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Simplifying Federal Criminal Laws

ROBERT H. JOOST*

I. INTRODUCTION

Now that the Reagan Administration and Congress have taken giant steps toward simplifying and rationalizing federal tax laws, they should return to and complete the task of simplifying and rationalizing federal criminal laws. Simplification and rationalization of these laws are overdue and important to society.¹

Considerable resources have already been invested in criminal law codification.² Twenty years ago, in 1966, Congress created the Na-

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Mr. Joost's analyses and opinions are his own and do not necessarily represent the views of the United States Senate Committee on the Judiciary, the District of Columbia Law Revision Commission, or any other governmental or other organization with which Mr. Joost has been associated.

Included in this article are citations to the Congressional Index Service [hereinafter CIS] for easier research assistance to the legislative materials cited.

1.

Whatever view one holds about the penal law, no one will question its importance in society If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be.

Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952).

2. Resources have been expended on this task from the earliest days of the nation. Agitation for codification was relatively widespread early in the 19th century. In 1820, the Louisiana state legislature passed a statute calling for the preparation of a comprehensive code of criminal law. The statute provided that "all offenses" in the new code "should be clearly and explicitly defined, in language generally understood. . . ." COMPLETE WORKS OF EDMUND LIVINGSTONE ON CRIMINAL JURISPRUDENCE 1 (1873). A draft was prepared and submitted by Edward Livingston, but the legislature never enacted it. Sixteen states did enact criminal codes a half-century or so

tional Commission on Reform of Federal Criminal Laws to study the need for codification and simplification at the federal level. The Commission, which was set up on a bipartisan basis, spent six years studying the criminal laws of the federal government, and drafting, debating, and revising simplified substitutes for them.

President Lyndon B. Johnson, a Democrat, proposed the establishment of this Commission in 1966. He noted that “[a] number of our criminal laws are obsolete. Many are inconsistent in their efforts to make the penalty fit the crime. Many — which treat essentially the same crimes — are scattered in a crazy quilt patchwork through our criminal code.”³

These observations were echoed by President Richard M. Nixon, a Republican, when he received the Commission’s Final Report in 1971. President Nixon noted the following:

[For] [o]ver two centuries the Federal criminal law of the United States has evolved in a manner both sporadic and haphazard [G]aps and loopholes in the structure of federal law have appeared; worthwhile statutes have been found on the books side by side with the unusable and the obsolete.⁴

The National Commission⁵ concluded that both Johnson and Nixon were right. It recommended to the President and Congress that Title 18, the criminal law title of the United States Code, be completely rewritten. The Commission recommended legislative language in its final report to replace all of the substantive-crime sections of Title 18. The Commission’s objective, a new Title 18, has not yet been achieved, despite a tremendous amount of effort.⁶

later, on the basis of a code proposal drafted for New York State by David Dudley Field in 1865. The most successful effort at codification took place almost 100 years later; in 1962, after years of debate and revision, the American Law Institute published a “Model Penal Code.” The Model Penal Code has been adopted, in whole or significant part, by the legislatures of at least 35 states. This Code is also at the heart of all the federal proposals discussed in this article.

3. H.R. REP. NO. 1396, 96th Cong., 2d Sess. 5 (1980) [hereinafter H.R. REP. NO. 1396] (message by President Lyndon Johnson, Message of March 9, 1966) [available CIS, No. H523-42, *Criminal Code Revision Act of 1980* (1980)(discussion of H.R. 6915)].

4. S. REP. NO. 307, 97th Cong., 1st Sess. 15 (1981) [hereinafter S. REP. NO. 307] (statement by President Richard Nixon, January 16, 1971) [available CIS, No. S523-1, *Criminal Code Reform Act of 1981* (1982)(discussion of S. 1630)].

5. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT (1971) [hereinafter FINAL REPORT]. The National Commission is often referred to as the “Brown Commission” after its Chairman, former California Governor Pat Brown.

6. Bills based upon the Commission’s proposals were introduced in Congress from 1973 to 1981. Such bills, and their legislative histories, are noted below. All bills and legislative histories are hereinafter referred to by their numbers, unless otherwise indicated.

(1) S. 1, 93rd Cong., 2d Sess. (1974) [available CIS, No. S522-1, *Criminal Justice Codification, Revision, and Reform Act of 1974* (1975)]; see also *Hearings on S. 1 Before the Subcomm. on Criminal Laws And Procedures*, 93rd Cong., 2d Sess. (1974) [available CIS, No. S521-46, *Reform of the Federal Criminal Laws, Part XI* (1975); available CIS, No. S521-19, *Reform of the Federal Criminal Laws Part X* (1975)].

(2) S. 1400, 93rd Cong., 1st Sess. (1973) [available CIS, No. S521-2, *Reform of the Fed-*

Now is the time to reassess the National Commission's recommen-

eral Criminal Laws, Part V (1974)]; see also *Hearings on S. 1400 Before the Subcomm. on Criminal Laws and Procedures*, 93rd Cong., 2d Sess. (1974) [available CIS, No. S521-46, *Reform of the Federal Criminal Laws, Part XI* (1975)]; available CIS, No. S521-19, *Reform of the Federal Criminal Laws, Part X* (1975)].

(3) S. 1, 94th Cong., 1st Sess. (1975) [available CIS, No. S522-27, *Criminal Justice Reform Act of 1975* (1975)]. Note that S. 1 incorporated the Commission's recommendations and other provisions from the two previous Senate bill Nos. 1 and 1400. See also *Hearings on S. 1 Before the Subcomm. on Criminal Laws and Procedures*, 94th Cong., 1st Sess. (1975) [available CIS, No. S521-82, *Reform of The Federal Criminal Laws, Part 12* (1975)].

(4) S. 1437, 95th Cong., 1st Sess. (1977) [available CIS, No. S523-45, *Criminal Code Reform Act of 1977, Part 2* (1977)]. Note that S. 1437 was related to previous Senate bill Nos. 1 and 1400 of the 93rd Congress. See also *Hearings on S. 1437 Before the Subcomm. on Criminal Laws and Procedures*, 95th Cong., 1st Sess. (1977) [available CIS, No. S521-57, *Reform of the Federal Criminal Laws, Part 13* (1977)]; S. REP. NO. 605, 95th Cong., 1st Sess. (1977) [available CIS, No. S523-46, *Criminal Code Reform Act of 1977, Part 2* (1977)]; H.R. DOC. NO. 17, 95th Cong., 2d Sess. (1978) [available CIS, No. H522-9, *Impact of S. 1437 Upon Present Federal Criminal Laws, Part 1* (1978)]; available CIS, No. H522-10, *Impact of S. 1437 Upon Present and Federal Criminal Laws, Part 2* (1978)]; H.R. DOC. NO. 29, 95th Cong., 2d Sess. (1978) [available CIS, No. H522-17, *Report of the Subcomm. on Criminal Justice on Recodification of Federal Criminal Law* (1978)]. Note that S. 1437 was similar to H.R. 2311 and H.R. 6869, noted below.

(5) H.R. 6869, 95th Cong., 1st Sess. (1977). See also *Hearings on S. 1437 and H.R. 6869 Before the Subcomm. on Criminal Justice*, 95th Cong., 1st and 2d Sess. (1977-78) [available CIS, No. H521-32, *Legislation to Revise and Recodify Federal Criminal Laws, Part 1* (1979)]; available CIS, No. H521-33, *Legislation to Revise and Recodify Federal Criminal Laws, Part 2* (1979)]; available CIS, No. H521-34, *Legislation to Revise and Recodify Federal Criminal Laws, Part 3*, (1979)]. H.R. 2311 was also discussed during these subcommittee hearings.

(6) H.R. 2311, 95th Cong., 1st Sess. (1977). See *Hearings on H.R. 6869 Before the Subcomm. on Criminal Justice*, 95th Cong., 1st and 2nd Sess. (1977-78) [available CIS, No. H521-32, *Legislation to Revise and Recodify Federal Criminal Laws* (1979)].

(7) S. 1722, 96th Cong., 2d Sess. (1980) [available CIS, No. S 523-1, *Criminal Code Reform Act of 1979* (1980)]. S. 1722 was related to S. 1723, 96th Cong., 2d Sess. (1980) and to S. 1437, noted above. See also *Appendix Volume to Hearings on S. 1722 and S. 1723*, 96th Cong., 1st Sess. (1979) [available CIS, No. S521-15, *Reform of the Federal Criminal Laws, Part 15* (1980)]; *Hearings on S. 1722 and S. 1723 Before the Subcomm. on Criminal Laws and Procedures*, 96th Cong., 1st Sess. (1979) [available CIS, No. S521-14, *Reform of the Federal Criminal Laws, Part 14* (1980)]. Note that the testimony also included comments on S. 1 of the 93rd Congress and the 94th Congress, and on S. 1437 of the 95th Congress. See also *Chart Showing Disposition of Present Provisions of Title 18, United States Code, in H.R. 6915 and S. 1722, House of Rep. Comm. on the Judiciary*, June 16, 1980 [available CIS, Nos. H522-6 (1980), H522-9 (1980)].

(8) S. 1723, 96th Cong., 2d Sess. (1980) [available CIS, No. 521-14, *Reform of the Federal Criminal Laws, Part XIV* (1980)]; CIS, No. 521-15, *Reform of the Federal Criminal Laws, Part XV* (1980)].

(9) H.R. 6915, 96th Cong., 2d Sess. (1980) [available CIS, No. H523-42, *Criminal Code Revision Act of 1980* (1980)]. See also H.R. REP. NO. 1396, 96th Cong., 2d Sess. (1980) [available CIS, No. H523-42, *Criminal Code Revision Act of 1980* (1980)]. H.R. 6915 is related to H.R. 6233, S. 1722 and S. 1723 of the 95th Congress, and H.R. 13959 and S. 1437 of the 94th Congress, and S. 1 of the 93rd Congress; see also H.R. COMM. PRINT, 96TH CONG., 2D SESS. (1980) [available CIS, No. H522-3, *Outline of Provisions of Title I*

dations and the value of codification and simplification of the federal criminal laws. It is also time to assess why the criminal code bills of the 1970's failed, and whether a modified criminal-code bill might pass today.

The failure of Congress to enact a new federal criminal code (from 1972 to 1982) may have resulted, in large part, from the fact that the code bills included proposals for policy changes that were controversial. Many of these proposals diverted attention from the merits of codification and simplification. A second reason for the congressional failure may have been the fact that each code bill was more than five hundred pages long. It is difficult for two subcommittees, two full committees, two Houses, and a conference committee to process a bill that long when a Congress itself exists for only two years.

The enactment of the Comprehensive Crime Control Act of 1984⁷ may have reduced the problems facing the passage of criminal code bills in two ways. First, the Comprehensive Act included more than one hundred pages of material that had previously been included in the criminal code bills. Such material will not be required in future criminal code bills which means that future bills will be significantly shorter than their five hundred page predecessors. The shorter the bill, the more feasible it will be for Congress to consider it during the two-year congressional life span. Second, some of the materials

of H.R. 6915 — *Criminal Code Revision Act of 1980* (1980)]. See also CIS, No. H521-13, *Revision of the Federal Criminal Code, Part 1* (1982); CIS, No. H521-14, *Revision of the Federal Criminal Code, Part 2* (1982); CIS No. H521-15, *Revision of the Federal Criminal Code, Part 3* (1982); CIS, No. H521-16, *Revision of the Federal Criminal Code, Part 4* (1982); CIS, No. H521-17, *Revision of the Federal Criminal Code, Part 5* (1982); CIS No. H521-18, *Revision of the Federal Criminal Code, Part 6* (1982).

