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STATUTORY CRIMINAL LAW: THE NEGLECTED PART

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In an age when commercial conduct has been the subject of widespread regulation, a great many criminal statutes have been enacted pertaining to commerce, agriculture, public health and welfare, and other matters. These statutes are not often found in the criminal codes of the states, but usually are scattered throughout the statute books. How numerous are these "non-code" criminal statutes? What areas of conduct do they control? Have they altered the basic concepts of criminology? Should they be codified, or should they receive uniform treatment by the states? Exploring these questions, and raising others, Professor Fox calls the bar's attention to some significant implications of the "non-code" criminal law.—EDITOR.

It is a well recognized fact that legislative manipulation of substantive criminal law has been scandalously neglected by the critical skills and judgments that lawyers have applied toward rational development of other fields of law. The drafting of a Model Penal Code provides the potential for reversing this indifference, but much remains to be accomplished. This paper sets forth some criminal legislation problems that presently appear destined to survive the awakening of the legal profession to its responsibility for the state of penal law.

Statutory criminal law may be marshalled into two groups: The first is the relatively homogeneous tripartite collection made in the criminal code¹ wherein may be found the restatement of the common law of crimes, common law as reshaped in the legislative process,² and increments to the substantive criminal law that have no direct common law antecedents.³

The second category of penal law is outstanding

* Helpful criticisms of Gerald Abraham, Assistant Professor, Duquesne Law School, are gratefully acknowledged. Much of the research could not have been completed without the competent efforts of Elizabeth Porada, Research Librarian, Boston College Law School, 1959-60.

The views expressed are the sole responsibility of the writer.

¹ The collection may be called the Criminal Code (Wisconsin) or the Penal Law (New York) or the Penal Code (California). It may not have a special name, as in Massachusetts where the crimes described in the following paragraph of the text are located in successive chapters of the laws. See MASS. ANN. LAWS chs. 263-274 (1952).

² E.g., N.Y. PENAL LAW §§402-405, defining several property offenses all closely related to common law burglary.

³ E.g., MASS. ANN. LAWS ch. 264, §19 (1952), proscribing membership in a subversive organization.

for its lack of homogeneity, except perhaps in that there is generally little common law history preceding enactment. It is made up of all the criminal offenses found outside the criminal code, that is, in the rest of the statute books.⁴ In this category are provisions which authorize six months incarceration and a \$500 fine for employing certain people during labor difficulties,⁵ and for injuring trees on a state highway;⁶ five years imprisonment and a \$5000 fine for using without proper authority certain licenses issued by the Director of Agriculture;⁷ six months and \$250 for certain improper practices by a dentist.⁸ The variety precludes an adequate description.

These statutes are incredibly dispersed in the statute volumes. For example, in the 1959 edition of the Massachusetts General Laws Annotated, brought out by a leading publisher, there are forty-eight volumes: one is devoted to the constitution, three to a general index, and one to crimes and offenses. In the remaining forty-three volumes there are no less than eleven hundred criminal offenses.⁹ Only seven of these forty-three volumes lack any criminal provisions. And, needless to say,

⁴ It is impossible to draw a firm line between "non-code" offenses generally and "code" offenses similarly lacking common law antecedents. The distinction then relates to location in the statutory organization.

⁵ MASS. ANN. LAWS ch. 149, §23A (1952).

⁶ *Id.*, ch. 87, §10.

⁷ CAL. AGRI. CODE §1258.

⁸ N.Y. EDUC. LAW §6612(4).

⁹ The distribution is as follows: (volume number: number of offenses) 2:8, 3:8, 4:13, 5:23, 6:78, 7:10, 8:21, 9:11, 10:14, 11:24, 12:191, 13:10, 16:22, 17:74, 18:24, 19:135, 20:98, 21:53, 22:82, 23:4, 25:15, 26:50, 27:25, 28:39, 29:14, 30:2, 31:2, 33:15, 35:3, 36:9, 37:3, 40:5, 41:2, 42:4, 43:2, 45:7.

the index is a wholly unreliable guide to the presence or content of these criminal penalties.

This startling state of affairs is not merely indigenous to Massachusetts. In Wisconsin the non-code crimes have been described as "scattered through the remainder of the statutes."¹⁰ Almost twenty-five years ago it was reported that in California "thirty-eight pages of Cal. Pen. Code (Hellyer, 1935) are taken up with an index to penal statutes not in the Penal Code. . . ."¹¹

How many of these offenses exist and what kinds of conduct they seek to suppress is not precisely known, since it appears no one has attempted to examine the statutes of the several states or even to deal comprehensively with the statutes of any one state.¹² This discussion is concerned with problems raised by a preliminary and elementary examination of the "forgotten" laws.

The absence from the literature of any comprehensive analysis of non-code criminal law indicates that these statutes have been deemed unworthy of scholarly attention.¹³ One does find a note of concern expressed, however, by those who have perceived the extent of criminal law proliferation.¹⁴

¹⁰ Platz, *The Criminal Code*, 1956 WIS. L. REV. 350, 357.

¹¹ L. Hall, *The Substantive Law of Crimes—1887—1936*, 50 HARV. L. REV. 616, 622 n.26 (1937).

¹² There is a brief study of all Wisconsin criminal statutes by students at the University of Wisconsin Law School, reported in 1956 WIS. L. REV. 154, 625, 641 and 656. There are also unanalyzed collections of all the Massachusetts criminal statutes. See BELL, INDEX TO PENALTIES FOR CRIME AND CRIMINAL EVIDENCE, PLEADING AND PRACTISE (1922); MCCARTHY, MASSACHUSETTS CRIME AND PUNISHMENT (1923). A general survey of some of the more ludicrous aspects of "non-code" crime can be found in Baker, *Legislative Crimes*, 23 MINN. L. REV. 135 (1939).

¹³ The outstanding exception to this lack of attention is the study of criminal statutes imposing strict liability, which statutes are found mostly outside of the code collections. E.g., see Sayre, *Public Welfare Offenses*, 32 COLUM. L. REV. 50 (1932).

Another area of mainly non-code law under study is "white-collar" crime, defined as "a crime committed by a person of respectability and high social status in the course of his occupation." SUTHERLAND, WHITE-COLLAR CRIME 2 (1949). For a recent survey of the status of research into white-collar crime see Newman, *White-Collar Crime*, 23 LAW & CONTEMP. PROB. 735 (1958).

