



## REMARKS ON THE INTRODUCTION OF CRIMINAL LAW REFORM INITIATIVES

*Ronald L. Gainer\**

It might be noted that I have been asked to speak on the topic of “*introduction* to criminal law reform”—not criminal law reform itself—presumably because the symposium organizers were well aware of my shortcomings in actually helping to *achieve* significant law reform. Those of us who had been working on the broad-scale federal reform effort from the late 1960s to the mid-1980s were not able to help move legislation beyond the introductory phase long enough to achieve congressional enactment, except for sentencing, which was untimely ripped, without its qualifying context, from the substantive portions of the proposed new code.

### THE STATE OF THE FEDERAL PENAL LAW

There was little doubt at the time—nor is there now—that the present federal criminal “code” (as it is euphemistically characterized) is not only in need of reform, it is in need of complete replacement. Of course, its provisions had never been designed to constitute a code; they were simply a scattering of laws that grew through accretion as the responsibilities of the federal government were expanded by congressional enactments. This leisurely process of aggregation was occasionally punctuated by significant additions prompted by crises of the moment, or by perceptions of public outrage. As examples of the latter: in the wake of John Dillinger’s successful bank robberies, Congress made such robberies a federal crime; after the kidnapping of the Lindbergh baby, Congress added kidnapping to the list of federal crimes; following President John Kennedy’s assassination, Congress decided to make it a crime to assassinate the President; when Senator Robert Kennedy was shot, Congress concluded that the killing of a Senator should be a federal crime, and, in a rare burst of foresight, decided also to make it a federal crime to kill a member of the House of Representatives.

Over a period exceeding two centuries, this approach has left us with a hodgepodge of about 4,500 penal statutes, hastily cobbled together, and bearing little relationship to each other in terms of either structure or terminology. They are not only multiplicitous, but internally confusing. They are also overlapping and redundant. We have accumulated a total of about

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\* Attorney and former Associate Deputy Attorney General and former ex officio of the U.S. Sentencing Commission.

700 federal statutes dealing with just four kinds of offenses: theft, forgery, false statements, and property destruction. They contain their own idiosyncratic verbiage and definitions, and bear some semblance of uniformity only with regard to the substantial nature of the penalties specified for their breach; instead of being confined within Title 18, the main penal title, they are scattered among the fifty titles of the United States Code; and the great majority are unknown even to the most experienced federal prosecutors. When the more quiescent statutes are occasionally prosecuted, their awkward structures are commonly found to harbor hiatuses that federal judges attempt to bridge, frequently with eminently reasonable propositions, but those attempts collectively have left the accumulated case law as a tower of legal babble.

#### STATE PENAL CODE REFORM

The criminal statutes in the majority of our states, although far less numerous, were not significantly better until the enlightenment generated by the promulgation of the American Law Institute's Model Penal Code. Its singular innovation, introduced by Professor Herbert Wechsler as the director of the project, was to remove from the statutory framework the vestiges of common law language that had been rooted in concepts of evil and wickedness and that had proved to be ill-adapted for application in courts of law. For centuries, the approach to mental components of crimes had been a quagmire of legalese—both in Latin and in English—through which legislators and judges had vainly attempted to give some coherence to concepts of wrongfulness. The archaic verbiage suggesting evil and wickedness was replaced in the in the Model Penal Code with concepts of purpose, knowledge, recklessness, and (very rarely) negligence, which could be applied separately to actions, circumstances in which actions take place, and results.

While retaining the capacity to reflect the moral values of society, the Model Penal Code promoted clearer, more objective thinking about mental elements of offenses. It also promoted clearer thinking about defenses, presumptions, and several other concepts related to the mental elements. This has provided standardized building blocks that may be employed with variations for construction of penal codes that, when compared with predecessor attempts at drafting codes for common law jurisdictions, are able to make significant advances in simplicity, in clarity, and in ordered interrelationships. It has been employed by over two-thirds of the states as a template for reforming the structure and substance of their respective codes. It has also been employed as a valued guide by several foreign jurisdictions that have sought to shed the confusion and inefficiency accompanying their English common law heritage.

