

LEGISLATION AND ADMINISTRATION

STATUTORY REVISION AND THE PROPOSED ILLINOIS CRIMINAL CODE

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I

WE ARE, today, in many common law jurisdictions of the country, in the midst of a vital transition period in the form of our law. The traditional and distinguishing feature between ourselves and the civil law countries, the unwritten law and the written law, the declaratory rule of court decision as opposed to the regulation of the code, is slowly giving way; we seem to be gravitating toward the Roman way, the law of the handbook. This evolution is exerting a profound influence in the legislative and judicial process of today.¹

Revision, consolidation and codification of statutes has been a significant trend in legislation in recent years. In Illinois this movement has been notably marked by the Civil Practice Act, the Business Corporation Act, the submission of a number of important revisionary projects at the present session of the General Assembly,² and an ever increasing demand for

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¹ Handbook of the Annual Conference of Commissioners on Uniform State Laws (1934), 419 lists fifty-three Uniform Laws, which, with the exception of five recently drafted laws, have been adopted in a number of states. A few of the laws generally enacted and the number of jurisdictions enacting follow: Aeronautic Acts, twenty-one; Bills of Lading Acts, twenty-nine; Declaratory Judgments, twenty-one; Desertion and Non-support, nineteen; Fiduciaries, sixteen; Fraudulent Conveyance Act, sixteen; Limited Partnership Act, twenty; Negotiable Instruments Law, fifty-three; Partnership Act, twenty; Sales Act, thirty-four; Stock Transfer Act, twenty-four; Veteran's Guardianship Act, thirty-three; Warehouse Receipts Act, forty-eight.

The codification of court procedure and of other important branches of the law has been accomplished in many states.

² Witness at this session of the Illinois General Assembly, Senate Bill 231 revising all of the many laws relating to insurance, House Bills 432-530 inclusive which attempt to conform almost a hundred statutes to the Civil Practice Act, and House Bills 712-717 which present a complete revision of the criminal law.

To the knowledge of the writer there are in preparation for submission to the present or next session of the General Assembly, a revision of the laws relating to probate; a marital relations act which consolidates all laws relating to marriage, divorce, husband and wife; and a bill to rewrite all of the complicated provisions relating to revenue and taxation matters.

the complete revision of all the statutes.³ For the bar generally, revision and codification holds more interest than mechanical consolidation.⁴ The intense study of the body of statute law with a view toward substantial improvement has been spurred immeasurably by the activities of the American Law Institute, the Commissioners of Uniform Laws, and the legislative proposals of various committees of the American Bar Association, state and local bar associations.⁵ Active lay groups seeking substantive reforms have also played a large part in the re-examination of the statute book.⁶

It is this new fashion in legislation which is partly responsible for the Draft Code of Criminal Law and Procedure⁷ of the Illinois Bar Association, prepared in cooperation with the Judicial Advisory Council of Cook County. The greater cause lay in the fundamental need for a restatement of the criminal law to meet the demands of a mechanized society.⁸ Not

³ See "An Act to provide for the codification of the general statutes of the State of Illinois," approved June 29, 1927. Ill. Cahill's Rev. Stat. (1933), c. 131, § 11. An appropriation for this purpose has been provided each session since 1927. The Legislative Reference Bureau proposed a number of revisionary bills in 1931 and 1933, but none was enacted.

House Bills 221, 222, 605, and Senate Bill 185 of the present session call for the revision of all the statutes of the State by the Attorney General. This follows the recommendation of the Section on Classification and Revision of Statutes of the Illinois Bar Association, 23 Ill. Bar J. 79 (1934). Of interest in this connection is the article by Henry Fitts, Duplication in Publication of Statutes, 23 Ill. Bar J. 44 (1934).

⁴ This conclusion is based to a certain extent on the legislative reception accorded to the bills presented by the Legislative Reference Bureau in 1931 and 1933, pursuant to the act which directed the Bureau to rewrite the statutes. Even though these bills did not change the substantive law in the slightest degree, no legislator advocated them with enthusiasm and the attempt of the Bureau to comply with the statutory mandate was abortive.

