Loyola University Chicago Law Journal

Volume 10
Issue 1 *Fall 1978*

Article 5

1978

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COMMENTARY

Criminal Law Codification: Three Hazards

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While Europeans have a long tradition of legal codification, running back to the Code Napolean of 1804,[1] in the United States true codification is still a relatively new notion. Lack of familiarity with codification still causes problems in jurisdictions adopting codes.

No serious codification proposal was made in the United States until David Dudley Field drafted a New York civil code in the late nineteenth century. The resulting Field-Carter controversy remains a classic in the debate over codification.[2] While the debate concerning the desirability of adopting a comprehensive general code continued, more humble codification of particular areas of the law, especially in commercial fields, had a clear beginning at the turn of the twentieth century. Early codifications of negotiable instrument law and sales law culminated in the middle of the twentieth century with the most ambitious American codification to date, the Uniform Commercial Code.[3]

As the popularity of the concept of codification grew in the commercial law area, inevitably its feasibility in other areas of law was also considered. In the early 1950's the American Law Institute began its efforts toward the development of a codification of the criminal laws,[4] which resulted in the Model Penal Code in 1962.[5] While the work of the American Law Institute [ALI] was in progress, committees in Wisconsin and Illinois were working to propose criminal codes adopted in 1955 and 1961 respectively.[6] The Illinois

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1. For a brief history of European codification, *see* J. MERRYMAN, THE CIVIL LAW TRADITION, 27-34 (1969).

2. For a discussion of the Field-Carter controversy and for further citations, *see* E. PATTERSON, JURISPRUDENCE, 421-25 (1953).

3. For a brief history of the codification movement in commercial law, *see* R. SPEIDEL, R. SUMMERS, & J. WHITE, TEACHING MATERIALS ON COMMERCIAL TRANSACTIONS, 16-26 (1st ed. 1969).

4. For discussions of the early organizations of this project, *see* Wechsler, *The Model Penal Code Project of the American Law Institute,* 20 U. KAN. CITY L. REV. 205 (1951-52), and Wechsler, *The Challenge of a Model Penal Code,* 65 HARV. L. REV. 1097 (1952).

5. For a discussion of some of the high points and limitations in the finished product, *see* Packer, *The Model Penal Code and Beyond,* 63 COLUM. L. REV. 594 (1963).

6. *See* WISC. STAT., §§ 939 to 949.18 (1975); ILL. REV. STAT. ch. 38, §§ 1-1 to 90-11 (1977);

Criminal Code utilized some of the concepts proposed in the then incomplete Model Penal Code.[7] Since 1962, a number of states have adopted criminal codes patterned to a greater or lesser degree on the American Law Institute model.[8] The modern trend toward codification of criminal laws makes a clear understanding of the term "code" particularly important.

THE MEANING OF "CODE"

The terms "code" and "codification" are sometimes misused as synonyms for "statute" and "statutory." Thus misused, the terms "code" and "codification" are frequently attached to that which is only a compilation of various statutes passed by the legislature at different times and having potentially different meanings from one another. A true code, however,

> is a pre-emptive, systematic, and comprehensive enactment of a whole field of law. It is pre-emptive in that it displaces all other law in its subject area save only that which the code excepts. It is systematic in that all of its parts, arranged in an orderly fashion and stated with a consistent terminilogy, form an interlocking, integrated body, revealing its own plan and containing its own methodology. It is comprehensive in that it is sufficiently inclusive and independent to enable it to be administered in accordance with its own basic policies.[9]

This definition emphasizes that a code is an integrated whole, the feature that most distinguishes it from a compendium of independent statutes. It suggests that the user of a code must first search for meaning within the code itself; resort to common law and other secondary authority comes only after this initial step has been pursued. Although different codifications vary as to how systematic and comprehensive they are, the principle of comprehensive treatment remains the same.

THE HAZARDS

Because the codification movement is still new in American law

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COMMITTEE FOREWORD, TENATIVE FINAL DRAFT, PROPOSED ILLINOIS REVISED CRIMINAL CODE (1961).

7. *See* COMMITTEE FOREWORD, TENTATIVE FINAL DRAFT, PROPOSED ILLINOIS REVISED CRIMINAL CODE (1961).

