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## REFORMING THE FEDERAL CRIMINAL CODE: A CONGRESSIONAL RESPONSE

EDWARD M. KENNEDY\*

Effective crime control means something more than gun control, reform of the Law Enforcement Assistance Administration and streamlining the administration of criminal justice. The federal government can set an example for the states in the area of criminal code reform. A major task awaits us—the first comprehensive revision of the Federal Criminal Code. Critical issues like capital punishment, sentencing, wiretapping, the insanity defense and the role of the press in national security cases must be resolved by Congress in the coming months. But the work we are undertaking must truly be worthy of the label ‘real reform.’

SENATOR EDWARD M. KENNEDY  
*October 20, 1975*  
*Chicago, Illinois*

### I. INTRODUCTION

The subject of crime remains a chief concern of Americans today.<sup>1</sup> Our nation's soaring crime rate and the inability of our criminal justice system to dispense swift and sure justice have given rise to various legislative proposals designed to combat the growth of crime. Although the war on crime is primarily a state and local problem, Congress has provided valuable financial and technical assistance to aid localities in their struggle.<sup>2</sup> But just as important as any federal financial commitment to improve state and local law enforcement efforts are legislative models, at the federal level, which can serve as examples to be copied by state legislatures in improving their own criminal justice systems.

The most comprehensive and innovative effort undertaken by the Congress to deal with the nation's crime problem is now underway—the drafting of a

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1. See, e.g., FBI UNIFORM CRIME REPORTS FOR THE UNITED STATES (1976); *Hearings, Nat'l Comm'n on the Causes and Prevention of Violence* (1969); REPORT OF U.S. NAT'L ADVISORY COMM'N ON CIVIL DISORDER (1968); NAT'L COMM'N ON THE CAUSES AND PREVENTION OF VIOLENCE, *TO INSURE DOMESTIC TRANQUILITY XIV* (1967); Ennis, *CRIMINAL VICTIMIZATION IN THE UNITED STATES: A REPORT OF A NAT'L SURVEY* (Nat'l Opinion Res. Center, May, 1976); Howard, *Police Reports and Victimization Survey Results: An Empirical Study*, 12 *CRIMINOLOGY* 133 (1975); Lesley, *Building New Support for Enforcing the Law, Public Attitudes on Crime and Law Enforcement*, 42 *VITAL SPEECHES* 524 (1976); *Public Opinion on Criminal Law and Legal Sanctions: An Examination of two Conceptual Models*, 67 *J. CRIM. L.* 110 (1976); Bartel, *Analysis of Firm Demand for Protection Against Crime*, 4 *J. LEGAL STUDIES* 443 (1975).

2. See, e.g., Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, as amended in 1970, (P.L. 91-644), 1973 (P.L. 93-83) and, most recently, in 1976 (P.L. 94-503). See also, the Juvenile Justice and Delinquency Prevention Act of 1974, P.L. 93-415.

completely new federal criminal code. Criminal code reform is not a hastily conceived idea. Efforts to update existing state criminal codes can be traced back to the 1950's, when the American Law Institute first developed its MODEL PENAL CODE.<sup>3</sup> The main impetus for current congressional efforts was the establishment, in 1966, of the National Commission on Reform of Criminal Laws.<sup>4</sup> The Commission's mandate included:

. . . a full and complete review and study of the statutory and case law of the United States which constitutes the federal system of criminal justice for the purpose of formulating and recommending to the Congress legislation which would improve the federal system of criminal justice. It shall be the further duty of the Commission to make recommendations for revision and recodification of the criminal laws of the United States, including the repeal of unnecessary or undesirable statutes and such changes in the penalty structure as the Commission may feel will better serve the ends of justice.<sup>5</sup>

In 1971, this national commission, chaired by former Governor Edmund G. Brown of California, issued its final report in the form of a substantive code similar to the MODEL PENAL CODE.<sup>6</sup> The *Brown Commission* concluded that a complete new codification of the federal criminal code was necessary and called on Congress to undertake the task using its *Final Report* as a starting point.

## II. PRIOR CONGRESSIONAL ACTION

Extensive hearings on the *Final Report* spanned the 92d Congress, from 1971 to 1973.<sup>7</sup> In 1973, during the first session of the 93rd Congress, two versions of a criminal code reform bill were introduced in the Senate as a basis for further hearings—Senate Bill 1 and Senate Bill 1400 (hereinafter referred to as S. 1 and S. 1400). These bills generally reflected views gleaned from the *Brown Commission*, the hearings in the 92d Congress, the Department of Justice and other federal agencies, and comments from numerous professional and public interest sources.<sup>8</sup>

3. MODEL PENAL CODE (Tent. Draft No. 1, 1953). See also H. Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952). Although the United States has never enacted a comprehensive criminal code, several consolidations and revisions—largely limited to eliminating gross inconsistencies—have occurred. See, e.g., Act of March 4, 1909, Pub. L. No. 350, § 321, 35 Stat. 1088; Act of June 25, 1948, Pub. L. No. 772, § 645, 62 Stat. 683.

4. Act of Nov. 8, 1966, Pub. L. No. 89-801, § 3, 80 Stat. 1516.

5. *Id.* at 1516-17.

6. FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS (1971) hereinafter referred to as the *Brown Commission and Final Report*. See also WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS (1970). (hereinafter cited as *Working Papers*)

7. *Hearings on Brown Commission Final Report Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d-93d Cong. (1973). (hereinafter referred to as *Hearings*)

8. See, e.g., testimony of Herbert Wechsler, chief reporter for the MODEL PENAL CODE. *Hearings* at 522.

On January 15, 1975, S.1 of the 94th Congress, titled "The Criminal Justice Reform Act of 1975," was introduced in the Senate by Senators John L. McClellan and Roman L. Hruska, along with other numerous cosponsors. Based on a hearing record of some 8000 pages, this new version of S.1 was a blend of the previous bills and accompanying hearings. Following two days of further hearings and after weeks of study and negotiation, the Senate Subcommittee on Criminal Laws and Procedures<sup>9</sup> unanimously reported the bill to the full Senate Judiciary Committee.<sup>10</sup> (hereinafter referred to as the *Committee*).

The ongoing efforts of negotiation and compromise continued in the *Committee*<sup>11</sup> with the encouragement of the leadership—Senators Mike Mansfield and Hugh Scott. Senators Philip A. Hart, James Abourezk, and I sought to identify and work out with Senators McClellan and Hruska those areas of controversy in the bill that imperiled the legislation.<sup>12</sup> Although essential compromises were not completely worked out in time to enable action in the 94th Congress, these discussions and formal delineations of position form a sound basis for processing a new criminal code bill next session.

### III. THE NEED FOR REVISION

Why has all of this effort been expended to achieve a replacement for Title 18 of the United States Code? The fact is that the current code is in desperate need of revision. (I deliberately avoid characterizing the effort as a "recodifi-

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9. The Subcommittee on Criminal Laws and Procedures consisted of: John L. McClellan, Chairman, Arkansas, Philip A. Hart, Michigan, James O. Eastland, Mississippi, Edward M. Kennedy, Massachusetts, Robert C. Byrd, West Virginia, Roman Hruska, Nebraska, Hugh Scott, Pennsylvania, and Strom Thurmond, South Carolina.

10. Not all of the members of the *Subcommittee* approved of the bill in agreeing to report it to the full Senate Judiciary Committee. In a letter to the *Subcommittee* Chairman, dated September 17, 1975, both Senator Philip A. Hart and I reserved our rights to amend the bill further, but agreed to report it to the full committee "without recommendation" where further debate could occur on an orderly basis.

11.

#### COMMITTEE ON THE JUDICIARY

James O. Eastland, Mississippi, Chairman

John L. McClellan, Arkansas  
 Philip A. Hart, Michigan  
 Edward M. Kennedy, Massachusetts  
 Birch Bayh, Indiana  
 Quentin N. Burdick, North Dakota  
 Robert C. Byrd, West Virginia  
 John V. Tunney, California  
 James Abourezk, South Dakota

Roman L. Hruska, Nebraska  
 Hiram L. Fong, Hawaii  
 Hugh Scott, Pennsylvania  
 Strom Thurmond, South Carolina  
 Charles McC. Mathias, Jr., Maryland  
 William L. Scott, Virginia

12. In a memorandum of February 9, 1976, Senators Mansfield and Scott suggested that, in an effort to come up with an acceptable bill, the principal Senators involved in the S. 1 discussions draft a new bill without those highly controversial sections, such as insanity, entrapment, the "Official Secrets Act", and capital punishment, which imperiled passage. In a memorandum of March 8, 1976, Senators Hart, Abourezk and I proposed certain changes as a first step toward reaching such an agreement. Senators McClellan and Hruska made a very constructive response to this memorandum on March 25, 1976. Negotiations have since continued, at the staff level, in an effort to iron out all remaining issues.

cation" since no systematic codification of federal criminal law has ever occurred!) Laced with ambiguities, historical anomalies, and inconsistencies, our current federal criminal laws are a disgrace.<sup>13</sup> Title 18 is merely a random assembly of provisions arranged without consideration of the content of other chapters.<sup>14</sup> Further, other important offenses are scattered throughout the other fifty titles of the United States Code.<sup>15</sup> Critics and proponents of S.1 alike are unanimous in the view that the first step in waging an effective war on crime—a step that many states have already taken in enacting modernized penal codes<sup>16</sup>—is the prompt development of a comprehensive, logically organized, and internally consistent federal criminal law.

A few concrete examples demonstrate the depth of the problems found in Title 18. Federal sentencing practices are hopelessly inconsistent and lead to unjustified disparity—two offenders who have committed identical offenses may find themselves in adjoining federal prison cells serving widely disparate sentences, while a third like offender walks the street, a beneficiary of probation. Sections dealing with the commitment of the mentally ill offender<sup>17</sup> seem more in tune with the philosophy of the Middle Ages. The federal laws governing rape and other sex offenses are hopelessly outdated.<sup>18</sup> Some seventy often conflicting sections deal with theft,<sup>19</sup> while over eighty separate provisions relate to forgery and counterfeiting.<sup>20</sup> The federal mail fraud statute suffers from a maze of inconsistencies—an offender who, in perpetrating a vast multistate fraud sends one letter through the mail is liable for a maximum penalty of five years; while another petty swindler whose fraud is minor but who, in the course of committing the fraud mails three letters, is subject to a maximum of fifteen years! In *Nelson v. United States*, 178 F.2d 458 (9th Cir. 1949), the court held that mailing several letters to different addresses in pursuance of a single scheme to defraud did in fact constitute separate offenses of using the mails to promote fraud in violation of 18 U.S.C. §341, and stated that separate sentences could be imposed for each violation. See also *Durand v. United States*, 161 U.S. 306 (1896).

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13. *Brown Commission* at xii-xiii.

