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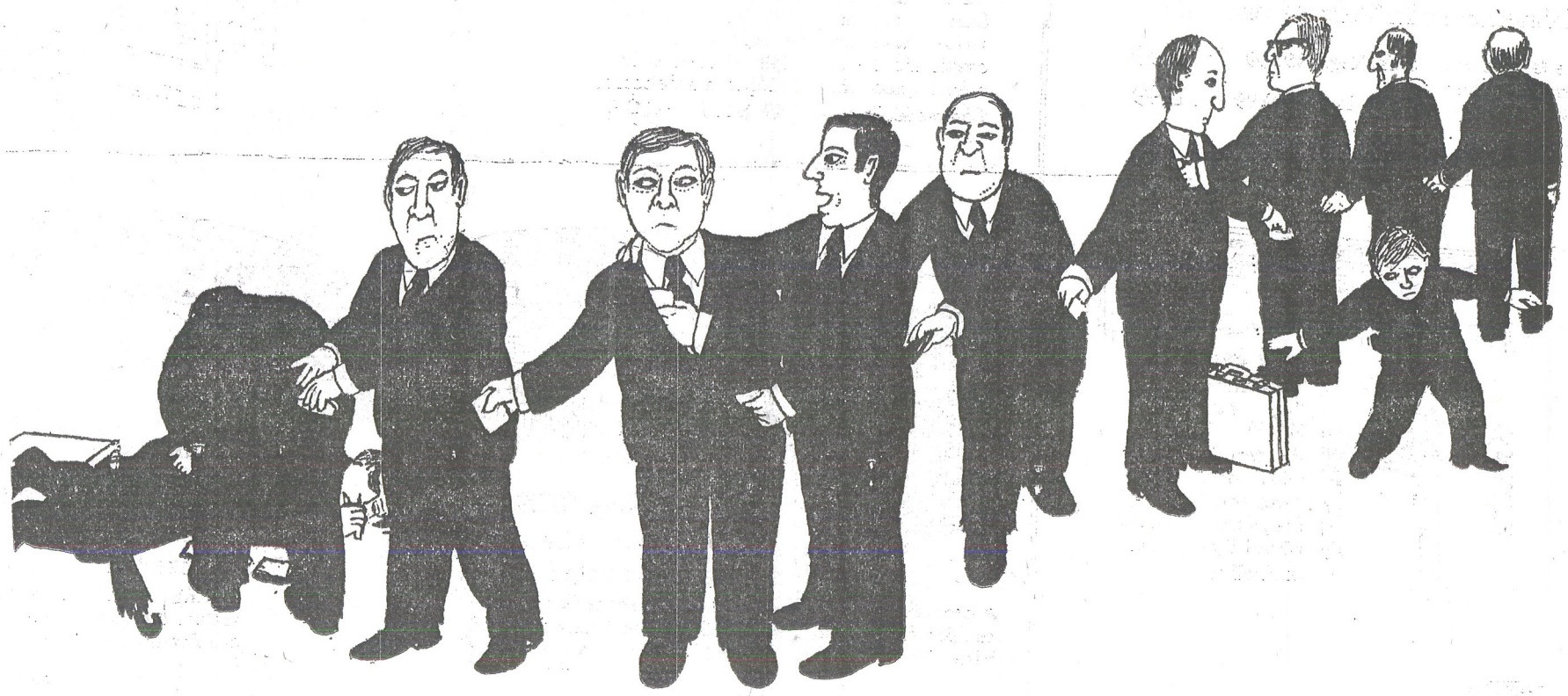
Respectability Helps If You're a Crook



By Tom Kleh

By Herbert S. Miller

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IN 1969 THE United States Attorney in New York City prosecuted a brokerage firm for having arranged for employees and customers to trade $20 million of stock through secret Swiss bank accounts. The firm pleaded guilty and was fined $50,000, the maximum allowable.

