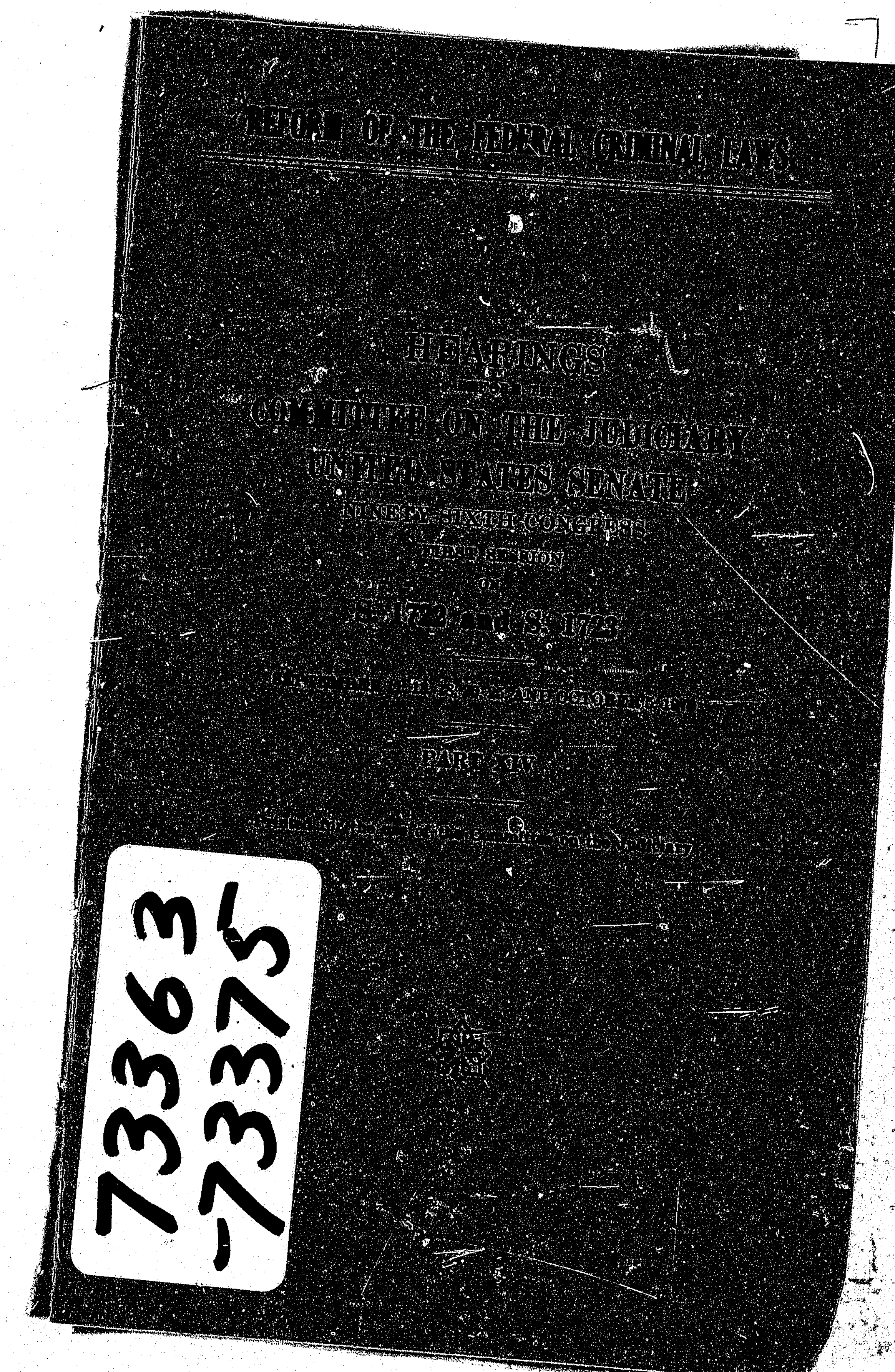
REFORM OF THE FEDERAL CRIMINAL LAWS
HEARINGS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
PART XIV
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REFORM OF THE FEDERAL CRIMINAL LAWS

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

S. 1722 and S. 1723

SEPTEMBER 11, 13, 18, 20, 25, AND OCTOBER 5, 1979

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73366 STATEMENT OF MARK GREEN, DIRECTOR, PUBLIC CITIZEN'S CONGRESS WATCH, CONCERNING REVISION OF FEDERAL CRIMINAL CODE, S. 1722

Mr. Chairman, Public Citizen has a long-standing interest in criminal code re-
vision because of its long-standing concern with business crime. "Some rob you
with a six-gun and some with a fountain pen," sang Woodie Guthrie decades
ago in words even more telling now. For the documented level of "crime in the
suites" today must worry all those who promote consumer values in the com-
petitive marketplace and who seek to establish an effective system of criminal
justice.