8. A proposal is currently pending in Congress for the codification of federal criminal laws. S. 1437, 95th Cong., 1st Sess. (1977). This proposal appears to have departed significantly from the Model Penal Code.

9. Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L. F. 291, 292. *See also* People v. Hairston, 46 Ill. 2d 348, 356, 263 N.E.2d 840, 846 (1970): "The entire Criminal Code and each of its sections must be considered in determining the legislative intent. . . ."

it is not surprising that some hazards remain to be uncovered. Certain problems in criminal law have long been apparent. For example, the codifier must consider whether or not the definition of the crime, defense, or principle of criminal liability will be politically acceptable to the legislative body which is to adopt it. The drafter of a criminal code also continuously faces the hazard that his verbal articulation of the crime, defense, or principle of criminal liability might contain an undesired loophole or extension. However, these hazards have been recognized since the very beginning of the codification movement. Less obvious are particular hazards in the application of the criminal code by working judges and lawyers.[10]

Because a new codification usually does not totally alter the criminal law within the adopting jurisdiction, judges and lawyers may apply it in most cases using much the same terminology and concepts that they used before the code was adopted. Finding that the end result under the code is much the same as before — the crimes are likely to have the same names and basically the same elements — they are also likely to continue to use common law terms and pre-code attitudes toward statutory construction.

Some of the primary hazards in working with a criminal code may be illustrated by considering a single recent decision by the Illinois Supreme Court. Undoubtedly examples could be drawn from any number of decisions from states which have recently codified their criminal law. But some of the worst potentials for mischief seemed to coalesce in this one case.

In *People v. White*,[11] the defendant was charged with armed robbery. His only defense, intoxication, was rejected by the trial court; his conviction was affirmed by the appellate court. The decision of the appellate court and the argument of the State before the Illinois Supreme Court may be summarized as follows: (1) robbery is a general intent crime, (2) the intoxication defense is available only for specific intent crimes, and (3) therefore, the intoxication defense is not available in a robbery prosecution.

The Illinois Supreme Court accepted the second premise without discussion, that the intoxication defense is available in prosecutions for specific intent crimes, but not for general intent crimes. However, the majority disagreed with the first premise, that robbery is a general intent crime. After reviewing the history of robbery statutes in Illinois together with their interpretations by the courts, the

10. For a discussion of problems in interpreting the first modern criminal law codification, the Louisiana Criminal Code of 1942, *see* Michael, *Present Problems in Louisiana Substantive Criminal Law*, 11 LOY. L. REV. 71 (1961-62).

11. 67 Ill. 2d 107, 365 N.E.2d 337 (1977).

majority concluded that robbery and armed robbery are specific intent crimes. Nevertheless, while the majority would permit the intoxication defense to be raised, they concluded that the evidence introduced by the defendant at his trial was insufficient as a matter of law to negate the intent required for armed robbery.

A further discussion of the court's opinion in the *White* case may best be organized in the context of the hazards encountered.

First Hazard: Retention of Pre-Code Vocabulary and Concepts

To the careful reader of the Illinois Criminal Code of 1961 who is otherwise unfamiliar with criminal law, the very statement of the premises of this appeal would make little sense. "Intent" is defined by the code,[12] but the terms "specific intent" and "general intent" are nowhere to be found. They are carry-overs from the pre-code times.

The continued use of the terms "general intent" and "specific intent" may largely be the fault of the drafters of the code. They created a classification of crimes without assigning names inviting the continued use of older terms which may also carry with them the freight of obsolete concepts.

The Illinois Criminal Code defines four mental states — intent, knowledge, recklessness, and negligence.[13] Section 4-3(b) provides that if the statute defining the offense prescribes a particular mental state, that mental state applies to each element of the crime. This section continues:

> If the statute does not prescribe a particular mental state applicable to an element of an offense (other than an offense which involves absolute liability), any mental state defined in Sections 4-4 [intent], 4-5 [knowledge] or 4-6 [recklessness] is applicable.