14. See, e.g., *Brown Commission* §§ 201, 1721, 302.

15. See, e.g., 7 U.S.C. § 2027 (1970) (food stamps); 15 U.S.C. § 80 b-3 (1970) (registration of investment advisors); 15 U.S.C. § 780 (1970) (over-the-counter markers); 42 U.S.C. § 261 (1970) (penalties for introducing prohibited articles and substances into hospitals). See Generally *Brown Commission* § 3006.

16. See, e.g., HAWAII PENAL CODE tit. 37; N.C. GEN. STAT. Ch. 5 (1975 replacement); N.Y. PENAL LAW §§ 100 et. seq. (McKenney 1975); ORE. REV. STAT. tit. 16 (1975).

17. See 18 U.S.C. §§ 4246-4248 (1970).

18. See, e.g., 18 U.S.C. § 2031 (1970).

19. See, e.g., 18 U.S.C. §§ 641-664 (1970) (theft); 18 U.S.C. §§ 2111-2117 (1970) (robbery and burglary); 18 U.S.C. §§ 1691-1734 (1970) (postal service theft); 18 U.S.C. §§ 1341-1343 (1970) (mail fraud); 18 U.S.C. §§ 2071-2076 (1970) (theft of records and reports); 18 U.S.C. § 2197 (1970) (theft by seamen and stowaways); 18 U.S.C. §§ 2311-2318 (1970) (stolen property).

20. See, e.g., 18 U.S.C. §§ 471-509 (1970) (counterfeiting and forgery); 18 U.S.C. §§ 1543-1546 (1970) (passports and visas); 18 U.S.C. §§ 2314, 2315, 2318 (1970) (stolen property); 18 U.S.C. §§ 1002, 1003, 1008, 1010 (1970) (fraud and false statements); 18 U.S.C. § 3185 (1970) (extradition of counterfeiter); 18 U.S.C. § 2156 (1970) (counterfeiting national defense documents).

Outdated provisions make it illegal to lie to a ship's captain,<sup>21</sup> prohibit a seaman from seducing a female passenger on an American vessel<sup>22</sup> and make it a crime for anyone to prevent a United States government carrier pigeon from completing its appointed rounds.<sup>23</sup>

#### IV. THE NEED TO REORGANIZE TITLE 18

Most critics of the current law agree that any new criminal code must reorganize Title 18 in a logical and consistent manner.<sup>24</sup> All general legal principles (for example, culpability requirements and defenses), specific offenses, and sentencing provisions should be clearly delineated by separate headings. Encompassed under such headings should be further chapters, subchapters and sections. The goal must be a logical progression in the development of the federal criminal law.

##### A. *General Legal Principles*

The general legal principles section would deal with such subjects as criminal culpability. A new criminal code must standardize the various levels of culpability required for commission of various offenses. The requisite state of mind is not comprehensively and precisely defined in current federal statutes. The task of construing the "mental elements" used in a particular statute has been left to the courts. The result has been confusion, conflict and disparate application. As noted in the report of the *Committee*,<sup>25</sup> the federal criminal justice system is in a state of chaos:

For example, the term 'willful' has been construed by the courts in a variety of ways, often inconsistent and contradictory. The courts have defined a 'willful' act as an act done voluntarily as distinguished from accidentally, an act done with specific intent to violate the law, an act done with bad purpose, an act done without justifiable excuse, an act done stubbornly, an act done without grounds for believing it is lawful, and an act done with careless disregard whether or not one has the right so to act.<sup>26</sup>

The present code contains over fifty undefined terms relating to the state of mind accompanying various crimes.<sup>27</sup> The MODEL PENAL CODE lists but four

21. 18 U.S.C. § 35 (1970).

22. 18 U.S.C. § 2198 (1970).

23. 18 U.S.C. § 45 (1970).

24. See, e.g., Phillips, *The Proposed Federal Justice Reform Act of 1975: A Civil Liberties Critique*, 6 SETON HALL L. REV. 591 (1975); Clark, *Prologue to Symposium of Proposed Federal Criminal Codes*, 68 N.W.U.L. REV. 817 (1973); Dobbyn, *Proposal for Changing the Jurisdictional Provisions of the New Federal Criminal Code*, 57 CORNELL L. REV. 33 (1972); Schwartz, *The Proposed Federal Criminal Codes*, 13 CRIM. L. REP. 3265 (1973); Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425 (1968).

25. S. REP. NO. 94-00, 94th Cong. 2d Sess. 1 (1976).

26. *Id.* at 51-52. See, e.g., *Screws v. United States*, 325 U.S. 91 (1945); *Spies v. United States*, 317 U.S. 492 (1943); *United States v. Murdock*, 290 U.S. 389 (1933).

