The Unit of Offense: A Case Study in Judicial Enlargement

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INTRODUCTION

The complexities of modern American society have already involved us in a web of federal regulatory legislation and the acceleration of this trend is everywhere regarded as inevitable. The problems yet to be posed by our technological advancement and the impact of this advancement on the intricacies of our economy will be reflected in the lawyer's world by an increasing need for the mastery of the techniques for framing adequate legislation and an increasing awareness of the necessity of careful analysis in statutory construction and application. That this situation has already made itself felt on our judiciary can be readily observed by contrasting the Supreme Court calendar of 1860 with that of 1960; today almost every Supreme Court case has a statute at the heart of it.¹

Nor can today's volume of litigation be attributed solely to today's volume of legislation. Due consideration must be given to the fact that much of today's legislation is directed towards compound objectives in areas so newly emergent that their ramifications are yet to be explored. The most direct illustrations are to be found in cases arising from newly imposed requirements in the internal revenue field and the area of the regulation of union affairs. Not only are these relatively uncharted areas, but they are areas in which Congress has sought to combine both regulatory provisions and criminal sanctions in single enactments, and it is the fact of this combination that has enabled the Justice Department to apply them to ends not originally within the contemplation of the legislature.

Utilization of the Internal Revenue Code to achieve convictions desired, but not otherwise obtainable by the government, has been a recognized phenomenon since the much publicized case of the late Al Capone.² More recent examples are to be found in the case of United States v. Accardo³ in which a conviction of criminal income tax evasion was based on a claimed deduction of about four thousand dollars and a sentence of two years on each of three counts to run concurrently was imposed. Perhaps the most flagrant example of this extension of the criminal sanctions of the Internal Revenue Code is to be found in the case of the United States v. Ray⁴ in which a conviction for evasion of

¹ Frankfurter, Some Reflections on the Reading of Statutes, 47, COLUM. L. REV. 527 (1947).
² Capone v. United States, 56 F. 2d 927 (7th Cir. 1932).
two hundred seventy-three ($273.00) dollars in taxes resulted in a sen-
tence of fifteen months; it is of more than incidental significance to note
that Mr. Ray was also the chauffeur of the alleged labor racketeer John
Dioguardi who was simultaneously convicted of income tax evasion and
sentenced to four years.\(^5\) While the zeal of the Justice Department in
protecting our society from its undesirable elements by vigorous crimi-
nal prosecutions is commendable, a policy of implementing this protec-
tion by such expanded application of existing legislation is open to
question.

Legislation has an aim; it seeks to obviate some mischief, to
supply an inadequacy, to effect a change of policy, to formulate
a plan of government. That aim, that policy is not drawn, like
nitrogen, out of the air, it is evinced in the language of the
statute, as read in the light of other external manifestations of
purpose. That is what the judge must seek and effectuate, and he
ought not be led off the trail by tests that have overtones of sub-
jective design.\(^6\)

While the technique of relocating the emphasis in regulatory mea-
ures to the criminal penalties therein provided has reached its greatest
development in actions based on the tax laws, recent legislation for the
regulation of labor unions is now showing itself to be susceptible to a
similar developmental pattern.

It is the thesis of this article that any statute which imposes criminal
sanctions for what is described as a single specified act or series of acts,
but which is in fact intended to curb several distinct offenses, i.e., in-
juries to the public good which differ in kind, is particularly subject to
utilization by zealous public prosecutors as a device for imposing
lengthy prison sentences on allegedly reprehensible citizens. And fur-
ther, that logical analysis will show this unique attribute of statutes of
this type to result from their inherent failure to establish adequate cri-
teria for determining what is to constitute a unit of offense.