The firm's senior partner was represented by an attorney who had spent nine years as a federal judge in New York City. The presiding judge, Irving Ben Cooper, told the attorney, "Judge, I might as well say it now, I will say it later anyway, that they have chosen well in you. You know you have the great respect of this court." The defense attorney then compared his client's offenses with breaking a "traffic regulation." (The fact was that the firm had received $225,000 in illegal commissions and that the senior partner had repeatedly perjured himself during the grand jury investigation.) Judge Cooper gave the senior partner a tongue-lashing, fined him $30,000, suspended a one-year sentence and placed him on probation.

A week later, an unemployed black male shipping clerk, married with two children and with a prior record for armed robbery, was convicted of stealing a television set worth less than $100 from an interstate shipment in a bus terminal. The same Judge Cooper sentenced him to a year in jail.

This is merely one of many examples of how criminals are not always treated very equally before the law, an issue that has been given greater urgency by the light punishemnts meted out so far in Watergate-related cases and the Agnew affair. Some have seen the outcry for stiffer penalties as a hypocritical thirsting for revenge by liberals and by erstwhile penal reformers turned hardhearted. They are mistaken.

The furor is part of a much more fundamental and justified cry against the class consciousness in our system of justice, a system in which the white-collar criminal generally gets the break and the "common" criminal gets the book—even though punishment tends to be more effective in deterring white-collar crime than in discouraging "street" cime.

The problem is rooted in our middle-class mentality and in the wide discretion judges have in handing down sentences. White-collar crimes, as the late Edwin Sutherland characterized them, are those "committed by persons of respectability and high social status in the course of their occupations." Many people tend to feel sorry for these "respectable" criminals, to argue that they have been disgraced, that their families have suffered, their careers stunted or ended. Isn't that punishment enough?

One does not hear as much sympathy about the degree of punishment given to "common" criminals. It is not as easy to "understand" them, to to be assumed by many that these offenders do not suffer under the criminal justice system, that their families blithely accept the verdict of society without being hurt.

This middle-class approach to morality is almost immoral in concept. Under this view, the best chance a crook has of avoiding prison is to demonstrate respectability before committing a crime. And, according to New York "identify" with their lives. It appears area and national statistics, that just may be accurate.

Those convicted of white-collar crimes in New York City, for example, stand only a 36 per cent chance of going to prison. But for those convicted of nonviolent "common" crimes the figure is 53 per cent, and for those found guilty of violent "common" crimes it is 80 per cent. Nationally, the chances of being locked up for bank embezzlement range from 20 to 23 per cent, but the chance of being imprisoned for bank robbery is 83 to 89 per cent. Similarly, those convicted of bribery face only a 25 per cent chance of imprisonment in New York, far below the 55 per cent rate for those guilty of interstate theft. Nationally, the comparable figures are 27 per cent and 42 per cent.

The same glaring disparity exists in the length of sentences. For white-collar embezzlement, the average sentence in 18 months, for bank robbery 69 months. For bribery the average sentence is 11 months, for interstate theft 18 months.

And it also exists in the sums allocated to combat white-collar offenses, the consumer crimes, frauds, conflicts of interest, government corruption and general economic crimes that abound in this country. Since the mid-1960s, commissions, congressional committees and others have found our criminal justice system to be in a state of serious decay, and Washington has since been pumping in enormous amounts of money to shore it up. The total now is $1 billion yearly—most of it earmarked for street and property crime. Only recently has the Law Enforcement Assistance Administration even begun paying limited attention to white-collar crime; it has allocated $2 million for work with selected prosecutors in devising ways to combat such offenses. This is very little, very late.

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This scarcity of funding is particularly worrisome because of the extra expense usually involved in combating white-collar crimes. Few prosecutors have the resources to carry out exhaustive investigations of serious "respectable" criminals. A white-collar crime can tie up both investigators and prosecutors for months merely in preparing for grand jury proceedings. Most white-collar criminals, moreover, retain their own counsels, who can further delay the case by forcing the government to respond to a wide array of motions and legal issues. Most prosecutors, therefore, can undertake such a rigorous process at present only at the expense of less activity against more conventional crimes. Far more money is needed to fight the white-collar crook, not less.

