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Criminal Code: Justice Replies

By Henry E. Petersen

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I AM SOMEWHAT disheartened by the article "Making It All Perfectly Legal" by Richard R. Korn and Gregory B. Craig which appeared in the Outlook section of Jan. 20. The subject of the article was S. 1400, a Senate bill designed to reform the entire body of the substantive federal criminal law, which was drafted within the Department of Justice and transmitted by the administration to the Congress in March of 1973. The article contains unfortunate innuendo and a number of inaccurate and misleading statements.

1. THE GENERAL theme of the article is that S. 1400 is "the quintessence of the law and order backlash" that takes "advantage of everything that confused and frightened Americans in the 1960s" and that it "matches the civil libertarians' worst nightmares." The bill's author is identified as "the Justice Department of John Mitchell," in which, it is pointed out, John W. Dean III "became the direct beneficiary of Mitchell's patronage." Implicit in the article is the suggestion that certain defenses to criminal prosecutions may have been included in S. 1400 with an eye to benefitting certain public officials involved in the Watergate matter.

S. 1400, which is based largely upon the draft bill produced in January, 1971, by the National Commission on Reform of Federal Criminal Laws [known as the Brown Commission after its chairman, former California Gov. Edmund G. Brown], was drafted by a special group of career attorneys in the Department of Justice working in consultation with attorneys of other federal departments and regulatory agencies that would be affected by this legislation. Their work was reviewed by a committee headed by me. The review in the Department of Justice went no further.

The spirit in which this work was carried on was accurately described by Judge Joseph T. Sneed, then deputy attorney general and former dean of Duke University's Law School, in testimony before the Senate Judiciary Committee:

"Let me stress that we have constantly sought to produce not just a useful assemblage of prosecutor's tools, but also as fair a series of provisions as could be drafted. The critical importance of fairness in a criminal code is apparent to us as citizens. It is also apparent to us as lawyers whose work under unfair statutes would very quickly and very properly be undone by the courts. This is a matter of great importance to us . . . We have consistently considered fundamental fairness —to potential defendants, to defendants and to society as a whole—to be an imperative."

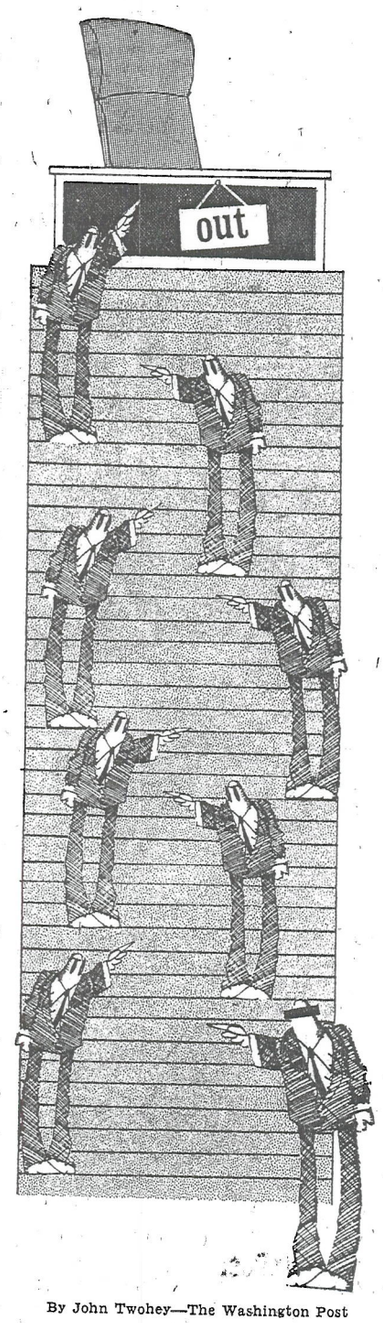
Whether or not everyone would agree that the product of this effort, in all of its provisions, has achieved the balance we attempted, to dismiss the entire proposal as a series of draconian provisions does service neither to the facts, the public, nor the career attorneys who produced it.

The inference suggested in the opening paragraphs of the article and at a few points thereafter—that the defense provisions of the bill were inserted by or on behalf of individuals accused of complicity in the Watergate matter—is nothing short of ludicrous. Suppressing a more direct response, I will tender only a chronological accounting, pointing out that the two defenses in question were drafted in the Department in mid-1971 and mid-1972; that the bill was transmitted to the Congress on March 22, 1973, before rather than after the reading of the [James W.] McCord letter [to Judge John J. Sirica]; that a bill of such scope obviously would require at least two or three years after introduction to wend its way through the appropriate congressional committees and reach the point of passage; and that the bill expressly provides that it is not to become effective until two years after its passage.

