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Penal Code Reform in Indiana: Piecemeal Amendment is Not the Answer

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NOTES

PENAL CODE REFORM IN INDIANA: PIECEMEAL AMENDMENT IS NOT THE ANSWER

If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works gross injustice to those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire field is more at stake for the community or for the individual.¹

I. INTRODUCTION

The above passage by Professor Wechsler in no way overstates the imperativeness of having a penal code that is not only clear, concise and effective, but which also reflects current social and judicial attitudes toward justice and individual rights. The present Indiana penal code² may be said to violate these ideals frequently.

Reform of the entire Indiana penal code last occurred in 1905.³ The procedure used since that time for modernizing the code has been the evolutionary process of piecemeal amendment which has been effectuated by the Indiana State Legislature, whose time for such activity is strictly limited by virtue of the sixty-day biennial session. Many of the individual statutes which have undergone this modernization process adequately reflect contemporary social attitudes⁴ and, therefore, escape criticism levied against their less defensible bedfellows.⁵ Regrettably, however, this patchwork treatment has left the present code, when viewed as a cohesive entity, fraught with defects and disorder which cannot be remedied by sporadic legislation or judicial interpretation. Of course, to

1. Wechsler, *Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952).

2. IND. ANN. STAT. tit. 9 (Burns 1956 Repl.) (containing material on criminal procedure); IND. ANN. STAT. tit. 10 (containing material on criminal offenses); IND. ANN. STAT. tit. 11 (containing material on fish and game); IND. ANN. STAT. tit. 12 (containing materials on intoxicating liquors); IND. ANN. STAT. tit. 13 (containing material on prisons and reformatories).

3. The revision was made effective on April 15, 1905 by the Indiana Acts of 1905.

4. *E.g.*, IND. ANN. STAT. § 10-3028-41 (Burns Supp. 1966) (Offenses Against Property Act). The enactment of these statutes on theft offenses was the first major revision of a section of the penal code since 1905. These statutes reflect many of the suggestions made in the MODEL PENAL CODE (Prop. Off. Draft 1962) [hereinafter cited as MODEL PENAL CODE].

5. See Foust, *Some Thoughts on Criminal Code Revision*, 1 IND. LEG. FORUM 4 (1967) [hereinafter cited as Foust].

expect penal code revision to eliminate all problems encountered in administration of the criminal law would be naive. Although complexity and obsolescence result in injustice, it does not follow that simplicity and modernization will eradicate injustice; nonetheless, careful and sophisticated effort would not be unavailing.⁶

The complexity and volume of material pertinent to penal code revision places exhaustive treatment of the entire subject or even one specific area beyond the scope of a single comment. This survey is intended to accomplish a three fold purpose: to create awareness of why an obsolete penal code should be revised, by offering examples of the various ways in which obsolescence may infringe upon individual rights; to refute some objections presently levied against revision, such as excessive expense, confusion caused by transition, and adequacy of the present code; and to suggest various alternative means by which the task of revision might be initiated and accomplished.

II. WHY REFORM IS NECESSARY

A. Obsolete offenses, penalties and procedures

Much recent material has drawn attention to the obsolescence of statutes which are particularly repugnant to our sense of fairness.⁷ A host of statutes particularly susceptible to this line of criticism is revealed by a casual survey of Indiana's penal code.

Obsolete statutes may be classified into four major categories: those failing to reflect the needs of modern times, for example, Indiana's riot conspiracy statute which allows conviction only if three or more participants conspire at night or while wearing white caps, masks or other forms of disguise;⁸ those in which penalties prescribed no longer fit the relative seriousness of the crime by modern standards, for example, a penalty of a one hundred dollar fine and six months in jail for being found intoxicated in a public place⁹ or a penalty of a 500 dollar fine and six months imprisonment for commission of adultery (fornication) by

6. The products of painstaking revision efforts in other states include: ILL. ANN. STAT. ch. 38 (Smith-Hurd 1964); MICH. REV. PEN. LAW (Final Draft, West 1967); MINN. STAT. ANN. ch. 609 (1964); N.M. STAT. ANN. ch. 40 (1964); N.Y. REV. PEN. LAW (McKinney 1967). See also MODEL PENAL CODE.

7. See Brumbaugh, *A New Criminal Code for Maryland*, 23 MD. L. REV. 1 (1963); Foust, at 4; Israel, *The Process of Penal Law Reform—A Look at the Proposed Michigan Revised Criminal Code*, 14 WAYNE L. REV. 772 (1968); Joost, *The Need for Recodification of the Criminal Laws of Massachusetts*, 3 PORTIA L.J. 45 (1967); Packer, *The Case for Revision of the Penal Code*, 13 STAN. L. REV. 252 (1960).

8. IND. ANN. STAT. § 10-1506 (Burns 1956 Repl.).

9. IND. ANN. STAT. § 12-611 (Burns 1956 Repl.).

consenting adults;¹⁰ those which are no longer enforced, for example, Indiana's toy pistol statute providing for a maximum penalty of a fifty dollar fine and twenty days in jail for selling or exposing for sale any toy cap gun;¹¹ and overlapping statutes which provide numerous divergent penalties for the same or similar acts, for example, Indiana's assault and battery statutes which could conceivably allow a charge to be brought for the same assault and battery under as many as nine different statutes.¹² Statutes in each of the foregoing categories pose serious threats to individual rights. An examination of the most obvious of these threats will illuminate the absurdity in the assertion that the only harm in obsolete statutes is the excessive space required in the code book.

B. Threat to Individual Rights

Equal Protection of the Law

There has been little reluctance by the courts to use the equal protection clause of the federal constitution¹³ to declare discriminatory laws unconstitutional.¹⁴ However, the equal protection problem created by seldom enforced statutes arises at points prior to litigation—when the decision must be made to arrest an individual for a violation, and when the decision must be made to prosecute.¹⁵

Outdated and seldom enforced statutes have the serious potential of becoming tools by which law enforcement agencies, through either inadvertence or design, can coerce and harass certain individuals. For example, the only person ever prosecuted under the Georgia income tax perjury statute was Martin Luther King.¹⁶ A similar example involved a "Massachusetts blasphemy statute that had lain dormant for a hundred years until it was dusted off and invoked against some sympathizers of Sacco and Vanzetti."¹⁷ Obsolete Sunday Blue Law statutes are also common devices for harassment for racial, religious or economic

10. IND. ANN. STAT. § 10-4207 (Burns 1956 Repl.).

11. IND. ANN. STAT. § 10-4703 (Burns 1956 Repl.).

12. IND. ANN. STAT. § 10-701 to 705 (Burns 1956 Repl.). See Foust, at 23.

13. U. S. CONST. amend. XIV, § 1.

14. The leading case on the right of an individual to nondiscriminating enforcement and administration of the laws is *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886):
Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

15. Kartozián, *Dead Law—Dead Letter? An Analysis of the Problem of Obsolete Laws in the Penal Codes of the United States*, 2 *PORTIA* L.J. 75 (1966).

16. N.Y. Times, May 29, 1960, at 1, col. 2.

17. N.Y. Times, Aug. 29, 1928, at 8, col. 1.

reasons.¹⁸

Several inadequate defenses appear available to persons subject to prosecution for these statutes.¹⁹ A denial of equal protection through discriminatory enforcement might be established. However, not only may the necessary facts be difficult to prove, but examination of court decisions shows that in many cases the courts do not permit the issue to be raised as long as the statute remains in the penal code and is therefore considered the *law*.²⁰ Another defense conceivably available, but even less plausible than equal protection, is the doctrine of desuetude.²¹ Although this doctrine has received some attention in recent years, it is far from being accepted as valid.²²

The general policy of refusal to recognize defenses to violations of desuetudinal or obsolete statutes is based on the courts' fear of usurping what is considered the legislative function of repealing statutes. Two approaches may be suggested which can eliminate inequities without transgressing such policy. Enactment of a statute recognizing desuetude as a defense has recently been proposed as a stop gap measure. The statute would require

a belief that conduct does not legally constitute an offense and

18. See, e.g., *Rogers & Rodgers, Desuetude as a Defense*, 52 IOWA L. REV. 1, 10 (1966). For cases using such laws primarily for harassment purposes see: *Bargain City, U.S.A., Inc. v. Dilworth*, 407 Pa. 129, 179 A.2d 439 (1962); *People v. Paine Drug Co.*, 39 Misc. 2d 824, 241 N.Y.S.2d 946 (Monroe County Ct. 1963), *rev'd* 16 N.Y.2d 503, 208 N.E.2d 176, *cert. denied*, 382 U.S. 838 (1965) (reversal based on ground that record failed to support findings of discrimination); *Taylor v. City of Pine Bluff*, 226 Ark. 309, 289 S.W.2d 679 (1956).

19. See Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103 (1961). The comment deals with the constitutional threats against equal protection rights arising from penal laws which may be enforced in a discriminatory manner.

20. A large number of courts have denied the use of the equal protection clause in discriminatory penal enforcement cases. See e.g., *Strand Amusement Co. v. Commonwealth*, 241 Ky. 48, 43 S.W.2d. 321 (1931) (blue laws); *Society of Good Neighbors v. Mayor of Detroit*, 324 Mich. 22, 36 N.W.2d 308 (1949) (lottery law); *People v. Montgomery*, 47 Cal. App. 2d 1, 14, 117 P.2d 437, 446 (2d Dists. Ct. App. 1941) (conspiracy to commit pandering); *People v. Van Randall*, 140 Cal. App. 2d 771, 777, 296 P.2d 68, 72 (1st Dist. Ct. App. 1956) (dictum) (gambling violation).

21. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389 (1964); *Rogers & Rodgers, Desuetude as a Defense*, 52 IOWA L. REV. 1 (1966). Professor Bonfield would require sufficiently widespread and notorious violation of the suspect statute to assure that administrative failure to apply it indicates a clear policy of disregarding its violation in order to raise the defense of unconstitutionality due to desuetude.

22. In a recent case, *United States v. Elliott*, 266 F. Supp. 318 (S.D.N.Y. 1967), the court held that the defendant charged with violating 18 U.S.C. § 956 (1964), by conspiring to destroy property in a country with whom the United States is at peace, could not make use of desuetude as a defense unless he could show that non-use of the statute deprived it of life, and that it was applied in a discriminatory manner against him. The court seemed to indicate that in certain circumstances desuetude could serve as a valid defense.

'reasonable reliance upon a clear practice of non-enforcement of the statute or other enactment defining the offense by the body charged by law with responsibility for enforcement,' and the absence of 'reasonably available' notice of intent to enforce the statute or other enactment.²³

By far the most logical and needed approach in Indiana, in view of the basic unfairness to those prosecuted or arrested, in solving the problem at its point of culmination rather than at its source, is a code revision which will eliminate the troublesome statutes.

