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REVISION OF CRIMINAL LAW—OBJECTIVES AND METHODS

Jerome Hall*

There are encouraging signs of the timeliness of criminal law revision and of the recognition of its importance. For example, the current project to provide a model penal code under the auspices of the American Law Institute¹ has engaged the services of distinguished lawyers, judges, and scholars. And the recently announced program of the American Bar Association to survey the administration of criminal justice is sponsored by leaders of the American bar, including a Justice of the United States Supreme Court.² This interest in criminal law is rooted in the traditions of the American bar. Thus, while the unparalleled economic progress following the Civil War greatly influenced professional attitudes, it is an indubitable fact that prior to the present century many eminent lawyers, including such immortals as Webster and Lincoln, practiced criminal law without apology; indeed, with satisfaction and pride. That this tradition is still alive, even if it is not widely appreciated, is evident, e.g., in the careers of Borah, Darrow, and Warren as well as in current important projects to improve the criminal law.

But, although there is very much in criminal law to stir the imagination and enlist the services of the ablest lawyers and scholars in thorough-going efforts to improve it, it is no less true that any enlistment short of that will prove inadequate to the onerous tasks of revision. The reasons for this will be apparent in the following discussion.

Objectives

The ultimate objectives of the criminal law may be described in terms of order, survival, security, maintenance of conditions which permit progress to be made (the "conditions of civilization"), experience of the "higher" values and, finally, "the good life," which subsumes all the ideals toward which a rational, democratic society moves. In this discussion these ultimate objectives are assumed, and the analysis will be concerned with the proximate objective, namely, the

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¹ See Wechsler, *The Challenge of a Model Penal Code*, 65 *Harv. L. Rev.* 1097 (1952).

² See Jackson, et. al., *Criminal Justice: The Vital Problems of the Future*, 39 *A.B.A.J.* 743 (1953).

soundest possible criminal law, together with significant critiques and theories supporting the suggested revision. Perhaps the simplest approach is to ask—what are the principal shortcomings of the substantive criminal law? We shall thus delineate specific objectives in terms of the removal of these limitations and of progress in related directions.

The glaring defect in the criminal law of most states is the disorganization of the statutes. The typical picture is one of an amorphous mass of statutes unrelated to each other or to any unifying ideas. Enterprising publishers and state officials have brought together statutes bearing on the various crimes, but it is not unusual to find criminal laws in remote reaches of the statute book, including non-criminal areas. Far from any persistent use of doctrines and principles, the fact is that in only a few states has anything approaching systematization of the criminal law been attempted. Lawyers and judges are thus handicapped in their work and their effectiveness is seriously impaired.

The contrast with the criminal codes of European countries is striking. These codes are usually divided into two parts, a "general part," which includes doctrines applying to all the specific crimes, e.g., those concerning insanity, mistake, coercion, and so on, and a "special part," where the rules defining particular aspects of the offenses are classified, usually in accordance with types of crime. By use of such an orderly arrangement not only can the relevant laws be easily located but, also, and much more important, the advantages of organized knowledge, as opposed to the handicaps of a collection of disparate data, are operative.³ The public is also interested in knowing various phases of the law of crimes, and if lawyers experience difficulty in working with that law, the complications must utterly dismay laymen who are limited to the statute book.⁴ In addition, many offenders who should be subjected to treatment or punishment escape because of the current confusion and complexities.

Especially unfortunate is the extreme disorganization of the treatment-punishment provisions attached to the commission of the various crimes. There has hardly ever been a careful survey and analysis of this aspect of the criminal law with a view to providing a sound, consistent body of sanctions. The present provisions represent intermittent responses to pressures on legislatures, reactions to public

³These problems are discussed in Hall, *Science and Reform in Criminal Law*, 100 U. of Pa. L. Rev. 787 (1952), reprinted in, *Readings in Philosophy of Science* 297 (Wiener ed. 1953).