27. See, for example, the use of the word "knowingly" in the following sections: 18 U.S.C. § 1082 (1970) (gambling); 18 U.S.C. § 152 (1970) (bankruptcy); the use of "unlawfully" in the

for all crimes—intentional, knowing, reckless and negligent.<sup>28</sup>

### B. Offenses

We must also modernize the definitions and gradings of existing offenses. For example, one new omnibus theft offense should replace the approximately seventy interrelated and inconsistent larceny and embezzlement sections now in current law.<sup>29</sup> And, whereas the penalty now imposed on a convicted offender depends on the nature of the theft or embezzlement, not on the seriousness of the crime, such arbitrary distinctions should be eliminated. (For example, robbery of a federally insured bank currently carries a maximum term of twenty-five years,<sup>30</sup> while robbery of a United States Post Office carries a ten year maximum sentence.<sup>31</sup>) Similar consolidations of various multiple provisions should also occur in the areas of property destruction,<sup>32</sup> forgery<sup>33</sup> and counterfeiting,<sup>34</sup> perjury<sup>35</sup> and false statements.<sup>36</sup>

The definitions of murder<sup>37</sup> and manslaughter<sup>38</sup> should be modernized to reflect current thinking on the issue of culpability, while the archaic federal rape and sex offense laws should be completely rewritten.<sup>39</sup>

Added to any new code must be effective new provisions designed to meet some of the problems of modern society. We must substantially strengthen civil rights law enforcement efforts by eliminating the current requirement of specific intent mandated by *Screws v. United States*, 325 U.S. 91 (1945). No longer should a defendant who knew that he was violating an individual's civil rights be able to argue that he did not specifically intend to violate those rights. New provisions aimed at corporate fraud and Watergate-type election practices are essential if we are to signal a new commitment by the federal government in the areas of white collar crime and government corruption. For example, there are currently conflicting interpretations of the terms "willfully" or "willfully and knowingly", as used in section 5 and section 17 of the Securities Act of 1933, regarding fraud in the sale of unregistered securities and fraud in the offer and sale of securities. 15 U.S.C. §§ 5, 17

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following sections: 18 U.S.C. § 1112 (1970) (manslaughter); 18 U.S.C. § 1111 (1970) (murder); the use of "willfully" in the following sections: 18 U.S.C. § 1163 (1970) (Indians); 18 U.S.C. § 1201 (1970) (kidnapping); the use of "maliciously" in the following sections: 18 U.S.C. § 1111 (1970) (murder); 18 U.S.C. § 81 (1970) (arson); the use of "willfully and maliciously" in 18 U.S.C. § 1362 (1970) (malicious mischief).

28. MODEL PENAL CODE, § 2.02 (proposed official draft, 1962).

29. 18 U.S.C. §§ 641-664 (1970) (embezzlement and theft).

30. 18 U.S.C. § 2113 (1970).

31. 18 U.S.C. § 2115 (1970).

32. 18 U.S.C. § 1363 (1970).

33. 18 U.S.C. §§ 471, 478, 482, 493, 1426 (1970).

34. 18 U.S.C. §§ 471-509 (1970).

35. 18 U.S.C. §§ 1621-1622 (1970).

36. 18 U.S.C. §§ 1001-1027 (1970).

37. 18 U.S.C. § 1111 (1970).

38. 18 U.S.C. § 1112 (1970).

39. 18 U.S.C. § 2031 (1970).

(1970). Many courts have indicated that it is not necessary to prove specific intent to violate the law, only that the defendant intentionally sold or offered to sell unregistered securities through the mails or interstate commerce.<sup>40</sup> In nearly all cases, the courts have not required proof of an evil motive or bad purpose.<sup>41</sup> A clear enunciation of the culpable state of mind required for conviction under these acts would eliminate confusion in this key area.

As to government corruption, the aftermath of Watergate clearly dictates areas of essential reform. Federal jurisdiction over the break-in of the Democratic Headquarters was only possible because the Watergate Hotel was located in the District of Columbia. If the same type of political break-in had occurred in one of the states, the federal government would not have had jurisdiction. Federal jurisdiction must be extended to cover these types of corrupt political and governmental actions, if these abuses are to be adequately dealt with on the national level. Further, although 18 U.S.C. § 612 (1970) addresses itself to what are now known as campaign "dirty tricks", there have been few prosecutions under this section and the scope of the section is unclear.<sup>42</sup> Clarification in this area is essential to help eliminate activity so detrimental to our national well-being.

A provision dealing with compensation of victims of crime would assure, for the first time, that the federal government will provide monetary benefits to those victims of a federal criminal attack.

But the most important and far-reaching changes occurring in any new federal criminal code must deal with federal sentencing policy. We must establish a uniform grading system whereby each serious offense is divided into various statutory degrees. The most severe penalties should be uniformly limited to aggravated forms of the offense. For example, the most aggravated forms of offense could be lettered Class A, with a descending order of intensity assigned consecutive letters (*i. e.* murder would be a Class A felony, manslaughter would be a Class C felony and negligent homicide would be a Class D felony).

Most importantly, general guidelines to aid judges in the exercise of their sentencing discretion should be established, along with limited appellate

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40. *Kistner v. United States*, 332 F.2d 978, 981 (8th Cir. 1964). *Contra*, (by implication) *United States v. Crosby*, 294 F.2d 928 (2d Cir. 1961).

41. *See, e.g.*, *United States v. Simon*, 425 F.2d 796, 808-810 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970); *United States v. Tarvestad*, 418 F.2d 1043, 1047 (8th Cir. 1969), *cert. denied* 397 U.S. 935; *United States v. Custer Wing Corp.*, 376 F.2d 675, 680 (4th Cir. 1967), *cert. denied* 389 U.S. 850.

42. *See, e.g.*, *United States v. Insko*, 496 F.2d 204 (5th Cir. 1974). The prosecution was based on the printing and distribution of bumper stickers which did not contain the requisite "attribution clause". The court held that since bumper stickers were in existence at the time the Act was passed, yet Congress did not specifically include them in its recitation of specific items falling within the ambit of the Act, that Congress did not intend for bumper stickers to be covered by the Act. The court went on to hold that the phrase "any statement", as used in the Act, could not be extended to include bumper stickers under the doctrine of *ejusdem generis* and, therefore, the defendant was inadequately apprised of the wrongfulness of his conduct.

review of sentences. The goal is to achieve some degree of uniformity in the sentences imposed in the federal courts. The absence of any articulated purposes or goals of sentencing has unfortunately resulted in a situation where different judges often mete out different sentences to similar defendants convicted of similar crimes depending on the sentencing attitudes of the particular judge. The resulting sentencing disparity has become a national scandal.<sup>43</sup> Criminal code reform can change all of this.

