

# FEDERAL CRIMINAL CODE REFORM: PAST AND FUTURE

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*Whatever view one holds about the penal law, no one will question its importance in society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy.*

*If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its coils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community, for the individual.*

—Professor Herbert Wechsler\*\*

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\*\* The Challenge of a Model Penal Code, 65 Harv. L. Rev. 1097, 1098 (1953).

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## INTRODUCTION<sup>1</sup>

Few events in a person's life are more traumatizing, more destabilizing, than falling prey to the perpetrator of a criminal offense. Few responsibilities assigned to a government are more important, or more warranted, than protecting citizens against those among them who would engage in serious criminal acts. The vehicle for that protection is the criminal law. Since there are limitations on the resources that can be supplied by a government—even to perform such an important function as this—it is crucial to assure not only that the criminal laws are appropriate and just, but also that they are cast in a fashion that

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1. This article is a revised version of an article that appeared in 1 *Crim. L.F.* 99 (1989), entitled Report to the Attorney General on Federal Criminal Code Reform. The author gratefully acknowledges the work of Michael Zosh, a third-year student at the School of Law at the State University of New York at Buffalo, in supplementing and otherwise making current the statistical references and the substantive references pertaining to federal statutory coverage.

allows them to be applied as efficiently as possible.

The Nation's federal criminal laws today do not permit efficient application. To the contrary, the existing morass of statutory provisions and judicial decisions is so complex, and so confusing to law enforcement officials as well as to the public, that it could scarcely have been designed to be less efficient. This is extraordinarily costly. It is no remedy simply to enact additional statutes in a stopgap fashion, or to provide additional investigative, prosecutive, and judicial resources. Adding additional statutes to the existing federal criminal laws is akin to adding new quartz headlights, a hydraulic jack, racing stripes, and chromium wheel-covers to a homemade equivalent of a Model-T Ford. Providing additional resources to the system is similar to allocating increased stores of gasoline and oil for the operation of the outmoded assemblage. What the Nation needs is a genuinely modern vehicle, designed as a coherent system, and built to perform smoothly, reliably, and efficiently. Without such a vehicle, the Nation will be left increasingly far behind in attempting to keep abreast of the problems of crime.

The prerequisites to progress in modernizing the federal criminal law include a cognizance of the seriousness of the need, an understanding of the direction that must be taken, and an appreciation of the extent of the commitment necessary for success. This paper attempts to outline some of the considerations involved, set against the background of recent history.

Section I presents a brief overview of the current state of the federal criminal law, focusing on the law that describes prohibited conduct (the penal law) rather than the law that governs the investigation and prosecution of those who violate the penal law (the procedural law).

Section II outlines the need for reform of the current federal criminal law. It reviews the current state of the federal statutory and case law in light of the

purposes of penal law in a civilized society, and calls attention to the expansion of criminal penalties into areas of administrative regulation.

Section III reviews the nature of the changes that would be necessary to reform the federal criminal law to the degree that it might effectively meet the purposes for which it is intended. It suggests that the necessary changes can be achieved only through broad-scale, comprehensive criminal code reform, not by a series of piecemeal enactments, and it outlines the benefits anticipated from such comprehensive reform.

Section IV recounts the history of recent attempts to reform the federal criminal law. Because of the importance of this history to an informed assessment of the difficulties that might be encountered in any resumed effort, the events—particularly the more recent ones—are set forth in some detail. The section traces code development from the American Law Institute's monumental accomplishment in producing the Model Penal Code, through the adaptation of the Model Penal Code approach to the federal context by the National Commission on Reform of Federal Criminal Laws, through the pragmatic modification of the Commission's proposal by the Department of Justice, and thereafter through the several variations on that modification as they evolved in the Congress over a twelve-year period. This history reveals the breadth of bipartisan support that sustained the effort over the course of several Administrations and several Congresses. It also reveals the nature and tenor of some of the criticisms leveled at various versions of the proposed code.

Section V describes the current, quiescent status of the effort to reform the federal criminal law, and notes the significance to future reform efforts of legislative initiatives on related fronts since the codification effort came to a standstill in 1982.

Section VI notes the difficulties that may be ex-

pected in any resumed effort to reform the federal criminal law—the difficulties in attracting public interest, in obtaining support from participants in the justice system, in achieving a commitment of time and resources from senior officials in both the Executive and Legislative Branches, in maintaining a coordinated effort by both the Executive and Legislative branches, and in allaying the concerns of special interest groups.

Finally, section VII outlines the particular steps that would be necessary to enhance the prospects for success of any future resumption of the effort to reform the federal criminal laws.

#### I. AN OVERVIEW OF THE CURRENT FEDERAL CRIMINAL LAW

The Framers of the Constitution contemplated a relatively minor role for the federal government in responding to criminal activities. Treason against the United States, a uniquely federal offense; counterfeiting of federal securities, another uniquely federal offense; and piracy, an offense that would seem beyond the effective reach of state action as well as state jurisdiction, were expressly specified as federal responsibilities by the Constitution.<sup>2</sup> Also, the provision for exclusive legislative jurisdiction over the seat of government and other federal lands<sup>3</sup> tacitly included penal jurisdiction, and the authority of the Congress to make all laws found “necessary and proper” for carrying into execution its various enumerated powers<sup>4</sup> would logically be understood to prompt enactment of a certain number of criminal prohibitions. Nonetheless, the law enforcement role envisioned for the national government was a limited one.<sup>5</sup>

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2. U. S. Const. art. I, § 8, cls. 6, 10; art. III, § 3.

3. *Id.* at art. I, § 8, cl. 17.

4. *Id.* at art. I, § 8, cl. 18.

5. Even those who then assumed the Constitution to permit federal

Over time, however, more and more laws were found by Congress to be “necessary and proper” for carrying out the enumerated powers of the federal government. A constant flow of enactments emanated from the Congress under its various assigned responsibilities—to coin money, levy taxes, establish import duties, establish post offices and post roads, and regulate interstate and foreign commerce, among others. In those enactments, a number of provisions were included to bolster the authority of the officials charged with implementing them. Commonly included were provisions imposing penalties upon persons who interfered with the execution of the authority granted—provisions which usually covered actions that would have been categorized as criminal under the English common law, and which sometimes included actions of lesser consequence. The result was that the scope of federal penal law grew by bits and pieces with each passing Congress.

As the criminal statutes grew in scope and in number, the Congress made remedial attempts to maintain their manageability. A compilation of over 200 separate penal provisions was made in 1877. A modest revision was adopted in 1909, and a more extensive one in 1948.<sup>6</sup>

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judicial cognizance of non-statutory common law crimes generally limited their assumption to common law offenses occurring in geographic areas under exclusive federal jurisdiction. They were soon disabused of even this assumption; it was made clear by the Supreme Court that before an act could be prosecuted as a federal crime the Congress would have to enact a statute, on the basis of constitutionally-granted authority, that specified the act as an offense. See *United States v. Hudson*, 11 U. S. (7 Cranch) 32 (1812); *United States v. Coolidge*, 14 U. S. (1 Wheat) 415 (1816).

6. For a review of the accomplishments of the revisions, see 117 Cong. Rec. 6120-33 (1971) (speech by Sen. McClellan), reprinted as *The Challenge of a Modern Federal Criminal Code in Reform of the Federal Criminal Law*, in *Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong. 21, 26-27, 29-30, 32-34 (1971). [Hereinafter, the Senate hearings on the subject, which spanned more than a decade and were printed with consecutive part and page numbers, will be cited by part and date as *Hearings*.]

The federal statutory law today is set forth in the 50 titles of the United States Code. Those 50 titles encompass roughly 27,000 pages of printed text. Within those 27,000 pages, there appear approximately 3,300 separate provisions that carry criminal sanctions for their violation. Over 1,200 of those provisions are found jumbled together in Title 18, euphemistically referred to as the "Federal Criminal Code," and the remainder are found scattered throughout the other 49 titles. The judicial interpretations of those provisions, which are necessary for their understanding, are found within the printed volumes reporting the opinions issued by judges in federal cases—volumes which now total over 2,800 and which contain approximately 4,000,000 printed pages.

The accumulated penal laws proscribe conduct thought by the Congress at the times of enactment to be sufficiently harmful to federal interests to warrant criminal sanctions. Certainly all the provisions are tied, in one degree or another, to powers delegated by the Constitution to the federal government. But usually the matters involved are not exclusively of federal interest; the conduct constituting a breach of those provisions commonly constitutes, simultaneously, a breach of the law of the state jurisdiction within which the conduct occurs. For example, fraudulently obtaining other people's money in a scheme involving the use of the mails (the operation of post offices having been delegated to the federal government), stealing goods from a railway car (the regulation of interstate commerce having been delegated also), and shooting a federal judge (the protection of government officials being an inherent power of government), will each constitute a violation not only of the federal criminal law but also of the penal law of the state in which it occurs. Either government may initiate prosecution. This raises questions concerning the need for federal intervention in such cases as a matter of routine rather than as a matter of reasoned election,

but federal law purports to require that the United States Attorneys undertake the prosecution of *all* crimes occurring within their districts.<sup>7</sup>

Within the conduct proscribed by the various federal statutes, there are of course many activities that would be perceived as criminal under any reasonable legal system. There are also, however, many activities that seem of quite minor significance. Of the approximately 3,000 provisions that in the early 1980s were identified as carrying penal sanctions for their violation, roughly 1,300 were found to encompass conduct that traditionally would be considered criminal under the common law concepts inherited from England, but approximately 1,700 were found to penalize conduct that involved only an infraction of regulatory requirements.<sup>8</sup>

## II. THE NEED FOR REFORM OF THE FEDERAL CRIMINAL LAW

The general purposes of the criminal laws of a society are not being met by the current federal laws. As those laws now stand, they are themselves a major impediment to their effective application. Their complexity wastes the time of the investigators, lawyers, and judges responsible for their enforcement. Considering the high level of crime that the Nation endures, such wastefulness is intolerable.

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7. 28 U. S. C. § 547 (1994). The undertaking of criminal prosecution has gradually become something of an election dictated by office workload rather than a responsibility mandated by original constitutional purpose.

8. The estimates are contained in a review undertaken by the Department of Justice in 1983. See Office of Legal Policy, *Decriminalization of Regulatory Violations 25-27* (1983) [hereinafter *Decriminalization*]. The preliminary results of a recent review undertaken by the Buffalo Criminal Law Center, employing somewhat different measures, concluded that of the 3,300 offenses existing today about 2,300 are related to common law offenses and about 1,000 are not.

*A. The Purposes of Criminal Law in a Civilized Society*

The criminal law is of fundamental importance to the effective operation of a civilized society. At an abstract level, it seeks to define the outer boundaries beyond which individual freedoms cannot be exercised without seriously transgressing the freedoms of others. At an operational level, it establishes the points at which government will intercede to protect those freedoms. If the law is to realize its potential value, the government must be able to intercede with sufficient frequency and even-handedness to instill and maintain public confidence in, and respect for, the criminal law. Only then can it achieve a fair measure of public compliance with its dictates.

A reasonable level of public compliance—through deterrence or through reinforcement of moral precepts—is exceptionally important to the practical utility of the criminal law. Any nation attempting to reduce a high rate of crime cannot rely solely on enforcement measures; the reality is that it would be prohibitively costly, both from a monetary standpoint and from the standpoint of risking an oppressive level of law enforcement, to attempt to investigate and prosecute all the criminal offenses—the serious and the minor—that take place. Any responsible attempt to provide effective protection against crime, therefore, must include a significant reliance upon voluntary public conformity to the requirements of law. In order to achieve public compliance, though, the criminal laws and the criminal justice process must be, and must be publicly perceived to be, sensible, certain, impartial, and efficient. A nation can achieve neither the reality nor the perception of these qualities if the laws themselves are confusing and complex, if important legal consequences turn on accidents in legislative drafting, and if just disposition of offenders often rests as much on chance as on design.

It is a basic responsibility of government to assure that the criminal law is adequate to meet both its abstract and practical purposes. Certainly the law must set a standard, it must reflect moral principles, it must provide notice of its provisions, and it must specify fair procedures and just penalties for redressing its violation. But it is through efficient application, and resulting public compliance, that it can provide a sound basis for protecting the safety and security of the nation's citizens, their property, and their institutions.

*B. The Necessary Characteristics of Criminal Law if It is to Achieve Its Purposes*

If a nation's criminal law is to achieve its purposes, its provisions must possess three important qualities. First, they must be adequate in their coverage, reaching all forms of serious transgressions. Second, they must be reasonably accessible, permitting both lawyers and ordinary citizens, if so disposed, to locate the central body of criminal law with the expenditure of a modest amount of effort. Third, they must be understandable, providing fair notice of what is prohibited and permitting relatively little argument about what is not.

When the criminal laws are of appropriate scope, are accessible, and are understandable, they will have met the principal prerequisites to their efficient application. If applied efficiently, they can, as noted above, achieve a suitable degree of morality reinforcement and deterrence of criminal conduct. This combination of qualities is thus essential to confining the level of crime to socially tolerable ranges. The absence of appropriate, accessible, and understandable criminal laws is enormously costly in terms of dissipated resources and high levels of unpunished crime; the resulting deterioration in the level of general public compliance with the laws then multiplies that costli-

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ness.

*C. The Characteristics of the Current Federal Criminal Law*

The current federal criminal laws do not possess the characteristics needed to achieve the fundamental purposes noted above. They have developed in a haphazard and incomplete fashion, have encompassed a stultifying chaos of traditional offenses and inchoate offenses only tangentially associated with acts usually considered criminal, and have spilled over into areas of regulated activity that has left us with a host of minor offenses that exceeds the bounds of reason and practicality.

1. General State of the Criminal Law

Federal criminal law was not planned; it just grew. Although nothing of such scope had been contemplated by the Framers of the Constitution, as federal responsibilities grew along with the growth in the complexities of life, the penal provisions of the federal law grew also. The provisions expanded statute by statute,<sup>9</sup> slowly at first, and by rapid spurts in later years. Without expectation, and without plan the statutes accumulated into a potpourri that can hardly be regarded as a criminal "code"—a term properly applicable only to a systematic, interrelated body of law. Instead, the process has simply produced an unorganized collage of legislative enactments adopted by the Congress over a two-hundred year period as a series of sporadic attempts to resolve crises of the moment. The reactive nature of the process is suggested

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9. There are, of course, no federal offenses other than those described by statute; the federal courts never possessed the authority, held in the past by most of their state and English counterparts, to punish conduct on the basis of its constituting a traditional crime under the common law. See *supra* note 5.

by some comparatively recent legislative examples: it was the spate of bank robberies by John Dillinger in the 1930's that provoked passage of the federal bank robbery statute; the kidnapping of the Lindbergh baby about the same time that caused passage of the federal statute on kidnapping; the assassination of President Kennedy in the early 1960's that prompted the statute on presidential assassination; and, the killing of Senator Robert Kennedy in the late 1960's that resulted in the passage of a statute finally making it a federal crime to kill a member of Congress.<sup>10</sup>

The result is a loose assemblage of criminal law components that were built hastily to respond to perceptions of need and to perceptions of the popular will, and that were patterned more upon hindsight than foresight. Of the 3,300 provisions carrying criminal penalties, each was produced at a different time by different draftsmen with different conceptions of law, the English language, and common sense. Any relationship of one to another is more often than not accidental. The criminal statutes have never been subjected to a substantive reform, only a minor paring and partial rearrangement under a peculiar application of alphabetical order.<sup>11</sup>

Many of these statutes are, in themselves, quite well drafted, and have proved reasonably capable as vehicles for appropriate investigation and prosecution. Many others, however, are plainly deficient either in their conception or in their amenability to application. Moreover, the potential effectiveness of even the better-drafted provisions is largely lost as a result of the statutory chaos that absorbs the time of those charged with administering the whole of the criminal law.

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10. See 18 U. S. C. §§ 2113, 1201, 1751, 351 (1994).

11. See *supra* note 6 and accompanying text.

## 2. Traditional Offenses

Offenses of a traditional nature are generally considered those that, to some degree or another, cause or risk injury to persons, loss of property, breach of important public mores, or significant impediment to institutions of self-government designed to protect persons, property, or public mores. In the federal jurisdiction, the statutory coverage of these offenses does not meet the prerequisites necessary to the achievement of the basic purposes of the criminal law.

### *a. Appropriate Coverage*

Problems pertaining to the appropriateness of the coverage of federal laws defining offenses today relate more to over-coverage than under-coverage. The members of more than 100 successive Congresses, in seeking to meet public concerns about crime, have papered over the field of criminal law with statutes that have accumulated into piles in some areas, and that have left relatively few areas uncovered. The consequence of these overlapping and multiplicitous statutes is not only redundancy, but confusing inconsistency, and thus a particularly serious form of inadequacy.

As a result of the federal system under which the exercise of criminal jurisdiction is limited to subject areas constitutionally designated as within the federal government's responsibility, numerous statutes directed at the same criminal conduct have been enacted as piecemeal efforts reaching narrow instances of such conduct—instances in which particular collateral circumstances touch upon one or another of the assigned federal responsibilities. An offense involving theft, for example, will commonly be written to cover theft only as it applies under a particular circumstance relating to federal responsibility. Hence, a statute will be passed to cover a problem involving

theft from the mails—but another will be passed to cover theft of government property, and still another will be passed to cover theft from a federally-insured bank. Each time the Congress finds it advisable to permit federal prosecution of theft in a new context, the essential criminal misconduct is restated in a new statute, along with a description of the factor newly found by Congress to provide a legal basis for the exercise of federal jurisdiction. Moreover, the commingling of the misconduct and the basis for federal jurisdiction often results in the jurisdictional factor being cast as the prominent matter, making the underlying criminality appear almost of secondary importance. For example, one who would be punished under a state statute for “fraud” is punished under the principal federal equivalent for depositing mail for the purpose of executing a scheme to defraud.<sup>12</sup>

In tending to concentrate upon the jurisdictional provisions rather than upon the substance of criminal offenses, Congress has often taken more care in the definition of the former than in the definition of the latter. The draftsmen commonly have assumed a free hand in developing fresh definitions of misconduct. The descriptions of what should be the same substantive crime, therefore, vary among the numerous statutes covering the different jurisdictional provisions that Congress selected to append to the offense. For example, among the several robbery statutes that exist within Title 18 of the United States Code—which include, among others, robbery of property of the United States, robbery from a federally insured bank, robbery of items in the mails, robbery affecting commerce, and robbery taking place on federal lands—the essential elements of the offense differ in material respects from one statute to another. One such statute penalizes:

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12. See 18 U. S. C. § 1341 (1994).

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Whoever, [on federal lands]. . . , by force and violence, or by intimidation, takes or attempts to take from the person or presence of another anything of value . . . .<sup>13</sup>

Another elaborates, penalizing:

Whoever [obstructs commerce by]. . . the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. . . .<sup>14</sup>

Still another leaves the offense unexplained, punishing:

Whoever robs or attempts to rob another [of federal property]. . . .<sup>15</sup>

Each statute thus presumes to redefine—in one or another of the innumerable variations on the original common law concept—the gravamen of the offense, as well as the justification for federal, as opposed to state, prosecution.

As a consequence of this approach, there exist today numerous federal statutes that cover the same kind of criminal activity but that define the essential criminal conduct quite differently. Two or three statutes covering each form of criminal conduct might be absorbed into a criminal justice system with little confusion. The redundancy of the federal statutes, however, is not so modest. According to a count made for code reform purposes by the Department of Justice in the mid-1970's, the federal jurisdiction had accumu-

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13. See id. § 2111.

14. See id. § 1951.

15. See id. § 2112.

lated 134 statutes pertaining essentially to theft and fraud, 89 pertaining to forgery and counterfeiting, 159 pertaining to false statements to government officials, and 84 pertaining to property destruction.<sup>16</sup> Today those statutes have grown to 232 pertaining to theft and fraud, 99 pertaining to forgery and counterfeiting, 215 pertaining to false statements, and 96 pertaining to property destruction.<sup>17</sup> Considering the variations among the federal statutes' substantive descriptions, which foster conflicts as well as confusion, what might otherwise seem to be more than adequate coverage is rendered inadequate and unworkable.<sup>18</sup>

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16. A compilation of the provisions from then-current law that would have been encompassed by a pending code reform bill was prepared by Department of Justice attorneys, and was published in two volumes by the House Judiciary Committee, in 1978. See Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., *Impact of S. 1437 upon Present Federal Criminal Laws* (1978) [hereinafter *Impact*].

17. These figures reflect the preliminary results of a recent survey by the Buffalo Criminal Law Center.

18. Although the principal cause for such multiplication of offenses is the jurisdictional peculiarity of federal criminal law—which has encouraged Congress to so interlink criminal conduct with its jurisdictional predicate that adding a jurisdictional basis requires adding new offense language rather than appending a new basis to a preexisting offense statement—there is another cause for offense proliferation. Under all penal systems, there is a tendency for legislators to view old offenses committed by new methods as new offenses. As inventions multiply, so do means of committing offenses. As new tangible devices become common (such as automobiles and computers), and as new intangible devices become common (such as new forms of holding companies and corporate takeover techniques), there is often a certain period of adaptation before the legal system begins to prosecute effectively for traditional offenses involving use of the new devices. During such periods, legislators are frequently moved to “solve” the “new problems” by enacting new statutes focusing upon the objects of the offenses or the means by which the offenses are committed, rather than focusing upon the results. Hence the proliferation of statutes dealing with such matters as “automobile theft” and “computer fraud.” Also, changes in social attitudes often prompt political support for new statutes focusing on the motives of the offenders—such as the recent “hate crime” enactments. Almost never is there a substantive need to add such statutes if there is already a reasonably drafted provision covering the basic wrongdoing; at most, a subsection confirming application might appropriately be added within the section of law stating

There exists in the federal statutes another, more troubling, manifestation of over-coverage. It concerns the occasional indirectness of the relationship between the conduct penalized and the conduct at which a statute is really aimed. It is one matter to penalize, as a criminal attempt, otherwise permissible conduct in situations in which the conduct is undertaken with the intent, and the capacity, to cause a criminal result; it is another matter to penalize otherwise permissible conduct that is itself innocently undertaken but that is commonly associated with criminal activity, or that is only remotely related to such activity. Nevertheless, as a consequence of prosecutorial and congressional frustration over the difficulty of reaching directly some serious forms of criminal conduct, there has been an understandable impetus to draft statutes that focus upon peripheral conduct.<sup>19</sup> The tendency is especially prevalent in the federal juris-

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the traditional offense.

