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The Sad Story of Superbill, or What Happened to the Indiana Code of 1971?

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Introduction

A fascinating, though disturbing, example of the judiciary's general difficulty in dealing with statutory and similar materials appeared in the Indiana supreme court's recent opinion in *State of Indiana ex rel. Pearcy v. Criminal Court of Marion County.*[1] In this case, the supreme court invalidated the Indiana Code of 1971, popularly known as *Superbill,* in the course of declaring unconstitutional an amendment to *Superbill* that violated the state constitution's "one-subject" requirement.[2] By enacting *Superbill* as a prelude to a thoroughgoing revision, the General Assembly had tried to provide a reliable and comprehensive statement of currently effective statute law to serve as a legislative base.

The facts of the case may be stated briefly. One Newman, who had been convicted of first degree burglary, asked to be credited with time previously served in jail or prison with respect to both the burglary and his previous offenses. He claimed under Public Law 155 of the Acts of 1971, in which the Indiana General Assembly had undertaken to amend the pertinent provision of *Superbill,* enacted several months before. The court struck down Public Law 155 because it covered two inadequately connected subjects. It said, "There is no apparent relation between the subject of prison officials and employees and the subject of the length and diminution of sentences of convicts, and none is disclosed in either the title or body of Public Law 155."[3]

So far, so good. If the opinion had stopped there, no one other than Newman could have complained. Unfortunately, it did not. The court reasoned that, despite its form, Public Law 155 had amended not *Superbill* but its relevant source laws. It reached this conclusion by finding that *Superbill* was not a "codification" but a mere editorial (however official) "compilation" and as such could not replace the laws on which it was based, even though it purported to repeal them.[4] *Superbill's* failure to replace its source laws, the court also reasoned,

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1. 274 N.E.2d 519 (Ind. 1971).
2. IND. CONST. art. 4, § 19.
3. 274 N.E.2d at 522.
4. *Id.*

resulted at least partly from the fact that, not being an original enactment of a "codification," it fell outside the constitutional exception for such enactments and thus under the constitutional ban on statutes covering more than one subject.[5] And so *Superbill* became an incidental casualty of the court's invalidation of Public Law 155.

The opinion caused widespread consternation among both members of the General Assembly and members of the bar. The bases for questioning the soundness of the court's action appear with respect to the procedural context in which the specific issue involving *Superbill* was resolved, the sensitive relationship between the judicial branch and the legislative branch, the court's reading of the constitution, its reading of *Superbill,* the internal coherence of its opinion, and the relevance of *Superbill's* validity to the validity of Public Law 155.

The Procedural Context

The fact that the case went to the Indiana supreme court on a writ of mandate, rather than by the normal appeal route, may have conditioned the result. The writ approach appears to have reflected the apparent urgency of the matter, which in turn resulted from the trial court's rather extravagant reading of Public Law 155: that the statute allowed credit for prior incarceration not only for the immediate crime but also for earlier ones. This would have allowed criminals to "bank" prison credit without limit, with the result that a discharged prisoner with, say, three years' prison credit could commit with impunity any crime not involving a longer term.

The supreme court apparently did not question the trial court's reading of Public Law 155. Should it have done so? It is arguable that the point was moot, because even a more reasonable interpretation (that a criminal's right to be credited with prior incarceration was limited to that occasioned by the immediate crime) would not have immunized the statute from the constitution's ban on multiple subjects. On the other hand, the possibility of a more reasonable interpretation might well have justified the supreme court in reinterpreting Public Law 155, denying the writ, and allowing the prosecuting attorney to seek review in the more deliberate climate of an appeal.

In presenting its case to the supreme court, neither party briefed or argued the validity of *Superbill.* Apparently the point was raised by the court on its own initiative during its search for an appropriate rationale.

5. *Id.* ". . . [A]ll enactments, other than original enactments of codifications as defined by this opinion, must satisfy the title and single subject matter requirements set forth in . . . Art. 4, § 19."

Only the two counsel for the relator were present at the argument, and their participation in the consideration of the issue was limited to answering several general questions put by the court concerning the character of *Superbill* as a "codification" or "compilation," the relevance of which was not immediately apparent to them and for which they had no opportunity to be specifically prepared. Accordingly, the court arrived at its conclusion without benefit of an adequate adversary briefing on the issue of *Superbill's* validity.