¹⁴ For example, in 1937 it was stated:

"There is scarcely any trade or profession into which a man may go today which does not find itself controlled in its peculiar features by legislative mandate. The common law has never gone far enough in this direction; the genesis of such statutory regulation antedates the period under discussion by centuries. The major part of the statutes now in effect, however, have been enacted within the last fifty years. It is

The concept of harmless error is well known to the common law. Such error can appear in not only the judicial but also the legislative process, and it may be urged that the statutes under consideration represent merely an innocuous miscarriage. There are, however, cogent reasons why the existence and continued multiplication of these penal statutes cannot be viewed as inconsequential and why our ignorance of them ought not persist.

I. THE PROBLEMS

Lack of Any Comprehensive Treatment

Criminal law generally has a stepchild status;¹⁵ the same is true of that part of the penal law found outside the penal code. In every real sense it is part and parcel of the penal law of the states. Quantitatively, it may be the bulk of the penal law.¹⁶ Its importance is at least as "cardinal" as the traditional penal law since (1) it protects many of the same interests of men seeking to live productively in an ordered society; (2) the "non-code" penal law provides its protection with the same mechanisms and facilities of prosecution and punishment; and (3) in many instances its impact goes beyond the scope of the more traditional criminal law. The supporting evidence can be quickly sketched.

(1) One of the prime functions of the traditional criminal law is to protect persons from unjustified risks of death and serious bodily injury. Many of

impossible even to summarize the fields into which the criminal law has been obtruded; a welter of special interests, specific abuses, publicized evils, and vague policies have dictated its direction. Much of this regulation is done by penal statutes not incorporated into the penal code proper, and is known for the most part only to the businessmen concerned and to the state departments charged with the duty of enforcement. Other more general statutes deal with matters such as false advertising, misuse of trade marks, resale price agreements, factory acts, sale of convict-made goods, and weights and measures.

"One result of this has been to make everyone a criminal. If the fines and short jail terms for which one was legally liable were actually enforced, few would have any net income, or leisure out of jail in which to spend it." L. Hall, *op. cit. supra* note 11, at 622-23.

¹⁵ "Despite its cardinal importance, penal law in the United States has never had the type of specialized attention that has nurtured the development of private law and those aspects of public law that bear directly on the regulation of important economic interests." Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952).

¹⁶ It has been said that this is true in Wisconsin. See Platz, *op. cit. supra* note 10. The Massachusetts "non-code" statutes outnumber the statutes in the Massachusetts "criminal code" by more than three to one.

the criminal offenses found outside the criminal code, at least in Massachusetts, are designed to accomplish precisely the same end—a lessening of unjustified and preventable personal harm. There are, for example, the public health criminal provisions¹⁷ and the criminal provisions relating to use and inspection of dangerous instrumentalities.¹⁸ The threat to the general security of misconduct under these and similar statutes, it is submitted, is far more serious than that produced by any single criminal homicide. In fact, the number of lives endangered by the spread of a disabling disease or by boiler and air tank explosions indicates that, relatively speaking, murder may be a trivial problem.¹⁹

(2) The consequences to the violator of these and many other “non-code” crimes are exactly the same as befall the robber, the rapist, and the burglar. He is deprived of financial resources through a fine, of liberty through incarceration.²⁰ He incurs expenses of counsel to defend and guide him through the technicalities of a criminal trial. If he incurs a lesser moral condemnation than the traditional criminal, this is because the moral sense underlying the condemnation is of a relatively rigid nature, not because control of disease and explosions are problems that can be safely or ethically ignored.

(3) Beyond question the impact of these laws brings criminality to new areas of activity. Probably the most perceptible expansion of statutory criminal law has been in the regulation of commercial conduct. It is, as has been pointed out above, impossible even to summarize this development.²¹

¹⁷ E.g., MASS. ANN. LAWS ch. 111, §5 (1952) (violation of sanitary code punishable by up to one year imprisonment and a five hundred dollar fine).

¹⁸ E.g., MASS. ANN. LAWS ch. 146, §33 (1952) (violation of provisions relating to inspection of boilers, air tanks, etc., punishable by up to six months imprisonment and a five hundred dollar fine).

¹⁹ “Crimes malum in se are such as murder, rape, arson, treason and robbery. Crimes malum prohibitum are such as driving on the wrong side of the road, speeding, embezzlement, bigamy, health laws, etc. So far as danger to society is concerned I see no difference between the two classes of crimes. Murder deprives society of a member, and the state of a possible defender. But more persons are killed by automobiles than are murdered each year, and more persons are carried off by tuberculosis contracted in sweated industries in violation of labor laws than are killed by automobiles.” Levitt, *Extent and Function of the Doctrine of Mens Rea*, 17 ILL. L. REV. 578, 587 (1923).

²⁰ In Massachusetts fully 511 of the 1100 “non-code” offenses authorize a jail or prison term.

²¹ See note 14, *supra*.

A Changing Concept of Crime

If it is at all important to know what is encompassed by the concept of crime, then the statutory developments under discussion must receive consideration. It is often and unequivocally stated that the essence of crime is the moral defect of the criminal;²² yet this assertion is not immutable dogma, unaffected by years of continuous and far-reaching counter-assertions by American legislatures through enactment of “non-code” crimes largely lacking in moral connotations. The essence of crime must be adjudged inductively.

But without the basic data concerning this mass of criminal provisions we cannot deal with the vital question whether a changing ethical conception is represented by such factors as the number of circumstances to which the penalties apply, the nature of these circumstances, and the magnitude of the penalties provided. That is, comprehensive research may show that substantial criminal penalties are provided for conduct that represents a deviation from neither traditional nor emergent standards of morality, but rather from standards such as those necessary to keep a free enterprise system functioning smoothly, to make urban living a physically and aesthetically tolerable existence, or to minimize the personal dangers inherent in an impersonal and mechanized society.

Experience may indicate that striving for such ends as these produces the need for precise and comprehensive regulation through criminal penalties, but one suspects that even a “knowing” or “intentional” violation of the regulations would not, with any significant frequency, produce the same inference of “evil” character that might be drawn in regard to the murderer or rapist or swindler. In this sense it may no longer be “wicked” to be a criminal, and generalized statements as to what “crime” and “criminal” means may no longer be adequate.

Definitely establishing that these terms have lost much of their moral impact, as on available evidence appears to be the case, would serve to focus the efforts of many dealing with the crime problem, lawyers and non-lawyers alike. Those committed to the dependence of criminal law on conventional notions of morality, mostly lawyers, would deprecate the legislative departures and seek to preserve the connection between law and

²² E.g., “Crime does and should mean condemnation. . . .” MODEL PENAL CODE §2.05, comment at 140 (Tent. Draft No. 4, 1955).

morality by moving the system of amoral regulation out of the penal law. On the other hand, those to whom it is regrettable that crime is considered a moral problem, mostly the criminologists, would welcome these developments as an indication that legislatures are now or may soon be ready to accept more utilitarian views in dealing with traditional crime and criminals.