As one reads the massive and well-crafted submissions of the Business Round-
table's law firms, however, there is no sense of empirical urgency over the issue
of corporate crime. One might think the debate were between different schools
of civil liberties thought—as the Roundtable invariably drapes arguments about
double jeopardy, self-incrimination and overbreadth over its interest to mini-
mize criminal penalties against member firms. Reading their submissions, one
might think the real crisis in law enforcement was the possibility that anti-
business prosecutors would abuse innocent businessmen and firms. The reality,
however, clashes with this selective analysis.

Not perhaps since the robber baron era, and certainly not since the 1930s—
when New York Stock Exchange president, Richard Whitney, was convicted of
stock theft and utility mogul Samuel Insull escaped prosecution by fleeing abroad
dressed as a woman—has America witnessed such an epidemic of corporate
crime and such a showing that justice is not collar-blind.

Allow me then to discuss first the empirical—rather than the wishful—con-
text of business crime in America today in Part I, before turning to how a bold
and workable criminal code revision bill can held deter such abuses in part II.

I.

Business crime is as old as business. There were prohibitions against monop-
oly in common law England. Lord Bryce's The American Commonwealth (1888)

and Henry Demarest Lloyd's Wealth Against Commonwealth (1899) dissected business corruption, with Lloyd saying that the Standard Oil Corporation "has done everything with the Pennsylvania legislature except to refine it." Widespread stock fraud led to the 1933 and 1934 securities acts; the 1960s saw the great electrical machinery bid-rigging case and the marketing of thalidomide by Distillers and MER 29 by Richardson Merrill, though both firms had evidence of health risks. Yet the apparent prevalence today of "corporate crime"—a subcategory of "white collar crime" involving managerial direction, participation, or acquiesance in illegal business acts—has newly raised the issue of the adequacy of legal sanctions. Why has deterrence apparently failed to reduce such economic illegality? Should the Federal criminal code affecting corporate crime be recodified—or reconceptualized? What new sanctions or structures can persuade companies to obey legal standards?

Prevalence

Professor Marshall Clinard of the University of Wisconsin studied the number of enforcement actions brought by 25 Federal agencies against the 582 largest publicly-owned companies (average sales volume, $1.7 billion). In testimony prepared for the House Crime Subcommittee earlier this year, he disclosed there were 1,553 cases pending against the 582 firms. 60.1 percent of the firms had one or more cases pending against them. A Public Citizen survey in February, 1978, of the large companies comprising the Business Roundtable found that 58 percent had in the previous 5 years either (a) admitted to an illegal or "questionable" payoff abroad or (b) been named by the Antitrust Division or FTC in an antitrust or consumer action. In 1972 the SEC referred 38 cases to the Justice Department for criminal prosecution; in 1976 it had tripled to 114.

There is no way to "prove" that business crime today is greater than in previous periods. Nor is it possible, given current data collection systems, to conduct a scientific "corporate crime prevalency study." We only know of firms publicly exposed, since other culpable companies do not volunteer their guilt. Certainly, at least, the exposure of four major forms of corporate crime—financial, antitrust, chemical, and product safety crime—is at its peak.

About 500 American firms—including more than one-third of the Fortune 500—have admitted in recent years to illegal or improper payoffs abroad totalling over $1 billion. And their primary public defense, that "everyone does it," was hardly reassuring. In a major 1976 report, the Securities and Exchange Commission declared that it was "unable to conclude that instances of illegal payments are either isolated or aberrations limited to a few unscrupulous individuals . . . the problem is serious and widespread." When 3M acknowledged their illegal payoffs, its chairman of 17 years, William L. McKnight, said, "I don't know that 3M did anything different than a great many other corporations did." An Opinion Research Corporation poll in 1974 revealed that 92 percent of the business people surveyed thought that legislation prohibiting bribes abroad would be ineffective. Said one, "How can you advocate morality over success?"

Over 100 grand juries—a record number—were a year ago investigating price-fixing conspiracies, the Justice Department Antitrust Division reports. Based on these investigations, former Division official Joe Sims concluded that "price fixing is a common business practice." Corroborating his view is the fact that there seems to be a linear relationship between increased resources spent on criminal investigations and criminal indictments. And when a Nader group asked Fortune's top 1,000 presidents if they agreed with the observation that "many companies price fix," 60 percent of the 110 respondents agreed.