SECTION 302 OF THE LABOR MANAGEMENT RELATIONS ACT

Section 302 of the Labor Management Relations Act of 1947 (Taft-
Hartley)\(^7\) deals with restrictions on payments made by employers to
employee representatives in reciprocal provisions which make it unlaw-
ful for (a) any employer to pay or agree to pay any money or thing
of value to any representative of his employees who are employed in an
industry affecting commerce,\(^8\) and (b) for any representative of em-

\(^6\) Supra note 1 at 538.
\(^7\) Labor Management Relations Act (Taft-Hartley Act) §302, 49 Stat. 449
(1952).
\(^8\) "(a) It shall be unlawful for any employer to pay or deliver, or to agree to
pay or deliver, any money or other thing of value to any representative of any
of his employees who are employed in an industry affecting commerce."
ployees so engaged to receive or agree to receive such payments. Sub-
section (c) is a saving provision excepting those payments which
might normally be expected to be made in the legitimate course of busi-
ness, payments of dues by check-off authorized by written assignment
and payments to welfare trust funds set up in the particular manner
authorized for stated purposes and to be administered in the prescribed
fashion. The penalty clause provides that a violation of this section
shall be a misdemeanor punishable by a fine of not more than $10,000
or imprisonment for not more than one year or both.

9 "(b) It shall be unlawful for any representative of any employees who are
employed in an industry affecting commerce to receive or accept, from the
employer of such employees any money or other thing of value."

10 "(c) The provisions of this section shall not be applicable (1) with respect
to any money or other thing of value payable by an employer to any repre-
sentative who is an employee or former employee of such employer, as com-
ensation for, or in recompense of, his services as an employee of such employer;
(2) with respect to the payment or delivery of any money or other thing of
value in satisfaction of a judgment of any court or a decision or award of an
arbiter or impartial chairman or in compromise, adjustment, settlement or
release of any claim, complaint, grievance, or dispute in the absence of fraud
or duress; (3) with respect to the sale or purchase of an article or commodity
at the prevailing market price in the regular course of business; (4) with
respect to money deducted from the wages of employees in payment of mem-
bership dues in a labor organization: Provided, That the employer has re-
ceived from each employee, on whose deductions are made, a written assign-
ment which shall not be irrevocable for a period of more than one year, or
beyond the termination date of the applicable collective agreement, whichever
occurs sooner; or (5) with respect to money or other thing of value paid to a
trust fund established by such representative, for the sole and exclusive ben-
efit of the employees of such employer, and their families and dependents (or
of such employees, families, and dependents jointly with the employees of
other employers making similar payments, and their families and dependents:
Provided, That (A) such payments are held in trust for the purpose of pay-
ing, either from principal or income or both, for the benefit of employees,
their families and dependents, for medical or hospital care, pensions on retire-
ment or death of employees, compensation for injuries or illness resulting from
occupational activity or insurance to provide any of the foregoing, or unem-
ployment benefits or life insurance, disability and sickness insurance, or acci-
dent insurance; (B) the detailed basis on which such payments are to be made
is specified in a written contract with the employer, and employees and em-
ployers are equally represented in the administration of such fund, together
with such neutral persons as the representatives of the employers and the
representatives of the employees may agree upon and in the event the employer
and employee groups deadlock on the administration of such fund and there
are no neutral persons empowered to break such deadlock, such agreement
provides that the two groups shall agree on an impartial umpire to decide such
dispute, or in event of their failure to agree within a reasonable length of
time, an impartial umpire to decide such disputes shall, on petition of either
group, be appointed by the district court of the United States for the district
where the trust fund has its principal office, and shall also contain provisions
for an annual audit of the trust fund, a statement of the results of which
shall be available for inspection by interested persons at the principal office
of the trust fund and at such other places as may be designated in such
written agreement; and (C) such payments as are intended to be used for the
purpose of providing pensions or annuities for employees are made to a
separate trust which provides that the funds held therein cannot be used for
any purpose other than paying such pensions or annuities."

11 (d) Any person who wilfully violates any of the provisions of this section
shall, upon conviction thereof, be guilty of a misdemeanor and be subject to
The Congressional purpose in enacting Section 302 has been the subject of lengthy judicial consideration. Congress in 1946 was disturbed by union demands for employer contributions to welfare funds which were to be subject to the sole control of the unions or their officers. The potential use of such funds for the development of union "war chests" was regarded as a formidable menace to balanced labor-management relations. Shortly after the United Mine Workers announced their demand that the coal operators contribute a ten-cent per ton royalty to such a fund, Congress passed the Case Bill which regulated welfare funds in much the same way as does Section 302. This bill was vetoed by the President, but the following year the Taft-Hartley Act containing Section 302 was enacted.

