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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.

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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.

CRIMINAL LAW

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[1] McMurray, *Seventy-five Years o* 461 (1925).

[2] ALI, MODEL PENAL CODE (Prop

CRIMINAL LAW REVISION IN CALIFORNIA

*by Arthur H. Sherry**

> *"It may be said that, although we are far along in the twentieth century, our Penal Code in many respects has scarcely entered it."* From an address given by the Honorable Phil S. Gibson, Chief Justice of the Supreme Court of California, September 25, 1963.

The high water mark of criminal law reform in California was reached in 1872 when the legislature, after at least a decade of indifference to requests for action, adopted the Penal Code, the Civil Code and the Code of Civil Procedure.[1] This emergence into the company of contemporary pioneers of codification, Louisiana and New York, was a source of complacent pride, but it proved to be completely ineffective as a stimulus for continuing revision or even further codification. Renewed interest in improving and modernizing the law was not apparent until well into the twentieth century. When this interest did appear, it did not include the criminal law except for a succession of ad hoc efforts, particularly in the improvement of criminal procedure. The substantive part of the Code suffered and continues to suffer from a year to year accretion of duplicitous, overlapping and frequently incompatible statutes. These are most usually enacted in response to what are perceived to be the law enforcement emergencies of the moment and not out of any real concern for or interest in achieving an integrated, coherent and rational code of criminal law.

In 1963, however, bright hopes for a complete reexamination and revision of California's criminal law were generated by growing legislative interest in this neglected area of legal reform. The Governor in his annual message to the newly-convened Senate and Assembly had recommended revision of the state's criminal laws. Crime and crime control were important political issues receiving extensive public exposure, and the recently published Proposed Official Draft of the Model Penal Code[2] was beginning to be recognized as a useful example of what could be accom-

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[1] McMurray, *Seventy-five Years of California Jurisprudence*, 13 CALIF. L. REV. 445, 461 (1925).

[2] ALI, MODEL PENAL CODE (Proposed Official Draft, May 4, 1962).

plished by a comprehensive study of the whole body of the substantive criminal law. This general receptivity of the idea of law reform was counteracted by deep divisions among groups of legislators who found themselves in disagreement over the means by which a criminal law revision project might be carried out. Two alternatives were in contention: the appointment of a special crime study commission[3] primarily responsible to the governor, or simply assigning the task to the existing California Law Revision Commission.

It would not be profitable to explore the history of this conflict; suffice it to say that the several proposals for revision fell between the two stools of choice and remained there until the closing hours of the 1963 session of the legislature. At that point, a last minute compromise by which the work was assigned to a joint legislative committee was quickly approved and the way appeared to be open for extensive criminal law reform.

The act[4] establishing the committee contained an almost unlimited grant of authority to make a broad study and appraisal of all penal laws and procedures and related statutes and to "prepare . . . a revised, simplified body of substantive laws relating to . . . criminal and quasi-criminal actions and proceedings in or connected with the courts, departments and institutions of the State." It was also given the explicit power to recommend the separation of the substantive criminal law from prodedure and to draft a new code of criminal procedure. The first working meeting of the joint committee was held in September 1964. In addition to conducting some administrative business, the committee adopted the following recommendations:

1. The project should commence with the drafting of a substantive code of criminal law.
2. It should continue thereafter with a draft of a code of criminal procedure; and
3. A draft of corrections code.[5]

In order to administer the project, the joint committee was empowered to employ a project director and to recruit a staff of draftsmen, technicians and consultants. The mandate was far reaching, the means for carrying it out were ample, and the road to the accomplishment of the first major revision and rearrangement of the criminal law in California seemed free of obstacles.

The vehicle established to reach these goals, however, was

[3] Authorized by CAL. PENAL CODE § 6028 (West 1970).

[4] CALIF. STATS. ch. 1797 (1963).

[5] REPORT OF THE JOINT LEGISLATIVE COMMITTEE FOR THE REVISION OF THE PENAL CODE 21 (Feb. 1967).