Using section 4-3(b), one may attempt to classify the crimes in the code according to the mental element involved. The crime of attempt, for example, requires that it be committed "with intent," so it is possible to term it an "intent" crime.[14] The statute defining assault, however, is silent on the mental element required.[15] Using section 4-3(b), it is obvious that any of the three mental elements — intent, knowledge, or recklessness — would satisfy the mental element of the offense. Should one describe assault as an "intent-knowledge-reckless" crime after reading the quoted language from

12. Ill. Rev. Stat. ch. 38, § 4-4 (1977).
13. *Id.*
14. *Id.*
15. *Id.*

section 4-3(b)? Such an awkward description leads to the temptation to use pre-code terminology; "general intent" may serve to describe an offense such as assault for which no specific mental element is prescribed. To distinguish these offenses from those such as attempt, where intent is the prescribed mental state, we may be tempted to call the latter "specific intent" crimes.

This use of "general intent" to define a concept in the code not otherwise given a name has utility of convenience. Moreover, there is some non-code support for using "general intent" to describe a general minimum *mens rea.*[16] Unfortunately, the general-specific intent dichotomy carries with it historical usage beyond its convenience as labeling for code concepts. The more traditional meaning of general intent was the intent to perform the *actus reus*,[17] which has nothing to do with the mental elements regarding the consequences of the act. This traditional meaning of general intent is incorporated elsewhere in the code — the section requiring a *voluntary* act.[18] Continuing the historical dichotomy, "specific intent" was used to describe "a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime."[19] Used in the traditional sense, neither "general intent" nor "specific intent" has anything to do with the meaning of "intent" as it is found in the Illinois Criminal Code. The confusion caused by this second use of specific intent and general intent is illustrated by a recent Illinois appellate court opinion which held battery to be a "specific intent" crime,[20] although the code section provides that one commits the offense if he acts "intentionally *or knowingly.*"[21]

Undoubtedly, some of the continued use of the general-specific intent dichotomy, especially in the context of the intoxication defense, simply represents a habit of thought carried over by judges and lawyers from pre-code law. Code drafters could have done much to avoid the confusion had they supplied a term of art to describe the general *mens rea* class. However, the fault does not lie exclusively with the drafters of the Illinois code. As early laborers at codification, the drafters of the Illinois code had little American experience to aid them in articulating general principles of criminal

16. *See* W. LaFave & A. Scott, Handbook On Criminal Law, 201, 202 (1972); J. Hall, General Principles of Criminal Law, 142-45 (2d ed. 1960).

17. *Id.*

18. Ill. Rev. Stat. ch. 38, § 4-1 (1977).

19. W. LaFave & A. Scott, Handbook on Criminal Law, 202 (1972). *See also* R. Perkins, Criminal Law, 762-64 (2d ed. 1969).

20. People v. Hayes, 37 Ill. App. 3d 772, 774, 347 N.E.2d 327, 329 (1976).

21. Ill. Rev. Stat. ch. 38, § 12-3 (1977).

liability. A major source was the unfinished American Law Institute's Model Penal Code, which also lacks a term for the general *mens rea.*[22]

In its 1970 *Study Draft of a New Federal Code,* the National Commission on Reform of Federal Criminal Laws proposed a term which might have prevented a similar problem in interpreting any new federal criminal code. Under this proposal, if the statute defining the offense were silent as to the mental element required, the proof would have to show that the act was done "willfully."[23] The proposal defined "willfully" to include "intent," "knowledge," and "recklessness."[24] While one might criticize the use of the term "willfully," which may carry some undesired traditional freight of its own, at least the proposal would have included a defined term of art to describe a concept in the code, without tempting one to resurrect the specific-general intent dichotomy. Unfortunately, the proposed Federal Criminal Code now pending before Congress contains no term to define the general *mens rea* element — "willfully" or otherwise.[25]

By using the pre-code terms "specific intent" and "general intent," the Illinois Supreme Court in *White* potentially reintroduced a concept alien to the meaning of "intent" as defined in the Illinois Criminal Code.

Second Hazard: Reading a Code only as a Group of Statutes

In deciding *People v. White,* the supreme court had to first determine what mental element is required for the crimes of robbery[26] and armed robbery.[27] The statutes defining these crimes are silent on this element. It seems apparent from section 4-3(b) that any of the three mental states — intent, knowledge or recklessness — would suffice.

Neither the majority nor the concurring opinion in the *White* case discussed the code language. The discussion turned immediately to the comments of the drafting committee concerning the robbery section. The words from the committee comments became the focal point for the majority opinion:

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22. The same problem exists in the Louisiana Criminal Code. *See* Michael, *Present Problems in Louisiana Substantive Criminal Law,* Loy. L. Rev. 71, 83-87 (1961-62).

