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REMARKS BY

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BEFORE THE

AMERICAN LAW INSTITUTE
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President Perkins, Director Hazard, Director Emeritus Wechsler, Ladies and Gentlemen:

As you know, earlier this week, the President introduced a tough and comprehensive anti-crime package designed to strengthen law enforcement efforts against violent criminals in the United States. Debate will soon be joined on this proposal and the multitude of issues it presents. It is, I believe, a sound package, fashioned to focus on the concerns of today's America and deserves widespread support.

Today, however, I would like to direct your attention to an item of unfinished business -- unfinished business on the part of the federal government, on the part of some of our state governments, and to a certain extent on the part of the membership of the American Law Institute. That unfinished business relates to fulfilling the responsibility of government for achieving a fair and effective code of criminal law.

I have with me this afternoon an antique that has been retrieved from the dusty, upper reaches of the Department of Justice library. Its now-fragile, yellowed pages were printed in 1828. The concepts it expresses, though, are as fresh today as they were at the time they were first set forth by the visionary author of this volume. The author is Edward Livingston, a member of the House of Representative from the State of Louisiana. The volume is entitled "A System of Penal Law for the United States of America", consisting principally of a code of crimes and punishments.

Mr. Livingston's proposal contained a true criminal code -- an integrated assembly of all cognizable criminal offenses, set forth in a clear, logically-ordered structure of criminal justice purposes and principles. It was a remarkable distillation of common-law concepts for use by a new, progressive nation. As might be expected, the lawyers and legislators of the time viewed such a simplification of the common-law with considerable wariness. Mr. Livingston's proposal languished in the Congress, as was noted in the printed debates for 1831, because of the "press of business," concerning other matters.

As a result of that congressional "press of business," our federal criminal law today has not been developed primarily through dispassionate reflection, and has not been cast along the logical lines proposed by Mr. Livingston. Instead, our federal criminal law has developed largely as a serious of sporadic responses to publicized criminal conduct that either touched upon a federal interest or provoked an expression of federal outrage. It has been cast in a multitude of fashions that reflects the idiosyncratic imprint of a two century-long parade of draftsmen possessing quite different views of crime, justice, and the English language.

Neither our federal criminal offenses, nor the principles of their application, are easily found. The federal statutory law is set forth in the 50 titles of the United States Code, which now encompass roughly 23,000 pages of text. Moreover, the judicial interpretations of those provisions, which are necessary for their full understanding, are found now in over 2,300 printed volumes, containing approximately 3,000,000 pages.

Within this welter of material there appear and are discussed approximately 3,000 separate provisions that carry criminal penalties for their violation. Of these, about 1,300 encompass conduct that traditionally would be considered criminal under the common-law concepts inherited from England, while the balance penalize conduct that involves only infractions of regulatory requirements. While the 3,000 statutory offenses are scattered throughout the 50 titles, most, but not all, of the important ones appear in title 18, where they are commingled with the trivial in a unique form of alphabetized confusion. Such offenses as assassination, kidnapping, murder, and rape are scattered among such other supposedly nefarious federal offenses as using a motorcycle to capture a wild burro on public land, reproducing the image of "Smokey Bear" without authorization, wearing the uniform of a postman in a theatrical production that tends to discredit the postal service, and taking artificial teeth into a state without approval of a local dentist.

In addition, within title 18, in describing the "general criminal intent" or "mens rea" that must accompany conduct before it is considered criminal, the Congress over the course of 200 years has provided 78 different terms -- ranging from "wantonly" to "without due ... circumspection" -- to help "clarify" the subject.

Moreover, our federal law has tended to ensure against gaps in coverage by the expedient of incorporating a certain degree of redundancy; of the 3,000 federal statutory offenses, 466 (at last count) encompass just four offense areas -- theft and fraud, forgery and counterfeiting, false statements, and property destruction. These groups of offenses, however, are redundant only as to their substantive coverage; the verbiage they use is sufficiently different that judicial interpretations have very limited value as precedent.

As a body of jurisprudence, our federal criminal law is thus, not only stultifying, but borders on the embarrassing. Far worse, it is seriously inefficient. Laws that are difficult to find, laws that are hard to understand, and laws that are redundant and conflicting, present a major impediment to the effective operation of the criminal justice system. They result in serious confusion about the law applicable to a particular case -- a confusion that absorbs the time, and reduces the effectiveness, of investigators, lawyers, judges, and jurors alike. Given the effect of crime on our society today, this is extraordinarily costly. Without the capacity for regular and effective implementation, the high principles that underlie our criminal justice system will exist largely as abstractions.

We need a body of law that is adequate in its coverage, reaching all forms of serious transgressions, and providing a sensible division of responsibility between federal and state governments.

We need a body of law that is reasonably accessible, permitting both lawyers and laymen, if so disposed, to locate its core provisions with the expenditure of a modest amount of effort.

We need a body of law that is understandable, providing adequate notice of what is prohibited and permitting little argument about what is not.

We need, in short, a body of law that is fair and effective.

