THE ILLINOIS CRIMINAL CODE OF 1961 AND CODE OF CRIMINAL PROCEDURE OF 1963

by

*Charles H. Bowman**

"I'm the Parliamentary Draftsman. And they tell me it's a fact That I often make a muddle Of a simple little Act."
J.P.C. Poetic Justice 32 (1947).

Early in 1954 the Supreme Court of Illinois and the Governor separately asked the Illinois State and Chicago Bar Associations to initiate a study looking toward a complete revision of the Illinois Criminal Code. On May 25, 1954, the respective presidents of the two associations together appointed the Joint Committee to Revise the Illinois Criminal Code. The committee consisted of sixteen lawyers, judges, prosecuting attorneys and law professors.[1]

During the first two years the group considered the scope of the revision problem, including detailed examinations of the proposed American Law Institute Model Penal Code, then in the process of being drafted; the Criminal Code of Louisiana, adopted in 1942; the Wisconsin Criminal Code, then pending before its legislature and adopted by it in 1955; and the Illinois Draft Criminal Code of 1935. The study revealed the magnitude of the project.

Illinois had no "Criminal Code" in the sense of a codified, systematic body of law functioning as an instrument of social control in a modern community. Many provisions had remained unchanged since Judge Lockwood, in submitting a revised draft of the Laws of Illinois to the Illinois General Assembly of 1827, described the small chapter on criminal jurisprudence as deriving primarily from a volume of the Laws of New York of 1802 which he brought with him to Illinois, and a volume of the Laws of Georgia which he located in the office of the Secretary of State. In fact, no serious attempt was made to revamp the criminal laws until 1869 when a commission was appointed by the General Assembly to revise the Law of Illinois. In 1874, chapter

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[1] Former Illinois Supreme Court Justice Floyd E. Thompson of Chicago was appointed Chairman.

thirty-eight of the commission's draft, which contained the bulk of the penal provisions, was submitted, adopted and designated the "Criminal Code." Although amended many times in the eighty years between 1874 and 1954, no comprehensive revision has every been made.[2]

As a result, when the Joint Committee was appointed in 1954, the criminal law of Illinois was scattered throughout the 171 chapters of the state statutes. In chapter twenty-three the maximum penalty for contributing to delinquency was one year or one thousand dollars; in chapter thirty-eight (the criminal code), the maximum penalty for the same offense was one year or two hundred dollars. The minimum penalty for stealing a horse was three years; for stealing an automobile, one year. One section said that no infant under ten years could be convicted of crime in Illinois; another said that anyone between the ages of seven and eighteen found smoking in public places should be guilty of a misdemeanor and fined not more than ten dollars for each offense. Seventy-four separate sections described various forms of theft and eighteen sections related to assaults, many of them prescribing different penalties without regard to relative seriousness.

The procedural provisions of the criminal law were similarly contained in a hodge-podge collection of sections in chapter thirty-eight, many duplicating or inconsistent with provisions in other chapters. The motion practice consisted of the medieval heirarchy of dilatory pleas and pleas in bar, the meaning and effect of which were constantly being changed by different interpretations and construction by the Illinois Supreme Court.

While the criminal laws of Illinois (contained in chapter thirty-eight and designated the "Criminal Code") were concerned with both substantive and procedural law, the Committee decided at an early stage to follow the example of such states as Wisconsin, Michigan, Pennsylvania and New York, and restrict the criminal code to substantive law, and to draft a code of criminal procedure separately. As a result of that decision, the Criminal

[2] By 1931 the criminal proscriptions in the Illinois statutes were so out-dated, complex and difficult to administrate that revision was essential. The Judicial Advisory Councils of Cook County (Chicago) and of the state made a joint report to the Governor and General Assembly setting forth the acute need for revision in 1931. This report received serious attention throughout the state, primarily due to the prestige and competence of its source. In 1934, Judge Floyd E. Thompson, then President of the Illinois State Bar Association, appointed a committee to draft a revised criminal code. Basing its revision of the substantive part of the criminal law primarily upon the principles of the Judicial Councils' report, and the procedural portion primarily upon the American Law Institute's Code of Criminal Procedure of 1930, the committee submitted the Illinois Draft Criminal Code of 1935 to the General Assembly in 1935, 1937 and 1939. The General Assembly failed to adopt it and no further attempt at revision was made for another twenty-two years (1961).

