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Symposium: Recondification of the Criminal Laws

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SYMPOSIUM: RECODIFICATION OF THE CRIMINAL LAWS

INTRODUCTION

*by Francis A. Allen**

The revision of American criminal legislation, both state and federal, has been for many years one of the most insistently required tasks of law reform. Even yet its urgency and importance are not fully realized. There are, however, signs that a genuine movement toward rethinking and restating our criminal jurisprudence is under way. This Symposium seeks to give encouragement and guidance to the revision movement by collecting relevant experience and reflections from a few of those who participated in pioneering ventures in criminal law codification.

Recent years have brought additional reasons for concern about the state of our criminal legislation, whether in the fields of substantive law, procedure or corrections. For a long time the attainment of criminal justice has been impeded by the deficiencies of the statutes. The language of the legislation is frequently incapable either of giving the citizen adequate notice of the conduct subject to criminal penalties or of providing the courts with standards sufficient to guide and limit their operations. An example of these problems of articulation is provided by the criminal statutes in Illinois, as they existed in the years before the Criminal Code of 1961. Those statutes employed about a dozen and one-half undefined statutory terms to designate the basic mental states required to be shown in prosecutions under these laws. The difficulty was that fifteen or sixteen terms were being used to convey not more than five or six distinct ideas. The result was confusion and futility; and what was true in Illinois before legislative revision remains true in many American jurisdictions. Moreover, the statutes ordinarily reflect no coherent or consistent body of principle, but, on the contrary, are often the product of ad hoc responses to particular problems coming to the legislature's attention at various times over the years. Statutes revealing no considered or consistent point of view are afflicted by internal

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conflicts of policy, redundancies and gaps in vital provisions. It is not too much to say that in most jurisdictions there is no such thing as a deliberate policy relating to the administration of criminal justice, and while this fact is the product of more than defects in the statutes, the deficiencies of the laws play a large role in creating and maintaining this condition.

All of this is familiar knowledge to those who have devoted any considerable attention to the criminal law and its administration. There may be at least one further observation worth making, however. The criminal law and all law is facing a crisis of legitimacy. By "legitimacy" I mean nothing mystical or mysterious. I am referring to the capacity of the law to evoke the willing compliance of the overwhelming fraction of the population, even in cases in which many persons believe that some particular laws are dubious and even unjust. No doubt we have tended to exaggerate the degree of legitimacy attained by the legal order in the past, but I see no reason to doubt that in recent years serious losses in the authority of the law and of the agencies that apply it have been sustained. Such losses may be an inevitable cost of necessary social and institutional change, but they can easily become exorbitant. One of the advantages of a widespread disposition to give allegiance to the law and its institutions is that it tends to reduce the levels of force applied by the state in maintaining public order. Challenge and resistance to the law-enforcing agencies, on the other hand, produce escalation in the kinds and amounts of public forces those agencies employ. This enhancement of force may, in turn, produce more fundamental alienation of significantly large groups from the legitimate agencies of society. The result may be further increases in the levels of force employed by official agencies, until the fundamental conditions of a free society are threatened or destroyed.

In a time when there is a strong disposition of many to withhold their allegiance from the legal order, the familiar failures of the criminal law and its administration, toward which we have displayed a formidable tolerance for decades, take on a new and ominous significance. We simply cannot afford the deficient criminal statutes that burden most American jurisdictions. This is true because such legislation results in inefficiency and injustice; and inefficiency and injustice in the criminal law produce intolerable losses in the legitimacy of all law. The problem of restoring legitimacy to the legal order entails a great deal more than exercises in law reform. Nevertheless, revision of criminal legislation is an appropriate, and perhaps a necessary, starting point.

Although many of the issues implicit in the movement for

criminal-law revision are of large and general significance, the execution of reform poses many other practical and down-to-earth questions. It is to these latter questions that the papers in this Symposium are primarily directed. What agency should be responsible for drafting the new code: should the initiative come from the law schools or the bar associations, on the one hand, or from a legislative commission, on the other? How should the membership of the agency be selected? What is needed by way of research staff and drafting facilities? How is the operation to be funded, and what is the optimum level of funding? Where should the task begin? Is it desirable to present the legislature with a code encompassing revision of all the statutes bearing on the administration of criminal justice, or is it preferable to submit first a draft of, say, substantive provisions and then move to the procedural and correctional codes? Is it essential that the revision be in all respects comprehensive, or are there situations in which it is permissible to exclude areas of great importance or sensitivity for separate treatment, such as narcotics regulation? Is there any wisdom that can be communicated about approaches to the legislature most likely to induce favorable response to the revision when completed by the drafting group?

These questions have been posed without any conviction that there are preordained answers applicable to all of the very different circumstances prevailing in the various American jurisdictions. I have convictions (or prejudices) about some of these matters. I believe, for example, that it may be desirable to "think small" about the apparatus required for criminal code revision. There is a certain minimum of funding that is required: a competent draftsman must be available, secretarial service must be provided, and enough money to pay a few good law students to research various areas of concern is indispensable. Nevertheless, I am impressed by what can be achieved by a small group of dedicated lawyers who are enthusiastically dedicated to the task at hand. Sometimes affluence erodes this enthusiasm and sense of individual responsibility. It is clear, however, that circumstances alter cases, and that the questions posed are more of art than of science. It is hoped that by communicating the experience of those who have dealt with these questions in recent years, others who will soon be embarking on similar endeavors may be provided with some insights and be aided in avoiding some pitfalls.

I do not intend to review the contents of the papers that follow. The authors are fully capable of speaking for themselves. The distressing experience in California, expertly set forth by Professor Sherry, raises broader issues, however; and I am disposed to

add a word. We have entered an era in which legislative law reform is not only important, but which has great significance for the very survival of the legal order. The execution of law revision, in turn, presupposes sufficient political maturity to utilize wisely the talents of those who have special skills in the various areas of law reform. The fact is that the group assembled in California and which labored long and effectively to revise the criminal statutes of that state was perhaps the most distinguished aggregation of legal talent ever brought together in a state commission dedicated to these purposes. I doubt that any other state could recruit a group including so many persons of such great talent; and I am confident that the distinction of the participants was apparent to all competent observers, not only in the United States, but throughout the Anglo-American legal world. Certainly, the principle of democratic representation implies that the proposals of no group, however distinguished or expert, need be accepted by the representatives of a community which finds them repugnant or uncongenial. If the mild and moderate proposals that precipitated the California furor were unacceptable to the legislature or to the group designated to review them in the first instance, one could accept their rejection with good grace, however much one might regret it or doubt its wisdom. But that these proposals should be regarded as so unthinkable or unspeakable to justify the discharge of a distinguished committee from the performance of its public responsibilities is simply preposterous. That such an instance of political know-nothingism could occur in our most populous state is a matter of concern for the entire nation. If the vital mission of law revision is to be achieved in this country, it is incumbent that a higher level of sense and responsibility than revealed in California be damanded and obtained by those having an appreciation of what is at stake.