive impulses does not mean that such impulses should be legally sanctioned by society, any more than we sanction some other unpalatable instincts of our biological

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[44] S. Hook, *The Death Sentence* in Bedau, *supra* note 16, at 153.

[45] A. KOESTLER, REFLECTIONS ON HANGING, 105 (1956) [hereinafter cited as KOESTLER].

> inheritance. Deep inside every civilized being there lurks a tiny Stone Age man, dangling a club to rob and rape, and screaming an eye for an eye. But we would rather not have that little fur-clad figure dictate the law of the land.

In short, abolitionists believe that the purpose of the criminal law is to provide protection against man's irrationality and violence, not to furnish a means of expressing it. Abolitionists contend that the death penalty is a violation of this purpose.[46]

Retentionists defend capital punishment on the argument that it satisfies a legitimate communal need for retribution aroused by particularly heinous crimes. Society's desire that a man pay with his life for a violent crime represents both society's moral condemnation of such acts and a closing of the ranks against those who violate society's laws.[47]

Retentionists reject the assertion that capital punishment is a violation of the sanctity of human life. To the contrary, they contend that it recognizes that sanctity.

E. ARGUMENTS RELATING TO CAPITAL PUNISHMENT AND CRIMINAL JUSTICE

A number of the arguments against capital punishment relate to its alleged incompatibility with equitable and efficient criminal justice.

1. *The Possibility of Error*

Observing the danger that an innocent man might be executed, the Marquis de Lafayette once said: "I shall ask for the abolition of the penalty of death until I have the infallibility of human judgment demonstrated to me." [48] Thorsten Sellin writes: [49]

> Human justice can never be infallible. No matter how conscientiously courts operate, there still exists a possibility that an innocent person may, due to a combination of circumstances that defeat justice, be sentenced to death and even executed. That possibility is made abundantly clear when one considers the many instances in which innocent persons have been saved from the extreme penalty either by the last minute discovery of new evidence or by a commutation followed, perhaps after many years in prison, by the discovery of the real criminal.

Studies indicate that innocent men have been wrongly convicted in the United States [50] and several Governors confronted with final decisions on execution have confirmed the reality and seriousness of the

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[46] MD. COMM. ON CAPITAL PUNISHMENT REPORT 25 (1962).

[47] Lord Justice Denning testified before the British Royal Commission on Capital Punishment that:

> The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else . . . . The ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime: and from this point of view, there are some murders which, in the present state of public opinion, demand the most emphatic denunication of all, namely the death penalty.

Quoted in R. Donnelly, *Capital Punishment*, CONG. REC., A6283, A6285 (daily ed. Aug. 24, 1960). [hereinafter cited as DONNELLY].

[48] Quoted in O. Pollack, *The Errors of Justice*, THE ANNALS 115 (1952).

[49] SELLIN, DEATH PENALTY, *supra* note 17, at 63.

[50] Bedau, *supra* note 16, at 436–440.

danger of executing the innocent.[51] It is reported that Maine, Rhode Island, and Wisconsin abolished the death penalty because innocent men were hanged.[52]

Retentionists argue that the possibility of error is exaggerated by the abolitionists and it is not, in fact, a very real possibility given the precautions taken by the courts in capital cases and the corrective powers of executive clemency. There have been no known cases in which an innocent man has been executed.[53] However, if an error should be made, this is the necessary price that must be paid within a society which is made up of human beings and whose authority is exercised not by angels but by men themselves. It is not brutal or unfeeling to suggest that the danger of miscarriage of justice must be weighed against the far greater evils for which the death penalty aims to provide effective remedies.[54]

2. *Inequality of Application*

Some abolitionists allege that there is a discrimination in the use of the death penalty, based primarily on race and wealth. Citing particularly statistics on executions for rape, abolitionists charge that racial prejudice is clear and evidences the unequal application of the death penalty. Other abolitionists believe that it is the "poor and friendless" who are executed because the very nature of the court system frequently makes the difference between life and death determined by the ability of the accused to provide himself with skilled legal counsel.[55]

Retentionists regard the allegation as a misinterpretation of the facts. First to say that the "poor and friendless" are discriminated against is to imply deliberate discrimination by trial courts, appellate courts, and boards of pardons. This simply is not true and has never been—and cannot be—proved. Rather the facts indicate that the vast majority of all prisoners throughout our Nation's history have been the "poor and friendless." It has never been shown that those under the death sentence differ significantly from the vast majority of other criminals.[56] The fact that a higher percentage of Negroes are subjected to a death sentence is similarly indicative of the fact that a high percentage of Negroes commit capital crimes.[57]

3. *The Administration of Criminal Justice*

Abolitionists contend that the existence of the death penalty has an adverse impact on the administration of criminal justice.[58] The

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[51] *E.g.*, E. BROWN, STATEMENT ON CAPITAL PUNISHMENT 6 (California Printing Office 1963); and DISALLE, *supra* note 14, at 6.

[52] Bedau, *supra* note 16, at 407.

[53] *Id.* at 440.

[54] MASS. SPECIAL COMM'N ESTABLISHED FOR THE PURPOSE OF INVESTIGATING AND STUDYING THE ABOLITION OF THE DEATH PENALTY IN CAPITAL CASES, REPORT AND RECOMMENDATIONS (1958); the minority report is reprinted in CAPITAL PUNISHMENT 81 (McClellan ed. 1961).

[55] DISALLE, *supra* note 14, at 10–11.

[56] Bedau, *supra* note 16, at 411–412.

[57] Wolfgang, Kelly & Nolde, *Exceptions and Commutations in Pennsylvania* in Bedau, *supra* note 16, at 473.

[58] The Florida Special Commission summed up the argument as follows:

> When the life of an accused person is at stake, it is more difficult and takes longer to impanel juries because prospective jurors dislike such cases and are frequently disqualified because they do not believe in the death penalty.

matter of the disproportionate amount of time involved in capital cases was the subject of a study conducted by the American Bar Foundation, the research branch of the American Bar Association. This 1961 study, prompted by the Caryl Chessman case (which began in June 1948 and ended with his execution on May 2, 1960) concluded that long delays in capital trials and in executing death sentences weakens public confidence in the law.[59]

Abolitionists further argue that the emotion aroused by a capital trial—the spectacle of a man fighting for his life—is not compatible with the just and rational administration of the law.[60] The retentionists respond to these arguments that what is needed is legal reform, not abolition, but the abolitionists in turn contend that legal reform is no answer unless the retentionists are "prepared to propose the solution that has so far eluded all students of the subject." [61] Many abolitionists believe that the death penalty is a principal factor operating against the needed reform of our criminal law.[62]

As indicated above, retentionists view the problems of the death penalty in the administration of criminal law not as an argument for abolishing it but a need for reforming court and criminal procedure. A partial reform is set forth in part III of this memorandum, *infra*. Retentionists, while they have not always been specific, also call for reform in "the rules of evidence, the customs of prosecution, (and) the machinery of appeal." [63]

F. THE RELIGIOUS ARGUMENT

The religious argument against the death penalty generally centers around the belief that even sinful men are the objects of God's redemptive love, and that vengeance belongs to God, not man. In the words of Bishop John Wesley Lord of the Washington, D.C. Conference of the Methodist Church:

> A Christian view of punishment must look beyond correction to redemption. It is our Christian faith that redemption by the grace of God is open to every repentant sinner, and that it is the duty of every Christian to bring to others by every available means the challenge and opportunity of a new and better life. We believe that under these circumstances only God has the right to terminate life.

Trials become longer and more expensive and emotions are especially likely to confuse the issues. Indeed, the guilty person is more likely to escape punishment altogether because of the reluctance of the jury to convict and thereby make the death penalty a possibility. Appeals are more likely to result in reversals, and this brings on new and equally expensive trials. More are of the opinion that there would be many convictions for what are now capital crimes if life imprisonment replaced execution. (FLA. COMM'N REPORT, *supra* note 25, at 26.)

[59] New York Times, Jan. 29, 1961, at 60, col. 1.

[60] Mr. Justice Frankfurter, in his appearance as a witness before the British Royal Commission on Capital Punishment, stated: "When life is at hazard in a trial, it sensationalizes the whole thing almost unwittingly: the effect on juries, the bar, the public, the judiciary, I regard as very bad. I think scientifically the claim of deterrence is not worth much. Whatever proof there may be in my judgment does not outweigh the social loss due to the inherent sensationalism of a trial for life" Quoted in Donnelly, *supra* note 47, at A-6285.

[61] Packer, *supra* note 15, at 441.

[62] *See* Bedau, *supra* note 16, at 433. *See also* FED. PROB. 21 (Sept. 1961).

[63] Bedau, *supra* note 16, at 163.

Abolitionists and retentionists both argue that the Bible supports their side. Abolitionists cite Romans 12:17 in which Paul says: "Recompense to no man evil for evil. . . . avenge not yourselves, but rather give place unto wrath: for it is written, Vengeance is mine; I will repay, saith the Lord."

In the Old Testament, the abolitionists point first to the fact that Cain was not put to death (Genesis 4:15), and then to the adjuration in Leviticus 19:18: "Thou shalt not avenge, nor bear any grudge against the children of thy people, but thou shalt love thy neighbor as thyself: I am the Lord."

More generally, those opposed to capital punishment for religious reasons argue that the whole Christian concept of love and redemption as presented in the New Testament runs counter to use of the death penalty in a system of justice. In support of this, they refer specifically to the Sermon on the Mount (Matthew 5:44, for example) and to Luke 6:35.[64]

The defense of capital punishment on religious grounds rests primarily on two points. First, it is argued that the death penalty is a testimony to the sacredness of life, and—in the case of the Hebrew-Christian tradition—that the Bible clearly differentiates between murder and the death penalty as a just punishment for the taking of God-given life. Retentionists contend that this argument is supported by the following passages, as well as others, from the Old Testament:

> Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made He man (Genesis 9:6).
>
> He that smiteth a man, so that he die, shall be surely put to death . . . But if a man comes presumptuously upon his neighbor to slay him with guile; thou shalt take him from mine altar, that he may die (Exodus 21:12, 14).
>
> Whoso killeth any person, the murderer shall be put to death by the mouth of witnesses . . . Moreover ye shall take no satisfaction for the life of a murderer, which is guilty of death; but he shall be surely put to death . . . and the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it (Numbers 35:30, 31, 33).

Turning to the New Testament,[65] it is argued that the law of love preached by Jesus implies the need for the existence of a strong civil

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[64] In addition to the Old and New Testaments, abolitionists quote St. Augustine in opposition to capital punishment. The following passage is from his plea that some Donatists, a heretic African sect, who had confessed to a heinous murder of Christians, be spared the death penalty: We do not wish to have the sufferings of the servants of God avenged by the infliction of precisely similar injuries in the way of retaliation. Not, of course, that we object to the removal from these wicked men of the liberty to perpetrate further crimes, but our desire is rather that justice be satisfied without the taking of their lives or the maiming of their bodies in any particular; and that, by such coercive measures as may be in accordance with the laws, they be drawn away from their insane frenzy to the quietness of men in their sound judgment, or compelled to give up mischievous violence and betake themselves to some useful labour.

Quoted in KOESTLER, *supra* note 45, at 105.

[65] In addition to the Old and New Testaments, St. Thomas Aquinas is also quoted in support of capital punishment: "It is lawful to kill an evil-doer insofar as it is directed to the welfare of the whole community." *II Aquinas*, SUMMA THEOLOGICA 1467 (Benziger ed., 1947).

law, and that it is a misreading of the New Testament to see it as advocating leniency for criminal behavior.[66]

Part III. Public Opinion

Available information makes it extremely difficult to discern any clear trend in the United States toward abolition or retention of the death penalty. The imprecision of the existing indicators subject any analysis to question. Nevertheless, reviewing this information with appropriate caveats may be helpful to the Commission.

General public opinion regarding the death penalty has been measured in several Gallup polls. The four most recent Gallup poll surveys indicate a steady decrease of public support for capital punishment, but it must be noted that the survey was restricted—as most of the material in this memorandum—to capital punishment for murder. The results of the polls in which the question asked was, "Are you in favor of the death penalty for persons convicted of murder?" are set forth below:

[In percent]

	1966	1965	1960	1953
Yes	42	45	51	68
No	47	43	36	25
No opinion	11	12	13	7

It may be argued that this changing attitude toward capital punishment has been reflected by the fact that most of the States that have abolished or partially abolished capital punishment have done so rather recently. Another possible indication is the decrease in executions of most offenders convicted of capital crimes. These indications, however, must be balanced against the fact that capital punishment still exists in 41 States, the District of Columbia and in the Federal system. If State and Federal legislators are any reflection of public sentiment—and indeed they are—there obviously remains a substantial public resistence to abolition.

Any evaluation of public sentiment must also take cognizance of the fact that it has been the abolitionists—and not the retentionists—who have organized themselves into highly articulate lobbies and found

[66] This argument is summed up as follows by Reverend Dr. Jacob J. Vellenga who, since 1958, has served as associate executive of the United Presbyterian Church in the United States:

> The law of love, also called the law of liberty, was not presented to do away with the natural laws of society, but to inaugurate a new concept of law written on the heart where the mainsprings of action are born. The church is ever to strive for superior law and order, not to advocate a lower order that makes wrongdoing less culpable.
>
> * * * * * * *
>
> [W]herever and whenever God's love and mercy are rejected, as in crime, natural law and order must prevail, not as extraneous to redemption but as part of the whole scope of God's dealings with man.
>
> * * * * * * *
>
> The law of capital punishment must stand as a silent but powerful witness to the sacredness of God-given life. Words are not enough to show that life is sacred. Active justice must be administered when the sacredness of life is violated.

representatives in respected public figures. Below is set forth material prepared by the Library of Congress indicating the current positions of known groups involved in the abolition versus retention debate.

A. AGAINST CAPITAL PUNISHMENT

In an article which appeared in the publication *Current History* (vol. 53, Aug. 1967, at 82–87) entitled "The Issue of Capital Punishment," Hugo Adam Bedau comments, at 84–85:

> [S]everal groups with a national constituency have taken public stands in favor of abolition. Most of the major Protestant denominations (Episcopal, Methodist, Congregational, Lutheran, Presbyterian, American Baptist) have been on record against the death penalty for several years. So have the Conference of American Rabbis and prominent Roman Catholic spokesmen, such as Richard Cardinal Cushing, of Boston. Until recently, the major civil liberties, civil rights, and correctional organizations refused to take such a stand. Within the past 2 years, however, the American Civil Liberties Union, the NAACP's legal defense fund, the National Council on Crime and Delinquency, and the American Correctional Association have publicly joined forces with the abolition movement, which has been led for 40 years by the American League to Abolish Capital Punishment.

According to the Encyclopedia of Associations (5th ed. 1968), the American League to Abolish Capital Punishment, to which Mr. Bedau refers, has 8,000 members, 37 State branches and 40 local branches. It was formed in 1927, is based in Brookline, Mass., and is headed by Mrs. Herbert B. Ehrman.

In May 1967, 15 national organizations joined together to set up the National Committee To Abolish the Federal Death Penalty, based in Washington, D.C., and chaired by the Honorable Michael DiSalle, former Governor of Ohio. A list of the participating organizations, including those which have joined the committee since its inception, follows:

American Civil Liberties Union
Americans for Democratic Action
American League to Abolish Capital Punishment
American Veterans Committee
National Council of Catholic Women
Department of Christian Social Relations, Executive Council, Episcopal Church
Friends Committee on National Legislation
Union of American Hebrew Congregations
Board of Social Ministry, Lutheran Church in America
Board of Christian Social Concerns, The Methodist Church
Office of Church and Society, United Presbyterian Church, U.S.A.
Unitarian Universalist Association
Department of Social Action, United Church of Christ
Women's International League for Peace and Freedom
National Board of the Young Women's Christian Association of the U.S.A.

Department of Christian Action and Community Service, The United Christian Missionary Society
Industrial Union Dept. AFL–CIO
American Ethical Union
United Automobile Workers
Transport Workers Union of America
Synagogue Council of America

In addition, anti-capital punishment groups from the following States are affiliated with the committee: New York, Ohio, New Jersey, Indiana, Utah, Colorado, California, Pennsylvania, Florida, North Carolina, Tennessee, and Maryland.

Several States have appointed committees to study the issue of capital punishment and make recommendations on State legislation involving the issue. The majority of the members of the following committees recommended abolition of the death penalty:

Pennsylvania General Assembly, Joint Legislative Committee on Capital Punishment (1961).
Maryland Legislative Council Committee on Capital Punishment (1962).
Massachusetts Special Commission Established for the Purpose of Investigating and Studying the Abolition of the Death Penalty in Capital Cases (1958).

At the Federal level, speaking for the Justice Department and the administration, U.S. Attorney General Ramsey Clark urged the abolition of the death penalty for all Federal crimes, including presidential assassinations. He took this position in his appearance before a subcommittee of the Senate Judiciary Committee on July 2, 1968. Myrl E. Alexander, Director of the U.S. Bureau of Prisons, has also gone on record in opposition to the death penalty.

B. FOR CAPITAL PUNISHMENT

To the best of our knowledge, no group has been formed for the purpose of advocating retention of the death penalty, and no national group has specifically and publicly recommended its retention in recent years. A representative of the International Association of Chiefs of Police told us that a resolution passed by its annual convention in 1922 is of historical interest only. This was a resolution to the effect that this organization go on record as favoring capital punishment following speedy trials. The IACP has not taken an official stand for or against capital punishment in recent years.

Of State committees formed for the purpose of studying and making recommendations on the issue, the majority of the following recommended retention of the death penalty: Florida Special Commission for the Study of Abolition of Death Penalty in Capital Cases (1963–65); New Jersey Commission to Study Capital Punishment (1964).

The New York State Senate Committee on Codes has been holding hearings on anticrime measures, including restoration of the death penalty. John Cassese, president of the Patrolmen's Benevolent Association, and Michael J. Maye, president of the Uniformed Firemen's Association, sent statements to the committee in favor of the death penalty. Mr. Maye urged that the present law making the death penalty mandatory for the murder of a policeman on active duty be extended to include firemen.

Part IV. Two-Stage Trials in Capital Cases

Should the Commission decide to retain capital crimes, the existing procedures for imposing a death penalty sentence should be reexamined. The existing Federal procedure, like that of most States, places the decision as to whether the defendant who has committed a capital offense should be punished by death on the same jury that rendered his conviction of guilt. Thus, under present Federal law a jury's decisions as to guilt and capital punishment are represented by a single verdict.

The need to reexamine this procedure is suggested by problems confronting a trial judge in either excluding background evidence relevant to the issue of punishment, thus requiring the jury to decide whether the defendant should live or die without considering the type of background information which a judge would consider in sentencing a defendant in a noncapital case, or admitting such evidence in order to allow an intelligent decision by the jury as to the penalty but at the risk of the grave prejudice which could result should the jury be influenced by it on the question of guilt.[67]

Four States and the Model Penal Code avoid this serious problem by providing for a split verdict or two-stage trial procedure, in which the issues of guilt and penalty of death or imprisonment are submitted to the jury separately; after the jury has returned a verdict of guilty, based on evidence relevant only to the issue of guilt, a separate proceeding is conducted in which information about the defendant relevant only to penalty is submitted to the jury for consideration in connection with its decision as to capital punishment.[68]

If capital punishment is to be retained in the Federal system, a similar system should be considered for Federal capital trials.[69] This part

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[67] *E.G., United States* v. *Curry*, 358 F.2d 904, 914 (2d Cir. 1966), *cert. denied*, 385 U.S. 873 (1966). *See generally* Note, 52. Cal. L. Rev. 386, 388 (1964); Model Penal Code § 201.6, Comment 5 at 74 (Tent. Draft No. 9, 1959).

[68] *See* Cal. Penal Code § 190.1 (West Supp. 1966); Conn. Gen. Stat. § 53–10 (1963 Supp.); N.Y. Rev. Pen. Law §§ 125.30, 125.35 (McKinney 1967); Pa. Pen. Code § 4701 (Purdon 1961); Model Penal Code § 210.6 (P.O.D. 1962).

[69] The fact that the existing Federal statutes do not specifically authorize the two-stage trial procedure has not precluded discussion, and substantial disagreement, among Federal judges as to whether and when the procedure may or must be used. Some judges have indicated that a two-stage trial might be required by the Constitution. *See* the opinions of Judge McGowan, Judge Wright and Chief Judge Bazelon in *Frady* v. *United States*, 348 F.2d 84, 92, 98 (D.C. Cir.), *cert. denied*, 382 U.S. 909 (1965); the dissenting opinion of Judge Hays in *United States* v. *Curry*, 358 F.2d 904, 920 (2d Cir.), *cert. denied*, 385 U.S. 873 (1966); *see also* the concurring opinion of Judge Hastie in *United States ex rel. Thompson* v. *Price*, 258 F.2d 918, 922 (3d Cir.), *cert. denied*, 358 U.S. 922 (1958), and the opinion of the Third Circuit in *United States ex rel. Scoleri* v. *Banmiller*, 310 F.2d 720 (3d Cir. 1962), *cert. denied*, 374 U.S. 828 (1963).

While some judges have suggested that such a system be judicially invoked, others have said that to require its use in every case would be "unwise," in the absence of legislation to that effect, but that "the silence of Congress" on the subject does not preclude the use of the procedure by trial judges "when the defendant's right to a fair trial would be jeopardized by a unitary trial." Majority opinion of Chief Judge Lumbard in *United States* v. *Curry*, 358 F.2d at 914; *accord*, *Maxwell* v. *Bishop*, 398 F.2d 138, 150–151 (8th Cir. 1968); *Pope* v. *United States*, 372 F.2d 710, 730 (8th Cir. 1961), *vacated on other grounds*, 392 U.S. 651 (1968). On the other hand, it has been said that for an appellate court, not being prepared to make a careful study of the ramifications of a two-stage trial, to attempt to institute such a system would be "utter folly," (dissenting opinion of Judge Burger, concurred in by Judges Miller, Danaher and Bastian, in the *Frady Case*, 348 F.2d at 116), and the Supreme Court has held that

of the memorandum is designed to raise the relevant issues the Commission should consider—and must ultimately resolve—if such a two-trial procedure should be recommended as appropriate for capital cases. Since only the Congress can ultimately resolve the capital punishment issue, the Commission may wish to recommend such a two-stage trial procedure to Congress, regardless of the Commission's position on capital punishment.*

The remaining pages of this memorandum will discuss the following issues that arise with such a two-stage procedure.[70] These issues are suggested by the Model Penal Code and those States which have such a procedure:

(1) The need for finality of a verdict as to guilt under the first stage of the procedure;

(2) Circumstances under which the death penalty might be automatically excluded;

(3) Should the capital sentencing proceeding be before a judge or jury;

(4) What evidence should be admissible at the second (or sentencing) stage of the proceeding;

(5) Should standards of proof be legislatively created for such a sentencing proceeding;

(6) Should the jury's decision to impose the death penalty be final;

(7) What procedure should be followed if the jury cannot reach agreement; and

(8) What provisions should be made for appellate review of a death sentence.

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such a "complex and completely novel procedure" may not, without a legislative mandate, be "thrust . . . upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality." *United States* v. *Jackson*, 390 U.S. 570, 580 (1968). *See also* the majority opinion in *United States* v. *Curry*, 358 F.2d at 914: "[W]e are loath to compel unwilling defendants to submit to a procedure which is devised for their benefit but which may be prejudicial in its application to a particular case." The Court in *Jackson*, upheld the charge of unconstitutionality of the capital punishment provision of the Federal Kidnapping Act because it provided for imposition of the death penalty only upon defendants who exercise their right to a jury trial, against the government's argument that since a trial judge could convene a jury to determine penalty in cases of jury waivers and guilty pleas, the statute did not limit the death penalty to cases where the defendant's guilt was determined by a jury. *Cf. Spencer* v. *Texas*, 385 U.S. 554, 567–568 (1967), in which the majority of the Court, while recognizing that a two-stage trial procedure might well be the fairest method of reconciling the interests of the State and the defendant with respect to prior-crime evidence in the recidivist statute situations, refused to hold that the Fourteenth Amendment requires the States to adopt such a procedure. *See also Segura* v. *Patterson*, 402 F.2d 249 (10th Cir. 1968).

*Section 3604 of provisional Chapter 36 in part C of the Study Draft provides for a two-stage procedure, which could be employed in the event the death penalty is retained.

[70] The Supreme Court, in *United States* v. *Jackson*, 390 U.S. 570, 579 (1968), discussed in note 69, *supra*, has pointed to several of the questions to which a legislature authorizing a separate penalty proceeding should address itself:

> [I]f a special jury were convened to recommend a sentence, how would the penalty proceed? What would each side be required to show? What standard of proof would govern? To what extent would conventional rules of evidence be abrogated? What privileges would the accused enjoy?

1. *Finality of Verdict as to Guilt*

Preliminarily it should be noted that in order for a two-stage trial scheme to be effective the verdict of guilt must not be subject to reconsideration after the penalty hearing begins, and the validity of the conviction should not be affected by error in the penalty trial (so that a conviction may be upheld on appeal if error is found only in the proceeding as to penalty). If it seems necessary, a Federal statute establishing a two-stage trial procedure should so specify.

2. *Are There Any Circumstances Under Which the Death Penalty Should Be Automatically Excluded?*

Certain conditions may be thought to warrant exclusion of the death penalty as a matter of law, thus obviating the necessity of conducting the second stage of the trial. Examples of situations in which the death penalty could be automatically excluded are:

(a) Where the defendant is less than 18 years of age at the time the crime was committed (Model Penal Code, New York, California);*

(b) Where the defendant has been previously sentenced to death for the same crime and his conviction and sentence set aside: Model Penal Code, section 201.6 (Tent. Draft No. 9, 1959) (deleted from Proposed Official Draft); New York (death sentence excluded where Court of Appeals finds error only in the sentencing procedure);

(c) Where the judge finds that:

(1) The evidence, although it suffices to sustain the verdict, does not foreclose all doubt as to the defendant's guilt (Model Penal Code),**

(2) The defendant's mental or physical condition calls for leniency,***

(3) No aggravating circumstance [71] was established at the trial or will be established if a further proceeding is conducted (Model Penal Code),

(4) Substantial mitigating circumstances, established at the trial, call for leniency (Model Penal Code; New York).****

The Model Penal Code also provides for the automatic exclusion of the death penalty where the defendant is convicted on a plea of guilty of murder as a felony of the first degree, for which life imprisonment is the maximum penalty, where the plea is approved by the prosecutor and the court. While this might arguably be held unconstitutional under *United States* v. *Jackson*, *supra*, in that it imposes an impermissible burden on the exercise of a defendant's constitutional right to have his guilt determined at trial by making the death penalty applicable only to defendants who choose to contest the issue of their guilt, it could be upheld as merely a statutory

*Provided in Study Draft section 3603(a).

**Provided in Study Draft section 3603(c).

***Provided in Study Draft section 3603(b).

[71] The Model Penal Code lists aggravating and mitigating circumstances and requires a finding of at least one aggravating and no mitigating circumstances as a prerequisite to imposition of the death penalty.

****Provided in Study Draft section 3603(d).

method of enforcing a prior bargain for exclusion of the death penalty in exchange for a plea of guilty to a "lesser" charge.