Status Crimes

There has been in the past decade an intense focus on the far-reaching question of the constitutionality of punishment for so-called status crimes,²⁴ such as drug addiction,²⁵ alcoholism,²⁶ and vagrancy.²⁷ The pragmatic importance of recent developments becomes readily apparent when it is observed that in some large cities drunkenness, vagrancy, and disorderliness account for more than seventy five per cent of the total arrests made.²⁸ The basic question affecting revision, readoption or repeal of status crime statutes is the extent to which the state has an interest in imposing criminal punishment for a particular status which may or may not infringe upon the rights of any other citizen.²⁹

Statutes which have 'sought to impose criminal sanctions based solely on a person's status have been successfully attacked on various constitutional grounds. For example, in the now landmark case of *Robinson v. California*,³⁰ the court held punishment for the status of

23. Rogers & Rodgers, *supra* note 18, at 28.

24. See Murtagh, *Status Offenses and Due Process of Law*, 36 *FORD. L. REV.* 51 (1967).

25. See *Robinson v. California*, 370 U.S. 660 (1962).

26. See *Powell v. Texas*, 392 U.S. 514 (1968); *Easter v. District of Columbia*, 361 F.2d 50 (D.C. Cir. 1966); *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966).

27. See *Hicks v. District of Columbia*, 383 U.S. 252 (1966); *Fenster v. Leary*, 20 N.Y.2d 309, 229 N.E.2d 426, 282 N.Y.S.2d 739 (1967).

28. PRESIDENTS' COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 234 (1967).

29. The determination of whether other citizens rights are infringed upon by certain conduct depends to a large extent on how harm is defined. "These harms have been classified in several ways: (a) harms to certain interests or values (against life, person, property, reputation, habitation, morality, political institutions, the family, etc.)." J. HALL, *CRIMINAL LAW AND PROCEDURE* 45-46 (1949). If the state chooses to define harm in the most liberal sense, then conceivably all conduct could justifiably be brought within jurisdiction of the criminal process.

30. 370 U.S. 660 (1962). As a result of the recent United States Supreme Court case of *Powell v. Texas*, 392 U.S. 514 (1968), which held that the eighth amendment prohibition applied in *Robinson* was not applicable since Powell had been convicted of a specific "act" of public intoxication whereas *Robinson* extended only to "status" crimes, it appears that a broad reading of *Robinson* had been for the time being curtailed. See 46 *J. OF URBAN L.* 110 (1968) (discussing the *Powell* case).

drug addiction to be violative of the eighth amendment cruel and unusual punishment prohibition and the Court of Appeals of New York in *Fenster v. Leary*³¹ held the state's vagrancy law unconstitutional as violative of due process of law. A review of existing Indiana laws which may be subject to a status-crime classification and a determination of how a revised code can satisfy legitimate state interests without eliding constitutional prohibitions are thus essential. At least two statutes in the present Indiana Penal Code appear vulnerable.

Under the present Indiana statute any person over fourteen years of age who is able to perform manual labor but has made no effort to do so and "is found in the state of vagrancy" can be convicted and fined up to fifty dollars.³² The statute not only provides law enforcement officials with a tool with which to effect arrests against known criminals, drug addicts, alcoholics, and prostitutes but also grants them the coercive power to influence a person to seek work, the thought of which disturbs our concepts of self-determination.³³ An assertion by the New York court in *Fenster* is relevant in this context:

The statute violates due process and constitutes an overreaching of the proper limitations of the police power in that it unreasonably makes criminal and provides punishment for conduct . . . which in no way impinges on the rights or interests of others and which has in no way been demonstrated to have anything more than the most tenuous connection with prevention of crime and preservation of the public order . . . other than,

31. 20 N.Y.2d 309, 229 N.E.2d 426, 282 N.Y.S.2d 739 (1967). The court stated: It is also obvious that today the only persons arrested and prosecuted as common-law vagrants are alcoholic derelicts and other unfortunates, whose only crime, if any, is against themselves, and whose main offense usually consists in their leaving the environs of skid row and disturbing by their presence the sensibilities of residents of nicer parts of the community. . . . [I]t seems clear that they are more properly objects of the welfare laws and public health programs than of the criminal law. . . . If fit is only to allow arrests and criminal prosecution for vagrancy to continue against individuals such as these. . . . then it must fall. *Id.* at 315-16, 229 N.E.2d at 430, 282 N.Y.S.2d at 744-745.

The portion of the New York vagrancy statute, N.Y. CODE CR. PROC. § 887, subd. 1 (McKinney 1954) which was held unconstitutional in *Fenster* was very similar to Indiana's existing statute, IND. ANN. STAT. § 10-4602 (Burns 1956 Repl.). *Fenster* was charged with being "a person who, not having visible means to maintain himself, lives without employment."

32. IND. ANN. STAT. § 10-4602 (Burns 1956 Repl.).

33. For a discussion of the many divergent problems and effects created by vagrancy statutes, see Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960); Foote, *Vagrancy Type Law and its Administration*, 104 U. PA. L. REV. 503 (1956); Sherry, *Vagrants, Rouses and Vagabounds—Old Concepts in Need of Revision*, 49 CALIF. L. REV. 557 (1960); Comment, *Trends in the Law of Vagrancy*, 1 CONN. L. REV. 350 (1968); Note, *Constitutional Attacks on Vagrancy Laws*, 20 STAN. L. REV. 782 (1968).

perhaps, as a means of harassing, punishing or apprehending suspected criminals in an unconstitutional fashion.³⁴

The United States Supreme Court has not yet ruled on the constitutionality of vagrancy statutes. However, in a recent case questioning the constitutionality of the District of Columbia vagrancy statute, Justice Black dissented from a dismissal of certiorari as improvidently granted and stated that, "I do not see how economic or social status can be made a crime any more than being a drug addict can be."³⁵

The Indiana statute, given its questionable constitutionality not only on due process and cruel and inhuman treatment grounds, but on grounds of its probable conflict with the void for vagueness doctrine, should undergo complete revision. The interests of the citizens and the state must still be protected by proscribing certain conduct but the prohibited acts or inaction should be specifically described as including such activity as loitering to use, sell or solicit drugs, begging, loitering to solicit persons to commit various sexual acts, and loitering or prowling in a manner or place under circumstances that warrant alarm for the safety of persons or property in the area. The statute should also provide an opportunity for the suspect to dispel police suspicion by an explanation of his conduct and presence. The injection of such specificity into the statute would diminish status and vagueness difficulties and define for the citizen, the police officer, and the courts exactly what type of conduct is forbidden by the state.³⁶

The problem of devising methods for controlling the growth of Communist and other subversive groups has long plagued the federal and state governments.³⁷ Indiana's statutes concerning membership in subversive organizations³⁸ make membership in an organization engaging in un-American activity unlawful and provide further that a public officer convicted of such activity must be immediately discharged. Indiana's membership statutes³⁹ are the only ones in the United States which do not on their face require knowledge of the organization's

34. 20 N.Y.2d 309, 312-13, 229 N.E.2d 426, 428, 282 N.Y.S.2d 739, 742 (1967).

35. *Hicks v. District of Columbia*, 383 U.S. 252, 257 (1966) (dissenting opinion).

36. Language incorporating the specific conduct which is prohibited can be found in the loitering statute adopted in the revised penal law of New York, N.Y. REV. PEN. LAW § 240.35 (McKinney 1967). The void for vagueness aspect of the vagrancy statute, IND. ANN. STAT. § 4602 (Burns 1956 Repl.), is discussed later in this comment; see text at note 90 *infra*. See generally 9 WM. & MARY L. REV. 1162 (1968) (discussing unconstitutional vagueness in vagrancy statutes).

37. Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1941); Sutherland, *Freedom and Internal Security*, 64 HARV. L. REV. 383 (1951).

38. IND. ANN. STAT. § 10-5204-5207 (Burns 1956 Repl.).

39. *Id.*

purposes.⁴⁰ The grave danger of such statutes was pointed out by the United States Supreme Court:

But membership may be innocent. A state servant may have joined a proscribed organization unaware of its activities and purposes. In recent years, many completely loyal persons have severed organizational ties upon learning for the first time of the character of groups to which they have belonged.⁴¹

In *Scales v. U.S.*⁴² the Supreme Court held that according to the Smith Act the government must prove the defendant's intent to overthrow the federal government, and also that he was an active member in the subversive organization. Although it thus appears that a definite showing of scienter is a requisite for prosecution under the Smith Act, the fact that the holding appeared to be based upon statutory construction makes it unclear whether scienter or mens rea was made a constitutional requirement for a conviction brought under a state anti-subversive statute.

Conviction under the Indiana membership statutes⁴³ does not depend on whether the organization appears on any government subversive organization list or whether the person even knew of the organization's purposes, and under the public officer statute⁴⁴ a government employee may be discharged for mere membership, perhaps inactive, if the head of the department or agency is satisfied by evidence of membership. The

40. Note, *Effectiveness of State Anti-Subversive Legislation*, 29 IND. L.J. 492 (1953).

See generally IND. ANN. STAT. § 10-5201 to 5208 (Burns 1956 Repl.). It is interesting to note that prior to 1953, the statute prescribing punishment [§ 10-5208] (one to three years), referred only to the statute concerning membership in such organizations [§ 10-5204]. The 1952 General Assembly passed an amendment to the penalty statute [§ 10-5208] stating that there was a typographical error when the statute was passed in 1951 which made the penalty section refer to the membership statute [§ 10-5204] rather than to apply only to the unlawful assembly statute [§ 10-5205], as it was supposed to do originally. The effect of this amendment is that there is now no penalty prescribed for violation of the membership statute [§ 10-5204] thus making the whole statute apparently void due to lack of a prescribed punishment. See *Rosenbaum v. State*, 4 Ind. 599 (1853) (Crimes and misdemeanors in this state, must be defined and the punishment therefore fixed, by statute, and not otherwise.).

41. *Wieman v. Updegraff*, 344 U.S. 188, 190 (1952).

42. 367 U.S. 203 (1961). The Court

... construed the membership clause, as it had the advocacy clause, that is, to require as an element of the crime that the defendant specifically intended to accomplish violent overthrow of the Government. Furthermore, the Court refused to attribute to Congress the purpose of visiting upon non-active Party members the heavy penalties imposed by the Smith Act, hence the statutory term "member" was construed to reach only active members whose participation in the illegal advocacy of the Party was sufficient to satisfy established due process standards of criminal imputability.

Comment, *The Status of Anti-Communist Legislation*, 1965 DUKE L.J. 369, 373.

