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# American Law Institute II--A Thoughtful Code of Substantive Law

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## II. A Thoughtful Code of Substantive Law

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### I

There is an intimate relationship between Dean Harno's part in this discussion and my own. The relationship was summed up twenty years ago by Roscoe Pound in saying that "a satisfactory administration of criminal justice must rest ultimately on a satisfactory criminal law." Administration is the process of enforcement. Criminal law is what enforcers are appointed to enforce.

Poor administration will, of course, impoverish the soundest paper system. Good administration may improve a poor one, in so far as it can nullify or mitigate glaring defects in paper law. The point is one I readily accept but it is not by any means an answer. There are limits to how far administrators can surmount the limitations of the thing that they administer. There are limits to how far we really sanction such reshaping of the law in its enforcement, even when the motives are ideal. "Equal justice under law" is what we write upon the portals of our greatest court house. If those words do not apply to "crime and punishment—American style," to what do they apply?

You will not understand what I have said to mean that I believe in no discretion for administration or that I think that all the problems of the legal system can be settled by a solid, formulated rule. Quite to the contrary, I think a penal code must confer large discretion on the courts and other organs of administration, at the same tine that it seeks to guide the exercise of the discretion so conferred. I have been speaking here of something else: the arrogation by administration of discretion that is unconferred and undefined by law. All that I say is that important as administration is, destructive as it is when it is poor, important as it is that we appraise it and improve it, it is not and cannot be a substitute for a sufficient law.

### II

Our genial director put my subject with his usual acumen as "a thoughtful code of substantive law." I confess that the word "thoughtful" gave me pause when I first heard it but reflection soon convinced me that it is exactly right. It is the most we have a right to hope for; and it perfectly describes the work in which the Institute is

now engaged. We are attempting to think through the problems of the law that governs the determination of what conduct constitutes a crime—at least within the major areas of criminality—and also governs what is done or may be done with the offender. In thinking through these problems we are seeking all the help that we can get. We look for legal wisdom—a quality that we believe to be both real and relevant —for we are dealing after all with law. We also look, however, for the knowledge, insight and experience offered by the other disciplines and occupations concerned with crime and its prevention. Armed with collaboration of this order, we mean to act as if we were a legislative commission, charged with construction of an ideal penal code—properly regardful of realities but free, as legislative commissions rarely are, to take account of long range values as distinguished from immediate political demands.

I am the last person in the world to say if this approach is really feasible. My commitment to it far transcends a mere conviction that it is for I have pledged it all my effort and my time. But I will say, without the fear of contradiction, that if any problems call for thinking through, they lie within this area. Penal law suffers from the lack of that sustained and specialized attention that has nurtered the development of private law and of those aspects of the public law that regulate the basic economic interests. Important as it is that trover for a cow should lie as justice, grace and wisdom indicate, it is the penal law that safeguards our deepest human interests at the same time that it governs condemnation and disgrace and punishment, with all the suffering that they entail and their irreparable scars. It is vital, I submit, that we should bring to bear on the full body of the law of crime whatever knowledge, statesmanship, morality and effort we are able to command. That the Law Institute, which I regard as the unique organ of disinterested law improvement in our culture, is devoted to this undertaking gives me pride.

Having said this, I wish to add *ex multa cautala* that it is not our purpose to propose or to promote the uniformity of law throughout the country; we do not seek to standardize the law of crimes. We are not animated by the thought—presumptuous as it would be—that our resolution of competing values of the kind reflected in the penal law should command general adherence, given the variety of circumstance and point of view in different states throughout the Union. We seek to locate, raise and state the problems and to marshal evidence and argument that bear on their solution. We seek to formulate conclusions we think wise. We hope that those who disagree with our conclusions will be aided in their own appraisal of the answers by the data and analysis that we advance. We urge no more than that the issues should be seen and should be faced.