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designed in the greatest haste and without any opportunity for reflecting upon its capability for the mission it was to preform. At best, a legislative committee is inherently unadaptable to serve as an effective sponsor for long range projects with multiple objectives. The inevitable turnover in personnel from session to session severely limits its administrative capacity; the difficulty of convening its members to review the operations of its staff and the inherent reluctance of politicians to engage in any but carefully selected controversy make it poorly equipped to plunge into a broad revision of the most controversial areas of the law. As matters turned out, the California Joint Legislative Committee for the Revision of the Penal Code was afflicted with all of these weaknesses and more. To begin with, it was composed of ten members, an unwieldy group, that was divided equally between both houses of the legislature. Appointments were made in accord with traditional political convention, with the majority chosen from the controlling political party. Few were selected because of any commitment to criminal law revision nor were any of the members more than casually familiar with contemporary criminal law revision projects in other jurisdictions. In the five active years of the operations of the original staff, the joint committee was unable to command a quorum for a meeting with the project director more than three times nor did any member of the committee ever, during that time, attend any of the frequent working sessions of the revision staff.[6] This lack of involvement with the functioning of the staff inevitably led to misunderstanding and, in some cases, disapproval of the objectives of the project.

An added administrative complication was the official Advisory Board. By the terms of the enabling act it was required to be made up of nine members, selected from predetermined categories.[7] The members from the bench were selected by the judicial council, the prosecutors' representatives on nomination of the California District Attorneys' Association. The history of the Board, until 1969, paralleled that of the joint committee. It was composed of individuals, enormously involved in their own demanding pursuits, who were not selected because of any prior in-

[6] All communication between the project staff and the chairman of the joint legislative committee was made through a legislative assistant to the chairman. He was in faithful attendance at almost all staff meetings, but his liaision efforts could not bridge the communications gap.

[7] The original board consisted of the project director; a representative nominated by the Attorney General; two district attorneys; two lawyers from the criminal defense bar; a professor of law who holds membership in the State Bar of California; and two judges designated by the Judicial Council. Ultimately, two municipal court judges were added and the project director removed from his incongruous position. CALIF. STATS. ch. 1797, § 3 (1963).

volvement or interest in criminal law revision. To be sure, some of its outstanding members became involved and devoted to the objectives of the staff but they were far from a majority. As a result, meetings of the staff and Board were not productive, the Board did not stand between the staff and its critics when the inevitable day of controversy arrived, nor did the Board serve in any way as a bridge between the staff and the joint committee. The denouement of this badly functioning organization came with the abrupt discharge of all the members of the staff in the late summer of 1969.

I. STAFF FUNCTIONS

By the end of 1964, the recruitment of a revision staff was completed. It consisted of a project director, four reporters, two consultants and a secretary. The project director and the reporters were selected from the law school faculties of the University of California at Berkeley and Los Angeles and Stanford University. One of the consultants was from the University of Southern California; the other from the University of California at Berkeley.[8] The director, consultants and reporters served in a part-time capacity. Their universities made supporting contributions to the project by providing office space, research assistance, library services and secretarial services. Without this support, expenses of operation would have been substantially higher than the amounts actually expended.

The members of the staff quickly developed into a cooperative and productive working group. The continuity of operations was interrupted from time to time because of the demands of academic duties, leaves taken for governmental service, prior commitments to research projects and the like, but in the main, drafting and research went forward at a regular pace.

The starting point was the preparation of a topical plan or outline for a substantive code of criminal law. This was used as a basis for the assignment of individual drafting and research responsibilities among the members of the staff and it was also circulated widely as a means of acquainting the profession, the judiciary and other interested persons with the general purpose and scope of the project. With respect to an assigned subject matter area, each individual reporter began his work with a survey

[8] By midyear, 1969, the staff consisted of ten members: William Cohen, Rex A. Collings, Jr., Phillip E. Johnson, Sanford H. Kadish, John Kaplan, Herbert L. Packer, Murray L. Schwartz, reporters; Richard A. McGee and E.K. Nelson, consultants; and Arthur H. Sherry, project director.

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of the existing law for the purpose of preparing an analysis of its content and application, and a comparison of existing law with the law of other jurisdictions and the provisions of the Model Penal Code. The reporter's preliminary memorandum would be included in the agenda of a convenient staff meeting and form the basis for a general discussion and review of the draftsman's recommendations. Staff meetings of this nature were held every one or two months depending upon the accumulation of preliminary memoranda and proposed tentative drafts.

