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THE CRIMINAL CODE REFORM ACT OF 1981 (S. 1630) PART II — THE DEBATE MOUNTS

INTRODUCTION

A November 10, 1981, Heritage Foundation Issue Bulletin examined the proposed "Criminal Code Reform Act of 1981" (S. 1630). This bill, favorably reported by the Committee on the Judiciary, awaits action by the full Senate. S. 1630 is only the most recent in a line of congressional efforts to recodify the criminal law over the last twelve years. While little disagreement exists that federal criminal law needs to be recodified into a single title of the United States Code, the proposed Act "is more than [an] effort at codification and revision." "It is an effort at reform as well" according to the Committee Report. The nature of that effort has engendered considerable controversy ever since Congress first addressed the revision of the Criminal Code.

Since November, Senator Strom Thurmond has attempted to mitigate some of the business-related concerns raised by the earlier Issue Bulletin by promising to amend or clarify certain provisions of S. 1630. In addition, the debate over the proposed Code has become increasingly virulent and raises significant questions about the Code and the manner in which the debate is being conducted. With both opponents and proponents of S. 1630 agreeing that it is one of the most far-reaching legislative proposals in years, it is clear that it merits further examination before a vote on the Senate floor. As Professor Herbert Wechsler aptly stated in testimony before the Senate: "[i]ts promise as an instrument of safety is matched only by its power to destroy."

OVERVIEW

The November 1981 Issue Bulletin on S. 1630 raised both general and specific philosophical and practical questions about

S. 1630's potential application and ability to achieve its stated goal of "streamlining" federal criminal law. The study finds that "the Act attempts too much and suffers from major theoretical, practical and philosophical defects" in its effort to recodify, revise, and extend all federal criminal law at one time. "No one, not even the drafters, seems to understand fully the impact of the proposed revision."

While the Act partly succeeds in eliminating the archaic, vague, or duplicative aspects of the present law, in some respects it merely substitutes new vague or duplicative language for old. Statutory language illuminated by hundreds of years of common law development is thus replaced by new words and definitions which only will gain meaning through de novo interpretation by a federal judiciary already unable to keep pace with its caseload. Federal criminal law could be altered fundamentally as each federal judge struggles to define the new law in his own fashion. Hence, whether S. 1630 can achieve its goal of "streamlining" the law is open to serious question.

The November Issue Bulletin also questions a number of specific provisions of S. 1630 which appear fraught with potential difficulties for the business community. A particular matter of concern has been the potential for prosecutorial abuse in the provisions which deal with Culpable States of Mind (Section 301-3); Attempt (Section 1001); Conspiracy (Section 1002); Solicitation (Section 1003); Racketeering and Operating a Racketeering Syndicate (Sections 1801, 1802, 4011, 4013, 4101); Liability of an Organization for Conduct of Agent (Section 402); Murder (Section 1601); Sentence of Fine (Section 2201); and Order of Notice to Victim (Section 2005); The language of these provisions is general and open to interpretation and abuse for alleged business misconduct, although "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."

CONTINUING CONCERNS OVER CORPORATE LIABILITY

Senator Thurmond, in responding to some of the anxieties about the new rules governing corporate liability in S. 1630, promised to sponsor floor amendments to continue current federal criminal law and ameliorate the potential for prosecutorial abuse of certain of the proposed Code's provisions. While the Judiciary Committee Chairman's response represents an important effort to eliminate potential problems in the Criminal Code Reform Act of 1981, significant cause for business concern remains. First, the proposed amendments might be rejected by the Senate or fail to survive a Senate-House conference. Second, an examination of the proposed amendments and some other selected provisions demonstrates that the amendments neither adequately address the areas of concern nor effectively ensure that business will escape the unnecessary harm that can result from a broad prosecutorial reading of general statutory language.

CULPABLE STATES OF MIND

No attempt has been made to amend Chapter 3 of S. 1630 which defines the culpable states of mind for crimes and the proof necessary for each. The Act identifies four states of mind: intentional, knowing, reckless, and negligent. It then applies these states of mind to three components of the actus reus of the crime: conduct, circumstances, and results. While proponents of the legislation laud Chapter 3 for greatly simplifying the law (it reduces the 79 existing terms which define culpability for federal offenses to the four set forth above), opponents view it from a different perspective.

The critical aspect of this section is that it eliminates the fundamental principle of criminal law -- fault is a predicate to liability. S. 1630 provides that a "reckless" state of mind as to "circumstances" and "results" is a sufficient basis for criminal liability unless the statute expressly indicates that a different state of mind applies to a particular offense. According to the Judiciary Committee's Report, "a person is reckless if he is aware of but disregards a substantial risk that a circumstance exists or that a result will occur. A substantial risk is defined as a risk the disregard of which constitutes a gross deviation from the standard of care a reasonable person would exercise under the circumstances...." Moreover, "[r]ecklessness... does not encompass any desire that the risk occur nor an awareness that is it practically certain to occur." In short, intent to commit a crime is no longer required.

