# CRIMINAL LAW REVISION IN DELAWARE AND HAWAII

*by Frank B. Baldwin, III**

Criminal law revision has not been limited to the largest states, which have greater resources and legal facilities, but has also occurred in Delaware and Hawaii, states which have relatively small numbers of legal practitioners, no local school of law, and relatively small populations. In both states, criminal law revision efforts were quite similar, in that an early decision was made to rely heavily on published revised codes of other jurisdictions and on the Model Penal Code, rather than undertaking an extensive initial study and preparing a unique code. The following article will compare the criminal law revision projects in both states, with particular attention to the organization used in each jurisdiction to effectuate reform and the sources used for particular provisions.

## I. The Impetus for Reform

In each state, the movement to reform the substantive criminal law was the result of efforts by leading members of the state bar. The laws of both states had ancient roots, physically dating from the mid-nineteenth century and ideologically dating from a far earlier era. In Delaware, a remarkable part of the substantive criminal law still depended on common-law judgments of the state's criminal courts,[1] and because of the relatively few number of crimes occurring in the population, it was often difficult to find a recent ruling on points of major significance. The laws of both states were additionally disorganized because their only arrangement was alphabetical, without regard to the dangerousness or penalty occurring to the crimes, and the laws frequently imposed disproportionate penalties.[2] In many cases, statutory definitions of

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[1] *E.g.*, the crime of assault had no statutory definition and was punishable by a discretionary sentence. Del. Code Ann. tit. 11, § 105 (1953). *Compare* State v. Brewer, 31 Del. (1 W.W. Harr.) 363, 114 A. 604 (1921), *with* State v. Woods, 23 Del. (7 Penn.) 499, 77 A. 490 (1896).

[2] *E.g.*, under present Hawaii law, larceny from the person draws a two-year sentence and a two thousand dollar fine, while simple larceny, not involving potential danger to the person but obviously pecuniarily motivated, is punished by a ten-year sentence and no



crimes were archaic or incomplete. Finally, many important matters of defense or mitigation were left to the tender mercies of case law.

Although the bar and judiciary in each state had long sensed these problems, they had somehow established a *modus vivendi* and had a good understanding of the nature of the law, in spite of its deficiencies. Naturally this led to an attitude of inertia toward reform. Neither state has a law faculty or a law review, so matters of substantive law could be expected to remain unexamined by scholars over long periods. However, due to the publicity accorded to criminal law reform efforts in other states and the completion of the Model Penal Code, groups of lawyers in both states invited attorneys involved in criminal law reform in other jurisdictions to report on the need for revision of the substantive criminal law. In each case, the suggestions strongly urged an immediate project aimed at the preparation of a new criminal code.

## II. Organization of Law Reform

In Delaware, reform was the responsibility of the Governor's Committee for Revision of the Criminal Law. The committee was composed of nine lawyers and one judge (who subsequently resigned) and was nicely balanced with respect to geography, politics and orientation toward defense or prosecution. Its weakness was that it had no members outside the bar, even in such important fields as corrections and psychology. Despite these deficiencies, the committee members functioned most ably as critics of the draft that emerged from the work of the two part-time staff members. One, the author of this article, was then assistant professor of law at the University of Pennsylvania Law School, and the other, who was expected to devote considerably less time, was a practicing lawyer with a substantial criminal practice. This mode of staffing was expected to temper the unrealistic excesses of the academic mind with practical insights, and some such tempering no doubt occurred. Part-time secretarial service was provided, and several summer research assistants were employed during the closing days of the project, but there was never any possibility of independent investigation of problems of criminology or penology in Delaware. Although such studies had been intentionally omitted, various committee members clearly based decisions about code provisions on their own impressions of what the results of such investigations might have been. Frequently the committee relied in making its decision upon the premise that the

to control a particular type of antisocial behavior, were often discussed without any independent evidence on either side of the issue.

Criminal law reform in Hawaii was organized by the Judicial Council of Hawaii, an important group of judges (including the Chief Justice of the supreme court), lawyers and influential laymen. Hawaii's Committee on Law Revision, headed by a trial judge, was expanded to include non-members of the Council with criminal law and correctional experience. The present author served as part-time director of the Hawaii project, with one, and later two, full-time staff reporters, a full-time secretary, and several student research assistants. Again, there was no effort to do more than very minimal field work or in-depth studies of Hawaii's individual needs in the penal law area. One productive hearing involving local psychiatrists and psychologists was held on the insanity defense and other related subjects, and additional individual contacts were made with police, prosecutors and community leaders concerned with various aspects of the penal law. Drafts of the code were submitted to members of the bar and other interested persons.

