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HOW LOUISIANA PREPARED AND ADOPTED A CRIMINAL CODE

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BACKGROUND AND LEGISLATIVE MANDATE TO LAW INSTITUTE

In 1942 Louisiana adopted a comprehensive and modern criminal code. Prior thereto, for one-hundred-thirty-seven years, Louisiana's basic law of crimes was contained in a general criminal statute known as the Crimes Act of 1805. This statute adopted in substance the common law of crimes with respect to the particular offenses that were enumerated therein. Complaints of the growing confusion, extended in breadth and depth by every session of the Legislature through the addition of statutes dealing with particular offenses, were constantly voiced. Successive efforts to remedy this condition came to naught until the adoption of the present code. How this accomplishment was achieved is the subject of this discussion in the thought that such a review may be of interest and assistance elsewhere.

There should be no need to say that the people of Louisiana are very much the same as the people in the rest of the country, and this includes, only by way of emphasis, the Louisiana lawyers. The same objections were heard here that are within the common knowledge of anyone familiar with attempts to make comprehensive improvements in the law. It was claimed that Louisiana had a system of criminal law that was working very well; under it Louisiana had succeeded in establishing a very good record in bringing to the bar of justice offenders against its order; the shortcomings and deficiencies of its system were known and understood and could be reckoned with; the jurisprudence was established; any new system would only multiply many fold whatever confusion existed; a long and laborious, costly and distressing period of uncertainty would be the fruit of adopting a new criminal code. Present also was the belief that experienced practitioners would lose the advantage of the special knowledge of the intricacies of the common law

system and would be no better off than the beginner and that district attorneys and judges would have to revamp their files of charges, instructions and other forms. These and more were the objections that were voiced and that, it may be, had had much to do in thwarting over such a long period many previous efforts to give Louisiana a comprehensive criminal code. At the same time there were some important factors exerting an opposite pull. In the first place, codification, as such, was native to Louisiana. To talk in terms of a code of laws was to talk in terms familiar to the Legislature and to the people. On the civil law side Louisiana had never known anything but codification. From its very beginnings as a territory it had functioned under a civil code. To suggest that it adopt a true criminal code was but to urge that it bring its system of criminal law up to that of its civil law, and that it finally consummate an attempt first undertaken by Edward Livingston, one of the fathers of its civil code. In the second place there were so many cases of overlapping and duplicating criminal statutes or provisions that in some important areas the law was well nigh incomprehensible.

It was against such a background that the Louisiana Legislature instructed the Louisiana State Law Institute to prepare a comprehensive and complete criminal code. That the mandate came from the Legislature attested the fact of interest in the project from its inception by that all-important body, and also its continued belief that something could and should be done. The rest of the story is largely a story of the Louisiana State Law Institute. Since the organization and history of the Institute are obtainable elsewhere little will be repeated here.[1] In the six years of its existence prior to the presentation to the Legislature of the Projet of a Criminal Code, the Institute had succeeded very well in establishing itself as a body devoted to the improvement of the law from an objective point of view as a means of regulating the social order that was Louisiana's heritage but without neglecting the habits, customs and mores of its people. The procedure it had adopted for the accomplishment of its projects was recognized as calculated to assure a degree of deliberation and thoroughness that so frequently is unattainable by a legislative body and at the same time a broadness of experience, vision and understanding that is too often a shortcoming of a small committee or group. In short, the Louisiana State Law Institute was ideally suited to the preparation of legislation as intimately concerned with the affairs of the whole people as a Criminal Code.

1. Tucker, *The Louisiana State Law Institute,* 1 La. L. Rev. 139 (1938); Smith, *The Louisiana State Law Institute,* 14 TUL. L. REV. 89 (1939); Daggett, *The Louisiana State Law Institute,* 22 TEXAS L. REV. 29 (1943).

Basic Policies and Procedures Adopted

The Institute accepted the mandate addressed to it by the 1940 Legislature as one to prepare a criminal code, true in form as well as substance, not to make a collection of criminal statutes or even merely to revise Louisiana's criminal laws. A manifest requirement of this policy was that, notwithstanding that criminal conduct was to be clearly defined, general principles should be used in place of detailed and particularized provisions. Whenever possible such conduct was to be defined in terms that were sufficiently inclusive to cover the limits of criminal behavior to be subjected to the stated penalty and at the same time sufficiently specific to avoid the objection of vagueness or uncertainty. It was realized that the common law rule of strict construction had operated to convert criminal law draftsmanship into the unacceptable practice of undertaking specifically to list every varying element of fact entering into the commission of an offense. Many intricate, inadequate and unworkable laws had been the fruit of Louisiana's submission to this principle. Although, of course, the principle *nullem crimen sine lege* was to remain in full vigor, no blind distortion of its meaning was to destroy basic principles of true codification requiring the use of general instead of specific terms in defining offenses.