The types of Federal offenses for which capital punishment is retained may suggest additional situations in which the death penalty should be automatically excluded.[72]

3. *Before Whom Is the Proceeding To Be Conducted: Jury or Judge?*

While it would seem fair to grant the defendant the right to a jury for sentencing in all cases,[73] the State statutes do not so provide [74] and the Model Penal Code does not provide for such a right.[75] If the defendant is given a right to a jury, however, it would seem appropriate to specifically state that he may waive his right to a jury on sentencing even if the issue of his guilt is tried to a jury.[76]

In addition, the posture of the case when it reaches the sentencing stage will depend on the manner in which the defendant was con-

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[72] The State statutes and the Model Penal Code restrict capital punishment to the crime of murder, but capital punishment in the Federal system may extend, if it were to follow existing law, to other types of offenses such as treason, aircraft piracy, and selling heroin to juveniles, for which the circumstances calling for leniency might differ greatly from those applicable in murder cases. Thus, for example, in the case of treason (now punishable under 18 U.S.C. § 2381), it might be desirable to prohibit the death penalty in a case where the evidence is insufficient to support a defense of duress and thus require acquittal, but substantial enough to call for sparing the defendant's life.

[73] As to the composition of the sentencing jury, consideration must be given the Supreme Court's rulings in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), and *Bumper* v. *North Carolina*, 391 U.S. 543 (1968). In *Witherspoon*, the Court held that to execute a death sentence imposed by a jury from which had been systematically excluded all prospective jurors who opposed capital punishment (but who did not indicate that such opposition would prevent them from making an impartial decision as to guilt, or from voting for imposition of the death penalty) would constitute a deprivation of life without due process of law. In *Bumper*, the Court held that, in the absence of any specific evidence to the contrary, such a systematic exclusion does not inevitably produce a jury unable to reach an impartial decision as to guilt, and that a verdict of conviction rendered by such a jury was not invalid. These rules would apply with equal force, in a two-stage trial, to the selection of a jury to try both the issue of guilt and the issue as to punishment, and to the selection of a jury to try only the issue of punishment, the defendant's guilt having been determined by the Court alone, upon a jury waiver, or upon a guilty plea. *See Yates* v. *Breazeale*, 402 F.2d 113 (5th Cir. 1968).

[74] Pennsylvania specifically states that in cases of guilty pleas the court may impose sentence of death or life imprisonment; California provides for a jury in cases of guilty pleas (unless the defendant waives a jury) but not where the court was the trier of fact as to guilt. Connecticut seems unclear as to whether a jury trial may be had in such cases. *Cf.* 18 U.S.C. § 1992 (train wrecking) and 18 U.S.C. § 34 (aircraft wrecking) which provide for imposition of the death penalty by the court alone if the defendant was convicted on a guilty plea, and, in the latter case, where defendant is convicted on a plea of not guilty but has waived a jury trial.

[75] It might also be noted here that the Model Penal Code contains an alternative formulation which provides for the conduct of the penalty proceeding before the court alone in all cases, but the Institute expresses a preference for determinations participated in by a jury. *See* MODEL PENAL CODE § 210.6, Comment at 133 (P.O.D. 1962).

[76] *See United States* v. *Curry*, 358 F.2d 904 (1966), quoted by the Supreme Court in *United States* v. *Jackson*, 390 U.S. 570 (1968), expressing distaste for compelling an unwilling defendant to undergo a sentencing trial before a jury since such a procedure, though designed to protect him, may in practice be adverse to his interests. The Model Penal Code denies the defendant such a right, requiring the prosecutor to join in the waiver of a jury.

victed, that is, by jury or judge, and any proposed statute should make specific provision as to these contingencies:

(*a*) Where the defendant is convicted by a jury:

The sentencing proceeding should probably take place before the same jury which convicted the defendant, except (1) if the defendant waives his right, if any, to a jury for sentencing, the proceeding could quite properly be conducted before the court alone, and (2) if the court, for good cause shown, discharges the jury which convicted the defendant, the proceeding could be conducted before the court sitting with a new jury empaneled for the purpose (Model Penal Code; New York; California).

(*b*) Where the defendant is convicted by the court on a plea of not guilty, a jury having been waived:

Here the sentencing proceeding would normally be conducted by the court, except, if the defendant is given a right to a jury for sentence even though he has waived a jury trial on the issue of guilt. Then the proceeding would be conducted by the court with a jury empaneled for the purpose of determining sentence, unless defendant waives his right to such a jury (the Model Penal Code, California, and probably Connecticut, indicate that where the issue of guilt is tried to the court alone, the court alone will try the penalty issue; Pennsylvania and New York do not cover this situation).

(*c*) Where the defendant is convicted on a guilty plea:

Here the sentencing proceeding would properly be before the court alone, except if the defendant is given the right to a jury for sentence. Then the proceeding would be conducted before the court and a jury empaneled for sentencing unless defendant waives his right to such a jury (California provides for such a jury unless waived; Pennsylvania provides for trial by the court alone, as do the Model Penal Code and Connecticut;[77] New York does not cover the situation).

4. *What Evidence May Be Presented—Subject Matter*

In general, all relevant evidence, including the nature and circumstances of the crime, the defendant's character, background history, mental and physical condition, and any aggravating or mitigating circumstances may be presented under existing statutes. While Pennsylvania merely states that "the Court shall . . . receive such additional evidence not previously received in the trial as may be relevant and admissible upon the question of the penalty," the Model Penal Code and the other States detail the types of evidence.

(*a*) *Aggravation and mitigation*

The Model Penal Code, unlike the State statutes, enumerates the aggravating and mitigating circumstances of which evidence may be received in the penalty trial, and directs that the trier of fact must

[77] As noted above, the Model Penal Code automatically excludes the death penalty in cases of guilty pleas (approved by the court and prosecutors), but it provides that the sentencing proceeding is to be conducted before the court alone if the defendant was convicted on his plea of guilty, presumably a plea not so approved. Similarly, the Connecticut statute grants discretion to the court to impose a sentence of life imprisonment in case of a guilty plea, but the succeeding language seems broad enough to include a penalty hearing in such cases.

find at least one of the aggravating circumstances and a lack of mitigating circumstances before it may impose the death penalty. The effect of the requirement of a finding of lack of mitigating circumstances is to minimize the danger in that aggravating background evidence will work disproportionately harshly on the defendant, inflaming the jury rather than providing a basis for dispassionate exercise of discretion.[78] *

(*b*) *Prior criminal activities*

The Model Penal Code specifically permits evidence of a previous conviction of the defendant of another murder** or felony involving the use of threat of violence to the person, providing that such a conviction is an aggravating circumstance. It is not clear to what extent other convictions, or evidence of other criminal activity may be admitted, although it would seem that prior convictions at least would come in, if not under the general relevancy test, then to negative the mitigating circumstance of no prior criminal history. Under the California statute,[79] the Supreme Court of California has laid down certain rules with respect to prior criminal activity which permit the admission of evidence of: [80]

(i) prior convictions, plus the circumstances surrounding the crimes resulting in the convictions, both extenuating (including innocence) and aggravating, but not with respect to the legality of the conviction or the process of adjudication; and

(ii) evidence of other criminal activities not resulting in convictions but only by independent proof beyond a reasonable doubt.

It would seem wise to cover this point in any proposed Federal statute, and the California judicial formulation would seem to provide a starting point.

(*c*) *Evidence, argument and instruction as to parole*

The Model Penal Code and the New York statute instruct the court to charge the jury on the nature of the sentence of imprisonment, including its implication as to parole, that is, how long is the defendant likely to be in a prison.[81] In California the rule is narrower. Until 1964, the California courts had permitted evidence of statistics as to parole practices, and instructions as to the length of time in prison which might result from a life sentence. In 1964, however, the California Supreme Court reversed the prior rule and held that the subject of pa-

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[78] *See* Judge Burger's opinion in *Frady* v. *United States*, 348 F.2d 84, 115 (D.C. Cir. 1968) (mentioned *supra* note 69), which criticizes the two-stage trial procedure on the ground that aggravating background evidence may have a disproportionately harsh effect, particularly in cases where sanity is an issue in the trial as to guilt so that the jury already has before it mitigating evidence which could benefit the defendant on the issue of penalty.

*Study Draft section 3604 provides that aggravating or mitigating circumstances may be considered. Section 3605 enumerates the aggravating circumstances which may be so considered with respect to each offense for which the death penalty is authorized, and lists the mitigating circumstances generally.

**The Study Draft is in accord (section 3605(4)(a)), and also lists a factor of no prior criminal history as a mitigating circumstance (section 3605(2)(g)).

[79] The other State statutes do not specify as to the extent of admissibility of prior criminal activities.

[80] *See Note*, 52 CAL. L. REV., *supra note* 67, at 394–398.

[81] *See* MODEL PENAL CODE § 201.6, Comment 5 at 77–78 (Tent. Draft No. 9 1959).

role is not a proper consideration in the jury's selection of punishment; the jury may now be informed as to the statutory power to parole, but must be instructed to disregard the issue, on the assumption that the parole authorities will carry out thir functions in a responsible manner.[82]*

(*d*) *Evidence and argument as to social justification of the death penalty*

California decisional law totally excludes evidence as to the efficacy of the death penalty as a deterrent, or its social or moral justification, and precludes argument on the subject since, the court has said, the legislature has not expressed a preference for the death penalty over life imprisonment.[83] This seems to be justifiable also on the ground that:[84]

> The basic purpose of the statutory procedure for sentencing in capital cases is that the decision be an individual one, based upon the character of the defendant and the degree of his moral turpitude, as judged by a jury of his peers.

The Model Penal Code's provision that the prosecuting attorney and the defendant may argue for or against sentence of death, which might be construed as permitting only arguments as to the propriety of the death penalty in the particular case, would seem on its face to be broad enough to permit, at least with respect to argument, introduction of the issue of the merits of the death penalty in general, which California excludes. The commentary to section 206.10 (Comment 5 at 76) (Tent. Draft. No. 9, 1959) states that "no effort is made to prescribe a limitation on the arguments that may be made in the view that this is not a problem that will yield to any legislative formulation; the court must be relied upon to assure that the decencies prevail." It might be preferable to make clear that such arguments must be limited to the facts of the particular case, if it is thought that the California rule is a good one.

(*e*) *What evidence may be presented—Exclusionary rules*

California forbids the introduction of incompetent evidence; thus all hearsay must be stricken from probation reports, prison records, and parole authority summaries before such records are submitted to the jury.[85] The Model Penal Code and New York, however, in permitting "all relevant evidence regardless of its admissibility under the exclusionary rules of evidence,"[86] clearly allow hearsay evidence. The New York statute's blanket waiver of the exclusionary rules has been criticized on the ground that it deprives the defendant of his constitutional rights to confront his accusers and to procedural due

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[82] *People* v. *Morse*, 388 P.2d 33, 36 Cal. Rptr. 201 (1964), discussed in Note, 52 CAL.L. REV., *supra* note 80, at 392–393.

*The Study Draft does not provide for instruction of the jury concerning parole.

[83] *People* v. *Love*, 56 Cal. 2d 720, 726, 366 P.2d 33, 35, 16 Cal. Rptr. 777, 779 (1961).

[84] Note, 52 CAL. L. REV., *supra* note 80, at 391.

[85] *Id.* at 389.

[86] The Model Penal Code limits such evidence to that which the court deems to have probative force. The Connecticut statute does not refer to the effect of the exclusionary rules.

process.[87] The proviso of the Model Penal Code that the defendant be permitted to rebut any hearsay statements diminishes substantially the force of such criticism.* The problem of the extent to which the exclusionary rules should be abrogated should not be lightly dismissed however; it is an important question, and one to which the Supreme Court has indicated legislation authorizing a jury proceeding to determine sentence should be addressed.[88]

The New York statute does exclude priviliged evidence from the penalty trial, which would seem to be fair and probably required.

None of the statutes refer to constitutionally inadmissible evidence such as coerced confessions. While it would seem clear that the reasons for exclusion of such evidence on the guilt issue would apply equally to prohibit admission on the penalty issue, a Federal statute could specifically so provide in order to make clear that an abrogation of the exclusionary rules as to penalty is not intended to work a denial of constitutional guarantees. In this connection, the Supreme Court's question in the *Jackson* case as to what privileges the accused would enjoy in a penalty hearing might be noted.[89] It could indicate the necessity for a specific statutory assurance that the constitutional requirements as to a right to counsel, *etc.*, applicable to criminal trials as to guilt, extend with equal force to the penalty stage.

5. *Should Standards of Proof Be Legislatively Improved?*

Another of the Supreme Court's questions in *Jackson* is "what standard of proof would govern?" [90] None of the State statutes contain any reference to standard of proof, nor does the Model Penal Code. Two situations should be considered in this regard. The first is where the decision as to penalty is in the "absolute discretion of the jury" and the legislature expresses no preference as to penalty. This is the case in California. The courts there hold that no burden of proof is imposed upon either party; this is true not only as to which penalty should be selected, but also as to facts upon which the decision as to penalty may be based.[91] But it would seem that to provide that, where the existence or nonexistence of a fact has been the subject of conflicting evidence, the jury should be instructed as to resolution of the conflict before considering that fact in aggravation or mitigation of the penalty, would be better than the California rule. An instruction to the effect that aggravating and mitigating circumstances must be proved by a preponderance of the evidence, given in conjunction with an instruction that the jury has absolute discretion to select either penalty on the basis of facts so found, would not limit the jury's power to select either penalty, and the defendant would be protected against speculative evidence which might otherwise be given weight.[92]

In the second situation, as is the case under the Model Penal Code, a finding as to the existence of an aggravating circumstance and the

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[87] *See* Note, *The Two-Trial System in Capital Cases*, 39 N.Y.U. L. REV. 51, 63–73 (1964).

*The Study Draft provision (section 3604(2)) is similar to that of the Model Penal Code.

[88] *United States* v. *Jackson*, 390 U.S. 570, (1968).

[89] *See* note 70, *supra*.

[90] *Ibid.*

[91] *See* Note, 52 CAL. L. REV., *supra* note 80, at 401–403.

[92] *Id.* at 402–403.

nonexistence of any mitigating circumstances must be made as a prerequisite to the imposition of the death penalty. In such a situation, a standard of proof might also be imposed; for example, it might be provided that the government must prove aggravating circumstances by a preponderance of the evidence, but that the defense must come forward only with some evidence of a mitigating circumstance in order to cast the burden of disproving that circumstance upon the government. While this would result in a greater preference for the penalty of imprisonment than presently exists under the Model Penal Code, such a result would seem to be fair and the extra burden on the government would not appear to be excessive.

6. *Should a Jury Decision To Impose the Death Penalty Be Final?*

In California, the jury's discretion as to penalty is said to be absolute. This is not so in practice, however, for it has been held that such discretion does not affect the power of the court to reduce the punishment in lieu of ordering a new trial, and it has been said that the vigorous use by the trial judge of the power to reduce the penalty is the most effective control of arbitrary action by the jury.[93] The Model Penal Code approaches the problem from the other angle, vesting discretion as to penalty in the judge, but requiring jury concurrence if the decision is death. It would seem that the Model Penal Code approach is preferable if only because it recognizes the fact that in practice a jury decision directing death will stand only if the judge thinks that it should.*

7. *What Procedure Should Be Followed if the Jury Cannot Reach Agreement?*

Several alternatives may flow from a jury's failure to reach agreement as to life or death:[94]

(a) The court must impose the death sentence;

(b) The court must impose a sentence of life imprisonment (or a term of years) (Model Penal Code);**

(c) The court may choose life or death;

(d) The court may choose between imposing a life sentence and empanelling a new jury to determine life or death (New York, Pennsylvania, California, and Connecticut);[95] or

(e) The court must empanel a new jury to determine penalty.

The Model Penal Code recommends the second alternative because "one submission [to a jury] ought to be enough and if there is disagreement the Court should terminate the matter by imposing sentence of imprisonment."[96] This appears sound. It should also be noted that mandatory death has been rejected by all four State statutes as

[93] *Id.* at 403–404. The New York and Connecticut statutes also require the judge to impose the death penalty if the jury so directs, but presumably the judge in those States could also reduce the penalty in lieu of ordering a new trial in cases of arbitrary jury action.

* Under the Study Draft, the jury performs an advisory function, although the court is required to submit the issue to a jury and may impose a sentence of death only upon the recommendation of the jury. Section 3604.

[94] *See generally* MODEL PENAL CODE § 201.6, Comment 6 at 78–79 (Tent. Draft No. 9, 1959).

**The Study Draft provides that the court must impose a sentence of life imprisonment. Section 3604(3).

[95] Connecticut and California specifically state that the issue of guilt is not to be retried to a new jury.

[96] MODEL PENAL CODE § 201.6, Comment 6 at 79 (Tent. Draft No. 9, 1959).

the consequence of jury disagreement, consistently with the traditional requirement of jury unanimity in criminal matters and the notion that unanimity should be especially important where the issue is life or death. It is also said that the requirement of unanimity reduces the danger of jurors holding out against conviction because of opposition to the punishment.[97]

As to the point at which a jury which cannot reach agreement may be discharged, Pennsylvania leaves the decision to the court, providing for discharge of the jury "whenever the court shall be of the opinion that further deliberation by the jury will not result in agreement;" the Model Penal Code, California and Connecticut simply state that the jury may be discharged if "the jury is unable to reach a unanimous verdict;" New York requires discharge "if, after the lapse of such time as the court deems reasonable, the jury report themselves unable to agree."

8. *What Provisions Should Be Made for Appellate Review of a Death Sentence?*

It should also be noted that, if capital punishment is retained and the two-stage trial procedure adopted, provisions as to appellate review of sentence (as distinct from conviction) should be reviewed by the Commission. Such provisions could be placed either in a general appellate review section * of the statute, or in the section dealing with the two-stage trial procedure (as in the New York statute). One issue in this connection is whether, on reversal of the sentence, the issue of life or death should be permitted to be resubmitted to a jury. The argument in favor of prohibiting such a resubmission is as follows:[98]

> Once a conviction has been secured and sustained on appeal, it is highly doubtful that any interest of the state is served by successive trials for the purpose of securing from a jury the choice as to life or death. Surely any interest that may be served is outweighed by the questionable practice of submitting a defendant to successive trials for his life.

Appendix

Provisions in Title 18 Related to Capital Punishment

18 U.S.C. § 3: An accessory-after-the-fact can be imprisoned not more than 10 years if the principal is punishable by death.

18 U.S.C. § 753: Creates an offense for forcibly freeing or rescuing a person found guilty of a capital crime when going to execution or during execution. $25,000/25 years or both.

18 U.S.C. § 754: Creates an offense for forcibly rescuing the body of an executed offender while being conveyed to or deposited at the place of dissection (*see* 18 U.S.C. § 3567).

18 U.S.C. § 3005: Provides for counsel in capital crimes.

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[97] *Id.*

*See the proposed amendment to 28 U.S.C. § 1291, Final Decisions of District Courts, in the Study Draft sentencing provisions, which would provide for appellate review of sentences.

[98] Note, 52 Cal. L. Rev., *supra*, at 406. The New York statute prohibits such a resubmission. The same result may be attained by including reversal of sentence for the same crime as a circumstance under which the death sentence is automatically excluded. *See* p. 1368, *supra*.

18 U.S.C. § 3141: Bail may be authorized in capital cases only by U.S. courts having original or appellate jurisdiction in criminal cases or by a justice or judge thereof.

18 U.S.C. § 3235: Venue in capital cases shall be the county where the offense was committed, where possible without great inconvenience.

18 U.S.C. § 3281: No statute of limitation for capital offenses.

18 U.S.C. § 3432: Provision for furnishing indictment and list of jurors and witnesses at least 3 days before trial of defendant in a capital case.

18 U.S.C. § 3566: Federal executions shall be carried out as prescribed by the State in which the sentence is imposed. Local facilities may be used. If State where sentence is imposed has no provision for infliction of death penalty, the court may designate some other place.

18 U.S.C. § 3567: The court may add to a judgment of death for first degree murder or rape that the body of the offender be delivered to a surgeon for dissection.

18 U.S.C. § 3651: Probation not available in capital cases.

TENTATIVE OUTLINE
of
THE CODE REFORM PROJECT
(Schwartz; August 10, 1967)

ANALYSIS OF THE CRIMINAL CODE

Tentative Outline of the Code Reform Project

[References in the form 18/XX are to Title 18, U.S. Code, the section number follows the slant bar. MPC means the Model Penal Code of the American Law Institute. Particular sections of Title 18 are frequently referred to by number alone, where it is clear that Title 18 is alluded to. "ff" following a number means that the section number given and an indefinite number of succeeding sections are referred to.]

PRELIMINARY NOTE ON ORGANIZATION

It is proposed to organize the Code Project into five main parts, as follows:

Part I.—General.—deals with matters that cut across the whole range of criminal law, such as attempt, conspiracy, accomplice liability, self-defense and other justifications, mistake and other excuses.

Part II.—Specific Offenses.—defines the various crimes and grades them according to the gravity of the offense.

Part III.—Disposition and Treatment of Offenders.—governs sentencing, probation, the prison system, parole, and special treatment of youths and juveniles.

Part IV.—Investigation, Enforcement, and Prosecution Practices.—relates to surveillance, search, seizure, interrogation, informants, plea bargaining, *etc.*

Part V.—Judicial Procedure.—although largely covered by the Federal Rules of Criminal Procedure, Part V will be the place for such matters as are or should be governed by statute, *e.g.*, post conviction review, appeal from orders suppressing evidence.

The major departure from the present organization of the Penal Code is in Part II, where we substitute a logical arrangement in place of an alphabetical sequence. The existing Code has a series of chapters running from "Aircraft", "Animals", "Arson" through to the final "White Slave Traffic." Such an arrangement had advantages for the 1948 revision which was not aimed at reforming Federal criminal justice, but at introducing a degree of order. The proposed logical arrangement follows the general pattern of modern State Codes as well as the pattern of Federal Codes prior to that of 1948. Thus all crimes relating to national defense and security appear together in the first chapter, whereas they are presently scattered among chapters entitled Espionage, Military and Navy, Sabotage, Treason and Sedition. Occasional provisions appear under other chapter headings like Arson (81—munitions), Counterfeiting (499—military passes), and Malicious Mischief (1362—defense communications). Similarly criminal misbehavior of officials will be treated in one chapter instead of being dispersed through many: chapter 93—Public Officers, chapter 15—Government Claims (291), chapter 17—Coins and Currency (332, 334), chapter 23—Contracts (435—exceeding appropriations), chapter 27—Customs (543, 552).

The incredible confusion resulting from dispersal through Title 18 of provisions relating to similar matters is documented below in comments on particular offenses. For example, conspiracy to defraud the United States carries a maximum of 5 years under chapter 19—Conspiracy (371), a maximum of 10 years under chapter 15—Government Claims (286), and a maximum of 1 year under chapter 23—Contracts (441, collusive bidding on postal supply contracts). The confusion is compounded by the scattering of many more criminal provisions throughout the United States Code, *e.g.*, in Title 26, chapter 75—Revenue Crimes. A notable benefit from bringing cognate provisions together is that fundamental policy questions are clearly exposed: If a 3-year maximum is adequate for extortion by officials (18/872) why should 5 be required in connection with naturalization (18/1422)? If capital punishment is appropriate for railroad sabotage resulting in death (1992), why not for ship sabotage (2273)?

Another prospective gain from logical organization is that it will be easier for Congress and individual legislators in the future to see where proposed criminal legislation would fit in, whether it is already covered, and what the general policy has been with respect to similar offenses.

The organization of the Code Project proposed below is tentative. It provides a general inventory of our problems as we see them at the beginning, without committing us to any particular solutions. It should be useful in assigning tasks within our own staff, giving each person a sense of the relation of his work to that of others. It should be similarly useful in communicating with other agencies when we call upon them for advice and assistance. The final organization of the Code may well be different from that previsioned here. For example, where the outline shows successive articles dealing with theft, fraud, and revenue offenses, the person working in this area might come up with proposals to combine these into a single article.

The extremely abbreviated references to issues likely to arise under various chapters and articles of the Code are, of course, illustrative rather than exhaustive. The citations given to existing law found in Titles 18 and 26 or to reforms proposed by the American Law Institute or the American Bar Association's Project on Minimum Standards of Criminal Justice are barest beginning points for investigations which will inevitably embrace, to name only a few examples, the entire United States Code, the relevant judicial decisions, Reports of the President's Commission on Law Enforcement and the Administration of Justice, recommendations of the National Commission on Crime and Deliquency, the work of the Judicial Conferences, and hearings and reports of numerous congressional committees.

The relative space given to different topics in this outline has no relation to the importance or difficulty of the issues, but rather relates to the accident of the author's greater familiarity with some areas of the criminal law or to the priorities which the Commission has approved for the beginning of our work.

PART I.—GENERAL

CHAPTER 1.—PRELIMINARY PROVISIONS

§ 1. Title.

Query: "Penal Code"? "Criminal Code"? "Penal and Correctional Code"? Correctional Code"?

§ 2. Purposes.

A statement of purposes can give guidance in interpreting and administering the law. Purposes, of course, are multiple and in part conflicting, *e.g.*, to give notice of what is forbidden and penalized, to deter violations, to reform or incapacitate dangerous characters, to grade offenses according to their seriousness. *See* MPC § 1.02.

§ 3. Construction.

Shall we retain "strict construction" or, taking account of more considered legislative definition and grading of offenses, adopt a rule of construction according to fair meaning and purpose of the law? *See* MPC § 1.02(3).

§ 4. Proof: Presumptions.

Here we will state the rule requiring proof beyond reasonable doubt. Does it apply to defenses? Use and consequence of "presumptions." *Cf.* MPC § 1.12 and variety of presumptions in Title 18, including §§ 42(c)(2), 45, 643, 837(c), 1201, 1465, 3487, 3488.

§ 5. Classification of Offenses.

Shall we retain the triple classification of 18/1 "felony" (punishable by imprisonment over 1 year), "misdemeanor" (1 year), and "petty misdemeanor" (6 months)? Shall we divide felonies into several degrees? Shall we recognize a "noncriminal" grade of offense entailing only reprimand, fine, or civil sanction? *Cf.* MPC §§ 1.04, 6.01, N.Y. REV. PEN. LAW § 10.00.

§ 6. Federal Criminal Jurisdiction Defined.

§ 7. Definitions of Terms Occurring Throughout Code.

This will include the usual glossary (*cf.* MPC § 1.13), but especially important will be the standardization of terms referring to criminal states of mind. The chaos of present Federal law is illustrated by the variety of terms now used, the confusion of Federal judicial decision as to the meaning of these terms, and the numerous laws that fail to specify the mental ingredient of the particular offense. *See, e.g.*, "intent" (113, 793, 1364), "purpose" (551, 793, 796), "knowingly" (3, 876–877, 2074), "actual knowledge" (1902), "willfully" (1362, 922), "knowingly and willfully" (798, 871, 957, 1001, 1501–1502, "willfully or maliciously" (1362), "knowingly or willfully" (2385), "knowingly and with fraudulent intent" (2318), "knowingly and fraudulently" (152, 153), "willfully and maliciously" (1363), "willfully and unlawfully" (2071), "willfully with intent to injure" (2155), "willfully and corruptly" (2271), "knowingly, willfully, or wantonly" (2152), "corruptly" (1503), "fraudulently or wrongfully" (1017), "unlawful and fraudulent intent" (2314), "malice aforethought" (1111), "maliciously and without justifiable cause" (2195), "maliciously and without reasonable cause" (2236), "reason to believe" (793), "gross negligence" (793(f)), "neglect" (2076–2076).