#### V. S. 1 NOT A SUITABLE VEHICLE FOR REFORM

Despite the obvious need for a new criminal code, I concluded that S. 1, as originally introduced, was not a suitable vehicle to realize the reforms I have mentioned. S. 1 carried forward too many unnecessary provisions of existing law and constituted, in a number of respects, an unwise and unnecessary encroachment upon civil liberties and lawful political dissent. For example, the sections in Chapter 11, labeled by critics an "Official Secrets Act" would have, in my judgement, unnecessarily shackled the press.<sup>44</sup> The provisions would have had a "chilling effect" on expression that clearly could not have been enjoined. *See New York Times Company v. United States*, 403 U.S. 714 (1971). Such offenses could not be countenanced in light of the recent revelations of abuses by the Central Intelligence Agency and Federal Bureau of Investigation. Further, such provisions did not require specific intent and, therefore could have been "a trap for innocent acts". *Papachristiou v. City of Jacksonville*, 405 U.S. 156, 164 (1972).

Section 522 would have unwisely abolished the traditional insanity defense at the very time the United States Circuit Courts of Appeals appear to be largely in agreement on a basic insanity test. In *United States v. McGraw*, 515 F.2d 758 (9th Cir. 1975), the Ninth Circuit Court of Appeals first cited its earlier holding in *Wade v. United States*, 426 F.2d 64 (9th Cir. 1970) (en banc), in which it held that, as regards the insanity defense, wrongfulness means moral wrongfulness rather than criminal wrongfulness. In *McGraw* the court went on to say that a total of five other circuits have now adopted that view. As these courts interpret the rule, a defendant lacks substantial capacity to appreciate the wrongfulness of his conduct if he knows his act to be criminal but, nevertheless, commits it because of a delusion that it is morally justified. 515 F.2d at 759-760.

Section 1103 would have retained a repressive symbol of another era—the

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43. *See* M. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1972); A. VONHRISCH, *DOING JUSTICE—THE CHOICE OF PUNISHMENTS* (1976); *FAIR AND CERTAIN PUNISHMENT: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING* (1976); K. Davis, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969); *Discretion in felony sentencing—a Study of Influencing Factors*, 48 WASH. L. REV. 857 (1973); Harris & Lura, *Geography of Justice: Sentencing Variations in United States Judicial Districts*, 57 J. AM. JUD. SOC'Y 392 (1974); Clemens, *Sex and Sentencing*, 26 S.W.L.J. 890 (1972).

44. *See National Security and Freedom of the Press: the Constitutionality of S. 1's "National Defense Information" Provisions*, 9 LOYOLA L.A. L. REV. 323 (1976).

so-called SMITH ACT.<sup>45</sup> These and many other provisions were, in my judgment, inconsistent with the concept of a just, workable, modern criminal code. Although most of S. 1 could be viewed as a noncontroversial major improvement over existing law, I viewed its possible enactment, without significant amendments, as a lost opportunity for genuine reform.

## VI. A MODERN FEDERAL CRIMINAL CODE

During the past year a major effort has been undertaken in the Senate to come up with an alternative to S. 1—an alternative that would reflect both the best features of S. 1 and changes which I and others perceived as essential to any new federal criminal code. Various Senators, joined by representatives of the Department of Justice and leading members of the academic community, have labored tirelessly to work out the many controversial areas and to perfect an altogether new bill.

At the outset, I consider it essential to genuine reform that codification of the *entire* federal criminal law finally be accomplished. Piecemeal codification will not do. But in doing so, the new bill must reject, in their entirety, those provisions of S. 1 which constitute an impermissible invasion of constitutional liberties. At the same time, justice demands that certain current provisions of Title 18 be severely limited or totally excised. Finally, careful consideration must be given to the enactment of new laws recommended in both the BROWN COMMISSION REPORT and the MODEL PENAL CODE.

### A. *Essential Codification*

Although recognizing the need for codification, some have argued that such a bill would be simply too cumbersome to deal with effectively (for example, S. 1 was 800 pages long as finally reported by the *Subcommittee*). However, length in such an undertaking cannot be avoided if comprehensive reform is to succeed. Uniformity and consistency in our criminal law cannot be achieved on a piecemeal basis. Moreover, such a bill need not be unmanageably long. H.R. 1, the Welfare Reform Bill, was 940 pages. The Tax Reform Bill, H.R. 10612, enacted by the last Congress, was over 1500 pages. More importantly, arguments about length can be deceptive. The heart of any new criminal code bill would be found in approximately the first 200 pages of the text, containing the offenses and sentencing provisions. In addition, approximately another 100 pages would relate to administration and procedure essentially duplicating current law dealing with such matters as wiretapping and investigative authority. Thus, the first 300 pages of reform required in a new bill would be rather modest in length, comparable to the comprehensive criminal codes enacted in various states.<sup>46</sup>

The remaining pages would simply recodify the current FEDERAL RULES OF CRIMINAL PROCEDURE and would make non-substantive conforming amend-

