The American Law Institute

60
6-Lwf.

Draft, H.W., March 1951

Memorandum for Advisory Committee on Criminal Law

The American Law Institute Proposal

The Project to Prepare a Model Penal Code

Prepare a Model Penal Code

Introduction

For almost twenty years the Institute's agenda of unfinished business has included a proposal to prepare a model penal code. The project was advanced in 1931 by a Joint Committee on Improvement of Criminal Justice composed of representatives of the American Bar Association, the American Law School Association and the Institute, with the endorsement of the Bar Association and the Schools (see A.B.A. Rep. vol. 56, p. 413). It was supported in December, 1934, after a year of study by an able Advisory Committee whose report the Institute itself approved (see the American Law Institute Reports in Relation to Future Work of the Institute [1935]). Funds for the project had not been provided when the chance arose to grapple with one aspect of the problem, the treatment of youthful offenders over Juvenile Court age. A satisfactory result within this narrow but important area led naturally to revival of consideration of the larger undertaking. The model code proposal was accordingly renewed and the requirements for its financing were submitted to the Rockefeller Foundation.

The Foundation was apparently not satisfied upon a number of the issues posed in making the substantial grant involved. Do

the real problems "lie in the realm of a more nearly adequate law - to which a model code would contribute" or "do they lie in the questions that still have to be answered more adequately in the behaviorist sciences?" Would "a model code written at once tend to 'freeze' what is, without plumbing these underlying questions?" Does the "main problem lie in the field of a more adequate law - important though that is - or does it lie in the human organization for administering the law . . .?" These were the doubts suggested, coupled with a recognition that "the answer may be that attempting to write a model code is the best way to get at these questions".

A grant was made, however, to permit the Institute to undertake the further exploration and consideration of the project by a "pondering committee" drawn not alone from law but also from the medical and social sciences. It was indicated that the officers of the Foundation would examine gladly - though "without commitment" the conclusions that a strong committee might put forward as to the most important opportunities - whether the model code or something else - to make a useful contribution in this field.

71 This memorandum is designed to formulate a statement of the bases, possibilities and method of the model code proposal ~~in terms the Institute may be prepared to put before a "pondering committee" in accordance with the grant.~~ for consideration by any committee that the Institute may designate pursuant to the grant. Its object is to outline the essential propositions on which lawyers and ~~the~~ men from the other disciplines ~~ought to be willing to agree.~~

The Institute has now appointed an Advisory Committee in accordance with the grant. This memorandum is designed to state - for the consideration of the Committee - the grounds on which it is submitted that the model code proposal merits full support.

I. The Bases of The Model Code Proposal

First: Whatever views are held 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 toils. 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 or for the individual.

Second: Despite its cardinal importance, penal law in the United States has never had the type of specialized attention that has nurtured the development of private law and those aspects of public law that bear directly on the regulation of important economic interests. The best minds of the bar have had small genuine professional involvement with the law of crimes, notwithstanding the brief interludes in prosecution that have sometimes marked unfolding of a bright career. Aloofness of the bar has been reflected in the schools. No Williston or Wigmore undertook to chart the contours of the subject, ordering its doctrines, rules and practice in the light of underlying policies and bringing

critical intelligence to bear upon the whole. The volume and the calibre of academic work in penal law is far below that in the fields that yield the large professional rewards. Only in recent years and in the recognition of a public duty have the schools and the profession evinced interest and concern commensurate with the importance of the field.