Compare MPC § 2.02. There may be advantage in retaining some of the more commonly used terms in the Federal Code, giving them precise differentiated meanings as in MPC. Note that MPC puts these definitions in section 2.02, which makes positive dispositions as to culpability requirements. I believe our own substantive provisions on culpability (chapter 2, article 1) will be clearer if definition is relegated to the general definitions section here.

CHAPTER 2.—BASIS OF CRIMINAL LIABILITY: ANTISOCIAL BEHAVIOR AND INCLINATION

Article 1. Antisocial Behavior and Inclination

Herein of act and omission (MPC § 2.01), required culpability (MPC § 2.02), causation (MPC § 2.03), ignorance and mistake (MPC § 2.04), strict liability (MPC § 2.05), duress (MPC § 2.09).

Article 2. Responsibility as Affected by Mental Illness, Intoxication, Youth

Cf. MPC art. 4 plus § 2.08. The problem will be to select among the many competing formulations of the "insanity" defense.

CHAPTER 3.—GENERAL PRINCIPLES OF JUSTIFICATIONS AND EXCUSE

Cf. MPC art. 3 plus § 2.10 (military orders) and § 2.11 (consent). Herein of privileges associated with self defense, crime prevention,

law enforcement, *etc.* None of this is found in present Federal legislation. Modern State Codes have it.

CHAPTER 4.—ACCOMPLICES; CONSPIRACY; LIABILITY OF CORPORATIONS AND ASSOCIATIONS

See 18/2, 3 and 371; MPC §§ 2.06, 2.07, 5.03.

We should consolidate various provisions scattered through the existing Code relating to aiding, abetting, *etc.* (*e.g.*, 552, 752, 757, 1002, 1115, 2274); harboring—which is a form of accessory-after-the-fact dealt with in section 3 of Title 18 (*see* 792, 1381, 2382); and conspiracy. As to conspiracy, *see*, in addition to section 371 (the general conspiracy provision): 286, 372, 757, 793(g), 794(c), 799, 956, 1201(c), 1751(d), 1792, 2153(b), 2192, 2388(b). The conspiracy concept is expressed in a variety of terms which may or may not mean the same thing (*e.g.*, "combine or conspire," in the antitrust laws; "agreement, combination or conspiracy"—286; "combine, conspire, or confederate"—2192, 2271). Consolidation will simplify drafting throughout the Code, and eliminate arbitrary penalty distinctions.

See Extended Note A, Conspiracy, *infra*.

CHAPTER 5.—ATTEMPTS; SOLICITATION; PREPARATION FOR CRIME

There is no general Federal attempt statute. Therefore, some attempts to commit Federal offenses are not punishable at all (*e.g.*, bribery—201, theft of Federal property—641; blackmail—873). More often the substantive section expressly includes attempt, and makes it punishable equally with the completed offense (*e.g.*, smuggling—545, espionage—793, escape—751, racketeering—1951). *But see* 1113, providing a maximum of only 3 years for attempted murder. Attempts are referred to by a confusing variety of terms (*e.g.*, "endeavors"—914, 1003; "attempts or endeavors"—1381). Very frequently what purports to be a substantive offense in effect describes an attempt. This is true of any offense defined as doing some innocuous act for the purpose of accomplishing a nefarious object (*e.g.*, mailing a letter to carry out a fraudulent scheme—1341; cutting mail bags with intent to steal—1706; possessing objects with criminal intent—957, 1002). A good general attempt section would make it possible to simplify the substantive provision leaving the attempt statute to cover *every* effort, of whatever sort, to reach the forbidden goal.

Traditional judge-made attempt law has been strictly limited to behavior that immediately precedes and comes very close to accomplishment of the crime. Here the line was drawn between "attempt" and "mere preparation." But modern legislatures have found it necessary in the interest of law enforcement to breach this line. For example, it should be possible to convict a would be arsonist who has only gone so far as to assemble combustible materials, fuses, *etc.* Some Federal legislation goes far—perhaps too far—in this direction (*e.g.*, 957, 1002—possessing papers or other objects with intent to commit crime; chapter 25—counterfeiting; chapter 37—espionage). Elsewhere the traditional line is inappropriately maintained (*e.g.*, chapter 5—arson).

Cf. MPC art. 5—Inchoate Crimes.

CHAPTER 6.—DEFENSES: UNFAIR OR OPPRESSIVE PROSECUTION

Article 1. Entrapment

No present legislation. *Cf.* MPC § 2.13.

Article 2. Statute of Limitations

18/3281 ff; 26/6331 (tax offenses).

Article 3. Double Jeopardy and Related Matters

Important questions of the effect of prior prosecution in the State courts must be worked out here. Occasionally, but inconsistently, conviction or acquittal in a State prosecution is made a bar to Federal prosecution "for the same act." *Compare* 659–660 *with* 836–837; 1991 *with* 1992. *See* MPC §§ 1.08–1.11, 7.05(4).

Article 4. Multiple Prosecution

Cf. MPC § 1.07.

Article 5. Multiple Venue

See 3237–3239. (*Cf.* MPC § 1.07).

Article 6. Dragnet Conspiracy Prosecutions

PART II.—SPECIFIC OFFENSES

CHAPTER 201.—NATIONAL DEFENSE AND SECURITY

Article 1. Treason

18/2381. But 2382 (misprision) would go into chapter 4, dealing with accomplices and harboring.

Article 2. Rebellion, Sedition, Organizing or Advocating Overthrow

18/2383–6. Some simplification and consolidation of these related and overlapping offenses seems desirable, especially in the light of the new General Part of the Code. Some provisions may have to be reconsidered in view of Supreme Court decisions.

Article 3. Espionage and Information Control

18/chapter 37 plus 952 (betrayal of diplomatic codes).

Article 4. Impairing Military Effectiveness

18/2387 (impairing morale of armed services, *etc.*).
18/1381 (enticing desertion).
18/2388 (false statements interfering with wartime operations).
18/2389–2390 (enlisting or recruiting for enemy).
18/1383–1385 (violating military restrictions).

Article 5. Selective Service

CHAPTER 202.—INTERNATIONAL RELATIONS AND LAW OF NATIONS

Article 1. Attacks on Diplomatic Personnel, Property [and Functions?]

18/112. Should coverage be broadened to include military, members of international organizations, *etc.*? Should this be limited to attacks related to office? Should the section be essentially a cross reference to chapter 203's comparable provisions on Federal personnel to incorporate grading there specified? *See* 18/956 (attacks on foreign property): 18/703 (impersonation of foreign officials, *etc.*); 18/546 (smuggling into foreign countries); and 18/2274 (permitting ships to be used contra law of nations).

Article 2. Neutrality and Private Relations with Foreign States

Most provisions of present chapter 45—Foreign Relations. But 952 (betrayal of diplomatic code) goes to new article on espionage; 956 to article 1 above. Section 957 may simply be a vague, and possibly unconstitutional, attempt law.

Foreign agent registration, 18/951, seems to belong here.

Article 3. Passports and Visas

Present chapter 75 (1541 ff.) except as specific offenses, *e.g.*, false statements, are incorporated in general provisions elsewhere.

Article 4. Piracy, Privateering

Article 5. Immigration and Naturalization

Article 6. Customs

CHAPTER 203.—SECURITY OF FEDERAL PERSONNEL AND PROPERTY

To what extent can the material in this chapter be consolidated with or incorporated by reference to the parallel material in chapter 209, article 6 dealing with attacks generally within the special maritime and territorial jurisdiction of the United States?

Article 1. Personnel

See 18/1751 (attacks on President, *etc.*); 18/871 (threatening the President); 18/1114 (killing Federal officials in line of duty); 18/111 (assaulting Federal officials in line of duty).

There are a number of problems to be worked out here. The principle of section 1751, growing out of the Kennedy assassination, is that Federal investigative agencies, Federal law, and Federal courts should deal with such assassinations. What are the rational extensions of the principle? What of assassination or kidnapping of a cabinet member, military leader, member of the Supreme Court? Is capital punishment a latent issue here?

Why is 871 (threats) limited to the Presidential group? Why are 111 and 1114 limited to specified officials; is there a reason why *anyone* attacked on account of Federal duty should not have Federal law and investigation? *Cf.* threats to witnesses, parties, *etc.*, in judicial and administrative proceedings. 18/1503, 1505.

Article 2. Federal Property: Injury, Trespass, Tampering, Interference

See existing chapter 65—Malicious Mischief, chapter 105—Sabotage, chapter 5—Arson, and miscellaneous provisions, *e.g.*, Federal property on wild life sanctuaries (41); mail or letter boxes (1703, 1705).

A central problem: distinguish between concern for Federal property as proprietor and concern for Federal functions. The former belongs here and calls for grading based on amount. The latter belongs in proposed chapter 205—Integrity of Federal Operations, where some purpose or risk of substantial interference should be shown, and it makes no difference whether property is involved or not, and grading would relate to the seriousness of the interference.

Query whether danger to life should enter into grading of these property offenses as in the arson section (81) or whether all life endan-

gering activities (including, for example, those associated with mischief to trains, airplanes, ships) should be treated together in connection with homicide and assault.

Article 3. Federal Property: Theft, including Embezzlement

Start with existing chapter 31—Embezzlement and Theft. But eliminate for transfer elsewhere all provisions which blanket "unauthorized disposition" of property with thievery, *e.g.*, 641, 644, 646, 653. Failure to account should not be denominated and punished as embezzlement, although some type of presumption may be appropriate. *Cf.* 643. These and other examples of official misfeasance belong in proposed chapter 5—Integrity of Federal Operations, article 2—Official Misconduct.

See also existing 153 (embezzlement by bankruptcy trustees, *etc.*); 332 (embezzlement by mint officers); 1721 (Post Office); 285 (papers relating to claims against the United States).

Article 4. Defrauding the United States

This is a hodgepodge of legislation, overlapping, confusing, with arbitrary penalty distinctions. The false claim section (287) in chapter 15 and the conspiracy-to-defraud provision in chapter 19 (371) may be regarded as basic. But there is also a special statute on conspiracy with respect to fraudulent "claims" (286), where the maximum penalty is 10 years as compared to 5 years under 371. Claims against the Post Office get no more than 1 year's imprisonment (288), although 5 years is the maximum for claims generally under 287. Collusive bidding on postal contracts or at public land auctions draws a maximum of 1 year (441, 1860), although these are conspiracies to defraud the United States. *See also* fraud in connection with postal money orders (500), "attempts" to defraud by counterfeit documents (495). *Compare* 1002 (possession of counterfeit documents to promote fraud of another).

CHAPTER 204.—PROTECTING FEDERAL REVENUES

Attempts to evade or defeat taxes and wilful failure to keep records, make returns, and supply information would presumably be incorporated in the general Penal Code at this point, bringing them over from Title 26, United States Code. *See* Extended Note C, Revenue Offenses, *infra.*

CHAPTER 205.—INTEGRITY AND EFFECTIVENESS OF FEDERAL [GOVERNMENTAL?] OPERATIONS

A preliminary question here will be the scope to be given the concept of "governmental" operations. Note that chapter 11 of Title 18 includes sections dealing with corruption of certain loan operations not involving Federal agencies directly, *e.g.*, land banks, small business investment companies. Don't these belong in proposed chapter 206, dealing with the security of facilities of national concern?

Article 1. Bribery and Corrupt Influence

18/201, 202, 210, 213. *Cf.* MPC art. 240. 18/224 (bribery of sports contests) is inappropriately classified in the same chapter with official bribery, whereas it is plainly a general fraud on the public. 18/218 provides for voiding contracts in relation to which there has been a

conviction under the bribery or conflict of interest laws. This provision, if retained, should move out of the penal law to which it is quite inappropriate. Rescission of a contract for corrupt procurement ought not to depend on criminal "conviction" (beyond reasonable doubt, *etc.*). Furthermore, the fact that an official was convicted of soliciting a bribe, which was not forthcoming, furnishes no rational basis for rescission.

Article 2. Official Misconduct: Conflict of Interest

A small fraction of official misconduct offenses appear in existing chapter 93—"Public Officers and Employees." *See also* 26/7213–7215 (revenue officers); 18/203–209 (conflict of interest), and miscellany of misconduct provisions scattered through the existing Code.

This article will probably include cross references along the following lines: "Theft of Federal property by Federal officials is punishable under ————————"; "The making of false certifications, records, *etc.*, is punishable under article 7 below." Examples of scattered misconduct provisions include those inappropriately blanketed with theft in existing chapter 31: failure of financial officers to account (643); use of funds for purposes not authorized by appropriations (644, 653); irregularities in deposit of funds, including failure to "keep safely" or "deposit promptly" (646–650).

Elsewhere: exceeding appropriations (435); using appropriations to lobby with Congress (1913); irregularities in issuing Federal reserve notes (334); revenue officer failing to collect duty (543); postal official abetting obscenity or lottery (552, 1303); allowing prisoners to escape (755); extortion (872, 1422); court officer's "neglect" to pay over United States money within 30 days of demand (1421); receivers and trustees willful mismanagement (1911); court officer's buying travel claims against the United States (291); falsifying records and reports (2073); "deserting" the mail (1700) and other postal irregularities (chapter 83); speculation in sugar by officials regulating sugar (26 U.S.C. § 7240). There is even a section penalizing "neglect" to file a report required by law or the Treasury—perhaps applicable to the National Commission on Reform of Federal Criminal Laws (2075).

The irrationality and disproportion in existing penalty provisions is illustrated by the range between a $50 fine for a postmaster failing to account for postage (1727) to 10 years' imprisonment under the general failure to account provisions (643; 1 year if amount does not exceed $100). Extortion generally carries a 3-year maximum (872; 1 year if amount does not exceed $100); but in connection with naturalization, citizenship, or alien registration, the maximum is 5 years regardless of the amount involved (1422).

Article 3. Perjury and Other Falsification in Official Matters

The perjury and false statement provisions of existing chapters 47 and 79 should be brought together here along with others scattered through the Code, *e.g.*, foreign controversies (954), customs (542), passports (1542), immigration, naturalization, and citizenship (1426), registration of seditious organizations (2386), claims for postal losses (288). There are undoubtedly scores of special false statement provisions to be found in regulatory legislation throughout the United States Code.

False statement provisions which are plainly directed against attempts to defraud the United States might be eliminated as adequately covered by the fraud and attempt provisions.

Compare MPC art. 241.

Article 4. Resisting or Obstructing Justice, Legislation, Federal Functions

Existing chapter 73 (Obstruction of Justice) assembles some particular provisions on interference with process, jurors, witnesses, legislative and administrative proceedings. Elsewhere, 111 and 1114 deal with a broad range of assaults on specified Federal officials "while engaged in or on account of performance of official duty," but includes some nonassault activity: "resists, opposes, impedes, intimidates or interferes with." Many chapters later, 2231 deals with similar activity in resisting searches and seizures. The maximum penalties under this section are 3 and 10 years depending on use of dangerous weapons, while the obstruction of justice chapter specifies a 1-year maximum for substantially the same behavior (1501–1502). There is the usual lot of unintegrated supplementary provisions with strange penalty variances: conspiracy to prevent discharge of duties or to retaliate (372) (6 years); conspiracy "by force to prevent, hinder, or delay the execution of any law of the United States" (2384—up to 20 years); "obstruct or retard the passage of the mail" (1701—up to 6 months); surveying public lands (1859—up to 3 years). In addition, the provision of the general conspiracy statute, 371, penalizing conspiracies to defraud the United States has been judicially interpreted to be applicable to defrauding the U.S. by subverting Federal functions.

Escapes and Rescues (existing chapter 35); bail jumping (3146); fugitives (1071–1072) may be dealt with in this article.

Article 5. Contempt, Disobedience of Subpenas, Administrative Orders, etc.

See existing chapters 21 and 233 on contempt of court. Supreme Court decisions have signaled the need for further legislation. As to obstruction of judicial and legislative proceedings, *see* 1503 ff. Here is an opportunity to bring some consistency to the scores of statutes providing penal sanctions for violation of administrative orders. *Compare* proposal as to violation of regulatory laws in article 6 next following.

Article 6. Defiance of Federal Regulation

This seems the appropriate place for a major effort to systematize penal enforcement of regulatory law. By regulatory law I mean statutory or administrative rules that prohibit actions which people would not ordinarily recognize as harmful or prescribe actions which are not dictated by ordinary morality. There are an immense number of such rules relating to every aspect of life in a highly organized society. Illustrative are rules prescribing licenses, reports, labeling, safety standards in vehicles, standards of purity or identity of food, drugs, and other products, limited seasons or quarry for hunting and fishing. Care will be required in distinguishing some regulatory from criminal offenses. For example, lists of objects which are "not mailable" appear to be regulatory; but when special provision is made for high penalties if the mailing is with homicidal or treasonous intent, it is clear that such provision must be regarded as dealing with an ordinary

criminal attempt (1716, 1717). Usually it would make better sense to group such criminal "mailing" with comparable interstate commerce offenses. *See* Extended Note B, Penal Sanctions for Regulatory Offenses, *infra.*

Article 7. False Assumption of Official Character or Qualification

Many of the provisions are concentrated in chapter 43—False Personation and chapter 33—Emblems and Insignia.

Article 8. Federal Records, Certificates, Reports, Certifications, Receipts

See existing chapter 101. Comprehensive prohibitions relating to false certificates are found in chapter 47—Fraud and False Statements. There are the usual puzzling features: 1018, applying to "certificate or other writing" containing a known false statement, penalizes only issuance and sets a maximum of 1 year. Section 1017 dealing with *sealed* certificates or "other paper" authorizes up to 5 years, and reaches use, procurement, transfer, *etc.* Falsification of *consular* certificates carries a 3-year maximum (1019). *See also* 1426 (naturalization and citizenship); 1546 (visas); 2197 (ship's and seamen's certificates); 497 (Presidential "letters patent"); 498 (military discharge certificates).

Article 9. Betrayal or Misuse of Official Information

E.g., 18/1902 ff., 26/7213.

Article 10. Elections and Political Activities

See existing chapter 29. Some provisions may be transferred outside the Penal Code as regulatory, and some to proposed chapter 207 on Civil Rights.

Perhaps this should be the first article in the chapter.

CHAPTER 206.—PROTECTING NATIONAL CURRENCY, THE CREDIT SYSTEM, PUBLIC SERVICE FACILITIES

Herein, probably in separate articles, of coinage and counterfeiting whether of money or securities (332 ff., 471 ff.); train, automobile, plane, and shipwrecking (32–34, 1992, 2117, 2271 ff.); the Federal banking and credit structure (1004–1010); communications systems (1362); power and other utilities related to national defense (2153). Probably the matter of special penalties where life is jeopardized or death results should be dealt with in the Homicide-Assault sequence in chapter 209 below which deals with a broad range of offenses committed "within Federal jurisdiction" so that a standard policy can be worked out. A cross reference in the present chapter should suffice.

Bank robbery and burglary (2113) and embezzlement (656–657), theft and embezzlement from interstate carriers (659–660), "burglary" of trains (1991), Post Office robbery, burglary (1706 ff.), should likewise be handled in chapter 209.

Such handling would avoid arbitrary penalty distinctions as well as jurisdictional distinctions like those found presently in sections 1991 and 1992. The former penalizes train robbery when committed on territory within the exclusive jurisdiction of the United States. The latter penalizes train wrecking and sabotage of tunnels, bridges, *etc.*

only when interstate or foreign commerce may be prejudiced. Why shouldn't interstate train robbery be Federally penalized when it occurs outside Federal territory? *Cf.* 2117. Why shouldn't train wrecking be Federally penalized if it occurs on Federal territory whether or not interstate commerce is involved?

CHAPTER 207.—CIVIL RIGHTS

Article 1. Elections

Protecting against intimidation and corruption of the ballot. *See* existing chapter 29.

Article 2. Protection against Oppression

Existing chapter 77 (slavery and peonage), and chapter 13 (civil rights). *Cf.* 2191, 2194 (shanghaiing and cruelty to sailors); 1231 (importing strike breakers). *See* MPC § 243.1.

Article 3. Anti-Discrimination

18/243, 244, plus criminal provisions of recent civil rights legislation.

Article 4. Protection of Privacy

Existing legislation against abuse of search (chapter 109). Bring over wire-tapping from Federal Communications Act with whatever changes Congress legislates.

CHAPTER 208.—ABUSE OF FEDERAL JURISDICTIONAL FACILITIES FOR CRIMINAL PURPOSES

The unifying idea here is that Federal legislative jurisdiction is invoked mainly in aid of local law enforcement. If chapter 209—Federal Police Power is expanded to cover theft and a whole range of other offenses presently left to State definition under 18/13, the present chapter would become little more than a series of cross references to chapter 209. Or the two chapters could be consolidated on the basis of a broadened definition of "Federal jurisdiction" in chapter 209. Where that concept is presently limited to "maritime and territorial" basis of Federal intervention, it would be extended to jurisdiction based on interstate and foreign commerce, use of the mails, and other "Federal" facilities, *etc. See* Extended Note D, Federal Criminal Jurisdiction in Aid of State Law Enforcement, *infra.*

Article 1. Fugitives

18/1073 makes it an offense to move across State or national boundaries to avoid prosecution or punishment for a State "felony" or to avoid testifying in a State felony case. The maximum penalty is 5 years although in States where, as in the Federal system, all offenses punishable by more than 1 year are felonies, this would penalize flight more harshly than the original offense. Indeed the statute in terms applies to an innocent witness who flees because he has been intimidated by a defendant. But the statute provides that only top officials of the Department of Justice may authorize prosecution, and prosecution may take place only where the original offense was committed. The statute is in fact employed mainly to return fugitives to States that want them.

Article 2. Theft

18/2311 ff. (stolen vehicles, securities, cattle, property over $5,000). Why are boats not covered? Why the special legislation on "cattle" (2316–2317), limited to bovine, including "carcasses", but excluding horses and sheep? Is there any sense in making it a felony (up to 5 years) to cross a State line with a stolen calf, but no Federal crime at all to cross the line with a stolen horse or $3,000 of stolen beef steaks? What is the point of the exception of forged or counterfeit governmental and bank securities (2314–2315)? Should the legislation, especially the criminal receiving sections (2313, 2315, 2317), extend to the proceeds of "fraud"? *Cf.* 2314: "taken by fraud," or does that refer only to "larceny by trick"? Should the offense be graded so that professional "fences" get higher penalties? *See* MPC art. 223, especially § 223.6.

Article 3. Fraud

18/1341 (mail), 1343 (wire-radio), 2271–2272 (defrauding marine insurers), 224 (sports bribery), 2318 (phonograph records with counterfeit labels). Plus scores of regulatory offenses in effect proscribing fraudulent practices.

Article 4. Gambling and Lotteries

18/1081–1084, 1301 ff., 1952–1953.

Article 5. Threats and Blackmail

18/875–877. Other sections of existing chapter 41 (Extortion and Threats) appear to belong logically elsewhere. *Cf.* 1951, 552.

Article 6. Morals; Obscenity

Existing chapters 117 (White Slave Traffic) and 71 (Obscenity). *Cf.* 1952 (travel in interstate and foreign commerce, use of facilities, including mail, to promote prostitution enterprise); 552 (customs employee abetting import).

The obscenity provisions especially require revision to conform to constitutional requirements and to modernize provisions on contraception and abortion.

Article 7. Liquor

Existing chapter 59 (Liquor Traffic). Some of this appears to be "regulatory." There are many more Federal liquor offenses presently outside the Penal Code. Some will fall within proposed articles of this Code dealing with Protecting Federal Revenues, Official Misconduct, *etc.*

Article 8, etc. Kidnapping, etc.

Here would come the serious offenses, if any, which are not defined for general Federal police power purposes in chapter 209, but which we wish to penalize Federally, in aid of State law enforcement, on the basis of interestate commerce, *etc.*

CHAPTER 209.—FEDERAL POLICE POWER

The unifying principle is that the offenses here defined are ordinary violations of law and order that a State would take care of if the offense occurred within the jurisdiction of that State. Federal leg-

islation is required and has been provided because such offenses may occur aboard American vessels on the high seas, or on territories within the exclusive jurisdiction of the United States. *See* definition of "special maritime and territorial jurisdiction of the United States" in 18/7, which, however, does not include the District of Columbia for which Congress has enacted a separate criminal Code. Where State and Federal jurisdiction are concurrent, Congress had made its own penal policy paramount as respects a whole range of more serious offenses, and left the rest to State law, defining the crimes and specifying the penalties, although Federal investigation, prosecution, courts, and prisons carry out that law. *See* 18/13, the so-called Assimilated Crimes Act.

The preparation of a new Federal Penal Code is an appropriate occasion to reexamine the practical operation of this arrangement. Considering the backwardness of the penal law in many States, there must be some grotesque consequences of this wholesale incorporation of State law. On the other hand, many States are well in advance of the Federal Penal Code in dealing with serious crime, and systematic reform proposals have been advanced by State commissions and by the American Law Institute in the Model Penal Code. We have a mandate to bring sound modernization to the Federal Penal Code, and we should carry out this mandate conscious that the new Federal Code will become a model for State imitation.

See Extended Note E, Expansion of the Concept of Special Federal Jurisdiction, *infra.*

Article 1. Homicide

Existing chapter 51 (Homicide) for a starter, *but cf.* MPC art. 210. The murder-manslaughter grading will have to take account of the provisions scattered through the existing Code making the occurrence of death in the course of other offenses an occasion for special severity. 18/34, 1201, 1992. Capital punishment will be an issue which the Commission can hardly escape, especially since the abolition movement has spread so among the States and the Federal Code would have the effect of authorizing capital punishment for violent crimes committed in an abolition State where the Federal concern is collateral at best, as in "interstate" kidnapping (1201), in train wrecking (1992), or rape (2031). However, we should not let this issue assume too large proportions in the Commission's debates. This is one which Congress itself will adequately canvas and the Commission may content itself with summarizing the evidence and arguments and reporting its own division of opinion, if there is one.

Article 2. Arson and Catastrophe

Existing chapter 5, which is grossly obsolete. *See also* 2275 (vessels). A 20-year maximum is authorized if a "dwelling" is burned. Otherwise the maximum is 5 years, explicitly for "munitions of war," implicitly for such buildings as schools, theaters, art museums, the Capitol. No special provision is made for modern nonburning catastrophes like explosion, flooding, widespread radiation, chemical, or bacteriological contamination. *Cf.* 18/1992 (interstate rail facilities) and MPC art. 220.

Article 3. Rape and Other Sexual Offenses

Existing chapter 99 (Rape) is grossly obsolete and indiscriminate, with the death penalty available contrary to the law of most States for alleged rapes involving no visible signs of violence, and controversy over whether the relations between the parties (who may have been "dating") were consenual should be treated differently from violent ravishment by strangers. *Cf.* MPC art. 213.

Should State law be followed on homosexual relations as it presently is under 18/13 if the "Federal" situs is within a particular State? There appears to be no special provision for homosexual assault or seduction of children, if the offense occurs outside State jurisdiction but within maritime or other Federal jurisdiction. There is a ridiculous provision in a chapter on "Seamen and Stowaways" penalizing seduction of female passengers, regardless of age, by "solicitation, or the making of gifts or presents."

