ADVANCE SHEET – June 20, 2025

President's Letter

The recent actions of the national administration in asserting a right to intervene in local political disturbances without an invitation from governors makes it appropriate to reprint some cautionary words about any such tendency that I voiced 55 years ago. I shall continue to abstain from expressing in this space my current expressions about current events.

The article I wrote then was prompted by a report of a National Commission appointed by President Johnson whose guiding spirits included Senators Edward Kennedy, John McClellan, and Roman Hruska. Because my articles were the first expressions of opposition, I was one of five persons who testified on the first day of the ensuing Senate hearings along with Governor Pat Brown and Attorney General John Mitchell. The guiding spirit of the hearings was the Judiciary Committee's staff director, an unrecognized major figure of the law, Professor G. Robert Blakey of Notre Dame, who is still alive and who was the principal draftsman of the generally successful and appropriately restrained federal RICO and wiretapping legislation directed against organized crime. He later was the staff director of the House Committee on Assassinations, whose courageous report did not spare the Eisenhower and Kennedy administrations.

The Brown Commission's bill was succeeded by somewhat less latitudinarian bills, Senate Bills 1 and 1400 sponsored by the Senate Committee with the enthusiastic support of Senator Kennedy and, as to the latter bill, the Nixon Administration. An omnibus bill passed the Senate with about a dozen dissenting votes but foundered in the House Judiciary Committee, the leading opponents being Congressman James Mann of South Carolina and Congresswoman Elizabeth Holtzman of New York, later District Attorney of Brooklyn, who echoed my opposition to the proposals to greatly empower magistrates without life tenure. She is still alive and active. The broad bill ultimately died because of a Senate filibuster led by a Dixiecrat, Senator James Allen of Alabama, a Republican libertarian, James McClure of Idaho, and Senator Alan Cranston of California, who had been a newspaper correspondent in Hitler's Germany

and who recalled the supersession of the Prussian police. By then, opposition had arisen from the business community and civil liberties organizations. Senator Kennedy was successful in securing enactment of the proposals for a Sentencing Commission, which produced a Thermidor of inflexible draconian sentences until its wings were somewhat clipped by opinions of Justice Antonin Scalia invoking the right of jury trial.

I testified before both Senate and House Committees and published several other articles in various legal publications. Recent developments appear to justify my worst forebodings.

George W. Liebmann

Chartering a National Police Force

by George W. Liebmann

A cross-examination of the proposed new federal criminal code asserts that the draft works neither a revision and re-arrangement of the code nor its reform in light of recent developments in case law. Instead, the draft advocates expansion of federal police power and a destruction of state responsibility and state autonomy in the preservation of public order and the administration of criminal law. The second installment of this article will appear next month.

BY PUBLIC LAW 89-801, Congress established the National Commission on Reform of Federal Criminal Laws in 1966, charging it with the modest task of recommending improvements in the "system of criminal justice" by which federal criminal statutes are administered and the duty of "making recommendations for revision and recodification of the criminal laws of the United States, including the repeal of unnecessary or undesirable statutes and such changes in the penalty structure as the Commission may feel will better serve the ends of justice". The creation of the commission was inspired by a message sent to Congress by President Johnson on March 9, 1966. That message proposed creation of a commission to accomplish "revision" of federal criminal laws. In describing the sort of revision contemplated, the President observed:

> A number of our criminal laws are obsolete. Many are inconsistent in their efforts to make the penalty fit the crime. Many—which treat essentially the same crimes—are scattered in a crazy-quilt patchwork throughout our criminal code.

The scope of revision contemplated by the President was clearly modest. Repeal of obsolete laws, rationalization of penalties and consolidation of related laws under a single head were the examples of contemplated revision referred to in the President's message. Deputy Attorney General Ramsey Clark, testifying before the Judiciary Committee of the House of Representatives later the same year, gave examples of the sort of anomaly intended to be corrected by the new commission:

> Several illustrations may help. Is it not puzzling that it is a felony punishable by a fine of not more than $1,000 or imprisonment for not more than seven years, or both, to actually maim a person, while an assault with intent to commit such a felony is punishable by a fine of not more than $3,000 or imprisonment for not more than 10 years, or both? . . .
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> The various false penalty and immunity statutes are equally confusing. Under Section 1001 of Title 18, United States Code, false statements generally are punishable by a fine of not more than $10,000 or imprisonment for not more than five years, or both. However, under various other statutes, false statements of a particular type are subject to lesser penalties.
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> Some statutes are obsolete or incorrect and should be either updated or repealed. For instance, Section 1652 of Title 18 speaks of pirates operating under color of any commission from a foreign prince. . . .

Subsequent to the House hearings, a member of the subcommittee, Representative Poff, introduced a bill similar to but slightly broader than the administration's measure. The changes in the commission's mandate made by the Poff bill were relatively minor. The word "revision" was changed to "reform" in the title. The House committee report explained that "H.R. 15766 contemplates a Criminal Law Reform Commission, which would not be limited to recodification or revision, merely restating existing laws and limiting disparities, but would itself determine where its attention will best be focused after having had an opportunity to review the entire spectrum of the criminal laws, including also the possible codification of case law where needed to modernize the system." While the addition of the word "reform" is of significance, Congress nonetheless contemplated reform of the existing federal criminal code, not reform of intergovernmental relations or the nation's working Constitution. The administration's bill provided for a nine-member commission with three

members each to be appointed by the President, the President of the Senate and the Speaker of the House, to which the Poff bill added provision for bipartisan membership and for appointment in addition of three members of the federal judiciary by the Chief Justice of the United States. The bill, as enacted, further provided for an advisory commission of fifteen members appointed by the commission, for a director to be appointed by the commission, for its permanent employees and for employment by it of a suitable number of members of that prolific, if somewhat incestuous breed of quasi-public servant, the $75-a-day man.

A Monster Has Sprung Forth

From these modest beginnings there has sprung forth a monster. The proposed study draft works not a revision and rearrangement of the federal criminal code or its reform in light of recent developments in case law, but rather a wholesale expansion of federal police power and a wholesale destruction of state responsibility and state automony in the preservation of public order and the administration of criminal law. One commission consultant vividly described the commission's modest approach: "As a general proposition, a fresh look ought to be taken at all basic legislative policy issues as a part of the comprehensive penal law reform effort." (Working Papers Volume 1, page 100.) The work of this commission, thus far, constitutes a massive act of usurpation—an exercise in government by sleight of hand which finds little parallel even in our rather surprising very recent history. For the study draft of this commission, appointed to "revise" and "codify", would, among other things, restructure the jurisdictional basis of the federal criminal law so as readily to permit federal jurisdiction to be pressed to and beyond its constitutional limits by the proposed code and by future legislation (Section 201); would further confirm the Federal Government in possession of wide police power and hence increased responsibility for the suppression of persons promoting civil disturbances, notwithstanding the absence of obstruction of federal law or a call for assistance by the governor of a state (Section 1301); and would provide the Federal Government with authority, regardless of the presence or absence of the conventional indicia of federal jurisdiction, to punish the bribery or unlawful rewarding of state and local officials, thus affording federal officials so minded an unparalleled opportunity to utilize the federal criminal law against elected state officers or their political opponents (Sections 1361, 1362, 1366 and 1367).