23. National Commission on Reform of Federal Criminal Laws, Study Draft of a New Federal Criminal Code, § 302(2) (1970).

24. *Id.* § 302(1)(e).

25. S. 1437, 95th Cong., 1st Sess. (1977).

26. Ill. Rev. Stat. ch. 38, § 18-1.

27. *Id.,* § 18-2.

> This section codifies the law in Illinois on robbery and retains the same penalty. No change is intended.*** No intent element is stated as the taking by force or threat of force is the gist of the offense and no intent need be charged. (See *People v. Emerling,* 341 Ill. 424, 173 N.E. 474 (1930).[28]

Writing for the majority in *White,* Mr. Justice Goldenhersh demonstrated persuasively that the *Emerling* decision cited by the drafting committee resulted from a misreading of earlier cases and statutes. Therefore, the majority concluded that properly read, the law in existence prior to the new code required intent for the crime of robbery. And since the legislature intended to bring about no change, intent is required under the code.

> In our opinion, as indicated by the Committee Comments, the General Assembly, upon enactment of sections 18-1 [robbery] and 18-2 [armed robbery] of the Criminal Code of 1961, intended no change in the existing law and there is no indication of a "legislative purpose to impose absolute liability for the conduct described." We hold that the appellate court erred and that the intent to deprive the person from whom the property is taken permanently of its use or benefit is an element of the crimes of robbery and armed robbery.[29]

It is worthy of note that this language appears to assume that the choice available is between recognizing intent as an element or imposing absolute liability.

In a special concurring opinion, Mr. Justice Dooley called attention to the problem caused by treating a conclusion in the comments of a legislative drafting committee as though it were a judicial opinion.

> The question before us cannot be resolved on whether the committee improperly cited *Emerling* as authority for the proposition that intent need not be charged or proved in a robbery case. The stark fact is that the committee which drafted the Criminal Code of 1961 did not introduce into sections 18-1 or 18-2 a specific intent requirement.[30]

Even more fundamental than the problem suggested by the concurring opinion is the approach to interpretation utilized. In interpreting the robbery sections, the court approaches the problem with the assumption that the answer is to be found in the language and

28. People v. White, 67 Ill. 2d 107, 110, 365 N.E.2d 337, 338-39 (*quoting* ILL. ANN. STATS. ch. 38, § 18-1, Comm. Comments (Smith-Hurd 1970)).

29. People v. White, 67 Ill. 2d 107, 117, 365 N.E.2d 337, 342.

30. *Id.* at 125, 365 N.E.2d at 346 (Dooley, J., concurring).

history of the code section itself. The code section is viewed as a single statute in a compilation, not as a part of a comprehensive legislative package. Other code sections are cited and discussed, but they are treated almost as secondary authority.

Section 4-3(b) of the Illinois Criminal Code of 1961 is not a monument to clarity. However, it is probably as clear as similar provisions found in most other codifications. The full utilization of any code requires that questions of interpretation be approached initially with a presumption that the answers will be found within the code itself.[31] Part of the interpretation problem may be attributed to the fact that there is a long history of calling any compilation of random penal statutes a "code," even though it does not represent an organized body of interrelated principles. For example, both Chapter 38 of the Illinois Revised Statutes and Title 18 of the United States Code are called criminal codes, although they are very different in operation and format.

Drafters of codes might alleviate the problem of ignored and overlooked sections dealing with general principles by using a device utilized in the Uniform Commercial Code — cross references. Such cross references would emphasize to the user of the code that he is reading but a part of an integrated whole, encouraging him to first look for clarification within. Of course, it would also give him direction as to where to look.

THIRD HAZARD: DRAFTERS' COMMENTS

It is axiomatic that when any statute is enacted, the words of the statute are the law, not the reasons given by the proponent of the legislation. Comments by the proponents and drafters may be important in understanding the meaning of the words of the statute,[32]