45. See Note 53, *infra*.

46. See, e.g., CALIF. PENAL CODE §§ 1-14017 (1969); PA. STAT. ANN. tit. 18 §§ 101-7505 (1973).

ments in the other 49 titles of the UNITED STATES CODE. This is necessary to assure conformity with the content, structure, and terminology of the new criminal code. The conforming amendments would not create any new crimes; they would delete obsolete crimes and amend the culpability and sentencing provisions of the non-Title 18 regulatory offenses. These changes, although bulky, are beneficial. Rather than relying on numerous different culpability terms such as "willful", which are not defined and have no consistent meaning from one section to the next,<sup>47</sup> the conforming amendments would substitute the carefully defined culpability terms noted above. This would provide clearer standards as to what must be proven to establish an offense, as well as clear notice of what actually constitutes an offense. These minor non-Title 18 offenses would also be amended to conform to the sentencing scheme of a new criminal code.

In addition, the conforming amendments would repeal those offenses in other titles which would be covered in the new criminal code. For example, aircraft hijacking offenses currently covered in Title 49 must be repealed, since they would be included in the new criminal code. Many theft and false statement offenses, which would be consolidated in the new code, must similarly be repealed by the conforming amendments.

### B. Revision of Title 18

S. 1 carried forward many provisions of Title 18 which I considered repugnant to the Constitution or which failed to incorporate limiting language of the United States Supreme Court. Any new bill must not repeat the grave errors of S. 1, particularly as regards those specific sections discussed below.

#### 1. *Impairing Military Effectiveness by False Statements*

Section 1114 carries forward a provision of existing law, 18 USC § 2388 (1970), which makes it an offense to make a false statement with intent to interfere with the operation or success of the military forces of the United States.

Section 1114 is more narrow than existing law in that it is expressly limited to purely factual statements. The offense could be further narrowed by requiring a greater degree of culpability. However, although narrowing the scope of the offense and requiring greater culpability are obvious improvements, the practical value of this offense is far outweighed by its potentially chilling effect upon first amendment rights. The only significant cases ever brought under this offense occurred during World War I and involved prosecutions for statements of opinion objecting to government war policies.<sup>48</sup> Virtually all of the statements involved in these prosecutions

47. See, e.g., 22 U.S.C. § 653 (1970) (relating to foreign relations and intercourse); 15 U.S.C. § 434 (1970) (relating to commerce and trade).

48. See, e.g., *Pierce v. United States*, 252 U.S. 239 (1920). See also *United States v. Pelley*,

would be considered protected speech under current interpretations of the first amendment. Accordingly, I believe that this type of provision must not be included in any new bill.

## 2. *Extortion, Blackmail and Labor Strikes*

The extortion offense<sup>49</sup> in S. 1 provides:

A person is guilty of an offense if he obtains property of another by force or by threatening or placing another person in fear that any person will be subjected to bodily injury or kidnapping or that any property will be damaged.

Although predicated to apply only to organized crime and other extortion situations usually involving serious violence or threats of violence such as arson, murder, maiming or kidnapping, many labor groups were deeply concerned—legitimately, I believe—that the offense would be construed to encompass minor violence arising out of labor picketing.

This interpretation, however, appears to be clearly inconsistent with the Committee Report accompanying S. 1 (hereinafter referred to as the *Committee Report*) which indicates that the proposed offense was not intended to cover such conduct. It stated:

In the Committee's view such acts (incidental picket-line violence) do not fall within the purview of the Hobbs Act (nor should they be Federally punishable) . . . .<sup>50</sup>

However, this is a matter of such importance that I would recommend that incidental violence arising in the course of labor picketing be expressly excluded from any extortion offense in the new bill.

Concern was also expressed that the offense of blackmail, section 1723, might apply to a union official or union member who threatens to strike. The blackmail offense proscribes the obtaining of property of another by threatening or placing another person in fear that a person will "improperly subject another person to economic loss or injury to his business or profession". The *Committee Report* stated:

The term 'improperly' is designed to make clear the lack of purpose to reach legitimate activity, e.g., a strike or picketing, intended to cause economic loss or injury to a person's business or profession.<sup>51</sup>

Again, however, this is a matter of such importance that I would recommend that threats of striking, by a union official or union member, be expressly excluded from any blackmail offense in the new bill.

132 F.2d 170 (7th Cir. 1942), cert. denied 318 U.S. 764 (1943). Cf. 18 U.S.C. § 2388(a)(first Para.) (1970).

49. "A person is guilty of an offense if he obtains property of another by force or by threatening or placing another person in fear that any person will be subjected to bodily injury or kidnapping or that any property will be damaged." S. 1, 94th Cong., 2nd Sess. § 1722 (1976).

50. Note 25 *supra*, at 644.

51. Note 25 *supra*, at 654.

### 3. *Smith Act*

S. 1, as introduced,<sup>52</sup> sought to retain the SMITH ACT,<sup>53</sup> making it a crime to engage in conduct that at some future time would facilitate the forcible overthrow of the government. That formulation appeared to be contrary to several Supreme Court decisions which narrowed the applicability of the SMITH ACT.<sup>54</sup> The Court has sought to draw a distinction between advocacy of the necessity or propriety of change and the urge to action. The Court has stated that statutes which fail to draw this distinction impermissibly intrude upon the first and fourteenth amendments. In *Yates*, it was held that there must be a reasonable justification for apprehension that action will occur. In *Brandenburg* it was held that freedom of speech and press do not permit a state to forbid the advocacy of the use of force except where such advocacy is directed to inciting or producing *imminent* lawless action and is *likely* to incite or produce such action. Under S. 1 as originally introduced there was no requirement of *imminency*. In fact, the time period in section 1103(1) had been nebulously expressed as *at some future time*. (emphasis added) In effect, this would have broadened the very aspects of the SMITH ACT the Court sought to narrow in order to protect first and fourteenth amendment rights.