The application of this new standard is likely to significantly expand the scope of federal criminal liability when read, as it must be, in conjunction with other provisions of the Act. While "reckless" conduct is defined in part by determining whether the conduct was a "gross deviation" and by examining the "care that a reasonable person would exercise in such a situation," those terms are definitionally subjective and prey to radically broad and variable interpretations by courts and juries. As the former Special Counsel to the Judiciary Committee recognized, "these words are imprecise and must await judicial interpretation and construction on a case-by-case basis."[1] Moreover, interpretations of the statutory language are likely to be turned against businessmen as reference to products liability law, where similar language is construed daily, demonstrates.

The requirement of proof of intent has generally acted as a meaningful check against arbitrary prosecution. Hence, business interests widely oppose the elimination of the criminal intent requirement and favor the substitution of the more objective

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[1] Feinberg, "Toward a New Approach to Proving Culpability: Mens Rea and the Proposed Federal Criminal Code," 18 Amer. Crim. L. Rev. 123, 135. (1980).

"knowing" standard of culpability to both "circumstances" and "results."

Even putting aside the potential for abuse in the provisions defining culpable states of mind, the discussion underscores practical problems in the application of the Act. A review of sections 301-303, the accompanying portions of the Committee Report, and some relevant commentary[2] indicates that Chapter 3 may simplify the existing law, but substitutes a complexity of its own. Understanding, mastering and applying the culpability framework of S. 1630 is likely to take judges, practitioners, and jurors a significant amount of time. Chapter 3 now requires decisionmakers to distinguish between the conduct, circumstances, and results of an offense in order to determine which state of mind applies. The present law has no such provision. Coupled with the open-ended nature of the terms in Chapter 3, the new terminology is such that the criminal justice system is likely to struggle with it for some time.

This, of course, does not negate the desirability of simplifying the mental state requirements of the existing criminal law. It does suggest, however, that Chapter 3 of S. 1630 should be subjected to further scrutiny to determine whether the "simplification" it embodies can be simplified further while retaining the current scope of federal criminal liability. For example, one might reasonably conclude that applying a "knowing standard" to all components of an offense (conduct, circumstances, and results) would significantly reduce the complexity of the law since decision makers would not have to distinquish between the elements to determine which mental state applies.

MURDER

The murder statute, Section 1601, remains problematical despite Senator Thurmond's effort to relieve the business community's concern that it might open the door to prosecution for unforeseen and unintended homicides. The Act provides that murder is committed if a person "intentionally causes the death of another person." Senator Thurmond has indicated his hope that making the standard of culpability "intentionally," which is higher than the "knowingly causes the death" standard of S. 1722, S. 1630's predecessor in the previous Congress, will "alleviate the concern expressed" by business. However, the change fails to meet the fundamental objection to Section 1601.

The language of Section 1601(a)(2), which must be read in conjunction with the mental elements provisions of Chapter 3, still offers plausible grounds for alleging that product design defects constitute "murder" under appropriate circumstances.

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2 Ibid.

Section 1601(a)(2) provides that 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." Since 1601(a)(2) does not expressly provide a standard of culpability, a "reckless" state of mind is all that is required to prove liability by virtue of Section 303(b)(2). The language of the two provisions read together is exceptionally broad. Hence, as stated in the November Issue Bulletin: "[a]ny experienced lawyer passably aware of both criminal and products liability law must shudder at the invitation for abuse provided by the language in this section." Similar language has been interpreted in products liability cases to hold product sellers civilly liable for virtually any "indifference." There is no reason to believe that similarly liberal interpretations would not be extended to the criminal arena.

The potential danger in Section 1601 is amply demonstrated by the Ford Pinto prosecution in Indiana. Ford Motor Company was indicted for reckless homicide and criminal recklessness for "causing the deaths" of three teenagers. Three girls were killed when a van plowed full speed into the back of their parked Pinto. The gas tank was full and the gas cap off at the time the car burst into flames. Nonetheless, the prosecution claimed that the car's design and Ford's failure to remove it from the highways caused their deaths. While the company was ultimately acquitted, the case provides a classic example of the dangers of relying on prosecutorial discretion as a check against broad readings of general statutory language. Neither the language of Section 1601 nor Section 102(c), which sets forth principles of causation, is sufficient to avert abuses of prosecutorial discretion as currently worded.