## III

I have stated that our penal law requires thinking through—especially upon the legislative level, where it is clear the basic norms must necessarily be set. The truth is that, with few exceptions, we have never had an integrated *corpus juris* in this field at all. While the demand that crime and punishment should be defined by written law has always had support in our ideals, we inherited a system at the start and here, as elsewhere, it was more congenial upon the whole to build on that foundation

than to start anew. Livingston and Field provided major integrative efforts, as Stephen and others did in England, but inertia and the preference for *ad hoc* legislation dealing with defined and narrow problems mainly won the day. As our statutes stand at present, they are disorganized and often accidental in their coverage, a medley of enactment and of common law, far more important in their gloss than in their text even in cases where the text is fairly full, a combination of the old and of the new that only history explains. Often a larger, integrative impulse is reflected in the traffic law than in provisions dealing with the major crimes for which the major sanctions are employed.

The consequence, it seems to me, gives proper cause for deep concern. Basic doctrines governing the scope and measure of this most important type of liability have received scant attention from the legislature. They can not easily be renovated by the courts which deal with discrete cases and are sensible of special bondage to the precedents where so much is at stake. Discriminations that distinguish minor crime from major criminality, or otherwise have large significance for the offender's treatment and his status in society, reflect a multitude of fine distinctions often turning upon factors that have no discernible relation to ends the law should serve. Added to this is a persistent challenge from outside the law, sometimes attacking fundamentals, a challenge that can only be refuted if and in so far as a community can say: "We have re-examined the position in the light of your contention and we think that you are wrong" for stated reasons—of which the best may be, of course, that there is no alternative that better meets the case. Such re-examination may, however, show *per contra* that a given challenge is correct. Our society will profit either way.

What I have said does not express my own opinion only, I assure you. It is the consensus of a host of inquiries into the state of penal law in many jurisdictions of the nation, differing to be sure in their extensiveness, though less in the abortiveness their findings tend to have. In this entire century, with the transforming legal change that it has wrought, only Louisiana has succeeded in enacting a new penal code, effecting major alterations in the *status quo;* only Wisconsin has produced a comparable draft, still pending in the legislature, its future still uncertain as it tangles with resistance in the State. Surely this is a challenge to be met. The happy thing is that there now are signs in many states of a real disposition to confront it.

## IV

This is not the time or place to project what the content of a "thoughtful" penal code would be; and I would lack capacity to do so if it were. We hope to gain progressive insight on this point by heavy labor as the work proceeds. It may be possible, however, to define the qualities that one would seek. They are no different in their essence from the standards that the Institute has set in other fields.

A thoughtful code would meet and face the major problems of the area of law involved, confident that an articulate, considered judgment on an issue is superior to none at all. Thus it would formulate the major doctrines governing the bases and extent of liability in so far as they can feasibly be stated, drawing here on basic ideas as to justice where the penal sanction is involved. In defining the substantive crimes, it would be animated by consistent insights as to where the evils that should be pre-

vented lie, avoiding exculpations that are merely technical and accidental or incriminations when the anti-social factor is not there. It would employ the rifle rather than the shot-gun but the target would be large enough to hit. In distinguishing among offenses, it would eliminate proliferation where it serves no useful purpose but would recognize that specificity has merits both in prosecution and defense. In the discriminations that it makes for varying the punishment or treatment of offenders, it would reflect important differences in harmfulness of conduct and the consequent importance of deterring it, in the probable dangerousness of the individual whose conduct is involved or in public demand for sanctions so inexorable that it cannot be denied. It would recognize that there are very finite limits to the number of distinctions that can reasonably be defended in these terms. In distributing authority within the system of administration, especially in dealing with offenders, it would reflect considered thought about the type of agency best qualified to make the judgments needed, the time when they can best be made, the dangers of abuse or anarchy, the utility of checks and balances that only separation of authority provides. Finally, in terminology, it would seek clarity and unity of concept, expressed in words that can be put to juries with simplicity and carry meaning when the words are heard.

In our planning, as you know, we think in terms of a code organized in four main parts: (1) the general provisions, including those that govern upon sentence; (2) specific crimes; (3) treatment and correction (the detailed regulation of each mode of dealing with offenders, including probation and parole); (4) organization of correction (the disposition of responsibility for the administration of all phases of correction).

The order is a large one I concede. To that a verse by Edna Millay gives the only answer:

> Only the ardent eye,
> Only the listening ear
> Can say, "The thrush was here!"
> Can say, "His song was clear!"
> Can live before it die.

