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REFLECTION ON THE LAW REFORMING PROCESS

by Sanford J. Fox

This paper is based on three experiences as draftsman or reporter in penal law legislation projects. The first such experience was as sole draftsman for a New Hampshire criminal code, an undertaking commenced in November 1967, which produced a proposed code in April 1969.¹ I am continuing this activity at the present time as assistant to a committee of the New Hampshire legislature that is currently holding hearings on the proposal in preparation for reporting out a criminal code bill this spring. Since work on the New Hampshire code represents the most extensive experience, it is the basis for most of the analysis in this paper. The second stint at drafting has been as co-reporter, with three others, in an effort to prepare a revised criminal code for Massachusetts. This effort began in October 1968, and is still progressing; almost an entire code has been drafted, with completion expected in the next few months. The third legislative law reform experience was in Rhode Island, where from January to April 1970, I drafted a statute designed to establish an office of special prosecutors for the Rhode Island Family Court.²

I. GENESIS

It is, of course, no easier to describe accurately the reasons why a rewriting of law is undertaken than it is to find the causation of any social event of comparable complexity and magnitude. In New Hampshire, the proximate beginnings can be traced to a legislative resolution introduced by two lawyer-members of that body that the criminal law be revised.³ Perhaps the fact that the New Hampshire legislature has the smallest proportion of lawyers of any state law-making body in the nation lent added persuasive weight to their view that funds should be allocated in order to redefine the shape of the law.

The Massachusetts revision, on the other hand, has had no

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formal legislative support. It came about partly as a result of a report which detailed the need for a revision, written by Professor Livingston Hall of the Harvard Law School, at the request of the Massachusetts Committee on Law Enforcement and Administration of Justice. There has been, however, a widespread and longstanding awareness of the deplorable condition of the state's penal law. Funds for the project were granted by a Boston charitable foundation to a specially formed organization known as the Massachusetts Criminal Law Revision Commission.

Rhode Island presents still another contrast in respect to immediate background. Here the first step was an executive decision. A crisis in the legal representation of the state in family court matters arose when the city solicitor of Providence announced that due to the pressure of duties in other courts, his staff could no longer perform a prosecutorial function in the family court of the state's largest city and capital. The Attorney General, a prospective gubernatorial candidate, announced that he would step into the breach, and assume responsibility for family court, and all other court prosecutions. The Governor asked the Chief Justice of the state supreme court to form a committee of judges to study the matter. The committee sought my help in producing a report and drafting legislation to implement their recommendations. The Governor's budget bore the cost of the work.

These descriptions report only the immediate circumstances behind the origins of the reform efforts. There is undoubtedly an element of "me-too-ism" involved as well. The Model Penal Code and the enactment of new codes by several states during the recent past have exerted a strong influence to reevaluate a body of law which many have known to require revision. The availability of federal, state and private funds to support law reform is, of course, another significant causal factor. It should also be noted that these projects are largely the domain of law school graduates, for whom the basic criminal law course has, of late, increasingly placed a strong emphasis on legislative policy problems. The central focus of some casebooks, notably that edited by the late

4 Governor's Committee on Law Enforcement and Administration of Justice, Revision of the Massachusetts Criminal Code (1968).

5 See note 2 supra.

6 Of central historical importance is the background of the Model Penal Code. Several documents which demonstrate major ideational roots of the Code, e.g., Michael & Wechsler, Rationale of the Law of Homicide, 37 Colum. L. Rev. 701 (1937); J. Michael & M. Adler, Crime, Law and Social Science (1933); J. Michael & H. Wechsler, Cases and Materials in Criminal Law and Its Administration (1940), make it clear that the thinking at Columbia and Chicago in the 1930's played a decisive historical role. It would be of great value to the historian of the criminal law if Professor Wechsler could be persuaded to provide his own significant recollections of this period.
Jerome Michael and Herbert Wechsler,\(^7\) have served to highlight the need for legislative action.

II. PARTICIPANTS

The New Hampshire resolution resulted in the appointment of a three-man Criminal Law Revision Commission, chaired by Frank R. Kenison, Chief Justice of the Supreme Judicial Court of New Hampshire. The other members were a practicing attorney with a specialty in criminal defense work, who became secretary of the Commission, and the clerk of the superior court (general jurisdiction) in one of the more populous counties, who became the Commission’s treasurer.