Regardless of what the *a priori* criminological commitment is, it is obvious that neither group can progress on this issue with maximum effectiveness without the basic legislative facts on which to base its case.

Problems of Administration

The third factor prompting concern for these statutory developments is that the administration of penal law poses major difficulties, as in the great degree of choice possessed by prosecutors concerning enforcement of the criminal law.²³ There are special difficulties in regard to offenses outside the penal code, since so few cases concerning them reach appellate courts or find their way into judicial statistics where even a slight amount of information would be available concerning enforcement policies and practices. The situation is especially complex, since investigative functions related to many "non-code" laws are frequently lodged in an inspecting agency outside the prosecutor's control. Recent times have seen few disclosures of corruption and bribery to equal those relating to the activities of these inspection and investigative agencies.²⁴

But not even a start can be made on understanding and improving the administration of these "non-code" offenses without knowledge of the kinds of laws and the policies underlying them with which the administration is concerned.

The Need for Uniformity

The variations from state to state in the substance of the penal laws have been passed off with

²³ "A society that holds, as we do, to belief in law cannot regard with unconcern the fact that prosecuting agencies can exercise so large an influence on dispositions that involve the penal sanction, without reference to any norms but those that they may create for themselves. . . . Indeed, one of the major consequences of the state of penal law today is that administration has so largely come to dominate the field without effective guidance from the law." Wechsler, *op. cit. supra* note 15, at 1102.

²⁴ E.g., N.Y. Times, Jan. 22, 1960, p. 1, col. 8 (city ed.), indicating a five million dollar fraud in delivery of fuel oil under protection of personnel of the New York City Bureau of Weights and Measures.

little concern; it is said that while uniformity is important in the area of business, it is undesirable in the area of social ideas.²⁵ As to the non-code penal law, however, uniformity is of great value—and precisely because it pertains so markedly to business affairs. In Wisconsin, for example, it has been said that market crimes—"those crimes in which the criminal's or the victim's activity in making a living by the sale of goods or services is directly involved in the criminal conduct"—make up more than half of all the criminal offenses.²⁶ As an attempt to regulate commercial conduct these offenses represent an *ad hoc* addition to the commercial code. It would be surprising indeed if business decisions and policies were formulated without regard to the demands of the penal law. In view of this, and of the ever-widening scope of multistate commercial activity, it seems apparent that uniformity is highly desirable and should be sacrificed only upon the appearance of weighty counter-considerations.

Codification

Closely related to uniformity considerations is the need for a systematized and comprehensive collection of statutes.

The ancient doctrine of *ignorantia legis neminem excusat* puts a unique premium on knowledge of penal law. The consequences to the offending individual make it imperative that every feasible step be taken to minimize the possibilities of ignorance. The sheer quantity of statutory regulation makes it unlikely, however, that the individual citizen not learned in the law can dissipate his ignorance even with the aid of well designed codifications. At this point in legal history the application of criminal penalties to "ignorant" offenders cannot be equated merely with advice to learn the law. It amounts most clearly to the suggestion, "See a good lawyer, or else."

But, generally speaking, even the advice of counsel does not shield from criminality.²⁷ The

²⁵ "Uniformity is not as such a value of importance in this field, as it is, for example, in the case of the commercial code. It is to be expected that substantial differences of social situation or of points of view among the states should be reflected in substantial variations in their penal laws." Wechsler, *The American Law Institute: Some Observations on its Model Penal Code* 42 A.B.A.J. 321 (1956).

²⁶ Comment, *Interests and Institutions Reflected in Wisconsin Penal Statutes*, 1956 Wis. L. Rev. 154, 162.

²⁷ *People v. McCalla*, 63 Cal. App. 783, 220 Pac. 436 (1923). It has been held, however, that a defense is established where the defendant was aware that his

prize goes only to him who is right. In view of this, it is difficult to justify a scattering of penal statutes from one end of the statute books to the other. The professional effort necessary to enable an attorney to advise safely that contemplated action would be free from criminality is overwhelming. The impact of this state of affairs can be fairly estimated by supposing that a tax attorney were required to search for statutes pertaining to taxation in every volume of the statutes, relying upon generally unreliable indices only at the peril of his client's affairs. It is difficult to conceive of the tax bar permitting such a situation to persist very long.

The apparent scope of contemporary statutory crime makes a lack of codification virtually impossible to justify. If it is true that an attorney cannot act as a competent business advisor without keeping an eye out for tax consequences, it is becoming equally true that the other eye must be fixed on the criminal law.

This need for codification is closely related to the need for uniformity. To the extent that variations in underlying social and economic policies deny achievement of uniformity, the problems thus created could be significantly mitigated by a uniform method of codification designed to point up existing differences. Even a criminal law loose-leaf service may be a necessary appendage to codification.

It may be mentioned, too, that establishing a method of codifying and classifying criminal statutes in this country so as to avoid inadvertent violations is of substantial international significance. As it becomes more imperative that Americans engage in overseas investment and business activity, and there seems little doubt that it is becoming imperative, the need for knowledge of foreign law becomes a clear necessity. This need has already been recognized in the field of taxation.²⁸ Criminal law, at least that pertaining to

conduct would be within the area regulated by criminal statutes and, further, that he acted only upon the advice of his attorney that the course of action would fall outside the scope of the statutes. *Long v. State*, 5 Terry 262, 65 A.2d 489 (1949).

²⁸ "Effective communication has long been recognized as the key to understanding in the world community. In the international commerce sector much progress has been made to bridge the gaps arising from differences in language, as well as differences in social, economic, and political structures. Yet even in this sector severe barriers to effective communication remain. Not the least important of these is the lack of knowledge concerning the tax systems of the world. Such knowledge as does exist with regard to foreign tax

economic activity, is of no less importance. As a matter of fact, few events are as disruptive of good international relations as finding oneself in a foreign criminal court for no known reason or having one's business affairs suddenly subject to the intervention of foreign police. Developing an internationally valid method of collecting, classifying and analyzing relevant criminal statutes may be a useful step to follow success in ordering the American laws.

The Size of the Penal Law

There are mushrooming numbers of "non-code" crimes. As has been indicated, these offenses constitute the bulk of statutory criminal law in Wisconsin and outnumber the criminal code penal law in Massachusetts in a ratio of more than three to one.

