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THE CRIMINAL CODE REFORM ACT OF 1981 (S. 1630)

INTRODUCTION

Congress has been working on a massive recodification of federal criminal laws for well over a decade. The most recent incarnation of this legislative effort is S. 1630, the Criminal Code Reform Act of 1981. Its stated purpose is the consolidation and simplification of all federal criminal laws in order "to establish justice" by "defining and providing notice of conduct that indefensibly threatens harm to those individual or public interests for which federal protection...is appropriate"; "prescribing appropriate sanctions for engaging in such conduct..."; and "establishing a system of expeditious procedures" to enforce the sanctions.

The Act was introduced by Senator Strom Thurmond (R-S.C.), Chairman of the Senate Committee on the Judiciary on September 17, 1981, and is co-sponsored by Senators Biden (D-Del.), Hatch (R-Utah), Kennedy (D-Mass.), Denton (R-Ala.), DeConcini (D-Ariz.), Simpson (R-Wy.), and Specter (R-Pa.).

S. 1630 is 425 pages long and goes far beyond a "recodification" of federal criminal law. A Heritage Foundation Issue Bulletin of July 1980 called S. 1630's predecessor in the 96th Congress, S. 1722, "[o]ne of the most potentially far-reaching -- and, ironically, perhaps one of the least generally understood -- legislative proposals of the past decade...."

The same statement is true of S. 1630. Despite its lengthy history and quantity of co-sponsors, the present reform bill contains all or most of the defects which infected its predecessors. It seeks not only to recodify, but to revise and extend all existing federal criminal law. As such, the Act attempts too much and suffers from major theoretical, practical and philosophical defects. No one, not even the drafters, seems to understand fully the impact of this proposed revision.

To evaluate this legislation is to begin with the question: does it accomplish its purpose? The answer is in part found by examining statements in last year's Judiciary Committee Report on the substantially similar bill from the last Congress, S. 1722.[1]

The report of January 17, 1980, states that the purpose of criminal code reform is "to restructure Federal criminal law so as to better serve the ends of justice in their broadest sense -- justice to the individual and justice to society as a whole." The report also quotes remarks by Senator Kennedy published in the May 2, 1977, Congressional Record:

> The Criminal Code Reform Act...constitutes the most important attempt in 200 years to reorganize and streamline the administration of Federal criminal justice. It is a major undertaking, of critical importance to our people. As I have repeatedly stated in recent months, I view this legislation as the cornerstone of the Federal Government's commitment to the critical problem of crime in America.

The need to "streamline" federal criminal laws by virtue of a wholesale overhaul is based upon the belief expressed in the Judiciary Committee report that present "statutory criminal law on the Federal level is often a hodgepodge of conflicting, contradictory, and imprecise laws with little relevance to each other or to the state of the criminal law as a whole." If the goal of the criminal law reform is to streamline the administration of criminal justice in order to better address the problem of crime in America, then the answer to whether S. 1630 will achieve these goals is open to serious question.

To the extent that the bill would eliminate genuinely archaic provisions of the present code or do away with needless duplication and conflicting or vague language, the legislation is laudable and little ground for substantive controversy exists. However, the bill in fact fails to clarify the vagaries of criminal law and, as previously noted, goes far beyond recodification and clarification. In addition, despite the widespread belief that violent crime is America's most critical law enforcement problem, the bill appears to ease standards and penalties for such offenses while simultaneously adopting a strong anti-business posture by significantly expanding the potential criminal liability of businesses.

The Act also would repeal provisions which make it illegal to conspire to overthrow the United States government and to teach or advocate overthrow. Meanwhile, penalties for crimes such as rape, importing pornographic materials, and drug trafficking would be reduced. Yet S. 1630 is much tougher on "white

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[1] A Judiciary Committee Report has not yet been issued on S. 1630.

collar crime." It would allow corporations to be prosecuted for the acts of agents acting without the authority of the company as well as for offenses like "racketeering" based upon two or more technical violations of the securities laws. Business fines would be increased radically and a new civil action would require companies to notify customer/victims of alleged company offenses.

These are only a few of the many provisions which have been inadequately examined.