Article 4. Robbery and Burglary

Existing chapter 103. *See also* 18/2276 (burglary of vessels). *Cf.* MPC arts. 221, 222. Get rid of ridiculous grading inconsistencies, *e.g.*, 2112 (up to 15 for robbery of Federal property) and 2114 (up to 10 for the same offense); 2113 (legislative *minimum* of 10 years for killing in bank robbery, although no such minimum is found in the murder or kidnapping statute); 2115 (Post Office burglary up to 5); 2117 (burglary of interstate vehicle up to 10). Section 2112 appears to be anomalous in making any robbery a Federal offense, no matter where it occurred, if it turns out that the victim held "property of the United States" (a draft card?). The juxtaposition of this section and 2111, penalizing robbery "within the special maritime and territorial jurisdiction" is probably an accidental application of the principle suggested in Extended Note E, *infra*, of an expanded concept of special Federal jurisdiction. Note that 2111 does not use the term robbery, but states more or less the common law elements of the offense, while 2112 simply penalizes "whoever robs."

Article 5. Kidnapping

Kidnapping does not appear among the offenses defined by Federal law when committed "within the special maritime and territorial jurisdiction," but is Federally penalized if the victim was transported in interstate or foreign commerce (18/1201). No reason appears why this serious offense is left to State definition when it occurs on a Federal enclave within a State (18/13), and not penalized at all if it occurs out of a State but not within the constricted Federal jurisdictional basis of 18/1201. The kidnapping definition in 1201 is in any event obsolete and undiscriminating. *Cf.* MPC art. 212.

Does shanghaiing sailors (2194) belong here or under Civil Rights?

Article 6. Assaults and Life Endangering Behavior

18/113 ff. *Cf.* MPC art. 211.

Article 7. Theft and Fraud

18/1025 (fraud). *Cf.* arts. 2 and 3 of chapter 208, above, which would become mere cross references to this chapter if these subjects are brought fully within the range of Federal definition rather than being left largely to the Assimilated Crimes Act (18/13).

Article 8. Narcotics and Dangerous Drugs

Mostly from Title 26. Although this subject might appear to fall logically within chapter 208, and local authorities are heavily engaged, the Federal government is deeply involved on the basis of customs control and the fictional revenue interest. The process has gone so far that Federal narcotics enforcement cannot easily be regarded as an activity auxiliary to State efforts. Perhaps it should be so administered. In any event, here is another illustration of the difficulty of drawing a hard line between chapters 208 and 209.

Article 9. Riots and Mutiny

There is no riot law for Federal enclaves other than the District of Columbia. But *cf.* 1792 (in prisons); 2192–2193 (seamen's mutiny); 2387 (mutiny in armed forces).

Part III.—Disposition of Offenders

Chapter 301.—Sentence

Article 1. Varieties of Sentence

Herein of the alternatives open to the sentencing judge. A comprehensive list would encourage judges and others to consider the whole range of possible disposition, *e.g.*, reprimand; probation and conditional release; restriction of residence, activities, or associations; fine; license lifting; disqualification from office; civil commitment; imprisonment with a limited variety of sentence limits (*e.g.*, 30 days, 6 months, 4 years, youth offender, extended term, life, death).

This article would also be the place for the expression of legislative preferences for some dispositions over others, *e.g.*, a presumption in favor of probation over imprisonment for first offenders of specified classes.

Here also might go sections authorizing judges to dismiss, even after a jury verdict of guilty, if the offense is trivial (*cf.* MPC § 2.12), or to reduce the level of the offense by one degree (*cf.* MPC § 6.12). Such provisions give judges authority to do what prosecutors now do in effect, without explicit authority, when they decide whether to prosecute, what charge shall be brought, and what guilty plea will be acceptable.

Consideration will be given to authorizing resentence within a year on recommendation of the correctional authorities, where the original sentence is long-term imprisonment. *Cf.* MPC § 7.08. Such a provision would not be appropriate if the Commission favors a system under which the correction authorities themselves determine the initial sentence limits. *Cf.* California system.

See generally. 18/chapter 227 (Sentence, Judgment, Execution).

Article 2. Pre-Sentence Investigation

Federal Rule of Criminal Procedure 32(c), MPC §§ 7.07, 7.08.

Article 3. Probation

18/3651; FRCrP. 32 (e) and (f); MPC article 301 and § 7.01.

Article 4. Fines, Penalties, and Forfeitures

18/chapter 229 and § 3563; 26 chapter 75—Crimes, subchapter c—Forfeitures (§§ 7301 ff.); MPC article 302 and § 7.02.

There is a major job to be done making sense of this branch of the law. What considerations dictate "penalties" (widely used for minor offenses under the revenue laws) rather than fines. Why forfeiture? Is it anything but an arbitrarily determined fine or penalty, dependent on legislative whim in authorizing forfeiture, the chance that property may be connected with the offense, the extent of the offender's interest in the property, policies and practice in administrative and judicial remission of forfeiture (3617), *etc.*? Is the rational basis of modern forfeiture simply a lien to satisfy a fine?

Observe fines related and limited to the amount embezzled but up to $1,000 if the amount embezzled is less than $100 (646, 653, 654), *double* the amount embezzled (645, 651, 652), *triple* the amount of a bribe (201(e)). Forfeitures are frequently authorized in counterfeiting (492) and customs offenses (544 ff.), offenses involving ships and other vehicle (962 ff., 1082, 2274), firearms (3611), liquor (3615 ff.). To what extent is forfeiture a historic survival from a time when fines were less common or more difficult to collect?

Article 5. Disqualification and License Lifting

The subject of disqualification from holding office, serving as juror, testifying, enjoying government contracts or benefits, *etc.*, needs basic reexamination. Should it be automatic (655—bank examiner) or discretionary (201(e)—bribery)? Should it be from the particular post (655, 1905, 1907, 26 U.S.C. § 7214—revenue officers) or all Federal office (201, 2383)? Should disqualification be permanent (2383—insurrection) or for a limited period (2385—sedition, 5 years)? The variations show no plan or reason. For betraying confidential information a Federal employee must generally be "removed" (1905) or "disqualified" (1907) from the particular office; but some related sections carry no such penalty (1906). Extortion (872) carries a 3-year maximum sentence of imprisonment, but no disqualification; however, a vessel inspector who receives a fee or reward for his services other than is fixed by law "forfeits his office," although he risks no more than 6 months' imprisonment (1912). Revenue officers are mandatorily discharged for a long list of derelictions, including extortion, fraud, and failure to report incriminating information (7214). There is no disqualification of a prison official who voluntarily allows an escape (755). One wonders whether the civil service law is not the appropriate place for regulating the conditions of dismissal of misbehaving officials, leaving in the Penal Code only a notice of this possibility and a discretion in the court to suspend pending action by the employer.

Many derelictions raise a question as to the suitability of the offender, not holding public office, to continue in an activity subject to licensing. So also, in this day when vast quasi-public responsibilities are entrusted to business and labor leaders, there may be appropriate occasions for excluding miscreants from posts of responsibility in particular organizations (a trade association executive bribes a Federal administrator) or in interstate or foreign commerce.

Article 6. Imprisonment: Sentence Limits

Herein of:

(a) *Maximum terms.*—It is assumed for present purposes that there will be only a limited number of grades of offenses each identified by a legislative maximum associated with some idea of the pur-

pose of that type of prison sentence. Thus, a 30-day maximum might be authorized for petty offenses—enough to give the shock of jail, with no pretense of effort in so short a term to "rehabilitate." There might be a misdemeanor limit of 6 months for offenses somewhat graver than the previous group. A 3- or 4-year limit might be appropriate for serious offenses where a real effort to reform the individual might be undertaken. Ten years or more would be for the typical very serious offenses, with a few exceptions where life imprisonment would be called for.

The system described offers just 5 types of prison sentence in contrast to the present bewildering variety of present maxima, *e.g.:*

30 days, 8 U.S.C. § 1306(b), 16 U.S.C. § 414

90 days, 2074—counterfeit weather reports, 969—contraband to Pacific natives, 1165—hunting Indian lands

6 months, 1504—influencing juror, 42—violating conservation regulations

1 year, 641—theft under $100, 594—intimidating voters, 873—blackmail

2 years, 609—"wilfull" violations of limits on political contributions, 875—extortion by threat to property or reputation, 1007 ff.—defrauding certain Federal agencies

3 years, 496—counterfeiting custom documents, 912—impersonating Federal officer, 958 ff.—violating neutrality

5 years, 371—conspiracy to commit an offense or defraud United States, 1001—false statements, 1621—perjury, 81—arson, except dwelling, 655–656—theft by bank examiners and employees, 1952—interstate racketeering

6 years, 372—conspiracy to hinder Federal officials

7 years, 1582—slave trade, 2382—misprision of treason

10 years, 641—theft of Federal property over $100, 2114—postal robbery, 793—espionage, 286—conspiracy to defraud on a "claim" against United States

15 years, 2111—robbery, 2032—seduction of girl under 16

20 years, 2113—bank robbery and burglary, 2385—sedition, 875 ff.—extortion by threat to kidnap

25 years, 2113—bank robery plus assault, 2114—postal robbery, second offense

30 years, 2153—military sabotage, seduction of girl under 16, second offense

40 years, 26 U.S.C. § 7237—giving marijuana to someone under 18

life [or death], 794—wartime espionage, 1111—murder, 1201—kidnapping, 2031—rape, 2381—treason

Important issues for the Commission will be whether to restrict the variety of legislative grading, what scale of maxima to use, and whether judges shall have some discretion to set lower than the legislative maximum in a particular case.

There is great need for some kind of reasoned consensus on aggravating circumstances, *e.g.*, use of weapons, danger to life, extensive harm, multiparty crime, second and subsequent offenses.

Normal maxima might be extendible (by the court? by the corrections authorities?) for specially dangerous classes of offenders (*cf.* MPC §§ 7.03 ff.). Another way of carrying out the same policy would be to accept higher legislative maxima initially and to create a presumption in favor of parole when some portion of the sentence has been served, the presumption being overcome only by finding the prisoner, under specified criteria, unsafe to release.

All prison sentences would, in any event, carry a parole component. *Cf.* MPC § 6.10. This would end the paradoxical present rule under which parole supervision is *inversely* proportional to imprisonment. Under this rule the worst cases—those whom the Board refuses to release until the expiration of the maximum—have no parole period left to serve. The more trustworthy, who are released on parole early, theoretically have the longest parole supervision.

(*b*) *Minimum sentences.*—There are two main issues here: whether to have any minimum sentences imposed by law, and whether the judges shall retain their present power, within limits, to set a minimum period of confinement before parole may be considered. Legislative minima appear erratically in some of our existing laws: *e.g.*, treason (2381–5 years), but not wartime espionage which likewise carries the death penalty (794); narcotics (18/1403—2 years; 26/7237—minima ranging from 2 to 10 years), kidnapping or murder in course of bank robbery (18/2113—10 years), but not other murder or kidnapping; evading the oleomargarine tax (26/7234(d)—6 months); violating regulations on adulterated butter and filled cheese (26/7235–7236—30 days).

As to the controversy over judicial control of the minimum as well as the maximum, *see* MPC § 6.06 and Alternate § 6.06 with commentary. The argument for a judicial control of the minimum is essentially that an administrative agency ought not have power in effect to nullify the judicial determination that the offender should go to prison, by paroling him as soon as he arrives. Also a judicial minimum, set very low, relieves the parole board of the burden of making decisions about offenders who have just arrived. The argument strongly pressed to the contrary is that the correctional authorities are best able to determine when a man may be optionally released, based on more intense study and more leisurely appraisal than is possible in court. The parole board, it is said, can and would defend itself against pressures to release prisoners or even hear applications immediately on arrival.

(*c*) *Extended terms; concurrent and cumulative sentences.*—*Cf.* MPC § 7.03 ff. Unlimited cumulation of consecutive sentences must be restrained. The alternatives are to provide a standard enhancement of penalty for dangerous offenders, including multiple and repeating offenders, or to treat the legislative maxima as intended for the worst cases and to create a legislative presumption in favor of the parole at some date short of the legislative maximum. The presumption would operate unless the Parole Board found the prisoner to be specially dangerous by reason of recidivism, mental aberration, or the like.

(*d*) *Effect of other sentences; pretrial confinement.*—MPC § 7.09, 18/3568.

Article 7. Death Sentence [if retained]

MPC § 210.6, 18/3566–3567.

Article 8. Civil Commitment

Article 9. Appeal from Sentence

This proposal must be investigated, as well as alternative means of achieving consistency in sentencing, unless the question is finally resolved by Congress in pending legislation.

CHAPTER 302.—PRISONS AND PRISONERS

18/chapters 301–309, 313–317; MPC arts. 303, 304.

CHAPTER 303.—PAROLE AND POST-PRISON TREATMENT

18/4201 ff.: MPC § 305.1 ff.

CHAPTER 304.—YOUTH CORRECTIONS

18/chapter 302, plus § 4209; MPC § 6.05.

CHAPTER 305.—JUVENILE DELINQUENCY

18/chapter 403.

PART IV.—INVESTIGATION, ENFORCEMENT, AND PROSECUTION PRACTICES

Herein of surveillance, search, seizure, interrogation, use and reward of informants, immunity, plea bargaining, *etc.* There may be need for systematic allocation of investigative jurisdiction among Federal agencies and between Federal and local authorities. *Compare* specific legislation on investigative jurisdiction in 18/1751(i).

Among the sources would be existing chapter 205 of Title 18 (Searches and Seizure), 18/1406, 1954, 2424, 3486 (immunity), decisions of the Supreme Court of the United States, recent Congressional bills and committee reports, the American Law Institute's draft Pre-Arraignment Code, the Reports of the American Bar Association's Project on Minimum Standards of Criminal Justice.

No detailed analysis of this Part is presently offered, since we have agreed to proceed first on other less controversial subjects. We may ultimately treat this subject by separate draft bill or bills, or by reports and recommendations in individual topics.

Chapter 6 of Part I, above, may preferably be located here.

PART V.—JUDICIAL PROCEDURE

Since most of this material is covered by the Federal Rules of Criminal Procedure and is subject to thorough study and continuous review by the Federal judiciary, it is not proposed to engage in a comprehensive restudy of the Federal Rules. However, it is within our mandate to make special recommendations in this area. Among the topics which the Commission may take up are: discovery, habeas corpus and other post-conviction remedies, review of orders suppressing evidence.

Appendix

Transition provisions relating to effective date, proceedings pending under old law on effective date, *etc.* There may also be "Schedules," *i.e.*, detailed lists which for the sake of clarity, had better be segregated out of the body of the Code.

Extended Note A

CONSPIRACY

Existing conspiracy provisions vary arbitrarily as respects 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 (371) has a 5-year maximum which applies to conspiracies with such objects as murder (1111—possible death penalty), rape (2031—possible death penalty), aggravated assaults (113—up to 20 years), arson (81—up to 20 years), bank robbery or burglary (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 the substantive offense will carry the same maximum: kidnapping (1201—death), assassination of President (1751—death), prison riot (1792—10 years), military insubordination or refusal of duty in wartime (2388—20 years), robbery and extortion obstructing interstate commerce (1951—20 years), mail fraud (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 371, is for conspiracies to commit "misdemeanors," defined in section 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 (542), many violations of the election laws (chapter 29), false personation of officials (912), offenses against neutrality (958–962), frauds against some Federal instrumentalities (1007–1008), purchasing or receiving government issue military equipment (1024), interstate transmission of gambling information (1084), lottery offenses (1301–1302), inciting desertion in armed forces (1381), broadcasting obscenity (1464), malicious mischief to post boxes and mail (1705), malicious assault or interference with a postal clerk (2116), resistance to search and seizure (2231, 2233).

A final oddity relates to all misdemeanors punishable by less than 1 year. Section 371 prescribes that in such case the maximum for conspiracy shall not exceed that for the substantive offense. So the law envisions criminal conspiracies punishable by 6 months (unauthorized manufacture, sale, use of Federal and other identifying badges and passes—chapter 33), 90 days (hunting Indian lands—1165), or $100 fine (evading postal class rates—1723). In some instances conspiracy

is punishable where the law, incomprehensibly, does not penalize individual behavior (*e.g.*, 371—to defraud the United States; 956—to destroy property of foreign government).

These arbitrary and absurd provisions reflect a general deterioration of understanding about the function of conspiracy. One of the important opportunities in the new Code is to create a sensible and useful conspiracy offense. A new conspiracy concept might center on the *creation and management of criminal organizations.* This would merit substantial punishment in excess of that ordained for isolated offenses. The remainder of what is presently treated as conspiracy ("agreement of two or more") might be left to the law of accomplice liability, making all equally punishable as for the substantive offense.

Extended Note B

Penal sanctions for regulatory offenses

It has unfortunately become common for legislatures enacting complicated regulatory statutes to insert, as a matter of routine and almost without consideration, a penal section authorizing 6 months or a year's imprisonment for violation of any command of the law or of any regulation issued under the law. *See* the enormous range of regulatory legislation listed in Statutes and Matters Administered by the Criminal Division (Dep't of Justice Mimeo 1964). This indiscriminate dealing with *men*, who may contravene the law wickedly or innocently, negligently, recklessly, defiantly, once or repeatedly, is often sharply contrasted with meticulous legislative detail in dealing with property and administrative decisions, where judicial and executive discretion is strictly limited.

The possibility to be explored here is that the new Penal Code can provide a sensible framework or pattern of penal sanctions for violating regulatory law. Regulatory legislation would then merely refer to these sections of the penal law, if penal sanctions are desired. The following might be included among elements of the new pattern:

(1) The lowest level of innocent violation would be "noncriminal" like a traffic violation, entailing only fines or reprimand.

(2) A petty offense maximum imprisonment of 30 days might be prescribed for offenders shown to be aware that they acted in violation of the rule, for persons in regulated trades who have a professional duty to make themselves aware of and to abide by the regulation, and for persons whose violation of the regulation manifestly imperils the interest which the rule protects.

(3) A misdemeanor maximum of 6 months for persistent or defiant violation, or for violation manifestly entailing risk of very serious consequences.

Although regulatory offenses will be found overwhelmingly outside the Penal Code, there are instances of regulatory detail inappropriately included in present Title 18. Illustrations: offenses relating to hunting, conservation, *etc.*, in chapter 3—"Animals, Birds, Fish, and Plants," much of which belongs in Title 16—Conservation; fire regulations on public and Indian land (1856); customs (547, 549); financial transactions with foreign government in default (955); supplying contraband to Pacific natives (969); regulations of liquor transport, labeling, *etc.* (1263–5); postal regulation (*e.g.*, 1716); civil

service regulations (203 ff.); election regulations (*e.g.*, 597, 603, 607); some special regulations applicable to Indians (1154, 1161).

It will be part of the responsibility of the draftsman to propose appropriate disposition of such provisions. A possible solution: transfer to appropriate substantive title of the United States Code; there change the penalizing language to "is unlawful and punishable as provided in section —— of the Penal Code." Or we might have a classification like the triple one suggested above, and specify which regulatory offenses go in each classification, either by a schedule attached to the Penal Code or by specification in the particular regulatory law. *Cf.* use of cross reference in criminal tax legislation 26/7213(e).

The anarchic penalty provisions associated with regulatory violations outside the Penal Code is illustrated by 49 U.S.C. § 322(a) under which Greyhound Lines, Inc. was recently indicted following a fatal accident allegedly caused by worn tires and hazardous condition of the vehicle. N.Y. Times, July 21, 1967, at 27. The maximum penalty is a $500 fine. Violation of safety regulations of rail and air carriers carry civil penalties. 49 U.S.C. § 1471, 45 U.S.C. § 16.

Extended Note C

Revenue offenses

The revenue offenses appear mainly in 26 U.S.C. chapter 75, §§ 7201 ff. The central failure offenses are "attempt to evade or defeat" a tax (7201), and failure to keep records or make returns, and supply information (7203). But chapter 75, rightly entitled "Crimes," is virtually a self sufficient Criminal Code, paralleling the provisions of Title 18, with respect to such matters as official misbehavior, fraud on the government, false statements, violating regulations, *etc.*

The question arises, why this segregation and duplication? Is it historical accident? a supposed convenience in having the laws most frequently invoked by the Treasury collected in one list? a method of defining the investigative jurisdiction of the Treasury bureaus? a necessity because of peculiarities of the revenue laws? Following are examples of oddities resulting from the isolation of this large part of the criminal law from the main body:

(1) False statements which would entail as much as 5 years' imprisonment under 18/1001 here are punishable by not more than 1 year. 26/7204, 7205.

(2) There is a pseudo-perjury offense covering documents declared to be made "under penalties of perjury," with sentence up to 3 years for "material" falsification (26/7206). It might be a good idea to have a general offense of this character with a milder penalty and no stumbling blocks about "materiality." *Cf.* MPC § 241.3(2).

(3) Particular forms of attempts to defraud carry a 3-year maximum (26/7206(3), (4), (5)), as compared to higher penalties in Title 18.

(4) Obstruction of the revenue laws carries maximum of 1 to 3 years depending on use of force (26/7212). The corresponding provisions of Title 18 carry 3– and 10-year maxima depending on use of dangerous weapons (18/111).

(5) A number of "revenue" offenses carry legislatively imposed ima, 30 or 60 days, or 6 months. 26/7233 (cotton futures tax), 7234 (oleomargarine regulations). Sometimes, as in connection with narcotics violations, the minima are very high and probation is prohibited (7237—10 years). There are some absurd inconsistencies among the "revenue" offenses themselves, as when a 6 months' minimum is provided for evading the olemargarine tax (7234), although evasion of income and other taxes carries no minimum (7201). It will be important to generate a consistent policy on legislative minima and probation in the new Penal Code.

(6) Many regulatory offenses in Title 26 are penalized by fines or civil "penalties" only, where corresponding offenses in Title 18 would carry imprisonment (7262 ff.). It is hard to see any consistent policy in the choices made between fine and penalty.

(7) The Crimes chapter of the Internal Revenue Code frequently employs cross references in the text of the statute, a device I have suggested for use in the new Penal Code where similar behavior falls logically in several categories, *e.g.*, assaults on Federal employees, assaults which obstruct law enforcement, and assaults generally. *See* 26 U.S.C. §§ 7238, 7329. However, the Revenue Code cross references often lead to virtual unintelligibility: the cross reference should be in the substantive section itself (*e.g.*, "violation of this section is punishable as provided in ——"), and could refer to the general Penal Code as easily as to the Crimes chapter of the Revenue Code.

(8) Many offenses in the Revenue Code are clearly regulations of trade (*e.g.*, in margarine, adulterated butter, filled cheese, white phosphorus matches), or general police statutes (narcotics). The tax aspect is manifestly jurisdictional only. Logic seems to call for putting such material in the general criminal law. The tax aspect could be treated by putting the subject matter within the "special jurisdiction of the United States" (*cf.* 18/7). Perhaps the jurisdictional base for these "revenue" offenses should be broadened to include interstate and foreign commerce, *etc.*

Note that Title 18 presently contains some text cross references to other titles for definition of offenses. *See*, for example, 18/1403 (use of communications facilities for narcotics violations). This section prescribes a minimum sentence of 2 years and a maximum of 5, for the same behavior, in practical effect, which is differently dealt with in Title 26.

Extended Note D

Federal criminal jurisdiction in aid of state law enforcement

Car thieves and kidnappers escape across State lines. Swindlers and lottery operators work by mail and telephone far from the reach of local law enforcement officials where the victims live. Obscenity and liquor are imported or distributed through Federally controlled facilities. The important thing is that State policies still govern, by and large, as can be seen when the legislation excepts from the Federal prohibition behavior legal in the target State (836—fireworks; 1262—liquor; 1084, 1953—gambling). Also, in actual practice, the Federal enforcers yield to local law enforcement when the situation can be locally handled, even though the Federal jurisdictional element is

present. Sometimes, the Federal law itself excludes Federal action, despite the presence of Federal jurisdiction, where the amounts involved are not substantial enough to warrant Federal supplementation of State enforcement efforts (2314 up to $5,000).

From the point of view of drafting and administration, it is helpful to consider these offenses as a group. The offenses can perhaps be drafted on a common comprehensive jurisdictional formula that includes many different Federal bases for action, so that we do not get one statute on use of the mails, and another on wire communication or broadcasting, and another on interstate transportation and travel, as in relation to lotteries (1304 ff.) or threats (875 ff., 1951). *Cf.* 18/1952: "travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail." And why not the facilities of the Federal Reserve and national or insured banking systems?

It may be possible to formulate common policies on referral of matters to the States or on foreclosure of Federal prosecution by State action. It may be that the Congressional goal indicated in 18/1952 (anti-racketeering) can be better expressed in terms of revised conspiracy law specifically aimed at the formation and conduct of criminal organizations of substantial scope. Substantiality might be measured by numbers of persons involved, *e.g.*, more than four, amounts of money, or geographical scope. Or some such principle could be laid down as a guide to the Attorney General's control of enforcement intervention in this area. It may be of fiscal interest to view these Federal law enforcement activities as a group so that we know the aggregate amount of Federal subsidy to local law enforcement. It may be possible to devise alternatives to Federal law, prosecution, adjudication, and imprisonment in these areas, for example, Federally subsidized investigation and transportation where these are the obstacles to local prosecution.

Extended Note E

Expansion of the concept of special federal jurisdiction

The concept of "special Federal jurisdiction" may be extended, in our draft of a reformed Federal Code, beyond the "maritime and territorial" base adopted in 18/7. At the very least, earlier chapters of the new Code will often incorporate by reference provisions of the present chapter dealing with homicide, kidnapping, arson, robbery, burglary, *etc.*, when violence is directed against Federal personnel, property, or functions. But the same thing could be accomplished by appropriate broadening of the definition of "special Federal jurisdiction," eliminating need for cross reference. The broadening might include all bases for Federal jurisdiction, *e.g.*, relation to interstate and foreign commerce, use of the mails and other Federal facilities, as in 18/1952 and in such regulatory statutes as the Securities Acts.

Carried to its ultimate conclusion this logic leads to a Federal Penal Code which is organized and drafted just like any State Code. The matter of Federal jurisdiction would be handled in a section of the General Part, where it would be laid down that the offenses substantively defined in the Federal Penal Code would be Federally prose-

cuted only if one or more specified bases of Federal jurisdiction exist. *See* Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROB., 64 (1948). Virtually every criminal offense committed in the United States which had any Federal impact or involved even incidentally use of the mail, telephone, facilities of commerce, *etc.*, would come within Federal cognizance. Concurrently with any such logical completion of the concept of Federal jurisdiction there would have to be a great development of explicit legislation controlling the exercise of this jurisdiction or delegating control to the Attorney General or making its exercise contingent on request by local law enforcement authorities.

The innovations just described appear radical, but Federal legislation has already moved far in this direction. It may be worth getting up a report on how far the process has gone and preparing an alternate draft based on the principle suggested above. Initially, however, we should probably proceed along more conservative lines.

Consideration must be given to the place of the District of Columbia Criminal Code in this scheme of things. It is remarkable that Congress has passed quite different laws dealing with the same subject matter, one for the District of Columbia, the other for Federal territory generally. For example, under the District of Columbia Code rape, including "statutory rape," is a capital offense, whereas under Title 18 statutory rape is differentiated and carries a 15-year maximum. If this Commission should recommend, and Congress should enact, a statutory definition of the defense of insanity, the law for the District of Columbia might remain unchanged.