⁴In ancient Greece every citizen was a lawyer, and the United States, too, has been called "a nation of lawyers." It does not seem far-fetched to suggest that intelligent citizens should know at least the fundamentals of the criminal law.

opinion which sometimes borders on hysteria or, at best, intelligent guesswork. It is little wonder that, with such sanctions deeply embedded in the statute book, the actual sentencing of offenders shows indefensible variations and unfortunate effects not only on resentful convicted persons but also on the community which maintains expensive peno-correctional institutions and bears the brunt of their unregenerated output. Here, in sum, it is easy to see the evils of piecemeal legislation and to appreciate the value of logic because sustained efforts to organize the statutes practically compel inclusive analysis and synthesis in terms of similarities, differences, and interrelationships.

No less important than organization of the statutes is the articulation of the values of modern Anglo-American criminal law in terms of a sound policy which is applied throughout that field of law.

The law of crimes, in the course of its development from the 13th century, has reflected various attitudes towards criminal conduct; and negligence, recklessness, intentional harm-doing, and certain behavior "at peril" became the recognized grounds of liability. Except in a few segments, progress in moral attitudes has been reflected in the continuous narrowing of criminal liability to morally culpable conduct. Thus, at present, except in certain corners of the common law of crimes, to be noted shortly, *mens rea* is restricted there to intentional and to reckless misconduct,⁵ i.e., to the *voluntary* commission of a harm. What emerges as perhaps the most important challenge to those who engage in criminal law revision is, therefore, this question—does further improvement of the criminal law require the total restriction of criminal liability to such conduct?

The principal areas of the criminal law which need to be explored in order to solve this problem concern objective liability, negligence, the felony-murder and misdemeanor-manslaughter rules, and strict liability. While a careful study of these crucial areas leads to conclusions of the utmost importance for revision of the criminal law, it is possible here only to comment briefly on salient features of the necessary inquiries.⁶

Objective liability, the "reasonable man" standard, is applied chiefly in the law of criminal homicide to limit "provocation" and "cooling time" and, generally, to limit mistakes of fact and the privilege of self-defense.⁷ Elsewhere, indeed in most of the criminal law, the test is the subjective one, and this is emphasized in such a sophisticated crime as receiving stolen property, where the majority rule is that

⁵ See Kenny, *Outlines of Criminal Law* 29-30 (Turner's ed. 1952).

⁶ These are discussed in detail in Hall, *General Principles of Criminal Law* (1947).

⁷ An exceptional case is *State v. Cope*, 78 Ohio 429, 67 N.E.2d 912 (1946), quoting from *State v. Sheets*, 115 Ohio St. 308, 152 N.E. 664 (1926).

criminal liability is determined not by the belief of the "reasonable man" that the goods were stolen but, instead, by the actual belief of the defendant on trial.⁸ It is evident that there are serious questions raised in holding a person criminally liable not on the basis of the actual condition of *his* mind and body at the time he committed a legally forbidden harm, but on the basis of how an "average person" would have behaved in those circumstances. If the defendant is, unfortunately, one of those persons who are neither average nor psychotic⁹ is it morally defensible to hold him to the objective standard when the consequence is punishment?

Negligence, in the usual, the tort, sense of the term (behavior inadvertently below reasonable care) has been continuously narrowed in the criminal law. Perhaps the most frequent instance of this is found in the law on homicide by use of an automobile, which, though designated "negligent" homicide, is in almost all jurisdictions interpreted to mean reckless homicide. But negligence persists in some corners of the criminal law to obstruct the march of consistent policy. Applying the objective test, courts transform avowed recklessness into negligence, e.g., the Tort's Restatement definition of recklessness is adopted. Statutory lesser degrees of manslaughter sometimes require only negligence; and negligence is involved in the causal ramifications of homicide. But, although the collateral influence of negligence is consequently important and many ill-conceived statutes penalize negligent behavior, the tendency has been definitely to exclude it from criminal law when the courts have faced the issues directly.¹⁰ Punishment of inadvertent adults is a sorry business; it has no proper place in modern criminal liability. Social utility is, of course, important; but that does not imply that we should reverse the trend spontaneously manifested in the case law, especially during the present century, on the supposition that negligent harmdoers can be deterred by the threat of punishment. In fact, available studies indicate that nothing is gained in learning habits or sensitivity by being punished for negligence.