After staff discussion of a preliminary memorandum the reporter who prepared it turned his attention to the drafting of a tentative revision prepared in conformity to the conclusions agreed upon in the discussion of the memorandum. This draft would include appropriate commentary and correspond in general with the form and style of the staff proposals as they appeared eventually in print. Staff review of the specific proposal followed. Sometimes, approval of the first draft was prompt; at other times the process of drafting and re-drafting went through several stages until it was approved for submission to the Advisory Board.

Relations with the Board were handicapped from the start in large part because it was not fully constituted until November 1965. This was eighteen months after the plan for the project had been approved and after more than a year's work by the staff had been completed. Not only was this investment in time and money a circumstance that could not be undone, but its product at first inspection struck most of the members of the Board, unfamiliar with the Model Penal Code or any other contemporary criminal law revision, as a strange and baffling departure from all of the familiar landmarks of conventional law. The style of the Model Penal Code, its rigorously logical order and its general abandonment of common law terminology does pose difficulties for anyone whose entire educational and professional experience has been circumscribed by the eighteenth century common law concepts still preserved in the criminal law of California. The staff, of course, was greatly influenced by the Model Penal Code. The Code had not been slavishly followed; on the contrary there was much modification and some significant innovation, but to the unprepared eyes of the Board members, the staff proposals were undistinguishable from the Model Penal Code and regarded with the same suspicion. As a result, meetings of staff and Advisory Board became formal presentations to the Board by individual members of the staff who found themselves confronted with two onerous tasks. The first of these was the necessity of educating

Board members about the meaning of individual proposed drafts; the second was then to defend the drafts from the criticism and attacks which swiftly followed.

Before the involvement of the Board, such as it was, a number of efforts had been made to enlist the cooperation, criticism and interest of the district attorneys, judges, public defenders, and the California bar in general. The only means open for accomplishing this small task of public relations was by frequent mailings of proposed tenative drafts as they became available and, later, by mailings of copies of the mimeographed series of proposals after they had been submitted to the Advisory Board. In spite of appeals for comment and criticism, the response was negligible. California was just not interested in criminal law revision.

II. REVISION PROPOSALS

The need for revision of the substantive part of the California Penal Code arises from its antiquity, prolixity, and growing internal and external inconsistency. There are more than sixty separate sections dealing with theft and allied offenses of misappropriation of property, for example, which reflect not only the historical development of common law larceny but also the history of the state and its times.[9] The much amended probation statute contains one sentence of just under five hundred words.[10] A plethora of special sections dealing with narrowly defined conduct creates problems of discovering the applicable section upon which to base criminal charges,[11] and a host of parallel statutes in other codes defining substantive criminal offenses add to the confusion.[12]

It seemed apparent to the staff that the Model Penal Code

[9] *E.g.*, the following Penal Code sections are illustrative: § 367, selling debased quicksilver; § 487d, stealing gold from a mining claim; § 500, concealing property saved from fire in San Francisco; § 537b, defrauding livery stable keeper.

[10] CAL. PENAL CODE § 1203 (West 1970).

[11] Illustrative of the problem is *In Re* Greenfield, 11 Cal. App. 3d 536, 89 Cal. Rptr. 847 (1970). The petitioner in this habeas corpus proceeding walked into a department store in an endeavor to obtain some clothing by the use of a stolen credit card. He was unsuccessful, but found himself charged with burglary (PENAL CODE §§ 459-461), receiving stolen goods (PENAL CODE § 496) and unauthorized use of another's credit card (PENAL CODE § 484a). The latter count was dismissed by agreement of prosecution and defense; the petitioner was convicted of the two remaining counts. The court of appeals, six years later in *Greenfield*, pointed out that the dismissed credit card charge was the only valid count and that counsel on both sides had erred grievously in failing to be aware of the fact that by enacting the specific credit card statute, the legislature had pre-empted prosecution under any other provision of law.

[12] The difficulty is generated by the efforts of the appellate courts in determining the legislative intent in enacting special statutes. Is such a statute *supplementary* of the general law, or an exception to it? A number of pertinent examples are collected in People v. Swann, 213 Cal. App. 2d 447, 28 Cal. Rptr. 830 (1963).