In *Whitcomb*, the Court made it clear that the *Brandenburg* reasoning was still controlling. In *Whitcomb*, certain officers and voters were denied a place on Indiana's National Ballot, for the 1972 general election, because of their failure to file a loyalty oath—as required by an Indiana statute. The statute prohibited placement on the ballot until affidavits were filed stating that the group did not advocate the overthrow of local, state or national government.

The Court held the statute unconstitutional under the first and fourteenth amendments, basing its decision on the fact that the Indiana statute failed to draw a distinction between advocacy of violent overthrow as an abstract doctrine and advocacy of unlawful action. The Court stated that failure to make that distinction would be a return to the “discredited regime of *Whitney v. California*, 274 U.S. 357 (1927)” which was unanimously overruled by *Brandenburg*.<sup>55</sup>

During the S. 1 negotiations, suggestions were made to narrow the offense by incorporating the limiting language of the Supreme Court, by limiting the offense to incitement rather than mere advocacy, and by distinguishing, for penalty purposes, between leaders of subversive organizations and mere members of such organizations. However, it did not appear that any formula-

52. S. 1, 94th Cong. 2nd Sess. § 1101 et. seq. (1976).

53. 18 U.S.C. § 2385 (1970).

54. See *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Noto v. United States*, 367 U.S. 290 (1961); *Scales v. United States*, 367 U.S. 203 (1961); *Yates v. United States*, 354 U.S. 298 (1957); *Dennis v. United States*, 341 U.S. 494 (1951).

55. 414 U.S. at 448.

tion of the SMITH ACT—particularly as it is used as a predicate to investigate groups which disagree with government policies— could be developed that would not have had a chilling effect upon first amendment rights. Accordingly, I feel the only effective solution to this important matter is to repeal the SMITH ACT in any new bill.

#### 4. *Demonstrating to Influence a Judicial Proceeding*

Section 1328 of S. 1 made it an offense to picket or demonstrate near a court house with intent to influence another person in the discharge of his duties in a judicial proceeding. The *Brown Commission* recommended a similar offense.<sup>56</sup> That section carried forward 18 USC § 1507 (1970), but with the additional safeguard that “near” was replaced by specific language prohibiting such demonstrations only if within “200 feet of a court house”. Also, a prior warning had to first be given before criminal liability could attach. The Supreme Court upheld a state law based on this federal statute in *Cox v. Louisiana*, 379 U.S. 559 (1965).

Nevertheless, I believe a further safeguard must be included in any new bill which would provide an exception to the statute for dignified, nonviolent demonstrations on courthouse grounds.

#### 5. *Leading a Riot*

Concern was raised that the S. 1 rioting offense (§ 1831) would expand existing law. Accordingly, S. 1 as reported by the *Subcommittee* deleted any federal jurisdiction based on crossing a state line to “plan or promote” a riot, or based on the use of the mails. Thus, federal jurisdictional requirements were substantially more narrow than under current law. A new bill should maintain this position. However, in addition, I believe it is desirable to delete any federal jurisdiction based on “interference with a government function”.<sup>57</sup> The new bill should also incorporate the Supreme Court test from the *Brandenburg* case, 395 U.S. 444 (1969), to require that “incitement” be advocacy of imminent lawless action under circumstances in which there is a substantial likelihood that such conduct will occur.<sup>58</sup> Finally, there is no reason why the new code should not also incorporate into the definition of “riot” the labor exemption contained in current law.<sup>59</sup> With these changes, any proposed codification would represent a substantial narrowing of the present offense. Under existing law, anyone who travels in interstate commerce or uses the mail with intent to incite or merely promote a riot, and performs any act, or attempts to perform any act, for the purpose of inciting or

56. *Brown Commission* §1325; *Working Papers* at 623. See also N.Y. PENAL LAW § 215, 50(7) (McKinney 1975).

57. S. 1, 94th Cong., 2d Sess. § 1831 (1976).

58. 414 U.S. at 447. See *United States v. Sweeney*, 262 F.2d 272 (3rd Cir. 1959).

59. 18 U.S.C. § 2101 (e) (1970).

promoting a riot, is guilty of an offense. 18 U.S.C. § 2101 (1970). No riot need occur; indeed, no actual incitement need occur to constitute the offense.

In contrast, the proposed code should require that the "incitement" actually cause a riot, should require that the "incitement" involve advocating "imminent lawless action" as defined by the Supreme Court;<sup>60</sup> and should require that the definition of "riot" be substantially identical to the proposed definition in the *Brown Commission Report*.<sup>61</sup>

### C. Proposed New Laws

In addition to carrying forward what I consider dangerous provisions of the existing Title 18, S. 1 also introduced new laws which demand close scrutiny.