COMMENT

on

IMMUNITY PROVISIONS

(Dixon; November 18, 1968)

I. Essential Elements in Proposed Immunity Reforms*

The immunity statutes proposed here, unlike other reforms presently being undertaken by the Commission, consist solely of procedural provisions. Initially immunity problems were considered relevant to the drafting of a substantive Code because under most existing Federal immunity laws a grant of immunity constitutes a defense to prosecution. But as the proposed reform took shape, it came to reflect the view that immunity need not be a defense but only a ground for suppressing the use of evidence. This reform is nevertheless an appropriate part of the Commission's proposals, not only because of the need to implement the recommendation that immunity no longer be a defense but also to accommodate explicit requests from the Judicial Conference and the Department of Justice that the Commission undertake reform in this area.

The reforms which these provisions would accomplish are as follows:

(1) in place of the multitude of existing Federal immunity statutes, all of which depend upon the nature of the inquiry and some of which, in addition, specify who may authorize immunity and in what proceedings, there would be substituted standard provisions keyed only to the proceeding in which immunity is to be conferred: court or grand jury, formal administrative, or Congressional;

(2) the immunity conferred would be confined to the scope required by the fifth amendment as interpreted by the Supreme Court—that is, prohibition of use of the information obtained and its fruits—thus permitting prosecution on untainted evidence;

(3) assertion of the privilege would be required in all instances, thus preventing an unwitting, automatic grant of immunity as may presently occur under some existing Federal statutes;

(4) in order to avoid unnecessary rituals, *e.g.*, taking the witness, whose attorney has worked out an immunity grant with the United States Attorney, first before the grand jury, then to the court to direct him to answer, then back to the grand jury, the court (or other competent authority) would be able to issue the direction to answer in advance, contingent upon assertion of the privilege;

*The essential features of the proposed immunity reforms have already been incorporated into presently (March 16, 1969) pending legislation: S. 30 (Organized Crime Control Act), 91st Cong., 1st Sess. (1969) and a companion bill in the House, H.R. 11157 (Federal Immunity of Witnesses Act), 91st Cong., 1st Sess. (1969).

(5) the power of Congress to apply for immunity would extend to any matter within its authority, rather than being limited, as at present, to national security matters;

(6) the role of the various branches of government would be clarified, at the same time that constitutional conflicts would be avoided, *e.g.*, requiring timely notice to the Attorney General of an intended immunity grant by Congress or an independent regulatory agency but not his approval, thus allowing him time to "lobby" for a change of mind;

(7) a standard immunity provision for administrative proceedings would be available so that whenever Congress wants to confer authority to grant immunity on any department or agency, it need only decide who should have the authority under the standard provision;

(8) the requirement in all three types of proceedings that the Attorney General receive notice of intent to obtain an immunity authorization will give him an opportunity to insulate from the immunity grant any incriminating data already in his files prior to the witness' testimony.

One comment on terminology should be added. It has been customary to refer to the statutes being affected by the proposed reforms as "immunity statutes" or "compulsory testimony acts." For the sake of continuity the term "immunity" has been retained in the above brief description, in the proposed new statutes themselves, and in the commentary which follows. However, the basic concept of "immunity" has been changed. As noted in point (2) above, part of the reform—in the spirit of the fifth amendment and recent Supreme Court cases—is to substitute a "use restriction" rule for the present absolute immunity rule which bars prosecution even on independent evidence. Hence, in the proposed new statutes and commentary on them the word "immunity" means "immunity" from having one's testimony or its fruits used against him in a criminal case.

Although it is not a reform, one additional feature should be noted at the outset for the sake of clarity: the immunity protection safeguards State use in a criminal case of Federally compelled information as well as Federal use. It has been clear since 1954 that a generally worded Federal immunity statute prevents State use of the compelled testimony by virtue of the supremacy clause; and the new theory of the fifth amendment announced by the Court in 1964 achieves this result by operation of the fifth amendment itself.

II. Existing Immunity Legislation: History and Analysis

A. *The Congressional Investigation Immunity Statutes From 1857 to the Present*

1. *The Beginnings of Federal Immunity Legislation.*—The initial congressional investigation immunity statute—which also was the first Federal immunity statute of any type—was enacted in support of an investigation of charges that members of Congress were extorting money from private persons interested in certain legislation. Its formula for immunity probably was adequate to satisfy constitutional requirements, but was phrased too loosely to preserve to the government the important discretion of whether or not to grant im-

munity. Witnesses could acquire immunity simply by testifying before a congressional committee. This 1857 Act, confined to congressional proceedings, read in pertinent part as follows:

> No person examined and testifying before either House of Congress, or any committee of either House, shall be held to answer criminally in any court of justice, or subject (sic) to any penalty or forfeiture for any fact or act touching which he shall be required to testify. . . . (11 Stat. 155–156 (1857)).

Abuses in the form of "immunity baths" occurred and in 1862 Congress reacted by rewriting the statute in the form which it retained without much modification until replaced by the Immunity Act of 1954 (which is applicable only to national security investigations by Congress and by Federal grand juries). As rewritten in 1862, the initial congressional immunity statute did attain the purpose of safeguarding against excessive immunity baths because only the actual "testimony" was immunized; the offense still could be prosecuted by using other evidence. This 1862 Act, confined to congressional proceedings, read in pertinent as follows:

> The testimony of a witness examined and testifying before either House of Congress, or any committee of either House of Congress, shall not be used as evidence in any criminal proceedings against such witness in any court of justice . . . . (12 Stat. 333 (1862)).

However, this revised formula did not give protection equivalent to the fifth amendment's right of silence. In immunizing only the testimony the statute seemed to allow the prosecutors to use this testimony as a "lead" to other evidence, and left the witness in an exposed position. This point was the key issue in *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892), under an analogous limited immunity statute of 1868, and the Supreme Court held the statute unconstitutional. Arguably, the Court would have been nearer to the true congressional intent, although inartistically expressed, if it had read both statutes as barring use of the fruits of the testimony as well as the testimony itself.

After the adverse decision in *Counselman* the Congress enacted in 1893, in aid of Interstate Commerce Act investigations by the Interstate Commerce Commission and by Federal grand juries, an immunity statute whose broadly phrased formula gave absolute immunity. This 1893 Act became the model for all later development. Its constitutionality was sustained in *Brown* v. *Walker*, 161 U.S. 591 (1896).

However, neither it nor any subsequent immunity statute down to 1954 applied to congressional investigations. The Court made it clear in 1964, in a ruling concerning the Antitrust Immunity Act of 1903, that immunity Acts passed in support of particular regulatory programs did not extend to congressional investigations. *United States* v. *Welden*, 377 U.S. 95 (1964). Also, the old 1862 immunity statute regarding congressional investigations was—by inference from the *Counselman* decision—ineffective to overcome a plea of the fifth

amendment. If a witness did testify before a congressional committee, however, the 1862 statute could operate to bar State use of the testimony even though the testimony was not "privileged," that is, was not testimony which the witness had any constitutional basis for withholding. *Adams* v. *Maryland*, 347 U.S. 179 (1954).

2. *The 1954 Congressional Investigation Immunity Act.*—When Congress enacted the Immunity Act of 1954 (18 U.S.C.A. § 3486), the Congress obtained an immunity act which, for the first time since 1862, was worded broadly enough to overcome a plea of the fifth amendment. It was confined, however, to national security investigations, leaving the great bulk of congressional investigations unsupported by immunity provisions to this day.

Even as to national security investigations, the 1954 Act contains some unresolved constitutional difficulties centering on the special procedure outlined for granting immunity. The 1954 Act does not vest in congressional committees or even in Congress itself unconditional power to grant immunity in support of congressional fact-finding interests. Rather the Act provided (a) that Congress should apply to a Federal district court for an immunity order: (b) that Congress also must notify the Attorney General of its desire to immunize a recalcitrant witness; (c) that the Attorney General shall have an opportunity to be heard before the Federal district court grants a congressional request.

The congressional history indicates clearly that the provisions concerning notice to the Attorney General, an opportunity on his part to be heard, and a consequent court order as preconditions to a grant of immunity in a congressional proceeding, were the product of a fear on the part of some members of Congress that otherwise immunity baths would occur. There would be a possibility that grants of immunity made by Congress without consultation with the executive branch would interfere with the law enforcement activities of the executive branch. And, assuming the worst, there might even be collusion between the witness in need of immunity and a compliant congressional committee. No cases have been ruled on by the Supreme Court under this part of the Immunity Act of 1954.

However, if the Act contemplates that the Federal district court should settle the possible dispute between a House of Congress desiring to grant immunity in support of congressional interests, and an Attorney General request in support of executive interests that no immunity be granted, then a serious separation of powers problem is posed. Grants of immunity are not a matter of right or wrong. Rather they are the product of a calculation by the immunity granting agency that its need for the information overrides the public interest in prosecuting those witnesses whose conduct has made them possible defendants in a possible proceeding.

This is a "law enforcement bargain situation."—a naked policy judgment—in regard to which courts have no legal standards for judgment. Should the situation arise under the 1954 Act of a conflict between congressional and executive policy concerning granting immunity to a congressional witness the Court would have no basis under our separation of powers system for deciding whether to prefer the congressional policy or the executive policy. To date there has been

no authoritative court interpretation of the operation or constitutionality of the congressional investigation portion of the Act.[1]

It may be noted that the second part of the Immunity Act of 1954 contains an immunity provision applicable to Federal grand jury proceedings in the area of national security, and it also requires a court order as a precondition of immunity. Before the court order can be obtained there must be a certification by the United States Attorney conducting the grand jury proceeding that immunity would be in the public interest, and approval by the Attorney General. In the leading case under this provision, *Ullmann* v. *United States*, 350 U.S. 422 (1956), the Supreme Court upheld the Act and rebutted the argument that the Act violated separation of powers by imposing a nonjudicial function on the district court. Construing the statute narrowly, the Court said that under the terms of this grand jury provision a Federal district court is not to exercise any independent judgment on the merits of granting immunity: it is simply to certify that the statutory requirement of a finding of public necessity has been made by the United States Attorney, and approved by the Attorney General. (*Id.* at 434.)

If the congressional investigation provision of the Immunity Act of 1954 could be construed, by analogy to its grand jury provision, as only empowering the court to make an official recordation of the notice to the Attorney General and the possible remonstrance by him, the Act might then be constitutional on the theory that it vests in the court only a ministerial duty. However, this would seem to be a forced construction of the Act. Although not expressly requiring Attorney General approval of a congressional grant of immunity, the Act does expressly provide that the court shall give the Attorney General an "opportunity to be heard" before the court enters an order authorizing immunity. This unavoidably creates the possibility of an open conflict between the Attorney General and the Congress on an issue of policy rather than constitutional right—with the court placed squarely in the middle.

B. *Administrative Inquiry and Court-Grand Jury Immunity Statutes, 1893 to Present*

Although American immunity legislation begins with statutes enacted in support of congressional investigations, the first constitutional and enduring immunity language is that found in the 1893 Act (27 Stat. 443) enacted in support of proceedings under the Interstate Commerce Act, whether handled administratively by the Interstate Commerce Commission or criminally by the Attorney General through grand jury process. As noted in part II–A–1 above on congressional investigation immunity statutes, the absolute immunity language of the 1893 special Act became the "model" language which Congress incorporated in a series of additional special immunity acts, each enacted

[1] For discussions of the 1954 Act and the separation of powers problem, *see* Dixon, *The Doctrine of Separation of Powers and Federal Immunity Statutes*, 23 GEO. WASH. L. REV. 501, 627, and especially at 640–646, 655–657 (1955); Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion*, 10 ST. LOUIS U.L.J. 327, especially at 353–367 (1966).

in support of a particular regulatory program. It reads as follows, and was declared constitutional in *Brown* v. *Walker*, 161 U.S. 591 (1896):

> No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of chapter 1 of this title on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Each of the independent regulatory commissions is supported in its work by one or more special immunity Acts, the practice being to incorporate immunity provisions in each of the several Acts administered by an independent regulatory commission, rather than to give each commission one immunity provision covering the total range of its work.[2] For example, the Securities Exchange Commission administers the following Acts, each containing an immunity provision: Securities Act of 1933, 15 U.S.C. § 77v(c); Securities Exchange Act of 1934, 15 U.S.C. § 78u(d); Public Utility Holding Company Act of 1935, 15 U.S.C. § 79r(e); Investment Company Act of 1940, 15 U.S.C. § 80A–41(d); Investment Advisers Act of 1940, 15 U.S.C. § 80b–9(d).

Because of this practice of tying immunity provisions to *statutes*, rather than to *agencies*, some immunity provisions have dual applicability: in support of administrative regulatory proceedings under the statute; and in support of grand jury-court proceedings if the statute also contains a criminal penalty. Several regulatory programs, although popularly conceived as being administered primarily by an independent regulatory commission, also contain criminal penalties which creates jurisdiction in the Attorney General to proceed by grand jury process. Indeed, the 1893 Act itself is an example, in its first appearance before the Supreme Court in *Brown* v. *Walker*, 161 U.S. 591 (1896), in which its constitutionality was sustained. Passed in support of the Interstate Commerce Act, it created immunity power in proceedings before the Interstate Commerce Commission, and also in grand jury and court proceedings to enforce criminal penalties arising out of the Act. *Brown* involved not an Interstate Commerce Commission proceeding but rather a grand jury investigation of an alleged unlawful railroad rebate, in the course of which a railroad official pleaded the fifth amendment.

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[2] *See* the list of existing immunity statutes compiled in Appendix A to this comment.

Until recent years the United States Attorneys and the Department of Justice did not have immunity statutes supportive of their general criminal law enforcement function, apart from their role in enforcing the "criminal kickers" attached to various economic regulation statutes. Since the Immunity Act of 1954, however, which authorized immunity power for the Department of Justice as well as Congressional Committees in the national security field, Congress has enacted a number of additional special immunity statutes supportive of various aspects of the criminal law enforcement function of the Department of Justice, *e.g.*, the Consumer Credit Protection Act of 1968, 18 U.S.C. § 895; the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2514; the Welfare and Pension Plans Disclosure Act, 18 U.S.C. § 1954(b); the Narcotics Control Act, 18 U.S.C. § 1406.

The new immunity provisions in the Omnibus Crime Control Act come close to being a general immunity statute for the Department of Justice. In addition to covering investigations of the offense of unauthorized interception of communications, which apparently was the initial purpose for inserting the immunity provision, a cross reference section (section 2516) extends the immunity power to a long list of other Federal criminal offenses. The most recent Federal immunity provision is the one inserted in the Gun Control Act of 1968, 26 U.S.C. § 5848, which supports the gun registration requirement by providing that registration information may not be used directly or indirectly against the applicant in a criminal proceeding.

A further complication from the standpoint of classification of our many existing immunity statutes is that our formal administrative regulatory hearings are not all centered in the independent regulatory commissions, such as the Interstate Commerce Commission, Federal Trade Commission, Securities and Exchange Commission, *etc.* Some administrative hearings are held by an executive branch department. For example, regulation of agricultural commodities and marketing is centered in the Department of Agriculture which administers the following Acts, each containing an immunity provision: Commodity Exchange Act, 7 U.S.C. § 15; Packers and Stockyards Act, 7 U.S.C. § 222; Perishable Agricultural Commodities Act, 7 U.S.C. § 499m(f); Agricultural Marketing Agreement Act, 7 U.S.C. § 610(h); Anti-Hog Cholera Act, 7 U.S.C. § 855; Cotton Research and Promotion Investigations, 7 U.S.C. § 2115(b). The first five of these statutes are "automatic," not requiring a warning of the interrogator by a witness' plea of the fifth amendment; the sixth is a "claim" statute, making a plea of the privilege a precondition of immunity.

In summary, and reserving for the next section an analysis of problem areas in existing immunity legislation, it can be said that Federal immunity legislation has developed haphazardly. Congress has made a series of ad hoc responses to the need to support particular statutory programs with a power to compel testimony. There is no general Federal immunity statute. There is no uniform immunity statute for the independent regulatory agencies. There is no uniform immunity statute for the executive branch. There is no uniform immunity statute for criminal law enforcement. Nor is there uniform provision for consultation before one agency authorizes an immunity which may adversely affect the criminal law enforcement program under a statute administered by another agency.

C. *Analysis of Problem Areas in Existing Immunity Legislation*

1. *Overbreadth in Congressional Phrasing of the Immunity Formula.*—Historically, two conflicting considerations underlie the drafting and revision of immunity statutes. One consideration is that the immunity conferred leaves the witness, who is compelled to make a disclosure under pain of contempt punishment, in the same position insofar as possible as though his right of silence under a proper plea of the privilege against compulsory self incrimination had been left undisturbed. The second consideration is that grants of immunity be as narrow and precise as possible so as to minimize the upsetting effect on the law enforcement activity of either the Federal or State governments.

The seeds of conflict between the two considerations outlined above are found in the first two Supreme Court decisions on immunity statutes: *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892), and *Brown* v. *Walker*, 161 U.S. 591 (1896). In *Counselman* the Court nullified an early immunity statute because it failed to meet the first consideration. The statute immunized the compelled testimony but not its "fruits." In other words, the statute did not immunize leads to other evidence which could be gained from the compelled testimony, thus enabling future prosecution without in-court use of the immunized testimony itself.

Reacting to the *Counselman* decision—in retrospect perhaps overreacting—Congress drafted a replacement statute in 1893 in support of the investigatory power of the Interstate Commerce Commission. The prime consideration was to meet the constitutional objections articulated by the Court in *Counselman*.[3]

Perhaps unknowingly, the Congress in the 1893 statute gave the witness *two* distinct protections not present in the statute nullified in the *Counselman* case. The key phrase is the one which reads "No person shall be prosecuted . . . for or on account of *any transaction, matter or thing concerning which he may testify* . . . ." The first protection, flowing necessarily from this phrase, was to protect the witness against any future prosecution based not only on his actual testimony but also based on any leads or tips gained by the prosecution from that testimony. The second protection, far more broad, was to shield the witness from *any* future prosecution *logically related* to his compelled testimony. There was no need to show any actual connection between the compelled testimony and leads gained therefrom, and the particular investigative techniques and evidence supporting the future prosecution.

Read literally, the key phrase would bar future incriminating use of independent evidence already in the hands of the prosecution at the time of disclosure, provided only that the witness be able to show that his compelled testimony did bear a logical relationship to the *transaction* which was the subject of the future prosecution. In this sense the key phrase in the Interstate Commerce Commission immunity statute could truly be said to operate as an "immunity bath."

Since the date of *Brown* v. *Walker* in 1896, which sustained the

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[3] The statute is set forth in full in part II–B, *supra*, on "Administrative Inquiry and Court-Grand Jury Immunity Statutes."

constitutionality of the 1893 statute, Congress has enacted more than 50 immunity statutes. Although they very in some respects, all of the statutes retain the key phrase of the ICC statute: "no person shall be prosecuted . . . for or on account of any transaction, manner or thing concerning which he may testify . . . ." Further, until very recently, there has been virtually no discussion of this key phrase and its apparent effect of not only immunizing the "fruits" of compelled testimony but also of giving the witness an "immunity bath" which will bar use of independent evidence also.

Over the years there were a few discussions of the question of the needed degree of "substantiality" of the relationship between the compelled testimony and the transaction which was the subject of the future prosecution. In most instances doubts were resolved in favor of the defense. In one case, however, *Heike* v. *United States*, 227 U.S. 131 (1913), with an opinion by Justice Holmes, immunity was denied. The logic of Holmes' opinion was that immunity statutes, drafted solely as a reaction to the fifth amendment, should be construed to give immunity as an exchange *only* for evidence which the government otherwise would be unable to obtain.

2. *"Gratuity" versus "Exchange" Theory: Must the Witness Claim His Fifth Amendment Privilege as Precondition of Immunity?*— The "model" immunity act of 1893, quoted above in part II–A–1, did not expressly require that a witness plead the privilege against self incrimination as a precondition to obtaining immunity from future prosecution for matters related to his testimony. Not until the Securities Act of 1933, 15 U.S.C. § 77v(c), did Congress begin its present practice of inserting a provision making claim of the privilege a precondition to immunity. The provision reads: "after having claimed his privilege against self-incrimination."

Even without this express provision it might be suggested, in the spirit of Justice Holmes' opinion in *Heike* v. *United States*, 227 U.S. 131 (1913), that immunity statutes are unnaturally construed when read and applied so as to offer "gratuity" to crime. Under the alternative "exchange theory" of immunity statutes it could be argued that the *intent* of Congress—even though not specified in the statute—was to authorize immunity *only* when needed to overcome a specific withholding of information on grounds of prospective self incrimination.

The Supreme Court finally had an occasion to rule on this issue in 1943 in *Monia* v. *United States*, 317 U.S. 424 (1943). It held that under a statute not requiring a specific claim of the constitutional privilege a witness acquired immunity automatically by testifying under the compulsion of a subpena, even though he had not warned the interrogator by pleading the fifth amendment. The Supreme Court reached this decision despite the argument, noted by Justice Frankfurter in his dissent, that a contrary congressional intent could be inferred from past congressional actions. Congress in 1906 had narrowed immunity grants by specifically requiring subpena and oath; and as already noted, Congress had further narrowed the immunity grant process in most statutes passed since 1933 by specifically requiring a witness claim of the privilege. These congressional actions do seem to support a congressional preference for the "exchange theory," in order that all the grants of immunity be known in advance by the government and controlled by the government.

Moreover, the decision of the Court upholding immunity in *Monia* can be read as an opinion not rejecting the "exchange theory" per se, but as an opinion grounded on the independent consideration that immunity statutes must be clear, and that uncertainty of the meaning should be resolved in favor of the witness because a constitutional privilege is at stake. Justice Roberts for the majority warned against reading implied meaning into immunity statutes, thus making them a "trap" for the unwary witness.

Such a reading of the *Monia* case, making the Court's opinion one on lack of clarity in legislative draftmanship rather than a holding against the "exchange theory," is consistent with the Court's subsequent decision in *Shapiro* v. *United States*, 335 U.S. 1 (1948). In that case, the Court denied the protection of the immunity provision in the Emergency Price Control Act to a businessman who had produced his business records under subpena. Because the records in question were required by law to be kept, and hence were deemed to be outside the scope of the privilege against compulsory self incrimination, the Court held that they were likewise outside the scope of the immunity statute. The immunity provision at issue here required an express claim of privilege. Once it has been decided that required records are outside the scope of the self incrimination privilege, which was the larger issue in the *Shapiro* case, it does follow logically, even necessarily, that immunity could not be acquired under a statute requiring a valid plea of the privilege as a precondition to immunity.

The general practice of inserting a specific "claim clause" in virtually all new immunity statutes enacted in recent years—including the several immunity grants authorized in sections 2514 and 2516 of the Omnibus Crime Control and Safe Streets Acts of 1968—indicates that use of a claim clause has come to be the settled congressional practice. There seems to be no consideration either of constitutional right or of law enforcement practice which would militate against inclusion of a claim clause in a uniform Federal immunity statute.

3. *Inclusion of a "Penalty or Forfeiture" Clause.*—Federal immunity statutes, dating from the initial Act of 1857 in support of congressional investigations, have purported to immunize against "any penalty or forfeiture" in addition to immunizing the witness against future prosecution. Because the fifth amendment has no "penalty or forfeiture" phrase but speaks only of a privilege against being "compelled in any criminal case to be a witness against himself," the derivation of the penalty-forfeiture phrase is unclear. In order to be constitutional it would seem to be sufficient for an immunity statute to immunize, in the terms of the Constitution, against future incriminatory use of the compelled disclosures. It would then be left to the process of constitutional interpretation to determine what kinds of penalties, forfeitures, or other harms falling short of conventional criminal prosecutions are included within the scope of the constitutional privilege.

Since *Boyd* v. *United States*, 116 U.S. 616 (1886), which was the first case in which the Supreme Court had to construe the self incrimination clause of the fifth amendment, it has been clear that at least certain kinds of penalties or forfeitures are included within the scope of the constitutional privilege. That case involved an attempt to force a disclosure, under pain of having the government's allega-

tions taken as true, in a proceeding in which the prospective harm was not criminal prosecution, but forfeiture of imported property for alleged violation of the revenue laws. The court set forth its finding that revenue law forfeitures are criminal, for the purpose of invoking both the fifth and fourth amendments, as an almost self evident fact. It gave no reasons to rebut the elaborate counterargument of Judge Dyer in *Three Tons of Coal*, 28 Fed. Cas. 149, No. 16,515 (E.D. Wis. 1875).

Judge Dyer had distinguished those forfeiture proceedings which are purely in rem from those which in addition inextricably involve punishment by fine or imprisonment. Perhaps the best argument for viewing the *Boyd* proceeding as sufficiently in personam and criminal to warrant invoking the constitutional privilege against self incrimination, is that the forfeiture could be viewed as a punishment being imposed in lieu of the fine or imprisonment also authorized for import fraud.

The meaning of the "penalty or forfeiture" phrase in all current Federal immunity statutes has seldom been litigated. Two issues rather than one derived from this phrase. The first issue is the question of what kinds of penalties or forfeitures justify invoking the self incrimination privilege. The second issue is the question of the kinds of penalties and forfeitures which a statutory immunity, once acquired, safeguards against.

Under a rigid exchange theory, the scope of the "penalty or forfeiture" concept under the constitutional privilege would also dictate its scope for the purpose of defining the range of protection gained under an immunity grant. This conclusion may not always follow, however, because *Adams* v. *Maryland*, 347 U.S. 179 (1954), indicates that Congress does have power to make the statutory immunity broader than the constitutional privilege, and also because *Monia* v. *United States*, 317 U.S. 424 (1942), indicates that uncertainties in the meaning of immunity statutes should be resolved in favor of the witness.

The Lee Case. One case directly in point concerning the scope of the "penalty or forfeiture" concept is *Lee* v. *Civil Aeronautics Board*, 225 F.2d 950 (D.C. Cir. 1955), although the relevant point is only a dictum by a single judge and not a holding.

Lee was an allegedly inattentive copilot on a Pan American ship which on takeoff from LaGuardia for an overseas flight collided with a Cessna and killed the Cessna pilot. In the accident investigation Lee pleaded the fifth amendment, obtained immunity and testified. When the administrator of Civil Aeronautics therefore brought a suspension proceeding against Lee the CAB ruled that Lee had acquired immunity against penalties and forfeitures, and that the license suspension on the actual facts of the case was a forfeiture, and therefore he could not be suspended.

When the Administrator tried to appeal to the Court of Appeals for the District of Columbia, two judges ruled he had no standing, but Judge Prettyman went to the merits and agreed with the CAB's protection of the pilot from suspension of his license. Judge Prettyman said:

> The suspension of these pilots would be a forfeiture of a privilege, even if not of a right. The immunity statute ex-

> tends to forfeitures as well as to penalties. The question, then, is whether the proceeding is punitive or merely remedial. In this connection we go to the Fifth Amendment cases. Any reading of the complaint shows the action prayed is purely punitive. The complaint says baldly that the men were careless and therefore ought to be suspended. It does not allege the pilots to be unqualified. I think they were protected by reason of their testimony taken in the investigation.

One way to avoid the result in *Lee* is simply to say that the case is wrong, or to try to take refuge in an "independent evidence rule" assuming that some independent evidence to support culpability and dismissal was available.[4]

Another approach, and one more responsive to considerations of constitutional policy, would be to work out a distinction between a suspension for "improper conduct" which could be classified as "penal" and protected by an immunity grant, and, on the other hand, a revocation for "unfitness" which could be classified as "remedial" and not protected.

