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# Congressional Record S. 663 - S. 1 Criminal Laws

Mike Mansfield 1903-2001

## ADDITIONAL STATEMENTS

### S. 1—REFORM OF THE CRIMINAL LAWS

Mr. MANSFIELD. Mr. President, yesterday, I had intended to include in the CONGRESSIONAL RECORD the entire content of an article on S. 1 entitled "The Battle Over the Criminal Code" by Mr. Theodore Voorhees which appeared in the current issue of Judicature, the magazine of the American Judicature Society. The article explains very well I think the present posture of the issues contained in S. 1 and suggests what must be done to insure that certain defects of the proposal be corrected in order to warrant its approval by the Congress. The article did not appear in full, however, as I had intended.

Similarly, I noted the appeal in behalf of S. 1 in a letter printed in the New York Times from former Gov. Pat Brown, who served as the Chairman of the President's Commision on the Reform of the Criminal Laws.

Again, it should be observed that there do exist serious defects in the bill as it is now written. It is the purpose of the legislative process to remedy these defects and if reform of the criminal laws is to occur during this Congress, those defects must be remedied.

Mr. President, these materials are well worth reading on this issue and I ask unanimous consent, therefore, that the complete article by Mr. Voorhees, together with the letter from former Gov. Pat Brown, be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

IT COULD DECIDE THE WAR ON CRIME—THE BATTLE OVER THE CRIMINAL CODE

(By Theodore Voorhees)

There has been so much talk in recent years about crime prevention, penal reform, and law and order, and so little effective action, that the public is becoming convinced that nothing will ever be done to restore citizen safety from crime. Cynicism prevails, and any suggestion that legislation, whether federal or state, might promote justice and reduce crime is likely to be greeted with derision.

In the case of members of the bar, however, such a negative attitude is unjustified. The profession is well aware of the importance and efficacy of state adoption of the Model Penal Code. It should be equally supportive of revision of Title 18 of the United States Code, the massive compilation of all federal legislation dealing with crime. No excuse should be accepted for a lawyer's ignorance of the compelling necessity for an immediate rewriting of that wholly outdated and ineffective compilation of criminal law.

Many provisions within the title as it now stands are so unreasonable as to offend all sense of justice. There is gross disparity among the maximum sentences permitted for similar crimes; the provisions for probation are inadequate; the treatment of the problem of recidivism is thoughtless and unplanned; and the provisions governing infractions and minor offenses are as chaotic as the rest.

Related offenses are not gathered together in Title 18 alone but are scattered through fifty titles. Senator Roman Hruska (R. Neb.) has pointed out that there are in excess of seventy different provisions dealing with theft, and for the requisite state of mind for criminal offenses, seventy-eight different terms are employed. He adds that such imprecision of language increases the chances of the guilty going free and the innocent being convicted.

By revising the criminal code, we will gain an infinitely more effective system of combating crime and create an example for the states which should spur them toward criminal law reform. Federal crime is only the tip of the lawless iceberg, but until it is dealt with on an enlightened and effective basis, it will be useless to expect much advancement on the part of the states.

Unfortunately, a combination of circumstances has caused a sharp division of opinion on the pending federal revision legislation which may hinder or even block the adoption of a new federal code. The following simplified explanation of the background of the bills pending in the House and Senate presents the basic controversy which must be resolved if this much-needed legislation is to have any chance of passage.

THE BROWN REPORT

Both Senate bill S. 1 and H.R. 333 grew out of a Study Draft of a revised Title 18 prepared by the National Commission on Reform of Federal Criminal Laws, popularly known as the Brown Report after the commission chairman, former California Governor Edmund G. (Pat) Brown. That report, released in 1971, was the product of four years of study by the congressionally-established Commission after it had received the advice of many of the recognized criminal law experts of the country.

The Commission's recommendations were endorsed by all shades of political and professional opinion. By stating some alternatives in areas of major controversy (such as drugs, gun control, capital punishment and wire tapping) and leaving resolution of such problems to Congress, the Commission was able to present a unanimous report. While opinion among its members differed sharply with respect to those difficult issues, on ninety per cent of the provisions there was general agreement.

In the House, H.R. 333 was first introduced in 1973 by Representatives Kastenmeier (D. Wisc.) and Edwards (D. Cal.). It follows the Brown Report closely and incorporates the preference of a large majority of the members of the Commission on how the controversial issues could best be resolved.