A relatively new category of illegality—chemical crime—has begun to spead, as Kepone, PCB's PBB's and other exotic chemicals work their way into our environment. The Environmental Protection Agency has estimated that there are perhaps 30,000 toxic dump sites around the country, with "significant amounts" in 800 of them in areas such as the one memoralized by the misnamed Love Canal community in upstate New York.

Finally, there have recently been a series of cover-ups of product hazards. Not only did Hooker Chemical conceal for decades its knowledge of the toxic effects of its dumping, but we now also know from internal firm documents obtained in legal proceedings that (a) the Ford Motor Co. knew that the gas tanks of earlier model Pintos had a tendency to explode when rear-ended, (b) Firestone knew that its radial 500 tires had an unusually high failure rate and (c) leading asbestos firms withheld the health hazards involved in their product from their workers. The New York Times, in May 1, 1979, editorial bristling with indignation, concluded that "The only effective remedy is to change the incentives and penalties that now shape such decisions . . . Otherwise irresponsible decisions will continue to poison not only the physical environment but public confidence as well."

Cost

There is, first, the direct consumer cost. A 1976 Joint Economic Committee report pegs it at $44 billion a year—a number that doesn't even include the costs of antitrust or environmental violations. Yet one price-fixing conspiracy in 1961 stole more money that year than all street burglaries combined. Professor William Sheperd of Michigan, a highly regarded economist, estimates that antitrust violations transfers (i.e. robs) over $60 billion each year from the pockets of consumers to the pockets of law-violating producers. 80 percent to 90 percent of all cancer is environmentally caused, says the American Cancer Society and the Council on Environmental Quality; the highest death rates from lung, liver, and bladder cancer correlate with areas around chemical plants. The health and property impacts of industrial pollution range in the tens of billions annually, according to the best government studies. It is now estimated for example, that it would cost $8 billion to clean up the Kepone contamination of the James River in Virginia.

There is also the indirect assault on public trust when the proverbial pillars of the community turn out to be its pillagers. Edwin Sutherland, in his seminal work on white collar crime 40 years ago, concluded that "white-collar crimes violate trust, and therefore create distrust, which lowers social morale and produces social disorganization on a large scale." Thus, there are not only the foreign governments subverted by our bribes and cooperation with extortion. There is also the subversion of our own society. A public accustomed to lawlessness, especially by its leaders, can lose the self-discipline and respect for law esential to a working democracy. Manhattan D.A. Robert Morgantheau, for one, argues that suite-crime can provide an easy rationalization and incitement for street-crime. In Brazil several years ago, one candidate boldly ran on the slogan, "To my enemies, the law; to my friends, facilities." If "everyone does it," many may ask—why not me?

Enforcement Effects

Despite the prevalence and costs of corporate crime, the federal effort against it, according to the American Bar Association's criminal section, is "underfunded, undirected, and uncoordinated, and in need of the development of priorities." A report by this section indicated how the lack of unified Federal policy, the multiple congressional committees each with a piece of the problem and the failure to centralize corporate crime data have defeated the Government's ability to confront this problem. The House Judiciary Committee's Subcommittee on Crime, in a preliminary survey, found that only 5 percent of the Justice Department's resources ($139 million out of $2.5 billion) were devoted to white collar crime. Under pressure from critics, Attorney General Edward Levi created an inter-agency white collar crime task force in the mid–1970's, yet it never issued any public report or recommendation. In a November 1975 report, Paul J. Curran, the outgoing U.S. Attorney for the southern district of New York, complained that "except for the Securities and Exchange Commission and the Internal Revenue Service, which operate in fairly narrow areas, the Federal agencies responsible for investigating these (white-collar crime) cases are simply not doing the job." Until the creation of the Watergate special prosecutor, the Justice Department had almost never moved against illegal business contributions to political figures. When last checked, there was not even a reporting category for business crime in the FBI's detailed annual compendium, "Crime in the United States"—Although there are 27 other categories.

Even where the Federal Government moves against business abuse civilly or criminally, the results are often insignificant. The chances of being sentenced to a prison term is 20 percent for those indicted for bank embezzlement and 89 percent for those indicted for bank robbery. In Marshall Clinard's study of the 582 corporations, 88.1 percent of all sanctions imposed were administrative in nature (e.g., cease and desist), 9.2 percent were civil, 2.7 percent criminal. In only 0.9 percent of all enforcement actions was a corporate official criminally sanctioned—probation, fine, suspended sentence, or jail; in all, five officials (out of 1,553 actions) went to prison.