No one questions the authority of the supreme court to adopt any approach that makes sense to it. What one may question is a judicial judgment that chooses to decide a question of this magnitude, especially one that involves a potential setback for a co-equal branch of government on a matter of serious concern to it, without calling on resources adequate to guard against significant risks of error.

Hearing rumblings of dissatisfaction with its opinion as originally filed,[6] the court reconsidered its views, without benefit of argument, in the light of a brief from an amicus curiae representing Phillip H. Gutman, President Pro Tem of the Indiana State Senate and Chairman of the Indiana Code Revision Commission.

The Governmental Context

Even granting that no one, not even Senator Gutman, had legal standing to demand reconsideration and that reopening the matter was solely an act of judicial grace, one may wonder whether the court took the most prudent course when it chose not to solicit additional advice. Although it accepted some of the suggestions in the brief of amicus curiae, it ultimately adopted a second-choice proposal that preserved *Superbill's* "citability" without preserving its validity as the definitive expression of Indiana law.[7]

Although, in hindsight, amicus curiae might be criticized for not pressing more strongly his first-choice alternative (to validate *Superbill* as the definitive expression of Indiana law), he must be credited with a more sensitive awareness of the need for the legislature to be deferential to a sister branch of the government than the supreme court showed with respect to the legislative branch. That this duty of deference might have led amicus curiae to pull his forensic punches was a contingency perceivable by the court. Certainly, in view of the almost universal professional dissent, the sensitivity of the matter could hardly have been overlooked.

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6. On September 24, 1971.
7. *Id.*

None of this argues that the supreme court's rationale was wrong. It only suggests that the court needlessly risked affronting the General Assembly and handicapping the Indiana bar. Unfortunately, there is reason to believe that the supreme court's rationale was indeed wrong and that at least some damage to the General Assembly's and the public's aspirations has resulted.

Meaning of the Constitution

Article 4, section 19 of the Indiana constitution provides as follows:

> Every act, amendatory act or amendment of a code shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act, amendatory act or amendment of a code, which shall not be expressed in the title, such act, amendatory act or amendment of a code shall be void only as to so much thereof as shall not be expressed in the title. The requirements of this paragraph shall not apply to original enactments of codifications of laws.
>
> Every amendatory act and every amendment of a code shall identify the original act or code, as last amended, and the sections or subsections amended shall be set forth and published at full length. The identification required by this paragraph may be made by citation reference.[8]

If this section means what it says, *Superbill* offended the constitution only if *Superbill* (1) covered more than one subject or inadequately reflected its subject in its title and (2) fell outside the exception for "original enactments of codifications." Thus, an enactment would seem to avoid the reach of article 4, section 19, merely by being an original "codification." The supreme court, however, thought otherwise:

> The [exception] has reference to *single subjects* which are enacted from time to time as *"original enactments"* and which contain in a codified form matters properly connected to that single general subject.[9]

The court supported this conclusion by citing the constitutionality of the *Uniform Commercial Code,* the *Uniform Consumer Credit Code,* and the *Probate Code,* each one of which, it said, dealt with a single subject and resulted from:

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8. As amended November 8, 1960.

9. 274 N.E.2d at 521 (emphasis in original). Did the court read "shall *not* apply" (emphasis added), in the exception provision, as "*shall* apply"?

> . . . a commission study . . . culminating in the proposed enactment of a particular code containing all the pre-existing laws pertaining to such a single subject.[10]

In brief, the court's analysis rests on three propositions: (1) *Superbill* was not a "code," because it was evolved by the process of mere compilation;[11] (2) *Superbill* was unconstitutional, because unlike the *Uniform Commercial Code,* it was not confined to "one subject;"[12] (3) to comply with the constitution, *Superbill* must both be a code and deal with a single subject.

The court deserves credit for attempting an honest exegesis of the constitutional text, especially in an era in which courts tend to read constitutional or statutory text only over the shoulders of other or earlier courts. Beyond that, there may be less reason for enthusiasm.

The court's first error lay in its apparent misunderstanding of the *Uniform Commercial Code* and its fellows. Far from "containing [*i.e.,* codifying] all the pre-existing laws pertaining to such single subjects," each of those codes was a product of comprehensive substantive revision that could not be said to reflect all the pertinent pre-existing laws.

The court's second error, which will be more fully discussed later, was in assuming, contrary to normal legislative understanding, that the term "codification" (referring to a code of laws) is coextensive with the term "codification process" (referring to a means by which a code may be developed). Indeed, it is not.