The strength of H.R. 333 rests in the fact that every section of Title 18 had been carefully examined by the Commission, brought into harmony and revised to conform to the best thinking of the day. Specifically, the Commission report followed closely the recommendations of the American Law Institute, as set forth in the Model Penal Code, and the American Bar Association Standards Relating to the Administration of Criminal Justice.

The heart of the Brown Report, preserved in H.R. 333, is the creation of a sentencing structure which specifies maxima for certain classified grades of crimes and to which each specific federal offense is tied. Every felony sentence involving a maximum would have a mandatory parole component, reducing to that extent the period during which the prisoner could actually be detained under the sentence. The Commission took the position that the upper ranges within the ordinary maximum were to be reserved for the especially dangerous offenders. It also directed that in sentencing, prison should be resorted to only if the judge was satisfied that it was a more satisfactory disposition than probation.

H.R. 333, among its other key provisions, confines consecutive sentencing to cases where "exceptional features provide justification" and requires the court to set forth its reasons in detail; provides for appellate review of sentences; stiffens the government's burden of proof in conspiracy cases; relaxes the inordinate severity of prison penalties for hard drug offenses and rules out incarceration for petty marijuana offenses; bans production, marketing and possession of handguns except for military and police use; and provides curtailment of federal involvement in situations having "no substantial federal interest."

Under the existing American penal system, increases in violent crime and recidivism have become a part of our way of life. The Brown Report and H.R. 333 have accepted the thesis of modern penologists that constant increase in the severity of punishment is not an intelligent way to attain a reduction of crime.

THE SENATE BILL

In the Senate, Senator McClellan (D. Ark.) put together a bill which, again, was largely based upon the report of the Brown Commission. A number of the provisions of his draft, however, reflected his more conservative viewpoint and that of the Department of Justice under the Nixon administration.

S. 1 had 13 sponsors, including, in addition to Senators McClellan and Hruska, who were members of the Commission, such liberal backers as Senators Scott (R. Pa.) and Bayh (D. Ind.). Hearings were held on the bill over the course of a year, and the transcript ran to more than 8000 pages. (A counterpart to S. 1 is H.R. 3907.)

S. 1 seeks to restore capital punishment and make it mandatory in a narrow group of homicides. It is silent on any form of gun control but adds additional years of imprisonment to already heavy maxima when guns are used in connection with an offense or when organized crime is involved. It retains a prison penalty for non-commercial private possession of marijuana but reduces the present heavy punishment considerably. It provides severe penalties for traffic in hard drugs. It narrows the defense of insanity.

The foes of the Senate bill have concentrated much of their fire on provisions which have been interpreted as curtailing First Amendments rights. They foresee wiretapping on an expanded scale and protest the excuse of national security as its justification. The bill has met intensive opposition from the political left, to whom demonstra-

tion has become a right valued above almost all others. The liberal opponents of S. 1 have overlooked two factors of great importance. First, mere defeat of S. 1 would leave intact many of the provisions to which they are opposed since they are carry-overs from existing law. Second, and more important, the critics have been ignorant of, or have ignored, the fact that at least ninety percent of the provisions of the bill constitute law reform that is virtually beyond the realm of serious controversy. In consequence, while amendment may be essential, total rejection would be tragic. To vote S. 1 down would doom the country to a continuation of totally unsatisfactory criminal law at the federal level and a dearth of reform in many state and local jurisdictions.

It has taken a full decade from the launching of the effort to secure revision during the administration of President Johnson to bring the matter to a congressional vote. If a revised code goes down to defeat, it is highly unlikely that a new effort at revision can be consummated in less than another decade. Meanwhile, crime marches on, and civil liberties suffer as much under the present chaotic system as they would, in all likelihood, under the most extreme provision of S. 1.

THE KILLING OF S. 1

The Wall Street Journal editorialized on August 22, 1975, on the subject of S. 1 and condemned it roundly. In calling for the rejection of the bill, it stated, among other things, that "[t]he entire bill in its present form goes well beyond present law in restricting First Amendment rights, reducing public access to knowledge of the workings of government and revising civil rights precedents."

The following comment was offered in reply by Professor Louis B. Schwartz, Benjamin Franklin Professor of Law at the University of Pennsylvania and director of the National Commission on Reform of Federal Criminal Laws:

"On the other hand, 95 percent of S. 1 is a competent non-controversial ordering and modernizing of the antiquated arbitrary hodge-podge that is our present criminal justice system. If there ever was a counsel of despair, of throwing out the baby with the bath water, it is the suggestion in your editorial that S. 1 be abandoned rather than amended, as it easily can be to remedy its defects."