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Code of 1961 is generally limited to the substantive law of crimes. It, not illogically, includes other provisions dealing with subjects such as place of trial and sentencing, which are more properly classified as procedural, but which are so closely allied to the substantive provisions as to require inclusion in the Criminal Code. The Code of Criminal Procedure of 1963, in addition to its general provisions dealing with the Rights of the Accused, proceeds chronologically from Apprehension, Investigation, and Proceedings After Arrest, to Proceedings After Trial, and Review.

I. The Criminal Code

During the first three years of its labors, the drafting subcommittee[3] met approximately twice each month to consider preliminary drafts prepared by other members of the subcommittee, and to prepare the drafts for presentation to the full committee. The Joint Committee met in two-day sessions twice each year to consider, approve, modify, or reject and refer back to the subcommittee the drafts submitted to it. During the last year of work on the substantive code and the entire year and one-half on the procedural code the subcommittee met almost weekly, while the full committee met bi-monthly in two-day sessions. Beginning in the fall of 1958, the preliminary research and drafting was accomplished by several members of the subcommittee and this reporter. This group worked full time on the Criminal Code during the summer of 1960 and on the Code of Criminal Procedure during the summer of 1962.

The most challenging task was the replacement of some eight hundred sections of substantive law and three hundred of procedural with a coherent, systematic code, stated in concise, modern language. Initially without funds, and working within the bar association's tradition of committee service without pay, the magnitude of the undertaking was almost more than the committee system could bear. Although the Wisconsin Code of 1955 and the evolving drafts of the Model Penal Code were relied on for

[3] In 1956, due to the death and resignation of some of the members of the Joint Committee, it was reorganized with twenty-one members (subsequently reduced to eighteen) and Judge Richard B. Austin, then Chief Justice of the Criminal Court of Cook County and presently a federal judge of the District Court of the Northern District of Illinois, as Chairman. A drafting subcommittee of seven was appointed with Professor Francis A. Allen, then on the University of Chicago law faculty and presently Dean of the law faculty at the University of Michigan, as Chairman. The University of Chicago made available to the Committee the part-time services of Professor Fred Merrifield, an outstanding legal researcher and draftsman. Financial assistance was supplied by the Judicial Advisory Council of Cook County to help defray clerical and other expenses of the Committee.

guidance, by the spring of 1960 only about a quarter or a third of the substantive Code had been drafted.

Hoping to present the Code to the General Assembly in 1961, and recognizing the proven slowness of the committee system, Judge Austin, as chairman of the Joint Committee, solicited and obtained from the Illinois Judicial Advisory Council sufficient funds to retain a full time, paid reporter. With an additional grant from the University of Illinois Research Board for the employment of two senior law students, the work proceeded rapidly through the summer and fall of 1960 and the substantive Code, with Commentary, was completed in November of 1960. After it was adopted in 1961 and approved by the Governor, it was not difficult to obtain the necessary funds from the Bar Foundations, the Judicial Advisory Councils, and the University of Illinois Research Board to complete the Code of Criminal Procedure. The drafting was finished in late fall of 1962 and the Code presented to the General Assembly in the spring of 1963. The entire six-year project (1956-1962) cost a total of approximately twenty-five thousand dollars.