⁵ Not without credit in this movement are the State Judicial Councils which have often been effective agencies in legislative reform. More than twenty states have established by law judicial councils charged with the duty of improving the administration of justice through the initiation of legislative proposals. The judicial council movement is discussed in the Report of the Judicial Advisory Council of the State of Illinois and the Judicial Advisory Council of Cook County of January, 1931, to Governor Emmerson and the General Assembly, p. 38.

⁶ The report of the Illinois Committee on Child Welfare Legislation of February 3, 1931 to the Governor and the General Assembly recommending some twenty-seven bills, embracing a comprehensive plan for the reform of laws relating to children, is a fine example of the contribution made by non-lawyers. Some of these bills ultimately became law.

⁷ Hereafter referred to as the Draft Code. This Code, published in March 1935, was presented to the Section on Criminal Law and Its Enforcement and the Board of Governors of the Illinois Bar Association on March 30, 1935. On April 4, 1935, the Code was introduced in the General Assembly by Representative Benjamin Adamowski as House Bill 712, together with five companion bills, House Bills 713-717 inclusive.

⁸ The need for revision is discussed in the Report of the Judicial Advisory Council of Illinois of 1931, *supra* n. 5, and the Report of the Sub-committee on Drafting of the Committee on Criminal Law and Its Enforcement, presented to the Illinois Bar Association at the 1934 annual meeting of the Illinois Bar Association.

since 1874 has the whole fabric of the law designed to thwart crime been subject to legislative scrutiny. Legislation for criminals since then has consisted in the main of sporadic attempts to meet a particular problem without any effort to work the new offense created into the pattern set by the revisionists of 1874. The result today is an ill-digested mass of amendatory acts and an antiquated code often contradictory and inconsistent in terms, wholly lacking in organization, in unified philosophy, and in uniformity of treatment.

It is not necessary further to elaborate the necessity of revision. The Draft Code presents the most important change in the substantive law of Illinois suggested in this generation. Making the bold assumptions of the author's fitness for the purpose, he does not propose to dwell upon the vast social implications of the Draft Code, nor upon the equally important procedural changes which it envisages. Rather it is the purpose of this article to confine itself to a few of the major drafting problems which were presented in the preparation of the Draft Code. Some of these problems we may expect to be present in the revision of the criminal law of other states, and of other branches of statutory law which require revision and codification;⁹ they are, therefore, worthy of recording in this transitory period of statutory development.

II

American criminal codes stand out from the rest of the statutory law as definite attempts to avoid the uncertainty of the unwritten law. Historically we have opposed the imposition of penalties except upon a uniform fixed basis, and necessity has dictated a statutory basis for the specification of crimes.¹⁰ There has, in most states, been developed, however, a large body of declaratory law relating to criminal responsibility, the nature of a criminal act, and similar problems.

The Illinois Criminal Code of 1874¹¹ is typical of American criminal codes. The various crimes are listed in alphabetical order and punishments therefor fixed. Aside from the distinction between felonies and misdemeanors, which will be discussed later, there is no other attempt at

⁹ The problems of classification of criminal offenses and other drafting problems in connection with the revision of the criminal law have been recently studied in New York. See the Report of the Commission on the Administration of Justice in New York State (1934), 853.

¹⁰ Some jurisdictions, however, still allow for the operation of the common law. Thus, as was pointed out by Ernst Freund (Legislative Regulation (1932), 11), the 1874 Revision (Div. II, § 20) provides: "All offenses not provided for by statute law may be punished by fine and imprisonment, in the discretion of the Court."

