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Criminal Law Revision Codification vs. Piecemeal Amendment

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CRIMINAL LAW REVISION
CODIFICATION VS. PIECEMEAL AMENDMENT

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I. Introduction

This symposium issue of the *Nebraska Law Review* affords additional evidence of the growing interest in criminal law revision. Not only is there interest, but, more important, there are indications that steps are being taken to translate that interest into tangible contributions to the improvement of criminal justice, and particularly toward the improvement of the substantive criminal law which has for so long been ignored.[1] It is with revision of the substantive statutory law that this article is primarily concerned.

Louisiana completed a thorough revision of its substantive statutes in 1942 and it is significant that one of the authors of that revision is able to state more than ten years later:

> ... the advantages of a simple, well defined body of substantive criminal laws are now fully recognized by the bench and bar.[2]

Efforts are being made elsewhere. A model penal code is currently being prepared by the American Law Institute.[3] A complete revision of the substantive criminal statutes was presented to the 1953 session of the Wisconsin legislature. Although the question of adoption was postponed, the legislature ordered the proposal printed in the 1953 statutes to insure wide circulation and also designated an advisory committee of members of the bench and bar to continue the study.[4] Revision is currently underway in Missouri,[5] New Hampshire,[6] New

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[1] If the current interest continues we may hope soon to approach the goal described by Dean Roscoe Pound when he said: "Until the criminal law is studied as zealously and scientifically and is regarded by teachers, students, lawyers and judges as being worthy of their best and most intelligent efforts as is the civil side of the law, the administration of criminal justice will continue to fall short of public expectation."

[2] Bennett, Louisiana's Criminal Code of 1942, 20 Kan. City L. Rev. 208, 220 (1952). Also see Smith, How Louisiana Prepared and Adopted a Criminal Code, 41 J. Crim. L. & Criminology 125 (1950), in which the author concludes by saying: "Under the criminal code of 1942 criminal law administration in Louisiana has been greatly improved. Instead of being productive of confusion as was claimed it has done much to simplify; instead of creating uncertainty it has brought assurance; and the envisioned difficulties of adjusting to a new system have not materialized."

[3] For a detailed description of the project, see Wechsler, The Challenge of a Model Penal Code, 65 Harv. L. Rev. 1097 (1952).

[4] Wis. Stat. c. 623 (1953).

[5] See 20 Kan. City L. Rev. 197-204 (1952), where Richard J. Chamier, Chairman of the Criminal Law Revision Committee of the Missouri Senate, and William R. Nelson, Director of Research, outline the scope of the Missouri revision.

[6] Report of the New Hampshire Legislative Council 9 (Dec., 1952): "The criminal statutes of New Hampshire are demonstrably in need of revision

Mexico[7] and Maryland.[8] In addition there is evidence of current interest elsewhere.[9]

The scope and nature of these revisions differ widely. Some, such as the revision in Louisiana and the proposed revision in Wisconsin, involve a redrafting of the entire substantive criminal law. Others, such as the current revision in Missouri, involve the study of specific aspects of the substantive criminal law with the results submitted to the legislature in the form of separate bills. Whatever the form, current efforts toward revision raise two basic issues upon which there is, and undoubtedly will continue to be, substantial disagreement: (1) Is revision of the substantive criminal statutes needed at all? (2) If so, what form should that revision take?

II. The Need for Revision

Lawyers often put the issue in this form: "What is wrong with the present law?" No one would argue that the prospect of an abstractly more perfect legislative formulation justifies revision in an area that vitally effects so many people. Revision must be justified on the basis of real need, upon a determination that there is something basicly wrong with present criminal statutes and that revision will result in significant improvement in administration. This appraisal can be made adequately only in the context of the problems of the particular

and re-organization. Many of the existing laws are inequitable and outmoded. As a result of this condition, a joint committee... has undertaken the work of revising the existing criminal statutes in an effort to improve our crimnial laws both substantively and procedurally...."

[7] Letter from New Mexico Legislative Council (March 23, 1953).

[8] Letter from Carl N. Everstene, Acting Director of Maryland Department of Legislative Reference (March 30 ,1953).