Even if all these statutory crimes were based on the most enlightened general principles of criminal law, the problem of the size of the criminal law would remain. Effective enforcement is not possible without devoting public resources in a quantity that no society faced with crucial needs for defense, education, and welfare programs can afford. An over-sized, albeit rational, penal law can be only discriminatingly enforced, and this is an invitation to corruption. In addition, vigorous enforcement of the penal law regulating commerce may so deplete the financial resources of commerce through fines or remove the most skillful from positions of management through incarceration that the economic health of society would be seriously impaired.

It must be faced that this particular problem is not simply one of separating offenses that involve risks of serious and unjustified harm from those that do not. Nor is it one of finding the proper sphere of operation for the concept of deterrence or the goal of reformation. The problem of the size of the penal law presents the question of what is to be done when there is too much risk of harm for the criminal law to handle, too much conduct to be deterred, too many persons manifesting a need for

systems is in large measure a matter of private province. With few exceptions, the American with interest in a foreign tax problem does not have readily available the necessary treatises and other tax materials, much less some method of providing a reasonable measure of currency.

"Harvard Law School's *World Tax Series* is designed to fulfill the long felt need for basic information in the tax systems of most of the major nations of the world." Chommie, Book Review, 13 TAX L. REV. 383 (1958).

involuntary re-education? In short, what are the principles of legislation by which some portion of an otherwise rational penal law is to be assigned to other methods of control? These questions cannot, of course, receive any satisfactory answer until the precise magnitude of the problem has been accurately surveyed.

Strict Liability

The fact that some of the "non-code" offenses dispense with the common law requirement of *mens rea* has produced the only observable concern for developments in this part of the penal law.²⁹ The judgment has been all but universal that these offenses should be removed from the criminal law. The utilitarian argument relies on the "morally neutral" nature of the conduct violating these statutes, asserting that,

"In the absence of minimal culpability, the law has neither a deterrent nor corrective nor an incapacitative function to perform."³⁰

Taken at face value, this consideration presses strongly for a comprehensive re-examination of this portion of the "non-code" offenses in order to learn the exact problems the statutes are designed to deal with as well as the available alternatives.

Conceding that strict criminal liability statutes present a challenging problem, it is nevertheless the view of the writer that the nature of this problem has been misunderstood. Only by oversimplification can it be maintained that there is *no* utilitarian value in strict liability. There can be, and undoubtedly is, a deterrent value to these statutes.

Deterrence means inducement of obedience to the law by the example of the punishment of violators. Does the imposition of strict criminal liability induce others to avoid punishment?

In the strict liability cases neither a defense of ignorance of the law nor of mistake of fact is available. As to those unaware of the law, it is commonly said that punishment of others cannot

influence their behavior. But what may be the effect of prosecution on lack of knowledge? It may be that the punished person is a member of a well-defined class, such as one occupationally defined, in which all members are likely to be apprised, perhaps through a trade journal, of such happenings. It is highly unlikely that ignorance within that class would prevail for very long. In this sense, prosecution may well be an efficient means of legal education. Of course, the larger the percentage of strict liability offenses found to relate to business activity, the more this exception to the inoperativeness of deterrence tends to swallow the rule.

But when attention is turned to those who know of the law but lack knowledge of the facts producing criminality, the situation is markedly different and the dominant generalization would seem to be that strict liability *can* have a definite deterrent effect. It is clear that we have no empiric evidence that would supply an authoritative answer either way. But knowledge of human nature would seem to indicate that, unless substantial inconvenience or cost is involved, and perhaps even then, an expanded effort will be made to find out the facts and, if possible, avoid a similar fate. It must be kept in mind that we are discussing situations where emotional overtones, such as those frequently accompanying violent crime, would usually be absent or would not interfere significantly with the normal desire to avoid violating the law.

For example, after Mr. Mixer was convicted for illegally transporting a substance he did not know to be liquor,³¹ it seems likely that both he and his colleagues did more to learn the nature of the material entrusted to them than they did before the conviction. To the extent that this is conduct designed to lessen the risk of harm, in this case the transportation of liquor, it is exactly the kind of behavior one hopes to produce when speaking of deterrence. The fact that this risk-lessening conduct cannot *insure* obedience to the law in all cases is irrelevant to whether strict liability stimulates people to attempt to obey the law. But this is, of course, not always true. Purposefully engaging in risk-lessening conduct may not be a feasible course of action.³² The problem with strict liability is not

³¹ Commonwealth v. Mixer, 207 Mass. 141, 93 N.E. 249 (1910).

³² In discussing strict liability under the Federal Food, Drug, and Cosmetic Act it has been perceptively noted that "Such strict liability would seem to have some value as a preventive, particularly in fostering greater care by manufacturers in choosing and super-

²⁹ The only accurate statement that can be made concerning the relative number of these strict liability statutes is that there are *some* of them. In the absence of knowledge concerning the absolute number of criminal offenses in the statutes, it could be only conjecture to say there are *many* or *few*. Obviously, fifty such statutes would be *many* in a total of 150 statutory offenses and *few* in total of 1500. Nevertheless, these offenses have been described both as "a large body of modern law," Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 422 (1958), and as "comparatively small" in number, Mueller, *On Common Law Mens Rea*, 42 MINN. L. REV. 1043, 1103 (1958).

³⁰ Model Penal Code §2.05. comment at 140 (Tent. Draft No. 4, 1955).

that it has no deterrent effect; it is that it does not *always* have this effect. The fact that there has been no study of strict liability statutes with this distinction kept in mind has helped foster the widespread misunderstanding and perhaps undue condemnation of strict liability crime.

II. THE EFFECT OF CRIMINAL CODE REVISION ON NON-CODE OFFENSES

It is important to note the effects of criminal law revision and reform on the problems outlined above. The conclusion emerges that the problems remain neglected and unsolved, and this is perhaps the most serious problem of all. Three projects are considered—the Louisiana revision of 1942, the Wisconsin revision of 1955, and the American Law Institute's Model Penal Code. These represent the most recent major attacks on defective statutory penal law.