⁸ *Commonwealth v. Boris*, 317 Mass. 309, 58 N.E.2d 8 (1944).

⁹ *Fisher v. United States*, 328 U.S. 463 (1946). But cf. *Wilson v. Inyang* [1951] 2 K.B. 799.

¹⁰ See, e.g., *Roper v. Taylor's Central Garages Ltd.* [1951] 2 T.L.R. 284, in which Devlin, J. said: "There is a vast distinction between a state of mind which consists of deliberately refraining from making inquiries, the result of which the person does not care to have, and a state of mind which is merely neglecting to make such inquiries as a reasonable and prudent person would make. . . . The case of shutting the eyes is actual knowledge in the eyes of the law; the case of merely neglecting to make inquiries is not knowledge at all—it comes within the legal conception of constructive knowledge, a conception which, generally speaking, has no place in the criminal law." And see the thoughtful opinion of Campbell, J. in *State v. Pickus*, 63 S.D. 209, 257 N.W. 284 (1934).

The community is clearly entitled to legal protection against negligent harmdoers, especially when they operate dangerous instrumentalities or businesses affecting health. In addition, the facilities of administrative boards can be used to educate negligent or awkward persons. Thus, the exclusion of negligence from criminal liability does not imply indifference to social needs. The pertinent question is simply this—should the criminal law be used in dealing with negligent harmdoers? And in answering that question the most important consideration is the moral significance of criminal law and how that can be made more effective.

If the issues concerning negligence should be resolved in the way suggested above, there could hardly be much doubt regarding the persistence of that strange *mélange*, "strict liability," in the field of criminal law. For, whatever view one takes regarding its utility, it is everywhere recognized that the law of strict liability is not criminal law. Thoughtful analyses of the subject run in terms not of crimes but of "public torts," "civil offenses," "quasi offenses," "not criminal in any real sense,"¹¹ and the like. Nor is the issue a merely academic or verbal one. The inclusion of strict liability statutes among criminal laws and the use of the language of criminal law lead to confusion and to long terms of imprisonment for conduct wholly free of *mens rea*. There is injustice even when the penalties are relatively small, e.g., businessmen who have employed the best experts and utilized the latest scientific apparatus in the operation of their business, are hailed into criminal courts, subjected to criminal trials, and punished. The ineffectiveness of this sort of crude instrumentation (defensible, perhaps, when it originated a hundred years ago, long before the progress in administration and administrative agencies) is an additional reason for excluding strict liability from the criminal law.¹²

A sustained effort to achieve a coherent policy in the criminal law must also take account of the felony-murder, misdemeanor-manslaughter rules. While it is not easy to employ ethical refinements in dealing with criminals, especially felons, that is the distinctive feature of the greatest part of our criminal law. This is evident, e.g., in the classification of criminal homicides where, in a crude sense, the harm committed is the same throughout; but modern penal law exhibits an enormous range in punishments—from that inflicted for first degree murder to that for the least degree of manslaughter. The differences

¹¹ Wright, J. in *Sherras v. De Rutzen* [1895] 1 Q.B. 918.

¹² A related issue is that of the criminal liability of corporations. The entire problem of corporate misconduct and of criminal conduct by individuals who operate behind the veil of a corporation should be re-examined in the light of such studies as Sutherland, *White Collar Crime* (1949), the principles of criminal liability, and the availability of non-punitive controls.

in punishment correspond to significant differences in moral culpability represented in the offenders' states of mind at the time the homicides were committed. The further modernization of the criminal law here, too, would apply current progress to the existing law of felony-murder, misdemeanor-manslaughter, especially to laws prescribing the severest sanctions, i.e., those imposed for first degree murder, where there was no intention to commit any homicide or, in some states, even any recklessness in causing death.