*Is prison forever to be the only method of punishing crime?*

He then gave a sampling of the numerous improvements incorporated in S. 1 which would be jettisoned if the Journal's counsel were followed:

"A rational scale of penalties under which like offenses are subject to like sentences;

"Systematic distinction between first offenders and multiple or professional criminals;

"Appellate review of abuse of discretion in sentencing;

"An improved basis for extraditing criminals who flee the country;

A system of compensation for victims of violent crime;

"The first democratically adopted statement of the aims of the criminal justice system for the guidance of courts, enforcement officials and correctional agencies."

Professor Schwartz concluded:

"In short, although there are a dozen specific amendments required to make S. 1 acceptable, the overall aim and substantial accomplishment of the bill is to promote respect for the law by making the law respectable. The reform of the federal criminal code should be rescued, not killed."

H.R. 10850

Belatedly, on November 20, 1975, Representatives Kastenmeier (D. Wisc.), Mikva (D. Ill.) and Edwards (D. Cal.) introduced H.R. 10850, a new bill to revise Title 18 which was prepared in large part by the American Civil Liberties Union. It tracks S. 1 closely, and departs materially from the bill only in the relatively few areas where major disagreement by the ACLU with the Senate bill was only to be expected. The provisions in question deal with: the insanity defense, treatment of classified material, marijuana, the sentencing structure, death sentence, obscenity and the like. It may be anticipated that the liberal view of the framers of H.R. 10850 may incite as violent opposition from conservative elements inside and outside of Congress as some of the repressive measures of S. 1 did from the liberals.

The introduction of the ACLU legislation is bound to increase the polarization among members of Congress and hurt the cause of revision, yet two points may be made in its favor. The bill follows the provision numbering of S. 1 and consequently makes easy an examination of the sections in which the sponsors of the two bills run at cross purposes. More importantly, a comparison should bring out forcefully how much agreement resides on each side with respect to the vast majority of the provisions of both bills. Only on a limited number of highly controversial issues does significant disagreement exist.

THE ABA CONTRIBUTION

At the 1975 annual meeting of the American Bar Association, the Section of Criminal Justice secured virtually unanimous approval by the House of Delegates of a resolution endorsing S. 1 in principle, subject to a series of thirty-eight suggested amendments. In a few instances the Section preferred the counterpart section of H.R. 333; in several it disapproved of the S. 1 provision in its entirety (treatment of the insanity defense, control of prostitution, crime in federal enclaves); but in most the S. 1 approach was approved, subject to amendments to make it conform to the Standards Relating to the Administration of Criminal Justice. Very few of the proposed amendments could be characterized as sweeping.

The Section of Criminal Justice studied the Brown Report and S. 1 over a period of four years. It is certainly to be commended for its recognition of the importance of pursuing federal criminal law revision, and unquestionably its proposed amendments would strengthen and improve the Senate bill. Yet its recommendations and the action of the House of Delegates are disappointing in several important respects.

The subject matter of S. 1 deserved something more than a mere legalistic analysis of the language of a complex bill. One may well wonder how helpful anyone could find the main paragraph of the long resolution of the House of Delegates. It reads in part as follows:

"Be it resolved . . . that the American Bar Association endorses in principle the provisions of S. 1 and its counterpart H.R. 3907, now pending in the 94th Congress, 1st Session, as a desirable basis for the reform of the federal criminal laws; noting however that the Commission on Correctional Facilities and Services urges the particular importance of amendments to reflect the general principles set out in Recommendations 28, 31, 33 and 34 in Appendix A hereto and the relevant sections of the ABA Standards Relating to the Administration of Criminal Justice. . . ."

Furthermore, the most criticized omissions or inclusions of S. 1 are almost ignored. The ABA taken no position on the absence of provision for gun control; it has ducked the question of capital punishment, taking refuge in the fact that it is *sub judice* in the Supreme Court; it has withheld recommendations on the S. 1 handling of the drug problem, pending a study by the association "in depth." In addition, the Section report, and consequently the House of Delegates' action, fails to call attention to the important fact that the vast majority of the bill provisions constitute law reform that is virtually beyond controversy. The ABA criticism and simultaneous support of S. 1 cannot be dismissed as upheipful, but the Association has done considerably less than sound a tocsin summoning Congress to get on with essential legislation without further delay.