The problem of interpreting the scope of Section 302(b) was presented to the United States Supreme Court by the case of United States v. Ryan. Ryan was President of the International Longshoremen's Association (I.L.A.) during the years 1950 and 1951. The I.L.A. and its affiliated groups were the recognized collective-bargaining agents for longshore labor in the Port of New York, and bargained through a wage scale committee of which Ryan was a member. The District Court for the Southern District of New York found, and the facts were not in dispute, that the president of a stevedoring firm, whose employees were members of the I.L.A., had given Ryan $1,000 in December of each year from 1946 through 1951 and $500 in April of 1951. Ryan was indicted under section 302(b) for accepting the one 1950 and two 1951 payments. He was found guilty and sentenced to six months on each of the three counts, the sentences to run concurrently, and fined $2,500. The Court of Appeals for the Second Circuit reversed the conviction solely on its interpretation of the term "representative" as used in the statute cited. Judge Frank, writing for the majority, concluded that the term had a technical meaning in labor legislation which was limited to "the exclusive bargaining representative" of the employees, which in this case was the I.L.A. itself. Since Section 302(b) applied only to the "representative", the court held that payments to Ryan as an individual were not covered even though as president of the representative union, he was a member of its wage scale committee and signed all negotiated agreements. In his dissenting opinion Judge Learned Hand focused his analysis on the intent of the statute and after discussing Congressional concern with the "war chest" problem stated,

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16 233 F. 2d 417 (2d Cir. 1955).
But that does not mean that prevention of such accumulations was the only object of the Act... An altogether adequate purpose... is that in addition to preventing employers from helping to fill a union's 'war chest', Congress wished to prevent employers from tampering with the loyalty of union officials, and disloyal union officials from levying tribute upon employers. [Emphasis supplied.]

The Supreme Court, reversing the Circuit Court, adopted the position of Judge Hand's dissent and held that Ryan was in fact a "representative" within the contemplation of the statute,

All collective bargaining is conducted by individuals who represent labor and management. Many limitations or prohibitions upon labor organization action can be effective only if there are corresponding limitations or prohibitions on the individuals who act for the labor organization. Congress, we believe, placed the identical limitations on both individuals and organizations by terming both "representatives" of employees in Section 2 (4).11

In addition, the Court noted that while Section 302 was directed largely at welfare fund abuses, its scope was not limited there to.

Nor can it be contended that in this legislation Congress was aiming solely at the welfare fund problem. Such a suggestion is supported neither by the legislative history nor the structure of the section. The arrangement of Section 302 is such that the only reference to welfare funds is contained in Section 302(c)(5). If Congress intended to deal with that problem alone, it could have done so directly, without writing a broad prohibition in subsections (a) and (b) and five specific exceptions thereto in subsection (c), only the last of which covers welfare funds. As the statute reads, it appears to be a criminal provision, malum prohibitum, which outlaws all payments, with stated exceptions, between employer and representative.19

Even prior to the Supreme Court's interpretation in the Ryan case Section 302 had been subject to interpretation as an attempt to control abuses in the nature of racketeering. William Dunbar Co. v. Painters and Glaziers District Council No. 5120 was an employer's suit for declaratory judgement regarding a welfare trust fund and for an injunction to prevent the union from breaching the contract by a strike in response to the employer's termination of payments to the fund. Discussing the preamble to Section 302 the District Court for the District of Columbia in 1955 could say,

That language was very deliberately intended to prevent kickbacks, prevent bribes, prevent things which would make for labor

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17 Id. at 426.
18 Supra note 12, at 302.
19 Supra note 12, at 305.
racketeering. And the business of exculpating the trust was put in there, that beyond the penalties which are purely criminal, there could be injunctive powers for quick and speedy remedy.\textsuperscript{21}

And during the same period other courts were placing their emphasis on the regulatory nature of Section 302. The Third Circuit in the 1954 case of \textit{International Longshoremen's Association Local 333 v. Essex Transportation Co.},\textsuperscript{22} held that,

They (the Congress) were forbidding money to be paid to representatives of unions unless through a trust fund, the requirements for which were set up in some detail (i.e., under Section 302(c) (5)).\textsuperscript{23}

