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CRIMINAL LAW

SYMPOSIUM ON THE POLICIES AND LEGAL THEORIES UNDERLYING THE PROPOSED FEDERAL CRIMINAL CODE

FOREWORD: EVALUATING A PROPOSED CRIMINAL CODE

ALAN M. DERSHOWITZ*

A nation's criminal code may be among its most important charters. It reflects the balance struck between liberty and security. It establishes priorities in law enforcement. It manifests the society's level of compassion for its most downtrodden—both those who perpetrate crime, and their victims. It sets comparative values on life, liberty, property, and privacy.

The criminal code does not, of course, exist in a vacuum. It operates through human agencies, such as police, prosecutors, defense attorneys, judges, and correctional officials. It functions within an evershifting political system. It is constrained by constitutional and other institutional checks.

The enactment of a new criminal code should occasion deep reflection and vigorous debate. Nearly every citizen has a potential stake in the criminal code. Hardly any American family is untouched by crime, either as victim or accused. Every American seems to have an opinion—*informed or otherwise*—about the appropriate responses to crime.

Over the past decade, Congress has attempted to recodify the federal criminal law. "Recodify" is perhaps not the appropriate term, since there never really has been a systematic codification of federal criminal law. For two hundred years our federal criminal laws have been en-

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acted in helter-skelter fashion, with no effort at achieving consistency. For the first century and a half this was not of critical importance, for prosecution of crime was left almost exclusively to the states (few of which, however, had consistent criminal codes of their own). Over the past half-century, federal criminal prosecutions have mushroomed. Organized crime, civil rights violations, anti-war activities, environmental pollution, commercial fraud, political corruption, obscenity, and interstate terrorism have been among recent targets of federal prosecutors. The United States government is now the most important prosecutor in this nation, and the federal courthouse the locus of many of our most important criminal trials.

Yet our federal criminal code remains a relic of our sleepy past. I will not rehearse the inadequacies here; they have been extensively documented elsewhere.¹ The need for reform is almost universally recognized. There is considerable debate, however, over the mechanism and substance of the needed reform, as well as over the criteria for evaluating whether the proposed changes constitute reform or regression.

Let me try to place this important debate into a realistic political context. It is impossible, in a heterogeneous nation such as our own, to achieve complete agreement on the content of a criminal code. We have not achieved consensus—nor will we in the foreseeable future—on such fundamental and divisive issues as capital punishment, exclusionary rules, wiretapping, immunity, entrapment, length of imprisonment, conspiracy prosecutions, obscenity, drug crimes, judicial discretion, plea bargaining, increased federal prosecutorial power, crimes of advocacy, and sexual offenses. Indeed, if “consensus” were to be defined as the support of a substantial majority, I am afraid such a consensus might well exist in favor of capital punishment, harsh sentences, vigorous prosecution of drug and obscenity sellers, and the elimination of exclusionary rules. This conservative consensus was reflected in the original Senate bill, S. 1.² Most of its important changes favored law enforcement at the expense of civil liberties.

But then, as a result of the masterful leadership of Senator Kennedy and Congressman Drinan, a process of revision began. The result has been a dramatic shift in direction. The emerging drafts—one from the Senate committee, the other from the House committee—proposed changes in existing law primarily in the direction of civil liberties. To be sure, they did not enact the entire civil liberties agenda of criminal law reform. Had they attempted to do so, the bill would have no realistic

¹ A comprehensive bibliography on the proposed Federal Criminal Code appears at the end of this symposium. See p. 631 *infra*.

² S. 1, 93d Cong., 1st Sess. (1973).

possibility of enactment. But the direction was unmistakable: abolition of the Smith Act, which makes it a crime to advocate the overthrow of the government, and of the Logan Act, which makes it a crime for a private citizen to negotiate with a foreign government; significant constraints on sentencing discretion; increased safeguards for the mentally ill; enhanced freedom of the press, speech, and assembly; greater clarity and fair warning in the definitions of crime, and decriminalization of some victimless crimes.

Political realities would prevent the enactment of a criminal code that reflected the minority civil liberties view on all controversial issues. Even when congressional liberals were ascendant during the previous administration—when Senator Edward Kennedy was chairman of the Senate Judiciary Committee and Congressman Robert Drinan chaired the relevant House subcommittee—it would have been impossible to get more than a dozen Senate votes and a few dozen House votes on the total abolition of capital punishment, on the curtailment of wiretapping, and on other civil liberties reforms. The American people simply do not favor these reforms, and their elected representatives—with few exceptions—will not endanger their electoral ambitions by supporting them.

Probably, enough civil liberties influence remains in Congress to prevent the enactment of the entire conservative program of criminal law reform. It is easier to *block* controversial legislation than to enact it. But in the context of political reality, any proposed code would necessarily reflect the predominant conservative bent of the Congress and the country. It might not fulfill the entire conservative agenda of law reform; some compromise would be necessary to prevent liberal blockage. But one would have expected the major *changes* from existing law to be in the direction of tougher law enforcement and fewer safeguards for the accused.

This is not what happened. The bill that emerged from Senator Kennedy's and Congressman Drinan's committees were unmistakably in the direction of increased civil liberties.

In the view of many civil libertarians, including me, the reforms were not as extensive as we would have liked. Were Congress a bevy of Platonic Guardians, with no electorate to whom to answer, perhaps the Code would have imposed considerably greater restrictions on the police, reduced the length of sentences, abolished numerous crimes, added others, and enacted a more humane and progressive criminal code. But legislators are not Platonic Guardians; they do have electorates to whom they answer.

A heated debate commenced within the liberal and civil liberties communities. Should "we" support a proposed recodification which

makes some improvements over the existing law, but which does not go nearly as far in that direction as liberals and civil libertarians would have preferred? Should we hold out for more reforms? Should we oppose all codification and support specific changes in the existing law? Should we be satisfied with the existing law until the climate for fundamental liberal reform is more hospitable?

In evaluating the proposed code from a realistic civil liberties perspective, I have proposed the following multitier test.

Is the proposed code—both its substantive changes and its systematic codification—a net gain for civil liberties over the existing law?

Are there any provisions of the proposed code which are substantially worse than existing law?

Does it contain any civil liberties “horrors”—absolutely repressive provisions?

Does the proposed code contain a substantial number of significant improvements over existing law?

Are we likely to do better by retaining the existing law and supporting specific improvements on a provision-by-provision basis?

If we defeat this codification, what is the risk that a substitute codification bill with a far more conservative bent would be enacted over our opposition?

The debate within the civil liberties community has not, for the most part, focused on these kinds of *realpolitick* questions. Instead, it has revolved around more absolute questions concerning the desirability of specific provisions, many of which simply reenact existing law.

Similar debates have been ongoing within conservative circles. These debates, and others, continue today. The proposed criminal code has still not been enacted. It is not clear whether it will be. Our nation continues to be governed by an entirely inadequate and anachronistic criminal code.

This symposium, with its excellent and varied contributions, will add considerable intelligence and information to the debate. Whatever the ultimate resolution, we—as a nation—will be better off for having ventilated these fundamental issues about how we govern ourselves and how we respond to crime.