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Essay

THE EROSION OF LEGALITY IN AMERICAN CRIMINAL JUSTICE: SOME LATTER-DAY ADVENTURES OF THE *NULLA POENA* PRINCIPLE

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In an era of legal thought characterized by an extraordinary preoccupation with the rights of persons, comparatively less attention has been given to the complex of rights and restraints implicit in the *nulla poena* principle than to those identified in other parts of the legal universe.[1] The grand old Latin maxims, *Nulla Poena sine Lege* and *Nullum Crimen sine Lege*, which, while not ignored in modern thought, pose issues apparently less interesting to many students than those arising from the first amendment, for example, or those involving invasions of personal privacy or the practice of criminal interrogation. At least at first glance, this may appear surprising; for, after all, the devotion to the *nulla poena* and *nullum crimen* concepts by free societies may constitute one of the characteristics that most sharply distinguish

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1. The maxim *Nulla Poena sine Lege* can be translated as "No punishment without (pre-existent) law." For the purposes at hand, I am treating the maxim as incorporating the value of due notice to potential offenders of the possibilities of criminal liability, and also, more generally, that of providing meaningful guidance to judges and administrative officials as they exercise their powers in the criminal justice system. More elaborate analyses are not lacking: J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 27-70 (2d ed. 1960); Elliot, *Nula Poena Sine Lege*, 1 JURID. REV. 22 (1956); Glazer, *Nullem Crimen Sine Lege*, 24 J. COMP. LEG. & INT. L. 28 (3d ser. 1942); Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165 (1937); Zupancic, *On Legal Formalism: The Principle of Legality in Criminal Law*, 27 LOY. L. REV. 369 (1981).

such societies from authoritarian or totalitarian regimes.[2]

The *nulla poena* proposition, obviously, constitutes part of a broader concept of legality.[3] Most American lawyers, nurtured on constitutional doctrine, tend first to equate *nulla poena* with provisions in both federal and state constitutions forbidding the enactment of *ex post facto* laws;[4] indeed, enactments that literally criminalize behavior not forbidden when committed or which impose more severe penalties than those authorized at the time of commission, do clearly offend basic notions of legality.[5] But *nulla poena* is much more pervasive. It has something to say about cases in which a criminal prohibition precedes the behavior in question, but in which the existence of the law was unknown to the actor and in all reasonable probability could not have been discovered by her.[6] The *nulla poena* principle is implicated in problems of ambiguity and vagueness in the interpretation of criminal statutes. These are the topics perhaps most frequently discussed under the rubric of *nulla poena*, but, as will shortly be seen, it has important relevance to the discussion of a wide range of other issues.

The remarks that follow do not constitute an exercise in jurisprudential theory. Systematic theory, of course, is important, and the decision here to employ other modes of discourse reflects no conviction that the pursuit of theory lacks value or relevance. Yet, if an heretical observation be permitted, it may well be true that the vitality of the principle of legality depends less on our ability to articulate it in comprehensive and coherent theory than

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2. The German Act of June 28, 1935, *quoted in* Zupancic, *supra* note 1, at 411 n.99, is often viewed as the authentic statement of the totalitarian posture:

> Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of a penal law and sound popular feeling, shall be punished. If there is no penal law directly covering an act it shall be punished under the law of which the fundamental conception applies most nearly to the said act.

In fact, the Russian Penal Code of 1926, R.S.F.S.R. PENAL CODE, Art. II-6, contained a considerably more open-ended provision:

> A crime is any socially dangerous act or omission which threatens the foundations of the Soviet political structure and that system of law which has been established by the Workers' and Peasants' Government for the period of transition to a communist structure.

See also J. HALL, *supra* note 1, at 66-67.

3. "Legality" or "the rule of law" is ordinarily understood as incorporating the *nulla poena* values. In addition, the concept of procedural regularity is included and, in some statements, the values of fairness and equal treatment. J. HALL, *supra* note 1, at 27 n.1; 1 H. SILVING, CRIMINAL JUSTICE 172 (1971). The late Lon Fuller itemized eight conditions for the "law's inner morality": generality, open promulgation, prospectivity, clarity, absence of self-contradiction, requiring only the possible, constancy through time, congruence of official action and official norm. L. FULLER, MORALITY OF THE LAW 42-94 (1964).

4. U.S. CONST. art. I, §§ 9, cl. 3, and § 10, cl. 1. ARIZ. CONST. art. 2, § 25.

5. Calder v. Bull, 3 Dall. 386 (1798); Fletcher v. Peck, 6 Cir. 87 (1810); Ex parte Garland, 4 Wall. 333 (1867); Duncan v. Missouri, 152 U.S. 377 (1894).

6. The paradigm case is that of Mrs. Lambert who, unaware of the existence of a Los Angeles municipal regulation, failed to register as one who had been convicted of a felony in another jurisdiction. The Supreme Court of the United States reversed the conviction, it being inferred that defendant lacked knowledge of the regulation and that there was no reasonable probability of one in her position having such knowledge. Lambert v. California, 355 U.S. 225 (1957). The Model Penal Code does not build on the *Lambert* holding, but instead, provides a defense of ignorance of law when the statute is not known to the accused "and has not been published or otherwise been reasonably made available prior to the conduct alleged." MODEL PENAL CODE § 2.04 (3)(a)(Part I, 1985). The full potentialities of the *Lambert* holding are as yet unrealized.

on the existence in society of a nurturing purpose and morale.[7] What these remarks are concerned with is the state of that morale in modern American society, what the factors are that weaken it, and what, if anything, can be done to invigorate it.

WHY THE *NULLA POENA* PRINCIPLE HAS BEEN SLIGHTED

It may be profitable at the outset to speculate for a moment on why the *nulla poena* principle appears to have been slighted in some modern discussions of individual rights. Contradictory explanations may be possible. First, the essential rightness of the principle in many of its most important applications appears so obvious that, its validity having been acknowledged, there may seem little more to say. Of course it violates the intuitive sense of justice that persons should be entrapped into criminal liability and subject to penal sanctions without adequate warning and fair opportunity to avoid the pains and penalties of the criminal law. Of course it is obvious (to most persons at least) that hopes for a society respectful of human values depends importantly on there being a viable system of comprehensible authoritative norms that contain and direct the exercise of power by judicial, executive, and administrative officials.

The intuitive response to the *nulla poena* principle can perhaps be best observed when one encounters a situation in which it has been flouted. A case arising in the early 1950s in what was then the Soviet Zone of Germany provides an illustration.[8] The facts, as reported by the International Commission of Jurists, go something like this: Defendant, a man named Volkman, was a resident of the Soviet Zone. He had no previous criminal record. Hearing a rumor that a forbidden zone along the borders of East Germany was under construction, he lawfully travelled to a newspaper office in West Berlin to learn what evidence the journal had to support its earlier report of such construction. Volkman was convinced of the accuracy of the report by the evidence shown him, and upon returning home, reported the facts as he understood them to several witnesses.

Because of his statements Volkman was arrested, placed in custody, and charged with offenses described as boycott-incitement and propagation of incitement to war. He was convicted, sentenced to three years of hard labor, and stripped of an impressive array of civil rights, including the right to be a member of a labor union. In justifying the conviction the municipal judge said:

> He [the defendant] could have seen clearly that the establishment of a prohibited zone along the border does not serve the purpose of bringing together and reuniting a Germany that has been divided by the monopolistic capitalists. The defendant knows the realities of life. He sees and knows that the peace-loving peoples of the world are striving to preserve world peace under the Soviet Union and that they are stak-

7. *Cf.* C. K. ALLEN, LAW IN THE MAKING 503 (5th ed. 1951) (". . . [W]e are driven, in the end, to the unsatisfactory conclusion that the whole matter ultimately turns on impalpable and indefinite elements of judicial spirit or attitude.").

8. INTERNATIONAL COMMISSION OF JURISTS, JUSTICE ENSLAVED 14 (1955).

> ing everything on the prevention of a third world war. . . . He knows that we have only one struggle, the establishment of German unity in order to give the world peace camp yet another formidable partner in the fight against the imperialist war mongers. He therefore also knows that nothing is ever done by the Soviet Union that stands in contradiction to these great aims. But the creation of such a zone would represent a preparation for war and would be just as dangerous a threat of war as a divided Germany is. . . .[9]

It is interesting to note the court's insistence on the defendant's preexisting knowledge of the falsity of his report. Perhaps even in a totalitarian society the legitimacy of serious criminal punishment depends significantly on a demonstration that the accused acted with purpose or knowledge to injure social interests. The denouement of the case occurred only a few months later when the government issued a decree establishing a prohibited zone along the demarcation line, thus confirming the essential particulars of the report the defendant had circulated. The prisoner appealed his conviction, presumably noting the events that had occurred since his trial. The appellate tribunal summarily denied defendant's appeal, characterizing it as "obviously unfounded."[10]

The sense of injustice generated by the tale springs spontaneously from the telling. No elaborate analysis is required to feel or justify it. A man is severely punished for engaging in public discourse. He is convicted under statutes that apparently contained inadequate warning that his acts might be punishable, leaving the dispensers of official power substantially free to impose pains and penalties whenever they deemed those penalties to be expedient. And when the rationale of the conviction was destroyed by the march of events, the system proved unwilling or unable to modify its results.

The atmosphere of reserve surrounding modern discussions of *nulla poena*, however, cannot be explained entirely by the self-evident rightness of the principle. In its less obvious applications, at least, consideration is dampened by very nearly opposite perceptions. As one considers the notion that penal law must be fully defined before the public force is applied, both in the interests of fair warning to the accused and also the containment and guidance of official power, he quickly discovers that occasions for its application in the actual administration of justice are limited in number. There are broad areas of administration of great importance in which the principle does not, and perhaps cannot, fully condition the application of penal power. These, of course, are not new discoveries; and for a very long time it has been understood that assigning a proper role for the *nulla poena* principle in the actual operation of social institutions presents difficult problems of definition and accommodation.