43. IND. ANN. STAT. § 10-5204-5207 (Burns 1956 Repl.).

44. *Id.* § 10-5207.

constitutionality of these statutes is therefore suspect, in view of the possible denial of due process⁴⁵ and the chilling effect which these statutes have upon first amendment freedom of speech and right of association.⁴⁶ Furthermore, since the statute banning membership has no penalty clause,⁴⁷ it appears that the statute is simply void as a violation of the doctrine of *nullum crimen sine poena*.⁴⁸

A revision of this chapter is necessary to eliminate constitutional infractions and reflect adequately the true intention and interests of the state in curtailing the dangers to it of subversion.⁴⁹

Unreasonable Search and Seizure

The historic procedure of piecemeal amendment—or, in many cases, simple inaction—has produced in Indiana a code of criminal procedure which is in serious need of complete reform. The present treatment of search and seizure affords an example. The federal and Indiana con-

45. Cf. *Morissette v. United States*, 342 U.S. 246 (1952). The defendant was convicted of illegal conversion of government property. The trial court had refused to hear evidence as to defendant's innocent state of mind in believing the property to have been abandoned. The Supreme Court reversed. While the Court did not rule specifically on the mens rea requirement, since its reversal was based on the presumption that statutes carried over from common law brought with them their original mens rea requirement, the case has at least raised the question of whether mens rea is a constitutional requirement. For a comprehensive discussion of the constitutional questions regarding mens rea, see Packer, *Mens Rea and Supreme Court*, 1962 SUP. CR. REV. 107.

46. The term chilling effect has been used by the United States Supreme Court to indicate the curtailing effect which an overly broad or vague statute may have upon exercise of first amendment rights. See *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Baggett v. Bullitt*, 377 U.S. 360 (1964).

47. IND. ANN. STAT. § 10-5204 (Burns 1956 Repl.).

48. IND. ANN. STAT. § 10-5208 (Burns 1956 Repl.):

Any person violating any of the provisions of section 5 [§ 10-5205] of this act shall be guilty of a felony and shall, upon conviction, be disenfranchised and rendered incapable of holding any office of profit or trust and shall be imprisoned in the Indiana State Prison for not less than one (1) year nor more than (3) three years.

It may be noted that there is a penalty provided for only [10-5205] of the eight statutes in the Communism section, IND. ANN. STAT. ch. 52 (Burns 1956 Repl.). See generally, J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 27-69 (1960).

49. It may be noted that while *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), held the Pennsylvania Seditious Act, PA. STAT. ANN. ch. 18, § 4207 (1939), void because of pre-emption of anti-subversive legislation by the Alien Registration Act of 1940, 19 U.S.C. § 2395 (1964) (commonly termed the Smith Act), the case was later interpreted by *Uphaus v. Wyman*, 360 U.S. 72 (1959), which held that the states may protect themselves by prosecutions for subversive acts directed against the state itself. In the recent case of *State v. Levitt*, 246 Ind. 275, 203 N.E.2d 821 (1965), which affirmed the validity of Indiana's statutes, the court said:

We must conclude, therefore, that the decisions of the United States Supreme Court [*Pennsylvania v. Nelson*, *supra* and *Uphaus v. Wyman*, *supra*] do not hold that the doctrine of preemption is applicable to the state's attempts to protect itself against subversive activities directed toward the violent overthrow of the state government.

Id. at 281, 203 N.E.2d at 824.

stitutions guarantee persons the right to be secure in their persons, houses, papers and effects against unreasonable searches and seizures.⁵⁰ These guarantees are effectuated through the statutory requirement of the search warrant which must be issued by a magistrate, upon showing of probable cause that the warrant should issue and description of a specific place to be searched.⁵¹ Reading the Indiana statute prompts the erroneous belief that the law enforcement officers' authority to conduct a search is limited to occasions where a warrant has been obtained. Such is hardly the case; an examination of Indiana Supreme Court cases has revealed that approximately ninety three per cent of the search and seizure cases decided by the court since 1958 have involved searches without a warrant.⁵²

The explanation for this dichotomy between statutory authority and contemporary law enforcement procedure is that the United States Supreme Court and high courts of a majority of states have realized that situations arise where it is proper for a search to be conducted without first obtaining a warrant. Although the necessity and wisdom of such exceptions to the warrant requirement cannot be denied,⁵³ it is disturbing that a practice which is obviously the rule rather than the exception is nowhere mentioned in the present code of criminal procedure, particularly in view of cases such as *Mapp v. Ohio*.⁵⁴ *Mapp* applied the exclusionary rule on illegally seized evidence to all the states through the fourteenth amend-

50. U. S. CONST. amend. IV, IND. CONST. art. I, Sec. 11.

51. IND. ANN. STAT. § 9-602 (Burns 1956 Repl.).

H.B. 1057 A which simplifies the procedure necessary for issuance of a search warrant and updates the terminology used has been passed by the 1969 Indiana General Assembly and signed into law by the Governor.

52. Examination of all Indiana search and seizure cases was made by the author as part of an extensive research project.

The difficulty entailed by searches conducted without a warrant was pointed out in the case of *Beck v. Ohio*, 379 U.S. 89 (1964):

An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search too likely to be subtly influenced by the familiar shortcoming of hindsight judgment.

Id. at 96. Cf. L. TIFFANY, D. MCINTYRE, JR. & D. ROTHENBERG, *DETECTION OF CRIME* 122 (1967) (estimated that over ninety per cent of searches involved in later judicial proceedings are incidents to arrest).

53. In the recent case of *Capps v. State*, —Ind.—, 229 N.E.2d 794 (1967), the court recognized that when police had probable cause to make an arrest, an arrest or search warrant was not required. In *Manson v. State*, —Ind.—, 229 N.E.2d 801, 803 (1967), the court said that:

It is undisputed that a search of a car without a warrant after a lawful arrest of one in possession is not constitutionally interdicted. The right to arrest without a warrant grew out of a need to protect the public safety by making prompt arrests.

54. 367 U.S. 643 (1961).

ment⁵⁵ and has therefore greatly magnified the necessity for establishing guidelines under which law enforcement agencies can operate. The state's interest is now two-fold, for not only must it seek to protect freedom from unreasonable searches and seizures, but it must also eliminate illegal police conduct which may have the effect of allowing a guilty person to go free as a result of unlawful search. This right of a state to adopt its own rules pertaining to arrests, searches and seizures was specifically approved in *Ker v. California*.⁵⁶

Examination of recent Supreme Court decisions⁵⁷ and the related literature⁵⁸ reveals that many pertinent questions have been left unanswered.⁵⁹ However, some points have been clarified sufficiently to allow the formation of procedural guidelines which would reflect the criteria and reasoning established by the federal and state courts on various issues. The following discussion will set forth some of the guidelines which might be adopted.

Reform of Indiana's search and seizure statutes would encompass three specific areas of concern. The first would involve a modernization and substantial revision of the statute which lists the various items for which a search can be made and a seizure effected.⁶⁰ The present list is

55. U.S. CONST. amend XIV, § 1.

56. 374 U.S. 23, 34 (1963):

The states are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet the practical demands of effective criminal investigation and law enforcement in the states, provided that these rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain.

57. See *Terry v. Ohio*, 392 U.S. 1 (1968) (search for weapons on less than probable cause); *Camara v. Municipal Court*, 387 U.S. 523 (1967) (warrant required for search of dwelling by housing inspector where consent withheld); *Beck v. Ohio*, 379 U.S. 89 (1964) (propriety of making search without warrant when officers lacked probable cause to make arrest); *Wong Sun v. United States*, 371, 471 (1963) (verbal evidence obtained after illegal arrest or search must be excluded as "tainted fruit").

58. See Aspen, *Arrest and Arrest Alternatives; Recent Trends*, 1966 U. ILL. L.F. 241; Collings, *Toward Workable Rules of Search and Seizure—An Amicus Curiae Brief*, 50 CALIF. L. REV. 421 (1962); Evans, *Search and Seizure Incidental to a Lawful Arrest*, 4 WM. & MARY L. REV. 121 (1963); La Fave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth,"* 1966 U. ILL. L.F. 255.

59. Examples include whether an officer may search a suspect for weapons without the showing of probable cause for arrest which was made in *Terry v. Ohio*, 392 U.S. 1 (1968), without first advising the suspect of his Constitutional rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)); how long an officer may delay making an arrest after he has probable cause to allow the suspect to reach a location that the officer desires to search (*Harris v. U.S.* 331 U.S. 145 (1946) (for discussion of *Harris* see note 70 *infra*)); and who may give a valid consent to be searched and under what circumstances.

60. Subsequent to preparation of this comment, the 1969 Indiana General Assembly enacted into law House Bill No. 1057 which amends the existing statute [Ind. Ann. Stat. § 9-601 (Burns 1956 Repl.)] and encompasses a majority of the above suggestions regarding modernization of the list of items for which a search can be made. House

long, incomplete and confusing and could be clarified easily and adequately by permitting search to be made for stolen property, property which it is illegal to possess, and property that might be used to commit a crime.⁶¹ The statute should permit the search for and seizure of mere evidence which might tend to show that a crime had been committed or show that a particular person had committed the crime.⁶² This provision would greatly assist law enforcement agencies.

Bill No. 1057 states:

Justices of the peace, judge of any city court, *town court* or magistrates court or the judge of any court of record, may issue warrants upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized, to search any ***** place for the following:*****

First. Property which is obtained unlawfully;

Second. Property, the possession of which is unlawful;

Third. Property used or possessed with intent to be used as the means of committing a crime or offense or concealed to prevent a crime or offense from being discovered;

Fourth. Property constituting evidence of an offense or tending to show that a particular person committed an offense.

Fifth. For any child that has been abandoned or neglected or in any manner left isolated without food, water or adequate shelter, and for any other purpose necessary to enforce the laws enacted to prevent cruelty to or neglect of children.

(b) The term "property" as used in this section shall include documents, books, papers, animals or any other tangible objects. The property described in this section or any part thereof, may be seized from any place where such property may be located or from the person or possession or control of any person who shall be found to have such property in his possession or under his control.

(c) The term "offense" as used in this section shall include any felony or misdemeanor or any act which, if committed by an adult, would be chargeable as a felony or misdemeanor.

(d) The term "place" as used in this section shall include any location where property as defined herein might be secreted or hidden, including, but not limited to buildings, persons and vehicles.

61. The proposal of the Committee to Study State Law Pertaining to Criminal Offenses, Penalties and Procedures in Indiana suggested a similar change to the state legislature during the 1967 session but the bill was not passed. See, however, note 51 *supra*.

62. In fairness it should be noted that prior to 1965, it was doubtful whether states could enact a "mere evidence" rule based on the holding in *Gould v. United States*, 255 U.S. 298 (1921); a few states did adopt such rules and upheld them. *E.g.*, *People v. Thayer*, 63 Cal. 2d 635, 408 P.2d 158, 47 Cal. Rptr. 780 (1965). But in 1967 the Supreme Court in *Warden v. Hayden*, 387 U.S. 294 (1967), overruled *Gould* and eliminated this distinction in the categories of evidence which may be constitutionally seized in an otherwise legal search. Justice Brennan writing for the Court said:

Nothing in the language of the Fourth Amendment supports the distinction between 'mere evidence' and instrumentalities, fruits of crime, or contraband. . . . Privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit or contraband. . . . Indeed, the distinction is wholly irrational, since depending on the circumstances, the same 'papers and effects' may be 'mere evidence' in one case and 'instrumentalities' in another. . . . In the case of 'mere evidence' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction.

Id., at 301.