In \textit{United States v. Brennan},\textsuperscript{24} a combined prosecution against the employer Archer-Daniels-Midland Co. for payments made in violation of 302(a)\textsuperscript{25} and Brennan and others as “representatives” for payments received in violation of 302(b)\textsuperscript{26} Judge Devitt, writing for the Minnesota District Court in 1955, refused to follow the majority of the Second Circuit in \textit{Ryan}\textsuperscript{27} and anticipated the Supreme Court in espousing the position of Learned Hand's dissent and went on to state that,

... it was one of the purposes of the proposed bill, as reflected in the report of the hearings and the Congressional debates, to cover bribery and extortion by individual labor leaders. There is no evidence that this purpose was ever abandoned nor was there apparent reason for abandoning it.\textsuperscript{28}

Cases subsequent to the Supreme Court decision in the \textit{Ryan} case, however, show a tendency to recognize the manifold intention on the part of Congress in enacting 302. In an action brought by the Employing Plasterers Association against the Journeymen Plasterers' Protective and Benevolent Society\textsuperscript{29} to test the legality of an employee welfare fund and to enjoin an asserted violation of the Labor Management Relations Act with respect thereto, Chief Judge Campbell while denying jurisdiction to issue the requested injunction read the legislative history of Section 302 as clearly showing that,

... Congress had a three-fold purpose in enacting Section 302:

(1) ... Congress was concerned with the protection of welfare funds for the benefit of employees ...
(2) Congress was also concerned with the corruption of collective bargaining through bribery of employee representatives by employers and extortion by employee representatives...

(3) Congress was further concerned with so-called Union 'war chests' and the possible abuse by Union officers of the power they might achieve if welfare funds were left to their sole control.  

Similarly, a 1959 case arising in Louisiana held that,

The legislative history of Section 302 makes clear that Congress had in mind, in addition to the protection of welfare funds, outlawing payment of bribes by management to representatives of employees, and extortion of employers by such representatives.  

And in Minkoff v. Scranton Frocks, Inc. the District Court for the Southern District of New York held that,

The indication is that the primary purpose of Section 302(a) was to prevent the building up of union slush funds...  

The most recent Supreme Court decision on Section 302 is Arroyo v. United States. In this case the defendant, president of a union, negotiated a contract which included a welfare fund which unquestionably met the requisite criteria of 302(c)(5). After the agreement had been signed the defendant told the employers that he wanted to borrow the checks for the amount due to exhibit at a union meeting. Subsequently, instead of depositing them in the existing welfare fund bank account, he opened another account in the name of the fund in another bank. Over a period of months he used this money for his personal purposes and, on some occasions, after transferring funds to still another account, for non-welfare union purposes as well. The government, contending that when the defendant accepted the checks he intended to use them personally and that he was therefore guilty not of embezzlement, but of conduct amounting to larceny by trick, sought to bring its action under Section 302. Justice Stewart, writing for a five-man majority of the Court, held that in this enactment it was not the intent of Congress to assist the states in punishing criminal conduct, but to deal with problems peculiar to collective bargaining; Congress was here concerned with bribery, extortion and the abuse of funds administered exclusively by union officials.

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30 Id. at 692.
33 Id. at 549.
Congress believed that if welfare funds were established which did not define with specificity the benefits payable thereunder, a substantial danger existed that such funds might be employed to perpetuate control of union officers, for political purposes, or even for personal gain... To remove these dangers, specific standards were established to assure that welfare funds would be established only for purposes which Congress considered proper and expended only for the purposes for which they were established.\textsuperscript{35}

Thus it can be demonstrated that Section 302 has been interpreted by the courts as a multi-purpose statute designed by Congress to curb abuses in two distinct areas: (a) that of the essentially regulatory offense of the maintenance by unions of unilaterally administered welfare funds,\textsuperscript{36} and (b) that of the common law crimes of bribery and extortion in the union-management milieu. And it is this multi-purpose attribute of the statute that makes it peculiarly susceptible to a distorted application to achieve criminal convictions that lie beyond the scope of Congressional intent, for the same statutory language has been used therein to describe what are essentially two disparate offenses.

Where the purposes of a statute encompass both regulatory and common law offenses the Justice Department is thereby enabled to allege in an indictment the common law offense but to conform the proof at trial to the statutory prohibition. In this manner it is possible to obtain convictions for common law crimes without either allegation or proof of their traditional elements.