19. Sometimes the operating philosophy seems to be that, if government cannot prosecute what it wishes to penalize, it will penalize what it can prosecute. No one would dispute the propriety, for example, of prosecuting a successful racketeer, not on a charge of racketeering from which he has insulated himself, but on a charge of tax evasion for failure to report his illegally derived income—the latter being an independent offense constituting, in essence, a fraud. But moving beyond penalization of collateral misconduct to the penalization of collateral, seemingly innocent conduct, that causes no real independent harm but that may be associated with either lawful or unlawful actions, raises jurisprudential questions that lawmakers have not frequently chosen to face. The expansion of the concept of criminality has been most notable in the area of law considered to be “regulatory,” but frustration with the inefficiency of the criminal justice system in reaching serious forms of crime has also led to a tendency to consider aiming at peripheral conduct—such as failing to file required forms, possessing equipment that is capable of both innocent and criminal use, and failing to maintain specified records—when reviewing different approaches to prosecuting traditional crimes. The potential for overly broad application may be restrained by specifying in the statute that the collateral conduct must, to be prosecutable, be undertaken with intent to further the basic crime, or by restricting coverage to conduct associated with basic crimes portending egregious harm, but such qualifiers are not always employed. See generally Norman Abrams, *The New Ancillary Offenses*, 1 *Crim. L. F.* 1 (1989).

diction, in which, as a result of the myopic approach to the implementation of the constitutionally-based jurisdictional limitations noted above, it has long been common to place the statutory focus upon such otherwise innocent activities as placing a letter in a mailbox or driving across a state line.

The over-coverage of so many of the federal statutes obscures the areas of under-coverage, but in some areas there are still gaps. The gaps are gradually being filled.<sup>20</sup> Typically, however, the Congress seeks to rectify only the narrow, particular problem that made the under-coverage apparent, rather than to cover as well the same kind of potential problem in related areas within the federal jurisdiction.

More common under-coverage is that occasioned by the failure of the statutes to penalize incomplete

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20. Although robbery of funds from a federally-insured bank has been an offense for many years, extortion of the same funds remained outside the federal jurisdiction until the Congress rectified the omission in 1986. See 18 U. S. C. § 2113. Also, most forms of the serious offense of bribing a state governmental official were not made the subject of a federal statute until late 1988. See, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508 (codified as 18 U. S. C. § 1346 (1994)). While the latter kind of offense raises legitimate questions about the proper role of the federal government in prosecuting state officials under our constitutional scheme, most legal analysts conclude that, while it is preferable to have a state resolve its own problems and undertake state prosecution, there will be instances in which the bringing of such prosecutions is made sufficiently difficult by the nature of the corruption that some form of backup federal authority is warranted. In the absence of such a statute, federal prosecutors for many years employed in this area a practice that commonly had been employed in other areas—picking among the panoply of peculiar federal statutes for one that arguably could be construed to encompass the conduct at issue. The mail fraud statute was selected, and, for a period of many years, bribery of state officials was prosecuted as the use of the mails for the purpose of executing a scheme to defraud a state's citizens of the honest and faithful services of a public employee. When the United States Supreme Court found this too tenuous a statutory nexus (see *McNally v. United States*, 483 U. S. 350 (1987)) the Congress, with the concurrence of the Department of Justice, "cured" the problem not by enacting a statute prohibiting the bribery of state officials, but by the more customary method—setting the makeshift, convoluted fraud approach into statutory permanence.

forms of the criminality at which they are aimed. For example, the attempted commission of a federal crime which comes near to completion, but falls short, is subject to federal prosecution only if a subcommittee counsel happened to recall the desirability of such coverage at the time the statutory offense was drafted. There is no general federal attempt statute, and very few of the numerous federal offenses encompass the attempted commission of the proscribed conduct as well as the completed commission.<sup>21</sup>

Even more serious an omission from adequate criminal law coverage is the failure to delineate the general principles of criminal law application. For example, the principles pertaining to the liability of corporate and other artificial entities, and the principles involving the availability of defenses with respect to conduct that otherwise would be criminal, are not covered by generally-applicable federal statutes—they have been left almost entirely to development by the judiciary on a case-by-case basis.<sup>22</sup> When these important concepts arise as issues in prosecuted cases, they make it all too apparent that the common law approach has not promoted the degree of standardization and consistency that is plainly desirable.

*b. Accessibility*

The federal criminal law is not readily accessible. The sheer bulk of the volumes that contain the federal

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21. The Department of Justice Survey in the mid-1970s found only about 150. See Impact, *supra* note 16, at 1-131. A number of attempt provisions have since been added to existing statutes on an ad hoc basis, but they are still rarities.

22. In the view of one authority on general principles of federal criminal law, "99% . . . remains unmodified, thereby delegating criminal lawmaking authority to the federal judiciary." Paul H. Robinson, Reforming the Federal Criminal Code: A Top Ten List, 1 Buff. Crim. L. Rev. 225, 228 (1997). Congress did finally enact a provision creating one generally-applicable defense—insanity—in 1984. See 18 U. S. C. § 17.

criminal and civil statutes, and that set forth the federal judicial decisions in criminal and civil cases, makes it extraordinarily difficult to ferret out the law applicable to a particular factual situation. Bulk, though, is not the only problem. Many of the important criminal offenses do not appear in the main penal portion—Title 18—of the published compilation of federal statutes, but are buried within essentially regulatory provisions of other titles. The serious offense of aircraft highjacking, for example, is almost lost in the regulatory provisions dealing with interstate transportation,<sup>23</sup> major espionage offenses have been placed in the midst of regulatory provisions pertaining to atomic energy,<sup>24</sup> and offenses involving narcotics appear among the regulatory provisions of titles involving food and drugs<sup>25</sup> and shipping.<sup>26</sup> Even when included within the main penal title, important offenses are masked by the unimportant—Title 18 encompasses in the disharmony of its roughly 5,000 sections<sup>27</sup> not only offenses such as murder and arson but such other forms of “criminality” as the transportation of alligator grass across a state line,<sup>28</sup> using the slogan “Give a hoot, don’t pollute” without authorization,<sup>29</sup> pretending to be a 4-H Club member with intent to defraud,<sup>30</sup> and including a member of the armed forces in a voter preference poll.<sup>31</sup> Furthermore, the accumulated *ad hoc* enactments appear in a uniquely unhelpful arrangement. They are clumped together in a series of chapters bearing titles apparently chosen by

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23. See 49 U. S. C. § 46502 (1994).

24. See 42 U. S. C. §§ 2274, 2275, 2277 (1994).

25. See 21 U. S. C. §§ 841-848, 854-856, 952-955, 959-964 (1994).

26. See 46 U. S. C. app. § 1903 (1994).

27. The majority of the sections in Title 18 are directed to procedural, definitional, and regulatory matters, not to specification of criminal offenses.

28. See 18 U. S. C. § 46 (1994).

29. See *id.* § 711a.

30. See *id.* § 916.

31. See *id.* § 596.

lexicographers rather than lawyers versed in the penal law, and are laid out in alphabetical order of their titles (Aircraft and Motor Vehicles; Animals, Birds, Fish, and Plants; Arson; Assault; etc. ) rather than by concept.<sup>32</sup> Individual provisions have proven so difficult to find that, until a change in type fonts several years ago, the paperback edition of Title 18 consisted of approximately 500 pages of statutory text, and, in a vain attempt to provide the reader with some rough idea of the contents, 300 pages of an index.

With the 3,300 statutory provisions carrying criminal penalties scattered throughout 27,000 pages of printed text, and with the judicial interpretations in criminal cases scattered among 4,000,000 pages in 2,800 volumes, it is apparent that simply finding the law is a formidable task for a criminal law specialist, and virtually an impossible task for others.<sup>33</sup>

*c. Understandability*

Once a provision of the federal criminal law can be located, it frequently proves to be unusually diffi-

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32. In theory, at least, any method of categorization is superior to no categorization. But throwing 5,000 statutory sections into an arrangement dictated by the first letter of a word chosen by a congressional employee to denote either the general subject of the offense or, just as often, the general subject of the jurisdictional predicate for prosecution, is of no help to someone attempting to ascertain the existence of statutory coverage over a particular kind of offense. While the alphabet may call for a wide separation between the bodily injury offenses of "assault" (Chapter 7) and "homicide" (Chapter 51), logic does not. More to the substance of the difficulty is the fact that the peculiarly drafted criminal statutes commonly commingle a variety of offenses in one section, and the name of any one of them might reasonably be chosen as that to determine the alphabetical placement of the section. It would make as much sense to place the sections in the chronological order of their enactment. The alphabetical approach is no more helpful in Title 18 than it would be in a history text arranged by the first letter of the names denoting important persons and events.

33. For reasons made apparent by the other problems noted in the course of this discussion, the advent of computer-assisted research has done comparatively little to alleviate this difficulty.

cult to understand, even when compared with other legal writing.<sup>34</sup>

In the statutes setting forth federal criminal offenses, no standard terminology is employed, and no standard style or format is followed. The only common features of the statutes are that they begin with the word "Whoever" and end, usually much later, with a reference to the maximum penalty that may be imposed for a violation. Between the "Whoever" and the penalty, the recitation of offenses may take any form, but the usual one is to employ lengthy, run-on sentences that commonly encompass between 100 and

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34. One Attorney General singled out the lack of understandability of the current federal laws as the principal impetus for their reform. In the course of testimony on a bill to reform the federal criminal laws, the following impromptu exchange took place between Senator Edward Kennedy and Attorney General Griffin Bell:

Senator Kennedy. Could you, General Bell, review very briefly why you think that this legislation is important from a law enforcement point of view?

General Bell. It is important to have a code of laws that the courts and law enforcement officials can understand. It is important from the standpoint of deterrence that the public understand what the law is.

We have a crazy quilt of laws now in many areas.

That is important . . . . We certainly have got to bring some stability and rationality into the criminal justice system. We do not have that now.

The law now, in many ways, can be described as a nonsystem or nonset of laws because there is so much overlap. It is important to have a code of laws that makes sense and that the people can understand.

I think that that would be the best answer.

The fact that we are so far behind the states is something that is of great concern to me.

Senator Kennedy. Thirty-five states have either completed or are working on this.

General Bell. They have codified the laws or are working on it. We in Georgia long ago recodified our criminal laws. Since then we have even recodified our criminal procedural law. The Federal Government is just out of step and behind; that is what it gets down to.

See Hearings, *supra* note 6, pt. XII, at 8593, 8597 (1977).

200 words, and frequently more,<sup>35</sup> and that commingle the important with the trivial. Since most of the terms used are unaccompanied by definitions, their interpretation is left to the pondering of federal judges, aided by whatever illumination the context and legislative history may provide. In the few instances in which terms are defined, the definitions are almost always limited in their application to the particular section or group of sections that had then been receiving attention by a congressional subcommittee,<sup>36</sup> and thus pro-

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35. For example, the federal statute prohibiting fraud by employees of federal credit institutions, 18 U. S. C. § 1006, reads as follows:

Whoever, being an officer, agent or employee of or connected in any capacity with the Federal Deposit Insurance Corporation, National Credit Union Administration, Office of Thrift Supervision, any Federal home loan bank, the Federal Housing Finance Board, the Resolution Trust Corporation, Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, the Secretary of Agriculture acting through the Farmers Home Administration, the Rural Development Administration, or the Farm Credit System Insurance Corporation, a Farm Credit Bank, a bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution, other than an insured bank (as defined in section 656), the accounts of which are insured by the Federal Deposit Insurance Corporation, or by the National Credit Union Administration Board, or any small business investment company, with intent to defraud any such institution or any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of any such institution or of department or agency of the United States, makes any false entry in any book, report or statement of or to any such institution, or without being duly authorized, draws any order or bill of exchange, makes any acceptance, or issues, puts forth or assigns any note, debenture, bond or other obligation, or draft, bill of exchange, mortgage, judgment, or decree, or, with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

36. The principal penal law title—Title 18—today defines a grand

vide no illumination as to the meaning to be ascribed to the identical terms appearing elsewhere in the federal statutes.

Lack of standardized terms has made it particularly difficult to understand the mental elements which Congress presumably intended to incorporate in the descriptions of offenses. Two mental states—"intentionally" and "negligently"—are commonly employed for drafting penal provisions in continental European jurisdictions,<sup>37</sup> and three or four concepts—"intentionally" (or "purposefully"), "knowingly," "recklessly," and often "negligently"—are being adopted in many efforts to simplify the law in various states and in other common law jurisdictions.<sup>38</sup> In the course of producing almost two centuries' worth of federal criminal statutes, however, Congress has invented about every two and one-half years, on the average, a new term denoting the mental state with which particular conduct must be accompanied if criminal liability is to exist. A count undertaken almost 30 years ago revealed 78 different terms in Title 18 alone that had been used by the Congress. They included "willfully," "maliciously," "fraudulently," "unlawfully," "improperly," "wantonly," "feloniously," "corruptly," "falsely," "wrongfully," and even "without due . . . circumspection."<sup>39</sup> As one of the several judicial contributions to lack of understandability, various federal courts have interpreted the most commonly used of the statutory terms—"willfully"—in different

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total of 18 terms (including "Canal Zone," "Postal Service," and "vessel of the United States") in its "General Provisions" chapter, and, of these, all but five are specifically limited in their application to offenses set forth within that single title.

37. See Michajlo M. Acimovic, *Conceptions of Culpability in Contemporary American Criminal Law*, 26 *La. L. Rev.* 28, 51-52 (1965).

38. See Model Penal Code § 2.02 cmt. 4 (1985); Law Reform Commission of Canada, *Recodifying Criminal Law*, Rep. No. 30 18-21 (1986).

39. See National Commission on Reform of Federal Criminal Laws, *Working Papers*, 119-120 (1970).

contexts to mean “voluntarily,” “intentionally,” “stubbornly,” “with bad purpose,” and, in at least one instance, “with studied ignorance.”<sup>40</sup> Augmenting the confusion is the fact that when Congress has failed to specify any particular mental state, sometimes the courts will assume one to have been intended, and sometimes not; criminal liability without any culpability—“strict liability”—has frequently been employed by the Congress, by design or by inadvertence, without the careful analysis that its consequences plainly would warrant.

Adding further to the lack of understandability is the fact that, as noted previously, the provisions setting forth offenses are filled with collateral, technical verbiage concerning jurisdiction, and sometimes other matters, commingled with the descriptions of the basic wrongdoing.<sup>41</sup>

### 3. Regulatory Offenses

It has been noted above that Congress has pushed the definition of criminal conduct far beyond the bounds drawn by the English common law, and has encompassed numerous activities that violate regulatory requirements rather than traditional criminal

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40. See S. Rep. No. 97-307, at 63-64 (1981).

41. Not only does this produce confusion, it occasionally produces legally anomalous results. As an example, the federal mail fraud statute is used essentially as an inchoate fraud offense statute. Upon analysis, however, it is apparent that the Congress in fact created an unusual extension of the traditional fraud-conspiracy approach. The statute penalizes a person for, in essence, conspiring with himself to commit a crime; he may be prosecuted for devising a scheme to defraud and then committing an overt act (depositing a letter in the mails) in furtherance of that scheme, even if the act falls far short of that required for prosecution as an attempted crime. The anomaly, however, is shrouded by the fact that the current form of statutory drafting focuses upon the jurisdictional factor as the criminal act; hence legal respectability presumably is rescued by technically prosecuting the offender, not for conspiring with himself to defraud, but for using the mails for an improper purpose.

prohibitions. The impetus for the expansion, its scope, and the reasons for its persistence, have not received much attention. Certainly the consequences of the expansion have not been given the consideration they deserve.

With the rapid growth of the industrial and commercial revolutions in the nineteenth Century, a great increase took place in the means by which serious endangerment of persons and property might arise on a broad scale. The Congress—and other legislatures—began to enact regulatory schemes to control commercial activities that could seriously affect public health or safety, and eventually began to apply criminal penalties for violations of regulatory provisions governing activities in which the risk of serious injury was particularly high. Some of those provisions, as noted earlier, carried no requirement of proof of a culpable mental state, and, given the nature of the danger they portended, the courts ruled that violators could be held strictly accountable, no matter how accidental the conduct. The legislative criminalization of regulated conduct gradually became common, and began to be applied to activities that did not directly endanger persons or property. Eventually, criminalization of new regulatory provisions became almost mechanical. Today, when a congressional committee adopts new requirements concerning commercial transactions, agricultural acreage allotments, welfare programs, or virtually any other regulated activity, it routinely incorporates at the end of the requirements a statement that any deviation constitutes a federal crime. This tendency has led to a gradual absorption of non-criminal law by the criminal law.<sup>42</sup>

The difficulty was well summarized by a presi-

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42. This amalgamation of the criminal law and the non-criminal law has contributed to the development of the popular misconception that if a person has violated "The Law," he deserves to be imprisoned, and that any lesser consequence demonstrates that the legal system is unjust.

dential commission which found:

Nothing is more distinctive of a mature, modern industrial society than the vast proliferation of minutely specified rules and regulations for the conduct of government, business, unions, and indeed of "private" life, whether it be the manner of driving one's automobile, the character of the wiring and plumbing in one's house, or the nature of records and reports required in one's profession. Penal sanctions are widely and indiscriminately employed, often dispensing with any requirement that the prosecution prove that the defendant knowingly violated the rules; "strict liability," precluding even the defense of reasonable mistake of fact, is commonly provided, sometimes even at the felony level. A not uncommon disposition is "whoever violates any provision of this statute or any rule or regulation thereunder shall be guilty of [a felony or misdemeanor]," although the great majority of the offenses contemplated are likely to be trivial or technical. A noteworthy feature of the legislative process in this connection is that while the Department of Justice initiates and Judiciary Committees must approve of legislation dealing with ordinary crimes, other departments and committees, knowledgeable in the particular field regulated but inexperienced and not attuned to the problems of "regulating" human beings, i. e., offenders, or the machinery of penal justice, generally dispose of penal aspects of regulatory law. (Footnote omitted.)<sup>43</sup>

As noted before, there have been found to exist in our federal laws about 1,700 such activities that have been made criminal by statute, but that bear no relationship at all to offenses within the traditional scope of the criminal law.<sup>44</sup> This figure, however, reveals only part of the coverage. Many of the penalty sections authorize the imposition of the specified penalty not

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43. National Commission on Reform of Federal Criminal Laws, Study Draft of a New Federal Criminal Code, xlvi (1970).

44. See Decriminalization, *supra* note 8.

only upon a person who violates the provisions described in the statute, but also, as the commission observed in the quoted paragraph, upon one who violates any regulation, rule, or order issued by the agency charged with the administration of the statute. Taking into account the numerous, discrete rules and regulations enforceable under such regulatory statutes (including, for example, those appearing in the 22 pages of OSHA requirements concerning the construction of ladders and scaffolding<sup>45</sup>), it appears that there are more than 10,000 regulatory requirements or proscriptions carrying criminal sanctions under the current federal law.<sup>46</sup>

In this broad expansion of the reach of the criminal statutes, the law has lost sight of the fundamental principles that historically were employed to differentiate between conduct that warrants penal treatment and conduct that does not. Of the thousands of activities made criminal by Congress because they are covered by administrative regulations, those that involve danger to life or property plainly warrant criminal law coverage under traditional jurisprudential concepts. Certainly, one who endangers human life by dumping chemicals into a municipal water supply is guilty of the same basic offense as one who shoots a rifle into a crowd of people. But the conduct covered by the 1,700 statutory provisions here at issue—ranging from walking a dog in a government building<sup>47</sup> to selling a mixture of two kinds of turpentine<sup>48</sup>—would generally seem to warrant an administrative or civil fine at most.

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45. See 29 C. F. R. §§ 1926. 450 - 1926. 452 (1997).

46. See Decriminalization, *supra* note 8, at 27.

47. See 41 C. F. R. §§ 101-20. 311, 101-20. 315 (1997).

48. See 7 C. F. R. § 160. 85 (1997).

*D. The Consequences of Defects in the Current Federal Criminal Law*

The most serious consequences of the defects in the current laws stem from the difficulty in applying the laws efficiently. The inefficiency leads to the loss of deterrence and public respect.

1. Inefficiency in Prosecuting Serious Offenses

It is readily apparent that laws that are redundant and conflicting, laws that are difficult to find, and laws that are hard to understand, present a major impediment to the effective operation of the federal criminal justice system. They result in serious confusion as to the law applicable to a particular case—a confusion that absorbs the time and energy, and reduces the effectiveness, of judges and lawyers. Young lawyers entering federal service as Assistant United States Attorneys experience a shock at the disarray of the federal criminal law, having usually been trained in law school along the logical lines laid out by the American Law Institute's Model Penal Code. They must spend considerable time learning the rudiments of the federal law—a period during which their effectiveness is materially less than that of their more experienced colleagues. By the time they have acquired a working familiarity with the federal law, they often are ready to move on to private practice.

