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Criminal Law--Official Misconduct--The Need for Legislative Reform

David L. Fister
University of Kentucky

sexuals" remain a significant segment of our population.[38] We make them criminals who have no victims.[39]

This writer knows of no public opinion poll taken in Kentucky reflecting public sentiment as to the matter of reforming the laws which attempt to regulate homosexual behavior. Perhaps then it is of some value to the legislature to know that in a recent Australian poll, twenty-two percent of the Australians polled favored the liberalization of their laws (which are much like Kentucky's) pertaining to the regulation of homosexual behavior.[40] If we hypothesize that Kentuckians are not any more receptive to the liberalization of such laws, one can only conclude that the possibility of reform in this area of the criminal law is politically unfeasible. If, however, this hypothesis is incorrect,[41] or in the alternative, if reason, knowledge and sanity prevail, then perhaps the Kentucky legislature will enact section 213.2 of the Model Penal Code,[42] thereby making Kentucky's criminal sanctions applicable only to those whose sexual deviation is accompanied by force, the adult corruption of a minor, or a public offense.

Paul L. Lamb

CRIMINAL LAW—OFFICIAL MISCONDUCT—THE NEED FOR LEGISLATIVE REFORM.—Official misconduct may be defined as any unlawful behavior by a public officer in relation to the duties of his office, willful or corrupt failure, refusal, or neglect by an officer to perform any duty imposed on him by law.[1] It differs from bribery in that in official misconduct the officer need not receive any bribe or derive any personal benefit from the corrupt act.[2]

At present Kentucky has no specific statute covering official misconduct. Various sections of the Kentucky Revised Statutes [hereinafter referred to as KRS] prohibit certain activities of specific

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[38] *See* THE WOLFENDEN REPORT 17-47.

[39] This paraphrase is borrowed from E. SCHUR, CRIMES WITHOUT VICTIMS (1965).

[40] Chappell & Wilson, *Public Attitudes to the Reform of the Law Relating to Abortion and Homosexuality*, 42 AUST. L.J. 175, 178 (1968).

[41] Education had a strong influence on the results of the poll; *e.g.*, forty-eight percent of those with college training favored the liberalization of the laws regarding homosexual behavior whereas only sixteen percent of the laborers and unskilled workers favored such reform. *Id.* at 179.

[42] MODEL PENAL CODE § 213.2 (Official Draft 1962). The provisions of this section are set out in full in note 12 *supra.*

[1] BLACK'S LAW DICTIONARY 1236 (4th ed. 1951).

[2] 11 C.J.S. *Bribery* § 1 (1938).

officials and provide penalties. These offenses can be grouped into three general classifications based upon the penalty imposed by the statute.

The first classification is that group of statutes which impose only a fine as a penalty. The offenses so punishable include the failure of a judge to give place to a special judge; the misuse by a judge of money held by his court;[3] and, the usurpation or wrongful retention of any state office.[4] The fines imposed by these statutes range from a minimum of one hundred dollars to a maximum of one thousand five hundred dollars.

The second classification includes those statutes which impose only a term in prison as a penalty. The offenses so punished under such statutes include false statements of notaries public;[5] voluntarily permitting a felon to escape;[6] failure to suppress places where bets are placed on races or other contests;[7] and, the misapplication of state property by a custodian.[8] The sentences imposed by these statutes range from six months to ten years.

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[3] KRS § 432.213 (1962) provides:
(1) Any judge who fails to give place to a special judge immediately upon his election shall be fined not less than one hundred dollars nor more than one thousand dollars.
(2) Any judge of a court who receives, uses or borrows, directly or indirectly, any money or trust fund under the management or control or subject to the judgment or order of the court of which he is judge, or under the control of any officer of the court, shall be fined for each offense not less than one hundred dollars nor more than one thousand dollars.

[4] KRS § 432.320 (1962) provides:
Any person who usurps any office established by the Constitution or statutes of this state, or who knowingly holds and pretends to exercise such office after his election or appointment has been declared illegal or void by a court of competent jurisdiction or after his term of office has expired, shall be fined not less than five hundred dollars nor more than one thousand five hundred dollars.

[5] KRS § 432.160 (1962) provides as follows: "Any notary public who falsely states in a protest made by him that notices were given or sent by him shall be confined in the penitentiary for not less than one nor more than five years."