This new interest has yielded tangible results but thus far they lie mainly in procedure and administration. The Crime Surveys and Wickersham Report focused attention on procedural abuses and the many problems that inhere in penal law enforcement. The Crime Conferences aided the expansion of federal participation in the work of crime control, including the immense development of the Bureau of Investigation. The Model Code of Criminal Procedure laid a basis for articulation and revision of the law of criminal procedure, culminating in the Federal Rules. There have been advances generally in police, its organization, equipment, personnel and methods. Led by the Supreme Court, the courts have brought new vigor to the Bill of Rights and to the vindication of its fundamental safeguards in the realm of criminal procedure. And spurred far more by influences from without than from within the law, there has been major progress in methods of dealing with offenders on conviction: probation and other approaches to individualization of treatment, prison reform, correctional programs, improved release procedures, juvenile court development, the youth offender laws, the tremendous growth of social services that have

a role in crime prevention. But important as this many-sided growth has been, it has been most unevenly distributed throughout the country; and where it has involved the penal law itself, as distinguished from procedure or enforcement, the change has been superimposed upon the corpus of the law without attention to the rest of the existing legal structure.

Third: Thus penal law to-day almost as much as twenty years ago shows the neglect with which it has been treated for so long. In many states the statutes have done little more with major crimes than indicate the range of penalties with which they may be visited, relying on the common law to pour a content into the main concepts used. Most states, for example, still have no statutory definition of the crime of murder but only, where the crime has been divided into two degrees, of the indicia of first degree. Many of the most important doctrines such as those that give the measure of responsibility, complicity, excuse or justification have no reflection in the statutes, having status as assumed qualifications of each individual enactment or as an explication of undefined words in statutory formulations, like "unlawful", "culpable" or "willful". Even in states such as New York and California that have attempted a full legislative statement, the statutes draw a large part of their meaning from the older concepts of the common law and the gloss provided by decisions is extremely large. These are the formal indications of neglect and inattention.

The substantive indications are as plainly marked. There are important differences as to the conduct that is criminal even in fields that involve major ~~[illegible]~~ e.g., justification and excuse in homicide and other crimes involving ~~serious~~ bodily injury; the extent to which negligent injury or ~~negligent~~ creation of the risk of injury is criminal; the range of the sexual offences; the scope of criminality in cases of conversion and of fraud; the defensive efficacy of honest mistake, such as belief in the validity of a divorce when a remarriage is attacked as bigamous; the reach of attempts, ~~and~~ conspiracy and similar inchoate crimes; the adoption of new commitment procedures, as with respect to narcotic addicts and so-called "psycopaths"; and the ~~differences in~~ responsibility. No less important, there is even wider variation in the lines dividing minor crime from major criminality, the nature and the number of the legal categories used to cover the most serious offences, the extent to which the categories overlap, the differentiations drawn to vary applicable penalties or modes of treatment, the ~~locus~~ of authority to make decisive judgments as to the offender's treatment and the penalties or treatment methods used.

These differences would present an important challenge to the agencies of law improvement even if they were the product of deliberate choice in different jurisdictions of the nation; the differences would call for exploration of the bases of competing views and some attempt to aid the rationality of judgment on the issues. They put an even larger challenge since we know in

what large part their grounds are accidental or fortuitous, an old decision deemed to be authoritative, the mood that dominated a tribunal or a legislature at strategic moments in the past, a flurry of public excitement on some single matter, the imitative aspects of so much of our penal legislation, the absence of effective legislative reconsideration of the problems posed. In this century only one State, Louisiana, has succeeded in accomplishing substantial legislative re-examination of its penal law resulting in enactment of a code effecting major changes. Even there, though the work was done by the Louisiana Law Institute, its immediately practical objectives forced a limited conception of the possibilities, precluding opening most of the deepest issues posed.

Fourth: There are, of course, important differences between the law in action and the law in books in this as in all other fields. The soundest paper system would be totally impoverished by an inadequate administration and sensible administration may get good results despite glaring defects in law. Abusive definitions of the scope of criminality may have their teeth drawn by the agencies of prosecution in refusing to proceed. Harsh or anarchical penalty provisions can be circumvented by proceeding for a lesser crime or by acceptance of a lesser plea. This happens on a large though quite incalculable scale. But such correctives only can effect amelioration; they can not extend the reach or vigor of the law beyond the fair intendment of its terms. There is,