(10) S. 1630, 97th Cong., 2d Sess. (1981) [available CIS, No. S523-1, *Criminal Code Reform Act of 1981* (1982)]. See also S. REP. NO. 307, 97th Cong., 1st Sess. (1981) [available CIS, No. S523-1, *Criminal Code Reform Act of 1981* (1982)]. S. 1630 is related to the following: S. 1722 and H.R. 6915 of the 96th Congress; S. 1437 of the 95th Congress; S. 1 of the 94th Congress; and to S. 1 and S. 1400 of the 93rd Congress. See also *Hearings on S. 1630 Before the Senate Judiciary Comm.*, 97th Cong., 1st Sess. (1981) [available CIS, No. S521-4, *Reform of the Federal Criminal Laws, Part XVI* (1982)].

(11) H.R. 4711, 97th Cong., 2d Sess. (1981).

As noted above, public hearings were held on each of these bills by the appropriate House and Senate committees. These committees, over the course of approximately 10 years, compiled and published more than 24,000 pages of testimony and exhibits. There are approximately 12,896 pages in the published Senate hearings and 11,119 pages in the published House hearings.

Note, in particular, that the Senate Judiciary Committee reported a code bill to the full Senate during every Congress from 1977 until 1981, and the House Judiciary Committee reported such a bill to the full House in 1980. H.R. 9615, 96th Cong., 2d Sess. (1980). In 1978, the full Senate passed such a proposal by a vote of 72 to 15; however, no code bill was ever acted on by the full House.

7. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984) [hereinafter *Comprehensive Act*].

passed in the Comprehensive Act were very controversial.⁸ The inclusion of such controversial subjects in the earlier criminal code bills may have impeded the timely passage of such bills due to time-consuming debates on divisive policy matters.⁹

The obstacles to enactment of a new Title 18 could be further reduced if interested Senators, congressmen, and the Attorney General of the United States agreed upon the following three points: 1) There should be a single proposed bill for a new Title 18 which should be introduced simultaneously in both Houses of Congress; 2) the scope of the code bill should be limited to Title 18 criminal offenses and felony offenses (now found elsewhere in the United States Code), general rules for applying these offenses, and a minimum number of conforming amendments; and 3) the principle underlying the code bill, and the proceedings in Congress, should be to simplify *existing*

8. The controversial matters include abolition of parole, authorization of preventive detention, and solicitation to commit a violent crime.

9. H.R. 6915, 96th Cong., 2d Sess. (1980) [available CIS, No. H523-42, *Criminal Code Revision Act of 1980* (1980)]. It is argued by some that the resolution of such controversial issues by the Comprehensive Act will make enactment of a new code even more difficult now than it was in the 1970's. This argument is based on the premise that controversial issues are needed to generate public and congressional support for any major bill. By enacting controversial materials from the criminal code bills, Congress, according to this argument, made enactment of a code more rather than less difficult. One exponent of this view states that "those members of Congress most likely to be interested in the subject and, especially the Committee staffers will be reluctant to retrace the old battles . . . if you concede in advance that no controversial substantive issue would be addressed." Letter to Robert Joost from an author who wishes to remain anonymous (Jan. 2, 1986).

This attitude does not consider the extent of confusion in current federal criminal law. Although there have recently been declines in the FBI major crime index (as the percentage of the population under age 30 decreases), the average citizen continues to regard "crime" as one of his second or third highest public concerns. The average citizen would, in my opinion, regard the passage of a code that reduces this confusion, and thereby increases the efficiency of law enforcement, as a positive development, whether or not it includes controversial proposals. As Senator Joseph Biden, the Chairman-designate of the Senate Judiciary Committee, said in 1981 about the code bill then being introduced by Senator Strom Thurmond, the then Chairman of that Committee: "It brings order and reason to a confusing, and in some instances illogical, mass of criminal laws enacted over the past 200 years. It follows the example of those States, including Delaware, which have modernized their criminal laws in recent years." 127 CONG. REC. S9776 (daily ed. Sept. 17, 1981), quoted in S. REP. NO. 307, *supra* note 4, at 2-3.

It would probably produce delay and might result in defeat for a future code bill if it included controversial issues such as capital punishment, modification of the exclusionary rule, and habeas corpus reform which were not addressed in the Comprehensive Act. The major goals of codification (simplification, diminution of confusion, increase of efficiency) have the greatest chance of accomplishment if they are advanced by themselves, without any controversial alteration of the substance of present federal criminal law.

law. If the parties are unable to agree on a particular provision, that dispute should be resolved by the adoption of language consistent with the policy set forth in existing statutory law.

Some knowledgeable individuals who have been involved for more than a decade with proposals for a federal criminal code disagree in part with the preceding recommendation. Louis B. Schwartz, the former Director of the National Commission on Reform of Federal Criminal Laws, wrote that he considers it desirable to have “a substantial substantive goal beyond simplification.”¹⁰ Schwartz commented, “You have to tell people you’re going to make beneficial changes rather than merely beautify.”¹¹

Another expert stated that he is opposed to “proceeding from the dubious calculus that the long range benefits of simplification alone warrant the enormous costs and risks of a code, even if shorn of any major substantive improvements for law enforcement.”¹²

I disagree. I believe that a federal criminal code based on simplification of language and reenactment of existing policy unless changes are noncontroversial would do much more than merely “beautify” the federal criminal law. It would be by itself a beneficial change that would result in major improvements for law enforcement. A simplified code would, for example, be easier for judges, jurors, and attorneys to understand and apply. The benefits of such a code, in terms of efficiency alone, would far exceed any costs it might entail in terms of “retooling.”¹³ Greater ease for judges, jurors, and attorneys means that, with existing resources, the Department of Justice and the federal courts could do much more than they can today. A federal criminal code would also be a permanent legacy for the Congress and Administration that enact it and a tribute to the sagacity of their leaders.¹⁴

The resolution of policy differences in accordance with existing law appears to be a characteristic of the revised criminal codes of the states. There are at least thirty-five revised state codes — approximately three-quarters of the states have passed them.¹⁵ To my

10. Letter from Louis B. Schwartz to Robert Joost (Jan. 23, 1986).

11. *Id.*

12. Paper transmitted to the author from an expert who wishes to remain anonymous, October 2, 1986. This expert noted “ ‘Current law’ is rarely so clear as to defy dispute, and we could well wind up with a series of hundreds or thousands of compromises reached over many months of negotiation that, in aggregate, represent a significant net loss for law enforcement”

13. Retooling costs would include retraining for prosecutors, defense attorneys, and judges and the preparation of new indictment forms and jury instructions.

14. Hammurabi, Justinian, and Napoleon are remembered for the codes of law promulgated in the course of their administrations.

15. See ALA. CODE §§ 13A-1-1 to 13A-14-5 (1982 & Supp. 1986); ALASKA STAT. §§ 11.16.100 to 11.81.900 (1983); ARIZ. REV. STAT. ANN. §§ 13-101 to 13-2000 (1978 & Supp. 1986); ARK. STAT. ANN. §§ 41-101 to 41-4161 (1978 & Supp. 1984); COLO. REV.

knowledge, none has ever codified its criminal law and, at the same time, made controversial changes in criminal justice policy. State government success with criminal-law simplification and codification is remarkable in comparison to the federal government's lack of success. Logically, the success rate ought to have been about the same at federal and state legislative levels because the state legislatures faced many of the same problems as did Congress (e.g., lengthy text, complicated and essentially dull material, short legislative session). The states, admittedly, did not have to contend with the difficult issue of federal jurisdiction or with national security offenses. The absence of such matters, however, should not account for the greater success rate at the state level. State government success is more likely to stem from their apparent decision not to include controversial policy changes in their criminal code proposals.

There are, of course, some issues which should never be resolved on the basis of "policy terms consistent with existing law."¹⁶ There are also some subjects as to which there are no existing statutory laws. In some situations, "existing law" is discernible only if one compares the number of federal courts of appeal that support position "A" with the number that support position "B." In other situations, "existing law" may mean the position that five United States

STAT. §§ 18-1-101 to 18-18-109 (1978 & Supp. 1984); CONN. GEN. STAT. ANN. §§ 53a-1 to 53a-261 (West 1972 & Supp. 1985); DEL. CODE ANN. tit. 11, §§ 101 to 9106 (1974 & Supp. 1984); FLA. STAT. ANN. §§ 775.01 to 893.15 (West 1976 & Supp. 1986); GA. CODE ANN. §§ 16-1-1 to 16-1-14 (1981); HAW. REV. STAT. §§ 701-100 to 712-1280 (1976 & Supp. 1984); ILL. ANN. STAT. ch. 38, para. 1-1-43-2 to 1-1 (Smith-Hurd 1972 & Supp. 1986); IND. CODE ANN. §§ 35-1-1 to 35-50-67 (Burns 1985 & Supp. 1986); IOWA CODE ANN. §§ 690.1 to 732.6 (West 1977 & Supp. 1986); KAN. STAT. ANN. §§ 21-101 to 21-46221 (1981 & Supp. 1983); KY. REV. STAT. ANN. §§ 500-010 to 534-060 (Michie/Bobbs-Merrill 1974 & Supp. 1986); LA. REV. STAT. ANN. §§ 14:1 to 14:513 (West 1986); ME. REV. STAT. ANN. tit. 17A, §§ 1 to 1357 (1964 & Supp. 1985); MINN. STAT. ANN. §§ 609.01 to 609.89 (West 1967 & Supp. 1986); MO. ANN. STAT. §§ 556.011 to 600.166 (Vernon 1979 & Supp. 1986); MONT. CODE ANN. §§ 45-1-102 to 45-10407 (1973); NEB. REV. STAT. §§ 28-101 to 28-1348 (1985); N.H. REV. STAT. ANN. §§ 625:1 to 651:67 (1974 & Supp. 1985); N.J. STAT. ANN. §§ 2C:1-1 to 2C:98-4 (West 1982 & Supp. 1986); N.M. STAT. ANN. §§ 30-1-1 to 30-28-3 (1984 & Supp. 1986); N.Y. PENAL LAW §§ 1.00 to 500.10 (McKinney 1975 & Supp. 1986); N.D. CENT. CODE §§ 12.1-01-01 to 12.1-33-04 (1985); OHIO REV. CODE ANN. §§ 2901.01 to 2967.31 (Anderson 1982 & Supp. 1985); OR. REV. STAT. §§ 161.005 to 167.820 (1971); PA. STAT. ANN. tit. 18, §§ 101 to 9183 (Purdon 1983 & Supp. 1986); S.D. CODIFIED LAWS ANN. §§ 22-1-2 to 22-42-13 (1979 & Supp. 1986); TEX. PENAL CODE ANN. §§ 1.04 to 47.09 (Vernon 1974 & Supp. 1986); UTAH CODE ANN. §§ 76-1-101 to 76-10-1801 (1978 & Supp. 1986); VA. CODE ANN. §§ 18.2-1 to 18.2-510 (1982 & Supp. 1986); WASH. REV. CODE ANN. §§ 98.04.010 to 94.98.020 (1977 & Supp. 1986); and WIS. STAT. ANN. §§ 939.01 to 950.07 (West 1982 & Supp. 1986). See also P.R. LAWS ANN. tit. 33, §§ 98 to 4628 (1983 & Supp. 1985).

16. See some of the examples in Part III of this article, *infra*.

Supreme Court Justices took twenty years ago in a 5-4 decision of the Court. In these circumstances, the Administration and Congress should determine policy positions on the basis of experience, rationality, cost-benefit analysis, and the purposes of the criminal law, rather than on the basis of existing law.

Existing law is not helpful in reconciling technical differences (i.e., differences in form, language, and style) between different code bills. Technical differences cannot be reconciled on this basis because all the code bills, by definition, reject the inconsistent, erratic, and inadequate form, language, and style of existing Title 18 in favor of a form, language, and style appropriate for a code.