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[14] Tentative Draft No. 1, at 61

provided the most useful and efficient base from which to attack this disorderly body of law. In the beginnings of the studies of the staff it was decided that one of the most important objectives of the project should be the consolidation of the entire body of substantive criminal law in a single code. The numerous sanctions in other codes should be restricted, in principle, to a regulatory offense category designated as "infractions" which would not carry imprisonment as a sanction.[13] Similarly, many regulatory offenses appearing in the present California Penal Code should be downgraded from misdemeanor to the infraction category and transferred from the Penal Code to whatever other code was logically appropriate. This process inevitably involved matters of more than mere regulatory importance. For example, it would include the transfer of California's substantial body of criminal law relating to narcotics and dangerous drugs from the Health and Safety Code to the proposed code of substantive criminal law. This in turn necessarily required a reexamination of this controversial and emotion-laden subject and led, in the course of events, to a substantial interruption and alteration of the scope and objectives of the project.

Almost all of the completed proposals of the original staff have been published in three tentative drafts. These are demonstrative of the objectives of the reporters and the means that were employed to prepare a rational and coherent body of substantive criminal law. Tentative Draft No. 1, the first printed publication by the reporters, opens with the subject of culpability. It is treated in much the same way as it is in the Model Penal Code and is in general accord with contemporary reform in other states. Under existing law, the *mens rea* concept is baffling. The Penal Code identifies nine varieties of "intent." To these, the appellate courts have added the specific intent-general intent classification with bewildering distinctions that become more incomprehensible as time goes on. Other topics include criminal liability for the conduct of another, exemptions and defenses, and three specific offenses. Of the last, the proposals on sexual offenses had the most interesting reception.[14]

The proposed sexual offenses are based upon the assumption that the criminal law should not attempt to deal with private, consensual, adult conduct but that its reach should be limited to assaultive acts, acts with minors, and publicly indecent acts. To

[13] In 1968 the legislature defined lesser Vehicle Code offenses as infractions and limited punishment to fines and license suspensions. CAL. VEHICLE CODE § 42001 (West 1960); CAL. PENAL CODE § 1042.5 (West 1970).

[14] Tentative Draft No. 1, at 61.

be sure, this retreat from a legally prescribed code of sexual behavior, once universal in the United States, is nothing new. It has been a matter of discussion here and in Great Britain for years and has been reflected in contemporary criminal law reform. In California, however, legislative avoidance of the subject prevailed, as it does today, upon the general assumption that revision of the law in this area is not worth the controversy it would engender. It was for the purpose of testing this assumption that it was decided to include the draft on sexual offenses among those to be presented at the earliest moment to the Advisory Board. Among the members of the drafting staff, the feeling was tacit if not expressed that we ought to discover at once whether or not the Board and the Joint Legislative Committee would accept and support recommendations for reform in sensitive and controversial areas. To the surprise of the staff, the sexual offense draft not only failed to arouse objection from the members of the Board, but it was the subject of praise and commendation. Without any substantive change, it was approved and went to print. Nor did its publication in Tentative Draft No. 1 generate public reaction. In a way this was disappointing because, apart from a few scattered newspaper accounts, the penal code revision project remained a low visibility operation attracting little attention from either the public or the profession.

The publication of Tentative Draft No. 2 did not increase public or professional awareness of the reform activity. This draft contains most of the general part of the proposed code and a substantial number of the more important specific offenses. A revision of the basic sentencing provisions of the California Penal Code appears in Tentative Draft No. 2 which may deserve comment in the light of current interest in correctional and sentencing reform. California has long been known and often undeservedly praised for its commitment to the indeterminate sentence. The concept of delegating the function of determining sentences to a single agency and thus avoiding the apparently arbitrary disparity which follows when sentencing is left to the discretion of hundreds of judges acting independently is an attractive one. In California, however, the indeterminate sentence law has been so hedged by legislative restrictions, and its operations so often hampered and interfered with by almost annual changes of one kind or another, that it has been the subject of continual litigation and has led to much administrative uncertainty. There are currently legislative restrictions on probation and parole eligibility.[15]

[15] CAL. PENAL CODE § 1203 (West 1970) contains the general probation restrictions.

recurring modifications in mandatory minimum and maximum terms, almost always upward, and even endeavors to control the trial court's discretion by conferring power on prosecutors to exercise a veto over the choices open to the sentencing judge.[16] The result is a system that tends to become more and more rigid, more beset by internal inconsistencies, and one which manages to survive mainly because of the administrative skills of the Department of Corrections and the discretion of the Adult Authority.