## FEDERAL PENAL CODE REFORM

In view of the opportunities for simplicity and clarity provided by the drafting approach of the Model Penal Code, the question arose whether the approach could be adapted for the purpose of undertaking reform of the federal penal laws. In 1966, the National Commission on Reform of Federal Criminal Laws was created to devise such a reform. The most vexing difficulty facing the new Commission's staff lay in trying to develop a drafting mechanism that would reduce unnecessary redundancy and permit similar treatment of, for example, the substantive provisions of the various federal theft offenses which covered—among other kinds of takings—theft of federal property, theft from an interstate shipment, and theft on a federal enclave. The Commission's director, Professor Louis Schwartz, who had been the deputy director of the Model Penal Code project, eventually produced a remarkably simple solution. He contemplated a code in which there would be, with regard to the theft example, a single theft section drafted along the lines of the Model Penal Code, but specifically limited by its final subsection to offenses that Congress had determined to be appropriate for coverage under one or another of the various jurisdictional predicates for federal action (in this example, that the subject of the theft was federal property, or that the theft affected interstate commerce, or that the theft occurred in a geographic area subject to federal, rather than state, administration). This simple solution proved to be as significant in its own right as Professor Weschler's culpability approach had been in relation to the drafting of the Model Penal Code. It was adopted by the Commission and enabled the Commission's final draft of a proposed federal criminal code to achieve a dramatic improvement in simplicity—replacing, for example, several hundred federal offenses pertaining to theft, forgery, false statements, and property destruction, with about a dozen sections set forth in the form of the Model Penal Code and employing its clear approach to the mental elements of the offenses.

The Commission's Final Report, issued in 1971, included a comprehensive and systematic proposed new federal criminal code that was based, in large measure, on the Model Penal Code. A series of federal code proposals, all built upon the Commission's model, were introduced as legislative bills with the strong support of sponsors from across the political spectrum. In 1978, a bill (S. 1437) that was championed by Senators Kennedy and Hatch, among several others, passed the Senate by a margin of 72 to 15, and in 1980 the House Judiciary Committee reported its own version after extensive hearings. Although code reform bills had been supported by every President from Johnson to Reagan and had been actively encouraged by every Attorney General from Clark to Smith (and by Attorney General Meese in his earlier capacity as counselor to the President)—and although the relatively few differences between conservatives and liberals had largely been resolved—the sponsors of the last Senate bill (S. 1630 in 1982)

were unable to overcome a filibuster threat. Political fatigue set in, and ultimately, despite resuscitation efforts by Attorney General Thornburgh, no federal criminal code proposal was enacted. There has been no collective effort to undertake federal criminal code reform since that time.

During the prolonged introductory phase of the past federal effort, Professor Norval Morris often referred to the reaction of Jeremy Bentham, probably the premier law reformer of 19th Century England, when Bentham himself was presented with a proposal for reform. Purportedly, he admonished the proposer not to speak to him of reform since “things are bad enough as they are.”

The so-called “federal criminal code” at that time was indeed “bad enough,” but it is worse today. The nation needs a simple, focused, reasonable, fair and effective criminal code. Achieving such a code, even in the best of times, will take a considerable number of years and will generate heated, if not always enlightened, controversy. It will be criticized from the left, the right, and the center; by the informed and the uninformed; by those with special interests that would be affected by reform and by those who seek only objective rationality. Anyone with a law degree will feel especially well-qualified to propose changes, despite exhibiting not much more than a layman’s knowledge of penal law and philosophy. Those who do possess a thorough, practical understanding of wide segments of the existing law, will fear that passage of a new code would deprive them of their special expertise upon which their careers have been founded; a substantial number of both prosecutors and defense counsel will demonstrate a strong trade union syndrome, and will work both covertly and overtly to forestall the adoption of such sweeping changes. Congressional inertia will prove formidable: it is an article of faith that no member of Congress has ever lost an election as a result of appearing too tough on crime and criminals, and a legislator’s willingness to reform demonstrably harsh laws may be exploited by political opponents as “softness.”

This, as noted, is what would take place upon the launching of a federal code reform effort in the *best* of times. Our current political environment does not seem to offer the circumstances required to engender reasoned and dispassionate congressional cooperation. Certainly, it is not the time to initiate a particularly lengthy effort that will demand unusually careful analysis and thoughtful discourse, and that will inevitably require a range of principled compromises. It is preferable at this point, simply to work quietly toward a sound foundation for eventual broad-scale criminal code reform, while awaiting a period of relative political quiescence that might carry the potential for responsible accommodation, and only then formally introduce such a proposal.