The remainder of this article is divided into three parts. Part II critiques current Title 18 and concludes that simplification and codification are badly needed. Part III offers some suggestions for melding the substantive and technical differences between the Senate and House bills into one version that might be enactable by both Houses of Congress. Part IV contains summary recommendations and conclusions.

II. CRITIQUE

A code has been defined as a "complete system of positive law, scientifically arranged . . ." ¹⁷ It implies a "systematic arrangement" of laws with revisions to "harmonize conflicts, supply omissions, and generally clarify and make complete the body of laws" involved. ¹⁸ Title 18 is not arranged "scientifically," nor is its arrangement "systematic." Its provisions do not "harmonize conflicts, supply omissions" or "clarify ambiguities"; rather, they do quite the reverse. Furthermore, Title 18 does not set forth a "complete" statement of substantive federal criminal law. Many major federal crimes are described in other titles of the United States Code, and many important principles of substantive federal criminal law are described only in case decisions of the federal courts.

A code, by virtue of its completeness, organization, and clarity, makes the law in an area simpler to understand than a compilation or consolidation of laws. Greater simplicity contributes to greater public understanding of that law so codified. Title 18, however, does not simplify federal criminal law, nor does it contribute to public understanding. Although it is called a codified Title, it is not really a "code." Instead, it is merely a consolidation. If it were a code, offenders, victims, jurors, and witnesses would all benefit. ¹⁹

17. *Wilentz v. Crown Laundry Service, Inc.*, 116 N.J. E9. 40, 41; 172 A. 331, 332 (1934).

18. *Gibson v. State*, 214 Ala. 38, 43, 106 So. 231, 235 (1925).

19. "Although no federal effort represents the full answer to this alarming growth

Although some liberals and conservatives are aware of the benefits of a code, they have nonetheless failed to support code proposals in the past because they believed that some of the provisions of the bills were unacceptable. These critics believed it would be more difficult to have provisions that were carried over from current law repealed, since their legitimacy would be enhanced by enactment as part of a code. These concerns could and should be overcome.²⁰

A. Organization

There are no federal common-law crimes. Congress, unlike state legislatures, started with a "clean slate" and created crimes and modified penalties as events and national passions dictated. In 1948, most of the federal crimes created up to that time were consolidated, without substantial change, into Title 18 of the United States Code. That Title was called "Crimes and Criminal Procedure." It was organized alphabetically by chapter, with the exception of chapter 1, which was designated "General Provisions."

As a consequence of the decision to organize the criminal law alphabetically, unrelated offenses exist side by side in Title 18, while related offenses are often separated by dozens of chapters. Thus, a chapter on "Arson"²¹ is preceded by a chapter on "Animals, birds, fish, and plants,"²² and a chapter on "Indians"²³ is squeezed between a chapter on "Homicide"²⁴ and a chapter on "Kidnapping."²⁵ Additionally, the chapter headings are, in some cases, obscure and uninformative. Consider, for example, chapter 33 of Title 18, which is

in crime, new and better federal criminal laws will at least contribute to the solution. The proposed recodification of federal criminal law is itself a major contribution to that solution." *Reform of the Federal Criminal Laws, Part XVI: Hearings on S. 1630 before the Senate Judiciary Comm., 97th Cong., 1st Sess. 11760 (1981)*(statement of William Smith, Att'y. Gen., Justice Dept.) Attorney General Smith testified that a code "would clarify and rationalize federal criminal law" and "make investigation and prosecutions more efficient." *Id.*

20. These concerns could be overcome or, at least, diminished. For example, the sponsor's opening statement could clearly state that the continuation of a policy, through its inclusion in the criminal code, would not constitute approval or disapproval of that policy. An informal agreement could be reached by all the sponsors to oppose all controversial policy amendments.

21. 18 U.S.C. § 81 (1982).

22. 18 U.S.C. §§ 41-47 (1982).

23. 18 U.S.C. §§ 1151-65 (1982).

24. 18 U.S.C. §§ 1111-17 (1982).

25. 18 U.S.C. §§ 1201-02 (1982).

called "Emblems, insignia, and names"²⁶ or chapter 91, which is called "Public lands."²⁷

Title 18 was organized on an "odd-numbered" basis because Congress apparently wanted to reserve the even numbers for future chapters it might enact. By leaving the even numbers blank in 1948, chapters could be added later that would fit into Title 18 without disrupting its alphabetical order and without requiring renumbering.²⁸ (On the basis of numbers, there appear to be 119 chapters in "Part I - Crimes" of Title 18, but there are really only seventy-two.) Organizing substantive criminal offense chapters on an alphabetical rather than a type-of-offense basis results in confusion, disadvantages new prosecutors and defense attorneys, and is nonfunctional. It results in having too many separate chapters that describe substantive offenses.

Moreover, some of the chapters in the current Title 18 have no apparent purpose at all. For example, chapter 89, which is entitled "Professions and occupations,"²⁹ contains only one provision, section 1821, which deals with, and is entitled "Transportation of dentures."³⁰

Other chapters in current Title 18 have an apparent purpose; however, this purpose is exactly the same as the apparent purpose of one or more other chapters. For example, having separate chapters dealing with presidential assassination (chapter 84) and congressional assassination (chapter 18) is redundant. In fact, both of these chapters are unnecessary. Presidential, congressional, cabinet-member, and Supreme Court assassinations should all be codified in chapter 51, the chapter on "Homicide." In addition, the kidnapping aspects of chapters 18 and 84 should be described in chapter 55, which is the chapter that describes other federal kidnapping and restraint crimes. Similarly, assaults on described officials should be set forth in chapter 7, which is the chapter on "Assault." All of these units should be made part of a larger unit that might be entitled "Crimes Against the Person."

26. All of the sections in chapter 33 deal with the unauthorized use of government and government-protected "emblems, insignia and names." 18 U.S.C. §§ 700-15 (1982).

27. The sections in the chapter all deal with offenses involving property that constitutes or relates to "public lands." The offenses described in that chapter range from unauthorized removal to unlawful entry, damage, and destruction. 18 U.S.C. 1851-63 (1982).

28. New chapters have in fact been added to Title 18 since 1948. Each has been assigned an even number and placed, on the basis of alphabetical considerations, within the title. A new chapter on Presidential assassinations, added in 1965, was made chapter 84 and placed between chapter 83, "Postal service" and chapter 85, "Prison-made goods." Another new chapter, one that is substantively almost identical to chapter 84, was made chapter 18 because it deals with congressional (rather than Presidential) assassinations and "C" precedes "P" in the alphabet.

29. 18 U.S.C. §§ 1821 (1982).

30. *Id.*

Related offenses are frequently not joined together in the same chapter in the present Title 18. For instance, crimes that the ordinary person might think of collectively as stealing, are divided into at least four different chapters: "Embezzlement and theft,"³¹ "Fraud and false statements,"³² "Mail fraud,"³³ and "Stolen property."³⁴ Provisions dealing with related crimes should be joined together. The foregoing four chapters, for example, should be grouped into one chapter labeled "Theft and related offenses." This consolidated chapter and related ones might then be joined in a subpart of Title 18, to be entitled "Offenses involving property."

Current Title 18 presents a different organizational problem at the individual chapter and section level. There is no organization whatsoever with respect to the placement of sections within a particular chapter and the placement of subsections within a particular section. Many of the individual sections are essentially duplications of other sections in the same chapter and could easily be merged. All of the sections should be arranged within their respective chapters in some logical order, such as order of severity.

The offense sections in the present Title 18 appear to have only one thing in common: each has an opening statement which starts with the word "Whoever" and ends with a clause that describes the maximum term of imprisonment and fine that can be imposed on a person found guilty of the offense. There exist a few subsections with no titles and no logic behind their presence or absence. In addition, very few paragraphs are indented and many sentences are very long.

By contrast, the most recently reported Senate and House bill proposals are a model of order and simplicity. The substantive criminal offenses to be included in Title 18 are divided into nine chapters, which in turn are subdivided into thirty-eight subchapters. Each offense that is described in each subchapter is organized in accordance with a descending level of severity of punishment. Most offense sections contain separate subsections dealing with matters like defenses, grading, and jurisdiction. Many of the subchapters and chapters contain sections which define technical terms and set forth general provisions applicable to more than one offense.

The current Title 18 is like a colony of one-celled organisms. Each

31. 18 U.S.C. §§ 641-65 (1982)

32. 18 U.S.C. §§ 1001-28 (1982).

33. 18 U.S.C. §§ 1341-43 (1982).

34. 18 U.S.C. §§ 2311-19 (1982).

cell, or section, is basically self-sufficient. It sets forth its own state-of-mind requirements, punishment levels, and federal jurisdiction requirements. The code proposals, by contrast, resemble a complex organism which has specialized and interdependent parts. Individual offense sections are not self-sufficient. The sentencing grade in each can only be understood by reference to the maximum punishments prescribed elsewhere in the code; the state of mind and jurisdiction requirements can only be understood by reference to the chapters on state of mind and jurisdiction in the general part; and specialized terms can only be understood by reference to definitions elsewhere in the code. A code, like a complex biological organism, is more flexible, adaptable, and useful as a result of specialization.

B. Completeness

Some material is impossible to find in the existing Title 18 simply because it is not there. Some major federal crimes are described in other titles of the federal code. For instance, the most seriously punished federal crime, aircraft hijacking resulting in death, is described in a section in Title 49, the Title on regulation of transportation.³⁵ Narcotics offenses are found in sections in Title 21, not in Title 18.³⁶ Espionage offenses involving atomic energy are described in Title 42, and not in Title 18 where other espionage offenses are located.³⁷ It may be appropriate to describe certain offenses in the title of the United States Code that deals with regulation of the subject matter of that offense (e.g., aviation, narcotics, atomic energy), but the offense, if it is a felony, should be cross-referenced to a section in Title 18.

The descriptions of some crimes are not set forth in any title of the U.S. Code, but rather in an appendix to one of the titles. The appendix to Title 18, for example, includes such crimes of general concern as firearms offenses and failing to register for the draft.

Today's Title 18 does not include descriptions or references to all of the major crimes against the United States, but it does contain descriptions of some crimes that are a bit weird. For example, capturing, killing, stealing, or detaining a carrier pigeon owned by the United States³⁸ and writing a check "for a less sum than \$1, intended to circulate as money"³⁹ are both federal crimes that are described in

35. 49 U.S.C. §§ 1472 (1982). It is considered the most seriously punished federal crime because it contains a constitutional procedure for the imposition of the death penalty.

36. 21 U.S.C. §§ 841, 842(c)(2)(A), 843(c)(1), 844(a), 952(a), 953(a), 955, 959, and 961(2) (1982).

37. 42 U.S.C. §§ 2272, 2077, 2122, 2131, 2138, 2273, and 2276 (1982).

38. 18 U.S.C. § 45 (1982).

39. 18 U.S.C. § 336 (1982).

Title 18.

C. Readability

Simplification means going beyond codification. Codes may be written with some sentences that are 200 words or more in length and with words that average three syllables each. Laws that are meant to be understood and applied by ordinary people such as jurors, should be easy to understand, which such codes are not.

The sections in current Title 18 are not written in "plain English"⁴⁰ and most of them are not easy to understand. Sentences of 200 words or more in length are not uncommon.⁴¹

A more readable federal criminal law would contribute to a more efficient criminal justice system because less time would be needed to make the applicable criminal law understandable to witnesses and jurors. The increase in efficiency might result in more indictments, trials, and dispositions, which might result in greater general deterrence.