However, the working out of such distinction as part of the process of clarifying the scope of the constitutional privilege—and consequent required scope of statutory immunity—may become complicated by attempts to give independent meaning to the "penalty or forfeiture" phrase inserted by Congress in immunity statutes. In other words, a focus on this phrase in immunity statutes may lead to conferring a broader protection than needed to replace the constitutional privilege under a rigid exchange theory.

In short, because the phrase "penalty or forfeiture" does not appear in the fifth amendment, there is no need to incorporate it in immunity statutes. Incorporation of the phrase may lead to unneeded "gratuities," *i.e.*, the granting of an excessive pardon in the process of overcoming a plea of self incrimination. It would seem to be sufficient for an immunity statute to be worded, as is the fifth amendment itself, in terms of protection against "*incriminatory*" consequences of compelled disclosures, and to let the scope of this concept develop judicially in the process of interpreting the meaning of the fifth amendment. However, if the use of the phrase "penalty or forfeiture" in immunity statutes has become too traditional to be dispensed with, the desired clarity could be achieved simply by expanding the phrase to make it read as follows: "shall be prosecuted or subjected to any criminal penalty or criminal forfeiture."

4. *Locus of Immunity Approval Power: Congressional Confusion; Statutory Ambiguity; Constitutional Problems.*—Under all immunity statutes enacted prior to the Immunity Act of 1954 the Congress imposed neither procedural nor other conditions on the discretion of governmental interrogators, in an authorized proceeding, to "grant" immunity in exchange for compelled testimony. Indeed, under the "automatic" immunity statutes, which do not require a witness claim of the self incrimination privilege as a precondition to immunity,

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[4] *See* the discussion in part III, *supra*, of *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964), and *Gardner* v. *Broderick*, 392 U.S. 273 (1968), to the effect that use restriction, not absolute immunity, is all that the fifth amendment requires.

immunity was obtained automatically whenever a witness testified in a proceeding covered by an immunity act. Indeed, the interrogator would not even be forewarned, and have an opportunity to avoid immunity by termination of the questioning, if the witness did not plead the fifth amendment.

Similarly, under a "claim" immunity statute, which requires that a witness claim his privilege against self incrimination, immunity would be acquired at the point when the witness testified under a direction to respond despite his claim. But under a "claim" statute, the governmental interrogator is forewarned. When the claim is made, he can preserve opportunity for criminal prosecution by honoring the self incrimination plea, rather than forcing testimony under an applicable immunity act.

The Immunity Act of 1954, creating an immunity provision for national security investigations conducted by Congress, and another for national security matters before a grand jury, introduced special clearance requirements as a precondition for opening the way for witness immunity.

(a) *Special clearance requirements under the congressional investigation part of the Immunity Act of 1954.*—The congressional investigation part of the Immunity Act of 1954 did not vest in congressional committees, or even in Congress itself, unconditional power to grant immunity in support of congressional fact finding interests. Rather the Act provided (i) that Congress or its appropriate organs, after a specified voting process, should apply to a Federal district court for an immunity order; (ii) that Congress also must notify the Attorney General of its desire to immunize a recalcitrant witness; (iii) that the Attorney General shall have an opportunity to be heard before the Federal district court grants the congressional request.

These requirements have been discussed above in part II–A of this memorandum dealing with congressional investigation immunity statutes from 1957 to the present, and that material need not be repeated in full here. It may be noted that the requirements seem to reflect some distrust of itself by Congress, and a desire to avoid, if possible, interference with executive law enforcement plans. However, the requirements pose unresolved constitutional problems in the area of separation of powers. An immunity grant is not a matter of right or wrong, but a discretionary governmental act. The Federal district court may of course scrutinize the record to make certain that the congressional request for an immunity order is jurisdictionally and procedurally well founded, and that the Attorney General has been notified. But if the Attorney General should oppose the congressional request for an immunity order solely because he feels it is "unwise," the court would have no constitutional or other legal basis for siding with the Congress, siding with the Attorney General, or making its own calculation of the degree of public need for the information, balanced against the loss of the possible opportunity to prosecute a possible criminal.

This situation has not yet occurred, nor has the Supreme Court had occasion to rule on the congressional investigation part of the Immunity Act of 1954 in other particulars. Lower Federal courts, in instances where there was no Attorney General objection to a congressional request for an immunity order, have assumed power to review to as-

certain procedural regularity before granting the request. *In re Bart*, 304 F.2d 631 (D.C. Cir. 1962). On statutory interpretation grounds one court ruled that a congressional request was premature when the prospective witness had neither been interrogated nor had claimed his privilege against self incrimination. *In re McElrath*, 248 F.2d 612 (D.C. Cir. 1957).

In the same case a divided court also ruled that a witness had a right to notice of congressional intention to seek an immunity order to compel him to testify, and to intervene in the district court proceeding. One wing of the full nine judge bench of the Court of Appeals for the District of Columbia derived the right of intervention from Rule 24(a) of the Federal Rules of Civil Procedure. The other wing, going further and announcing a right of notice, did not clearly indicate whether the right was constitutionally founded in due process considerations, or statutorily derived from presumed congressional intent concerning the needed formality of ascertaining procedural regularity under this immunity statute.

If there are detailed jurisdictional and procedural findings to be made before the government is to be allowed to exercise its ultimate discretion to grant immunity or not, then a United States district court may have a meaningful role to play before it puts its stamp of approval on the request for an immunity authorization. But if the only reason for injecting the court into the immunity picture is to make a formal record of a particular immunity authorization, one may question whether the game is worth the candle. Indeed, a court or judge, once in the immunity picture, may naturally be disposed to find a "meaningful" role by ballooning a petty, and even demeaning, procedural role into a pseudo-procedural-substantive-oriented review of the public need for the particular grant in question. That this is a real possibility is intimated by some of the lines in the opinion of Judge J. Skelly Wright in *In re Bart*, *supra*.

(b) *Special clearance requirements under the grand jury part of the Immunity Act of 1954.*—The second part of the Immunity Act of 1954 relates to Federal grand jury proceedings. Like the congressional investigation provision of the Act, it only applies to grand jury investigations in the areas of national security and subversive activities. Because this provision of the Act is confined to the executive branch, it does not have the same kind of separation of powers problem which inheres in the congressional proceedings provision of the Act. The grand jury section provides that after a claim of privilege has been made the United States Attorney may make a judgment that the desired testimony is "necessary to the public interest." He then, upon approval of the Attorney General, may apply to a Federal district court for an immunity order.

In the leading case under this section, *Ullmann* v. *United States*, 350 U.S. 422 (1956), it was argued that since there are no legal standards governing the basic decision to grant or not to grant immunity, it was unconstitutional to involve a Federal district court in the immunity granting process. In upholding the Act the Supreme Court rebutted the argument that the Act imposed a nonjudicial function on the district court. The Court said that under the terms of the Act a Federal district court is not to exercise any independent judgment on the merits of granting immunity. It is simply to certify that the

statutory requirements of a finding of public necessity has been made by the United States Attorney, and approved by the Attorney General.

(c) *Special clearance requirements in recent immunity statutes regarding Department of Justice enforcement of certain criminal statutes.*—Several recent executive branch immunity statutes (*i.e.*, statutes bearing on the criminal law enforcement responsibilities of the Department of Justice) contain, like the grand jury part of the 1954 Act, the following three preconditions for a grant of immunity: (i) judgment of a United States Attorney that the testimony is necessary to the "public interest"; (ii) approval of the Attorney General; (iii) court order. After these requirements are met immunity is acquired—in accord with present practice under all similar statutes—when the witness does relinquish his fifth amendment plea, under pain of contempt punishment if he persists, and responds to the government's request for testimonial or documentary information. Similar statutes are Consumer Credit Protection Act of 1968; Omnibus Crime Control and Safe Streets Act of 1968; Welfare and Pension Plans Disclosure Act; Narcotics Control Act.

Litigation under the 1954 Act has already been discussed. Other than the 1954 Act, none of the recent statutes containing the three preconditions for a grant of immunity has given rise to significant litigation concerning immunity practice or theory.

D. *Informal Immunity and Formal Grant Practices*

For an immunity statute to be seen in total perspective it should be recognized that immunity is, and can be, effectively conferred other than by a legislatively authorized method. The ways may be roughly divided into grants which are *unintentional*, being judicially imposed, and *intentional*, as a result of prosecutorial agreement.

Unintentional immunity is frequently conferred as the result of the fact that exclusion of illegally seized evidence and the fruits thereof is the sanction for a violation by government agents of constitutional (and possibly certain procedural) rights. Under present constitutional doctrine this use restriction applies to information and leads obtained as the result of an illegal search or seizure, *Weeks* v. *United States*, 232 U.S. 383 (1914), failure to give *Miranda* warnings, *Miranda* v. *Arizona*, 384 U.S. 436 (1966), or otherwise wrongfully coercing or inducing a confession, *Wilson* v. *United States*, 162 U.S. 613 (1896), and possibly an unlawful arrest, *Wong Sun* v. *United States*, 371 U.S. 471 (1963). Wrongful inducement includes making an unauthorized promise that the person will not be arrested or otherwise prosecuted, *Crawford* v. *United States*, 219 F.2d 207 (5th Cir. 1955). Although the prosecution may proceed upon untainted, and thus unsuppressed, evidence, in many cases the only evidence available is suppressible, resulting in complete immunity for the alleged offender. This consequence is the source of most of the controversy regarding the method of implementing constitutional protections: shall the criminal go free because the constable blundered?

Immunity is also conferred when a law enforcement agency or the United States Attorney refrains from prosecuting in order to secure a witness' cooperation. This power of intentional grant of immunity is not based solely on considerations related to the bargain for informa-

tion. The power is also exercised by law enforcement agencies when they decide to proceed against an offender civilly, administratively, or not at all, *i.e.*, make no recommendation of criminal prosecution to the Department of Justice, or when the United States Attorney declines to prosecute even when the case is brought to his attention. This kind of immunity grant seemingly has been held valid, even though not authorized by statute. In one case a defendant, who was not the beneficiary of the immunity, argued unsuccessfully that the testimony of material witnesses should be suppressed—as illegally seized—because it had been obtained by an informal (*i.e.*, statutorily unauthorized) promise of immunity by law enforcement agents, *United States* v. *Levy*, 153 F.2d 995 (3d Cir. 1946). Although the issue was raised in an odd way, it is perhaps unlikely that it would ever be raised by a defendant to whom it was intended to give immunity because the prosecution's breach of such bargains would undoubtedly decrease his chances of obtaining cooperation from others in the future.

Experience indicates that Federal prosecutors and law enforcement agents often will try to avoid conferring immunity without express authority and will seek instead to confer some other benefit on a cooperative witness, *e.g.*, reduction of the charge or punishment. But occasions do arise when a person on the fringe of a criminal enterprise will be told, in effect, that he will not be prosecuted at all if he cooperates; and frequently such persons will be named in an indictment as coconspirators but not as defendants.

An immunity statute may thus be seen as having only corollary utility in certain kinds of conventional criminal investigations. It will, of course, be helpful where the potentially cooperative witness, through his attorney, seeks the certainty which comes from compliance with a statute; and the making of a record will avoid credibility contests. But, as noted above, this value may be only marginal, since there are other pressures upon the prosecutor to hold to his promise.

The statute's greatest value lies in overcoming the resistance of the witness who does not want to cooperate at all, regardless of the inducement, since immunity is the only way to overcome a persistent claim of privilege.[5] Of course, even the threat of prosecution for refusal to answer truthfully may not always result in cooperation.

In New York State, the jurisdiction which appears to have made the greatest use of immunity statutes, statutory immunity has been used frequently as a tool in investigation of official bribery, a consensual crime. Use of an immunity provision often leads first to prosecutions for perjury or contempt (for refusal to answer or the giving of evasive answers). Under the pressure of such prosecution, or the threat of punishment after conviction, the witness cooperates against others. In the Southern District of New York, use of existing Federal immunity statutes has increased in recent years, particularly in narcotics and labor cases: but often such use has resulted in prosecutions for contempt.

The significance of the experience with nonstatutory immunity is threefold. First, it supports broad grants of responsibility to the

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[5] *Hooley* v. *United States*, 209 F.2d 234, 235 (1st Cir. 1954) (United States Attorney's promise of immunity to witness claiming privilege before grand jury was irrelevant in determining sufficiency of evidence in a prosecution for contempt).

Department of Justice and the agencies to decide when immunity should be conferred, since, even as to inquiries in which they do not have express authority, they can presently give immunity, although in a manner which may not be satisfactory to all parties. This factor also supports the simplicity of the procedures now being recommended, which are analyzed in detail in part III, *infra*. Second, the change to a use restriction from absolute immunity should not add appreciably to the difficulties which the government already faces in deciding whether there is sufficient untainted evidence upon which to prosecute, and in litigating the taint issue. These difficulties are likely to continue to occur in much greater number in cases involving suppression of illegally seized evidence than in the few where suppression is sought because of immunity conferred intentionally under a statute. Third, in the few cases where the witness's cooperation might be stinted because of the limited scope of the immunity conferred under the statute, the residual power of the prosecutor or agency not to prosecute in any event could be relied upon to obtain the fullest cooperation.

III. Analysis of Proposed Reforms

A. *Introduction*

The proposed reforms substantially alter the form, and to some extent the substance, of present Federal immunity legislation. In place of numerous specialized immunity provisions tied to particular substantive statutes, the reform envisions a single, integrated immunity provision applicable to compulsory testimony situations functionally classified into three situations: court-grand jury proceedings; formal administrative hearings whether of an investigatory, rule-making, or adjudicatory type, and whether handled by an independent agency or within the executive branch; congressional investigations. The three main subdivisions of the draft statute, in terms of immunity procedure, are keyed to these three types of proceedings.

Despite some differences in procedure, the immunity provisions for all three of these types of proceeding have a number of common elements. A witness claim of his privilege against compulsory self incrimination is a precondition of obtaining immunity in all situations. The central concept of "immunity" is modified, in accord with recent judicial clarifications of the fifth amendment, so that the protection offered the witness is a restriction against incriminating use of his disclosures, or their fruits. Thus, in the wording of the statute, use restriction language replaces the present absolute immunity language. Under the proposed use restriction language the possibility of criminal prosecution based on independent evidence remains open, as is the case when a witness plea of the fifth amendment is left undisturbed by a compulsory testimony provision. Under the existing absolute immunity language to be replaced, a witness obtains in effect a blanket pardon, exonerating him in regard to all offenses related to his testimony of production of other information.

In accord with the spirit of the use restriction concept, and better to conform immunity provisions to the language of the fifth amendment, the protection extends to "any criminal case." The "penalty or forfeiture" phrase found in existing immunity statutes is deleted.

To minimize the possibility that a conferment of immunity (use restriction) in order to support the "public interest" being promoted by one agency, will subvert the "public interest" being promoted by another agency, various special clearance requirements are included in the draft statute. In all instances there is provision for notice to a central law enforcement point, the Attorney General of the United States. Beyond this point there are some differences in procedure for authorizing a direction to testify under the immunity provision.

For court-grand jury matters, *i.e.*, the primary area of Department of Justice law enforcement, there must be a "public interest" certification by the United States Attorney, approval by the Attorney General, and application to a United States District Court for an authorizing direction. For administrative hearing matters, the public interest assessment, and the power to issue a direction to testify, are left with such agency officials as may be specified by Congress—subject, however, to a notice provision so that the Attorney General may make a remonstrance if one of his own programs or any program known to him would be adversely affected by the direction, testimony, and consequent use restriction. For congressional investigations the present requirement of application to a United States District Court is retained, but clarified, and again there is a provision for notice to the Attorney General and possible remonstrance by him. There is an optional provision in all instances for obtaining a direction to testify, prior to the actual plea of the fifth amendment by a witness at the inquiry.

B. *Requirement That Witness Claim His Constitutional Privilege as a Precondition of Immunity*

The proposed statute requires that as a precondition of immunity a witness claim his privilege against compulsory self incrimination, as do virtually all recent immunity statutes. This avoids the possibility of gratituous, and even unknown, grants of immunity which may occur under automatic immunity statutes such as the initial and frequently copied Interstate Commerce Commission immunity provision of 1893. All commentators recommend, and principle and logic seem to dictate, abolishing all "automatic" immunity language and adopting "claim language" as the proper mode for a compulsory testimony act. The "claim" issue, and its status under existing statutes, and relevant cases, are discussed *supra*, in part II–C–2. There is no constitutional problem here. It is simply a matter of Congressional choice.

C. *Conversion from "Absolute Immunity" Language to "Use-Restriction" Language*

The traditional "any transaction . . ." phrase in Federal immunity statutes since 1893 is modified by substituting for it the "neither the testimony nor . . ." phrase. There is language in *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892), supporting the constitutional sufficiency of the latter phrase which operates like an exclusionary rule and bars use of the compelled disclosure or its fruits, *i.e.*, it is a *use restriction* rule. The Court identified the vice in the statute at issue in *Counselman* as follows:

> It [the statute] could not, and would not, prevent the use of his testimony to search out other testimony to be used in

> evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted. (142 U.S. at 564.)

This same point that the statute at issue was not coextensive with the self incrimination privilege because it did not protect against the *indirect* use of compelled testimony, was repeated again in the summary at the end of the opinion. (142 U.S. at 586.)

There also is a dictum in *Counselman* which can be read as requiring that an immunity statute go beyond use restriction and absolutely bar future prosecution even with wholly untainted independent evidence, thus offering a "gratuity to crime" (or, more properly stated, an excessive pardon). The dictum, which appears in the summary at the end of the opinion and is not related to the use restriction discussion which dominates the bulk of the opinion, reads as follows:

> [The statute in question] does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates. (142 U.S. at 585–586.)

1. *Recent Developments in Self Incrimination Theory.*—The Court's intellectual confusion in *Counselman*, not clarified in *Brown* v. *Walker*, 161 U.S. 591 (1896), has not been a featured aspect of discussions of fifth amendment and immunity statute theory until recently. However, the new self incrimination and immunity cases of the past few years have raised fresh questions concerning the constitutional requirements for a valid immunity statute, in the light of the two overall but competing considerations of giving the witness his just due under the fifth amendment while at the same time preserving the interest in effective prosecution of law breakers. Use restriction has emerged as the central theme of the fifth amendment, analogous to the case development under the fourth amendment. Of particular importance are the Supreme Court's decisions, opinions and dicta in *Murphy* v. *Waterfront Commission, New York Harbor*, 378 U.S. 52 (1964), and *Gardner* v. *Broderick* and its companion case, *Uniformed Sanitation Men Association* v. *Commissioner of Sanitation*, 88 S.Ct. 1913, 1917 (1968).

(a) *Murphy* v. *Waterfront Commission.*—The *Murphy* case, following on the heels of *Malloy* v. *Hogan*, 378 U.S. 1 (1964), which had made the fifth amendment applicable to the States, held that as a consequence of the new scope of the fifth amendment the Federal government must be barred from prosecutorial use of State compelled "*testimony and its fruits*" (emphasis added.)

This rule is based not on State legislative power to immunize against Federal prosecution but rather on the operation of the fifth amendment itself. Such an exclusionary rule, judicially announced and based on the fifth amendment, is parallel to the judicially an-

nounced and judicially policed exclusionary rule derived from *Mapp* v. *Ohio*, 367 U.S. 643 (1961), as a sanction against fourth amendment violations. In a sense it may be called "judicial immunity," and it is based on a use restriction concept derived directly from the Constitution. Unlike statutory immunity, there is, first, no bar to use of independent evidence: and second, no absolute bar to prosecution for a transaction which relates substantially to the improperly coerced disclosure. Thus, under recent fifth amendment jurisprudence developed in such additional cases as *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), and *Spevack* v. *Klein*, 385 U.S. 511 (1967), the due process "coerced confession" line of cases, the fourth amendment cases, and the fifth amendment line of cases seem to coalesce in result, even though there may be underlying doctrinal differences.

Although in *Murphy* there was a State immunity statute which by its terms purported to extend immunity concerning "any criminal proceeding," the Supreme Court apparently agreed with the defendants' theory that the statute did not purport to extend to *Federal* incrimination because it had been enacted before *Malloy* had nationalized the fifth amendment. However, the Supreme Court did not quote or discuss the statute nor rely on it for its holding. The Court's holding in *Murphy* is based rather on the fifth amendment itself, interpreted in the context of the needs of the Federal system.

Justice Goldberg phrased the holding of the Court as follows:

> . . . we hold the *constitutional rule* to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude moreover, that in order *to implement this constitutional rule* and *accommodate the interests of the State and Federal Governments* in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled *testimony and its fruits.* (378 U.S. at 79.) [Emphasis added.]

Justice Goldberg's footnote for this statement, further explaining his meaning, read as follows:

> Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that its evidence is not tainted by establishing that it had an independent, legitimate source for the disputed evidence. (*Id.*)

Justice White, concurring, made a similar but more explicit statement concerning the scope of the constitutionally required protection in this situation. He said:

> The Constitution does *not* require that immunity go so far as to protect against *all prosecutions* to which the testimony relates, including prosecutions of another government, whether or not there is any causal connection between the disclosure and the prosecution or evidence offered at trial. In my view it is possible for a federal prosecution to be based

on *untainted evidence after a grant of federal immunity* in exchange for testimony in a federal criminal investigation. Likewise it is possible that information gathered by a state government which has an important but wholly separate purpose in conducting the investigation and no interest in any federal prosecution will not in any manner be used in subsequent federal proceedings, at least "while this court sits" to review invalid convictions. Panhandle Oil Co. v. State of Miss. ex rel. Knox, 277 U.S. 218, at 223, 48 S.Ct. 451, 72 L.Ed. 857 (Holmes, J., dissenting). *It is precisely this possibility of a prosecution based on untainted evidence that we must recognize.* For if it is meaningful to say that the Federal Government may not use compelled testimony to convict a witness of a federal crime, then, of course, the Constitution permits the State to compel such testimony . . . . I believe the State may compel testimony incriminating under federal law, but the Federal Government may not use *such testimony or its fruits* in a federal criminal proceeding. Immunity must be as broad as, but not harmfully and wastefully broader than the privilege against self-incrimination. (378 U.S. at 106–107.) [Emphasis added.]

(b) *Garrity-Spevack-Stevens-Blue.*—A further series of recent cases, with one caveat, support the use restriction concept. In two of them the special comment of Justice Fortas, concurring, is especially noteworthy: *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), and *Spevack* v. *Klein*, 385 U.S. 511 (1967).

Both *Garrity* and *Spevack* are relevant to the question of the breadth which an immunity statute must have to be constitutional. In *Garrity* the Court held that a holder of position of public trust (policeman questioned regarding ticket fixing) could not be criminally convicted on the basis of information he had divulged under threat of dismissal if he invoked the privilege against self incrimination and remained silent. In *Spevack* the Court held that an attorney who was the subject of an ambulance chasing investigation could not be disbarred for pleading self incrimination and refusing to testify and produce his financial records.

It may be noted that in *Garrity* the issue was not discharge but use in a *criminal prosecution* against a policeman of testimony which he had been induced to give under threat of discharge if he persisted in a self incrimination plea and remained silent. In his comment on the *Garrity* holding, expressing the thought that the policeman could have been *discharged* for his silence, Justice Fortas wrote:

> This Court has never held, for example, that a policeman may not be discharged for refusal in disciplinary proceedings to testify as to his conduct as a police officer. It is quite a different matter if the State seeks to use the testimony given under this lash in a subsequent criminal proceeding. (Justice Fortas concurring opinion in *Spevack*, commenting on *Garrity*, 385 U.S. at 519. Justice Fortas' vote was needed for a majority.)

The Fortas statement focuses on use restriction in the context of *incriminating* use (criminal case), and qualifies this broad statement of Justice Douglas writing for the Court in *Garrity:*

> The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self incrimination is the antithesis of free choice to speak out or to remain silent. (385 U.S. at 497.)

Further, in his opinion for a unanimous Court in June, 1968 in *Gardner* v. *Broderick*, 392 U.S. 273 (1968), Justice Fortas repeated this statement, and its concept of *criminal* use restriction.

It is true, of course, that *Spevack* v. *Klein*, unlike *Garrity*, did not involve criminal prosecution but disbarment, and the Court extended protection to the attorney. However, *Spevack* can be given a close reading, as shown by a recent article on the effect of the case on State licensing authorities. Reviewing post-*Spevack* cases in New York, the Administrative Counsel to the Committee on Grievances of the Association of the Bar of the City of New York concludes that *Spevack* is limited to those rare situations where there is *no independent evidence* of misconduct on the part of the licensee, and the licensee has merely refused to answer questions by pleading the fifth amendment. In short, there is a use restriction effect, not exoneration.[6]

Even after *Murphy*, to be sure, there have been some puzzling dicta concerning the breadth of protection which an immunity statute must provide in order to satisfy constitutional requirements. For example, in *Stevens* v. *Marks*, 383 U.S. 234 (1966), which on its facts was a narrow case concerning capacity to withdraw a "waiver" of the fifth amendment and immunity, Justice Douglas for the Court added this comment:

> We need not stop to determine whether the immunity said to be conferred here—which merely prevents the use of the defendant's testimony or its fruits in any subsequent prosecution but, apparently, does not preclude prosecution based on "independent" evidence . . . constitutes that "absolute immunity against further prosecution" about which the Court spoke in *Counselman* v. *Hitchcock* . . . and which the Court said was necessary if the privilege were to be constitutionally supplanted. (383 U.S. at 244–245.)

Justice Harlan added this comment in his separate opinion:

> . . . the Court today leaves undecided the question whether this immunity [*i.e.*, against use of compelled testimony and its fruit] is sufficient to supplant the privilege. (383 U.S. at 249. *See also Albertson* v. *SACB*, 382 U.S. 70 (1965).

However, in *United States* v. *Blue*, 384 U.S. 251 (1966), in the same term of the Court with Justice Harlan writing the opinion, the Court said that if the government had acquired evidence in violation of the fifth amendment, the remedy would be to suppress the evidence and its fruits at trial, not to dismiss the indictment as requested by

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[6] Franck, *The Myth of Spevack* v. *Klein*, 54 A.B.A.J. 970 (October 1968).

Blue. Justice Harlan, speaking for a unanimous Court, added this comment:

> So drastic a step [barring prosecution altogether] might advance marginally some of the ends served by the exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book. (384 U.S. at 255.)

2. *The Registration Cases of 1968, and Congressional Response.*—A series of cases decided by the Court in 1968 reendorsed the rationale of *Murphy*, and the concept that use restriction is the essential requirement imposed by the fifth amendment and hence the proper test of a valid immunity statute. The question was raised in the Bookie Tax Cases, *Marchetti* v. *United States*, and *Grosso* v. *United States*, 390 U.S. 39 and 62 (1968), and in the Gun Registration Case, *Haynes* v. *United States*, 390 U.S. 85 (1968). In these cases the Court was urged to save the registration requirements at issue by following the *Murphy* precedent and judicially imposing a use restriction. The Court said that this government suggestion was "in principle an attractive and apparently practical resolution of the difficult problem before us." (390 U.S. at 60.) However, the suggestion was deemed to be inapplicable, on statutory interpretation grounds. For example, in the Bookie Tax Situation the Court noted the clear intent of Congress that the gambler registration information be made available to interested prosecuting authorities. Thus, *Murphy*, though not followed, remained unimpaired. Also, Chief Justice Warren dissented in all three cases, preferring a use restriction rule.