[9] *Illinois*: "...Bar leaders said the criminal code should be the next step to follow the judicial reorganization constitutional amendment they are backing in the current session. Criminal code revision hasn't been attempted since 1937 and 1939 sessions. Preliminary work on bringing the work up to date has been started by a Chicago Bar Association Committee." Chicago Tribune, Feb. 5, 1953.

Kansas: "Our Judicial Council has been doing some sporodic research looking toward a revision of our criminal code, but lack of funds has limited the work." Excerpt from letter from Walter G. Thiel, Chairman of the Kansas Judicial Council (Sept. 7, 1951).

Puerto Rico: "...interested in drafting a new criminal code, as our code dates back to the last century." Excerpt from letter from Carlos V. Davela, Assistant Attorney General, Puerto Rico (Aug. 30, 1951).

[10] This does not detract in the least from the value of the forthcoming Model Penal Code of the American Law Institute. "The project should, at least, 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 may be able to draw aid ....The model Code itself will represent the practical embodiment of the conclusions of the study, in the form best calculated to promote their use."

jurisdiction where the issue is raised.[10] It requires intensive study of the substantive criminal statutes, a study of their relation to procedure and treatment provisions and a pooling of the views of those experienced in the administration of the criminal law. Only then can the significant defects be outlined and a decision made as to whether the difficulty caused by the defects is sufficiently great to justify the effort and expense of adequate revision.

Generalizations based upon experience elsewhere, though not sufficient, may be helpful. There are certain basic reasons for criminal law revision which in large part explain the current interest in revision and which are to a varying degree applicable to most jurisdictions. Only the briefest attention can be given them here. They can be fully illustrated by examples taken from almost any state.

A. Obsolescense

The substantive criminal statutes of most jurisdictions have not been revised for 100 years. Though there is often pressure for the passage of new laws, seldom does anyone urge the repeal of old ones. Sections passed upwards to 100 years ago to meet specific social problems remain, although the problems have long ago ceased to be of any real importance.[11] They are found scattered among the important provisions, making the use of the statutes unnecessarily difficult, making it necessary for officials to pick and choose the laws which they will enforce; serving no useful purpose except as a favorite topic for the humorist, and, in general, adding little by way of dignity to the law.[12]

In some situations obsolescence is not so obvious. Often the process of judicial interpretation of a statute over a period of years results in a statute meaning something quite different from what it seems to say.[13] Some aspects of the substantive statutory law have failed to keep pace with administrative and procedural changes. For example, the failure to integrate the substantive law with changes in the law relating to parole has frequently resulted in minimum penalties being of little effect and serving only to mislead.

Advances in scientific knowledge have made some substantive rules outmoded. The "year and a day rule" made sense at a time when a

[11] See Wis. Stat. § 340.76 (1951): "No person shall cause any steam engine to be propelled or hauled upon or over any highway in the nightime...."

[12] See Baker, Legislative Crimes, 23 Minn. L. Rev. 135 (1939). The article contains many illustrations of outmoded legislative enactments. In many fields of law an article written some 14 years ago would now be out of date. Unfortunately Mr. Baker's article is still very much in date.

[13] See Wis. Stat. § 340.02 (1947): "Such killing, when perpetrated from premeditated design to effect the death of the person killed...." In State v. Hogan, 36 Wis. 226 (1874), the Court stated: "We take the 'premeditated design' of our murder in the first degree to be simply an intent to kill."

doctor was unable accurately to trace the chain of causation for a longer period of time. Medical science has progressed to a point today where the rule has lost its reason for being.

B. Needless Verbosity

Many criminal statutes are unnecessarily verbose. The result is that they are difficult to read and uncertain in their application. Statutes dealing with criminal damage to property and theft traditionally contain long lists of words attempting to specifically describe every conceivable type of property which may be damaged or stolen.[14] If the result were certainty in the meaning of the statutes, the verbosity might be justified. Quite the contrary is true. Recently a person punctured eggs, drained off their contents and then filled the shells with white paint. These were taken to an outdoor movie and during the show thrown at the screen which was considerably damaged. The jurisdiction in which the case arose had a long statute on criminal damage which enumerated in detail almost every conceivable type of tangible property. But, since movie screens are of relatively recent origin, they were not listed. Long investigation by the district attorney and consultation with the attorney general finally afforded an answer to the problem. It happens that the movie screen had a door behind which was a small closet. This made it a building and since buildings are specifically enumerated in the statutes a violation was proved. This demonstrates neither certainty of meaning nor efficiency in administration. We have long since reached the point where the subject matter of both criminal damage and theft is capable of brief, accurate, and sensible definition.