III. SUGGESTIONS FOR RECONCILING DIFFERENCES

The National Commission, the Senate, and the House of Representatives have each developed language and organization for a new Title 18. Each has proposed a text that would eliminate the deficien-

40. The best way to tell whether a writing is in "plain English" may be to apply the "readability" formula and scale developed by linguist Rudolph Flesch. Under the Flesch scale, a score of "zero or close to zero" means the material is unreadable or close to unreadable. A score of "100" or close to 100 means the material is totally or highly readable. The Internal Revenue Code scored a "-6" on the Flesch scale compared to a "+82" for magazine advertisements. The average insurance policy was a "+10" and material in the *Reader's Digest* was a "+65." R. FLESCHE, HOW TO WRITE PLAIN ENGLISH 26 (1981).

41. Consider the following:

If any of the gold or silver coins struck or coined at any of the mints of the United States shall be debased, or made worse as to the proportion of fine gold or fine silver therein contained, or shall be of less weight or value than the same ought to be, pursuant to law, or if any of the scales or weights used at any of the mints or assay offices of the United States shall be defaced, altered, increased, or diminished through the fault or connivance of any officer or person employed at the said mints or assay offices, with a fraudulent intent; or if any such officer or person shall embezzle any of the metals at any time committed to his charge for the purpose of being coined, or any of the coins struck or coined at the said mint, or any medals, coins, or other moneys of said mints or assay offices at any time committed to his charge, or of which he may have assumed the charge, every such officer or person who commits any of the said offenses shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

18 U.S.C. 332 (1982).

cies of current Title 18. The Commission's proposals, S. 1630⁴² and H.R. 6915,⁴³ have much in common.

The three proposals are almost identical on all major points relating to simplification and codification. All three do the following: 1) Separate the elements of federal criminal jurisdiction required for each offense from the wrongful conduct that makes it an offense; 2) classify the severity of each offense by letter grading; 3) define and apply to all offenses a limited number of culpable states of mind; 4) consolidate into one basic section, with a few specialized offense sections, the approximately 116 sections in current Title 18 which make theft in one or another form a federal crime; 5) consolidate into a few sections the approximately thirty-eight sections in current Title 18 that deal with arson and property destruction; 6) consolidate into a few sections the fifty-three or so sections in Title 18 that deal with counterfeiting, forgery, and related matters; and 7) consolidate into a few sections the approximately 156 sections in the entire U.S. Code that make it a crime to make a false statement.

The three proposals also have many differences. Some of the policy and technical differences between the most recent House and Senate proposals are summarized below. Suggestions are also presented for reconciling some of those differences. This discussion may stimulate readers to think of alternative reconciliations and ways in which other policy and technical differences can be reconciled or neutralized.

A. Policy Differences

Policy differences between code bills should be resolved, where feasible, on the basis of policy terms consistent with existing law.⁴⁴ If existing law is ambivalent or not acceptable to most interests, a formulation should be devised which reconciles opposing interests in a way acceptable to each or that postpones the issue for resolution in

42. S. 1630, 97th Cong., 2d Sess. (1981) [hereinafter S. 1630].

43. H.R. 6915, 96th Cong., 2d Sess. (1980) [hereinafter H.R. 6915].

44. "I have often proposed — and I continue to do so now — that when a section of the code is extremely controversial and is unsupported by broad-based interests, the codifiers ought to return to existing law." H.R. REP. NO. 1396, *supra* note 3, at 655 (statement of Rep. Robert W. Kastenmeier). There are difficulties in a "code neutral" position based on existing laws. As one congressman has remarked:

On some amendments proponents of the bill would argue that it should be supported because it retains current law. They would state their goal was not to make changes, but simply to reorganize and put the federal criminal law in a workable form. On the next amendment, these same proponents would argue that the present law was not satisfactory, and that the proposed amendment would 'modernize' the law and bring it up to date. The bill is a mixture of a codification of some current law provisions with . . . 'modernization' [of others].

Id. at 703 (dissenting statement of Rep. Harold L. Volkmer).

the future.⁴⁵

Postponement is the best disposition if the issue is highly emotional (e.g., capital punishment) or is one in which a majority exists to change existing law but is divided as to what change to make. Reconciliation of opposing views is probably not possible in these cases, and maybe a waste of time to try. The best disposition in these cases is to include nothing on the subject or to set out present law verbatim with code-necessitated stylistic changes.

Some examples of policy differences are set forth below. The following also includes suggestions for the possible reconciliation of these differences.

B. Criminal Facilitation

The Senate bill provides that "[a] person is criminally liable for an offense based upon the conduct of another person if he knowingly facilitates the commission of the offense by providing assistance that is in fact substantial."⁴⁶ The House bill rejects this provision on the ground that it "would have criminalized even the routine provision of goods or services if the provider knew that the recipient was engaged in or intended to engage in criminal conduct, even if the provider had no intent to help such conduct."⁴⁷

The Senate report quoted the National Commission with approval on this point: "[t]his section . . . would provide a legislative solution to the dilemma faced by a court which has to choose between holding a facilitator as a full accomplice or absolving him completely of criminal liability."⁴⁸ The House, by contrast, felt "that the creation of a general form of such liability could seriously impede the free flow of commercial goods by forcing merchants to inquire into the intentions of each purchaser, lest the merchant be accused of being 'willfully blind' . . . concerning the future criminal use of the goods."⁴⁹ House

45. A code, once enacted, will undoubtedly be amended as frequently as existing Title 18 has been. Many of the Amendments to the code will change policies in existing law, which means that postponement should not be viewed as defeat when it is used as a mechanism for reconciliation. It may only be temporary delay. As an illustration, existing law as to two of the examples (G and N) in this Part was changed by Congress in the six months between the submission of the manuscript to the Pepperdine Law Review and its publication.

46. S. 1630, *supra* note 37.

47. H.R. REP. NO. 1396, *supra* note 3, at 670 (separate views of Congressmen John F. Seiberling, William J. Hughes, and John Conyers).

48. S. REP. NO. 307, *supra* note 4, at 80.

49. H.R. REP. NO. 1396, *supra* note 3, at 41.

members declared that “such a concept would have been a departure from traditional principles of accomplice liability which require aiding and abetting with intent to assist the criminal activity, not just mere knowledge.”⁵⁰

Existing statutory law on this point is vague. It provides that a person commits an offense “as a principal” if he “aids, abets, counsels, commands, induces, or procures its commission.”⁵¹ However, the law does not indicate what state of mind is required for criminal liability. Most federal courts of appeal have approved instructions which state that the defendant must consciously intend to make the criminal venture succeed in order to be criminally liable.⁵² But some other courts have held that knowingly aiding another to commit a crime is sufficient for criminal liability.⁵³

The absence of statutory language making facilitation an offense creates a gap in existing statutory law. The facilitator or supplier is important to the success of criminal enterprises. The gap means that he may escape punishment. From a public policy point of view, this causes the gravest consequences to espionage and organized-crime offenses. If knowing facilitation was a crime in all circumstances, persons who routinely provide goods and services to the public might be vulnerable to criminal investigation whenever one of their “suspicious” customers commits a crime. If the gap were filled only in the gravest of circumstances, however, honest suppliers would be unlikely to be burdened and public safety would be enhanced. The Senate and the House position on criminal facilitation could be reconciled by the following: (1) Establishing the offense of facilitation as a national security or racketeering offense; and (2) incorporating specific national security and racketeering offenses into the section.

C. Criminal Liability of Each Co-Conspirator for Each Offense Committed by any Member of the Conspiracy

The Senate bill includes the *Pinkerton*⁵⁴ rule, which provides that a member of a conspiracy is criminally liable for each offense committed by any other member of the conspiracy in furtherance of the conspiracy.⁵⁵ The House bill rejects the *Pinkerton* rule and instead

50. *Id.* at 670.

51. 18 U.S.C. § 2(a) (1982).

52. *United States v. Tijerina*, 446 F.2d 675, 677-78 n.1 (10th Cir. 1971); *United States v. Kelton*, 446 F.2d 669, 671 (8th Cir. 1971).

53. *United States v. Greer*, 467 F.2d 1064, 1069 (7th Cir. 1972), *cert. denied*, 410 U.S. 929 (1973); *United States v. Harris*, 435 F.2d 74, 88-89 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 986 (1971).

54. The rule is named after the decision in *Pinkerton v. United States*, 328 U.S. 640 (1946).

55. S. 1630, *supra* note 37, § 401(c). The subsection provides that a person is criminally liable for an offense based upon the conduct of another person if (1) he and the

follows the position of the Model Penal Code.⁵⁶ *Pinkerton* is existing law, but it is not existing statutory law. Therefore, it is arguable that the recommended rule for reconciling differences should not apply. Rather, this question should be decided on the merits.

The Senate report acknowledges that the *Pinkerton* rule has been criticized by "those who believe that criminal liability should not attach where the facts would not support conviction on traditional aider and abettor grounds."⁵⁷ Nevertheless, it recommends continuation of the rule by statute on the ground that persons who set in motion a chain of criminal events should be accountable for foreseeable related offenses committed by co-conspirators. Abrogation of the *Pinkerton* rule would, according to the Senate report, seriously harm law enforcement.⁵⁸

In support of its decision not to include the rule, the House report quotes the following from a 1953 commentary on a provision of the Model Penal Code:

The reason for [not including *Pinkerton* liability] is that there appears to be no other or no better way to confine within reasonable limits the scope of liability to which conspiracy may theoretically give rise. In *People v. Luciano*, 277 N.Y. 348, 14 N.E. 2d 433 (1938), for example, Luciano and others were convicted of sixty-two counts of compulsory prostitution, each count involving a specific instance of placing a girl in a house of prostitution, receiving money for so doing or receiving money from the earnings of a prostitute The liability was properly imposed with respect to these defendants who directed

other person engaged in the offense of criminal conspiracy, (2) the other person engaged in the conduct in furtherance of the conspiracy, and (3) the conduct was authorized by the agreement forming the conspiracy or was reasonably foreseeable that it would be performed in furtherance of the conspiracy. *Id.*

56. H.R. 6915, 90th Cong., 2d Sess. § 1102(a) (1980). This House bill states in relevant part:

Except as otherwise provided by law, if 2 or more persons, with intent that a crime (other than an attempt) be committed, knowingly agree to engage in the conduct that is required for the crime so intended, and any one of those persons so agreeing intentionally engages in any conduct in furtherance of the intended crime, each such person commits an offense one class next below the most serious crime so intended.

Id. (emphasis added). See also MODEL PENAL CODE § 2.06 (1980).

57. S. REP. NO. 307, *supra* note 4, at 81-82.

58.

The Committee's research indicates that more than one hundred cases involving the *Pinkerton* principle of liability have been decided by the federal courts of appeal in the last five years. Given the fact that approximately eighty percent of federal convictions occur as a result of guilty pleas as to which no appellate review would occur, this figure may be translated into an estimate that *Pinkerton* currently account for around one hundred convictions per year [I]t is clear that elimination of the well established *Pinkerton* doctrine would have a substantial adverse impact on law enforcement.

S. REP. NO. 307, *supra* note 4, at 82.

and controlled the combination; they commanded, encouraged and aided the commission of numberless specific crimes. But would so extensive a liability be just for each of the prostitutes or runners involved in the plan? A court would, and should hold that they are all parties to a single, large, conspiracy; this is itself, and ought to be, a crime. But it is one crime Law would lose all sense of proportion if in virtue of that one crime, each were held accountable for thousands of offenses that he did not influence at all.⁵⁹

A reasonable compromise between the House and Senate positions would be to codify the rule but limit it. The logic of the *Pinkerton* rule, and the practical needs of law enforcement, would best be served if the rule was codified to include supervisors or managing directors of criminal conspiracies, but not to include support staff. A person would be criminally liable for an offense based on the conduct of another person if he has significant responsibility or authority for all or part of the subject matter of the conspiracy, or has, by virtue of position or influence, the power to prevent the conduct from occurring.