Even if we accepted, for the moment, the court's assumption that the character of the end product as a "code" depends on the process by which it was evolved, those acts would not be "codifications" (revisions without significant substantive change) but "substantive statutory revisions." On the other hand, if the constitution's exception for "original codifications" includes not only codes resulting from the process of codification but also those resulting from the process of substantive statutory revision, what is the basis for not also including codes resulting from the process of compilation? Certainly, the fact that the constitution's exception includes codes resulting from two of the three processes does not necessarily create the negative implication that it excludes acts resulting from the third.

Conversely, if comprehensive acts resulting from the process of compilation are excluded because they do not result from the process of

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10. *Id.*
11. *Id.* at 522.
12. Although the court did not expressly find *Superbill* to be "unconstitutional," its reasoning is compatible with no other result.

codification, what basis was there for the court to include acts such as the *Uniform Commercial Code,* which resulted from the process of substantive statutory revision? If the answer is "none," these acts would likewise be unconstitutional. The inconsistency is resolved with less harsh results if all such comprehensive unified enactments are considered to be constitutional codes regardless of the process by which they were respectively evolved.

In talking about "codifications" rather than "codes" (terms that the court apparently treats as synonymous), were the authors of the constitution's exception talking about the process by which statutory results were arrived at or about the statutory results? Either way, the court was inconsistent in including two types of "codifications" and excluding the third. Although the court might have escaped from this inconsistency by holding that because it alone blanketed the whole field of state law, *Superbill* alone ran afoul of the requirement of "one subject," it would have meant abandoning the court's assumption that *Superbill* was not a "codification."

On the other hand, if we accepted the court's dubious assumption that a comprehensive enactment must be *both* a codification and confined to one subject,[13] what purpose would the exception serve? A statute that deals with a single subject properly reflected in the title does not need an exception; it already complies with the constitutional requirement to which the exception applies. Or was the only purpose of the exception to save codifications with inadequate titles? The authors of the exception did not so restrict it.

Moreover, to contend that the constitution covers the limited codification while excluding the comprehensive one seems to imply that the narrower the scope of a codification the greater claim it has to constitutionality. If so, at what point would the narrow "codification" end and the ordinary enactment begin? It would seem more plausible to assume that the broader a statute's coverage the more it assumes the features of a codification. If, on the other hand, the constitution means what it plainly says, an original enactment of a codification need not be restricted to a single subject, and it may not need even an adequate title.

The court took special comfort in the fact that the 1960 amendment to section 19, which added the exception, couched it in the plural at the same time that it added to the subject of the first sentence ("Every act") two additional subjects ("amendatory act or amendment of a Code") couched in the singular.[14] The contrast is hardly significant, because it

13. *See* text at note 8 *supra.*
14. 274 N.E.2d at 521.

is a common (though often undesirable) practice to draft in the plural, and because the use of the singular for the added subjects can be explained simply on the ground that the original subject was already in the singular. The contrast is ultimately irrelevant, because at best it only reinforces the assumption that when the authors of the amendment used the plural they meant the plural. The question then arises, "So what?"

Let us conclude, as the court does, that in using the plural the authors were telling us that they intended to include a plurality of codes dealing with areas of limited scope. Although this is undoubtedly so, it does not imply that they also intended to exclude a comprehensive code; there is not even the minimum basis here for a negative implication. Including such a code is fully compatible with the notion of plurality; it even furthers it. Also, the plural form is consistent even with an intention to cover only *Superbill's* kind of code, because over the long haul there could be a succession of such codes.

In holding that *Superbill* did not constitute an original enactment of a codification, the court said that it was, instead, a comprehensive "compilation"[15] like *Burns Indiana Statutes Annotated,* except that *Superbill* is official whereas *Burns* is not. This approach gives *Superbill* the same legal status as the unenacted provisions of the current *United States Code,* which comprise an official editorial compilation of the federal laws published by the Committee on the Judiciary of the United States House of Representatives. It is thus official without being definitive. The court's analysis overlooks the important fact that whereas its federal counterpart remains unenacted, *Superbill* was enacted. The court was undoubtedly misled by the fact that every other compilation known to it had in fact been unenacted.

An earlier congressional enactment might seem to be precedent for the court's apparent assumption that a compilation is inherently incapable of replacing its source laws even if it is enacted. Although in 1926 Congress enacted the *United States Code,* which likewise failed to supplant the source laws that it restated, that enactment contained a special provision, not found in *Superbill,* that the *Code* was intended to be only "prima facie evidence of the law."[16] It was only this provision and the absence of a general repealer that prevented the 1926 *Code* from replacing the laws on which it was based.