Further, the new proposed code, not content with its broadening of existing jurisdictional bases, provides for a new form of pendent federal criminal jurisdiction, charmingly referred to by the draftsmen as a "piggyback" base (Section 201 (b); further provides for significant broadening of the rather vaguely drafted federal civil rights statutes by eliminating the requirement of 18 U.S.C. § 245 which limits federal interference to cases involving intimidation "by force or threat of force", thereby taking a step that Congress expressly declined to take in its very recent enactment of the Civil Rights Act of 1968[1] (Section 1500); and further dispenses with the requirement that deprivations of federal rights be under color of state law rather than the product of private action (Section 1501). These safeguards of federalism are said to "have become unnecessary due to an expanded view of the scope of federal rights and congressional power to protect them" (Study Report, page 147). The code further makes it a federal offense for a state or local policeman to "exceed his authority in making an arrest or a search and seizure" and expressly dispenses with the requirement of *Screws* v. *United States*[2] that there be shown a specific intent to deprive the victim of federal constitutional rights (Section 1521).

Section 1541 of the study code drastically recasts many systems of political finance of state and local elections by making it a federal offense for a labor union or corporation to make a campaign contribution in a state or local election. Section 1826 purports to create federal jurisdiction over all drug offenses, including marijuana offenses, offenses involving amphetamines and offenses involving substances within the scope of the proposed Controlled Dangerous Substances Act[3] (Sections 1821, 1826, 1829). Section 503, although purporting to adopt the American Law Institute's Model Penal Code test of insanity[4] extends immunity to sociopathic offenders,[5] implicit in this proposal being a vastly broadened role for the Federal Government in the confinement of persons deemed mentally ill.[6] Nor are the sweeping judgments and innovations made by this new code confined to those involving the restriction, or more accurately, obliteration, of the independent powers and responsibilities of state and local governments. Thus the draftsmen of the proposed statute would reject out of hand the considered recommendations of the Reardon Commission for revision of the federal contempt statute[7] (see Section 1341), would drastically curtail the contempt powers of federal judges, would freeze into federal law, despite the current flux in the field, the "utterly without redeeming social value" test of obscenity espoused by four members of the Supreme Court in the *Memoirs* case[8] (Section 1851), would create a new inchoate offense of "criminal facilitation"—a proposal rejected by the American Law Institute after opposition from Judge Learned Hand[9] (Section 1002), and would annex to corporate criminal convictions a new class action restitution procedure confusing criminal sanctions and redistributive social policy (Section 405). This catalogue is only illustrative.

These extraordinary recommenda-

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1. See S. Rep. No. 721, 89th Cong., 1st Sess. (1967).
2. 325 U. S. 91 (1945).
3. S. 3246, 91st Cong. 1st Sess.
4. A. L. I. Model Penal Code §2.08.
5. *Cf.* Allen, The Borderland of Criminal Justice 120-122 (1969).
6. See, *e. g.*, Tydings, *Federal Verdict of Not Guilty By Reason of Insanity and A Subsequent Commitment Procedure*, 27 Md. L. Rev. 131 (1967).
7. See A.B.A., Standards Relating to Fair Trial and Free Press (1966).
8. *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966).
9. See A. L. I. Model Penal Code (1962 Draft), Comment, § 2.06.

tions have been presented to the Bar and to the public in a fashion that could not be better calculated to preclude intelligent and informed comments. On June 3, 1970, the study draft was issued. The draft contains numerous references to the commission's working papers. The letter of transmittal accompanying the study draft expresses regret that the working papers, because of printing delays, could not be issued together with the study draft. As of July 27, 1970, the working papers had not been published.[10] The letter of transmittal, together with the first page of the study draft, established an effective deadline for comments to the commission of August 1, 1970 (later extended to August 31, 1970), pointing out that the final report of the commission is, by statute, due November 3, 1970. (It is understood that some portions of the report may be delayed until shortly before January 3, 1971, the date the commission expires by statute.) Thus the Bar and the public are afforded at most five weeks in midsummer, with benefit of the commission's working papers, in which to comment on the study draft.[11] Under these circumstances the commission's announcement that it will receive comments can be deemed little more than window dressing.

Unless Revised, Draft Must Be Discarded

What already has been said about the substance of this commission's recommendations speaks for itself. Before analyzing the recommendations in detail, I shall state my conclusions: This study draft may be poisoned at its source, it may well be beyond repair and, unless drastically revised, must be discarded, root, stem and branch. Understanding of the substantive provisions cannot, unfortunately, be obtained without consideration of the fashion in which they came about. It is appropriate, therefore, before discussing the substantive provisions, to say a word about the composition of this commission, its advisory committee and its staff.

The commission is composed of twelve members. President Johnson's appointees included the commission chairman, former Governor Edmund Brown of California, and two lawyers, Donald Scott Thomas of Austin, Texas, and Theodore Voorhees, a Philadelphia lawyer long active in the affairs of the National Legal Aid and Defender Association. Chief Justice Warren's appointees included Judges George C. Edwards, Jr., A. Leon Higginbotham, Jr., and Thomas J. McBride. The President of the Senate designated Senators Sam J. Ervin, Jr., John L. McCellan and Roman L. Hruska. Speaker McCormack's designees were Congressmen Robert W. Kastenmeier, Abner J. Mikva and Richard H. Poff. Congressman Mikva succeeded Congressman Don Edwards of California, and Judge Edwards succeeded Judge James Carter of the Ninth Circuit. A judgment as to the adequacy of representation of the political and legal center on the commission must abide its action on the study draft. It may be hoped that the final report will not constitute an amalgam of the views of "liberals" uncritical of expansions of federal authority and "conservatives" favoring a harder line on questions of criminal justice. Conspicuously absent from the commission is any representative of state or local governments—an omission ascribable to the terms of the statute creating the commission, which contemplated a body that would engage in some rather routine housekeeping within the federal establishment, and not an organ whose staff would arrogate to itself the powers and aspirations of a constitutional convention.[12]

The possible defects in the makeup of the commission may not have been redeemed by its choice of an advisory committee and staff. The advisory committee likewise is notably bereft of representatives of state and local governments. The only such representative now serving is the former Police Commissioner of New York City, Howard R. Leary, who must be assumed to have had little time to devote to the work of this commission.[13] Its staff is headed by Professor Louis B. Schwartz of the University of Pennsylvania Law School, a qualified scholar who was also codirector of the American Law Institute Model Penal Code project. Professor Schwartz's somewhat unorthodox views on such subjects as the appropriate scope of federal criminal jurisdiction[14] and the definition of and sanctions for corporate criminal liability[15] found little room for expression in connection with the drafting of the Model Penal Code. The present study draft gives them full play.

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10. They became available on June 28, 1970.

11. On January 16, 1969, Governor Brown addressed a letter to Congress in support of an act extending the time for the commission to submit its report by one year to November 8, 1970. This letter observed: "The Commission is planning to publish a tentative draft of a proposed new criminal code this spring. However, the Commission believes that the tentative draft must be widely circulated to Federal judges, Federal agencies and departments, U.S. attorneys, and other interested parties for critical analysis. It is felt that additional time will be needed so that those who receive the tentative draft will have time for analysis of its contents and in order that the Commission staff can accommodate those changes which the Commission may wish to be made in light of the analysis given the tentative draft by those who review it." 1969 U.S. Code Cong. & Ad. News 1044 (1969). In the final event, the study draft was not made available until more than a year after its promised date, and the year properly deemed necessary to solicit, receive and absorb comments has been reduced to barely two months, with the results that might be expected.

12. While many of the members have prior experience in state or local government, this scarcely remedies the lack of representation of now serving state and local officials. As the commission's director, Professor Schwartz, observed some years ago: "The very fact of employment by the central government seems to shift the center of loyalty and to modify or restrain local attitudes. There is a kind of *esprit de corps* uniting men to the organization to which, if only for the time being, they belong . . .". Schwartz, *Federal Criminal Jurisdiction and Prosecutor's Discretion*, 13 Law and Cont. Prob. 64, 68 (1948).

