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Department of Legislation

Charles B. Nutting, Editor-in-Charge

■ Interest in the codification of the criminal law is currently at a high point because of the American Law Institute's proposal to prepare a model criminal code and because of the Wisconsin project previously described in these pages. In the following article Professor Hall, an eminent authority in the field, comments on the significance of codification and on some of the problems involved.

Codification of the Criminal Law

By Jerome Hall

Professor of Law, Indiana University

■ Codification of the criminal law involves problems, methods and values which are important not only for the current practice of law in many of its branches; they also raise challenging questions about the future practice of law and the functions of the Bar.

The illustrious precedent established by Edward Livingston should help persuade leaders of the Bar that they have an obligation to contribute their skills to penal codification. Moreover, the recent enormous expansion of the criminal law in corporate and commercial areas involves the interest of many clients, which can not be safeguarded by occasional dips into criminal law. A sustained thoughtful effort to codify the criminal law is an excellent way to become familiar with that important branch of the *corpus juris*.

The time is opportune for a revival of the traditional interest of the American Bar in the criminal law because of the current codification movement. In 1947 Louisiana adopted a criminal code; and there are similar projects under way in Wisconsin and other states. And the American Law Institute has recently initiated a national program to provide a model criminal code.¹

The criminal law is largely expressed in statutes which in most states at the present time comprise a veritable hodgepodge. There is a pressing need to organize these materials so that obsolete rules can be eliminated, inconsistencies resolved,

and the retained laws readily located. These obviously needed immediate objectives can in good measure be attained by a careful examination and ordering of the existing statutes.

Codification, looking far beyond that important objective, seeks to systematize the entire criminal law. For example, modern penal codes are divided into a General Part and a Special Part, the former including principles and doctrines applicable to all crimes, while the latter includes only the distinctive material elements of the various specific crimes. Thus, in a sound criminal code, the various parts are logically interrelated, and the consequences for adjudication and practice are analogous to the achievements of a science as contrasted with a mere aggregate of unrelated bits of knowledge on various subjects.

The codification of the criminal law includes objectives that extend far beyond even the systematization of all existing statutes and decisions. What is called for, in sum, is the most searching study of the entire criminal law that is possible, the discovery of necessary reforms, and a clear precise code which reflects the best relevant knowledge of the problems of criminal law. The potentialities of such an inquiry for legal progress are so great that any present estimate must be a severe understatement.

During the past half century there has been an enormous growth in scientific and social knowledge which

is relevant to the problems of criminal law. These disciplines also comprise a variegated, often tricky, terrain where some are tempted to accept all of the claims put forth in the name of science, while others, sensing a threat to important values, reject the new learning *in toto*. What is needed, however, is thoughtful criticism and judicious use of whatever knowledge withstands such analysis.

For example, this century has witnessed the rise of psychiatry to a position of great importance for the criminal law. When one explores the literature of psychiatry he discovers that some previously neglected facts are well established, *e.g.*, the large role of unconscious drives and emotions. But he also finds much dogmatism, conflicting theories and naïve criticism of the bases of legal liability. The obvious desideratum is to cull the sound from the fallacious and to utilize the former in improvement of the law. This is not as simply done as said; and the present major obstacle is the lack of participation in relevant inquiries by competent members of the Bar.

The hazard we face is that the theories and opinions of nonlegal specialists will prevail, unchallenged by the scrutiny of competent lawyers who have studied the relevant sciences and disciplines. Unfortunately the "average practitioner" is apt to react in one of two ways: either he will say, "How can I pit my judgment about psychiatry against that of a recognized authority?" Or he will say, "All of that 'stuff' is dogmatic, fallacious, and dangerous. Away with it!" But if there is a large core of valid knowledge in psychiatry, which has very important bearings on vital legal and social issues, neither of these reactions is defensible. Since the problems to be dealt with are ultimately legal ones, some competent lawyers—and the more the better—must appraise the relevant claims of scientific and other knowledge, and

1. An excellent statement of the American Law Institute's project has been supplied by the Reporter, Professor Herbert Wechsler, in "The Challenge of a Model Penal Code", 65 *Harv. L. Rev.* 1097 (1952).

contribute the kind of analysis that must be available if our law is to progress.

To cite another specific instance of present needs and opportunities, it is only in the past quarter of a century that scientific knowledge of alcoholism has been supplied. This also has important implications for criminal law because although intoxication is a factor in many crimes, few courts have been informed of the available facts and knowledge. Solution of all the relevant legal problems again depends upon lawyers' familiarity with the literature on alcoholism to the point of being able to participate intelligently in conferences with experts in that field. With reference to juvenile delinquency, sex crimes, theft and many other types of harmful behavior, considerable knowledge has also become available, which a broadly conceived program of codification should utilize.

As was indicated above, such a project, while it provides unparalleled opportunities to reappraise and improve a very important branch of the law, is also hazardous. Consider, for example, the claims of superior knowledge put forth by social scientists and psychiatrists who criticize the criminal law as archaic and completely untouched by recent science. Again, some psychiatrists hold that crime is a disease, that all criminals are sick. Obviously such a theory has drastic implications for moral and legal standards of criminal liability. The validity of the thesis propounded by the experts must be carefully evaluated by lawyers since there is no short cut to uniformly held "better answers". The above theory of crime may represent the position of relatively few, but tremendously articulate, psychiatrists. Subjected to the hard tests of experience, common sense and opposing scientific positions, it may be totally unsound. On the other hand, it may have important relevance for some offenders. In any case, ill-phrased as the theory often is, it challenges the legal profession to establish a sound relationship between law and science.