Lawyers and judges are not the only ones operating within the system who are adversely affected by the state of the law. Jurors, for example, regularly are subjected to unusually convoluted instructions in the course of being advised by federal judges of the legal standards they are to apply in assessing the consequences of the facts of a case. Also, foreign governmental officials who have been requested to extradite an offender for trial in the United States have frequently been puzzled by federal offenses focusing on

the use of the mails and the crossing of state lines, occasionally finding them insufficient to constitute an extraditable fraud or kidnapping.<sup>49</sup>

Attempts to remedy some of the confusion by means of clear judicial opinions interpreting the application of a particular statute are of limited value. Such opinions commonly will be considered as authority only for the interpretation of the particular statute under which the case arose (and frequently only within the geographic jurisdiction of the court that issued the interpretation). Given the fact that many common law felonies have been splintered by the Congress into scores of federal offenses, each with its own particular jurisdictional base and each defined somewhat differently from the others, the value of such opinions as useful precedent is greatly diluted. What is of value in interpreting the nature of the offense of theft in a statute dealing, for example, with postal stamps, may be of no help at all in understanding the nature of the same basic offense when described somewhat differently in a statute dealing with another jurisdictional predicate. This approach squanders considerable resources. The judicial time—and attorney time—that is expended in the research, analysis, and writing that forms the basis of such an opinion, may produce a nugget of academic value to the occasional scholar who traverses the field in the future, but the product may be of no practical use within the system that created it until a similar case is presented under the same statute, perhaps decades later.

Inefficiency obtains even in cases that can be prosecuted quickly and successfully. Frequently, some serious aspects of a defendant's conduct do not fall within the scope of federal jurisdiction,<sup>50</sup> the federal

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49. Particular care has been taken in recent years to draft extradition agreements in a manner that will reduce the problem.

50. For example, an offense involving robbery from a post office that results in the maiming of a customer is likely to be prosecuted by the

prosecutor proceeds only on the potential charges that do, and the state prosecutor, overworked as most of them are, has little incentive to initiate a prosecution based upon the federal residue.<sup>51</sup> Many offenders, thus, receive less than their deserved sanction.

In short, the current haphazard, complex, and confusing federal laws are permeated with major impediments to overall efficiency. In the course of processing criminal cases, judges, prosecutors, and defense counsel must expend a considerable amount of time in resolving arguments designed to clarify or exploit the statutory confusion. This dissipates limited resources, and engenders public jaundice.<sup>52</sup> It robs the criminal justice system of its moral authority and of its potential for achieving a reasonable level of deterrence.

## 2. Inefficiency in Encouraging Compliance with Regulatory Provisions

The inefficiencies that obtain with regard to enforcement of the general federal criminal laws also affect the enforcement of essentially regulatory provisions that have been enveloped by the expanding criminal law. While one may question whether the Nation loses much by providing only an inefficient means of sanctioning relatively insignificant conduct, there is a measurable loss, and an unnecessary one.

Much of the conduct here in question does not

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federal government under 18 U. S. C. § 2114, but federal jurisdiction will cover only the robbery and not the maiming.

51. The laws of some states bar state prosecution for the other offenses stemming from the same transaction. See Comment, Successive Prosecutions by State and Federal Governments for Offenses Arising Out of Same Act, 44 Minn. L. Rev. 534, 539 n. 31 (1960).

52. The problem is aggravated when the level of crime is high. The confusion of the law necessarily leaves more than is desirable to the judgment and discretion of investigators, prosecutors, and judges. Given the effect of systemic inefficiency and case overload, this tends to foster the appearance, and often the reality, of idiosyncratic or arbitrary application of the law, raising questions of fairness—to the public and to offenders—and of predictability and certainty.

reach the level of even minor crime in the traditional sense. Nevertheless, it is conduct that in many instances does warrant governmental regulation. Violations of provisions governing such conduct would seem appropriate for administrative or civil sanctions. The difficulty is, however, that many of the provisions in question carry *only* criminal sanctions. The public interest in effective, constructive regulation—in those areas where federal involvement is found warranted—is not served by using the full force of the criminal law to batter an otherwise law-abiding individual or organization into compliance with a regulatory requirement when an administrative penalty would be fully sufficient. Nor is the public interest served when the government is obliged to forgo enforcement of a useful regulation because the only available sanction is a criminal one, carrying a high burden of proof, and the diversion of precious criminal justice resources for a protracted case does not, on balance, appear appropriate. The club frequently is found too big to warrant use, or too unwieldy to permit it. It is akin to a nation possessing nuclear arms but no counter-guerrilla capacity.

There is a further aspect of regulatory over-criminalization that has more troubling consequences. The expansion of the criminal law to encompass essentially innocuous conduct has contributed materially to the trivialization of the concept of criminality that has taken place in the Nation—a trivialization that erodes the respect for, and hence the deterrent impact of, the criminal law generally. There is something self-defeating about a society that seeks to induce its members to abhor criminality, but that simultaneously brands as “criminal” not only those who engage in murder, arson, and rape, but also those who inadvertently commit petty administrative errors. As observed by a distinguished English criminal law authority, “When it becomes respectable to be convicted, the vitality of the criminal law has been

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sapped.<sup>53</sup>

### III. THE NATURE OF THE NEEDED REFORM

There is a compelling national need for a genuine code to meet the problems posed by criminal activities legitimately falling within the federal jurisdiction. In view of the extensive and interlocking nature of the changes necessary to achieve an appropriate code, it is apparent that they must be enacted at one time rather than as a series of piecemeal adaptations. If the necessary changes can be enacted, the increase in the efficiency of the federal criminal justice system would produce substantial benefits.

#### *A. The Necessary Broad-Scale Changes*

The shortcomings of the existing federal criminal laws make apparent the need for broad-scale reform. Nothing less than a comprehensive federal criminal code is required. The code should constitute an integrated compendium of the totality of federal criminal law, combining general provisions, all serious forms of penal offenses, and closely-related administrative provisions.

The general provisions should encompass all matters relating to the interpretation and application of the criminal laws—the conceptual principles, the definitions of frequently-used terms, the circumstances warranting federal prosecution, the basic mental states that must accompany conduct, the grounds for holding individuals and organizations responsible for acts committed by others, and the defenses and bars to prosecution.

The penal offenses should be consolidated into essential forms of wrongdoing. They should be described

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53. Glanville L. Williams, *Criminal Law: The General Part* 259 (2d ed. 1961).

in terms of the fundamental misconduct involved, with the jurisdictional limitations of federal law set forth in separate subsections. Under such an approach, a single offense of theft, for example, would be interpreted in the same fashion no matter which of the congressionally-specified jurisdictional predicates happened to bring the case within the federal cognizance.

The offenses should be cast in simple, readable, and understandable verbiage. They should be grouped together in a rational arrangement under which, for example, all offenses involving bodily injury to persons would be set forth in a single chapter, with like offenses appearing next to each other, and with the offenses within the groupings ordered by the degree of their severity.

The regulatory offenses in current law should be divided into those that are serious, those that are minor, and those that are beyond the scope of sensible criminal law coverage. The serious offenses that today are buried in regulatory titles should be imported into the new criminal code and recognized and categorized as the crimes that they are. Lesser regulatory offenses, which may warrant criminal coverage but which may not warrant piecemeal importation into the central body of criminal law, should be covered generically by a regulatory offense section in the code—with the criminal law coverage accomplished by a general description of the nature of the harm occasioned (or the nature of the harm risked and the extent of the risk) and the level of the offender's culpability.<sup>54</sup> Regulatory violations that do not warrant

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54. Under such an approach, a high degree of culpability (for example, actual intent that a harm take place), coupled with a low level of harm (for example, minor damage to replaceable property) could warrant criminal prosecution. Similarly, a low level of culpability (for example, a negligent failure to perceive a risk of harm in a situation in which a reasonable person would recognize the risk), coupled with a high level of harm (for example, the death of a human being), could also warrant criminal proceedings. Situations involving low levels of both

criminal sanctions should be set forth elsewhere and addressed by civil or administrative remedies.

*B. The Means of Achieving the Changes*

The most obvious means of achieving the needed broad-scale changes is to develop and enact a new code as a complete replacement for the existing criminal statutes. This is a course that has been taken by numerous common law jurisdictions, including many of the states, in reforming their criminal laws. The question arises, however, whether the federal criminal law might be brought to the requisite level of effectiveness by changes less sweeping, and more gradual, than those proposed. For a variety of reasons, such a course does not appear to be a practical alternative.

First, certain fundamental prerequisites to an effective code affect provisions now appearing, in one manner or another, in all penal statutes. They include the standardization of provisions concerning culpable mental states, the restructuring of federal jurisdictional qualifications, and the specification of standard penalty provisions. All penal statutes would have to be rewritten in order to accord with these commonly-applicable provisions. To enact the general provisions, and then adapt to their coverage a few of the penal offenses at a time, would cause prolonged confusion and litigation that would probably exceed the limited benefits.

Second, broad criminal law concepts that are applicable to all penal offenses are addressed in current law in a haphazard fashion, with fragmentary provisions appended to the definitions of numerous particular offenses. The concepts include liability of persons for acts committed by others, liability for incomplete offenses, and exceptions to liability based

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culpability and harm, however, might appropriately be satisfied by civil or administrative proceedings, at least for an offender who is not a persistent violator.

upon defenses or bars to prosecution. Without revising the many redundant or inconsistent provisions in current law, any attempted statutory adoption of such broad concepts would cause intolerable conflicts.

Third, duplication and fragmentation of offenses is not confined to particular subject areas of the federal criminal laws, but is endemic. Attempts to reform any one subject area would necessitate modification of many statutes that also deal with other subject areas. Within the current Title 18, references to fraud, theft, and property destruction, for example, may appear within a single sentence describing an offense.<sup>55</sup> Reform of the theft laws, therefore, would require modifications in many statutes having relatively little to do with theft.

Fourth, successive, piecemeal efforts to enact portions of a new code would introduce into an already inefficient and confusing system a prolonged period of tumult during which there would always be one portion of the law or another in a state of flux with, arguably, unintended effects on untouched provisions. The invitation to direct and collateral litigation would be seized by numerous potential litigants who could benefit by exploiting the resulting uncertainties. The longer the period over which implementation would gradually take place, the longer the period of disruption. It would seem that in the field of criminal law, as in the field of economics, gradualism can be more painful to a nation than the "shock therapy" of a single, sweeping implementation.

Fifth, piecemeal reform proposals are likely to fare poorly when competing for congressional attention with other matters of greater apparent urgency or higher political visibility. Even if it should appear possible to garner the necessary congressional attention for passage of one set of provisions in an effort at step-by-step reform, there is no assurance that the re-

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55. See, e. g. , 18 U. S. C. § 1708 (1994).

quired congressional time could be secured for the next modest step. It appears that only comprehensive reform would be of sufficiently obvious importance to secure the necessary degree of sustained congressional attention.

*C. The Anticipated Benefits*

If the nation is able to achieve the sweeping changes necessary to convert the jumble of federal criminal laws into a true, comprehensive code, two kinds of benefits would accrue.

First, in any such codification there would be hundreds, perhaps thousands, of particular changes that would resolve conflicts, remove ambiguities, fill gaps, and otherwise make specific improvements in the law that would permit the effective investigation and prosecution of offenders who previously might have profited from the law's inadequacies. No codification could fail to have this effect. While the number of such specific improvements would depend upon the general philosophy guiding the draftsmen and the thoroughness of their research, the cumulative benefits would be significant.<sup>56</sup>

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56. For an overview of some of the specific benefits promised by the most recent federal criminal code reform bill introduced in the Congress, see Staff of the Senate Committee on the Judiciary, *The Criminal Code Reform Act of 1981, S. 1630, 97th Cong.* (1981), and U. S. Department of Justice, *Summary of Selected Law Enforcement Improvements in the Proposed Federal Criminal Code (S. 1630)* (1982). For another, very brief outline of a few of the potential benefits of S. 1630, see *Hearings*, pt. XVI, *supra* note 6, at 11760, 11763-65 (1981) (testimony of Attorney General William French Smith outlining the bill's improvements that would (1) make the process of proof of the mental elements of offenses more efficient, (2) help meet the problems of violent crime, (3) help make more effective the investigation and prosecution of offenses involving narcotics, (4) expand the laws concerning criminal misappropriation of taxpayers monies, (5) provide more appropriate attention to the needs of victims and witnesses caught up in the criminal justice process, and (6) create generally-applicable facilitation and solicitation provisions to increase significantly the likelihood of successfully prosecuting promoters and brokers of crime). As

Second, there would be substantial, overriding benefits that would accrue from the general simplicity and understandability fostered by such a code.<sup>57</sup> Those benefits would stem from increased efficiency in the application of the law.<sup>58</sup> There is no means by which an accurate prediction may be made of the degree of heightened efficiency that may be expected with such a new code, but given the fact that the effort would be a first-time codification rather than simply a recodification, and given the extreme disorganization of the existing federal law, the increase in efficiency should have a measurable impact on the operation of the federal justice system. As one Attorney General observed, "we have been laboring for decades under a complex and inefficient criminal justice system—a system that has been very wasteful of existing resources."<sup>59</sup> A more efficient system would permit the investigation and prosecution of a greater number of offenders by a stable number of investigators, prosecutors, and judges.

One benefit to the public from the increase in case processing capacity would stem from its incapacitative effect. Assuming, for purposes of illustration, that ten

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noted in section V, *infra*, several of the potential benefits of S. 1630—some in circumscribed form—were subsequently adopted in more limited legislation.

57. As practical evidence of the understandability of a federal criminal code drafted along the lines suggested above, several professors of criminal law—at Cornell University, the University of Virginia, and the University of Notre Dame, among others—informed the Department of Justice that they used the Department's legislative proposals for a new code as a principal text for first-year law students. Others have put to similar use the earlier proposal of the National Commission. See *infra*, pt. IV(B)(3).

58. As a collateral suggestion of the degree of simplification that may be expected, the proposed code in the last federal criminal code reform bill introduced in the Congress, S. 1630, contained 9 offense chapters as opposed to the 86 offense chapters in the current Title 18, and contained approximately 190 offense sections as opposed to the more than 600 separate offense sections describing over 1,200 offenses in the current Title 18. Compare the Table of Contents of S. 1630, with the Table of Contents of the current Title 18.

59. See Hearings, *supra* note 6, pt. XVI, at 11760, 11766 (1981) (statement of Attorney General Smith).

percent of the time of investigators,<sup>60</sup> prosecutors, and judges could be saved by eliminating the bulk of the confusion from the current law, that would be ten percent more time that could be devoted to the prosecution of offenders who today are able to escape justice as a consequence of our overloaded system.<sup>61</sup> On the basis of an analysis undertaken in 1987, the National Institute of Justice estimated that a ten percent increase in the federal conviction rate would mean the punishment of approximately 4,000 more offenders each year, and would result in roughly 4,500 offender-years of incarceration. By precluding 4,500 offender-years of criminal activity that otherwise would take place, this consequence of incapacitation alone would foster an annual savings to the American public of billions of dollars.<sup>62</sup>

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60. It is fair to assume that the effectiveness of criminal investigators, as well as the effectiveness of lawyers and judges, would be improved by clear, easily accessible penal laws.

When Sir Robert Peel first entered the British Cabinet as Home Secretary, two of his most urgent goals were police reform and law reform—in that order. His experience in office did not alter his estimate of the importance of these objectives, but it did cause him to reverse the order of their accomplishment; and his achievements in police reorganization and training came largely during his eventual Prime Ministership. It is said that he speedily learned that good police performance is highly dependent upon the existence of rationally conceived and clearly formulated criminal statutes.

*Williams v. District of Columbia*, 419 F. 2d 638, 640 (D. C. Cir. 1969).

61. A 1978 review of federal prosecution practices concluded that United States Attorneys declined to prosecute 62% of the complaints they received. A major reason was office workload; 22% of the declined cases were considered prosecutable. See General Accounting Office Rep., *U. S. Attorneys Do Not Prosecute Many Suspected Violators of Federal Laws* (1978).

62. See Edwin Zedlewski, National Institute of Justice Research in Brief, *Making Confinement Decisions* (1987). The estimated incarceration was predicated upon guideline sentences of imprisonment for 75% of the convicted offenders, with the sentences averaging only one and one-half years. The study concluded that the average offender, if not incarcerated, would commit approximately 187 to 287 offenses a year, each causing an average harm of approximately \$2,300. Under these computations, 4,500 offender-years of imprisonment would effectively

A separate benefit to the public from the increase in case processing capacity would result from its eventual deterrent effect.<sup>63</sup> Whatever its actual measure, it is apparent that at least some degree of greater efficiency and regularity in the application of the penal laws would be prompted by a comprehensive criminal code. Over time, this would increase public confidence in the administration of justice, and thereby increase the deterrent and morality-reinforcing effect of the law.<sup>64</sup> However difficult it may be to quantify this effect, the existence of the effect is nonetheless a reality

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preclude the commission of offenses causing between \$1.9 billion and \$3.8 billion in harm.

The same study today would reasonably be expected to result in estimates of greater benefits, given the expansion of the capacity of the federal system to the extent that the number of prosecutions is now substantially greater than that at the time of the study (heightening the significance of a 10% increase in efficiency), the higher average sentences now being meted out, and the larger proportion of drug offenders (a particularly crime-prone category) in today's prison population. Moreover, even though not all of the avoided harm would result in savings, the realized savings would dramatically exceed the \$89 million in confinement costs for 4,500 offender-years of imprisonment (based on the current federal cost for a year's imprisonment, including amortized construction costs, of approximately \$19,700). (Certainly, as noted by the last Attorney General to address the subject in any detail, "the increased efficiency of the new federal system . . . would far more than offset the costs of the training required for its implementation. "Hearings, *supra* note 6, pt. XVI, at 11760, 11767 (1981) (statement of Attorney General Smith).) See also David P. Cavanaugh and Mark Kleiman, *Sanctions* National Institute of Justice, *A Cost Benefit Analysis of Prison Cell Construction and Alternative* (1990); Mark A. Cohen, *Pain, Suffering, and Jury Awards: A Study of the Cost of Crime to Victims*, 22 *L. & Soc'y Rev.* 537 (1988).

63. Some analysts suggest that imprisoning an additional 3,000 offenders (75% of an additional 4,000 convicted offenders) would result in about 30,000 fewer future offenses because of deterrence alone. See Zedlewski, *supra* note 62, at 4-5.

64. Some greater efficiency would be promoted by a modern criminal code itself; the resulting increase in successful prosecutions would, through incapacitation, preclude a certain amount of crime, and this in turn would leave a slightly smaller number of offenders upon whom the criminal justice system could concentrate. While the effect on the overall level of crime might be marginal, it holds some promise of being cumulative.

that should neither be ignored nor discounted to the extent that it is not considered as factor in evaluating the consequences of codification.

#### IV. THE HISTORY OF PAST ATTEMPTS TO REFORM THE FEDERAL CRIMINAL LAW

The desirability of a federal criminal code—as a replacement for *ad hoc* legislation supplementing judicially developed common law concepts—has been apparent for some time. It was only after the development of the American Law Institute's Model Penal Code, and the adaptation of that approach to federal requirements by the National Commission on Reform of Federal Criminal Laws, that the feasibility of such an approach became as apparent as its desirability. The recognition of the concept's practicality prompted a sustained governmental effort to enact a federal code. The effort eventually stalled, largely as a result of problems arising from the amount of legislative time required to overcome shifting criticisms leveled at the evolving code proposal.

##### A. *The Historical Context*

The inherited English common law concepts, as embellished and modified by legislation, have long been recognized in many jurisdictions as candidates for thoughtful codification. Different attempts at codification have reached different degrees of theoretical and practical success. The greatest success probably has been that achieved in the United States with the promulgation of the Model Penal Code.

##### 1. The Common Law

The body of the criminal law inherited by the American colonies from England bore only a few faint traces of the organizational concepts of the Roman law

and none of the instructive influences that later emerged with the best of the continental codes—particularly those of France and Germany. The inherited body of law had developed in England by accretion. It was the product of a series of judicial ebbs and flows that eventually grew into a loose aggregate. It was law “found” by judges on a random basis—law designed to achieve justice in the immediate cases to which it was applied, with generally less than careful thought as to its effect on slightly different kinds of cases that might arise in the future. It was law that relied upon reasonable and consistent exercises of judicial discretion—reliance sometimes better justified by faith than by practice. Although Parliament intruded from time to time for the purpose of correcting perceived anomalies or intolerable inefficiencies, the judges construed very strictly the enactments that sought to overrule their pronouncements.

Certainly, the common law often embodied sound principles and noble purposes. Those qualities, however, could hardly be found, and even then barely understood, by leafing through the clutter of opinions and enactments in which, collectively, they were encompassed. It was a body of law that often made a mockery of itself in pronouncing, as one of its tenets, that “Every man is presumed to know the law.”

## 2. The Recognition of the Utility of Codifying the Common Law

The shortcomings of the common law as the basis for a nation’s criminal jurisprudence were recognized long before the American Revolution. In 1614, Sir Francis Bacon, then Attorney General of England, introduced a bill in the Parliament to create a commission to initiate reform of the penal laws. The commission was charged to “review the state of penal laws to the end that such as are obsolete and snaring may be repealed, and such as are fit to continue and concern

one matter, may be reduced respectively into one clear form of law."<sup>65</sup> The project he envisioned was begun but not completed. Later, Oliver Cromwell called upon the second Protectorate Parliament to reform the "wicked and abominable" criminal laws.<sup>66</sup> That reform was never undertaken. By the time of the Revolution, there was little to exemplify the value of reform; the influence of Jeremy Bentham was only beginning to be felt, and Thomas Macaulay's successful codification of the common law for India,<sup>67</sup> and the unsuccessful proposals of the English Criminal Law Commissioners<sup>68</sup> and James Fitzjames Stephen,<sup>69</sup> were still to come.

In the United States, the anomalies of the inherited criminal law did not go unnoticed. Certainly the American Constitution, written at one time as a cohesive document that set forth in a single place the general principles under which the Nation was to be governed, was widely perceived to be distinctly superior to the unwritten Constitution of England; the similar benefits of a codified criminal law were apparent also. One of the first would-be codifiers was Thomas Jefferson, who had prepared a bill to codify the penalties of the State of Virginia.<sup>70</sup> Significant steps occurred

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65. Statement of purpose in a Bill of Grace introduced in Parliament in 1614, in 13 Works of Francis Bacon 60 (James Spedding et al. eds., 1869); 12 Works of Francis Bacon 41 (James Spedding et al. eds., 1869).