13. The late Justice Byron O. House of the Supreme Court of Illinois served as a member until September, 1969, and Elliot Richardson, as the Attorney General of Massachusetts, served until April, 1969. Five of the commissioners and advisory committee members also served as members of or consultants to the President's Commission on Violence (Eisenhower Commission).

14. See the critique of those views in Allen, Kenison, Willens & Schwartz, *Role of the Federal, State and Local Governments in the Administration of Criminal Justice: A Panel*, 1961 Rep., A.B.A. Section of Criminal Law 30.

15. See Professor Schwartz's dissent to the Report of the Attorney General's Committee To Study the Antitrust Laws (1955).

National Police Force

The research staff of the commission appears drawn in heavy portion from the staffs of the Department of Justice. The commission's academic consultants constitute a representative cross section of the younger members of American criminal law faculties. Service as a consultant to the American Law Institute Model Penal Code Project appears to have been regarded almost as a disqualification for work on this study draft.[16] It is no disparagement of the academic competence of the consultants to say that a number of the choices made appear quite extraordinary.[17]

Neither responsible criminal defense attorneys nor state and local officials appear to have significantly participated in the work of this commission. It is fair to say of the commission's staff that in general it is composed of a coalition of federal prosecutors and younger academic members. While we are told by Governor Brown's preface (page xx) that "divisions of opinion emerged on issues so vital to the maintenance of an orderly society and the preservation of individual liberty", the two groups were apparently largely united in their lack of concern about issues of federalism.

Having thus reviewed the background and origins of the code, detailed attention may be given to a few of its provisions.

Single Section Defines Federal Jurisdiction

The jurisdictional provisions of the code depart from existing federal statutes by including a single section defining federal jurisdiction. That section, 201, provides as follows:

> Federal jurisdiction to penalize an offense under this Code exists under the circumstances which are set forth as the jurisdictional base or bases for that offense. When no base is specified for an offense, federal jurisdiction exists if the offense is committed anywhere within the United States, or within the special maritime and territorial jurisdiction of the United States.
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> Bases commonly used in this code are as follows:
>
> (a) the offense is committed within the special maritime and territorial jurisdiction of the United States;
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> (b) the offense is committed in the course of committing or in immediate flight from the commission of any other offense over which federal jurisdiction exists;
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> (c) the victim is a federal public servant engaged in the performance of his official duties or is the President of the United States, [etc.] ... or any member or member-designate of the President's cabinet or the Supreme Court, or a head of a foreign nation or a foreign minister, ambassador or other public minister;
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> (d) the property which is the subject of the offense is owned by or in the custody or control of the United States or is being manufactured. constructed or stored for the United States;
>
> (e) the United States mails or a facility in interstate or foreign commerce is used in the commission or consummation of the offense;
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> (f) the offense is against a transportation, communication or power facility of interstate or foreign commerce or against a United States mail facility;
>
> (g) the offense affects interstate or foreign commerce;
>
> (h) movement of any person across a state or United States boundary occurs in the commission or consummation of the offense;
>
> (i) the property which is the subject of the offense is moving in interstate or foreign commerce or constitutes or is part of an interstate or foreign shipment;
>
> (j) the property which is the subject of the offense is moved across a state or United States boundary in the commission or consummation of the offense;
>
> (k) the property which is the subject of the offense is owned by or in the custody of a national credit institution;
>
> (l) the offense is piracy, as defined in section 212.

Individual sections of the code defining specific offenses either contain no reference to jurisdiction, in which case "federal jurisdiction exists if the offense is committed anywhere within the United States", or contain a statement like that in the theft section: "There is federal jurisdiction over an offense defined in Section 1732 to 1737 under paragraphs a, b, d, e, h, i, j, k, or l of Section 201." By the simple expedient of adding additional letters to a given section of a code or, better still, deleting any letter references at all, the jurisdictional reach of the code sections may be vastly extended by future Congresses, comprehendingly or otherwise. Particularly notable among the bases included in this list are those provided by Subsection (b), the pendent criminal jurisdiction section, Subsection (g), the "affecting commerce" section, and Subsection (h), which rests on the premise that "if interstate transportation of a kidnap victim suffices for federal intervention, interstate movement of the kidnapper to commit the offense should also suffice". Just why this is so, or why an additional federal penalty should be visited upon the free interstate movement that the courts have increasingly told us is constitutionally protected is not explained.

It is fair to describe the general approach to jurisdiction as the most serious flaw, and indeed, as an irremediable flaw, in the study draft. It appears that at the inception of the project Professor Schwartz himself described the approach as "radical" and observed "Initially, however, we

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16. Of the members of the staff of or consultants to the A.L.I. Model Penal Code project, only one other than Professor Schwartz appears to have been associated with the work of this commission.

17. Thus the views of the consultant on the law of contempt, the leading American critic of the contempt power, are more than adequately reflected in the study draft contempt statute.

should probably proceed along more conservative lines." (Working Papers, Volume 2, page 1403.) In justifying its approach the commission declares: "It is impossible to continue to pretend, as we have under nineteenth century laws, that the federal government is not interested in the substantive problems of fraud, prostitution, gambling, drugs, firearms, or corruption of local government—but only in the simple 'use of the mails' or 'interstate commerce'" (page xxi).[18] Thus, having erected a false dichotomy, the framers of the code go on to justify the "writing (of) the new federal penal code very much like a state penal code" (page xxi).[19] But the Federal Government can be "interested" in these questions while confining its role, as it has traditionally, chiefly to federal legislation in aid of state enforcement. Suggestions of this nature, such as those made by a consultant to the commission (Working Papers, Volume 1, page 62), are not pursued in the study draft. The "Variation on the Present Approach" proposed by Professor Abrams (Working Papers, Volume 1, page 43) affords another such rejected solution. This redrafting would eliminate the catalogue of jurisdictional provisions contained in Section 201, as well as the peculiarly objectionable provision, "When no base is specified for an offense, federal jurisdiction exists if the offense is committed anywhere within the United States." Similarly, the listing of the jurisdictional basis in each code section would make the code more easily used the ordinary practitioner and by the layman, albeit somewhat longer. Further, such an arrangement would eliminate the listing and characterization of "offenses . . . affecting interstate or foreign commerce" among "common jurisdictional bases".

Moreover, consideration was not given to whether the existing case law requiring culpability as to the jurisdictional bases in some instances should be followed. This would seem reasonable as to offenses founded on the jurisdictional base set forth in Section 201 (c) of the study draft (acts directed against federal public servants) and as to offenses where jurisdiction is founded on the fact that property "is being manufactured, constructed or stored for the United States". Section 201 (c) as a jurisdictional peg goes well beyond most present law by encompassing added offenses directed against low-ranking federal officers in the course of their duties, as does the quoted portion of Section 201 (d). The federal interest in punishing acts affecting low-level employees or property being manufactured for the Government, usually a limited interest, is negligible when the actor is not conscious of the federal element but merely directs a crime at part of the general mass of persons or property within a state. Finally, notwithstanding Section 203, which dispenses with a culpability requirement, present case law may be sound in requiring culpability as to jurisdictional facts with respect to inchoate offenses.[20]

Four Principles That Should Have Been Followed

If a broad and in many respects unintended expansion of federal jurisdiction is not to take place by enactment of the code (notwithstanding its occasional provisions restricting existing jurisdiction) or by action of future Congresses, it would seem that four principles should have been followed: (1) there should be no claim to plenary jurisdiction anywhere in the code and no statement, such as that in Section 201, that plenary jurisdiction exists unless otherwise provided;[21] (2) proof beyond a reasonable doubt of jurisdictional elements should continue to be required; otherwise the jurisdictional limitations will tend to become attenuated to the point of meaninglessness—the study draft is indecisive on this point (Section 103 (1)); (3) there should be no catalogue of common jurisdictional bases such as that of Section 201; (4) culpability as to the jurisdictional element should be required in some instances involving at least the two jurisdictional bases referred to and with respect to inchoate offenses, such as conspiracy.