Neither of the draft organizations was ideal. Probably there ought to have been considerably more citizen involvement in the planning and drafting of the code. In the context of political realities, it is unlikely that a criminal code can be politically successful if it does not have a valid base of citizen support. One way of involving citizen groups would have been to set up a series of study groups or task forces to work on controversial areas of the law. In addition, both committees were over-representative of the legal profession with experience in fields relating to criminal law and penology. It would probably have been wise to include on the reform committee persons selected from a relevant committee of the legislature, so that those persons would have been committed to the draft at the time it was introduced as legislation.

Since the larger staff of the Hawaii project was able to produce a much more polished draft for initial committee consideration, the committee could confine itself to broader issues of policy. However, in both states the staffs were composed solely of lawyers, and staff level input from a non-lawyer would have been invaluable. No doubt the training of lawyers makes them well-suited to the task of drafting a code, but very little in their training necessarily makes them competent to judge the many sociological and psychological factors that need consideration in such an effort.



for the staff product. Each committee had a core of well-prepared members whose principal purpose in many cases was to test and refine the ideas of the staff. Since these persons served without compensation, and in all cases had busy professional practices or other important responsibilities, there may be some kind of native genius in this type of organization that defies scholarly analysis.

## III. FINANCIAL CONSIDERATIONS

What a state spends on criminal law reform depends very much on its decisions about the basis of reform, *e.g.*, whether the assumptions of the Model Penal Code are to be the framework of reform. The Delaware project was a low-budget operation. Less than $25,000 was expended for professional staff, secretaries, transportation, office expenses and printing. The low expenditure resulted from the employment of a relatively junior person to do the bulk of the work, and an extensive contribution of time by members of the committee.

Although the reform effort in both states relied very heavily on the Model Penal Code and its derivatives, Hawaii expended more than Delaware. The difference in funding resulted in part from a somewhat more lavish approach to government financing of research projects and in part from a feeling that Hawaiian problems could differ from those of the mainland and might therefore require different solutions. The proposed budget provided for an expenditure of approximately $140,000 over three years, but this included expenses of criminal procedure reform as well. The budget would have included the services of two full-time staff members, an academic person to serve as project director, and adequate supporting staff and supplies. The legislature cut this estimate by $100,000, but appropriated more money in later years. Total costs, however, were under $100,000 for the substantive revision.

## IV. SOURCES OF CRIMINAL LAW REFORM

In both states there was preliminary discussion about the model to be used for criminal law reform. Each group initiating the reform was familiar with the Model Penal Code, and the basis of the draft ultimately proposed to the legislature was a Model Penal Code derivative.

In the case of Delaware, that derivative was the New York Penal Law. Members of the Delaware committee made an early visit to the staff of the New York Penal Law Revision Commis-

Penal Code were unsuitable for statutory purposes. Indeed, this conclusion is inescapable with respect to some sections of the "General Part" of the Model Penal Code. There is an air of holy writ, as opposed to mortal legislation, coupled with a somewhat incomprehensible drafting style reminiscent of the Restatements, that may not commend some early parts of the Code to the legislator (the same criticisms cannot generally be made of the part of the Model Code in which substantive offenses are defined). As a result of the influence of the New York draftsmen, the Delaware code was largely modeled after the New York Penal Law. An additional selling point in favor of the New York effort was its heavy reliance on the skills of the practicing lawyer. The final product in Delaware relies heavily on the great precision of draftmanship characteristic of the New York law while hopefully avoiding some of its principal pitfalls. In the final analysis, the most persuasive argument in favor of adoption of as much of the New York law as possible was the likelihood that its provisions would receive early judicial construction which would be helpful to the Delaware courts.

In Hawaii, several members of the committee had recent experience with the enactment of uniform legislation, particularly the Uniform Commercial Code, and they therefore considered it appropriate to adopt the Model Penal Code as the principal framework for their codification.[3] However, as the staff progressed in its drafting work, it became clear that it would be preferable to rely principally on the enacted and proposed codes of other jurisdictions which have performed relatively major surgery on the Model Penal Code structure. By the time work began on the Hawaii Penal Code, a draft of the Michigan Revised Criminal Code[4] was available, along with its excellent commentary. In addition, good work had proceeded on the general part of the criminal law and on some specific offenses in California.[5] The staff relied heavily on the Michigan draft, also using other published drafts, including California, Delaware and New York. Several committee members performed the useful function

[3] It has never been intended, I understand, that the Model Penal Code should be considered as uniform legislation. The kind of uniformity required for orderly commercial transactions may not be a legitimate expectation in the field of criminal activity. Yet the Model Code will ultimately have the effect of inducing a large number of jurisdictions to make fairly consistent assumptions about criminal law and about the activities that ought to be punished in various ways.