Compare *Superbill.* Here, the Indiana General Assembly made

15. *Id.* at 522.
16. Act of June 30, 1926, ch. 712, § 2(a), 44 Stat. 1.

clear that it intended to enact a definitive statement of Indiana law and to repeal the source laws on which it was based. With specific exceptions, *Superbill* repealed "all acts enacted prior to the 1971 session of the General Assembly."[17] Section 1-1-1-5, providing that *Superbill* was intended to be a continuation of the laws that it restated, was included only to provide substantive continuity from the old to the new. It was intended to forestall any contention that *Superbill* represented a substantive break with the past, which might create problems of unfair surprise. It was framed on the assumption that, although the source laws were no longer in effect, the substance of what they expressed continued uninterrupted.

In calling *Superbill* a mere "compilation," the court confused the end result of codification with the process of compilation by which the legislature created it. The status of a law as a "code" is not determined by the process by which it was evolved. *Black's Law Dictionary* defines a code as "A collection, compendium or revision of laws . . . . A complete system of positive laws, scientifically arranged, and promulgated [*i.e.*, enacted] by legislative authority."[18] *Superbill* is such a "collection . . . of laws," "scientifically arranged" and "promulgated . . . by legislative authority." This appears to reflect the common understanding of the term "code" that the authors of the constitution presumably had in mind. Black defines "codification" as the process involved in developing a code,[19] and this may have misled the court into concluding that the authors of the constitutional amendment were more interested in legislative processes than they were in legislative results, even though the context makes reasonably clear that the opposite was true.

On the other hand, Black defines "compilation" as a "literary production composed of the works of others and arranged in a methodical manner."[20] Nothing is said about enactment or non-enactment. In any event, the fact that a scientifically arranged compendium of laws has been created by the process of compilation does not prevent it from becoming a code or codification, if it is then "promulgated by legislative authority."[21] Thus, what was merely a compilation before enactment became a code or "codification" in the accepted sense as a result of enactment.

Even assuming that *Superbill* was not an "original enactment

17. IND. CODE § 1-1-1-2 (1971).
18. BLACK'S LAW DICTIONARY 323 (4th ed. 1968).
19. *Id.* at 324.
20. *Id.* at 356.
21. 2 J. SUTHERLAND, STATUTORY CONSTRUCTION § 3702, at 250 (Horack ed. 1943).

of a codification" covered by the exception, the question still remains whether it offended the basic requirements of article 4, section 19. Did it deal with only one subject? If so, was that subject adequately reflected in the title?

The court pointed out, "An examination of the *Indiana 'Code' of 1971* readily reveals that it contains a multitude of widely varying subjects."[22] In one sense, this is incontestable; a statute that deals with all topics necessarily deals with more than one. Underlying this is the more difficult question, what is "one subject"? Philosophically, this can be a highly sophisticated problem. Fortunately, factors inherent in the problem suggest that the one-subject rule requires only that each Indiana statute be confined to a functionally integrated problem. The constitution itself is specific: ". . . shall embrace but one subject *and matters properly connected therewith.*"[23]

Even if it is only an enacted "compilation," *Superbill* does not necessarily offend the constitution. As to whether it deals with only one subject, it is arguable that, if the whole field of Indiana commercial law as covered by the *Uniform Commercial Code* can be called "one subject," it does not strain credulity to suggest that the objective of bringing together the whole field of Indiana law can be considered one subject, especially in a statute that (unlike the *Uniform Commercial Code*) makes no substantive change and can, therefore, be realistically considered to have the simple, single thrust of consolidation.[24] With this as the unified core, each reenacted provision becomes a matter "properly connected therewith."

"Finding no ambiguities" in section 19 of article 4, the court found it unnecessary to look at case law in other states.[25]

The supreme court's most fundamental error in dealing with the one-subject requirement was its failure to give appropriate weight to the single most important principle for interpreting constitutions, statutes, and other legal documents: A court should read a document in the light of its purpose as revealed by its language when read in appropriate context.

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22. 274 N.E.2d at 522.

23. *See* text at note 8 *supra* (emphasis added).

