S.I.—Making the criminal code ‘perfectly clear’?

Ly Mike Ruppert

The current U.S. Criminal Code was last updated in 1909; it is an obsolete collection of laws in need of revision. In 1966, President Johnson appointed a bipartisan National Commission on Reform of Criminal Laws. The Commission consisted of three senators, three representatives, three federal judges and three members at large. Former California Governor Pat Brown was named chairperson. The Brown Commission worked five years, achieved a high degree of consensus, and submitted its final report to President Nixon and Congress on January 7, 1971. Two subsequent developments critically affected what is now S.I. First, the three (and frequently outvoted) members of the Brown Commission—McCullom, Bruska and Ervin—introduced their dissenting views to the Senate Judiciary Committee, of which all three were members, as S.1 of the Ninety-Third Congress, in 1973. (see page 6)

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Did you look it up in Black’s? —a legal fiction

By Oswald Ortmann
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Dramatic Personae:

Mr. Dimpore
Mr. Folleague
Mr. Verbiage
Mr. Hornyton
Miss Latecomer
Prof. Liable

Figure of Professor Nearly Liable peers out at the masses from behind the pile of papers and efforts to solve the puzzle of the briefcase. His evil eye is about to choose its prey.

Liable: Any questions about what we covered last time? No? Alright, Miss Latecomer—what’s a penis?

Latecomer: A penis?

Liable: That’s right: what about it?

Latecomer: Ugh, um. I don’t know.

Liable: You don’t know? Did you look it up in Black’s?

Latecomer: Yes, I did, but I couldn’t find it.

Liable: Is there anybody who can help her out? Yes, Mr. Verbiage.

Verbiage: Well, in point of fact I do believe that a penis is a spongy membrane characteristic to the male of the species, the primary function of which is to provide an outlet for the excretion of bile, urea and other waste products of the digestive system and urinary systems.

Liable: What about in Ohio?

Verbiage: I don’t believe I can speak about that. I haven’t seen one here.

Liable: Mr. Dimpore, I’d like to add what Mr. Verbiage said. Another purpose for a penis is procreation.

Liable: That is true, but only in a minority of jurisdictions. Now, Mr. Hornyton, tell the class what a penis is.

Hornyton: mumblemumblemumble—mumblemumblemumble...

Voice 1: Louder!

Voice 2: Can’t hear.

Liable: Would you speak up, Mr. Hornyton?

Hornyton: MUMBLEMUMBLEMUMBLE—MUMBLEMUMBLEMUMBLE...

Voice 3: Can’t hear.

Liable: He says it’s like a soda straw. Immeasurable length. Alright. Quiet down. There are three theories concerning penises. One, as Mr. Verbiage pointed out, a majority of jurisdictions hold the common law theory that a penis is an outlet for the excretion of bile, urea and other waste products of the digestive system and urinary systems. Two, as Mr. Verbiage pointed out, the so-called ‘recognition theory’ which acceptance of the ‘recognition theory’ means that one can prove affirmatively that a penis is.

Liable: That is true, but only in a minority of jurisdictions. Now, Mr. Hornyton, the class what a penis is.

Liable: Can’t understand. It has come up in some dissent.

Remember that these theories are not mutually exclusive but, for example in a urinary jurisdiction, the burden would be on the defendant to prove affirmatively that a reasonably prurient woman—women—would have urinated under the circumstances. If he can show this, it’s a defense.

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Grading guidelines—Do they work?

By Greg White and Dave Brandt

A few administrative matters possess the illusive characteristics of the grading guidelines. The mystery and confusion appear to stem from a lack of knowledge of the goals and operation of the guidelines as well as a lack of predictability as to their effect in any particular situation. This article is intended to help eliminate this confusion.

Auerbach appointed

Charles Auerbach, professor of law emeritus, has accepted a one-semester visiting professorship at the San Fernando Valley University Law School, in California. He will teach evidence and professional responsibility.

In 1971, as chair of the subcommittee of the Ohio Bar Association’s Legal Education Committee, Auerbach proposed the adoption of a required course in legal ethics in Ohio law schools. Academicians were originally largely opposed to it, he said, on the theory that legal ethics cannot be taught.