The thesis that criminal liability should be rested exclusively on moral culpability does not represent an unwarranted inflexible attitude toward serious problems or a sentimental disinclination to use sharp instrumentalities to meet social needs. On the contrary, since the moral dimensions of human action are extremely wide, there is ample range for penal law even if it is rigorously restricted to conduct which is morally culpable. Nextly, the effectiveness of criminal law is unavoidably bound up with the moral attitudes of the community. Apprehension of offenders, initiation of prosecutions, what happens thereafter, including verdicts, the crime rate, rehabilitation, etc., are largely dependent upon public attitudes appreciative of the distinctive character of criminal law. Accordingly, even canons of sheer efficiency require the exclusion of non-culpable conduct from the range of punitive sanctions so that public confusion, unsound rationalization, and the like may be avoided. Finally, the progress of legal institutions has been from uniform, crude controls to complex, nicely differentiated ones. Revision of the criminal law should take account of the numerous instrumentalities now available in non-penal law, if effective rational controls of criminal conduct are to be forged. There are other parts of the criminal law besides the four noted above, which would need to be studied with regard to the determination of a sound, coherent policy; some of the more urgent issues will be indicated shortly.

Turning now to a different kind of inquiry, it is evident that we have not come to grips with many serious legal problems in the light of recent advances in the sciences and social disciplines. For example, there has been a considerable increase in psychiatric knowledge in this century, raising difficult questions regarding certain rules of criminal law. Recent discoveries concerning alcoholic and narcotic addiction indicate that revision of other rules is necessary. Much knowledge of sexual deviation has been added; and, however one may criticize particular theories in this field, it is clear that the law on sexual offenses has been neglected. Studies of juvenile delinquents and youthful offenders indicate that here, too, a re-examination of prevailing policies and laws is needed. Researches in the field of theft are available to improve the existing law in many important respects. These are only the more prominent areas of criminal law where sound

revision requires a thorough use of the empirical knowledge provided by the sciences and social disciplines.

Certain hazards confront those who participate in such work, which must be considered from the outset. On the one hand, the notion has prevailed among some lawyers and legal scholars that anything and everything alleged in an expert's book has as great validity as the laws of physics. These hopeful souls are eager to abandon the knowledge now embodied in the law and to substitute the expert's opinion at the drop of a hat. On the other hand, there are stubborn legalists who resent the possibility of any improvement in law, especially those recommended by non-legal specialists. Unfortunately, there is no easy solution of the difficulties met by those who strive simply and persistently to have the criminal law reflect the best available knowledge. Frequently the investigator finds inconsistencies and conflicts among the experts, making it extremely difficult to discover the better solutions. Nor can the community depend for improvement of a legal institution upon experts who are unfamiliar with legal controls, purposes, and guarantees. By like token, the community cannot depend upon merely technical lawyers to make careful appraisals of relevant knowledge or to discover the best ways of implementing social objectives. The lawyers required to do this important work must have open, inquiring minds, a zest for investigation, and a thorough appreciation of legal values—qualities that are easily specified but which are actually rare in law, as elsewhere.

Revision of the criminal law, which in its thousands of cases represents the accumulated experience of centuries of thoughtful work, is fraught with other potential dangers. Among the most serious of these is that the principle of legality, the "rule of law," may be weakened. Anglo-American criminal law has long been jealous of the rights of innocent persons and it has achieved a relatively high degree of protection against governmental abuse through adherence to detailed rules of law which define criminal conduct precisely and place strict limits on the punishment of offenders. Whatever one's opinion may be concerning such specification and assurance in civil areas, it will be agreed that it is of the utmost importance to preserve the rule of law in the criminal field, where the sanctions are punitive and the dignity of personality is deeply involved.

The issue becomes acute if wide generalizations are recommended as substitutes for collections of cases bearing on a problem. There is a natural tendency to avoid the intricacies of case law by substituting general formulas which, at first sight, solve the existing complications. This tendency is particularly marked in codification of the criminal law when the draftsman does not clearly distinguish civil law from penal law. Some of the advantages of sound codification have been noted above, e.g., instead of the handicap of isolated rules,

there is an organization of the rules through use of doctrines and principles. But it is also essential to consider that it is precisely in the effort to draft a code (rather than merely to organize a body of statutes) that the danger to the rule of law is greatest. The historic debates on this subject between Field and Carter are available to any who wish to review the respective claims of code law as against those of case law. Initially, at least, the issues would seem to be weighted definitely against penal codification because our criminal law consists not only of case law but also of many statutes which have been interpreted in numerous cases—thus adding additional definiteness. The pertinent question is—can the advantages of codification be secured without impairment of the “rule of law,” which is presently assured by case law and statutes?