C. Needless Distinctions

No lawyer needs to be told of the difficulty and uncertainty which results from the distinctions between larceny, embezzlement and false pretenses. If these distinctions separated criminal from non-criminal behavior, their retention would be warranted. Instead their existence is explainable almost entirely on the basis of historical development.[15] The confusion created serves no useful purpose and can be eliminated by consolidation.[16] Nor is the problem confined to the theft offenses. In one jurisdiction, where the arson statutes distinguish between the burning of a dwelling and the burning of other buildings,[17] a defendant set fire to a hotel. Much time and effort was devoted to the question of whether the hotel was a "dwelling." Since the manager permanently resided in one of the rooms, it was held that it was.

[14] See Wis. Stat. § 343.44 (1951).
[15] See Hall, Theft Law and Society (2d ed. 1952).
[16] Stumberg, Sources of Confusion in Crimes Involving Property, 10 Texas B. J. 100, 118 (1947).
[17] Wis. Stat. §§ 343.01, 343.02 (1951).

Where statutory distinctions are based upon substantial differences in the nature of the conduct involved, a useful purpose is served. But, to the extent that distinctions are drawn between substantially similar conduct, the time and effort devoted to drawing the distinctions are wasted.

D. Needless Overlapping

In some jurisdictions there is almost exact duplication between two or more statutes. Often two statutes will prescribe different penalities for exactly the same conduct, with the fate of the defendant dependent upon the accident of which one is chosen by the prosecutor. In some instances, despite the fact that there is a general provision applicable to all sections, the substance of the general provision is specifically repeated in some specific sections but not in others. For example, in Nebraska the section on horse stealing[18] contains a clause prohibiting the harboring of a horse thief. The first degree murder section[19] contains no such clause, reliance being placed upon the general provisions on harboring.[20] The result is that the offense of harboring a horse thief carries a maximum penalty of ten years, while the maximum for harboring a first degree murderer is two years.

Duplication may be justified where there is a basis for penalty variation; e.g., where a specific statement serves an educational purpose, such as a specific prohibition against smoking in bed which can be posted in hotel rooms; and, where the offense occurs so frequently that a specific statute contributes to facility of administration.[21] But, haphazard duplication contributes nothing except confusion.

E. Inadequate Statement

Many statutes do little more than indicate the range of penalties, requiring resort to the common law in order to determine their meaning.[22] Many important doctrines, such as defenses to crime, are either inadequately defined or not defined at all in the statutes. Inadequate statement of important aspects of the substantive criminal law often necessitates extensive research adding unnecessarily to the cost of both prosecution and defense. This is amply demonstrated by the recent case of *Morissette v. United States*,[23] where an appeal to

[18] Neb. Rev. Stat. § 28.509 (Reissue 1948).
[19] Neb Rev. Stat. § 28-401 (Reissue 1948).
[20] Neb. Rev. Stat. § 28-202 (Reissue 1948).
[21] "Bad check" statutes are in large part explainable by the frequency with which the problem arises. In most instances, the case could be handled under the false pretense statutes, but administrative convenience is furthered by the use of prima facie cases, etc.
[22] See Wis. Stat. § 343.31 (1951): "Any person who shall be convicted of any gross fraud or cheat at common law shall be punished...." Also see Wechsler, Challenge of a Model Penal Code, 65 Harv. L. Rev. 1097, 1100 (1952).
[23] 342 U.S. 246 (1952).

the United States Supreme Court was necessary in order to determine the mental state required by the crime of which the defendant was convicted. Careful attention in the drafting of criminal statutes to insure that the basis of criminal liability is clearly expressed would do much to obviate this difficulty.[24]

F. Needless Penalty Variations

In some jurisdictions there has been almost a legislative mania for setting up an infinite number of classifications for penalty purposes. In one, there are six classifications of larceny within one section; six sections dealing with murder and thirteen sections dealing with manslaughter.[25] The differences between some of the sections are inconsequential and yet the prosecutor is put to the trouble of making a correct choice; the judge, to the trouble of deciding which must be submitted; and the trier of fact, to the trouble of making a determination of fact which too often has no bearing upon the seriousness of the defendant's conduct. This is not to say that the legislature cannot properly indicate a range of permissible penalties. It would seem obvious, however, that penalty variations ought to be based upon significant differences in the nature of the conduct which is prohibited.