Calculating the Costs

THE RELATIVELY WEAK interest in fighting white-collar crime is surprising in light of the vast economic loss involved, the impact on public confidence in our system of justice, and the deterrence effect that a tougher attitude could have.

Economically, the U.S. Chamber of Commerce calculates the consequences of white-collar crime in the following ways. First, embezzlement and pilferage exceed by several billion dollars yearly the losses sustained from burglary and robbery. Second, fraud was a major contributing factor in the closing of about 100 banks during a 20-year period. Third, in one state the annual bill for all purchases dropped about 40 per cent following exposure and prosecution of businessmen and government officials for bribery and kick-

backs. Fourth, dishonesty by corporate executives and employees has increased the retail cost of some merchandise by about 15 per cent.

The chamber found that bribery, kickbacks and payoffs cost $3 billion a year; consumer fraud, illegal competition and deceptive practices cost us about $21 billion a year, including a government revenue loss of $12 billion (some of this in the form of tax fraud reported as prevalent among the self-employed especially in the medical, legal and accounting professions); and that securities theft and fraud cost about $4 billion a year.

The total annual cost, according to the chamber, is approximately $42 billion a year, most of which has a direct impact on ordinary citizens in terms of higher prices for merchandise, increased insurance rates and rising tax payments.

But beyond these financial costs is the more important question of public confidence in the fairness of our system of justice, to say nothing of confidence in government generally in cases involving leading public and private figures. What can the public think, for example, when none of the business executives who plead guilty to illegal 1972 campaign contributions receives a jail sentence? Watergate appears to be affirming long-held and deep suspicions about the injustice of our system. In prophetic words, the National Advisory Commission on Standards and Goals for Criminal Justice had this to say only a year and a half ago:

"Simply put, official corruption breeds disrespect for the law . . . To the majority of honest businessmen, their recognized competitor is one who 'pays off' for government contracts . . . The message is clear. Crime not only pays: it is the legal tender of public officials who have been tried and convicted of such crimes as bribery and conspiracy, and of an unknown number of other officials who have committed comparable crimes and escaped justice.

"No one can fail to realize the impact of public corruption on street crime. The . . . robber . . . burglar, and the murderer know that their crimes are pale in comparison with the larger criminality 'within the system.' And nowhere, unfortunately, is the cynicism greater than in this nation's prisons . . . A sense of injustice is endemic among prisoners, and it stems in large measure from the hypocritical system that tolerates lawlessness among its officials but makes scapegoats of less well placed offenders . . .

"In short, official corruption stands as a serious impediment to the task of reducing criminality in America. As long as official corruption exists, the war against crime will be perceived by many as a war of the powerful against the powerless; 'law and order' will be just a hypocritical rallying cry, and 'equal justice' will be an empty phrase."

The Deterrence Factor

FINALLY, THERE IS the pragmatic question of effectiveness: Does stiff sentencing of "common" criminals and light treatment of "upper-class" crooks help combat crime? The facts suggest that it doesn't.

There is much evidence that few of the usual objectives of sentencing—deterrence, rehabilitation, restitution—are met by putting common criminals in jail for long terms. Yet we continue this practice. Our jails and prisons are still filled with the young, the poor and the minorities, the ill-educated and the ill-prepared. More than half of those in jail are awaiting trial—too poor to afford bail.

If imprisonment does to appear to deter common criminals, can it work for educated individuals who make it in our world of work and status and then commit offenses? There is some evidence that tougher treatment of the white-collar criminal does indeed have a deterrent effect. One of the most celebrated white-collar cases before the Agnew and Watergate affairs involved General Electric and other corporations in massive price fixing on electrical equipment. Thirty-one executives received jail sentences, a unique event which, according to the Justice Department, sent tremors through the business community. Granted that most of the sentences were suspended; only seven offenders went to jail, and not for very long. But the department was convinced that the sentences had a deterrent effect on other businessmen. In 1967 it detailed its conclusions, stating that criminal fines or substantial civil penalties were insignificant punishment for the wealthy. The department regarded the moral stigma of a criminal proceeding and the possibility of incarceration as the greatest deterrence.