The proposal lay dormant said Auerbach, until after the disclosure of the Watergate crimes, which he credits with having given “the spark needed” to cause the Ohio Supreme Court to adopt it in 1973 as an amendment to the Rules of the Bar of Ohio.

Auerbach will return to teaching here in the summer quarter of next year.

The basic theme of the guidelines is a merging of the concepts of professional subjectivity in assigning grades with the relativity of performance which exists among students. By mandating a range of grades which a professor must assure that guidelines reduce this subjectivity while assuring relativity. Originally, this mechanism was intended to achieve the following goals:

1) To enhance the overall grade point average of the student body in general and the graduating class in particular without demeaning its value to the community.
2) To promote the selection of professors by students on the basis of teaching competence rather than grading practices.
3) To force competition among students, by blocking any efforts to pad averages by careful selection of electives.
4) To more accurately predict success on the bar examination.

Exemptions

An assessment of the effects of the guidelines is impossible in the absence of an understanding of their operation. Exemption is granted to a visiting professorship, brief writing and advocacy, legal writing, moot court, law review, legal research, and research assistant courses. Also exempted are all courses in which less than 25 students are eligible for final grades. Other courses may be exempted through special faculty action.

The guidelines consist of two ranges as follows:

<table>
<thead>
<tr>
<th>Grade</th>
<th>First Year Courses</th>
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<tr>
<td>A</td>
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<td>B+</td>
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Q: The word “fool” has gained new popularity in common parlance. Do you agree with the view or fear of many liberals that the economic methods of this country have begun, or are likely, to squelch progressive movements in society, and to encourage a more static mood within it?

A: Well, I think there are a variety of dynamics that, taken with our economic situation, tend us toward authoritarianism. We talked a moment ago about powerlessness that the individual feels, and people who've studied the psychology of tyranny, a person like Erich Fromm, will nearly always note the relationship of powerlessness to the acceptability of authoritarianism; you can’t do it yourself so you've got to have somebody on a horse do it for you. The fear that arises from economic insecurity and from other insecurities—the fear for personal safety, fear for international safety arising from what most people still perceive as a loss in Indochina, an accumulating failure of institutions, things aren’t working well, cities are failing, states are failing, the federal government is failing to solve problems—all those things tend toward an acceptability of ‘1000’ supports Jones commutation

The Committee of 1000 last Thursday approved, with only several dissent, a resolution stating its support for the commutation of the sentence of Harrell Jones, presently incarcerated in Lucasville Penitentiary.

As reported in the last issue of The Gavel, Jones, a late-1960’s black nationalist figure in Cleveland, was convicted in a trial which has raised serious questions of police, FBI, and prosecutorial misconduct. His commutation hearing, specially scheduled by ex-Governor John Gilligan, will be held in several weeks. The federal district court here has also granted a hearing on Jones’ motion for a writ of habeus corpus, to be conducted at the conclusion of the current school integration case.

The Committee’s resolution states, “We strongly believe it to be in the best interests of justice and of society at large that the State of Ohio pass favorably upon the application of Mr. Jones for commutation of his sentence.”

A liberal’s liberal and the rule of law

(On the following interview of Ramsey Clark conducted for The Gavel by Jeffrey Dorwin before Clark’s recent speech here.)

Question: I'd like to begin with a retrospective on the 1960’s. While we find it easy to view the 1960’s as years of confrontation and heightened social awareness, the characterization of the present seems more elusive. How would you characterize the changes in national politics and mood since the close of the past decade?

Answer: Well, it’s not easy to do. I guess we’ve come to a time of disbelief. There’s a poem by a fellow named William Meredith, an American poet, and one line says, “There are noises that when first heard stir both belief and disbelief.” The word “America” is such a word. I guess in the ’60’s there was a lot of belief.

