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Theory and Reform of Criminal Law

By Jerome Hall

Theory

Theory and practice are interdependent. Far from being merely academic, the theory of any field comprises the most important part of the knowledge of that subject and, consequently, guides the practice of the relevant discipline or profession. Similarly, theory is illuminated and often modified when it is tested in practice. Thus, the theorist and the practitioner go hand-in-hand; both are essential participants in a common enterprise.

In this Article the subject of theory and practice is American criminal law, an application and modification of English common law that goes back in an unbroken line to the thirteenth century. The reports of the Anglo-American criminal law cases, whose rich significance is unique among legal systems, are the most valuable repository of the moral and legal experience of the English-speaking peoples. If we add to that the fact that sound criminal law is an essential factor in the survival and well-being of society, that, more than any other branch of the law, it has dramatic interest for the entire community and that the values it protects also concern every thoughtful lawyer, it is plain that the advance of our knowledge of criminal law is a matter of paramount importance.

There are many kinds of knowledge, ranging from the individualized knowledge of the artist, the historian, and the expert, and the

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intuitive know-how of an experienced trial lawyer to the organized
general knowledge of physics and mathematics. There is also inter-
disciplinary knowledge, and because law is a cultural datum or arti-
fact and because, as Savigny put it, “its essence is the life of man itself,” law can be elucidated and illuminated by drawing on many
relevant disciplines. A study of the law of theft, for example, made
use of economic history, especially that of the Industrial Revolution,
the sociological theory of the “case history” and methods of empirical
research, statistics, and the philosophy of science. So, too, in adv-
cancing knowledge of the law on mental illness and criminal respon-
sibility, one turns to psychiatry, fully cognizant that some psychiatric
theories, for example, determinism, conflict with the moral postulates
of criminal law and must be critically examined and sometimes re-
jected or at least interpreted in ways that are consistent with those
postulates which, in turn, may be reassessed. In this country, prob-
ably more than in any other, interest in interdisciplinary study ac-
companied a vast expansion of the social sciences, not all of which
is helpful either to the practitioner or the legal scholar.

A different direction is taken in this Article. Borrowing from
science and the logic of codification, this Article will focus first on the
organization or systematization of the criminal law. Such analysis
is far from being a mere exercise in logic; on the contrary, just as the
systematization of the laws of physics illuminates every one of those
laws, so, too, the significant organization of the numerous propositions
of criminal law adds greatly to our knowledge of that law. Because
the substantive criminal law is expressed in the general terms of
statutes and decisions, it is general knowledge that is of primary rele-
vance, and such knowledge has reached its greatest development in
physics and mathematics. What is distinctive in these sciences is the
high degree of organization of their generalizations; in a strict sense
they are systematic bodies of knowledge.

1. F. Von Savigny, Of the Vocation of Our Age for Legislation and Juris-
2. J. Hall, Theft, Law and Society (2d ed. 1952). See also Blakey & Gold-
smith, Criminal Redistribution of Stolen Property: The Need for Law Reform, 74
3. Hall, Science, Common Sense and Criminal Law Reform, 49 Iowa L. Rev. 1044
(1964).
4. “Science searches for relations . . . its coherent systems.” Einstein, quoted in
Readings in the Philosophy of Science 779 (H. Feigl & M. Brodbeck, eds. 1953).
Building on the suggestiveness of scientific knowledge and seeking a similar goal, I first distinguish three types of generalization that comprise the substantive criminal law, namely, "rules," "doctrines," and "principles," terms that represent progressively wider concepts. "Rules" state what is distinctive in each crime, for example, the material elements of larceny and robbery, including the particular mens rea of each crime without reference to justification or excuse. These normal definitions as regards mens rea are qualified by more general propositions usually called "defenses," such as those concerning infancy, insanity, ignorance or mistake, coercion, self-defense, and necessity, propositions that I have called "doctrines." In addition to the above doctrines of excuse and justification, there are doctrines concerning complicity, solicitation, conspiracy and attempt, that is, relational doctrines. When all the doctrines are applied to all the rules, a minimal statement of the criminal law of any country is expressed. But in advanced legal systems there is an additional feature that must be recognized; indeed, by reference to a science of criminal law, this feature is the most important of all. Thus, if one envisions the union of all the rules and all the doctrines and tries to discover the basic ideas which permeate that combined set of propositions, one may derive the ultimate categories, the principles, of criminal law, namely, legality, mens rea, effort (or "act"), the fusion of mens rea with effort (or act) to comprise conduct, harm, the causal relation between conduct and harm, and the punitive nature of the sanction. In sum, we have thus far distinguished three kinds of propositions comprising the substantive criminal law and have noted some of their interrelations, viz., that the rules are limited by the doctrines and that the principles are implicit in that combination of rules and doctrines.

Let us take a closer look at some of the above interrelations. For example, the principle of mens rea is derived from all the relevant doctrines, such as insanity and mistake, and also from the significance of the "normal" mentes reae described in the rules. The defendant frequently does not plead an excuse or justification; he simply denies that he did what is charged in the indictment. If he is found guilty, his mens rea is the "normal" one expressed in the rules minus the doctrines, that is, he was a sane adult, knew the facts, and was not acting in self defense, for example, and, therefore, was neither justified nor excused. And if we ask, as we should, why was he not justified or excused, we can state the answer in terms of the ultimate principles of the criminal law without implying that justification and excuse are wholly absorbed in those principles. It should be added that, al-
though the principles are "ultimate" in the above indicated sense, they must be distinguished from the simple unity characteristic of physical concepts. For example, mens rea is a fusion of cognition and volition, and the fact that mens rea adds meaning to the other principles implies that they, too, are not simple concepts. Thus, the principle of causation, linking conduct to harm, is qualified by the meaning of mens rea; if mens rea is limited to intentionality and recklessness, that is, to mental states expressed in voluntary conduct, that limitation restricts the meaning of causation to end-seeking or authorship in contrast with the meaning of causation as the co-variation of facts; for example, increase in volume varies with increase in temperature. Again, mens rea qualifies "harm," it is not simply a death or loss of possession that is a harm in penal law but a death or loss of possession caused voluntarily (mens rea) by, for example, a sane, sober adult without justification or excuse. So too, harm must be related to "mens rea" to define the latter concept; for example, it is intentionally or recklessly committing a proscribed harm, not mens rea in isolation, that determines the meaning of "mens rea." Likewise, harm as a bridge between voluntary misconduct and punishment gives "punishment" a congruent meaning. Finally, the principle of legality serves as the formal vehicle to place definite bounds on all concepts and propositions of penal law. I trust that the above brief discussion of a large subject will suffice to indicate the contextual significance of interrelated criminal law propositions and the desirability of organizing that corpus juris.