D. Unauthorized Use of a Federal Motor Vehicle

The House bill contains a section that makes it an offense to knowingly take, operate, or exercise control over an automobile, aircraft, motorcycle, motorboat or other motor-propelled vehicle without the owner's consent, if that vehicle is owned by the federal government or if the offense occurs in an area of exclusive federal jurisdiction (e.g., high seas).⁶⁰ The Senate bill contains no such provision. The House report admits that this section "is new to Federal law."⁶¹

Under normal application of the "existing law" principle of reconciliation, the section would be left out of a code. Excluding this section, however, might be a mistake. Joyriding in federal-government-owned trucks and jeeps should be penalized. The offense should not be left to the discretion of state and local prosecutors who have no particular interest in federal problems. Federal prosecutors should have this section so they will have an alternative to prosecuting for theft if the vehicle taken is returned. An effort should be made to secure a consensus in favor of including this provision in a new code.

E. Possessing Burglar's Tools

The Senate bill makes it a federal offense if a person "possesses an object that is designed for, or commonly used for, the facilitation of a forcible entry" with intent to use that object to commit burglary, criminal entry, or criminal trespass.⁶² The House bill does not in-

59. MODEL PENAL CODE § 2.04 comment at 21 (Tent. Draft No. 1, 1953), *quoted in* H.R. REP. NO. 1396, *supra* note 3, at 39.

60. H.R. 6915, *supra* note 38, § 2539.

61. H.R. REP. NO. 1396, *supra* note 3, at 326.

62. S. 1630, *supra* note 37, § 1715.

clude an equivalent section.

The Senate report admits that "[t]here is no existing Federal provision prohibiting the possession of 'burglar's tools.'"⁶³ The Senate report also indicates that forty-three of the states have statutes that make it a crime to possess "burglar's tools."

The House position, excluding offenses of this type, should be adopted. The House position represents existing law, and there is not, as with joyriding in a federal motor vehicle, a strong federal interest in changing that law.

F. *Negligent Homicide*

The Senate bill establishes an offense called "negligent homicide." It is made a federal crime for a person to engage in "conduct by which he negligently causes the death of another person."⁶⁴ The House bill has no equivalent provision.

Section 1112 of current Title 18 makes it an offense to kill a human being "in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death."⁶⁵

The Senate position should be adopted because its provision carries forward the essence of the existing-law language which is quoted in the preceding paragraph. The jurisdictional reach of the Senate provision should, however, be reduced to approximate the jurisdictional reach of existing section 1112. Section 1112 makes "negligent" homicide a crime if it is committed within the special maritime and territorial jurisdiction of the United States. The Senate bill makes it a crime if it is committed, *inter alia*, against "an inspector who performs inspections . . . carried out to satisfy requirements under the Atomic Energy Act of 1954," if it is committed "by transmitting a dangerous weapon through the United States mail," or if it is committed "on a railroad vehicle operating in interstate or foreign commerce . . ."⁶⁶

63. S. REP. NO. 307, *supra* note 4, at 666.

64. S. 1630, *supra* note 37, § 1603.

65. 18 U.S.C. § 1112 (1982).

66. S. 1630, *supra* note 37, §§ 1601(e)(2)(C)(ii), 1601(e)(3), and 1601(e)(5). These jurisdictional bases are among those included in the negligent homicide section of the Senate bill by virtue of a cross-reference in section 1603(c). Section 1601(e)(1) is the only jurisdictional base provision that should be cross-referenced into section 1603 if existing law is to be the basis for reconciliation. It would make for a much more understandable code if the language of section 1601(e)(1) were printed, as part of section 1603, rather than cross-referenced.

G. *Unlawful Sexual Contact*

The Senate bill makes a "touching of the sexual or other intimate parts of a person to arouse or gratify the sexual desire of any person"⁶⁷ an offense if it is done under circumstances that would constitute rape or sexual abuse of a minor or a ward if the touching involved intercourse.⁶⁸ The House bill includes no equivalent provision. The Congress adopted the Senate position in 1986 as part of the "Sexual Abuse Act of 1986."⁶⁹ It should therefore be adopted in a future code bill.

H. *Aircraft Hijacking*

Aircraft hijacking, under the name "aircraft piracy," is already a severely punished federal crime.⁷⁰ While the Senate bill makes aircraft hijacking a Title 18 federal crime,⁷¹ the House bill does not. Instead, the offense is set forth in Title 49 rather than in Title 18. The House bill does not propose to repeal this section.

Since the House bill does not repeal 49 U.S.C. section 1472, there is no substantive policy difference between the two Code bills. The Senate position should, as a technical matter, be adopted for the code. The offense of aircraft hijacking, which is a Class B felony (twenty years imprisonment), is serious enough to deserve to be included in the criminal rather than the transportation code of the United States.

I. *Failing to Keep a Government Record*

The Senate bill makes it a crime for a person who is responsible for keeping records for an organization or agency to fail, with intent to defraud, to maintain a record required as a result or condition of a federal grant, contract, loan, or other form of federal assistance.⁷² The House bill contains no such provision.

The Senate Report admits that "[t]his offense has no counterpart in present federal law."⁷³ The bills should be reconciled on this point by adhering to existing law and adopting the House position.

J. *False Swearing*

The Senate bill provides for an offense termed false swearing.⁷⁴

67. The term "sexual contact" is so defined in section 1646(a)(2) of S. 1630. The Senate bill section under discussion makes it an offense to engage in "sexual contact" under certain circumstances.

68. S. 1630, *supra* note 37, § 1645.

69. Public Law 99-646, § 87(b).

70. S. 1630, *supra* note 37, § 1631.

71. 49 U.S.C. § 1472 (App. 1982).

72. S. 1630, *supra* note 37, § 1345.

73. S. REP. NO. 307, *supra* note 4, at 418.

74. S. 1630, *supra* note 37, § 1342.

False swearing is a lesser-included offense to perjury. It is graded lower than perjury (Class A misdemeanor v. Class D felony), but the requirements are basically the same. There is, however, one important exception: any false statement under oath in an official proceeding can be prosecuted as false swearing, but only false statements that are "material" can be prosecuted as perjury. The House bill does not provide for an offense of false swearing, although it does provide for an offense called "making a false statement."⁷⁵

A provision of existing law makes it a crime for any person in a matter within federal government jurisdiction to make "any false, fictitious or fraudulent statements or representations."⁷⁶ Pursuant to this position, the United States Court of Appeals for the Second Circuit has held that a false statement need not be material in order to be criminal.⁷⁷ If a false statement not under oath could be prosecuted pursuant to this provision of existing law, regardless of its materiality, then the proposed false swearing section is encompassed by the substance of existing law. Although this conclusion is not valid in all cases because other federal courts of appeal disagree with the Second Circuit on this point,⁷⁸ the penalty for violating the provision in existing law (five years imprisonment) is 500% higher than the proposed penalty for violating the false swearing section in the proposed Senate bill.

The Senate proposal was recommended on practical grounds by the National Commission.⁷⁹ A senior counsel to the Commission noted the following:

[P]rosecutions for perjury have been dismissed, perhaps needlessly, because of holdings that the defendant, though he may have lied deliberately under oath, did not, under the circumstances of the case, lie as to material matter. Such difficult cases have led to proposals such as that of the National Conference of Commissioners on Uniform State Laws, to eliminate materiality altogether from the definition of perjury.⁸⁰

75. H.R. 6915, *supra* note 38, § 1742.

76. 18 U.S.C. § 1001 (1982).

77. *United States v. Silver*, 235 F.2d 375 (2d Cir. 1956), *cert. denied*, 352 U.S. 880 (1956); *United States v. Marchisio*, 344 F.2d 653 (2d Cir. 1965).

78. *Gonzales v. United States*, 286 F.2d 118 (10th Cir. 1960), *cert. denied*, 365 U.S. 878 (1961); *United States v. Larocca*, 245 F.2d 196 (3d Cir. 1957); *Freidus v. United States*, 223 F.2d 598 (D.C. Cir. 1955).

79. FINAL REPORT, *supra* note 5, § 1252(1). The inclusion of a false swearing section without any requirement of materiality as to the statement was also recommended by the Model Penal Code. MODEL PENAL CODE § 241.2 (Proposed Official Draft 1962).

80. Working Papers, National Commission on Reform of Federal Criminal Law, at 661-62 (1970).

Under all the circumstances, it is recommended that the two proposals be reconciled by adopting the Senate position. There is no existing statutory law on this point, but logic favors the Senate position.

K. *Impairment of Military Service Obligation*

The House bill contains a section entitled "Wartime impairment of military service obligations."⁸¹ It provides, inter alia, that a person commits a Class D felony if he "knowingly" impairs the recruitment, conscription, or induction of any person in the armed forces of the United States during a time of war or national emergency.

The Senate bill contains an equivalent section⁸² entitled "Obstructing Military Recruitment or Induction."⁸³ This section provides that the conduct proscribed must be performed "with intent to hinder, interfere with, or obstruct the recruitment, conscription, or induction of a person into the armed forces of the United States."⁸⁴

Congressman Robert W. Kastenmeier, who was a member of the National Commission, declared that the state of mind requirement in the House bill "is a departure from current federal law which requires a specific intent to interfere with, hinder or obstruct the recruitment, conscription or induction of persons into the military."⁸⁵

A new code bill should adopt the Senate provision and require proof of intent because one of the sections in existing law which gave rise to this section makes the proscribed conduct a crime only if it is committed "willfully."⁸⁶

L. "Enmons"

"Enmons" refers to the holding of the United States Supreme Court in the case of *United States v. Enmons*.⁸⁷ In that case, the Court held, by a 5 to 4 vote, that violence or the threat of violence in the context of a labor dispute does not violate federal extortion law because the conduct in such context was not committed "wrongfully."

The House bill upholds the *Enmons* rule immunizing activity related to a labor dispute from prosecution for extortion by including the word "wrongfully" in its definition of the offense of extortion.⁸⁸

81. H.R. 6915, *supra* note 38, § 1316.

82. Unlike the House section, the Senate section does not apply in time of national defense emergency. It is only operational "in time of war."

83. S. 1630, *supra* note 37, § 1115.

84. S. 1630, *supra* note 37, § 1115(a).

85. H.R. REP. NO. 1396, *supra* note 3, at 654 (statement by Rep. Robert W. Kastenmeier).

86. 18 U.S.C. § 2388(a) (1982).

87. 410 U.S. 396 (1973).

88. See H.R. 6915, *supra* note 38, § 2522(a) ("Whoever knowingly threatens or

One of the committee members stated the rationale for preserving the rule in the following words:

A legislative overruling of *Enmons* would involve federal law enforcement officials in any labor dispute in which property damage occurred during picketing intended to induce an employer's agreement, as long as the employer was engaged in interstate commerce.⁸⁹

The report that accompanies Senate code bill S. 1630 states that the Senate Committee reached the same conclusion as the House Committee and decided to preserve the *Enmons* doctrine:

The Committee has concluded that for the purposes of this bill the *Enmons* decision should not be modified. On the other hand, the Committee believes that the thrust of an extortion statute should be to punish violent extortionate means to obtain the property of another regardless of the legality of the ends sought and has carried forward current law to that effect in situations not involving a labor dispute.⁹⁰

The extortion provisions of S. 1630, however, do not support the language of this report. The magic word, "wrongfully," is not used in the definition of the offense, and there is nothing in the provision itself to suggest that labor-dispute-related violence is exempt from prosecution under this section.