In retrospect, and in view of the experience of the American Law Institute and of states which have revised their criminal laws since Illinois, it seems obvious to this reporter that the most efficient method of accomplishing such a task is to employ a full time paid reporter to direct and supervise the initial research and drafting for presentation to a full committee of practitioners. An intermediate subcommittee, or "advisory" committee, might be utilized to review and modify the preliminary drafts of the reporter so as to reduce the time the full committee need spend on final approval of the drafts. It also seems clear that a person who has been teaching criminal law is a logical person to employ as a reporter. Such an individual is thoroughly familiar with state and decisional law of both local and foreign jurisdictions. He is familiar with both the critical literature on controversial subjects in the criminal law field and the experience of other jurisdictions with different provisions. The library of a law school is often the most comprehensive in the state; and qualified law student researchers are usually readily available at substantially less cost than members of the bar. The practical experience of the members of the advisory committee, and of the full committee, ensures that their efforts to improve the code will be both realistic and oriented towards achieving acceptance by the legislature.

Several methods are available to those revising and codifying the criminal laws of a state. Some prefer a step-by-step approach of amending or codifying existing law on a particular subject, such

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as theft, homicide, sex offenses, gambling, etc. When the existing law is as archaic in language, inconsistent and duplicative as was Illinois', however, the total death (repeal) and rebirth is the only practical method. Moreover, writing a systematic code has the additional advantage of producing a unified law and not merely a gathering together of isolated, ad hoc provisions.

After making the initial decision to draft and submit to the legislature separately the substantive and procedural codes, the question became which to prepare first. Although the Illinois' procedural morass was more in need of immediate revision, the substantive code was chosen, primarily because the substantive law is, on the whole, less controversial than the procedural. Generally, most people agree on the type of conduct that should be proscribed; disagreement arises over the precise definition of such conduct, and the penalty. Moreover, it was felt that the procedural code could be more definitively related to a substantive code than vice versa.

The New Code compressed approximately eight hundred old sections into 197 new sections and repealed outright all of the old sections.[4] New provisions made the following changes: abolished common law crimes; abolished the life sentence and provided that all sentences in excess of one year should be for an indeterminate term; retained the death penalty in treason, murder, kidnapping for ransom, but restricted its imposition to cases where it is recommended by the jury;[5] took all sentencing power away from the jury (except for the death recommendation); and provided that if two or more offenses arose out of the same conduct the sentences must run concurrently.

In the article labelled Rights of Defendant it was provided that if two or more offenses arose out of the same act, they must be tried together if this fact is known to the prosecutor; it was also provided that acquittal or conviction of the defendant for the same offense in another jurisidiction (federal or state) shall be a defense to prosecution in this state.

The Model Penal Code approach restricting all mental states

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[4] The sections were organized in the traditional textbook arrangement: I. General Provisions; Title and Construction of the Act and State Jurisdiction, General Definitions and Rights of Defendant; II. Principles of Criminal Liability; Criminal Act and Mental State, Parties to Crime, Responsibility and Justifiable Use of Force and Exoneration; III. Specific Offenses; Inchoate Offenses, Offenses Directed Against the Person, Offenses Directed Against Property, Offenses Affecting Public Health, Safety and Decency, Offenses Affecting Governmental Functions; IV. Construction, Effective Date and Repeal (of prior laws). For lack of a better place, and because they are primarily procedural anyway, we put Place of Trial and Sentencing in the first part on General Provisions.

[5] However, the jury recommendation is not mandatory on the court (in bench trials the court might impose death or imprisonment).

to four—intent, knowledge, recklessness and negligence—was adopted in the article on the Criminal Act and Mental State. The new Code specified the precise situations in which a person's reasonable belief that his conduct does not constitute an offense would be a defense, including when he acts in reliance upon an order or opinion of an Illinois appellate or supreme court, or a United States appellate court later overruled or reversed.

The new Code abolished all "assault with intent to" (rape, murder, etc.) offenses and provided that such conduct shall be prosecuted as attempts. An offense of "Reckless Conduct" was created which was defined as endangering the bodily safety of an individual by any means. The Code repealed the seventy-four sections dealing with various forms of theft and adopted one comprehensive theft offense. It restricted absolute liability offenses to those not punishable by incarceration or a fine exceeding five hundred dollars, unless the statute defining the offense specifically and clearly provided otherwise.