¹¹ "An Act to revise the law in relation to criminal jurisprudence," approved March 27, 1874. Ill. Cahill's Rev. Stat. (1933), c. 38. Hereafter referred to as the 1874 revision.

classification of offenses. The matters of criminal responsibility and of the nature of the criminal act are discussed in general terms.¹² It is no wonder that the courts have by many decisions built up a criminal law outside of the criminal code. The Draft Code, to the extent that it was possible, attempted to work into the definition of offenses these decisions of the reviewing courts. Neither time nor expediency permitted the more ambitious undertaking of truly codifying the entire substantive law in Illinois.¹³ The procedural portions of the Draft Code do, however, form a code of procedure in a more accurate sense.¹⁴

III

The substantive portion of the Draft Code, *Title I to Title IV*, consists in a revision and consolidation of the 1874 Act and more than two hundred acts passed since that date.¹⁵ The most important problem in this connection involved the decision as to which offenses should be excluded from the Draft Code as not partaking of the true character of a penal offense. Throughout the statute book there are many hundreds of acts for which a criminal penalty is provided. What part of these offenses are properly part of the criminal law? Should not a revision embrace in its terms all offenses to which a penalty attaches?

Obviously a revision of the criminal code does not call for such an effort. Were such a revision desired, the practical difficulty of collating, classifying and redrafting these provisions would bar the attempt. Furthermore, it is clear that such a revision would result in greater confusion and more difficult access to the law. At the outset, therefore, it was necessary to determine what should be the test for exclusion.

The test adopted was whether the offense in question was regulatory or penal in character. The criminal law, *per se*, defines crimes and fixes appropriate treatment. The provisions indiscriminately scattered throughout the law are in the main parts of statutes which purport to regulate

¹² Ill. Cahill's Rev. Stat. (1933), c. 38, §§ 617-621.

¹³ A project for a model code of the substantive criminal law was discussed at the time of the Annual Meeting of the American Law Institute. See 20 American Bar Assn. J. 333 (1934). The case for and against codification is discussed by Ernst Freund (*Legislative Regulation* (1932), par. 2), and Frederick K. Beutel, *Some Implications of Experimental Jurisprudence*, 48 Harv. L. Rev. 169 (1934).

¹⁴ See Titles V to VIII of the Draft Code. These titles are based to a great extent on the Model Code of Criminal Procedure of the American Law Institute.

¹⁵ To be exact, there were two hundred and twenty-nine acts relating to the criminal law passed since the 1874 revision. Of this number, eighty-two acts were amendatory of the Criminal Code, one hundred and ten were complete in themselves, and thirty-seven were amendatory of acts relating to the criminal law independent of the code.

conduct and certain acts at the risk of incurring the punishment specified in the statute. Without the antecedent regulatory provisions, the penalty which arises from a violation of these provisions would be meaningless. To include all of these provisions in the revision would mean making a criminal code out of the entire statute book. Moreover, the criminal law, having its origin in the concept of crime and guilt, the mores of the group, changes relatively slowly.¹⁶ Regulatory statutes have as their basic motivating force, public welfare, the police power, a concept which in comparison to the criminal law fluctuates rapidly and requires flexible legislative expedients.

Montesquieu expressed the distinction in these words: "In the exercise of the police, it is rather the magistrate who punishes than the law; in the judgment of crimes, it is rather the law which punishes than the magistrate."¹⁷ Thus, on the basis of being regulatory in character, a number of statutes now found in the chapter on the criminal code in the unofficial compilations were excluded.¹⁸

Many acts can not be classified easily on the basis of penal or regulatory statutes. Very often they partake of character similar to both types of statutes.¹⁹ Matters which were already regulatory, when incorporated in the 1874 revision,²⁰ have lost this character largely because of their dis-

¹⁶ Ernst Freund, *Legislature Regulation* (1932), p. 12.

"The peculiar province of the criminal law is the punishment of acts intrinsically vicious, evil and condemned by social sentiment; the province of the police power is the enforcement of merely conventional restraints, so that in the absence of possible legislative action, there would be no possible offense." Freund, *Police Power* (1904), 21.

¹⁷ *Spirit of the Laws*, XXVI, 24.

