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tifies abuses or questionable practices in noting or raising issues about specific trial procedure. This is the most speculative and interpretive section of Marshall's book¹² and is likely to hold the greatest interest for practicing attorneys and interested scholars.

Many of Marshall's remarks are based on the experience of other attorneys or the findings of other legal scholars; some are his own. For the most part these remarks are incisive and cogent and reflect skillful interpretation of behavioral findings and observations relating to trial practices. For instance, he observes that "each juror is a witness to each witness, perceiving and interpreting the testimony through the lenses he has ground out of his own experience and expectations."¹³ Marshall further observes that another legal fiction is that an emotion such as sympathy must not determine judgment. "Judge and jury are expected to be objective, free from the common human trait of sympathy . . . It would be a surprising departure to discover a lawyer who did not attempt to get judge and jury to identify with his client out of sympathy."¹⁴ He quotes Louis Nizer: "We talk of the credibility of witnesses, but what we really mean is that the witness has told a story which meets the tests of plausibility and is therefore credible."¹⁵ One of Marshall's more speculative comments is that "the lawyer trying a case has the task of bringing about *change*. He must bring the attitude of judge and jury from neutrality or hostility to supportiveness."¹⁶ Could it not also be true that the lawyer sometimes has the task of avoiding change and reinforcing current dispositions where he senses that the judge and jury support him, his case, or his client? His task then is to avoid rather than to overcome neutrality or hostility.

On the whole, Mr. Marshall's book is not news. It is, however, the kind of inquiring and reflective intellectual effort that should be evidenced in more barristers and legal scholars interested in the trial process, especially those who want to do something about it.

Robert S. Redmount*

¹² MARSHALL, *op. cit. supra* note 3, at 83-111.

¹³ *Id.* at 93-94.

¹⁴ *Id.* at 93.

¹⁵ NIZER, *MY LIFE IN COURT* 11 (1961), quoted in MARSHALL, *op. cit. supra* note 3, at 89.

¹⁶ MARSHALL, *op. cit. supra* note 3, at 84.

* B.A., 1943, M.A., 1947, Pennsylvania State University; Ph.D., 1949, New York University; LL.B., 1957, Yale University.

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PROPOSED REVISION OF THE TEXAS PENAL CODE

W. PAGE KEETON* AND WILLIAM G. REID†

Texas' current penal code, based on the original penal code of 1856, is inadequate to meet the problems of criminality in a modern society. Substantive changes in the code have been made sporadically, resulting in inconsistencies and overlapping among sections of the code. Recognizing the need for rational order and certainty in the criminal law, the State Bar of Texas in 1965 appointed a Committee on Revision of the Penal Code. The need for revision of the penal code and the organization and goals of the State Bar Committee appointed to the task are the subjects of this article.

The State Bar of Texas Committee on Revision of the Penal Code is undertaking a thorough substantive revision of Texas' present code. The Committee was appointed in the summer of 1965 and thereafter set up its revision organization and commenced research. The Committee began holding working meetings in October 1966 to consider proposed drafts submitted by the reporters. The work of the Committee has not advanced far enough for the substance of the proposed revision to be surveyed at this time, but it is appropriate to discuss the need for revision in Texas, the organization and method being used to accomplish the revision, and the goals of the Committee.

I. THE NEED FOR REVISION

The existing Texas Penal Code is a bulky, confusing, and conflicting compilation of the original Texas Penal Code of 1856 plus additions and amendments. The accumulation of 110 years of legislation today rests uneasily upon a foundation laid twenty-one years after the Texas Revolution.¹ While the penal code has undergone four formal

* Dean, University of Texas School of Law, Chairman, State Bar of Texas Committee on Revision of Penal Code.

† Project Director, State Bar of Texas Committee on Revision of Penal Code. A.B., 1960, Harvard University; LL.B., 1966, University of Texas.

¹ The penal code was adopted at the adjourned session of 1856 and took effect February 1, 1857. Wilkinson, *Edward Livingston and the Penal Codes*, 1 TEXAS L. REV. 25, 37 (1922); *Introductory to WILSON'S TEXAS CRIMINAL STATUTES* at v (4th ed. 1896).

revisions (in 1879, 1895, 1911, and 1925) substantive change was carefully avoided in each case.² Each revision was accomplished by a commission charged with revision of all the laws of Texas.