moreover, no assurance that the possible correctives will be used in situations where they ought to be upon the merits or that their application will be principled and free from favor or abuse. A society that holds, as we do, to belief in law can not regard with unconcern the fact that prosecuting agencies can exercise so large an influence on dispositions that involve the penal sanction, without reference to any norms but those that they may create for themselves. Whatever one would hold as to the need for a discretion of this order in a proper system or the wisdom of attempting regulation of its exercise, it is quite clear that its existence can not be accepted as a substitute for a sufficient law. Indeed, one of the major consequences of the state of penal law to-day is that administration has so largely come to dominate the field without effective guidance from the law. This is to say that to a large extent we have, in this important sense, abandoned law - and this within an area where our fundamental teaching calls most strongly for its vigorous supremacy.

Fifth: The importance and neglect of penal law and the wide breach between law and administration would make a case for re-examination of the subject, were there nothing else involved. Much more, however, is involved. For in no other area of law have legal purposes and methods been subjected to a more sustained and fundamental criticism emenating from without the legal group - especially the psychological and social sciences - but buttressed also from within.

The challenge is, in substance, that the penal law is ineffective, inhumane and thoroughly unscientific. ¶ Its ineffectiveness is argued from the prevalence of serious offences and the high rates of recidivism that the crime statistics uniformly show. Its inhumanity is argued from the use of punishment as sanction including even penalty of death; the narrow range in which the law accords importance to the causes and dynamics of criminal conduct rather than the nature of the proved offence; the extent to which sanctions are governed by the injury inflicted rather than the future danger the defendant may present and the requirements for an effective therapy; the wide and seemingly anarchical disparity in sentence practice even among judges of one court. All this is urged as evidence that penal law, whatever its exponents may avow as its philosophy and purposes, is actually animated largely by retributive objectives, constituting nothing more than vengeance in disguise. ¶ The further impeachment based on science rests in part on these contentions but in larger part on the submission that the law - or some at least of its important aspects - employs unsound psychological premises such as "freedom of will" or the belief that punishment deters; that it is drawn in terms of a psychology that is both superficial and outmoded, using concepts like "deliberation", "passion", "will", "insanity", "intent"; that even when it takes the evidence of psychiatric experts, as on the issue of responsibility, it poses questions that a scientist can not regard as meaningful or relevant or answer in his scientific

terms; and, finally, that though the law purports to be concerned with the control of specified behavior, it rejects or does not fully use the aid that modern science can afford.

To state this many-sided challenge is not to say that it is right either in whole or part or even that it is internally consistent. It is to say that its existence indicates a state of conflict about penal law among important groups seeking to further public interest that is itself a proper cause for deep concern. The way to profit from this tension and contribute to its mitigation is to explore the merits of such criticism in the context of a reconsideration of the law. Where the critique is valid, law will gain from recognition of its merit. Where it reflects misunderstanding or inadequate analysis of the intrinsic social problems, a reasoned statement of the points involved may serve to clear the air.

It should be added that in recent years the law has yielded major ground before the thrust of some of these contentions; this is, indeed, where the reform has been.

There is no difference of opinion, for example, on the point that prisons can be totally destructive in their influence upon impressionable inmates, enlarging rather than diminishing potentialities for further criminality by the time the moment of release arrives. This is the basis of probation laws, affording power to forego imprisonment, as well as of prison reform and new release procedures, designed to mitigate or to eliminate destructive factors, and to enlarge constructive influences, in so far as that can feasibly be done.

There also has been some acceptance of the larger point that penal law in general ought to concern itself with the offender's personality, viewing his crime primarily as symptom of a deviation that may yield to diagnosis and to therapy. This is the theory of juvenile court and youth offender laws, which seek public protection mainly through a disposition calculated to effect reform of anti-social tendency, with the subject restrained of liberty only when and in so far as that is deemed essential pending the rehabilitation sought. It is the theory used in dealing with the irresponsible and in related areas in which commitments have been authorized. It is an approach that is now possible to a significant extent in treatment of adult offenders, in virtue of probation laws and the development of indeterminate sentences, though neither law nor its administration can be said to concentrate upon this single end.