The organization of the criminal law rests on logical grounds. But if the rules and doctrines are not substantively sound, the principles drawn from them and, indeed, the entire resulting structure, though logically valid, might be vulnerable to the severest criticism; the harshest dictatorship might have a system of "criminal law." Penal statutes may be unsound inter alia because they conflict with basic values or because they concern trivial affairs or problems best left to other agencies. In this Article, I shall restrict inquiry to the ethics of criminal law, indeed, to the principal moral postulate on which the common law of crimes rests, namely, that only voluntary conduct that inflicts a harm definitely proscribed by criminal law is a crime. This postulate does not imply that the criminal law is or should be based only on retributive justice because it is apparent that the above moral postulate is also consistent with a utilitarian perspective that regards criminal action as the consequence of weighing the advantage of a contemplated crime against the disadvantage
of the potential punishment. The above moral postulate is recommended by the fact of its survival for thousands of years, extending, as it does, from Aristotle to the present time. That postulate means simply that one is to be praised or blamed for what he voluntarily does or omits doing. By reference to that basic postulate stem the defenses, the doctrines that take their meaning in terms of either excuse or justification. But perhaps most persuasive is the fact that the above moral postulate is exemplified in the case law on the felonies and major misdemeanors. Its adoption as the central moral postulate of the criminal law is not the imposition on that law of an external standard plucked from moral philosophy; it is, on the contrary, implicit in the common law of those crimes.

This restriction of criminal law to voluntary wrongdoing raises questions about inadvertent negligence and strict liability. As to the latter, it will suffice to note that it is universally recognized that those offenses are not really crimes; the exclusion of mens rea has suggested that they be designated “public torts,” “quasi-crimes,” “regulatory offenses,” “infractions,” or “violations” and, also, that they be located in statutes outside the criminal code.

With regard to negligence, the late Professor Turner of Cambridge University wrote, “[I]t should now be recognized that at common law there is no criminal liability for harm thus caused by inadvertence . . . .” But legislation has altered that firm and sustained judicial adherence to the basic moral postulate of penal law, and we now have such statutes as California Penal Code section 192(3b) on vehicle manslaughter, and in some states, statutory manslaughter other than by vehicle also requires only proof of negligence.

The soundness of such legislation has been widely debated in many countries, and opposed positions have been taken by able scholars both in this country and abroad. The positions reflect differences in moral philosophy or concern for practical expediency, for example, a belief that something must be done to negligent drivers and that, in the absence of other better controls, the punitive sanction should be employed. This Article is not the place to amplify or even to

summarize that wide-ranging polemic. What must be stated here is that if we are to organize our knowledge of criminal law, it is necessary to omit negligence from the relevant field. The reason for that is simply that any valid descriptive generalization, including the factual implications of the various propositions of criminal law, subsumes a unified field of data. Negligence is the contrary of intentional or reckless misconduct which is characterized by awareness or advertence. The inclusion of both awareness and inadvertence in "mens rea" makes that term a confused or merely formal concept. Moreover, the related concepts of causation, harm, and punishment are also confused when "mens rea" includes such disparate states of mind. Obviously, so long as negligence continues to be proscribed, practicing lawyers must accept that fact. But their treatment of negligent conduct depends on their knowledge of the law concerning voluntary misconduct because the one is the contrary of the other. In sum, regardless of one's view of the desirability of penalizing negligent behavior, the organization of the knowledge of penal law, that is, of propositions that are valid only if limited to the same kind of data, has logical demands that are inexorable.

The organization of the criminal law, expressing its contextual significance, and its foundation in a basic moral principle provide the general outline of the policy that should guide reform. When we study specific problems, this perspective may recede or even be forgotten in our concentration on technical or linguistic issues; but a logic that is the tool of a sound policy will eventually compel the test of consistency.

Reform

The objectives of reform are (a) to preserve what is sound in the criminal code and jurisprudence, (b) to improve that law, and (c) to organize the statutes along lines previously discussed, i.e., a General Part consisting of (a) Principles and (b) Doctrines, and a part on Specific Crimes. Obviously, when the objectives are stated so broadly, there is, correspondingly, a very large array of problems that must be dealt with in improving the criminal law of any state.9

8. See Hall, Negligent Behavior Should be Excluded From Penal Liability, 63 Colum. L. Rev. 632 (1963), which includes references to writers having opposed views on this subject.

But instead of a wide survey of the field, it will be more helpful to limit the discussion to a few problems in California criminal law that are also typical of the problems met in many other states.

Resolving Ambiguities

A number of principles in California criminal law require refinement and clarification. One is the degree of necessary force which may be used to protect persons or property. California criminal law, usually in the forefront, lagged behind other states in limiting the degree of force a police officer can justifiably use in arrest for commission of a felony. Only recently did California law limit the use of deadly force to violent felonies or cases in which the fleeing felon possesses a lethal weapon;¹⁰ in effect, nonviolent felonies are now classed with misdemeanors for that purpose. What calls for clarification in the California law are questions raised by People v. Ceballos.¹¹ In that case the defendant’s conviction for assault with a deadly weapon for use of a trap gun was affirmed notwithstanding decisions to the effect that the shooting might have been justified had he been present at the time of the illegal entry of his home.

Also requiring clarification is the liability of one who goes to the rescue of a person who he mistakenly but reasonably believes is the victim of an attack but who actually is attacking a police officer. The alter ego rule adopted by the New York Court of Appeals in People v. Young¹² has not helped to clarify this problem; because notwithstanding the fact that the charge in Young was for a third degree assault which under New York law required no mens rea or at least not the usual mens rea of common law assault, that decision has been variously interpreted. The dissenting opinion in that case would make reasonable mistake a defense,¹³ and by reference to the policy discussed above the only pertinent issue is whether an unreasonable mistake should also be a defense. In any case, although recent decisions are suggestive of a trend, the ambiguity of Ceballos, though not

¹¹. 12 Cal. 3d 470, 526 P.2d 241, 116 Cal. Rptr. 233 (1974). The facts in this case, involving a trap gun, raise questions about statements in the opinion regarding the right of an occupant confronted by a burglar in his house at night.
¹³. Id. at 276-79, 183 N.E.2d at 320-22, 229 N.Y.S.2d at 3-6 (Froessell & Van Voors, J.J., dissenting).
directly relevant to the defense of a third person, as well as the paucity of California law on the latter situation, call for clarification of this segment of the law.\textsuperscript{14}