The Penal Code of 1856 was a good code and was well drawn to deal with the social problems of its day. However, the major problems of society have changed considerably since the drafting of that ancient document, as evidenced by the profusion of legislation that has been added to our penal law.

Consider the society for which our code was drafted: In 1856 the population of Texas was only 450,000, and only four percent of these people lived in towns.³ About one-fourth of the population was made up of slaves, subject to different laws and punishments than the rest of the people.⁴ Slaves were punished by death for minor crimes. One of the reforms proposed by the Commissioners was to substitute the branding of slaves for capital punishment for a long list of crimes.⁵ Branding and whipping were common forms of punishment during this period.⁶

Texas had gained independence from Mexico and the Mexican system of criminal law only twenty-one years before and had been a state for ten years. The common law and a statute proscribing some thirty-odd offenses served as the criminal law of Texas from Independence until the adoption of the present Code. There were only sixty-three miles of railroad track in the state, so horses and oxcarts provided the primary means of transportation.⁷ In 1856 the United States Army brought camels to Texas to assist in reconnaissance expeditions in the western part of the state.⁸ Communication was limited to messenger and mail because there were only two telegraph lines, one connecting Marshall with Shreveport, Louisiana, the other from Marshall to Houston.⁹

Governor Elisha Marshall Pease, who appointed the Commissioners to draft the penal code and signed the completed work into law, had been elected on a platform calling for the founding of a public school system, encouragement of internal improvements, and removal of hostile Indians from Texas.¹⁰

² See Comment, *Bulk Revision of Texas Statutes*, 30 TEXAS L. REV. 469, 470-82 (1961).

³ 1966-1967 TEXAS ALMANAC 122.

⁴ See 16 BANCROFT'S WORKS 530 (1889).

⁵ COMMISSIONERS TO PREPARE A PENAL CODE, REPORT TO THE SIXTH LEGISLATURE: A PENAL CODE FOR THE STATE OF TEXAS 17-18 (1855).

⁶ See Potts, *Early Criminal Law in Texas: From Civil Law to Common Law, to Code*, 21 TEXAS L. REV. 394 (1943).

⁷ 1966-1967 TEXAS ALMANAC 497.

⁸ RICHARDSON, TEXAS THE LONE STAR STATE 149 (2d ed. 1958).

⁹ 1966-1967 TEXAS ALMANAC 504.

¹⁰ RICHARDSON, *op. cit.* *supra* note 8, at 129.

Law enforcement in Texas was limited. The United States Army and state forces were concerned with protecting exposed settlements on the frontier from Indians and renegade white men. Texas Rangers were sometimes available for dealing with major social disturbances such as Indian attacks, bandit raids from Mexico, feuds, and the more flagrant activities of local outlaws.¹¹

The citizenry often resorted to organizing vigilance committees to protect themselves.¹² Accounts of the summary trial and execution of horse thieves and murderers are commonly found in the literature of the day.¹³ Trials, if held at all, were swift and penalties severe, often because of the lack of a jail in which to hold the offender. There was no penitentiary available until 1849, and during the first decade of its operation only 412 malefactors were committed to this institution.¹⁴

In view of the state of law enforcement during the times, much of the Penal Code of 1856 was probably hortatory, but it was well drafted and based upon a highly praised model. The Commissioners drew heavily upon the work of Edward Livingston, who drafted a code for the State of Louisiana in 1824. The Louisiana legislature rejected Livingston's code because it was too modern. Our legislature also rejected a great many of Livingston's ideas, but they did enact what was generally recognized as one of the finest codifications of its day.¹⁵

The Commissioners had a worthy model and excellent goals. They stated their goals to be: First, to provide the people with a body of written law setting out an intelligible definition of offenses, and secondly, to assign to each offense its appropriate punishment. Their major argument for the code was that the citizen charged with crime has just cause to complain when he "asks for the law which establishes his guilt, and is referred to the elementary treatises upon such subjects, and the books of Reports containing the elaborate dissertations of various courts, who, by judicial decisions, have illustrated the law."¹⁶

¹¹ See WEBB, *THE TEXAS RANGERS* (2d ed. 1965).

¹² See GARD, *FRONTIER JUSTICE* 199-205 (1949).

¹³ See, e.g., O. D. Smith, *A Trip to Texas in 1855*, in 59 SOUTHWESTERN HISTORICAL Q. 24, 32 (1955).

