Department of Justice

"CODIFICATION AND THE RULE OF LAW"

REMARKS

BY

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BEFORE THE CONFERENCE ON CRIMINAL CODE REFORM;
A CONFERENCE OF THE SOCIETY FOR THE REFORM
OF THE CRIMINAL LAW

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Jeremy Bentham, perhaps the foremost law reformer of the 18th and 19th Centuries, was himself once presented with a proposal for reform. He is purported to replied: "Reform, sir? reform! Don't talk to me of reform; things are bad enough as they are."

Well, here we are again, talking reform, as things go from "bad enough" to worse in the court overload of criminal cases. We are in the midst of a worldwide epidemic of drug-related crime. Yet we are still caught up in the ad-hockery of revising the criminal law, one statute at a time. Frankly, we need to face up to our far greater professional responsibility, and show a collective determination to undertake reform of the criminal law at the quintessential level -- codification.

Codification efforts, admittedly, do take time. The push to codify the federal criminal laws in the United States has now been underway for almost 25 years. A similar effort in Japan has been underway for 35 years. The French penal law reached a milestone with the introduction of an entire new code last year. It has been underway in a sporadic fashion for approximately 100 years. Codification of the criminal law of England -- a prospect brightened by the introduction of a complete criminal code last May -- was begun by then Attorney General Francis Bacon 375 years ago. As the late Chief Justice Arthur Vanderbilt of the State of New Jersey once observed, "Law reform is no sport for the short-winded."

After such long strivings, you at this conference need no persuasion as to the importance of comprehensive codification. We in government are equally aware of the shortcomings of the legal tools we have at hand to assure the liberty and security of our citizens. So I am here to ask anew for your assistance -- and patience -- in achieving these reforms so necessary to the rule of law.

I strongly believe that intelligent codification is fundamentally important to the rule of law. Laws in themselves do not assure the rule of law, or even that justice will be done. But complex, confused, or incomplete laws create a sense of misrule, and can lead to complex, confused, or incomplete justice. Laws that require too much intepretation become the subordinates of their interpreters. And we soon find ourselves governed not by the laws but by the men and women charged with applying them, as disparity and inefficiency grow.

We cannot afford disparity in the application of criminal justice since it erodes the foundation of fairness on which a democratic system must be predicated. We cannot afford inefficiency when our criminal justice process is already overloaded by today's rising caseloads.

Yet disparity and inefficiency, to a large extent, are built into the hodgepodge of law that so many of us have built out of

our common-law heritage. One of the members of your executive committee, Professor Norval Morris, wrote a book some years ago with the provocative title -- The Honest Politician's Guide to Crime Control. In it, he noted: "Our present criminal law is a product of a series of historical accidents, emotional overreactions, and the comforting political habit of adding a punishment to every legislative proposition."

Indeed, in the United States, our statutes have been adopted haphazardly over the course of 200 years as a series of idiosyncratic attempts to resolve crises of the moment. Each was produced at a different time by different draftsmen with different conceptions of law, the English language, and common sense. A criminal law is difficult to find, and when found it is difficult to understand, and when understood, it often competes with, and sometimes conflicts with, other federal laws and with the corresponding state laws.

Our federal criminal laws are presently scattered among 50 titles of the United States Code containing over 23,000 pages of text. They cannot be understood without review of case decisions encompassed in 2,300 volumes containing over 3,000,000 pages. They are contaminated by the inclusion of over 1,700 essentially regulatory violations -- ranging from selling a mixture of two kinds of turpentine to walking a dog in a government building.