31. Apparently the Illinois Supreme Court has also overlooked Article 4 of the Criminal Code in dealing with the offense of attempt murder. Under § 8-4, the crime of attempt is committed when one, "with intent to commit a specific offense," performs an act in furtherance of that offense. ILL. REV. STAT, ch. 38, § 8-4. In People v. Muir, 67 Ill. 2d 86, 365 N.E.2d 332 (1977), the court found that the meaning of "intent" is found in the murder statute: "He knows that such acts create a strong probability of death or great bodily harm to that individual or another." ILL. REV. STAT. ch. 38, § 9-1 (a)(2). Four months later, in People v. Trinkle, 68 Ill. 2d 198, 369 N.E.2d 888 (1977), the court reached what appears to be the opposite conclusion: "It is not sufficient that the defendant shot a gun 'knowing that such act created a strong probability of death or great bodily harm . . . .'" *Id.* at 201, 369 N.E.2d at 890. The *Trinkle* decision did not specifically overrule - or even cite - *Muir*. Although the central question in both *Muir* and *Trinkle* was the meaning of "intent" in the attempt offenses section, neither case cited or discussed the code section defining intent: ILL. REV. STAT. ch. 38, § 4-4. For a discussion of these and other Illinois cases dealing with this problem, *see* W. LAFAVE, MODERN CRIMINAL LAW: CASES, COMMENTS AND QUESTIONS, 479-85 (1978).

32. The Committee Comments are "a source to which we may properly look in determining the legislative intent" behind the Illinois Criminal Code. People v. Touhy, 31 Ill. 2d 236, 239, 201 N.E.2d 425, 427 (1964).

but those comments do not replace the meaning of the words in the statute as the law.[33]

Nevertheless, comments are simply less soporific to read than legislative pronouncements. They shed more light on underlying policy reasons for the rule, and make the premises leading to the rule more obvious. The reader can also fault commentary, as the majority opinion in *People v. White* demonstrates, while it is difficult to argue with a legislative command except on constitutional grounds. For these reasons, there may be a temptation to interpret the commentary, rather than the code. In discussing the mental element in the robbery sections, it is not unfair to suggest that the majority opinion in the *White* case adopted as its major legal premise the words in the commentary, "No change is intended." Relying upon this major premise, the court went on to determine the prior state of the law which was to be preserved by the code.

The *White* case demonstrates another instance in which the drafters' comments to the Illinois Code appear to have prevailed over the language of the code; this involves the effect of voluntary intoxication. The relevant section of the code says that "[a] person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition . . . (a)[n]egatives the existence of a mental state which is an element of the offense; . . . ."[34] After criticizing the previous statutory formulation, the committee comment comes to the rather inexplicable conclusion that "[t]he new Code makes no change in the substantive law as to intoxication but states the governing principle in a more intelligible form. . . ."[35]

Once again, section 4-3 seems to make it clear that there is a "mental state which is an element of the offense"[36] for every crime, except for minor offenses which qualify for absolute liability.[37] Some crimes, such as attempt, contain a specific mental state in the statute defining the offense. Other crimes, such as assault, lack such specification. However, this absence does not mean that there is no "mental state which is an element of the offense." Section 4-3(b) requires proof of intent, knowledge or recklessness.

33. *See, e.g.*, Certain Taxpayers v. Sheahen, 45 Ill. 2d 75, 84, 256 N.E.2d 758, 764 (1970), where the court stated: "The legislative intent should be sought primarily from the language used in the statute. Where the language of the act is certain and unambiguous the only legitimate function of the courts is to enforce the law as enacted by the legislature."

34. ILL. REV. STAT. ch. 38, § 6-3 (1977).

35. ILL. ANN. STAT. ch. 38, § 6-3, Comm. Comments (Smith-Hurd 1970).

36. ILL. REV. STAT. ch. 38, § 6-3 (1977).

37. Under ILL. REV. STAT. ch. 38, § 4-9 (1977), absolute liability exists only if the offense is a misdemeanor not punishable by incarceration or by a fine in excess of $500, or if the statute defining the offense clearly indicates such a purpose.

Applying this analysis to the voluntary intoxication section,[38] it appears that the intoxication defense should be available in all but absolute liability offenses. In the case of a prosecution for the crime of attempt, responsibility would be avoided if intoxication prevented the formation of the "intent" which the attempt statute requires for perpetration of that crime. But it would also annul responsibility in an assault prosecution if it precluded the defendant from "consciously disregard[ing] a substantial and unjustifiable risk,"[39] which is required for recklessness — a "mental state which is an element of the offense" through the application of 4-3(b).