[6] KRS § 432.470 (1962) reads as follows:
Any jailer, officer or guard who voluntarily permits a prisoner in his charge or custody, convicted of or charged with a felony, to escape shall be confined in the penitentiary for not less than one nor more than five years.

[7] KRS § 436.470 (1962) states:
Any peace officer who willfully fails to suppress any room, building, float, vessel or premises in which the provisions of KRS 436.400 are being violated or to arrest violators of the provisions of KRS 436.440 shall be imprisoned for not less than six nor more than twelve months. In addition, a peace officer convicted under this section shall forfeit his office and shall be ineligible to hold any other office in the gift of this state.

[8] KRS § 434.020 (1962) provides:

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The final classification includes those statutes which impose a fine and/or a term in prison as a penalty. The offenses punishable under these statutes are failure of a peace officer to arrest violators of Kentucky's gambling statute (KRS 436.230);[9] and, the receipt by a Commonwealth's attorney of a bribe not to prosecute a violator of any penal law.[10]

(Footnote continued from preceding page)

(1) Any person, other than an officer of a city of the first class or an assistant or deputy of that officer, who has the custody, control or distinct possession of any money, bank notes, bonds, treasury notes, legal tender notes, promissory notes, property, effects or other movable thing of value belonging to or for the use of the state or any policical subdivision of the state, and who is under any trust or duty to keep, return, deliver, cancel, destroy or specifically apply them or any part of them, and who, in violation of that trust or duty, willfully misapplies, misappropriates, conceals, uses, loans, or otherwise wrongfully and fraudulently disposes of such money, bank notes, bonds, promissory notes, property, effects or other movable thing of value, or any part of them, for his own purposes or use of another, with the intent to deprive the owner or authority of them or any part of them, for the benefit of the wrongdoer, or of any other person, shall be confined in the penitentiary for not less than one nor more than ten years.

(2) Any person who without lawful authority receives any of the things mentioned in subsection (1) of this section and then willfully and fraudulently misapplies or misappropriates them, shall be confined in the penitentiary for not less than one nor more than ten years.

(3) Any official, agent or employee of this state who expends or uses any money belonging to this state for any purpose not expressly authorized by law shall be confined in the penitentiary for not less than one nor more than ten years.

(4) Any officer of a city of the first class, or assistant or deputy of the officer, who embezzles or knowingly misapplies or withholds any money or property of any kind belonging to the city or coming into his hands officially shall be confined in the penitentiary for not less than two nor more than ten years.

[9] KRS § 436.350 (1962) provides:

Any peace officer, having knowledge or information of the commission of the offense of setting up or carrying on a keno bank, faro bank, game of cards or other gambling machine or contrivance whereby money or anything of value may be won or lost as prohibited by KRS 436.230, or who has knowledge of any person aiding or abetting in the offense, who fails to arrest or cause to be arrested, immediately the person offending, and take him before the proper court, shall be fined not less than one thousand dollars and imprisoned for not less than six nor more than twelve months, and shall forfeit his office.

[10] KRS § 432.190 (1962) provides as follows:

No Commonwealth's attorney or attorney prosecuting for the Commonwealth shall receive or agree to receive, directly or indirectly, any money or other thing in consideration not to prosecute any person for a violation of any penal law, or not to prosecute him for more than one violation of any penal law, or in any other way to waive or fail to make a prosecution under any penal law, or to dismiss an indictment or enter a nolle prosequi, so as to enable the offender to avoid the full penalty

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In an attempt to consolidate these statutes, the Kentucky Crime Commission [hereinafter referred to as the Commission] has proposed the adoption of a uniform statute. This proposal would establish both first and second degree official misconduct, depending upon the intent of the public servant.[11]

The primary source upon which the Commission bases its proposal is the New York Penal Law of 1967 [hereinafter referred to as N.Y. Penal Law].[12] This law makes the intent of the public servant a prime ingredient of official misconduct. It purports to punish the *commission* of an act that amounts to an unauthorized exercise of official power; and, it also purports to punish the *omission* of doing a legally imposed duty.

> . . . [T]he significant features of § 195.000 [N.Y. Penal Law] are (1) that it condenses in one section all offenses of general malfeasance and nonfeasance in public office, and (2) that it requires a specific intent or *mens rea* not found in the miscellaneous provisions of the former Penal Law. . . .[13]

As applied to offenses of omission to perform official duties, as most of the former provisions did, the only *mens rea* required appeared to be an intentional omission, regardless of its purpose. Some of the offenses, moreover, were satisfied by even less, penalizing a public servant who "knowingly permitted" or "unreasonably neglected." The over-all impression is that these were offenses of virtual or actual

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of the law. Any Commonwealth's attorney or attorney prosecuting for the Commonwealth who violates any of the provisions of this section shall be fined not less than the amount imposed upon the offense compounded or agreed, or imprisoned for ninety days, or both.