An earlier Senate code bill, S. 1722, did contain language that would clearly have preserved the *Enmons* ruling while placing some limitations on it:⁹¹

(b) BAR TO PROSECUTION. It is a bar to prosecution under this section that the offense occurred in connection with a labor dispute as defined in 29 U.S.C. 152(9) to achieve legitimate collective bargaining objectives, unless there is clear proof that the conduct which constitutes the threat or placing in fear required under subsection (a)(1) consists of a felony and the conduct was engaged in for the purpose of causing death or severe bodily injury in order to achieve such objectives and [a top Justice Department official certifies that such elements are present, that a federal prosecution should be commenced, and that the applicable State is 'unable or unwilling' to prosecute for such conduct].

It would be a misuse of the phrase "existing law" to call a doctrine that is set forth in a 5 to 4 decision of the United States Supreme Court "existing law" and to preserve it when it is highly controversial. It is, after all, the constitutional function of Congress to make the laws. The phrase "existing law" has no meaning in terms of separation of powers if the phrase includes existing case law. On this

places another in fear that [any person will be injured or kidnapped or any property will be damaged] and thereby *wrongfully* obtains property of another . . . commits" (emphasis added).

89. H.R. REP. NO. 1396, *supra* note 3, at 649 (statement of Rep. Don Edwards).

90. S. REP. NO. 307, *supra* note 4, at 677.

91. S. 1722 § 1722(b).

question, Congress itself must face the question of whether or not to exempt violent activities connected with a labor dispute from the reach of the federal criminal law of extortion.

It is the author's personal view that the S. 1722 "bar to prosecution" represents the best possible resolution of this issue. The bar to prosecution prevents state criminal jurisdiction from being further eroded in the labor management relations field while it maintains, via the certification procedure, a federal presence that could be called upon in the extreme case.

M. Logan Act

The Logan Act⁹² is one of the oldest federal criminal statutes and the most moribund. Although it was enacted in 1799, it has never formed the basis of a prosecution. The Act makes it a crime for a United States citizen, acting without authority, to commence or carry out any correspondence or intercourse with any foreign government or personnel thereof "with intent to influence the measures or conduct of any foreign government or any officer or agents thereof, in relation to any disputes or controversies with the United States." Although the constitutionality of the Act has been drawn into question,⁹³ the issue has never been decided because the statute has never been used.

The Senate bill repeals the Logan Act and replaces it with an equivalent offense entitled "Interfering with Foreign Relations."⁹⁴ The new section requires a showing of actual interference with the foreign relations of the United States and makes the offense applicable to any person who owes allegiance to the United States rather than only to American citizens. The House bill reenacts the Logan Act.⁹⁵

Both decisions were criticized. Congressman John Conyers, Jr., a House Judiciary Committee member, characterized the Logan Act as "legislation at its worst."⁹⁶ A spokesman for Senate conservatives listed the proposed repeal of the Logan Act as point number twenty five in his memorandum urging opposition to the Senate code bill.⁹⁷

Application of the "existing law" rule would lead to retention of the Logan Act in a new code, despite the fact that the Logan Act has never formed the basis for a prosecution in almost 200 years and may, in fact, be unconstitutional. Using the "existing law" rule to reach

92. 18 U.S.C. § 953 (1982).

93. *Waldron v. British Petroleum Co.*, 231 F. Supp. 72, 89 (S.D.N.Y. 1964).

94. S. 1630, *supra* note 37, § 1207.

95. H.R. 6915, *supra* note 38, § 415.

96. H.R. REP. NO. 1396, *supra* note 3, at 689.

97. Hammond, Memorandum (August 10, 1981)(unpublished material).

such a result would be foolish. It makes more sense to follow the Senate proposal and retain the Logan Act in spirit while changing its words to make sure that they are constitutional.

N. Spousal Immunity for Rape

At common law, in a limitation long embodied in federal statutory law, a person could not be found guilty of raping his own spouse.⁹⁸ This limitation was not carried forward in either the Senate or the House⁹⁹ code bill.

Curiously, neither the Senate Committee report nor the House Committee report gives any reasons for this change from existing law. The change was supported by womens' rights groups, and it is opposed by some conservatives.

The Congress, in 1986, changed federal statutory law and eliminated the limitation, as part of the Sexual Abuse Act of 1986.¹⁰⁰ Spousal immunity as to rape is no longer federal law.

Since the position taken on this issue by both the House and Senate code bills is now existing law, it should be adopted in a future code bill.

O. Obstructing a Government Function by Fraud

Existing law makes it a felony offense to conspire to obstruct a government function by defrauding the United States.¹⁰¹ The provision does not require that the objective of the conspiracy be a substantive offense so long as the actor conspires "to defraud the United States, or any agency thereof, in any manner or for any purpose."¹⁰² The section has been construed very broadly, as the following quotations from United States Supreme Court opinions indicate:

[I]t is not essential that such a conspiracy [to defraud the United States Government] shall contemplate a financial loss or that one shall result. The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of Government.¹⁰³

To conspire to defraud the United States means primarily to cheat the United States Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit,

98. R. PERKINS, *CRIMINAL LAW*, 154-56 (1969); *but cf.* *United States v. Lone Bear*, 579 F.2d 522, 525 (9th Cir. 1978).

99. *See* S. 1630, *supra* note 37, § 1641; *see also* H.R. 6915, *supra* note 38, § 2331.

100. Public Law 99-646, § 87(b).

101. 18 U.S.C. § 371 (1982)(the maximum term of imprisonment is five years).

102. *Id.*

103. *Haas v. Henkel*, 216 U.S. 462, 479 (1910).

craft, or trickery, or at [the very] least by means that are dishonest.¹⁰⁴

The Senate bill makes it a felony offense to intentionally obstruct or impair a government function "by defrauding the government through misrepresentation, chicanery, trickery, deceit, craft, overreaching, or other dishonest means."¹⁰⁵ This section does not make it a prerequisite to conviction that the actor was engaged in a conspiracy with the objective of committing such an offense.

The House bill contains a section which is entitled "Conspiracy to fraudulently obstruct a Government function."¹⁰⁶ This provision is closer to existing law than the Senate provision because it makes proof of a conspiracy a prerequisite to conviction.¹⁰⁷ Moreover, it does not add words from court decisions (e.g., chicanery, trickery, deceit, craft, overreaching) to the language of the proposed statute, as does the Senate version. The House bill, however, defines the term "fraud" in its general definitions section.¹⁰⁸ This definition makes the application of this statute far narrower than existing law given the propensity of the federal courts to define the term fraud very broadly.

The House conspiracy section is closer to existing law than the Senate offense section. Therefore, it should be adopted in future code legislation, provided the legislation does not define statutorily the term "fraud."

P. Federal Criminal Jurisdiction

The House and Senate bills are not very far apart on the issue of federal criminal jurisdiction. Both devoted liberals and dedicated conservatives, however, are nervous about the scope of federal jurisdiction under the code bills. Both fear that the code would move the United States along the road toward a centralized criminal justice system and a national police force.

A liberal congressman argued that "affect on interstate commerce" and "use of the mails" should never be the basis for federal investigation and prosecution unless that affect or use played "a substantial

104. *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924).

105. S. 1630, *supra* note 37, § 1301 (the offense is classified as a Class D felony which means the maximum term of imprisonment is six years).

106. H.R. 6915, *supra* note 38, § 1705 (the offense is classified as a Class D felony which means that the maximum term of imprisonment is 40 months).

107. The House code bill also contains two specific offense sections which do not require proof of a conspiracy in order to establish criminal liability. The offenses, which are termed "Obstructing a Government Inspection By Fraud" (H.R. 6915, § 1703) and "Obtaining a Government authorization by fraud" (H.R. 6915, § 1704), are much narrower in scope than the proposed section in the Senate bill which also obviates the need to prove a conspiracy. Nevertheless, they do represent an expansion of existing law.

108. H.R. 6915, *supra* note 38, § 101(16).

role in the offense."¹⁰⁹ The National Association of Attorneys General, a group that could be described as conservative, declared that "a purely incidental use of, or effect on, interstate commerce is an inappropriate basis for federal action."¹¹⁰ The group urged Congress to "reconsider the necessity of each extension of federal jurisdiction which has been added over the last 200 years."¹¹¹

The safeguard against unwarranted extension of federal criminal jurisdiction proposed in both code bills¹¹² is a provision authorizing the U.S. Attorney General to issue guidelines for the exercise of federal jurisdiction. These guidelines would provide for declination of federal jurisdiction unless a "substantial federal interest" would be served by having a federal prosecution.

The current Chairman of the Subcommittee on Criminal Justice, Congressman John Conyers dismissed the idea of guidelines as a safeguard:

The problem with this approval is that by giving the Attorney General authority to determine, in administrative guidelines, what constitutes a substantial federal interest, Congress gives away its authority and responsibility to write the laws. Further, by making the requirement of a substantial federal interest jurisdictional, the determination of substantiality is for the court to make in individual cases. A determination made in administrative guidelines would be effectively unreviewable by the court and beyond attack by a defendant who questions the Attorney General's definition of "substantial."¹¹³

Existing statutory law alone is not an adequate useful guide through the federal jurisdictional thicket because there are a number of existing Title 18 sections which have a very broad jurisdictional reach.¹¹⁴ Unless there are reductions of some of them, codification may extend their influence automatically. By consolidating a large number of statutes and making the jurisdictional bases for each one of the jurisdictional bases for the consolidated section, the impact of existing laws like the Hobbs Act will be increased.

109. *Id.*

110. H.R. REP. NO. 1396, *supra* note 3, at 692 (statement of the National Association of Attorneys General).

111. *Id.* at 693.

112. S. 1630, *supra* note 37, § 205(c); H.R. 6915, *supra* note 38, § 115(b).

113. *Id.*

114. The Hobbs Act, for example, penalizes a person who acts in the following manner:

In any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by . . . extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section.

18 U.S.C. § 1951 (1982).

The members of the House and Senate must deal with the jurisdiction-expanding phenomenon of codification, or they will find that they have in fact expanded federal jurisdiction without intending to do so.¹¹⁵ The best way to avoid such expansion may be to cut back or modify the extremely broad bases of jurisdiction such as "affects interstate commerce" or "use of the mails." It is arguable that, as a general rule, the federal government should not have jurisdiction to investigate and prosecute unless the alleged criminal activity "has a direct effect on interstate commerce," affects a purely federal interest, or involves an "opponent" such as organized crime which may have greater resources than the law enforcement agencies of some states.

IV. TECHNICAL DIFFERENCES

The differences of form, language, and style between the House and Senate code bills cannot be resolved on the basis of existing law since both bills substitute an entirely new technical framework for existing federal statutory criminal law.¹¹⁶ The usual reconciliation practice is probably inappropriate. This practice calls for each House of Congress to "recede" to approximately the same number of points in the bill passed by the other House. The usual practice would not reflect the fact that the form, language, and style of a code are very important to understanding, applying, and enforcing it. Trading technicals on a number-of-points basis might produce a lack of stylistic consistency, readability problems, and mistaken court constructions.

A dispassionate study of the House and Senate code bills indicates that each has form, language, and style that appear to an outsider to be superior to equivalent points in the other bill. It further appears

115. See generally Quigley, *The Federal Criminal Code Revision Plan*, 47 GEO. WASH. L. REV. 459 (1979). A contrary view is expressed in Pauley, *An Analysis of Some Aspects of Jurisdiction Under S. 1437, The Proposed Federal Criminal Code*, 47 GEO. WASH. L. REV. (1979). Pauley contends that no action is necessary to limit jurisdiction under a code because the primary mechanism by which Congress historically has limited federal law enforcement and federal prosecution, limitation of appropriations, is unaffected by codification.

116.