[4] Special Committee of the Michigan State Bar for the Revision of the Criminal Code and Committee on Criminal Jurisprudence, State Bar of Michigan (Final Draft, 1967).

[5] Joint Legislative Committee for Revision of the Penal Code, Penal Code



of comparing the Model Penal Code provisions with those proposed by the staff, and helpful discussion often arose out of the differences between the model and the draft.

While the pace of substantive criminal law reform has slowed somewhat in recent years, a survey prepared in 1968[6] revealed that thirty-one jurisdictions were either in the process of or had completed such reform. The survey clearly indicated that the Model Penal Code had exerted an enormous influence on active codes and proposed revisions. While this influence took several forms, its most important effect was structural. No pre-Model Penal Code criminal legislation in the United States had attempted an orderly grouping of general principles and substantive offenses.[7] In all jurisdictions, the law had developed on a piecemeal basis, with various crimes being defined and stigmatized as a result of periodic waves of public outrage at particular forms of antisocial conduct. Grossly disproportionate penalties for offenses of roughly equal enormity were characteristic of American penal legislation. The Model Penal Code's contribution was to bring a sense of order to criminal legislation, and a sense of proportion to the imposition of penalties. These influences have been most important in all of the substantive criminal law revisions which I have studied.

The other more obvious Model Penal Code influence is ideological. Many of its proposals, particularly in the area of abortion and sexual offenses, have now been restated and supported (at least by more liberal elements of the community) so frequently as to be almost boring. These reforms have received considerable public attention, as has the Code's restatement of the insanity defense. Other important innovations have largely been ignored by the public, although they are probably far more important to the daily administration of the criminal law. Particularly appealing are the Code's innovations in the area of offenses against the person (where an enormous number of common-law crimes have received intelligent codification) and in the area of offenses against property (where the vexing common-law development of the law of larceny, for example, has been greatly reformed). Finally, the Model Penal Code hastens the demise of the common law of crime. Its rigorous insistence that all matters of defense and mitigation be codified has generally been followed and has been perhaps the most salutary influence of all.

[6] Baldwin, *The Progress of Criminal Law Reform* (American Law Institute—unpublished, but available on request).

[7] This assumes that

The proposed Michigan Code, having benefited from both the Model Penal Code and the revised New York Penal Law, is far superior to either effort. The other advantage of the Michigan Code for the future reviser is the availability of its commentary. Unfortunately, a definitive addition of the Model Penal Code with updated commentary has never become available. This has apparently been the result of inertia, because fully updated commentary to the substantive offenses sections of the Model Penal Code was prepared and available for publication late in 1964, the Official Draft having been adopted in 1962. The commentary appearing with the tentative draft is not always very useful because of revisions made after the publication of the tentative draft.

Other source material which was unavailable in Delaware, Hawaii and other states was significant citizen input and field study of the jurisdiction's peculiar needs. Even if such contributions had not changed the final form of the draft, they might have greatly eased the process of legislative passage. In both Delaware and Hawaii, the committees were broadly representative of the legal profession, but it is doubtful that the public's divergent views about crime were adequately represented on either committee. Certainly this deficiency can be remedied on the legislative level by public hearings, but a penal law revision introduced into the legislature without significant prior criticism from many segments of the community entails an important political defect. In Delaware, for example, one of the most significant hurdles to enactment of the proposed code has been police opposition. While it might have been impossible to avoid all police criticism of any revised code, by involving police study groups in the project at an early date, the committee could have obtained useful suggestions from the police viewpoint and could have educated police representatives about the purposes and goals of substantive criminal law revision. Similarly, ethnic minority groups, often over-represented in criminal statistics, might have made significant contributions with respect to penalties and matters of defense. Perhaps one reason that reform elements in this society resort so frequently to the demonstration and the picket line is the lack of viable procedures for involving citizens in the important decision-making processes. It would be an interesting and socially important experiment to construct a criminal law revision project which would include such opportunities for citizen involvement.