In Massachusetts, there are several levels of personnel. The Law Revision Commission proper is made up of fifty-five persons, each of whom serves on the Executive Committee and/or on a drafting subcommittee. The Commission as a whole has final responsibility for the proposed criminal code that will emerge. The Executive Committee is composed of four law professors, four practicing lawyers, two well-known trial court judges, three members of the state’s House of Representatives, the district attorney and sheriff of two large counties, the Director of the Division of Legal Medicine of the Massachusetts State Mental Health Department, a deputy superintendent from the Boston Police Department, the State Commissioner of Probation, the Attorney General, and the Director of the Committee on Law Enforcement. Professor Hall is chairman of the Executive Committee as well as each of the four subcommittees to which every reporter initially submits his drafts. There are approximately twelve members of each subcommittee.

As already indicated, the Rhode Island group responsible for the family court legislation draft was composed entirely of judges. The chairman was Hon. John E. Mullen, Presiding Justice of the superior court; the others were the Chief Judge and an Associate Judge of the family court; the Chief Judge of the district court; and an Associate Justice of the superior court.

There are significant variations in degree of participation of these various personages in the reform proceedings. In New Hampshire and Rhode Island, the meetings to consider policy problems, drafts and other matters looking toward the goal of legislation entailed a near perfect attendance record. The Massachusetts record is not at all comparable. At one session of the

\(^7\) J. MICHAEL & H. WECHSLER, CASES AND MATERIALS IN CRIMINAL LAW AND ITS ADMINISTRATION (1940).
drafting committee, no one appeared but Professor Hall and myself.\textsuperscript{8} Other meetings, both of the subcommittee and Executive Committee, have often attracted no more than three or four others; some Commission members have never put in an appearance. Meetings of the fifty-five man Commission as a whole have involved about a dozen members.\textsuperscript{9}

These comparisons require consideration of how to account for the discrepancy in participation. One possible explanation is that in New Hampshire and Rhode Island the reforming process has entailed strong deferential relationships that are notably lacking in Massachusetts. At the head of the enterprise in each of the former states, one finds the Chief Justice of the state supreme court. As an abstract matter, it may well be that the Roscoe Pound Professorship at the Harvard Law School is an equally prestigious, influential and revered position. But the important comparison is not of that sort; rather it is more a matter of how the other members of the working group relate to the leadership position. In New Hampshire and Rhode Island these participants are other judges, a practicing attorney, and a court clerk, all of whom are well used to entertaining and displaying a degree of respect for their Chief Justices which effectively precluded their choice about withholding the participation they had promised. In Rhode Island, moreover, while appointments to the committee were made by the Chief Justice, the actual work of the group was chaired by the jurist who presided over the court immediately below the supreme court of the state, thereby reinforcing the closely-knit professional relationships involved for the other judges on the committee. It must be added, however, that reference to these relationships should by no means obscure the fact that the Rhode Island and New Hampshire participants were conscientious individuals from the outset.

Yet, so might be those in Massachusetts who have failed to appear: the majority of those in question have all achieved a notable degree of success in law, law enforcement, medicine and related professional fields, which could hardly have occurred without their having a keenly developed sense of responsibility.

\textsuperscript{8}We completed the subcommittee's scheduled business nonetheless.

\textsuperscript{9}The New Hampshire meetings all were held in Concord, N.H. They commenced in the morning and usually extended to mid-afternoon. Discussions of the work usually continued over lunch at a nearby restaurant. In Rhode Island, I normally met with the committee of judges in early afternoon, although several evening meetings were undertaken when there were other commitments during the day.

The meetings to review drafts were held most frequently in Rhode Island where the intervals were never more than two weeks. In New Hampshire, three weeks was the general practice, although during the summers there was sometimes a four or five week gap. Massachusetts meetings average an interval of approximately four weeks.
There is little basis for distinguishing them on this issue from the participants in the other two states. What is markedly different is that the professional deference owed by a lower court judge, or any other active member of the legal profession, to his state's chief justice, has no real counterpart in the relationship between law professor on the one hand, and police, prosecutors, corrections administrators, practicing lawyers and behavioral scientists, on the other. There is, in fact, a good deal to suggest that academic lawyers (and appellate courts) frequently find themselves in opposing ideological camps from these latter participants in the criminal process.