More than 80 percent of all antitrust civil cases and 90 percent of SEC complaints end with consent decrees, which are not admissible as prima facie evidence in later private actions. More than 70 percent of antitrust indictments and 80 percent of securities fraud cases end with nolo pleas—which also cannot be used in later private actions, which often lead to more lenient punishment and which allow defendants to describe their offenses as merely "technical." Though antitrust violations are now felonies punishable by up to three years in jail and $1 million in fines for corporations, terms of over 3 months or fines over a few thousand dollars are rare. Those companies who, following an SEC investigation, have admitted to illegal or "questionable foreign payoffs have paid fines that equal the revenue of a few minutes of company production. Indeed, many of the responsible company directors and officials continued on in their positions. This level of tolerance upset Business Week. "The public will trust businessmen only if it knows they will be held responsible when they break the law."

There is a long history of judges and justices being solicitous to business felons. One Judge Woodward, when sentencing real estate executives in 1933 for mail fraud, said, "You are men of affairs, of experience, of refinement, and culture of excellent reputation and standing in the business and social world." More recently, Federal district court Judge Warren Ferguson has written, "All people don't need to be sent to prison. For white collar criminals, the mere fact of prosecution, pleading guilty—the psychological trauma of that—is punishment enough." This comment lends credence to sociologist Gilbert Geis's conclusion that "the legal justice system represents a class prejudice so evident that it leads citizens to question the fairness and the integrity of our system of justice."

More specifically, C. Arnholdt Smith, whose misappropriation of $400 million led to the collapse of a $1 billion bank, received a 5-year probation and a $30,000 fine—to be paid at the rate of $1,000 for 30 years. Attorney Joel Dolkart stole $2.5 million from two New York City law firms, and on appeal received a suspended sentence (the lower court judge who had imposed the sentence called the suspension "a travesty of justice"). Those convicted in the Home-Stake oil swindle in Texas, involving tens of millions of dollars, were each sentenced to spend a night in jail.

Even for many executives who may be indicted and convicted, a new vogue has appeared to cushion the blow—community service instead of penal sanctions. One Federal judge "sentenced" convicted price-fixers to give speeches before civic groups about the evils of price-fixing. Another sentenced dairy executives guilty of price-fixing to serve food in charity dining rooms and distribute free milk to charity. Which is nice, but probably not a successful deterrent when matched against the huge potential gains of antitrust crime. The moral: crime pays; courts are not collar-blind; "the people who call the shots [in corporations] don't bear the risks" (Professor Christopher Stone), or, as Eugene O'Neill put it in the Emperor Jones, "For de little stealin' dey gits you in jail soon or late. For de big stealin' dey makes you emperor and put in de Hall o' Fame when you croaks."

Recent Developments

The 1974 Antitrust Procedures and Penalties Act increased antitrust illegality from a misdemeanor to a felony, increased potential jail terms from 1 year to 3 years, and upped the fines to $100,000 for an individual and $1 million for a company. As a result, fines have somewhat increased from their previous low level and jail terms have been more frequently imposed. The Crime Control Act of 1976 provided for $10 million to State attorneys general to fight antitrust crime better. In 1977 the Foreign Corrupt Practices Act prohibited bribery of foreign officials by U.S. companies (fines are up to $10,000 per individual and $1 million per firm, with a maximum prison term of 5 years), and it required the creation of an accounting system that would be adequate to deter and expose payoffs. In his speech a year ago to the Los Angeles Bar Association, President Carter said, "Powerful white-collar criminals cheat consumers of millions of dollars. Public officials who abuse their high rank damage the integrity of our Nation in profound and long-lasting ways. Justice must be blind to rank, power and position . . . The Justice Department is undertaking a major new effort on white-collar crime." To date, it hasn't.

Public Citizen believes that any revision of the Federal criminal code must take into account this backdrop of widespread and costly business crime—not the abstractions and hypotheses of the Business Roundtable but the consumer costs of managerial crime. When the number of burglaries leap in New York City, the city responds with new law enforcement approaches designed to meet the problem. So too should a pattern of growing business crime inspire new approaches in a federal criminal code. Indeed, it is just this category of willful, pre-meditated, cost-calculating and intelligent individuals who the criminal laws should be able to successfully deter. I will discuss several white collar provisions that are either in S. 1722, and should remain so, or have been dropped from earlier versions, and shouldn't have been, or which are new yet valuable approaches:

Liability of an organization for conduct of an agent.—Section 402, continues and explicates existing law, which holds that an organization is criminally responsible for the criminal acts of its agents—acting in their official capacity for the benefit of the firm—since it can only act through its agents.