As a second step the probable cause requirement⁶³ for issuance of the warrant should be liberalized at least to a point at which it will no longer exceed the requirement of probable cause for justifying a search incident to arrest.⁶⁴ For as long as it remains easier for law enforcement officers to conduct a search incident to arrest, or by means of the other exceptions to the warrant requirement, rather than observing the procedure of obtaining a warrant, the warrant procedure will continue to be used only in the rarest of circumstances. This revision should be enacted only to encourage use of the warrant where it appears reasonable and no attempt should be made to curtail the effectiveness of the officer in carrying out his law enforcement functions.⁶⁵

The final and most troublesome step would involve setting forth the various circumstances in which an officer may conduct a search without having obtained a search warrant.⁶⁶ Two exceptions to the warrant requirement which have been recognized consistently by the Indiana Supreme Court involve searches incident to a lawful arrest based on probable cause⁶⁷ and searches where an emergency situation exists.⁶⁸

The search incident to a lawful arrest is by far the most widely used method of conducting a search and therefore should be so described in the statute as to define adequately permissible activity.⁶⁹ For example,

63. IND. ANN. STAT. § 9-602 (Burns 1956 Repl.).

64. In *Wong Sun v. United States*, 371 U.S. 471, 480 (1963), the Court said: Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than when an arrest warrant is obtained. Otherwise, a principal incentive now existing for the procurement of arrest warrants would be destroyed.

See the discussion at note 51 *supra*.

65. For an illustration of the danger in formulating an arbitrary rule that search warrants must be obtained if time permits, and an indication that such a rule is completely unworkable, see Collings, *Toward Workable Rules of Search and Seizure—An Amicus Curiae Brief*, 50 CALIF. L. REV. 421, 446 (1962).

66. See, e.g., ILL. ANN. STAT. ch. 38, § 108-1 (Smith-Hurd 1964).

67. See *Tyler v. State*, —Ind.—, 236 N.E.2d 815 (1968) (search of defendant's auto); *Peterson v. State*, —Ind.—, 234 N.E.2d 488 (1968) (search of the defendant's auto); *Wagner v. State*, —Ind.—, 233 N.E.2d 236 (1968) (search of the defendant for narcotics); *Kirkland v. State*, —Ind.—, 232 N.E.2d 365 (1968) (search of an auto for money and revolvers used in robbery); *MacGregor v. State*, —Ind.—, 231 N.E.2d 241 (1967) (search of a car described by rape victim); *Manson v. State*, —Ind.—, 229 N.E.2d 801 (1967) (search of an auto); *Moore v. State*, —Ind.—, 223 N.E.2d 899 (1967) (search of a dwelling for narcotics); *Minton v. State*, 247 Ind. 307, 214 N.E.2d 380 (1966) (search of an auto and a dwelling for narcotics).

68. See *Machlan v. State*, —Ind.—, 225 N.E.2d 762 (1967) (search of an auto for firearms after an accident); *Wilson v. State*, 247 Ind. 454, 217 N.E.2d 147 (1966) (search of a dwelling without a warrant during an emergency investigation of a reported accident); *Idol v. State*, 233 Ind. 307, 119 N.E.2d 428 (1954) (search of a garage and auto). Cf. *Warden v. Hayden*, 387 U.S. 294 (1967).

69. For a thorough discussion of search and seizure with and without a warrant, see La Fave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth"*, 1966 U. ILL. L. F. 255.

the statute should describe the permissible scope of the search of the suspect's person and surroundings at the time of arrest, the extent to which consent by the suspect or other persons may justify a more extensive search,⁷⁰ and the extent to which a police officer can hesitate in making an arrest in order to allow a suspect to reach a location that the officer desires to search.⁷¹

The emergency situations which arise and require that a search be made without the delay of obtaining a warrant involve, for example, moving vehicles which are believed to contain contraband, situations in which there is a likelihood that evidence will be destroyed or lost and occasions where the safety of the officer or other persons is jeopardized.⁷²

*Terry v. Ohio*⁷³ has recently expanded further the possible circumstances in which officers may search without a warrant and without probable cause for formal arrest. The Court held that there is no distinction between a "search" and "frisk" since fourth amendment limitations apply to both, but that searches may be differentiated according to their purpose and extent. The Court therefore established a rule, based on the standard of reasonableness enunciated in the fourth amendment, that a law enforcement officer with less than "probable cause" may conduct an on-the-street-stop and make a search for weapons if reasonable suspicions exist to justify the stop and if subsequent to the stop reasonable belief exists that the person may be armed and dangerous.⁷⁴

70. *Id.*, at 279-98.

71. In the case of *Harris v. United States*, 331 U.S. 145 (1947), the Court held that search of the defendant's entire four room apartment without a search warrant was valid since it was a search of area under the defendant's control and made incident to a valid arrest. Justice Jackson, dissenting, objected to the so-called timed arrest in that it "leaves to the arresting officer choice of the premises to be searched insofar as he can select the place among those in which the accused might be found where he will execute the warrant of personal arrest. *Id.* at 197.

72. See authorities cited at note 67 *supra*.

73. 392 U.S. 1 (1968).

74. *Id.* at 33-34. The majority of the Court moved cautiously in its first adventure into the area of street encounters and framed its holding narrowly:

We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous; where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquires; and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or other's safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

Further, the Court declined to rule on the constitutionality of the New York stop-and-frisk law under which the case was handled in the lower courts. Thus, the status of stop-and-frisk legislation is still in question. Some six states now have such legislation,

The exceptions to the search warrant requirement raise complex questions beyond the scope of this comment; obviously a codification of these exceptions will not eliminate them all. However, several desirable consequences would justify recodification. The general guidelines established by codification would enable law enforcement officers to justify and, in some cases, refrain from certain types of search activity.⁷⁵ That one's rights may be violated by a policeman who is ignorant or scornful of the intricacies of the constitution is unfortunate; however, it is equally unfortunate that one who commits an offense may be freed or subject the state to the expense of a new trial simply because a policeman was unaware of what search procedures would taint the evidence seized thus allowing it to be excluded regardless of relevance or probative value. Also codification of the exceptions would tend to establish a more uniform system of search procedure and administration throughout the state, an ideal which is virtually impossible when the existing guidelines are hidden in a maze of state and federal court decisions. In addition, publicity surrounding enactment of the statutes could make more citizens aware that instances exist when the police must act quickly without a warrant in order to serve society effectively, thereby curbing some claims of police overreaching by legislative sanction of the defined procedure.

Void for Vagueness—A Violation of Due Process

A further constitutional infirmity of an obsolete penal code appears in the form of statutes which are potential violators of the fifth⁷⁶ and fourteenth amendment⁷⁷ due process clauses given their inherent vagueness or overbreadth. The Supreme Court has declared "that no one may be required at peril of life, liberty or property to speculate as the meaning of penal statutes. All are entitled to be informed as to what the State

while most other states treat the matter by case law. 53 MINN. L. REV. 652, 657 n.43 (1969). Indiana has very recently joined this group by enacting S.B. 88A in the 1969 Session of the Indiana General Assembly.

For one possible interpretation of the implications of the *Terry* opinion and for a thorough discussion of the many problems lying ahead, see La Fave, "Street Encounters" and the Constitution: *Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 40 (1968).

75. Conversations with various police officers indicated a general unfamiliarity with the various ways in which evidence might be excused at trial simply because the officer making the search was not familiar with the various standards which must be complied with for a search without a warrant to be valid. For examples of cases which were ultimately reversed in the Indiana Supreme Court because of search procedure, see *Dowlut v. State*, —Ind.—, 235 N.E.2d 173 (1968); *Gasaway v. State*, —Ind.—, 231 N.E.2d 513 (1967); *McCurry v. State*, —Ind.—, 231 N.E.2d 227 (1967); *Machlan v. State*, —Ind.—, 225 N.E.2d 762 (1967); *Enlow v. State*, 234 Ind. 156, 125 N.E.2d 250 (1955); *Idol v. State*, 233 Ind. 307, 119 N.E.2d 428 (1954).

76. U. S. CONST. amend. V:

... nor be deprived of life, liberty, or property without due process of law; . . .

77. U.S. CONST. amend XIV, § 1.

commands or forbids."⁷⁸ The effects of this doctrine have been significantly weakened since invariably the courts allow a questioned statute the benefit of whatever clarification previous decisions may have added.⁷⁹ The injection of this added procedure into the fair warning doctrine, requires that a person look not only to the statute to find what the law prohibits, but also to the many cases interpreting that law. What is more disturbing is that the person asserting the vagueness defense is charged with the knowledge, at the time he acted, of the subsequent interpretation which the state court may apply. Assuming the validity of the protection and basic underlying philosophy of the fair warning doctrine, it is rendered almost meaningless to all citizens except those trained in the field of legal research.⁸⁰

The argument is sometimes heard that the fair warning doctrine is of little or no significance since no one except attorneys ever consult statutes. Admittedly, this comment is often apt. Crimes such as murder, rape, robbery and theft are considered morally and socially wrong to such a universal degree that no assertion can be made that the doctrine would aid people committing such crimes—persons intent on murder do not read the penal code first. However, certain activity is of the type that recourse to the code prior to acting may be reasonable or highly probable. Joining an organization that may have subversive undertones, purchasing or selling books or literature which appear to be of an obscene nature, conducting various gambling enterprises of a charitable or commercial nature and conducting student or political demonstrations without fear of arrest for disorderly conduct, are examples. Vague or overbroad statutes make reliance on the code a risk-fraught practice which fact may cause persons to abstain from possibly legal conduct simply from inability to determine what is prohibited. Here ignoring the doctrine begins to parallel the conduct of Roman Emperor Caligula who inscribed laws on pillars so high that they were impossible to read.

Some courts have imposed upon the vagueness defense the requirement that the person must show that the statute was vague as to the conduct charged, and not just generally vague as to hypothetical cases.⁸² Statutes concerning violence and destruction of property should be given benefit of the presumption of constitutionality and not be voided simply because the defendant can show possible circumstances of questionable

78. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

79. Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 73 (1960).

80. See generally Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

81. See Rogers & Rodgers, *Desuetude as a Defense*, 52 IOWA L. REV. 1, 3 (1966).

82. See *United States v. Elliott*, 266 F. Supp. 318, 321 (S.D.N.Y. 1967).

legality because of statutory vagueness. However, statutes which appear to violate basic freedoms are automatically suspect, should not be presumed constitutional, and should not defeat a defendant's standing by inability to show the statute vague as to conduct charged. The possibility that state courts will fail to make the above distinction, thus allowing a statute whose chilling effect violates guaranteed rights to remain in the code, makes it essential that such vague statutes be eliminated or adequately revised.⁸³

On this score the Indiana statutes on disorderly conduct⁸⁴ are particularly vulnerable. These statutes have drawn considerable attention in recent years given the role which they play in current problems involving civil disobedience and student demonstrations.⁸⁵ Since convictions under these statutes are rarely appealed, there is an unfortunate dearth of information as to how trial courts throughout the state deal with alleged violations. The extremely fine line dividing a person's right to free speech from possible violations of the present disorderly conduct statutes places a too heavy burden upon judges to exercise scrutiny and judgment. The language most susceptible to criticism is "to disturb the peace and quiet of any neighborhood or family."⁸⁶ Who must be disturbed before an arrest can be made is not at all clear. For example, if questions such as whether the conduct must actually disturb a person in the neighborhood and not merely the arresting officer, whether the disturbance was initially

83. See *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938) : There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

84. IND. ANN. STAT. § 10-1510 (Burns 1956 Repl.) :

Whoever shall act in a loud, boisterous or disorderly manner so as to disturb the peace and quiet of any neighborhood or family, by loud or unusual noise, or by tumultuous or offensive behavior, threatening, traducing, quarreling, challenging to fight or fighting, shall be deemed guilty of disorderly conduct, and upon conviction shall be fined in any sum not exceeding one hundred dollars [\$100], to which may be added imprisonment for not to exceed sixty [60] days.

