Washington and Lee Law Review

Volume 35 | Issue 2 Article 9

Spring 3-1-1978

Iv. Criminal Law

the college attempted at trial to justify this treatment by distinguishing rule infraction by individuals from rule infraction by a group of faculty members, the dissent concluded that the disparate treatment and the purported distinction amounted only to "an admission that Shaw and Winn were discharged because they acted in concert with their fellows to protest a college policy."[43] Thus the school could not have demonstrated that in the absence of the protected conduct the plaintiffs would have been dismissed because in prior instances of violations without the protected conduct offenders were not dismissed.

If the *Shaw* majority had adopted such a test, rather than the simple "real motivation" criterion, its attention might have focused on the protected conduct of the teachers and not on the arguably proper conduct of the school. Such an approach would follow a prior Fourth Circuit case in which the court expressly mentioned that comparison to other instances of the same misconduct is a valuable tool in determining the extent of first amendment protection.[44] Generally, such an approach would seem consonant with the traditionally high value placed on first amendment activity, even in the restricted environment of the classroom.[45]

EDITORIAL STAFF

IV. CRIMINAL LAW

A. Federal Statutes and the Common Law

Federal criminal code sections often designate specified activities as criminal without precisely defining those activities.[1] Courts have held that such undefined terms should be given their common law or ordinary meaning.[2] Serious problems have arisen as persons engaging in criminal pursuits

[43] *Id.*

[44] *See* Chitwood v. Feaster, 468 F.2d 359 (4th Cir. 1972); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966). In *Chitwood* the court remanded, seeking to know "how many other untenured teachers had engaged in comparable speech and how many of them had their contracts terminated." 468 F.2d at 361. In *Johnson,* the Fourth Circuit stated that "absent the special question [the alleged impermissible motive], the issue would not have arisen." 364 F.2d at 182.

[45] *See, e.g.,* Board of Regents v. Roth, 408 U.S. 564 (1972); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); Pickering v. Board of Educ., 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Wieman v. Updegraff, 344 U.S. 183 (1952).

[1] *See, e.g.,* 18 U.S.C. § 2314 (1970). Section 2314 proscribes the transportation in interstate commerce with fraudulent intent of "any falsely made, forged, altered, or counterfeited securities . . . ," but does not define any of those terms.

[2] *See, e.g.,* Wright v. United States, 172 F.2d 310 (9th Cir. 1949). *But see* Bergman v. United States, 253 F.2d 933 (6th Cir. 1958). An important issue in both *Wright* and *Bergman* was the determination of definitions for terms not statutorily defined in 18 U.S.C. § 2314 (1970).

engendered by newly developed technology have been prosecuted under voluminous, often overlapping federal statutes which incorporate antiquated common law provisions. The Senate Judiciary Committee, recognizing these deficiencies in the current federal criminal statutes, has approved a bill which, if passed by Congress, will completely revise the criminal code by proscribing new types of criminal activity and eliminating some traditional technical distinctions between common law crimes.[3] Several recent Fourth Circuit cases illustrate the need for these changes in the federal criminal code.

United States v. Jones[4] demonstrates the deficiencies of section 2314 of the criminal code dealing with the interstate transportation of stolen goods and fraudulent documents.[5] In *Jones,* the appellee's accomplice had fed false information into a computer of a Canadian company. As a result, the computer printed a check payable to the appellee Jones although the company in fact owed no debt to Jones.[6]

The appellant in *Wright* had been convicted of transporting forged securities in interstate commerce in violation of 18 U.S.C. § 415 (1940), the predecessor and equivalent of § 2314. The *Wright* court held that the undefined terms "falsely made" and "forged" in § 415 should be given their common ordinary meaning. 172 F.2d at 311.

The defendant in *Bergman* had been convicted of violating § 2314 by knowingly transporting stolen goods in interstate commerce. Although § 2314 offers no definition of "stolen," the Sixth Circuit held that, to sustain a conviction under § 2314, the prosecution need not prove the commission of a common law larceny. 253 F.2d at 935. However, the *Bergman* court did not explain the standard by which the trial court should have determined whether an article was stolen.

[3] The Senate Judiciary Committee approved S. 1437, 95th Cong., 1st Sess. (1977), the Senate's comprehensive criminal code revision bill, on November 2, 1977. *See* Cong. Q. Weekly Rep., November 5, 1977 at 2364. The bill, if enacted, will greatly reduce the number of federal substantive offenses by creating simpler, more comprehensive provisions which will encompass activities proscribed by the less inclusive, but more numerous, provisions of the current criminal code. *See* Cong. Q. Weekly Rep., October 15, 1977 at 2190. For example, the versions of S. 1437 approved by the Senate Judiciary Committee would reduce the fifty false statement measures, eighty counterfeiting and forgery statutes, and seventy theft provisions of the present federal criminal code to three false statement and perjury sections and a single basic theft provision. The sentencing provisions of S. 1437 stress predictability and uniformity of sentence for each particular offense, severely curtailing the sentencing discretion currently enjoyed by federal judges. *See* Cong. Q. Weekly Rep., November 5, 1977 at 2190.

[4] 553 F.2d 351 (4th Cir.), *cert. denied,* 45 U.S.L.W. 3807 (U.S. June 14, 1977) (No. 76-1586).

[5] 18 U.S.C. § 2314 (1970). *See* note 1 *supra.*

[6] After the check was printed, the defendant caused the check to be transported to her home in Maryland, where she deposited the check in her bank account. 553 F.2d at 354.

The incidence of the use of computers in the commission of crime has increased dramatically in the United States in recent years. *See* Bequai, *A Survey of Fraud and Privacy Obstacles to the Development of an Electronic Funds Transfer System,* 25 CATH. U.L. REV. 766, 772-81 (1976). The ease with which a skilled computer programmer can alter information on existing computer programs and input false information, and the difficulty of detecting program alteration are important reasons for this computer crime wave. *See* Nycum, *Computer Abuses Raise New Legal Problems,* 61 A.B.A.J. 444, 446 (1975). The proliferation of computer crime has raised serious questions concerning the ability of existing criminal

The issue addressed by the *Jones* court was whether appellee's activities fell within the exclusionary clause of section 2314, which states that the provisions of 2314 do not apply to "any falsely made, forged, altered, counterfeited or spurious representation" of a "security . . . issued by a corporation of any foreign county." Since the Canadian corporation was a foreign corporation and had issued a security in the form of a check, the dispositive issue was whether the check had been "falsely made, forged, altered, or counterfeited."[7] Reversing the district court's dismissal of the indictment against the defendant, the Fourth Circuit held that the defendant's activities were not within the terms of the section 2314 exclusionary clause.[8]

The *Jones* court stated that the section 2314 exclusionary clause language, "falsely made, forged, altered, or counterfeited" defines common law forgery,[9] and that false making and forgery are substantially synony-

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statutes to deal with the problems presented by computer crimes. For example, computer programs may be altered or rendered inoperable in certain situations by persons working from a remote terminal miles from the computer. If information is stolen from a computer in such a situation, the prosecutor would be forced to decide whether to seek an indictment for trespass, burglary, malicious mischief, or some other offense. *Id.* at 445. The outcome of a trial resulting from such a manipulation of a computer could depend upon whether the prosecutor could successfully demonstrate that the defendant's actions fit the technical requirement for each crime as established under the common law.

