A Criminal Code for the 18th Century

*By Joseph Wheatley**

Introduction

The federal criminal code has it all. Its crimes run the gamut—trafficking in dentures, murder, even misappropriating the likeness of "Smokey Bear." Where else in federal law could you find "chemical weapons" and "child support" side by side? All joking aside, bizarre juxtapositions such as these are actually signs of a larger problem.

Simply put, the code belongs to another era—even as crimes have evolved with the times. A hodgepodge of incongruous crimes (and potential non-crimes), it lacks an overall structure and suffers from analytical gaps—flaws which many states and the Model Penal Code (MPC) resolved decades ago. While other parts of the federal code have been modernized, the criminal code has fallen behind, and efforts to reform it have faltered time and again.

In 1981, United States Attorney General William French Smith testified before a congressional committee that "[w]e have been laboring for decades under a complex and inefficient criminal justice system—a system that has been very wasteful of existing resources." More than twenty years later, the code—if it can even be called a code—has not improved, and may have become even more byzantine and unwieldy in the interim.

Applied as it is, the code may indeed be inefficient, but it has also slighted the interests of justice. In particular, since the code is open to judicial interpretation and fails to serve as a layperson's rules of conduct, it could undermine the moral dimension of the justice system. In turn, with less moral support among the public, the code might not command the deference that it might otherwise.

A Vintage Criminal Code

Parts of the federal criminal code date back to the early years of the United States. In 1948, Congress created Title 18 of the U.S. Code, entitled "Crimes and Criminal Procedure," otherwise known as the federal criminal code. Before then, Congress had enacted new provisions on a piecemeal basis, resulting in a hodgepodge of disparate laws, not a comprehensive penal code. Though it was meant to bring order to chaos, Title 18 merely organized the chaos. Primarily cosmetic changes and a confusing alphabetical ordering system failed to resolve the code's larger flaws. Title 18 still suffered from the same organizational and analytical shortcomings that plagued its predecessor.

Efforts to develop and enact a comprehensive federal criminal code began in earnest in the 1960's. The flaws of Title 18, the successful release of the MPC, and concerns about rising crime prompted groups in government and academia to reconsider the logical underpinnings of federal criminal law. Proposed by President Johnson, the National Commission on Reform of Federal Criminal Laws met between 1967 and 1970, and delivered its final report to President Nixon in 1971. The Commission recommended that the criminal code be completely rewritten. Congress considered the report for more than 10 years. Committee meetings were held and legislation was proposed, but Congress never enacted a comprehensive criminal code. Ideological differences and procedural obstacles proved insurmountable. Subsequent reform efforts have not materialized.

Why Reform the Code?

Since reform plans stalled in the 1980's, the federal criminal code has undergone evolutionary—not revolutionary—changes on a piecemeal basis. As such, the code retains much of its original character and bears little resemblance to the MPC or the modern codes of many states. Even so, is a comprehensive reform of the code necessary? In its present form, Title 18 suffers from flaws so substantial that comprehensive reform is the only option. Discussed below are three major flaws in the code, along with reform proposals for each, which have been derived from the MPC and reformed state codes.

First, Title 18 merely alphabetizes offenses, rather than functionally conceptualizing them—as the MPC does. The alphabetical format provides little guidance about the existence of offenses, the relationships between offenses, and their grades of seriousness. For instance, Chapter 89 ("Professions and Occupations") contains just one oddly placed crime, "Transportation of dentures" (18 USC 1821). Also, offenses against the person, such as assault (Chapter 7) and homicide (Chapter 51), are isolated in distant categories, even though they deal with conceptually related harms and dangers. These kinds of idiosyncrasies originated because Congress added offenses to the code on an *ad hoc* basis, with little regard for their interactions or levels of seriousness. Such a system causes needless confusion for prosecutors and defense attorneys—not to mention the layperson, who relies on the law for rules of conduct.

A code organized along functional lines, such as the MPC, would help resolve some of these drawbacks. Under the MPC, for instance, the category of "offenses involving danger to the person" includes crimes such as homicide, assault, and sexual offenses. When organized functionally, penal provisions complement one another, so as to avoid coverage gaps or overlapping offenses—and the under- or over-punishment that could result. Also, a functional code such as this would diminish confusion for prosecutors, defense counsel, and the layperson—as well as establish the relative seriousness of crimes that is so lacking in Title 18.

Second, Title 18 lacks a comprehensive "general part," a section with definitions and principles that apply to specific offenses—such as inchoate offenses (e.g., attempt), principles of liability, and general defenses. As a result, much of the federal criminal code is not codified. For instance, Chapter 1, titled "General Provisions," provides little more than a

handful of definitions and an insanity defense. With so little guidance provided, the rest of the code is left to federal judges to interpret as they see fit. In contrast, the MPC provides a relatively thorough "general part," which streamlines the rest of the code, limits discretion by the judiciary, and provides notice to the layperson.

Third, Title 18 lacks an analytical framework for determining liability that attempts to reflect communal notions of blameworthiness. The MPC follows a three-part framework based on the presence of criminal conduct (whether an act or an omission), justification defenses, and excuse defenses. First, has the actor committed criminal conduct? Aside from a few exceptions, Title 18 does not consider more than the question of the criminal act itself, whereas the MPC considers two additional questions that are crucial to determining blame. Second, even though an actor commits criminal conduct, his conduct may be justified (and thus not wrongful) because it was done in self-defense, for instance. Third, an actor may be excused for criminal (and wrongful) conduct because he committed it under duress, for instance. By incorporating such defenses, this analytical framework tries to follow communal notions of blameworthiness.

However, Title 18's incomplete "general part" frustrates the use of a full-fledged framework for determining liability. As shown above, the code provides little in the way of defenses, and falls short of what the MPC provides. Until it has the justification and excuse defenses which refine and complete judgments of blameworthiness, the code cannot claim the moral standing that the MPC has attained. Such standing requires a full-fledged framework for determining liability that Title 18 simply does not possess.

The Costs of Inaction

As shown above, Title 18 possesses many flaws—inefficiencies and injustices, not to mention bizarre juxtapositions such as "Child Support" and "Chemical Weapons." Ostensibly, the federal criminal justice system perseveres in spite of these problems. The legal community may have adapted to the flaws in the criminal code—but what of the unqualified layperson, who bears the brunt of the criminal law? The present course of action, muddling through these problems, imposes costs upon society and slights the interests of justice. Comprehensive reform of Title 18—albeit a daunting prospect—would lead to a cheaper and fairer criminal justice system.

Moreover, a criminal code that is in sync with communal notions of justice could command greater respect—and compliance—than it might otherwise command in its currently flawed form. For instance, were the law clearer and more accessible, it could serve one of its original functions as rules of conduct for the layperson. Also, an analytical framework that permits defenses would reflect broad-based notions of blameworthiness and thereby affirm the community's role in the law. Although utilitarian principles usually clash with desert principles, desert actually advances utilitarian interests here.

Title 18, what regrettably passes for the federal criminal code, amounts to a list of crimes cobbled together over hundreds of years. It suffers from minimal organization and a negligible analytical framework, both of which invite excessive interpretation by the judiciary. Inefficiencies abound, thanks to the confusion that the code creates for all parties. Many of the states modernized their codes decades ago, yet the federal government has stubbornly held on to obsolete legislation. The country deserves better.

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