66. See Essays in the History of Early American Law 182 (David H. Flaherty ed., 1969).

67. See A Penal Code prepared by the Indian Law Commissioners (1838), and published by command of the Governor General of India in council.

68. See Sir Rupert Cross, The Reports of the Criminal Law Commissioners (1833-1849) and The Abortive Bills of 1853, in Reshaping the Criminal Law 5 (P. R. Glazebrook ed., 1978).

69. See Sir Rupert Cross, The Making of English Criminal Law: Sir James Fitzjames Stephen, 1978 *Crim. L. Rev.* 652. The Stephen Code was successful, however, in prompting and shaping legislative reforms in New Zealand, Australia, and Canada.

70. See 2 The Papers of Thomas Jefferson 305-24 (Julian P. Boyd ed., 1950); Kathryn Preyer, Crime, The Criminal Law and Reform in Post-Revolutionary Virginia, 1 *Law and Hist. Rev.* 53, 56-61 (1983).

when Edward Livingston produced a true, comprehensive criminal code for the State of Louisiana<sup>71</sup> and subsequently, as a member of Congress, introduced a bill to enact a modern criminal code for the federal jurisdiction.<sup>72</sup> Representative Livingston's proposed Louisiana code was not adopted, however, and his proposed federal code did not receive active consideration since congressional attention could not be diverted from the "press of business" on other matters.<sup>73</sup> Livingston's proposals for genuinely integrated criminal codes were followed by the far more modest and far less organized effort by David Dudley Field and William Curtis Noyes for the State of New York, which was there adopted,<sup>74</sup> and which subsequently influenced the development of the penal laws in more states than may have been warranted by its quality.<sup>75</sup>

### 3. The Model Penal Code Effort

By the early part of the twentieth century, the criminal laws of the states had developed in such an idiosyncratic fashion that the newly formed American Law Institute, which had hoped as one of its first projects to produce a simplified restatement of the substantive criminal law, concluded that a synthesis of the subject matter was not possible. In 1931, the Institute developed a proposal, not for an instructive summarization of the existing law, but for the formulation of a model code. The proposal was strongly sup-

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71. See *A Code of Crimes and Punishments*, reprinted in 2 *The Complete Works of Edward Livingston on Criminal Jurisprudence* 13-181 (1873).

72. See Edward Livingston, *A System of Penal Law for the United States of America* (1828).

73. See 7 Cong. Deb. 343 (1831).

74. See *Commissioners of the Code, The Penal Code of the State of New York* (1864).

75. For an excellent summary of Anglo-American codification history, see Sanford Kadish, *Codifiers of the Criminal Law: Wechsler's Predecessors*, 78 *Colum. L. Rev.* 1098 (1978).

ported by President Roosevelt, but was found too expensive to warrant financing during the prolonged period of economic depression.<sup>76</sup>

In 1950, the Institute's project was revived, a large advisory committee was created, and a staff was assembled to work under the direction of Professor Herbert Wechsler of Columbia University and Professor Louis Schwartz of the University of Pennsylvania. Work began in earnest in 1952. Shortly thereafter, Professor Wechsler observed:

Our penal law requires thinking through—especially upon the legislative level, where it is clear the basic norms must necessarily be set. The truth is that, with few exceptions, we have never had an integrated corpus juris in this field at all. . . . Inertia and the preference for ad hoc legislation dealing with defined and narrow problems mainly won the day. As our statutes stand at present, they are disorganized and often accidental in their coverage, a medley of enactment and of common law, far more important in their gloss than in their text even in cases where the text is fairly full, a combination of the old and the new that only history explains.<sup>77</sup>

The broad charter accorded the drafters—the production not of a distilled restatement nor of a uniform act, but of a model—gave them the freedom to follow logic and practicality in areas where others had been compelled to follow precedent. Working over a ten-year period, the drafters therefore were able to succeed in reducing the complexities and confusion of American criminal law into broad principles capable of specific application, and into an ordered compendium of described conduct that, with admirable brev-

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76. See Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 *Colum. L. Rev.* 1425, 1425-1426 (1968).

77. Herbert Wechsler, *A Thoughtful Code of Substantive Law*, 45 *J. Crim. L. Criminology & Police Sci.* 524, 525-26 (1955).

ity and simplicity, covered the gamut of conduct warranting penalization.

The result, published in 1962, was acclaimed by many academicians as restoring intellectual respectability to the criminal law.<sup>78</sup> Moreover, it was found by many legislators to be sufficiently pragmatic to commend itself for what it had been intended—a model for state criminal law reform. In the decades that followed its promulgation, the Model Penal Code was used as the basis for significant revisions of the laws—if not complete recodification—in two-thirds of the states. The factors that led to its general success were the critical need for reform (which was made all the more apparent by the code's simplicity); the competence of the work underlying the code; the high quality of the code's draftsmanship; and the general feeling of momentum imparted by its consideration, in whole or in part, in so many state legislatures at once.

### *B. The Federal Effort*

For almost a century and a half after Representative Livingston's unsuccessful attempt to convince the Congress of the need to undertake the drafting of a comprehensive federal criminal code, the Congress continued annually to add to the accumulation of disparate, *ad hoc* enactments, without pausing to reflect whether the accretion of penal provisions constituted, collectively, a reasonable body of criminal law. Eventually the confusion caused by the approach became so obvious that the Congress in 1948 approved a superficial culling and rearrangement of the accreted provisions.<sup>79</sup> The exercise, however, accomplished little more than sweeping a host of internally-disorganized statutes containing fragmentary coverage into a series of chapters laid out in the peculiar alphabetical order

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78. See, e. g., Herbert L. Packer, *The Model Penal Code and Beyond*, 63 *Colum. L. Rev.* 594 (1963).

79. See Act of June 25, 1948, 62 Stat. 683, Pub. L. No. 80-772 (1948).

noted earlier. The alphabetized confusion was reenacted as positive law—Title 18 of the United States Code.

In the 1960's, a number of influences coalesced to concentrate national attention upon issues of crime and criminal justice. The American Law Institute published its Model Penal Code, demonstrating to a previously dubious legal profession the simplicity that could be achieved through an inventive recasting, and thoughtful embellishing, of the principles inherited from the English common law. Sociological studies of crime improved in quality, a potential emerged for inexpensive computer analysis of statistical information concerning crime and justice, economic cost-benefit evaluations began to be applied to the field of criminal justice, and management techniques for reasonably-effective operation of governmental programs were found feasible in the justice area. Finally, as the prospect of combining some of these promising developments began to dawn on those involved with the operation of state and federal justice systems, the necessity of doing so was hastened by social changes. Crime began to be perceived as having reached an intolerable level, and a vocal minority began to call into question a number of the Nation's traditional moral and social norms. In short, the tools, and the impetus, had evolved for introducing more logic into the life of the law.

This combination of factors prompted several complete reappraisals of the Nation's approach to crime and justice. Preeminent among them was a re-examination conducted by the President's Commission on Law Enforcement and Administration of Justice, established by President Lyndon Johnson in 1965.<sup>80</sup> One of the Commission's early conclusions, contained in an interim recommendation and later repeated in

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80. See Exec. Order No. 11,236, 3 C. F. R. 329 (1965).

its report,<sup>81</sup> was that strong consideration should be given to appointing law revision commissions to review and revise the nation's criminal statutes.

1. The Creation of a National Commission on Reform of Federal Criminal Laws (1966)

In response to this early conclusion of the President's Commission, President Johnson transmitted a message to the Congress in which he graphically directed attention to the extent of crime in the Nation, stated that the first duty of government was to provide for the safety and security of its citizens, called for a national strategy against crime, and, as a part of that strategy, advocated revision of the federal criminal laws.

We must modernize our criminal laws. I propose the appointment of a Commission to conduct a comprehensive review of all the Federal criminal laws and to recommend total revision by 1968.

A number of our criminal laws are obsolete. Many are inconsistent in their efforts to make the penalty fit the crime. Many—which treat essentially the same crimes—are scattered in a crazy-quilt patchwork throughout our Criminal Code.

The Commission will be composed of outstanding Americans, including Members of the Congress, officials of the executive branch, jurists, and members of the bar. This Commission will bring to us the most modern and rational criminal code.

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81. See President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 283 (1967).

We are a nation dedicated to the precepts of justice, the rule of law, and the dignity of man. Our Criminal Code should be worthy of those ideals.<sup>82</sup>

The congressional response was immediate. Senator John McClellan of Arkansas promptly introduced a bill to establish such a commission,<sup>83</sup> as did Representative Richard Poff of Virginia<sup>84</sup> and a number of other members of the House of Representatives. Among the witnesses testifying in support of the proposal was Deputy Attorney General Ramsey Clark who noted that:

The proposed revision would be the most ambitious initiated in this century, if not in the history of the Republic. In view of the state of the Code, the limited purposes of the 1948 codification and the hundreds of criminal statutes enacted since, it is imperative that these laws be completely and carefully reviewed.<sup>85</sup>

Thereafter the Judiciary Committee of the House of Representatives reported out a bill, not to create a criminal law *revision* commission as proposed by the Administration, but to create a criminal law *reform* commission.<sup>86</sup> The Committee report explained that the Commission

would not be limited to recodification or revision, merely restating existing laws and limiting disparities, but would itself determine where its attention will best be focused after having had an opportunity to review the entire spectrum of the criminal laws, including also the possible codification of case law where needed to modernize the system.<sup>87</sup>

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82. Message from the President, 112 Cong. Rec. 5368, 5370 (1966).

83. See S. 3064, 89th Cong., 112 Cong. Rec. 5403-05 (1966).

84. See H. R. 13714, 89th Cong. (1966).

85. 112 Cong. Rec. 27987 (1966).

86. See H. R. 15766, 89th Cong., 112 Cong. Rec. 13375-76 (1966).

87. 112 Cong. Rec. 27987 (1966).

By November of 1966, both houses had voted to establish a "National Commission on Reform of Federal Criminal Laws," and their enactment was signed into law.<sup>88</sup>

## 2. The Work of the Commission (1967-1970)

The Commission established by the Congress was composed of three members of the Senate appointed by the President of the Senate, three members of the House of Representatives appointed by the Speaker of the House, three members appointed by the President, and three federal judges appointed by the Chief Justice. Former Governor Edmund Brown, Sr., of California was appointed as the Commission's Chairman, and Representative Poff, the principal author of the Act creating the Commission, was appointed as its Vice Chairman.<sup>89</sup> The Commission was assisted by a fifteen-member Advisory Committee, with former Justice Tom Clark serving as its chairman.<sup>90</sup>

For its staff Director, the Commission selected Professor Louis Schwartz, a professor at the University of Pennsylvania Law School, who had been a co-reporter for the American Law Institute in the development of the Model Penal Code. For Deputy Director,

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88. See An Act to Establish a National Commission on Reform of Federal Criminal Laws, Pub. L. No. 89-801, 80 Stat. 1516 (1966).

89. The other members of the Commission were Circuit Judge James Carter of California (until December 1967), Representative Don Edwards of California (until October 1969), Circuit Judge George Edwards of Michigan (from December 1967), Senator Sam Ervin of North Carolina, District Judge Leon Higginbotham of Pennsylvania, Senator Roman Hruska of Nebraska, Representative Robert Kastenmeier of Wisconsin, District Judge Thomas MacBride of California, Senator John McClellan of Arkansas, Representative Abner Mikva of Illinois (from October 1969), Mr. Donald Thomas of Texas, and Mr. Theodore Voorhees of the District of Columbia.

90. The other members of the Advisory Committee were Charles Decker, Brian Gettings, Patricia Harris, Fred Helms, Byron House, Howard Leary, Robert Morgenthau, Louis Pollak, Cecil Poole, Milton Rector, Elliot Richardson, Gus Tyler, James Vorenberg, William Walsh, and Marvin Wolfgang.

the Commission chose Richard Green, who had been the project director for the American Bar Association's Standards for Criminal Justice. Together, they directed a staff of close to twenty professionals, which was augmented by an approximately equal number of part-time consultants.

One of the first conclusions of the Commission was that its mandate, which it read to encompass not only substantive reform but procedural reform as well, was too ambitious. It quickly resolved to concentrate on substantive penal code reform; to work toward a comprehensive, complete, and integrated code adapted for the federal jurisdiction; and to avoid disharmony, which would otherwise be occasioned by serious policy differences among members, through the technique of setting forth alternative provisions in those areas in which no consensus seemed possible. Even with the narrowing of the Commission's focus and with its adoption of a method for obviating prolonged debates on controversial issues, the Commission soon found that it would need more time to complete its task. It secured from the Congress an extension of one year in which to submit its report—until November of 1970.

### 3. The Report of the Commission (1971)

In July of 1970 the Commission published a *Study Draft of a New Federal Criminal Code*,<sup>91</sup> solicited public comments, and thereafter adopted a number of changes. In January of 1971, the Commission transmitted to the President, and to the Congress, its final report,<sup>92</sup> which it described as a "work basis" for an entirely new Title 18 of the United States Code. The report was supported not only by commentary appear-

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91. See National Commission on Reform of Federal Criminal Laws, *Study Draft of a New Federal Criminal Code* (1970).

92. See National Commission on Reform of Federal Criminal Laws, *Final Report* (1971), reprinted in 1 *Hearings*, supra note 6, at 129-517 (1971) (hereinafter *Final Report*).

ing after each section, but by over 1,700 pages of detailed analysis of the existing state of the law and the effect of the proposed revisions.<sup>93</sup>

The proposed new code contained dramatic departures from past federal practices. It included all of the broad-scale changes noted above as necessary for a comprehensive, modern code. It succeeded, in essence, in adapting the approach of the Model Penal Code to the more limited focus of federal law enforcement responsibilities by using an imaginative and workable means of reflecting the narrower reach of federal jurisdiction.

In general, the code proposed by the Commission presented a compendium of virtually all federal penal statutes, together with the rules for interpreting them and the procedures for imposing sanctions for their violation. The proposed code's most important attribute was that it succeeded in setting forth the law in a far more comprehensive, orderly, and simple fashion than might reasonably have been thought possible in view of the existing chaos. It incorporated important areas of judge-developed law into associated statutory provisions, thus providing for the first time a single, basic source of federal criminal law.

The proposed code was divided into three parts. Part A, consisting of seven chapters, contained the generally-applicable, cross-cutting provisions of the criminal law which would affect the other portions of the code.

Chapter 1 enunciated the broad principles and purposes of the criminal law that were intended to govern the interpretation and application of the code's provisions. It also set forth a glossary of terms used throughout the code (for example, "dangerous weapon," "element of an offense," "harm," "person"), assuring that the defined terms would be interpreted

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93. See National Commission on Reform of Federal Criminal Laws, Working Papers (1970).

similarly no matter where they appeared in the code.

Chapter 2 described the basis of federal penal jurisdiction. The approach employed by the Commission in this chapter provided the key to the simplified drafting of the offenses described thereafter. The jurisdictional chapter listed a dozen sets of circumstances that traditionally had been used by the Congress to justify federal investigation and prosecution—such as commission of an offense on federal lands, against a federal public servant, against property belonging to the United States, and through use of the mails or a facility of interstate commerce. The various kinds of circumstances were set forth in a series of subsections to which the offense sections in the body of the penal laws might refer by cross-reference in order to describe the particular instances that would warrant federal prosecution of the different offenses.<sup>94</sup> Each penal offense, therefore, could be defined in terms of the underlying misconduct (for example, the conduct constituting a kidnapping), just as would occur in a state criminal code. In a separate subsection of each offense section, however, there would be set forth a cross-reference to one or more of the particular provisions appearing in Chapter 2 that had been found to justify the federal government's exercise of jurisdiction to investigate and prosecute the specified criminal conduct (for example, the transportation of a kidnapping victim across a state line). This approach, by removing from the description of the heart of an offense all of the previously-customary language detailing the jurisdictional elements, succeeded in allowing far clearer definitions of substantive misconduct. It

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94. Although the code reform legislation later introduced in the Congress incorporated almost all of the Commission's major innovations, this particular aspect of the jurisdictional approach—the cross-references to the bases defined in Chapter 2—was abandoned in favor of spelling out the applicable bases in the jurisdiction subsections under each offense. The modification of the Commission's approach was, comparatively, a minor matter of mechanics.

also enabled the Commission to propose a dramatic consolidation of many existing federal offenses into a few offenses with several jurisdictional bases. The technique was sufficiently adaptable that it could be used either to parallel the jurisdictional reach of federal offenses under existing law, or to expand or retract that reach.

A second jurisdictional innovation was contained in a provision permitting the federal government to prosecute for certain common law kinds of offenses committed in the course of specified federal crimes—an ancillary form of jurisdiction. Under such a provision, for example, if a serious injury to a victim occurred as a part of a sabotage offense, the federal government, in the course of charging and prosecuting for the sabotage, would also be permitted to charge and prosecute for the battery. The purpose of providing jurisdiction over such ancillary offenses was completeness as well as economy; when federal jurisdiction is exercised over an offense, an overworked state prosecutor's office seldom follows with independent prosecution of collateral offenses. The Commission believed that this was an acceptable means of assuring the prosecution of a defendant for all the wrongs occasioned by his conduct, even though, absent the principal federal offense, federal jurisdiction ordinarily would not lie over related assaults, restraints, property destruction, or other wrongs.

The jurisdictional chapter also contained a further innovation. It sought to discourage the exercise of federal jurisdiction in situations better left for state investigation and prosecution. The Commission incorporated a provision, new to federal law,<sup>95</sup> encouraging federal prosecutors to use restraint in the exercise of their jurisdiction in instances where, as is common, concurrent state jurisdiction also exists. The provision

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95. Current federal law, as noted previously, requires a United States Attorney to prosecute *all* offenses arising in his district. 28 U. S. C. § 547 (1994).

set forth a checklist of factors for officials to employ in determining whether a case is of sufficient federal interest to warrant federal, as opposed to state, response.

Chapter 3, dealing with “culpability,” adopted the foremost innovation incorporated in the Model Penal Code. It described in a simple fashion the states of mind that must accompany prohibited acts before they can be found to constitute violations of the penal laws. It reduced the 78 mental states the Commission had identified within Title 18<sup>96</sup> to four defined terms—“intentionally,” “knowingly,” “recklessly,” and “negligently”—like most modern state criminal codes that have followed the American Law Institute’s approach. This simple yet sophisticated treatment of culpability allowed far greater clarity and precision in the Commission’s drafting of the penal statutes, while still permitting, by means of appending the particular terms to different aspects of criminal conduct, all of the flexibility necessary to the thoughtful description of offenses.<sup>97</sup> Moreover, it assured that each of the four terms would carry the same meaning throughout the penal law, rather than having meanings that varied from one statutory provision to another as has been the case under the current law.

Chapter 4 described the circumstances under which an individual or an organization could be held criminally liable for the conduct of another individual or organization. It undertook to codify, and to modify where it found it appropriate, much of the current, judicially-developed law concerning accomplices and corporate liability.

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96. See Acimovic, note 37.

97. For example, the description of an offense could state that a violation would exist if a person intentionally engaged in specified conduct, with knowledge of certain circumstances, and thereby recklessly caused a particular result. Almost endless combinations are possible in applying four different mental states to different acts, circumstances, and results.

Chapters 5 and 6 set forth, respectively, common defenses based upon lack of responsibility and common defenses involving justification or excuse. Such generally-applicable defenses previously had been absent from the federal statutes, and had been left to *ad hoc* explication by the courts. The Commission recognized, however, that it could not accurately describe what constituted criminal conduct in the penal provisions unless it also described what constituted general exceptions to criminal conduct in chapters setting forth defenses. Some of the defenses it defined were drawn from federal case law; some deviated from the case law for reasons explained by the Commission in its comments and its *Working Papers*.<sup>98</sup>

Chapter 7, the last chapter in Part A, contained a variety of bars to prosecution, including, for example, a uniform federal approach to a statute limiting the time within which prosecutions must be initiated. Again, some of the concepts were familiar from the federal case law, and some were new.

Part B of the Commission's proposed code, consisting of chapters 10 through 18, contained the substantive penal offenses. All were set forth for the first time in a single title of the United States Code, and grouped in an orderly, rational arrangement such as one would find in a state criminal code. The Commission sought to describe the offenses in as clear a fashion as the appropriate precedents would permit, using many of the common terms defined in Part A. As noted above, the provisions permitting the federal government to prosecute for an offense were no longer buried in the description of the criminal conduct. In-

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98. The codification of general defenses, although commonly considered to be one of the more important potential contributions of the Commission's draft code, was largely eliminated from the major code reform bills in the Congress after it was concluded in 1976 that any formulation of the defenses, at that particular time, would be likely to provoke more controversy than could comfortably be absorbed. The general defenses were to be left for debate, resolution, and adoption after passage of the rest of the code. See *infra* section IV(B)(5)(a)(ii).

stead they were set forth in a separate subsection of each section describing an offense, which, for the most part, simply cross-referenced to the particular provisions of the catalogue of jurisdictional bases appearing in the jurisdictional chapter of Part A.<sup>99</sup>

Chapter 10 set forth the offenses of general applicability—the inchoate offenses. In addition to including the long-familiar provision making it a federal offense to act in furtherance of a conspiracy to commit a specified federal crime, the chapter included a general provision that made it an offense to attempt to commit a federal crime, a general provision that made it an offense to solicit another person to commit a federal crime, and a general provision that made it an offense to facilitate the commission of a federal crime by another person.