¹⁴ 16 BANCROFT'S WORKS 534 (1889).

¹⁵ Wilkinson, *supra* note 1, at 37.

¹⁶ From an historical point of view, there is reason for pride in the Texas Penal Code and Livingston's influence on it. Livingston's code was acclaimed by the rulers of Russia, Sweden, and the Netherlands. Such outstanding jurists as Marshall, Kent, Story, Jefferson, and Bentham praised its excellence. His code was adopted in Guatemala and influenced the Russian, Brazilian, and Indian codes. In this country one of Livingston's most interested students was David Dudley Field, the architect of the influential New York Penal Code of 1881, which many states used as a model. See Beckman, *Three Penal Codes Compared*, 10 AM. J. LEGAL HIST. 148, 165-68 (1966).

¹⁷ COMMISSIONERS TO PREPARE A PENAL CODE, REPORT TO THE SIXTH LEGISLATURE: A PENAL CODE FOR THE STATE OF TEXAS 8 (1855).

The goals of the State Bar Committee include those of the early Commissioners, but go beyond them. While many of the issues remain the same, many of the earlier answers have become dated. The original success of the Commissioners has not endured the passage of time. The basic principles and structure of our code either have remained static or have become muddled in a changing society. Intermittent attempts to meet immediate problems by specific legislation have left us with a code that is out-moded and accidental. The legislature's attempts to meet changes often have resulted in overlapping between crimes, making boundaries uncertain and arbitrary.¹⁷ Changes in our code have been made without reference to general principles or to the problem of maintaining a consistent and rational system. The statutes have accumulated a gloss of judicial interpretation, and the result is that many sections mean something quite different from what they seem to say. The resulting discrepancy in meaning is inconsistent with our fundamental objective of certainty in the area of criminal liability.¹⁸

Thus, while our code began as a consistent body of law with intelligible definitions of offenses and punishments appropriate to each according to the standards and values of 1856, we have returned to the situation whereby citizens who ask "What is the criminal law?" must be referred to a conflicting array of statutes and then to "elaborate dissertations" in judicial decisions. An expression of the frustration which our present penal code has created is contained in the latest report of the Bexar County Grand Jury. Recently that body of citizens charged with applying the law began their report with this appallingly accurate observation: "The Penal Code of Texas, as it now exists . . . is a hodgepodge of inconsistencies, inequities, and penalties which have no basis in reason or common sense."¹⁹

Our criminal law is unacceptable in its present condition. Men place their ultimate reliance upon the criminal law for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. Criminal law governs the strongest force that we permit official agencies to bring to bear on individuals. If our

¹⁷ See Remington, *A Proposed Criminal Code for Wisconsin*, 20 U. KAN. CITY L. REV. 221, 222-23 (1952).

¹⁸ *Id.* at 223.

¹⁹ Report from Ralph G. Langley, Foreman, Bexar County Grand Jury for July-August term to John F. Onion, Jr., Judge, 175th District Court, Aug. 17, 1966, reproduced in Letter From James E. Barlow, Criminal District Attorney of Bexar County, to Page Keeton, Aug. 3, 1966.

laws are weak or ineffective, basic human interests are jeopardized. If they are harsh or arbitrary, they work a gross injustice on those caught within its toils. The law that carries such responsibility must be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community or individual.²⁰

Certainly there is a substantial group who would disagree with the assertion that our present law is in need of thorough revision. They counter with the argument that our present system works, and in a sense they are correct. However, a rational, consistent, and clearly articulated penal code should assist those who must administer our present system by removing many of the unnecessary burdens they must bear. This state's default in providing a rational system of criminal law too often places an impossible burden on the police, prosecutors, and judges to bring both order and justice out of the chaos of our laws.

The field of criminal law suffers from the noninvolvement of the majority of the members of the bar. It is understandable when lawyers say that they do not take criminal cases because they do not understand the complexity of substantive and procedural criminal law. It is a waste of the valuable time of our lawyers and prosecutors to require them to learn the unnecessary intricacies of our unrevised penal code. The expense is unwarranted whether it is borne by the state, the client, or the lawyer himself.²¹

One would be naive to believe that a revision of the penal code could solve all of the problems of administration of our criminal law, but it would help. At least some of the obstacles which hamper the prosecution and defense of criminal cases can be removed.