Obsolete statutes, the discrepancy between statutory language and judicial interpretation, the wide disparity between the "law" on the books" and the "law in action," needless verbosity distinctions and duplication, inadequate statement, and inconsistent and irrational penalty variation, all contribute to confusion and difficulty in administration. All of these defects may not be found in a particular jurisdiction. Their occurrence is frequent enough, however, to warrant giving serious consideration to revision in most states.

It is no answer that this complexity has become familiar to those experienced in the criminal law. Education in the unnecessary intricacies of the present substantive law takes time and expense which is unwarranted whether borne by the state, the client, or the lawyer himself.[26] Efficiency of administration which would result from a rational, consistent and clearly expressed criminal law ought to result in a saving to both the state and the defendant. Nowhere is adequate legal assistance at minimum cost needed more than in the field of criminal law.

[24] For a full discussion of the *Morissette* case and the problem of adequate formulation of the requisite mental state, see Remington and Helstad, The Mental Element in Crime—A Legislative Problem, [1952] Wis. L. Rev. 644.

[25] Wis. Stat. cc. 340, 343 (1951).

[26] The more the practice of law becomes diversified, the more important it is that statutory formulations adequately set forth the basis of liability. To the extent that statutes are clear and sufficiently comprehensive, the nonspecialist can render adequate service without the expenditure of an exorbitant amount of his time.

This is not to say that we have not been getting along relatively well in most jurisdictions. To the extent that we have, it is a tribute to good administration which has achieved a measure of success despite an unnecessarily complex substantive law.

III. Form of Revision

There are numerous approaches to the problem of criminal law revision. Three basically different methods will be briefly discussed here: (1) Piecemeal amendment. (2) Mechanical redrafting of all existing criminal statutes. (3) Codification. No one of the alternatives is necessarily the right one. Each has some merit. The choice must be made finally by the individual jurisdiction in the context of the problems it seeks to solve by revision. Nonetheless, some generalization is possible.

A. Piecemeal Amendment

This involves the repeal of certain sections, the amendment of others, perhaps the enactment of a few new ones. Emphasis is upon the most obvious defects with the least possible disturbance to other criminal statutes. It is the traditional method of revision in the criminal law.

The argument in support of the piecemeal approach to revision is largely one of political theory. "Any changes in the criminal law should be presented individually so that every legislator knows exactly what he is doing to the basic rights of citizens as human beings. If changes are not made in this way, everyone has reason for alarm."[27]

As a practical matter, it is true that the piecemeal approach is the only method of revision which insures that each legislator will be able, with a minimum of effort, to understand the nature of the legislation before him. Total revision covers a large amount of the substantive criminal law. The result is a bill so large and so complex that few legislators have the time, interest, or ability to understand and evaluate its merits. Legislative debate is, therefore, confined to generalities.[28]

This view reflects a lack of confidence in the committee system. Interim legislative committees or legislative councils in charge of the research necessary for complete revision are looked upon with suspicion. It is claimed that the only safeguard against ill-conceived legislation is to have each specific change individually debated on its merits before the entire legislature. Proponents of this view may concede the efficacy of total revision in other fields, corporation law for example, but deny that methods, suitable elsewhere, should be used

[27] From a document submitted to the 1953 session of the Wisconsin Legislature in opposition to the Proposed Criminal Code.

[28] For example: "This is a prosecution bill;" "It is dictatorial in concept;" "It is the academic aproach."

in the field of the criminal law where people's liberty is so vitally involved.

The argument in opposition to the piecemeal approach is easily demonstrated by a study of the present criminal statutes in most jurisdictions. Whatever the merits on grounds of political theory, one hundred years of piecemeal revision has left the criminal statutes lacking any coherent plan and subject to the defects which have previously been discussed. The remarks of Mr. Justice Jackson, speaking for the United States Supreme Court,[29] when called upon to change a single rule of evidence is pertinent here:

> But the task of modernizing the longstanding rules on the subject is one of magnitude and difficulty which even those dedicated to law reform do not lightly undertake.... To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance... than to establish a rational edifice.