85. See Watts, *Disorderly Conduct Statutes in our Changing Society*, 9 WM. & MARY L. REV. 349, 358 (1967). In speaking of the problems created by the various disorderly conduct statutes Judge Watts indicated that

[t]he answer would be to set forth in the statutes as completely and as broadly as possible those acts which constitute offenses. The various state legislatures could very easily enumerate the conduct which in its wisdom should be criminal, such as failure to obey a lawful command of a police officer fairly made to prevent a breach of the peace. . . . Conviction under a disorderly conduct statute for loitering on corners is a dangerous area in view of constitutional safeguards, but it is better for the statute to spell out what constitutes loitering than to leave it to the whim of the police on the beat.

86. IND. ANN. STAT. § 10-1510 (Burns 1956 Repl.).

created by the officer's arrival,⁸⁷ how severe the disturbance must be, and how much disturbance may be countenanced where such activity is a routine phenomenon, such as on a university campus, have answers, they are certainly not found in the statutory language. Similar vagueness objections may be levied against the somewhat overlapping statute regarding disturbance of public meetings.⁸⁸

A suggested starting point in undertaking revision of the disorderly conduct statutes is the format set out in the Model Penal Code which describes not only the actual types of conduct prohibited, but also the various degrees of conduct punishable either as a misdemeanor or as a violation carrying a lesser penalty.⁸⁹

The Indiana vagrancy statute⁹⁰ and the statute concerning membership in subversive organizations,⁹¹ are also suspect, particularly in view of the total lack of any definition in the former as to what constitutes vagrancy. Such statutes, considering their conspicuous lack of specificity, may become convenient tools of coercion which can be used with impunity when the purpose is to harass rather than obtain a conviction.

Overlapping Statutes

It is frequently asked why the entire penal code should be revised when revision of only the particularly offensive and obsolete statutes would be adequate. The most meaningful answer is that piecemeal amendment of obsolete statutes creates, and since 1905 in Indiana has created, a body of inconsistent and overlapping statutes. Because of the limited duration of legislative sessions, amendments to various statutes are aimed at very narrow and specific issues which call for immediate attention, and the broad area of law involved is not evaluated. Also failure to repeal an existing law on the same subject occasionally results. The types of overlap existing in the present code should serve to illustrate

87. Guidelines should be established for law enforcement officers covering the permitted response when the officer's arrival and conduct are responsible for the subsequent disturbance. It should be determined whether an officer can allow an argument to reach such proportions that his sensibilities are offended, then arrest the individual for disorderly conduct, or whether he has some affirmative duty to mitigate the disturbance or at least remove the individual from the area to eliminate disturbing other individuals or families.

A technique used by many police departments in flammable situations is to remove potential troublemakers from the area immediately and question their activity in some other location to avoid creating further disturbance.

88. IND. ANN. STAT. § 10-1508 (Burns 1956 Repl.): ". . . molests or disturbs any collection of persons convened for the purpose of worship; or who thus disturbs persons attending any agricultural fair or exhibition. . . ."

89. MODEL PENAL CODE § 250.6.

90. IND. ANN. STAT. § 10-4602 (Burns 1956 Repl.).

91. IND. ANN. STAT. § 10-5204 (Burns 1956 Repl.).

the pressing reasons for forsaking piecemeal amendment as a tool for reform.

The burglary statutes furnish excellent examples of confusion. There exist five statutes, carrying penalties from ten days in county jail to twenty years in the state prison, under which a person entering a dwelling house intending to commit a felony could be charged and possibly convicted. The explanation is that amendments to the various 1905 statutes were enacted in 1927, 1941, and 1955, without repeal of the old statutes which were either paralleled by the new amendments or in conflict with them. Clarification can be accomplished only by complete re-evaluation of the offenses to be proscribed and a subsequent redrafting which clearly and logically defines the true intention of the legislature.⁹²

Especially inconsistent and confusing are the three covering kidnapping: the first prescribes a mandatory life sentence for one found guilty of kidnapping,⁹³ the second prescribes a two to fourteen-year imprisonment and a fifty dollar to 1,000 dollar fine for carrying off a child under fourteen years of age with the intent of concealing the child from his parents;⁹⁴ the third statute prescribes a mandatory life imprisonment or death sentence for kidnapping or carrying away an individual with the intent of obtaining a ransom.⁹⁵

An illustration of the possible consequent injustice may be noted:

92. Foust, at 23-24.

93. IND. ANN. STAT. § 10-2901 (Burns 1956 Repl.) :

Whoever kidnaps, or forcibly or fraudulently carries off or decoys from any place within this state or arrests or imprisons any person, with the intention of having such person carried away from any place within this state, unless it be in pursuance of the laws of this state or of the United States, is guilty of kidnapping, and, on conviction, shall be imprisoned in the state during life.

94. IND. ANN. STAT. § 10-2902 (Burns 1956 Repl.) :

Whoever takes, leads, carries, decoys, or entices away a child under age of fourteen [14] years, with intent to detain or conceal such child from its parents, guardian or other person having lawful charge or custody of such child, and whoever, with the intent aforesaid, knowingly harbors or conceals any such child so led, taken, carried, decoyed or enticed away on conviction, shall be fined not less than fifty dollars [\$50.00], nor more than one thousand dollars [\$1,000.00], and be imprisoned in the state prison not less than two [2] years nor more than fourteen [14] years.

95. IND. ANN. STAT. § 10-2903 (Burns 1956 Repl.) :

Whoever kidnaps, takes or carries away any person or decoys or entices such person away from any place in this state, with the intent of obtaining from any one any money, means, property, or thing of value as a ransom, reward or price for the return of the person so kidnaped, taken, carried, decoyed or enticed away, as aforesaid, or whoever shall imprison, detain or hold any person at any place in this state with the intent of obtaining from any one any money, means, property or thing of value, as a ransom, reward or price for the return, liberation, or surrender of the person so imprisoned, detained or held, shall be deemed guilty of the crime of kidnaping for the purpose of ransom, and, on conviction, shall suffer death, or be imprisoned in the state prison during life.

One who stages a forcible kidnapping but undergoes a change of heart and releases his victim unharmed within minutes, if found guilty under the statute, will be sentenced to mandatory life imprisonment, the judge having absolutely no discretion to reduce the sentence regardless of the circumstances.⁹⁶ By contrast a person who abducts a two year old child, intending to conceal the child from his parents and keeps the child for six months before being apprehended, could be charged under the child stealing statute and possibly receive the minimum sentence of two years in jail and a fifty dollar fine.⁹⁷

It is not at all clear from these statutes and pertinent cases under what circumstances a charge of kidnapping rather than the lesser offense of child stealing may be utilized by the prosecutor. Revision is necessary to clearly delineate when an act falls within either kidnapping or the lesser offense of child stealing. The mandatory life sentence should be abolished to give more discretion as to what sentence to impose depending on the circumstances of the case.⁹⁸ For although the absence of judicial discretion may serve as an effective primary deterrent, it completely ignores the benefit of having an effective incentive with which to induce the safe release of the kidnap victim.

Without purporting to be exhaustive, other areas in the present criminal code in which difficulties are engendered by overlap include: the section which prohibits various gambling activity under thirty-two separate statutes;⁹⁹ the section on disorderly conduct which contains nine separate statutes;¹⁰⁰ the section on assault and battery which contains eleven statutes covering in many cases similar or identical conduct;¹⁰¹ and the section on sex offenses which also contains many overlapping and inconsistent statutes.¹⁰²

It is thus important to point out that mere existence of overlapping statutes creates undue confusion to citizens, the accused, prosecutors, and courts. In addition there looms the potential for violating due process rights as a result of the warning doctrine's prescription that a person be

96. IND. ANN. STAT. § 10-2901 (Burns 1956 Repl.).

97. IND. ANN. STAT. § 10-2902 (Burns 1956 Repl.).

98. See *White v. State*, 244 Ind. 199, 204, 191 N.E.2d 486, 488 (1963) where the court speaking of the penalty of mandatory life imprisonment for kidnapping in Indiana said:

It may be that the penalty provided by the kidnaping statute is too great in view of the factual situation as herein delineated, and that the legislature should give some thought to an amendment of that statute, but that is a function of the legislature, not of this court.

99. IND. ANN. STAT. § 10-2301-2336 (Burns 1956 Repl.).

100. IND. ANN. STAT. § 10-1501-1510 (Burns 1956 Repl.).

101. IND. ANN. STAT. § 10-401-410 (Burns 1956 Repl. & Burns Supp. 1968).

See also Foust, at 23.

102. IND. ANN. STAT. § 10-4201-4226 (Burns 1956 Repl. & Burns Supp. 1968).

aware of the activities which are prohibited by the state. The problem becomes more pronounced when the various overlapping statutes embody divergent punishments potentially applicable to a single act.¹⁰³

The second problem arising with overlap is the expansive power given the prosecutor. When possible penalties may range from ten days to twenty years, depending on the statute under which the prosecutor chooses to proceed, as in the burglary section,¹⁰⁴ statutes can become mockeries of true legislative intention. Gross inconsistencies in penalties can often be used as a coercive tool to induce a plea of guilty by use of the plea bargain.¹⁰⁵ Until such time as the plea bargain is subject to more careful scrutiny and open treatment by the courts and prosecutors, and until all defendants are supplied with counsel familiar with the mystical process of the plea bargain routine, eradication of overlap is imperative.¹⁰⁶

III. GENERAL PROVISIONS: A SUGGESTED ADDITION TO THE PENAL CODE

Many doctrines and principles, often more significant of outcome than the bare statute under which the accused is charged, permeate the criminal law with varying desirability. These concepts include: responsibility, for example insanity and intoxication; justification, for example self-defense, and necessity; liability, for example absence of mens rea, mistake, entrapment and strict liability; and theories of classifications of crimes and prescription of penalties. The need for re-evaluation and re-definition to reflect more adequately contemporary philosophies should be examined.

103. Although clear constitutional argument against the divergent punishments possible with overlapping statutes has not been successfully raised, their effect can be analogized to the area of discriminatory enforcement of laws as a denial of equal protection. The existence of numerous statutes having widely differing penalties applicable to a single act allows prosecutors to engage in just the type of selection process which is prohibited when laws are enforced in a discriminatory manner.