The age of infancy was raised from ten to thirteen, and the Model Penal Code formulation of the test for insanity was adopted. It also adopted the "apparent," rather than actual, necessity rule for the use of force in defense of one's person or that of another, and abolished the right of a person to resist an unlawful arrest, even if he knows it is unlawful and it is in fact unlawful. Although the total ban against eavesdropping by any means was retained, this was amended in 1969 to permit eavesdropping with the consent of one of the parties to the conversation, and at the request of a state's attorney.[6]

The new Code revamped entirely the sex offenses so that sexual activity between consenting adults (18 and over) in private would not be a crime, and legalized sexual activity between humans and animals. It abolished statutory rape and added three affirmative defenses to the offense of indecent liberties with a child: that the accused reasonably believes the child was sixteen years of age or over; that the child is a prostitute; or, that the child has previously been married. However, contributing to the sexual delinquency of a child was made an absolute liability offense with a maximum of one year or one thousand dollars. The Model Penal Code defenses to abortion were included, but the legislature amended out the defenses and restored the old "except when necessary to save the mother's life" provision.[7]

[6] Eavesdropping of this nature was recently held not to violate the fourth amendment. United States v. White, 39 U.S.L.W. 4387 (U.S. Apr. 5, 1971).

[7] This was held to be unconstitutionally vague and an invasion of the mother's right of privacy by the federal District Court for the Northern District of Illinois on January 29, 1971.

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Immediately after copies of the Tentative Final Draft were available,[8] the Joint Committee sponsored a series of one and two-day seminars in Chicago and downstate localities to familiarize the bench, the bar and the public with the proposed Code provisions. Various members of the drafting subcommittee explained separate articles of the Code prior to open discussion. A large number of comments, favorable and unfavorable, were received from participants in the seminars and later by mail. All suggestions for changes, modifications or deletions were subsequently considered by the Joint Committee and a few minor changes were adopted. This reporter then assisted the Legislative Reference Bureau in putting the Code into bill form.

One of the most critical decisions of any revisions commission is the procedure to be followed in presenting the revision to the legislature. Although various methods may be used, if they are not successful a tremendous amount of dedicated effort will have produced no reward.

Every attempt at comprehensive revision of the law is bound to encounter opposition to specific provisions by special interest groups. Many seem willing to sacrifice the entire revision if changes are not made to meet their particular demands. Strangely enough, in Illinois, the first request and pressure for change from an organized group came from the commodities and stock exchanges in Chicago. The proposed Code, in article twenty-eight, prohibited gambling in futures. Almost immediately after the Tentative Final Draft was published, the drafting subcommittee received a joint request from two of the top legal firms in Chicago, representing the exchanges, for a meeting with the subcommittee. In the highest tradition of professional negotiations, the counsel for the exchanges requested that the futures provision be amended to except contracts executed on the exchanges, especially in view of the existing federal and internal policing. The counsel even presented the subcommittee with a re-worded provision which would accommodate their request. After consideration, the subcommittee nevertheless decided there was no satisfactory reason for excepting any group or agency from criminal proscriptions, and declined to make the change.

In the meantime, since the Joint Committee was an agency of the two bar associations, the Tentative Final Draft had been

[8] The substantive Code and Commentary were completed in October 1960, and the Tentative Final Draft, and Commentary, were published free of charge in pamphlet form by West Publishing Company of St. Paul. Five thousand copies were distributed on request by the headquarters staffs of the two bar associations. Five hundred copies were withheld to assure individual copies for each legislator and others who would need copies when the Code was introduced in the General Assembly.

submitted to the respective governing boards of the associations for approval, subject to minor modifications as the Joint Committee might deem desirable. Although the Board of Governors of the Illinois State Bar Association gave prompt approval, for some unexplained reason the Board of Managers of the Chicago Bar Association delayed action on the Code. Investigation by the Committee indicated that only acquiescence in the amendment proposed by the exchanges would halt the delay in favorable action by the Board of Managers. As a result the Committee threatened to expose the whole matter to the newspapers which brought quick approval of the Code by the Board of Managers. The exchanges later sponsored their amendment in the legislature but it was easily defeated.