Recognizing the serious nature of computer crime, Congress may soon simplify federal prosecution of computer criminals. A bill has been introduced in Congress which would make it a crime to use computers owned by the federal government or other "entities affecting interstate commerce" "for fraudulent or other illegal purposes." *See* S. 1766 § 3, 95th Cong., 1st Sess. (1977); H.R. 8421, 95th Cong., 1st Sess. (1977). The bill, if passed by Congress, would proscribe the use of a computer "for the purpose of devising or executing any scheme or artifice to defraud, or obtaining money, property, or services by means of false or fraudulent pretenses, representations, or promises . . ." S. 1766 § 3. Thus, under S. 1766, the prosecution must necessarily prove fraudulent intent, although proof of the commission of a common law crime such as forgery or counterfeiting is not required.

[7] 18 U.S.C. § 2314 (1970).

[8] 553 F.2d at 356.

[9] *Id.* at 354. The *Jones* court relied on Greathouse v. United States, 170 F.2d 512 (4th Cir. 1948), to establish that the words "falsely made, forged, altered, or counterfeited" indicate the crime of forgery. *Id.* The *Greathouse* court held that "the words, 'falsely made, forged, altered, or counterfeited' in the collocation in which they appeared are *ejusdem generis* and are usually employed to denounce the crime of forgery." *Id.* at 514.

The principle of *ejusdem generis* requires that a broad or comprehensive statutory term which follows specific terms having only one meaning shall not be construed to its widest extent, but must be construed to mean the sense of the broad term which is most closely associated with the previously enumerated specific term or terms. *See* diLeo v. Greenfield, 541 F.2d 949, 954 (2d Cir. 1976); Bumpus v. United States, 325 F.2d 264, 266 (10th Cir. 1963); H. BLACK, INTERPRETATION OF LAWS § 71 (2d ed. 1911). The *Greathouse* court gave no reason why it applied the *ejusdem generis* principle to the terms "falsely made, forged, altered, or counterfeited." Presumably, the court determined "forged" to be a specific term which was followed by the more general terms "altered or counterfeited." Under this presumption, the terms "altered or counterfeited" should be construed to indicate the meanings of these words most closely associated with forgery. *See* H. BLACK INTERPRETATION OF LAWS § 71 (2d ed. 1911). Thus, "altered or counterfeited" are simply modifiers of the controlling expression of the phrase, which is "forged," leading to the conclusion that the entire phrase defines the crime

mous.[10] Thus, a false making had to be established to include defendant's activities within the exclusionary clause. False making of an instrument is the creation of an instrument which is not genuine, because the instrument is not, in fact, what it purports to be.[11] False making can be distinguished from the making of a genuine instrument which contains false statements.[12] The falsely made instrument is an entirely bogus creation, but the genuine instrument containing a false statement would be a valid, enforceable obligation if it did not contain the false statements.[13]

Since the check payable to defendant did not constitute a false writing, the *Jones* court held that it did not constitute a forgery.[14] The check was what it purported to be, an obligation of the Canadian company as the apparent maker of the check. The check, however, contained the implicit

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of forgery. This conclusion is not convincing, however, for the term "counterfeited" seems to be as precise and definite a term as "forged."

[10] *Id.* at 354; *see* Marteney v. United States, 216 F.2d 760, 763 (10th Cir. 1954); Wright v. United States, 172 F.2d 310, 311 (9th Cir. 1949); Greathouse v. United States, 170 F.2d 512, 514 (4th Cir. 1948).

In *Wright,* the Ninth Circuit defined forgery as "the false making or materially altering, with intent to defraud, of any writing, which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability." 172 F.2d at 311. Thus, in the Ninth Circuit, proof of a false making is not necessary to demonstrate the occurrence of a forgery because a forgery may be predicated upon a "material altering." *See Id.* at 311.

Proof of false making, or false writing, is absolutely necessary to sustain a § 2314 conviction for forgery in the Fourth and Tenth Circuits. In *Greathouse,* the Fourth Circuit held that the terms falsely made and forged are virtually synonymous when used as they are in § 2314. 170 F.2d at 514. *Accord,* 216 F.2d 763.

[11] *See* Wright v. United States, 172 F.2d 310, 311 (9th Cir. 1949). The genuineness of a document is not determined by the veracity of statements appearing on a document. A document is genuine if the apparent maker of the document did actually make the document and the instrument is actually what it appears to be. *See* Baldwin v. Van Deusen, 37 N.Y. 487, 492-93 (1868). Thus, a counterfeited U.S. Federal Reserve Note is not genuine, since the government, the apparent maker, did not actually make the note, and because the counterfeited bill is not what it appears to be, an obligation of the federal government. The counterfeiting of the bill is thus a false making.

[12] The distinction between false making of a writing and the making of a writing which contains false statements was recognized by the Supreme Court in United States v. Staats, 49 U.S. (8 How.) 41 (1850). In *Staats,* the defendant had been convicted of forgery for procuring the creation of documents to support his claim for benefits under a Revolutionary War veterans' pension statute. *Id.* at 43. The defendant argued that his conviction could be reversed, since the document was genuine as to execution, but contained false statements. The Supreme Court recognized this distinction but affirmed defendant's conviction on the ground that the statute at issue allowed conviction for the creation of a writing which contained false statements, as well as for forgery, or creation of a false writing. *Id.* at 47.

A genuine writing containing false statements was found in Marteney v. United States, 216 F.2d 760 (10th Cir. 1954). In *Marteney,* the defendant had altered a valid warehouse receipt so that the receipt represented more grain in the warehouse than defendant had actually stored. In holding that defendant's transportation of the receipt in interstate commerce was not a violation of § 2314, the Tenth Circuit noted that the receipt had not been forged or falsely made, but was a genuine instrument which simply contained false information. *Id.* at 763-64.

[13] *See* Wright v. United States, 172 F.2d 310 (9th Cir. 1949).

[14] 553 F.2d at 355.

false statement that the company owed a debt to the defendant in the amount printed on the check.[15] Had the company actually owed the defendant the debt indicated on the check, the check would have been a valid enforceable instrument. Thus, the check was not a falsely made instrument, but was a genuine instrument which contained a false statement. The check was therefore not a forgery and the exclusionary clause of section 2314 did not apply.

There are other problems with the incorporation of common law definitions into the terms of section 2314. For example, the Fourth Circuit in *United States v. Pomponio*[16] considered the application of common law definitions of counterfeiting that have been incorporated by federal courts into the broad proscription of section 2314 against the fraudulent interstate transportation of counterfeited securities.[17] In *Pomponio,* the court addressed the issue of whether the defendant's acts constituted common law counterfeiting since the evidence confirmed the satisfaction of the other section 2314 requirements.