HISTORY OF CRIMINAL CODE REFORM

S. 1630's long history dates from 1952 when the American Law Institute began drafting a "Model Penal Code." Ten years later, the Council of the American Law Institute published the "Proposed Official Draft" of the Model Penal Code.

In 1966, Congress created the National Commission on Reform of Federal Criminal Laws. The Commission, whose chairman was former California Governor Edmund G. Brown, submitted its recommendations to Congress and the President in a Final Report on January 7, 1971. The Report was intended as a "work basis" for congressional choices. Extensive hearings by the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee followed during 1971 and 1972. On January 4, 1973, Senators John McClellan, Roman Hruska, and Sam Ervin, all of whom served on the Brown Commission, introduced S. 1, the first in a series of omnibus bills to reform, revise, and recodify the Federal Criminal Code. Similar bills have been considered -- without passage -- in each succeeding Congress.

During the 95th Congress, the Criminal Code reform bill was known as S. 1437. It was reported favorably by the full Judiciary Committee on November 15, 1977, and was passed by the Senate on January 30, 1978. None of the various bills, however, has ever reached a vote on the floor of the House of Representatives.

The history of this legislation and the many changes that have been worked on successive versions are evident in the hearings and reports of the Senate Judiciary Committee and its Subcommittee on Criminal Laws and Procedures, a record that encompasses some 11,750 pages of testimony, statements, and exhibits in 18 volumes of hearings conducted during 1971, 1972, 1973, 1974, 1975, 1977, and 1979 under the overall title Reform of the Federal Criminal Laws. During the 93rd, 94th, 95th, and 96th Congresses, these hearings have been supplemented by detailed Committee reports of great length and comprehensiveness; the most recent report (Senate Report No. 96-553, Criminal Code Reform Act of 1979, January 17, 1980) runs 1,517 pages. (The hearings recently held on S. 1630 have not been transcribed.) The hearings contain detailed pro and con analyses by some of the nation's most eminent legal authorities, representatives of concerned special interest groups, and officials of the Department of Justice.

An examination of selected provisions of the bill underscores the deficiencies characteristic of the entire bill, the changes it will effect in existing law, and its anti-business bias.

WORDS AND DEFINITIONS

Perhaps the most fundamental deficiency in S. 1630 is that it replaces statutory language enhanced and illuminated by hundreds of years of common law development with new words and definitions subject to de novo interpretation by a modern federal judiciary which already is unable to keep pace with its caseload. Furthermore, the definitions in different sections relate to one another in such a way that cross reference is necessary to fully understand the bill. Chapter 3 of the bill, for instance, defines the culpable states of mind and the proof necessary for each. It identifies four states of mind: intentional, knowing, reckless, and negligent. It then applies these states of mind to three possible situations: conduct, an existing circumstance, and a result. The state of mind necessary to convict varies with each situation.

Not only is this type of codification confusing, it eliminates the traditional concepts of mens rea (guilty mind or criminal intent) and culpability developed over the last 400 years of Anglo-American jurisprudence. Chapter 3 alone could alter federal criminal law fundamentally as each federal district judge struggles to define the new terms in his own fashion. Numerous states of mind now exist which apply to particular offenses and which have been developed through case law as needed. Eliminating this body of law through "codification" may simplify the process, but it certainly will not improve criminal justice and may well be a step backward.

Under the bill, each federal criminal law has been codified and defined to be comprehensive and inclusive. These definitions have extended the reach of each federal violation; just how far and what conduct the new interpretation will reach will depend on innovative and aggressive prosecutors who may attempt to expand their authority. At this time, however, it is impossible to foresee all the areas of potential abuse.

Reviewing a few offenses covered by the bill exposes some of the difficulties which should be examined carefully by Congress.

INCHOATE OFFENSES: EXPANSIONS

S. 1630 contains three inchoate offenses: attempt, conspiracy, and solicitation. The proposed code expands federal jurisdiction in defining these crimes and in its procedural approach to these inchoate offenses.