A similar question must be raised about battery in California law. It is clear that assault in California (stated in common law terms of "attempted battery") must be intentional and that "intentionality" is not a synonym or the equivalent of "recklessness." It seems equally clear in this common law view that every battery includes an assault; but does it imply that it does not also include a reckless battery? Some states recognize reckless assaults and reckless batteries and still others, intentional assaults and reckless batteries. \textit{People v. Lathus}\textsuperscript{15} casts doubt on the question of reckless battery in California. The judgment reached there raises doubts because the court identified very reckless conduct with intentional conduct, implying at the same time that it regarded intention as the requisite \textit{mens rea} in battery. But the fact that battery includes the common law assault does not imply that it is limited to intentional contact; just as assault in some states includes both common law assault and intentionally frightening someone, so, too, it is possible to extend battery to include contact that was not intentional. The term used in California Penal Code section 242\textsuperscript{16} is "willful," which would include recklessness, but the recent trend is to restrict battery to intentionally caused contacts.\textsuperscript{17} On the other hand, such grossly reckless conduct as that in \textit{Lathus} calls for appropriate penalization which does not strain current law. The ambiguities in this area of California law should be resolved.

A third area of uncertainty concerns "coercion." Until very recently, California law adhered closely to the common law requirements that the threat must be of death or great injury, that it must be imminent, that there be no way of escape from that perilous situation

\begin{footnotes}
\item 15. 35 Cal. App. 3d 466, 471, 110 Cal. Rptr. 921, 924 (1973). This is not resolved in Cal. S.B. 565 § 7302 (1975). In \textit{Lathus}, the court said: "Reckless conduct alone does not constitute a sufficient basis for assault or for battery even if the assault results in an injury to another." 35 Cal. App. 3d at 469, 110 Cal. Rptr. at 923. Then it added: "However, when an act inherently dangerous to others is committed with a conscious disregard of human life and safety, the act transcends recklessness, and the intent to commit the battery is presumed." \textit{Id.} at 470, 110 Cal. Rptr. at 924. \textit{See also} Regina \textit{v. Belfon}, [1976] 3 All E.R. 46, 53.
\item 17. \textit{See} W. LA FAVE & A. SCOTT, \textit{CRIMINAL LAW} 605 n.15 (1972).
\end{footnotes}
and, finally, as to murder, that coercion can never be a defense. 18 People v. Lovercamp 19 departed from the common law and followed decisions in other states expanding coercion in cases of escape from prison for fear of homosexual attack. 20 More suggestive still is the decision of the English Court of Appeal in Regina v. Hudson and Regina v. Taylor 21 where two women, threatened with severe beatings by gangsters, committed perjury as witnesses in a prosecution against members of the gang. Their conviction for perjury was reversed and "coercion" was recognized as a defense notwithstanding the fact that the defendants lied in a courtroom, where they were not under threat of immediate serious injury, and notwithstanding the fact that they could have asked for police protection. The court of appeal took a realistic view of the pressure on these defendants at the time they testified and of the protection the police could actually provide outside the courtroom.

General Intent and Specific Intent

Among problems of a different order is that raised by the terms "general intent" and "specific intent," which have their origin in decisions on charges of murder by grossly intoxicated defendants. In seeking to mitigate the rigor of the law without at the same time approving voluntary intoxication, the judges said they would simply recognize the actual state of the defendant's mind and if that excluded a necessary mens rea, the judgment would have to take account of that. Apparently, the simplest way to reach this result was to say that in crimes that required a specific intent intoxication could be used to exclude that mens rea. This cautious statement made it possible in the then accepted view to hold intoxicated offenders guilty of lesser included crimes that did not require a specific intent, such as manslaughter or assault.

The consequent problem arose from the fact that "specific intent" naturally suggested "general intent." Much confusion followed the use of "general intent" and "specific intent" because it was assumed that the former, no less than the latter, was a descriptive term; hence, in assault with a deadly weapon, manslaughter, and rape, for example, one searches for an elusive general intent.22

The fact is that every intention is specific in that it embodies an intention to focus on one or more definite objectives. Although in a loose sense one may say, for example, that he intends to do everything possible to advance humanity or his own career (which is better stated in terms of planning or having an ideal or ambition), both clarity and precision require that, when one says that he intends to do x, the x refer to something definite. If then, at least within the limits of penal discourse, "general intent" does not describe any actual state of mind, it must be viewed as a technical term, like "continuing trespass," employed to serve a purpose, such as holding defendants criminally liable for some crimes notwithstanding the fact that they were so intoxicated as to escape liability for a more serious crime.

That purpose can be served if, instead of "general" and "specific," the terms "simple" and "complex" are used to designate, respectively, the mens rea of such crimes as assault and burglary. Alternatively, that purpose can be met by omitting both adjectives and saying simply that the mens rea required in a particular crime was not proved to exist because part of it or all of it was not proved to exist. This

22. In People v. Hood, 1 Cal. 3d 444, 458, 462 P.2d 370, 377, 82 Cal. Rptr. 618, 626 (1969), Chief Justice Traynor called the difference "chimerical." Similar doubts were expressed in Director of Public Prosecutions v. Morgan, [1975] A.C. 182. California cases hold that rape does not require specific intent. People v. Franklin, 56 Cal. App. 3d 18, 128 Cal. Rptr. 94 (1976); People v. Butcher, 174 Cal. App. 2d 722, 345 P.2d 127 (1959). But in a felony-murder context it was held that evidence of diminished capacity could negate "specific intent" where the underlying felony is rape. People v. Mosher, 1 Cal. 3d 379, 461 P.2d 659, 82 Cal. Rptr. 379 (1969). In People v. Nance, 25 Cal. App. 3d 925, 102 Cal. Rptr. 266 (1972), a diminished capacity instruction was disallowed in the case of arson, which the court termed a "general intent" crime, but was allowed as to burglary. Of course, burning one's own house is very rare, but so, too, is breaking into one's own house. Yet both situations can occur; this raises a question regarding the above alleged difference in the mens rea in arson and burglary. In People v. Lerma, 66 Mich. App. 566, 569, 239 N.W.2d 422, 425 (1976), although the court seemed to agree that "specific intent cannot be meaningfully distinguished from a general intent," it nonetheless proceeded to distinguish them in terms that compound the difficulty. Cf. People v. Rocha, 3 Cal. 3d 893, 479 P.2d 372, 92 Cal. Rptr. 172 (1971) (assault with a deadly weapon held to be a general intent crime). On "general intent," see State v. Farris, 218 Kan. 136, 542 P.2d 725 (1975); on "specific intent," see Steubgen v. State, 548 P.2d 870, 875-76 (Wyo. 1976).
approach would avoid clouding analysis with speculation about an imagined "general intention" and with attempts to differentiate that intent from the superfluously characterized specific intent; in addition, it would bring into focus the necessary reliance on fact to establish any required mens rea, whether simple or complex.