The bill makes . . . myriad changes in form and terminology. This in itself would not trouble us if all the changes had been adequately discussed and the consequences fully understood. Many of these changes are essentially the work of Subcommittee staff. On several occasions it became apparent that the Chairman and the other members of the Subcommittee were not fully aware of some of the implications of these changes, and in some cases the staff did not understand them either. We have the uncomfortable feeling that this bill is loaded with 'sleepers' on every page, and that future prosecutors, defendants, courts, and Congresses will be uncovering them for decades to come.

H.R. REP. NO. 1396, *supra* note 3, at 669 (separate views of Congressmen Seiberling, Hughes, and Conyers).

that there are additional form, language, and style points which, if inserted in a new code bill, would make it technically superior to both bills.

Lists that were prepared by the author in 1980, when House and Senate passage of a code bill appeared imminent, indicated to the author that the House bill was better than the Senate bill in 101 specific technical points. In addition, there was indication that the Senate bill was better than the House bill in fifty-seven specific technical points. Also, the Senate's points tended to be applicable on a greater number of occasions than the House's.

This observation that neither House had a monopoly on technical superiority can be illustrated by a number of examples taken from both bills:

The House bill does not include a section setting forth the "general purposes" of a criminal code, whereas the Senate bill does.¹¹⁷ The House position is better because it is impossible to set forth the general purposes of a criminal code without resorting to some words and phrases that are ambiguous. Ambiguity invites judicial construction, and judicial construction of ambiguous terms can result in decisions that were never intended by the members who voted for that language.

The House bill does not suggest that only men will be criminal perpetrators and offenders, whereas the Senate bill does. The Senate bill uses "he," "him," and "his" exclusively, and then relies on an obscure paragraph to declare that "[a] term . . . that signifies the masculine gender includes and applies to the feminine gender and the neuter gender . . ." The House position, which involves heavy use of sex-neutral terms like "person," "actor," and "defendant," is better because it doesn't have to be explained.¹¹⁸

The Senate bill gives each subsection in new Title 18 a title, whereas the House bill does not. These subsection titles attempt to indicate accurately the subject matter covered by each subsection. The Senate position is better because it leads to better organization of the section and makes it easier to understand each subsection.¹¹⁹

In addition, the Senate bill sets forth a table of contents for the entire new Title 18. Since the official text should be designed to inform

117. S. 1630, *supra* note 37, § 101.

118. *Id.* § 112(e)(3).

119. This stylistic device has been adopted by Congress in many of the new Title 18 sections enacted as part of the Comprehensive Act, and in the sections enacted by the Sexual Abuse Act of 1986.

citizens of what may be the most important title of the United States code, the Senate position is better.

Following, in more abbreviated language, are a number of style points that are taken from both the House and Senate bills which are recommended for use in a future code bill. They have in common the fact that they make provisions of the code somewhat easier to understand and apply.

Stylistic points seldom receive much attention from political leaders, but the real-world success of the effort to simplify federal criminal laws will depend heavily on the stylistic skill with which the final product is presented. The success of a code will, after all, depend heavily on the ability of ordinary people like jurors to understand and apply the law efficiently and effectively.

The following form, language, and style points from the House bill are recommended:

1. To achieve greater clarity, use the House bill's "action and consequence" formulation instead of the Senate bill's "parenthetical action" formulation. Thus, for the offense of arson, use the term "a person knowingly starts a fire or sets off an explosion and thereby causes damage,"¹²⁰ instead of "if, by fire or explosion, [a person] damages a public facility; or damages substantially a building or a public structure."¹²¹ Or, for the offense of aggravated battery, state "uses physical force and thereby . . . causes serious bodily injury,"¹²² rather than "if, by physical force, he causes serious bodily injury."¹²³
2. Use the House bill's phrase "an individual who is found guilty," rather than the more telegraphic and colloquial Senate bill phrase "an individual found guilty."
3. Adopt the House bill's phrase "State crime punishable by more than one year's imprisonment," rather than the Senate bill's phrase "State or local felony." This is better because many jurors and others do not know that a felony normally means a crime punishable by more than one year's imprisonment. In addition, several modern state criminal codes do not use the term "felony."
4. Make "Indian country jurisdiction" a separate base for federal criminal jurisdiction, as in the House bill,¹²⁴ rather than including it as one of several separate bases for federal criminal jurisdiction under the "Special Territorial Jurisdiction of the United States."¹²⁵ There may be situations where it is inappropriate to have the same federal criminal jurisdiction on Indian reservations as in federal en-

120. H.R. 6915, *supra* note 38, § 2501(a).

121. S. 1630, *supra* note 37, § 1701(a).

122. H.R. 6915, *supra* note 38, § 2312(a)(1).

123. S. 1630, *supra* note 37, § 1612(a).

124. H.R. 6915, *supra* note 38, § 114.

125. S. 1630, *supra* note 37, § 203(a)(3).

claves or on U.S. ships. More importantly, federal jurisdiction over Indians deserves to be mentioned directly.

5. Follow the House bill form in the following ways: (1) Capitalize the initial letter of the word "federal" wherever the word appears; (2) make separate paragraphs and indent them where there are several elements to definitions of terms and where there are distinct elements of an offense (avoid the Senate practice of squeezing all possible variations of an offense into a single subsection regardless of how long the resulting sentence may be); (3) number terms defined in the section of general definitions of terms used throughout the code (the absence of such numbers in the Senate bill makes accurate cross-referencing virtually impossible); (4) avoid the almost-archaic word "abet" in favor of using "commands, induces, procures, or aids;"¹²⁶ and (5) always give a brief parenthetical summary of the subject matter of a section that is mentioned and cross-referenced in a section except where such a summarization would be redundant or where the subject of the other section is obvious.

6. Include in the bill, as the House did in H.R. 6915, the elements of the general defenses to criminal liability as to which there is no serious disagreement. The Senate bill's policy, which was to leave the defenses to common-law case decisions, is inconsistent with the objective of a code to make all salient aspects of a field of law available and visible in systematic form. The House decision to make the elements of most of the defenses available to nonlawyers is preferable to the Senate decision to require interested persons to search out the case law.

7. Use the House bill's phrase "required by [f]ederal law"¹²⁷ rather than the Senate bill's phrase "required by . . . a federal statute . . . or a regulation, rule, or order issued pursuant thereto."¹²⁸

8. With respect to descriptions of federal criminal jurisdiction, use the verb "is" (as in the House bill) rather than the open-ended verb "includes" (as in the Senate bill).

9. When the material that follows is divided into subsections already, follow the House-bill form in making the introduction to a complicated section a subsection by itself.¹²⁹

126. Compare H.R. 6915, *supra* note 38, § 501(a)(1) with S. 1630, *supra* note 37, 401(a)(1).

127. *E.g.*, H.R. 6915, *supra* note 38, § 1506.

128. *E.g.*, S. 1630, *supra* note 37, § 1204.

129. Compare the form of H.R. 6915, *supra* note 38, § 113 with that of S. 1630, *supra* note 37, § 203.

10. The text of the section setting forth a description of a bar to prosecution, such as immaturity, should include a provision, such as the House bill does, which states that the bar can be waived.¹³⁰ The principle may be obvious to lawyers familiar with the case law, but it should be set forth in the code for the benefit of ordinary citizens.

11. For the dozens of grading subsections, use the House phrase “offense under this section is,” rather than the Senate phrase “offense described in this section is.” This is because the Senate phrase technically does not encompass specific offenses which are only described in a section by cross-reference to some other provision of federal law. Alternatively, the standard phrase should say “offense described in this section or in a provision incorporated by reference in this section is.”

12. Follow the House bill in designating the major subdivisions of proposed new Title 18 as “subtitles” rather than as “parts” (the term used in the Senate bill). This is the term used for major subdivisions in Title 26, the Internal Revenue Code.

13. Wherever possible, avoid legal terms that may not be understood by the average citizen. Thus, follow the House bill in using the phrase “enters or agrees to enter”¹³¹ rather than the equivalent Senate bill phrase “contracts to enter.”¹³²

14. Use the House term when describing the offense of “impersonating an official” because it is less legalistic and “stuffier.” Thus, the House’s language “engages in any conduct that asserts the authority the actor pretends to have”¹³³ is easier to explain and apply than the Senate’s “purports to be exercising the authority of such public servant or foreign official.”¹³⁴

15. In the offense of bribery, use the House bill phrase, “with intent to influence,”¹³⁵ for the scienter element. The equivalent Senate bill

130. H.R. 6915, *supra* note 38, § 702(b)(2).

131. H.R. 6915, *supra* note 38, § 1503. *Entering or Recruiting for a Foreign Armed Force* states in relevant part: “(a) Whoever, being in the United States, knowingly — (1) *enters or agrees to enter* the armed forces of a foreign power; commits a Class E felony.” (emphasis added).

132. S. 1630, *supra* note 37, § 1203. *Entering or Recruiting for a Foreign Armed Force* “(a) OFFENSE — A person commits an offense if within the United States, he — 1) *contracts to enter* the armed forces of a foreign power.”

133. H.R. 6915, *supra* note 38, § 1702(a). *Impersonating an official*, states, in relevant part: “(a) Whoever, with intent to cause another person to alter or maintain that person’s course of action, knowingly pretends to be a public servant or a foreign official, and *engages in any conduct that asserts the authority the actor pretends to have*, commits a Class E felony.” (emphasis added).

134. S. 1630, *supra* note 37, § 1303(a) states, in relevant part: “(a) OFFENSE. A person commits an offense if he pretends to be a public servant or a foreign official and *purports to be exercising the authority of such public servant or foreign official.*”

135. H.R. 6915, *supra* note 38, § 1751(a)(1) states, in relevant part: “(a) Whoever knowingly — (7) offers, gives, or agrees to give anything of pecuniary value to any person *with intent to influence* such person regarding any particular official action by, or the violation of any particular legal duty of, that person as a public servant.”

phrase is "in return for an agreement or understanding that the recipient's official action as a public servant will be influenced thereby."¹³⁶ The Senate language, while it expresses the quid pro quo nature of bribery, could be misinterpreted to require a prosecutor to prove an actual agreement or understanding.

16. Use the House term "criminal sexual conduct."¹³⁷ This term is more descriptive and unencumbered by secondary meanings than the equivalent Senate term "rape."¹³⁸

17. Use the House title, "Nongovernmental Bribery,"¹³⁹ as the title for the next to the last subchapter of the chapter on "Offenses Involving Property." The Senate title, "Commercial Bribery and Related Offenses"¹⁴⁰ is accurate, but it is not descriptive of the content

136. S. 1630, § 1351(a) states, in relevant part:

OFFENSE. A person commits an offense if — (2) as a public servant, he solicits, demands, accepts, or agrees to accept from another person; anything of value *in return for an agreement or understanding that the recipient's official action as a public servant will be influenced thereby*, or that the recipient will violate a legal duty as a public servant.

Id. (emphasis added).

137. H.R. 6915, *supra* note 38, § 2332, in relevant part, defines criminal sexual conduct as the following:

- (a) Whoever knowingly —
 - (1) engages in a sexual act with another person who is not the actor's spouse if such other person —
 - (A) is incapable of understanding the nature of the conduct;
 - (B) is physically incapable of resisting, or of declining consent to, the sexual act;
 - (C) is unaware that a sexual act is being committed; or
 - (D) participates because of a mistaken belief that the actor is married to the other person; or
 - (2) threatens another person or places another person in fear and thereby causes that other person to engage in a sexual act with the actor; or attempts to do so, commits a class C felony.

Id.

138. S. 1630 as reported, *supra* note 37, § 1642 describes rape as follows:

- (a) OFFENSE. A person commits an offense if he engages in a sexual act with another person who is not his spouse, and —
 - (1) knows that the other person is incapable of understanding the nature of the conduct;
 - (2) knows that the other person is physically incapable of resisting, or declining consent to, the sexual act;
 - (3) knows that the other person is unaware that a sexual act is being committed;
 - (4) knows that the other person participates because of a mistaken belief that the actor is married to the other person; or
 - (5) compels the other person to participate by a threat or by placing the other person in fear, other than by a means described in section 1641(a)(1).