Although the Illinois State Bar Association has a representative in each session of the General Assembly to explain and lobby for bills sponsored by the association, and to notify association officers and committee members when and where to appear for committee hearings on such bills, the Joint Committee felt that the criminal Code was too complicated and complex to leave to the guidance of a single spokesman who was neither a criminal law practitioner nor familiar with the new Code. With the approval of the two governing boards, the Joint Committee appointed this reporter the spokesman for the Joint Committee and the bar associations before the legislature. It was agreed that all requests for explanations and amendments would be directed to the spokesman for reply and handling, and that unless requested to do so by the spokesman, other members of the Joint Committee would not agree to any amendments. It was agreed, also, that authority to approve minor amendments be vested in the spokesman but that any major amendments should be considered by the drafting subcommittee.

In order to keep the sponsorship of the Code nonpartisan, it was decided to ask the Democratic chairman of the House and the Republican chairman of the Senate Judiciary Committee to act as prime sponsors for the Code. These sponsors and the Joint Committee agreed that it would be wise to seek as many secondary sponsors as possible and, in order to expedite consideration of the bill, to introduce the Code in both Houses simultaneously to be referred to subcommittees of their respective committees. The chairmen of the subcommittees then agreed, for the first time in Illinois history, to hold joint public hearings on the Code and, if possible, make identical recommendations to their respective parent committees.

The subcommittees held seven public hearings on the Code;

five in Springfield and two all-day sessions in Chicago. At these meetings, several groups indicated opposition to part or all of the Code. The commodities and stock exchanges wanted to be excepted from the gambling article; The Altar and Rosary Society, and some others, wanted to except bingo from the gambling article; the manufacturers of slot machines for shipment out of state wanted to be exempted from the anti-slot-machine provision; the National Automobile Theft Bureau wanted motor vehicles included in the burglary statute; the Defense Lawyers Association wanted sentencing power left with the jury in certain cases; the Council of Catholic Churches opposed the affirmative defenses in the abortion provision; and The National Rifle Association and members of about four hundred gun clubs in Illinois opposed the entire Code because the subcommittee had not let them draft the "weapons" article.

Most opposition never posed a serious threat to the Code's chances of passing. Several factors probably contributed to the favorable consensus supporting the proposal. First, the explanatory meetings held throughout the state prior to the session helped to familiarize the news media and the public with provisions of the Code and the old laws they were intended to replace. Second, as soon as the bills were introduced, each legislator was furnished with a personal copy of the Tentative Final Draft with Commentary which provided them additional opportunity to study it. Third, the members of the Senate and House subcommittees who approved the Code were highly respected in both Houses. Moreover, they had thoroughly familiarized themselves with the specific provisions of the Code and were thereby able to explain its background and need, and compare it with similar provisions in other jurisdictions. Fourth, in addition to being personally available to answer any and all questions raised in the hearings, the spokesman for the Joint Committee provided detailed written explanations concerning any troublesome questions which were duplicated and sent to each member of the General Assembly. This served to inform all legislators about questions being raised and the explanations being given even before the Code was approved by the committees.

Only three groups made sustained and continued efforts to amend the Code. We successfully resisted two and compromised with the third. The Defense Lawyers Association made efforts to amend the sentencing provisions so as to retain some sentencing power in the jury, but the proposed amendment was easily defeated on the floor of the House, and never offered in the Senate.