The defendant Pomponio had been the owner of all the stock in a corporation. The defendant pledged all the stock to one Murray as collateral for the performance of an obligation by issuing him stock certificates numbered one, two, and three. The defendant then pledged the exact same stock to one McShane by issuing him other stock certificates numbered one, two, and three.[18] The Fourth Circuit found that the mere fact that defendant issued the second set of certificates did not constitute the crime of counterfeiting. The court conceded that a simple misrepresentation of the value of the certificates would not be sufficient to sustain a section 2314 conviction based on counterfeiting.[19] The *Pomponio* court concluded, how-

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[15] *Id.*

[16] 558 F.2d 1172 (4th Cir. 1977).

[17] 18 U.S.C. § 2314 (1970) provides that "whoever, with unlawful or fraudulent intent, transports in interstate . . . commerce any . . . counterfeited securities . . . knowing the same to have been . . . counterfeited shall be fined . . . or imprisoned. . . ."

[18] 558 F.2d at 1174. In consideration for the issuance of the second set of certificates, McShane endorsed a promissory note in favor of the defendant, who negotiated part of the note and travelled from Pennsylvania to Virginia with the proceeds from the negotiation, a $2,000,000 cashier's check. This interstate transportation of the check brought the defendant's action within the scope of § 2314. *Id.* at 1173-74.

[19] The mere fraudulent misrepresentation of the value of the second set of stock certificates constituted a making of a genuine instrument which contained false information. 558 F.2d at 1174, *citing* Gilbert v. United States, 370 U.S. 650 (1962); *see* Marteney v. United States, 216 F.2d 760, 763 (10th Cir. 1954); Greathouse v. United States, 170 F.2d 512, 514 (4th Cir. 1948).

In *Greathouse,* the defendant had represented to the bank that he had authority to sign a check payable to himself in the name of a third party. The defendant signed the third party's name, endorsed the check in his own name, and cashed the check. The *Greathouse* court found that the defendant had not violated § 2314, since the bank was aware that it was the defendant who had signed the third party's name, and thus no false making had occurred. 170 F.2d at 514. *Marteney* involved a warehouse receipt which represented goods which the defendant owned, but which listed a greater quantity of the goods than were stored in the warehouse, due to the defendant's alteration of the receipt. The Tenth Circuit held that the

ever, that the defendant's acts of purchasing a new stock book and numbering the second set of certificates one, two and three were an attempt to simulate the first set of certificates and held that the second set of certificates was a counterfeit of the first set.[20]

Prior to the *Pomponio* decision, the Fourth Circuit had determined that the term "counterfeited" means "imitated, simulated, feigned, or pretended."[21] This general definition[22] did not enumerate the specific elements that constitute common law counterfeiting.[23] In contrast, a more precise definition of the term "counterfeit" cited by the *Pomponio* court, adopted by the Sixth Circuit in *Richland Trust Co. v. Federal Insurance Co.*,[24] and recently approved by the Ninth Circuit,[25] indicates that "counterfeit" means "an imitation of a genuine document having a resemblance intended to deceive and be taken for the original."[26] The *Pomponio* court's determination that the second set of certificates were counterfeits of the first set was made "in light of" the Fourth Circuit and *Richland Trust* definitions.[27]

The *Pomponio* court's holding that the defendant had counterfeited his own stock certificates was proper under the Fourth Circuit definition of "counterfeited" since the defendant "feigned" or "pretended" that the certificates represented all the stock in his company. However, the Fourth Circuit finding that "counterfeited" means "imitated, simulated, feigned, or pretended"[28] is so broad and inclusive that it possibly would be impru-

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defendant's transportation of the receipt was not violative of § 2314 since the receipt was genuine, but contained false information. 216 F.2d at 763. In *Gilbert*, the appellant negotiated government checks by signing his own name, stating that he was the agent of the payee. 370 U.S. at 652. The Supreme Court held that this act did not violate 18 U.S.C. § 415 (1940), the predecessor and equivalent of 18 U.S.C. § 2314 (1970), since the bank cashed the check, not in reliance of a false writing, but in reliance on defendant's misrepresentation that he was the payee's agent. 370 U.S. at 657.

Even if the second set of certificates in *Pomponio* had not physically resembled the first set, the defendant's actions constituted a state criminal offense. 18 PA. CONS. STAT. ANN. § 4114 (1973) (Purdon) states that an individual commits an offense if "by deception he causes another to execute any instrument affecting or purporting to affect or likely to affect the pecuniary interest of any person." McShane executed his promissory note in favor of the defendant because the defendant had deceived him into the belief that the certificates which McShane had received represented all the stock in Pomponio's corporation. The execution of the promissory note adversely affected McShane's pecuniary interest. Therefore, the defendant's activity, *see* 558 F.2d at 1152, was within the ambit of the Pennsylvania statute.

[20] 558 F.2d at 1174.

[21] United States v. Smith, 318 F.2d 94, 95 (4th Cir. 1963), *citing* 2 OXFORD DICTIONARY 1066 (1933 ed.).

[22] *E.g., Id. citing* 2 OXFORD DICTIONARY 1066 (1933 ed.).

[23] The *Smith* court derived its definition of "counterfeited" from the Oxford Dictionary, a nonlegal source. *See* 2 OXFORD DICTIONARY 1066 (1933 ed.).

[24] 494 F.2d 641, 643 (6th Cir. 1974).

[25] *See* United States v. Anderson, 532 F.2d 1218, 1224 (9th Cir. 1976), *quoting* Union Banking Co. v. U.S. Fidelity & Guaranty Co., 4 Ohio App. 2d 397, 213 N.E.2d 191, 196 (1965).

[26] 494 F.2d at 642, *quoted in*, 532 F.2d at 1224.

[27] 558 F.2d at 1174.

[28] *See* text accompanying note 21 *supra*.

dent to sustain a 2314 conviction on such weak authority alone.

The defendant's actions in *Pomponio* do not appear to constitute "counterfeiting" within the *Richland Trust* meaning of the term. When the defendant issued the second set of certificates to McShane, he assured the latter that these certificates represented all the stock of the company.[29] McShane apparently did not know that all the stock of the company had been previously issued and thus was unaware of the existence of the first set of certificates.[30] Since McShane was unaware that the first set of certificates existed, he had no idea that the second set resembled the first. Under the *Richland Trust* definition, the second set of certificates could not have been an imitation "having a resemblance intended to deceive and be taken for the original"[31] because McShane had never seen an original with which to compare the second set of certificates. Rather, the second set of certificates was intended to be taken as representative of the interest in the company that actually was conveyed by the first certificates. The defendant wanted McShane to believe that he was pledging all the stock in the corporation to McShane by selling McShane the certificates.[32] Thus, while the Fourth Circuit's holding in *Pomponio* can be justified under the previous Fourth Circuit definition of "counterfeit," the *Pomponio* decision apparently cannot be justified under the more persuasive authority of the *Richland Trust* definition.[33]

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[29] 558 F.2d at 1173.

[30] The *Pomponio* court did not directly state that McShane had no knowledge of the first set of certificates, but this lack of knowledge may be inferred. The court noted that the cashier's check which Pomponio received upon cashing McShane's promissory note was obtained by fraud. *Id.* at 1175. Had McShane known of the first set of certificates, then he would have realized the value of the stock which the defendant offered him, and purchase of that stock would not have been induced by fraud. Thus, McShane could not have known of the first set of certificates.