## FEDERAL REGULATORY PENALTY REFORM

There exists, however, one particular subset of federal code reform that may be timely—the subset that would need to be addressed to rectify, or at least reduce, the problem presented by the subject of this symposium—overcriminalization. This would be particularly true if the problem were to be addressed by legislation that is relatively short in length, simple in concept, and broad in sweep, thereby carrying a greater possibility of being enacted over the next two or three years. There would, of course, be formidable difficulties, but some significant degree of success would seemingly be possible. That possibility now exists, in large measure, because of the unusual amount of current interest and enlightened outrage initially provoked, in particular, by the dogged efforts of the Washington Legal Foundation and the Heritage Foundation, and subsequently by George Mason University and others. They have pulled the subject from its academic origins and set out to make it a popular concern.

The “over” in the word “overcriminalization” of course refers to the extension of the penal law to reach conduct that most persons would never consider anything other than innocuous, inadvertent, or inconsequential. In the past, such extensions have received relatively little notice. Violations of the traditional criminal law, on the other hand, regularly provoke our interest. As noted by one would-be law reformer, “Its raw materials are greed, lust, violence, treachery, political fanaticism, and madness”—key elements of our theater and our films. Regulatory violations on the other hand, are infinitely more boring, particularly when committed by corporations, and it is hard to generate much beyond indifference with regard to artificial entities committing artificial crimes. Yet individuals and organizations are sometimes caught up in a Kafka-esque net when charged with such “offenses,” and we ignore this area at our peril.

I was once asked by a group of foreign visitors to the United States, what it was that made an offense a *federal* offense. I replied rather flippantly, “The Congress.” I then reflected for a moment in order to supplement the response with a more sober answer predicated upon jurisprudential philosophy, societal needs, the concept of federalism, and other grand principles, but I was disturbed then, and I am disturbed now, that I was unable to do so. The fact is simply that Congress may make a criminal offense of virtually anything, and, particularly in the regulatory area, Congress seems to have done so. It has criminalized so much fundamentally innocuous behavior that recently it has become almost a cottage industry among concerned researchers and academics to gin out examples of the breathtaking absurdity of the range of conduct that Congress has subjected to penal sanctions through accident, inattention, pandering to constituents, over-reliance upon junior staff, and, inexplicably, the trusting of employees of federal agencies to rein in their agency’s delegated authority and differentiate sensibly be-

tween actions or inactions warranting sanctions and actions or inactions warranting only reminders of compliance requirements.

The traditional penal law of most nations may be viewed as aimed at preventing three general categories of harm: harm to persons, harm to property interests, and harm to governmental institutions designed to protect persons and property interests. In the early part of the 19th Century, the forerunners of today's regulatory offenses were rooted in these traditional areas. In England, and later in the United States, legislatures slowly began to apply minor criminal penalties to acts directly affecting the welfare of the public. Such offenses appeared initially in the field of public health with proscriptions on the sale of adulterated or unsafe foodstuffs. With the rapid growth of the Industrial and Commercial Revolutions, a great increase took place in the means by which serious endangerment of persons and property might occur on a broad scale and, correspondingly, laws were enacted to protect public safety. The Congress then began prescribing minor criminal penalties for violations of regulatory provisions that somewhat less directly related to the protection of public health and public safety. Some of those provisions carried no requirement of proof of a culpable mental state, and given the nature of the danger to be averted, the courts ruled that violators could be held strictly accountable, no matter how accidental the conduct.

The congressional criminalization of regulated conduct gradually became common. Eventually, Congress began to apply criminal penalties to activities that involved no endangerment of persons or property. Criminalization of new regulatory provisions became almost mechanical. Today, when a congressional committee adopts a new requirement—concerning commercial transactions, agricultural acreage allotments, welfare programs, or virtually any other regulated activity—it routinely incorporates at the end of the provision a boilerplate statement that any deviation from the new set of requirements constitutes a federal crime. This tendency, together with the lack of any requirement that the legislation pass through the Judiciary Committees of Congress (which are at least theoretically responsible for keeping an eye on the rationality of newly proposed criminal offenses) has led to a gradual expansion of the criminal law to encompass virtually any kind of conduct that a congressional committee or an administrative agency sees fit to regulate. As a result, we are left with a panoply of essentially regulatory crimes, some legislated and some invented by agency employees, which are so numerous that their total can only be guessed. Department of Justice lawyers in the early 1980s identified about 1,700 criminal statutes essentially of a regulatory nature and estimated that administrative agencies, through their regulatory authority, had contributed at least an additional 10,000. Since that time, Professor John Baker and other researchers have found far more, with each new count uncovering additional instances of agency busyness. One recent estimate places the agency contribution at over 300,000 regulations enforceable by criminal or civil sanctions.