LIABILITY OF ORGANIZATION FOR CONDUCT OF AGENT

Section 402 of the proposed Code, 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. In particular, the provision paves the way for organizational liability for the conduct of an agent acting with only "apparent" authority; under present law, an agent's authority must be "actual" or "implied" for criminal liability to be imposed on an employer. Senator Thurmond's promise to amend Section 402(a)(1) to modify the term "authority" with the terms "actual or implied" will largely ameliorate the concern over this problem.

INCHOATE OFFENSES: ATTEMPT AND SOLICITATION

Senator Thurmond has similarly announced his intention to amend the "attempt" (Section 1001) and "solicitation" (Section 1003) provisions of S. 1630 to eliminate concerns expressed by

the business community. These provisions have been challenged on a variety of grounds: Section 1001 creates a federal "attempt" statute where none exists under current law; criminal solicitation is an entirely new concept; the language of both sections is confusing, extremely broad, and subject to abuse and, as such, capable of application to a wide variety of regulatory offenses. Senator Thurmond has attempted to meet these criticisms by promising an amendment to the general attempt and solicitation provisions which will prohibit their application to non-Title 18 regulatory offenses or the regulatory offenses covering Investment, Monetary and Antitrust Offenses, and Public Health Offenses contained in S. 1630.

These changes significantly reduce, but fail to fully eliminate, concerns over the application of Sections 1001 and 1003. The language of these provisions specifically retains broad attempt and solicitation statutes that do not exist under current law. For example, an individual must currently go almost to the last step toward the commission of a crime to be guilty of "attempt." Under S. 1630, however, he only must take a "substantial step" toward the commission of the crime to be liable.

Moreover, pivotal business provisions such as Section 1734, which covers executing a fraudulent scheme, are not covered by the proposed amendment. Even if they were, the problem here, as in other sections of the proposed Code, lies in building broad concepts into the law. Principles are created which may be acceptable today but which experience teaches will be subjected to expansion tomorrow. While some business activity may be excluded from the coverage of these broad concepts now, it is unlikely that undesirable applications can be avoided in the future.

FINES

Chapter 22 of S. 1630, which governs the imposition of fines for criminal conduct, remains a threat to business despite a purported effort to meet two specific objections to its provisions: the massive increase in the amount of fines and the possibility of pyramiding fines on the basis of allegedly multiple violations of the law growing out of a single transaction. The pertinent provisions of S. 1630, unlike their predecessors in S. 1722, require consideration of the "size of the organization" and a limit on the aggregation of fines.

The changes are helpful to an extent, but fail to eliminate the cause for concern. S. 1630 still mandates a special fine structure applicable only to organizations. The fines for organizations are four to ten times higher than those for individuals and range up to $1,000,000. While Chapter 22 provides guidelines for the courts to use in imposing fines, their amount is likely to vary widely from jurisdiction to jurisdiction and judge to

judge, even for similarly situated companies, given the range of the amount which may be imposed.[3]

Moreover, the language of Section 2202(b) which is intended to limit the pyramiding of fines may prove ineffective. The statutory language contains an important caveat: fines may not be aggregated "for different offenses that arise from a common scheme or plan, and that do not cause separable or distinguishable kinds of harm or damage." The "separable or distinguishable" harm clause is capable of a broad reading. For instance, prosecutors could claim, as they have in civil actions enforcing the Federal Trade Commission Act, Consumer Product Safety Act, and similar regulatory statutes, that each alleged violation causes separate and distinguishable harm. Since the harm is separable, multiple fines are permissible. Even if the government does not ultimately prevail on such a claim, it may plausibly prosecute it in order to gain settlement leverage over a company. Thus, further consideration of this provision is in order.

ORDER OF CRIMINAL FORFEITURE

Section 2004, which provides for criminal forfeiture of property when a defendent is convicted of racketeering-related offenses, also poses a threat to business. While the provision is no doubt intended as an enforcement tool for use against organized crime, subsection (b) allows for protective orders that could devastate innocent businesses when read in conjunction with the broad, general definitions of racketeering activities in Chapter 18.

Section 2004(b) states that a court may "[a]t any time after the arrest of the defendent...enter a restraining order or injunction,...require a performance bond, and...take such action as is in the interest of justice, with respect to any property that may be subject to criminal forfeiture." A businessman erroneously indicted for racketeering could be plausibly subjected to and destroyed by the discretionary use of protective orders that limit the conduct of his business. Hence, consideration of ways to mitigate the potential for abuse of this section seems in order.