Id.

139. Nongovernmental bribery in the House bill is subchapter VI of seven subchapters listed under "Offenses Involving Property."

140. See subchapter F of the Senate bill of chapter 17, Offenses Involving Property.

of all the sections. The subchapters in both bills contain sections on labor bribery¹⁴¹ and sports bribery;¹⁴² while these offenses are “related” to commercial bribery, they are also quite different.¹⁴³

The following form, language, and style points from the Senate bill are recommended:

18. The House bill follows the style of current federal criminal statutes in prefacing the description of each offense with the term “Whoever.” None of the thirty-five states which have revised their penal codes have adopted the “whoever” model. In the Senate bill, and the state codes, the description of each offense begins with the following clause: “A person commits an offense if.” This style is easier to understand and more modern.

19. With respect to the offense of criminal attempt, follow the Senate bill’s form of a single and unified section with a subsection which sets forth all offenses as to which an attempt to commit the offense is not itself an offense.¹⁴⁴ The House bill affirmatively included the offense of criminal attempt in the section which described each offense as to which an attempt to commit was itself an offense. The House approach has been rejected by the thirty-five or more states which have enacted revised criminal codes.

20. Follow Senate form by including a section on “General Principles of Construction.”¹⁴⁵ The bulk of the material that would be included in this section is already federal law under Title 1 of the United States Code. Repetition of these basic rules in Title 18 would not be harmful and it might make the task of understanding easier for some nonlawyer citizens.

21. Make the numbers of the several chapters in revised Title 18 consecutive, as in the Senate bill. Skipping numbers may make sense for a body of statutory law that is organized alphabetically like present Title 18. Chapter numbers that have been omitted can be filled as new areas such as “atomic energy offenses” appear. To skip numbers does not make sense, however, for a code that provides for all future expansion internally and that does not classify offenses or chapters of offenses alphabetically.

22. Follow Senate form by making “Jurisdiction”¹⁴⁶ or “Federal Criminal Jurisdiction” the subject of a separate chapter in revised Ti-

141. For the subsections on labor bribery, see S. 1630, *supra* note 37, § 1752; H.R. 6915, *supra* note 38, § 2552.

142. For sports bribery, see S. 1630, *supra* note 37, § 1753; H.R. 6915, *supra* note 38, § 2553.

143. Compare H.R. 6916, *supra* note 38, chapter 25, subchapter VI with S. 1630, *supra* note 37, chapter 17, subchapter F.

144. See S. 1630, *supra* note 37, §§ 1001, 1004(b)(1) and (b)(2).

145. See S. 1630, *supra* note 37, § 112.

146. See S. 1630, *supra* note 37, § 201.

tle 18. The subject does not take many pages, but it is too important to be merely the subject of a subchapter.

23. Follow the Senate bill by using conventional American spelling, regardless of the spelling in present Title 18. Thus, say "subpoena" rather than "subpena" and say "kidnapping"¹⁴⁷ rather than "kidnaping."

24. Follow Senate form in giving offense sections understandable titles. There should, for example, not be any offenses in the new code with anachronistic or incomprehensible-to-laymen titles. Offenses with such titles as "false implication of another," "misprison of a felony," and "use of armed services as posse comitatus"¹⁴⁸ are difficult to understand and enforce. If these offenses were labeled "hindering law enforcement," "obstruction of justice," and "misuse of military," they would be easier to explain to jurors.

25. Follow Senate bill form in combining conduct that constitutes two separate sections in the House bill ("Refusing to produce information" and "Refusing to testify")¹⁴⁹ into one section, entitled "Refusing to Testify or to Produce Information."¹⁵⁰

26. The Senate phrase "circumstance dangerous to human life"¹⁵¹ is better than the equivalent House phrase "circumstances dangerous to the life of an individual."¹⁵² The latter suggests that it is necessary to the commission of the offense that the life of a *particular* individual be threatened.

27. The Senate bill's title for the first subchapter of the final chapter of the Offenses part of the proposed code is more accurate than the House bill's title for the equivalent subchapter. The Senate bill entitled its subchapter "Organized Crime Offenses."¹⁵³ The House bill entitled its subchapter "Racketeering."¹⁵⁴ Comparison of the scope of the sections included in the House subchapter with a dictionary definition of the term "racketeering" suggests that the Senate title is better.

Notwithstanding the foregoing recommendations from both the House and Senate bills, the form, language, and style of both bills can

147. See S. 1630, *supra* note 37, § 1621.

148. See H.R. 6915, *supra* note 38, §§ 1714, 1712, and 1771.

149. *Id.* 1733 and 1734.

150. S. 1630, *supra* note 37, § 1333.

151. S. 1630, *supra* note 37, § 1616(a)(2).

152. H.R. 6915 *supra* note 38, § 2316(a)(2).

153. See S. 1630, *supra* note 37, ch. 18, subch. A.

154. See H.R. 6915, *supra* note 38, ch. 27, subch. 1.

be improved by new approaches or by combining approaches used in the existing bills.

28. Many of the offense sections, in both the Senate and House bills, do not have any federal jurisdiction subsections. Knowledgeable experts will be aware that the absence of a subsection on jurisdiction means the offense is within the general jurisdiction of the United States, the broadest jurisdictional nexus possible. Less knowledgeable individuals may not be aware of this fact. A "Jurisdiction" subsection should, accordingly, be added to each of the Offense sections, which now have none. The new subsections could read as follows:

"JURISDICTION. There is federal jurisdiction over an offense described or incorporated by reference in this section if the conduct constituting the offense is committed anywhere within the United States."

29. The title of the second subchapter in the code bill chapters on offenses involving individual rights should be "Offenses Involving Political *Activity*" rather than "Offenses Involving Political *Rights*."¹⁵⁵ Collecting political contributions as a federal public servant or misusing authority over personnel for a political purpose (to take two provisions at random from the subchapters) represent political activity rather than political rights.

30. Both bills are excessive in their use of the clause and semicolon style of writing rather than the sentence and period style. For example, section 2531(e) of the House bill and section 1731(c) of the Senate bill set forth the jurisdictional bases for federal prosecution of theft in a single sentence that contains more than 1,000 words. The "lead-in" clause should be rewritten as a complete sentence, i.e., "There is federal jurisdiction over an offense under this section if any of the following is applicable." Each separate paragraph connected by a semicolon that follows the "lead-in" clause should also be made a separate sentence with appropriate punctuation.¹⁵⁶

Technical reconciliation or agreement on questions of form, language, and style should, if possible, be achieved before a new bill is introduced in Congress. The guiding principles of form, language, and style should accord best with the goal of a code to make federal criminal law clearer, more logical, and more readable.

V. CONCLUSION

Simplifying the criminal laws of the United States is in the public interest. It would be *excellent* if *all* of the federal statutes, which au-

155. Subchapter B of chapter 15 of S. 1630, *supra* note 37, and subchapter II of chapter 21 of H.R. 6915, *supra* note 38, are entitled "offenses involving political rights."

156. "Semicolons should be used sparingly. Periods are usually better." THE WASHINGTON POST, DESKBOOK ON STYLE 143 (1978).

thorize the imposition of criminal penalties, were codified in, or cross-referenced to, a new Title 18 of the United States Code. Unfortunately, this result is probably not "do-able" in the relatively short time span of a single Congress. The number of criminal penalty provisions outside Title 18 is extremely large, and practically every committee of the Congress may want to conduct oversight hearings on one or more of them.

It would be *very good* if *all* of the federal statutes in *Title 18* of the U.S. Code were rewritten in simplified form. A new Title 18 consisting of revised descriptions of major crimes, a general part, uniform state of mind requirements, a separation of wrongful conduct and jurisdiction, and grading on the basis of severity would improve both efficiency and understanding. The chances of a single Congress enacting a new Title 18 are much better than a few years ago, since the enactment of the Comprehensive Crime Control Act of 1984 reduced the necessary size and scope of future criminal code bills. The passage of that Act reduced also the need to debate, within the context of proposals to codify the law, the wisdom of a number of very divisive policy changes from present law.

It would be *good* if all of the general provisions and principles which code bills have made applicable to federal offenses were *added* to present Title 18. Enacting a general part and making it applicable to existing federal offenses would be a real plus for the federal criminal justice system. It would also be good if a number of simplified and readable statutes were passed to show judges, juries, and attorneys how much easier they are to deal with. The white-collar crime area, which encompasses a very large number of substantive offenses, has been recommended as a good place to start.¹⁵⁷ Such a bill would have a lively focus (white-collar law enforcement)¹⁵⁸ instead of a

157. This idea was suggested to the author by a respected professor of criminal law, G. Robert Blakey. The argument against this approach is that it makes the opponents of improved white-collar law enforcement the automatic opponents of codification and simplification. These opponents might be able to delay the code plus white-collar offenses bill by various parliamentary maneuvers that might have the effect of killing code reform entirely.

158. The current Chairman of the Subcommittee on Criminal Justice of the House Judiciary Committee, Congressman John Conyers, Jr., is an avowed opponent of criminal-law codification. However, Representative Conyers is concerned about existing inadequacies in the criminal law with respect to corporate and white-collar crime. In 1980, as a member of the Subcommittee on Criminal Justice, Congressman Conyers dissented from the decision to report H.R. 6915. This decision was made partially on the ground that "[m]any of the provisions contained in H.R. 6915 throw unnecessary obstacles in the way of meaningful deterrence and enforcement in the white-collar and corporate crime areas." H.R. REP. NO. 1396, *supra* note 3, at 683. Conyers pointed out

bland one (simplification and codification). In addition, since it is limited in scope, it might not require a “superman” to get it enacted.¹⁵⁹

In my opinion, a new code bill could be passed in the 100th Congress if the following occurs:

1. The President announces that simplification of the federal criminal law is a major goal of the Administration. The leadership of both parties in both Houses of Congress, and in their respective Judiciary Committees, make a commitment to pass an effective modern federal criminal code and assign the task to members hospitable to that goal.
2. A single bill is developed, for purposes of introduction, in both Houses of Congress.
3. This single bill is developed cooperatively by majority and minority members of the House and Senate Judiciary Committees and the Attorney General. Knowledgeable and interested private citizens would have an informal opportunity to make contributions to this development.
4. This single bill does not contain controversial policy changes from current law. It is difficult to establish and maintain the consensus needed to enact this type of legislation unless the participants are willing to agree, in a rather summary fashion, to resolve policy disagreements, in favor of current law.
5. The size of the bill is kept as small as possible — i.e., to 200 pages or less;
6. The bill is limited to rules and principles applicable to all offenses and a limited number of substantive offenses.

Simplifying federal criminal laws is in the public interest and the necessary groundwork has been laid. All that remains is a commitment to see the task through.

that corporate and white-collar crimes cost the American public \$200 billion per year compared to \$4 billion per year for all property-related street crime. *Id.* at 684.

159. The only criminal-code bill that has yet been reported by the Judiciary Committee of the House of Representatives, H.R. 6915, *supra* note 38, may have resulted from the presence of such a person as the applicable subcommittee chairman. According to the Committee Report, the Subcommittee on Criminal Justice held 157 public sessions before reporting a code bill to the full committee, and the full committee held 18 days of mark-up before reporting a code bill to the full House. H.R. REP. NO. 1396, *supra* note 3, at 9-10. The chairman of the subcommittee was former Congressman Robert F. Drinan, S.J. It is unlikely that another chairman will appear who is willing to dedicate 175 days of public sessions to criminal-law revision. Reducing the task to more human dimensions, with enactment in stages, may be a more realistic way to proceed.