24. "If there is any reasonable basis for grouping the various matters together, and the public will not be deceived, the act will be sustained." 1 J. SUTHERLAND, STATUTORY CONSTRUCTION § 1711, at 304 (Horack ed. 1943). ". . . [A] fair interpretation of the meaning of a single subject for purpose of code revision includes all of the topics which encompass the existing law of the state." 2 J. SUTHERLAND, STATUTORY CONSTRUCTION § 3707, at 253 (Horack ed. 1943).

25. 274 N.E.2d at 522.

In the light of what seems to be the obvious purpose of section 19, the supreme court's opinion fails to make adequate sense.

It is well-known that the purpose of state one-subject requirements is to strike at the abuses of legislative riders, in which extraneous legislative provisions that would otherwise be hard to sell to individual legislators are tacked onto bills considered to be generally attractive.[26] A bill with such a rider is a tie-in arrangement in which the individual legislator is unreasonably induced to vote for something that he would otherwise reject. The abuse, however, arises only where the provisions in question make substantive changes in the law. No such change was made in *Superbill.* In it the danger of a legislative tie-in did not and could not exist.

The purpose of the title requirement is simply to require the legislature to label its products for what they are. There seems to be little basis for faulting the title of *Superbill* ("An Act to enact the Indiana Code of 1971"), which decently describes what the Indiana General Assembly was trying to do: enact a general statement of Indiana's statutory law.[27]

Assuming that the purposes of the two requirements have been accurately stated, it would seem absurd to read the Indiana constitution as intended to validate, on the one hand, a thoroughgoing revision of a substantial area of Indiana law[28] (which, with or without substantive changes, would involve far more radical changes and, with substantive changes, might carry some threat of legislative tie-ins) and to invalidate, on the other, a modest rearrangement and renactment (in which the danger at which the constitutional requirement was aimed was nonexistent). Even under the "plain meaning rule" there is no requirement that a literal reading be followed to the point of absurdity.

The Meaning of Superbill

The court's holding rests not only on a misreading of the constitution but on a misreading of *Superbill* itself. The court said that *Superbill* purported to do no more than "compile," and thus did not purport to replace its source law. Despite the repeal clause already referred to, the court interpreted *Superbill* as recognizing its own lesser status

26. Manson, *The Drafting of Statute Titles,* 10 IND. L.J. 155 (1934); Ruud, *No Law Shall Embrace More Than One Subject,* 42 MINN. L. REV. 389 (1958).

27. Widney v. Hess, 242 Iowa 342, 348, 45 N.W.2d 233, 237 (1950); State v. Czarnicki, 124 N.J.L. 43, 45, 10 A.2d 461, 462 (1940); Chumbley v. People's Bank & Trust Co., 166 Tenn. 35, 42, 60 S.W.2d 164, 166 (1933).

28. *E.g.,* the UNIFORM COMMERICAL CODE.

as a compilation through "continuous reference therein to 'Source,' "[29] to identify its respective source laws. How the court arrived at this conclusion it does not explain. It merely says that the use of this device shows that the " 'code' recognized that each of its provisions is dependent upon some Act of the Indiana General Assembly."[30] "Dependent upon some Act" for what? For its legal force? Or merely to show its continuity with the predecessor source law?

The court's evaluation seems at variance with what is now accepted as a routine part of codification. In all statutory codifications it is customary to include at least an editorial reference to each relevant provision of source law to guide the researcher to the text of the earlier law, especially where the new law turns out to be ambiguous, vague, or otherwise uncertain.[31] In no wise does it imply that the new law was not intended to replace the old.

A Look at Legislative Purpose

There was little or no precedent for *Superbill,* because as with the current *United States Code* the normal codification procedure has been to take the respective title areas one by one and thoroughly revise them, using as a base not the text of the unenacted editorial compilation but the text of the relevant source laws.

Why did *Superbill* depart from accepted codification practice by contemplating a two-step, instead of the usual one-step, approach? Indiana's Statute Revision Commission, which perceived the special need for *Superbill,* was trying to meet the almost unique problem created by the supreme court's earlier reading of the Indiana constitution as it existed before the amendments of 1960.[32] The extraordinarily long titles of amendatory statutes that that reading produced finally induced legislative draftsmen to avoid in many instances the patent absurdity of 17-page titles for 5-page bills[33] by substituting the inconsistent-statute approach for that of express amendment or repeal. In most fields, the

29. 274 N.E.2d at 522.
30. *Id.*
31. *E.g.,* U.S.C., tit. 10.
32. The key cases were Draper v. Folley, 33 Ind. 465 (1870), and Feibleman v. State, 98 Ind. 516 (1884). *See* Note, *"Constitutional" Limitations on Amendments in Indiana,* 28 Ind. L.J. 65 (1952):

> The rule in *Draper v. Folley* makes every amendment after the first an amendment to an amendment and the *Feibleman* rule requires that the title of the act to be amended to be set forth in full. Thus, the titles of amendatory acts in Indiana necessarily increase in such proportions that they are virtually impossible to understand, thereby nullifying the spirit of Section 19 of the constitution.

