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REFLECTIONS FROM A DIFFERENT PERSPECTIVE

*B. J. George, Jr.**

A signal fact of the 1960's is the widespread attention being paid to modernization of America's criminal law and procedure. After nearly a century of patchwork adjustments of state codes or fragmentary modification of the common law, the federal government and a great many states are moving toward new substantive codes and new codes or rules of criminal procedure. As one who has been working as a reporter in Michigan's endeavor to revise its criminal law and procedure,[1] I have been asked to comment in a general way on Mr. Robinson's effort at reforming Wisconsin law.

It is a concomitant of all human activity that though men may agree on a goal to be attained, there is inevitably conflict over the best path to that goal. Some will insist that only a conceptually perfect end product is acceptable and will refuse to have anything to do with compromise. Others, perhaps because they are imbued with a measure of cynicism or weariness, will accept whatever is possible on a particular day. To a degree Mr. Robinson seems to be in the first group as far as procedural revision is concerned; I would have to be assigned to the second.

A few points of comparison are in order. One concerns the scope of revision. As Mr. Robinson indicates,[2] one may simply restate existing statutes in simpler modern language. Alternatively, he may aim only at selective change in those parts of a criminal procedure system that have not worn well. Or he may seek a complete new code. Mr. Robinson clearly prefers the third alternative and seemingly would not be willing to accept either of the others. To a degree, I share his belief that a modern code is preferable to random modification; the Michigan substantive revision is such a code, despite the preference of some members of the committee at the outset for relatively modest changes in the existing law. However, legislative drafting as an application of politics is the art of the possible. To update portions of an old code is to make progress. There is practical

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[1] The Commissioners of The State Bar of Michigan created in 1964 a Special Committee to Revise the Criminal Code; in 1965 the Committee on Criminal Jurisprudence joined in the effort. The product is The MICHIGAN REVISED CRIMINAL CODE FINAL DRAFT — September 1967, which the Michigan Legislature will probably consider early in 1969. The Committee is now proceeding to prepare a criminal procedure statute and rules. 47 MICH. ST. B.J. No. 9, p. 72 (Sept. 1968).

[2] *See* text accompanying notes 6-8 *supra* in Robinson's article.

merit in doing nothing more than updating language, since a statute in modern dress, like Scripture or liturgy in modern dress, enhances the understanding of doctrine by the new generation, though at the cost of nostalgia in the older generation for the old way of saying things. Moreover, a little bit of redrafting or reform is like a little bit of pregnancy. The interrelationship of legal concepts makes it very difficult to maintain a narrow scope for any revision, so that the end product of a revision project very probably will be a code.

A second comparison involves the necessity of comprehensive field studies of the actual effectiveness of existing law and enforcement practices before drafting begins. Mr. Robinson believes that an exhaustive field study must be made before any satisfactory code can be drafted. In the abstract it is difficult to demur to this desire. However, no state legislature will appropriate nor private foundation give the money necessary to underwrite such a survey. Moreover, there is no guarantee that what the researchers believe they have heard or observed actually reflects current practices. Furthermore, an insistence on an exhaustive preliminary study is tantamount to a long postponement of the revision effort. Field studies take time. Judging by the history of the American Bar Foundation Study of the Administration of Criminal Justice in the United States, years are required to correlate and summarize field survey data. By the time the final reports appear, usually years after the original data were acquired, they no longer reflect current conditions, and thus are no more appropriate a basis for reform legislation than the general understanding of the profession at the earlier time. All one has, interesting though it may be, is documented history rather than undocumented folklore. If one in fact wants reasonably speedy law reform, he will have to accept a consensus of informed opinion about what the current problems and circumstances are.

A third has to do with the comprehensiveness of the final product. Mr. Robinson believes that no gaps should be left in coverage. However, there is no such thing as a complete code, as the history of codification efforts in the Roman Empire, Western Europe, Japan and the United States indicates. Naturally, a drafting group should envision as many problems as possible and give some measure of guidance in solving most of them. Language, however, is always ambiguous, and even the most fertile imagination cannot anticipate all the concatenations of circumstances that chance and human ingenuity can achieve. Moreover, there are times when it is better to ignore problems or defer action. Police, for example, want guidelines and litmus tests. To a degree their claim can be effectively met. But if, as is often the case, the request is based on a belief that detailed rules promote an automatic and accurate decision process, then the kindest action is to refuse to provide what can only be the illusion of definite rules. In addition, many areas of the law at any given time will be in a state of flux. Where the Supreme Court is active, and indeed fluctuating in its ap-

proach,[3] it may take several years before answers are given to today's questions. Under circumstances like these, the matter is better left untouched or else referred to in very general terms. In any event, many of the problems Mr. Robinson raises have not yet been effectively regulated in any country's codes that I know.

A fourth concerns who the principal drafters should be. The author clearly prefers that drafting be done by a small band of scholars. Pride of class naturally restrains me from denying the validity of this out of hand. As a practical matter, a law teacher if he wishes can free the large amount of time necessary to prepare drafts and commentaries far more easily than a busy attorney or judge. However, I have strong distrust of a draft produced by academics. Only one who deals with actual cases every day has a real feeling for the direction that reforms should take. As a code reporter I came away bloody and bowed from sessions in which I "lost" an issue. In a few instances I continue to feel that the original proposal would be both fairer and simpler to administer. But in most instances I believe the committee's position was the better, and the proposed code is the stronger for having tempered policy with practical wisdom. In short, I do not share Mr. Robinson's belief that only a code drafted by scholars can be "scientific."

The latter is the key to the final point. The impression I carry away from Mr. Robinson's paper is that unless one achieves a complete code, drawn in light of a comprehensive study of actual conditions and scientifically "correct" in principle, it is preferable that he not try at all. This is often the premise on which a dedicated reformer proceeds, and perhaps the world is the better for it. However, this is not a premise on which I can operate. A flawed contemporary code is better than a flawed archaic one. Advances in only a few rather than all areas of concern are preferable to no progress in any area. If on a majority of questions one can conclude the draft to be recommended to the legislature is more workable or understandable than existing law, the effort has been worthwhile. If a further advance is not possible today, it may become so tomorrow.

In short, the difference of opinion about the immediate worth of Mr. Robinson's effort lies in the conflict between idealism and realism. There is perhaps more of the former than the latter in his work. That is not to say, however, that it is trifling and unimportant. The author's concerns should be the concerns of all of us. The ultimate goals he seeks are ones we can share. The coverage and language of the sections he has drafted are a good starting point for any drafter. The results in a given state, including perhaps Wisconsin, may not be what Mr. Robinson has hoped for, but without his work and that of others motivated in the same way, progress could not be achieved.

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[3] As an illustration, *compare* Katz v. United States, 389 U.S. 347 (1967), *with* Berger v. New York, 388 U.S. 41 (1967), on the matter of constitutionality of state eavesdropping legislation, and *compare* Simmons v. United States, 390 U.S. 377 (1968), *with* United States v. Wade, 388 U.S. 219 (1967), on the matter of eye-witness identification.