However, these more limited approaches are rejected by the study draft, with its catalogue of jurisdictional provisions. Those who regard the absence of a national police force as a great safeguard of liberty in this country and indeed as a constitutionally rooted safeguard will not be cheered by the commission's observation that "a notable incidental benefit of this new clarity is that Congress can

18. The discerning consultant on jurisdiction, Professor Norman Abrams of U.C.L.A., recognizes that "Plenary Federal criminal jurisdiction would carry with it general Federal police power and a truly national police force. The concomitant centralization of law enforcement authority in Washington would clearly be unacceptable. . . . Ultimately, the question of what the Federal role ought to be in this area goes to the heart of our Federal system and the relative parts to be played by the Federal and State governments." (Working Papers, Volume 1, page 35). Also, "absent criteria of limitation clearly set forth, the fact of an enlarged statutory jurisdiction may create a pressure for increasing [federal enforcement] resources" (Volume 1, page 57). "General policy declarations [on limitation of jurisdiction] would have no specific sanction behind them or policing effect" (Volume 1, page 60). It is further recognized that "In some ways, the present [precommission] approach tends to help maintain the limited quality of [the] Federal role. . . . [B]y focusing on the jurisdictional question in connection with each individual offense an emphasis on the limited criminal authority of the Federal government is maintained. Stated another way, the present approach can be defended on the ground that it helps to maintain a tone of limited Federal authority" (Working Papers, Volume 1, page 43). Undaunted, the framers of the study draft would take a giant step toward plenary federal jurisdiction.

19. The need for this is not self-evident even as respects federal enclaves, the rights and privileges of residents of which have been increasingly assimilated to those of state residents. See *Evans* v. *Cornman*, 398 U.S. 419 (1970), holding that the equal protection clause required residents of enclaves under exclusive federal jurisdiction to be accorded the state franchise, the Court resting its decision in part on the power delegated to the states by the Assimilative Crimes Act.

20. *Cf. United States* v. *Sherman*, 171 F. 2d 619 (2d Cir. 1948), and the cases following it.

21. At least two sections of the code—those relating to drug offenses and criminal usury business—assert plenary jurisdiction and the bribery provisions go nearly as far. The constitutional basis for plenary federal jurisdiction in these instances is dubious and not well established. See *United States* v. *Perez*, 426 F. 2d 1073 (2d Cir. 1970), and the dissenting opinion of Judge Hays therein, and see also *Griego* v. *United States*, 298 F. 2d 845 (10th Cir. 1962); *United States* v. *Peeples*, 377 F. 2d 205, 209 (2d Cir. 1967); *White* v. *U.S.* 393 U.S. 928 (1968) (Black and Stewart, JJ. dissenting from denial of certiorari).

make general policy about the *exercise* of federal jurisdiction".

Federal Prosecution of Riot Inciters

Section 1301 of the code defines the offense of inciting a riot and permits federal prosecution of riot inciters where movement of any person across a state or United States boundary occurs in the commission or consummation of the offense, if the Attorney General certifies that a federal interest exists by reason of the fact that the riot involved one hundred or more persons. Section 1301 of the draft code relating to incitement to riot is in large measure founded on the much-criticized riot provisions of the 1968 Civil Rights Act, 18 U.S.C. §§ 231 and 245 (b) (d). The framers of Sections 1301 and 1302 note that their proposed statute does not reach as far as the 1968 act. The 1968 act reaches offenses affecting interstate commerce. The study draft proposals relating to incitement to riot and to arming of rioters reach "only" cases when the mails or a facility in interstate or foreign commerce is used in the commission of the offense, or movement of any person across a state or United States boundary occurs in the commission or consummation of the offense, or (in the case of supply of firearms or destructive devices) the firearm or destructive device is moved across a state or United States boundary in the commission or consummation of the offense, or the offense is committed in the course of committing or in immediate flight from the commission of any other offense over which federal jurisdiction exists. The draftsmen of Section 1301 further limit the offense of inciting a riot to inciting "a current or impending riot" in order to "avoid constitutional issues under the First Amendment" (study draft, page 232). The comment in the study draft suggests that this limitation is similar to "the explicit requirement of clear and present danger in 18 U.S.C. Section 2120".

While the jurisdictional reach of the provisions of Sections 1301 and 1302 is somewhat narrower than the jurisdictional reach of the 1968 act, it is not much narrower. The effect of the proposed code section is similar to the effect of the 1968 act: It embroils the Federal Government in hotly contested prosecutions of the leaders or asserted leaders of disturbances even though the disturbances themselves are not of a character requiring federal intervention or resulting in requests for federal intervention from the governor of a state. The controversy is held to require the engagement of the prestige of the national government, but not of its power—surely a paradoxical result. The slight narrowing of present law worked by the draft, if anything, renders the existing statute even more illogical. The categories of jurisdiction in which federal prosecutions may still be invoked remain broad and remain lacking in functional relationship to the evils they are designed to punish. In addition, the other narrowing feature of the study draft—its introduction of a requirement of "imminence" —seems indefensible. It rests on the apparent premise that the clear-and-present-danger doctrine is applicable to prosecutions for solicitation of crime. The Supreme Court and the leading commentators on free speech problems have never questioned the continuing applicability and validity of the statement of Judge Learned Hand that "words . . . which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state".[22] While, as the Supreme Court recently recognized in the *Brandenburg*[23] case, the clear-and-present-danger doctrine limits prosecutions for solicitation of overthrow of the Government, the reason for its applicability in this context is the fact that overthrow of the Government is not in itself a criminal offense. When verbal statements solicit commission of a specific crime, they have not traditionally been deemed subject to the clear and present danger doctrine.[24] The framers of the code recognize this in their draft of a solicitation statute (Section 1003 of the code); it is not clear why they would apply a more rigorous standard to prosecutions for solicitation to the commission of the crime of riot than they would apply to prosecutions for solicitation to commit other offenses.

Offenses Against State and Local Officials

Section 1361 undertakes to make it a Class C federal felony for a person to knowingly offer, give or agree to give to another or solicit, accept or agree to accept from another, a thing of value as consideration for the recipient's official action as a public servant or the recipient's violation of a known legal duty as a public servant. A thing of value is defined by Section 109 (ac) of the code as "a gain or advantage, or anything regarded, or which might reasonably be regarded, by the beneficiary as a gain or advantage, including a gain or advantage to any other person". The framers of this broad definition recognize that the definition of "thing of value" is so sweeping that an additional provision must be inserted to "require exclusion of 'log-rolling' from the scope of the offense" (study draft, page 127). Accordingly, Section 1369 (b) of the code expressly provides that "thing of value . . . does not include . . . concurrence in official action in the course of legitimate compromise among public servants".

The effect of this provision is to render the federal courts the arbiters of what constitutes legitimate compromise in the affairs of state government. Section 1368 (2) (a) purports to punish the bribery or intimidation of state or local officials when the offense of bribery can be subsumed under any of the broad jurisdictional bases contained in Section 201, including Section 201 (g): "the offense affects interstate or foreign commerce". Not satisfied with even this, the framers of the code go on to extend categorically the bribery and intimidation provisions to "service involved . . . as an elected public serv-

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22. *Masses Publishing Company* v. *Patten*, 244 Fed. 535 (S.D. N.Y. 1917).