ACHIEVING THE VALUES OF LEGALITY IN THE FACE OF CHALLENGES

My purposes in approaching these questions are not primarily polemical. Nor do I seek a comprehensive conceptual definition of the *nulla poena*

9. *Id.* at 17.
10. *Id.*

principle that delineates its proper role in all possible situations and contingencies confronted in the administration of justice. What needs consideration are some of the circumstances and realities that obstruct a full and literal achievement of a legal order in which the exercise of official power is fully contained by the rule of law and in which potential offenders are fully warned of the hazards of criminal liability. Since such realities limiting the full expression of the *nulla poena* principle do exist, a matter of much practical concern then becomes how the values of legality can be maximized when full realization of the principle seems impossible to achieve.

The Fallibility of Language

Discussions of "the rule of law" frequently, and for good reasons, begin with a consideration of the fallibility of language. Verbal communication, of course, is beset by irreducible imperfections; but beyond the inherent fallibilities, one may be sure that the language employed by any operating system will often fail to reach the levels of articulation ideally attainable. Reflective lawyers long before Henry Adams knew that "words are slippery and thought is viscous,"[11] and have joined in spirit with T.S. Eliot bemoaning

> . . . the intolerable wrestle
> with words and meaning.[12]

Perhaps the most important consequence of these realities is that they give rise to the problem of interpretation. The language of statutes defining criminality and specifying penalties produces conflicting readings, and authoritative resolution of the conflicts is required. In the ordinary course of events, the judicial interpretation will be made after, not before, the behavior alleged to be criminal is committed; and if the dispute concerning statutory meaning was a substantial one, the rendering of the subsequent authoritative interpretation may impinge substantially on the principle of prior notice to prospective offenders embraced in the *nulla poena* maxim.[13] Nor does the matter end here. The judicial interpretation itself is a product of language, and may display the characteristic fallibilities of statutory language plus some of its own. Thus, interpretation breeds new interpretation, and the result can often be to enlarge rather than reduce the departure from the *nulla poena* ideal. There comes a point, of course, in which the deficiencies of statutory language cannot be ignored, and courts may disregard statutes on grounds of *casus omissus* or invalidate them by invoking the constitutional doctrine of void for vagueness.[14] These doctrines are employed sparingly by the courts, however; one may feel all too sparingly. Yet even a

11. H. ADAMS, THE EDUCATION OF HENRY ADAMS 451 (1918, 1931).

12. "Four Quartets: East Coker" *in* ELIOT, THE COMPLETE POEMS AND PLAYS, 123, 124 (1952).

13. *Cf.* Justice Holmes in Nash v. United States, 229 U. S. 373, 377 (1913) (". . . [T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment . . . ; he may incur the penalty of death.").

14. On *casus omissus* see 2 SUTHERLAND, STATUTORY CONSTRUCTION § 605 (1904). Leading cases on the vagueness doctrine include Connally v. General Construction Company, 269 U.S. 385 (1926); Lanzetta v. New Jersey, 306 U.S. 451 (1939); Winters v. New York, 333 U.S. 507 (1948); Colautti v. Franklin, 439 U.S. 379 (1979). *See also* Amsterdam, *The Void for Vagueness Doctrine,*

more liberal application of the vagueness doctrine would leave untouched the overwhelming majority of statutes presenting problems of ambiguity, omission, and inexactitude. The requirements of an operating system of criminal justice demand considerable judicial accommodation to the defects of statutory language. Counsels of perfection do not flourish in the context of day-to-day operations.

Even if one could conceive of a legal prescription stated with perfect clarity and admitting of no readings other than that intended by the writer, a need for interpretation might ultimately arise because the context in which the statute operates has changed. For centuries we have been told that murder is the killing of another human being with malice aforethought. But has an accused "killed" when by reason of his act the victim has suffered "brain death" but whose heart beat and respiration are being maintained by artificial means? The question could not have arisen when the murder formula was first articulated, for the circumstances supposed could occur only when medical technology entered into its present stage of development. Having arisen, the question must be answered by interpretation, unless it has been anticipated and resolved in advance of adjudication by a statutory modification of the murder definition.

What has just been said are commonplaces. They express little more than the sophistication of the first-year law student. It is difficult to believe that intelligent lawyers of earlier times could have been unconscious of these realities. Certainly, an understanding of them is part of the ordinary equipment of the modern judge, legislator, and practitioner. For present purposes, what is important to be asserted is that the fallibilities and inexactitudes of verbal communication neither render the aspiration of legality naive nor, of themselves, deny important substance to the *nulla poena* principle. To be sure, reflection makes clear that the achieving of the values of legality cannot be gained easily or maintained without effort. It is also clear that the values can be realized only partially. Accommodations to the inherent fallibilities of verbal communication must be made, and compromises necessitated by the inescapable exigencies of an operating justice system will be struck. It is possible that the processes of accommodation and compromise may subvert or unnecessarily constrict the values. What this implies is that the values of legality today, as in the past, can be gained only by struggle. The question is not so much whether the values are capable of realization in American society as it is whether in the *malaise* of the times our morale can be pitched at levels sufficient to maintain the struggle.

As we are all aware, there has been a good deal of writing in recent years that takes a much more pessimistic view of the resources of language to maintain and advance the values of legality. I shall attempt no detailed description of the literature, and my cursory treatment of it, no doubt, risks doing it injustice in various particulars. One of the announced purposes of the literature is to "demystify" language.[15] To one intellectually alive in the

109 U. PA. L. REV. 67 (1960); Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985).

15. An essay directed, *inter alia*, to this end is Frug, *Henry James, Lee Marvin and the Law*, NEW YORK TIMES BOOK REVIEW 1 (February 16, 1986).

twentieth century, the effort may seem almost a work of supererogation. Anyone cognizant of such features of the twentieth-century landscape as Freudian psychology, Marxist polemics, and a revived fundamentalist religious exegesis, has been exposed to a very considerable education in the limitations and perversions of language. The central point of the argument, however, is the assertion of a wide, if not unlimited, freedom of the reader to find his own "meanings" in a text. The work of certain modern literary analysts asserts the dominance of the reader over the text. Because of his virtual freedom to assign meanings to the text, the reader will choose those that comport with his own interests and values. Hence "official" readings of legal texts by judges and administrators represent simply the interest of the stronger. The significance of language as a constraint on official behavior dwindles or disappears entirely. Right-minded persons are exhorted to employ their freedom to achieve readings of legal texts that express their more elevated social values.

Others better qualified than I must be relied on to evaluate the uses this critique makes of modern literary theory. It is apparent, however, that not all modern theorists accept so expansive a view of the reader's freedom as that described.[16] It seems likely, also, that most writers of serious literature feel a greater power than that suggested above to impose meanings on their texts and so to determine within narrower limits the readers' understanding of them.[17] A commonsensical approach to the matter might suggest that the degree of freedom a reader possesses in interpreting written language depends significantly on the kind of text he or she is reading. Certain forms of imaginative fiction may be written with the purpose, not of communicating unitary meaning, but rather of triggering personal and idiosyncratic images and reactions in the individual reader. The problem of "interpretation" facing such a reader seems significantly different from one seeking to understand a specimen of legal discourse—a statute, judicial opinion, long-term lease, or Marks lecture.

Permit me to make one final point before happily concluding this part of the discussion. It must be clear that theories relating to communication of understanding are as much theories about the human condition as they are about language. If, indeed, human capacities to communicate are so limited that understandings of readers and auditors cannot be confined within a relatively narrow spectrum of alternatives, then there emerges an even more atomistic picture of the human species than we may have heretofore suspected. It presents a picture of discrete individuals separated by walls of incomprehension. We may be compelled to reject John Donne's assurance

16. *E.g.*, W. BOOTH, CRITICAL UNDERSTANDING (1979); E. D. HIRSH, JR., VALIDITY IN INTERPRETATION (1967). Professor Frug cites these and other works, but does not analyze the positions taken. Frug, *supra* note 15, at 28.

17. E. D. HIRSCH, JR., *supra* note 16, at 18 ("Most authors believe in the accessibility of their verbal meaning, for otherwise most of them would not write."). *See also* a recent review of V. S. PRITCHETT, A MAN OF LETTERS (1986) ("There is no fussing—a la Barthes or Foucault—about the Death of the Author, since what Mr. Pritchett cares about, perhaps beyond anything else, is evoking what an author is like. The assumption—for me an attractive one—is that we read to make contact with distinct imaginations, unlike any other including our own and precious for that very reason.") Pritchard, *Book Review*, NEW YORK TIMES BOOK REVIEW 12 (May 4, 1986).

that no man is an island. Not only does the view imply separation from other human beings now living, but it, *a fortiori*, also bars us from an understanding of the past.[18] One wonders whether such a view rides well with a social philosophy that places high value on community and on human interaction.

The extreme language skepticism sometimes expressed in the literature just discussed seems to me to err, in the words of E. D. Hirsh, Jr., by confusing "the impossibility of certainty in understanding with the impossibility of understanding."[19] Accordingly, the case for radical pessimism about the contributions language can make to a realization of the values of legality appears not soundly based. Yet even if this conclusion be true, it provides no ground for complacency as one views the operating system of criminal justice in the United States. It is a system beset, as all will attest, by crisis and failure. In important measure, the crisis of American criminal justice is a crisis of legality. Although some of the central problems of criminal justice administration have not always been viewed in this light, they, in fact, involve failure to achieve the attainable values of legality, including some of those associated with the *nulla poena* principle.