There are other more challenging problems regarding the mens rea and the criminal liability of grossly intoxicated offenders. In England, for example, legal scholars have pressed for complete exculpation from liability even for assault; and it must be granted that the current rationale of liability of grossly intoxicated offenders does not fare well under sustained analysis. For example, in homicides by grossly intoxicated offenders, the current rationale posits liability for second degree murder or manslaughter on voluntary intoxication; that reasoning may have been persuasive in the nineteenth century, but now it raises difficult problems.

Diminished Capacity

From its beginnings in People v. Wells and People v. Gorshen to People v. Wolff and People v. Conley, and up to the present time, California courts have been sensitive to pleas of diminished capacity. The subject merits thorough study and detailed analysis, but it is possible here to discuss only some aspects of Conley, where the issue was the validity of a conviction for first degree murder. The origin of diminished capacity both in England and in this country was in decisions rendered in homicide cases where the courts recognized gross intoxication as mitigating or exculpatory. In California, where there are degrees of murder, diminished capacity includes not only intoxication but also "trauma, disease, or defect" and lowers liability to voluntary manslaughter or, in extreme intoxication, to involuntary manslaughter.

27. 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964).
29. People v. Ray, 14 Cal. 3d 20, 533 P.2d 1017, 120 Cal. Rptr. 377 (1975). There are decisions or dicta to the effect that diminished capacity is a defense to other crimes, e.g., aggravated assault, People v. Wells, 33 Cal. 2d 330, 202 P.2d 53 (1949); issuing
In order to appreciate the strategy of Conley we must place the California Supreme Court's reversal of the lower court's opinion in the context of the guiding lines and limitations within which that judgment had to be reached. One relevant factor to be overcome was that in other states gross intoxication in homicide cases was held to exclude only premeditation, leaving those offenders guilty of murder in the second degree. That solution, probably influenced by an inherited bias against voluntary intoxication, hardly comports with the inebriate's actual mental condition; nor does it provide a persuasive reason for the imposed liability because murder in the second degree requires at least a very reckless killing.

The other guiding factor was that malice is a material element of both degrees of murder in California. In Conley, therefore, it was necessary not only to eliminate malice if the homicide was to be reduced to manslaughter but, also, to recognize the corollary, that malice must not be treated as synonymous with premeditated intent. For if the two concepts were synonymous, the elimination of premeditation would not have reduced liability to manslaughter which, in the California court's perception of the nature of diminished capacity, was the required judgment.

"Malice," abandoned in the Model Penal Code and in states that have been influenced by it, including New York,\(^3\) is a troublesome term. In the first place, "malice" cannot mean malice in the dictionary sense because that usage would exclude well-motivated homicides, such as some cases of euthanasia. But, second, because "malice" is part of the law of murder in California, it had to be given a meaning that connotes culpability, but at the same time avoids the dictionary meaning. How can that result be achieved?

The classical definition of "malice" — an intentional killing without justification or excuse and not reducible to manslaughter — is

more methodological than descriptive of a state of mind; most of it tells us only where malice is to be found. The issue in diminished capacity obviously concerns *mens rea*; accordingly, moving within the above guidelines, *Conley* held that "the court or a jury could conclude that the defendant killed intentionally, with premeditation and deliberation, but did not do so with malice aforethought."\(^{31}\) Having taken that important step but still saddled with the need to give "malice" a defensible meaning, Chief Justice Traynor said:

> An intentional act that is highly dangerous to human life, done in disregard of the actor's awareness that society requires him to conform his conduct to the law is done with malice regardless of the fact that the actor acts without ill will toward his victim or believes that his conduct is justified.\(^{32}\)

And in his concluding remarks he added, "Although legally sane according to the M'Naghten test, such a defendant could not be convicted of murder if mental illness prevented his acting with malice aforethought."\(^{33}\) In sum, an offender suffering from diminished capacity is not "capable . . . of comprehending the duty society places on all persons to act within the law,"\(^{34}\) but he does have the capacity to understand or appreciate the nature of his act and that it is wrong.

The need for further elucidation is evident especially in California because the evidence admitted in the first stage of trial, where diminished capacity is in issue, must be distinguished from the evidence admissible in the second stage, where insanity is the only issue. That the above formula was intended to apply only to diminished capacity, which was in issue in *Conley*, and cannot be an implication of *M'Naghten*\(^{35}\) is shown by the fact that in *Conley* the exclusion of malice ends in liability for manslaughter while in insanity cases the state of mind described in *M'Naghten* leads to complete exculpation. The logic of this differentiation implies that in diminished capacity there is sufficient *mens rea* for liability for manslaughter while in insanity not only malice but, also, other relevant mental conditions are absent. It should be recalled that in *Conley*, because the appeal was from a conviction for murder in the first degree, it was sufficient for reversal to exclude malice; it was not necessary to compare the above

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31. 64 Cal. 2d at 323, 411 P.2d at 919, 49 Cal. Rptr. at 823.
32. Id. at 322, 411 P.2d at 918, 49 Cal. Rptr. at 822.
33. Id. at 323, 411 P.2d at 919, 49 Cal. Rptr. at 823.
34. Id. at 322, 411 P.2d at 918, 49 Cal. Rptr. at 822.
35. 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843).
formula regarding diminished capacity with California's liberalized M'Naghten test.

If malice were omitted from a future statutory definition of murder, a court dealing with diminished capacity would presumably instruct a jury in terms of the difference in the degree of incapacity between insanity and diminished capacity.\(^3\) But how significant would that be regarding "disease," "defect," and "trauma;" does the last include the traumatic experience of one who learns of his wife's infidelity and in a highly emotional state kills after "cooling time" has expired?\(^3\) Is "disease" different from "defect," and are they limited to physical or physiological abnormalities, or do they open the door to a search for any deviation from normal competence short of psychosis?