We believed that poverty was unacceptable and could be eliminated. We believed that America was good. Now we are not trusting. I think that skepticism is essential; I think to lose all faith is, however, both cowardly and destructive. We must believe that right makes might. Because we’ve been seemingly deceived in many ways, we just have to be that much more determined not to be deceived again but to achieve change. There’s some cynicism and there’s a greater sense of powerlessness. In the ’60’s people believed they could do something. You could feel a moral fervor in a march from Selma to Montgomery which was almost a pinnacle of the emotional commitment to a bundle of principles—freedom and equality. So, now I guess the politics—the American perceptions of national affairs seem full of doubt and disbelief. The wonderment is to whether we can cope.

Interview with Ramsey Clark

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...Ramsey Clark interview (from page three)

Q: The social reforms of the 1960's appear to have been, at least in part, a function of latent, and sometimes overt, mass violence in this period, do you believe that the social changes toward which your efforts were directed can come about by peaceful and law-abiding means?

A: "Peaceful" and "law-abiding" are loaded words. I would substitute "nonviolent," because to some people "peaceful" simply means doing nothing, not rocking the boat, not speaking out at indignation or injustice; law-abiding too often means mere conformity, unwillingness to assert a moral principle. I think that the change that is essential in human attitudes and in human institutions not only can be achieved by non-violence but probably cannot be achieved any other way. I guess I think that technology has relegated the power of violence as a problem solver of the past.

I think we have to devise new systems and new techniques, but I think that we have to recognize that the profit motive, which is so intrinsically related to our materialism, is very destructive. We have to convert the profit motive to a satisfaction from human service. We have to recognize the enormous hypocrisy that we make of the word freedom too, free enterprise. If what this means is the right to exploit black, essentially slave, labor in South Africa, why, that's not free. We have to get away from that; we have to develop new combinations of public and private.

Q: You were Attorney General during the latter Johnson years, and were previously a ranking member of the Justice Department during the Kennedy and early Johnson years. Did you have any knowledge of the illegal domestic surveillances by which the FBI conducted against American citizens during your period at Justice?

A: I caused the Department of Justice to go into court dozens of times revealing illegal surveillance, bugs that weren't authorized, among other things. We had a number of cases to determine whether there was illegal evidence in them to cause removal, dozens of cases, hard-fought court cases, several prosecutions. I had knowledge of that. Things like COINTELPRO I'd never heard of or conceived of. I would say, Right after I became active Attorney General, the Honorable George Brown called me and said he wanted to have a meeting of Congressmen in his office and I went up there and had thirty-odd congressmen who said they believed dossiers were kept on them, and what did I know about that? I said "nothing" but I would try to find out. I inquired of the director and would see in writing that there was no such thing as a dossier on Congress or anybody else. I don't know to this day whether he had dossiers, whether it was a semantical confusion of what's a dossier—or how they organize their files, whether they had material or not that was not in a single file on a secure basis. There are allegations that FBI agents were using press credentials to photograph demonstrations. I asked about that and was told they didn't do it. There were constant allegations about police and federal investigative misconduct in organized crime and the peace movement area and civil rights activities. You would inquire, you'd try to do something about it. The idea is, you have the total political context and social context which says we don't object to this and that, that you can have a few officials spotted through there, whatever their commitment, civil liberties or law, in police—it's a little ridiculous to say you can't do that.

It is very interesting now to see guys like Senator John Tower, who would have been one of the most outraged people in the country if anyone dared to say 'boo' about J. Edgar Hoover, now saying 'why didn't you do something?' In a sense, you get exposed to double jeopardy. At that time I was a jeans-wearing, soft on crime because I turned down scores of requests for wiretaps and bugs because I refused to permit black-bag operations and many other things, and I must say at some price.

When you get down to it, that's the reason that Mr. Nixon chose as one of his major campaign issues the changing of the Attorney General. The first thing I'm gonna do, he said, is get a new Attorney General. And what he was saying was, this kid is soft on crime and we need some tough people. And by that he was really saying was a Houston Plan, that's what this country's all about. Who watches the night watchman? The idea that where you have built a whole system of police that by any civilized standard, to send bombers over civilian areas to kill people, and I hope this country would stand for that view. If you pay some price for it in terms of anger and hatred at home, in terms of what we call patriotism is not absolute inhumanity that you don't want to, because they don't want to be on record as saying that agents should do certain things. That's why in fact I want agents to do. They want the agents to take the brunt of it.