¶ Whether and to what extent the law ought to go further and embrace this as its only or its major object is one of the basic issues calling for consideration. The implications of this proposition with regard to treatment methods and its further impact on the definition of offences, not to speak of the problem of safeguards for the individual, call for much larger exploration than they thus far have received. Even the reforms of recent years that move in this direction and the experience that they have yielded call for close evaluation on the most impartial scale.

Sixth: If systematic re-examination of the content, methods and objectives of the penal law is needed and important, the model code proposal is responsive to the need.

The draft would be prepared upon the basis of a study that would canvass the existing law and practice, articulate the legislative issues, analyze the possible solutions and appraise competing values and considerations that a legislative choice should weigh. Upon the major points involved it would not only survey and compare the merits of solutions found in the prevailing law of the United States and the proposals that have been advanced for its improvement but also those developed in the codes of foreign countries, where penal legislation has received such large attention, and the further possibilities that fresh imagination may suggest. ¶ To the extent - and the extent is large - that legislative choice ought to be guided or can be assisted by knowledge or insight gained in the medical, psychological and social sciences, that knowledge would be marshaled by those competent to set it forth. This would be done, moreover, in the context of the concrete legislative problem on which such knowledge bears, meeting the difficulty felt with much work in the social sciences, namely, that it has focused insufficiently upon the crucial issues posed in contemplating social action and so has amassed data that can not be used. ¶ The project would, in short, permit the law to join with other disciplines in the production of a treatise on the major problems of the penal law and their appropriate solutions from which future legislation, adjudication and administration would be able to draw aid. If nothing else were done, this would be an achievement

of immense importance. Such a commentary, executed competently, would serve at least to place the literature of the penal law upon a parity with that of well-developed legal fields.

Fourth: The model code would represent the practical embodiment of the conclusions of the study and the commentary, in the form best calculated to promote their use. It would represent much more as well. It would assure attention not alone to substance in solutions recommended but also to the drafting problems they present. This is a matter of substantial import in a field where legislative drafting on the whole is at its lowest level and where the drafting difficulties are immense. Even more important, legislative formulation is the best way to elicit the collective judgment of the Institute upon the merits of conclusions offered by the specialists who would conduct the study and prepare the draft. It is precisely for the reason that the Institute's approval presupposes the support of representative professional opinion after opportunity for full consideration of the issues that its sponsorship has seemed to both the law schools and the bar to be ideal for the task.

Seventh: The way a model code extends the influence of the conclusions of a study is illustrated by the famous work of Sir James Fitzjames Stephen. Stephen's Digest has been a British judge's handbook from its date of publication but Stephen's impact on the course of legislation rests far more on the draft code that he prepared for a Royal Commission after his exploratory work was done. Though parliamentary interest was too ephemeral for its enactment

as a whole, it was the basis of ~~a series of significant~~ important English legislation in some fields. ~~enactments (Criminal Law Amendment Act, 1885; Perjury Act, 1911; Forgery Act, 1913; Larceny Act, 1916).~~ More important, it was the main source employed in drafting the Criminal Code of Canada of 1892 and played a major role in the numerous other formulations for the British colonies and the dependencies. Similarly, Macauley would not have shaped British penal legislation for India by his Commentaries only but the Commentaries and the draft produced enactment in 1860, twenty-three years after their completion. One may doubt also whether Macauley and a host of other Europeans would have weighed so carefully the views on penal law of ~~Samuel~~ Edward Livingston if he had not presented them with the proposal of a code. Would New York in 1882 have legislated on the basis of Field's thoughts of 1865 unless he had prepared a draft? The point is simply that when legislation is in prospect legislators do not seek a treatise but a legislative model. Nothing, indeed, could make this clearer than the Institute's experience with the Model Youth Authority Act. It is the draft that gave an impetus to legislation in the states that have now moved in the direction urged.