Chapters 11 through 18 described various sets of penal offenses involving, respectively, national security; foreign relations, immigration, and nationality; integrity and effectiveness of government operations; internal revenue and customs; civil rights and elections; danger to persons; destruction and taking of property; and public order, health, safety, and sensibilities. In recasting the counterpart provisions of the existing Title 18 into the new format, the Commission, largely as a result of its new drafting approach to jurisdictional and culpability requirements, was able to achieve a dramatic consolidation of the existing panoply of provisions, and to eliminate most of the redundancy and inconsistency of current law. As an example, several hundred current statutory provisions that related to the four subject areas noted earlier<sup>100</sup>—theft, forgery and counterfeiting, false statements, and property destruction—were consolidated into nineteen sections of the proposed new code.<sup>101</sup>

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99. See *supra* note 94.

100. See *supra*, section II. C. 2. a.

101. See Final Report, *supra* note 92, §§ 1351, 1352, 1701-1705, 1731-1734, 1736-1738, 1751-1753, 1755, 1756.

Part C of the proposed code introduced a totally recast series of provisions governing the sentencing of convicted offenders. It classified offenses by grade, described the consequences (in terms of probation, fine, imprisonment, and parole) of each grade of offense, and provided criteria to be employed by judges in the imposition of sentences.

The Commission also suggested a simple reform of the regulatory laws carrying criminal penalties for their violation. It proposed a single statutory provision to which those regulatory offenses outside the new code could refer for specification of appropriate criminal penalties. The provision would set generalized penalties scaled to the culpability, persistence, and dangerousness evinced by the conduct breaching the regulatory statutes. The specified penalties were limited to the misdemeanor range; serious forms of regulatory offenses would be prosecutable as felonies under the main body of the proposed new code.<sup>102</sup>

#### 4. The Response of the Executive Branch to the Report of the Commission

Those who had followed the work of the Commission recognized that the response of the Executive branch would be the crucial factor in determining whether the effort would conclude as an academic exercise or, instead, would provoke serious governmental consideration. A fair hearing in the Legislative branch appeared likely, since three of the Commission's members were Senators and four were Representatives; those members had been exposed extensively to the need for change in the federal criminal law and to various rationales underlying the Commission's response to that need, and they were expected to continue their involvement during any legislative consideration of the project. The

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102. See Final Report, *supra* note 92, § 1006.

Administration, however, was another matter.

One potential difficulty in this respect was that the President and the Attorney General who had launched the Commission had been succeeded by a President and an Attorney General who emphasized discernibly different (although by no means inconsistent) interests in addressing the problems of crime and criminal justice. In the past, commissions begun with fanfare by one Administration—to make recommendations on subjects involving far less potential for controversy and philosophical difference—had lived to see their work products ignored, if not shunned, by successor Administrations. That fate was considered to be a clear possibility.

In addition to the political difficulty of gaining acceptance from a new Administration, there were difficulties of institutional inertia. The career attorneys of the Department of Justice had spent their professional lives working within the existing statutory framework. While they were hardly oblivious to the inanities of the current statutory confusion, they had learned over time to pick and choose among redundant and conflicting provisions, thereby enabling the government to succeed in the investigation and prosecution of most serious offenses. Their ability to work with difficult law within their areas of specialty was highly valued as expertise. They would be expected to exhibit an understandable hesitation about welcoming a replacement of the statutes upon which that expertise was based, and a natural professional reluctance to abandon a familiar but creaky mechanism, that could be jury-rigged into operating condition when necessary, in favor of shiny new machinery of unknown workability. Although the membership of the Commission, its Advisory Committee, and its staff had included several individuals with prosecutorial backgrounds, it was recognized that this would not lend significant credence to the Commission's product from the viewpoint of Department of Justice lawyers. Ca-

reer attorneys tend to view those who move in and out of prosecutorial positions as amateurs whose involvement cannot not be relied upon to assure the evolution of a work product that would meet legitimate prosecutorial concerns.

Recognizing the potential difficulty of enlisting the new Administration to the cause of penal law reform, the Commission made special efforts to seek and consider the views of both the political appointees and the career attorneys in the Department of Justice. When the Commission's study draft was published, the Commission asked that it be reviewed particularly carefully by the Department's divisions with criminal justice responsibilities. Commission staff members who had worked extensively on the proposed code visited the appropriate sections of the Criminal, Tax, and Civil Rights Divisions in order to explain to departmental attorneys what the Commission had intended to achieve and how the vastly simplified proposed code could be employed far more efficiently than the statutes with which the attorneys had been operating.

The Criminal Division coordinated the Department's review of the Commission's study draft—a somewhat hasty review that produced several hundred pages of analytical evaluations of mixed quality. The analyses were made available to the Commission's staff, which discussed the suggestions and criticisms with the Department's lawyers, and which thereafter made a number of changes in the course of preparing the Commission's final report.<sup>103</sup>

Significantly, the Department's analysis of the study draft produced the gradual emergence of a common conclusion among senior Criminal Division officials—a conclusion that an entirely new federal criminal code along the general lines laid out by the

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103. The author was responsible for coordinating the Department's work with the Commission, for briefing the White House staff with regard to the legal and policy implications of the Commission's report, and later for directing the Department's Criminal Code Unit.

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Commission was fundamentally sound. It was perceived as offering the promise of a far more effective federal criminal justice system. The conclusion and its bases were communicated to the White House staff in a series of detailed briefings, in anticipation of the President's receipt of the Commission's final report.

Accordingly, when the report of the Commission was delivered to President Richard Nixon in January of 1971, he accepted it as a significant step toward needed federal criminal law reform. In doing so, the President called attention to the deficiencies of the existing laws:

Over two centuries the Federal criminal law of the United States has evolved in a manner both sporadic and haphazard. Needs have been met as they have arisen. *Ad hoc* solutions have been utilized. Many areas of criminal law have been left to development by the courts on a case-by-case basis—a less than satisfactory means of developing broad governing legal principles.

Not unexpectedly with such a process, gaps and loopholes in the structure of federal law have appeared; worthwhile statutes have been found on the books side by side with the unusable and the obsolete. Complex, confusing and even conflicting, laws and procedures have all too often resulted in rendering justice neither to society nor to the accused.

Laws that are not clear, procedures that are not understood, undermine the very system of justice of which they are the foundations.<sup>104</sup>

The President then acknowledged the valuable work of the Commission,<sup>105</sup> announced that the Ad-

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104. See Hearings, *supra* note 6, pt. I, at 5 (1971).

105. He stated:

ministration would undertake a careful review of the Commission's proposal, and pledged to work in a bipartisan spirit with the Congress in an attempt to achieve the necessary reform.<sup>106</sup>

On the same day, the President transmitted to Attorney General John Mitchell a memorandum stating that "the entire [existing] Code is in dire need of comprehensive reform" and noting that the report of the Commission "provides a useful framework for considering the issues involved in reform of the federal penal law." The memorandum went on to direct that the Attorney General establish a team of experienced attorneys within the Department of Justice to work full-time on a comprehensive reform of the federal criminal code; prepare a thorough evaluation of the Commission's report; make an independent examination of the present federal criminal code and recommendations for its comprehensive reform; consider procedural as well as substantive areas of reform; and, after the foregoing thorough analysis, prepare and submit appropriate legislation encompassing comprehensive reform of the federal criminal laws.<sup>107</sup>

Two weeks later, Attorney General Mitchell issued a memorandum announcing the creation of a "Criminal Code Revision Unit" to undertake the work directed by the President.<sup>108</sup> The personnel for the Unit—which totaled between 8 and 12 over the course

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Composed of distinguished legislators, judges, attorneys—all of demonstrated competence in the field of Federal criminal law—the Commission was mandated to review exhaustively the Federal criminal code—and to make recommendations for both procedural and substantive reform.

The Commission has fulfilled its mandate . . . .

Even a brief examination of the report indicates the enormous investment of time and thought it represents, and the value of this vast work of 4 years . . . .

Id.

106. See id. at 6.

107. See id.

108. See id. at 84-85.

of its existence—were chosen from the ranks of the senior attorneys in the Criminal Division of the Department and in the various United States Attorneys Offices. The Unit was instructed by the Attorney General to prepare reports analyzing section-by-section and chapter-by-chapter the proposed changes and their effect, and periodically to present its emerging analyses, for review and policy guidance, before a special review committee headed by Assistant Attorney General William Rehnquist.

Over the course of approximately two years, the Unit undertook a very careful review of the existing state of the statutory and case law, using as its principal starting point the *Working Papers* published by the Commission. It examined in great detail the various components of the federal penal laws, the underlying principles, the historical antecedents, the state law counterparts, the foreign law analogues, and the related provisions in the Model Penal Code and the Commission's proposed code. In the process, it consulted extensively with many other attorneys with administrative and prosecutorial experience under the existing statutes. Although the Unit originally encompassed among its attorneys both supporters and skeptics with regard to the concept of complete codification, within a short time all of the participants became convinced of the marked superiority of a code along the lines suggested by the Commission. The principal effort of the Unit's attorneys soon focused on melding the simplicity of the Commission's draft with a clarified form of those portions of current statutory and case law that they did not believe were adequately incorporated by the Commission—a process intended to assure a code that would prove not only sound in theory but also practical in application.

The Department of Justice continued to work on the examination and rewriting of the National Commission's draft through early 1973. In March of 1973, President Nixon transmitted a message to the Con-

gress on *Our Federal System of Criminal Justice*, in which he stated that he would soon submit to the Congress a Criminal Code Reform Act aimed at comprehensive revision of existing federal criminal laws. This was the product, he noted, of the Department of Justice's study, and further refinement, of the Commission's proposed reform. Although he observed that "in some areas this Administration has substantial disagreements with the Commission's recommendations," he agreed fully with the "almost universal recognition that modification of the Code is not merely desirable but absolutely imperative."<sup>109</sup>

Shortly thereafter, Attorney General Richard Kleindienst transmitted a draft bill to the Congress. In his forwarding message, he noted:

The need for reform and codification of the federal criminal law is universally conceded. For too long now our efforts to protect life and property, human rights and domestic tranquillity have been hobbled by the most fundamental element of the criminal justice system, the law itself. While numerous individual criminal statutes, particularly some of the more recent ones, have been of great value, an even greater number have been of little or no use, and as a body of law the existing provisions have been sadly deficient. The Criminal Code Reform Act faces this problem squarely and meets it fairly, by providing a rational, integrated code which is both workable and responsive to the demands of our twentieth century society . . . .

Congress is now presented with its first opportunity in nearly 200 years to simplify and restructure the federal criminal law so as to serve more effectively the ends of justice in its broadest sense—justice to the individual and justice to society as a whole. While every facet of the proposed Code may not be viewed with equal favor by all observers, we do not think it too

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109. Message from the President, 119 Cong. Rec. 7652 (1973).

much to hope that the task of translating the proposals it embodies into reality will be approached with quiet reason and in a spirit of true bipartisanship. The monumental importance of the undertaking demands no less.<sup>110</sup>

The bill containing the Administration's proposed code was introduced by Senators Roman Hruska and John McClellan as S. 1400 of the Ninety-Third Congress.<sup>111</sup>

#### 5. The Effort to Enact a New Federal Criminal Code

For a period of a dozen years, the effort to enact a new federal criminal code was a principal preoccupation of several senior members of the Congress and a series of Attorneys General. The subject was a major focus of the Senate Judiciary Committee, was twice before the full Senate for consideration, and was the subject of a shorter but intense period of drafting and debate within the House Judiciary Committee.<sup>112</sup>

##### *a. In the Senate*

The Senate's consideration of legislation to enact a federal criminal code began promptly after its receipt of the National Commission's proposal, and continued as the Senate's primary criminal justice initiative for approximately a dozen years.

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110. 119 Cong. Rec. 9659-60 (1973).

111. *Id.* at 9655-69 (1973).

112. For an elaboration upon the interrelationships of those involved in the effort to achieve reform of the federal criminal laws, and a candid and accurate recitation of the details of the congressional consideration of the code reform bills, see Charles R. Wise, *The Dynamics of Legislation* (Jossey-Bass Publishers 1991).

## i. S. 1 and S. 1400 (1973-1974)

In early 1971, approximately one month after the submission of the National Commission's final report, the Senate Sub-committee on Criminal Laws and Procedures of the Committee on the Judiciary began the first of what was to become an extraordinarily long series of hearings on reform of the federal criminal laws.<sup>113</sup> Present at the beginning of the hearings were the three Senate members of the National Commission—Chairman McClellan, and Senators Hruska and Ervin—and also Senators Edward Kennedy, Phillip Hart, and Strom Thurmond. They began the hearing with the testimony of Attorney General Mitchell; proceeded to hear from the National Commission's Chairman, Vice Chairman, Director, and Deputy Director; and also heard from the first of a series of critics of the code reform effort. It was apparent during the course of the hearing that the members of the Subcommittee regarded the undertaking as warranting their serious involvement.

Thereafter, as the Department of Justice began its review and revision of the National Commission's draft code, the Subcommittee staff was assigned to undertake its own, parallel effort. During 1971 and 1972, the two efforts proceeded, with frequent communication between the attorneys working within the Department and the attorneys working within the Senate Judiciary Committee, but with no real coordination. As the work progressed, additional hearings were held in the Senate, with the printed hearing records soon reaching over 4,000 pages. In January of 1973, the draft code prepared by the Senate Judiciary Committee staff was introduced as S. 1 by Senators McClellan, Hruska, and Ervin.<sup>114</sup> It was followed, two months later, by the introduction of the Administra-

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113. Hearings, *supra* note 6, pt. I (1971).

114. 119 Cong. Rec. 989-1018 (1973).

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tion's bill, S. 1400, as noted above.

At this point, the supporters of federal criminal code reform in the Administration and in the Senate began to face the reality that the development of two distinctly different variations on the same essential theme was not the best way to ensure progress. The parallel efforts had produced thoughtful products, but not what was coming to be recognized as most needed—a single, commonly-supportable vehicle for federal criminal code reform. The familiar tactics that had been used in the past to work toward criminal law legislation of lesser scope—including the tactic of introducing multiple bills to provide leverage for future compromise—began to be understood as unworkable for a project of this magnitude. The essence of the proposed code was its intended philosophical consistency, harmony, and structure. These, it became clear, were basic matters upon which agreement was crucial before specific policy elections could be made in casting individual penal provisions. It was a uniquely important venture, and it required a uniquely cooperative approach.

After recognizing the need for a single code reform vehicle, the Administration and the Senate directed their staffs to work cooperatively in the development of a synthesized draft, incorporating the best elements from the Administration and Senate variations on the National Commission's approach. With the direct, personal involvement of Attorney General Elliot Richardson, the most controversial issues were re-examined, resolved, and incorporated into the evolving, common draft.

As the joint drafting progressed, so did the hearings by the Senate Judiciary Committee, with almost 3,000 printed pages being added to the hearing record in 1973 alone. By that time, though, the subject had caught the attention of a number of critics, as well as supporters, and controversy on a variety of points be-

gan to develop.<sup>115</sup> The controversy, however, was soon overshadowed by the emerging interest in the series of events that came to be known as the Watergate matter. The Watergate issues diverted so much attention from the code reform effort, as well as from other subjects, that they eventually mooted ongoing consideration of the code.

The shift of public focus away from the proposed code provided an opportunity for quiet progress on the joint Administration-Senate draft. The first version of a joint draft was completed, and published as a Judiciary Committee print, in October of 1974.<sup>116</sup>

ii. S. 1 (1975-1976)

In January of 1975, Senator McClellan introduced, as a new S. 1, the *Criminal Justice Reform Act of 1975*.<sup>117</sup> This was the final product of the joint effort of the Department of Justice attorneys, then operating under the direction of Attorney General William Saxbe and Deputy Attorney General Laurence Silberman, and the Senate Judiciary Committee staff attorneys, operating under the direction of Senator McClellan. On this occasion, Senator McClellan had several co-sponsors including, initially, Senators Hruska, Birch Bayh, James Eastland, Hiram Fong, Robert Griffin, Mike Mansfield (the Majority Leader), Frank Moss, Hugh Scott (the Minority Leader), Robert Taft, and John Tower. In June of 1975, President Gerald Ford added his personal support, stating that "everyone will agree . . . that comprehensive reform of the Federal Criminal Code is needed" and terming the passage of the kind of comprehensive code reform set forth in the Criminal Justice Reform Act as a legisla-

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115. See *infra* section IV. C.

116. See Staff of Senate Comm. on the Judiciary, 93d Cong., S. 1. (Comm. Print 1974).

117. See 121 Cong. Rec. 121, 215-20 (1975).

tive priority in the federal effort against crime.<sup>118</sup>

Despite the widespread bipartisan support for a new federal criminal code along the lines set forth in the new S. 1, the effort soon was mired in controversy. Although only two days of formal hearings were held by the Senate Judiciary Committee in 1975, the Administration and Senate supporters of code reform found themselves enmeshed in a series of meetings, discussions, and debates—public and private—with regard to many of the issues on which attention had focused, especially those perceived as affecting civil liberties of citizens.<sup>119</sup> Senate sponsors, Department of Justice officials, and former members of the National Commission, spent a considerable amount of time explaining the provisions of the current federal criminal law, in order to place the counterpart provisions of the proposed code in reasonable perspective.

By early 1976, the merits of the code reform proposal had become sufficiently clouded by controversy that Senator Mike Mansfield, the Majority Leader, and Senator Hugh Scott, the Minority Leader, sent a joint memorandum to the primary sponsors—Senators McClellan, Hruska, Phillip Hart, and Kennedy. In the memorandum, they noted that the bill offered significant improvements over the existing law, that ninety percent was relatively non-controversial, but that arguments between liberals and conservatives over the remaining ten percent were jeopardizing the bill's prospects.<sup>120</sup> To break the impasse, Senators Mansfield

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118. See *id.* at 19672, 19673 (1975).

119. See *infra* section IV. C.

120. See 122 Cong. Rec. 3099 (1976). Specifically, they stated:

It has become clear that S. 1, under attack from both the left and the right, is in a great deal of jeopardy. It is also understood that many Senators, both liberal and conservative, are vitally interested in passing a criminal revision and reform bill during this session. The controversy involves two broad areas. On the one hand are those sections of the bill that are deemed to be repressive, that change the existing law and existing procedures in ways that even the courts might later strike down in the face of the Constitution. On the other hand, the liberals

and Scott recommended that the four Senators to whom the memorandum was addressed, and who collectively represented "the full spectrum of viewpoints" involved in the issues, meet together and reach an accommodation that would result in "the introduction of a brand new bill with certain understandings and having certain agreed upon characteristics."<sup>121</sup> The new bill, they noted, would require a new number, since "the number, S. 1, now serves as a battle cry for both the right and the left." Substantively, the new bill would require deletion of the most highly controversial issues, particularly those involving defenses to criminal conduct and those involving the series of provisions on espionage and disclosure of classified information, thereby leaving in place the existing law in the identified areas. Most important, in resuming the effort they noted:

It should be understood and agreed by the Senators most concerned that in the context of considering this new bill *at all stages* none of the heretofore controversial aspects of S. 1 would be raised. Thus *none* of the more "repressive" measures or the more "liberalizing" measures would be offered [as amendments] to the new bill (and would be opposed). They could be offered, of course, either in the form of separate vehicles or separate bills or as amendments to *other* legislation on the floor.<sup>122</sup>

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would in some instances like not only to eradicate the more repressive features of the bill but to "liberalize" the existing law and in effect use the S. 1 vehicle to overturn court decisions that have supported so-called law enforcement interpretations. As a result an impasse has been reached and, unless resolved, it is unlikely that the remaining 90% of S. 1 (relatively noncontroversial) will be addressed by the Senate. This would be unfortunate because, as *all agree*, included in that 90% are measures that would bring a great deal of logic and relevance and consistency to the present law.

121. *Id.*

122. *Id.*

The suggested approach was accepted by the four Senators to whom it was presented. It was also accepted by Attorney General Edward Levi and Deputy Attorney General Harold Tyler as guiding the future work of the Department of Justice. Those parties agreed that it was the general structure and simplicity of the new federal criminal code was of paramount importance rather than the resolution of particular subsidiary issues and, consequently, that they would jointly draft a bill avoiding the seriously controversial points, reform the law where all parties could agree upon the desirability of such reform, and revert to retention of the current substance of the law, albeit in simplified verbiage, in areas where change could not be agreed upon. It was understood that the existence of serious controversy should not preclude all possible change; it should preclude only change that would attempt resolution of the controversy in the context of the code effort. Divisive issues would be put aside until passage of the code, but afterward they might be raised separately and given the individual attention that they would warrant. Fundamental to the understanding was that *all* parties would stand together in opposing any future proposal for change, proffered by other Senators in the course of Committee action or floor debate, if any *one* of the parties found the proposal substantively objectionable.

This understanding served as the operating, strategic premise forming the basis of all future progress in the Senate. Representatives of the four Senators, together with representatives from the Department of Justice, thereafter worked together to draft a new bill that would meet the stated criteria. The product of the joint effort, it was agreed, would be introduced at the beginning of the Ninety-Fifth Congress, in 1977.

iii. S. 1437 (1977-1978)

In May of 1977, after a delay to permit the incom-

ing Administration to examine the revised code reform bill and to work out resulting proposals for modifications, Senators McClellan and Kennedy introduced the new bill as S. 1437.<sup>123</sup> The most noteworthy difference from its predecessors—other than its deletion of the chapter on defenses and the subchapter on espionage and classified information offenses—was the bill's creation of a sentencing commission to set detailed guidelines for the imposition of sanctions on federal offenders.<sup>124</sup> The sponsors were soon joined by Senators Hubert Humphrey, Strom Thurmond, and Orrin Hatch as co-sponsors.

The first witness at the resumed Judiciary Committee hearings on the new bill was Attorney General Griffin Bell, who noted the close involvement of Department of Justice attorneys in the development of the proposal and stressed that it had his strong personal support as well as the full support of the Administration.<sup>125</sup> He stated:

I firmly believe that the result is as fair and workable a Federal criminal code as has yet been devised. It is a careful, yet progressive, balance; and care must be taken to assure that this is not upset by well-intended attempts to shift the code's emphasis either toward the views of those who would emphasize the need of our communities for more effective law enforcement, or toward the views of those who would emphasize the equally important need for strong assurance of individual liberties.<sup>126</sup>

Although the new bill did not prove totally devoid of controversy, the approach it embodied was successful in that it circumvented most of the issues that had prompted the serious schisms of the past. Shorn of the more controversial features, the basic proposal could

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123. See 123 Cong. Rec. 13059, 13061 (1977).