The Institute selected for the actual work of drafting the Code the professors of criminal law of the Loyola, Tulane and Louisiana State University law schools. It was believed that law faculty members would be in a better position to take an objective approach to their responsibility being relatively free of any personal bias that can so easily be developed by participation in the active functioning of the law. At the same time, realizing that many practitioners are given to believe, rightly or wrongly, that professors are likely to be removed too far from the play of the law in action to catch the subtler tones and shades from its many facets, the Institute undertook to provide an assurance of any needed balance by selecting an advisory group to the reporters made up of judges presiding over criminal trials and lawyers engaged in criminal law enforcement or specializing in the defense of those charged with criminal offenses.

Before beginning the work of drafting, a detailed and complete survey was made of the criminal law of Louisiana, in whatever form it might be found. Much consideration was given also to the criminal law of other jurisdictions with particular emphasis on criminal law codification. Expert opinion was sought and secured from many sources. In short, every effort was made to obtain all available information neces-

sary to produce a code that would reflect the best in thought and experience.

The reporters addressed themselves to their task in full sympathy with the adopted objectives. They divided the Code into two main parts. In the first or general part there were set out the general provisions affecting the specific offenses later to be dealt with. Among these provisions were included general definitions of terms used in the code, rules of interpretation, lesser and included offenses, elements of crimes, such as intent, culpability, parties and inchoate offenses such as criminal conspiracy. The remainder or second main part of the code was devoted to specific offenses. In the drafting of provisions dealing with specific offenses the reporters adhered closely to the basic objective of eliminating and avoiding useless distinctions that would serve only to mystify and confuse and more importantly to destroy effectiveness in the administration and enforcement of the criminal law. Where related crimes could be combined and difficult distinctions eliminated they combined them. Instead of inviting the discovery or development of gaps and sags by particularizing, much care was devoted to the selection of general terms that it was believed could escape the charge of vagueness or indefiniteness. Simplification without prejudice to fundamental concepts of individual liberty was the constant objective.

As the work of drafting moved forward, the reporters met with their advisory staff from time to time and went over in great detail every proposed article of the new code. In addition to undertaking to pursue consistently the principles of codification adopted much care was given to the choice of language for the purpose of assuring that the provisions would be readily understandable. Upon final agreement being reached on the draft by the reporters and the advisory staff, it was ready for submission to the Council of the Institute.

Organization of Council and Methods of Review

The Council, the governing authority of the Institute, is made up of twenty-two ex-officio and twenty-eight elected members. The members ex-officio include the officers of the Institute, the Attorney General, the Executive Counsel to the Governor, and the Chairmen of the judiciary committees of the Senate and House of Representatives of the State of Louisiana, the President of the State Bar, the Deans of the Loyola, Tulane and Louisiana State University Law Schools, and the Louisiana members of the Council of the American Law Institute. The elected members include representatives of the Supreme Court, of the Courts of Appeal, of the District Courts and of the Federal Courts in Lou-

isiana; three members of each of the three mentioned Law Schools, and fifteen practicing attorneys chosen at large throughout the state. Although many of the members of the Council might have claimed no particular expertness in the field of criminal law yet, in point of fact, many important suggestions came from such members.

In reviewing the draft, the Council did not address itself to its task perfunctorily. The presentation of every provision was accompanied by a detailed analysis and explanation of its language, the background against which it was drawn, and its purpose. Presentation was, of course, followed by discussion until agreement was reached. Redrafting and resubmission were frequently required. Needless to say it was often necessary for the reporters to review at great length developments based on modern experience and the mature thought of scholars of criminal law and criminology. In some cases proposals were offered that the Council was unwilling to accept. Some of its decisions have drawn complaint but the wisdom or unwisdom of its action need not here be discussed. In any event, instances of this kind further attest the thoroughness of the Council review, if also the unwillingness of the Council to break with the past where the importance of breaking was not to a majority of its members sufficiently apparent. They also suggest that there was little in the draft after adoption that any person unless fired with a zeal to destroy could find vehemently objectionable.