Current Problems of Legality in American Criminal Justice

Consideration of the problems of legality in American criminal justice can reasonably begin with identification of important structural characteristics of the American system. Not all these matters bear directly on efforts to give fuller expression to the *nulla poena* principle, but cumulatively they provide the context in which such efforts must be made. A foreign visitor from the European continent or Japan, if asked to identify what to him is the most conspicuous feature of criminal justice administration in the United States, would likely point to its extraordinary fragmentation.[20] It is a system lacking in centralized administrative supervision, and one for which no single official or agency is politically responsible. Police agencies are not only widely distributed among the federal government and the states, but also, within each political sovereignty, each agency acts largely independently of the other.[21] In most states, prosecutors are popularly elected. As publicly

18. The significance of the past for social reform is addressed in H. MARCUSE, ONE-DIMENSIONAL MAN 98-99 (1964):

> Remembrance of the past may give rise to dangerous insights, and the established society seems to be apprehensive of the subversive contents of memory. Remembrance is a mode of disassociation from the given facts, a mode of 'mediation' which breaks, for short moments, the omnipresent power of the given facts. Memory recalls the terror and the hope that passed. Both come to life again, but whereas in reality the former recurs in every new forms, the latter remains hope. And in the personal events which reappear in the individual memory, the fears and aspirations of mankind assert themselves—the universal in the particular.

19. E. D. HURST, JR., *supra* note 16, at 17.

20. These matters are discussed more fully in Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L. FORUM 518, 524-25.

21. In 1965, it was reported that nearly 40,000 separate and independent police units existed in the United States. Within a fifty-mile radius of Chicago there were approximately 350 municipal, county, and state police forces. R. CALDWELL, CRIMINOLOGY 302 (2d ed. 1965). *See also* Note, *Disorganization of Metropolitican Law Enforcement and Some Proposed Solutions*, 43 J. CRIM. L., C. & P.S. 63 (1952).

elected officials possessing an independent power base, they are ordinarily able to resist whatever small efforts may from time to time be made to scrutinize and supervise their performance by the state attorney-general or other centralized authority.[22] The American prosecutor possesses large and imperfectly defined discretion with reference to the conduct of his office, and efforts to influence his options, by judicial intervention or otherwise, operate spasmodically and produce only peripheral impact.[23] Correctional systems within the states are typically allocated among cities, counties, and the state, a decentralization that tends to complicate even the enforcement of basic health regulations.[24] In short, it is a system ill-constructed to encourage the development of supervisory norms from within, and, because of its multifarious nature, often proves immune to effective regulation from without. It is a system, therefore, generally lacking in a tradition of administrative action effectively monitored by the rule of law.

The administration of criminal justice is resistant to the governance of authoritative norms, however, not simply because of a tradition that minimizes the rule of law, but also because of the existence of certain compelling facts of American social and institutional life. One of the most potent of these is the overwhelming weight of numbers confronted by criminal justice agencies, which, especially in urban areas, has transformed the American system from one of adjudication of guilt to one primarily of processing cases.

The consequences of this metamorphosis were strikingly illustrated over a decade ago by Frank Zimring and his associates in their study of homicide cases adjudicated in the trial courts of Philadelphia.[25] In one sample of 118 cases tried on pleas of guilty or by a judge without a jury, no defendants, surprisingly enough, were convicted of first-degree murder; and this occurred in a jurisdiction in which the formal rules of law, both substantive and procedural, were as favorable to the gaining of first-degree convictions as perhaps any in the country.[26] Equally arresting were the sentences im-

22. One factor that may ultimately contribute to the amelioration of the situation as described, is the important effort to subject the exercise of prosecutorial powers to meaningful standards. ABA, *Standards Relating to the Administration of Criminal Justice, Compilation, 73-99 (1974).*

23. The dangers of possible abuse of prosecutorial powers was a frequent theme of the late Justice Robert Jackson. At the Second Annual Conference for U. S. Attorneys in April, 1940, he said:

> [The most dangerous power of the prosecutor is] that he will pick people he thinks he should get rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of pinning at least a technical violation of some act on the part of almost anyone. In such a case it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books or putting investigators to work, to pin some offense on him. . . . It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

Quoted in V. NAVASKY, KENNEDY JUSTICE 396 (1977).

24. *Cf.* H. MATTICK & R. SWEET, ILLINOIS JAILS: CHALLENGE AND OPPORTUNITY 94 *et seq.* 1969).

25. Zimring, Eigen, O'Malley, *Punishing Homicide in Philadelphia*, 43 U. CHI. L. REV. 227 (1976).

26. Thus, the temporal requirements in the proof of "premediation" appear to involve no more than the proof of a specific intent to kill. Commonwealth v. Carroll, 412 Pa. 525, 194 A.2d 911 (1963); Commonwealth v. Earnest, 342 Pa. 544, 21 A.2d 38 (1941). The specific intent may be

posed on the convicted defendants for second-degree murder, voluntary manslaughter, and lesser crimes. In the 118 cases, eighty-two percent of the defendants received sentences of less than two years imprisonment. In only three percent of the total did sentences exceed six years.[27]

There is no mystery about what these numbers portray. There are cases that the system was disposing of "wholesale," cases being swept from the courts today to make room for cases in comparable numbers tomorrow or next week. The norms guiding the adjudication and sentencing were never articulated, and can only be inferred from an analysis of what was actually done. Whatever the norms, they surely were not those of the written law. Whether the present inundations of courts and correctional institutions make plea-bargaining systems inevitable, and whether such systems can be made more responsive to considered and articulate legal norms, cannot be considered further in these remarks.[28] However, they are questions clearly relevant when reckoning prospects for a "more lawful law" in a criminal justice arena.[29]

Adjudications of delinquency in the juvenile courts have also given rise to substantial issues of legality, some of which directly implicate the *nulla poena* principle. The modern critique of what had become the prevailing practices of American juvenile courts first became an effective vehicle for reform in the 1950s and '60s.[30] The critique extended to both the substantive and procedural ingredients of the courts' proceedings. The concept of delinquency, a finding of which was required to authorize the court's intervention in the lives of the children before it, was typically only meagerly defined. This lack of clarity gave rise to genuine possibilities of children and their parents running afoul of the authorities without adequate warning and, certainly, provided sparse guidance to the juvenile judge, the court's staff, and the police in the performance of their respective functions.[31] In addition, given the infrequency of appeals in juvenile court cases, no significant guidance could be found in the opinions of appellate courts. On the procedural side, for well over a half-century the children's courts operated with minimal consideration of constitutional due-process norms when apprehending children, detaining them, adjudicating their cases, and subjecting them to subsequent involuntary treatment.[32] The reform movement resulted in new legislation being enacted containing more articulate substantive stan-

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inferred from the intentional use of a weapon on a vital part of the victim's body. Commonwealth v. Moore, 398 Pa. 198, 157 A.2d 65 (1959).

27. Zimring *et al., supra* note 25, at 234.

28. Alschuler, *The Prosecutor Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983); *Cf.* Hughes, *English Criminal Justice: Is it Better Than Ours?* 26 ARIZ. L. REV. 507, 582-84 (1984).

29. Radin, *A Juster Justice, a More Lawful Law*, ESSAYS IN HONOR OF O.K. MCMURRAY 537 (1927).

30. F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 43-61 (1964).

31. "Yet it is true that in many jurisdictions the statutory definition of even the basic terms 'delinquent' or 'delinquency' are so amorphous and so all-inclusive that little practical guidance is actually provided." *Id.* at 21.

32. An instructive illustration of the early judicial attitude may be found in Rule v. Geddes, 23 App. D.C. 31, 50 (1904). *See* Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957).

dards than were usual in the old laws.[33] The notable holding of *In re Gault*[34] gave promise of an era in which juvenile court procedures would be brought into closer harmony with constitutional norms. Despite the accelerated criminalization of the juvenile court since *Gault* and its progeny, the position of a child before the court is still affected by anomaly and ambiguity,[35] and the change of focus, itself, has given rise to new and pressing issues of legality.[36]

There are, of course, many other areas of concern that might be canvassed in any calculation of the problems of legality in American criminal justice and in any assessment of the possibilities for a larger realization of legality values in the system's operation. One of the very important areas that must be slighted here is that of criminal sentencing. For at least a decade and one-half, a spirited effort has been made to construct a pattern of norms and practices that will induce principled exercises of sentencing powers, while, at the same time, reserving sufficient discretion in the sentencing judges to take proper account of the atypical features of particular cases. The task has proved a formidable one. As these remarks are being written, tentative guidelines issued by the recently created United States Sentencing Commission are receiving widespread attention and criticism.[37] A number of states have adopted similar reforms, and in some of these the innovations are under attack from trial judges and prosecutors.[38] The outcomes of the various reform efforts will almost certainly have significant impact on the character of American criminal justice in the decades ahead, and one of the most important issues, not yet resolved, is the degree to which sentencing powers are to be directed and contained by pre-determined official norms.

Statutory Interpretation and the Erosion of the Strict Interpretation Rule

Rather than give further consideration in these remarks to the much-discussed issues of criminal sentencing, I shall now turn to a final set of legality concerns: those arising from the processes of statutory interpretation. Such an announcement, I am aware, is hardly likely to elevate the

33. FLICKER, STANDARDS FOR JUVENILE JUSTICE: A SUMMARY AND ANALYSIS 54-56 (2d ed. 1982).

34. 387 U.S. 1 (1967).

35. F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 8, 10 (1981); *Cf.* Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 273 (1984): "Despite the criminalization of the juvenile court, it remains nearly as true today as two decades ago that 'the child receives the worst of both worlds: that [the child] gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.' " (citing Kent v. United States, 383 U.S. 541, 556 (1966)). It is also true that the changes brought about by *Gault* have not obliterated difficult issues concerning principles underlying representation of children in court. *See* Guggenheim, *The Right To Be Represented But Not Heard: Reflections on Legal Representation of Children*, 59 N.Y.U.L. REV. 76 (1984).

36. One example is discussed in Note, *The Expanding Scope of Prosecutorial Discretion in Charging Juveniles as Adults: A Critical Look at* People v. Thorpe, 54 U. COLO. L. REV. 617 (1983).

37. *United States Sentencing Commission Sentencing Guidelines: Preliminary Draft*, 40 CRL 3001 (Sept. 1, 1986).