124. *Id.* at 13061-69.

125. See Hearings, *supra* note 6, pt. XIII, at 8593, 8595 (1977).

126. *Id.* at 8595.

be recognized by most observers, as well as by criminal law specialists, as a measure of unusual significance that offered sensible and needed change. News reporters introduced articles with such statements as “the bill . . . revising the federal criminal code brought Congress about as close as it ever comes to truly cosmic questions.”<sup>127</sup> Columnists with widely differing political views supported its enactment.<sup>128</sup> A number of lead editorials in *The Washington Post*, *The New York Times*, *The Boston Globe*, and *U. S. News and World Report*, among others, called for its passage, describing it in terms such as “[an] indisputably monumental achievement;” “one of the most important . . . pieces of legislation to come before Congress in years;” “legislation of great stature and importance—truly of landmark quality;” “a product of masterly legislative compromise;” “wholly laudable legislation;” “[supported by a] huge amount of scholarship;” “politically realistic;” “a remarkably good bill;” “an unprecedented opportunity;” “truly laudable reforms;” “long overdue;” and “ready to become the most remarkable achievement of this Congress.”<sup>129</sup>

S. 1437, with modifications, was favorably reported to the full Senate by the Senate Judiciary Committee in November of 1977. In January of 1978, with Senator Kennedy undertaking the principal leadership role following the death of Senator McClellan, the Senate held floor debate on the bill over a period of eight days. Numerous amendments

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127. Fred Barbash Hill, Blood Boiling at Dispute Efforts at Revising Code, *Wash. Post*, June 12, 1978, at A3.

128. See e. g. , Carl Rowan, Let's Reform the Contradictory Criminal Laws, *Wash. Star*, Sept. 23, 1977, at A9; James Kilpatrick, This Recodification Bill Should Pass, *Wash. Star*, Jan. 28, 1978.

129. See *Boston Globe*, Sept. 18, 1977, at B6; Straemlining the Criminal Law, *N. Y. Times*, May 9, 1977, at A30; Marvin Stone, Needed: New Criminal Code, *U. S. News and World Rpt.* , Aug. 15, 1977, at 68; Son of S. 1 Returns, *Wash. Post*, Oct. 2, 1977, at C6; The Criminal Code, *Wash. Post*, Jan. 19, 1978, at A24; Criminal Code (IV): Civil Liberties, *Wash. Post*, May 20, 1978, at A14; A Holdup of the Criminal Code, *Wash. Post*, June 19, 1978, at A22.

were proffered, but the coalition held to the terms of its agreement and the sponsoring Senators jointly and successfully opposed all amendments upon which they collectively could not agree. The bill passed by a vote of 72 to 15.<sup>130</sup>

Expectations for enactment of a new code were, at this point, higher than at any time since the creation of the National Commission. Eventually, however, after several former members of the Commission, and many others, failed in their attempts to spur the House of Representatives to favorable action on a counterpart bill, the Senate bill died with the expiration of the Congress. Interest in the subject remained very much alive, though, and President Jimmy Carter informed Attorney General Bell that he wished to "mount a major effort to pass [the] revised U. S. Criminal Code in 1979."<sup>131</sup>

#### iv. S. 1722 (1979-1980)

In 1979, the Administration and the interested Senators prepared a revised version of S. 1437. Attorney General Bell spent a considerable amount of time working with Senate supporters to lay a foundation for rapid progress. The resulting bill was introduced in September by Senators Kennedy, Thurmond, Hatch, Dennis DeConcini, and Alan Simpson as S. 1722.<sup>132</sup> President Carter personally urged its passage, and Attorney General Benjamin Civiletti, who undertook the supportive role previously played by his predecessors, announced that, "[i]n area after area, [the bill] . . . provides genuinely major advances for our criminal justice system."<sup>133</sup>

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130. See 124 Cong. Rec. 1463 (1978).

131. See undated handwritten note from President Carter to Attorney General Bell and Hamilton Jordan, returned on an Attorney General memorandum dated October 13, 1978.

132. See 125 Cong. Rec. 23537 (1979).

133. Hearings, *supra* note 6, pt. XIV, at 9905 (1979).

The Senate Judiciary Committee held further hearings, incorporated a change in the sentencing provisions to move to a determinate system of imprisonment, and favorably reported the bill to the full Senate by a vote of 14 to 1.<sup>134</sup> The scheduling of floor action on the Senate measure soon became complicated, in part, by events pertaining to the Presidential candidacy of a principal sponsor, Senator Kennedy. The Senate sponsors eventually elected to await action by the House of Representatives on the rapidly evolving House version of a code reform bill, and meanwhile encouraged an effort by their staffs to attempt informally to ready a version that could serve as the basis for a Senate-House compromise when enacted bills reached the post-passage conference committee. The supporters expected that the Senate would be able to take up the bill at least by the time of the post-election session—a time at which the House of Representatives would be ready to conclude action on its separate code reform bill. After the election, however, party control of the Senate shifted unexpectedly, and another principal sponsor, Senator Thurmond, found himself suddenly faced with new duties as the incoming Chairman of the Judiciary Committee and President Pro Tem of the Senate. Those events, in combination with other difficulties,<sup>135</sup> prompted Senator Thurmond to ask that further action on the bill be postponed until the following Congress.

v. S. 1630 (1981-1982)

In early 1981, with the arrival of a new Administration, the Department of Justice carefully re-examined S. 1722 as it stood at the end of the previous

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134. See S. Rep. No. 553, 96th Cong. (1980).

135. A few Senators, who were concerned about particular provisions in the bill and more concerned about counterpart provisions in the House bill, cautioned the sponsors that they thought the subject warranted more debate than the post-election session could accommodate.

Congress, suggested a series of modifications,<sup>136</sup> and worked closely with the interested Senators in readying a commonly-supportable bill for introduction. In September of 1981, the resulting proposal was introduced, as S. 1630, by Senators Thurmond, Biden, Hatch, Kennedy, DeConcini, Jeremiah Denton, Robert Dole, John East, Paul Laxalt, Alan Simpson, and Arlen Specter.<sup>137</sup> The first witness to testify on the revised bill was Attorney General William French Smith, who strongly proclaimed the new Administration's support for the bill and stated that it "represents the most significant series of law enforcement improvements ever considered by the Congress."<sup>138</sup> On the same day, President Ronald Reagan announced:

We will be working with the Congress to achieve a sweeping revision of the Federal Criminal Code. This matter is now pending before both Houses. A revised criminal code will help in our fight against violent crime, organized crime, narcotics crime, and fraud and corruption. I cannot stress too strongly the need for prompt passage of legislation that revises the Federal criminal code. This will be the foundation of an effective Federal effort against crime.<sup>139</sup>

In January of 1982, the Senate Judiciary Committee once again favorably reported a bipartisan bill to reform the federal criminal laws.<sup>140</sup> S. 1630, as modified by the Committee, was scheduled for floor action

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136. The most important change proposed by the new Administration was a procedure for confining, pending trial, defendants who were found by federal judges to pose a danger to the community. Although the issue sparked a great deal of public debate, it was found supportable, and accepted, by all of the Senators who intended to sponsor a new code bill.

137. See 127 Cong. Rec. 29025 (1981).

138. Hearings, *supra* note 6, pt. XVI, at 11760 (1981).

139. Address by the President to the International Association of Chiefs of Police (September 28, 1981).

140. See S. Rep. No. 307, 97th Cong. (1982).

the following April.

The scheduling of Senate consideration of S. 1630 was impeded by an unusually heavy legislative agenda. It was in this context that three conservative Senators announced that they would offer approximately 60 amendments to S. 1630, on each of which they proposed to engage in extended debate. Even though those involved in planning the legislative strategy on behalf of the bill's supporters maintained complete confidence in the resolve of the sponsoring Senators to stand together in opposing all the proffered amendments except those upon which they could collectively agree, there was some question concerning their ability to convince a majority of their colleagues to vote with them against the expected amendments. To avoid potential filibusters on each of the proposed 60 amendments, cloture of debate would be necessary. The prospect of securing it was tested on a motion to limit debate on taking up the bill, which unexpectedly lost by a 45 to 46 margin—15 votes short of the number required for cloture.<sup>141</sup> Although most of those involved in the process viewed this procedural difficulty as only a temporary impediment, the principal sponsor, Senator Thurmond, interpreted the vote as indicating that it would not be politically feasible to attempt to marshal the necessary support to force cloture on the controversial amendments, and he acquiesced in a decision of the Senate leadership to withdraw the bill from further consideration at that time.<sup>142</sup> He then informed his staff that he believed

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141. See 128 Cong. Rec. 7776, 7777 (1982).

142. The floor colloquy immediately following the vote revealed a general view that the bill had run into a "procedural cul de sac," that the vote in no way could be interpreted as a reflection on the merits of the proposed code, and that within a matter of hours or days it would return in another procedural posture. See *id.* at 7777-78. The colloquy also disclosed, however, a great unease on the part of the code sponsors that, absent any real progress on the counterpart bill in the House of Representatives, a concentrated Senate effort would be wasted. See *id.* at 7777-79.

that the best course would be to break out certain segments of the code and incorporate them into a separate bill—an interim measure that might be able to achieve the benefits of some of the code's proposed changes. The general code effort, he stated, could then be resumed in the following Congress.

No comprehensive code reform bill has since been introduced in the Senate.

*b. In the House of Representatives*

The code reform movement did not receive the same degree of attention in the House of Representatives that it had been accorded in the Senate. Although the House Judiciary Committee, like its Senate counterpart, included several members who had served on the National Commission—Representative Poff, who had been the Vice-Chairman of the Commission, and Representatives Robert Kastenmeier, Don Edwards, and Abner Mikva—there were several significant differences in the operations of the two Committees that affected the undertaking of a major code reform effort. The House Judiciary Committee had, at that time, less staff support than the Senate Committee; it had more of an arms-length relationship with the Department of Justice than did the Senate Committee; and it had a recent history of following, rather than preceding, the Senate on criminal justice initiatives. Furthermore, over the course of time, it began to appear to those working with both Houses of the Congress on criminal code reform that the biennial election of Representatives made the development and House passage of such a major legislative proposal very close to impossible. It proved difficult enough for the Senate sponsors to find the time to consider and review the innumerable code reform issues that required thoughtful responses in the Committee, on the floor, and in public appearances; it proved many times more difficult for the members of

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the House Judiciary Committee who would be starting to campaign for re-election by the time such a significant bill would probably be ready for full Committee action. It is in this light that the House work on federal criminal code reform must be viewed.

i. The Hungate Subcommittee (1973-1976)

Unlike the Senate Judiciary Committee, the House Judiciary Committee did not initiate work on code reform upon receipt of the National Commission's final report in early 1971. Aware that both the Department of Justice and the Senate Committee were working on what were explained as more practical refinements of the Commission's proposal, the House members elected to await the results of those two efforts. When the results were published as S. 1 and S. 1400 in early 1973, Representative William Hungate, as Chairman of the House Subcommittee on Criminal Justice, invited senior attorneys from the Department who had worked on code reform to provide informal briefings to the Subcommittee with regard to differences in the treatment of various criminal law issues under the current law, the Commission's proposal, and S. 1400. Although the briefings were well attended and the Chairman and others evinced considerable interest in the subject matter, the Watergate issues soon monopolized the attention of all the members of the House Judiciary Committee.

By 1975, the Watergate matter had concluded and the new S. 1 had been introduced in the Senate. Representative Charles Wiggins, at the request of the Administration, introduced an identical bill,<sup>143</sup> and Representatives Kastenmeier, Edwards, Mikva, and Joshua Eilberg, introduced, in bill form, the National

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143. See H. R. 3907, 94th Cong. (1975).

Commission's proposal.<sup>144</sup> In view of the widespread debate S. 1 immediately provoked in the Senate, however, the Hungate Subcommittee decided to limit itself again to a few informal briefing sessions.

ii. The Mann Subcommittee (1977-1978)

In 1977, at the time the bipartisan, compromise code reform bill bearing the label S. 1437 was introduced in the Senate, Chairman Peter Rodino of the House Judiciary Committee introduced an identical bill in the House as H. R. 6869.<sup>145</sup> An introductory hearing was held by the Subcommittee on Criminal Justice, under Chairman James Mann, to obtain the views of Attorney General Bell.<sup>146</sup> In January of 1978, upon Senate passage of S. 1437 the members of the House Subcommittee suddenly began to be subjected to considerable pressure—from their Senate colleagues, from the Administration, and from the press—to move the counterpart bill through the House. The Subcommittee promptly began a series of hearings at which there appeared a number of critics and supporters of the Senate's efforts.<sup>147</sup> In March and April, resolutions were introduced in the House urging the Judiciary Committee to disapprove the Senate approach and to initiate its own comprehensive hearings on the revision of the federal criminal code.<sup>148</sup> The Subcommittee continued its hearings, but, in light of the pressures from two directions and the shortness of time, it ultimately concluded that the task was too great. It ended its session by recommending, in essence, only a minor rearrangement of the existing

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144. See H. R. 333, 94th Cong. (1975).

145. See 123 Cong. Rec. 13301 (1977).

146. See Legislation to Revise and Recodify Federal Criminal Laws, Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong. 6 (1977).

147. See *id.* at 31-2883 (1978).

148. See H. R. Res. 1066, H. R. Res. 1125, 95th Cong., 124 Cong. Rec. 6140, 7064-65, 9697 (1978).

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statutory law.<sup>149</sup>

## iii. The Drinan Subcommittee (1979-1980)

Early in 1979, the House Subcommittee on Criminal Justice, under a new chairman, Representative Robert Drinan, began hearings on revision of the federal criminal code. The testimony of the Subcommittee's first witnesses—in particular former Senator Hruska—and its own review of the general subject matter, quickly caused the Subcommittee to conclude that the necessary revision of the federal criminal laws could not be accomplished by an incremental, piecemeal approach.<sup>150</sup> With the encouragement of Senator Kennedy and other Senate sponsors of a new code, and cognizant of the criticism attending the Subcommittee's work in the previous Congress, the Subcommittee members elected to undertake a highly concentrated effort to develop and pass a code reform bill. By the conclusion of the Congress, the Subcommittee had amassed a hearing record totaling over five and one-half thousand pages,<sup>151</sup> and had drafted and secured Judiciary Committee approval of a genuine code reform bill—H. R. 6915—that was supported by an extensive report.<sup>152</sup> In terms of drafting style and format, however, and in terms of numerous substantive points, the bill differed so much from the Senate

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149. See H. Rep. No. 95-29 (1979). The reaction to the Subcommittee's action was generally critical. As an example of the harshness of some of the press responses, the Washington Post, in two editorials, derided the Subcommittee for its "foolishness" in "flushing down the drain a decade of sustained effort" (A Holdup of the Criminal Code, Wash. Post, June 19, 1978, at A22), and called for rejection of the Subcommittee's modest recommendations as a "farce" and a "ridiculous pretense" that were "hardly worth the cost of the paper on which they are printed" (The Criminal-Code Farce, Wash. Post, July 18, 1978, at A10).

150. See H. R. Rep. No., 1396, 96th Cong., at 9 (1980).

151. See Revision of the Federal Criminal Code: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 96th Cong. (1979).

152. See H. R. Rep. No. 1396, supra note 150 (1980).

version that reconciliation of the two measures would require a considerable amount of time. During the latter part of 1980, the staffs of the two Committees together engaged in a series of informal negotiating sessions that undertook the function, in essence, of a post-passage conference committee, and made an impressive amount of progress in reducing the number of differences and in incorporating the areas of agreement into a tentative, compromise draft.<sup>153</sup> Eventually, however, it became apparent that the expected length of the necessary negotiations between representatives of the two houses, in conjunction with the timing of the Senate floor action which had moved the subject to the post-election period, precluded the completion of congressional action before the end of the session.

iv. The Conyers Subcommittee (1981-1982)

In early 1981, a comprehensive criminal code revision bill, identical to that which had been reported by the House Judiciary Committee in late 1980, was re-introduced by two Committee members who had worked extensively on the earlier version.<sup>154</sup> The dynamo pushing a code toward enactment in the previous Congress, however, was missing; Representative Drinan, a Roman Catholic priest, had withdrawn from politics at the request of the Vatican. The Subcommittee on Criminal Justice, then headed by Representative John Conyers, began hearings on the reintroduced measure, and also on a different code reform bill introduced by the Subcommittee Chairman.<sup>155</sup> Progress in the Subcommittee was slow, and the sup-

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153. The Chief Counsel of the Senate Judiciary Committee, Stephen Breyer, and Representative Drinan, acted as the de facto co-chairman of the informal working group.

154. See H. R. 1647, 97th Cong. (1981). The bill was introduced by Representatives Tom Kindness and Sam Hall.

155. See H. R. 4711, 97th Cong. (1981).

porters of code reform expressed concern when announced dates for reporting the bill to the full Committee passed without action.<sup>156</sup> President Reagan reminded Chairman Peter Rodino that he wished to work with him to ensure “prompt action” on the bill, noting that “the government’s first duty is to protect the people.”<sup>157</sup> In late April of 1982, as arrangements were being made to move the measure to the full Committee, the Senate sponsors suffered the procedural defeat noted above.<sup>158</sup> Absent the likelihood of Senate action in 1982, the House supporters of code reform turned their attention to other issues.

Reform of the federal criminal laws has not since been the subject of serious attention in the House of Representatives.

*C. The Major Criticisms of the Past Federal Effort and Responses to Those Criticisms*

It can be anticipated that any major effort to reform a nation’s criminal laws will be met with a considerable amount of criticism. Since the penal laws seek to define the proper limits of relations among individual citizens, and between individual citizens and their government, they lie near the philosophical foundation of an organized, civilized society. Proposed changes in the explication of rules defining such limits are therefore bound to be viewed with wariness and concern.

It cannot so easily be anticipated, however, which particular provisions will emerge as the primary focus of such concerns. Certainly it can be expected that penal provisions directed at criminal conduct that commonly provokes outrage on the part of citizens, or that

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156. See, e.g., Letter from Attorney General Smith to Chairman Rodino (Apr. 1, 1982).

157. Remarks of the President at signing ceremony for H. R. 4482, 97th Cong. (Apr. 2, 1982).

158. See *supra*, section IV. B. 5. a. v.

affects strongly-held societal moral values, will be examined with special care. So, too, will provisions perceived as capable of being employed in a manner restricting the civil liberties, or the civil rights, of citizens. Nevertheless, the particular provisions within these categories that will ignite controversy, and the procedural and substantive provisions outside these areas that will become the objects of denunciation, cannot readily be predicted. Two factors account for much of the uncertainty. First, the most vocal critics commonly are not from the ranks of those familiar with the existing criminal law. When exposed to the language of existing law, they tend to assume that it is new law, and when presented with a change in the language of existing law they tend to assume that it portends a change in the substance of the law. It is not easy to guess where the confusion will center. Second, some critics, in their anxiety about the possible adoption of a bundle of new laws that they do not fully understand, may chose to direct their public attacks in a general manner designed to generate unease about the package as a whole, hoping thereby to convert other potential doubters into allies who can help delay the legislative process. Occasionally particular provisions will be seized upon for this purpose; those provisions will vary with the identity of the prospective allies.

Certainly, not all concerns expressed by critics are misdirected or ill-motivated. Any effort to effect a major reform of penal laws will have its share of provisions that should, in fact, be modified or abandoned, and public scrutiny will help to identify them. It is independently useful, though, to have any proposed penal code bear the heat of the less well-founded public attacks. It is a tempering process, and, whether or not it results in many changes, it will produce a strengthened final product.

Like any other proposal for a new penal code, the work product of the National Commission, and its

progeny as they evolved in the Senate and the House of Representatives, became the subject of critical, public attacks. Some of the concerns had legitimate bases; some did not. Some were focused and thoughtful; some were generalized and intemperate. Some were raised by critics who appreciated and supported the goal of code reform; some were raised by those who, for diverse reasons, felt more comfortable with keeping the law in its existing state.<sup>159</sup> Three sets of criticisms—involving federal jurisdiction, civil liberties, and public mores—warrant particular mention.

Criticism pertaining to the reach of federal jurisdiction under the code proposed by the National Commission was heard even before publication of the Commission's final report. In late 1970, an article entitled *Chartering a National Police Force* complained, in essence, that the Commission's system of jurisdictional bases and its new concept of ancillary jurisdiction<sup>160</sup> would vastly expand federal jurisdiction into the domain previously left exclusively to the states.<sup>161</sup> Some of the criticism rested on a correct predicate; the Commission had in fact proposed expansion of federal jurisdiction in a variety of areas, and the ancillary jurisdiction concept was the principal means of doing so. In the Commission's view, as noted earlier, this was only reasonable; because these ancillary offenses were seldom prosecuted by state prosecutors after federal cases had ended, offenders were escaping a portion of

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159. The vast majority of critics were seeking to improve, from their standpoint, the proposed code. A few, however, privately explained the basis of their opposition as a preference for confused and inefficient laws that they assumed would be more difficult for a repressive federal government to misuse on a broad scale.