23. *Brandenburg* v. *Ohio*, 395 U.S. 449 (1969).

24. See, *e.g.*, Meiklejohn, *The First Amendment is an Absolute*, 1961 Sup. Ct. Rev. 245 at 258, and for the same observation since *Brandenburg*, see Wechsler, *The Future of Political and Intellectual Freedom*, 46 Va. Q. Rev. 369, 376-381 (1970).

ant". They suggest that "broad federal jurisdiction in this area might be rested on Article 4, Section 4 of the Constitution, under which the federal sovereign guarantees to the states a republican form of government. This responsibility could be construed as a power to preserve the states from any intrusion of nonpolitical pecuniary influences into government. The scope of this constitutional power is as yet untested and might be limited to elective and representative character of state government. Paragraph (b) is drawn to fall within the limited construction. Paragraph (a) incorporates the conventional bases of federal jurisdiction, *e.g.*, use of the mails, upon which reliance may be placed with confidence" (page 133).

These propositions are simply breathtaking. None of the cases under Article 4, Section 4, suggest that the constitutional provision was intended to confer on Congress anything other than a power to intervene in particular states upon the breakdown of representative government.[25] There is no suggestion in the debates relating to the guaranty clause that it was intended to supply a license for general federal legislation aimed at cutting down the authority of state governments or impairing the automony of their officials. Even if the guaranty clause were construed to permit the Federal Government to pass general legislation relating to the "elective and representative character of state government", it may be doubted that such an interpretation would justify the provision federally penalizing bribery of a single local public official. The *Federalist* No. 43 observes "[t]he only restriction imposed on [the states] is that they shall not exchange republican for anti-republican Constitutions . . . ". When one recalls the expressed views of Hamilton and others relating to the role of corruption in politics, the notion that the clause confers "a power to preserve the states from any intrusion of non-political pecuniary influences into government" becomes incredible.

A Bad Bargain for the States and the Country

The justification urged for this provision is that it permits the states to be protected against "subversion by organized criminals". Is it inadmissible to think, even in this age, that the citizenry of a state gets the state government it deserves, that good state government cannot be conferred from above and that the surrender of automony for a dubious guarantee of purity is likely to be a bad bargain for the states as well as for the country?[26]

In *Re Duncan*,[27] quoted approvingly by the Supreme Court in *Baker* v. *Carr*,[28] the Supreme Court declared: "By the Constitution, a republican form of government is guaranteed to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves."

Section 201 (b) of the code, concededly "a novel device" (page 12), provides for federal jurisdiction over "offense[s] . . . committed in the course of committing or in immediate flight from the commission of any other offense over which federal jurisdiction exists". The draftsmen suggest by way of example that a person who commits murder while impersonating a federal official should be subject to prosecution for murder in the federal courts. Why this is so is not readily apparent. The indefinite and illogical expansions of federal jurisdiction that can result from this provision are almost without limit. Thus, a person fleeing a gambling raid on a federal enclave whose automobile ran over a pedestrian outside its boundaries would be subject to prosecution in the federal courts for the offense of negligent homicide. Similarly, one who commits a murder at a manufacturing plant while attempting to steal property that happened to be in the process of manufacture for the United States would be subject to prosecution for murder by the Federal Government in the federal courts (Sections 1740 and 201 (d)). The same would be true if the United States owned a security interest in the property (see Section 1738). One might readily go on. The piggyback provision would make possible the extension of federal jurisdiction on a basis bearing no functional relationship to any interest of the Federal Government. When this piggyback provision is read together with the provisions of Section 707 of the code barring subsequent prosecution by a state in numerous circumstances, the extent to which it may operate to impair the powers of a state to keep order in its own house becomes entirely evident.

The extent to which the framers of the code are prepared to go also becomes evident in the commentary on Section 201 (c), which, after justifying the extension of federal criminal law to offenses against all federal public servants rather than merely those now listed in 18 U.S.C. § 1114, goes on to suggest that "a more substantial change in existing jurisdiction would be deletion even of the requirement that the federal official be engaged in the performance of his official duties, and its incorporation in Section 207 as a guideline for discriminating exercise of federal jurisdiction. This treatment would avoid the occasional problems attending litigation of the issue. Proof problems, however, are minimized in any event by the code's proposal that culpability not be required as to the facts establishing jurisdiction."

25. See *e.g.*, *Texas* v. *White*, 79 U.S. 700 (1869). *Baker* v. *Carr*, 369 U.S. 186 (1962).
26. See 86 Cong. Rec. 720, 2557 (1940) (remarks of Senator Pepper), quoted in Schwartz, *op. cit.* note 12 *supra*, at 86.
27. 139 U.S. 449 (1891).
28. 369 U.S. 186 at 223, note 48.

Chartering a National Police Force

by George W. Liebmann

The first installment of this article, which appeared in the November *Journal*, page 1070, considered and criticized the general jurisdictional provisions of the study draft of the new Federal Criminal Code prepared under the auspices of the National Commission on Reform of Federal Criminal Laws. This final installment considers the effect of those jurisdictional principles as to selected provisions of the proposed code.

APPARENTLY UNIMPRESSED by the depth of Congressional debate on the 1968 Civil Rights Act and the civil rights acts that preceded it, the framers of the study draft of a proposed new Federal Criminal Code propose what would be a wholesale dismantling of the jurisdictional limitations contained in those statutes. Section 1501 of the study draft would extend existing civil rights legislation to private as well as official injury, oppression, threat or intimidation directed against the exercise or enjoyment of "any right, privilege or immunity secured . . . by the constitution or laws of the United States".[1] The effect of this change would be to abolish the state action doctrine as a limitation on the reach of the federal civil rights legislation and to render a notably nebulous legal provision even more nebulous.

The common law "conspiracy to corrupt morals" in English law, which was the subject of Professor Hart's celebrated recent essay,[2] is a thing of wonderful precision compared to the nebulous language of much of the existing federal criminal civil rights legislation. The case against heavy reliance on such legal devices was made years ago by Professor Zechariah Chafee.[3] It applies with multiplied and added force to Section 1501. Indeed, if Section 1501 were enacted and applied according to its terms it would be almost fair to say that the remainder of the federal criminal code and all state criminal codes would be all but superfluous. The framers observe only "the scope and effectiveness of Section 1501 and its current analogues may be circumscribed by the requirement articulated in *Screws* v. *United States*, 325 U. S. 91 (1945), that there be shown a specific intent to deprive the victim of his federal *rights*, not merely, for example, to beat or murder him".[4] The applicability of the *Screws* doctrine is further rendered doubtful by the fact that Section 1501 as drafted, unlike the provisions of 18 U.S.C. §§ 241 and 242 before it, contains no intent requirement, although presumably by reason of Section 302(2) of the draft code a requirement of "willfullness" would be read into the statute. But it is well to

1. *Cf. Adickes* v. *S. H. Kress & Company*, 398 U. S. 144 (1970).

2. HART, LAW, LIBERTY AND MORALITY (1963). Compare *United States* v. *Guest*, 383 U. S. 745, 773 (1966) (Harlan, J., dissenting in part): "What the court has in effect done is to use this all-encompassing criminal statute to fashion federal common-law crimes, forbidden to the federal judiciary since the 1812 decision in *United States* v. *Hudson*, 7 Cranch 32, 3 L. Ed. 259."