## V

Were I a prudent man I should now stop, for it is always safe to state a case with generality; the trouble comes when one gets down to the details. I wish, however, to present some fair examples of the opportunities and difficulties posed, once the re-thinking of the penal law is under way. Time being what it is, I shall be sparing in my illustrations.

1. Let me put first a problem that involves the very basis of the penal liability or, stated differently, of what we mean by crime. All would agree, I think, that there is no defensible foundation for declaring conduct criminal unless it injures or threatens to injure an important human interest and, further, is not justified because it serves some other higher ends to which the injury or risk of injury may be subordinated. This is a basic standard that should animate the legislature in defining crimes; it often is involved in litigation.

But is it a sufficient standard? Plainly not, one would reply, because it does not take account of culpability. Unless the actor realized or should have realized that

his behavior threatened such unjustifiable injury; unless he knew or should have known the facts that gave his conduct its offensive quality or tendency, it was an accident. The threat of sanctions cannot operate as a deterrent; the conduct does not show the individual to be a larger menace than another man.

To recognize this qualification on the valid condemnation of behavior was, of course, a major triumph in the growth of law. Criminal liability imports a condemnation, the gravest we permit ourselves to make. To condemn when fault is absent is barbaric. It is the badge of tyranny, the plainest illustration of injustice. Correct me if I overstate this but I do not think I do. Indeed, we are reluctant—very properly—to condemn action as a crime merely because the actor should have known of its offensive quality. We seek so far as possible to insist that he really must have known. When he knew and acted nonetheless, we feel real confidence we have our man.

This is so fundamental in the moral thought that traces from the Greeks, preserved for ages by the Church, that you may wonder why I should rehearse it now. The reason is that modern penal law has made great strides in overlooking it. Strict liability has made important inroads in the penal field. An employer employs a minor. A producer ships a food that is misbranded or impure. An advertiser makes a statement innocently false. A scale produces a false weight upon a sale. An alcoholic beverage is transported or possessed in a dry area. An official deposits funds in an unauthorized depositary. A man is in possession of a car with defaced serial. These and countless similar actions are crimes in many jurisdictions, however innocent the cause of violation, however unrelated to the fault of the defendant, even to the absence of due care. The action may indeed be by your agent. *Respondeat superior* applies. Nor is the matter limited to these so-called "regulatory" offenses. A woman may believe herself a widow or divorced—with wholly reasonable basis for belief. If she is wrong and she remarries, it is bigamy. Other illustrations might be given, even in the area of major crime. Only a few months ago a case went all the way to the Supreme Court before it was perceived that partners are not *ipso facto* guilty of the crimes of their employees, committed in the course of their employment.

The kind of departure from sound principle involved in these strict liabilities is discovered in re-thinking penal law. I know that the departure is defended as essential to effective regulation in a number of the areas involved. The defense fails with me and I am not unsympathetic to the regulators. If practical enforcement can not undertake to litigate the culpability of violations, I do not see how the enforcers rightly can demand the use of penal sanctions for the purpose. There are other weapons that can be employed such as injunctive orders or a civil penalty. Crime means condemnation and it is not right to pass that judgement if the bench can not declare that the defendant's act was wrong. This is a point that lawyers can not compromise. We have suffered with this thing now for too long.

2. If I have put a case where penal liability is too extended, let me put one now that works the other way. Some years ago some fellow citizens of mine in New York City hatched a plan to rob a pay-roll messenger of a substantial pay-roll. The police got word of it and when the day arrived they followed closely on the bandits' car. The car stopped at the building where the messenger had been expected. He did not appear and the police closed in. Convictions of attempted robbery were reversed by

the highest court, though not without congratulating the police on their alertness. The action had not progressed far enough to constitute a criminal attempt. A prosecution for conspiracy was possible, of course, but that, as commonly within the states, was but a misdemeanor.

Why should conspiracies to commit major crimes be viewed as trivial offenses? One reason I suggest is that we have a vague uneasiness about conspiracy indictments but though we are uneasy we do not proceed to think the problem through. What's wrong with prosecution of conspiracies formed for the purpose of committing crimes? Does not the conduct show the individuals involved to be a danger to the safety of the public? Must police action be held up until the evils contemplated are inflicted? In a thousand and one other situations, no one acts upon that principle in formulating and defining crimes.