160. See *supra*, section IV. B. 3.

161. See Hearings, *supra* note 6, pt. I, at 63-76 (1971). The criticism prompted a resolution by the National Association of Attorneys General to disapprove of the Commission's proposed code. See *id.* at 6-11. The Association later supported the Federal code reform effort after the jurisdictional provisions had been modified. See Hearings, *supra* note 6, pt. XIII, at 9421 (1977); Hearings, *supra* note 6, pt. XVI, at 11932 (1981).

their legitimate punishment. Part of the criticism, however, rested on a misunderstanding of the reach of current federal jurisdiction. Because of the plethora of overlapping federal statutes scattered throughout the 50 titles of the United States Code, very few lawyers in the country had any real appreciation of the extent of criminal law jurisdiction already staked out by Congress as within the federal province. By consolidating these scattered laws into a series of easily-found provisions in the proposed new code, and by setting forth clearly the reach of the jurisdictional bases, the Commission had uncovered and made plain what had formerly been buried within the morass of the existing statutes. Thus, although the Commission certainly had undertaken an expansion of federal jurisdiction in some areas, its principal affront was in exposing the reach of current jurisdiction. This was understood by those who undertook further drafting on behalf of the Administration and the Congress.<sup>162</sup> For philosophical reasons, though, based upon perceptions of the nature of shared responsibility between federal and state authorities, the later drafters narrowed the jurisdictional reach of the proposed code in all subsequent versions, and recast the ancillary jurisdiction provision to focus upon collateral offenses involving injuries to persons that occurred in the course of federal crimes.<sup>163</sup>

Criticism concerning the fate of civil liberties under the proposed code was expressed throughout the congressional consideration of the code bills, but was particularly dominant during the early 1970's, when the critics perceived the prime advocates of reform to be within the Nixon Administration.<sup>164</sup> Although the

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162. See, e. g. , S. Rep. No. 307, 97th Cong., at 35 (1981).

163. *Id.* at 36-39 (1981); Roger A. Pauley, *Analysis of Some Aspects of Jurisdiction Under S. 1437, the Proposed Federal Criminal Code*, 47 *Geo. Wash. L. Rev.* 475, 491-96 (1979).

164. Thereafter it became common for such critics to suggest that subsequent code bills suffered from the drafting legacy of that Admini-

criticism was heard from many quarters, it was expressed most persistently over the years by civil liberties organizations.<sup>165</sup> Again, while some of the criticism was directed at changes in the law, the overwhelming bulk of the criticism stemming from civil liberties concerns was directed at the code counterparts of existing law. In many instances, in fact, the code's counterpart provisions had made minor modifications in the reach of current law that generally would be perceived as desirable from a civil liberties viewpoint. Nonetheless, the criticism was intense and prolonged. Some accommodation was reached in the evolving drafts, but efforts to point out that most of the complaints were misdirected were of little avail in stemming either the nature or the tenor of the criticism. Ultimately, the serious misstatements of some of the critics led to condemnation of their attacks by better-informed members of the organizations,<sup>166</sup> to dismissal of their criticisms by other groups with a history of similar understandings of civil liberties,<sup>167</sup> and to point-by-

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stration. See, e. g. , Milton Viorst, *Nixon's Revenge*, *Harpers Magazine*, Feb. 1976, at 17; Enstad, *Senate Bill 1: Freedom's Graveyard*, *Barrister*, Winter 1976, at 14. One observer wrote that "the American Civil Liberties Union is having the purple conniption fits; in a shameful display of ad hominem rhetoric, the ACLU denounces the bill because Richard Nixon and John Mitchell once had something to do with it." James Kilpatrick, *This Recodification Bill Should Pass*, *Wash. Star*, Jan. 28, 1978.

165. See, e. g., Hearings, *supra* note 6, pt. XI, at 7942 (1974); Hearings, *supra* note 6, pt. XII, at 190 (1975); Hearings, *supra* note 6, pt. XIII, at 8985, 9058 (1977); Hearings, *supra* note 6, pt. XIV, at 10151 (1979); Hearings, *supra* note 6, pt. XVI, at 11954, 12029 (1981); John Shattuck and Jack Landau, *Civil Liberties and Criminal Code Reform*, 72 *J. Crim. L. & Criminology* 914 (1981).

166. See, e. g., Louis B. Schwartz, *The Revised Criminal Code*, *The Nation*, April 8, 1978, at 386 (letter to the editor); Alan M. Dershowitz, *The Revised Criminal Code*, *id.* at 403 (letter to the editor); Louis B. Schwartz, *Civil Liberties v. the ACLU*, *The New Republic*, July 26, 1980, reprinted in Hearings, *supra* note 6, pt. XVI, at 11811-11815 (1981).

167. In mid-1977, the National Executive Board of the Americans for Democratic Action voted 79 to 3 to endorse S. 1437, and in early 1980, despite importuning by ACLU representatives to withhold support, it

point rebuttals by the staff of Senator Kennedy<sup>168</sup> and by Attorney General Bell.<sup>169</sup>

Criticism of the code reform effort on quite different grounds—that it was not sufficiently sensitive to the need for effective coverage of offenses involving public morals—began to appear in the late 1970's. By 1981, a few individuals who were concerned principally about the proposed code's treatment of such matters had persuaded a number of conservative organizations—including religious organizations—to take official positions reflecting their concerns. Those organizations expressed alarm at what they perceived as the code's unduly lenient approach in the areas particularly of pornography, sex offenses, prostitution, and drug trafficking, and also criticized the code as being excessively harsh in the area of corporate crime. The numerous specific complaints added up to an indictment charging that the code would permit vice to flourish while hounding innocent businessmen into bankruptcy or prison.<sup>170</sup> Again, the criticisms were predicated primarily upon misperceptions or misconstructions. Eventually, the conservative sponsors of the Senate bill, including Senators Hatch, Thurmond, and Laxalt, in cooperation with the Department of Justice, prepared an item-by-item refutation of the criticisms in order to quell what they perceived as a misdirected effort by organizations that ordinarily would be expected to support a bill fostering efficient and fair law enforcement.<sup>171</sup> Nonetheless, despite the

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again voted overwhelmingly to endorse the code reform effort.

168. See Staff of the Senate Judiciary Committee, 96th Cong., *The Federal Criminal Code Reform Act of 1979: A Detailed Response to the American Civil Liberties Union* (1980).

169. See Hearings, *supra* note 6, pt. XIII, at 9229-38 (1977).

170. See, e. g., 2 *Moral Majority Report* 1, 3, 16 (Nov. 23, 1981); John Chadwick, *Attack on Crime Code Revision*, *Chicago Tribune*, Dec. 5, 1981, 9; Thornston, *Moral Majority to Step Up Work Against Criminal-Code Bill*, *Wash. Post*, Nov. 14, 1981, at A11.

171. See Senators Thurmond, Hatch, and Laxalt, and the U. S. Dept. of Justice, *A Response to Recent Criticisms Disseminated by the Moral Majority, Inc., and Other Groups Concerning S. 1630, the Criminal*

refutations by respected members of the conservative community, the doubts generated by the criticisms proved difficult to erase from the minds of those who had little time to sort through for themselves the various charges and countercharges.

#### V. THE CURRENT STATUS OF THE EFFORT TO REFORM THE FEDERAL CRIMINAL LAW

As noted earlier, no attempt has been made in either House of Congress to resume the codification effort since the Senate bill was set aside in 1982, after failing to overcome a procedural impediment. Although the principal sponsors had then expressed the intent of resuming the effort in the following year, by the beginning of the Ninety-Eighth Congress the pressures upon office holders to be seen as “doing something” about the problems of crime led to a diversion of attention toward efforts that were more likely to

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Code Reform Act of 1981 (November 4, 1981). Attorney General Smith later declared:

Some conservatives have mounted a mini-crusade against the proposed Criminal Code. . . . Their efforts are exceedingly misguided. They have relied upon mischaracterization, attenuated arguments, and even former provisions of the proposal that have been amended. Worst of all, they misconceive the significant strengthening of law enforcement that would flow from enactment of the Code now. After more than a decade of debate, we can no longer afford nit-picking that delays reform of the antiquated hodge-podge of federal criminal law. Although improvements can still be made—and we will work to make any that are feasible—no conservative should doubt the numerous valuable improvements contained within the proposed Code.

The law enforcement program we have proposed . . . deserves support from all Americans concerned about crime.

William French Smith, Remarks before the Conservative Political Action Conference (Feb. 25, 1982).

In addition, other representatives of the religious community began to speak out against what they recognized as the mispredicated efforts of their brethren. See, e. g., Moral Majority Aims at the Criminal Code; But shoots Itself in the Foot Instead, Say Its Critics, Christianity Today, Feb. 5, 1982, at 4-5.

achieve quick congressional enactment. With the acquiescence of the Administration, numerous piecemeal provisions were taken from the code, and from other sources, and cobbled into a legislative package. The package was ultimately enacted in late 1984 as the Comprehensive Crime Control Act.<sup>172</sup> Upon passage of that Act, which included a number of provisions of significance, the Executive Branch shifted its immediate attention to the implementation of the disparate new laws, rather than to the challenge of yet securing the enactment of fundamental reform.

As time passed, the retrogression to past practices became complete. The setting aside of the general criminal code reform effort in 1982 not only led to the passage of the Comprehensive Crime Control Act in 1984, but also opened the floodgates for a host of other statutory changes in federal penal laws and procedures. A rush of narrow legislative proposals suddenly began to flow from the Department of Justice and from the offices of members of Congress—a torrent that swept aside the former sponsors' remaining inclinations to reattempt basic reform. The flow of proposals was pushed by pent up pressures. During the dozen years in which serious administration and congressional efforts were concentrated on large-scale code reform, proposals for the minor sorts of changes that had been frequent in the past were held in abeyance. They were then thought to be of too little individual significance to warrant being pushed to enactment at a time when far grander and more sweeping reforms were promised by enactment of the code; the changes that the more meritorious of these lesser proposals would have wrought in the existing Title 18 were instead absorbed—partly for reasons of merit and partly for purposes of garnering additional code supporters—into the structure and substance of the

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172. See Comprehensive Crime Control Act, Pub. L. No. 98-473, 99 Stat. 1837 (1984).

then-pending code reform bills. When the code effort stalled, the way was opened for resuming the uncoordinated, piecemeal initiatives that typified the criminal law enactments of the last two centuries. A host of such provisions moved through the Congress and were signed into law between 1984 and the present time.<sup>173</sup> Like past enactments, some appear conceptually worthwhile, some merely posturing or otherwise neutral in consequence, and some troublesome from a jurisprudential or broader social standpoint.<sup>174</sup> Certainly, they have in no way diminished the need for overall code reform. The results of the reversion to past habits, to the contrary, have increased the need for a thoughtful culling and for a cohesive, logical framework to support the concepts that survive.

In one respect, however, the passage of the 1984 legislation eased the way for successful code reform in the future. The more significant segments of the 1984 legislation included page after page of lengthy provisions that had been lifted from the last draft of the code, and that had contained some of its more contentious issues. They included the whole of the code's sentencing approach,<sup>175</sup> the proposal permitting pre-

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173. Among them were new anti-narcotics laws contained in the Omnibus Drug Enforcement, Education and Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207; the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181; the Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789; the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796; and the Federal Death Penalty Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

174. For a particularly perceptive and detailed account of the events and pressures leading to the passage of anti-crime measures in the 1993-1996 period, see Lord Windlesham, *Politics, Punishment, and Populism* (Oxford University Press 1998).

175. See 18 U. S. C. chs. 227, 229 (1994); 28 U. S. C. ch. 58 (1994). It is probably the code's sentencing guidelines approach that suffered most from being wrenched from the code context, in which the maximum statutory penalties would have been substantially rationalized as compared with the existing Title 18. For reasoned accountings of the nature and source of various problems in the resulting implementation of the sentencing guidelines concept, see David Robinson, *The Decline and Potential Collapse of Federal Guidelines Sentencing*, 74 Wash. U.

trial detention of dangerous offenders,<sup>176</sup> the sections governing the disposition of insane or incompetent defendants,<sup>177</sup> the parts extending wiretap authority subject to court authorization,<sup>178</sup> and a number of other provisions that had been the focus of considerable debate.<sup>179</sup> Although all the sponsors of the code reform effort had been able to accept those provisions as they existed in the proposed code (under the Mansfield-Scott compromise, the provisions would not have been included if such agreement had not been possible), their common support did not, in itself, insulate such issues from controversy. Now that those provisions have been enacted into law—as scattered, statutory islands cast in the proposed code's format—there is little reason to rekindle debate on those issues in the context of a resumption of the code effort. It could prove possible to leave a large number of those provisions essentially as they stand, with the new code enacted around them, postponing any substantive changes for later, more particularized consideration. They would be treated as among the limited provisions of now-current law that would be carried forward by the new code.<sup>180</sup>

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L. Q. 881 (1996); Paul Robinson, *One Perspective on Sentencing Reform in the United States*, 8 *Crim. L.F.* 1 (1997); Jeffrey Standen, *The Privatization of Federal Criminal Law and Its Aftermath*, 2 *Buffalo Crim. L. Rev.* (1998). By far the most serious difficulties have been those caused by the subsequent congressional retrogression, with Department of Justice acquiescence, to the practice of imposing statutory minimum penalties for a wide variety of offenses—a concept totally at odds with the sentencing guidelines system.

176. See 18 U. S. C. §§ 3141-3150 (1994).

177. See 18 U. S. C. ch. 313 (1994).

178. See 18 U. S. C. §§ 2516(1) and 2518(7) (1994).

179. Subsequent enactments incorporated still more debate-provoking segments of the proposed code into the current Title 18, in substance if not in form. The series of sections on sex offenses was modified in style and added in 1986 as 18 U. S. C. ch. 109A.

180. One commentator calculated that the 1984 legislation included about 100 pages of material that previously had been included within the 500 pages of S. 1630. See Robert H. Joost, *Simplifying Federal Criminal Laws*, 14 *Pepp. L. Rev.* 1, 4 (1986).

Although for the past fifteen years there has been no resumed code effort in either House of Congress, and no leadership undertaken within the Administration to spark a resumption of the effort (with the sole exception of an initiative by Attorney General Thornburgh<sup>181</sup>), the need for reform not only persists but is becoming increasingly evident. With the magnitude of violent crime still distressingly higher than that of other developed nations, with economic crime having become more sophisticated and widespread, and with neither reason nor federal budgetary constraints proving sufficient to force a reexamination of the traditional approach of attempting to keep pace through increased spending, the chaos, confusion, and inefficiency of our current federal criminal laws continues as an intolerably expensive adherence to an anachronism. Eventually, code reform will be rediscovered as one of the major components in a potential resolution of the problems of crime and justice. Any resumption of the effort, however, if it is to be successful, will require a high degree of commitment, cooperation, and coordination among the necessary participants, and a collective resolve to follow through with the persistence that will be needed to overcome the formidable difficulties.

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181. Richard Thornburgh had been an active participant in the codification effort during his tenure as Assistant Attorney General of the Criminal Division during the Ford Administration. When he returned to the Department of Justice as Attorney General late in the Reagan Administration, he undertook to review the past efforts and to meet with individual members of Congress to explore the political feasibility of resuscitating the effort. He ultimately concluded that it was not then politically practicable. He proceeded, however, to make a very well-received address on the subject to the American Law Institute, Richard L. Thornburgh, Remarks by the Attorney General before the American Law Institute (May 19, 1989), and to make a presentation on the subject before a major conference on "Codification and the Rule of Law," Richard L. Thornburgh, Remarks by the Attorney General before a Conference of the Society for the Reform of Criminal Law (January 22, 1990). (More recently, on his own initiative, he has begun private efforts to provoke a resumption of the reform process.)

## VI. THE DIFFICULTIES INHERENT IN ANY RESUMPTION OF THE EFFORT TO REFORM THE FEDERAL CRIMINAL LAW

The federal experience recounted above suggests that a modern federal criminal code may be easier to draft than to enact. To achieve enactment, it is necessary to develop and maintain a "critical mass" of knowledgeable supporters who can sustain the effort. The supporters will face a number of difficulties. They include the difficulty of pointing out convincingly that the ordinary citizen has a material stake in code reform; the difficulty of obtaining support from those who have spent their careers working with the current statutes; the difficulty of creating and sustaining a concentrated, coordinated effort by the necessary participants within the Executive and Legislative branches of government; and the difficulty of allaying or otherwise overcoming concerns of special interests groups.

### *A. Difficulty in Attracting Public Interest*

Such a broad-scale and apparently abstract effort as reforming the Nation's penal laws in order to make them more fair and more efficient is something that the public may accept as worthwhile, but not something that in itself will generate spontaneous public enthusiasm. The criminal laws generally are not well understood by those with no special reason to explore their intricacies, and most citizens are thus in no position to determine for themselves whether the criminal laws in fact are in need of major reform. They must rely for their information upon the representations of those whom they perceive as authorities in the field.

Social needs that are perceived as abstract and lacking in immediacy, and that can be appreciated only on the basis of an authoritative explanation, are

not the sorts of needs that prompt clarion calls for action. Public attention will be aroused only with regard to particular issues raised by the codification effort—usually issues that affect perceptions of a code's effect upon public safety. Thus, while the public may understand that a package of revisions is supported by officials with law enforcement responsibilities, its interest will be captured only by the treatment of a few specific provisions. Even that interest, though, is likely to be restrained; a legislative proposal for more sensible or more efficient treatment of robbery offenses, for example, is not likely to spark the writing of supportive letters to the Congress. Reasoned positions engender, at best, sober, unemotional and largely passive support. Although it is of advantage that such reform proposals do not evoke the flood of communications that is prompted by legislative consideration of issues such as the death penalty, handgun control, or abortion—the very reason, of course, why proposals touching on such issues were the first items that the code sponsors in the past found necessary to avoid in a comprehensive bill—public expression of some degree of interest is a welcome buttress to the resolve of potential supporters.

*B. Difficulty in Obtaining Support from Participants in the Justice System*

A troublesome retardant to a major code reform effort is the tendency among those involved in the criminal justice system—principally lawyers and judges—to tolerate the structural and conceptual deficiencies of the existing criminal laws. This tendency lessens the potential for direct support from the community whose work would be most directly affected, and most directly benefited, by change. It also forestalls the emergence of public interest, which, as noted above, is dependent upon supportive statements by those recognized as authorities in the field. Two

factors account for much of the tendency toward toleration—insularity and inertia.

Insularity plays a major part because most lawyers and judges who work within our modified common law system have had little opportunity for exposure to alternative formulations of legal concepts. The legal profession is therefore predisposed to seek solutions in minor variations of approaches with which it is already familiar. Lawyers have lived for a long time with the common law heritage, and have tended to attribute to it, without differentiating between its form and its substance, many of the assurances of individual liberties that all citizens are proud to acknowledge as fundamental to the American system of government. Foreign examples of the structuring of the penal laws have been considered just that—foreign. There has been little inclination to look to the continental European approaches in the statutory description of broad legal concepts or in the orderly arrangement of penal offenses, even though close examination would reveal that moving in such directions could serve to strengthen, rather than detract from, the cherished protections of common law principles. Until the development and publication of the American Law Institute's Model Penal Code, there was no domestic example to encourage the legal profession to contemplate the potential advantages of a simpler, more orderly, and more rational structure.

Inertia—the other major impediment to the acceptance and advancement of broad-scale reform by justice-system professionals—is partly institutional and partly professional.

Institutional inertia is to be expected. Prosecutors, judges, and criminal justice administrators, like officials involved in the operation of other major governmental programs, are most comfortable with the familiar, and their discomfort with any new proposal tends to be directly proportional to its scope and importance. Only a small minority may be expected to

encourage fundamental restructuring of the statutes under which they operate on a daily basis. The majority will exhibit considerable circumspection with regard even to proposals that seem patently beneficial, preferring instead the security they have found in their arcane knowledge of the current amalgamation of statutes and judicial decisions, and the pride they have derived from being able to work around the many obstacles on a case-by-case basis.

The special inertia characterizing the legal profession is legendary. Although lawyers will launch vigorous attacks against particular legal concepts, either as a matter of representation or as a matter of conscience, they are loathe to participate in criticisms of broad segments of the system as a whole. They are products of formal training that has stressed repeatedly the importance of following precedent. Seldom do they venture to suggest more than minimal correction of inadequacies in the law, either by judicial interpretation or by legislative act. Lawyers tend to consider themselves the guardians and protectors of past approaches, not the usurpers. In addition, the preservationist instincts of lawyers are reinforced by natural, self-protectionist instincts that will be found within the practitioners of any profession; most are reluctant to consider change that would forfeit the value of their long apprenticeship.

Nonetheless, despite the usual inclination of the profession to welcome no more than minor variations from the status quo, the need for broad penal code reform has become accepted by a substantial number of lawyers over the past few decades. This development has been caused in part by the magnitude of the need as gradually perceived by those operating within the justice system, and in part by the fact that law schools over the last thirty years commonly have undertaken to train students in the conceptual framework of the criminal law set out by the Model Penal Code—the progenitor of the federal codification effort. In the

1970's and the 1980's the new converts and the new graduates assisted in prompting general support for the federal codification effort from such organizations as the American Bar Association, the Federal Bar Association, the National Association of Attorneys General, and the National District Attorneys Association.<sup>182</sup>

*C. Difficulty in Achieving a Commitment of Sufficient Time and Resources from Senior Officials in the Executive Branch*

The Executive Branch of the Federal Government is inhabited by few senior officials or mid-level officials who may be considered law reformers—largely as a consequence of the considerations set forth above. Within the professional, career ranks of the Department of Justice, some would-be reformers eventually evolve after examining the bases of their frustrations with existing practices and policies.<sup>183</sup> At the political

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182. See Hearings, supra note 6, pt. III D, at 3155 (1972) (Federal Bar Association); Hearings, supra note 6, pt. X, at 7426 (1974) (National District Attorney's Association); Hearings, supra note 6, pt. XII, at 360 (1975) (American Bar Association); Hearings, supra note 6, pt. XIII, at 9421 (1977) (National Association Attorney's General); Hearings, supra note 6, pt. XVI, at 11821 (1981) (ABA); id. at 11932 (National Association Attorney's General); Letter from David R. Brink to all Senators (Apr. 16, 1982) (urging enactment of S. 1630) (American Bar Association).