The situation has passed the point of absurdity and reached the point of caricature.

As a result of the recent, ongoing exposure of this accelerating trend of legislative and administrative inventiveness, there is a possibility that Congress may be induced to think about the subject with greater care than it has in the past. Certainly, it is becoming increasingly apparent that the current approach to regulatory violations is not only largely ineffective in providing notice of what is prohibited; it carries the potential for intolerable unfairness to many of the individuals and organizations that are surprised to find themselves prosecuted for such violations. It also tends to bring the whole federal judicial system into public disrespect. As noted by Professor Glanville Williams, “[w]hen it becomes respectable to be convicted, the vitality of the criminal law has been sapped.” This carries consequences that can be enormously costly to the nation.

A principal question is how best to alleviate the problem short of broad-scale federal criminal code reform which, as noted, is not now timely. If one can get past the irony of Bentham’s disinclination to consider reform because things are “bad enough as they are,” I would like to think that the heart of his comment, taken seriously, is that less than carefully thought through reforms can make matters worse. This constitutes an important caution in addressing any criminal law reform, whether directed to the heart of the criminal law or to peripheral regulatory prohibitions. In both instances, before proceeding we might well borrow a principle from the physicians’ Hippocratic Oath: “First, do no harm.”

If we are to avoid the potential for serious harm caused by inadvertent circumscription of legitimate federal criminal prosecutions of traditional offenses, any near-term reform of regulatory offenses should be restricted so that it would affect regulatory offenses alone. Broad-scale criminal code reform reaching the heart of federal criminal law should await a time when it can be treated properly along Model Penal Code lines with a scope and structure that can assure smooth interrelationships among culpability provisions, penal offenses, and defenses.

An approach focused solely upon reform of regulatory offenses and their prosecution should be simple in concept, brief in form, and broad in coverage. If those criteria can be met, it is less likely to be intimidating to members of Congress and senior staff members to the extent that it would discourage their active consideration. It is also less likely to become mired in a swamp of particulars. In any event, it certainly would not be helpful to address only a limited number of comical or otherwise outrageous “offenses” that have been brought to public attention either as rueful jokes or as tragic examples highlighted by their application. Any attempt to reform regulatory offenses must reach these ridiculous “offenses” only as a subpart of a larger group.

The defining characteristics of such a potential group would not rest upon their current location being outside of Title 18, since a great number

of what we would deem to be regulatory proscriptions appear within that title. The characteristics would not rest upon their penalty levels as they vary irrationally. Nor would the characteristics rest upon the federal interest potentially affected by their breach since an exceedingly wide range of obscure federal interests in the past have been “protected” by these offenses.

One example of legislation meeting desirable criteria for such an approach would, in brief compass, involve the following steps. First, it would move all serious federal felonies that are currently located outside Title 18 (such as aircraft hijacking and espionage offenses) into a new Title 18 Appendix. This would permit an easy means of reference within the legislation by which Congress might limit application of specified reform provisions to “offenses described outside Title 18 and Title 18 Appendix.” Second, it would move out of Title 18, and to more appropriate titles of the U.S. Code, as many of the purely regulatory offenses as the bill’s sponsors believe that they could accomplish without treading on the sensitivities of the original proponents of such offenses or otherwise proving impolitic. Third, it would provide that, “notwithstanding any other provision of law,” violation of regulatory offenses that are criminalized by *statutes* described outside Title 18 and its Appendix: (a) would require proof, for conviction, of a “knowing” level of culpability regarding the conduct proscribed (unless the purpose of the statutory provision is directly related to endangerment of public health or safety, in which case the level of required culpability for conduct would be at the “reckless” level); (b) would specify that the level of culpability for any required attendant circumstances and results would be at the “reckless” level; and (c) would provide that the maximum penalty would be within the misdemeanor range (unless the act was a repeat offense by the offender, in which case the maximum penalty would be that set forth in the statute criminalizing such conduct). Fourth, it would stipulate that violation of regulatory offenses that are criminalized through *agency rules, regulations, or orders*—the vast majority of regulatory offenses—would, notwithstanding any other provision of law, be an administrative violation only and would be subject only to an administrative penalty after a show cause order inviting the subject to explain why a sanction should not be imposed (unless the act was a repeat offense by the offender, in which case the matter could be referred for prosecution at the misdemeanor level). In all these instances, the legislation would provide for the availability of an increased penalty for intentional, repeated breaches, and for breaches involving serious endangerment of public health or safety.