THE BAR'S RESPONSIBILITY

In light of the wreckage that crime is causing throughout the country (one family out of every four victimized); of the financial burden that crime and its prevention imposes upon us annually (around $100 billion, or a tenth of the gross national product); and of the unique capability of lawyers to provide leadership in a field in which they have more expertise than almost all others, the apparent lack of concern of the profession is difficult to explain.

We are apparently ready to stand by and allow Congress to resolve some of the most important criminal law issues of our times with scarcely a word of advice, support, or even opposition, from the organized bar. Within the framework of revision of Title 18 as a whole, rest among others the following great questions of the day:

Are sentences of imprisonment to be left, as heretofore, to the whim of a judge who may be guided entirely by the theory that only severity of punishment will block crime, or should sentencing be placed on a more uniform, scientific basis conforming to modern principles of penology?

Should we continue to fight drug abuse only with the savagery of heavy punishment, or with up-to-date principles of crime prevention and control?

Do victimless crimes and minor infractions of law deserve the inordinate share of police time and effort now devoted to them at the cost of serious diminution of the protection of society from crimes of violence?

Must we continue to suffer the present annual slaughter by homicide rather than give up the absolute right of everyone to bear all kinds of arms for whatever purpose?

Is prison forever to be the only method of punishing crime, or might a modern scientific effort be made to utilize probation as a supplementary method?

Must we accept recidivism as unconquerable rather than try to arrest it by a wholehearted system of rehabilitation?

The mere delineation of those issues should make clear how hopeless it would be to expect a single piece of legislation to resolve every one of them satisfactorily. It seems obvious that several of the questions demand separate legislation carefully drafted and followed by time for what may be prolonged debate. To attempt to package all the solutions in an omnibus treatment, as have the framers of S. 1 and H.R. 10850, simply invites the possible rejection by Congress of any revision whatever.

It is here that one might have expected the leadership of the profession to offer guidance to the Congress. Instead of being content to stand by and witness the crushing to death of this important legislation between the extremists of the right and those of the left, the American Bar Association might well have called for the elimination of the controversial provisions and the enactment of the portions of S. 1 on which nearly everyone can agree.

That is not to say that the provisions of the code governing wiretapping, drug abuse, capital punishment, obscenity and gun control should be ignored. Obviously, they are in great need of reexamination and revision. The bar should call for new legislation in those areas without delay. There is no persuasive reason, however, why the other portions of Title 18 should be hung up until agreement on the controversial portions is reached.

U.S. CRIMINAL CODE: THE IMPORTANCE OF S. 1

*To the Editor:*

As chairman of the National Commission for Reform of Federal Criminal Laws, I have watched with deep concern the efforts of some civil libertarians and representatives of the press to kill S. 1, the pending bill to recodify Title 18 of the U.S. Code. That bill incorporates a very substantial portion of the recommendations of our commission, and 95 percent of its provisions constitute a major improvement over existing Federal criminal law. Those provisions have been found acceptable by all who have studied the legislation and they are really beyond the realm of serious controversy.

I, of course, agree with some of the bill's critics that there are a few sections of S. 1 which may be characterized as repressive, but these are limited to a small number and in all likelihood will be taken care of in the Senate Judiciary Committee or by amendment on the Senate floor. The contention that the whole bill must be defeated because of these few sections is, in my opinion, without semblance of validity.

Recognizing the urgency of criminal code revision at this session of Congress, Senators McClellan and Hruska, the sponsors of S. 1, have informed me of their willingness to accept some modifications which would meet the objections of the press and other critics. With a similar sense of responsibility, Senators Kennedy and Hart are working toward securing the amendments necessary to make this bill perfectly acceptable to their liberal constituencies.

There are some areas of the criminal law which presently pose serious problems for the sponsors of code revision. The most obvious examples are national security, wire tapping, gun control, traffic in drugs and capital punishment. While Congress must eventually resolve these issues, it is certainly unnecessary for the whole code to be held up until totol agreement can be reached. They might more properly be left to separate legislation to be introduced, debated and enacted at a later date.

A great deal of misinformation has been spread about S. 1. As the members of the Senate Judiciary Committee have studied this comprehensive and important legislation, the chances of its passage in somewhat modified form have been greatly enhanced. Defeat would be a severe blow to criminal law reform in this country.

EDMUND G. BROWN.

(P.S.—The writer is former Governor of California.)