183. The evolution is not always permanent. Even officials formerly involved in the effort to achieve a new code have, with the passage of over 15 years, found the Department's ability to patch up and otherwise work around the problems of the status quo sufficiently seductive to discourage consideration at this time of a resumption of the effort. One has specifically questioned the value of federal criminal code reform, on a cost-benefit basis—citing the need for attorney training and preparation of new pattern jury instructions—if the effort were to be limited to making the law more rational rather than including a number of new provisions that the Department would consider substantive improvements in the law. (It might be noted in this regard that the cost-benefit analyses developed by the Department's policy offices in the 1970's proved to be highly favorable; the training of new attorneys would be far simpler since it would be predicated on a federal analog of

appointee level, new appointees sometimes arrive with an open mind as to the virtues of broad-scale reform, if not with a professional background fostering a resolve to seek it, but the subject is unlikely to trickle-up for their consideration and, if it does, is unlikely to come to rest at a position sufficiently high on their agendas to warrant referral to the White House.

Within the Department of Justice, it is hard for any reformers among the career professionals to capture sufficient time of incoming political appointees for a serious review of the subject of federal criminal code reform. The subject commonly strikes new Attorneys General and Deputy Attorneys General as intriguing, but perhaps a little too academic to warrant the commitment of the degree of their personal time that would be required for success.<sup>184</sup> The prospects for active code support by an Attorney General are materially enhanced if the appointee enters the Office with either considerable knowledge about the subject (Richardson and Thornburgh); a strong academic background that has prompted careful thought about the value of statutory law with a firm jurisprudential foundation (Levy); or professional experience that has produced a natural proclivity to embrace reform concepts (Bell). All incoming Attorneys General who have

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the Model Penal Code provisions that are taught in the nation's law schools; and every Senate report explaining the evolving Senate bills contained explicit descriptions of the elements of the offenses that indeed had been designed by the Departmental participants in the report-drafting process to serve as the basis for future jury instructions in prosecutions under the new sections. )

184. One Attorney General-designate requested a careful briefing on the subject before assuming office. In the course of the ensuing briefing by the author, he found himself sufficiently absorbed and interested in the details that the session went on for well over two hours, over twice the time scheduled. After the end of the session, he asked how long it would take for congressional passage. Upon hearing an estimate of approximately four years, well beyond his expected tenure, his interest in making the subject a priority immediately evaporated. (He did, however, assure general support for the code reform project while he was in office.)

been presented with the reasons for federal criminal law reform, however, have given their support to the effort, and many have proven willing to augment their support with the devotion of a considerable amount of their personal time and attention.<sup>185</sup>

Within the White House, the attention of incoming officials is more difficult to capture. Yet, if code reform is to succeed, it must be selected as a White House priority. There is a limited amount of legislation that successfully can be pushed to enactment by an Administration in the course of a two-year Congress, and there is a limited amount of political capital that an Administration can call upon in its dealings with members of Congress. If the subject of code reform is identified only as one of scores of Administration goals, rather than as one of a half-dozen or so, the attention accorded the subject will be, at best, enough to keep it alive, but not enough to advance it. To achieve timely identification as a White House priority is exceedingly problematic; it must be identified as such very early in the life span of an Administration, if not during the transition period, and yet at such an early stage the would-be votaries within the Department of Justice will not have earned the confidence of the incoming Attorney General, and neither the Department of Justice attorneys nor the new Attorney General will yet have full credibility with the senior White House staff. The chances of success are increased if the incoming Attorney General has had a long-standing personal relationship with the President. Otherwise, it is almost necessary that an incoming President enter office with code reform in his announced portfolio, based upon an earlier-acquired understanding of the long-term importance of the

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185. Attorney General Richardson believed the subject to be of such importance that he interrupted a secret negotiation session for a guilty plea by Vice President Agnew in order to attend one of the scheduled, but routine, briefing sessions on the Department's code development process.

subject.<sup>186</sup> This difficulty, therefore, presents a very high hurdle.

*D. Difficulty in Achieving a Commitment of Sufficient Time and Resources from Senior Members of the Legislative Branch*

The difficulties that are faced in the Legislative Branch are the most intractable of all. The primary difficulties pertain to legislative passivity, legislative time, legislative organization, and the legislative atmosphere.

A general problem is that senior congressional leaders in the course of their careers have become more accustomed to responding to legislative proposals than to initiating them.<sup>187</sup> Although there are dramatic exceptions to the reticence of congressional leaders to initiate major proposals, those exceptions are usually based upon perceptions of pre-existing public support or political advantage which, as noted above, do not attend such subjects as criminal code reform. In consequence, the commitment of attention by congressional leaders rests upon the identification of criminal code reform as a major White House initiative.<sup>188</sup> Certainly, unless there is an initial show of serious White House interest in the subject, any sea-

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186. It does not harm prospects if the incoming President has an appreciation of the historical treatment of national leaders—from Hammurabi through Napoleon—who successfully fostered code reform efforts.

187. The author accompanied one Attorney General to a private meeting with a Chairman of the House Judiciary Committee at the beginning of a two-year Congress. The purpose of the Attorney General was to induce the Chairman to allot the Committee time and resources that would be necessary for House passage of code reform legislation. When queried by the Attorney General about his legislative agenda for the next two years, the Chairman replied "Well, we'll have to wait and see as we go what pops up in the morning headlines."

188. Some members will occasionally observe that it is the President's Constitutional responsibility to initiate needed legislation. U. S. Const. art. II, § 3.

soned legislator is well aware that it will be difficult to garner the necessary attention, and to secure the attendance of strongly-supportive governmental witnesses from the Executive Branch.

Legislative time presents an almost prohibitive problem. The difficulties presented by a two-year lifespan of a Congress are well known, and have been touched upon above. Within a two-year period, legislation on a relatively limited number of issues can be moved through the congressional processes, and among those successful legislative proposals can be very few of any significance. Moreover, the almost constant need of members either to campaign or to secure money for campaigning tends to dictate that the most attention will be accorded legislative proposals recognized to be of a vote-getting or contribution-getting nature.<sup>189</sup>

Legislative organizational difficulties may be appreciated simply from the fact that the Legislative Branch is composed of 535 essentially co-equal members. The staff of each member is responsible to the member alone, and even the staffs of the committees and sub-committees are largely composed of individuals who feel special responsibility for following the views of the member who secured their appointment. Cohesive work among members and among staffs is possible on important legislative proposals, but to have any prospect of success it must be very carefully planned with the concurrence of a substantial number of the members holding relevant committee assignments. Once a legislative proposal is prepared, it must, on its way to enactment, run a gantlet composed of eight stages, at any one of which it may be able to be sidelined by as little as the artful opposition of a single member.<sup>190</sup> Moreover, the lack of

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189. Among the casualties of the collapsed efforts to reform federal campaign financing are long-term projects that require extensive thought and deliberation.

190. See Robert H. Joost, *Federal Criminal Code Reform: Is It Pos-*

party discipline today precludes the use of the most effective means of securing a cadre of reliable, secondary-level legislative supporters.

Finally, the legislative atmosphere itself does not encourage thoughtful consideration of complex issues. The atmosphere in the Capitol building and the adjoining office buildings, far more than in any place within the Executive Branch, is one of barely-circumscribed chaos; it is hectic, frenetic, and characterized by incessant interruptions by lobbyists, constituents, and calls for floor votes. Few members have the ability and the career security to enable them to focus attention on complex issues for more than a very limited period.

Augmenting these difficulties is the reality that the legislative incentives in addressing law reform are very slight. A subject perceived to be as theoretical and academic as criminal code reform, and yet perceived to contain elements capable of producing emotional debate, will prove worrisome to members of Congress. On the one hand, they risk boring constituents,<sup>191</sup> and on the other hand, they risk converting themselves into targets for potshots.<sup>192</sup> Only those convinced of the utility of such reform—and willing to screw up their resolve to commit their time to the effort as well as the time of their senior staff members—will be able to be counted upon.

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sible? 1 Buffalo Crim. Law Rev. 195, 208 (1997).

191. During the code reform efforts in the late 1970's and early 1980's, one member of the House Judiciary Committee repeatedly demanded of representatives of the Department of Justice who appeared to testify: "Where is the constituency for federal criminal code reform? Where is the constituency?"

192. Because of his sponsorship of federal criminal code reform, Senator Kennedy, in the course of his campaign for his party's nomination for the Presidency, became the subject of strong attacks from individuals and organizations that ordinarily would be among his supporters.

*E. Difficulty in Sustaining a Coordinated Effort by the Executive and Legislative Branches*

Even if good-faith commitments can be secured from the Administration and from the Congress, adherence to those commitments will prove very difficult. Within the Executive Branch, there are enormous pressures to focus on day-to-day problems—particularly those garnering enough public attention to seduce into myopic concentration new officials who are not used to dealing with matters provoking headlines. Within the Legislative Branch, the daily problems interfering with commitments, as noted above, are even more intense.

The difficulty of sustaining a coordinated effort by the Executive and Legislative Branches is therefore a formidable one, and one that will require the expenditure of a great deal of political capital. The scope alone of other code reform projects has made passage difficult in state jurisdictions,<sup>193</sup> and even in foreign jurisdictions with strong single-party control of the government.<sup>194</sup> Certainly the federal effort to date has made it clear that in order to assure any reasonable prospect of success, it is crucial that there be a particularly strong determination on the part of the Executive Branch of government, and unusual resolve on the part of principal sponsors in both Houses of Congress, in both parties, and in the main philosophical wings of each party.<sup>195</sup>

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193. See, e. g. , Hearings, *supra* note 6, pt. II, at 654-663, 684-691, 692-695, 698-706, 698-750 (1971). Most state efforts, however, eventually succeeded.

194. See, e. g., Yoshio Suzuki, *The Politics of Criminal Law Reform in Japan*, 21 *Am. J. Comp. L.* 287 (1973).

195. Among the lessons from the past are: the one taught by the development of the first S. 1 and S. 1400—that the administration and congressional supporters must work together on a common draft; the one taught by the development of the second S. 1—that it is not enough to have both Democratic and Republican sponsors, the sponsors must include both liberals and conservatives; the one taught by the development of S. 1437—that there must be strong supporters generating mo-

*F. Difficulty in Allaying the Concerns of Special Interest Groups*

Finally, there is the difficulty of allaying the concerns of special interest groups. Such difficulty can be reduced if early agreement is reached among the sponsors to sever consideration of, and thereby leave for current law coverage, all emotion-arousing issues upon which the sponsors cannot collectively agree. It is plain, though, that such action can reduce only particular aspects of the problem.

A certain degree of circumspection on the part of a number of individuals and groups is understandable and natural when the Executive and Legislative branches undertake a major reform dealing with a subject of such fundamental importance as the whole body of criminal law. Many individual issues that have provoked considerable debate in the past have for some time lain quiescent in our current statutes and case decisions. No matter what the state of the current law in those areas, and no matter what approach the proposed code takes in attempting to deal with them, any code treatment—including that of simply carrying forward the current state of the law—is bound to foster renewed controversy. Consequently, when change of such a scope is proposed, any version of such change will include at least something that will provoke dispute on the part of every reviewer. When an attempt is made to restate the way in which the government is to deal with matters touching upon fundamental liberties, individuals and groups of all kinds will keep watch with troubled vigilance to assure that the principles they hold important do not suffer at the hands of the codifiers. Those who tend to focus on the need for effective law enforcement will fear that too much of presumed value in the old law

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mentum in both houses of Congress; and the one taught by the development of S. 1722 and H. R. 6915—that a commonly agreed upon format and style is crucial.

has been sacrificed for the sake of simplicity. Those who tend to stress the protection of individual liberties will fear that differently cast protections mean lesser protections, or, at best, will complain that proposals they recognize as statutory improvements have not gone far enough. Additionally, as noted previously, given the range of issues encompassed by any modern code, it is impossible to predict the particular ones that will provoke extended debate.

Moreover, it is to be expected in the course of any codification effort that concerns frequently will be expressed not merely as the product of thoughtful reflection but also as the result of emotional reaction, and consequently that these concerns often will be announced with the kind of hostility that can spring only from suspicion that fundamental freedoms are at risk. It is to be expected, also, that those harboring concerns about discrete provisions will often find that their easiest and safest course is to resist not just those particular portions of the proposed code, but to oppose the whole of the comprehensive effort.

#### VII. THE STEPS NECESSARY FOR A SUCCESSFUL RESUMPTION OF THE EFFORT TO REFORM THE FEDERAL CRIMINAL LAW

The above discussion indicates a fairly obvious series of steps that should be included in any worthwhile resumption of the federal criminal code reform effort. In broad outline, the steps include the following:

\* Potential initiators of a resumption of the code reform effort should attempt to ascertain whether, collectively, they can muster the necessary understanding, will, and persistence to bring such a project to fruition. Those to be involved in the process must include a sufficient number with strong backgrounds in criminal law, and with genuine appreciation of the need for broad-scale code reform, that together they

can provide the impetus necessary to overcome the inevitable difficulties, and buttress the other participants in making sustained progress toward an elusive but enormously important goal.

\* The potential initiators should consult among themselves with regard to possible routes to, and other participants in, a renewed effort to enact a modern federal criminal code. They should identify in their planning as many potential participants as possible, given the likelihood that many would eventually find themselves as formal or informal contributors to the drafting and explanation processes. They should include those who played roles with the Brown Commission, those involved in the federal effort between 1970 and 1982, and perhaps a few of those involved in state adaptations of the Model Penal Code.

\* The initiators should attempt to devise a means by which continuing academic support could be insured for any resumed effort. The project concerns matters that, for the most part, only those in academia are able to make the time to consider thoroughly. Any confederation of criminal law academicians, no matter how loosely assembled, would be invaluable not only as potential participants in various stages of the drafting processes, but as resources for those who hold political office and who would need thoughtful advice and assistance in the course of congressional consideration of the subject. An organizing role could be initiated by one or more law schools,<sup>196</sup> or conceivably by the American Law Institute.

\* The initiators of the project should attempt to identify potential political supporters in the Senate, in the House of Representatives, and, through an effort re-

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196. The Buffalo Criminal Law Center has made a significant start in this regard.

quiring impressive prognostic abilities, in a future Administration. Those to be identified should include Members of Congress who may not currently be assigned to one of the Judiciary Committees, but who possess the experience, intellectual capacity, and leadership ability to assume roles as principal sponsors. When it becomes advisable, such members could request seats on the Judiciary Committees. The process, obviously, should include potential supporters from both parties and both wings of each party.

\* The initiators should consider the establishment of a drafting authority—or at least a pre-drafting authority. The authority could be constituted formally with an assigned goal of producing a draft code, or it could evolve as an informal assemblage of knowledgeable participants who are willing to devote time to the subject. It should include some individuals who are currently working, or who conceivably could be working at the time of code consideration, with the Department of Justice and with one of the two Judiciary Committees. If the process is to be a formal one, it could be in the form of a Commission like the National Commission on Reform of Federal Criminal Laws,<sup>197</sup> or it could be undertaken by the American Law Institute.

\* Those involved in the preliminary process should, to the extent possible, attempt to adjust their timing so

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197. Paul C. Summitt, the lawyer who bore the principal responsibility in the Senate for carrying forward the federal criminal code reform effort from 1973 through 1982—under, successively, Senators McClellan, Kennedy, and Thurmond—has stated to the author his conviction that any successful resumption of the effort will require the establishment of a commission to give the cause credibility and acceptability. Robert H. Joost, who in 1971, and in 1972 was the principal draftsman of Senator McClellan's first modification of the National Commission proposal (the first S. 1), concurs, adding that such a commission, unlike the National Commission, must remain in existence through the code enactment and code implementation processes if it is to supply the guidance and support that will be necessary. See Joost, *supra* note 190, at 219-220.

that any eventual bill emerging from the process would be ready for congressional introduction during what they might reasonably hope to be a period of relative quietude on the "law and order" and "individual liberties" fronts.

\* When the subject appears timely for broader consideration, those involved in the preliminary process on behalf of the Administration and on behalf of the Senate and House should undertake to secure a clear agreement among senior Administration officials and interested members of the Senate and House Judiciary Committees to cooperate in bringing the effort to a conclusion within the span of a single two-year Congress. The Administration officials and the potential Senate and House sponsors, together with their representatives and staffs, should develop plans for a concentrated effort that will fit into the agendas of the Administration and of the Senate and House leadership. Attempts should be made at that time to secure from the leadership a pre-agreement on the concept, at least, of a limitation on amendments to the legislation once it reaches floor consideration in the two legislative chambers. The Administration and congressional representatives should collaborate on means of maintaining particularly close cooperation and support throughout the proposed two-year period. The original initiators of the effort should be able at that time to assure the potential House and Senate sponsors of the continuing assistance of the academicians involved in the preliminary part of the process, and to give the sponsors the comfort of knowing that, if need be, they will have academic defenders of their participation.

\* At this point the congressional sponsors should direct a drafting group to augment the substantive work already undertaken by the earlier group or commission, and begin in earnest to complete a revised code bill that could be introduced in identical form, and supported, in both Houses of Congress. The development

of the bill should proceed in a cooperative, bi-partisan spirit, continuing the understanding of the earlier congressional effort that any irreconcilably controversial changes should be abandoned for the time being in favor of current law coverage.

\* Those involved in the process should quickly issue invitations to organizations that have either supported or opposed code reform efforts in the past, for the purpose of making certain that they and their staffs understand the provisions of the emerging bill, and its deviations from current law, in areas in which the organizations have an interest, and for the purpose of assuring such organizations that their arguments will be heard and that their legitimate concerns will be addressed. Among the organizations and groups consulted, the supporters should identify and encourage potential allies. In addition, they should keep abreast of the project various news media members who have backgrounds in law.

\* At this point, those involved in the process will need to become public proponents. They should raise the general subject publicly, with a sober, low key introduction that points out, with authority but without hyperbole, the anticipated benefits.

\* The proponents should assure that formal introduction of the code reform bills in the House and Senate is accompanied by a public demonstration of broad, bi-partisan support—in particular strong support from the Administration.

\* The proponents should similarly assure that the initial Judiciary Committee hearings demonstrate the support of a broad spectrum of governmental officials, governmental institutions, academic and professional organizations, and knowledgeable individuals.

\* The proponents will find it critical to the success of the effort that a mechanism be established to monitor the details of the congressional progress on a constant basis so that, whenever necessary, strong and continuing support can be mustered from the Administration, from other members of Congress, from the original initiators, and from other organizations and individuals.

\* The proponents should assure that the bills, either when initially drafted or when they evolve from the Judiciary Committees, are designed to minimize potential opposition by those who may be led to believe that an entire new code would deluge government investigators, prosecutors, and courts with such a panoply of new laws that, for a prolonged period following enactment, the operation of the system would be worse than its operation under current law. This probably would be accomplished most readily by adoption of the proposal by one commentator for enactment in a manner that would have the new code run in parallel with the existing Title 18 for a period of time.<sup>198</sup> The two codes could coexist for a period as long as ten years or so, if that were to prove politically necessary. Investigators and prosecutors could continue to use the set of provisions they are already familiar with, or could instead use the far simpler provisions that had just been enacted, as they may choose on a case-by-case basis. The choice afforded by the redundancy would, as a practical matter, differ little from the existing situation in which legislative excess has afforded prosecutors a range of statutory provisions that they may employ to charge particular defendants. By providing for a gradual period of adaptation and testing, con-

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198. See Joost, *supra* note 190. This single proposal by Mr. Joost, a former participant in the Senate drafting process, would appear to obviate a number of the past problems in securing support for federal criminal code reform. See also Joost, *supra* note 180. (Mr. Joost suggests that the new code be called Title 18A, but it may be preferable for psychological reasons to name it Title 18, instead, and to rename the existing title as Title 18A.)

cerns about the implementation of a new code should materially lessen. From a long-term standpoint, it would seem worth the cost of the delay.

\* Finally, the proponents should incorporate mechanisms to impede future congressional retrogression from the form and substance of a new code. The best insurance would be a small, ongoing law reform commission that would make periodic recommendations to the Congress. In addition, proponents should attempt to achieve such modification of the Senate and the House rules as may be necessary to assure that, in the future, all legislation carrying criminal law penalties will be referred, at least concurrently, to the appropriate Judiciary Committee, with the explicit understanding that it will be the latter Committee to determine the verbiage, placement, and penalties of any offense provision it finds to be warranted.

## CONCLUSION

The Framers of the Constitution, in enumerating their purposes, listed to “establish justice” immediately after to “form a more perfect Union.” They recognized that an effective system of justice is fundamental to ordered liberty. If the justice system is inadequate in its scope or application, the basic freedoms of all citizens are at risk. If the system is too broad in its scope or too harsh in its application, liberties of individual citizens are at risk. If the law is unclear—and leaves much subject to interpretation—both the rights of society and the rights of accused individuals are endangered.

A clear, comprehensive body of criminal law, defining the boundaries of tolerable relationships among citizens, is a prerequisite to liberty in part because it is a prerequisite to public respect for law. A body of law that can be perceived as reflecting the basic principles and values of a society will command that soci-

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ety's support. A body of law that also can be applied effectively, and thereby reinforce moral precepts and deter, will warrant that support. The purpose and the logic of the law—and its amenability to efficient application—must be apparent to all.

Legal codes that ensure liberty and that prompt respect are not easily achieved. They require an extraordinary amount of thought and care. The codes that have been successful in the past have stood among the intellectual achievements that defined civilizations.

The principal question that was raised over thirty years ago—whether our federal criminal laws might be amenable to comprehensive codification, and might thereby be made easier to understand and more effective—has been answered. They are so amenable. The reform effort prompted by this recognition was advanced under the Administrations of five successive Presidents and with the support of eleven successive Attorneys General. The remaining question pertains to the accomplishment of that reform. In view of the overwhelming need for an effective and fair criminal justice system, and in view of the historical significance of a code holding the promise of such a system, the code reform effort warrants bipartisan commitment to its resumption and eventual achievement.