There are, indeed, some special problems in this area, procedural for most part in their nature. There is the problem of vicarious admissions. There is the problem of accomplice testimony. There is the problem of group trials. There is the need that guilty knowledge be well proved. None of these problems is, however, limited to cases where the crime charged is conspiracy. Each of them arises equally when the charge is a completed crime and a conspiracy is adduced as the basis of complicity, as commonly occurs. Hence problems such as these, important as they are and worthy as they are of right solution, do not justify at all the minor grading of conspiracies to commit major crimes. I suggest that in re-thinking the whole subject, inchoate crimes such as conspiracy will be viewed with a seriousness comparable to the crimes that are the object of the plan, as is indeed the situation under the present federal law.

3. A final illustration and I shall be done. I point to the persistent tension and enduring controversy on the issue of the bearing of mental defect or disorder on responsibility. In most states the standard of responsibility is, as you all know, that drawn from *M'Naughten's* case, an advisory opinion of the House of Lords rendered in 1843. The test is in substance whether the defendant, by reason of the disease or defect, did not know the nature of his act or, if he did, did not know that it was wrong. In some jurisdictions this criterion is supplemented by allowance for cases where cognitive capacity is not impaired by the disease, but the defendant is rendered incapable of self-control: the so-called irresistible impulse test.

Nothing so divides lawyers and psychiatrists as does the law's insistence on retaining these criteria and then demanding help from medicine in their specific application. No harder problem is presented—or will be presented to the Institute than that of dealing with this issue. Three Royal Commissions have now sat upon the question in England, where the tension on the point is equally acute; the last under the chairmanship of Sir Ernest Gowers reported only last September. No comparable inquiries have been conducted in America, though we have made important studies too.

The issues are august and it is difficult to face them without dealing with the no less august question of the use of capital punishment for murder, minimal as our infliction of the supreme penalty has now become: 71 executions for murder in 1952 and even less in the last recorded year. What does it mean to "know" the nature of an act or to "know" that it is wrong? Does "knowing" imply the capacity, as Stephen urged and some psychiatrists repeat, to act upon one's knowledge? What is "disease"? Can

judgments of this sort be made after the event? How should the matter be determined if there is substantial doubt? These and a host of other questions call impressively for our attention. Re-thinking of the penal law implies re-thinking them.

Often, however, critics of the law imply that this is really very simple. *M'Naughten's* case was decided a century ago, when modern psychiatry was barely in its infancy; indeed, before it even was conceived. How, it is asked, can any formulation made so long ago be valid now, with all the progress that psychiatry has made?

This is the type of critique that is too simplistic to assist re-thinking. The legal standard of responsibility is not a proposition in psychiatry. It is a moral and juristic concept drawn from deep ideas of justice derived from the ancient world. The question is when it is just to grant exemption from afflictive punishments applied in general, when it is right to make exceptions to the rules that normally apply. Changes in psychiatric knowledge may have bearing on that issue, as upon a host of our perceptions; but psychiatric knowledge can not answer such a problem in itself. We must consider first the ends that law should serve before we can determine how far science bears on their attainment.

I say this not to indicate a view upon the answer to the problem of *M'Naughten.* We have only now begun to work upon the vexing issue. My point is that re-thinking penal law means going to the fundamentals. There is no escape from such an effort if the task we have assumed is to be done. We can no more agree that we must favor change because the law is old than we can think that its antiquity establishes that it is right.

Even when this is recognized, an enterprise of this kind necessarily involves us in the robust criticism of existing law. It is important, therefore, to declare the spirit in which we proceed. I know no better words in which to put the sentiment than those of Justice Holmes:

"I trust that no one will understand me to be speaking with disrespect of the law, because I criticize it so freely. I venerate the law, and especially our system of law, as one of the vastest products of the human mind . . . But one may criticize even what one reveres. Law is the business to which my life is devoted, and I should show less devotion if I did not do what in me lies to improve it, and, when I perceive what seems to me the ideal of the future, if I hesitated to point it out and to press toward it with all my heart."