The gun lobbyists were fanatic in their attempts to influence the

Code. Illiniois has always had one of the most liberal "gun laws" in the country. No registration or licensing was required, and the only real prohibition was against the carrying of "concealed" weapons. The proposed Code prohibited possession of certain types of dangerous weapons which had no ordinary lawful use (for example, blackjacks, metal knuckles, switch-blade knives, sawed off shotguns, machine guns, spring guns, silencers and tear gas guns). In most instances, these weapons had been proscribed in isolated sections of the prior law, the Code simply bringing them all together in one article. The new article was neither more liberal nor more restrictive than the prior law. Nevertheless, the gun lobby, in newspapers throughout the state, condemned the new Code as being poorly drafted, inimical to the best interests of all citizens and of sportsmen in particular, and a denial of several constitutional rights. The National Rifle Association magazine continually criticized the new Code, in part, by carrying erroneous reports of what the weapons article provided. Explanatory letters to them accomplished nothing except renewed attacks. The joint subcommittees listened to some twenty-five representatives of the gun people in one afternoon session which deteriorated into a shouting match between gun representatives and individual members of the subcommittees. All members of the subcommittees were so incensed after that session that none of them ever offered an amendment to the weapons article.

The third group, the Council of Catholic Churches, had warned the full Joint Committee that it would organize terrific opposition to the Code's inclusion of the three Model Penal Code defenses to abortion – to save the life "or health" of the mother, if there is an irremediable defect in the fetus, and if pregnancy results from forcible rape or aggravated father-daughter incest.[9] Although the issue was not raised during the early hearings of the joint subcommittees, the abortion provisions were receiving much attention in the press. Shortly after the third hearing the representative of the Council of Catholic Churches made it known that unless an agreement could be reached amending out the defenses, the Council would denounce the provisions from the pulpit. Although it was felt that the abortion sections were valid in the minds of the sponsors and would receive considerable support on the floor, the Code's supporters were not ready to jeopardize the entire Code just because of the abortion provisions.

[9] Illinois was the first state to submit the Model Penal Code defenses to its legislature, long before Colorado became the first to adopt them in 1967, and at that time – 1961 – the population of Illinois was estimated to be 35 percent Catholic and that of Chicago about 55 percent.

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Subsequently, the Council's representative indicated that if the defenses were amended out, and abortions were permitted only when necessary to save the mother's life, the Council of Catholic Churches would support all other provisions of the Code. This proposed amendment was discussed with the other members of the drafting subcommittee who promptly decided that the abortion defenses should not be allowed to defeat the Code. Thus, the amendment of the Catholic Churches was submitted to the joint subcommittees which adopted it as an amendment to be recommended to the judiciary committees. As a result of these determinations the abortion defenses were never brought into issue nor discussed in any legislative committee nor on the floor of either House of the legislature.

Although the heart of the abortion provisions were lost, the Catholic Churches in accord with their agreement did not attack the sex provisions in the Code, and Illinois consequently became the first, and still the only, state in which sexual activity between consenting adults in private is not a crime. Excepting the amendment on abortion, all amendments recommended by the joint subcommittees were of minor importance. As amended, the Code was easily passed by both Houses of the legislature.

II. The Code of Criminal Procedure

As anticipated, achieving a consensus of the subcommittee and of the full Committee on the precise wording of the procedural Code was more difficult than with the substantive Code.[10] As might also be expected, the lines of disagreement were generally drawn between the "defense minded" and the "prosecution minded" members of the committee. Since these discussions were in 1961-62, we did not have the benefit of the numerous procedural due process decisions handed down by the United States Supreme Court during the past eight years. Nevertheless, on drafting the Code, the subcommittee did provide by statute for practically all of the constitutional "rights" which the Supreme Court has since held to belong to persons accused of crimes.