This might constitute a partial explanation of why the Massachusetts people felt so little motivation to participate as compared with that found in the other states, and why there might even have been some enticement to stay away. To these considerations should be added observations relating to the nature of the discussions at the various meetings. These often involved the propounding of hypothetical cases, one varied somewhat from the other, as a means of testing whether the rule proposed in the draft under consideration solves the right sorts of problems, or goes too far, or not far enough, in its coverage. With no obvious transitions, the issue might then be shifted to whether the draft expresses a policy agreeable to all with the peculiar elegance of statutory language: for example, the lawyers would ask whether the *suches*, the *whereins*, the *howevers*, the provisos, and the commas or semicolons were all in the right place, whether the qualifying phrase qualified all it was meant to qualify, and whether the meaning would be more clear if this paragraph or that were divided into subparagraphs, or consolidated into larger entities.

The similarity of meetings conducted in this manner to what goes on in law school classrooms and in courts is, of course, no coincidence given the professional biases of the discussion leaders. The meetings proceed with the verbal razzle-dazzle, semantic nit-picking and enthusiasm for the minutia of syntax that is the stock and trade of lawyers. One can hardly blame the police officer, the correctional administrator, or the social scientist who feels left out of and not impressed with such esoterica.

The absence of law enforcement persons from the Massachusetts Executive Committee meetings might further be explained by a possible anticipation of an inability to have their view adopted by the group and incorporated into the proposed legislation. It is not only procedural law that presents issues which divide police and prosecutors from civil libertarians, although the large number of Supreme Court decisions in the sixties over questions of proce-
dural law has made it appear that the division in thought is over *procedural* rights. A code of *substantive* criminal law poses kindred questions. Justification rules, in particular the matter of when police may shoot people, is an obvious example. The scope of the offense of resisting arrest, whether there should be an open-ended crime of breach of the peace or vagrancy, and how much a conspirator should be required to aid the state in frustrating accomplishment of the conspiratorial object before he is granted a defense to his own criminal liability for the conspiracy are all issues in which police and prosecutors have a vital professional concern. The law abounds in others. Nevertheless, the police and prosecutors did not participate to assert their interests. A possible explanation may be that the experience of one highly publicized defeat after another, from *Mapp* through *Miranda* and *Davis,* may well have created the impression that penal law reform is so essentially an anti-law enforcement and criminal-coddling affair that to advocate the less libertarian view would be an exercise in futility. How long it will take for them fully to realize how different the present decade bodes to be, is hard to tell.

Perhaps I can pose a somewhat negative hypothesis on this question which can be substantiated or negated by other experiences reported in this symposium. Perhaps having a strong professional interest in the state of the penal law is not a significant guarantee that persons with that interest will assume any responsibility for changing it. This leaves a great deal unsaid—such as why people accept appointments to law revising bodies in the first place—but the hypothesis may be a useful caveat to future undertakings of this sort.

New Hampshire furnishes the opportunity to make several observations in regard to the non-participation of police in the drafting of the proposed code. There were no law enforcement representatives among us when the code was first assembled, but they have since appeared as articulate advocates before the

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11 *Miranda* v. Arizona, 384 U.S. 436 (1966). (Requires constitutional warnings to be given a suspect whenever he is deprived of his freedom for purposes of police interrogation).
13 See, e.g., *Dutton* v. *Evans*, 400 U.S. 74 (1970). (Upholding Georgia's co-conspirator hearsay exception as valid under the Confrontation Clause of the 6th Amendment, even though it did not comply with the hearsay exception applicable in federal conspiracy trials).
14 It should be noted, however, that Chief Justice Kenison, as a former state prosecutor, brought valuable experience as the people's advocate to our deliberations. The other two members of the Commission conducted informal discussions concerning the progress of
legislative committee that has been considering the code. As a result, it is clear that their participation in the drafting phase would have made a difference in the nature of the proposal. For example, we drew the line between misdemeanor and the lowest grade of felony at five hundred dollars for the offense of fraudulent use of a credit card. Subsequently, at the public hearings, the police indicated that tourists in New Hampshire who committed this offense could be extradited from their home states only if they were charged with a felony, that most of the fraud was for less than five hundred dollars, and that a credible threat of extradition was necessary in order to induce the offender to compensate the loss of the New Hampshire businessman. Had we known this initially, the offense would have been graded differently to take this problem into account.