38. The opposition in Florida to existing sentencing guidelines is discussed in a news story entitled "Legislation to drop sentencing guidelines endorsed by senators," MIAMI HERALD 29A (December 3, 1986). *See also* the critique of the preliminary guidelines proposed by the United States Sentencing Commission, Statement of John M. Greachen, On Behalf of the American Bar Association (December 3, 1986).

pulse of the reader. Indeed, broaching the topic in class to a group of skeptical law students often proves to be a prescription for boredom and somnolence. It may be instructive to inquire why such reactions are common. One reason may be that only a little experience with statutory language demonstrates that general "principles" of statutory interpretation and "maxims" of construction are more easily stated than applied in situations in which genuine questions of meaning arise. Perhaps, also, the students borrow a chapter from the extreme language skeptics, and perceive that general directions toward "strict" or "liberal" interpretation lack potency to constrain a judge or court not disposed to be constrained. On occasion, the language of strict or liberal interpretation may provide camouflage for perversions of the interpretive process. Thus, the language of strict construction may be useful in emasculating a statute or constitutional provision toward which the judge is unsympathetic; while the language of liberal construction may be employed to attempt legitimation of expansive flights of judicial legislation incapable of being realistically regarded as exercises of an interpretive process. Admittedly, discussion of statutory interpretation in criminal cases encounters difficulties and frustrations. Yet the subject presents some of the most important modern *nulla poena* concerns.

The recent and unremarkable Wisconsin case of *State v. Williquette*[39] may provide an entree into the difficulties of the topic. The defendant, a mother, had permitted her husband to have access to their child. The husband, to the defendant's knowledge, was a man of brutal propensities. The mother, therefore, knew or should have known that in granting the man control of the child, she risked its maltreatment at his hands. Indeed, the husband severely abused the child. The question at issue was whether the mother, whose role in the occurrence was wholly passive, had committed a felony under a Wisconsin statute providing penalties for one who ". . . tortures a child or subjects a child to cruel maltreatment. . . ."[40]

In his opinion, Chief Justice Heffernan asserts the question is not one of legislative power to penalize behavior like that of the defendant, but, rather, whether the state's conceded police power had been exercised in this statute. He concluded the language of the statute does not encompass the merely passive role of the wife. She did not "torture" the child nor did she "subject" the child to maltreatment. Nowhere in the statute is mere "permitting" prosecribed. The statute "is not sufficiently definite to give reasonable notice to a parent that the failure to act falls within the prohibited conduct of the statute."[41] For the appellate court to affirm the mother's conviction in response to some presumed general legislative purpose would be to usurp "the legislative prerogative to make the criminal law."[42] The arguments of the Chief Justice echo those frequently encountered in judicial opinions seeking strict readings of criminal legislation. The outcome of the appeal in the state supreme court may also be characteristic of the modern era, for the

39. 129 Wis. 2d 239, 385 N.W.2d 145 (1986).
40. WIS. ANN. STAT. § 940.201 (Supp. 1981).
41. *Williquette*, 129 Wis.2d at 265-66, 274, 275, 385 N.W.2d at 157, 160, 161.
42. *Id.*

conviction of the mother was affirmed. The opinion of the Chief Justice, joined by Justice Abrahamson, was filed in dissent.

The principle that "in the construction of a penal statute, all reasonable doubts concerning its meaning must operate in favor of the defendant,"[43] has been repeated in perhaps thousands of judicial opinions in the Anglo-American legal world during the last two and one-half centuries. I will now briefly consider questions that relate, first, to the role of the strict interpretation principle in modern criminal law and the reasons for an apparent ebbing of its vitality. Next, I will inquire whether reinvigoration of the strict interpretation rule is essential to the proper working of the *nulla poena* principle as well as to the realization of other broader values.

It would be premature to announce the demise of the rule of strict interpretation in modern criminal cases. Reliance on it in both prevailing and dissenting judicial opinions persists, and its invocation is no uncommon occurrence.[44] In addition to the usual form of its statement, a special rule of strict interpretation is occasionally articulated in federal cases. Thus in *United States v. Bass*,[45] Justice Marshall is found saying, "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States."[46]

Whether the matters just mentioned can be taken as evidence of the continuing vitality of the strict interpretation rule, however, is at best doubtful. Frequently, in analyzing judicial opinions in which the strict interpretation rule is relied on, one is left in doubt whether the rule determined the outcome in significant degree or, rather, the rule was invoked primarily as a means of articulating results based largely on other considerations. Also, one may accept the proposition that the values of federalism sometimes influence a narrower reading of federal criminal statutes than might otherwise result. At the same time, it must be noted that in recent years the federal

43. North American Van Lines v. United States, 243 F.2d 693, 696 (6th Cir. 1957).

44. Thus, in the modern era, the Supreme Court of the United States has said:

> . . . [A]s we have recently affirmed, 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' Rewis v. United States, 401 U.S. 808, 812 (1971). . . . In various ways over the years we have stated that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22 (1952). This principle is founded on two policies that have long been part of our tradition. First, 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.' McBoyle v. United States, 283 U.S. 25, 27 (1931). . . . Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.' H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks 196, 209 (1967). Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.

United States v. Bass, 404 U.S. 336, 347-48 (1971).

45. 404 U.S. 336, 349 (1971).

46. *Id.* at 349.

courts with fair regularity have read important new criminal legislation as constituting inappropriate objects for the rule of restraint because of perceived congressional purposes to enter areas of penal regulation theretofore regarded as of exclusive concern to state law and authority.[47]

There are, however, other and more positive indications of the waning of the strict interpretation rule. One of the clearest and most important of these is the rejection of the rule in the drafting of the American Law Institute's Model Penal Code.[48] Following the Model Code lead, or arriving at similar positions independently, a substantial number of state legislatures have enacted statutory principles that exclude the mandate of strict interpretation.[49] At the federal level, Congress, in recent years, has almost routinely included in its most important criminal enactments prescriptions of broad interpretation of the statutory language to achieve the legislative purposes, directions that some federal judges have heeded with considerable alacrity.[50] What may be the posture of many federal judges today is expressed in a statement by Judge Irving R. Kaufman in *United States v. von Barta*.[51] "This doctrine of strict construction," he wrote, ". . . has long been a tenet of American jurisprudence. . . . But the principle is just the start of the difficult process of statutory construction, for in some areas Congress has purposely cast wide the net of the criminal law."[52] Although the matter is scarcely one capable of mathematical demonstration, anyone who has considered the evidences with care will come to the conclusion, I believe, that the idea of strict interpretation has suffered significant erosion in the present century. Moreover, the tendency appears to have accelerated in the decades just past.[53] It

47. *E.g.*, Perez v. United States, 402 U.S. 146 (1971).

48. MODEL PENAL CODE § 102(3) (Part I, 1985).

49. A list of such state provisions may be found *id.* at 11.

50. Thus, the RICO legislation provides: "The provisions of this title shall be liberally construed to effectuate its remedial purposes." Title IX, § 904 a, 84 Stat. 941, 947 (1970). "Far from construing the statute narrowly, however, the courts, reflecting the natural fear of racketeering, have extended RICO beyond the broadest boundaries permitted by the statutory language, thereby defeating the congressional intent and raising serious constitutional questions." Bradley, *Racketeers, Congress, and the Courts*, 65 IOWA L. REV. 837, 838 (1980). *See also* Atkinson, *"Racketeer Influence and Corrupt Organizations," 18 U.S.C. §§ 1961-68: Broadest of the Federal Criminal Statutes*, 69 J. CR. L. & CRIM. 1, 3 (1978).

Not all federal judges have rallied to the congressional call for broad interpretation of the RICO legislation. Thus, in United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976), the court said:

> . . . [T]he Act, with its civil and criminal provisions, has both punitive *and* remedial purposes. While Congress may instruct courts to give broad interpretations to civil provisions, it cannot require to abandon the traditional canon of interpretation that ambiguities in criminal statutes are to be construed in favor of lenity. . . . To do so would be to violate the principles of due process on which the canon of interpretation rests.

51. 635 F.2d 999 (2d Cir. 1980).

52. *Id.* at 1001.

53. The rise of the rule of strict interpretation is ordinarily explained as a judicial reaction to the draconian regime of capital punishment in England during the seventeenth and eighteenth centuries. Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 749-52 (1935). There is considerable evidence in support of this view. Thus, Hawkins, writing in 1724, said:

> A statute excluding the principal from the benefit of clergy, doth not thereby exclude the accessories before or after. . . . Yet inasmuch as such statutes taking away a privilege of so high a consequence to the subject, ought to receive the strictest interpretation; and the words of them may, without any manner of strain, or repugnance to the general rules of law be taken in such sense as will include the principals only; I do not know that they have been carried further.

HAWKINS, 2 PLEAS OF THE CROWN 342-3 (1724).

may assist evaluation of the trend to speculate about its most likely causes.

The questions of what assumptions are to be brought to the reading of penal statutes are not simply of narrow, technical interest. On the contrary, they are connected with matters of broad social concern. For example, the professional literature has not sufficiently noted that the ways in which ambiguous statutory language is read may be strongly influenced by prevailing ideas about the dominant purposes of criminal punishment. Thus, any consideration of interpretation that ignores current basic convictions about the ends and means of criminal justice will likely prove partial and unsatisfactory. In fact, however, there has occurred in this century significant shifts in basic convictions about the purposes of penal sanctions. Until about a decade and one-half ago, the rehabilitative ideal was widely accepted in American society as at least an aspiration to be pursued in criminal justice administration.[54] One basic tenet of rehabilitationism is that sanctions imposed on the convicted accused are to be conceived of, not as punishment, but as treatment, not as a deprivation, but as a positive benefit. In its more extreme forms, the rehabilitative ideal looked upon the criminal conviction primarily as an opportunity for the community to dispense beneficial services to those in need of cures.[55] Quite obviously, the tendency of rehabilitative ideology, when adopted by the judiciary, is in the direction of expanded, rather than constricted, interpretations of ambiguous statutory language.[56] Conceiving of criminal sanctions as a form of social services moves toward enlargement of official interventions.