3. Chafee, *Preserving Fundamental Civil Rights: The Tasks of State and Nation*, 27 GEO. WASH. L. REV. 519 (1959). See the several opinions in *United States* v. *Guest*, 383 U. S. 745, 753, 785 (1966), criticizing the vagueness of 18 U.S.C. § 241 and making clear that it was saved from unconstitutionality only by the requirement of specific intent missing from Section 1501 of the study draft.

4. FINAL REPORT OF THE NATIONAL COMMISSION ON CAUSES AND PREVENTION OF VIOLENCE 78 (1969). The consultant's explanation for the retention and extension to private action of Section 1501 must be seen to be believed: "Section 1501 of the proposed revision retains the language dating from the reconstuction period, which very loosely and vaguely says that anyone is a 'dirty bird' and subject to Federal criminal persecution 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 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. . . .

"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. . . . 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." (Working Papers, Volume 2, pages 809-810)

point out that Section 302(1)(e) defines "willfully", contrary to its dictionary definition, as "intentionally, knowingly, or recklessly". Many readers of the study draft are likely to be seduced into acceptance of its provisions in many instances in which they would not ordinarily be inclined to accept them if they do not pay careful heed to the unconventional and, indeed, Orwellian definition of states of culpability contained in Section 302(1).

The breadth of Section 1501 is suggested by the framers' observations that "Section 1501 will provide a base for further development of federal protection of federal rights by judicial interpretation". The commentary notes that "The succeeding sections of this Chapter deal with a variety of *specific* civil rights and elections offenses most of which have been and might be embraced within the generality of proposed § 1501." Thus, notwithstanding the fact that the commission in drafting Section 1515, relating to interference with speech or assembly, wisely decided not to provide a basis for federal interference in campus disorders, as recommended by the Eisenhower Commission,[4] the provisions of Section 1501 are so broad as to provide a basis for that intervention, with all its consequences for the prestige of the Federal Government and the freedom of the universities.

Section 1511 undertakes, contrary to the express judgment of Congress in enacting the Civil Rights Act of 1968, to proscribe criminally economic pressures to forgo federal rights. The arguments against use of economic duress as a legal standard have been well made elsewhere, even in the context of the law of contracts, and need not be reiterated here. The incredible nature of this provision in a criminal code is adequately suggested by the draftsmen's observation: "The result is a compromise which leaves it to the courts to spell out the precise range of 'injure or intimidate' taking into account Congress' intent both to go beyond violence and yet not so far as every conceivable 'interference' such as might result, for example, from lawful though erroneous judgments of election officials, judicial decisions, discretionary judgments of federal employers or disbursing officers." Nothing like this will have been seen in the criminal law since the German and Soviet statutes held up as horrible examples in criminal law casebooks.[5]

Section 1541 makes it a federal offense for a labor union or corporation to make a campaign contribution in a state or local election. In explaining this bit of sleight of hand, the draftsmen declare, "In reaching all elections this section follows 18 U.S.C. § 245(b)(1)(A), revised as proposed § 1511." But that provision relates to forcible intimidation and has nothing whatever to do with campaign contributions. It would seem that if a policy judgment about campaign finance in state elections is to be made, the states should make it, ideally as part of a broader revision of systems of campaign finance. What is even more remarkable is that proposed Section 1541 otherwise partakes of all the defects of present 18 U.S.C. § 610, a provision notoriously evaded and susceptible of evasion, notwithstanding the assurance of the framers that "in practice it has been found useful".

Drug Offenses Put Under Federal Plenary Jurisdiction

Section 1826, entitled "Federal Jurisdiction Over Drug Offenses", provides: "Federal jurisdiction over an offense defined in Sections 1822 to 1824 extends to any such offense committed anywhere within the United States or the special maritime or territorial jurisdiction . . . pursuant to the powers of Congress to regulate commerce and under the findings of Congress expressed in Section [101] of the regulatory law." This section would extend jurisdiction to the possession offenses defined by Section 1824, including possession of marijuana and possession of any dangerous or abusable drug as defined in the regulatory law. Thus the federal authorities are afforded power to arrest all persons possessing any drug.

The comment observes: "An alternative to plenary jurisdiction for all offenses would be plenary jurisdiction for the trafficking offenses but only enclave jurisdiction for the possession offenses. Since this would produce difficulties in deciding who could be arrested in certain situations, *e.g.*, in a raid on a place where drugs were being distributed, plenary jurisdiction is proposed over possession offenses . . .". This is typical of the study draft's approach to jurisdictional problems, which gives slight considerations of expediency in exceptional cases greater weight than Mr. Justice Story's observation that questions of jurisdiction are questions of power.[6]

It requires only a casual glance at arrest statistics in state courts to perceive how far this "possession" provision extends the practical reach of federal criminal jurisdiction. Evidently, the commission has learned nothing from experience under the Eighteenth Amendment in its effort to impose national standards with respect to possession of the less seriously addictive drugs in quantities not raising an inference of trafficking. While it is possible to state the view that there is not too much practical difference between the present apparatus of federal drug control, with its foundation in transportation in interstate and foreign commerce and its registration requirements and its presumptions, and plenary jurisdiction, there are some differences in scope, particularly where the numerically significant possession offenses are concerned.

It is, of course, true that the definition of possession offenses contained in Section 1824 of the study draft is limited by a new—indeed novel—defense: "It is an affirmative defense to a prose-

5. *E.g.*, Article 16 of the Soviet Code, quoted in DENNING, FREEDOM UNDER THE LAW 40-42 (1949), quoted in PAULSEN & KADISH, CRIMINAL LAW AND ITS PROCESSES 20-21 (1962): "If the Code has not made provision for any act which is socially dangerous, it is to be dealt with on the basis, and as carrying the same degree of responsibility, as the offenses which it most nearly resembles." Huey Long devised a mirror image of Section 1501 of the study draft: "One [bill] provided a mandatory fine and jail sentence for any person who violated Louisiana's reserved rights as guaranteed in the Tenth Amendment." WILLIAMS, HUEY LONG 860 (1970).

6. *Cf.* the rather different approach of HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM ch. IX (1953).

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cution under this section that the drug was possessed for personal use by a defendant who was so dependent on the drug that he lacked substantial capacity to refrain from use." The arguments against recognition of this defense are well rehearsed in Justice Marshall's opinion in *Powell* v. *Texas*, 392 U. S. 514 (1968).[7] What happens to persons acquitted under this section is not made clear by the statute; presumably they, like persons acquitted under the broadened insanity defense, will be confined in newly created federal institutions.

The gambling provision, Section 1831, similarly extends federal jurisdiction to cases in which "movement of any person across a state or United States boundary occurs in the commission or consummation of the offense". This makes another considerable and rather illogical extension in the range of the federal criminal law.

A.L.I. Insanity Provision Used and Misused

Section 503 of the study draft adopts the American Law Institute's Model Penal Code test of insanity but deletes from the test the exclusion of "sociopathic" offenders. As framed, the study draft provision would permit psychiatrists to testify that a defendant was insane even when the sole basis of this psychiatric testimony is evidence of prior criminal offenses. The comment explains: "The A.L.I. formulation explicitly denies the defense to 'sociopaths,' *i.e.*, habitual offenders without other symptoms. Such a provision may be of questionable utility in view of the near certainty that some additional symptoms will be found by any psychiatrist inclined to the ultimate conclusion that the accused was mentally ill. In view of the general policy against constraining expert testimony, it may be better not to pose issues regarding the range of evidence on which the diagnosis is based."