104. Foust, at 23-24.

105. See Enker, *Perspectives on Plea Bargaining* in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 108-19 (1967) (Appendix A); Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865 (1964).

106. Although the plea bargain is used in an overwhelming majority of cases, lest the the entire criminal system collapse, the price of expediency is indeed high. For example, an innocent defendant may be induced to plead guilty to avoid even remote possibilities of conviction or to escape reputation damaging charges, e.g. pleading guilty to an assault charge rather than be subject to a morals charge; rehabilitation efforts are seriously curtailed since the true offense which a particular defendant committed may never be discovered by the correctional authorities; success in the bargaining process may depend on the lawyer's reputation and apparent ability to carry out his threats to take the case to trial; and in many cases the negotiation becomes a controversy as to how many years a plea is worth rather than what sentencing goals would be most meaningful.

Despite their importance, the existing code has treated these issues in a cursory manner, often omitting them entirely. The desirability of incorporating a "general provision" section into a revised code deserves consideration. The fact that all states which have enacted revised penal codes in recent years¹⁰⁷ and the American Law Institute¹⁰⁸ have all adopted rather exhaustive "general provision" sections indicates a growing awareness that the basic concepts of the criminal process and not just the substantive and procedural provisions should be clearly defined and easily ascertainable. Although each state's enactment is in many ways unique, all appear to be similar enough in basic content to permit discussion of them as embodying a single "general provision concept" for purposes of comparison with the present situation in Indiana and to serve as a model to aid in formulating such a section.

This task poses a two-fold problem. The absence of many of the above categories from the present code prevents merely transferring statutes into a general provision section. Also, it must be determined in each instance whether the advantages of codification outweigh the occasional value of vagueness and flexibility. For example, the question of whether the insanity defense should remain a court-made rule, or whether it should be a function of the legislature to define the appropriate rule¹⁰⁹ could pose this problem.¹¹⁰ A brief discussion of suggested chapters will illuminate some of the advantages and problems inherent in such a task.

A. Basic Principle Provisions

One chapter should contain statutes on geographical jurisdiction; rules of construction, which need only to be repositioned with minor changes; statutes on general definitions; statutes of limitation; rules of

107. The states which have recently adopted revised penal codes are: Illinois (ILL. ANN. STAT. ch. 38 (Smith-Hurd 1964)); Minnesota (MINN. STAT. ANN. ch. 609 (1964)); New Mexico (N.M. STAT. ANN. ch. 40 (1964)); New York (N.Y. REV. PEN. LAW (McKinney 1967)); Wisconsin (WIS. STAT. ANN. tit. XLX (1955)).

108. MODEL PENAL CODE Part I.

109. Although a narrowly drafted statute on the insanity defense may curtail the adoption of modern psychiatric techniques as they are developed, the existence of the insanity defense test as a court made rule has produced a disturbing lack of uniformity throughout the state in its actual application. See language *infra* note 134.

110. Instances where vagueness and flexibility are desirable vary considerably depending on the concept involved. An example of where vagueness might be more feasible than in the insanity defense might involve a statute attempting to define the amount of force a police officer may use to effect an arrest. The MODEL PENAL CODE § 3.07 appears to reach a rather plausible compromise between over-vagueness and unwarranted specificity by indicating the circumstances where various degrees of force may be used, for example, no force is justified unless the actor discloses his identity and purpose for arrest, also the use of deadly force is not justified when arrest is for a misdemeanor. This is in contrast to IND. ANN. STAT. § 9-101 (Burns 1956 Repl.) which states only that an officer may use all necessary means to effect the arrest.

evidence concerning proof beyond a reasonable doubt, presumptions, burdens of producing evidence, and affirmative defenses; and rules for multiple offenses, double jeopardy and lesser included offenses which are now either non-existent or in need of major substantive revision.

The five closely related statutes of limitation,¹¹¹ could be combined into one statute for sake of clarity. Also meriting attention is the question of whether crimes which carry both misdemeanor and felony penalties, for example seduction,¹¹² come within the two-year limitation for misdemeanors or the five-year limitation for felonies.¹¹³ Thus it is not clear whether a defendant who neglected to raise in his plea in abatement¹¹⁴ the defense that the limitation had run for the misdemeanor portion of an offense, will be deemed to have waived his right to raise this fact in a post-trial motion if the conviction which results from the charge is held to be a misdemeanor. As long as multiple offense statutes are deemed desirable, the applicable time limitation when prosecutions can be brought must be clearly defined.¹¹⁵

Crimes or offenses punishable by death or imprisonment in the state prison are presently classified as felonies, any other offenses are misdemeanors.¹¹⁶ As Dean Foust has noted, classification of crimes based on place of incarceration rather than on seriousness of the crime creates the anomaly of having a "twenty-year misdemeanor and a ten-day felony."¹¹⁷ Consideration should be given to reclassifying crimes on the basis of seriousness. For example any crime punishable by more than one year might be a felony, anything else a misdemeanor. A further classification would include very minor offenses, which should be stipulated not to bear the stigma of a criminal conviction, and should not result in imprisonment.

111. IND. ANN. STAT. § 9-301-305 (Burns 1956 Repl.).

112. IND. ANN. STAT. § 10-4208 (Burns 1956 Repl.):

. . . on conviction, shall be imprisoned in the state prison not less than one [1] year, nor more than five [5] years, and fined not exceeding five hundred dollars [\$500], or be imprisoned in the county jail not exceeding six [6] months, and fined not exceeding one hundred dollars [\$100].

113. IND. ANN. STAT. § 9-304 (Burns 1956 Repl.):

In all other cases, prosecutions for a misdemeanor must be commenced within two [2] years, and prosecutions for a felony must be commenced within five [5] years after its commission.

114. IND. ANN. STAT. § 9-1129 (Burns 1956 Repl.).

115. California has one possible solution to the dilemma created by statutes having both misdemeanor and felony classifications. When this problem arises the crime is considered a misdemeanor until otherwise stipulated by the court. CAL. PEN. CODE §§ 17, 799, 800, 801 (West 1968 Supp.).

116. IND. ANN. STAT. § 9-101 (Burns 1956 Repl.).

117. Foust, at 17. As a result of classifying crimes on place of incarceration, statutes which specify neither whether an offense is a felony or a misdemeanor, nor the place of incarceration, leave in doubt which class of crime the statute intended to create. See, e.g., IND. ANN. STAT. § 10-2801 (public indecency), § 10-1510 (disorderly conduct) (Burns 1956 Repl.).

B. Principles of Liability

Numerous unclear and ambiguous terms are presently used to describe the mental states necessary for liability under various crimes.¹¹⁸ A clear description of the alternative mental states, for example "intentionally," "knowingly," "recklessly," and "with criminal negligence," as enacted in the revised New York code¹¹⁹ and the Model Penal Code¹²⁰ is desirable. These terms should then be used consistently throughout the revised code where specific culpability is an element of the offense.

The present code is silent as to the effect of mistake of law and mistake of fact. Although the traditional approach holds mistake of law no defense, a contemporary view suggested by the Model Penal Code¹²¹ makes no distinction between types of mistake and considers them valid defenses if the mistake negatives the mental state which is a material element of the offense charged. A claim that one did not believe his conduct constituted an offense is considered an affirmative defense which must be proved by a preponderance of the evidence.¹²²

C. Principles of Responsibility—Insanity Defense

The effect of mental disorders on criminal responsibility creates extremely complex questions—in no other area of criminal law are demonstrably proper answers more difficult to discover. Since only limited mention of the problem is possible, it may be useful to raise some of the questions that must be considered before codification is advisable.

An important consideration is the purpose of having the defense codified¹²³ and whether it is an affirmative defense,¹²⁴ since it merely denies the existence of one of the elements of the crime, the *mens rea*.

118. The following are terms used in the existing penal code to describe the mental states necessary to the offense; IND. ANN. STAT. § 10-601 (corruptly), 10-2103 (designedly), § 10-4510 a (intentionally), § 10-401 (intent to commit felony), § 10-305 (maliciously), § 10-4509 (mischievously), § 10-406 (purposely), § 10-406 (premeditatedly), § 10-3401 (premeditated malice), § 10-301 (willfully), § 10-301 (wantonly), § 10-4708 (with or without malice), § 10-408 (violently), § 10-4514 (fraudulently), (Burns 1956 Repl.).

119. See Note, *The Proposed Penal Law of New York*, 64 COLUM. L. REV. 1469, 1481 (1964).

120. MODEL PENAL CODE § 2.01-2.02.

121. *Id.* § 2.04.

122. *Id.* § 2.04 (4).

123. For discussion of advantages of codification to avoid such conflicts as whether the McNaughten test allows the jury to hear all relevant testimony regarding defendant's mental impairment, the so-called Modern McNaughten, see note 109 *supra*.

124. Weintraub, *Criminal Responsibility: Psychiatry Alone Cannot Determine It*, 49 A.B.A.J. 1075, 1076 (1963). Justice Weintraub suggested that:

Although we sometimes speak of insanity as a defense, it is not a separate defense to a case the state has otherwise established. Rather it is a denial of an essential ingredient of the state's case—*mens rea*.

Also, consideration must be given to whether mental impairment should affect determination of guilt, or whether it is relevant only in determining the disposition of the individual after his act of committing the crime has been demonstrated by conviction. The suggestion of proponents of this latter view¹²⁵ that convictions be based solely on commission of the prohibited act, regardless of mental state, and that mental state has relevance only at final disposition, completely ignores the seriousness of the stigma of criminality and the fundamental precept that "[o]ur collective conscience does not allow punishment where it cannot impose blame."¹²⁶ It may well be noted that use of the narrow McNaughten test may produce a quite similar result.¹²⁷

The McNaughten rule is coupled with the irresistible impulse test in Indiana;¹²⁸ the capacity of a person to distinguish right from wrong, to comprehend the nature and consequences of his act and sufficiently unimpaired will power to resist the impulse to commit the act are determinative. These rules, as in a majority states, were formulated and adopted by the court rather than the legislature.¹²⁹ This legislative abstention from involvement in the insanity defense places the burden of modernization and change upon the branch of state government least capable of performing the task because of inadequate time, money and staff required to perform the necessary study. Although the recent trend in some jurisdictions has been to abandon the McNaughten rule¹³⁰ and replace it with tests such as that of the Model Penal Code,¹³¹ literature

125. *Id.*, at 1078. Justice Weintraub in asserting that insanity should not affect the finding of criminal accountability stated:

. . . the little we know suggests that insanity should have nothing to do with criminal accountability. Rather, we should think of conviction as simply a determination that the individual has demonstrated his capacity for antisocial behavior, and that having been proved, we ought then to draw upon medical knowledge for such help as it may offer in deciding what should be done with the offender.

126. *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954).

127. By concern with only cognition, regardless of impairment of volition, individuals in fact blameless could suffer criminal punishment simply because cognition had not been sufficiently impaired. It may be noted that recently, in *United States v. Shapiro*, 383 F.2d 680 (7th Cir. 1967), the United States Court of Appeals for the Seventh Circuit reversed a criminal conviction in which the defendant was found not insane by the United States District Court using the McNaughten Test. In formally adopting the A.L.I. test, the court rejected the use of McNaughten and found the A.L.I. test superior to both it and the Durham test.