[31] *See* text accompanying notes 24-26 *supra.*

[32] In order to justify the *Pomponio* court's holding under the *Richland Trust* definition, the word "original" in the *Richland Trust* definition of "counterfeiting" must be construed to mean the original interest in the company rather than the original set of certificates. A plain reading of the *Richland Trust* definition of "counterfeit" as "an imitation of a genuine document having a resemblance intended to deceive and be taken for the original," 494 F.2d at 643, *quoted in* 532 F.2d at 1224, reveals that the *Richland Trust* court intended for the word "original" to refer to the document. There is no evidence in the definition that the word "original" should refer to the interest represented by the document rather than to the document itself. *See Id.* Furthermore, the *Pomponio* court gave no reason why the plain meaning of the term "original" in the *Richland Trust* definition of "counterfeit" should be extended.

[33] In contrast to *Pomponio,* the Fourth Circuit's recent decision in United States v. Totaro, 550 F.2d 957 (4th Cir.), *cert. denied,* 431 U.S. 920 (1977), was controlled by the statutory definition of a crucial term in a federal criminal statute. In *Totaro,* the defendants had arranged to extend two loans to a potential debtor at per annum interest rates of 300% and 520% respectively. The defendant wrote the potential debtor a check in the amount of $2,500 on the defendant's business account. When the potential debtor's business partner tried to negotiate the check, the bank in which the defendant's account was established refused to honor it for lack of sufficient funds. Throughout the transaction, the defendants had made threats of force upon the potential debtor to induce repayment of the loan. *Id.* at 958.

Difficulties with the incorporation of common law definitions into federal statutes also arise in the area of sentencing. The Fourth Circuit addressed one such problem in a recent decision construing a part of the Youth Corrections Act.[34] Since 1950, the Youth Corrections Act, or Y.C.A., has provided federal judges with a special sentencing system under which the judges may exercise discretion in determining sentences for offenders under the age of twenty-two.[35] The Y.C.A.'s purpose is to allow the sentencing judge to determine each youth offender's sentence according to the rehabilitative needs of the individual offender.[36] The judge has several options under the Y.C.A. For example, he may choose to sentence the individual under the Y.C.A. or any other applicable federal sentencing provision.[37] If a judge decides to sentence a youth offender under a provision other than the Y.C.A., however, he must first enter an express finding that the offender would not benefit from sentencing under the Y.C.A.[38]

The defendants were convicted of violating 18 U.S.C. § 892 (1970), which proscribes the making of "an extortionate extension of credit." 18 U.S.C. § 891 (1970) states that for the purpose of § 892, "to extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim . . . may or will be deferred." *See* 550 F.2d at 958-59.

The defendants in *Totaro* claimed that since the potential debtor had received no money there had been no extension of credit under § 892. The issue of whether a potential debtor's failure to receive any money pursuant to an offer to extend an extortionate loan precludes a conviction under § 892 was a novel issue. In holding that the defendants' actions did constitute an extension of credit under § 892, the *Totaro* court relied partially on legislative history which demonstrated the Congressional intent that the defendant's act should be covered by § 892, *see* CONF. REP. No. 1397, 90th Cong., 2d Sess., *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2025-2029, and partially on prior cases which have construed § 892 broadly. 550 F.2d at 959, *citing* United States v. Andrino, 501 F.2d 1373 (9th Cir. 1974); United States v. Annerino, 495 F.2d 1159 (7th Cir. 1974); United States v. Briola, 465 F.2d 1018 (10th Cir. 1972), *cert. denied,* 409 U.S. 1108 (1973); United States v. Keresty, 465 F.2d 36 (3d Cir.), *cert. denied,* 409 U.S. 991 (1972). However, the *Totaro* court relied primarily upon the plain meaning of the definition of "extension of credit" in § 891, which states that a credit extension can be a mere "agreement . . . whereby the repayment or satisfaction of any debt or claim may or will be deferred." 550 F.2d at 959. Reception of money by the potential debtor pursuant to the extortionate credit agreement is clearly not necessary to constitute an extension of credit under § 891; thus, defendants' convictions under § 892 were proper.

[34] 18 U.S.C. §§ 5005-26 (1970).

[35] *See* H.R. REP. No. 2979, 81st Cong., 2d Sess. 1, *reprinted in* [1950] U.S. CODE CONG. & AD. NEWS 3983, 3983. F.Y.C.A. C1115, § 2, 64 Stat. 1085 (1950).

[36] *Id.*

[37] *See* 18 U.S.C. § 5010 (1970). Under the sentencing section of the Y.C.A., a judge may suspend a sentence and put the youth offender on probation, *id.* at § 5010(a), sentence the offender to be placed under the custody of the Attorney General for special sentencing procedures, *id.* at § 5010(b), or sentence the offender under an applicable procedure outside the Y.C.A., *id.* at § 5010(d).

[38] *See* Dorszynski v. United States, 418 U.S. 424 (1974). In *Dorszynski,* an appellant under the age of 22 had been found guilty of possession of a controlled substance without authorization under 21 U.S.C. § 884(a) (1970). The appellant had been sentenced under a standard adult sentencing procedure, 18 U.S.C. § 3651 (1970), without reference to the Y.C.A. 418 U.S. at 429-30. The Supreme Court held that in order to sentence under other procedures a person eligible to be sentenced under the Y.C.A., the sentencing judge must first make an

In *Jenkins v. United States*,[39] petitioner had been convicted of a crime and sentenced without reference to the Y.C.A. Petitioner moved to have his sentence vacated[40] since he had been sentenced without the required "no benefit" finding. The evidence showed that petitioner had been twenty-one years old at the time of the determination of his guilt and twenty-two years old when his sentence was imposed.[41] The issue in *Jenkins* was whether the Y.C.A. jurisdictional requirement is satisfied if the offender is under the age of twenty-two at the time of a judicial determination of the offender's guilt or at the time of the offender's sentencing. The Fourth Circuit held that the requirement is satisfied when an offender is under the age of twenty-two at the time of determination of his guilt.[42]

The statutory language of the Y.C.A. relevant to age limitations seems to require that the offender's age be determined at the time of his sentencing.[43] The Act applies only to the "youth offender,"[44] a term defined as a "person under the age of twenty-two years at the time of conviction."[45] In addition, the definition of the term "conviction" is "the judgment on a verdict or a finding of guilt, a plea of guilty, or a plea of nolo contendere."[46] The term "judgment," however, is not defined in the Y.C.A; in the absence of a statutory definition, the common law meaning of the term is relevant. The Supreme Court has held that the common law definition of "judgment" is sentence.[47] The *Jenkins* court could have incorporated this Supreme Court definition into the Act as the Y.C.A. definition of "judgment" and held that the time of conviction under the Y.C.A. is the time of sentencing.[48] Nevertheless, a countervailing consideration precluded such construction by the Fourth Circuit.