[11] 1 KENTUCKY CRIME COMMISSION, OUTLINE FOR PROPOSED CRIMINAL LAW REVISION § 2205, Comment (1968) reads as follows:

Official Misconduct

1st degree—acting unlawfully in his official capacity *with intent* to benefit self or harm another. (Emphasis added.)

2nd degree—acting unlawfully in his official capacity *without specific intent.* (Emphasis added.)

Is the 2nd degree necessary since the public servant has no intent to benefit himself or harm another when he consciously acts in violation of law?

[12] N.Y. PENAL LAW § 195.00 (McKinney 1967) reads as follows:

A public servant is guilty of official misconduct when, with intent to obtain a benefit or to injure or deprive another person of a benefit:

1. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized; or

2. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office. Official misconduct is a class A misdemeanor.

[13] *Id.* (Practice Commentary).

absolute liability and that any omission—and in some cases an unconscious one—constituted an offense whether or not any culpable motive was present. Even mere laxity was sometimes sufficient to create criminal liability. Section 195.000 now imposes a blanket requirement of culpable purpose before penal sanctions may be applied in this area.[14]

The secondary authorities referred to by the Commission include the Illinois Criminal Code of 1961 [hereinafter referred to as Illinois Code][15] and the Michigan Revised Criminal Code of 1967 (final draft) [hereinafter referred to as Michigan Code].[16]

The Michigan Code is similar to the N.Y. Penal Law in that it emphasizes the intent behind the omission or commission of the public servant's act.[17] But, it also contains the element of second degree

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[14] *Id.*

[15] ILL. REV. STAT. ch. 38, § 33-3 (1965) reads as follows:

A public officer or employee commits misconduct when, in his official capacity, he commits any of the following acts:

(a) Intentionally or recklessly fails to perform any mandatory duty as required by law; or

(b) Knowingly performs an act which he knows he is forbidden by law to perform; or

(c) With intent to obtain a personal advantage for himself or another, he performs an act in excess of his lawful authority; or

(d) Solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law.

A public officer or employee convicted of violating any provision of this Section forfeits his office or employment. In addition he shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to five years, or both fined and imprisoned.

[16] MICH. REV. CRIM. CODE §§ 4805-06 (Final Draft, Sept. 1967) reads as follows:

§ 4805. (1) A public servant commits the crime of official misconduct in the first degree if with intent to obtain a benefit for himself or to cause harm to another:

(a) He knowingly commits an act relating to his office but constituting an unauthorized exercise of his official functions;

(b) He knowingly refrains from performing a duty imposed upon him by law or clearly inherent in the nature of his office; or

(c) He knowingly violates any statute or lawfully adopted rule or regulation relating to his office.

(2) Official misconduct in the first degree is a Class A misdemeanor.

§ 4806. (1) A public servant commits the crime of official misconduct in the second degree if:

(a) He knowingly refrains from performing a duty imposed upon him by law or clearly inherent in the nature of his office; or

(b) He knowingly violates any statute or lawfully adopted rule or regulation relating to his office.

(2) Official misconduct in the second degree is a Class C misdemeanor.

[17] *Id.* § 4805.

official misconduct[18] which is the same as official misconduct in the first degree without the intent requirement.

Intent is also a necessary element in the Illinois Code,[19] however, it makes no referrence to the need for the official misconduct to harm anyone, and in only one of its provisions does it require that the public servant have his own benefit in mind when he commits the wrongful act.[20] A public servant in Illinois could intentionally or recklessly fail to perform any mandatory duty that he is required by law to perform, with no benefit inuring to himself and with no harm to anyone, yet be prosecuted under the statute.