In view of the confusing state of our criminal law and the fact that no comprehensive study of the complete system has been conducted in over a century, it can hardly be denied that our penal code should at least be subjected to a thorough inspection and inquiry to determine whether it still represents the best possible solution to the problems assigned it. The question is: Does our penal code represent the best thinking of our judges, attorneys, law enforcement officers, the administrators of our correctional system, and legislators? By undertaking a thorough revision, the State Bar Committee has indicated its opinion that the penal code fails to meet this test.

²⁰ Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952).

²¹ Address by Frank J. Remington, Edward Douglas White Lecture, Georgetown University Law Center, Nov. 13, 1963.

II. TIMELINESS OF REVISION

The State Bar Committee was encouraged in its decision to revise the penal code by three factors which indicate the timeliness of the project. First, the American Law Institute's *Model Penal Code* is available as a guide for the study; secondly, a great number of other states have recently taken action to bring their penal codes up to date; and finally, our own state legislature has launched a general statutory revision program.

A. *Model Penal Code*

The *Model Penal Code*, completed in 1962, is the result of ten years of labor by a distinguished corps of professors, judges, practicing lawyers, prison administrators, probation and parole specialists, psychiatrists, and criminologists. Its preparation cost over one-half million dollars, which was given to the American Law Institute by the Rockefeller Foundation.²² It is the most important study of American criminal law in this century.

The *Model Penal Code* was not drafted for wholesale adoption by states, but is a carefully drawn guide to assist states in the revision of their own laws. The outstanding virtue of the *Model Penal Code* is that it offers a draft conceived and reviewed by experts, which each state is free to adopt or modify. It provides an organization which clearly delineates the issues that must be met and offers well-considered suggestions. It also provides comprehensive discussions of the current state of American criminal law on each of the subjects covered. The *Model Penal Code* proposals may be modified or rejected, but they cannot be ignored.

B. *Revisions in Other States*

Several recent revisions of other states' criminal laws will be of great value to the revision of the Texas Penal Code. For almost a century criminal law in the United States had been static, and no state had undertaken a thorough revision.²³ Beginning with Louisiana's adoption of a thorough revision of their criminal law in 1942, there has been a wave of criminal law reform in the United States, most of

²² Schwartz, *The Model Penal Code: An Invitation to Law Reform*, 49 A.B.A.J. 447 (1963).

²³ Cohen, *Criminal Law Legislation and Legal Scholarship*, 16 J. LEGAL ED. 253, 254 (1964).

which has occurred in the past decade. Much of this effort has been inspired by the American Law Institute's study. Eighteen states, over one-third of the United States, have either accomplished or are undertaking comprehensive reform of their substantive criminal law.²⁴ The most notable revisions have been accomplished in Wisconsin, Illinois, and New York. Of the more populous states, California and Pennsylvania are well into their proposed revisions. Texas can draw upon these new codes and proposals for further examples of alternative solutions to its criminal law problems.

C. *Texas Statutory Revision Program*

A comprehensive and systematic program of formal statutory revision is underway in Texas. This program began in 1963, and its first fruits are the Business and Commerce Code and the Water Code, both of which were introduced to the Sixtieth Legislature in January 1967.²⁵ When the statutory revision program is completed, all Texas statute law will be formally revised and codified in twenty-six topical codes which will replace the 1925 revision of our statutes.²⁶

The State Bar Committee's proposals can be easily integrated into the Texas legislature's general statutory revision program.²⁷ Under the Texas Legislative Council's plan, the revised penal code will contain only traditional crimes. Penal code articles of a regulatory or administrative nature will be transferred to more appropriate codes. For

²⁴ The following states have enacted revisions in the years indicated: Louisiana, 1942; Wisconsin, 1955; Illinois, 1961; Minnesota, 1963; New Mexico, 1963; New York, 1965. For discussions of revisions in progress see Brumbaugh, *A New Criminal Code for Maryland*, 23 MD. L. REV. 1 (1963); Keeton, *Revision of Penal Code*, 29 TEX. B.J. 508 (1966); Molnar, *Criminal Law Revision in Georgia*, 15 MERCER L. REV. 399 (1964); Sloane, *A Touch Upon the Model Penal Code and Pennsylvania Criminal Law*, 35 PA. B.A.Q. 358 (1964); Wilson, *State Criminal Law Revision*, 3 AM. CRIM. L.Q. 198 (1965) (California, Colorado, Connecticut, Iowa, Kansas, Missouri, and Montana); Address by Frank J. Remington, Edward Douglas White Lecture, Georgetown University Law Center, Nov. 13, 1963 (Oregon).