Id. at 72.
33. *E.g.,* Ch. 315, [1959] Ind. Acts 797.

ultimate result of amending or repealing by implication was a welter of overlapping legislative expressions of live law, dead law, and various combinations of both.

Superbill's main purpose, therefore, was to sweep away the resulting legislative debris and provide for the first time a single, unified statement of existing law. It adopted what was in effect a cut-and-paste method, because from the first *Superbill* envisaged a second phase in which a thoroughgoing revision of language could be done title by title, working from a solid legislative base rather than one resting on statutory quicksand. Thus, in reading a provision that was designed for a wholly different purpose in a way that prevented the General Assembly from doing in two steps what it clearly could have done (had it been feasible) in one, the court was reading the Indiana constitution with crippling literalness.

Throwing the General Assembly a Bone

The court took some of the sting out of its opinion by holding that, despite its other inadequacies, *Superbill* might be cited, instead of its respective source laws, in meeting the citation requirement of the second paragraph of section 19 of article 4,[34] providing,

> Every amendatory act and every amendment of a code shall identify the original act or code, as last amended . . . . The identification . . . may be made by citation reference.[35]

The court then said, "By such interpretation and construction of Art. 4, § 19, we give full meaning to each and every provision thereof, as well as preserve the efficacy of the *Indiana Compilation.*"[36] Does this mean that despite its unconstitutionality *Superbill* is at least partly valid? If so, how can a law whose constitutional inadequacies taint its every provision be valid in any sense?

Assuming, instead, that by "efficacy" the court meant the efficacy of *Superbill* merely as a compilation, what has the court preserved? Apparently, it first demoted *Superbill* from a codification to a mere compilation and then said that it has all the advantages of the status to which it has been demoted.

Does the court's language mean that *Superbill* is to be accorded some

34. 274 N.E.2d at 522.

35. If *Superbill* is invalid, can it be the "original act or Code" referred to by section 19? Assuming that it cannot, is the court saying that a citation reference to *Superbill* is synonymous with a citation reference to the original act or code, *i.e.*, the source law?

36. 274 N.E.2d at 522.

advantage that is denied Indiana's other compilation, *Burns Indiana Statutes Annotated*? Would the court uphold an identification made by citation reference to that compilation?[37] If so, the court has preserved nothing that would not inhere in any reliable compilation. If not, the court has merely proclaimed *Superbill's* "officiality" while denying its constitutionality. The long-run advantage is marginal.

The whole point of enacting *Superbill* was to give it something no mere compilation has—reliability as a definitive statement of statutory law. The reader of a mere compilation can never be sure that even its clearest provisions are accurate and, in the case of a discrepancy, the source law necessarily prevails.

The effective codification, on the other hand, is proof against discrepancy, because it is, at least in its enrolled form, the source law. Although this is a far greater advantage than mere citability, it is the benefit that the supreme court has denied to *Superbill.* As a result, in any important case the prudent lawyer must now go back to the source law, as it must with *Burns,* even where *Superbill* is crystal clear. The disadvantage may become monumental when the state gets around to a full-dress codification of each of the areas respectively represented by the titles of *Superbill.* In each case it would normally be necessary to trace the new text to the text of the source statutes, not the corresponding text of *Superbill.*

Even the preservation of citability, without more, may not be an unqualified advantage. Although legislators need not go behind *Superbill* for the purpose of citing the subject of an amendment, they may have to search source law to see that the substituted language fits the form of the source law. After all, that, rather than *Superbill,* is the law, and the new piece, it would seem, must fit with the old. Although the form of the source law may have been only occasionally changed in *Superbill,* it was changed often enough to plant a nagging uncertainty in the mind of the conscientious legislator or legislative draftsman.

Preserving *Superbill's* citability has, of course, saved the General Assembly and the court from having to face the unconstitutionality of all legislation enacted in the 1971 session. But what significant future advantage can it claim?

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37. And why not? If a technically wrong, but still understandable, reference is valid in the one case, why not in the other?