One addition should be considered. For purposes of this section "organization" has been defined to mean "a legal entity other than a government . . ." Why is government excluded especially in light of the recent Supreme Court decision holding for the first time that the Federal antitrust laws do apply to municipalities in their purchasing and economic functions? As your committee report on S. 1437 indicated "there does not appear to be a Federal case holding a governmental entity as such criminally liable. Nonetheless the committee notes that there is nothing in the nature of, e.g., a State or municipal corporation which would make it inherently incapable of committing a crime—for instance, a State corporation could commit reckless endangerment under section 1617 through pollution of a water supply—and the issue whether to include such governmental entities in this section may therefore well be deserving of further study."

Liability of an agent for the conduct of an organization.—Still in section 403 is (b) "Omission to Perform a Duty of an Organization." The Roundtable's objection here is that persons might be culpable "who have no consciousness of wrongdoing. Individual liability flows chiefly from one's supervisory position and the fact of an offense by the organization"—seems directly contradicted by the section's own language requiring an agent have the authority and "the power to prevent the offense . . . [and] the state of mind required for the commission of the offense." Their objection seems hypothetical but the problem of supervisory executives seeking "plausible deniability" is very real. As the Harvard Law Review's April 1979 developments note on "Corporate Crime: Regulating Corporate Behavior through Criminal Sanctions," indicated, "Superiors can preserve their ignorance by conveying to employees the understanding they do not wish to be told of information which may subject the corporation to liability" (at 1254).

The very related provision of S. 1437, "Reckless Failure to Supervise Conduct of an Organization," has unfortunately been dropped in S. 1722. Both sections together attempted to codify and extend the Supreme Court rulings in *U.S. v. Dotterweich* (320 U.S. 277, 1943, J. Frankfurther for a 5–4 majority) and *U.S. v. Park* (421 U.S. 658, 1975, C. J. Burger). According to Justice Frankfurther, "Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships. Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless." Said Justice Berger 3 decades later: "The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them."

The business community objected to this provision because defendants, according to Roundtable submissions of May 3, 1978 to the House Criminal Justice Subcommittee. "had no consciousness of wrongdoing." Yet the "reckless" standard means a conscious disregard of or gross deviation from a reasonable standard of care—not merely negligent conduct—something that businessmen will not often innocently engage in. Thus, critics are simply wrong when they assert that these provisions, like *Park* and *Dotterweich*, impose vicarious liability on managers. Their guilt is not imputed from the guilt of subordinates but from their conscious disregard or recklessness in not stopping a wrongful act.

Section 403(c) is still needed to correct the complaint of Professor Christopher Stone that decision-makers should bear the risks of wrong decisions. Aiding and abetting laws are inadequate here, argues Philip Heymann, chief of the Justice

Department's Criminal Division. "The intricate hierarchy of most large business organizations in this country, coupled with the rather rigorous proof required for conviction as an aider and abettor, frequently makes it impossible to prosecute high level supervisors of an organization who have substantially contributed to an offense by lower eschelon employees by recklessly failing to execute supervision over their activities."

Judge Bell, after substantial lobbying pressure, finally agreed to delete § 403 (c). But at that time Deputy Attorney General Benjamin Civiletti disagreed. I hope this committee will re-open this important issue with the new Attorney General, who should not be controlled by the "political" compromise, as a Justice aide has called it, of his predecessor.

Reckless endangerment.—If a person "places another person in danger of imminent death or serious bodily injury," according to § 1617, he will be guilty of a class D felony (up to 6 years in prison) "if the circumstances manifest extreme indifference to human life" and a class E felony otherwise (up to 3 years in prison).

Although existing Federal law penalizes some forms of life-threatening activity—i.e. explosives, vessels, motor carriers—the present section is new in generalizing the offense. This is an important provision, potentially capable of reaching blatant environmental pollution, transporting impure food or dangerous drugs, gross safety violations. It is important to retain § 1617 as one of the only sections that could apply greater criminal penalties to environmental corruption. (See also § 1853, "Environmental Pollution," which would largely just recodify existing law, making offenses of the Clean Air, Water, and Noise Pollution Acts merely Class A misdemeanors—unless the company has previously violated one of these laws, in which case it would be a Class E felony.)

The Roundtable, again, doesn't like this strict provision because it could implicate the innocent, such as managers who "treat meat products with nitrites [that] may cause cancer. But not to do so causes botulism. This surely is a strained example, for if the nitrites were really that ambiguous, no jury or judge could find that a defendant had acted recklessly. The Roundtable expresses concern that "[o]ne need only add the epithet 'reckless' to lay the basis for an indictment which, even if it did not lead to conviction, could seriously injure an individual, his family, and his career." This touching sympathy seems grounded in the fear of "over-deterrence." Yet based on a demonstrated trend of business crime, if anything there is under deterrence. The innocent victims of toxic dumping deserve more concern that business supervisors, ably defended by lawyers, who to my knowledge are not often falsely prosecuted.