Nor do deterrent and incapacitative theories of punishment encourage restrictive views of statutory language. Deterrent punishment is exemplary: it looks to the future behavior of others rather than to the justice of the offender's conviction. Such justice concerns as are expressed in a deterrent regime of criminal law originate from sources located largely outside the deterrent theory itself.[57] What is true of deterrence is perhaps even more clearly true of theories of incapacitation. A focus on the perceived future dangerousness of the accused offender operates to widen the criminal net

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It is likely, however, that influences other than a purpose to mitigate the impact of the death penalty were felt in the development and persistence of the rule. Roscoe Pound once suggested that it may be a product of a general hostility toward statutory law on the part of common-law judges and lawyers, and of a school of historical jurisprudence arising after the French Revolution that viewed efforts at statutory change with suspicion. R. POUND, CRIMINAL JUSTICE IN AMERICA 144 (1945). By the latter part of the nineteenth century occasional voices expressing skepticism about the rule were raised. T. SEDGWICK, THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 279-81 (2d. 1874).

54. F. ALLEN, *supra* note 35, at 5-11.

55. *Id.* at 46 *et seq.*

56. Thus Professor Livingstone Hall's 1935 essay calling for liberal interpretation of penal statutes was written in the heyday of the rehabilitative ideal. At one point he writes:

> It is only if punishment is regarded as retributive (that is, where one who has freely committed the prohibited act, knowing that it was prohibited, is punished in order to expiate the evil which he has done) that it should be important that every criminal be afforded an opportunity to know precisely what acts are prohibited. Clearly retribution should have little part in determining present-day principles of criminal law.

Hall, *supra* note 53, at 759 n.56. (Citing Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453 (1928).).

57. Hart, *Murder and the Principles of Punishment: England and the United States*, 52 NW. L. REV. 433, 450-55 (1957).

rather than to constrict it. It is the retributive theories of punishment that offer most hospitality to the strict interpretation of criminal statutes. A concern for just punishment directs attention, for example, to the *nulla poena* concern with fair notice to potential offenders. Since the Vietnam era, a strong current of just-punishment theory has reentered American criminological thought.[58] Yet it is not the dominant current. One need only to scan a representative cross-section of judicial opinions in criminal appeals across the country to discover that American judges, reflecting prevalent societal attitudes produced by the current fears of widespread, rampant criminality, are responding to concerns largely of deterrence and, especially, of incapacitation.[59] The present era affords infertile soil for restrictive readings of criminal statutes.

Reference to fears of, and outrage over, crime in American society, which have strongly manifested themselves during the last quarter-century, suggests other, though compatible, explanations for the erosion of support for theories of strict interpretation. In this century, the principal periods in which advocacy of broad construction of criminal statutes was most active appear to have been times of high anxiety about crime. One of the periods includes the years just after the first world war. As indicated by the law-review literature and, particularly, by the reports of crime commissions established in many American jurisdictions, the era was one of considerable interest in the reform of criminal justice.[60] Many of the measures advocated may seem today as rather modest efforts calculated to increase the "efficiency" of the system. Such measures include proposals such as permitting prosecutors and judges to comment on the failure of the accused to take the stand at the criminal trial, and also include extending the power of the state to appeal in criminal cases.[61] To many such reformers, the rule of strict interpretation was viewed as another outmoded legacy from the common-law past, one reflecting conditions no longer obtaining in modern urbanized society and, therefore, ripe for elimination.[62] What is significant for present purposes is that all this activity and the proposals arising from it were in some measure related to the serious public unease engendered by the spate of

58. *E.g., American Friends Service Committee, Struggle for Justice* (1971); A. VON HIRSCH, DOING JUSTICE (1976). *See also* F. ALLEN, *supra* note 35, at 66 *et seq.*

59. Allen, *A Serendipitous Trek Through the Advance-Sheet Jungle: Criminal Justice in the Courts of Review*, 70 IOWA L. REV. 311 (1985). *See* J. WAITE, THE CRIMINAL LAW IN ACTION 320 (1934):

> But if once the whole idea of punishment be discarded and the objective of every prosecution be recognized as the removal of a particular social danger, the public attitude must inevitably change. Indeed, the adoption of the new objective will be possible only when that attitude does change. In the light of that purpose, quibble, casuistry, technicality in the fabrication of 'rights,' will no longer seem legitimate defenses in a contest, but must appear in their true character as obstacles to the progress of social prophylaxis.

60. WICKERSHAM COMMISSION, REPORTS OF THE NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT (U.S. Gov. Printing Office, 1931); CLEVELAND FOUNDATION, CRIMINAL JUSTICE IN CLEVELAND (1922 and reprint 1968); ILLINOIS ASSOCIATION FOR CRIMINAL JUSTICE, ILLINOIS CRIME SURVEY (1929 and reprint 1968).

61. MOLEY, OUR CRIMINAL COURTS 91-106 (1930).

62. *E.g.*, "But for a century or more it has been the policy of the judiciary—a policy now gradually changing—to utilize casuistic plausibility or any dubiety of the situation for the benefit of the accused rather than for the immediate safety of society." J. WAITE, *supra* note 59, at 16.

criminal activity set off or aggravated by the Prohibition experiment.[63]

The history of legislation designed to combat organized crime in this country displays a somewhat different relationship between the fear of crime and erosion of the strict interpretation principle, for in this area the fear of crime has been purposefully engendered by the government. At various times over several decades, the Department of Justice, certain members of Congress, and congressional committees have launched barrages of statements, news releases, and committee reports designed to reveal the menace of organized crime and to inform the public of the complexities encountered in official efforts to eliminate it.[64] Thus the Report of the President's Commission on Law Enforcement in 1967 includes language such as the following:

> In many ways organized crime is the most sinister crime in America. . . . Organized crime is not merely a few preying upon a few. In a very real sense it is dedicated to subverting not only American institutions, but the very decency and integrity that are the most cherished attributes of a free society.[65]

Recently, Congress has included comparable language in the form of legislative findings in criminal statutes ostensibly directed against organized crime.[66] In much of this legislation liberal construction of its terms is specifically prescribed.[67] The legislative practices clearly imply that the perils of organized criminality and the difficulties of waging effective war against it are so great that the congressional purposes can be achieved only through

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63. The appointment of the Wickersham Commission by President Hoover in 1929 appears to have been prompted principally by perceptions of burgeoning criminality associated with efforts to enforce the Eighteenth Amendment to the U.S. Constitution. Although the reports of the Commission contain a litany of woes associated with efforts to enforce the prohibition laws, a majority of the Commission did not recommend repeal of the Amendment and the criminal statutes associated with it. One of the dissenting members, Frank L. Loesch, said, in part:

> A strong reason, among others, why I favor immediate steps being taken to revise the Amendment is in order to destroy the power of the murderous, criminal organizations flourishing all over the country upon the enormous profits made in bootleg liquor traffic. Those profits are the main source of the corruption funds which cement the alliance between crime and politics and corrupt the law enforcing agencies in every populous city.

NAT. COMM. ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES. H. Doc. No. 722, 71st Cong., 3d Sess. (1931), reprinted in 1-2 WICKERSHAM COMMISSION, COMPLETE REPORTS, at 149 (1968).

64. Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CR. L. REV. 213, 214-15 (1984):

> After a century of federal efforts to eliminate organized crime, the only certain result is that the federal bureaucracy dedicated to the elimination of the problem has grown exponentially. As for organized crime itself, no one definitely knows what it is or how extensive its operations may be; consequently, attempting to assess its growth or dimunition is pure speculation . . . Thus, a fundamental bureaucratic principle emerges: *failure is success.* That is, an ever-growing threat of crime . . . or at least the perception of such a threat, is the lifeblood of the establishment's set-up to combat these problems.

65. REPORT, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 209 (1967).

66. Thus, in the Organized Crime Control Act of 1970, Congress included an elaborate list of findings beginning with the following: "The Congress finds that (1) organized crime is a highly sophisticated, diversified, and widespread activity that annually drains billions from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; . . ." 84 Stat. 922 (1970). *See also* Title II of the Consumer Credit Protection Act, 82 Stat. 159 (1968).

67. *See supra* note 50.

broad interpretations of statutory language.[68]

In concluding the canvass of causes for erosion of the rule of strict interpretation, brief attention will be given to two additional factors presenting considerations perhaps less speculative than some just discussed. The first of these relates to the movement to codify the statutory criminal law in many American jurisdictions during the last thirty years.[69] In an eventful century no events in the development of American criminal law are more important than the drafting of the Model Penal Code and the influence it has exerted on the reformulation of criminal statutes throughout the United States. The Model Code, as previously stated, does not adopt the rule of strict interpretation. Instead, it invokes a "fair import" standard, adding that "when the language is susceptible of differing constructions," it should be read to further the "general purposes" of the Code as a whole as well as those manifested in the particular provisions under examination.[70] The reference to the Code's general purposes may be of special significance. One familiar with the codification movement in Anglo-American jurisdictions will be aware of the frequent apparent unwillingness or inability of judges to perceive the overarching structure of a well-articulated criminal code and to discern the relation of particular provisions to achieving the code's central purposes.[71] One of the consequences of attending to the code's general purposes, however, may be to reject strict interpretation in many particular instances.

The last, and among the most important, of the circumstances contributing to neglect of the rule of strict interpretation is the fact, simply stated, that increasingly in recent years the criminal law has been assigned more difficult and complex functions to perform. Efforts to extirpate "organized crime," the assault on "white-collar crime," and the uses of criminal sanctions to achieve objectives of economic regulation, impose new and largely unprecedented burdens on the language of the criminal law. In many instances the criminal behavior sought to be deterred cannot be clearly and crisply stated, but instead encompasses a great variety of behavior patterns.

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68. One of the persistent legislative problems in these areas is that of overbreadth: the creation of statutes that may be effective in the assault on organized crime, but also bring into the federal net much behavior which, while criminal, is by no definition associated with organized crime, and for which there is no apparent need for federal prosecution. That the problem is perhaps insoluable has been conceded on occasion by some of the strongest sponsors of organized-crime legislation. *See* McClellan, *The Organized Crime Act or Its Critics: Which Threatens Civil Liberties?* 46 NOTRE DAME L. REV. 55, 142-44 (1970).