¹⁸ Thus §§ 30-45, relating to butter; §§ 67-74, relating to bedding; §§ 121a-121e, relating to carnivals; §§ 151a-151i, relating to dance halls; §§ 192a-192w, relating to the Drug Act; §§ 274-276, relating to false-stamping of canned goods; §§ 304-314, relating to itinerant vendors; §§ 349-350, gasoline receptacles; §§ 351-353, storage gasoline; §§ 497-498, mattresses; §§ 518-524, relating to mobs; §§ 525-535, relating to sheriff's powers; §§ 538-541, relating to shanty boats; §§ 604-608, relating to criminal identification; §§ 608a-608o, relating to detectives; §§ 780a-780q, relating to State Bureau of Criminal Identification; §§ 780h-780n, relating to radio broadcasting; § 781, relating to expenses of conviction of criminals in other states; §§ 782-783, relating to payment of fines to humane societies; §§ 784-800, relating to probation,—all of Chapter 38, *Smith-Hurd Rev. Stat.* (1933); and §§ 2-12, relating to non-support; §§ 73-81, relating to ophthalmia neonatorum; §§ 119-125, relating to cottonduck; §§ 247(1)-247(7), relating to commercial fertilizer; §§ 248-255, relating to fire-escapes; §§ 316(11)-316(17), relating to horse-racing; §§ 460-474, relating to paints and oils; and §§ 487(1)-487(11), relating to plating,—all of Chapter 38 *Cahill's Rev. Stat.* (1933), were omitted from the Draft Code as regulatory in character.

¹⁹ The regulation of firearms or of explosives is typical of this character of offense.

²⁰ §§ 4-8 of the Criminal Code relating to the sale of abortifacient drugs, and the adulteration of foods, *Ill. Cahill's Rev. Stat.* (1933), c. 38, §§ 16-29. and §§ 62 and 63 of the Criminal

association from the statutes of which they were once an intrinsic part. Having been part of the Criminal Code for 61 years, to exclude them would be difficult. If included, into what part of the statute book would they now fit? In the main, therefore, all provisions contained in the 1874 code, unless obsolete because of their archaic nature, were included. In the same class belong many short regulatory acts which for many years have been included by the unofficial compilers of the statutes as part of the Criminal Code. As for example, the acts regulating firearms, machine guns, embalming fluids, explosives, advertisements, silver imitations, ticket scalping and tipping.²¹ Very often these provisions resembled regulatory provisions contained in the 1874 revisions.²² Wherever there was this identity in character so that the matter of working the provisions into the revision was made simple, temptation led again to exceptions.²³ These exceptions may seem arbitrary, but the justification is the rule of convenience. The bulk of the new offenses made part of the Draft Code have for many years been in the twilight zone of legislation.²⁴ These offenses were created by statutes enacted outside of the 1874 revision, but which were clearly penal in character, punishing objectionable practices growing up since 1874 and not attempting to regulate in any respect. In truth, because of the practice of the unofficial compilers of sandwiching these acts between portions of the Criminal Code, the acts have come to be generally regarded as part of the Criminal Code.²⁵

Code relating to the labelling of poisonous drugs, Ill. Cahill's Rev. Stat. (1933), c. 38, §§169-170, illustrate the matters so incorporated.

²¹ See Ill. Cahill's Rev. Stat. (1931), c. 38, §§ 141(1)-141(7) (dangerous weapons); §§ 183-185 (embalming fluid); §§ 207-214 (explosives); §§ 222-223 (advertising); §§ 330-332 (gold and silver); §§ 409(1)-409(7) (machine guns); §§ 574(1)-574(3) (ticket scalping).

²² Compare sub-paragraphs (a) to (e) of § 118 of the Draft Code relating to drug violations, or the provisions of § 121 relating to fraud; these sections are partly taken from the 1874 revision and partly from acts passed since that time, yet there is a close identity in matter and purpose throughout.

²³ Note, for instance, how paragraphs (d), (h), (j), and (i), taken from separate acts, fit naturally into § 103 on fifth grade swindling.

²⁴ A glance at § 568, the repealing clause, will indicate how many of such statutes were grafted into the Draft Code.

²⁵ Although the unofficial compilers have been blamed for this practice (Freund, *Legislative Regulation* (1932), 34) an examination of the session laws reveals that by reason of precedent or otherwise the various secretaries of state have, at least since the 1874 revision, indiscriminately placed many such acts in the chapter on the Criminal Code, in the session laws, irrespective of the true nature of the offense. Thus provisions relating to bastardy, to boarding homes for children, to bedding, to drug regulation, and similar offenses were assigned to Criminal Code chapters in session laws.