Factors Contributing to Public and Legislative Approval

Throughout the preparation of the Projet, the Institute remained constantly aware that its work would come to naught unless found acceptable by the Legislature. The presence of the key judiciary members of that body as members of the Council assured that a small but important nucleus of the popular representatives of the people would be kept abreast of what was being done in the new code and would have the opportunity to express a voice in adopting the policies as they were initially developed. Through the Attorney General and the Executive Counsel to the Governor the administrative side of the state government would be kept constantly informed. The presence of representatives of the several courts sitting in Louisiana made it certain that the draft would reflect the wisdom of the bench and the point of view of those whose duty it would be to enforce the new code if and when it became law. From every point of view, no opportunity was lost that would add to the statute of the Code when submitted or that might be needed to assure the more skeptical that the ultimate in care and thoroughness had characterized its preparation.

The Institute knew also that any determined opposition by the Louisiana Bar would go a long way toward convincing the Legislature that the proposed code should not be adopted. It had foreseen that opponents of the draft would most likely come from lawyers who had specialized in defense representation both because the existing state of the law would be deemed more favorable to successful defense work than would the improved and clarified system of the new code and because the possibilities afforded under the old were so well known. With such thoughts in mind the Institute had included in the advisory group two of Louisiana's most successful criminal defense lawyers. These appointments were designed to afford the opportunity to qualified and able representatives of the viewpoint of the defense to express their ideas as the work progressed and also to secure a first-hand knowledge of the problem of drafting the Code from the point of view of the draftsmen. It was believed that this would go a long way toward dispelling any opposition likely to develop from the criminal defense segment of the bar and at the same time the Institute would be advised of the arguments most likely to be heard when the adoption of the Code was being considered.

Since its beginning there had been very close liaison between the Institute and the Louisiana State Bar Association. Many of the more outstanding and active members of the bar were numbered on the Council, including as already stated the president of the Association. In addition, the general membership of the Institute included not only all of the judges of the various courts, federal and state, in Louisiana but a carefully selected group of one-hundred-and-fifty lawyers who had practiced for at least ten years. When, therefore, following approval by the Council, the Institute was ready to present the Projet of a Criminal Code to a meeting of its general membership, this meant that it would then be reaching a large and important element of the bar as well.

After the Council had given its approval to the draft it was submitted to a meeting of the general membership called for such purpose. Copies had been distributed well in advance of the meeting to afford an ample opportunity for careful study. The presentation to the Institute members was hearteningly free of serious attack. Most of the objections raised were disposed of without difficulty. Certain modifications were made but only one had the potentiality of being of any real significance. The meeting was unwilling to accept as drafted the provision aimed at forestalling application by the courts of the rule of strict construction which would have done much to destroy the effectiveness of the Code.

As originally written, Article 3, on interpretation, suppressed the com-

mon law rule of strict construction and provided, as it still does, for genuine construction. In addition, it provided that the draftsmen's notes should be valid aids in the interpretation of the provisions of the code. The feeling of the meeting was that the provisions might be found objectionable by the Legislature on the ground that the province of the courts was being too seriously invaded. The redraft of the article was aimed at overcoming the possible objections to it in its original form while yet providing a rule of interpretation inconsistent with the common law rule of strict construction that, if applied to the code, could seriously cripple it.

Having secured the approval of the general membership, the Council addressed itself directly to the important matter of general publicity. Newspaper releases were prepared to acquaint the public with the major features of the proposed code. In addition, Institute spokesmen presented the Code before the convention of the Louisiana State Bar Association and secured the approval of that body. Of course, the fact that so many leading members of the bench and bar were members of the Institute and its Council had much to do with the comparative ease that characterized the Institute's efforts to secure approval of the Bar Association.

Finally, when the new Code was introduced simultaneously in both branches of the Legislature, it bore the names of legislative members of the Institute in the Senate and the House of Representatives. In keeping with advance planning a joint hearing was held by the judiciary committees of the Senate and the House to which it had been referred. At this hearing Institute spokesmen reviewed the history of the criminal law in Louisiana, pointed up the many deficiencies of its then existing system and explained the improvements made. After detailed consideration approval by both committees followed without difficulty. When the Code came up for final passage only one amendment was voted—a return to the year and a day rule, the unscientific nature of which had been so thoroughly exposed in so many quarters. But at any rate Louisiana had a new Criminal Code—after one-hundred-thirty-seven years of trying.