Two of the most controversial provisions were the "stop and frisk" section, borrowed from the Uniform Arrest Act, and the

[10] The basic procedure adopted for the drafting of the substantive Code was continued with this reporter and the younger members of the drafting subcommittee doing the preliminary research and drafting; the drafting subcommittee then discussing and redrafting the proposals for submission to the full Joint Committee. The drafting subcommittee met every two weeks and the full committee quarterly until this reporter began working full time on the Code in June of 1962 when the drafting subcommittee met weekly and the full Committee monthly until the Code was completed in December 1962.

ten percent bail deposit provision, aimed at abolishing the professional bail bondsman. Strangely enough, the stop and frisk provision was opposed vehemently not only by the civil libertarians, which was anticipated, but also by the Chicago Police Department, which was not expected. The police opposition reflected a belief that stop and frisk would be unnecessary and undesirable if the Code would provide more time for investigation between arrest and the initial appearance before a magistrate. The subcommittee refused to do the latter and retained the provision requiring appearance before a magistrate "without unnecessary delay." Nevertheless, the combined opposition of civil libertarians and the Chicago Police Department to the stop and frisk provision convinced the subcommittee to delete it from the proposed draft.

The ten percent bail deposit provision was a response to pleas against the inequities in the system of bail bondsmen. Since bail bondsmen were, by statute, permitted to charge a fee of ten percent of the amount of bail set, the deposit provision simply provided that an accused could obtain his release on bond by depositing with the clerk of the court ten percent of the amount of the bail specified in the bond. If the accused complied with all conditions of the bail bond, ninety percent of the deposit would be returned to him. A provision in the substantive code making it a crime to jump bail was included as an added inducement for defendants to appear as required.

As companion measures to the ten percent deposit provision, the Code provided for release on recognizance and added a provision stating that this "Section shall be liberally construed to effectuate the purpose of relying upon criminal sanctions instead of financial loss to assure the appearance of the accused." In addition, the subcommittee proposed that in all cases a judge or magistrate might issue a "Summons to Appear" instead of an arrest warrant, and that peace officers might issue a "Notice to Appear" instead of making an arrest without a warrant.

This reporter was again designated spokesman for the Joint Committee in redrafting the Code in bill form and guiding it through the General Assembly. Again, it was considered most efficient to introduce the proposal in both Houses and have the bills referred to subcommittees of the judiciary committees simultaneously. At the joint public hearings, most of the difficulty came in the form of amendments offered by various members of the subcommittees on behalf of the Illinois Chapter of the American Civil Liberties Union and the Illinois State's Attorneys Association, rewording, in a manner more acceptable to each, various sections of the Code. For example, the American Civil Liberties

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Union wanted the phrase "without unnecessary delay" changed to "forthwith" in the section on taking an accused before a magistrate after arrest. The State's Attorneys Association wanted to lodge the discretion to reveal grand jury proceedings in the state's attorney instead of the court. Numerous other minor amendments were suggested of which the judiciary subcommittees adopted eighteen before reporting the bills back to the respective judiciary committees. Unlike the substantive Code, the judiciary committees did not adopt identical amendments, so bills with minor differences were sent to the floors of the respective chambers. The greatest attack against a specific provision of the proposed code of procedure was launched on the floor of the House against the ten percent deposit bail provision.

The bail bondsmen were powerful people around the courthouse and jails, and their campaign contributions to both state's attorneys, legislators and sheriffs were appreciated by those elected to office. By the morning of the second reading, the Bail Bondsman Association representatives had called or seen practically every legislator in the House. Moreover, on the prior day, the Illinois Sheriffs Association had convened a special meeting in Springfield and adopted a resolution opposing the ten percent deposit provision. In view of this opposition, it was decided that the bail provision would have a greater chance of success if couched in terms of a two-year trial period and used as an alternative method of making bail instead of the exclusive method. Observation over two years, it was felt, would provide sufficient experience to determine if it worked well and should be renewed in 1965; otherwise, the ten percent deposit provisions would expire. Although much lobbying was necessary the ten percent provision was maintained in the Code with the two-year experimental clause incorporated.[11] On the following day the House passed the Code and the Senate soon followed.