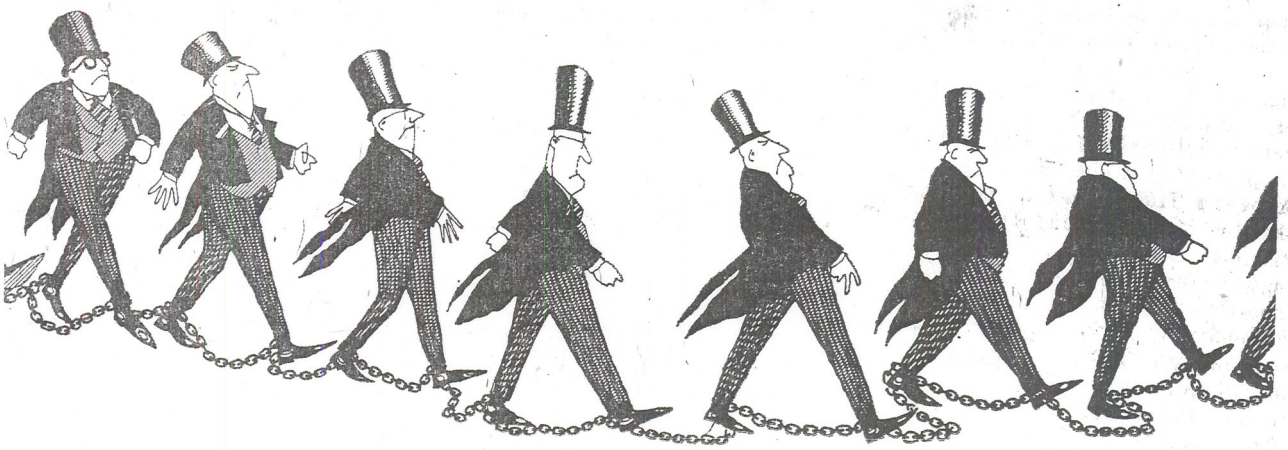
Appealing the Sentence

IT IS NOT inconsistent, therefore, to urge both reform of our present penal system and tougher treatment of white-collar criminals. The prison reformers have advocated improvements in our money bail system and increased use of community facilities and services as the major approach in corrections. Some have called for a virtual moratorium on the construction of new jails and prisons pending the expanded use of known and effective community alternatives. Most are working for the abolition of unreasonable legal and administrative restrictions on the ability of a person with a criminal record to obtain employment. These are chiefly intended to help combat "common" crime.

At the same time, firmer sentencing is needed for the rich and powerful. Former U.S. Attorney Whitney North Seymour believes that sentencing for white-collar crimes should have as its primary objective deterrence. He characterizes these crimes as deliberate and willful offenses which might be prevented by prompt and firm detection, prosecution and sentencing. To achieve deterrence, according to Seymour, a fixed minimum sentence should be mandated by law based on a percentage of the maximum sentence authorized by statute. The sentence would not be left to unregulated judicial discretion.

Both the American Bar Association and the National Advisory Commission on Criminal Justice Standards and Goals recommend appellate review of sentences. Both believe appellate courts should have the right to increase, as well as decrease, sentences.

The ABA, however, does not feel the state should have the right to initiate such an appeal. This matter should be reconsidered and the state's right to



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initiate a sentencing appeal in white-collar crimes should be given a second hearing.

The prosecutor's right to agree to a plea of guilty in a completely unfettered manner also should be closely examined. The ABA has adopted standards relating to guilty pleas aimed at assuring that the plea is not coerced and that improper considerations are not involved. One standard relates to the plea of nolo cntendere, or no contest.

This plea, notorious in the case of former Vice President Agnew, should be given close scrutiny. It is clear that legally a plea of nolo contendere is an admission of guilt and carries all the attributes of a guilty plea. But the public and many members of the bar are confused about its meaning. In Agnew's case, the court's acceptance of this plea has been used persistently to fog the issue of his guilt. The only difference between a plea of guilty and of nolo contendere is that the latter prevents the fact of conviction from being introduced into evidence in subsequent civil proceedings. A guilty plea permits such an introduction.