The traditionally recognized forms of wrongdoing are lost among multiple, and confused, citations. Four essential offenses -- theft, perjury, counterfeiting, and property destruction -- crop up in 466 separate statutes. They outdo each other in confusion through inventive descriptions of the intent or other state of mind that must accompany conduct before it is considered criminal. Modern codes generally employ three or four terms -- such as "intentionally", "knowingly", and "recklessly" -- to describe such mental states. But Congress has introduced almost 80 different terms into the federal law, ranging from "wrongfully" to "without due . . . circumspection." This confusion has been furthered by a judiciary that has interpreted the terms to mean everything from "stubbornly" to "with studied ignorance". (The Congress has stopped just short of the California legislature which decreed that, to demonstrate malice in a homicide case, it must be proved that the defendant acted with "an abandoned and malignant heart.")

Even the range and juxtaposition of offenses appears confusing and somewhat unseemly. Within the main penal title, among such serious offenses as assassination, rape, and kidnapping, there appear the notorious federal offenses of using gifts or promises to seduce a female passenger on steamship, using a personal check to pay a debt of less than one dollar, broadcasting information concerning the prizes awarded in a

fishing contest conducted for profit, and taking artificial teeth into a state without approval of a local dentist.

Now clearly all of this has not gone noticed. Congress has, on occasion, attempted to revise the statutes. Those revisions, however, have resulted primarily in rearranging the confusion. In alphabetical order. Other than a-b-c, the revision has been ineffectual. Take the 1948 revision of the statute penalizing, by one month's imprisonment, the personal carrying of a letter on board a boat that is transporting mail -- plainly a candidate for the revisors' scalpel. This section indeed was revised. The reference to "one month" was changed to "thirty days." Or consider the recently enacted provision requiring federal judges to explain their reasons for selecting the particular sentence to be imposed on a criminal defendant. In a 1988 case from a federal district in the Midwest, the entire explanation was as follows: "I am supposed to make a statement as to why I sentenced him the way I did. And the answer is because I am the Judge."

What we need in the federal system is a new criminal code -- an integrated consolidation of all significant offenses, set forth in a clear, logically oriented structure, and following plainly defined purposes and principles. This would make the system far fairer and far more efficient. It would save considerable time of investigators, lawyers, judges, and jurors

who now suffer from the current confusion. With the savings in time that a clear code would bring, we could -- with the same levels of justice system personnel -- investigate and prosecute more of the serious offenders who today escape justice because of case overloads.

Some brief history. The need for such comprehensive codification, and its potential value, has been recognized ever since Professor Herbert Wechsler and his colleagues produced the Model Penal Code. The success of that Code in the states -- two thirds of which have adopted at least some of the Code's provisions -- prompted Congress in 1966 to create a National Commission on Reform of Federal Criminal Laws. The Commission presented a draft code to the Congress in 1971. The Commission's product inspired several members of Congress to devote considerable personal time to the cause of federal criminal code reform -- notably Senators McClellan, Kennedy, and Thurmond, and Representatives Drinan, Lungren, and Kindness. The effort was supported by every President from Lyndon Johnson through Ronald Reagan, and by every Attorney General from Ramsey Clark through William French Smith. In 1982, however, the legislative effort ran into a procedural wall, and wrecked reform has returned from the body shop to narrower, and more easily achievable, ad hoc changes.

This experience in the United States, of course, is similar to that of other nations that have inherited the English common laws. We have all undertaken gradually to replace common law offenses with statutory counterparts, which sometimes parrot the common law principles and sometimes modify them. We have all developed somewhat more formal rules of procedure. And we have all come to the recognize that the modest effort and hodgepodge are still no substitute for a carefully conceived, comprehensive, and consistently articulated code of criminal law.

I need not explain to this audience why piecemeal attempts, particularly in common law jurisdictions, simply do not work. I would summarize the situation by calling to your attention a cartoon I saw recently. It depicted Moses on a mountaintop, holding in his right arm stone tablets with paragraphs numbered one through ten -- and in his left arm stone tablets with paragraphs numbered eleven through twenty. He was looking to heaven, and saying, "Maybe I'd better deliver just the first ten now and see how it goes down."