The *Jenkins* court determined that the legislative history of the Y.C.A. clearly demonstrates that the drafters of the Act intended that the term "conviction" should mean judicial determination of guilt, and that the court should not defeat the manifest legislative intent by incorporating the

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express finding that the offender would derive no benefit from sentencing under the Y.C.A. 418 U.S. at 425. However, the court noted that the judge is not required to state his reasons for this "no-benefit" finding. *Id.* at 426.

[39] 555 F.2d 1188 (4th Cir. 1977).

[40] The petitioner's motion to have sentence vacated was made under 28 U.S.C. § 2255 (1970).

[41] 555 F.2d at 1189.

[42] *Id.* at 1190.

[43] *See* 555 F.2d at 1189.

[44] *See* 18 U.S.C. § 5010 (1970).

[45] 18 U.S.C. § 5006(e) (1970).

[46] 18 U.S.C. § 5006(h) (1970).

[47] In Berman v. United States, 302 U.S. 211 (1937), the Supreme Court ruled that a dismissal of an appeal from a conviction for which petitioner had already been sentenced was inappropriate. 302 U.S. at 212. The Court held that once a person has been sentenced, no appeal from the conviction can be dismissed as interlocutory. *Id.* at 213. The Court noted that an appeal can only be based upon a final judgment and that "the sentence is the judgment." *Id.* at 212.

[48] *See* text accompanying note 49 *infra*.

Supreme Court definition into the statute.[49] Judge Widener, dissenting in part, stated that the Y.C.A. clearly refers to "judgment" which plainly means "time of sentencing" under the Supreme Court common law definition of judgment; the plain meaning of judgment as the time of sentencing should control.[50] However, this rigid preference for statutory language to the exclusion of all other considerations in the construction of statutes, known as the "plain meaning rule," has lost much of its vitality.[51]

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[49] 555 F.2d at 1189. An example of the belief that the term "conviction" means a determination of guilt is found in a letter from the Deputy Attorney General to the Chairman of the House Judiciary Committee. In the letter, the Deputy Attorney General wrote:

> The measure would define a youth offender as a person under the age of 22 years who has been *convicted* of an offense against the United States. While it would not deprive the court of any of its present functions as to sentencing, the bill would provide that, *upon conviction,* the court may place the youth offender on probation, proceed under the Juvenile Delinquency Act, *or sentence* under any applicable provision of law relating to the offense . . . (Emphasis supplied).

Id. at 1189-90, *citing* Letter from Deputy Attorney General Peyton Ford to House Judiciary Committee Chairman Emanuel Celler (June 21, 1950), *reprinted in* [1950] U.S. CODE CONG. & AD. NEWS 3983, 3991. The letter clearly indicates that the Deputy Attorney General regarded the terms "conviction" and "sentence" as separate concepts under the Y.C.A. *See Id.* Another example of the Y.C.A. drafters' perception of a distinction between "sentence" and "conviction" is a House of Representatives report which states that "[t]he proposed legislation is designed to make available for the discretionary use of the Federal judges a system for the *sentencing* and treatment of persons under the age of 22 years who have been *convicted* of crime in the United States courts . . ." H.R. REP. NO. 2979, 81st Cong., 2d sess. 1, *reprinted in* [1950] U.S. CODE CONG. & AD. NEWS 3983, 3983. *See* 555 F.2d at 1189. The cited materials demonstrate that the Y.C.A. drafters did not intend that the term "conviction" in the Y.C.A. should be construed to mean "sentence." Rather, the Y.C.A. drafters obviously used the term "conviction" to indicate a judicial determination of guilt. *See Id.*

[50] *Id.* at 1192 (Widener, J., dissenting in part, concurring in part). Judge Widener supported his contention that clear statutory language controls statutory construction by citing United States v. Shreveport Grain & Elevator Co., 287 U.S. 77 (1932). In *Shreveport,* the appellant had been convicted of violating a federal statute prohibiting the misbranding of food or drugs distributed in interstate commerce. The appellant's defense was based on his assertion that the legislative history of the bill clearly proscribed a conviction under the circumstances of the case. *Id.* at 81-82. However, the Supreme Court found the statutory language clear and therefore controlling. *Id.* at 83.

[51] *See* Murphy, *Old Maxims Never Die: The 'Plain-Meaning Rule' and Statutory Interpretation in the 'Modern' Federal Courts,* 75 COLUM. L. REV. 1299 (1975) [hereinafter cited as Murphy]. The case most responsible for the demise of strict application of the plain meaning rule is United States v. American Trucking Assns., Inc., 310 U.S. 534 (1940). The holding in *American Trucking* was controlled by the definition of the term "employer" in § 204 of the Motor Carrier Act of 1935, Ch. 498, § 204, 44 Stat. 543 (1935). Although the meaning of the term seemed clear upon the face of the statute, the legislative history of the Motor Carrier Act demonstrated that Congress intended that "employee" should mean something other than the obvious meaning. The *American Trucking* Court held that the manifest legislative intent controlled over statutory language. 310 U.S. at 543-44.

The plain meaning rule has been criticized by American legal scholars who argue that rigid application of the doctrine frustrates the purpose of the courts to "ascertain and effectuate the intention of the legislature." Murphy, *supra,* at 1299. Furthermore, some commentators insist that the concept that every word has one fixed taxonomic legal meaning is clearly incorrect. *See* Curtis, *A Better Theory of Legal Interpretation,* 3 VAND. L. REV. 407, 409 (1950); Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal*

The Fourth Circuit's determination that Y.C.A. jurisdiction extends to persons who are under the age of twenty-two at the time of a judicial determination of guilt is in harmony with the decisions of other federal courts.[52] However, the *Jenkins* court's decision that "conviction" under the Y.C.A. means determination of guilt seems inconsistent with the Fourth Circuit's holding in *United States v. Bailey*.[53] *Bailey* concerned the appeals of several individuals convicted of a bank robbery.[54] In discussing the appeal of one of the defendants, the court stated that he "was 22 years of age at the time sentence was passed upon him and hence not within the mandates of the Youth Corrections Act."[55] This determination has an implicit holding that "conviction" under the Y.C.A. means "sentence." Thus, *Jenkins* and *Bailey* seem irreconcilable.[56]

Statutes, 25 WASH. U.L.Q. 2, 4 (1939). Therefore, extrinsic aids such as legislative history should be used by courts in order to determine the sense in which a legislator uses a term in a statute. *See* MacCallum, *Legislative Intent*, 75 YALE L.J. 754, 759 (1966). If such extrinsic aids may not be utilized by courts, then the legislator must stipulate a meaning for every term which he uses, therby raising the need to further explain the meaning of the stipulated words. *Id.* Access by courts to sources outside the statutes to determine legislative intent would eliminate the necessity of stipulation.

[52] The Ninth Circuit, in Standley v. United States, 318 F.2d 700 (9th Cir. 1963), allowed a convicted individual to be sentenced under the provisions of the Y.C.A. since the trial judge, under 18 U.S.C. § 4209 (1958), had made a specific finding that the procedure would benefit the offender. 318 F.2d at 701. However, the court made it clear that because the offender was "twenty-two years, ten months of age, on the date of his 'conviction,' i.e., his plea of guilty" he was not entitled to sentencing under the Y.C.A. as a matter of right. *Id.* This dictum clearly indicates that the Ninth Circuit regards "conviction" under the Y.C.A. to mean the time of a judicial determination of guilt.