The ABA standard states that a nolo plea may be entered only with the consent of the court and goes on to say "Such a plea should be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice." This standard should be considered for expansion to cover judicial acceptance of guilty pleas by white-collar criminals. Moreover, consideration should be given to spelling out standards for the court's guidance as to when it can accept such pleas in these cases. In short, if judicial discretion is inadequate to represent "the interest of the public in the effective administration of justice," it is time for legislators to provide guidance.

Two Watergate Cases

WHAT ABOUT the sentences meted out to some Watergate defendants? Let's begin with the case of former Attorney General Kleindienst. He appeared before the Senate Judiciary Committee in connection with his nomination as Attorney General and lied under oath. The charge, which could have been the felony of perjury, was reduced to refusing to testify on one point, a misdemeanor.

From a possible sentence of many years in prison Kleindienst was left with a potential maximum of just one year. Not only was possible prison time substantially decreased but other effects of the crime, particularly his ability to continue practicing law, were also favorably affected. Appearing before Federal District Court Judge George L. Hart Jr. for sentencing Kleindienst found himself lauded for his loyalty and the recipient of a suspended 30-day sentence.

The ABA has declared that imprisonment serves a useful purpose if any other disposition "would unduly depreciate the seriousness of the offense." Did such a lenient sentence "unduly depreciate" the seriousness of Kleindienst's offense?

What impels judges to hand out lenient sentences in cases where obvious trust as been breached by individuals of great status in our society? What does a judge feel when he sees before him an individual close to him in background, age, and until the crime, respectability and status in the community? And what does this same judge, generally white and middle class, feel when he sees a young, frequently black male accused of common crimes? The sentencing judge apparently sees a reflection of himself in the white-collar offender. The argument that the fall from grace is punishment enough for the rich and powerful undoubtedly holds great sway as the judge looks down upon the white-collar defendant. Such feelings may be human, but they offend society's sense of fairness.

The colloquy between Federal District Judge Gerhard A. Gesell and Charles Colson's defense attorney raises different issues. Colson's attorney stated that if Judge Gesell sentenced his client to prison, it would be in response to public expectations engendered by strong feelings about the Watergate affair. The defense attorney intimated that this would be an improper consideration for the judge. Judge Gesell responded by stating that the defense attorney was barking up the wrong tree and proceeded to impose a sentence of one to three years for Colson, the stiffest punishment imposed so far on a high-ranking defendant in the Watergate case.

Should public expectations affect the judge's sentence? While the ABA believes in imprisonment if other disposition would "unduly depreciate" the seriousness of the offense, it does not believe community hostility toward the defendant is a legitimate basis for imprisonment. But what about public expectation or public feelings? Is that the same as "community hostility?" The ABA also believes that failure to impose a prison sentence for certain white-collar offenses might destroy the confidence of the public, so clearly it does not believe that public expectations and feelings are the same as community hostility.

Why shouldn't a judge take public expectations and feelings into account when sentencing convicted offenders, particularly white-collar criminals whose offenses threaten the integrity of our political processes and our system of justice? This is the essence of the matter.

White-collar crimes are carefully considered, planned and executed in the most sophisticated manned by educated individuals who have been placed in positions of high trust by a business organization or the public. These are crimes which can threaten the very existence of a free and open society.

At the heart of this issue is the recognition that ultimately our system of justice will work only if the public has confidence in its fairness. If rich and powerful criminals receive minor sentences, the system will truly be threatened. In the final analysis, to have an effective system of criminal justice, the public must feel that the government and the social order deserve credence, respect and loyalty.

People also have to feel that those who pronounce sentence live up to their image of black-robed and impartial justice. The sentencing power of judges has been characterized as "terrifying and intolerable for a society that professes devotion to the rule of law." Judge Marvin Frankel, a federal district court judge in New York City, believes that the discretion given by statute to sentencing judges is so unconfined as to render judges "subject to no law at all".

Sentencing has been called a human process, subject to the weaknesses of humanity. The restoration of public confidence in our system of justice demands that standards and restraints be imposed on judicial sentencing practices.