Apart from the merits, practical considerations within a jurisdiction may lead to the adoption of the piecemeal approach. One of the reasons why thorough revision has been infrequent in the past is because it is difficult. It takes time and costs money. This apparently explains the decision in Missouri to study a few specific problems at a time. While recognizing the need for complete revision "... to achieve modernization, to eliminate conflicting and obsolete provisions and to make for more uniformity ...," the Missouri committee decided that the pressure of an imminent deadline precluded the careful and thorough study which is necessary for overall revision.[30]

B. Redrafting of Existing Statutes

This contemplates a mechanical revision of the entire substantive criminal law including the redrafting of the statutes to eliminate inconsistent use of terminology, verbosity, needless distinction, and duplication between sections, and, perhaps, to reorganize the statutes according to a more sensible classification. The objective is to modernize, simplify, and clarify the language of existing statutes. Change, whether it be the enacting of new statutes, the repeal of old ones, or the codification of existing case law in areas untouched by existing statutes, is to be avoided. Though the drafting style is new, the existing structure of the statutes remains intact.

The argument in favor of this approach is one of practical politics. Both legislators and lawyers can be assured that the product is the same as the one with which they are familiar. Moreover, legislators in most jurisdictions are accustomed to this type of revision and therefore will view it without the fear that generally accompnies innovation. The size and complexity of the bill are minimized by assurances

[29] Michelson v. United States, 335 U.S. 469 (1948).
[30] 20 Kan. City L. Rev. 197-204 (1952).

that no changes are made. If change in substance is needed, that change will have to be made in the form of separate bills each subject to full legislative debate.

The disadvantages of this method of revision are twofold: (1) To the extent that existing legislation suffers from a failure to reflect important doctrines, such as those dealing with responsibility, justification and excuse; from substantive inconsistencies between various sections dealing with essentially the same type of conduct; and from needless penalty variation, mere mechanical revision of existing statutes is plainly inadequate. (2) The second difficulty comes when the job is attempted. There may be merit in the position that revision should accomplish simplicity and clarity of statement without any change in the substance of the law. It certainly is the answer if the only problem is inadequate draftsmanship. But if the confusion and complexity results in large part from substantive inconsistency, redrafting alone cannot accomplish clarity in the statutes. This can be illustrated by examples:

(a) Assume an unnecessarily verbose statute which specifically enumerates each type of property which can be damaged or stolen. The list of items is so complete that a general definition of the term "property" is feasible and would contribute to clarity. Would this type of redrafting be consistent with mechanical revision? It can be said that the general definition does not significantly extend criminal liability. It cannot be said that no change at all is involved and any representation to that effect to the legislature is misleading.

(b) Assume that consolidation of the theft offenses is contemplated. Since in larceny an intent to return is a defense while in embezzlement it is not a defense, consolidation of the two is impossible without making some change.

(c) Assume that consolidation of various arson or burglary statutes is contemplated. Since each existing statute carries a penalty different from the others, consolidation is impossible without effecting a change in penalty.

There are illustrative only. The proposals embodied in the three examples given are modest in scope. The fact that they cannot be accomplished in the form of a strictly mechanical revision indicates the severe limitations of this approach to the problem.

C. Codification

Codification is the attempt to state enough of the substantive law in statutory form to give a reasonably adequate picture of its scope and the details of its provisions without extended reference to the case law. Two things are necessary.[31]

[31] See Wechsler, Challenge of a Model Penal Code, 65 Harv. L. Rev. 1097 (1952).

(1) The standards of conduct must be stated fully and in clear and concise terms. It is not enough to incorporate common law crimes by reference. Nor is it enough to indicate the basis of liability by undefined terms such as "willful," "wanton," or "unlawful."[32] Consistency of purpose and consistency in the use of terminology is required. Consistency of purpose makes it necessary to make the substantive law internally consistent and in conformity with the procedural and treatment provisions of the jurisdiction. Consistency in the use of terminology makes it neecssary to use words of precise meaning, defining them if necessary, and to use them uniformly throughout the code.

Substantive change in the law is not the primary objective. But, if in the elimination of needless verbosity, distinctions and duplication, the elimination of irrational penalty variations and the consolidation of offenses, changes are necessary to accomplish the objective of a clear, concise and consistent code, those changes should be made.