Police participation might well have made a difference in our draft in some other cases as well, although in these instances I am not nearly so certain. An example of this sort would be the rules governing police use of deadly force. These rules evoked scathing criticism by the New Hampshire police chiefs at the committee hearings. They contended that once criminals knew that the law did not allow police to shoot at them ("over their heads" was the phrase uniformly used in the testimony), they would all be able to evade arrest except insofar as track stars could be recruited to the force who could be counted on to catch and subdue fleeing felons. As a result of the hearings in which these predictions were made and the discussions by the committee in executive session, it appears that the police view will prevail in the bill to be reported out. Had the advocates of this position participated in the Commission's deliberations in Chief Justice Kenison's chambers, I suspect that a majority of the Commission would have been amenable to submitting a justification provision in keeping with police urgings. I would not have supported this, but when my opinion conflicted with that of the Commission, the policy of the Commission prevailed.

There are other instances, however, where articulation of the police position would clearly have had no effect. In New Hampshire, as well as in Massachusetts and many other states, police officers prosecute cases in the lower criminal courts. At the New Hampshire hearings, police complained that the presence of words such as "knowingly" or "purposely" in the code put an unfair burden on them. Those testifying before the committee the revision with police officers with whom they were brought into contact by their business in the courts. In addition, the Commission was aided on several occasions by formal written comments concerning parts of the Code from the office of the state's Attorney General.
expressed concern for how they were to prove what was going on in another man’s mind. Proof of what the defendant did was considered, by the police position, to be sufficient. The co-chairmen of the legislative committee, both being members of the bar, and I tried quite unsuccessfully to persuade the police witnesses that *mens rea* was an essential part of our criminal jurisprudence and that circumstantial proof was the usual way in which this element is established. Eventually the police acquiesced to our position on the issue, though for reasons which were far from clear to them. Undoubtedly the result would have been the same had the issue been presented to the Commission at the drafting stage.

It was quite evident from the committee hearings that the police constitute a segment of the public to which legislators on the committee pay keen attention. There is no reason why this is not true of members of the New Hampshire legislature generally. It would appear, therefore, that unless at least some of the police views are incorporated into the bill which is finally presented to the legislature, its passage would be in grave jeopardy.

What the consequences of non-participation are in regard to others, particularly prosecutors\(^1\) and other lawyers, is more difficult to assess. As to the former, I would expect that their influence in the legislature will gain for them all of the concessions that could have been obtained in the drafting, and more. In this respect, the penal code that finally emerges will reflect the prosecutors’ views to the extent that they choose to make the views known to the legislature. It would simply have been more convenient and efficient to incorporate the opinions of police and prosecutors from the outset. At this point in the legislative process, only one written communication has been received from a county attorney. What consequences will follow from the absence of more lawyers from the New Hampshire and Massachusetts work remains to be seen. Three or four concentrating minds can accomplish as much as seven or eight, and probably a good deal more than twelve, when it comes to the niceties of drafting and the exploration of policy. However, the degree of influence leading members of the criminal bar have with the legislature, and the direction the influence might take, cannot yet be reported.

III. The Drafting Process

In New Hampshire, Rhode Island, and Massachusetts, drafts

\(^1\) See note 14 supra.
were mailed to members of the group with whom I was working in advance of a meeting to discuss them. In Massachusetts, notwithstanding the fact that there are four reporters working on the criminal code, we have not exchanged drafts in the early stages, but are undertaking to evaluate each other's work prior to action by the Commission on the entire code. In all three states, a substantial amount of rewriting was invariably required to incorporate the suggestions agreed upon at these meetings. These suggestions were sometimes prefaced with a "Look here, professor," indicating that I was about to be chastised for viewing things from the ivory tower of academia. On the whole, however, there was a remarkable degree of consensus among the participants in the discussions. Where disagreement arose, I have always considered it my role to produce draft legislation which reflects the view of the committee or commission, rather than my own. The legalistic nature of the discussions has already been indicated.

Properly anticipating the reaction that the draft legislation might produce has presented a problem in all three states. In Rhode Island this specifically emerged as a matter of whether the prosecutors' office which was to be recommended to the Governor for the family court should be tailored in such a way as to minimize its cost. The draft legislation still sits on the Governor's desk, largely, I am told, because of a reluctance to seek an appropriation for it from a very money-conscious legislature. In New Hampshire and Massachusetts, anticipating the legislative reaction has been very important, particularly in determining whether the expected opposition to radical changes in such sensitive areas as abortion, capital punishment, homosexuality, and the like would be strong enough to jeopardize the whole code. The question we have been forced to face is whether the passionate feelings aroused by these problems of great socio-legal significance would be likely to somehow taint other recommendations dealing with such relatively uncontroversial problems as consolidating the various theft offenses under one heading. Individuals within the committees and commissions have assessed this risk differently. Some advocate proposing reform that is considered appropriate, regardless of the possible legislative reaction. Others evade the issue of what shape the reform ought to take by insisting that it is too risky to propose anything radically different from what we now have. It is interesting that individual legislators reflect a somewhat different balance of views. Proponents of reform seem to agree that passage of an entire code might be imperilled if radical changes on delicate issues were to be included. They favor submission of separate bills, so that the bulk
of penal law reform could be considered free from emotion-laden controversy.