In some cases it is possible to recognize persons of diminished capacity and to distinguish them from psychotics. There are, for example, the cases of Nevares,\(^3\) who had suffered a serious head injury and filed a plea of insanity, and Fisher,\(^3\) a dull-witted alcoholic who could only do janitorial chores and that in a minimal way. It seems probable that neither Nevares nor Fisher had suffered so great a breach from reality or loss of intelligence as not to be able to understand what he was doing and that it was wrong. But the need to distinguish persons of diminished capacity from normal persons reveals the complexity of the issue. Although "psychosis" itself is a vague term, the popular view of it, supported by psychiatric evidence of a sharp breach with reality, renders defensible, though certainly debatable, the conclusion that valid judgments can be made regarding that part of the continuum, on the assumption that the recognized tests of insanity are a definite anchor at one end of the scale. But when we scrutinize the other end of the continuum and the need to

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36. The problem of mental illness, intoxication and other addiction is a large and difficult one. In California, a thorough inquiry would take account of all relevant laws. e.g., the liberalized M'Naghten rule, the extant law on diminished capacity, the result of decisions favorable to the defense in both situations, especially the question of compulsory commitment, the burden of proof, and other pertinent laws.


distinguish persons of diminished capacity from "normal" ones, questions arise that cast doubt on "diminished capacity."

Until that concept is elucidated much more thoroughly than the present decisions allow, unless, perhaps, definite physical or physiological symptoms, as in gross intoxication, are required, "diminished capacity" sails on an ocean that is as turbulent as it is uncharted.

The most that we can say now, limited by our present lack of study and authoritative clues, is that it may be possible to recognize specific instances of abnormality and to realize that they are manifested in a continuum; but it is quite another task to formulate the differences of degree in ways that help the triers of the facts to reach sound decisions. Perhaps we shall eventually conclude that it is preferable to follow the example of foreign codes that treat diminished capacity as meriting mitigation of punishment, not as a defense.

**Felony-Murder**

That the California law on felony-murder is very much in need of reform can hardly be doubted. That ancient rule has been abolished in England, and judicial restrictions of it in many states support the negative attitude towards a rule that is so plainly at odds with the principle of *mens rea*. This is evident in California where even an accidental killing in the commission of one of six specified felonies is murder in the first degree, while in other states the killing must be very reckless, indicating the minimally desirable change in

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40. In England diminished responsibility is limited to reduction of murder to manslaughter "if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility . . . ." Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, § 2. In Regina v. Byrne [1960] 2 Q.B. 396, 403, Lord Chief Justice Parker said: "'Abnormality of mind' . . . means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal." Lady Wootton found cases, e.g., of euthanasia, where a plea of diminished responsibility was successful despite the absence of any evidence of mental abnormality. B. Wootton, *Crime and the Criminal Law* 72-73 (1963).

41. Foreign codes typically treat diminished capacity as a means to mitigate punishment, not as a defense that may reduce the charge. See, e.g., *German Penal Code* § 51(2) (1871); *Swiss Federal Penal Code* Art. 11 (1937); *Korean Penal Code* Art. 10, § 2 (1953). See also Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 *Colum. L. Rev.* 827 (1977).

42. Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, § 1.
the current California law.\textsuperscript{43} The needed reform was implied in Justice Traynor's concurring opinion in \textit{People v. Thomas},\textsuperscript{44} where he said that California Penal Code section 189\textsuperscript{45} does not make any "killing" in the course of one of the proscribed felonies murder in the first degree but is in terms of "murder" in the course of one of those felonies. Notwithstanding that pointed observation, California judges have not limited the felony-murder rule in that way; indeed, the clearest part of the California law on this entire subject is that even a purely accidental killing suffices for murder in the first degree.

It is necessary to keep in mind that this rigorous rule is applicable to the usual situation where the felon directly does the killing if we are to understand the more complicated decisions in cases where a policeman or the intended victim kills; in the California cases discussed below one of the felons was killed by a third party and the surviving felon was charged with murder in the first degree for that death.

We shall limit this discussion to the four principal decisions, the first of which is \textit{People v. Washington},\textsuperscript{46} where the defendant's accomplice was killed by the intended victim of a robbery. Conviction of first degree murder was reversed, and the plain import of \textit{Washington} is shown not only by the language of Chief Justice Traynor's opinion — "Section 189 requires that the felon or his accomplice commit the killing, for if he does not, the killing is not committed to perpetrate the felony"\textsuperscript{47} — but also by the fact that \textit{Washington} was decided after the Pennsylvania Supreme Court had reversed earlier convictions based on "proximate causation"\textsuperscript{48} and also after the New York Court of Appeals limited its felony-murder rule to killings directly committed by the felon or his accomplice.\textsuperscript{49}

One year after \textit{Washington} came \textit{People v. Gilbert}\textsuperscript{50} and with it the regrettable complexity of felony-murder law in California. One may surmise that \textit{Gilbert} represented a reconsideration of the problem

\begin{itemize}
  \item \textsuperscript{43} We are not discussing the case of the robber or rapist who, after committing the felony, deliberately kills his helpless victim. We are concerned here only with killings that occur in furtherance of or in flight from the proscribed felony.
  \item \textsuperscript{44} 41 Cal. 2d 470, 477, 261 P.2d 1, 4 (1953).
  \item \textsuperscript{45} \textsc{Cal. Penal Code} § 189 (West 1970).
  \item \textsuperscript{46} 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).
  \item \textsuperscript{47} \textit{id.} at 781, 402 P.2d at 133, 44 Cal. Rptr. at 445.
  \item \textsuperscript{48} Commonwealth v. Root, 403 Pa. 571, 170 A.2d 310 (1961).
  \item \textsuperscript{49} \textit{People v. Wood}, 8 N.Y.2d 48, 167 N.E.2d 736, 201 N.Y.S.2d 328 (1960).
  \item \textsuperscript{50} 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1965).
\end{itemize}
and a backing away from the limitation on felony-murder laid down in Washington. *Gilbert* involved three robbers, one of whom, fleeing, shot and killed a policeman, while another police officer shot and killed one of the other felons. The two surviving felons were found guilty of murder in the first degree for the death of their accomplice. That conviction was reversed on the ground that the trial court had instructed in terms of "proximate cause" — the rationale rejected in Pennsylvania in a detailed analysis of the difference between "causation" in tort and in criminal law. But, although it reversed the conviction, *Gilbert* laid down a new rule, namely, that where a felon initiates a gun battle and a police officer or an intended victim responds in like manner, killing someone, the felon is guilty of murder in the first degree. This was based on a single statement in Washington: "Defendants who initiate gun battles may also be found guilty of murder if their victims resist and kill." After writing that statement, Chief Justice Traynor returned to the central ratio of Washington, namely, "the act of killing must be committed by the defendant or by his accomplice acting in furtherance of their common design." *Gilbert* was plainly a leap from the proposition that a felon who initiates a gun battle is guilty of "murder" to the conclusion that Penal Code section 189 must be applied to make it murder in the first degree.