IV

Another important problem before the drafting committee involved reconciling the distinction between felonies and misdemeanors²⁶ to the reclassification of offenses to which the draft was committed.²⁷

It was first planned to do away with the distinction altogether.²⁸ The new classification, it was hoped, would be a better substitute. The arbitrary nature of the distinction, unscientific in its basis, made its abolishment desirable.²⁹ But an examination of the statute book revealed that the desired change could be accomplished only through the passage of a great many amendatory acts.³⁰ The laws of Illinois fairly bristle with references to 'felonies' and 'misdemeanors.'³¹ Furthermore, the long tradition of the distinction in the many court precedents acted as an additional barrier. Because of these practical impediments the committee felt constrained to retain the distinction as collateral to the classification.³² This action, although in truth dictated by expediency, is not inconsistent with the purposes of the draft. The old distinction now serves the sole purpose of reconciling the Draft Code with the terminology of the statute book.³³ In terms of the distinction, crimes of the first and second grade would be felonies; the lesser grades of crimes, misdemeanors. Elsewhere

²⁶ This distinction is set out in § 5 of Division II of the 1874 revision providing, "A felony is an offense punishable with death or by imprisonment in the penitentiary," and § 6 of Division II which provides, "Every other offense is a misdemeanor. . . ." See Ill. Cahill's Rev. Stat. (1933), c. 38, § 614.

²⁷ The Draft Code provides for a classification of all offenses into six grades according to the seriousness of the offenses. For a list of the offenses in each grade see §§ 11, 22, 41, 66, 87 and 108.

²⁸ Report of the Sub-committee on Drafting of the Committee on Criminal Law and Its Enforcement, *supra* note 8.

²⁹ A similar sentiment is expressed in the Report of the Commission on the Administration of Justice in New York State (1934), 869.

³⁰ A possible alternative would be the use of the device of legislation by reference. An amendment of the Statutory Interpretation Act, together with appropriate language in the Draft Code may possibly be a method of avoiding statutory multiplicity. The device has met with some criticism among draftsmen (Lord Thring, *Practical Legislation*, 48-58). An additional objection would exist in the necessity of giving the amendment and the Draft Code a retrospective effect. This device was distrusted in the movement to conform all statutes to the terminology of the Civil Practice Act. See House Bills 432-530 inclusive of the present session.

³¹ A study made by the Associate Committee on the Amendment of the Law, of the Chicago Bar Association reveals three hundred and nine misdemeanors and thirty-two felonies provided for outside of the criminal code.

³² Preface to Draft Code, page IV.

³³ Thus §§ 3 and 4 of the Draft Code keep the definitions found in the 1874 revision; see *supra* note 26 § 5 provides:

"Without reference to the distinction between felonies and misdemeanors, all offenses shall be classified into six grades as follows: (1) crimes of the first grade; (2) crimes of the second

in the Draft Code, all punishments provided for in the statute book outside the Criminal Code are classified in accordance with the division of crimes provided by the Draft Code.³⁴ By this device the same end has, in effect, been achieved and in time it is hoped that the words felony and misdemeanor will be regarded as archaic and wholly unnecessary.

V

The structural organization of the Draft Code is designed to overcome the defects of most existing penal statutes. An examination of almost any section of the present Code reveals a mingling of the following elements: the definition of the offense sought to be punished, revisions relating to attempt and to accessoryship, the penalty to be imposed, provisions relating to procedure or to evidentiary matters, and provisions setting standards for exoneration and exemption.³⁵

The obvious advantage of such a section is that it is complete in itself and there is no necessity to refer to other sections of the Criminal Code for guidance. The disadvantages are that: (1) the legislature is prone to pass an entire new act to cover a specific offense without attempting to reconcile the new provision with the Criminal Code.³⁶

(2) When a section is added to the Criminal Code, because of its completeness, there is no compelling necessity to examine the rest of the Code, and often lack of uniformity in definition, penalty and circumstances of excuse or exoneration results.

grade; (3) crimes of the third grade; (4) crimes of the fourth grade; (5) crimes of the fifth grade; (6) petty offenses.