128. H. WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 141 (1954). See also note 127 *supra*.

129. See H. WEIHOFEN, *supra* note 122, at 50-173, for a summary of the insanity defense tests of all the states and the statutes or cases involved.

130. The most recent jurisdiction abandoning the McNaughten test and adopting the A.L.I. test was the Seventh Circuit in *United States v. Shapiro*, 383 F.2d 680 (7th Cir. 1967), see discussion at note 127 *supra*.

131. MODEL PENAL CODE § 4.01.

advocating the validity of the McNaughten rule continues to appear.¹³² Objection to the McNaughten test stems primarily from the limits which it places on testimony of the psychiatrist witness and its emphasis on only one of the many symptoms of mental disease. Although each test has its ardent supporters, the real importance of a formal test must be questioned from the standpoint of juries possibly being unable to distinguish between the various tests, and of the inherent conflicts between the concept of insanity as a legal and not a psychiatric term.

Codification of the insanity defense test and related issues¹³³ would be desirable not only to obtain legislative clarification and expertise but also to provide necessary uniformity throughout the state.¹³⁴ The widely fluctuating language used by the Indiana Supreme Court in applying the insanity defense has produced a serious lack of uniformity and raises questions as to which test is actually followed and what its specific characteristics are. A thorough study must be undertaken prior to codification to determine the value and shortcomings of various suggested rules and the effect on administration of maintaining the status quo or undertaking a substantive revision. Equally fundamental is the question of whether a change in the test will have any beneficial effect on the person suffering the mental impairment: If the treatment and facilities available for the mentally ill in correctional institutions do not differ from that in mental hospitals, then it is apparent that merely change and codification will not create a panacea for the existing problems. Serious evaluation must therefore be made not only of the insanity defense, but of the equality of treatment facilities in Indiana penal institutions as well as mental hospitals.

132. J. Hall, *GENERAL PRINCIPLES OF CRIMINAL LAW* 449-529 (1960); Weintraub, *Criminal Responsibility: Psychiatry Alone Cannot Determine It*, 49 *A.B.A.J.* 1075 (1963); Dershowitz, *Psychiatry in the Legal Process: A Knife that Cuts Both Ways*, *TRIAL MAGAZINE* Feb./March 1968, at 29.

133. Other matters which should be considered include: psychiatric examination to determine competency to stand trial; effect of diminished responsibility short of legal insanity; commitment, release or discharge of persons found not guilty by reason of insanity; and effect of complete cure after a defendant has been committed to a mental hospital.

134. Prior to 1869, the insanity test was based on the prosecution's inability to show malice or intent. In *Stevens v. Stevens*, 31 *Ind.* 485 (1869) the court adopted a test similar to Durham, holding an act not criminal when an offspring or product of mental disease. The court then went to a rather broad form of McNaughten, and made the insanity test in criminal cases the same as in civil cases. From 1869 to 1904 the court fluctuated between a narrow and broad irresistible impulse rule. In the 1948 case of *Kallas v. State*, 227 *Ind.* 103, 83 *N.E.* 769 (1948) the court used the McNaughten and irresistible impulse tests but said the jury was not in error in ignoring the presence of sexual impulses to gratify sadistic urges and in finding a sadist, homosexual killer sane. The court has in many cases used language similar to the Durham test, but specifically rejected it in *Flowers v. State*, 236 *Ind.* 151, 139 *N.E.2d* 185 (1956).

D. Principles of Justification

Justification is a defense to conduct that would be considered an offense were it not authorized or required by statute or necessary to avoid a public or private harm greater than that sought to be prevented by the offense charged. This portion of the general provision section would include codification of the law of self-defense, defense of others and property, and permissible use of force by police in making an arrest and preventing escape.

The entire statutory law of justification in Indiana appears in a proviso to the statute entitled Drawing Dangerous Weapons and states "[t]he provisions of this section shall not apply to a person drawing or threatening to use such dangerous or deadly weapon in defense of his person or property, or in defense of those entitled to his protection by law,"¹³⁵ and in a statute entitled Arrest stating ". . . the officer may use all necessary means to effect the arrest."¹³⁶ Resorting to the existing code to determine whether justification is a valid defense to crimes like assault and battery, manslaughter, murder and the extent to which a person can defend himself, his family and his property is an exercise in futility. Although the law can be found by researching Indiana cases, it is unreasonable to expect laymen to have the expertise to accomplish such a task.¹³⁷

E. Classification and Sanction for Criminal Offenses

In Indiana destruction of a house by fire is punishable by a maximum of fourteen years imprisonment,¹³⁸ but destruction of that same house using explosives carries a three-year maximum sentence.¹³⁹ Forging or counterfeiting instruments that evidence payment of taxes for alcoholic beverages intending to defraud the state is punishable by a maximum of one-year imprisonment,¹⁴⁰ whereas a banker knowingly making a false entry in any book or record regardless of whether the entry involved any substantial amount of money may receive a five-year maximum sentence.¹⁴¹

135. IND. ANN. STAT. § 10-4707 (Burns 1956 Repl.).

136. IND. ANN. STAT. § 9-1007 (Burns 1956 Repl.).

137. See BUSINESS WEEK, Aug. 5, 1967, at 113 (Weekly feature "Personal Business"). The increased interest of the average citizen in protecting himself, his home and family due to rise in crime and riots was indicated by an article entitled "A Memo on Self-defense." The two page article discussed in laymen's language the law of self-defense in capsule form. A criminal code should be clear and complete enough to serve the same function should persons resort to it for guidance.

138. IND. ANN. STAT. § 10-301 (Burns 1956 Repl.).

139. IND. ANN. STAT. § 10-305 (Burns 1956 Repl.).

140. IND. ANN. STAT. § 12-607 (Burns 1956 Repl.).

141. IND. ANN. STAT. § 10-1713 (Burns 1956 Repl.). For further examples of disproportionate penalties, see Foust, at 29. This statute is particularly objectionable since there are no degrees of the offense listed as in the theft or burglary sections

Piecemeal amendment over the last sixty years has created a sentencing structure which in many cases bears little or no resemblance to the relative seriousness of the offense.¹⁴²

An overwhelming majority of penal statutes in Indiana provide for both a fine and imprisonment; however, absolutely no legislative guidelines are provided as to when one or the other or both sanctions should be used. Determination of why punishment is needed and the proper sanction to fulfill that need is left entirely to the judge. The difficulty of this task is exemplified by such questions as whether society is properly served by imprisoning a bank executive for making a false entry, or whether anything but contempt for the law is fostered by imposing a 100 dollar fine upon a poverty-stricken ghetto dweller for public intoxication or disorderly conduct.

Suggestion by the President's Commission¹⁴³ and adoption by the Model Penal Code¹⁴⁴ and the New York Revised Penal Code¹⁴⁵ indicates the desirability of grouping offenses into major categories to enable delimiting permissible sentences. For example, felonies and misdemeanors could be each divided into three degrees of seriousness; first, second and third degree. Each degree of offense would then be assigned an applicable range of punishment in terms of fine, imprisonment or both. All criminal statutes would then indicate merely the degree of the offense involved, thus, prescribing the same range of punishment for all offenses, for example all those classified as second degree felonies. Further classification could include minor offenses, which would carry no label of criminality and only a monetary sanction. The clarification and ease of administration that such a system would necessarily produce would be a major improvement.

IV. CURRENT OBJECTIONS TO PENAL CODE REVISION

Advocacy of disruption of the status quo seems inevitably to prompt widely divergent objections to the proposed change. Some objections

depending on the seriousness of monetary harm caused. Therefore, a false entry of only five dollars results in a felony conviction and a maximum of five years imprisonment.

142. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE TASK FORCE REPORT: THE COURTS 15 (1967).

In its discussion of sentencing structure of penal codes in most states generally the Commission found:

As a result the sentencing distinctions among offenses are in excess of those which could rationally be drawn on the basis of the relative harmfulness of conduct or the probable dangerousness of the offender.

Id. 15

143. *Id.*

144. MODEL PENAL CODE Part I, art. 6.

145. N.Y. REV. PEN. LAW §§ 55.00 to 80.15 (McKinney 1967).

levied against penal code reform are more meritorious than others, and it is essential that at least the more frequently heard complaints be discussed, particularly since cooperation of persons who must use the code is vital. The unfortunate effect of non-acceptance is exemplified by experience with the various state divorce codes which shows that the reduction, addition or revision in the grounds for which divorce can be granted has little or no effect on the actual divorce rate.¹⁴⁶

Complete avoidance of confusion during transition is not possible. Affirmative plans initially to reduce the confusion to workable level are necessary. One suggestion is not to attempt simultaneous reformation of the substantive, procedural and correctional sections but concentrate on enacting one such section at a time. In this way the entire criminal process is not at once exposed to a new system of administration. From a study of the states which have recently enacted revised penal codes,¹⁴⁷ and states now in the process,¹⁴⁸ it appears that this approach is followed in a majority of cases. Perhaps the most effective and logical means of eliminating the problems of transition is to follow the procedure used by the New York legislature. The New York Commission on Revision decided that "[i]n order to allow the judiciary and the legal fraternity and law enforcement agencies ample opportunity to study and familiarize themselves with the new law,"¹⁴⁹ the code would not become effective until more than two years subsequent to enactment. Any changes found necessary during such an interval as a result of meritorious suggestions can be incorporated without significant effect on the administration process while the old code remains in effect.

The Criminal Offenses Committee in Indiana was created to study the laws relating to criminal offenses, penalties and procedures.¹⁵⁰ The committee reports, while recognizing the desirability of complete revision of all existing criminal laws, advised that this goal was not now possible because of inadequate financial assistance. Although exploration of the intricacies of code revision economics lies beyond the scope of this comment, it may be useful to discuss some general concepts of financing to

146. Reinstein. *Divorce and the Law in Germany: A Review*, 65 AM. J. of Sociology 489 (1960).

147. See note 107 *supra*.

148. *E.g.*, California (Cal. Joint Leg. Comm'n For Revision of the Penal Code, Penal Code Revision Project (Tent. Drafts Nos. 1, 1967; 2, 1968)) and Michigan (Mich. Rev. Crim. Code (Final Draft, West 1967)).

149. Memorandum of the Commission on Revision of the Penal Law and Criminal Code on the Penal Law, 39 N.Y. REV. PEN. LAW xxxi (McKinney 1967).

150. This committee was created as a result of an amendment to Chapter 20, Indiana Acts of 1963 to study a broad range of subjects in the field of criminal law, and recommended legislation in seventeen areas. Many of the proposed bills were not innovations in the law, but rather an updating of existing criminal statutes.

determine whether anticipated costs, now deemed prohibitive, might be re-evaluated in terms more favorable to total revision. By use of an elementary benefit-cost analysis, it may be possible to show that the basic cost of total revision is substantially offset by long term financial savings resulting from adoption of a revised penal code.