The Code Before the Courts

Before closing this account a brief review of how the Code has fared in the courts should be of interest. The new Criminal Code was adopted by the Legislature in 1942.[2] Through the 1948-49 term of the Supreme Court, twenty-seven cases involving the code were heard and decided. Although many of the opinions handed down are of general interest in

2. La. Act 43 of 1942.

the field of criminal law only those of interest or import from the standpoint of draftsmanship will be here considered.

The first case to reach the court raised the issue of constitutionality of the act enacting the Code in the light of a constitutional provision that every law shall embrace but one object and shall have a title indicative of such object. The title of the act indicated simply that it was an act to adopt a criminal code, define crimes and fix penalties. The court took the logical view that the object was single and that the title was indicative thereof.[3]

Also involved in the case was a charge of unconstitutionality leveled at Article 67 defining the crime of Theft. The combination into one crime of the theretofore separate offenses of larceny, obtaining by false pretenses, embezzlement, and the confidence game constituted one of the major improvements and an outstanding simplification of the law. The purpose of the article was to eliminate the difficult, tricky and confusing common law distinctions between the offenses being dealt with by using a definition based on the element common to all of them that the lawful owner had been culpably deprived of his property. The argument urged upon the court was that the combination of several distinct crimes under the heading of "theft" rendered the article unconstitutional because it contained more than one object. To this the court gave the same answer given to the general charge of unconstitutionality and added that the grouping of offenses of the same character in a single article was in accordance with the modern trend, followed in numerous states, of simplifying the law by discarding ancient and outmoded forms and re-defining offenses to prevent confusion and injustices.

The next case of present interest that reached the court raised the question of whether an offense described in a penal provision of a civil statute as perjury but without a penalty provided should be treated as the crime of false swearing under which it would fall in the Criminal Code.[4] This problem had been considered in the preparation of the code and the conclusion had been reached that in such a case since the penalty to be imposed would have to be determined by reference to the code, the character of the offense would be fixed by the code. The court, however, took the view that the provision had not been impliedly repealed as in conflict with the code and that the character of the offense as stated therein was controlling notwithstanding that extra-judicial false swearing of the kind involved would not be perjury but only the lesser offense of false swearing under the code. The court indicated

3. State v. Peet, 206 La. 1078, 20 So. 2d 368 (1944).
4. State v. Smith, 207 La. 735, 21 So. 2d 890 (1945).

clearly that in its opinion all such provisions would control over the more general provisions in the criminal code.

A problem of considerable importance reached the court during the 1946-47 term.[5] In Article 104 the offense of maintaining a disorderly place was defined as the "intentional maintaining of a place to be used habitually for any illegal or immoral purpose." The argument presented to the court was that the article was unconstitutional in that the word "immoral" was vague, indefinite, and uncertain and that it therefore required the court to decide in every case what would constitute the immoral purpose within the meaning of the article, a determination constitutionally resting in the Legislature and not the courts. This was a case where, in keeping with the accepted civilian theory of codification on the basis of which the code was drawn, generality of expression was used instead of specific language in the belief that the word "immoral" was sufficiently restricted in content to justify the omission of any qualifying term that might result in undesirable limitations in its application. In the final analysis this belief was fastened on the interpretative provision of Article 3 that all of the provisions of the code were to be given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision. But the court felt otherwise and found the article unconstitutional. Without considering the question of whether the code should have concerned itself with immoral as opposed to illegal conduct, an issue itself of some complexity, the holding of the court in effect constituted a surrender to the Anglo-American rule of strict construction which is fundamentally inconsistent with the civilian theory of codification.[6]

The same problem was again presented to the court through an attack on the constitutionality of Article 92 defining the crime of contributing to the delinquency of juveniles.[7] The crime was defined as the enticing of a juvenile to "perform any immoral act." Here as in the former case the court held the word "immoral" inadequate for the purpose of definition in a criminal statute in that it was too vague, general and indefinite. The following comment was made: "Crimes must be denounced with such precision that the person sought to be held accountable will know whether his conduct is such that it falls within the purview of the act intended to be prohibited." Consistent with this view the court has

5. State v. Truby, 211 La. 178, 29 So. 2d 758 (1947).
6. *See* Morrow, *Civilian Codification Under Judicial Review: The Generality of "Immorality" in Louisiana,* 21 TUL. L. REV. 545 (1947).
7. State v. Vallerie, 212 La. 1095, 34 So. 2d 329 (1948).

held also that the word "indecent" of Article 106(2) defining the crime of obscenity is too vague and uncertain.[8]