It is possible here merely to point to the advantages of directing revision toward a *model* penal code (whether or not a penal code is actually adopted) and, also, to suggest the retention of the present safeguards if a code is to be adopted. As was indicated above, the principal advantage of directing revision toward a code rather than an organization of statutes is that in the former the problems of systematization must be directly and fully confronted—with consequent important gains in knowledge of the criminal law.

With reference to adoption of a criminal code, the most important safeguard would be retention of the existing case law, except where specifically changed by the code, to provide precise definitions of the provisions of the code wherever that is necessary. And secondly, where the code departs from the existing criminal law, those provisions should be subjected to the present tests of ambiguity and vagueness. There can, of course, be no avoidance of the tests of “due process.” In addition, the common law rules governing the interpretation of criminal statutes should be retained and applied to the code.¹³ The codifier should make it clear where he is restating existing law, where he is rejecting it, and where he is providing new rules.

The objectives of criminal law revision can be achieved in good measure, despite the difficulties of the task, if full use is made of sound methods of inquiry and research. In the writer's opinion, the time has arrived when it is possible to place law revision upon a much sounder foundation than any that could be constructed in the past. Without indulging in fanciful prognostications regarding a “science of law,” we can accelerate legal progress considerably if we attack the

¹³ That the Louisiana Supreme Court has used common law and previous Louisiana law in interpreting the Louisiana criminal code is shown, e.g., in *State v. Vallery*, 212 La. 1095, 34 So.2d 329 (1948), and *State v. Labrode*, 202 La. 59, 11 So.2d 404 (1942). And see *Morrow*, *The 1942 Louisiana Criminal Code in 1945*, 19 *Tulane L. Rev.* 483 (1945); *Bennett*, *Criminal Law and Procedure*, 8 *La. L. Rev.* 281 (1948); *Note* 8 *La. L. Rev.* 129 (1948).

problems without inhibition as to methods of inquiry and with a careful eye to the utility of many methodological tools which are now available.

Methods

The traditional methods employed in solving legal problems are for the most part analytical and dialectical, i.e., they include critical discussions which, however, are usually restricted to technical legal questions. Without disparagement of these important methods, especially when they are illuminated by the experience of able lawyers, it is submitted that mid-twentieth century revision of law should also make full use of methods whose value has been well exemplified in other fields.

The traditional methods, in their usual, restricted application, cannot fully attain the ends required by logic and organization. Study of foreign penal codes and of treatises and essays on the systematization of criminal law will be suggestive. But the discovery of doctrines and principles and of their place and functions in the criminal law cannot be greatly aided by methodological rules or descriptions of scientific inquiry. That sort of achievement depends, instead, on the participation and encouragement of sensitive minds interested in discovering "the one among the many" and able to sustain thinking about many discrete items and specific rules in relation to general concepts and theories.

The second objective discussed above, i.e., the determination of a sound coherent policy of the criminal law, is attainable in substantial measure by thorough use of the traditional methods of discussion and criticism. The success of this sort of inquiry depends largely on the skillful presentation of all important points of view; accordingly, necessary steps must be taken to make certain that the principal divergent viewpoints are well represented. The discovery and articulation of a sound policy also depends, however, upon a thorough understanding of the criminal law which, in turn, waits upon progress in systematization and upon the knowledge that can be derived from empirical investigation, consultation with experts, and so on. The latter needs, i.e., those dependent upon factual information and knowledge, should receive the most careful consideration because the relevant methods are not well known, and there are other difficulties in the way of using them on a large scale.