A: Well, personally I gained first-hand knowledge, a feeling that as an individual I had at least tried to fulfill a responsibility to myself and my country as I saw it. To see the bombing directly, to know the bombing to be able to report about it, is something I had wanted to do for several years. I had been attacked while I was there, and before I had been able to report about it, or even know of the attacks by a series of people including Agnew, Mitchell, Kleindeinst, Goldwater; and it was an orchestrated thing.

And the reason is, we didn't want you to be knowing if you had suffered as a result?

Q: What do you feel you gained from your trip to Vietnam, both personally and politically, and what have you suffered as a result?

A: Yes.

Q: Have you announced that?

A: No. You know, I say it whenever anybody asks me but I'm not gonna run until I have to, because it takes up your time.

THANKS TO DAVID NOVAK, HOST OF THE EVIDENCE CLUB'S THIRD LAST ANNUAL CORPUS DELICTI BALL.
... Grading guidelines

(from page three)

36 courses the committee could not resolve the noncompliance and the grades were changed to pass-fail. Of these, eight were prior to the November 1973 Amendment and the students had the option to elect his given grade. The totals indicate that 604 courses out of the 616 courses offered, or 98.05%, went into the records as initially reported by the professors. It can be seen that most of the grades given in courses that were subject to Committee review were not in strict compliance with its provisions. In fact, over 75% were outside of the "range permitted". 12 courses received some kind of grade change.

Effects

The question remains as to whether the guidelines have been achieved. For example, the average g.p.a. of graduating seniors is up from 2.6 (immediate effects of the guidelines) to a current 2.86 for 1975 graduates. But what role the guidelines played in this is difficult to say, not impossible, to say. Likewise, it is questionable whether the system more accurately predicts the probability of bar success since our most recent passing rate was below the state average.

Alternatives

If it is agreed that the goals of the system are desirable, and if grading guidelines actually provide a means to achieve these goals, the issue becomes what substantive form the guidelines should take; and, what method may be employed to effectively enforce that system. Whether the present form of the guidelines and the mandatory pass-fail program constitutes a viable approach is an open question. The Committee is currently considering the following proposals:

1) Retaining the guidelines in their present form;
2) eliminating the guidelines;
3) raising the exemption level from 25 to 30 students; and
4) continuing the present program on an optional basis with only gross and/or repeated violations subject to Committee review.

Student comment is invited by Chairperson Browne.

In the past, a student's concern with these issues has been aroused only when his or her grade has been subject to alteration. The guidelines, however, have considerable utility for those students--say, 10%--who merit student attention. Change appears imminent; the opportunity for student input at this point should not be passed over.

... Look it up (from p.2)

Foliation: I don't understand—why not a woman?

Liable: Because women aren't covered under the penile codes. We use a different set for them. Remember that under the penile codes we must weigh the likelihood and severity of the potential harm caused by the guidelines. If the latter is greater—no liability. If not, we have the first element in the erection of our prima facie case.

Do you think you can find it now, Miss Latecomer?

Latecomer: I think so.

Liable: Well, if you don't get it now you might never get it. Any other questions before we leave the penile code? Yes, Mr. Foliation.

Foliation: If you don't understand—what does this have to do with soda straws?
...S.1--Proposed criminal code (from front page)


The second, and more critical, development was that Nixon rejected both the Brown Commission's First Reform Act and the S.1, the bipartisan Commission's Final Report.

Professor Schwartz criticized the Nixon revision as "a program of primitive vengeance." Schwartz stated in a summary critique to the Senate on June 1, 1975:

S.1. expresses the view that the crime problem can be solved by extending government's power over individuals. This extension can take the form of increased secrecy, "sneer surveillance... broad discretion to officials in deciding about punishment... exceptions to the exclusionary rule, or of restricting access to critical information about government operations. The school of thought, represented by the Brown Commission, is skeptical about the gains in law enforcement that can be expected from such measures, and more concerned about impairing the quality of civil life by needless restraints on liberty.

Senators McClellan and Inchus held hearings to consolidate their proposal and Nixon's. The consolidation was completed by the Ford administration in October, 1974. The media, which had been focusing the nation's attention upon the crimes of Watergate, virtually ignored this issue of potentially grave consequence to itself as well as the public, until early 1975.