During the same term the court considered an attack on the constitutionality of Article 81 defining the crime of indecent behavior with juveniles as the commission of any "lewd or lascivious act upon the person or in the presence of any child under the age of seventeen, with the intention of arousing or gratifying the sexual desires of either person."[9] In rejecting a claim of vagueness based principally on the ground that the article failed to explain the meaning of "lewd or lascivious" the court answered that the phrase drew a clear and understandable line between criminal and non-criminal conduct. Adverting to the previous cases and to its pronouncements concerning the word "immoral" the court explained that the latter term is of such broad import that it was impossible to declare with any degree of certainty the type of conduct the Legislature sought to prohibit and that because of the vast difference of opinion as to the sort of behavior that might be considered as immoral the judge or jury would be required to apply his or its own conception of morals, thereby assuming the exercise of power given to the Legislature.[10]

In defining the crime of negligent homicide in Article 32, the violation of a statute or ordinance was made presumptive evidence of criminal negligence. This provision was attacked on the ground that it destroyed the presumption of innocence guaranteed to the defendant by the due process clause of the federal constitution.[11] The contention was rejected, the court observing that the article did not relieve the state of the burden of proving beyond any reasonable doubt every element of the crime charged, that is, the homicide, the criminal negligence of the defendant, and the fact that such negligence was the proximate cause of the homicide.

In addition to material already cited, further discussions of the code and of the jurisprudence thereunder have appeared from time to time and are readily obtainable.[12] By and large there is room for considerable

8. State v. Kraft, 214 La. 351, 37 So. 2d 815 (1948).
9. State v. Siabold, 213 La. 415, 34 So. 2d 909 (1948).
10. Articles 92 and 104 of the Criminal Code have now been amended and re-enacted with the word "sexually" added before the word "immoral" with a view to satisfying the constitutional requirement of certainty. See La. Acts 388 and 389 of 1948.
11. State v. Nix, 211 La. 865, 31 So. 2d 1 (1947).
12. Smith, *The Louisiana Criminal Code—(Its Background and General Plan)*, 5. LA. L. REV. 1 (1942); Bennett, *The Louisiana Criminal Code: A Comparison with Prior Louisiana Criminal Law*, 5 LA. L. REV. 6 (1942); Wilson, *The Louisiana Criminal Code: Making the Punishment Fit the Criminal*, 5 LA. L. REV. 53 (1942); Morrow, *The Proposed Louisiana Criminal Code*, 15 TUL. L. REV. 415 (1941); Morrow, *The Louisiana Criminal Code of 1942—Opportunities Lost and Challenges Yet Unanswered*, 17 TUL. L. REV. 1 (1942); Morrow, *Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation*, 17 TUL. L. REV. 351, 535 (1943); *Comments included in Surveys of the work of the Louisiana Supreme*

satisfaction in the fact that the initial adoption of a criminal code in Louisiana has proved to be a successful and noteworthy accomplishment notwithstanding that in some respects the possibilities for improvement have not been exhausted. In this regard there is perhaps greater need as well as opportunity for a more realistic and enlightened judicial approach, the key in the final analysis to legislative success. Yet despite some opportunities for criticism, on the whole the Code has been construed fairly and liberally. There is, at the same time, some basis for believing that the Courts will tend more and more to a recognition of their responsibility, as provided by Article 3, to give the provisions of the code a genuine construction in the light of their purpose.[13] The general recognition the Code has received as a major improvement in Louisiana's legal system has constituted a positive assurance that the fears voiced of the harmful consequences of such an undertaking were insubstantial and unreal. The reaction of judges, district attorneys and even counsel for the defense has been particularly gratifying.

Under the Criminal Code of 1942 criminal law administration in Louisiana has been greatly improved. Instead of being productive of confusion as was claimed it has done much to simplify; instead of creating uncertainty it has brought assurance; and the envisioned difficulties of adjusting to the new system have not materialized. It is perhaps not too much to believe that the outspoken opponents and the enervating skeptics as well would not now return to the old order.

Court, 5 LA. L. REV. 236-241 (1943); 5 LA. L. REV. 554-558 (1944); 6 LA. L. REV. 173-182 (1945); 7 LA. L. REV. 288-292 (1947); 8 LA. L. REV. 281-287 (1948); 9 LA. L. REV. 247-252 (1949); 10 LA. L. REV. 198-205 (1950).

13. State v. Almokary, 212 La. 783, 33 So. 2d 519 (1947); State v. Bessor, 213 La. 299, 34 So. 2d 785 (1948); State v. Logan, 213 La. 451, 34 So. 2d 921 (1948).