The fact that there have been so many penal law codification efforts going on at the same time has been both a help and a hinderance in the task of producing draft legislation. Their large number has, on the one hand, provided a rich source of substantive ideas and drafting forms with which to work. This very asset has, however, made it appear at times that there can be an almost unending variety of alternatives to consider, so much so that the need to get on with the work has often dictated that somewhat arbitrary choices be made. Examples of this would be the necessity of drawing numerical lines in order to define the number of people needed to constitute a riot, the age at which a person should cease to be a minor for purposes of making others responsible for his moral welfare, the amount of dollars which need to be lost in a theft or an arson before the degree of the offense becomes more serious, the number of days which should elapse before a complainant against a child loses his right to appeal a prosecutor's refusal to initiate proceedings against the child, and the appropriate time period in which a sex offense victim should be required to make a complaint or for a general statute of limitations. There are, of course, some rough guidelines for making some of these decisions. Inflation dictates that dollar figures be presumptively raised from what they have been in the statutes. Changes in relevant social relations and biological facts, bringing an earlier maturity for young people, suggest that ages be lowered in most instances. Analogous state statutes governing time periods for filing legal papers of various sorts are useful in resolving some of the time problems. But in the final analysis, the resolution of such questions does not yield to the formulation of rational policy, and one is left with the uneasiness of having made essentially arbitrary choices.

The prior discussion far from exhausts the problem of variety. The circumstances of a confinement that make it kidnapping instead of some lesser offense, and the kind of threat that must be presented to a householder in order to justify his use of deadly force against an intruder are other illustrations where widely disparate statutory provisions appear. After a start in New Hampshire that entailed checking all the recent legislation before beginning a draft, I came to rely primarily on the Model Penal Code, the New York Penal Law, and the 1967 Michigan draft. This not only alleviated the problem of unmanageable variety, but also permitted an insight into the critical development of the law. For example, the New York law shows obvious influences of the
Model Penal Code, while the Michigan draft often included explicit reference to variations in both of these in arriving at its own position. In all three of these documents, moreover, the presence of extensive and learned commentary proved of great value. Prior to the appearance of these documents in Michigan and New York, there existed in both states a detailed statutory treatment of substantive criminal law. It therefore became possible to determine when a particular provision could be accounted for by the existence of relevant statutory predecessors, and when a conscious departure from the past had been produced. Reliance on these same sources was followed in Massachusetts, except that additional reference was made to the New Hampshire draft.

This referential scheme has not, as might initially be supposed, resulted in substantial similarity between the New Hampshire code and that part of the Massachusetts code for which I have been responsible. In fact, often there is little resemblance at all. The discrepancy can be explained by examining the different forms a code may take in order to fulfill varying roles. A code is commonly viewed as a body of law that will settle all possible disputes that might arise, or at least as many as can be provided for by the collective imagination of the drafters. From this perspective, the criminal code needs to be detailed and specific, resembling in many ways a contract drawn by a lawyer desirous of providing for every contingency. The Massachusetts drafts are of this sort, but the New Hampshire code is not.

The drafting experience in the latter state reflected a desire for parsimony in the use of statutory language, eschewing complex details wherever possible. In large measure this approach was adopted on account of the relatively few lawyers among the lower court judges and in the legislature of New Hampshire. Lengthy provisions, bristling with whereins, provisos, exceptions, and exceptions to the exceptions could hardly be thoroughly understood by these laymen; and, not being understood, might well be rejected. The drafting of the New Hampshire code was also guided by a persistent effort to measure the need for complexity. In an early chapter dealing with the basis for criminal liability, for example, we simply provided that a voluntary act was required. Provisions spelling out the treatment of the problems of reflex actions and automatisms were not included—a result that came about after Judge Kenison suggested that no serious person would consider sleep walking or the thrashings of an epileptic as voluntary acts.\textsuperscript{16} It was not infrequent that other detailed drafts were