69. As of 1981, thirty-seven states had enacted criminal code revisions since World War II. 58 A.L.I. PROC. 517 (1981).

70. Section 1.02(3) provides:

> The provisions of the Code shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this Section and the special purposes of the particular provision involved. The discretionary powers conferred by the Code shall be exercised in accordance with the criteria stated in the Code and, insofar as such criteria are not decisive, to further the general purposes stated in this Section.

MODEL PENAL CODE (Part I, 1985).

71. Examples may include State v. Cannon, 133 Ariz. 216, 650 P.2d 1198 (1982), in which the court appears to treat the case as one of intentional killing even though death of the victim was not the accused's conscious objective. In People v. Andersch, 107 Ill. App. 3d 810, 438 N.E.2d 482 (1982), the court appears to have stripped the requirement of conscious awareness of peril from the statutory definition of recklessness. The fault for these and many other failures of interpretation may lie in part with the practicing bar appearing before the courts.

These patterns, moreover, tend to alter over time.[72] To encompass such multifarious conduct, statutory definitions move to extreme generality and encourage, if not require, wide latitude in the interpretive process. A recent comment in a federal court of appeals opinion describes one of the difficulties: "The centuries-long trend toward greater sophistication in criminal law has increasingly blurred the line between criminal and noncriminal behavior."[73] The larger issue these new demands raise is whether they can be imposed on the system of criminal justice without compromising the essential nature of the criminal law. It is probably not surprising that courts required to assign meanings to the new legislation have found the rule of strict interpretation insufficient to their tasks.

THE DEFAULT OF JUDICIAL DOCTINE—CAN WE HONOR THE VALUES OF LEGALITY?

Given, then, the array of forces and circumstances tending to weaken or eliminate the rule of strict interpretation, what role ought to be assigned it in the years ahead, and do the modern assaults on it signal a crisis in the career of the *nulla poena* principle? In my judgment, it would be a misfortune if the tradition of strict interpretation were lost.[74] In recent years the rule seems ordinarily to have been applied with reasonable moderation.[75] It has not generally been employed (to use the words of Justice Holmes in another context) so as to include "every misinterpretation capable of occurring to intelligence fired with a desire to pervert."[76] There is much to be said for a larger insistence by the courts than is often made that legislatures dot i's and cross t's when proposing to subject persons to the pains and penalties of the criminal law.

Having so said, however, one must also note that, at most, the rule of strict interpretation offers only limited contributions toward realization of the *nulla poena* principle. Perhaps it should not be surprising to discover that a task as complex and important as defending the values of legality cannot be successfully achieved through reliance on any such simplistic

72. Kadish, *Some Observations on the Use of Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963).

73. United States v. Von Barta, 635 F.2d 999, 1001 (2d Cir. 1980). The circumstances pointed to, however, may be more indicative of sophistication of crime than of the criminal law. The inability of the substantive criminal law to perform its first and essential function of distinguishing clearly between criminal and non-criminal behavior can scarcely be accepted as evidence of sophistication of law. It may be indicative of a loss of grip by both courts and legislatures on what are appropriate areas for intervention by the criminal law.

74. *Cf.*

> For the rule that penal statutes are to be construed strictly something may be said. When acts are to be made penal and are to be visited with loss or impairment of life, liberty, or property, it may well be argued that political liberty requires clear and exact definitions of the offense.

Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 387 (1908).

75. The canon in favor of strict construction [of penal statutes] is not an inexorable command to override common sense and evident statutory purpose. . . . Nor does it demand that a statute be given the 'narrowest meaning;' it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.

United States v. Brown, 333 U.S. 18, 25-26 (1948).

76. Paraiso v. United States, 207 U.S. 368, 372 (1907).

formula. Advocates of the strict interpretation rule ordinarily see it as advancing the *nulla poena* value of fair notice to potential offenders. An interpretation threatening an actual danger of persons' blundering into criminal liability should be rejected by the courts, whether or not the rule of strict interpretation is given general application in the jurisdiction.[77] The problem, however, is that in many cases there will be no evidence whatever that the accused's behavior was motivated by any particular understanding of the relevant statutory provisions. Often, the defendant has pursued his course despite knowledge or belief that his behavior is criminal. In these and other cases, to require interpretations to be confined to those giving criminal statutes their narrowest possible scope will often result in losses of considerable social advantage, losses not offset by any very obvious compensating gains.[78] This, of course, is not to say that there remain no serious problems of supplying adequate notice of the prospects of criminal punishment to potential offenders. For the most part, however, promising solutions to these difficulties lie, not in applications of the strict interpretation standard in criminal cases, but in more generously defined defenses of mistake or ignorance of law than we have thus far been willing to accept.[79]

The considerations just reviewed suggest that the rule of strict interpretation cannot or will not be permitted to serve as a panacea for the problems of legality arising out of the readings of criminal statutes by courts. The problems, however, remain; and if the values of legality in American criminal justice are to be maintained and enlarged, efforts must be undertaken that are larger and more complex than generally thought necessary in the past. The magnitude of the problems and the complexity of their solutions need illustration. No more dramatic illustration is at hand than the current applications of the federal Mail Fraud Act in the lower federal courts.[80] Rarely has a body of doctrine of such Byzantine intricacy been permitted to rest on so narrow a statutory base. One Court of Appeal has denied with emphasis that the mail fraud offense has become a "common-law crime;"

77. Thus § 1.02(3) of the Model Penal Code, which does not adopt a strict-interpretation standard, directs that statutes be read by reference to the Code's general purposes. Among those purposes are "to give fair warning of the nature of the conduct declared to constitute an offense." MODEL PENAL CODE § 1.02(1)(d).

78. *Cf.* "The notion that every statutory ambiguity should be resolved, against the government, no matter what the merits of the case, seems to me simplistic and wrong." Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 219 (1985). I came upon Professor Jeffries's article only as I was writing the concluding paragraphs of this paper. Had I seen it earlier, its influence would no doubt have been reflected at many points in the discussion.

79. The conservatism of the MODEL PENAL CODE on these issues was observed earlier. *See supra* note 6. For a discussion of the continental approach to some of the questions, see Ryu and Silving, *Error Juris: A Comparative Study*, 24 U. CHI. L. REV. 421 (1957).

80. 18 U.S.C. § 215, 35 Stat. 1130. The Mail Fraud provision was supplemented eighty years after its initial enactment in 1872 by passage of the "wire fraud" act. 18 U.S.C. § 1343 (1984), 66 Stat. 772 (1952). The latter provision is predicated on the commerce powers of congress, rather than on its power to establish the postal service. Recent cases applying these provisions have attracted a considerable literature. *See, e.g.*, Coffee, *From Tort to Crime: Reflections on the Criminalization of Fiduciary Breach and the Problematic Line Between Law and Ethics*, 19 AM. CR. L. REV. 117 (1981); Coffee, *The Metastasis of Mail Fraud: The Continuing Story of a White Collar Crime*, 21 AM. CR. L. REV. 1 (1983); Hurson, *Limiting the Federal Mail Fraud Statute*, 20 AM. CR. L. REV. 432 (1983); Morano, *The Mail-Fraud Statute: A Procrustean Bed*, 14 MAR. L. REV. 45 (1980); Rakoff, *The Federal Mail Fraud Statute*, 18 DUQ. L. REV. 771 (1980).

but, in all conscience, when one notes the freedom from legislative guidance displayed in these cases, the characterization seems hardly inappropriate.[81] Surprisingly enough, most persons, including most lawyers, are largely unaware of the modern expansion of judicial doctrine in these areas. Accordingly, even a necessarily truncated and inadequate account of what has occurred may serve some useful purpose.[82]

The Mail Fraud Act, one of the earliest and most important congressional assertions of federal criminal jurisdiction, first became law in 1872.[83] It has ever since served as one of the primary weapons in the arsenal of federal prosecutors.[84] Essentially, the language of the statute provided felony penalties for one who devised "a scheme or artifice to defraud," and who for the purpose of executing the scheme placed a letter or other matter in the mails.[85] The mailing requirement is purely jurisdictional. There is no necessity to prove that the use of the mails was essential to the fraudulent scheme; all that is needed is a showing that the mails were used.[86]

From the beginning it was clear that the Mail Fraud Act was not simply a reenactment at the federal level of the ancient fraud offense of obtaining property by false pretenses.[87] None of the differences noted in the early cases, however, cast doubt on the view that the Act was directed to schemes intended to inflict pecuniary or property losses on victims. Indeed, it was to avoid widespread pecuniary losses stemming from fraudulent lottery schemes that most likely provided the impetus for the statute's enact-

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81. United States v. Margiotta, 688 F.2d 108, 124 (2d Cir. 1982). *But cf.* Ezersky, *Intra-Corporate Mail and Wire Fraud: Criminal Liability for Fiduciary Breach* 94 YALE L.J. 1427 (1985): "[C]ontrary to accepted notions of legality courts have used mail/wire fraud to create a virtual common law crime."

82. Editor's Note: The following criticisms of the Courts of Appeals' interpretations of the Mail Fraud Act were written prior to the Supreme Court's recent case. McNally v. United States, 55 U.S.L.W. 5011 (U.S. June 23, 1987). In *McNally*, the Court rejected a line of decisions from the Courts of Appeals, and held that the language and legislative history of § 1341 limits its scope to the protection of property rights, and does not extend to an intangible right of citizens to have the government's affairs conducted honestly. *Id.* at 5013-14.

83. *See supra* note 80.

84. Chief Justice Burger praised the Mail Fraud Act as a "stopgap device" available to be employed on a temporary basis to meet new problems before detailed new legislation can be devised. United States v. Maze, 414 U.S. 395, 405-06 (1974) (Burger, C.J., dissenting). *See also* Rakoff, *supra* note 80, at 771: "To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarious, our Colt .45, our Louisville Slugger, our Cuisinart—and our true love. . . . [W]e always come home to the virtues of 18 U.S.C. sec. 1341, with its simplicity, adaptability, and comfortable familiarity."

85. Whoever, having devised . . . any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . , for the purpose of executing such scheme or artifice . . . places in the post office . . . for mail matter . . . to be sent or delivered by the Post Service. . . .