It is important to note that—for the eminently pragmatic purpose of increasing the chances of achieving wholesale reform of regulatory penalties—this proposal would avoid addressing whether the extant regulations that are criminalized by statute are either legally sound or sensible, or whether their violation should be punished criminally at all. It would simply address what mental states should be required and what penalties would

appear appropriate if such violations are to be considered criminal. Specific changes to the substantive aspects of such regulations could then follow in a more deliberate fashion once the broad-scale defangment has taken place.

The particulars set forth above may vary as reason and political considerations require. Certainly, they will need at least some degree of modification and refinement. The important factors are the use of simplicity, brevity, and breadth to achieve a general approach that will imbue far greater rationality and fairness into the regulatory process. Any legislation setting forth an approach of this general nature will, of course, prove somewhat more complicated than has here been detailed. With proper groundwork, however, the approach does offer a pathway that is relatively simple and thus might be able to engender quick understanding on the part of busy legislators to the extent that it could achieve acceptance by both houses of Congress in a single session.

#### PREVIOUS ATTEMPTS TO ACHIEVE FEDERAL REGULATORY PENALTY REFORM

It should be noted that a broad reform of peripheral offenses is not as far-fetched a possibility as it might appear. There may now be few people who are aware of it, but a regulatory reform approach was drafted during the Ford Administration and was introduced in Congress with bipartisan support during the Carter Administration. Moreover, it passed the Senate by a vote of 72 to 15 (it was part of S. 1437, the Criminal Code Reform Act of 1978, which was designed primarily to bring a Model Penal Code kind of structure to Title 18). That earlier congressional work on the regulatory offenses could provide a significant head start in the drafting of a regulatory reform bill along the lines noted above. First, the detailed Senate Report accompanying S. 1437 included 175 pages describing the particular changes that would be necessary to revise the non-Title 18 statutory offenses one by one in order to incorporate appropriate culpability references. Second, in the 1,569 pages of the Senate Report concerning the successor bill four years later, S. 1630, a revised version of that description was set forth. Third, in the course of the consideration of federal criminal code reform by the Judiciary Committee of the House of Representatives, the House staff developed a six-volume compendium of changes that the Senate bill would make to criminal offenses located outside of Title 18.

If nothing else, these existing materials provide a substantial head start in identifying the regulatory offenses that would need to be reviewed in the course of any future consideration of a reform initiative. Although they were produced at a time when computer analysis was not available to undertake a reliable exposure of telltale statutory verbiage indicating criminal penalties, such an approach is now readily available to supplement the earlier efforts and to achieve a reasonably accurate compilation of federal regulatory offenses.

## THE PROSPECTS FOR SUCCESSFUL CONGRESSIONAL ACTION

The question remains whether the broad scale reform of regulatory offenses can be achieved today, absent its incorporation in the context of a broader Title 18 reform along the lines of the Model Penal Code. It certainly would be an uphill battle, and would face most of the impediments encountered during prior attempts to achieve reform of Title 18 without possessing the advantage of offering a result that would substantially advance fairness and effectiveness at the heart of federal criminal law. It would require a similar amount of energy and commitment while aiming at a far more modest result. Moreover, the political component of the enactment process presents a greater barrier than it did thirty years ago, with reasonable accommodation being far more difficult to achieve. Nonetheless, given the relatively recent public exposure of the twin problems of the current approach—unfairness to unsuspecting violators and ineffectiveness as a general deterrent—it is worth attempting. Moreover, it may well be possible, particularly if the initiators of the effort are able to develop a sound working relationship with the Administrative Conference of the United States with regard to the development of non-judicial sanctioning processes, and with the Department of Justice with regard to the drafting of provisions legitimately falling within the criminal justice sphere.

In short, broad scale regulatory reform is worth exploring as an independent initiative, but any undertaking of the effort needs to be done with full awareness of the observation once made by Justice Vanderbilt of New Jersey, “[r]eform is no sport for short-winded.”