Responding to the voiding of the previous gun registration legislation by the *Haynes* case, Congress incorporated in the Gun Control Act of 1968, 26 U.S.C. § 5848 (approved October 22, 1968) a provision designed to overcome fifth amendment objections. Significantly, relying on recently developed fifth amendment theory as summarized above and in the *Gardner* case (*infra*), the Congress used a use restriction concept rather than an absolute immunity concept. Indeed, an absolute immunity concept would well nigh render the registration provision impractical, from the government's standpoint, as an administrative regulatory device. The use restriction section reads as follows:

> No information or evidence obtained from an application, registration, or records required to be submitted or retained by a natural person in order to comply with any provision of this chapter or regulations issued thereunder, shall, except as provided in subsection (b) of this section, be used, directly or indirectly, as evidence against that person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence. [Subsection (b) exempts from the use restriction a prosecution for giving false information.]

3. *The Gardner Case and Justice Fortas' Clarification of Fifth Amendment Protections.*—The current meaning of the fifth amendment was reviewed by Justice Fortas in his opinion for the Court in

two recent companion cases concerning dismissal of New York City employees for invoking the fifth amendment right of silence: *Gardner* v. *Broderick*, 392 U.S. 273 (1968), and *Uniformed Sanitation Men Association* v. *Commissioner of Sanitation*, 392 U.S. 280 (1968). The cases are instructive in clarifying the concept of *incriminatory* use restriction as the essence of the fifth amendment both in regard to discharge of noncooperative (secretive) public employees, and in regard to the necessary scope of a compulsory testimony act, *i.e.*, "immunity" statutes. Although our concern at this point is with the latter question, both aspects of these cases will be set forth in order to better understand the Court's view of the fifth amendment.

(a) *Incriminatory use restriction and permissible employee discharge.*—Both the *Gardner* case and the companion *Uniformed Sanitation Men* case arose under the same section of the New York City Charter which paraphrases a section of the New York Constitution. The State constitutional provision reads as follows:

> No person shall be . . . compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present . . . office or the performance of his official duties . . ., refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years . . . and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general.

The corollary discharge section in the New York City Charter reads in pertinent part as follows:

> If any . . . officer or employee of the city shall . . . refuse to testify or to answer any question regarding the property, government or affairs of the city . . . or official conduct of any officer or employee of the city . . . on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify . . . his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible for election or appointment to any office or employment under the city or any agency. (392 U.S. at 275.)

In *Gardner*, in the course of a New York grand jury investigation into alleged police corruption (bribery in connection with unlawful gambling operation), Patrolman Gardner was advised of his self incrimination privilege, and was asked to sign a waiver. Under the terms of the above quoted State constitutional provisions and city charter section he was told that he would be fired if he did not sign. He refused to sign, and after an administrative hearing was discharged for this refusal to sign a waiver of immunity against subsequent criminal prosecution.

The Supreme Court reversed the discharge and in an opinion by

Justice Fortas distinguished between using threats of discharge as a sanction to induce *signing* of a *waiver* of immunity, and, on the other hand, using discharge as a sanction against the self incrimination plea itself. The distinction derives from Justice Fortas' concurring opinion in *Spevack* v. *Klein* where he commented on *Garrity* v. *New Jersey*, as noted *supra*, in part III–C–1–(b).

In Garrity, to repeat, the issue was not discharge but use in a *criminal prosecution* against a policeman of testimony which he had been induced to give under threat of discharge if he remained silent under a plea of the fifth amendment. Suggesting that the policeman could have been *discharged* for his silence, Justice Fortas wrote:

> This Court has never held, for example, that a policeman may not be discharged for refusal in disciplinary proceedings to testify as to his conduct as a police officer. It is quite a different matter if the State seeks to use the testimony given under this lash in a subsequent criminal proceeding. (385 U.S. at 519.)

The distinction which Justice Fortas is delineating seems to go back to the earlier employee discharge cases, prior to the incorporation of the fifth into the fourteenth amendment by *Malloy*, which were challenged on due process and freedom of speech grounds. In those cases the employees refused to testify concerning actual or alleged association with subversive organizations. The discharges generally were upheld on a theory of a "duty of candor" on the part of a public employee in those instances where the inquiry seemed to have the primary purpose of ascertaining the fitness or reliability of the employee, and was not one directed toward opening up possible criminal presecution. *See, e.g., Lerner* v. *Casey* and *Beilan* v. *Board of Education*, 357 U.S. 468 (1958), and related cases. In these cases a refusal to testify occurred in investigations being held by, or under the direction of, the public employer of the employee whose discharge was in question. By contrast in the earlier case of *Slochower* v. *Board of Education*, 350 U.S. 551 (1956), in which the discharge was reversed, the discharge seemed to be an automatic and punitive reaction to *Slochower's* plea of the fifth amendment in the course of a congressional hearing.

Justice Fortas' most complete statement of his apparent rule allowing discharge of silent public employees in certain circumstances is set forth in *Uniformed Sanitation Men Association*, the companion case with *Gardner* in which he wrote:

> [I]f New York had demanded that petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so, this case would be entirely different. In such a case, the employee's right to immunity as a result of his compelled testimony would not be at stake. But here the precise and plain impact of the proceeding against petitioners as well as of § 1123 of the New York Charter was to present them with a choice between surrendering their constitutional rights or their jobs. Petitioners as public employees are entitled, like all other persons, to the benefit of the Constitution,

> including the privilege against self-incrimination. . . . [citing *Gardner*, *Garrity*, *Murphy*]. At the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust after proper proceedings which do not involve an attempt to coerce them to relinquish their constitutional rights. (382 U.S. at 284.)

At first glance there may seem to be an internal inconsistency in the above statement in regard to the phrase "a choice between surrendering their constitutional rights or their jobs," *unless* one creates a public trust exception to the fifth amendment when a public employee faces the option of accounting for his official conduct (and disclosing possibly incriminating matter) or of being dismissed. *However*, the answer to the seeming inconsistency is that under the *Garrity* precedent the employees' statements cannot be used against them *in a criminal prosecution*. Hence, there is *no relinquishment of a constitutional privilege* in his being forced to make an accounting concerning his official conduct.

The central concept is incriminating use restriction. In other words, "pressure" (threatened dismissal for silence) which may force the employee into disclosures opening the way to his criminal prosecution is forbidden (*Garrity*); but forcing a public employee to give possibly incriminating *but immunized* statements (*i.e.*, statements which cannot be used in a *criminal* prosecution because coerced), under pain of dismissal, is all right (*Gardner—Uniformed Men*). The following comment of Justice Fortas in *Gardner* also seems to be in accord with this analysis:

> If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof *in a criminal prosecution* of himself, Garrity v. State of New Jersey, supra, the *privilege against self incrimination would not have been a bar to his dismissal.* (392 U.S. at 278.) (Emphasis added.)

(b) *Incriminatory use restriction as the essence of necessary statutory immunity.* The *Gardner* case is very instructive also in its restatement of the needed scope of immunity under a compulsory testimony act. Justice Fortas' opinion for the Court, building on the prior statements of Justice Goldberg for the Court in *Murphy* v. *Waterfront Commission* and the concurring opinion in that case by Justice White, and other intervening cases and judicial statements noted above, specifically stated that to be constitutional an *immunity statute* need only bar future prosecutorial use of the compelled *testimony* or its *fruits*.

He also cited *Counselman* v. *Hitchcock*, indicating that the analysis of the *Counselman* opinion set forth at the beginning of part III–C, *supra*, is correct. In other words, the essence of *Counselman* is its use restriction language, and not the additional loose statement from which the absolute immunity has been derived. It would seem, therefore, that the traditionally broader language used in Federal immuni-

ty statutes, which raises a question concerning the use of independent evidence, is unneeded. Similarly, there would be no *constitutional* obstacle to construing immunity statutes more narrowly than their actual phraseology so as to permit not only the use of independent evidence, but also to permit prosecution for a transaction which has a substantial logical relationship to the compelled testimony, provided there is no use of the testimony or its fruits. Justice Fortas' statement in *Gardner* of his understanding of the breadth of the constitutional privilege, and the corresponding needed breadth of a valid immunity statute, reads as follows:

> Our decisions establish beyond dispute the breadth of the privilege to refuse to respond to questions when the result may be self-incriminatory and the need fully to implement its guarantee . . . . [citing *Spevack*, *Counselman*, *Albertson*] The privilege is applicable to states as well as federal proceedings . . . . The privilege may be waived in appropriate circumstances if the waiver is knowingly and voluntarily made. Answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled *testimony* or its *fruits* in connection with a *criminal prosecution* against the person testifying. (392 U.S. at 276.) [Emphasis added.]

It may be noted that this statement in *Gardner* also helps to round out the rule which seems to emerge in *Murphy*—concerning Federal-State relationships in regard to immunity grants—and makes it applicable likewise where a State seeks to prosecute after a Federal immunity. In other words, the *Murphy* case involved a State investigation and the Court's dictum concerning the power of the Federal government to prosecute on independent evidence was based on an interpretation of the constitutional *privilege itself*, no immunity statute bearing on the question being at issue. Now in *Gardner* Justice Fortas in his opinion for the Court in effect is saying that a *Federal statutory immunity* grant to a witness in a Federal investigation could be construed—so far as constitutional requirements are concerned—as permitting subsequent State or Federal prosecution on independent evidence.

4. *Avoidance of Interagency and Federal-State Conflict.*—Insertion in existing absolute immunity statutes of a requirement that a witness claim his privilege against self incrimination solves the problem of unknown and unwitting grants of immunity which may occur under an automatic statute. But such a requirement does not solve the problems of overbreadth in the scope of the immunity itself, and the very real possibility of interagency and intergovernmental conflict. Absolute immunity, acting like a *pardon* for all offenses related to the testimony, not only exonerates the witness for his offense under the statutes being administered by the agency conferring immunity, but also exonerates him for his offenses under other Federal or State statutes in all instances where the offense relates to the area concerning which he testified. Under absolute immunity, a mistake in granting immunity is very costly to society.

A use restriction rule, by contrast, only limits the interrogating agency itself (and other agencies) in regard to use of the testimony

and leads derived therefrom. Although interagency adverse impact is not wholly eliminated it is greatly eased. Prosecutions may continue, with independent evidence. As stated above, the *Murphy* case. and now the *Gardner* case, open the way not only to a needed rerationalization of our inherited assumptions about fifth amendment and immunity statute theory, but also specifically ease the problem of interagency and intergovernmental conflict in law enforcement in our Federal system.

D. *Deletion of "Penalty or Forfeiture" Phrase*

The proposed reform eliminates the traditional language of the "penalty or forfeiture" phrase in order to conform this clause to current concepts of the scope of the fifth amendment, and to minimize the possibility of abuse in the form of an unneeded or accidental "gratuity to crime." The derivation of the "penalty or forfeiture" phrase is unclear. The fifth amendment has no such phrase but speaks only of a privilege against being "compelled in any criminal case to be a witness against himself."

From *Boyd* v. *United States*, 116 U.S. 616 (1886), derives the proposition that at least certain kinds of penalties or forfeitures are included within the scope of the constitutional privilege. The precise precedent value of *Boyd* is unclear, however, because the fact situation which gave rise to the far ranging opinion, with its oft quoted dicta, was unusual and has not been repeated. Moreover, the fact situation in *Lee* v. *Civil Aeronautics Board*, 225 F.2d 950 (D.C. Cir. 1955), and the dictum of Judge Prettyman in that case, raise a warning flag concerning continued use of the unrestricted phrase "penalty or forfeiture."

Copilot Lee had obtained immunity after pleading the fifth amendment in the investigation of the accident in which he was involved. Hence, the CAB subsequently ruled, it would be a forbidden "penalty or forfeiture" under the immunity statute to suspend his pilot license. The Administrator of Civil Aeronautics failed for lack of standing in his effort to get court review.[7]

Because of the major public interest considerations involved in the various fields of licensing, particularly in the areas of health and safety, there should be an effort to avoid immunity statute clauses which may be construed not only to bar punitive action, but also to bar remedial actions to protect the public. The danger posed by the *Lee* case would remain even if "use restriction" language were substituted in present immunity statutes for the present "absolute immunity" language, *unless* the "penalty or forfeiture" phrase is eliminated. The aim should be to draft language which will avert this danger, while at the same time protecting a witness from incriminating or penal consequences flowing from his testimony. This purpose can be accomplished by making use restriction the central concept in compulsory testimony acts and eliminating the "penalty or forfeiture" phrase.

The propriety of this change is supported by the Supreme Court's opinion (by Justice Fortas) in *Gardner* v. *Broderick*, as quoted above in part III–C–3(a), which indicates that in a nonpunitive context, a

[7] *See* the detailed discussion of *Boyd* and *Lee* in part II–C–3, *supra*.

public employee who seeks to shelter under the fifth amendment rather than respond to inquiries concerning his performance of his duties may suffer the "forfeiture" of his office. In short, the present unqualified "penalty or forfeiture" term in immunity statutes may get out of hand. It would seem to be sufficient for an immunity statute to be formulated, as is the fifth amendment itself—and as is the proposed draft statute—in terms of protection against "incriminatory" consequences of compelled disclosures. The scope of this concept would then develop judicially in the process of interpreting the meaning of the fifth amendment. Accordingly, like the fifth amendment, the proposed statute keys the protection to "any criminal case. . . ." It may be noted that this standard confers protection in the same manner as developed in the coerced confession (due process), search and seizure, and similar cases.

E. *Special Clearance Requirements Before Immunity (Use Restriction) May Be Conferred In Court-Grand Jury Proceedings*

In keeping with several immunity statutes enacted since 1954, the draft statute creates the following preconditions for a grant of immunity: (1) judgment of a United States Attorney that the testimony is necessary to the "public interest": (2) approval of the Attorney General; (3) issuance by the United States District Court of a direction to the witness to testify.[8]

There seems to be no opposition, at least in regard to existing executive branch immunity statutes, to requiring a "public interest" certification by the United States Attorney, and an approval by the Attorney General. Most recent law review comments focus on the impact of *Murphy* on the *Counselman* dictum concerning absolute immunity, and ignore these recent procedural innovations. However, the President's Commission on Law Enforcement and Administration of Justice in its recommendation for a general immunity statute expressly recommended that immunity approvals be centralized in the Attorney General.[9]

The argument for centralizing approval in the Attorney General is quite compelling. In a precise sense there is no "right" to a grant of immunity. The starting point is a witness plea of the fifth amendment. At that point, if the government wishes to go forward with the investigation it must make a determination in these terms: Is the public need for the particular testimony or documentary information in question so great as to override the social cost of granting immunity and thereby possibly pardoning a person who has violated the criminal law? Such a calculation can be made only by a person familiar with the total range of law enforcement policies which would be affected by an immunity grant, and not by one familiar only with the asserted public need in the particular case.

As stated in a supporting study for the President's Crime Commission's conclusion, only the Attorney General will have "the perspective

[8] *See* part II–C–4(c), *supra*, for discussion of these requirements under existing Federal law.

[9] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY, at 140–141 (1967).

to choose which investigation is most important," and "whether the price of the testimony is worth paying." [10]

At least so far as executive branch criminal law enforcement activities are concerned, there seem to be no sound reasons against a requirement of approval by the Attorney General. Granting an immunity from criminal prosecution is a serious business, and this consideration alone is sufficient to outweigh the possible time loss involved in clearing with Washington immunity issues arising in the course of the work of United States Attorneys in the field.

Indeed, the Attorney General clearance procedure already required in a few statutes, and recommended here for the general immunity statute, is already in use by informal policy within the Department of Justice. A Department of Justice memorandum of March 11, 1965 to all United States Attorneys concerning Federal immunity statutes outlines the plethora of existing provisions—some being claim statutes and others being automatic statutes—and contains these policy directives:

> Before commencing the prosecution of any matter referred by a regulatory agency where the controlling statutes contain immunity provisions, it is important to determine if any of the prospective defendants have received immunity through some administrative process. In a grand jury investigation it is of even greater importance to avoid an inadvertent grant of immunity. This might arise under those statutes which do not require a claim of privilege, where a witness who might be a prospective defendant appears and testifies pursuant to a subpoena . . . .
>
> Under any immunity statute administered by the Criminal Division whether of the first or second class as indicated above, a prospective defendant should not be subpoenaed and compelled to testify by you without first obtaining approval of this Division. It is the policy of the Department not to extend immunity in any case unless there are sound and urgent reasons for such actions. [The memorandum was signed by Herbert J. Miller, Jr., Assistant Attorney General, Criminal Division.]

1. *The Court Order Requirement: Questionable Utility?*—Far more difficult, conceptually and practically, is the corollary requirement of an application to a Federal district court, after Attorney General approval, for a direction that the witness testify under the use restriction provision (*i.e.*, "immunity"). As noted above, a witness has no right to an immunity grant.

Immunity is the fixed price which the government must pay to obtain certain kinds of information, and only the government can determine how much information it wants to "buy" in the light of the fixed price. Viewed thusly, a court has nothing on which to base a determination whether a given immunity grant is "right" or "wrong," whether it should be made, or whether it should not be made. Indeed,

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[10] Blakey, *Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis* in THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME at 87 (1967) [hereafter cited as TASK FORCE REPORT: ORGANIZED CRIME].

for a court to attempt to make such a decision, or for Congress to attempt to confer such a role upon a constitutional court, would raise serious questions of separation of powers under article III, *i.e.*, conferment on a constitutional court of a function not "judicial" in nature.[11]

The basic rationale for centralizing immunity approvals in the Attorney General also rebuts the idea that a court should thereafter make another, and final, determination. The Attorney General is to have an approval role, as phrased in Professor Blakey's memorandum for the President's Commission, because *only he* will have the needed "perspective to choose which investigation is most important." By definition, a court, with no panoramic vision of total Federal law enforcement planning and accomplishment, will lack the needed perspective for an informed decision.

With approval power centered in the Attorney General, there is likewise no need to refer the matter to a court simply for record keeping purposes. A centralized Attorney General file should be sufficient.

The President's Commission mentioned only two grounds for a court order requirement. It spoke of avoiding abuse of authority by prosecutors, and it spoke of the danger of hidden immunization for corrupt purposes. However, with approval power centralized in the Attorney General, these two points really are a single point: is the Attorney General to be trusted, or is a court somehow to review his good faith? Professor Blakey, in his supporting memorandum for the President's Commission, speaks of making "visible" the Attorney General's decision in order to minimize the "danger of hidden immunization of friends." If such were attempted, he suggested, the Federal district court would "have inherent power to refuse to be a party to it."[12]

Apart from the queston of "inherent power," which perhaps may be conceded, who would raise such questions? What kind of evidence could be adduced? Who would bear the burden of proof and who woul have the benefit of presumptions? Would an attempted, narrow "equity-clean hands" policing by the court really call for a judicial finding on the ultimate issue of law enforcement policy—*i.e.*, whether a "public purpose" would be served by obtaining the information in question in exchange for the immunity? To be sure, we have had our Teapot Dome Scandal, but does this inherent risk justify an attempted judicial "good faith" inquiry in regard to every grant of immunity?

A court order requirement will be harmless, however, if Federal district courts continue to view their role here as being solely ministerial—*i.e.*, service as a recording agency. This approach was outlined in the leading case of *Ullmann* v. *United States*, 350 U.S. 422 (1956), sustaining the constitutionality of the initial court order requirement statute, 18 U.S.C. § 3486(c), concerning grand jury investigation and national security. At the same time the proposed language,

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[11] *See, e.g.*, Dixon, *The Doctrine of Separation of Powers and Federal Immunity Statutes*, 23 GEO. WASH. L. REV. 501, 627 (1955); Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion*, 10 ST. LOUIS U. L. J. 327, 362-365 (1966). *See also* Rogge, *The New Federal Immunity Act and the Judicial Function*, 45 CALIF. L. REV. 109 (1957).

[12] TASK FORCE REPORT: ORGANIZED CRIME, *supra* note 8, at 87.

while clearly negating a full policy review, would not prevent a Federal district court from finding sufficient reserve authority to deny a request for an immunity order in the context of cronyism.

The proposed draft statute, therefore, attempts to clarify the ambiguity implicit in referring simply to "court order" by specifying that the direction "shall be issued" when the two facts are demonstrated: a "public interest" certification by the United States Attorney, and approval by the Attorney General. This approach leaves open the question of residual inherent power of the court in special "Teapot Dome"-type situations.

This latter eventuality is so unlikely, however, that little would be lost, in regard to the court-grand jury section of the draft statute, if the requirement of application to a United States district court simply were deleted. The Attorney General, as part of his approval power, could be expected to maintain as adequate a record as one maintained by district courts. Indeed, the Attorney General's recordkeeping might have an added advantage in being centralized. Further, if there is seen to be a need, particularly in the organized crime area, to permit official but undisclosed (except to the witness himself and the grand jury) immunity grants, the need could be met under a statute giving the Attorney General ultimate responsibility, as the issuer of the direction to testify. This need cannot be met under a requirement of application to a Federal district court.

Because Congress has included a court order requirement in several recent immunity statutes, it is retained in the draft statute. However, the matter should be given careful scrutiny, and it might be concluded that a court order requirement is unneeded in this section. In this connection it should be stated again that under the proposed use restriction concept the "social cost" of giving immunity is lower than under an absolute immunity concept. Hence, the need for multitudinous checks to safeguard against an unauthorized grant of immunity is reduced.

2. *Delegability of Attorney General Approval Power: The "Deputy or Assistant Attorney General" Phrase.*—The proposed draft statute expressly authorizes the Attorney General to delegate his approval function to a "Deputy or Assistant Attorney General designated by him." Hence, the approval in a given instance may be given by the Attorney General personally, the Deputy Attorney General, or one of the Assistant Attorneys General.

Bypassing for a moment the question of statutory language, and focusing only on the policy question of whether or not the Attorney General's function of approving immunity grants should be delegable by him, two opposing considerations appear. First, the basic rationale of requiring Attorney General approval, as set forth by the President's Commission on Law Enforcement and Administration of Justice, is to centralize the approval power so that immunity will be granted only by a person in a position to know the full law enforcement ramifications of a particular immunity grant. A second, and opposing consideration, is that enactment of a general Federal immunity statute (as the 1968 Omnibus Crime Bill virtually is already) may vastly increase the number of immunity requests from Federal interrogators, thus creating a need for delegation for the sake of administrative efficiency.

On balance, it would seem to be unreasonable to prohibit delegation. There may well be repetitive areas where the Attorney General could set forth immunity policies and allow subordinates to implement the policies, case by case. Further, delegation would not absolve the Attorney General of ultimate responsibility. It also would be expected that a centralized record still would be made of actual immunity grants. If necessary such a central record could be statutorily required, coupled with a duty to make an annual report to Congress on immunity grants.

If Congress left the Attorney General approval power unqualified, the result might be to create total delegability. It may be noted that 28 U.S.C. § 510 creates a broad Attorney General delegation provision as follows: "The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General." There seems to be no reason why this language would not apply to create delegability automatically regarding an immunity approval function specified by statute to be exercised by the "Attorney General."

With one exception the present statutes which make approval by the Attorney General a precondition of immunity simply name him, and are silent on delegability. The exception is the Consumer Credit Protection Act of 1968 (Truth in Lending Bill). 18 U.S.C. § 895 which specifies "approval of the Attorney General or his designated representative."

The draft statute limits delegability by retaining the approval function at a high level and authorizing delegation only to the Deputy Attorney General or an Assistant Attorney General. This language serves to highlight the social cost in immunity grants and minimize the possibility of abuse through overly broad subdelegations by the Attorney General. However, the language may not be essential. The Department of Justice already has required United States Attorneys to check with Washington, as noted in the memorandum of the Department's Criminal Division quoted above at the beginning of the discussion of special clearance provisions.

F. *Procedure for Authorization of Immunity (Use Restriction) in Administrative Proceedings: No Court Order or Attorney General Approval, but Notice to Attorney General*

At the present time no immunity statute for formal administrative hearings, whether held by an independent regulatory commission or by an agency inside the executive branch (*e.g.*, hearings in Department of Agriculture under various regulatory statutes), conditions the grant of immunity either by a requirement of notice to the Attorney General or by a requirement of obtaining a court order. Immunity is acquired, at the discretion of the official conducting the inquiry, when the witness responds under a direction to answer despite a plea of self incrimination. And immunity may be acquired automatically, and unknown to the official conducting the inquiry, if the statute is an "automatic" statute and not a "claim" statute as explained in part III–B, *supra*. This latter problem is solved by the Commission's recommendation that a plea of self incrimination be made a precondition of all immunity.

The provisions in the proposed draft statute regarding immunity in administrative proceedings are based on the uniform clause concerning nature and scope of immunity (section 1 of the draft statute). Therefore the discussion above (part III–B, III–C, III–D) concerning requirement of a witness claim of his self incrimination privilege, the use restriction concept of immunity, and elimination of the "penalty or forfeiture" phrase, is equally applicable here, and need not be repeated.

Unlike the provision in the draft statute concerning procedure for conferring immunity in court-grand jury proceedings (section 2, discussed in Part III–E, *supra*), section 3 dealing with formal administrative proceedings does not set up Attorney General approval and application for a court order as preconditions to immunity. The primary changes from present practice, other than the various elements in section 1 of the draft statute regarding nature of immunity, are: (1) requirement of 10 days notice to the Attorney General of intention to authorize immunity, and (2) provision that Congress shall specify the person or persons in the agency who shall have the power to authorize immunity. Congress may choose to place the authority at a high level in the Board or Agency, *e.g.*, commissioners of the Federal Trade Commission, or the Secretary of Agriculture. Subdelegation could be expressly authorized, or be left to general statutory provisions on subdelegation. The Commission need not feel it should make specific recommendations on these points of detail, which might vary from agency to agency.

More significant aspects of the proposed reform are the provision for notice to the Attorney General, and the absence of a provision for application to a United States District Court for an immunity authorization. These two parts will be discussed separately.

There are several reasons for not requiring a court order as a precondition to immunity in formal administrative proceedings, in contrast to the insertion of such a requirement in section 2 concerning court-grand jury immunity authorizations. First, there has been no demonstration of need to make such a change in present practice. Second, Congress has shown no concern or interest regarding such a requirement for administrative hearings, despite the fact that Congress has inserted the requirement in some recent court-grand jury immunity statutes, as already mentioned. Third, as discussed in detail in part III–E, *supra*, the court order requirement may not perform any important function even in the court-grand jury immunity statutes. It may even be suspect on constitutional grounds (separation of powers) if the United States district court should try to arrogate to itself the final decision on ultimate immunity policy. Fourth, with the basic concept of immunity shifted from absolute immunity (exoneration) to use restriction, the possibility that one agency's too casual conferment of immunity may seriously harm a second agency's law enforcement program is greatly minimized. Thus, the argument for repetitive reviews before immunity is conferred is weakened, even if it be assumed that a Federal district court could play a meaningful role in a "second-guessing" kind of review. Fifth, such benefits as formalization of the immunity conferment process, and making a formal record, which may be thought to flow from a court order requirement, are achieved under the draft statute in two other ways:

vesting by Congress of immunity conferment authority at a particular point in each agency: notice to the Attorney General, who can be expected to keep a record of notices to him and his response.