met, and demolished, by the consideration of whether the result would be any different if the provision were omitted. It is, of course, true that one can think up the hypothetical case that would make it desirable to have the detailed statutory solution. In Massachusetts, the draft provides for the occurrence of virtually all possibilities, at least all that could be thought of at a given time and place. To the contrary, in New Hampshire there was always the effort to determine whether the instance being considered was simply a remote possibility that might occur once in a century, if that often. In such cases, the decision was made not to deal explicitly with the problem in the draft. There are, of course, some places where the law is irreducibly complicated, and there was no alternative but to reflect the complexity in the proposed code. The best example of this is perhaps the law relating to justification for the use of force, involving rules based upon the shifting identity of an aggressor in an affray. Quite predictably, the chapter on justification produced a great deal of questioning in the committee of the New Hampshire legislature, and in the end, it appears to me that much of it was accepted largely because of respect for Judge Kenison's opinion that it made sense.

IV. THE LEGISLATIVE PROCESS

In discussing the legislative process, there is only the New Hampshire experience, which is still incomplete, to draw upon. Following publication of the proposed code, I spoke to a meeting of the lower court judges of the state and to the annual meeting of the New Hampshire Police Chiefs' Association. In both instances, I accomplished little more than to inform them of the existence of a proposed criminal code. Due to the fact that the published report containing the code was sent only to members of the state bar, many of the judges, who are laymen, had not received it and therefore had no familiarity on which I could draw in a discussion with them. The police chiefs evinced little interest in discussing the code, even the rules on arrest and use of force in law enforcement which I called to their attention. I offered to return to both groups at their convenience to explain the provisions of the code in greater detail, but no invitations developed. Moreover, I wrote a description of the work of the Commission and of the major provisions of the code in the New Hampshire Bar Journal; however, as far as I know, little response from the bar was forthcoming. In view of these experiences, I fully ex-

pected that when public hearings were held by the legislature, hardly anyone would appear.

This expectation was, in part, fulfilled. A joint committee of the judiciary committees of the House and Senate was formed to consider the report of the Commission. Since the New Hampshire legislature formally convenes only every other year, the committee first met as an interim body. At the first meeting of the committee, nine months after the code was published in the report of the Commission, all members of the Commission appeared and spoke briefly of the way the Commission had operated. I described the overall nature of the code, emphasizing that it did away with common law crimes by providing four classifications of offenses that would govern the sentencing of all offenders, and the importance of bringing some order into the *mens rea* elements of the criminal jurisprudence. As subsequent encounters with the committee revealed, few of these descriptions were entirely understood.

Following this first meeting, I began work on a supplementary report for the Commission, dealing with a number of important items. Professor Wechsler, to whom the report and code had been sent, made several useful suggestions concerning the sentencing provisions of the code which the Commission decided to adopt. In addition, the early sections of the code, dealing with general principles applicable to offenses defined in other parts of the New Hampshire statutes, was a matter of some concern to the Commission on the ground that the legislature would not be fully cognizant of the impact of these provisions on the so-called "outside" offense unless the Commission called attention to just what the effects would be.18 A major source of hesitation was the provision converting absolute liability offenses to the lowest classification of offenses under the code (violations), for which no imprisonment penalty was authorized. The Commission suspected, and quite rightly as research demonstrated, that there were a number of absolute liability offenses that carried substantial prison terms. Upon reflection the Commission decided that the change of all absolute liability offenses to offenses of minimal seriousness should be effected by legislative consideration of the proper penalty for each individual offense rather than the automatic conversion wrought by the code. I undertook, therefore, to redraft the several hundred offenses which carried either any incarceration penalty, or a fine of more than $100, retaining absolute liability for some and changing others to culpable crimes.

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Although the specific aim of this part of the supplementary report was to produce recommendations to the Commission concerning what should be retained as absolute liability and what should be made into culpability offenses, my work included changing the existing statutory *mens rea* terminology into that which had been adopted in the code, and substituting the classification plan of the code for the fine and imprisonment penalty phrases of the present offenses. Thus, the “maliciously” of the present law became the “purposely” or “knowingly” of the code; and the “shall be imprisoned for not more than one year” became “shall be guilty of a misdemeanor.”

While this redrafting was being completed, the legislative committee commenced a series of four public hearings where three of four members of the committee on legislation of the New Hampshire Police Chiefs Association appeared. Although the first public hearing was in October 1970, approximately seventeen months after I had appeared at their annual meeting to describe the code which had been published a month earlier, the testimony of the chiefs was that many of their members had not been able to get a copy and were not, therefore, fully prepared to comment on its provisions. The committee had more copies printed. As some indication of the impact my earlier remarks had made, one of the chiefs told the committee that they had met with me “two or three years earlier.”