Eighth: Seventh: There are, of course, important difficulties to be faced in the delineation of the scope of any model code. Whether behavior ought to be made criminal may be affected by variation in social conditions and public attitudes from state to state. What treatment methods ought to be employed may be in part a function of such factors, as well as of such other variables as crime

rates, the character of population, public budgets, facilities and personnel. It is essential to confine the project within areas where such variety does not preclude a uniform solution or else to meet the difficulty by the presentation of alternative solutions adapted to the various conditions posed. There will be need, in any case, for such use of alternatives since many legislative choices may so largely turn on matter of opinion that the Institute will not be ready to endorse a single answer to the question raised. Where that is so, the commentary will provide a full discussion of the reasons for this mode of presentation, marshaling the relevant considerations on the issue that the draft does not resolve.

The enterprise will have an ample scope within these limitations. They will, indeed, do little more than to assure that emphasis is placed where it should be in any case, namely, on the pervasive problems posed in shaping law to deal with the serious injuries and threats to vital human interests rather than the vast, heterogeneous mass of special legislation declaring this or that conduct a petty ~~crime~~ offense, subject to ~~minor penal sanctions~~ a minor penalty. Neither the human personality nor the largest requirements for its protection nor its sense of justice nor its most malevolent aggressions differ very markedly from state to state. It is with them and with their legal implications that the model code should mainly be concerned. Within that area there is no major difficulty that can not be surmounted by using alternative provisions where there ~~is~~ may be no single answer to be found.

To put the matter more concretely, the code should deal with the general doctrines governing both the existence and the scope of liability; the classification of and the definition of major offences; justification and defences; the discriminations made to prescribe or to vary applicable penalties and other treatment methods and the range, nature and purpose of the sanctions used; the criteria for measuring the effect of mental disorder or defect upon responsibility; the distribution of authority for disposition of offenders, including sentence and release procedures; the selection and definition of the groups accorded special treatment, such as juveniles, youths and habitual offenders and the nature of the special treatment authorized; the inchoate crimes and commitment procedures designed to reach potential malefactors before the harm of which they may be capable is done. The organized, professional criminality that exercises such a baneful influence in other areas as well as on the incidence of crime would necessarily receive attention in these contexts.

This is a full agenda which encompasses both the main content of our penal law apart from the minor offences and, except for so-called contraventions, of the modern penal codes abroad.

Ninth: The present state of the behavior sciences does not cast doubt upon the wisdom, usefulness and feasibility of such a program. Granting that we may expect significant advance in scientific insight concerning both the causes and control of human conduct, it is none the less important to attempt fully to use the insights we now have. Work done today is subject to revision in the future in light of changes in the state of knowledge and present ——————→

conclusions can, in any case, be cast in forms most suited to assimilate such changes as they may occur. More than this, however, only systematic study of the penal law and its pervasive problems can appraise the relevancy of behavior science to the field. What is required is sustained analysis, sorting the ethical, political, technical or practical aspects of problems from their scientific aspects, in the sense of the behavior sciences. Such an analysis has been too long delayed.

Given a sound analysis of this dimension, there is every reason to believe that proper canvass of the fruits of special medical and psychological knowledge will have important impact on the law. By the same token, to conduct the canvass in the context of the concrete legislative problems is an ideal way to judge the status and the implications of behavior science for this enduring form of social action and control.

There is small danger that a project so conceived will tend to "freeze" existing practice without exploration of the larger underlying questions. Its basic purpose is precisely the reverse: to judge existing practice in the light of all the knowledge that can be obtained. The tendency of such an enterprise is necessarily to "unfreeze" far more than it can tend to "freeze." But if and in so far as candid study leads to the conclusion that social judgments reflected in penal law rest on grounds unlikely to be touched by scientific progress, there is important gain in recognizing this

to be the case. Not the least of the results of such a finding is that it may further education with respect to the intrinsic limitations of the penal law, as distinguished from other and less oppressive, more constructive methods of protection and control.