**Problems of the Indictment**

In order for an indictment to be sufficient in law it is required that upon its presentation to the defendant it properly apprise him of the charges being made against him in order that he be able adequately to prepare his defense, that he be protected from surprise during trial and that upon subsequent attempts to convict for the same offense the plea of double jeopardy will lie.\textsuperscript{37}

The general rule in reference to an indictment is that all of the material *facts and circumstances* embraced in the definition of the offense must be stated, and if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly and not inferentially or by way of recital.\textsuperscript{38} [Emphasis supplied.]

Whether a crime being charged is in the nature of the regulatory offense of maintaining a welfare fund which fails to comply with statutory re-

\textsuperscript{35} Id. at 426.
\textsuperscript{38} Pettibone v. United States, 148 U.S. 197, 202 (1893).
uirements or whether it is in the nature of the common law offenses of bribery and extortion should certainly be considered a material fact and/or circumstance to be stated.

The federal courts have consistently held that where the language of a statute creating an offense sets forth fully, directly and expressly all of the essential elements constituting the crime to be punished, it is sufficient if the indictment charges the offense in the words of the statute.39 However,

Where the statute is in general terms and does not set out expressly and with certainty all of the elements necessary to constitute the offense . . . the indictment must descend to particulars and charge every constituent ingredient of which the crime is composed.40

Rule 7(c) of the Federal Rules of Criminal Procedure 18 U.S.C.A. provides that the indictment shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. In spite of these forceful interdictions to specificity in framing indictments, a literal reading of Section 302 makes possible a criminal prosecution which is based on an indictment or information which fails to make clear the gravamen of the offense charged.

That such a result was possible was implicit in the controversy over the definition of the term "representative" that culminated in the Supreme Court decision in the Ryan case.41 The decision in Ryan did not put the matter to rest, but rather skirted the matter completely, perhaps awaiting a case in which this abuse should more directly arise. More specific recognition of the problems presented by the multi-purpose nature of Section 302 is to be found in Chief Judge Campbell's analysis in Weir v. Chicago Plastering Institute, Inc.42 in which he says,

Apart from this general language, it is my opinion that the meaning of the term 'representative' must necessarily vary in relation to the express aim of Congress. For example, if the theory of an action is to prevent union-management corruption, bribery or extortion, then the term 'representative' takes on a narrow construction. This approach is substantiated by Arroyo v. U.S.43 . . . However, if the theory of an action is to protect the funds of employees, then necessarily, the term 'representative' must take on a broader construction because otherwise, any spurious trust fund could act to defeat the intention of Congress.44

40 Carter v. United States, supra note 39, at 685.
41 Supra note 12.
42 Supra note 29.
43 Supra note 34.
44 Supra note 29, at 700.
Foreshadowed in this recognition that an essential term of the statute was subject to varying definition is the possible occurrence of a case in which the statute itself is subject to such varying definition and in which the designation of which one of the two purposes of the statute is involved is crucial.

**The United States v. Inciso**

Angelo Inciso is an officer of Amalgamated Local 286 United Industrial Workers of America. Amalgamated Local 286 is an industrially organized union with about 4,000 members whom it represents in approximately 25 shops. Its contracts are negotiated individually on a shop by shop basis and Mr. Inciso customarily represents the local in contract negotiations. In October of 1956 the Grand Jury returned an indictment alleging criminal violation of Section 302(b) of the Labor Management Relations Act of 1947 and violation of 18 U.S.C.2(b), the "aider and abettor" statute. The framework of the indictment is as follows:

1. That at all times hereinafter mentioned, United Industrial Workers of America, Amalgamated Local 286, (hereinafter referred to as Amalgamated Local 286) a labor organization maintaining its offices in Chicago, Illinois, was a representative of employees who were engaged in an industry affecting interstate commerce.

2. That at all times hereinafter mentioned, Angelo Inciso, the defendant herein, was an officer and official of Amalgamated Local 286.

3. That on or about . . . (date) . . . , to and including on or about . . . (date) . . . , and periodically throughout such period of time at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, Angelo Inciso, defendant herein, did unlawfully willfully and knowingly cause Amalgamated Local 286 to receive and accept from . . . (employer's name and address) . . . , an employer of said employees, engaged in an industry affecting commerce, a sum of money aggregating $. . . (sum stated) . . . , more or less; in violation of Section 186(b), Title 29, United States Code.46

The twenty-two counts of this indictment are unchanged except for the varying dates of alleged violations, and the stated sum of money involved; a different employer is named in each count.