Despite the unnecessarily technical and sometimes bizarre language employed in social science discussions of methodology, there is a great deal to be learned from that literature, which can be used in criminal law revision.¹⁴ There are, e.g., suggestive critiques of relevant theory

¹⁴ Cf. Hall, *Some Basic Questions Regarding Legal Classification for Professional and Scientific Purposes*, 5 *J. Legal Educ.* 341-2 (1953).

and, more immediately significant, there are examples of the actual use of various methods in successful researches, among which are several socio-legal studies. It is impossible to analyze these studies here,¹⁵ but certain observations may be made to remove "methods" from the realms of cant and mystery and to indicate their utility for revision of the criminal law.

First, the successful studies make it quite clear that the use of effective methods of research depends not only upon spontaneous intelligence and insight but also, upon the testing of various potentially helpful methods and techniques. Second, it has been shown that methods are effective if they are chosen and adapted in direct reference to the distinctiveness of problems, subject matter, and objectives, and that it is futile to speculate on methods in isolation from needs and ends or to debate in the abstract one type of method as compared with another. Third, and most important, the final results of inquiry in large measure depend upon the quality and extent of the empirical research that is carried on to acquire necessary information and knowledge; and the success of that is determined by the methods used to carry on the investigations.

The greatest bar to the use of methods needed for successful law revision is the lack of appreciation of factual research, even though it is recognized that the criminal law deals with social problems. This is an anomalous situation because social problems are certainly manifested in many facts, and these facts can be understood by aid of empirical and other knowledge. Rules of law, among other purposes, serve as effective instruments if they are suited to the distinctive characteristics of social problems. In sum, legal instruments, as well as methods of research, make sense in terms of subject matter and objectives. Some specific instances may clarify and lend persuasiveness to these observations.

Even the best of lawyers, if they confined their research to the law on receiving stolen property, including the statutes, cases, and the professional literature, would never come to close grips with the relevant social problems. But factual research quickly led to discoveries of the utmost importance for understanding the social problem and, thence, to appraisal of existing law and formulation of sound lines of legal revision. It was discovered, e.g., that there are large businesses which deal in millions of dollars' worth of stolen commodities each year, that these businesses have interstate connections extending over the entire country, that the offenders are astute, experienced men, etc., etc. It was thus established, among other important conclusions,

¹⁵ The theory of methods of socio-legal research is discussed in Hall, *Theft, Law and Society* (2d ed. 1952), especially in the Introduction; and see the Index.

that there are vast differences between that kind of "receiving" stolen property and individual violations by persons who, once or twice in a lifetime, buy stolen property for their own consumption.

With reference to the wide incidence of intoxication and addiction to narcotics in criminal conduct, if inquiry is limited to the statutes and cases, there will be little insight into the personality of the offenders and less understanding of the significance of related facts. But once investigation concentrates also upon the factual data and upon the medical and scientific literature which makes it possible to interpret these facts as they are met in legal problems, policy becomes informed and the road has been cleared for a sound revision of the law.

Again, as regards automobile theft, the statutes on larceny and the propaganda of insurance companies do not begin to reveal the social realities. But when there is an investigation of the facts, it becomes known, e.g., that about ninety-five per cent of the automobiles "stolen" are soon abandoned in good condition, that they were taken for "joy rides," usually by youngsters under twenty years of age, without prior criminal records, and so on. That phase of the social problem differs sharply from the facts of larceny, and both differ from the depredations of the professionals, whose attendant organizations, including the inevitable criminal receiver, comprise distinctive configurations. Once these facts are known and understood, does it make sense to retain a single automobile larceny statute or a grand larceny statute or, indeed, to stop short of a revision which will register sensitivity to important differences in facts, social problems, and the meanings of the respective situations?

Finally, in the agitated area of sexual offenses, it must be obvious that the limitation of inquiry to cases and statutes is grossly inadequate. The impetuous reaction of legislators to a vicious crime and consequent public hysteria is apt to result in legislation which is very cruel and violative of elementary legal safeguards. Adequate, defensible controls can be invented only if the relevant facts are known, together with the available knowledge of the personality of sexual offenders, the etiology of their offenses, and so on. We shall never know enough facts and psychology to satisfy every doubt, but before officials are empowered to imprison human beings for many years, every possible effort should be made to provide legal controls which are defensible on rational grounds.