That may have been dicta in *Gilbert*, but it was made law in *Taylor v. Superior Court*, which, again, involved three felons, this time attempting robbery in a liquor store. Two of them entered the store, one of them, Daniels, making threats. The intended victim's wife shot and killed Smith, the other felon in the store; and Taylor, who was outside in the get-away car, was convicted (4-3) of first degree felony-murder of Smith — again in reliance on the statement in Washington regarding initiation of a gun battle. We need not be concerned here with the sequence, where Daniels was separately tried and acquitted, and Taylor's conviction was set aside on the ground of "collateral estoppel." But it should be noted that *Taylor* first repeated the above *Washington* statement and did not until three pages into the opinion state that such a felon is guilty of "first degree

51. 62 Cal. 2d at 782, 402 P.2d at 134, 44 Cal. Rptr. at 446.
52. *Id.* at 783, 402 P.2d at 134, 44 Cal. Rptr. at 446.
53. 3 Cal. 3d 578, 477 P.2d 131, 91 Cal. Rptr. 275 (1970).
murder."\textsuperscript{55} "Murder" in California does not designate any crime but is a classificatory term; one is charged not with "murder" but with "murder 1" or "murder 2." It would have been helpful had it been said that, quite apart from felony-murder, one who initiates a gun battle and so on is guilty of murder in the second degree. This not only would have clarified the relevant law on that phase of the situation but also would have made it clear that, when second degree murder is otherwise established, in contrast to cases where the felon directly kills, there is then reliance on felony-murder to reach murder in the first degree.

Much of this has been altered by \textit{People v. Antick}.\textsuperscript{56} Antick and Bose had committed a burglary, and later that same night police officers discovered a parked automobile that had previously aroused their suspicion because it contained furniture and a stereo. Bose, seated in the parked car and ordered out of it, fired at the officer and ran away. Failing to stop when ordered to do so, he was shot and killed by the officer. A few days later Antick was arrested and he was convicted of first degree murder of Bose. Antick was not with Bose when the latter initiated the gun battle but was nearby, and it is not apparent why it was necessary to apply the law on felony-murder especially since the prosecutor on appeal conceded that the trial court's instruction on felony-murder was erroneous.\textsuperscript{57}

In any event, the opinion discussed the above decisions and reversed the conviction on two grounds: first, the felony-murder rule was not applicable because the killing was by a police officer and. second, vicarious liability was not applicable because Bose had not killed anyone; he himself was killed. He, therefore, committed no crime for which his accomplice Antick could be held liable. In this latter holding the court relied on \textit{People v. Ferlin},\textsuperscript{58} where an arsonist was burned to death while setting a fire, and the surviving accomplice, Ferlin, who was not present, was acquitted of that homicide. It is not likely that the conviction of felony-murder would have been upheld even if Ferlin had been present. But analogy has no logical limits, and for some there may be a persuasive similarity between being burned by a fire one starts and being shot by one who resists a hold-up. \textit{Ferlin} and \textit{Antick} may have reached a sound result simply on

\textsuperscript{55} 3 Cal. 3d at 583, 477 P.2d at 134, 91 Cal. Rptr. at 278 (emphasis added).
\textsuperscript{56} 15 Cal. 3d 79, 539 P.2d 43, 123 Cal. Rptr. 475 (1975).
\textsuperscript{57} \textit{Id.} at 90 n.11, 539 P.2d at 50, 123 Cal. Rptr. at 482.
\textsuperscript{58} 203 Cal. 587, 265 P. 230 (1928).
the ground that co-felons who voluntarily engage in a dangerous enterprise take the risk of that and that interpersonal legal duties do not apply among them during that hazardous venture. That, however, was not the direction taken in _Gilbert_ and _Taylor_.

Accordingly, the statement in _Antick_ that felony-murder was not applicable because the killing was not the direct act of a felon clouds the fact that in the _Gilbert-Taylor_ rationale, given murder in the second degree, felony-murder is applicable to raise liability to murder in the first degree; in that view, felony-murder is only held in abeyance and becomes operative if murder in the second degree was committed. With reference to the court's treatment of "vicarious liability" in _Antick_, it should be noted that the act in issue in all these cases was not solely the initiation of a gun battle; also in issue was the lethal act of the policeman or of the intended victim. The initiation caused the response and it was this response that killed; the causal question is resolved by imputing the killing to the felons who actually or in the legal view of complicity initiated the gun battle. As long ago as 1838 it was definitely recognized that "it is a principle of law, that if several persons act together in pursuance of a common intent, every act done in furtherance of such intent by each of them is, in law, done by all." Thus, vicarious liability is not disposed of simply by asking what crime did X commit for which his accomplice is vicariously liable? Vicarious liability makes every co-felon guilty of every act of his accomplices in furtherance of the felony. When Daniels shouted his threats, the legal effect was the same as though all three had initiated the gun battle. Following _Gilbert_ and _Taylor_, all are liable for the lethal response; the fact that one of the felons was killed does not alter the criminal liability of the surviving felons, each of whom in legal effect killed the dead felon.

Accordingly, although _Antick_ can be distinguished from _Gilbert_ and _Taylor_ (e.g., the relevant felony, burglary, had been completed and the felons were not in flight, _Antick_ at the time in issue was not

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Accordingly, it was said in _Taylor_: "Therefore, the trier of fact may find that Smith set into motion, through the intentional commission of acts constituting implied malice and in furtherance of the robbery, a gun battle resulting in his own death. Since petitioner may be held vicariously responsible for any killing legally attributable to his accomplice, he may be charged with Smith's death." _Taylor_ v. Superior Court, 3 Cal. 3d at 584, n.3, 447 P.2d at 135, 91 Cal. Rptr. at 279. For the corresponding rule in criminal conspiracy, see R. PERKINS, CRIMINAL LAW 632 (2d ed. 1969).
assisting Bose to commit a felony, hence Bose's initiation of the gun battle cannot be imputed to Antick) it is not easy to escape the impression that Antick is inconsistent with Gilbert and Taylor in a much wider sense than that implied in its expressed overruling of Taylor only as regards the instruction there on vicarious liability based on the dead felon's conduct.\(^6^0\) In addition to this departure from traditional vicarious liability, Antick made a problematic\(^6^1\) application of the estoppel to Taylor's subsequent conviction based on Daniels' prior acquittal; since Bose was dead and could not be convicted of any crime, estoppel\(^6^2\) was also held to bar the conviction of Antick.