A second major hazard in codification concerns the principle of legality, the "rule of law" in the field of crimes. Statutes and case-law now provide specific definitions, proscriptions and, consequently, limitations on official power. The threat to this dearly won tradition comes from two directions. Draftsmen, intent on logical and aesthetic results, may also be unmindful of the relevant political values, and they may draft many provisions in general terms. They may even wish to confer upon the courts great powers of discretion in interpreting the criminal code. Such innovations would undermine the principle of legality in the field of crimes. The remedy is insistence on retention of the common law of crimes, especially in interpretation of general, vague or ambiguous phrases, realistic precision in drafting the code, and uncompromising adherence to the values that protect individuals from the iron hand of the state when it is applying the heavy sanctions of penal law. This danger to basic legal safeguards is abetted by social scientists who imagine that their discipline has achieved the status of an exact science. In effect, they demand that their opinions be substituted for legal controls. The short answer to such demands is that the nonlegal experts should be kept on tap, but not on top. A fuller, better answer is a careful critique of the relevant disciplines and values of a democratic legal order.

The deliberate recognition of possible dangers involved in codification of the criminal law is a necessary condition of legal progress. However, it provides no defense of the uninformed or of ostrich-like indifference. Nor can potential dangers to existing institutions be avoided by indiscriminate opposition to all proposed reforms. Change is inevitable, and the preservation of sound values, as well as the implementation of important new ones, requires considerable effort. There is no escape, therefore, at least for thoughtful persons, from active, sincere, searching inquiry.

Consequently, the over-all question concerning codification of the

criminal law is this—how can one best participate in such an enterprise or, more directly, what methods should be used to provide the best possible code? The available methods include both traditional, professional methods and scientific methods. In the past, codification has been the product of traditional, professional methods, *i.e.*, of preponderant concern with statutes, codes, case-law and treatises. Since law does not exist in a vacuum, critical appraisal of the legal materials was, of course, enlightened by common sense, experience and such smatterings of scientific knowledge as became fortuitously available. Scientific methods of codification do not exclude or depreciate the use of the legal materials or the professional techniques of applying them. They *supplement* them by (1) concentration on relevant facts; (2) thorough use of scientific and other relevant knowledge; (3) articulation of methods employed and steps taken so that (a) the best methods are used and (b) the various steps in the investigation can be retraced and checked; (4) the entire procedure is carried on systematically, and (5) a final record of relevant empirical science and ethical knowledge is provided.

It is possible to argue that allegedly scientific methods add nothing but pretension to the traditional professional ones. It is possible to argue that the difference is not novel but only represents an emphasis. It is possible to argue that the difference is monumental and that the implications for the functions of the legal profession in the future are revolutionary in the best sense. These issues cannot be discussed here.² What is possible in this brief comment is to urge unbiased reflection on the importance of factual investigation in relation to legal problems and appreciation of the persistent use of available knowledge and the best methods of research.

Without elaboration of the divisions of the indicated factual-legal

2. See generally, Jerome Hall, *Theft, Law and Society* (2d ed. 1952).

researches which, in the writer's judgment, are necessary to the production of the best possible code, the following outline may be suggestive:

1. Intensive factual research into certain social problems regarding which legal controls are or should be employed, together with a critique of the relevant values.

2. A thorough study of the relevant existing law. This includes not only its restatement, together with commentaries, but also its history and, especially, researches into its functioning.³

3. Many legal problems would be formulated in the light of the two preceding stages of the work. Especially important would be the dis-

covery and formulation of problems which can in good measure be solved if available factual knowledge is soundly employed.

4. The relevant disciplines and sciences would be searched (and conferences of specialists and lawyers arranged) to provide the necessary information and knowledge, in the light of which the provisions of the code would be drafted.

5. A record should be provided which, in effect, would be the empirical scientific foundation and the rationale of the values upon which the code was constructed. The least advantage of such a record would be to facilitate pointed informed discussion as well as improvement of the

code in future years, as scientific and moral knowledge progressed.

That scientific and other sound methods of research can be used very profitably in analysis and solution of legal problems is no longer a pious hope or exhortation. Several extant large-scale studies and numerous shorter ones supply specific concrete illustrations and supports of the above assertion. Their implications for other fields of law than the criminal law and, consequently, for the functions of the Bar are very significant.

3. As to the significance of the functioning of rules for both the understanding of present law and the discovery of needed reforms, see Hall, *Theft, Law and Society* (2d ed. 1952).

Notice by the Board of Elections

■ The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1953 Annual Meeting and ending at the adjournment of the 1956 Annual Meeting:

Alabama	Missouri
Alaska	New Mexico
California	North Carolina
Florida	North Dakota
Hawaii	Pennsylvania
Kansas	Tennessee
Kentucky	Vermont
Massachusetts	Virginia
Wisconsin	

Nominating petitions for all State Delegates to be elected in 1953 must be filed with the Board of Elections not later than March 27, 1953. Petitions received too late for publication in the March issue of the JOURNAL (deadline for March issue, January 28; deadline for April issue, February 27; deadline for May issue, March 31) cannot be pub-

lished prior to distribution of ballots, fixed by the Board of Elections for April 3, 1953. Ballots must be returned by June 8, 1953.

Forms of nominating petitions may be obtained from the Headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M., March 27, 1953.

Attention is called to Section 5, Article VI of the Constitution, which provides:

Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for

the office of State Delegate for and from such state.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Special notice is hereby given that no more than twenty-five names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires.

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