²⁵ Dougherty & Searcy, *The First Fruits of the New Formal Revision Program: The Business & Commerce Code*, 29 TEX. B.J. 555 (1966).

²⁶ See generally Freeman, *Texas Legislative Council's Statutory Revision Program*, 29 TEX. B.J. 1021 (1966).

²⁷ The Texas Legislative Council, whose chairman and vice-chairman are Lieutenant Governor Preston Smith and Speaker of the House Ben Barnes, established a Study Committee for Statutory Revision on August 30, 1965, and gave that Committee authority to make arrangements to cooperate with the State Bar Committee on Revision of the Penal Code. This study committee met November 8, 1965, and authorized the staff of the Legislative Council to extend assistance to the State Bar Committee by providing a consultant to insure that the code as revised conforms to the Council's statutory revision program. Additional assistance was authorized to be extended, subject to the approval of the Executive Director of the Texas Legislative Council. Mr. Robert E. Freeman of the Legislative Council Staff was designated as consultant to the State Bar Committee and has rendered valuable assistance.

example, the revised penal code will no longer include liquor regulation, the licensing of barbers, or the game and fish laws.²⁸

III. TYPE OF REVISION NEEDED

Distinctions must be made between "formal" and "substantive" revisions and the goals of each. The general statutory revision program of the Texas legislature is concerned only with formal revision. The purpose of a formal revision is to clarify and simplify existing law and to make it more accessible by restating the existing law in simple modern language and by eliminating needless duplication and verbosity. In a formal revision all provisions which have been specifically or impliedly repealed or found unconstitutional are removed. The law, scattered throughout numerous volumes of statutes, court reports, and attorney generals' opinions, is reorganized into some logical order—typically according to subject matter. The guiding principle in a formal revision is that existing substantive law must not be changed.²⁹ While a formal revision of the penal code would be a significant contribution to Texas criminal law, it could not resolve the fundamental inconsistencies and ambiguities that exist in our criminal law. It would merely make them more apparent.

A substantive revision seeks to identify and consider fundamental policy issues and resolve them by changing existing law. In a substantive revision of criminal law these are the issues that must be faced: What behavior ought to be made criminal and how should it be defined? Where should the dividing line between minor and major criminality be drawn? What variations in the nature, circumstances, or results of criminal behavior or in the character or situation of the individual offender should have the legal consequence of varying the mode of treatment of offenders? What method of treatment ought to be prescribed in dealing with offenders?³⁰ Generally, the object of the State Bar Committee is to consider existing law and practice, to articulate the issues, to analyze possible solutions, and to make recommendations that reflect the competing values and considerations inherent in a rational choice.³¹

²⁸ A detailed study of the assignment of Texas Penal Code articles to the various proposed codes is found in TEXAS LEGISLATIVE COUNCIL, CLASSIFICATION OF TEXAS STATUTES 35-43 (1966).

²⁹ Comment, *Substantive Law Revision in Texas*, 37 TEXAS L. REV. 740-41 (1959); Comment, *Bulk Revision of Texas Penal Statutes*, 39 TEXAS L. REV. 469 (1961).

³⁰ Wechsler, *supra* note 20, at 1104-05.

³¹ *Id.* at 1130.

A substantive revision need not necessarily include the objectives of a formal revision. Changes could be made within the existing structure in a piecemeal fashion. The State Bar Committee was faced with a choice of whether to direct its revision study toward a piecemeal amendment program or a thorough recodification. The first consideration was the problem inherent in attempting to patch new pieces into an old code. The problem is the same as that faced by the United States Supreme Court when it was asked to change a single rule of evidence. Mr. Justice Jackson explained the problem in this way: "[T]o pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance . . . than to establish a rational edifice."³²

Not only is a piecemeal approach a delicate task involving the danger of unforeseen effects, but any decision to work within the familiar framework is founded upon the basic assumption that that framework is adequate in all respects to support the desired changes. It is a decision which necessarily forecloses consideration of the great majority of fundamental policy questions. The State Bar Committee was unwilling to give our present system such an endorsement or to eliminate the study of major issues. This does not imply that our present system does not work or that it is incapable of being administered. Texas has been "getting along" with the present law. However, it is possible that the administrators of the criminal law have succeeded *in spite of our present system* of substantive criminal law rather than because of it.