The evidence presented by the government to meet its burden of proof was all directed to a showing that the stated sums of money involved which Inciso claimed to be increased dues payments, authorized by the union check-off system, were in fact employer contributions to

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45 "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

the union's unilaterally administered insurance program. No showing was ever made, nor in fact did the government ever attempt to show that these payments were made in response to any threats of force or violence or that the employers involved expected to obtain future special favors from either Inciso or the Union. The record is replete with testimony given by the employers presented as witnesses on behalf of the government, that denies any element of bribery or extortion in the transactions that comprise the basis of the indictment. Rather the government chose to present a case which would prove that under Inciso's direction the Union was maintaining its own insurance program which included financing by employer contributions and that the receipt of such contributions was in violation of Section 186. The United States Attorney himself in argument to the jury summed up the case in this way,

Now, what became of that money after it went to the union treasury is no concern of us here. The law says that the union is forbidden to receive any insurance money and the union received it. That is as far as we go in this case.

On the basis of this presentation the jury returned a verdict of guilty to each of the twenty-two counts of the indictment. Judgment was entered accordingly and Inciso was sentenced to imprisonment for one year on each of the twenty-two counts, the sentences to run consecutively for the first ten counts, those for the remaining eleven counts to run concurrently with each other and with the sentence imposed on count ten. It was further adjudged that Inciso pay a fine of one thousand dollars on each of the twenty-two counts and that such fines be cumulative. Thus the total sentence imposed was ten years of imprisonment and a twenty-two thousand dollar fine.

The basic question posed by the Inciso case is whether such a result was within the intended scope of Section 302 as determined by the language of the Congressional enactment and its subsequent interpretation by the Supreme Court in the Ryan case. As we have seen Section 302 includes within its contemplation what are essentially two distinct types of offenses: one in the nature of a technical violation of the prescribed requirements for the maintenance of a union welfare fund, the other in the nature of the common law offenses of bribery and extortion. And it should follow that here, as from any other single statute defining two distinct types of crimes, two distinct types of convictions have thereby been authorized.

47 Id. at Appellant's Appendix.
48 Id. at 345, 356.
49 Id. at 356.
50 Supra note 12.
Any statute two-fold in its nature must permit of at least two types of indictments, one for each point of law, i.e., offense at which the law is directed. It is a fundamental precept of criminal law that the proof adduced in support of any indictment must conform to the structure of such indictment and that sentence will be imposed accordingly.

With this framework in mind, an examination of the *Inciso* case reveals that the indictment therein was constructed in such a way that each payment by an employer to the union was considered a separate violation of the statute. This would indicate that the government was here proposing to present a case under what has here been described as the bribery-extortion purpose of the statute. It is clear that if such were in fact the case to be presented each payment by a different employer would be considered an appropriate unit of offense. The manner in which sentence was imposed also indicates that each payment by a different employer was considered a distinct violation of the law.

A review of the proof presented by the government in the *Inciso* case, however, leads to the directly opposite conclusion. All of the prosecution's evidence was directed to a showing that the union, under Inciso's leadership, was maintaining an insurance program financed by employer contributions which did not conform to the requirements for such a fund as defined in Section 302(c)(5). From this it would appear that the gravamen of the offense being tried was in the nature of what has here been described as the regulatory purpose of Section 302.

**UNIT OF THE OFFENSE**

As has already been shown, the nature of the proof to be adduced on trial of the issue is logically determined by the theory on which the indictment rests. And similarly definition of the unit of prosecution must also be determined by the theory on which the indictment rests. Thus an indictment founded upon the theory that the regulatory aspect of Section 302(b) has been violated states the unit of offense to be the failure of the defendant to maintain a trust fund in accordance with the provisions of Subsection (c)(5); it is this failure to properly maintain the fund which must be said to constitute the crime for which the defendant has been brought to bar regardless of the number of participating employers. Under this theory a single violation of the act can be proven by demonstration of a single payment by a single employer to the improperly constituted fund or by demonstration of multiple payments by multiple employers to this same improperly constituted fund.