These holdings in Antick and the fact that in no case subsequent to Gilbert has a final judgment affirmed that extension of the felony-murder rule lead almost inevitably to the conclusion that the supreme court, despite the Antick avowal of substantial conformity with Taylor,\(^6^3\) has in fact returned to the main thrust of Washington.

Indeed, in view of the widespread criticism of the felony-murder rule, a more extensive judicial reappraisal of the California decisions may be expected. As long as section 189 remains in the penal code it must be applied and enforced, but there is nothing in the code that requires a court to extend the felony-murder rule to killings by a police officer or an intended victim. On the contrary, the restriction of felony-murder to criminal homicides committed directly by a felon in furtherance of the felony is supported by Washington and the law of many states. There is nothing in the Code that requires a court to bring accidental killings by a felon within the statute. On the contrary, there is Justice Traynor's emphasis on "murder" not "killing" in Thomas, a position which is supported by the Model Penal Code's provision and the law of several states to the effect that the criminal homicide must be committed "recklessly under circumstances manifesting extreme indifference to the value of human life."\(^6^4\)

Finally, there is a third possible restriction that merits consideration because it is a plausible limitation on traditional vicarious liability, namely restriction of felony-murder to the principal, thus excluding an accessory who did not solicit or aid the killing, was not

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60. 15 Cal. 3d at 92 n.12, 539 P.2d at 51, 123 Cal. Rptr. at 483.
62. 15 Cal. 3d at 92, 539 P.2d at 51, 123 Cal. Rptr. at 483.
63. Id. at 91, 539 P.2d at 50, 123 Cal. Rptr. at 482. 
armed and did not know that any co-felon was armed. This narrowing of felony-murder is also supported by recent English decisions (not regarding felony-murder since that is no longer law in England) that, departing from the traditional rule that coercion is not a defense to murder, allowed that defense to accessories who had no direct part in the homicide.

As regards all three of the suggested modifications of the present California case law, it should be kept in mind that what is at issue is murder in the first degree, not escape from very severe penalties for the commission of other major felonies, and finally, of course, that the felony-murder rule, even when it is restricted in the above ways, contradicts a basic principle of criminal liability implying that punishment for murder in the first degree should reflect and be limited by the moral culpability expressed in the mens rea normally required for murder in the first degree.

The problems discussed above represent only a few of those that require study. Among others that are immediately suggested is the extant law of conspiracy, especially clarification of the liability of one who knowingly sells merchandise to conspirators but has no additional interest either in the conspiracy or its objectives. There is also the intriguing problem of criminal attempt, especially that raised by the New York law to the effect that "legal impossibility" is no longer a defense and by the decision of the House of Lords which explicitly approved People v. Jaffe and rejected People v. Rojas. Again, there is section 4 of the California Penal Code, which, if not a "dead letter," has been reduced by judicial decision to little more than a mere truism to refrain from deliberate circumvention of a clearly expressed legislative intent. Among other persistent problems

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65. This, in effect, is the law of New York. See N.Y. Penal Law § 125.25(3) (a)-(d) (McKinney 1975).
68. N.Y. Penal Law § 110.10 (McKinney 1975).
70. 185 N.Y. 497, 78 N.E. 169 (1906).
are those regarding error juris,\textsuperscript{74} "gross negligence,"\textsuperscript{75} strict liability,\textsuperscript{76} "transferred intent," and objective liability in homicide.\textsuperscript{77}

Practical Conclusions

Just as an overall policy and congruent guidelines are necessary to reform the substantive law so, too, the order and methods of reform need to be analyzed, weighed and reflected on; in other words, just as "due process" is often the best ground for thinking that the conclusions reached are sound, so too, with reference to the methods of reform. We are, I believe, in a strategic position to plan the reform of the criminal law because of our experience with the Model Penal Code and the present availability of later similar projects in many states and foreign countries, especially that of the English Criminal Law Reform Committee, the Law Reform Commission of Canada, and the studies in West Germany that led to the adoption there of a Penal Code in 1975.\textsuperscript{78}

Initial emphasis should be placed not on "codification" but on "improvement." In the first place, "code" is ambiguous. In this country it may mean simply that most penal statutes are placed alphabetically in a single volume or in the order in which they come from the legislature. But in Europe, Latin America, Japan, and other countries, a code is an organized relatively complete body of statutes based on a set of fundamental principles.

Secondly, although we have travelled far from nineteenth century Field-Carter debates on codification, the challenge to produce a penal code in the European sense of that term is understandably disturbing to many common law lawyers. The genius of the common law lies in the richness of its case law and the consequent precision of analysis; and California's criminal jurisprudence is an achievement that no one wishes to diminish. Almost instinctively, the common law lawyer is apprehensive that vague generalizations may be substituted for the specificity of the case law, and novel terms for established ones

\textsuperscript{74} See Arzt, Ignorance or Mistake of Law, and Hall, Comment on Error Juris, in Symposium: The New German Penal Code, 24 Am. J. Comp. L. 589, 646, 680 (1976) [hereinafter cited as Symposium].

\textsuperscript{75} Cal. Penal Code § 192(3)(a) (West 1970).


\textsuperscript{77} See Criminal Justice Act, 1967, c. 80, § 8 (Eng.).

\textsuperscript{78} See Symposium, supra note 74.
that have been elucidated in thoughtful decisions. Nevertheless, it should be possible to improve the criminal law without making such sacrifices.\textsuperscript{79}

There is another question regarding codification that raises doubts not only among lawyers but also among lay persons; this concerns major shifts in policy that may be recommended by the drafters in far-reaching departures from the current law. For example, there is considerable disagreement regarding penalties and that is most pronounced regarding nonviolent offenders, some arguing that they should not be imprisoned at all while others regard even the present treatment of white collar offenders as unfairly lenient in comparison with that imposed on the usually underprivileged offenders who fill the prisons.\textsuperscript{80} There are sharp differences of opinion regarding the so-called "victimless crimes," drug addiction, juvenile offenders, and other major issues. The inordinate delay that besets adoption of the proposed revision of the Federal Code was occasioned by vigorous opposition to a single provision. More unfortunate than the loss of time is the fact that this concentration of criticism has diverted attention from the need to study the bulk of the proposed draft which was very much influenced by the Model Penal Code.