2. THE PRINCIPAL, direct charge levelled by the article is that, in the chapter on defenses to criminal prosecutions, the defenses entitled "Public Duty" brazenly extend the law in providing defenses to public officials accused of wrongdoing. They would not.

The public duty defense does not "give greater license to officials" than does current law. It is probably as accurate a statement of the current case law as is possible to devise. It certainly would give no public official a defense to a prosecution in the sorts of situations with which the authors profess concern. Even the allegation that S. 1400 and the Brown Commission Code would expand upon the recommendation contained in the Model Penal Code [published by the American Law Institute in 1953]—on the questionable assumption that the Model Penal Code is more relevant than current law—is not wholly accurate. The Model Penal Code would permit a defense where the defendant "believes" his conduct to be authorized in certain circumstances; the S. 1400 insertion of the word "reasonably" before the word "believes" is a cutback from the prospective reach of the Model Penal Code's formulation in such instances. (Section 3.03 (3) (a) MPC, Proposed Official Draft.)

The allegation that the defense of "official misstatement of law" would "turn the case law topsy-turvy as far as officials are concerned" is also without basis in fact. This defense, too, reflects the current case law, except to the extent that it cuts back on the existing law by requiring that any reliance upon an agency's interpretation of the law be "written" and be "issued by the head of (the) agency." Moreover, as an affirmative defense, the burden would be upon the defendant to establish to a jury that his reliance upon the official misstatement of the law was reasonable and was in good faith. The defense has been applied in appropriate circumstances in the past —see *Cox v. Louisiana*, 379 U.S. 559 (1965) (involving defendants engaged in a civil rights demonstration); *U.S. v Laub*, 385 U.S. 475 (1967) (involving a defendant who traveled to Cuba in violation of State Department regulations); and *Raley v. Ohio*, 360 U.S. 423 (1959) (involving defendants charged with contempt of court for invoking their privilege against self-incrimination)—and it would continue to be available in appropriate circumstances in the future. By no stretch of the imagination could it be construed to reach the situations hypothesized by



By John Twohey—The Washington Post

the authors of the article. (See generally, L. Hall and Seligman, "Mistake of Law in Mens Rea," 8 U. Chi. L. Rev. 641 (1941); J. Hall, "Ignorance and Mistake in Criminal Law," 33 Ind. L. J. 1 (1957).) Moreover, not only is most state case law similar, so is the comparable provision of most modern state codes. (See e.g., Section 15.20 of the New York Revised Penal Law.)

As to the authors' ultimate doubts about the wisdom of codifying defenses at all, it should be recognized that any such codification can provide only the broad outlines of the law, as do the generalized statements of such law prefacing the specific holdings in the current case decisions. Application of these principles to the myriad fact situations possible must continue to be left to the sound judgment of the courts and the common sense of juries.

3. WHILE THE above allegations constituted the foundation of the authors' primary attack, in the course of their article they made several other plain misstatements which demonstrate unfamiliarity either with S. 1400 or with current law. Among those misstatements are the following:

• The authors allege that "S. 1400 would make it easier to wiretap." It would not. S. 1400 parallels precisely the reach of the current wiretapping statutes even to the extent of retaining some of the more unwieldy language of the current statutes in an effort to allay any possible concern that attempted simplification might alter their scope. (Compare sections 1532-1534 and 3125-3131 of S. 1400 with 18 U.S.C. 2510-2520.)

• The authors claim that "S. 1400 would make it easier to . . . entrap suspects." It would not. The entrapment provision of S. 1400 codifies the case law consistently announced by the Supreme Court for over 40 years. (Compare Section 531 of S. 1400 with the decisions in *U.S. v. Russell*, 411 U.S. 423 (1973); *Sherman v. U.S.*, 356 U.S. 369 (1958); and *Sorrells v. U.S.*, 287 U.S. 435 (1932).)