Attempt

S. 1630 creates a federal "attempt" statute. Currently, no such federal statute exists; only specific attempts in relation to particular crimes are punishable. The most important conceptual problem with the "attempt" provision is that it mixes contradictory concepts. While requiring as a culpable state of mind that an individual "intentionally engages in conduct," it also provides that such conduct need only "in fact, constitute a substantial step toward the commission of the crime."[2] Section 302(a)(i) provides that conduct is "intentional" if it is a "conscious objective or desire to engage in the conduct." Section 303(a)(1), on the other hand, provides that "no state of mind must be proved with respect to a particular element of an offense of... specified...as existing or occurring 'in fact.'" These two sections contradict each other, thus badly confusing the definition of "attempt" as embodied in S. 1630.

This section also eliminates the common law defenses of legal impossibility and merger. Under common law, legal impossibility has constituted a defense to an attempt charge. Legal impossibility exists if the defendant did -- or could do -- all of the things he intended to do but nonetheless actually did not violate the law. Now, Section 1001(c)(1) provides that even if completion of the act would not violate the law, "if the crime could have been committed had the circumstances been as the actor believed them to be" then the actor is guilty of breaking the law. Thus, individuals can now be convicted of what might be termed "thought crime."

Similarly, Section 1001(c)(2) eliminates the merger defense by which an individual cannot be held legally accountable under common law for both attempting and completing a crime; the attempt was logically held to be merged into the greater offense. All of the above points raise the question of whether the attempt statute will streamline the administration of justice.[3]

Conspiracy

The language of the proposed conspiracy provision, Section 1002, could be interpreted in ways which greatly expand the

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2 "Substantial step" is not defined.

3 It bears noting that Section 1001(b), which provides an "affirmative defense" to attempt, contains a trap in connection with Section 1325 of the Act which makes it a crime to tamper with physical evidence. For instance, under the code, a manufacturer of a product could manufacture an item that turns out to violate some statute. While he lacked intent to violate the law, it has "in fact" occurred and he could be guilty of "attempt." Assuming he discovers the problem prior to shipping the product and proceeds to destroy it, he could be charged and convicted for tampering with physical evidence as that offense is described in the proposed Section 1325.

concept of conspiracy beyond its current meaning in common law. As written, this section could cover unilateral activity by a single co-conspirator.

Solicitation

Criminal solicitation is an entirely new concept. The definition of solicitation embodied in Section 1003 is extremely broad and subject to abuse. For example, under the common law, conduct preparatory to an inchoate offense is not criminal -- one cannot be guilty of attempted conspiracy. Now, it seems, two inchoate offenses, taken together, could constitute criminal conduct.

INCHOATE OFFENSES: LIMITATIONS -- NATIONAL SECURITY IMPLICATIONS

Unlike the provisions which expand federal jurisdiction, Section 1004 of S. 1630 dramatically changes the common law in a way that has grave implications for national security. The Act provides that there can be no attempt, conspiracy, or solicitation for a number of specified offenses. Almost all of these offenses relate to the national security interests of the government or to matters affecting public order and the administration of justice. For example, attempting, conspiring, or soliciting to obstruct military recruitment, to incite mutiny or desertion, or to fail to register for the draft, among other things, would not constitute criminal activity. Soliciting to defraud the government would also be legal. In short, unless a person participates directly in anti-government activities, he cannot be held responsible. Thus, these limitations invite pressure groups to provoke unlawful anti-government conduct without being held accountable for their actions.

ANTI-RACKETEERING AND RELATED PROVISIONS

A number of provisions in the bill related to anti-racketeering efforts constitute, when read together, a threat to business interests. Under Section 1802, a company could be convicted of racketeering based upon two technical securities violations simply because the definition of racketeering activity is so exhaustive. Moreover, a new civil damage action is created by Section 4101 for anyone injured in his personal business or property by "racketeering" activity. Relief includes treble damages as well as attorney and investigative fees.

Section 4011 authorizes the Attorney General to initiate a civil injuctive proceeding to restrain "racketeering" activities. Section 4013 provides the Attorney General the additional authority to serve a Civil Investigative Demand requiring any person to produce any material relevant to the civil proceeding under Section 4011. The Attorney General may therefore obtain discovery in a civil action which can be used in a subsequent criminal

action. The potential for abuse of such a powerful tool is awesome.