³⁴ § 153 provides treatment in accordance with the six divisions of offenses of the Draft Code for all offenses not defined in the Draft Code.

³⁵ A typical section is § 57 of the Criminal Code, Ill. Cahill's Rev. Stat. (1933) c. 38, § 145:

"Whoever keeps or maintains a house of ill fame or place for the practice of prostitution or lewdness, or whoever patronizes the same, or lets any house, room or other premises for any such purpose, or shall keep a common, ill-governed and disorderly house, to the encouragement of idleness, gaming, drinking, fornication or other misbehavior, shall be fined not exceeding two hundred dollars, or imprisoned in the county jail or house of correction for a period of not more than one year or both. When the lessee or keeper of a dwelling house or other building is convicted under this section, the lease for contract for letting the premises shall, at the option of the lessor, become void, and the lessor may have the like remedy to recover the possession as against a tenant holding over after the expiration of his term. And whoever shall lease to another any house, room, or other premises, in whole or in part, for any of the uses or purposes punishable under this section, or knowingly permits the same to be so used or occupied, shall be fined not exceeding two hundred dollars, or imprisoned in the county jail or house of correction for a period of not more than one year, or both, and the house or premises so leased, occupied or used shall be held liable for and be sold for any judgment obtained under this section, but if such building or premises belongs to a minor or other person under guardianship, then the guardian or conservator and his property shall be liable instead of such ward, and his property shall be subject to be sold for the payment of said judgment."

³⁶ Glaring examples of this practice exist particularly with reference to gambling, prostitution and malicious mischief. In all of these offenses, the pressure of special interest groups

(3) Systematic and planned treatment of criminal offenders is discouraged and, in fact, made impossible by the confusion which arises through inconsistencies caused by the sporadic use of the section complete in itself.³⁷

(4) Construction by the courts and the bar is made more difficult and confusing to the extent that the courts are compelled to discourage the use of the language of the statute.³⁸

(5) The section complete in itself is apt to be overly long, replete with provisos and gutted with references here, there and everywhere.

To overcome these difficulties the Draft Code provides for the separation of the elements referred to. *Title I* includes among other general provisions definitions for assault, attempt and accessoryship which eliminate the necessity of referring to these situations in each offense. *Title II* is limited solely to the definitions of crimes and petty offenses. *Title III* is limited to circumstances of exemption and exoneration. *Title IV* embraces all penalties and other treatment accorded to offenders. *Title V* to *Title VIII* include all procedural matters.

The real drafting contribution of the Draft Code lies in the fact that its structure will automatically compel future legislatures to prepare amendments to the criminal law in accordance with the classification of the Code. Hereafter, the legislative draftsman will have to ask the legislative proponent, what grade offense do you regard this? Once this question is answered, the remaining mechanics of amendment are simple. They consist only in the addition of a new definition to the grade of offense to which the amendment relates. All the other necessary provisions, penalty, procedure, exoneration and exemption, will immediately attach.

Although a code is probably the highest form of legislative expression,

causes the enactment of separate acts at almost every session of the General Assembly. As a result, these offenses proved the most difficult to reconcile and organize. See §§ 59, 62 and 77 of the Draft Code. As pointed out, *supra* note 15, of two hundred and twenty-nine acts relating to the criminal law enacted since 1874, one hundred and ten were acts complete in themselves. An examination of these acts discloses that most of the offenses defined could have been written into the Criminal Code.

³⁷ Note the variations in punishment for altering the mark or brand of a mule or domestic fowl and the identification number of an automobile. For the former the penalty is imprisonment in the penitentiary for not less than one nor more than three years if the value exceeds \$15.00; for the latter a fine not to exceed \$200.00 or imprisonment in the county jail for a period not to exceed six months.

Stealing a horse is punished by imprisonment in the penitentiary from three to twenty years, stealing a motor vehicle, from one to twenty years.