The decision to attempt both formal and substantive revision was positively influenced by the success that other states have had with complete revisions. Eight years after their code was enacted, the Louisiana draftsmen said that the administration of criminal law in Louisiana had greatly improved and that the new laws had not produced the confusion and uncertainty that had been predicted.³³ One of the leaders of the Wisconsin revision, in assessing the effect of the new code after seven years' experience, was able to state that it did not create confusion and that the number of appellate reversals for error in interpretation of the substantive criminal law had even been reduced.³⁴

³² *Michelson v. United States*, 335 U.S. 469, 486 (1948).

³³ Smith, *How Louisiana Prepared and Adopted a Criminal Code*, 41 J. CRIM. L., C. & P.S. 125, 135 (1950).

³⁴ Address by Frank J. Remington, Edward Douglas White Lecture, Georgetown University Law Center, Nov. 13, 1963.

No evidence has been found from any state that has adopted a thorough revision that the lawyers, judges, prosecutors, police, or correctional officials have been disappointed with the result or have thought that the project was not worth the effort required to bring it about.

When the New York Revised Penal Law was enacted in 1965, Governor Rockefeller noted:

Among those recommending approval [of the revision] are the Association of the Bar of the City of New York, the State Administrator of the Judicial Conference, the Correctional Association of New York, the Association of Chiefs of Police, the Association of Magistrates, the State Department of Correction, the District Attorneys' Association and numerous civic organizations and citizens.⁸⁶

In view of these encouraging remarks concerning the experiences of other states and their success with new codes, and in view of the fact that the revisions have been able to generate broad public support, the State Bar Committee resolved to undertake a thorough revision of the Texas Penal Code.

IV. ACCOMPLISHMENT OF THE REVISION

Considering the experience of other states, particularly those that have been successful in obtaining enactment of their revised codes, three factors seem to be most important to the accomplishment of a good revision. These factors are: First, a good organizational plan; secondly, the wholehearted cooperation of all those who are involved in the administration of the criminal law; and thirdly, adequate financial support.

A. Organization

The organizational structure of the revision project includes the State Bar Committee as the policy making body, a Law Enforcement Advisory Committee, an Advisory Committee on Corrections, project director, secretary, eight reporters, and an advisory committee and student research assistant for each reporter.

The State Bar Committee is made up of twenty-seven members, including judges, legislators, legal educators, and other distinguished attorneys, most of whom have had experience as prosecutors or defense

⁸⁶ Governor's Memorandum of Approval in MCKINNEY'S CONSOLIDATED LAWS, NEW YORK REVISED PENAL LAW xii (1965).

attorneys.⁸⁶ This Committee is charged with the responsibility of making policy decisions and approving the drafts submitted to it and will ultimately make its final recommendation to the State Bar Board of Directors in the form of a completed proposed code.

Serving on the Law Enforcement Advisory Committee are the President of the Texas Police Association, the Executive Secretary of the Texas Sheriffs' Association, the Police Chiefs of Houston, Dallas, and Austin, and a representative of the Department of Public Safety.⁸⁷ This outstanding group will work closely with the State Bar Committee to provide information, perspective, and possible solutions.

The Advisory Committee on Corrections consists of (1) the Director of the Texas Department of Corrections, (2) the Director of the Sam Houston State College Institute of Contemporary Corrections and the Behavioral Sciences, (3) the President of the Texas Probation and Parole Association, (4) the Director of the Division of Parole Supervision, Texas Board of Pardons and Paroles, (5) the Director of Court Services of the Juvenile Department of Dallas, (6) the Chief Adult Probation and (7) Chief Juvenile Probation Officers of Travis County, and (8) the Texas Representative of the National Council on Crime and Delinquency.⁸⁸ This group of experienced men will be particularly helpful to the Committee as it considers the problems involved in developing a realistic and practical sentencing structure. The Committee will look to these men for information on the relationship between the sentence and rehabilitation, and their opinions will be sought on the question of how to make the punishment fit the individual as well as the crime.