LIABILITY OF ORGANIZATION FOR CONDUCT OF AGENT

Section 402 of the proposed Act, which provides for criminal liability of an organization for the conduct of an agent, lacks a statutory predecessor and appears to expand the law of agency. The entire section is riddled with vague language subject to broad interpretation. It provides criminal liability for an offense if the agent's conduct:

> occurs in the performance of matters within the scope of the agent's employment or authority and is intended by the agent to benefit the organization.

Three separate determinations, all subject to a broad reading, are required: is the act within the scope of employment; is it within the agent's authority; is it intended to benefit the corporation?

The latter two points are most troublesome. Under present law, a corporation may not be held criminally liable for the conduct of an agent acting with only "apparent" authority; for liability, the authority must be "actual" or "implied." This distinction is not made in Section 402. Hence, a company could specifically forbid certain conduct and, though not criminally culpable in any meaningful sense, still be branded and punished as a criminal.

Moreover, experience with the "intended to benefit the corporation" language teaches that it is subject to abuse. The conduct of an employee wholly motivated by self-aggrandizement may always be interpreted as benefiting the company in some way, even if the company is being cheated by the agent. While senior management may not have desired the dubious benefits which flow from illegal conduct, the agent will likely maintain during investigation and trial that his actions were intended to benefit the organization.

Finally, Section 402(b) holds a corporation criminally liable for the failure of its agent to perform a duty specifically imposed on an organization by law. Taking the broad range of regulatory and other duties imposed by law, together with other sections of S. 1630 which provide that reckless ignorance of circumstances is no bar to prosecution, the impact of this provision could be enormous.

In short, Section 402 is a boon to prosecutors who are politically ambitious, hostile to "big business," or hungry for the publicity emanating from indicting a corporation. The Department of Justice, moreover, has always favored expanding corporate criminal liability for the acts of agents and employees.

MURDER

The murder statute, Section 1601, significantly expands federal jurisdiction. The traditional common law terms "kill" or "killing" are replaced by the phrase "intentionally causes the death of." In addition, under the Act murder is committed if one "engages in conduct by which he causes the death of another person under circumstances manifesting an extreme indifference to human life." Any experienced lawyer passably aware of both criminal and product liability law must shudder at the invitation for abuse provided by the language in this section. For example, the "extreme indifference" language, as interpreted by product liability case juries, is an extremely low standard; that is, almost any corporate conduct is found to manifest an "extreme indifference." To extend this interpretation to criminal law hardly seems to serve the public interest.

SENTENCE OF FINE

The proposed Section 2201 dramatically increases criminal fines for corporations and organizations from their current level of between $1,000 and $10,000 to $1,000,000 for a felony and $100,000 for a misdemeanor. With the myriad of federal regulations, technical violations are increasingly likely. The new high fines would impose an enormous burden on the nation's business community.

Under present law, the number of times a particular statute has been violated is often at issue in cases of alleged regulatory violations. For instance, if a company mails 100,000 copies of an allegedly deceptive advertisement on a single day, is it guilty of one violation or 100,000 violations? Prosecutors usually claim the latter in order to increase their leverage and force a company to settlement. That power, together with the increased fine, makes it likely that companies will be forced to settle, rather than fight for their rights against the government.

ORDER OF NOTICE TO VICTIM

Section 2005 proposes to vest authority in the courts to require corporations to notify victims of a corporate offenses of the company's conviction. This section has no counterpart in current law and will constitute an open invitation to civil damage lawsuits even though the company will likely have paid a large criminal fine.

CONCLUSION

The above points are only a glimpse at the problems in S. 1630, a legislative package of monumental scope. The provisions examined, however, represent the types of changes made to existing

law as well as the types of interpretive problems likely to be caused by S. 1630. Whether the Act will accomplish its goal of streamlining criminal law to effect better and fairer criminal justice remains to be seen. What is certain, however, is that a measure as monumental as criminal code reform absolutely needs deliberate and careful consideration. Haste, in this case, will be the enemy of responsible legislation. This is particularly true because all federal legislation of the type and magnitude of S. 1630 has a "teaching" effect on the states. Many states can be expected to use S. 1630, if adopted, as model legislation and the bill's defects will ripple across the nation.

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