#### 1. Public Safety Orders

Section 1862 of S. 1 made it an offense if a person refused to obey an order of a public servant to move, disperse or refrain from activity in a particular place, where such order was lawful and reasonably designed to protect persons or property. This offense has been criticized as giving government officials a license to prevent the right to assemble peaceably. The *Committee Report* indicated that the purpose of the offense was not directed to curtailing the exercise of first amendment rights, but would have been applicable only in situations such as a riot, flood, fire or similar public disturbance or natural disaster justifying prompt government action. The requirement that an order be "lawful and reasonably designed" to protect persons or property would appear to preclude the arbitrary application of this offense.<sup>62</sup>

Nevertheless, there does not appear to be sufficient justification for creating a general federal offense in this area, with jurisdiction based solely on the fact that the order was given by a federal public servant or that the conduct would obstruct a federal government function. Accordingly, I will urge that a new bill provide general federal jurisdiction only if the order is given by a federal public servant during the course of a riot, fire, flood or other disaster.

#### 2. Solicitation

Section 1003 of S. 1 made it an offense to solicit another person to commit a crime. Both the MODEL PENAL CODE and the *Brown Commission* recommended a general solicitation offense.<sup>63</sup> In addition, twenty states have a

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60. 395 U.S. at 447.

61. *Brown Commission*, § 1801; *Working Papers*, at 1021.

62. See, e.g., *Colten v. Kentucky*, 407 U.S. 104 (1972), upholding a state criminal statute directed at those refusing to obey a lawful order to disperse.

63. MODEL PENAL CODE, § 5.02, Comment at 82-89 (Tent. Draft No. 10, 1960); *Brown Commission* § 1003.

solicitation offense in their codes and eight proposed state criminal codes contain such an offense.<sup>64</sup>

Nevertheless, I questioned the applicability of that offense to crimes which themselves are directed against speech—for example, incitement to riot. A new bill should expressly prohibit application of the solicitation offense to such crimes, or to any other crimes that themselves proscribe solicitation (for example, soliciting a bribe).

### 3. *Other Essential Changes*

Tentative favorable responses from interested Senators have been forthcoming in many other important areas as well—it is anticipated that any new bill will not include a section prohibiting simple possession of small amounts of marijuana<sup>65</sup> or the “Official Secrets Act.”<sup>66</sup> Important civil liberties provisions relating to espionage,<sup>67</sup> disorderly conduct,<sup>68</sup> false statements,<sup>69</sup> physical obstruction of a government function<sup>70</sup> and others, must also be reexamined and either not included in the new bill or modified to make them constitutionally acceptable.

Some of the other notable anticipated changes are the deletion of almost all of the statutory defenses and the deletion of any new expansion of capital punishment. The defenses in § 1 engendered enormous controversy. Rather than debate such sensitive issues as the scope of the public authority defense<sup>71</sup> and entrapment,<sup>72</sup> it would be wiser to leave these issues for separate debate and decision. Until the Congress acts on this matter, judicially created defenses now in effect will remain as they are, subject to case-by-case development.<sup>73</sup> The death penalty provisions were deleted for much the same reason. Many Senators support codification but oppose capital punishment. Advocates of the death penalty may support it in separate legislation.

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64. See, e.g., *Brown Commission*, § 1003; MODEL PENAL CODE § 5.02; ALA. CODE tit. 14 § 326 (1973); ALASKA STAT. § 11.10.070 (1972); ARK. CODE § 41-705 (1976); COLO. REV. STAT. ANN. § 18-2-301 (1973); CONN. GEN. STAT. REV. § 53a-8 (1975); DEL. CODE ANN. REV. tit. 11 § 501-03 (1974); FLA. STAT. ANN. § 777.04 (2) (1976); ILL. STAT. ANN. § 8-1 (1972); LA. STAT. ANN. REV. § 14:28 (1974); ME. REV. STAT. ANN. tit. 17A § 153 (Special Supp. 1976); MONT. REV. CODE ANN. § 94-4-101 (Supp. 1975); N.Y. PENAL LAW § 100.00 et. seq. (McKinney 1975); ORE. REV. STAT. § 161.435 (1975); PA. STAT. ANN. tit. 18 § 902 (1973); TENN. CODE ANN. § 39-115 (1975); TEX. PENAL CODE § 15.03 (1974); UTAH CODE ANN. § 76-2-202 (1973); VT. STAT. ANN. tit. 13 § 7 (1974); VA. CODE ANN. § 18.2-29 (1975); WIS. STAT. ANN. § 939.30 (1958); and the proposed codes of the following states; Arizona, Iowa, Indiana, Maryland, Massachusetts, Michigan, South Carolina and Tennessee.

65. S. 1, 94th Cong., 2nd Sess. § 1813 (1976).

66. S. 1, 94th Cong., 2nd Sess. § 1121-1126 (1976).

67. S. 1, 94th Cong., 2nd Sess. § 1121 (1976).

68. S. 1, 94th Cong., 2nd Sess. § 1334 (1976).

69. S. 1, 94th Cong., 2nd Sess. § 1343 (1976).

70. S. 1, 94th Cong., 2nd Sess. § 1302 (1976).

71. S. 1, 94th Cong., 2nd Sess. § 541 (1976).

72. S. 1, 94th Cong., 2nd Sess. § 551 (1976).

73. See generally R. PERKINS, PERKINS ON CRIMINAL LAW, at 977-1029 (2nd ed. 1969).

**VII. CONCLUSION**

A point has now been reached where effective criminal code reform is nearing reality after almost twenty years. A new congressional effort will be made in the 95th Congress; a broad, bipartisan effort reflecting the twin goals of safeguarding the public welfare while fully preserving individual freedoms. The common goal is the development of a rational, just and respectable federal criminal code which can assist, not hinder, law enforcement personnel and members of the judiciary in carrying out their sworn duty to uphold the law. The federal war on crime requires no less.