If the nitrites example seems far-fetched, environmental corruption due to the reckless failure to supervise is not. Should that be criminally punished? There are societies where the most severe penalties are reserved for those who relieve themselves into a community's water supply. Yet major firms for years relieve themselves into our rivers and expect not criminal sanctions but consent decrees.

Such reckless corporate conduct almost never leads to jail terms. Though if society is interested in less "reckless endangerment," "One jail sentence was worth 100 consent decrees," said a judge. As the Harvard Law Review note observed, "the threat of a jail sentence in particular induces employees to forgo even substantial corporate profits rather than risk individual criminal liability."

If anything, Section 1617 has been unnecessarily weakened from S. 1437's version. Why is the standard "imminent" death? If a person sets a time bomb—or creates a Love Canal situation—why should it be actionable under § 1617 if he sets the clock for 15 minutes away but alright if he sets it for 3 months away? The word "imminent should be deleted.

Order of notice to victims.—Any organization guilty of fraud or other deceptive practices, would be made to give notice of that fact—via mail, advertisement or other appropriate means—to the victimized community. Section 2005 introduces a new approach to title 18, though there are some analogies in Federal law—auto and tire firms must notify DOT of certain product defects, and DOT can disclose those defects to the public; as part of some FTC settlements, companies have agreed to admit in future ads that claims made in prior ones may not have been entirely accurate.

The court under § 2005 is free to review the adequacy of any notice; companies will be encouraged to comply since they could be held in contempt of a court order otherwise (in which situation there is no ceiling in fines to be imposed.) This section promotes the double benefit of deterrence and compensation: companies, anxious about good will and their good name, are especially loathe to have to publicize their misdeeds—publicity which, among other things, can mobilize shareholder activity against errant managers. And such notice alerts potential plaintiffs about their victimization and remedies.

As the Senate Report on S. 1437 accurately observed, "The provision may be expected to result in an increase in individual actions and class actions for civil recovery but only when organizations have admitted guilt for an offense. It should also have the collateral effect of reducing the attractiveness of large scale, profit seeking, deceptive practices." According to the Brown Commission's "Working Papers," "Adverse publicity in appropriate cases might be the most feared consequences of conviction in an era when public relations figure so largely among management concerns. Customers and prospective customers of products or securities might be warned that the corporate defendants had engaged in fraudulent practices. Appropriate notices might be required in proxy statements. Advertisements in trade journals or the general press could be employed."

The Business Roundtable objects to this notice provision, arguing that it is "novel" (i.e., bad), that proponents haven't "proved" that traditional sanctions of fines and imprisonment aren't adequate, that "there is no exception for pleas of nolo contendere, which . . . avoid prejudice to the defendant with respect to possible civil sanctions," and that "the sanction smacks too much of the colonial stocks and pillory."

These objections are as numerous as they are shallow. When you rewrite a code every 40 years, presumably there should be new approaches to new problems, otherwise the venerable Articles of Confederation would still be guiding our destinies. Given the voluminous recent record of corporate crime, alluded to in part I, it takes a large dose of ideological chutspah for the business community to demand proof that traditional law enforcement mechanisms have failed. If anything, the burden is on them to explain the swelling docket of white collar cases around the country. As for the lessened utility of the over-used nolo plea, I discuss it at the end of this testimony. Finally one should not be surprised that a secret organization which refuses to disclose publicly who its members are—the Roundtable won't do it, Mr. Shapiro once said, because it would invite "junk mail"—would consider a notice "stocks and pillory." Rather, it is the simple justice of insisting innocent and unknowing victims be told of their victimization by their sophisticated and secretive victimizers.

Order of restitution.—Section 2006 of S. 1722 provides that a court in its discretion may require a company to make "restitution to a victim of the offense." Under existing law, a defendant could be required to pay restitution as a condition of probation, but not as part of a sentence independent of probation.

As the Brown Commission's "Study Draft" realized, "That imprisonment of organizations is impossible and that fines may be absorbed as a cost of doing business limit the effectiveness of the usual sanctions which may be employed to deter offenses by organizations." Therefore, notice and restitution sections are needed to help take the profit out of crime and to compensate victims of it.

This committee could improve this provision in at least two ways. Change the word "victim" to "victim or victims" to make explicit that perhaps a class in the community—all people who brought an overcharged or defective product—will be the beneficiary of restitution, and not merely one unfortunate individual. And give the federal prosecutor power "to institute supplementary proceedings . . . 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 multiplicity of small claims or other circumstances make restitution by individual suit impractical" (language of Brown Study Draft § 405(1)(b)). This language would encourage restitution of small amounts to many persons in federally organized class actions. This addition is based on the theory that violation of the statute is negligence per se, thus dispensing with the usual requirements of lack of due care and foreseeability; each plaintiff would merely have to demonstrate the amount of damages suffered by him or her. Here the moving party would be a federal prosecutor engaged in one unified action settling all claims where a company has already admitted that consumers were defrauded.