But there are some indications of progress. A code of considerable elegance and simplicity has been developed in Canada under the leadership of Justice Allen Linden. New codes have been introduced in Australia, New Zealand, and Israel. The Law Reform Commission in Nigeria has made considerable progress. And

the dormant effort in the United States is showing certain signs of life, which we hope to aid in advancing.

The nations that have inherited the Roman law as a basis for their jurisprudence have long enjoyed the benefits of comprehensive codes encompassing general principles of criminal law and an integrated series of penal offenses. Still, time and changed circumstances have provoked a number of significant recodification efforts. As I noted earlier, France has introduced a complete replacement for the Napoleonic penal code. Belgium, too, is working on a complete new code. And Japan has virtually finished work on a highly refined recodification.

Moreover, recent changes in eastern Europe have propelled scholars and government officials to seize the opportunity for modernizing penal codes. In Hungary, a young professor of law who worked quietly for years on a new penal code has just been elevated to Deputy Minister of Justice and charged with overseeing the draft code's enactment. During my own visit to Moscow last fall -- to meet with top Soviet officials with responsibility for law enforcement and the administration of justice -- intense interest was evident in keeping changes in the law apace with the rapidity of political change. I had a chance to witness this simultaneous, very piecemeal law reform when I visited the Chairman of the Soviet Supreme Court. Numerous

typewritten pieces of paper had been hastily pasted into his single code book, reflecting recent, quick revisions.

In our own history, political change has brightly focused on the field of justice. The framers of the Constitution listed to "establish justice" immediately after to "form a more perfect Union." They recognized that in a democratic society, an effective system of justice is fundamental to its preservation. The rule of law is the proof and bulwark of democracy.

Even in more prosaic times, steady improvement of the law is always desirable, and in a field as significant as the criminal law, it is particularly important. The most carefully developed body of law requires periodic reform. As noted by the American reformer Edward Livingston, "No act of legislation can be, or ought to be immutable. Changes are required by the alteration of circumstances; amendments, by the imperfection of all human institutions. . . ." Or, as put more succinctly by the English reformer, Thomas Babington Macaulay, "Reform, that you may persevere."

Let me add one further dimension. We are speaking at this conference about the need for effective justice systems in our respective nations. This is an appropriate concentration. But over the past several decades, modern means of communication, travel, transportation, and transfer of monies have become more

international, and in their nefarious use, so has crime, particularly the cartels of the drug lords.

As lawyers, jurists, government officials, and academicians, we should ponder what orderly advancements in justice and liberty might also be made international concerns. We have already seen significant progress in developing vastly improved mechanisms for international mutual assistance in resolving problems of drug related crimes -- witness the United Nations Vienna convention on drug law enforcement, now ratified by the United States Senate. The time may be ripe for considering whether our bilateral and regional arrangements with regard to other forms of transnational crime might be undergirded by other comprehensive international agreements as to basic procedures. In this regard, I am pleased to learn that this Society is planning to undertake a review of potential international countermeasures against transnational economic crimes, and is also scheduling for next year, under the chairmanship of Dr. Albin Eser, a small conference to explore codification of basic international penal law concepts.

Those of us with governmental responsibilities for criminal justice have a moral obligation to venture beyond the day-to-day functions of our office. Those of us with academic responsibilities have a moral obligation to employ our intellects to help advance the common good. We all have a moral obligation

to improve the law -- and thereby to improve the level of freedom and security that may be enjoyed by all our fellow citizens.

Some observers may question the value of such a seemingly abstract enterprise as simplication of the criminal law at a time when specific problems of crime are competing for our attention. The membership of this Society, however, can assist in ensuring that the longer perspective is not lost. Such a perspective is important. I can do no better than to quote from Professor Wechsler when he observed:

> 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 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.
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> If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works 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.

That is what is at stake. This is the unfinished business that you and we must face up to as we pursue the principles and problems which you will examine here this week.

May I wish you God speed in your endeavors.