Another important factor to consider in evaluating these statutory authorties referred to by the Commission is the penalty imposed. New York classifiies official misconduct as a Class A misdemeanor.[21] In New York a Class A misdemeanor is punishable by confinement of up to one year in prison;[22] or, a fine of up to $1,000;[23] or both confinement of up to one year and a fine of up to $1,000;[24] or, probation for three years;[25] or both probation of three years and a fine of up to $1,000.[26] In cases where the public servant has made a profit from his misconduct, then the fine imposed may be as much as double the profit from such misconduct.[27]

Michigan classifies official misconduct in the first degree as a Class A misdemeanor;[28] and, official misconduct in the second degree as a Class C misdemeanor.[29] A Class A misdemeanor is punishable by up to one year in prison[30] or a maximum fine of $1,000.[31] A Class C misdemeanor is punishable by up to thirty days in prison,[32] or a maximum fine of $250.[33]

Illinois does not classify official misconduct as either a felony or a misdemeanor. It imposes penalties in the body of the statute. In Illinois, a public servant convicted of official misconduct forfeits his

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[18] *Id.* § 4806.
[19] ILL. REV. STAT. ch. 38, § 33-3 (1965).
[20] *Id.* § 33-3 (c).
[21] N.Y. PENAL LAW § 195.00 (McKinney 1967).
[22] *Id.* § 70.15-1.
[23] *Id.* § 80.05-1.
[24] *Id.* § 60.10-2(d).
[25] *Id.* § 65.00-1.3(b).
[26] *Id.* § 60.10-1.
[27] *Id.* § 80.05-5.
[28] MICH. REV. CRIM. CODE § 4805 (2) (Final Draft, Sept. 1967).
[29] *Id.* § 4806(2).
[30] *Id.* § 1415(1)(a).
[31] *Id.* § 1505(1).
[32] *Id.* § 1415(1)(c).
[33] *Id.* § 1505(3).

office; and, many be fined up to $1,000 or imprisoned up to five years; or, may be both fined and imprisoned.[34]

The Practice Commentary on the N.Y. Penal Law points out the main advantage of having a specific uniform statute on official misconduct—the condensation in one section of all offenses of general malfeasance and nonfeasance in public office, with a statutorily imposed maximum penalty.[35]

As pointed out earlier, Kentucky has some seven statutes which attempt to define and punish varying forms of official misconduct. This presents several dangers. First, if an act of official misconduct does not fit into one of the present statutes, then the public servant might go unpunished. Second, the degree of harm resulting from the violation of one statute may be greater than that resulting from another statute. But, because of the penalties imposed by each statute, the penalty in the former instance may be less severe than that of the latter. For example, a judge who fails to give place to a special judge may cause irreparable injury to the parties before the court, for which he could be fined up to $1,000;[36] whereas, a notary public may cause little harm in making a false statement, but he could be imprisoned for at least one year.[37]

Finally, the present statutes do not require that the public servant have any specific intent, or *mens rea,* when he violates their provisions. Instead, these statutes refer to such terms as "knowingly holds,"[38] "voluntarily permits,"[39] "willfully fails,"[40] and "willfully misapplies."[41] Other statutes impose actual absolute liability with no consideration of whether there was any culpable motive present.[42]

Thus, if a uniform, official misconduct statute were adopted, the dangers of unpunished crime, discriminatory penalties, and punishment of non-culpable acts would be greatly lessened. And, such a statute might have a hidden benefit. It may serve to make public servants exercise greater care in carrying out the duties of their office, for it would encompass the misconduct of all public servants.

Following is a proposed draft of such a statute.

(1) A public servant is guilty of official misconduct when, with

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[34] ILL. REV. STAT. ch. 38, § 33-3 (1965).
[35] N.Y. PENAL LAW § 195.00, Practice Commentary (McKinney 1967).
[36] KRS § 432.310(1) (1962).
[37] KRS § 432.160.
[38] KRS § 432.320.
[39] KRS § 432.470.
[40] KRS § 436.470.
[41] KRS § 434.020(1).
[42] KRS §§ 432.310, 432.160, 432.190, 436.350.

the intent to benefit himself or another, or with the intent to injure or deprive another person of a benefit;

(a) He knowingly commits an act that constitutes an unauthorized exercise of his official functions; or

(b) He knowingly refrains from performing a duty imposed upon him by law or clearly inherent in the nature of his office; or

(c) He knowingly violates any statute or lawfully adopted rule or regulation relating to his office.

(2) Official misconduct is a Class A misdemeanor.[43]

David L. Fister

[43] This statute is a consolidation of N.Y. PENAL LAW § 195.00; and MICH. REV. CRIM. CODE §§ 4805-06. These statutes are quoted in note 12 (New York) and note 16 (Michigan), *supra.*