18 U.S.C. § 1341 (1984).

86. In re Henry, 123 U.S. 372, 374 (1887). Moreover, each of multiple mailings constitutes a separate offense, even though all the mailings relate to the same "scheme or artifice to defraud." United States v. Stull, 743 F.2d 444-45 (6th Cir. 1984); United States v. Shelton, 736 F.2d 1397, 1408-09 (10th Cir. 1984).

87. *E.g.*, Durland v. United States, 161 U.S. 306 (1896)(A promise made with intent not to perform is sufficient to sustain a mail fraud conviction). In recent years "promissory fraud" has been widely incorporated into false pretenses law in many state jurisdictions. People v. Ashley, 42 Cal. 2d 246, 267 P.2d 271 (1954); MODEL PENAL CODE § 223.3 (Part II, 1980).

ment.[88] Whether the Act is to be read as limited to fradulent schemes directed to infliction of pecuniary and property losses or, whether its scope is to be extended also to encompass losses to social and political interests of various sorts, obviously constitutes a critical issue in determining the modern role of the Mail Fraud Act in federal prosecutions. Some persons have strongly urged a reading that would confine the operation of the law within the parameters of traditional fraud doctrine.[89] The federal courts, however, resoundingly rejected the counsels of restraint. In an important series of holdings, federal courts ruled that "intangible" rights, in addition to pecuniary and property interests, are to be granted protection by the Act.[90]

What sorts of "intangible" rights are now within the statute's purview? An example is provided in *United States v. States*.[91] The defendant created a scheme to cast absentee ballots of non-existent voters in a state election. There was no evidence the plan would have resulted in any direct pecuniary loss to anyone. "Here," said the court, "we have a scheme . . . to deceive and defraud the public . . . of certain intangible political and civil rights."[92] The acts of the accused were certainly reprehensible and richly deserving of criminal penalties (although why inflicting them is a task for federal rather than state authority is less clear). The difficult questions, however, are which among the infinitude of civil, political, and social interests are to be given protection by the Act, and by what standards are the selections to be made? The litmus tests offered in some of the opinions are lacking in reassuring crispness. Thus, one federal court tells us that a scheme to defraud under the Act is one that conflicts "with accepted standards of moral uprightness, fundamental honesty, fair play and right dealing."[93] Acting under the authority of such a commission, the federal prosecutor becomes a kind of roving custodian of the public morals at both the local and national levels of American life.

The concept of "intangible" rights having been established in the mail fraud cases, a number of striking holdings followed in short order. Former

88. Comment, *The Intangible-Rights Doctrine and Political Prosecutions Under the Federal Mail Fraud Statutes*, 47 U. CHI. L. REV. 562, 567 (1980).

89. A not unpersuasive argument has been advanced for an interpretation of the mail fraud legislation that would confine it to cases in which pecuniary or proprietary losses are intended. *Id.* The argument was specifically noted and rejected in at least one prevailing opinion in the United States Court of Appeals. United States v. Margiotta, 688 F.2d 108, 121 (2d Cir. 1982). Judge Winter's dissenting opinion in the same case appears to rely, in part, on the Chicago Comment. *Id.* at 141 n.4. Some have pointed to the historical interpretation of what is now 18 U.S.C. § 371, as a reason for expanded readings of the mail fraud law. *See* United States v. Isaacs, 493 F.2d 1124, 1150 (7th Cir. 1974). Section 371, in part, condemns conspiracies "to defraud the United States." Early cases asserted the proposition that the United States may be "defrauded" within the meaning of the provision even though no pecuniary or proprietary loss to the government is involved. Haas v. Henkel, 216 U.S. 462, 480 (1910). Considering, however, the differing interests ordinarily protected by the two provisions and the greater propensity of the mail fraud statute to impinge on traditional areas of state authority, the argument seems hardly conclusive.

90. *E.g.*, United States v. Keane, 522 F.2d 534 (7th Cir. 1974); United States v. Brown, 540 F.2d 364 (8th Cir. 1976).

91. 488 F.2d 761 (8th Cir. 1973).

92. *Id.* at 765.

93. United States v. Mandel, 591 F.2d 1347, 1361 (4th Cir. 1979). *See also* Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958).

governors of Illinois and Maryland ran afoul of the Act.[94] In neither case was there proof of financial loss to the citizens of their respective states, and in the Maryland case it appears the defendant did not profit personally from his behavior.[95] In both, however, federal courts found schemes to defraud, in that the defendants deprived citizens of their rights to receive the honest services of their elected public officials.[96] A few years later, the even more remarkable decision in *United States v. Margiotta*[97] was reached in which the accused, who was not a public official at all, but a Republican party leader, had been able through his political influence to saddle an insurance kick-back scheme upon a New York county. In the prevailing opinion, Judge Kaufman elaborated the portentous phrase "fiduciary obligation" as an element of the mail fraud offense.[98] Defendant, because of his *de facto* power and influence, was under a fiduciary duty to members of the community to disclose the dishonest kick-back scheme. A scheme involving violation of that fiduciary obligation, the court said, constituted a fraudulent scheme or device within the meaning of the Mail Fraud Act.

One final illustration may assist in communicating the flavor of the developments being considered. In *Bronston v. United States*,[99] the accused, a state senator and member of a large New York law firm, gave secret assistance to a personal client who was competing for a franchise from the city with a company already being represented by defendant's law firm.[100] Bronston thus wrongfully created and concealed a serious conflict of interest. On the other hand, there is no evidence the accused made use of confidential information supplied by the firm's client to advance the interests of his own client.[101] Nevertheless, the accused's conviction under the Mail Fraud Act was affirmed in the Court of Appeals, principally on the ground that, as a partner, he breached a fiduciary obligation of loyalty owed by him to the firm's clients.[102]

Do these cases, and others of which they may be representative, provide adequate reasons for concern? In each of the cases described, the defendants were guilty of wrongdoing, some serious wrongdoing. It may also be true that, but for the intervention of the federal prosecutors and charges drawn under the Mail Fraud Act and other federal statutes, some of the accused might never have been brought to justice. It is all very well to say that powerful figures like Kerner, Mandel, and Margiotta could have been prosecuted in the state courts under clearly applicable state laws. But persons of power and political influence have ways of evading trial and conviction in the local courts.

94. United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974); United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979).

95. Nor, unlike the *Isaacs* case, does it appear that Governor Mandel committed the crime of bribery under state law. Coffee, *From Tort to Crime*, 19 AM. CR. L. REV. 117, 143 (1981).

96. *Isaacs*, 493 F.2d at 1150; *Mandel*, 591 F.2d at 1362.

97. 688 F.2d 108 (2d Cir. 1981).

98. *Id.* at 130 *et seq.*

99. 658 F.2d 920 (2d Cir. 1981).

100. *Id.*

101. *See* the extended discussion of the *Bronston* case in Coffee, *supra* note 95, at 130.

102. *Bronston*, 658 F.2d at 926-27.

It seems reasonable, therefore, to conclude the recently expanded judicial doctrine in these cases and the work of federal prosecutors in developing and applying it, have resulted in the punishment of a considerable number of serious offenders, some of whom might not otherwise have been convicted. There is no apparent reason to doubt the convictions constitute a substantial social advantage. But the matter cannot rest here. As always, there are questions to be answered. At what costs have the gains been made? Are the costs tolerable?

At the outset, it seems clear the expansion of judicial doctrine in these cases has at times ignored the restraints of the *nulla poena* principle in the area of its most basic application: that of requiring the criminal law to give fair notice to potential offenders of the threat of criminal punishment. It can hardly be supposed that the lawyer Bronston, aware as he was of his involvement in an unprofessional conflict of interests and presumably of possible professional discipline, could, nevertheless, have contemplated his behavior risked conviction for a federal felony. Nor can it be doubted that the conviction, when it occurred, engendered a powerful sense of injustice in the accused and in those bound to him by ties of family and friendship. Discussion of fair notice, when it occurs in the cases, is rarely persuasive. Thus, the prevailing opinion in *Margiotta* acknowledges that "the line between legitimate political patronage and fraud on the public has been difficult to draw."[103] The opinion hardly eases the difficulty. Thus, it is said that "[t]he breach of fiduciary duty on which this mail fraud prosecution has been predicated is not his failure to make decisions on the basis of merit. . . ."[104] But, if this suggests that should Margiotta, for partisan motives or worse, exert his great influence to place in an important and sensitive public office one whom he knows to be radically lacking in qualifications, and no violation of the "fiduciary obligation" to the voters results, then one wonders why. In practical impact, such an exercise of power might wreak greater havoc on the community than anything charged in the indictment on which Margiotta was convicted. Nor does the resort to the familiar but illusive concept of fiduciary duty give greater concreteness to the standards of liability. As Judge Ralph K. Winter states in dissent: "The words fiduciary duty are no more than a legal conclusion, and the legal obligations actually imposed under the label vary greatly from relationship to relationship."[105]

The expansion of coverage of the Mail Fraud Act by the courts assaults

103. *Margiotta*, 688 F.2d at 111.

104. *Id.* at 127.

105. *Id.* at 142. A somewhat similar view has been expressed by a student of corporate and securities law:

> The most alluring theoretical underpinnings for examining management's defensive techniques is the 'fiduciary' concept. As if the statement has inherent and authoritative meaning, we are told that directors of target companies 'have a high fiduciary duty of honesty and fair dealing with shareholders . . . and their dealings with the corporation and its shareholders are rigorously scrutinized.' This standard creates the appearance of an acceptable evaluative norm for management actions, but upon application it fades into illusion. . . .
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> Yet the concept survives, even flourishes. Reference to the 'fiduciary duties' of management is prominent in recent tender offer litigation. Its popularity is the direct outgrowth of its inherent ambiguity, serving as the simultaneous rallying cry of both plaintiff shareholders and defendant management. Frequency of recitation creates an illusion of

the values of legality in another way: it exacerbates the problems of prosecutorial discretion, an area of power surely among the most resistent to regulation by authoritative norms within the range of criminal justice administration. These problems are particularly troublesome, as some dissenting judges have observed, in cases involving immoral and corrupt behavior by persons engaged in state and local governments.[106] The incidents of serious improprieties in these areas are so numerous and ubiquitous that federal prosecution is incapable of responding to more than a small fraction of the total. Because choosing cases for prosecution must necessarily be highly selective, there is the ever-present danger of choices being made that promise the greatest political advantage to the national administration or to political and economic groups at the local level. Almost equally serious, suspicions of politicizing the processes of justice are engendered, whether or not justified in the particular case.