Once the chiefs did their homework, however, they were quite effective. They commented intelligently on a wide range of provisions in the code, asked for clarification of the meaning of others, and generally constituted the major source of public reaction to the proposal. The members of the legislature who sat on the committee accorded them a respectful and warm reception and, except for the proposal that *mens rea* be eliminated from the penal law, the committee seems prepared to report out a bill that will reflect the bulk of the suggestions made by the chiefs.

No member of the judiciary appeared at the public hearings. No one from the correctional system appeared to say anything concerning the sentencing provisions, or anything else. No members of the bar appeared. No one from the Chamber of Commerce or the general business community appeared, in spite of the presence of much law in the code dealing with theft, fraud, deceptive business practices, and other subjects of interest to the world of commerce. Although there are provisions dealing with public offenders and the political process, no one in government service appeared to speak on behalf of himself or other public servants.

The code proposes a change in the New Hampshire abortion
laws along the lines recommended by the Model Penal Code. This section attracted numerous witnesses to the public hearing, all testifying that the change was, by far, too minimal. The Civil Liberties Union, the Zero Population Growth organization, various representatives of Protestant groups, and individual women all spoke at length in favor of giving the physician and his patient exclusive authority to make the abortion decision. No one testified in favor of leaving the law as it is. The chairman of the committee pointed out to each witness that in the fall, each candidate for the governor’s office had pledged to veto any change in the abortion laws. The witnesses persisted in their support, however, suggesting that the legislature’s responsibility was different from the governor’s, obviously trying to concentrate their fire in one place at a time.

The representative of the New Hampshire and American Civil Liberties Union also spoke against two other provisions of the Code: continuation of the death penalty, and the present proscriptions against fornication and sodomy. Since the bill has not even been reported out by the committee, it may be premature to predict what the ultimate nature of the new penal code will be. Nevertheless, I have little doubt that it will repeal the current New Hampshire law on abortion and sodomy. There may be a small, but insignificant, narrowing of the circumstances in which capital punishment may be imposed, and fornication may become a more limited offense than it now is. On these matters of sexual morality, abortion and the death penalty, the enormous influence of one particular newspaper in the state can be seen time and again. There has already been extremely reactionary editorializing, in highly emotional terms, on these and other issues raised by the proposed code. It seems to be the rare legislator who is prepared to become the specific object of the paper’s scorn.

Following the public hearings, the committee has gone into executive session, where it is as of the time of this writing. The Office of Legislative Services has not only reproduced transcripts of the public hearings for the committee’s use, but has developed a tabular view of the comments that relate to each section of the code that was the subject of testimony. These documents have been invaluable to the committee’s deliberations in reviewing the individual sections of the code—voting approval, amendment or

19 N.H. Rev. Stat. Ann., §§ 585:12, 585:13 (1955) prohibit all abortion efforts, except that after the child is quick and on the advice of two physicians, the pregnancy may be terminated in order to save the life of the woman.

20 There is some suggestion afoot that fornication be prohibited only if it is committed in public.
deletion of the provisions that will compose the bill they will report to the legislature. Chief Justice Kenison and I have continued to sit with the committee in its weekly meetings, providing what background, explanation and advice the committee needs. Once a bill has been reported, it will be referred to the standing committees on judicial matters of each house. Whether the long process of committee work will be repeated following this referral is doubtful, since the standing committees will be made up largely of those who have been on the interim committee. But there will be other legislators whose opinions must be heard and advice considered, and just how much more time will be consumed before the legislature as a whole considers a new penal code is far from certain. Current expectations are that the legislature will act before it completes its business this summer. If it does, it will have taken slightly over two years from the time the proposed code was first published, and almost four years from the time the first drafting began.

Legislative time will not be consumed by consideration of the drafts of the “outside” offense which I did for the supplementary report of the Commission. It has become obvious that review of these provisions is more than the interim committee and the rest of the legislative process can now undertake. Since the largest uncertainty about these offenses is generated by the provision of the code making all absolute liability offenses subject only to a fine, that provision of the code will probably be deleted. Such a deletion is, of course, at the expense of the principle advocated by the Commission that a person who is subjectively not culpable ought not to be sent to prison. Nevertheless, there is the consolation that this result seldom, if ever, obtains, in spite of its legal possibility. There is also a vague expectation that the Office of Legislative Services will one day submit a “house-cleaning” bill that will accomplish this change in the law.