Was the Court's Rationale Necessary?

Was so drastic an approach necessary to discharge the court's judicial responsibility? The issue immediately before it was the validity of Public Law 155, not the validity of *Superbill.* Because of the constitutional deference owed by each basic branch to its sister branches, there is a wholesome presumption of constitutionality. Thus, a court should hold a state statute unconstitutional only after giving it the benefit of every reasonable doubt.[38] This is true of Public Law 155. It is especially true of *Superbill,* whose invalidation could seriously handicap Indiana's efforts to consolidate, reorganize, and update its vast array of statutes and seems likely to impede the legal profession's practical access to Indiana's statute law.

How was *Superbill* relevant, if at all, to the question whether Public Law 155 dealt with two inadequately related subjects? Why did the supreme court consider it necessary to "pierce" *Superbill*? "Public Law 155 is clearly double and embraces two subjects which are not properly connected."[39] Agreed. But would this be any less true if that act were considered as having amended *Superbill* instead of one of its source laws? The true test of Public Law 155's constitutionality would seem to be the plural nature of Public Law 155, not the plural nature of the act that it amended. If so, was it not a matter of indifference whether Public Law 155 amended *Superbill* or one of its source laws?

It might not have been a matter of indifference had the only basis for upsetting Public Law 155 been that it fell outside the title of the law that it amended.[40] Thus, if the title of the 1857 law[41] that was the source for section 11-2-1-1 of *Superbill,* which Public Law 155 amended, was originally too narrow to accommodate the amendment, the defect would probably have been cured[42] by the more inclusive title of *Superbill* (had

38. *See* 1 J. SUTHERLAND, STATUTORY CONSTRUCTION § 1706, at 295 (Horack ed. 1943). Albert v. Milk Control Bd. of Indiana, 210 Ind. 283, 200 N.E. 688 (1936); Henderson v. London & Lancashire Insurance Co., 135 Ind. 23, 34 N.E. 565 (1893).

39. 274 N.E.2d at 522.

40. Before the 1960 amendment to IND. CONST. art. 4, § 19, if the title of the act being amended was too narrow to accommodate the subject of the amendatory act, the title, too, had to be amended. Smith v. State, 194 Ind. 686, 144 N.E. 471 (1924).

41. Ch. 56, § 6, [1857] Ind. Acts. "AN ACT to provide for the government and discipline of the State Prison and to repeal 'An act to provide for the government discipline of the State Prison,' approved March 3, 1855, and all other laws or parts of laws inconsistent herewith."

42. The cases are collected in 82 C.J.S. *Statutes* § 274 b(2) (1955). Such a cure, however, would probably not extend to violations of the one-subject requirement. If so, there was no need to pierce *Superbill,* even if Public Law 155 was constitutionally

the latter been validily enacted), and *Superbill* thus stood in the way.

But if that were the only way to invalidate Public Law 155, why would the court want to invalidate that law if the only reason it had to do so was a constitutional defect that was fully cured if *Superbill* was valid? This strongly suggests that the court would have had to have another reason for invalidating Public Law 155. Did the court dislike the policy that the act, as read by the trial court, expressed? It could have plausibly reduced Public Law 155 to reasonable size simply by reading it as applying only to the current offense. Did Public Law 155 offend the constitution for a substantive reason? The court could have declared it invalid on that ground. Certainly, mere disagreement with legislative policy would hardly justify judicial invalidation.

However, the court disavowed the title approach:

> Since the time of the 1960 amendment . . . , there is no requirement that the subject matter of the amendatory act be expressed in the title of the original act, but only in the title to the amendatory act itself.[43]

Instead, it relied on a criterion of relevance to support its main determination that the one-subject requirement had been violated:

> . . . it is . . . necessary that the amendatory language bear some relationship to the subject of the section amended.[44]

But if relevance rather than title was the criterion, the 1857 source law was no more vulnerable to attack on this ground than *Superbill* and, thus, it offered no better basis for invalidating Public Law 155.

What occasion, then, to invalidate *Superbill*?

Where Do We Go From Here?

What will be the practical effect of *Superbill's* invalidation as the definitive statement of Indiana's statute law?