The effect of this provision is to remove any legal restraint from the range of psychiatric expert testimony. The justification advanced for this is no compliment to the psychiatric profession. And perhaps more important, if the provision is accepted, the portion of the A.L.I. formulation excluding habitual offenders without other symptoms from the insanity defense, will be omitted from jury charges. In effect, therefore, the study draft provision would make the insanity defense available to so-called sociopathic offenders and would make the defense available to almost any recidivist.

The study draft fails to codify the important rule that the insanity defense must be raised by and cannot be forced on a defendant.[8] It is silent as to what happens to persons acquitted on the ground of insanity.[9] It is fair to assume that under the view taken by the draftsmen they will be confined under some form of federal commitment statute in federal institutions, notwithstanding the grave constitutional and other objections to these federal commitments.[10] It should be noted that the commission's Alternative Formulations I and II (Working Papers, Volume 1, page 234) would avoid most of these perils.

Significant Modifications of Contempt Powers

Section 1341 of the study draft retains without significant modification the limitations on the contempt powers of federal courts imposed by statute in 1831. The effect of these provisions is to exclude almost entirely any possibility of federal court punishment of contempts by publication. The American Bar Association has recommended that courts be equipped with limited powers to punish contempts by publication in two instances—when newspapers publish the details of a closed pretrial hearing and when they publish the details of closed bench conferences and similar matters heard outside the presence of a nonsequestered jury during the course of a jury trial.[11]

Similarly, notwithstanding contrary recommendations,[12] the study draft perpetuates the rule of *Cammer* v. *United States*, 350 U. S. 399 (1956), excluding attorneys from the scope of the second section of the federal contempt statute.[13] The draft also would limit the power of the federal courts to impose punishment for contempts committed in their presence or by their officers, as distinct from contempts by violation of court orders, to a maximum sentence of either five days or thirty days, rather than the present effective maximum of six months.[14]

Obscenity Provisions Reach All Interstate Shipments

Section 1851 of the study draft proposes a federal obscenity statute that would be applicable to all interstate shipments of certain obscene materials. The "utterly without redeeming social value" test of *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966), is utilized, notwithstanding the present flux in the field and the fact that that test secured the assent of only four members of the Supreme Court. It may also be noted that the word "redeeming" is omitted in the study draft from the Supreme Court's language, "utterly without redeeming social value". Under the provision as drafted, advertising and man-

7. See generally, ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE (1964).

8. *Lynch* v. *Overholzer*, 369 U. S. 705 (1962). Compare Study Draft, Section 102(2).

9. See *supra* note 5.

By way of partial explanation for the exculpation of sociopaths, the consultant observes: "[L]arge numbers of defendants presently regarded as 'bad' rather than 'sick' would be exculpated on careful psychiatric examination and testimony. . . . Doctor Bernard Diamond has predicted that the second paragraph exclusion of A.L.I. will in fact tend to reduce the number of sociopaths exculpated, but only those who had routine examination would be benefitted; the affluent and the fortunate would be able to avoid the restriction." (Working Papers, Volume 2, pages 245-246.) Egalitarianism runs riot over individual responsibility.

10. See Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832 (1960), and authorities there cited.

11. AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS §§ 3.1, 3.5(d) and 4.1(b).

12. *Id.* at §§ 1.1, 1.2 and 1.3.

13. 18 U.S.C. § 401.

14. *Cf.* Tefft, *United States* v. *Barnett*, *'Twas a Famous Victory*, in 1964 SUP. CT. REVIEW 123.

ner of distribution may be considered in determining the social value of material, although not, apparently, in determining whether its dominant theme is an appeal to prurient interest. The applicable contemporary community standard is a national standard.

The commentary does not expressly address itself to the questions whether it is appropriate to have a federal obscenity statute reaching significantly beyond importation and use of the mails, whether it is appropriate to have a common national standard of obscenity, and whether it is appropriate to make the federal standard (assuming a federal standard is appropriate) the standard of the *Memoirs* case further restricted.

Offense of Criminal Facilitation Is Created

Section 1002 of the study draft creates a new inchoate offense of "criminal facilitation" reaching a person who "knowingly provides substantial assistance to a person intending to commit a crime". A provision of this nature appears as Article 115 in the New York Penal Law, but was deleted from the Model Penal Code by vote of the American Law Institute at the urging of the late Judge Learned Hand.[15] The case against its inclusion is well stated in Judge Hand's opinion in *Falcone* v. *United States*, 109 F. 2d 579 (2d Cir. 1940).

Under the study draft formulation, "The ready lawful availability from others of the goods or services provided by a defendant is a factor to be considered in determining whether or not his assistance was substantial." The framers of the section explain that the section "would provide a legislative solution to the dilemma faced by a court which has to choose between holding a facilitator as a full accomplice or absolving him completely of criminal liability". Under this provision criminal liability depends on one person's knowledge of another's intention and also on the extent of the availability of goods and services from others. The study draft formulation omits the provision in the New York section that "a person shall not be convicted of criminal facilitation upon the testimony of a person who has committed the felony charged to have been facilitated unless such testimony be corroborated by such other evidence as tends to connect the defendant with such facilitation".

Criminal Liability of Corporations

These provisions of the study draft are especially remarkable. Section 402 defines the criminal liability of corporations and purports to restate present law. It may be noted, however, that the study draft subjects a corporation to criminal liability for "any misdemeanor committed by an agent of the corporation in furtherance of its affairs". The New York statute more accurately expresses present law, reaching as it does only "offenses . . . engaged in by an agent of the corporation while acting within the scope of his employment and in behalf of the corporation". The proposed federal provision would effectively eliminate the "scope of employment" issue as a possible defense.

Section 404(4) of the study draft would subject an individual to criminal liability for organizational offenses attributable to his "willful [*i.e.*, reckless] default in supervision within the range of [his] responsibility". This provision thus combines recklessness and vicarious responsibility. Further, Section 404(2) makes "any agent of the organization having primary responsibility for the subject matter of the duty" legally responsible for corporate omissions to perform a duty. Section 20.25 of the New York Penal Law does not go nearly as far, imposing criminal liabilities on individuals for corporate conduct only where the individual is guilty of "conduct" and not where his vicarious responsibility is founded solely on an omission.

"Special Sanctions" Ignore Unfortunate Past Experience

More remarkable still are the "Special Sanctions in Cases of Organizational Offenses" provided by Section 405. Section 405(1)(b) permits a court to direct "the Attorney General, United States Attorney, or other attorney designated by the court [including, presumably, private counsel] to institute supplementary proceedings in the case in which the organization was convicted of the offense to determine, collect and distribute damages to persons in the class which the statute was designed to protect who suffered injuries by reason of the offense, if the court finds that the multiplicity of small claims or other circumstances make restitution by individual suit impracticable." The court is placed in the role of being the instigator of a subsequent prosecution. Moreover, benefits to large private groups are attached to criminal convictions, a consequence not likely to produce an atmosphere of disinterestedness or detachment in a corporate criminal trial. The provision would cause the criminal process to become permeated with and subject to all the pressures surrounding civil class actions.

It has been forcefully questioned whether courts are appropriate agencies to undertake to redistribute large sums of money between social groups.[16] Even the limited experience under new Rule 23 of the Federal Rules of Civil Procedure suggests the problems that will occur.[17] It is not self-evidently wise to convert judicial proceedings, and particularly judicial proceedings in criminal cases, into a forum for political and economic power struggles. The costs of administration and legal costs incurred when the courts undertake to distribute large sums, as in class actions and previously in reorganization proceedings, are notorious.