³⁸ See *People v. Garines*, 314 Ill. 413, 145 N.E. 699 (1924), in which a charge of self-defense in the language of § 149 of the Criminal Code was held improper, the court stating that this section did not give the jury any accurate knowledge of the law.

it remains so only if it is not constantly subjected to haphazard planless amendment. The 1874 revision did not project itself beyond the year of its enactment because it provided no method of moulding future changes in the criminal law. As a result, the 1874 revision today forms, perhaps at the most, one half of the substantive criminal law. As has been indicated it is entirely lacking in organization, devoid of a uniform philosophy or method of treatment, and distinguished only by confusion in thought and in detail. It is thus hoped, by virtue of the structural organization, that the Draft Code will not meet with the same disintegration in the course of time as did the 1874 revision: that unity will remain unity and that the harmony wrested from the existing law will continue.

VI

In order effectively to carry through the structural organization, definitions were resorted to freely. Although the 1874 revision contained a definition of assault,³⁹ attempt,⁴⁰ and accessoryship before the fact,⁴¹ these definitions were not intended as legislative shortcuts. Repeatedly, throughout the many sections of the 1874 revision, there is an effort to cover all of these situations without making avail of the definitions. By the use of three broad definitions,⁴² the necessity of embracing the situation of an assault, an attempt, or an accessoryship in each section defining an offense is eliminated. A great saving of language is accomplished by this device. There is also the added virtue of the assurance that every definition of an offense includes assault, attempt and accessoryship. In a lesser way the other definitions included under *Title I* operated to redeem the bulk of the bill.

In an effort further to clarify and reorganize definition of offenses, groups of offenses with common characteristics were brought together. Thus all the fraudulent offenses, obtaining money under false pretenses, by false personation, by false financial statement, checks or other writing, and similar frauds, were grouped under the section on swindling. The theftuous offenses, embracing larceny by bailee, embezzlement, receiving stolen property, conversion of moneys, thefts by officers and by other persons acting in a fiduciary capacity, were placed in the section on theft. Malicious mischief embraced a variety of offenses against the property of the public, railroads, telegraph companies, newspapers, and other special

³⁹ §§ 20, 23, of the 1874 Revision, Ill. Cahill's Rev. Stat. (1933), c. 38, §§32-34.

⁴⁰ § 1 of Division II of the 1874 Revision, Ill. Cahill's Rev. Stat. (1933), c. 38, § 610.

⁴¹ §§ 2 and 17 of Division II of the 1874 revision, Ill. Cahill's Rev. Stat. (1933), c. 38, §§ 611, 626.

⁴² §§ 6, 7, and 8 of the Draft Code.

interests.⁴³ By this method of grouping, and by the use of the definitions and the economy of the structural organization, the 671 sections of the statute book now devoted to the substantive criminal law were reduced to 175 sections.⁴⁴

VII

The classification of offenses in any criminal code necessarily must be the expression of the underlying social philosophy of the time. Its determination therefore is more a question for the policy maker than for the draftsman. Nevertheless the classification adopted fundamentally shapes the architecture of the draft.

The first criminal code of Illinois, adopted one year following the incorporation of the state, merely listed offenses, without so much as arranging them in alphabetical order.⁴⁵ The criminal code of 1827 more nearly approached modern codes, and through an organization of seventeen divisions classified offenses according to the nature of the offense.⁴⁶ The 1845 revision presented a much more expanded code and again offenses were distinguished on the basis of their nature.⁴⁷ The present code presented as part of the ambitious revision of all the statutes in 1874, interestingly enough abandons the division according to the nature of the offense, which in the interim had become popular in other states,⁴⁸ and is content with a simple arrangement of offenses according to the alphabet.

The Draft Code rejects all of the antecedent classifications and presents as its most important project a classification of offenses into six grades according to the severity of the punishment. Apart from what may be said for or against the policy of division on this basis, there was at once

⁴³ §§ 34, 38, 40, 59, 64, 65 of the Draft Code.

