

First Supplement to Memorandum No. 63-19

Attached is a letter from Professor Arthur Sherry containing an outline of the procedure that he suggests for revising the Penal Code. This letter will be considered together with Memorandum No. 63-19 at the March meeting.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

UNIVERSITY OF CALIFORNIA

School of Law
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March 6, 1963

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Dear John:

The revision of the California Penal Code is a task of such large dimension that it should not be undertaken without thorough and painstaking planning. It necessarily involves a great amount of research, serious problems of technique, a need for careful administrative control and the determination of policy questions in many areas of public and political controversy. If mistakes are made or if inadequacies occur in any of these areas, they may jeopardize the entire project.

I am sure you are aware of these considerations and realize that I can respond to your request for an outline of how such a task should be undertaken only in a general and tentative way. Specific definition of policy, of design and of operational method will depend upon the result of the study and consideration given to the problem by those who will be responsible for initiating it.

With these limitations in mind, a revision project, in my opinion, ought to incorporate the following features:

1. Preliminary planning. During the last six or seven years, four or five major penal (or criminal) code revision projects have been brought to completion or near-completion. Some of these have dealt with only the substantive law; others have included procedure. Important among these are the American Law Institute's Model Penal Code, the Louisiana Code of Criminal Procedure revision, the Illinois Criminal Code revision and the proposed Minnesota Criminal Code revision which is now pending in the Minnesota legislature.

A revision project in California ought to take advantage of the technical, administrative and financial experience of these projects. This may be accomplished quickly by interviewing their directors, reporters or other administrative personnel. This should not involve more than a week or ten days of travel.

The result of this inquiry should provide enough detailed information to indicate the size and composition of the staff needed to accomplish the work, expose the problems and difficulties inherent in the work and make it possible to prepare a line-item budget that would be much more realistic than any devised by a process of estimation.

2. Staff. At the outset, the person in charge of the project, together with a single assistant, should draft a detailed plan for the actual work of revision. This should define and describe objectives, method of operation, administration and direction of the work, duration of the project and anticipated costs. During this stage of the project some secretarial support would be necessary. By way of illustration, an endeavor should be made during this stage to determine questions like these: style and organization of the code; drafting of a single code or separate codes, one a criminal code, the other a code of criminal procedure; inclusion in the code of subject matter now in other codes (i.e., narcotic offenses;) the classification of crimes; the relationship between state criminal legislation and the authority of local government. There are, of course, many others which come to mind but need not be detailed here.

During this stage, plans should be made for the composition, selection and responsibilities of an

3. Advisory Committee. This group should include competent, knowledgeable and experienced persons selected from all groups and institutions concerned with the administration of criminal justice. In its membership should be lawyers, judges, legislators, law enforcement officers, corrections personnel and representatives from the forensic and behavioral sciences. This committee would meet at intervals with the project's draftsmen to review, criticize and to develop desirable amendment. It should have no drafting responsibility but it will be expected that the final revisor's drafts will reflect the benefit of the opportunity that the committee will afford for the testing of the draftsmen's original proposals.

The committee should receive advance copies of the revisioners' drafts as they are prepared by the staff; otherwise these should not receive general publication. (The revisers, for the most part, should be selected for their special competence and work under contract and individually. The staff, which should be

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small, will collate, edit and review their work. This will not foreclose them from engaging in some drafting.)

Committee members need not receive compensation but some kind of reimbursement for out-of-pocket expenses should be provided. This is essential to insure continuing, responsible participation.

4. Tentative Drafts. Following redrafting after advisory committee review, tentative drafts of the proposed revision should be published as the work goes on. These may be issued according to subject matter (i.e., homicide, theft, principles of liability, attempts and other inchoate crimes etc.) or in related groups of offenses (crimes against person, crimes against property etc.)

These drafts should be thoroughly annotated not only to preserve the work of staff researchers but to disclose the legal basis for each specific proposal. In addition, they should contain appropriate commentary descriptive of the problems involved, the reasons for choices and suggestion of the alternatives. This will not only evoke appropriate criticism but it will go far to foster public and legislative understanding.

5. Final Draft. Some reviewing body (the Law Revision Commission?) should make the final choices among alternatives appearing in the tentative drafts, should resolve the issues of policy which the tentative drafts will present and conclude the project with the presentation of a proposed code for legislative approval. The policy problems will be extremely difficult in many areas. I need name only abortion, obscenity and responsibility for criminal conduct to make this point plain.

In spite of the length of this letter, what I have written above is by no means complete. It is merely the outline of one approach which will probably raise more question than it answers.

It reflects in general, however, administrative principles and revision techniques which have been thoroughly tested in several major projects with a high degree of success.

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Except for a tentative suggestion in the last part of the outline, I have not attempted to indicate or recommend how a project organized as I have described it should or may be administered or directed by the Law Revision Commission. From your description of them, the Commission's current and past operating procedures are sufficiently different that some serious problems of compatibility may be involved.

Cordially yours,

S/ ARTHUR H. SHERRY

AHS:jh
cc: Arthur Alarcon, Esq.