Business complaints that calculating restitution can be confusing are unpersuasive. S. 1722, unlike S. 1437, explicitly says that restitution only be provided "without unduly complicating or prolonging the sentencing process." As Assistant Attorney General Heymann told the House Subcommittee on Criminal Justice. "We fail to understand why this argument should bar the availability of restitution as a separate sentence in those cases in which the determination of

damages (e.g., a stolen car, or a theft or fraud in which the amount obtained is not seriously disputed) is not difficult." Also, as between the violator keeping his ill-begotten gains or the innocent party being made whole, it seems only right that the offender not profit and the victim not suffer. It is theoretically possible to postulate that sometimes the felon may pay too much restitution, but without § 2006 one could confidently assert that victims would go grossly uncompensated. Consequently, to argue that the constitutional rights of convicted felons might be violated by this provision seems to confuse culprit and victim.

Fines and double damages.—Section 2201 increases fines for felonies to $1 million for organizations and $250,000 for individuals. This increase from current inflation-outdated levels is necessary, and consistent with recent congressional action setting maximum fines of $1 million for antitrust felonies and foreign bribery. S. 1722 is far preferable to the inadequate levels set in S. 1723.

Unfortunately § 2201(c) of S. 1437 is also essential but has been dropped from the Committee's current bill. That provision would have allowed a sentencing judge an alternate fine of up to "twice the gross gain derived or twice the gross loss caused . . ."

The 2x provision, which has no comparable provision in Federal law other than treble civil damages in the antitrust laws, comes from New York and Michigan law. The section usefully makes fines uniform for similar offenses, as there are now 14 different fine levels in title 18 that are often inconsistent for similar offenses. By pegging the fine to the crime, you insure that you don't under-penalize huge companies to whom a fixed amount—even $1 million—would merely be "a cost of doing business." It is a mathematically fiting way of making the penalty fit the crime. Also, it is especially approprate for organizations since the alternate sanction, that of imprisonment, is unavailable. As your committee's report on S. 1437 recognized. "The committee is of the view that fines generally have been an inappropriately underused penalty in American criminal law . . . There are no offenses for which a fine may not be imposed."

It has been argued that the calculation of such a fine might be difficult due to the complexity of some corporate crime. But why should it not be available to a judge in those circumstances where calculation is not difficult, especially since it seems perverse to allow organizational felons to escape high fines if they can develop a sufficiently complex fraud. Under S. 1437, this 2x penalty was neither required nor permitted, an approach we would urge this panel to re-adopt.

Finally, we support § 3505, which says that "the fine shall not be paid, directly or indirectly, out of the organization." This provision is essential to insure that individual accountability not be eliminated in the name of corporate efficiency. It directly addresses the concern of the Harvard Law Review note, which observed: "Establishing individual liability presents special problems when a crime occurs in the context of a corporate bureaucracy." The Business Roundtable correctly observes that this provision contradicts some state corporation codes that permit indemnification in certain circumstances. But due to the well-known "Delaware Syndrome"—where states engage in a "race to the bottom," in the phrase of former SEC chairman William Cary, in order to garner incorporation fees—it is entirely appropriate that a national standard preempt business-dominated state codes. What is left of deterrence if individual offenders—who are either knowing, willful or reckless law-violators—realize their crimes will be paid for by someone else?

Individual disqualification/company disqualification.—Many of the high corporate officials who have admitted illegal payoffs abroad still occupy their managerial posts. The message conveyed to potential managerial law-violators is that they can break the criminal law without jeopardizing their job. This sense of security, as with the state indemnification provisions, poorly serves the goal of deterrence. Which is not to say that every convicted felon should lose their job. But if (a) persons convicted of certain official misconduct are barred from holding public office, (b) some State legislation aimed at ending waterfront corruption disqualifies convicted felons from union office, (c) the Landrum-Griffin Act of 1959 (29 U.S.C. § 504(a)) bars convicted felons from holding union office for 5 years following the conviction, (d) persons convicted of certain financial offenses cannot hold specified positions in banks insured by the F.D.I.C. (12 U.S.C. § 1829); and (e) broker-dealers and lawyers can lose their licenses to practice for crimes, then it seems consistent and not unfair to allow courts to prohibit managers who have abused their power from serving in a similar position that would invest them with comparable power.