There are proven methods of exploring social problems and there are sound ways of discovering and appraising the relevant empirical knowledge. To assure the use of these methods, rather than to depend upon whatever resources are conveniently at hand, is the condition of successful criminal law revision.¹⁶

¹⁶ *Id.* at 349-356.

It is equally important to appreciate the need for knowledge of the administration of criminal law because that is probably the best index of the soundness of the substantive law. For example, when Illinois lacked a "joy ride" statute, the judges and prosecutors of that state agreed to wholesale waivers of the felony of automobile larceny (punishable by one to twenty years' imprisonment) and accepted pleas of guilty to petty larceny, e.g., to stealing a tire. A knowledge of those facts regarding the administration of the Illinois automobile larceny law would certainly raise serious questions of substantive reform. The facts of other, equally significant administrative practices are not well known, nor have they been collected in careful detail. Basic criminal law revision would include or presuppose factual studies of the administration of important substantive laws.

No better instance of this need can be given than that concerning embezzlement. Revision based on legal and factual research into the social problems of embezzlement, though necessary, do not suffice. Only when one probes into the administration of the laws on embezzlement does the substantive legal problem become illuminated by the knowledge thus acquired. To some extent this kind of knowledge can be gotten by consulting prosecuting attorneys and judges who have had considerable experience with embezzlement cases. But knowledge that is precise and systematic is much more meaningful, and it reveals definite possibilities for the invention of new controls. For example, research in this area discloses that a very small percentage of known embezzlers are prosecuted despite the fact that embezzlement is one of the most common and costliest of all crimes. It reveals that far more frequently than with any other comparable offense, prosecution terminates in the grant of probation, and so on. Investigation of the facts of the operation of the laws on embezzlement points to serious shortcomings in the substantive laws. It indicates that, e.g., the prevailing assumption among criminal law specialists that there should be an inclusive theft statute (as in California) in which embezzlement, larceny, and fraud are subjected to the same sanctions may need to be re-examined. It suggests the need for laws to cope with widespread practices of businessmen and surety companies to enter into arrangements to withhold prosecution. It will raise other important questions in the minds of lawyers who become familiar with the actual embezzlement problem and the administration of the criminal law in this area.¹⁷

Thus, if the soundest possible revision is the objective, no academic theory or predilection is involved in insistence on the need for factual information regarding certain social problems and the administration of present laws, and for a thorough understanding of the relevant

¹⁷ *Id.* at Chapter 7.

empirical knowledge. With reference to many of the problems that need to be faced in criminal law revision there are available published studies, collections of data, statistical reports, expert opinions and, not least, the experience of judges and lawyers in specialized areas. All of this information and knowledge can be rendered useful if care is taken to formulate pertinent legal questions directed toward the objectives of criminal law revision. In other areas, however, the facts and the necessary knowledge are not readily at hand, waiting to be tapped. Considerable research and many facilities are required to supply the information and relevant knowledge. The facilities, including a properly equipped personnel, are not easily obtained in the field of law. Indeed, the history of law revision has been one of individual, short-time inquiries conducted by traditional methods.

If efforts to improve the law and keep it always, so far as possible, abreast of established knowledge, were placed upon a permanent basis, the limitations of separate short-term projects could be avoided. Freed of pressure to complete a very difficult task within a short period of time, thinking would rise to the level needed to satisfy permanent needs, and the best methods of research would be used. No large commercial or industrial concern would modify its practices and adopt major change in policy without the most careful investigation. The good sense thus manifested and expected should be applied to law revision.¹⁸

In no field of law are the prospects of great achievement more promising than in the criminal law. Here, if anywhere, it is possible to exemplify the superiority of law revision based upon the thorough use of sound methods of research and available empirical knowledge. And if very important progress were clearly and definitely achieved in criminal law revision, who would discount the effects upon other fields of law, the enlarged functions of the legal profession, and the added resources of a troubled world which needs to understand law and legal ways of preserving the values of civilization?

¹⁸ The existing law revision commissions represent traditional perspectives. For the reasons indicated above, it is desirable to include factual research and to provide a personnel equipped to carry on both the legal and the empirical investigations.