The proposed basic sentencing draft is designed to simplify the present structure, to eliminate its hopelessly incompatible *minima* and *maxima* and to make it reflect the reality of actual practice on the part of the Adult Authority. To achieve this objective, the tentative draft recommends three degrees of felonies, the removal of restrictions on the granting of probation, and the use of an extended term procedure for the multiple offender and the offender whose crime or later behavior while incarcerated indicate that he is so dangerous that longer than usual periods of detention are necessary.[17] The draft assumed that in almost all offenses, a maximum term of five years would be adequate and would best serve the goals of modern correctional practice. Thus, most felony penalties would fall into the felony of the third degree category; a few into the second degree group with a maximum of ten years, and only murder, a felony of the first degree, would be punishable for life.

An important objective of the revision project, which bears significantly upon the sentencing of lesser offenders, was to strip most if not all of California's many regulatory codes of misdemeanor criminal sanctions. In place of these would be substituted the non-criminal offense of "infraction," punishable only by fine, license suspension or other appropriate non-custodial restraint. If this could be accomplished, the proposed substantive code would be the primary repository for all of the state's criminal law except procedure. The misdemeanors included within it, although lesser offenses by definition, would be concerned only with blameworthy, injurious or threatening conduct. During the term of the original staff, this goal, although kept in mind, never

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CAL. PENAL CODE § 3043 *et seq.* (West 1970) deals with parole eligibility. There are other restrictions, most notably in narcotics cases. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11500 (West 1964).

[16] One example, recently declared unconstitutional by the California Supreme Court in People v. Tenorio, 3 Cal. 3d 89, 437 P.2d 993, 89 Cal. Rptr. 249 (1970), is CAL. HEALTH & SAFETY CODE § 11718 (West 1964). This statute prohibited a trial court from striking an allegation of prior conviction in an accusatory pleading for the purpose of mitigating a mandatory sentence, except upon motion of the district attorney. The supreme court held that this section was violative of the California constitutional separation of powers.

[17] *Tentative Draft No. 2*, at 7-51 (1968).

got beyond preliminary planning stages. Another objective, however, that of transferring felony offenses from other codes to the code of criminal law, was the subject of study and a proposed draft which turned out to be the staff's undoing. The code was the Health and Safety Code and the subject was narcotics and dangerous drugs.

III. THE MARIJUANA PROPOSAL

California's Health and Safety Code is a conglomerate of administrative and regulatory statutes relating to public health and public health services generally but also including public housing legislation, vital statistics and legislation relating to the formation of police protection districts. There are many provisions governing the medical use and distribution of narcotic drugs.[18] These cover subjects ranging from pharmacists' records and the use of prescriptions by physicians, to the treatment of narcotic addiction and the use of drugs for research purposes. Immediately following these provisions is a chapter containing the main body of the criminal substantive law which applies to the illegal use, possession, sale and transportation of drugs and narcotics.[19] Except for first offenders convicted of the possession of marijuana or peyote, the penalty structure is at the felony level. It commands minimum periods of imprisonment before release on parole on a scale of from two to fifteen years, to a maximum of life. In addition, this law circumscribes tightly the power of courts to release offenders on probation.

It seemed obvious to the revision project staff that any body of law containing such a rigid and extreme sentencing structure cried aloud for serious, critical examination and study. It appeared appropriate also to question the propriety of continuing what was in effect a separate and special code of criminal law simply because its subject was a particular contraband substance. Such a separation from the main body of the criminal law is bound to lead to serious sentencing incompatibilities. Indeed, this had happened in California with respect to drugs, narcotics and, particularly, marijuana to the point of absurdity. For these reasons, the decision was made to revise this body of law and to recommend that it be incorporated in the proposed substantive code.

Beyond what seemed to the staff to be a clear case of punitive overkill in the way the legislature had dealt with the subject, the statutory equation of marijuana use and distribution with that of

[18] CAL. HEALTH & SAFETY CODE § 11000 *et seq.* (West 1964).
[19] *Id.* § 11500 *et seq.*

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opium and opium derivatives and with the more recent and at least equally dangerous synthetic drugs was being called into such serious question by respectable authorities[20] that inquiry into the matter was urgent. Accordingly, it was decided that this controversial issue required research not only for the purpose of revision as such but in an endeavor to resolve the underlying problems of public health and criminal law policy.