It is interesting to compare the language of the Illinois statute with that of the Model Penal Code. The Illinois code section provides that an intoxicated person is responsible unless such condition, "negatives the existence of a mental state which is an element of the offense. . . . "[40] This provision is not unlike the first subsection of the Model Penal Code section on intoxication: "(1) Except as provided . . . , intoxication of the actor is not a defense unless it negatives an element of the offense."[41] The potential for change which this subsection, standing alone, might possess was not overlooked when it was presented to the American Law Institute in May of 1959. Consequently, a second subsection was also proposed:"(2) When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial."[42]

The addition of this subsection represented a conscious choice by the ALI to retain the American practice of recognizing only a limited defense of intoxication, rather than adopting the English rule of treating intoxication as one aspect of the overall determination of *mens rea,* as advocated by at least one of the ALI Advisory Committee members.[43] No language similar to subsection 2 is found in the Illinois code, even though the Illinois section was proposed after the ALI debate.

If the Illinois code makes the defense of intoxication available in

38. ILL. REV. STAT. ch. 38, § 6-3(a) (1977).
39. *Id.* § 4-6.
40. *Id.* § 6-3(a).
41. MODEL PENAL CODE § 2.08 (Proposed Official Draft, 1962).
42. *Id.*
43. *See* MODEL PENAL CODE § 2.08 (Tent. Draft No. 9, 1959). Judge Learned Hand objected to the special rule approach. *See* Wechsler, *Foreword, Symposium on the Model Penal Code,* 63 COLUM. L. REV. 589, 591 (1963). For the views of an opponent of the Model Penal Code formulation of the intoxication defense, *see* Packer, *The Model Penal Code and Beyond,* 63 COLUM L. REV. 594, 599-601 (1963).

all prosecutions, not just those requiring intent, it does indeed amount to a change in the law from that which existed prior to its adoption.[44] Yet one searches in vain among the Illinois decisions for a discussion of the words of the code. Among the appellate court decisions, the words of section 6-3(a), defining the intoxication defense, are quoted only in general statements amounting to dictum.[45] Where the defense of intoxication is at issue, the courts have stated as the operative law the pre-code rule that the defense is available only for intent crimes. They have even gone a step further to say that for the defense to apply, the intoxication must be so extreme as to suspend entirely the power of reason.[46] This latter extention defines the defense objectively, even though the mental element involved, intent, is defined by section 4-4 as a subjective mental state.[47]

The Illinois Supreme Court has never squarely faced the intoxication defense since the adoption of the new code. In the *White* case the language of both the majority and concurring opinions appears to assume that the defense applies only to "specific intent" crimes. However, since they found robbery to be a "specific intent" crime, they did not need to decide whether the intoxication defense applies to other crimes.

The appellate court decisions limiting the intoxication defense to intent crimes[48] have ignored the language of the code. Operationally, the law has been drawn from the drafters' comments: "The New Code makes no change in the substantive law as to intoxication. . . ."[49] In these opinions, as in the *White* majority's use of the comments to interpret the robbery statute, the drafters' comments have taken precedence over the words of the legislation.

Legislative history has long been used as an instrument for statutory interpretation. However, it has generally been relied upon only where the legislative language is ambiguous; presumably it is never to be used to alter the clear meaning of the legislative language.[50]

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44. *See, e.g.*, People v. Bartz, 342 Ill. 56, 67, 173 N.E. 779, 783 (1930).

45. *See, e.g.*, People v. Hunter, 14 Ill. App. 3d 879, 884-85, 303 N.E.2d 482, 485 (1973).

46. *See, e.g.*, People v. Fleming, 41 Ill. App. 3d 1, 3, 355 N.E.2d 345, 348 (1976).

47. ILL. REV. STAT. ch. 38, § 4-4 (1977), provides that a person acts with intent "to accomplish a result or engage in conduct described by the statute defining the offense, when his conscious objective or purpose is to accomplish that result or engage in that conduct." Thus, even if one were to assume that the intoxication defense is limited to intent crimes, it would appear that the defense would be available whenever intoxication prevents the formation of the "conscious objective or purpose" to accomplish the specific result, whether or not the power of reason has been entirely suspended.

48. *See* note 45 *supra*.

49. ILL. ANN. STAT. ch. 38, § 6-3, (Smith-Hurd 1970).

50. *See* note 33 *supra*.