The *Jenkins* holding is also consistent with the District of Columbia Circuit's holding in United States v. Branic, 495 F.2d 1066 (D.C. Cir. 1974). The *Branic* court held that a person aged twenty-one at the time of the jury verdict and twenty-two at the time of the sentencing must be given an opportunity to be sentenced under the provisions of the Y.C.A. *Id.* at 1070. In reaching this decision, the District of Columbia Circuit relied on the rationale of United States v. Carter, 225 F. Supp. 566 (D.D.C. 1964). The *Carter* court held that the term "conviction" in the Y.C.A. meant a finding of guilt. *Id.* at 567. The *Carter* court determined that the objective of the act was to further the meaningful rehabilitation of the youth offender, and a finding that "conviction" meant "sentence" would decrease the number of offenders eligible for the program. *Id.* at 568. Also, the *Carter* court presented the idea that if conviction meant sentencing, then time considerations might induce judges to make hasty decisions and sentence immediately persons found guilty of a crime who were just under 22 years of age in order for those sentences to be made under the Y.C.A. Such judicial haste could result in sentencing errors. *Id.; see* United States v. Kleinzahler, 306 F. Supp. 311, 313-14 (E.D.N.Y. 1969) (*Carter* reasoning employed to hold that "conviction" means determination of guilt).

[53] 509 F.2d 881 (4th Cir. 1975).

[54] The defendants had been convicted of bank robbery under 18 U.S.C. § 2113 (1970).

[55] 509 F.2d at 883. The *Jenkins* court did not indicate that the defendant was also 22 years old at the time of the determination of his guilt.

[56] The *Jenkins* court held that applicability of the Y.C.A. should be based on the offender's age at the time of the determination of his guilt, but this seems to conflict with the earlier *Bailey* decision, which apparently ruled that Y.C.A. applicability is based on the offender's age at the time of his sentencing. The *Jenkins* court tried to harmonize the *Jenkins* and *Bailey* cases by referring to language in *Bailey* which stated that another defendant was

The disposition of the *Jenkins* case, however, seems proper. The court's decision is consistent with the manifest legislative intent of the Y.C.A.'s drafters and with the holdings of other federal courts that have defined "conviction" under the Y.C.A.[57] The *Jenkins* court could have avoided the inconsistency with the *Bailey* decision by directly overruling the pertinent part of *Bailey*.

B. Interstate Criminal Activity

In *United States v. Williams*,[1] the Fourth Circuit held that the theft of gasoline from a storage tank, the terminus of a spur line[2] connected to an interstate pipeline system, constituted theft of goods moving in interstate commerce in a pipeline system under section 659 of the criminal code.[3]

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under the age of 22 at the time of his conviction and hence subject to Y.C.A. sentence provisions. However, this reference does not reconcile *Jenkins* and *Bailey*. The inconsistency between the two cases it that the *Bailey* court apparently defined "conviction" to mean sentencing under the Y.C.A., and the *Jenkins* court defined "conviction" to mean a judicial determination of guilt under the same act. The *Bailey* court's statement that a defendant was subject to Y.C.A. sentencing provisions because he was 22 years old at the time of his conviction does not reveal which definition of the term "conviction" the court employed in reference to the sentencing of this defendant and thus does not diminish the impact of the implicit holding that conviction means sentence.

[57] The Fourth Circuit recently decided another case in the area of federal sentencing procedure. In Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977), the Fourth Circuit held that the admission of evidence of allegedly illegal prior convictions at a sentencing hearing is not a proper ground for resentencing the defendant if the judge finds that the determination of the sentence was unaffected by the allegedly improper evidence. *Id.* at 1072.

The defendant contended in *Goodson* that his resentencing was necessary because the sentencing judge in the district court had considered allegedly unconstitutional prior convictions in determining this sentence. *Id.* The defendant's contention was based on United States v. Tucker, 404 U.S. 443 (1972), in which the Supreme Court held that evidence of prior unconstitutional convictions may not be considered by a federal sentencing judge because such a consideration might affect the length or nature of the sentence imposed by the judge. *Id.* at 448-49. The *Tucker* Court determined that if such prior unconstitutional convictions affecting sentencing were considered by the sentencing judge, the defendant has a right to a resentencing hearing in which the offensive prior convictions are not considered. *Id.* In order to comply with *Tucker*, while avoiding needless resentencing hearings due to harmless errors, the Fourth Circuit held, in Stepheney v. United States, 516 F.2d 7 (4th Cir. 1975), that an individual is not entitled to a resentencing hearing because of the admission of evidence of unconstitutional prior convictions at his sentencing when the judge makes a specific finding that his knowledge of the questioned convictions did not affect the determination of the sentence. *Id.* at 9.

In *Goodson*, the district court specifically found that the length of petitioner's sentence had not been affected by the court's knowledge of the allegedly unconstitutional convictions. 564 F.2d at 1072. This finding fully complied with *Stepheney*. Thus, petitioner was not entitled to a resentencing hearing because he had not been harmed by the court's knowledge of allegedly illegal prior convictions at his sentencing. *Id.*

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[1] 559 F.2d 1243 (4th Cir. 1977).

[2] *See* text accompanying note 5 *infra*.

[3] 559 F.2d at 1248. 18 U.S.C. § 659 (1970) provides, in part, that

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or

Since the evidence had shown that the defendant had stolen gasoline from a storage tank with intent to convert it to his own use,[4] the *Williams* court considered only whether the storage tank was a part of a pipeline system and whether the gasoline stolen was in interstate commerce under section 659. The Fourth Circuit determined that the district court jury in *Williams* could have concluded reasonably that the storage tank from which the gasoline had been stolen was part of a pipeline system because of the tank's function in the gasoline distribution process.[5] The pipeline, owned by Colonial, ran from Texas to North Carolina. Gasoline left the main line in North Carolina and entered a spur line where part of the gas from the spur line emptied into the storage tank from which the gasoline was stolen.[6] This physical connection between the spur line and the storage tank was an important element in the demonstration that the storage facility was part of the pipeline system. The transient nature of the gasoline also indicated that the gasoline was stolen from a part of the pipeline system.[7]

In order to sustain a conviction under section 659, the government also had to demonstrate that the gas stolen from the storage tank was in interstate commerce. A preliminary consideration was whether the temporary halt in the transporting of the gasoline as it sat in the storage tank placed the gasoline outside the scope of interstate commerce. The court determined that in order to sustain a conviction under section 659, the stolen goods did not have to be in motion at the time of the theft.[8]

> by fraud or deception obtains from any pipeline system . . . with intent to convert to his own use any goods . . . moving as or which are part of or which constitute an interstate or foreign shipment of freight, express, or other property . . . [s]hall in each case be fined . . . or imprisoned. . . .

The references to "pipeline system" and "storage tank" were added to § 659 in 1966 to afford the same protection to gasoline carriers given to other interstate carriers. *See* H.R. REP. No. 2144, 89th Cong., 2d Sess. 1, *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 3271, 3271.

[4] 559 F.2d at 1246.