Early in 1969, this part of the project was completed and published for submission to the Advisory Board.[21] It consisted not only of statutory proposals marked by a new, differential approach to marijuana control, but it included a comprehensive study of the use of marijuana and its public health implications. From this study it was concluded that marijuana use is not a significant factor in the commission of violent, aggressive crime; that although some users of marijuana become addicted to heroin, there is no reliable evidence that marijuana users become addicted to heroin in any greater degree than non-users; and that it is not apparent that the physical and psychological results from marijuana use are so harmful that social control should be on the same level as that applied to heroin, other opium derivatives, barbiturates, amphetamines and the like.

It was not suggested that marijuana usage should be legalized. It was agreed, however, that under contemporary law, it was unjustifiably overcriminalized and that the weight of the criminal sanction should be applied to the producer, the importer and the trafficker, not the user.

Accordingly, the draft statute made possession of marijuana a misdemeanor if the amount possessed exceeded one pound; if the amount possessed was in excess of ten pounds the offense became a felony of the third degree. Sale of marijuana was classified as a petty misdemeanor, a misdemeanor or a felony of the third degree, depending upon the amount involved. Giving marijuana to a person under the age of eighteen carried a misdemeanor penalty as did the cultivation of marijuana. Importation was graded as a misdemeanor unless the amount involved exceeded one pound; in the latter case the offense would be a felony of the third degree.

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[20] *See* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 224 (1967); REPORT OF THE COUNCIL ON MENTAL HEALTH AND THE COMMITTEE ON ALCHOLISM AND DRUG DEPENDENCE OF THE A.M.A. AND THE COMMITTEE ON PROBLEMS OF DRUG DEPENDENCE OF THE NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, MARIJUANA AND SOCIETY, *Reprinted in* 204 J.A.M.A. 1181 (Je. 24, 1968).

[21] Proposed Tentative Draft, Drugs, Pt. I: Marijuana at 183 (December 1968). Note: research materials appearing in this draft have been augmented and adapted for use in J. KAPLAN, MARIJUANA—THE NEW PROHIBITION (1970).

The various aggregations of penalties for successive offenses which appear in the existing law were omitted from the proposal because of the basic sentencing draft which made explicit provision for successive and multiple offenders. Two parallel tentative drafts were planned to cover narcotic drugs and dangerous drugs. Hashish, synthetic marijuana or marijuana concentrates or derivatives were to be included in the part on dangerous drugs. This part of the revision of the law on illegal drugs would not have made any substantive change in existing law, but it would have recommended the moderation of the harshness and rigidity of the present sentencing structure. In short, the proposal seemed to afford a reasonable basis for mitigating existing methods for dealing with what is essentially a public health problem and to open the way for reforms that had long been advocated by many informed and responsible persons.

To the dismay of the staff, however, the members of the Advisory Board, with several notable exceptions, reacted to the draft with such emotional indignation that all avenues for a thoughtful interchange of points of view were quickly closed. There had been serious disagreements about other proposed drafts but in each of these cases the positions of the staff were always open to negotiation; it was clearly understood that the staff proposals were no more than tentative and, in most instances, modifications suggested by the Board were incorporated in the final tentative drafts before they went to print. With respect to marijuana, the majority of the Board rejected criminal law reform out of hand. Had it not been for other events, reconsideration and some resolution of the several underlying disagreements between Board and staff would have been sought. Newspaper accounts, while invariably predicting that the proposed changes would be "controversial," reported the matter fairly and with some sympathy. Almost all of the individual responses from interested persons who had reviewed the proposed marijuana draft were favorable. Of greater importance was the subsequent action of the legislature which expressed at least partial acquiescence in the staff's position by reducing the penalty for possession by a first offender to a misdemeanor.[22] In these circumstances, it could be expected that the Board's position would have remained open to modification.

Meanwhile, however, growing discontent with the project on the part of the California District Attorneys' Association was becoming a serious obstacle. Early in 1969, in hearings before the Joint Legislative Committee, the Association expressed almost complete opposition to the project and a strong commitment to

[22] CAL. HEALTH & SAFETY CODE § 11530 (West 1964), *as amended*, (Supp. 1971).