⁸⁶ The membership of the State Bar Committee consists of: Page Keeton, Chairman, Austin; Senator Charles F. Herring, Vice-Chairman, Austin; Travis D. Shelton, Board Advisor, Lubbock; Judge John M. Barron, Jr., Bryan; Senator James S. Bates, Edinburg; Robert Lee Bobbitt, San Antonio; Warren Burnett, Odessa; Senator Galloway Calhoun, Jr., Tyler; Senator Thomas W. Creighton, Mineral Wells; Judge Lloyd Davidson, Austin; Judge Ed B. Duggan, Houston; George W. Gray, III, Dallas; Newton Gresham, Houston; O. Morris Harrell, Dallas; Henry Kerry, Fort Worth; Judge Henry King, Dallas; Dr. Abner V. McCall, Waco; Judge Connally McKay, Tyler; Representative Dudley R. Mann, Jr., El Paso; Representative Jim Nugent, Kerrville; Judge Truman E. Roberts, Hamilton; Jack Ross, Austin; Judge T. Gilbert Sharpe, Brownsville; Franklin L. Smith, Corpus Christi; Representative Terry Townsend, Austin; Bill Wyatt Waters, Pampa; Judge K. K. Woodley, Austin.

⁸⁷ The membership of the Law Enforcement Advisory Committee consists of: Charles Batchelor, President, Texas Police Ass'n and Chief of Police, Dallas; Lewis Berry, Executive Secretary, Sheriffs' Ass'n of Texas, Austin; Herman Short, Chief of Police, Houston; R. A. Miles, Chief of Police, Austin; C. G. Conner, Inspector, Texas Dep't of Public Safety, Austin.

⁸⁸ The membership of the Advisory Committee on Corrections, in order of the positions listed in the text, is as follows: (1) Dr. George J. Beto, (2) Dr. George C. Killinger, (3) William H. Thompson, (4) James F. Berger, (5) Luster P. Gollaher, (6) Giles Garmon, (7) Bill Anderson, and (8) Donald J. Welsenhorn.

The project director has had experience in legislative drafting and served on the staff of the House Committee on Criminal Jurisprudence when that body considered the new code of criminal procedure. He is now working closely with the staff of the Texas Legislative Council in order to insure that the revision will conform to their standards of organization, form, and language. A detailed compilation of the present Texas Penal Code into the *Model Penal Code* organization has been accomplished in order to coordinate the efforts of the reporters and enable the Committee to consider the issues of revision in a logical order.

Eight legal scholars were requested to serve without compensation as reporters. They are all instructors of criminal law and represent four different law schools. Each reporter is assigned one of the following general areas: (1) General Provisions, (2) Offenses Involving Danger to the Person, (3) Sexual Offenses, (4) Offenses Against Property, (5) Offenses Against the Family, (6) Offenses Against Public Administration, (7) Offenses Against Public Order and Decency, and (8) Vagrancy and Loitering.³⁹ The reporters are responsible for research and preparation of proposed drafts in their areas. They are provided with student assistants to help them conduct their research.

Each reporter has an advisory committee made up of an experienced trial judge, a prosecutor, a defense attorney, a law enforcement officer, and a member of the State Bar Committee. The function of each group is to provide a critical forum for the reporter's initial draft, to test his proposals against their experiences, and to provide a balance of views from the very first. After the reporter has consulted with his advisory committee and has modified his drafts in light of its suggestions, he will submit his draft to the State Bar Committee for its criticism. The Committee will hold frequent meetings to consider these proposed drafts. The first meeting was held October 14, 1966.

With this organization the Committee intends to insure that all views are taken into account from the initial preparation of proposed drafts to their final consideration by the Committee. It is hoped that the proposed code will reflect the best available balance between

³⁹ The reporters, in order of their assignments listed in the text, are: (1) Fred Cohen, Professor of Law, University of Texas, (2) Frank Maloney, Visiting Professor, University of Texas, (3) Joel Finer, Associate Professor, University of Texas, (4) Newell Blakely, Professor of Law, University of Houston, (5) Saul Baernstein, Associate Professor, Southern Methodist University, (6) Judge Archie Brown, 144th District Court, Visiting Professor, St. Mary's University, (7) Albert Alschuler, Assistant Professor, University of Texas, and (8) Paul Rothstein, Associate Professor, University of Texas.

theory and practice. It is also hoped that the revision will result in a thoughtful and effective code which can maintain the delicate balance between the interests of society and those of the individual.