*The Louisiana Criminal Code of 1942*³³

Prior to enactment of the new code, the basic criminal law of Louisiana was embodied in the Crimes Act of 1805. This collection of substantive offenses had been substantially augmented by other penal statutes during the near century and a half of its reign.³⁴ The purpose of the 1942 Code was almost exclusively to bring about consolidation. The coverage of the code's approximately 100 substantive articles permitted repeal of more than 500 separate statutes.³⁵ Thus, for example, the new criminal mischief article³⁶ replaced twelve separate statutes;³⁷ the criminal damage to property article replaced twenty statutes.³⁸

The value of such centralization is not to be depreciated; obscurity engendered by overlapping and inconsistency should not be part of any penal law. But the code represents a job only partially completed. The Louisiana Revised Statutes of 1950 contain many penal provisions that antedate the 1942 Code and remain uncollected and unanalyzed.

vising employees or in maintaining satisfactory operating conditions; but it has a questionable effect when applied to such groups as distributors or manufacturers operating under high standards who, as a practical matter, cannot take further precautions." *Developments in the Law, The Federal Food, Drug, and Cosmetic Act*, 67 HARV. L. REV. 632, 695 (1954).

³³ LA. CRIM. CODE §§1 *et seq.* (1942).

³⁴ There are no common law crimes in Louisiana. See *State v. Robinson*, 143 La. 543, 78 So. 933 (1918).

³⁵ LA. ACTS 1942, No. 43, §3.

³⁶ LA. CRIM. CODE §59 (1942).

³⁷ *Ibid.* (draftsmen's comment).

³⁸ *Id.*, §60 (draftsmen's comment).

The diversity of these persisting criminal laws is reminiscent of the Massachusetts collection: secreting seamen,³⁹ violating laws governing leases of public lands,⁴⁰ unlawfully practicing accounting,⁴¹ occupying a dwelling unfit for habitation,⁴² noncompliance with laws relating to female employees,⁴³ violating health rules for cosmetic therapy,⁴⁴ etc.

The code barely recognizes the existence of non-code crime in its section granting discretion to the district attorney to proceed under the provisions of the code or under "some other provision of the Revised Statutes, some special statute, or some constitutional provision"⁴⁵ when the conduct is criminal according to more than one statute.

Inasmuch as the centralization and prosecuting option represent the only legislative⁴⁶ impact of the code on "non-code" criminal law, the problems described in the first part of this paper continue to be largely unsolved in Louisiana.

*Wisconsin Criminal Code of 1955*⁴⁷

In Wisconsin, the 1955 Criminal Code affected the "non-code" crimes in two ways. First, it shifted the location of criminal statutes; 244 sections were removed from the criminal code.⁴⁸ Three criminal statutes were moved from one point outside the code to another point outside the code.⁴⁹ And a handful of non-code sections were transferred into the code, producing a partial centralization of perjury and false swearing of

³⁹ LA. REV. STAT. 34:874 (1950).

⁴⁰ *Id.*, 41:1221.

⁴¹ *Id.*, 37:91.

⁴² *Id.*, 40:564(4).

⁴³ *Id.*, 23:362.

⁴⁴ *Id.*, 37:520.

⁴⁵ LA. CRIM. CODE §4 (1942).

⁴⁶ The Supreme Court of Louisiana has held that §27 of the code, dealing with attempts, is applicable to attempts to commit "non-code" crime. *State v. Broadnax*, 216 La. 1003, 45 So.2d 604 (1950).

⁴⁷ WIS. STAT. §§939.01 *et seq.* (1955).

⁴⁸ The figure 244 represents a count of sections of the old penal code, WIS. STAT. §§3.40.01 *et seq.* (1953), assigned new section numbers outside the new criminal code by the statute enacting the new code, WIS. L. CH. 696 (1955). "All such statutes have been renumbered and transferred, usually without change, into other parts of the statute book." Platz, *op. cit. supra* note 10, at 358. The figure 244 does not include sections of the former code that were repealed.

⁴⁹ WIS. STAT. §§175.05, 175.10, & 175.12 (1955) are now found in a new chapter 134, entitled "Miscellaneous Trade Regulations," as §§134.35, 134.50, and 134.51. One of these sections deals with failure of a telegraph company to endorse the time of receipt on the messages given it for transmission, and the other two relate to certain aspects of the poultry business.

enses.⁵⁰ No reason appears why the centralization was only partially accomplished. Immediately prior to the enactment of the new code it was reported that in the Wisconsin statutes there were seventeen separate crimes against government involving "giving false information (perjury)."⁵¹ Only two of these were in the former criminal code.⁵² It seems that eleven of the seventeen are still to be found scattered in the statute books.⁵³

It is obvious that the enactment of the new code has had the most minimal and indiscriminate impact on criminal statutes outside the code. This has been regretfully acknowledged by the Assistant Attorney General of Wisconsin.⁵⁴

It remains to note the second effect the new code has had on the criminal statutes outside the code. The first chapter of the code, entitled "General Provisions,"⁵⁵ applies "to crimes defined in other chapters of the statutes as well as to those defined in the criminal code,"⁵⁶ with two exceptions. The section containing definitions of words and phrases⁵⁷ and the one dealing with "criminal intent"⁵⁸ are to have no operation outside the criminal code.⁵⁹

⁵⁰ WIS. STAT. §§85.08(36), 159.14(1), 215.385, 221.20 (1953) are now in WIS. STAT. §§946.31 & 946.32 (1955).

⁵¹ Comment, *Interests and Institutions Reflected in Wisconsin Penal Statutes*, 1956 WIS. L. REV. 154, 157.

⁵² WIS. STAT. §§346.01, 346.02 (1953).

⁵³ E.g., WIS. STAT. §158.15 (1955) (false oath by a barber). No attempt has been made to verify whether the figure eleven is precisely correct. The section penalizing interference with fire fighting equipment, *id.*, §213.095(2), (3), has also been moved into the criminal code as §941.12.

⁵⁴ "The code, . . . is by no means all the criminal law of the state. Many criminal laws—in fact the numerical majority and the quantitative bulk of them—are to be found scattered through the remainder of the statutes.

"Roughly, these extra-code laws may be regarded as 'regulatory'—statutes which regulate conduct which is not always essentially bad, or at least is tolerated under controlled conditions. Examples are the corrupt practices act, regulating political campaigns; the fish and game laws; the law of the road; the uniform narcotic drug act; laws licensing and regulating trades, businesses and professions, including the liquor traffic; laws regulating the practices of the market place; the blue sky law and a host of others.

"It requires no argument to demonstrate that such laws, however much they may stand in need of revision, are not a proper subject for a project like the one here under consideration. Not only would it require an unconscionable amount of time; it would require intimate knowledge of the details of more fields of human activity than could be comprehended by any group of people such as those who devoted so many days to the development of the code." Platz *op. cit. supra* note 10.

⁵⁵ WIS. STAT. §939 (1955).