• The authors allege that S. 1400 would restore "the 'guilt by association' provision of the Smith Act, which the Supreme Court found unconstitutional," and "repudiate the 'clear and present danger' doctrine." It would not. The only portions of the Smith Act, 18 U.S.C. 2385, that would be carried forward by S. 1400 are those that have specifically been held constitutional by the Supreme Court. The language employed—singled out and quoted by the authors of the article as exemplifying its unconstitutional breadth—is taken directly from Supreme Court decisions to insure that the statute would stay within the bounds set by the Court. *(Dennis v. U.S.*, 341 U.S. 494, 499-511 (1951); *Yates v. U.S.*, 354 U.S. 298, 321, 325 (1957); *Noto v. U.S.*, 367 U.S. 290, 297-298 (1961); and *Scales v. United States*, 367 U.S. 203, 234 (1961).) The "clear and present danger" test does not appear in S. 1400, just as it does not appear any place in current statutes, for the simple reason that it is an implied constitutional limitation, the statement of which in a statute would be redundant at best. *(Dennis v. U.S.*, 341 U.S. at 512-15; *Scales v. U.S.*, 367 U.S. at 230.)

• The authors assert that S. 1400 seeks "more power for the state" than S. 1, another proposal for a federal criminal code which has been introduced by Sens. McClellan, Ervin and Hruska. I am not sure of the measure the authors would use to determine what would constitute "more power for the state," but most lawyers would measure such power contained in a federal code by the provisions granting federal jurisdiction to prosecute the criminal offenses therein defined. An examination of S. 1400 will readily reveal that the jurisdictional reach of that bill is clearly more circumscribed than that of S. 1, and, for that matter, materially more circumscribed than that of the Brown Commission.

4. IN THREE ofther areas—involving the insanity defense, the dissemination of classified information and the death penalty—the authors have made reference to the S. 1400 provisions in a fashion that hardly suggests any sensitivity on the part of the Department to the serious social and policy considerations involved. All three areas, however, have been the subjects of extensive and thoughtful evaluation during the drafting process, and have been specifically pointed out by the Department to the Congress as matters involving controversial points warranting hearings, close examination and dispassionate consideration. Hearings with respect to two of those areas have already been held.

Insanity is a defense to a prosecution under S. 1400 only if the defendant was not aware of what he was doing. Defendants suffering from a less debilitating mental disease or defect, though found by a jury to have committed the criminal act with the requisite criminal intent, would be entitled to a special pre-sentencing proceeding at which psychiatric testimony, free of the ordinary confines of the rules of evidence, would be admissible. The judge would then sentence the individual, where appropriate, to psychiatric treatment in a hospital or an outpatient clinic rather than to incarceration in a federal prison. The procedure was devised as a reasonable and humane alternative to the current swearing contest between government and defense psychiatrists. (See sections 502 and 4221-4225 of S. 1400.) The allegation that in S. 1400 insanity "is no longer to be recognized as a disease by the law" is not a fair characterization.

The provision concerning dissemination of classified information by government employees would, in a more careful analysis, be acknowledged to restrict current law in at least as many areas as it extends it. (Compare section 1124 of S. 1400 with 18 U.S.C. 798, 42 U.S.C 2274 and 2277, and 50 U.S.C. 783(b), and *Scarbeck v. U.S.*, 317 F 2d 546 (C.A. D.C. 1962).) Moreover, to the extent that the authors' language may be interpreted as suggesting that disseminating classified information is not now punishable at the felony level, it should be noted that the current statutes carry penalties of 10 years or more while S. 1400 carries a three-year maximum penalty (or a seven-year maximum if the information was delivered to a foreign agent.)

The authors state that S. 1400 would "reimpose a mandatory death penalty for certain offenses." The provision referred to cannot fairly be categorized as mandatory in the traditional sense. While certainly the incorporation of the death penalty at all is a matter of justifiable controversy, if there is to be a death penalty under any circumstances the provision set forth in S. 1400 deserves to be recognized as a carefully circumscribed proposal. It is limited to a very narrow range of offenses and attendant circumstances; it is designed in a fashion that will afford the maximum deterrent protection to victims of rapes, kidnapings and aircraft hijackings; and it is made subject to an objective, post-verdict determination by a jury. It is, in my view, more rationally devised than any other death penalty proposal pending in the Congress or pending or passed in any of the state legislatures. (See sections 2401 and 2402 of S. 1400.)

A work of scope encompassing the entirety of the federal criminal law is bound to include some provisions that will create, or recreate, legitimate controversy, but these provisions should be recognized for what they are—relatively minor segments of a major work containing literally hundreds of improvements in the federal criminal law. Certainly they warrant thoughtful discussion rather than innuendo and ill-considered extrapolation. The federal criminal code proposed by the Department of Justice, as well the codes proposed in S.1 and in the Brown Commission report, will receive careful and reasoned consideration in the Senate and House Judiciary Committees, and I hope that they will receive similar consideration in the press.