The resort to comments by courts may often be attributed to the habit of approaching statutes as singular pronouncements, rather than as fragments of a codified whole. Thus, interpreting a specific statute, a court is likely to turn initially to the comments concerning the specific statute, rather than to other statutes within the code.

Use of drafters' comments in Illinois is further complicated by the fact that the comments are not, strictly speaking, *legislative* intent. The committee which drafted the code was made up of distinguished Illinois judges, lawyers and law teachers. In addition to the proposed code sections, they wrote comments concerning their work. As distinguished as the committee was, it was not the legislature. The comments by this committee are thus only the comments of an interested group of citizens. Only inferentially may they be taken as the intent or understanding of the legislature; the legislative pronouncement was the code, not the commentary.[51]

Undue emphasis upon drafters' comments may be a hazard not easily avoided. Perhaps drafting committees should circulate no commentary, or if they do so, they should avoid commenting upon changes which would result. In many instances, however, such solutions would be practically unwise. Commentary is a valuable device for understanding a codification, especially while it is new, and before judges and lawyers have had experience in working with it. Further, the legislature may insist upon some explanation of the meaning and impact of the proposal. Short of abolishing commentary, a suggestion made earlier might be helpful: if the commentary includes cross references, anyone relying upon the commentary will be drawn to other code sections which bear upon the issue involved. Thus the commentary itself might contain guidelines for its use.

Conclusions

The codification movement in criminal law is to be welcomed. With it, the substantive law of crimes has benefited through more precise definitions not only of the rules defining offenses themselves, but also of the doctrines and principles of criminal responsibility. It has also permitted the discarding of some of the more irrational concepts which have encumbered criminal law. At the same time, the codifications have not ordinarily included major changes from common law traditions.

51. Thus, while the reports of such citizen committees may be examined in determining legislative intent (*see* note 32 *supra*), they occupy a less authoritative position than the reports of legislative committees. Cases hold that the latter "may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure." Duplex Printing Press Co. v. Deering, 254 U.S. 443, 474 (1920).

The fact that criminal codes have usually resulted in the fine-tuning of traditional law, rather than complete reconstruction, has contributed to the hazards discussed above. Had the codes completely revamped the vocabulary and concepts of criminal law, judges and lawyers would probably have been more aware of the need to reconsider their assumptions in light of changes in legislative formulation. Because vocabulary and concepts are not completely altered in the new codes, most cases are resolved in the same way used prior to codification, apparently making detailed examinations of code sections unimportant. As a result, code sections inconsistent with prior law are likely to be ignored or simply overlooked.

Of course, judges and lawyers should be admonished to read a code as an unified whole, not as a compendium of legislative miscellania. But drafters of codes and those charged with writing code commentary should also be aware of the hazards in applying these relatively new inventions. As legislative drafters they may do so by making certain that each important concept is identified by a term of art, even if they must invent a term to identify a concept which differs from the traditional one. Definitional sections prominently placed may also encourage the user to refer first to the code for meaning.

Drafters of commentary could aid the user by suggesting other code sections relevant to statutory construction. A useful model may be the Uniform Commercial Code comments, which typically list cross references and definitional cross references.

Finally, it may help to avoid the erroneous use of drafters' comments if the drafters of commentary avoid stating that no change is intended when, in fact, the wording of the statute has been changed. Such words in the commentary, at least in the Illinois experience, may assume greater importance than the code section itself. Again, the Uniform Commercial Code comments may be instructive.[52]

The benefits of criminal codes are many. The organized, rational exposition of the substantive criminal law may avoid many of the uncertainties, inconsistencies and undue technicalities which have plagued the common law of crimes. Not only may these benefits be lost by the improper use of codes, but the law may be made worse

52. *See, e.g.*, U.C.C. § 3-106 Comment. Following citation to the prior statute, the comment continues:

> Changes: Reworded:
>
> Purposes of Change: The new language is intended to clarify doubts arising under the original section as to . . . .

than if codes had not been adopted at all. If readings of legislative pronouncements and judicial opinions lead to opposing conclusions, one may wonder whether clarity and rationality would not better be served by repealing the legislation. For codes to be beneficial, they must be followed; to be followed, they must be understood.

Loyola University Law Journal

Published Quarterly by the Students of Loyola University of Chicago School of Law
Loyola University of Chicago
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Cite 10 LOY. CHI. L.J. — (1978)