⁵⁶ *Id.*, §939.20.

⁵⁷ *Id.*, §939.22.

⁵⁸ *Id.*, §939.23.

It seems puzzling why the legislature should provide that certain words should have certain meanings within the code, but be indifferent to whether the same words have the same meaning outside the code. Why, for example, should "transfer" mean "any transaction involving a change in possession of any property, or a change of right, title, or interest to or in any property"⁶⁰ for purposes of the criminal code, but not for other purposes? Only confusion can result from statutes using the same words with varying meanings. Of course, definitions must be constructed to suit the particular purpose of the statute involved. In view of the fact that the legislature (and the law revisers)⁶¹ did not know how many and what kinds of criminal statutes the definitions would apply to outside the criminal code, it may have been the wisest course to restrict the scope of the definitions as was done; nevertheless, clarity is hardly achieved by this restriction.

The exemption of the section dealing with "criminal intent" from application outside the code is a more serious shortcoming.⁶² This section enacts a legislative criterion for determining when a criminal statute imposes strict liability; the absence of any of certain specific terms (concerning intent, knowledge, or belief) mentioned in subsection (1) indicates the imposition of strict liability. Prior to enactment of the code it was stated that "the dominant characteristic of the criminal statutes of Wisconsin is their ambiguity on the issue of the requirement of fault."⁶³ Although this resolution of the ambiguity appears to produce some harsh results within the criminal code,⁶⁴ our concern is for the crimes outside the code. Here the

⁵⁹ *Id.*, §939.20.

⁶⁰ *Id.*, §939.22 (40).

⁶¹ See note 54 *supra*.

⁶² This provides:

"When criminal intent is an element of a crime in the criminal code, such intent is indicated by the term 'intentionally', the phrase 'with intent to', the phrase 'with intent that', or some form of the verbs 'know' or 'believe.'" WIS. STAT. §939.23 (1) (1955).

⁶³ Remington, *Liability Without Fault Criminal Statutes—Their Relation to Major Developments in Contemporary Economics and Social Policy: The Situation in Wisconsin*, 1956 WIS. L. REV. 625.

⁶⁴ E.g., according to §941.04 there is authorized a five year term of imprisonment and a \$10,000 fine for mooring a navigation craft to a bridge under circumstances endangering human life. None of the words importing "criminal intent" are mentioned. Were it not for the legislative policy in §939.23, a court could require knowledge of the circumstances as an element of the offense. But the clear implication of §939.23 is that in the absence of the magic words no "criminal intent" is required.

result is that the ambiguity continues as before; it continues in what appears to be the areas most in need of clarification. The 1956 study of liability without fault statutes in Wisconsin indicated that "key social and economic tension points, such as transportation, food and dairy, tobacco, employer-employee, insurance, drugs, conservation, liquor, family, care of minors, vehicles and highways, and elections are most frequently regulated by such criminal statutes."⁶⁵ Almost all of these offenses are found outside the criminal code.⁶⁶

The effects produced by application of the "General Provisions" (other than the two exempted sections discussed above) to crimes outside the code can be worked out only by examining each of these crimes in the light of the overriding provisions. Since such an examination was beyond the scope of the work of the code revisers, it obviously cannot be undertaken here. There are, however, some patent problems to be noted.

Section 939.14 of the code provides, "It is no defense to a prosecution for a crime that the victim also was guilty of a crime or was contributorily negligent."

This provision produces curious results when applied to strict liability offenses where there is theoretically no moral defect shown. That is, a crime may be committed by one not "at fault" against one who was "at fault." This kind of topsyturvy morality enforced on jurors requires some justification. Justification may be found where there is a public interest in preventing the forbidden conduct above and beyond the public interest in protecting the victim. Thus the jury may properly feel that more is involved than the moral nature of the conduct of the criminal and that of the victim when the crime is one such as selling adulterated food.⁶⁷ Even though the purchaser may have been negligent or reckless in making the purchase (as where he had the opportunity to recognize the adulterated quality of the food before the sale was made), a jury may deem it sufficiently important to seek to stimulate others to avoid offering adulterated food for sale, to overlook the misplaced "fault" and impose the penalty.

This justification may be completely lacking, however, when there is no overriding public inter-

est and when the implications of the harm are significant only to the parties involved. Thus where the "victim" solicits advice and assistance from the accused relating to hunting activities, knowing or having good reason to know that the accused is in no way qualified to render competent advice or assistance, one might well be sympathetic to the accused in a prosecution for acting as a guide without a license.⁶⁸ Why should the law require the jury to reach its decision without taking into consideration the "fault" of the person whom the statute is designed to protect?

One more example will suffice to point out that the blanket application of the "General Provisions" to offenses outside the criminal code may not constitute wise legislation. These provisions include such inchoate crimes as conspiracy.⁶⁹ It requires no extensive argument to demonstrate that the crime of conspiracy is potentially subject to much abuse and represents the most that society is, or should be, willing to do in forbidding otherwise harmless conduct in order to frustrate the future accomplishment of a substantive evil. The rationale is that the magnitude of the evil justifies preventative action when the probability of accomplishment attains significant proportions, *i.e.*, when there is an agreed commitment to accomplishment.

But just as there are gradations in the scope and degree of the risk of accomplishment along which the line between criminality and non-criminality must be drawn, there are also gradations in the magnitude of the substantive evil calling for the drawing of a line. In other words, wise judgment may dictate that society should bear the risk of harm represented by certain agreements, for example, one to sell a ticket to a University of Wisconsin football game in violation of the conditions printed on it.⁷⁰ Perhaps the sale itself ought not be a substantive crime in the first place. As the Wisconsin conspiracy statute now embraces agreements to commit any crime in the Wisconsin statutes, the only sensible alternative to complete re-examination of the "non-code" crimes for the purpose of reclassifying some as civil matters is to have the conspiracy statute apply discriminately to some statutory crimes and not to others. Under either method of remedying the present too-broad

⁶⁵ 1956 WIS. L. REV. 625, 628.

⁶⁶ There are also offenses in the criminal code dealing with these subjects. Homicides by vehicle, §§940.08, 940.09; abandonment of young child, §940.28; wrongful use of vehicles, §§941.01, 941.03, 941.04.

⁶⁷ WIS. STAT. §§97.25, 97.72(3) (1953).

⁶⁸ This is made criminal by WIS. STAT. §§29.165(1), 29.63(d) (1953).

⁶⁹ WIS. STAT. §939.31 (1955).