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the defense of the Penal Code. The proposed culpability provisions for the revised code were ridiculed by prosecutors who purported not to be able to understand them. The proposal that the *M'Naghten* rule be replaced by a definition drawn from the Model Penal Code and a decision of the California Supreme Court was attacked because it would "turn criminal trials over to the psychiatrists," and the sentencing proposals were rejected because their lower maximum terms were described as a threat to the public safety. Although two district attorneys have always been members of the Advisory Board, complaint was made that the staff had not sought the cooperation of the district attorneys and other law enforcement officials. In point of fact, frequent efforts had been undertaken to secure their participation, but until the first printed drafts appeared, the lack of response, except for the California Peace Officers' Association, was a source of continuing frustration and disappointment. As a matter of routine, mailings of preliminary drafts and final tentative drafts were made to all district attorneys and to the judges of California, but the requests of the staff for comment and criticism evoked useful replies from only one district attorney's office.

As a result of the hearings, however, the district attorneys appointed a group of assistants and deputies to attend the working sessions of the staff and to participate in the work of revision. This was a welcome change. During the last five months of the terms of the original staff, the prosecutors' representatives worked with the staff in a most cooperative way, accepted the general objectives of the revision project, and made helpful contributions, particularly in reviewing the completed tentative drafts. It appeared that the *detente* with the district attorneys had corrected a major weakness in the organization of the project, and that the way was cleared to the completion of a substantive code which would receive general acceptance. The work continued to go forward. Tentative Draft No. 3 was sent to press and then, without warning, discussion or explanation, the acting project director was informed by telephone that the chairman of the Joint Legislative Committee had discharged all of the members of the staff and ordered the project halted at once.

Newspaper interviews of the chairman left no doubt (and provided the only explanations any former member of the staff ever received) that the marijuana draft threatened to impose a burden of controversy that he was not prepared to carry.[23] There were

[23] "In a telephone interview (the chairman of the joint committee) said a majority of the committee composed of five assemblymen and five senators 'is not ready to legalize pot. We are not ready to end the death penalty. We are not ready to accept diminished

more fundamental reasons, of course, for so drastically interrupting a project that had involved six years of demanding effort and the expenditure of substantial sums of public money. The basic structural weaknesses in its organization, the policy of the committee to treat the staff at arm's length, and the lack of any adequate means to carry on a program of public information isolated the revision group and made it impossible to enlist any continuing interest in either the profession or the public at large. Criminal law revision had no champions in California. When the first gleam of publicity disclosed that the Penal Code Revision Project was well on the road to basic and serious law reform, no one spoke for it; it fell an easy prey to the defenders of the status quo.

Some months after the termination of the staff, the joint committee retained a new project director on a full-time basis. Revision therefor continues, but it is not known what its scope will be or the directions it will take. The two consultant members of the original staff who were engaged in drafting the proposed Corrections Code were retained; hence, it may be expected that this part of the original revision proposal will be carried to completion in substantial accord with its first objectives.

IV. CONCLUSION

Far more than in any other area of the law, criminal law revision viewed as a total reexamination and reformation of its substance, its policies and its relevance to contemporary social goals must concern itself with issues over which there are deep divisions of opinion. Choices and evaluations must be made that evoke not only philosophical objection, but which stir emotional reactions that can be overcome only by patient explanation and the continuing maintenance of open lines of communication to all sectors of the public and particularly to all who are concerned in the administration of criminal justice. Success is unlikely unless the project has the firm and uninterrupted support of an institution or an organization whose members have a commitment to law reform and whose sponsorship will not be withdrawn in the face of controversy or threat of political intervention. It is not enough that this kind of sponsorship makes it possible for the task to be carried to completion. Beyond that, it must carry the final issue to the court of last resort, the legislature in whose discretion rests the ultimate power of decision.

capacity.' " Los Angeles Times, Sept. 14, 1969. For comment on this and other newspaper reports. *See* 17 U.C.L.A. L. REV. vii. (1969); *see also* letter from H. Packer to *Stanford Law Review*, 22 STAN. L. REV. 160 (1969).

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

* Professor of Law, Boston College. A.B., 1950, University of Illinois; LL.B., 1953 Harvard University.

[1] Report of Commission to Recommend Codification of Criminal Laws (1969).

[2] *See* Fox, *Prosecutors in the Juvenile Court: A Statutory Proposal*, 8 Harv. J. Legis. 33 (1970).

[3] N.H. Laws, 1967, ch. 451.

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.[4] 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.[5] 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.[6] 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.

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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 superintendant 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).