The last category of costs to be mentioned involves definition of the proper judicial role in these cases. What is at issue is more than the structural question of separation of powers in the American governmental system. A basic element in the legitimacy of law is the perception that in making law, the law-giver acted within the limits of its designated authority. The recent decisions under the Mail Fraud Act surely strain at the limits and may, indeed, exceed them. Apart from questions of legitimacy, it may also be seen that before the law intrudes into areas as sensitive as those entered by the courts in the mail fraud cases, the political judgment of the legislature should be obtained. Converting the federal district courts into a national tribunal to test the political morality of local officials, or precipitately enlarging the fiduciary obligations of corporate managers in their relations with the corporation,[107] may be sound courses for public policy to pursue, but confidence in that conclusion is seriously weakened by the absence of legislative consideration and contribution. Nor is it persuasive to argue, as some persons have, that Congress has validated the new judicial doctrine both because it has not been subjected it to legislative repeal and also because a few legislators have indicated willingness to enact statutory provisions incorporating bodily the language of "intangible rights," no more closely defined than in the emerging cases.[108] Such action or non-action is not so much evidence of congressional consideration and validation as it is of congressional irresponsibility.

While belaboring the judicial performance in mail fraud cases or other areas may contribute to definition of the problems of legality in American society, it does very little to resolve them. Indeed, reflection suggests that if

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substance. The utility of a legal standard must be seriously questioned when the standard is avidly and equally embraced by adversaries.

Cohn, *Tender Offers and Sale of Control: An Analogue to Determine the Validity of Target Management Defensive Measures*, 66 IOWA L. REV. 475, 490, 492 (1981).

106. *See, e.g.*, the dissenting opinion of Judge Winter in *Margiotta*, 688 F.2d at 143-44.

107. United States v. Siegel, 717 F.2d 9 (2d Cir. 1983); United States v. Weiss, 752 F.2d 777 (2d Cir. 1985). *See also* Ezersky, *Intra-Corporate Mail and Wire Fraud: Criminal Liability for Fiduciary Breach*, 94 YALE L. J. 1427 (1985).

108. Kanter, *Mail Fraud and the De Facto Public Official: The Second Circuit Protects the Citizens' Right to Honest Government*, 49 BROOKLYN L. REV. 933 (1983).

the problems are to be effectively met, they must be confronted in the legislative arena. Much judicial legislation in criminal cases springs from failures of the legislature to legislate. It may be true that courts have proved all too willing to rescue statutes from shoddy legislative performances, but the demands of an on-going system are great, and the judicial urge to make the best of bad legislation is understandable. Moreover, the reputed benefits of legislative law-making often exist more in the realm of myth than of reality. In theory, legislative fact-finding powers make possible the collection of a wide range of data and conflicting views before the statutory provisions are formulated and enacted. The creation of criminal legislation, at leaset, often deviates strongly from the ideal model, both the necessity for and the form of evolving legislation being largely determined by the prosecuting agencies of the government. It is no doubt true that in many instances the first time anything resembling a genuinely adversarial consideration of the purposes and policy of the statute occurs, is in court when a judge is being asked to apply the law to a particular defendant.[109]

Yet reliance on the courts to supply the deficiencies of legislative law making, as has been shown, creates its own problems, including those of weakening the values of the *nulla poena* principle. The first and most fundamental issue of legislative policy requiring modern reconsideration (and one which law school scholarship has often neglected) relates to identification of those areas of behavior that are appropriate for the introduction of criminal sanctions and those that are not.[110] It has already been observed that many of the modern tasks assigned to the criminal law give rise to serious issues of legality. In some cases, the distinctions between criminal and noncriminal activity can hardly be delineated; the range of behaviors sought to be reached is so broad and varied that legislative standards of liability must be stated with extreme generality. If penal regulation cannot be achieved without threatening the basic decencies of the criminal justice process, if adequate warning cannot be given to potential offenders nor adequate guidance for judicial application, then there are surely powerful reasons to withdraw or withhold criminal penalties and to seek noncriminal sanctions to achieve the goals of public policy in the areas under consideration. The modern arsenal of noncriminal sanctions available to the law is a formidable one, and doubts about their effectiveness in particular situations should not be permitted to prevail until thorough consideration of the alternatives is given.

Resort to criminal sanctioning is unlikely to become so parsimonious, however, as totally to exclude invocations of the criminal law in situations containing significant threats to the *nulla poena* values. It must suffice here to say that vital to any effort to mitigate such dangers is an increased willing-

109. A somewhat similar statement was made by the late Ernst Freund when reflecting on an earlier instance of judicial expansionism, the liberty of contract doctrine: "And it is probably true that, in a great majority of cases, those interests [affected by state regulatory legislation] received their first hearings under forms giving some assurance of impartial and adequate consideration in the courts of justice." JURISPRUDENCE AND LEGISLATION 9-10 (Vol. VIII, Congress of Arts and Sciences, Universal Exposition, St. Louis, 1904).

110. Allen, *The Morality of Means: Three Problems in Criminal Sanctions*, 42 U. PITT. L. REV. 737, 738-41 (1981); *Majorities, Minorities, and Morals: Penal Policy and Consensual Behavior*, 9 NRN. KY. L. REV. 1, 2-3 (1982).

ness of legislatures to adopt procedures for more systematic and thoroughgoing audits of experience with earlier-enacted legislation than ordinarily occur today. An important part of any such legislative audits will be a scrutiny of the continuing judicial interpretations of the law. The relevance of this goes beyond determining whether the courts have faithfully implemented the legislative purposes. In addition, the cases in court will often provide the legislature with a body of invaluable data concerning actual issues of criminal regulation in the areas under consideration, information that those who enacted the law could not have possessed. One of the outcomes of the audits may be the more frequent discovery of limited areas within the broad scope of the earlier statute that can be made the subject of more concrete and precise regulations.[111] One hopes when this occurs in the future, the legislature will make clear that the areas covered in the new laws are removed from the earlier statute. In this way we may avoid the present unedifying spectacle in the federal courts of indictments containing a proliferation of counts derived from two or more federal statutes, but covering essentially the same behavior.[112]

CONCLUSION

The failures to honor the values of legality in the American system of criminal justice, and the difficulties encountered in efforts to achieve a more complete realization of the values, constitute a reality that challenges complacency. Some persons, indeed, may be tempted to view the evidence canvassed here as corroborative of the assertions of those who reject the ideal of legality as unattainable and regard the effort to achieve it a sham. In my judgment, the conclusion is unwarranted. In actuality, the conditions sketched are important as indicating a small part of what will be lost if, because of ignorance, lassitude, or insufficient morale, we permit the values of legality to languish and die in American society.

It is obvious, of course, that problems of legality, that problems of effectively conditioning exercises of the public force through the application of authoritative political and legal norms, are by no means confined to the administration of criminal justice. On the contrary, some, perhaps the greater part, of our most vehement public controversies in the last twenty years, controversies involving both domestic and international policy, have centered on issues of the abuse of power by persons in positions of authority. In the 1970s, a generation of young Americans, disillusioned by the experiences of Vietnam and Watergate, sought measures to strip governmental officials of all discretion and to bind their actions by inflexible legal prescriptions.[113] As might have been predicted, the effort failed. Denials of discretion in the operation of social institutions are subject to a hydraulic principle: discre-

111. Hurson, *Limiting the Federal Mail Fraud Statute—A Legislative Approach*, 20 AM. CR. L. REV. 423 (1983).

112. *Cf.* United States v. Green, 494 F.2d 820 (5th Cir. 1974).

113. In the area of criminal sentencing, this view was strongly expressed by American Friends Service Committee, *supra* note 57, at 144: "Whatever sanction or short sentence is imposed is to be fixed by law. There is to be no discretion in setting sentences, and unsupervised street release is to replace parole."

tion denied in one area of institutional operation will suddenly emerge in other and sometimes unexpected parts of the institution's functioning.[114] More importantly, to deny discretion to those who wield power is to deny to society attainment of those ends that can only be achieved through discretionary exercises of power.[115] Since those ends include many of the most important policy goals, goals relating to national defense and to human welfare, the objective of a discretion-free polity is doomed before it begins. This being true, the aspiration of legality confronts the perpetually difficult task of guaranteeing officials the freedom of action to deal with situations that cannot be anticipated in all respects in advance, insuring that when action is taken, it will conform tolerably well to the general norms of morality and action expressed and validated in advance by the established governmental processes.[116]

Those who reject the legality values are correct in at least one respect: legal norms of themselves are powerless to contain the exercise of power. Over a century ago, Cardinal Newman gave his eloquent warning that reason proves a feeble strand when confronted (as he said) by "those giants, the passion and pride of man."[117] The reason of the law encapsulated in legal norms is not enough. It must receive purposeful and energetic support in the community. Cultivating such effort and morale is a task that cannot be confined to any single group or occupation. Yet it must be true that commitment to the values of legality constitutes the distinctive attribute of lawyers. Without it, the profession has little to profess.

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114. F. ALLEN, *supra* note 35, at 75.

115. *Id.* at 88.

116. For a discussion of the range of issues this task entails see M. KADISH & S. KADISH, DISCRETION TO DISOBEY 37 *et. seq.* (1973).

117. J. NEWMAN, IDEA OF A UNIVERSITY 121 (1923): "Quarry the granite rock with razors, or moor the vessel with a thread of silk; then may you hope with such keen and delicate instruments as human knowledge and human reason to contend against those giants, the passion and pride of man."