⁷⁰ *Id.*, §36.50(2) (1955).

impact of the conspiracy statute, the "non-code" crimes must be taken into consideration.

The Model Penal Code and Non-Code Offenses

The most unique and far-reaching effort toward producing a rational substantive law of crimes is the American Law Institute's Model Penal Code. The overwhelming need for law reform has been amply demonstrated by the Institute's Chief Reporter.⁷¹ To what extent is this a reform of all penal law?

1. Scope of the Code

In the 1931 proposal of the Joint Committee on Improvement of Criminal Justice it was suggested that the American Law Institute research for a Code of Criminal Law focus on the following questions:

"How far have legislatures sought to make new social and economic regulations by invoking criminal law? How do their provisions vary from state to state? What happens in connection with these regulatory laws? What different provisions are made for the initiation of prosecutions under such laws? What evils have grown up in connection with the enforcement of these and other criminal laws?"⁷²

It appears, however, that if the research does include these questions, it will not be reflected in any redrafted provisions of the "social and economic regulations." The Chief Reporter of the Model Penal Code has stated that the final product of the project will be composed of four major parts:

"(1) the general provisions, encompassing a full articulation of the basic principles that govern the existence and scope of liability . . .

"(2) the definitions of specific offenses—at least within the major areas of criminality on which our thought is mainly focused. [Emphasis supplied.]

"(3) the provisions governing the processes of treatment and correction . . .

"(4) finally, what we have called 'organization of correction', meaning the public law establishing and governing the various official agencies responsible for dealing with offenders . . ."⁷³

There is no indication that "major areas of criminality" means anything but a common law of crimes brought up to date and expanded where

necessary, made consistent and rational, and codified with all the drafting skill available. There is no indication, in other words, that the Model Penal Code project will accomplish much more than was attempted in the Wisconsin revision. This impression is reenforced by the comment to the section of the code draft abolishing common law crimes: "While it will not be possible to re-examine all the areas of law in which the penal sanction is employed, it is at least essential that the area of common law offenses should be re-examined."⁷⁴

2. Draft Provisions Affecting Non-Code Offenses

From some of the provisions of the code already in draft form we may gauge the impact of the code on the criminal statutes which the project apparently will not individually re-examine. There are three areas of impact: (a) strict liability, (b) applicability of general provisions, and (c) duplication of some "non-code" crimes.

a. Strict Liability

Strict liability offenses are dealt with in Part I, "General Provisions." Three parts of Tentative Draft No. 4 (1955) are in point.

One section provides that if a strict liability offense is created by statute outside the code, the offense can be only a "violation."⁷⁵ Section 1.04 divides all offenses into crimes (felonies, misdemeanors and petty misdemeanors) and violations. A violation is, therefore, something different, at least semantically, from a crime.⁷⁶ The code finally provides that only a fine may be imposed for a violation.⁷⁷

The primary thrust of these provisions is to permit strict liability offenses to continue as non-criminal "violations" for which a penalty no more severe than a fine may be provided. But when the

⁷⁴ MODEL PENAL CODE §1.05, comment at 106 (Tent. Draft No. 4, 1955).

⁷⁵ *Id.*, §2.05(2).

⁷⁶ *Cf. Wyngaard v. Rogers*, 187 F. Supp. 527 (D.D.C. 1960), where conviction for what New York law called an "offense," as distinguished from a "crime," was nonetheless treated as conviction for a crime involving moral turpitude for purposes of establishing an alien's deportability.

⁷⁷ MODEL PENAL CODE §§6.02(1), (4), 6.03(4), (5), (6) (Tent. Draft No. 4, 1955). In addition to the provision discussed in the text, there is also a limited defense of mistake or ignorance of law, provided in *id.*, §2.04, (3), (4), applicable to all offenses, including violations. The narrowness of the defense, however, makes it extremely difficult for a defendant to maintain it successfully.

⁷¹ See Wechsler, *op. cit. supra* note 15.

⁷² 56 A.B.A. REP. 513, 522 (1931).

⁷³ Wechsler, *op. cit. supra* note 22, at 322.

proscribed result has been *culpably* brought about, section 2.05(2)(b) permits a crime to be charged.⁷⁸

In thus treating all strict liability offenses alike, the code neglects the distinction between statutes with a proper deterrent role and statutes without such a role. In fact, the comments to the draft indicate the belief that no deterrent function is involved at all,⁷⁹ and the code has adopted a blanket dilution of the sanction available for all strict liability offenses.

The dilution is produced by calling the offense only a "violation," and by permitting only a fine to be imposed. In those circumstances where strict liability has *no* affirmative value, *i.e.*, where there is no deterrent effect, it is obviously unjust to force an individual into the status of defendant in proceedings where the state seeks a conviction and a jury may adjudge guilt. Whether calling these proceedings non-criminal significantly lessens the hardship imposed is highly questionable. If there are no grounds for state proceedings against the individual, no "semantic manipulation" will provide the grounds.

Where, on the other hand, the imposition of strict liability may be effective in stimulating higher standards of conduct, it is not at all clear that it is wise to forbid any kind of incarceration. In cases where the public interest in bodily security is seriously in jeopardy, as in the manufacture of food involving limited use of carcinogenic material, it may be prudent to employ a short period of incarceration even though the penalized conduct hypothetically engenders no strong condemnation. If an offense were committed involving a wide and unauthorized distribution of a carcinogenic foodstuff, it is not likely that the public would view with moral neutrality the one from whom the harm emanated.

The point is that without a discriminating examination of the situations in which legislatures have imposed strict criminal liability, it is extremely difficult to adopt a policy well designed to cope with the problems involved.

At first glance the provision for converting all offenses which impose only fines into non-criminal violations⁸⁰ appears very neatly to meet the problem of the undue size of the penal law. But is the

⁷⁸ A person acts culpably if he acts purposefully, knowingly, recklessly or negligently. These terms are defined in *id.*, §2.02.

⁷⁹ See note 30, *supra*, and accompanying text.