Perhaps less appreciated is the po-

15. See Model Penal Code, Tent. Draft No. 1, at 28-35; Tent. Draft No. 4 at 21; Tent. Draft No. 10, at 108-109.

16. See *e.g.*, Francis A. Allen, *Preface to Freund*, in STANDARDS OF AMERICAN LEGISLATION xxviii-xxix (2d ed. 1965): "The courts are well adapted to weigh the competing claims of individual litigants; but they are poorly equipped to resolve broad issues of policy involving, for example, the reallocation of resources among large social groups or classes. Judicial law making in the latter areas is confronted with a dual peril: it may ignore considerations relevant to intelligent policy formulation, or in taking them into account, it may inspire doubts about the integrity of the judicial process."

17. See *e.g.*, MANUAL ON COMPLEX AND MULTIDISTRICT LITIGATION, §§ 1.61, 1.11 (as revised, May 18, 1970).

tentially corrupting effect on the Bar and the Bench of these proceedings, in which the disposition of huge sums is made dependent upon judicial determinations of an essentially discretionary rather than legal character.[18] The problems encountered in the 1930s as to claims by competing reorganization committees in bankruptcy, so graphically documented by Thurman Arnold,[19] are being duplicated increasingly in the proceedings under the broadened Rule 23. The framers of the study draft, undaunted, would project this experience on the federal criminal law and would in substance revive private prosecutions under modern guise.

Similarly, to require publicity of criminal convictions, as would Section 405(1)(a), is scarcely a measure to be adopted lightly. The oft-noted effect of antitrust enforcement proceedings on the ordinary criminal law of conspiracy suggests that these provisions would not be limited in their application to corporate defendants. Moreover, contrary to the draftsmen's suggestion, the explicit statutory provisions of 15 U.S.C. § 1402(d), relating to publicity of defects in motor vehicles, which are of blanket application, can hardly be deemed precedent for provisions allowing particular judges to impose these sanctions on particular offenders in connection with a criminal case. This proposed use of publicity as a penal sanction is reminiscent of Hawthorne's *The Scarlet Letter* and the practice of totalitarian states.[20]

The "Special Sanctions in Cases of Organizational Offenses" are not confined to corporations but extend by Section 403 to unincorporated associations. If consideration has been given to the possible consequences of the application of these provisions to labor unions, it is nowhere reflected in the comments to the study draft. The New York code contains no provision extending corporate criminal liability to voluntary associations. It seems to be the unconscious aim of the draftsmen of the study draft to produce additional *Danbury Hatters* cases.[21]

The provisions relating to corporate criminal liability cannot be viewed in isolation from the provision on regulatory offenses (Section 1006). This section is intended to "govern the use of sanctions to enforce a penal regulation whenever and to the extent that another statute so provides. 'Penal regulation' means any requirement of a statute, regulation, rule, or order which is enforceable by criminal sanctions, forfeiture or civil penalty."

This section is intended to be incorporated by reference in the multitude of criminal sanctions and civil sanctions provided by statutes and regulations outside Title 18. The provision would make it a Class A misdemeanor punishable by imprisonment on the order of six months or a year to violate willfully *i.e.*, recklessly) a penal regulation and thereby create a substantial likelihood of harm to life, health or property, or of any other harm against which the penal regulation was directed. As if this extension of severe penal sanctions to offenses committed recklessly against the myriad of federal regulations was not enough, Section 1006(4) would erect a presumption of willfullness (*i.e.*, recklessness) "in the case of a person engaged, whether as owner, employee, or otherwise, in a business, profession, or other calling subject to licensing or pervasively regulated, when charged with violating a penal regulation applicable to him in that capacity". Even nonculpable violations of regulations by persons engaged in a "pervasively regulated" calling (and what calling today is not "pervasively regulated") are subject to punishment as Class A misdemeanors. When it is further reflected that Section 109(w)[22] would in all probability operate to subject corporations and other organizations to Section 1006, and when it is further realized that the "special sanctions in case of organizational offenses" may be imposed in the absence of criminal intent or even any but presumed culpability, the breadth and sweep of the study draft's attack on the rights of corporations and voluntary associations becomes evident.

Study Draft Threatens a National Police Force

The ultimate probable consequences that will result from the adoption of anything like this study draft could not be more clearly spelled out than in former Governor Brown's prefatory statement, which includes the following quotation from the opinion of Judge McGowan in *Williams* v. *District of Columbia*, 419 F. 2d 638 (D.C. Cir. 1969):

> When Sir Robert Peel first entered the British Cabinet as Home Secretary, two of his most urgent goals were police reform and law reform—in that order. His experience in office did not alter his estimate of the importance of these objectives, but it did cause him to reverse the order of their accomplishment; and his achievements in police reorganization and training came largely during his eventual Prime Ministership. . . .

It cannot be said that the Bar and the public have not been warned. This study draft, if enacted, will be the charter of a national police force, with all that this implies. Members of the Bar, state and local officials and the public cannot make known their views about its provisions too soon.

Perhaps Congress and those members of it on the commission, in considering the study draft proposals for chartering of a national police, may be mindful of a somber precedent:

> [W]hile the Houses were employing their authority thus it suddenly passed out of their hands. It had been obtained by calling into existence a power which could not be controlled. In the summer of 1647, about twelve months after the last fortress of the Cavaliers had submitted to the Parliament, the Parliament was compelled to submit to its own soldiers.[23]

18. See *e.g.*, BORKIN, THE CORRUPT JUDGE 13-14 (1962).

19. ARNOLD, THE FOLKLORE OF CAPITALISM ch. X (1937).

20. See Cohen, *The Criminal Process in the People's Republic of China*, 79 HARV. L. REV. 469, 490 (1966). Equally notable are the provisions of Section 405 (2) allowing organization executives to be disqualified from exercising "similar" functions "in the same or other organizations" for a period of five years, thus imposing, if the views of writers on "the new property" have merit, a modern form of forfeiture of estate. *Cf. Bigelow* v. *Forrest*, 9 Wall. 339 (1870).

21. See *Loewe* v. *Lawlor*, 208 U. S. 724 (1908); *Lawlor* v. *Loewe*, 235 U. S. 522 (1915).

22. "'Person' means a human being and, where relevant, an organization."

23. 1 MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II 117 (Boston ed.).

Summer in the City

Today is the first day of Summer. Sort of hard for me to say because I had been taught, and always thought, that Winter, Spring, Summer and Fall were ruled by the 21s, but then, as it so often does, science had to go and ruin everything. I suppose in the land of pleasant living it does not really matter a great deal, since everyone knows, Summer really begins with Memorial Day, or at least that moment of that weekend when you stop working and start celebrating.

There is much that defines Summer, more than any of the other seasons. There are snow balls; crabs; melons; Maryland tomatoes; corn on the cob; short sleeve shirts and seersucker suits. The weather in Baltimore is "hot and humid with a chance of afternoon thunder storms" and at least twice a day you hear people say they will never complain about cold weather again.

In the era before air conditioning, Summer was a time when things slowed down because it was simply too hot to do anything, especially hold a trial. It is believed by historians that the only two trails ever held "back then" in the Summer involved a guy named Atticus Finch and another involving William Jennings Bryan, Clarence Darrow and a monkey, although the record is somewhat sketchy as to the details of what took place, just that everyone was issued hand fans at the courtroom door.

Now, of course, thanks to Carrier, even in July we can carry on. You can say it's too hot to do anything, but the fact that you are wearing a sweater because the senior partner likes the thermostat low, kind of gives you away. So, it has to get done, and a good place to get it done is the Baltimore Bar Library. We have everything you need from the books to the databases, the majestic rooms and the quiet spaces. Come see for yourself. It is a place conducive to achievement, to not just getting it done, but getting it done right. Besides, it will give you a chance to take off your sweater.

I look forward to seeing you soon.

Joe Bennett