## V. Some Innovations

Although both the Delaware and the Hawaii codes relied very heavily on previous drafting efforts, several innovations, both of form and substance, are worthy of note. Both codes are printed with extensive commentaries, which serve the joint functions of advocacy and explanation.[8] Both provide that the commentary "may be used as evidence of legislative intent."[9] While this provision will require the ready availability of the commentary as well as a certain amount of updating after the legislative process is complete, it is expected that the new codes will receive more favorable consideration by courts which have a readily available source of legislative history. Both codes have also been published with extensive cross-reference sections and with tables of derivation, which should simplify the task of interpretation. There are also extensive definitional cross-references.



Among the other innovations in the Delaware Code, perhaps the most striking is the provision allowing appeal by the prosecution.[10] Appeal lies as of right when a court dismisses any indictment or information or any count thereof or grants a motion vacating a verdict or judgment of conviction where the court's order is "based upon the invalidity or construction of the statute upon which the indictment or information is founded or where the order is based on the lack of jurisdiction of the lower court over the person or subject matter."[11] In the discretion of the appellate court, an appeal may also be entertained to determine a substantial question of law or procedure. However, the ruling of the appellate court in a discretionary appeal does not affect the rights of the defendant in whose case it is made.[12] Interlocutory appeals of pretrial orders suppressing evidence are also permitted. The Delaware committee considered the proposed legislation constitutional because it permitted a reversal or an order freeing a defendant only where he has not actually been placed in jeopardy, or where he has been convicted and then released only by an erroneous ruling of law.

The Delaware Code also includes sections on proving and disproving criminal guilt. These sections elaborate on the burden of prosecution and defense in proving elements of the offense and matters of defense.[13] This part includes a section defining the effect of presumptions in the code and preserving certain pre-

[8] Governor's Committee for Revision of the Criminal Law, Proposed Delaware Criminal Code (1967); Judicial Council of Hawaii, Penal Law Revision Project, Hawaii Penal Code (Proposed Draft, 1970).
[9] Proposed Delaware Code § 7; Proposed Hawaii Code § 105.
[10] Proposed Delaware Code § 15.
[11] *Id.* § 15(1).
[12] *Id.* § 15(2).
[13] *Id.* §§ 200-07.

sumptions previously existing in the state's jurisprudence. There is a somewhat innovative section intended to ease the prosecution's burden of proving the objective standards of guilt established in the code. The section provides:

> The defendant's intention, recklessness, knowledge, or belief at the time of the offense for which he is charged may be inferred by the jury from the circumstances surrounding the act he is alleged to have done. In making the inference permitted by this section, the jury may consider whether a reasonable man in the defendant's circumstances at the time of the offense would have had or lacked the requisite intention, recklessness, knowledge, or belief.[14]

The section also provides that the prosecution can meet its burden of proving a prima facie case by proving circumstances surrounding the act from which "a reasonable juror might infer that the defendant's intention, recklessness, knowledge, or belief was of the sort required for commission of the offense."[15] This group of sections on proving and disproving criminal guilt was motivated by fear that old common-law principles of evidence might not be sufficient under a completely statutory criminal law, and that certain of the old rules would effectively nullify some of the intended reforms.

The Hawaii Code also contains similar legislation on sufficiency of the criminal evidence.[16] It includes some major modifications of the Model Penal Code's "General Part," following Michigan and California. It also includes some new legislation on drug offenses, including marijuana, which, *inter alia*, makes simple possession of small amounts of dangerous (non-narcotic) drugs and marijuana a misdemeanor.[17] The sections on narcotics and dangerous drugs attempt a gradation of the offenses by type of drug possessed, amount possessed, and the likelihood of commercial involvement.[18]

## VI. Political Pitfalls

The Delaware Code was introduced at the 1969-1970 session of the General Assembly, where it encountered considerable opposition, despite efforts to make the code as originally published and submitted in 1967 more politically attractive. Criticism has come mainly from law-enforcement groups, and has principally

[14] *Id.* § 206(1).
[15] *Id.* § 206(2).
[16] Proposed Hawaii Code § § 114-17.
[17] *Id.* § 1246.
[18] *Id.* §§ 1241-89.



been directed against the code's provisions on justification (which were themselves somewhat more police-oriented than the Model Penal Code provisions) and against the burden of proving the insanity defense, which made insanity a simple defense, allowing the defendant merely to suggest a reasonable doubt as to his guilt. The code, with further modifications, is expected to be introduced at the present session of the General Assembly, where its chances of passage appear to be improved because it has the support of the present Attorney General. The Hawaii Code was introduced in the 1970 session of the state legislature, but too late for active consideration. It has been the subject of interim study, and at this writing is the subject of legislative hearings. There is reason to hope for its passage at the 1971 legislative session.