⁸⁰ MODEL PENAL CODE §1.04(5) (Tent. Draft No. 4, 1955).

penal law in fact unburdened? These offenses must still be enforced. Any amount of fine may be imposed, since there is express exception to the five hundred dollar ceiling for any amount a legislature may specifically invoke.⁸¹ And this provision makes no inroad on the number of times incarceration is authorized outside of the penal code. In short, the name of the offense has been changed from "crime" to "violation" in some instances; whatever may be the beneficial results expected from the change, it does not appear that a realistic diminution in the size of the penal law will be among them.

b. General Provisions

Another impact of the extant drafts of the Model Penal Code is the application of all the "General Provisions" of Part I to "non-code" offenses, "unless the Code otherwise provides."⁸²

This provision raises questions similar to those noted in regard to the Wisconsin Criminal Code, including the problem of creating conspiracy liability where the substantive harm may be minimal.⁸³ It can be restated here that the precise impact of the "General Provisions" cannot be estimated without examining the corpus of "non-code" offenses. However, to the extent that the non-code penal law is deficient because it is subject to unwritten and unthought-out general rules, such as those relating to intoxication,⁸⁴ entrapment,⁸⁵ or insanity,⁸⁶ a marked improvement is accomplished by the across-the-board application.

c. Duplication

In undertaking to draft comprehensive statutes "within the major areas of criminality" the code, at times, covers the same ground as statutes that may be outside a state's criminal code. For example, section 223.8 relates to fraud in insolvency.⁸⁷ As is noted in the comment to this section, there is a statute outside the criminal code in Massa-

⁸¹ Note 77, *supra*.

⁸² MODEL PENAL CODE §1.05(2) (Tent. Draft No. 4, 1955).

⁸³ The draft provision for conspiracy makes the conspiratorial object "crime." MODEL PENAL CODE §5.03 (Tent. Draft No. 10, 1960). It is thus open to the same criticism. That is, there are many crimes which pose so little substantive danger (even after the impact of the code provision on "violations") that the "reaching back" inherent in conspiracy may be totally unjustified.

⁸⁴ *Id.*, §2.08 (Tent. Draft No. 9, 1959).

⁸⁵ *Id.*, §2.10.

⁸⁶ *Id.*, §4.01 (Tent. Draft No. 4, 1955).

⁸⁷ Tent. Draft No. 11, 1960.

chusetts directed at misconduct under the same circumstances,⁸⁸ but the Massachusetts statute announces a broader prohibition than does the Model Penal Code section.⁸⁹ The comment to the code section criticizes the Massachusetts statute, stating that, "If justifiable at all, it belongs in a code of business regulation rather than in a penal code."⁹⁰

The policy underlying this comment is difficult to discern. Two questions press for reply. What is the criterion for determining which penal statutes "belong" in the penal code and which do not? Secondly, what turns upon the location of a particular penal statute?

The point to be emphasized is that the substantive offenses presented in the Model Penal Code sometimes replace "non-code" offenses, thus consolidating related crimes.⁹¹ As noted above, however, in the event of a conflict between the code provision and the "non-code" offense which would be consolidated, it seems that the code policy makers are prepared to assign the conflicting offense to another statutory domicile without resolving the question of whether it is or is not acceptable penal law. In view of the fact that it is in resolving difficult questions of this nature that the code performs one of its most valuable functions, this policy is regrettable.

III. SUMMARY AND CONCLUSIONS

Evidence of the exact state of "non-code" criminal statutes is admittedly skimpy. It would be presumptuous to generalize conclusively either geographically or chronologically. On the other hand, there is nothing to indicate that Massachusetts and Wisconsin are atypical or that since 1937 the situation has improved. For certainly since that time the role of government in private affairs generally and in economic activity in particular has been steadily increasing.

⁸⁸ MASS. ANN. LAWS ch. 216, §136 (1955).

⁸⁹ Both the Model Penal Code and the Massachusetts statute prohibit certain kinds of dealings with property by a debtor after creditor action has been taken against him. In addition, Massachusetts forbids the debtor to expend any money "except such as may reasonably be expended for the support of himself and family."

⁹⁰ Model Penal Code §223.8, comment, at 101 (Tent. Draft No. 11, 1960).

⁹¹ *E.g.*, *id.* §208.22 (Tent. Draft No. 6, 1957) proscribes "unsworn falsification to authorities" in terms general enough to encompass such "non-code" offenses as making a false statement concerning veterans' allowances, now penalized in MASS. ANN. LAWS ch. 33, App. §14-5 (1955).

On the basis of the available evidence it appears warranted to conclude as follows:

1. The development of "non-code" criminal law has generally lacked informed and critical evaluation.

2. There are many reasons why this evaluation is long overdue. These include the following considerations:

a. Many of these statutes seek to protect the most vital interests of the individual and his society through the imposition of controls and penalties of the most severe nature.

b. Substantive criminal law revision and the development of new methods of treating convicted offenders depend heavily upon views as to the immoral nature of crime and criminals. Study of "non-code" criminal law developments may well reveal a legislative judgment that immorality is no longer a necessary ingredient of all crime.

c. We know practically nothing about the exercise of the far-reaching power vested in those charged with administering the "non-code" criminal law, except when instances of corruption are brought to public attention.

d. The impression that so many of the "non-code" statutes pertain to business activity makes it important to seek uniformity and standardization. Codes of criminal law which would include the statutes now scattered in all directions would be of immense value.

e. The pressure to exorcise strict liability statutes from the "non-code" law appears to be ill-conceived. There may well be an important role for these statutes in a rational and ethical scheme of regulation.

f. Rendering the present chaotic mass of laws into a useful collection of codes has important implications for doing business abroad, since it may permit development of materials designed to keep the American businessman out of the throes of foreign criminal law.

3. The Louisiana and Wisconsin criminal law revisions have done little to accomplish any of the study, evaluation and reform needed in the "non-code" penal statutes. The lack of knowledge concerning these statutes frustrated application to them of valuable provisions in the criminal code in Wisconsin.

4. The Model Penal Code project is not designed to undertake a comprehensive survey of "non-code" criminal law. The draft provisions of the code and the comments thereto indicate a com-

promise decision in regard to reform of strict liability statutes. Being based on what is, in the writer's view, an erroneous understanding of this portion of "non-code" criminal law, the code draws the line of compromise at a point that may, in light of the actual nature of these statutes, produce few affirmative results while neglecting opportunities to achieve others.

The code also superimposes a significant number of its provisions on the "non-code" penal statutes, apparently without a complete awareness of the contents of these statutes. As desirable as this may be in regard to reform of such principles of general application as the law of insanity, in other areas,

such as conspiracy, some of the results may be both undesirable and unnecessary.

Some of the Model Penal Code revisions of the definitions of crimes overlap penal statutes sometimes found outside a criminal code collection. When there is a conflict between the code provision and such a law there is, regrettably, not a policy of resolving the conflict so as to produce the most rational statutes regardless of their location.

One must conclude that in discharging its duty as custodian of the laws, the bar must meet the severe need for critical effort in solving the manifold problems presented by the "non-code" criminal statutes.