[5] *Id.* at 1248.

[6] The storage tank was owned by Cities Service and Amoco, the company from which the gas was stolen. *Id.*

[7] The jury's finding of the transient nature of the gasoline is supported by the fact that gasoline stored in the tank generally did not remain in the storage tank for longer than four days before being pumped into delivery trucks. *Id.* The gasoline which was stolen had been in the tank only twenty-four hours when it was taken. *Id.* The constant flow of gas in and out of the tank strongly indicated that the storage tank was more a part of the pipeline system than an independent storage terminal in which the gasoline company deposited its gas. Finally, gasoline could not be pumped directly from the spur line into delivery trucks, but had to be pumped first into the storage tank and then pumped into the trucks. Since gasoline moving through the pipeline could only be dispersed from the tank, the storage facility could be viewed as an integral, necessary part of the pipeline system. *Id.*

[8] 559 F.2d at 1247; *see* United States v. Astolas, 487 F.2d 275 (2d Cir. 1973), *cert. denied,* 416 U.S. 955 (1974); United States v. Gollin, 176 F.2d 889 (3d Cir.), *cert. denied, sub. nom* Richman v. United States, 388 U.S. 848 (1949). Both *Gollin* and *Astolas* involved manufacturers who shipped their own goods. In both cases, the trucks were loaded and then moved a short distance around the manufacturers' plants in preparation for out-of-state transportation. As the trucks sat on company property awaiting the trip, thieves broke into the vehicles

The court also had to consider that the storage tank from which the gasoline had been stolen was partially owned by Amoco, the owner of the stolen gas. The gasoline had thus passed from the control of the interstate shipper, Colonial, to the control of the owner, Amoco. This transfer of control of the gasoline before it was stolen is significant because of a long-standing rule of interstate commerce that the interstate character of a shipment ends when the consignee accepts delivery of the goods from the consignor.[9] This rule is applied in the Eighth Circuit,[10] and possibly the Sixth Circuit.[11] The rule that acceptance of delivery by the consignee ends interstate transportation, however, has been repudiated by the Third, Fourth, Fifth, Seventh, and Ninth Circuits.[12] Following the latter rule, the Fourt Circuit has determined that the interstate character of a shipment of goods is a practical consideration, depending upon the circumstances surrounding the shipment.[13]

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and stole the goods. In each case, the minor movement around the plant was held to be the start of the interstate journey; the fact that the trucks had temporarily stopped did not alter the interstate character of the movement or prevent a conviction under § 659. 487 F.2d at 279; 176 F.2d at 893. The gasoline in *Williams,* while sitting in the storage tank, was temporarily stopped in interstate movement similar to the stop in *Astolas* and *Gollin.*

[9] *See* O'Kelley v. United States, 116 F.2d 966, 968 (8th Cir. 1941).

[10] *See Id.* In *O'Kelley,* the consignees of a shipment of goods from Louisiana to Arkansas accepted delivery. Before the consignee could move the goods from the railroad car in which they had been shipped, the goods were stolen. *Id.* at 967. The Eighth Circuit held that the fact that the consignee had accepted delivery meant that the goods were no longer in interstate commerce. *Id.* at 968.

[11] *See* United States v. Yoppolo, 535 F.2d 435 (6th Cir. 1970); Winer v. United States, 228 F.2d 944 (6th Cir. 1956).

In *Yoppolo,* a shipment of liquor was stolen as it was being transported by the shipper. The appellant asserted as a defense that the liquor had been accepted by the consignee, and had therefore not been in interstate commerce at the time of the theft. 435 F.2d at 626. The *Yoppolo* court did not question the appellant's argument that acceptance by the consignee ends interstate commerce, but asserted that the argument lacked evidentiary support. *Id.*

Thus, in *Yoppolo* the Sixth Circuit implicitly reaffirmed its position in *Winer* that acceptance by the consignee constitutes an end to interstate commerce. In *Winer,* the court implied that when the consignee accepts delivery of goods stolen from a railroad freight car the goods are no longer in interstate commerce. Acceptance by the consignee was labeled a "controlling consideration." 228 F.2d at 948.

[12] *See* United States v. Gates, 528 F.2d 1045, 1047 (5th Cir.), *cert. denied,* 429 U.S. 839 (1976); United States v. Parent, 484 F.2d 726, 729-30 (7th Cir. 1973), *cert. denied,* 415 U.S. 923 (1974); United States v Gimelstob, 475 F.2d 157, 164 (3d Cir.), *cert. denied,* 414 U.S. 828 (1973); United States v. Padilla, 457 F.2d 1403, 1405 (9th Cir. 1972); United States v. Cousins, 427 F.2d 382, 385 (9th Cir. 1970); United States v. Maddox, 394 F.2d 297, 299-300 (4th Cir. 1968). In the Fifth, Seventh, and Ninth Circuits, the test for determining "whether a shipment is in interstate commerce at a given time is essentially a practical one, depending upon the relationship between the consignee, consignor, and carrier, the indicia of interstate commerce at the time the theft occurs, and the preservation of the congressional intent." 427 F.2d at 385, *quoted in* 528 F.2d at 1047; 484 F.2d at 729.

[13] *See* United States v. Maddox, 394 F.2d 297, 299-300 (4th Cir. 1968). In *Maddox,* sugar had been shipped from overseas to Baltimore, where it was stored in a warehouse, under the control of the consignee, awaiting out-of-state shipment pursuant to pre-existing contracts. The *Maddox* court held that the theft of the sugar from the warehouse was a violation of § 659. *Id.* at 300. The court specifically noted that the consignee's control over the sugar and

The *Williams* court found that many of the facts important to the jury's determination that the storage tank was part of the pipeline system were also relevant to the finding that the gasoline had been in interstate commerce at the time of its theft. Perhaps the most important factor, in the opinion of the court, was the fact that the gasoline had only been in the tank for 24 hours and was scheduled to be delivered to a predetermined pool of purchasers.[14]

C. Jurisdiction under Drug and Customs Laws

The Fourth Circuit also recently decided a case involving a jurisdictional overlap between Title 19 Customs Laws and Title 21 Drug Laws in which clear statutory language was the dispositive factor. In *Taylor v. United States*,[1] the Fourth Circuit held that procedures for an award claim based on the report to government officials of the presence of illegal drugs aboard a ship on the high seas are governed by the drug laws, which incorporate certain customs laws.[2] The *Taylor* court also decided that the proper basis for calculating such an award would be the value of the drug on the severely regulated legal market created by the medicinal use of the drug.[3]

The appellant in *Taylor* was a merchant seaman who discovered hashish aboard his ship while the ship was at sea.[4] Hashish, a marijuana derivative, is included under Title 21 as marijuana,[5] a Schedule I controlled substance.[6] Schedule I substances have a high potential for abuse, no

consequential power to divert the sugar from its predetermined channels was a relevant, but not controlling factor in the determination of whether the sugar had been in interstate commerce at the time of its theft. *Id.* at 299.