From the standpoint of the agencies conducting formal administrative proceedings, the most significant change in the draft statute from present procedure is the requirement of 10 days notice to the Attorney General. One reason for the proposal is the point just mentioned: formalization of the immunity conferment process, and recordation. Far more important, however, is the thought that even under a use restriction scope of immunity, there may be possible adverse effects on other governmental agencies and other "public interests." Therefore, it seems fair and advisable to require that before conferring immunity an administrative agency at least notify the Attorney General and hear his remonstrance, if any. Because the remonstrance would be advisory only, there would be no "confrontation" between an independent regulatory commission and the Attorney General, which might pose problems concerning the traditional understandings of commission "independence," if not constitutional problems. There would be only a "lobbying" effect. Also, for those who might prefer an even stronger Attorney General role, with a right of disapproval of a desired conferment of immunity, it may be noted that this effect may be achieved within the executive branch, *e.g.*, the regulatory activities of the Department of Agriculture, by informal Presidential direction under existing immunity legislation, and under the draft statute.

One final comment may be appended concerning further work on the matter of compulsory testimony provisions for administrative agencies. Now that the Administrative Conference of the United States is formally organized and in operation, it may be that the Conference could serve as a clearing house for research and proposals on how to implement this draft statute in each agency. The draft statute is open ended on congressional implementation through designating the responsible officials to authorize conferment of immunity. It is also open ended concerning internal regulations in each agency regarding field office-head office relationships, and regarding the procedure for transmitting notice to the Attorney General and receiving and ruling on his remonstrances.

G. *Procedure for Authorization of Immunity (Use Restriction) in Congressional Inquiries: Notice to the Attorney General; Court Order*

The present provision for immunity in support of congressional inquiry (Immunity Act of 1954) sets up a battery of preconditions to conferment of immunity, as analyzed in detail in part II–C–4(a), *supra*. The procedural sequence includes a requirement of obtaining a court order, after notice to the Attorney General who has a right to be heard thereon.

The provisions in the proposed draft statute regarding immunity in congressional inquiries are based on the uniform clause concerning nature and scope of immunity (section 1 of the draft statute). Therefore the discussion above (part III–B, III–C, III–D) concerning requirement of a witness of claim of his self incrimination privilege, the use restriction concept of immunity, and elimination of the "penalty

or forfeiture" phrase, is equally applicable here, and need not be repeated. The draft statute does expand the coverage of the immunity provision beyond national security investigations to encompass the total investigatory power of Congress.

Regarding procedure for authorizing conferment of immunity, the draft statute retains, but clarifies, the provisions for notice to the Attorney General, and for application to a United States district court for an authorizing order. Continuance of the requirement of notice to the Attorney General prior to congressional conferment of immunity is supported by the same considerations listed above (Part III–F) which support Attorney General notice as a precondition to conferment of immunity by an administrative agency. (*See also* the discussion in Part II–C–4(a) concerning apparent purposes and motivations which led Congress to insert the Attorney General notice requirement in the Immunity Act of 1954.)

In short, immunizing against prosecution for crime, even in the limited form of a rule of use restriction on evidence elicited under a compulsory testimony provision, is serious business. Therefore, immunity should be conferred sparingly, and should never be conferred without the maximum possible knowledge of the potential adverse effect the immunity conferment may have on criminal law enforcement plans. The Department of Justice is the central point of knowledge concerning criminal law enforcement. Hence, regarding immunity in the context of court-grand jury action, the draft statute as already noted gives the Attorney General an approval power. Regarding immunity in the context of administrative proceedings, and also congressional inquiries, he is to be given notice and a power of remonstrance, although not of veto, before immunity is conferred. In the special instance of congressional inquiries, in contrast to administrative proceedings, it would be virtually unthinkable to give the Attorney General the additional power of disapproval of conferment of immunity, because in a Teapot Dome-type congressional investigation the Attorney General himself would be the focus of the inquiry.

More difficult conceptually and practically is the additional precondition to conferment of immunity in congressional or court-grand jury inquiries of application to a United States district court for a direction that the witness testify under use restriction protection. The separation of powers objections, and practical objections, to full court review of the wisdom of authorizing immunity have been discussed above in part II–C–(4)a and part III–E. However, Congress has seen fit to create and continue this provision in regard to congressional inquiries and in regard to recent court-grand jury immunity statutes. And, since *Ullmann v. United States*, 350 U.S. 422 (1956), problems both of constitutionality and of insufficiency of information for meaningful judicial scrutiny, have been averted by making the court's function a weak and paltry thing—ministerial, not discretionary in nature.

The draft statute, accordingly, in continuing the requirement of application to a United States district court, makes more clear than the present statute the intention that the court's function is not discretionary. The court "shall" issue the direction to testify subject to a finding that the procedural requirements concerning specified voting arrangements in Congress, and notice to the Attorney General, have been met.

When all this is said there may be, nevertheless, some merit in continuing this meager court role, perhaps more merit than in regard to the court-grand jury section of the draft statute. For one thing, the Congress is even further removed from criminal law enforcement responsibilities than are the administrative agencies. And yet the broad charter of congressional inquiry power may lead congressional investigators into many areas where an immunized witness response may affect criminal law enforcement planning. Hence, there may be merit simply in the additional formality—beyond the needed requirement of notice to Attorney General—of making an application to a district court. (The recordation aspect as noted already is immaterial because the witness knows, and the dual records in Congress and the office of the Attorney General should be sufficient, and indeed more readily available, than a court record.)

A further supporting reason for continuance of the requirement of application to a district court is that it could conceivably be converted into a sort of declaratory judgment proceeding *not* on the wisdom of conferring immunity or no, but on the question of constitutional jurisdiction of Congress over the inquiry area, statutory (or resolution) jurisdiction of the particular agent of Congress over the inquiry, and relevance of the information sought to the authorized inquiry.

Concededly, one of the opinions by a divided court in *In re McElrath*, 248 F.2d 612 (D.C. Cir. 1957), suggests that a witness, even if entitled to a notice of congressional application to court for an immunity order, may at that stage raise only procedural objections not extending to such matters as jurisdiction and relevancy (opinion of Judge Burger endorsed by four other judges). However, the foundation for Judge Burger's narrow view of the scope of the pretestimony court proceeding is not clear. It may derive from the particular statute at issue, or from assumed general principles of prematurity in reaching large constitutional and jurisdictional issues. If the latter, the view then expressed by Judge Burger is subject to modification as judicial concepts of the proper scope of preventive relief on constitutional issues broaden, *cf. Dombrowski* v. *Pfister*, 380 U.S. 479 (1965). Further, the opinion in *McElrath* by Chief Judge Edgerton, endorsed by three judges for this purpose, suggested no restraint on the scope of witness challenge in a pretestimony hearing on the issue of authorizing immunity. Hence, it would seem that despite *McElrath* a kind of declaratory judgment practice at the pretestimony stage could develop if deemed fitting by the Court under general principles concerning ripeness of constitutional and jurisdictional issues for a conclusive adjudication.

Under our decided cases concerning congressional investigations there are potentially four kinds of restraints of a jurisdictional nature which the courts may impose, in an appropriate proceeding. First, a court may review to ascertain whether the investigation falls within the total constitutional scope of the congressional investigatory power. *Kilbourn* v. *Thompson*, 103 U.S. 168 (1880); *McGrain* v. *Daugherty*, 273 U.S. 135 (1927); *Sinclair* v. *United States*, 279 U.S. 263 (1929). Second, a court may review to ascertain whether a committee investigation exceeds the scope of the authorizing resolution, or perhaps is wholly unauthorized. *United States* v. *Rumely*, 345 U.S. 41 (1953).

Third, a court may review to ascertain whether the testimony sought is constitutionally privileged under the fifth amendment's self incrimination clause, which is irrelevant in this immunity statute context, or is privileged under some other constitutional provision such as the first amendment. Although the Supreme Court has not yet allowed a congressional witness to shelter under the first amendment, it has been willing to take a look and has split five to four on the issue. *Barenblatt* v. *United States*, 360 U.S. 109 (1959); *cf. Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539 (1963). Fourth, a court may review to ascertain whether the testimony sought is relevant to the authorized inquiry. *Watkins* v. *United States*, 354 U.S. 178 (1957); *Deutch* v. *United States*, 367 U.S. 456 (1961).

In short, deletion of the requirement of congressional application to a district court as a precondition of conferment of immunity would not sacrifice any vital interest, so long as the requirement of notice to the Attorney General was retained. At the same time, the retention of the requirement is harmless so long as district courts respect the *Ullmann* principle, and it may have some positive benefit.

It may be noted that, while under section (4), the Attorney General must be given 10 days' notice of the application, which is the same period as for administrative immunity under section (3), he also may obtain under section (4) delay up to 30 days in the issuance of the direction. This difference reflects the fact that the same urgency is not expected with respect to congressional factfinding inquiries as with respect to administrative investigations, while, at the same time, the Attorney General's "lobbying" efforts with Congress or a congressional committee would appear to require more time than with an administrative official or board.

H. *Pre-Hearing Issuance of Direction to Testify*

In subsection (b) of section (1), the proposed draft authorizes the issuance (by the appropriate authority) of a direction to the witness to testify or produce other information, in advance of the time when the witness actually asserts his privilege against self incrimination. It is made clear, however, that the direction does not become effective, *i.e.*, immunity is not conferred, until the witness does assert his privilege and the direction to testify is communicated to him by the presiding official at the inquiry—the foreman of the grand jury, the hearing officer at the administrative proceeding, the chairman of the congressional committee or subcommittee. In effect, this subsection permits (but does not require) the issuance of a contingent direction, when the circumstances indicate its desirability in a particular situation.

The general purpose of this device is procedural efficiency. In the conventional situation it is not unusual for the United States Attorney, the administrative official or congressional committee counsel to be forewarned that a witness is going to refuse to answer or is willing to cooperate if he can have immunity protection. To require, in such circumstances, that he first appear at the proceeding and claim his privilege, and that the proceeding then be recessed or adjourned while the necessary direction is applied for and issued results only in perpetuating a useless ritual.

Authorizing a contingent direction would also go a long way toward dissipating objections which might be made to the new requirement of special approval of the grant, together with 10 days' notice to the Attorney General for administrative proceeding immunity. Presently, under many Federal immunity statutes, whoever issues the subpena determines whether immunity is to be granted, even though a claim of privilege is required before immunity is conferred. For internal procedural efficiency there probably is nothing superior to this method: but the external cost is that some grants may be improvidently (or unknowingly) granted and complicate ongoing Department of Justice investigations and prosecutions. The middle ground proposed here is that, while special approval and notice to the Attorney General are essential, public officials in the field may anticipate their needs in order to minimize such delay, interruption or inconvenience as observance of these requirements might impose.

The procedure provided for congressional immunity under the Immunity Act of 1954 is somewhat analogous. There immunity is conferred when the witness claims his privilege before the congressional committee and he is directed to answer by the presiding officer, provided that an order authorizing such direction has been filed by the appropriate United States District Court. In at least one case, *In re McElrath*, 248 F.2d 612 (D.C. Cir. 1957) (*see* discussion in Part II–C–4(a), *supra*), the congressional committee applied for the order—and gave notice to the Attorney General, who stated he had no objection—prior to the witness's having claimed his privilege. Although, when the witness sought to intervene, the court held that the proceeding was moot because the application had been made prematurely, it appears quite clear that the ground for this holding was that the *statute* did not authorize a preclaim application:

> *The Act* does not authorize grants of immunity to persons who are not witnesses but may in the future become witnesses, may refuse to testify, and may claim their privilege. *Nothing in the Act* suggests that Congress meant to authorize grants of unlimited immunity to possible witnesses in exchange for undescribed evidence of undisclosed value in unidentified investigations. (248 F.2d at p. 615.) (Emphasis added.)

It should be noted that the proposed statute does not require that notice of the pre-hearing issuance of the direction be given to the witness. Because of one of the *McElrath* opinions (by Judge Burger) regarding the question of notice, this omission may not be on as firm ground as the explicit authorization for a preclaim application. In *McElrath* five of the nine judges concurred in stating that ". . . the witness should be given reasonable notice of the application, be allowed to appear in the proceeding and be heard . . ." on questions as to the procedural regularity of the application (248 F.2d, at 617). It is nevertheless believed that the Commission is justified in omitting the requirement of notice to the witness from its proposed immunity statute. First, it is not clear to what extent, if at all, this opinion limits legislative action. The unanimous decision of the court was to require dismissal of the application as premature, so that the discussion as to intervention by the witness may be regarded as dictum. Moreover, the context in which notice to the witness is discussed by

Judge Burger suggests that the primary purpose of his opinion was merely to express a narrower view of the scope of what the witness could contest, if he intervened (under rule 24(a) of the Federal Rules of Civil Procedure), than that expressed in the other opinion (by Chief Judge Edgerton, stating the majority view as to prematurity), which implied that the witness could contest a mature application on any ground. The Burger opinion lists the procedural issues the witness might raise, *i.e.*, compliance with the statute, but explicitly rejects the notion that he might raise issues regarding the scope of the inquiry, the pertinency and relevancy of questions propounded or the constitutionality of the statute—all of which must await the event of his being prosecuted for contempt. Accordingly, although notice is spoken of as something which "should be given," it is not sufficiently discussed to determine whether it was intended as an inevitable right derived from constitutional due process or as a right linked to the context of that particular statute or merely as a corollary to the procedural right to intervene conferred by rule 24(a). In any event, of course, *McElrath* is not a Supreme Court decision on a constitutional issue.

A second reason for, in effect, ignoring *McElrath* is that, even if notice to the witness becomes a judicially imposed requirement, it will not materially affect the proposed statutory scheme. When the witness is willing to receive the immunity, notice will be a mere formality. When he does not wish to testify in any event, there still remains some utility in avoiding the ritual of his first appearing and claiming his privilege. Further, as the Burger opinion suggests, if his challenge to the application can only be to procedural regularity, it is likely that notice of the application will often, again, be only a formality. (It may be noted that a witness who testifies under a direction erroneously made will probably have the benefit of use restriction immunity under the same principles which govern judicially imposed immunity. (*See* part II–D, *supra.*) That the direction was invalid, however, would be a defense to prosecution for contempt for refusal to answer.)

Appendix A

EXISTING IMMUNITY STATUTES

Provision of Code–title/section	Subject	Type
7 U.S.C. § 15	Commodity Exchange Act	Automatic (subpena).
7 U.S.C. § 222	Packers & Stockyards Act	Do.
7 U.S.C. § 499m(f)	Perishable Agricultural Commodities Act	Automatic (subpena and oath).
7 U.S.C. § 610(h)	Agricultural Marketing Agreement Act	Automatic (subpena).
7 U.S.C. § 855	Anti-Hog-Cholera Act	Do.
7 U.S.C. § 2115(b)	Cotton research and promotion investigations.	Claim.
11 U.S.C. § 25(a)(10)	Bankruptcy	Automatic (use restriction).
12 U.S.C. § 1820(d)	Federal Deposit Insurance	Claim.
15 U.S.C. § 32–33	Sherman Antitrust Act	Automatic.
15 U.S.C. § 49	Federal Trade Commission Act	Automatic (subpena).
15 U.S.C. § 77v(c)	Securities Act of 1933	Claim.
15 U.S.C. § 78u(d)	Securities Exchange Act of 1934	Do.
15 U.S.C. § 79r(e)	Public Utility Holding Company Act of 1935	Do.
15 U.S.C. § 80a–41(d)	Investment Company Act of 1940	Do.
15 U.S.C. § 80b–9(d)	Investment Advisers Act of 1940	Do.
15 U.S.C. § 155(c)	China Trade Act, 1922	Automatic (subpena and oath).
15 U.S.C. § 715h(a)	Connally Hot Oil Act	Claim.
15 U.S.C. § 717m(h)	Natural Gas Act	Do.
16 U.S.C. § 825f(g)	Federal Power Act	Do.
18 U.S.C. § 835(b)	ICC investigations re explosives	Do.

EXISTING IMMUNITY STATUTES

Provision of Code—title/section	Subject	Type
18 U.S.C. § 895	Consumer Credit Protection Act of 1968	Claim and court order.[1]
18 U.S.C. § 1406	Narcotics Control Act	Do.
18 U.S.C. § 1954(b)	Welfare and Pension Plans Disclosure Act	Do.
18 U.S.C. § 2424(b)	White Slave Act	Furnishing required statement.
18 U.S.C. § 2514	Electronic surveillance	Claim and court order.
18 U.S.C. § 3486	Internal security	Claim and court order. (U.S. Attorney's public interest certification and Attorney General approval not required for congressional proceeding).
19 U.S.C. § 1333(e)	Tariffs Act	Automatic (subpena and oath).
26 U.S.C. § 4874	Cotton Futures Act	Automatic.
26 U.S.C. § 5848	Gun Control Act of 1968	Registration (use restriction).
26 U.S.C. § 7493	Cotton Futures Act (tax)	Automatic.
27 U.S.C. § 202(c)	Federal Alcohol Administration Act	Automatic (subpena).
29 U.S.C. § 161	Labor Relations Board investigations	Claim.
29 U.S.C. § 209	Fair Labor Standards Act	Automatic (subpena).
29 U.S.C. § 308(e)	Welfare Pension Plans Disclosure Act	Do.
29 U.S.C. § 521(b)	Labor-Management Reporting and Disclosure Act.	Do.
42 U.S.C. § 405(f)	Social Security Act	Claim.
42 U.S.C. § 2201(c)	Atomic Energy Commission Act	Do.
45 U.S.C. § 362(c)	Railroad Unemployment Insurance Act	Do.
46 U.S.C. § 827	Shipping Act	Automatic (subpena and oath).
46 U.S.C. § 1124(c)	Merchant Marine Act	Claim.
47 U.S.C. § 409(l)	Federal Communications Act	Do.
49 U.S.C. § 9	Damage suits against common carrier (Interstate Commerce Act).	Claim and court order (use restriction) (no other requirements).
49 U.S.C. §§ 43, 46–48	Interstate Commerce Act	Automatic (subpena and oath).
49 U.S.C. § 305(d)	Motor Carriers Act	Do.
49 U.S.C. § 916	Water carriers	Do.
49 U.S.C. § 1017(a)	Freight forwarders	Do.
49 U.S.C. § 1484(i)	Federal Aviation Act	Claim.
50 U.S.C. §§ 792(c), 792a(d)	Subversives Activities Control Board	Automatic (subpena, when issued by Attorney General on representation that testimony is necessary).
50 U.S.C. § App. 643(a)	Second War Powers Act	Claim.
50 U.S.C. § App. 1152(4)	War and Defense Contract Acts	Do.
50 U.S.C. § App. 1896(f)(6)	Housing and Rent Acts	Do.
50 U.S.C. § App. 2026(b)	Export Control Act of 1949	Do.
50 U.S.C. § App. 2155(b)	Defense Production Act of 1950	Do.

[1] Unless otherwise indicated, a "claim & court order" type includes U.S. Attorney's "necessary to public interest" certification and approval by the Attorney General.

APPENDIX B

SECOND INTERIM REPORT OF THE COMMISSION TO THE PRESIDENT AND THE CONGRESS

NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS,
Washington, D.C., March 17, 1969.

The PRESIDENT,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT:

This is the second interim report by the National Commission on Reform of Federal Criminal Laws and the first recommending a specific reform for consideration by the President and Congress. The reform relates to the matter of granting immunity to a witness in order to compel him to testify despite his assertion of the privilege against self-incrimination.

As noted in our first interim report (of November 4, 1968), we are primarily engaged in drafting a new code of federal criminal laws, defining offenses, defenses, and sentencing authority. Since it is to be an integrated and systematic code, our work does not usually lend itself to severable recommendations. We have been prompted to move ahead with the recommendations here, however, not only because the need is manifest but also because it can be met by provisions which are independent of the other reforms upon which we have been working.

We annex to this report statutory provisions recommended for reform of immunity, together with a report on federal immunity prepared for us by Professor Robert G. Dixon, Jr., of the George Washington University Law Center. The report included appendices consisting of a list of existing federal immunity laws and some samples of them.

Upwards of 50 different statutes now authorize the granting of immunity in federal matters. They vary in a number of respects. The proposed reform would replace them with a single set of provisions having the following features:

1. The scope of immunity would be converted from immunity of the witness from prosecution for all matters related to his testimony to immunity from use of the testimony, or its fruits, against the witness in a criminal case.

2. The witness would have to claim his privilege in all cases before the immunity could be granted, unlike some existing statutes which confer immunity automatically when a subpoenaed witness testifies.

3. Instead of the authority to grant immunity being confined to inquiries having a specified subject, which leaves some matters of interest outside the compulsory testimony power, the immunity authority would extend to *all* court, grand jury, and Congressional proceedings, and to those administrative proceedings designated by Congress. Authority to determine when the need for information warrants an immunity grant would be vested in responsible officials to the extent of their jurisdiction.

4. To meet the concern that immunity may be improvidently conferred, a centralizing role is given to the Attorney General. He, or another high Department of Justice official, must approve grants to be authorized by a United States Attorney; and he must be given notice of grants to be conferred in Congressional and administrative proceedings. The proposal requires notice but does not give a veto power to the Attorney General because the likelihood of his being able to persuade the Congress or department or agency officials that a particular immunity grant would be unwise makes it unnecessary to face difficult constitutional or policy issues arising from a requirement that he approve it.

5. Since on many occasions it can be anticipated before a witness appears to testify that he will assert his privilege, the proposal permits a contingent grant of immunity by the responsible official, to become operative when the privilege is asserted. This procedure should permit avoiding inconvenience, delay, and unnecessary ritual.

6. Although we make no recommendation as to which official or what body within a department or agency should be granted the authority to confer immunity in administrative proceedings, we do provide a standard provision for the exercise of such authority once the Congress has determined by law who should have it.

We are satisfied that our substitution of immunity from use for immunity from prosecution meets constitutional requirements for overcoming the claim of privilege. Immunity from use is the only consequence flowing from a violation of the individual's constitutional right to be protected from unreasonable searches and seizures, his constitutional right to counsel, and his constitutional right not to be coerced into confessing. The proposed immunity is thus of the same scope as that frequently, even though unintentionally, conferred as the result of constitutional violations by law enforcement officers. The change from absolute immunity to a use-restriction supports our recommendation that Congress no longer confine immunity authority to inquiries regarding a limited range of legislatively-specified subjects. At the same time this change in the scope of the immunity avoids the concern, which has arisen as the result of recent Supreme Court decisions, regarding the impact of federally-compelled information on state prosecutions. State prosecutions would be thwarted only if the evidence upon which they are to proceed has been derived directly or indirectly from the federal compulsion.

The provisions we propose could appropriately be placed in Chapter 223 of Title 18 of the United States Code; at the same time the immunity provisions in Sections 895, 1406, 1954(b), 2514, and 3486 of that Title should be repealed. We further recommend that, except for Section 2424 of Title 18 (dealing with the filing of a statement required under the White Slave Act) and Section 5848 of Title 26 (dealing with registrations under the Gun Control Act of 1968), the immunity provisions of the other laws listed in Appendix A of the immunity report be repealed; at the same time legislation should be enacted naming the appropriate person or body in the various federal departments and agencies

authorized to issue a direction to testify, as required by Section 3 of our proposal.

Directions to testify under Section 2 of the proposal (court and grand jury) and under Section 4 (Congress) can be enforced through existing provisions. When testimony is required by court order, refusal would be contempt under Section 401 of Title 18, United States Code. When testimony is required before Congress, refusal would be a misdemeanor under Section 192 of Title 2, United States Code.

The adequacy of existing law to deal with enforcement of directions to testify under Section 3 (formal administrative proceedings) will depend upon which officials or bodies Congress determines should have the immunity-granting authority. Existing provisions applicable to certain agencies now make it a misdemeanor to "refuse . . . to answer any lawful inquiry" of the agency. See, for example, first paragraph of Section 50 of Title 15, United States Code (Federal Trade Commission); subsection (c) of Section 78u of Title 15, United States Code (Securities and Exchange Commission); last sentence of Section 46 of Title 49, United States Code (Interstate Commerce Commission).

The Commission has under consideration a provision which would make it an offense to intentionally fail or refuse to comply with a direction to testify, lawfully issued under the provisions proposed here; but until it is forthcoming as a part of our complete code, we are satisfied with existing laws dealing with unlawful refusals to testify.

Respectfully submitted for the Commission.

EDMUND G. BROWN, *Chairman.*

PROPOSED IMMUNITY PROVISIONS

Section (1). *Immunity Generally.*

(a) A witness who asserts his privilege against self-incrimination before either House or committee of either House or a joint committee of both Houses of Congress, or a court or grand jury of the United States, or in a formal administrative proceeding may be directed to testify or produce other information as provided in this article. He shall not thereafter be excused from testifying or producing other information on the ground that his testimony or other information required of him may tend to incriminate him. But neither the testimony nor other compelled disclosures of the witness, nor any information or evidence derived therefrom, shall be used against the witness in any criminal case, except a prosecution for perjury or any other offense constituting a failure to comply with such direction.

(b) A direction to testify or produce other information authorized by this article may be issued prior to the witness's assertion of his privilege against self-incrimination: but the direction shall not be effective until the witness asserts his privilege against self-incrimination and the person presiding over the inquiry communicates the direction to him.

(c) As used in this article "other information" includes any book, paper, document, record, recordation, tangible object or other material; and "formal administrative proceeding" means any proceeding for which an agency of the United States is authorized to issue subpoenas and at which testimony of witnesses may be taken under oath.

Section (2). *Immunity Before Court and Grand Jury.*

When the testimony or other information is to be presented to a court or grand jury, the direction to the witness to testify or produce other information shall be issued by the United States District Court upon application therefor by the United States Attorney. The application may be made whenever, in the judgment of the United States Attorney, the witness has asserted or is likely to assert his privilege against self-incrimination and his testimony or other information is or will be necessary to the public interest, and the application has been approved by the Attorney General or a Deputy or Assistant Attorney General designated by him.

Section (3). *Immunity in Formal Administrative Proceeding.*

When the testimony or other information is to be presented in a formal administrative proceeding, the direction to the witness to testify or produce other information shall be issued by the person or persons in the agency concerned to whom such authority has been given by statute. The direction may be issued whenever, in the judgment of such person or persons, the witness has asserted or is likely to assert his privilege against self-incrimination and his testimony or other information is or will be necessary to the public interest, but no sooner than ten days after service of notice upon the Attorney General of an intention to do so.

Section (4). *Immunity Before Congress.*

(a) When the testimony or other information is to be presented to either House or a committee of either House or a joint committee of both Houses of Congress, the direction to the witness to testify or produce other information shall be issued by a United States District Court, upon application therefor by a duly authorized representative of the House or committee concerned, and subject to the requirements of this section.

(b) Before issuing the direction, the court must find that application was authorized, in the case of proceedings before one of the Houses of Congress, by affirmative vote of a majority of the members present of that House, or in the case of proceedings before a committee, by affirmative vote of two-thirds of the members of the full committee.

(c) Notice of the application for issuance of the direction shall be served upon the Attorney General at least ten days prior to the date when the application is made. Upon the request of Attorney General, the court shall defer issuance of the direction for not longer than thirty days from the date of such notice to the Attorney General.

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.