It is often observed that

economic criteria for decision-making are abstruse theoretical postulates invented and circulated by academic professional economists, or at best, that economic analysis is suitable only for application to idealized situations that have little relation to the real world.¹⁵¹

These criticisms of economic analysis are of questionable validity; moreover, the tool may be used in the present context not to yield answers to actual policy problems, but merely to create an awareness that factors exist which are relevant beyond the mere primary cost of revision.

The cost of crime has been growing rapidly, as shown by the President's Commission indicating that from 1955 to 1965 annual public expenditure for dealing with crime, including police, courts, prosecution and correction institutions, has gone from 2.2 billion dollars to approximately 4.6 billion dollars.¹⁵² These costs must be borne heavily by the states, Indiana being no exception.¹⁵³ Moreover, while in themselves staggering, these figures do not portray the total picture, for they fail to consider any of the external costs to society. External costs include such items as decreased use of public facilities at night, and failure to invest in businesses in high crime areas.¹⁵⁴ It can be shown that a total revision

151. J. HIRSHLEIFER, J. DE HAVEN & J. MILLIMAN, *WATER SUPPLY: ECONOMICS, TECHNOLOGY AND POLICY* 358 (1960).

The above quote is a reference by the authors to the critics of economic analysis and is not the viewpoint of the authors.

152. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION AND ADMINISTRATION OF JUSTICE, *TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT* 55 (1967).

153. See Penegar, *Appraising the System of Criminal Law, Its Processes and Administration*, 47 N.C.L. REV. 69 (1968).

154. *Id.*, at 114-117. A summary description of such external (secondary) cost states that:

People stay behind locked doors of their homes rather than risking walking in the streets at night. Poor people spend money on taxis because they are afraid to walk or use public transportation. Sociable people are afraid to talk to those they do not know. In short, society is to an increasing extent suffering from what economists call opportunity costs as the result of fear of crime. For example . . . officials interviewed . . . report that library use is decreasing because borrowers are afraid to come out at night. School officials told of parents not daring to attend P.T.A. meetings in the evening, and park administrators pointed to unused recreational facilities. When many persons stay at home, they are not availing themselves of the opportunities for pleasure

of the existing penal code will have some effect in reducing the cost of crime and these savings must be considered in determining the true cost of revision. The following measures while neither exhaustive nor categorically recommended are possible ways by which the cost of crime could be reduced.

Recent literature indicates the feasibility of completely eliminating from the criminal process certain activity now subject to penal sanction.¹⁵⁵ The basic premise of the criminal law is that when activity is sufficiently harmful to society, it becomes desirable to control it through the criminal rather than the civil legal system. Therefore some of the so-called victimless crimes which are felt to harm no one except the consenting actors might be removed. These crimes include prostitution,¹⁵⁶ certain gambling offenses,¹⁵⁷ drug use offenses,¹⁵⁸ fornication and homosexuality between consenting adults,¹⁵⁹ drunkenness or alcoholism¹⁶⁰ and abortion.¹⁶¹ The substantive changes would reduce the task of the police, prosecutors and courts, thereby reducing the cost of the system and permitting the devotion of more resources to coping with crimes which directly harm

and cultural enrichment offered in their communities, and they are not visiting their friends as frequently as they might. The general level of social interaction in the society is reduced.

Id., at 116.

155. Perhaps the most thorough and scholarly work on this entire subject is Herbert Packer's recent book, *The Limits of the Criminal Sanction*. The exhaustive treatment given this entire area by Professor Packer obviates treatment in depth of whether certain crimes should be removed from the criminal process.

156. H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 328-31 (1968). In questioning the validity of using the criminal process to deal with prostitution, Professor Packer asks:

What does society gain from this kind of law enforcement activity? If the effort is to stamp out prostitution, it is plainly doomed to failure. If it is to eradicate or curb the spread of venereal disease, that too is illusory, given the sporadic pattern of enforcement To put it crudely but accurately, the law is perverted to serve goals for which it was never intended.

Id. 331.

157. *Id.* 347-54.

158. *Id.* 332-42. Regarding the use of the criminal process to curb and handle the problem of narcotics and other drugs. Professor Packer states rather forcefully that "[a] clearer case of misapplication of the criminal sanction would be difficult to imagine." *Id.* 333.

159. *Id.* 301-12.

160. *Id.* 345-47.

161. *Id.* 342-44. The statistics which show that of the approximately one million abortions which are performed in this country each year, only about one per cent of these were performed in hospitals, has caused Professor Packer to indicate that:

[t]he conclusion seems irresistible that the only way to eliminate the illegal abortionist is to eliminate the illegal abortion, and to substitute for it a narrowly drawn criminal prohibition addressed to the real secular evil of abortion performed by unqualified practitioners, leaving to the evolving mores of the medical profession the determination of the circumstances under which its skills will be mobilized to perform abortions.

Id. 344.

society. Also, agencies such as welfare, social, religious, and clinical bodies could handle these problems more effectively than can the courts.

The President's Crime Commission has estimated that national average daily cost for keeping an individual on probation is less than forty cents, while the daily cost per prisoner in a correctional institution is over five dollars.¹⁶² This rather pragmatic observation emphasizes the fact that legislative apathy toward a sometimes antiquated and illogical sentencing structure is not without financial consequence.

Since Indiana's penal code is in need of not only formal revision but also substantive revision,¹⁶³ it is essential that the philosophy of punishment be re-evaluated. Preparatory to any meaningful substantive revision, the purpose for attaching a certain degree of punishment to a given act, the extent to which judges should be limited by prescribed inflexible ranges of punishment and the means of punishment to be employed must be determined. While this determination is primarily important as the axis upon which the entire revision process must turn, its effect upon costs also merits consideration. If it is found that certain criminal offenses can be satisfactorily dealt with by shorter prison terms, combined with better probation and release programs that will have positive rehabilitative effect, and increased use of fines for types of crimes whose primary function is deterrence,¹⁶⁴ such as strict liability crimes, certain white collar crimes, and gambling, the state will realize sizable savings.

After determining revision to be at least in some respect desirable, and after determining its scope with respect to substance, procedure and correction, the benefit-cost analysis may be utilized.¹⁶⁵

Tangible costs¹⁶⁶ should be ascertained by considering: estimated

162. Penegar, *supra* note 153, at 117.

163. The term "formal revision" includes such operations as systematic bringing together of statutes and parts of statutes relating to the same subject and arranging them in logical order; eliminating obsolete, unconstitutional, impliedly repealed and duplicate provisions, elimination of unnecessary words; and rectifying conflicts which have arisen.

164. See Becker, *Crime and Punishment: An Economic Approach*, 76 J. OF POL. ECON. 168 (1968). This rather unique article contains an interesting approach to the increased use of fines throughout the entire criminal process to serve the same deterrent function as imprisonment but at the same time compensate the state and society for the actual monetary cost caused by the crime.

165. For general discussion of the basic mechanics of a traditional benefit-cost analysis see J. SAX, *WATER LAW, PLANNING AND POLICY* 29 *et. seq.* (1968).

166. Two separate concepts of benefits and costs are considered under the traditional benefit-cost analysis—tangible items which can be quantified in monetary terms, and intangible items which are not subject to monetary quantification but have real value in satisfying human needs or desires.

A second classification concerns primary benefits and costs, which flow directly from the revision project, and secondary benefits and costs which are indirectly attributable to the project, for example decreased business investment in a neighborhood having a high crime rate.

time for completion; size and make-up of committees; cost of hiring part time and full time reporters, consultants and researchers; printing and distribution costs for tentative and final drafts; and applicability of work already completed by recently revised codes of other states as well as the Model Penal Code.

Tangible benefits expected from the revision should then be determined to the fullest extent possible. Areas to be considered involve: increased use of probation as opposed to imprisonment; decrease in police, prosecutor and court cost by removal of certain activity from the criminal process entirely; decrease in recidivism resulting from improved rehabilitative programs; and more effective use of law enforcement agencies resulting from more definite description of what constitutes criminal activity and guidelines for acceptable police response.

Since the tangible costs will obviously exceed the monetary benefits to be expected from the revision process, it is then necessary to look to intangible benefits, such as: increased protection of citizens' constitutional rights; clear definition of conduct prohibited by the state to satisfy the fair warning doctrine and also elimination of the chilling effect caused by vague statutes; and increased respect for the law resulting from a more equitable system. The legislature must determine the extent of its responsibility to subsidize attainment of these intangible benefits. If that duty is adjudged at least roughly comparable to the pecuniary difference between tangible costs and intangible benefits, revision is desirable. Absence of mathematical precision is not crucial; the analysis merely emphasizes that considerations beyond the cost of revision should be considered in determining the project's feasibility.

V. CONCLUSION

Small reforms, it has been remarked, are the enemy of great reforms. Piecemeal amendment of Indiana's penal code is the enemy which complete reform must face. Apathy toward the criminal law, alleged lack of adequate time and money, and occasional reform of a particularly unjust law to meet an immediate crisis, are formidable obstacles in the path of complete reform. Fortunately, the task is not impossible, for since 1942 when Louisiana made the first major revision of penal law in this century, Minnesota, New Mexico, Pennsylvania, New York, Illinois and Wisconsin have in varying degrees accomplished major reform, along with states like California, Michigan and Texas whose efforts should add them to that list in the near future. Rising cost of crime and subsequent costs in dealing with criminals, increased pressure by the United States Supreme Court in protection of constitutionally protected rights, and the increasing dissatisfaction with the obsolete code now in existence, are

placing burdens and pressures on our enforcement personnel and legislatures which cannot continue unnoticed and uncorrected.

Increasingly widespread use of modern technology in the legal system must be included in an overall consideration of reform. Presently, complete text of the entire statutory laws of nine states, the United States Code, the Internal Revenue Code and Regulations, all Pennsylvania Supreme and Superior Court cases since 1960, all Third Circuit, Second Circuit and United States Supreme Court cases since 1950, and decisions of the Equal Employment Opportunity Commission, are on computer tape.¹⁶⁷ Due to the innovation of full text indexing,¹⁶⁸ a computer, given a properly phrased question, can search the code and print out relevant statutes on the problem involved with speed and accuracy impossible under the traditional manual approach. The accuracy of a search by such modern techniques depends to a great extent on the clarity, and absence of overlap and ambiguity in the statutes used. The overwhelming presence of these undesirable characteristics in the existing penal code makes contemplation of use of these modern time saving devices in Indiana highly unrealistic. The impending advent of computers in the legal system increases the need for eliminating the so-called diseases of language from the statutes and codes so that the most effective use can be made of these devices. These considerations become even more important in terms of formulating a completely revised code.

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167. See Comment, *Computer Retrieval of the Law: A Challenge to the Concept of Unauthorized Practice?*, 116 U. PA. L. REV. 1261, 1265 (1968) for a more detailed description of the use and advantages provided by such a computer system.

168. See *id.*, at 1265-69 for an explanation of full text indexing, and various modifications of that system.