Everyone in this room is well aware of the American Law Institute's monumental achievement in undertaking to secure the completion of Mr. Livingston's unfinished business -- at the state level -- through the development and promulgation of the Model Penal Code. That achievement took the simplification and rationalization of common-law concepts to a new level. It has spawned major revisions of the laws in over two-thirds of our states, and it has proved to be the single most important spur to law reform efforts in other English-speaking nations. It is something in which we can all take pride. And I take particular pride in the fact that the director of the project, Professor Herbert Wechsler, and the co-director, Professor Louis Schwartz, are alumni of our Department of Justice.

The dramatic success of the Model Penal Code in engendering sensible reform of state criminal laws raised the question whether a similar kind of approach might be able to bring order and efficiency to the federal criminal laws. Congress sought to answer that question in 1966 though the creation of the National Commission on Reform of Federal Criminal Laws. That bipartisan Commission, with Professor Schwartz as its director, soon developed an inventive mechanism by which the simplicity of the Model Penal Code approach could form the basis for a new federal criminal code, while maintaining the ability to circumscribe the reach of federal jurisdiction. The Commission was thus able to draft a clear, integrated compendium of the totality of federal criminal law, combining general provisions, all serious forms of penal offenses, and closely-related administrative provisions into an orderly structure.

And here, unfortunately, the story begins to sound familiar. The Commission's draft code was presented to the Congress in early 1971. For more than a decade it was the inspiration for several criminal code reform bills which intermittently occupied the attention of the House and Senate Judiciary Committees until action ground to a halt in 1982. It was strongly supported by every President from Lyndon Johnson through Ronald Reagan, and by every Attorney General from Ramsey Clark through William French Smith.

The effort to achieve a clear, fair, and effective federal criminal code must be resumed. It must be resumed simply because the need is so great. The only question involves the timing -- a timing that must be determined by the Administration and by the members of the House and Senate Judiciary Committees based upon our joint evaluation of the chances of overcoming the inevitable difficulties that confront such broad-scale reforms.

One difficulty lies simply in generating interest in code reform. From a general standpoint, the natural constituency for such reform is the public -- those interested in more effective law enforcement, those interested in improving civil liberties by eliminating over-broad statutes, and those interested in facilitating legitimate business operations by clarifying ambiguous law. But something so seemingly abstract as criminal law codification reform does not easily prompt clamor for its passage.

Another difficulty lies in explaining in a satisfactory fashion the reason for changes in the law. Individuals and groups who focus on the need for effective prosecution will fear that too much of presumed value in the old law has been sacrificed for the sake of simplicity. Those who stress the protection of individual liberties will fear that differently stated protections will mean lesser protections. Both will complain that the proposed statutory improvements have not, from their standpoint, gone far enough. Even the deletion of seemingly obsolete provisions may be strongly criticized; when I headed the Criminal Division some years ago, we received a complaint from a local sheriff that we were falling into a Soviet trap in proposing the abandonment of the current statutory offense prohibiting the detaining of U.S. government carrier pigeons.

A further difficulty comes from a quarter that many here would expect, but some might not. That difficulty relates to the encouraging of lawyers -- particularly lawyers in the criminal justice system -- to work in support of major code reform. I see that the Institute's program for yesterday afternoon involved a discussion of "The Law Governing Lawyers". All too often a more appropriate concern is "lawyers governing the law." I think that there may be a fitting analogy here to the observation that war is too important to leave to the generals. Certainly the legal profession is characterized by a special form of inertia, perhaps because of academic training that has stressed repeatedly the importance of following precedent.

So where does this leave us? How shall we proceed? Several things are clear. The effort to enact a federal criminal code must continue to be rooted in the Model Penal Code and the National Commission's draft. It must build upon the lengthy efforts of the House and Senate Judiciary Committees. It must proceed with a genuinely bipartisan commitment to see it through to conclusion, and must avoid the handful of legal issues that provoke emotional debate. More than anything else, it must have as its intended beneficiary the whole of the American people.

During my conversations with my counterparts around the world this past year, it is clear that penal code reform is becoming a prominent agenda item in many countries. Last week the French Justice Ministry presented a proposal for a complete re-writing of Napoleon's penal code of 1810. My meeting in Madrid last week with the Spanish Justice Minister was devoted in large part to a discussion of their interest in a similar project. And several of the common-law nations -- including England and Wales, Australia, New Zealand and Canada -- are now reviewing proposals for complete codification of their criminal law. Finally, just yesterday, we initiated discussions as well with representatives of the Soviet Union with regard to the dramatic changes occurring in their legal and judicial systems as well.

We hope that the time soon arrives when the federal code reform effort can resume with a reasonably high prospect of success in the United States. When it does, the Administration, the House of Representatives, and the Senate will be working together as partners, but we will need a considerable amount of help. We will, in particular, need the continued counsel of the members of this Institute, which stands as the intellectual leader among institutions concerned with law reform.

Some observers may question the value of such a seemingly abstract enterprise as simplification of the criminal law at a time when specific problems of crime are competing for congressional attention. The membership of this Institute, though, can assist in ensuring that the longer perspective is not lost. Such a perspective is important. I can do no better than to quote from Professor Wechsler when he observed:

> Whatever view one holds about the penal law, no one will question its importance in society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy.
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> If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works gross injustice on those caught within its coils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community, for the individual.

This is what is at stake. This is the unfinished business. We must make it our unfinished business...and then finish what Representative Livingston started in 1828.