THE NATURE AND CONTENT OF THE CURRENT DEBATE OVER CRIMINAL CODE REFORM

The preceding examination of selected provisions of the "Criminal Code Reform Act of 1981" does not exhaust the potential

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[3] Proponents of the bill argue that S. 1630's provision for a Sentencing Commission will preclude abuse. While we disagree with their assessment, we do not argue the point here.

problems in the bill for either the business community or the general public. It serves to demonstrate, however, that provisions of the legislation are problematical. It also serves as a springboard for considering several important questions about the nature and content of the current debate over criminal code reform including whether the debate as currently conducted is serving the public interest.

The essence of an effort to recodify, revise and reform all federal criminal law at once is such that the legislation and surrounding controversy involve every aspect of federal criminal law from murder, robbery, and kidnapping to economic regulation and union violence to civil rights offenses and pornography. A recent article in Human Events noted that the all-inclusive nature of the debate "has led to a profusion of charges and countercharges concerning almost every imaginable subject in the legal lexicon."[4] While one might expect that the heated nature of the debate over criminal code reform would result in a thorough reassessment of the legislation, statements by proponents of S. 1630 suggest instead that whole bodies of criticism are possibly being dismissed without appropriate consideration.

Organizations ranging from the Moral Majority to the American Civil Liberties Union have criticized the concept as well as specific provisions of S. 1630. The efforts of some of these organizations drew a combined response from several of the principal sponsors of the legislation and the Department of Justice on November 4, 1981. The joint response concentrated on the "Moral Majority... and some other groups [which according to the responders] began a campaign against this important legislation...based on a 25-point memorandum that contains numerous false and misleading allegations reflecting varying degrees of lack of understanding of current Federal statutes, of existing case law, and of provisions of the bill."[5] More recently, in language that echoes both the joint Senate-Justice Department memorandum of November 4 and past and present Committee Reports, Attorney General William French Smith attacked the "mini-crusade" against Criminal Code reform by what he termed its "exceedingly misguided" conservative critics.[6] He stated that:

> They have relied upon mischaracterization, attenuated arguments, and even former provisions of the proposal that have been amended. Worst of all, they misconceive the significant strengthening law enforcement [sic] that

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4 "Dangerous New Criminal Code Reform," Human Events, February 27, 1982, at 172, col. 2.

5 "A Response to Recent Criticisms Disseminated by the Moral Majority, Inc. and Other Groups Concerning S. 1630, The Criminal Code Reform Act of 1981," November 4, 1981 at 1.

6 The Attorney General made his remarks to a meeting of the Conservative Political Action Conference in Washington, D.C.

> would flow from enactment of the code now. After more than a decade of debate, we can no longer afford nit-picking that delays reform of the antiquated hodge-podge of federal criminal law.

Putting aside for the moment the merits of these attacks and the fact that similarly spirited defenses of the Code against its liberal opponents have not been forthcoming, their tone, which has been echoed publicly and privately by Justice officials and Senate staffers, indicates that some careful self-examination is in order.

The attempt by proponents of the proposed Code to characterize all opposition to it as "misguided" and as emanating from a small group of hard-core opponents is itself misleading. The characterization is simply a vehicle for allowing the legislation's proponents to ignore the extent and merit of opposition to the bill. Stated somewhat differently, it permits S. 1630's supporters to dismiss criticism without fully considering its constructive value.

The attitude, if it in fact prevails, is unfortunate. Opposition to the present reform attempt is widespead and encompasses many noted groups and individuals with considerable background in the practice of criminal law. The new statutory language is necessarily general and, concomitantly, subject to varying interpretations. Hence, charges that a particular provision is subject to a broad reading and abuse should not in most instances be too readily dismissed as misguided, even if the proponents believe them to be inaccurate. Such criticisms should at least be regarded as an indication that aspects of the legislation are troublesome and capable of a similar reading by some future prosecutor, court, or jury.

Of course, not all interpretations have merit; but many do. Sponsors of the legislation should at least examine opponents' concerns with an open mind. While the U.S. is a nation of laws not men, men interpret and enforce the laws and have imaginatively stretched the law too often in the past for the possibility of potential abuse to be ignored. If doubt exists on this point, a review of the Justice Department's enforcement of the civil penalty and forfeiture provisions of the various regulatory statutes over the last five or six years should dispel it. The point is simply that the public interest will be better served if the concerns about criminal code reform are given their due and carefully examined rather than being characterized in a pejorative fashion and dismissed.

Finally, it is worth noting that reasonable minds might conclude that the nation can indeed "afford nit-picking that delays reform of the...federal criminal law." Given the importance of the issue, the mere fact that legislation has been debated for over a decade is not a sufficient ground to support its immediate enactment. Rather, the length of the debate indicates

that the legislation needs to be improved. Since it took over 200 years to assemble the U.S. criminal code, it is surely in the public interest that we not rush to judgment to completely revamp it in ten.

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