On the other hand, an indictment based upon the bribery-extortion aspect of the statute must define the unit of offense in terms of each individual act in the nature of bribery or extortion. Thus under this

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51 *Supra* note 10.
theory the proof of each payment or series of payments found to constitute a bribe describes a distinct violation; hence the unit of prosecution will often be found to correspond to individual payments received.

Historically the bulk of the litigation on unit-of-offense questions has been in the area of compound larcenies and in cases developing the concept of a course of conduct. Objections to the government determination of the unit of offense applicable in a given case are frequently based on the grounds that the indictment as returned is either duplicitous or multiplicitous. The former objection is used when the defense believes that several crimes have been included in a single count and that the defendant is thereby subjected to a verdict of guilty when the jury has in fact failed to come to any agreement, i.e., that some members of the jury have found him guilty on one of the crimes included in the count and others on another of the crimes without in fact having unanimously agreed on either. Objection on the ground of multiplicity is raised when the defense believes that the unit of offense as defined by the prosecution is too small, that is, that single crimes have been splintered and listed in separate counts thereby subjecting the defendant to multiple findings of guilt and multiple sentences based on the commission of a single crime. The accepted test for determining whether the offenses separately stated are in fact identical, and the indictment therefore multiplicitous, is that there must be a difference in the evidence necessary to establish the particular crime stated in one count from the evidence necessary to establish the particular crime stated in a subsequent count.

Problems of multiplicitous indictments have been the subject of federal appellate consideration in several important cases of the past decade. One of the most frequently cited opinions is that of Justice Frankfurter in United States v. Universal C.I.T. Credit Corporation, a case in which an employer was charged in 32 counts of violation of the minimum wage, overtime and record-keeping provisions of the Fair Labor Standards Act. The District Court dismissed all but three of the counts on the theory that the indictment was multiplicitous. In affirming the lower court, the United States Supreme Court held that,

A draftsman of an indictment may charge crime in a variety of forms to avoid fatal variance of the evidence. He may cast the indictment in several counts whether the body of facts upon which the indictment is based gives rise to only one criminal offense or to more than one. To be sure, the defendant may call upon the prosecutor to elect or, by asking for a bill of particu-

52 Annot. 28 A.L.R. 2d 1182 (1953).
54 344 U.S. 218 (1952).
lars, to render the various counts more specific. In any event, by indictment of multiple counts the prosecutor gives the necessary notice and does not do the less so because at the conclusion of the government's case the defendant may insist that all the counts are merely variants of a single offense.\(^{55}\)

Thus many versions of a single transaction may now be incorporated in one indictment, each version being set out as a separate count, though conviction can be obtained on only one count.\(^{56}\)

In *Bell v. United States*\(^{57}\) the defendant was given consecutive sentences after conviction on a two-count indictment under the Mann Act for the simultaneous transportation of two women across state lines for immoral purposes. Again speaking for the Supreme Court, Justice Frankfurter stated,

> When Congress leaves to the judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of a sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment. . . . It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity doubt will be resolved against turning a single transaction into multiple offenses, when we have no more to go on than the present case furnishes.\(^{58}\)

This policy of lenity in resolving questions of the unit of offense under ambiguous statutes has been reiterated in several subsequent cases.\(^{59}\)

What is perhaps a more subtle application of this same policy of lenity in the definition of units of offense can be found in those cases which base their decisions on the concept of a course or pattern of conduct or on the concept of a single continuing offense. An example of this approach is found in *Bramblett v. United States*.\(^{60}\) In this case Congressman Bramblett presented forms to the Government Disbursing Office in which he falsely declared another as his clerk and thereby obtained authorization for government compensation for her services in the amount of $4,700 per year. On the strength of this authorization the alleged employee received monthly government checks which she kicked back to the Congressman retaining only enough to pay her increased income taxes. A seven-count indictment was returned against the Congressman in which each of the monthly checks was stated as a

\(^{55}\) *Id.* at 225.


\(^{57}\) 349 U.S. 81 (1955).

\(^{58}\) *Id.* at 83.