[14] The *Williams* court supported its contention that an owner's temporary storage of his goods prior to movement to a pre-determined point does not necessarily terminate the interstate character of the movement by citing United States v. Padilla, 457 F.2d 1403 (9th Cir. 1972). In *Padilla*, goods were stolen from a J.C. Penney warehouse in Stockton, California. The goods had been manufactured in the Far East and shipped to California. *Id.* at 1404. By applying the totality of circumstances test the court found that the goods were still in foreign commerce since the goods had not reached their final destination and were subject to the order of the consignee. *Id.* at 1405. The *Williams* court correctly pointed out that the situation was analogous to the facts of the instant case. *See* 559 F.2d at 1248-49 n.3. The gas in the storage tank had reached a temporary halt in its movement, subject to further movement at the order of the owner.

[1] 550 F.2d 983 (4th Cir. 1977).

[2] *Id.* at 997.

[3] *Id.* at 988-90.

[4] The hashish was hidden in a stereo speaker that appellant had agreed to place on his customs list for a fellow seaman. The other seaman had agreed to transport the speaker for a man he had met in the last foreign port where the ship had docked. *Id.* at 985.

[5] Under 21 U.S.C. § 802(15) (1970), the term marijuana includes all forms, derivates, seeds and compounds thereof. Furthermore, 21 C.F.R. § 1308.11(d) (1977) declares that the term marijuana includes "any mixture or substance which contains any trace of marijuana."

[6] 21 U.S.C. § 812(c) Sched. I(c)(10) (1970).

presently accepted medical value in treatment, and no safety standards under which they can be used.[7] The appellant reported the hashish to authorities,[8] and claimed an award equal to 25% of the street value of the hashish under applicable Customs Laws.[9]

The issue faced by the *Taylor* court was whether the federal customs laws or the federal drug laws of the United States Code governed the case. The court held that while consideration of customs laws section 1619 was necessary to its decision, primary attention had to be focused on section 881(d) of the drug laws.[10] The thrust of section 881(d) is that customs laws prevail as long as they do not conflict or overlap with the drug laws. When the conflict or overlap does exist, the drug laws supersede the customs laws. The court thus faced the necessity of determining whether the *Taylor* situation involved any overlapping provision of the drug laws which would take precedence over section 1619 of the customs laws.

Schedule I substances are subject to seizure by the United States,[11] and the drug laws prescribe how the Attorney General may dispose of such confiscated substances.[12] The drug laws provide for payment by the Attorney General to persons who give information regarding a violation of the drug laws. The amount of this payment under Title 21 is an "appropriate" sum, as determined by the Attorney General.[13] An appropriate compensation for reporting a violation of a customs law is 25% of the value of the

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[7] 21 U.S.C. § 812(b)(1)(1970). Importation of Schedule I substances is illegal unless the Attorney General makes an express authorization allowing such action, and even this authorization is limited to certain circumstances. In order for the Attorney General to allow strictly limited importation of Schedule I drugs under this section, he must find a scientific, medical, or other legitimate need for the substance; furthermore, to authorize the importation, the Attorney General must find a domestic shortage of the drug or an inability of domestic manufacturers to produce sufficient quantities of the substance. 21 U.S.C. § 952(a) (1970).

[8] The appellant reported his discovery to his captain, who took possession of the marijuana and turned the drug over to customs officials and Drug Enforcement Administration officials when the ship docked in New Orleans. 550 F.2d at 985.

[9] The applicable part of 19 U.S.C. § 1619 (1970) reads:

> Any persons not an officer of the United States who detects and seizes any . . . merchandise . . . subject to seizure and forfeiture under the customs laws or the navigation laws, and who reports the same to an officer of the customs, or who furnishes . . . original information concerning any fraud upon the customs revenue, or a violation of the customs laws or the navigation laws, perpetrated or contemplated which detection and seizure or information leads to a recovery of any duties withheld, or of any fine, penalty, or forfeiture incurred, may be awarded . . . a compensation of 25 per centum of the net amount recovered, but not to exceed $50,000. . . .

[10] 21 U.S.C. § 881(d) (1970).

[11] *See* 21 U.S.C. § 881(f) (1970).

[12] 21 U.S.C. § 881(e) (1970) provides that when property is forfeited under subchapter 13, Title 21, of the drug laws, the Attorney General may retain the property for official use, require that the General Services Administration take and dispose of the property, or give the property to the Bureau of Narcotics and Dangerous Drugs for disposition for scientific or medical purposes under rules specified by the Attorney General.

[13] *See* 21 U.S.C. § 886(a) (1970).

seized goods.[14] Thus, the *Taylor* court held that the appellant should be paid 25% of the value of the seized hashish.[15] Therefore, the Attorney General's power to compensate an informer for reporting illegal drugs is governed by drug law, while the actual basis for the amount of compensation in *Taylor* was to be derived from customs law.

Since Title 21 drug laws were applicable to the situation, the regulation established by the Drug Enforcement Administration (D.E.A.) pursuant to Title 21 was relevant. The applicable D.E.A. regulation states that the "domestic value shall be considered the retail price at which such or similar property is freely offered for sale."[16] Marijuana is not freely offered for sale on the street, but is secretly offered to persons as contraband. Therefore, the steet value of the hashish could not be used in calculating the appellant's award.

Petitioner in the lower court had not offered any evidence that hashish had any medicinal value. The Fourth Circuit, however, decided that this failure by appellant would not be fatal to his cause of action since there was a lack of authority indicating that a free market for the hashish existed when this action commenced. The court did not hold that such a retail market in fact existed, but determined that petitioner should be given a chance to establish its existence,[17] based on new evidence regarding the medicinal use of marijuana.[18] Accordingly, the appellant would have the burden of proving the existence of a free market for marijuana upon remand.

Conclusion

The Fourth Circuit generally followed established precedent in deciding recent cases under common law and by statutory construction. The holdings in both *Jones* and *Pomponio,* concerning the federal criminal prosciption against interstate transportation of forged and counterfeited instruments, were strictly limited to the facts. The seemingly strained reasoning applied by the Fourth Circuit in determining that a common law forgery had not occurred in *Jones,* but that a common law counterfeiting

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[14] *See* 19 U.S.C. § 1619 (1970); note 61 *supra.*

[15] 550 F.2d at 988.

[16] 21 C.F.R. § 1316.74 (1977).

[17] Title 21 does allow the Attorney General to authorize the importation of Schedule I substances in certain situations. *See* 21 U.S.C. § 952(a)(2) (1970). The Federal Regulations recognize the right of authorized individuals to conduct research using Schedule I substances. *See* 21 C.F.R. § 1301.22(b)(3) (1977). Thus, the court decided that the appellant may be able to establish the existence of a retail market upon which to calculate his claimed award. 550 F.2d at 990.

[18] Researchers have accumulated strong evidence that marijuana may be used in the near future as a treatment for glaucoma, *see* Newsweek, November 8, 1976, at 53, and asthma and related respiratory ailments, *see* Science News, July 24, 1976, at 55. Other researchers believe that marijuana may prove very helpful for controlling vomiting and nausea and for stimulating appetites of people undergoing chemotherapy treatment for cancer. *See* Science News, Oct. 25, 1975, at 262. Thus, there may soon be a legal market for valuation of marijuana.