B. Cooperation of Bench, Bar, and Administrators

Another essential factor in a successful revision is the cooperation and assistance of the bench, bar, and law enforcement and correctional officials. A foundation for such cooperation has been established through the broad representation on the advisory committees. The Committee has also solicited suggestions from such groups as the Criminal Law and Procedure Section of the State Bar, the District and County Attorneys' Association, and district judges throughout the state. This search for criticism and suggestions will be continued throughout the project.

C. Financial Support

Such a revision project as is being undertaken by the State Bar Committee requires adequate financial support. Expenditures on penal code revision in other states vary considerably: The New York legislature invested 100,000 dollars a year for four years; the Illinois committee received no financial support from their legislature and expended only about 30,000 dollars, but still designed an outstanding code by drawing heavily upon the *Model Penal Code*.

The Texas revision project has received financial support from the State Bar and several private foundations.⁴⁰ In addition, valuable services and assistance have been provided by the law schools of Texas, West Publishing Company, and the Texas Legislative Council. Additional funds will be needed to sustain the project.

V. CONCLUSION

There is a definite need for revision of the Texas Penal Code, and the State Bar Committee has undertaken a complete substantive revision. The Committee has a plan of organization including over seventy individuals who are helping design an up-to-date penal code for Texas. Many others have written to offer their assistance and suggestions. Some reporters have

⁴⁰ The following foundations have contributed to the support of the revision project: The Brown Foundation, Inc., of Houston; The James R. Dougherty, Jr. Foundation, Inc., of Beeville; The Hogg Foundation for Mental Health, Inc., of Austin; The Houston Endowment, Inc., of Houston; and The Moody Foundation, Inc., of Corpus Christi.

already submitted preliminary drafts in their areas. The Committee hopes to have a completed draft prepared for submission to the Board of Directors of the State Bar in time for that group to recommend the draft to the Sixty-first Legislature in 1969.

For the revision to be a success, it is essential that all of those who are involved in the administration of criminal justice in Texas cooperate in this effort. Each can take an active part in the revision by providing the Committee with his continued criticism and support throughout the project. The Committee is particularly interested in receiving information on specific problems encountered by persons working with the present penal code. Only by commencing and sustaining an intelligent, critical debate on the code can the Committee hope to incorporate the best thinking in this state into the revision of the Texas Penal Code.

REFLECTIONS ON THE REVISION OF THE TEXAS PENAL CODE*

FRED COHEN**

The revision of a penal code is a monumental undertaking. Those charged with the task of revising the Texas Penal Code face the problem of creating a rational, workable body of law that is both scientifically sound and politically acceptable. In this "peregrinating" article, the author, one of the reporters of the State Bar of Texas Committee on Revision of the Penal Code, gives his thoughts on a few of the difficulties to be encountered by the revisors and offers some solutions of his own.

To know what you want and why you think that such a measure will help it is the first but by no means the last step towards intelligent legal reform. The other and more difficult one is to realize what you must give up to get it, and to consider whether you are ready to pay the price.

Oliver Wendell Holmes, 1915.

Those persons engaged in the revision of the Texas Penal Code know that change is in order and believe that recodification of the law is the appropriate method to accomplish it. There is, however, a rather elusive quality about both the pressures that stimulated this undertaking and the expectations of those involved. With few exceptions, and they relate to particular crimes and punishments, no major problems have been preliminarily identified, and no outcomes have been proposed. The revision apparently is not a response to pressure for social reform or intended to reflect any startlingly modern penal philosophy. Indeed, the few statements that exist concerning needed changes simply reflect the old "punish or perish" school of thought.

In this situation the ultimate dimensions of the revision remain entirely speculative. It does seem rather clear that the State Bar Committee, the reporters, and the staff initially will be required to define the precise direction and scope of the project.¹ This paper

* Based on an address delivered at the Second Annual Criminal Law Institute, University of Texas School of Law, Sept. 18, 1966, Austin, Texas.

** Professor of Law, The University of Texas. B.S., 1957; LL.B., 1960, Temple University; LL.M., 1961, Yale University. Reporter, The General Part, State Bar of Texas Committee on Revision of the Penal Code.

¹ For details concerning the structure and composition of the various work forces involved in the revision see Keeton & Reid, *Proposed Revision of the Texas Penal Code*, 45 TEXAS L. REV. 399 (1967).