III. CONCLUSION

The two new Codes have generally worked out well in Illinois during the years since passage. Admittedly, as long as there is crime in the large volume that mobile urban populations seem to generate, no system of criminal justice is going to be perfect. However, in the opinion of this reporter, if the criminal law is to be respected (whether it is obeyed or not), it should impose

[11] Because of the very favorable experience with the ten percent deposit bail provision during 1964, it was renewed at the 1965 legislative session, but it was made the exclusive method of making bail. Thus, Illinois no longer has professional bail bondsmen, and the state is by far the better for it.

minimal restrictions on the conduct of citizens, consistent with the rights of persons and property, and a well ordered society. The laws, likewise, should be succinct and stated in modern language which anyone can understand. This is a task for the reporter or draftsman, and his best efforts will always leave something to be desired. For the most part, the Illinois Code meets these requirements.

The Illinois courts (and the federal courts which have had occasion to pass upon various provisions) have respected the interest of the drafters of the Illinois Codes in interpreting their provisions. The courts have consistently cited the Committee Comments as a valid source for interpretation and construction of the specific provisions and almost without exception they have adopted the intent of the drafters, sought to be expressed in the language of the statutes. As a result, it is seldom that one will find a decision which seems to be contrary to the plain meaning of the statute, especially when read in the context of the Committee Comments.

To this reporter it seems that the writing of the commentary to a statutory code is one of the most valuable contributions a law professor can make to the adoption and implementation of new legislation. He is peculiarly equipped by training, occupation and every day activity to research, evaluate and collate the law on a particular point, and explain the desirability of one formulation over another. Draftsmanship is an inexact art. Any accomplished lawyer can attribute different meanings to the same words. However, well researched and written commentary clarifying the intent of the statute is difficult to contradict, regardless of whether one agrees with the expressed intention. Moreover, the preliminary draft by a reporter of a particular provision is only a tentative suggestion. The members of the drafting subcommittee and of the full committee are going to scrutinize and analyze the purpose and probable effect of the proposal, as well they should in the light of their collective experience on the bench and at the bar. In addition, no legislature is going to adopt without question or change proposed legislation which is submitted to them (unless it is something as complex, comprehensive, and incomprehensible as the Uniform Commercial Code). Legislators are more likely, however, to accept a specific formulation if it is fully explained to them in the commentary. They may disagree with the principle involved, as on abortion, bingo or the bail provisions, but if the statutory formulation expresses in simple and direct language that which the commentary says is intended, there is not much leeway for technical change.

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Another important function of the law professor-reporter is to be available to legislative committees and others who are interested, including representatives of the news media, to explain the substance of the code and commentary. Having originated the preliminary draft, participated in all subcommittee and committee discussions modifying and changing it into its final form, and written the commentary, the draftsman-reporter is easily the one most familiar with the entire legislative package. He can quickly and easily refer a questioning legislator from one section to another, which may qualify or supplement the first. It is seldom that any other member of the drafting committee can do this.

Whether the reporter should be the sole spokesman for the drafting committee in guiding a code through the legislature, as was done in Illinois, presents a different consideration. From my experience, legislators seem to have an innate distrust of professors. They are quick to resent any indication of "lecturing" them, and it seems difficult for them to accept the idea that a professor has any understanding of what goes on "in the outside world." However, if the professor-reporter has been active in bar association and professional activities, and has a wide acquaintance with the legislators involved, he is certainly the best qualified to speak specifically and favorably about the code. Yet, even if the chairman of the drafting committee, as the most prestigious member of the committee, assumes the role of spokesman, the reporter should be ever at his side and available for comment and explanation of the various provisions.

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 fine.

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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 voters or the politicians would not support a particular change. More subtle matters, such as the efficacy of a particular provision

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.

The committees functioned well as critics and sounding boards

for the conduct. 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 would 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 Commission, which indicated that, in their view, sections of the Model

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 REVISION PROJECT (Tent. Draft No. 1, 1967).

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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.

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

[7] This assumes that the revised Wisconsin Code, completed in 1955, was to some extent influenced by the early drafts of the Model Code.

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

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[10] PROPOSED DELAWARE CODE § 15.
[11] *Id.* § 15(1).
[12] *Id.* § 15(2).
[13] *Id.* §§ 200-07.

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.