The bill is presently before the Senate Judiciary Committee. S.1. was initially sponsored by influential members of the Senate: John McClellan, Democrat of Arkansas; Daniel L. Moynihan, Democrat of New York; Henry M. Jackson, Democrat of Washington; Hugh Scott, James Eastland, Robert Griffin, Birch Bayh, Hiram Fong, John Tower, Frank Moss and Robert Taft. The five most influential features of S.1., the point to be emphasized is this: In the process of attempting a needed legislative reform, the Senate Judiciary Committee has been commissoned to hear testimony and consolidate their proposal in the Final Report of the bipartisan Brown Commission has been wholly perverted, in the interest of partisan politics.

The following are just a few of the repressive features contained in S.1.:

Vengeance

Wiretapping. S.1. reaffirms existing federal wiretapping statutes. The ambiguous authority of the President to authorize wiretapping of domestic and overseas communications is unchanged. However, S.1. also expands permitted use of wiretapping. For example, landlords and telephone companies are directed to cooperate with federal wiretapping. For such cooperation, they are to be compensated. (Chap. 31, A; pp. 206-18)

Death Penalty. S.1. would provide mandatory capital punishment for certain crimes under certain conditions. (Chap. 24; pp. 194-98)

Entrapment. S.1. would allow conviction for committing crimes which defendants were induced to commit by improper police pressure. S.1. shifts to the defendant the burden of proving that he was "not predisposed" to commit the crime and is subject to "unlawful entrapment." (Sec. 551; p. 59)

Secrecy. According to Wilkinson's article, "From Huac to S.1., " more than fifteen thousand federal employees in forty seven executive departments [are] authorized to classify documents, and an estimated billion pages of data [are] already classified." S.1. increases the scope and severity of criminal sanctions in order to maintain the administrative classification of documents.

Communicating Defense Information. Section 1121 provides that "in time of war or during a national defense emergency, any person convicted of collecting or communicating "national defense information," knowing that it may be used to the prejudice of the U.S. or the advantage of a foreign power, may be sentenced to life imprisonment or death. § 1121, p. 69. Wilkinson asks: "Would the exposure of government corruption render a governement employee or a news reporter subject to the law?"

Ellsberg Clause. Section 1122 seems to be an Ellsberg-Russo clause. It provides seven to fifteen years' imprisonment for "unlawful distribution" of a "written interpretation issued by a written interpretation issued by the head of a government agency, may be immune to prosecution under sections 542, 544 and 575 (i.e., "only following orders.")

The above are but a few of S.1.'s more Orwellian features.

Redraft

Can and should S.1. be salvaged? According to Professors Vern Countryman of Harvard Law School and Thomas Emerson of York Law School, enactment of S.1. as it stands is a "sloppy disaster for the system of individual rights in the United States." Emerson and Thomas state that S.1. is inherently ambivalent and should be completely redrafted for two reasons. First, the 753 page bill "contains too many repetitions, contradictions, clauses, words and definitions that would have to be charged." Second, the bill is largely the product of the Nixon administration. As such, it was drafted upon political, ethical and philosophical bases which the American people repudiated as the result of the Watergate crisis. The bill is permeated with assumptions, points of view, and objectives, finding expression in numerous overt or subtle provisions that basic liberties are in fact ephemeral and expendable.

On August 19, 1975, Senator Birch Bayh withdrew from sponsorship of S.1. He said: "The more people I talked with around the country about this bill, the more I became convinced that my initial judgment was wrong. S.1. is due to go before the Judiciary Committee in the near future; now is the time to inform Members of the House and Senate that the people have not yet started this third century with this legacy of the Nixon administration.

This article is compiled from information published by the National Committee Against Repressive Legislation and two articles published in The Center Magazine, A Publication of the Center for the Study of Democratic Institutions. The articles, "From Huac to S.1.," By Frank Wilkinson, Executive Director of the National Committee Against Repressive Legislation and "Criminal Law--the State's Largest Power," by Norman Norris, Dean of the University of Chicago Law School, appeared in the September/October, 1976 issue.