⁴⁴ This is based on Chapter 38 of the Smith-Hurd Revised Statutes (1933). It is to be remembered, however, that certain sections were omitted as regulatory. See *supra* note 18.

⁴⁵ "An Act respecting Crimes and Punishment," approved March 23, 1819, lists the following offenses in the order named: treason, murder, manslaughter, riots, larceny, forgery, usurpation, assault and battery, fraudulent deed, disobedience of children and servants, obtaining goods by fraudulent pretenses, arson, hog stealing, maiming and disfiguring, rape, sodomy, bigamy (spelling of statute) and forcible and stolen marriages, perjury.

⁴⁶ The divisions of offenses were: crimes against the government and people; crimes and offenses against the person; crimes and offenses against habitations and other buildings; crimes and offenses relative to property; forgery and counterfeiting; crimes and offenses against public justice; offenses against the public peace and tranquillity; offenses against the public morality, health and police; offenses committed by cheats, swindlers and other fraudulent persons; fraudulent and malicious mischief; offenses relative to slaves, indentured servants and apprentices.

⁴⁷ The divisions of offenses were identical with the 1827 code.

⁴⁸ Thirty states classify their crimes according to type.

presented the problem of arrangement of offenses within each grade.⁴⁹ The plan which seemed to afford the greatest ease in organization and in presentation was that of listing the offenses in alphabetical order in each grade.⁵⁰ In order to effectuate this plan another unique device was resorted to that of giving to each offense a descriptive label. There are three additional reasons for this method. If the label is sufficiently descriptive, it acts as a short digest of the definition and presents the important part of the section first; the labels operate to make the method of definition more uniform; the labels in time will become currently used to describe the crime defined.

Labels which are new and which illustrate the technique employed are: trafficking in explosives; escape; falsification of financial statement; swindling theft; malconduct toward children; tampering with witnesses; official misconduct. Occasionally it was difficult to get a label sufficiently descriptive to convey the exact connotation desired. It was then that the ingenuity of the drafting committee was taxed to the extreme and its members ventured into long epistemological excursions.⁵¹

VIII

It is not submitted that the problems⁵² herein briefly dealt with have found their perfect solution in the Draft Code. Experience with the Code reinforces the conclusion that revision of important branches of the law cannot be governed entirely by ordinary rules of draftsmanship, that legislative expedients must be devised to meet the exigencies of the body of law under examination. Only by intensive additional study will standards of legislation peculiarly adapted to codification emerge.

⁴⁹ The Report of the Commission on the Administration of Justice in New York (1934), 875 devotes considerable attention to this matter.

⁵⁰ The other alternatives, such as division on the basis of the type of crime, or the social interest sought to be protected, were thought too cumbersome for practical use. By way of facilitating the locating of offenses each grade of offense is preceded by a section listing the offenses within the grade in alphabetical order.

⁵¹ Amusing discussions arose over possible labels. A suggested label for criminal banking, for instance, was banking malversation.

⁵² Each of these problems could well form the subject of a separate article. Other problems are worthy of comment if space permitted. Particular attention should be called to § 568 of the Draft Code setting up a detailed saving clause of a type unusual in Illinois. Its provisions were adopted to avoid any doubt which might arise because of the conflicting decisions of the Supreme Court. The confusion which arose after the enactment of the Civil Practice Act because of the general saving clause served as an example to the drafting committee.

Farmer v. People, 77 Ill. 322 (1874); *People v. Zito*, 237 Ill. 434, 86 N.E. 1041 (1909); *Merlo v. Coal and Mining Company*, 258 Ill. 328, 101 N.E. 525 (1913); *Wall v. Chesapeake and Ohio Ry. Co.*, 290 Ill. 227, 125 N.E. 20 (1919), 256 U.S. 125 (1921); *Vulcan Detinning Co. v. The Industrial Commission*, 295 Ill. 141, 128 N.E. 917 (1920). See also *Sutherland, Statutory Construction* (2d. Ed. [by Lewis] 1904), § 256 ff., § 355.

It is interesting to contrast the saving clause of the Draft Code with that of the 1827 Criminal Code, Rev. Laws of Illinois (1827), 168.