The Brown Study Draft took a crack at this problem in draft § 405 "Officer: When an executive officer or other manager of an organization is convicted of an offense committed in furtherance of the affairs of the organization, the court may include in the sentence an order disqualifying him from exercising similar functions in the same or other organizations for a period not exceeding 5 years, if it finds the scope or willfulness of his illegal actions make it dangerous or inadvisable for such functions to be entrusted to him." S. 1 had a similar provision, § 1–4A3, which improved on the Brown Commission language in that it substituted for the words "for a period not exceeding 5 years" the words "not in excess of the authorized term of imprisonment for such offense." That is, any disqualification from office should not be longer than the longest possible sentence.

Is this Draconian, denying someone a job for years? No. It doesn't say that a one-time embezzler, price-fixer or food adulterator doesn't work for five years—only that they should seek employment other than as, respectively, a bank teller, purchasing agent and in-house health inspector. When one may hold a position affecting a broad public interest or trust, such strict standards are entirely appropriate. This punishment is now permitted as a condition of probation under § 2103(b)(6). It should be made a separate sanction for company officials convicted of job-related felonies or any company employee guilty of repeated misdemeanors.

This section in S. 1437 also allowed judges to prohibit organizations from engaging in certain lines of business if its crimes bore a "reasonable relationship to the offense." Section 2103(b)(6) in S. 1722, however, is limited to individuals. We would suggest that the standard of S. 1437 be renewed with the qualification that recidivist organizations, say subsidiaries guilty of two related felonies in a five year period, be subject to the terms of (b)(6).

Corporate probation.—Especially because you can't put a corporate entity behind bars, if you subject a convicted person to the conditions of probation, why not a convicted corporation? True, a corporation cannot visit a probation officer, but a probation officer can visit a corporation. This concept is not prohibited by § 2103 "Conditions of Probation," but neither is it made explicit.

There is some modest precedent for this approach.

When ARCO pled "nolo" to an oil spill charge in 1972, it expected a modest fine. But Justice Department lawyers, annoyed that the ARCO plant in question had previously been convicted of the identical violation, proposed instead that the company be put on probation, a condition being that it establish a program within 45 days to handle the oil spillage. Judge James Parsons ordered ARCO to satisfy the spillage program condition of the probation, or he would appoint a special probation officer with visitorial powers to enter the ARCO plant and supervise an oil spillage program (see *U.S.* v. *Atlantic Richfield*, 465 F. 2d 58 (7th Cir. 1972)).

In another case, the SEC sued one of the twelve largest accounting firms in the U.S., Lavanthal, Krekstein, Horwath and Horwath. Judge David Edelstein and the SEC worked out a settlement which required Levanthal to follow a thick set of "supervisory and control procedures," and the court then got the AICPA to select an inspection team to enter Lavanthal to see how well the procedures were being carried out. Finally, as part of the settlement of civil cases brought against Phillips Petroleum and Northrop, these companies agreed to the reorganization of their boards of directors and the appointment of several "public director" agreed to by plaintiffs, themselves and the court.

If a court finds an institutional structure that inclines a post-conviction company to violate the law, it should be able to try to cure that defect to avoid recidivism. Perhaps it would mean the appointment of a law compliance officer within the managerial hierarchy; perhaps a probation officer with the power to help establish procedures to avoid unsafe products; perhaps a financial "special receiver" with access to all books to check for financial fraud. If the law will send a dangerous person away to jail to protect the community, it should at least be able to send a probation officer to a company in order to protect the community.

Thus, to the list of 20 "discretionary conditions" listed in § 2103 could be added a 21st: "for an organization convicted of a crime, give a probation officer such visitorial powers, create such positions within an organization, require such financial and non-financial disclosure or appoint such special receivers as is deemed necessary to protect against repeat offenses."

a sentence of disqualification for recidivist firms;

the expansion of "consumer fraud" provision beyond Federal enclaves; and

prima facie effect in civil litigation for "nolo" pleas.

Mr. Chairman, we appreciate this opportunity to contribute to your awesome task of trying to design a Federal criminal code that is consistent, fair and effective. We also are not unaware that compromises often have to be made to gain the support of an ideologically broad sponsorship to push this rock up the legislative mountain. At the same time, we hope you and the committee freshly consider new approaches to the widespread, costly, yet deterrable problem of business crime in America. May I suggest that the spirit of your effort be guided by the observation of Jonathan Swift, who uncovered an ancient Hebrew tradition in a land visited by Gulliver: The Lilliputans look upon fraud as a greater crime than theft . . . for they allege that care and vigilance, with a very common understanding, may preserve a man's goods from theft, but honesty has no defense against superior cunning.

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