(2) Considerable attention must be given to fundamental concepts such as mental state, justification, mitigating factors, complicity and other doctrines which are largely ignored in present statutory formulation. This requires a codification of existing case law. In those areas where the court of the jurisdiction has not faced the problem, the statutory draft will be based upon experience elsewhere.[33] Once again substantive change, though not the objective of codification, is not to be avoided where change is necessary to accomplish consistency of purpose and adequate formulation of the basic doctrines of the criminal law.

Where change in policy is necessary or desirable in the process of codification, the issue involved ought to be squarely presented to the legislative committee and the advisory committee supervising the project. The possibility of complete debate before the legislature is limited for reasons to which reference has already been made. Success in codification requires legislative confidence in the integrity and ability of those engaged in the study. For that reason the active participation of experienced members of the legislature, bench, and bar is highly desirable.[34]

[32] For a discussion of the difficulties such terms create, see Remington and Helstad, The Mental Element in Crime—A Legislative Problem, [1952] Wis. L. Rev. 644.

[33] In some areas, lack of sufficient knowledge or experience may preclude concise statutory formulation. Those areas, where judicial development is to be encouraged, should be explicitly recognized and designated.

[34] It is also desirable to start with reformulation of familiar concepts. Formulation of doctrines, such as those relating to justification, responsibility, etc., will be regarded as innovations and should be postponed until confidence in the project is created.

The argument in favor of codification is that it is the only method of accomplishing the task at hand. Dean Albert J. Harno, respected both for his scholarship and his experience in statutory revision, has stated the need in these terms:[35]

> There is a clear public reaction against the plethora of laws . . . reasons for codification also are real and they are urgent. Anglo-American criminal law has nowhere in it evidence of plan or design. That is its outstanding weakness. A great mass of judge-made law containing a mingling of ancient precedents, outgrown formulas, traditional beliefs, and some forward-looking expressions, supplemented by a large number of statutory provisions, constitutes the framework of the criminal law. A unity of aim is needed, and codification, when it comes, should be erected on that foundation.

The argument against codification is reflected in the following quotations taken from a statement submitted in opposition to the Proposed Criminal Code for Wisconsin:

> . . . a code is handed down from one or a group of master lawmakers, while the American concept is that criminal laws originate with the people. The various needs of the people are generally reflected in the separate criminal statutes passed by the legislators.
>
> There is an extremely serious question involved in the propriety of changing substantive criminal law by a single massive code. Under the American system of jurisprudence, every crime is independent of every other one; . . . a code, on the other hand, is a legal unit containing all of the law on a given subject. Every section refers and relates to every other section, and must be interpreted in the light of every other section. Thus, the whole code is interlaced and interlocked, so as to effectuate a single presumptive legislative intent.[36]

Some of the statements, such as the claim that every section of a code must be read in relation to every other one, are obviously not true. Yet the fear of codification is held by a sufficient number of lawyers to make their objections worthy of serious consideration.

Although codification is not possible without making some change in the law, it does not necessarily involve a fundamental reorientation of the basic policy of the criminal law. If fundamental change is desirable that change may, of course, be accomplished in the process of codification. Fundamental change in policy raises problems beyond the scope of this article. It has nowhere been attempted in this country. There is serious doubt whether present knowledge of human behavior affords a sufficient basis for a basic reorientation of the

[35] Harno, Some Significant Developments in Criminal Law and Procedure in the Last Century, 42 J. Crim. L. & Criminology 427, 456 (1951).

[36] The claim that codification will also increase the number of appeals is frequently made. This proved not to be true in Louisiana. Smith, How Louisiana Prepared and Adopted a Criminal Code, 41 J. Crim. L. & Criminology 125, 135 (1950).

substantive criminal law. Nonetheless codification now ought not to freeze the status quo.[37] Fundamental reorientation, when and if a concensus as to the desirable direction for change is reached, should not be foreclosed.

CONCLUSION

The inadequacies of the substantive, statutory criminal law reflect the fact that it is a comparatively neglected area of the law. The need for revision is real. Yet the problems which revision presents are not easily solved. They deserve the attention of all who have an interest in the administration of the criminal law. Their solution will more than compensate for the time and effort involved.

[37] See Wechsler, Challenge of a Model Penal Code, 65 Harv. L. Rev. 1097, 1132 (1952).