\(^{60}\) 231 F. 2d 489 (D.C. Cir. 1956).
separate count; the defendant was convicted of knowingly and wilfully falsifying by a scheme a material fact in a matter within the jurisdiction of a department or agency of the United States. The Circuit Court of Appeals in construing the statute held that the actions of the defendant would support an indictment for only one offense, and that the Congressional intent was to reach a pattern of conduct rather than to penalize each of a series of acts which manifested the pattern. Nonetheless they refused to allow the bar of the Statute of Limitations holding that this was a single continuing offense; they also refused to reverse the conviction and citing Braverman v. United States stated,

The theory of the case seems to be that several verdicts of guilty on counts charging as separate crimes conduct which in fact comprised only one crime, amounted to a verdict of guilty of that one crime.

The case was remanded for sentencing only. Thus is appears that a multiplicitous indictment is not grounds for dismissal, but merely requires that conviction and sentencing be limited to a single count.

A comprehensive discussion of what constitutes the appropriate unit of offense under a criminal statute the purposes of which reflect a regulatory intent and an intent to punish common law crimes appears in Ladner v. United States. In this case the evidence showed that the defendant had fired a shotgun once into the front seat of a car and had simultaneously wounded two federal officers who were transporting an arrested prisoner. The indictment charged the defendant in three counts with: 1. conspiracy to assault the officers; 2. assault on one of the officers; and 3. an assault upon the other officer. He was convicted on each of the three counts, and sentenced to two years on the conspiracy count to run concurrently with a ten-year sentence for one of the assaults and to ten years on the other assault to run consecutively for a total sentence of twenty years. Upon completion of the first ten-year sentence the defendant moved under 28 U.S.C.2255 to correct the second ten-year sentence.

Writing for the Supreme Court, Justice Brennan held that the question was solely one of statutory construction. He stated,

The Congressional meaning is plainly open to question on the face of the statute. . . . The Government does not seriously contend otherwise, but emphasizes that the legislative history shows that the statute was designed to protect federal officers from personal harm.
From this premise the Government argued that there must be an offense for each officer who was assaulted and that each officer thus defines a unit of offense. The Court held that although legislative history of the statute and the Attorney General's letter which recommended its passage discussed the need for the protection of federal officers, the letter also indicated the need for legislation to further the legitimate purposes of the federal government. And that therefore at least as plausible an argument as that presented by the Government may be made that the Congressional aim was to prevent interference with official functions and was not to protect federal officers except as incident to that aim. The Court supports this position by pointing out that the Statute also makes it unlawful to forcibly impede an officer in the course of his duties and further argues that Congress probably did not intend that there would be as many crimes as there were officers impeded.

And, that if a single act of hindrance which has an impact on two officers is only one offense when the act is not an assault, an act of assault can be only one offense even though it has an impact on two officers.67

Justice Brennan further states that where neither the wording of a statute nor its legislative history points clearly to either meaning the Court will follow the policy of lenity in accordance with its decisions in United States v. Universal C.I.T.68 and Bell v. United States69 and,

This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.70

While arising in the context of a different statute the case of United States v. Ladner71 presents a problem of statutory construction parallel to that presented by the case of United States v. Inciso.72

Conclusions

Thus it appears that the ambiguous quality of a multipurpose criminal statute is likely to be reflected in the indictment; this occurrence is most likely in those indictments which are framed in the language of the statute itself. The consequences of this ambiguity are most serious when the differing purposes of the statute define different units of the offense. Where the purposes of the enactment encompass both common law and regulatory objectives, a conviction and sentence may be predicated on the former purpose, while the proof conforms to the latter.

67 Id. at 176-77.
68 Supra note 54.
69 Supra note 57.
70 Supra note 65, at 178.
71 Supra note 65.
72 Supra note 46.
Where the unit of offense for the former is smaller than for the latter, the criminal penalties may be correspondingly increased. The result is a return of a multiple count indictment which might be appropriate for a series of common law crimes but which is multiplicitous under the regulatory aspect of the statute. Objection to an indictment on the grounds of multiplicity is raised by a motion to elect and it would appear that a similar motion could be made to apply to situations of the kind here described. The prosecution would thereby be compelled at the outset of the trial to make an election and to specify under which of the two theories of the statute the government planned to proceed; and a remedy would be thereby provided in those cases in which the multi-purpose nature of the statute has itself operated to the defendant's detriment.

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