The above problem was recognized from the outset of plans to reform the English criminal law. In a memorandum addressed to the Lord Chancellor, urging the appointment of a Criminal Law Reform Committee, the Society of Public Teachers of Law said: "Some proposals for reform raise such wide issues of social policy that they can be properly considered only by a body having broadly based membership, such as a Royal Commission."\textsuperscript{81} A royal commission would include representative members of Parliament and of the Bar and, probably, some very thoughtful lay persons. The adoption of some such plan would go far to alleviate apprehension about a new code.

\textsuperscript{79} For a discussion of those problems in Canada where these issues are familiar and insistent, see \textit{Law Reform Commission of Canada, Towards a Codification of Canadian Criminal Law} (1976).


\textsuperscript{81} Memorandum from the Society of Public Teachers of Law addressed to the Lord Chancellor setting out the case for the appointment of a Criminal Law Reform Committee, 4 J. Soc. Pub. T.L. 231 (1958).
It is only natural that committees in various states, assigned to draft a code within three or four years, should rely on the Model Penal Code for the most part and rest content with occasional departures from it. The Model Penal Code was an important advance in many ways, not least because in 1951, when work on it began, there were helpful treatises and many excellent articles available to the draftsmen. Nothing said here is intended to detract from that notable achievement. But there are important reasons for us to read it and statutory departures from it critically and compare them with the reports of the English Criminal Law Reform Committee, the reports of the Canadian Law Reform Commission, and the 1975 Code of West Germany, bearing in mind that it took more than ten years to produce the Model Penal Code and that many more years of thorough study went into the draft of the 1975 German Code.

This is hardly the place for a detailed analysis of the Model Penal Code or discussion of all the questions raised about it that have developed in the fifteen years since its publication; only a few of them can be briefly noted here. In the important field of theft, "asportation" was eliminated and "control" was employed. The reason seems to have been that the drafters believed that criminal attempts should be subjected to the same punishment as that imposed for the consummated crimes. In any event, what is certain is that a vague concept was substituted for a very definite common law term. To doubt the wisdom of that change, it is necessary only to note the dissenting opinion regarding "control" written by the distinguished Chief Judge Breitel of the New York Court of Appeals in which he insisted on the retention of "asportation."

In another important area, that concerning insanity, the Model Penal Code adopted two tests—a liberalized version of the M'Naghten rule and, as an independent alternative, an improved formulation of the "irresistible impulse" test. Many have been impressed by the adoption of the A.L.I. provision by almost all the federal courts and several states. But the federal courts, for very questionable reasons, had for many years adhered to the "irresistible impulse" test as well as to M'Naghten. The adoption of the Model Code's test was not therefore the adoption of a substantially new rule; it was only the

substitution of better phrasing of the traditional M'Naghten terms (especially "knew") and of "irresistible impulse" (to avoid the notion of quick, impulsive action). What is far more significant than this "adoption" by the federal courts and a number of states that simply followed the Code without a thorough study of what was involved is the fact that several states rejected the alternative test regarding "conformity," among them New York and Pennsylvania, and that other states, including California, have also retained a liberal version of M'Naghten, rejecting "irresistible impulse" and equivalent formulas.

Among other phases of the Model Penal Code that raise questions are the proposed rule of unilateral conspiracy, the dubious meaning of "gross negligence," the uncertain use of "purpose," and other proposed rules that have been criticized. Among its obvious achievements is the sustained effort to rid the law of a vast array of confusing, disparate penalties by constructing a relatively simple classification of felonies and misdemeanors; even that auspicious beginning has been criticized.

Important as are these and other issues, the most serious problem regarding penal codification in this country, no matter how competently executed, results from two shortcomings: first, the notion that adequate reform of the criminal law can be achieved by intensive intermittent efforts every 30 or 40 years; and second, the failure even in those sporadic efforts to report fully the relevant discussions and supporting data as well as the dissenting opinions so that a record is made that obviates the necessity of starting from scratch every time penal reform is in vogue. We have only to contrast these self-im-

84. N.Y. Penal Law § 30.05 (McKinney 1975).
87. "Purpose" was not used as a separate category of mens rea in the Canadian Law Reform Commission's Published Working Paper No. 31 (June 16, 1970). That term and "knowingly" raise problems because they are involved in "intention" and "reckless." This linguistic problem merits further study.
posed limitations with the way penal reform is carried on in other countries. In Germany, for example, reform of the criminal law is a continuously ongoing enterprise. A new penal code was adopted in 1975, the outcome of continuous efforts to improve the code of 1871 (itself the product of years of work) and later codes. These efforts were accompanied by detailed reports of the contributions of large numbers of specialists in penal law. Not only did this facilitate the evaluation of proposed changes, it also helped later efforts to reform the law. The implications are plain: improvement of the criminal law should be a permanent ongoing enterprise and detailed records should be kept.

A “working group” composed of a small number of representative specialists who can devote most of their time to such reform should report to a larger committee composed also of experts who are representative at least of all branches of the profession and are willing to take the time to study the working group’s research and recommendations. A rational sequence in the study of problems should be observed. For example, there are defects in the current Penal Code and case law that can rather easily be repaired; some of them have been discussed above and these obviously needed reforms can proceed apace. Nor is there any reason to delay the organization of the existing statutes into a rational system; that would be an important step in the direction of sound codification. Major legislative changes, such as those recently enacted in California regarding sentences, could be incorporated into these preliminary reforms. The subsequent allocations of major problems and the methods to be employed involve too many variables for helpful generalization. But “the limits of judicial creativity,” the relative freedom of legislators, and the resources available to scholars indicate guidelines for their collaboration. It is worth emphasis that they now have readily available what the drafters of the Model Penal Code did not have, namely, the Model

90. Notable peak years of reform were 1894, 1899, 1905-09, when, as a necessary preparation for sound reform, a sixteen volume treatise on comparative criminal law was published, 1911, 1913, 1919, 1922, 1925, 1927, 1930, 1952, 1954-59, 1962, 1966 when a detailed “alternative draft” was prepared by scholars dissatisfied with the official draft, 1971 and 1975. See Oehler, Introduction – The Revision of the Penal Code, in Symposium, supra note 62, at 592.


Penal Code, itself, as well as the departures from it, the reports of the English Criminal Law Reform Committee and of the Canadian Law Reform Commission, and the 1975 Code of West Germany. What is called for, in sum, is a fresh start in which the above and other important publications are carefully appraised.

In comparison with what we now have, the initial product, published, say ten years after the work began, could be a great advance. If it were generally recognized that continuing efforts to improve any penal code are necessary, one could tolerate those parts of it that fell short of one’s expectations, knowing that the book had not been closed and that ongoing study and discussion will take us nearer to that inevitably elusive "perfect penal code."