The classification of all offenses, wherever defined, into the groupings of the code, and the applicability of one sentencing structure raise similar questions of amending laws not specifically before the legislature. However, since I had already identified the outside offenses, I could indicate as to each of them what the effect of the classification and sentencing provisions would be. In any event, little difficulty is expected in getting this accepted, since in almost all cases the net result is to increase the penalty that is now provided.

V. Conclusions

Yet undescribed is the consideration of the extent to which the
final drafts from the three law reforming experiences reflect the personal views of the drafter. In the Rhode Island report, the opinion that the hostile procedures of the law should be controlled in juvenile proceedings was broadly shared by all members of the judges' committee. As a result, the draft legislation conveyed to the Governor in the report was the product of our joint efforts to write legislation appropriately expressing this shared intent. The central idea of manipulating the role of the prosecution, in order to preserve as much of the welfare philosophy of the family court as possible, was sufficiently my own idea that I would not hesitate to be identified with it. This feeling that the Rhode Island draft is essentially "mine" contrasts sharply with the way I can view the products of the New Hampshire and Massachusetts efforts. In these states I found the role of reporter to be essentially that of a technician, with relatively little opportunity to produce a body of law reflecting personal views.

There are many reasons why drafting a penal code appears to be uncreative in this sense. To a large extent the criminal law, no matter how decrepit, embodies values that cannot be altered. Persons and property need to be protected from a variety of invasions, and issues such as whether murder is to be an offense with different degrees, which felonies are to be included in a felony murder rule, and what the role of provocation is to be are relatively minor matters encompassing severely limited choices. In addition, so much of the creative change in traditional penal law has already been considered in the work that produced the Model Penal Code, that little more than variations on a theme can be proposed in a new criminal code. It is true that there have been many codifications since the appearance of the ALI's Proposed Official Draft in 1963 that have differed in many respects from the Model Penal Code, but these are nonetheless, still in the nature of more or less elaborate variations. The New Hampshire experience suggests, moreover, that the legislative process regarding penal reform operates so as to minimize sharp departures from tradition. The police appear to play a major role in this, almost as if they, rather than any legislative body, speak for the public at large; and it is commonplace to note that the law enforcement community is generally quite conservative.

If these observations about the role of the reporter are accurate, then it would make much sense to strive to create a permanent body of civil servants whose job it would be to supervise, on a continuing basis, the development of the criminal law. Thus, when some feeling exists that the present statutes need to be changed, these civil employees should be able to determine the
realistic possibilities and analyze the relevant attitudes in order to devise proposed changes for presentation to the legislature.

A second point that emerges relates to the nature of the experience that is brought to the drafting of a penal code, and the expectations that arise from it. The drafting process is often significantly influenced by the experiences the participants have had in the criminal process. Defense lawyers are aware of one sort of need for change; trial judges of another; criminal law professors see the problems from still a different perspective. None of these individuals, however, can validly propose generalizations concerning what now occurs or predict what is likely to result if one provision or another is enacted. There is no assurance, in other words, that the declarations of experience are representative. But the law is enacted to produce desired results, whether there be change or a continuation of the status quo. After all is said and done, however, to find out what the new criminal process is like in one detail or another, we still end up asking a judge, a lawyer, a policeman, etc.; we will know no more of value about life under the new law than we discovered we did under the old law. It seems most desirable, therefore, that penal law revision be accompanied by some provision for monitoring, by way of gathering already existing statistics, by generating new statistics, by interviewing representative samples of officials or citizens whose reports can be of value, or by any other means the creative social science imagination can provide. Some legislatures have already enacted a rule that legislation calling for an expenditure of public funds must include a price tag or estimate of just how much the legislative program will cost. It would be similarly wise to provide that no change in the penal law be enacted unless it is accompanied by some provision for determining, over some appropriate period of time what the effect of the law turns out to be. In some areas, a degree of monitoring is already built in. Abortion reform, for example, relies heavily on the use of medical facilities that are used to keeping records and publishing statistics. Yet, we have no idea what changes, if any, would take place in the arrest rate if there were a radical change in the law regarding circumstances when the officer could shout: “Stop or I’ll shoot.”

This is not to say that the state of the law will always be determined by the state of life it purports to govern. There are sufficient indications that many people regard the penal law as a code of morality whose role it is to approve or disapprove, rather than to regulate. But even under such a view, it would be important to know what is gained and what is lost by the particular shape of the law on issues that are viewed as pointed moral questions.