Just as *Burns* has been subject to challenge or doubt, *Superbill's* invalidity can potentially make a difference because of the continuing possibility that it deviates in unknown respects from its source laws. In the course of preparing *Superbill* enough errors were found in *Burns* to suggest that perfection is hard to come by and that even *Superbill* may not be error-free. By its invalidation, therefore, *Superbill's* reliability as a statement of Indiana law has been wholly destroyed. How heavy a

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required to come within the title of Acts, 1857, ch. 6. By stating the original provisions of the section of the 1857 law and then adding to them by amendment nonrelated provisions, Public Law 155 violated the one-subject requirement and was invalid on that account, even if *Superbill* was wholly valid.

43. 274 N.E.2d at 523.

44. *Id.*

burden of extra effort and expense this will impose on the bar would be hard to measure. Fortunately, the practical impact of the court's decision will lessen in proportion to the willingness of Indiana courts to accept *Superbill,* like *Burns,* as an accurate statement of the law. (This approach will remain available only if *Superbill* is recompiled as its source laws are successively amended.) On the other hand, in case of specific challenge and demonstrated discrepancy, the court will have to side with the session law or the corresponding enrolled bill.

Although *Superbill's* legislative citability has some value, it should not be overestimated. Some changes in wording were made in *Superbill,* and it may be theoretically necessary to couch some amendments in terms of the old, not the new, format. Or will the General Assembly be willing to frame the text of specific amendments following the format of *Superbill,* even where that of the source law may be different?

If the General Assembly purports to amend *Superbill,* the court's opinion reassures us that the result will not offend the constitution. But will that approach confer piecemeal constitutional validity on *Superbill,* or will the amendment, while referring to *Superbill,* be read as amending only the source law? (Would this be the same as amending *Burns* instead of the source law?) The answer is not entirely clear.

The most important unresolved question relates to the future usefulness of *Superbill* for serving its main function—providing a solid legislative basis for conducting future, more adequate codifications of the respective substantive areas represented by its 35 titles.

One member of the General Assembly was heard to remark that the best way for it to respond to the court's decision would be to ignore it. Although, taken literally, this might seem inappropriate, there is one sense in which the General Assembly could legitimately approximate such an approach without, however, defying the court. It could quite properly revise the language of each title on the possibly fictitious assumption that it is an accurate expression of current law as embodied in the source laws. In this way it could gain the same practical advantage that *Superbill,* if legally valid, would have immediately provided. The only risk would be that in the case of a discrepancy between *Superbill* and one of its source laws, the general assembly might make a substantive change without knowing it. Fortunately, the risk would be insignificant in view of the fact that the General Assembly has already accepted it by enacting *Superbill,* which may not be 100 percent accurate. Under this approach, an already accepted risk would simply be deferred.

To this extent, the practical effect of the court's opinion will depend, at least partly, on how the General Assembly chooses to respond to it.

Conclusion

In view of these considerations, there is reason for deep dissatisfaction with the supreme court's opinion. Although the practical effect of its theoretical deficiencies could easily be exaggerated, it seems fair to conclude that, overall, the practical disadvantages may still be considerable. Although the General Assembly can minimize the threat to its own aspirations, the conscientious practitioner is still relegated, on occasion, to examining a hodgepodge of live and dead session laws. Besides, the uncompiled laws that *Superbill* purported to repeal as dead or otherwise obsolete still clutter the legislative landscape.

If there were compensating advantages (apparently there are none), the price might be worth paying. As it is, the result will always lie in the shadow of the possibility that had the court deferred consideration of the issue until it could have been resolved under conditions more favorable to full and balanced consideration, the full value of *Superbill* might have been preserved without compromising the court's evaluation of Public Law 155.

The fascinating question remains: What induced the supreme court to take an approach to *Superbill* that not only involved extraordinary theoretical difficulties but makes functional sense only if it is henceforth disregarded? In the meantime the General Assembly has the unhappy alternative of choosing between writing off *Superbill* as a dead loss or of treating the court's opinion as if it had never been written. If, as seems not only plausible but inevitable, it chooses the latter course (which the decision itself tends to invite), it will have to make sure that *Superbill* is treated as official and, at least for its own use, kept up to date.[45] While the General Assembly takes care of its own housekeeping, someone will have to look after the needs of the practitioner. Presumably, there will eventually be a thoroughly revised *Burns*. Eventually, too, there may even have to be a constitutional amendment.[46]

In the meantime, there will be all those source laws.

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45. And adequately indexed. At present writing, *Superbill* lacks an index. Its usefulness is thus seriously impaired.

46. The first step was taken in House Joint Resolution 4, concurred in by the Senate on February 10, 1972.