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B. J. George Jr.
Practising Law Institute

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A COMPARATIVE ANALYSIS OF THE NEW PENAL LAWS OF NEW YORK AND MICHIGAN

B. J. GEORGE, JR.*

If imitation is the sincerest form of flattery, then the drafters of the New York Penal Law should feel flattered, at least by those responsible for preparing the proposed Michigan Criminal Code. A comparison of the New York statute with the Michigan draft shows substantial similarities in approach, organization and technical terminology, a fact regularly acknowledged in the commentaries to the Michigan provisions.

There is in fact historical precedent for this. Much early Michigan legislation in the 1840's and 1850's was adapted from the then-new New York codes, and New York decisions were relied on in interpreting the new legislation. But the principal reasons for relying on the New York revision were first, that it is the most sophisticated legislation yet achieved in the evolution of a twentieth century criminal code, and second, the aims and goals it embodied were appealing to the Michigan revisers. Both points deserve some amplification.

I. THE NEW YORK PENAL LAW AS A MODEL

The present decade is seeing a wave of criminal law reform; Professor Israel calls this "clearly 'the' law reform movement of the sixties." Thirty or more states have either completed and enacted new substantive criminal codes or are at some stage of the revision process. Some of the earlier efforts, like those in Louisiana and Wisconsin, proceeded principally without outside illustration or example. From the early 1950's through 1962, however, the work of the American Law Institute in drafting the Model Penal Code offered both a spur to action and a source of ideas. As the work of the Institute progressed, the measure of its influence increased accordingly. The drafters of the Wisconsin code noted the Institute's program, the Minnesota revisers acknowledged their indebtedness to the early phases of the Institute's efforts, and the Illinois committee quoted extensively from the Institute's tentative drafts in the commen-

* A.B., J.D., University of Michigan. Associate Director, Practising Law Institute; Adjunct Professor of Law, New York University.
4. Louisiana State Law Institute, Projé (1942).
tary to its proposed revision. It is, however, the New York revision that serves both as an endorsement of and a critical reaction to the Model Penal Code.

This use of the Code is of course what the Institute contemplated, as the usage of "model code" rather than "uniform code" clearly indicates. But this "model" function has its limitations. For one thing, the composition of the Institute, representing as it does lawyers, judges and teachers from every jurisdiction, precludes close attention to the details of criminal law administration in a particular jurisdiction. Therefore, the practical suitability of each provision to a particular state's legal system is not something that can adequately be dealt with at Institute meetings, for reasons of time if no other. Additionally, the generalist orientation of the Institute membership makes it a matter of chance only that questions reflecting current practice and enforcement needs are put to the reporters. While preliminary colloquia offer some opportunity for criticism, they do not necessarily affect the text finally submitted to and adopted by the Institute itself. Whatever the reasons, there is considerable justification for some of the practice-oriented criticisms levied against the Model Penal Code.

The New York revision effort, therefore, constitutes the first deliberate, well-funded and amply staffed evaluation of the Model Penal Code. The degree of its actual influence is discussed later in this symposium by those responsible for the New York revision; they have acknowledged elsewhere that the Code "has been an invaluable source of stimulation and guidance throughout the course of the Commission's work." A carefully drawn statute like the New York Penal Law, written in a state with a long history of continuous law revision, could not under any circumstances be ignored by a legislative draftsman in another state who wished to perform his task conscientiously.

Something more, however, was necessary if a Michigan adaptation of the New York re-evaluation of the Model Penal Code was to begin. It was necessary that there be factors of similarity of environment and consonance of goals. The environmental factor is either there or not there. A code suitable for New York, with its great concentrations of population in cities and thickly settled rural areas contains many provisions totally beyond the experience and needs of a sparsely-populated state, the economy of which rests largely on farming, ranching or extractive industries. Michigan, however, though smaller in total population, offers a mix of urban and rural dwellers, manufacturing and farm industries, not too dissimilar to New York. Therefore, most of the problems

the New York legislature had to deal with in a modern penal code confronted Michigan legislators as well.

Most of the consonance, however, stemmed from the shared objectives of the revision efforts in the two states, what one might call agreement in drafting objectives. The chief objectives in both jurisdictions were modernization of code coverage, improvement in code organization, simplification of statutory language, and completion of statutory coverage in both general conceptual provisions and specific definitions of crime. Though other objectives also could be achieved in Michigan that had already been substantially achieved in New York, like abolition of common-law crimes\(^\text{13}\) and the removal of essentially regulatory statutes from the criminal code\(^\text{14}\) it was the more fundamental shared goals that made the New York revision so attractive to the Michigan revisers.

**Modernization of code coverage.** The New York revisers faced a statute that had not been substantially reworked for eighty years.\(^\text{15}\) The Michigan committee confronted a similarly outmoded statute. Though in form a new code had been enacted in 1931, it constituted little more than a rearrangement of the then-existing statutes, many of them going back to the original Michigan Penal Code of 1846. The original code had been almost buried in the legislative accretions that enfolded it, and the chronic failure to evaluate new legislative proposals in light of existing statutes meant that a great many outmoded statutes, governing things like inciting Indians to break treaties with the United States,\(^\text{16}\) dueling\(^\text{17}\) or using the name of a former president to promote liquor sales,\(^\text{18}\) lingered on far beyond their time, while cumulative sections dealt with essentially the same undesirable conduct. As illustrations of the latter, over seventy different sections cover destruction of or injury to property,\(^\text{19}\) sixteen govern larceny\(^\text{20}\) and thirteen deal with embezzlement.\(^\text{21}\) A painstaking survey of all the compiled laws showed over 3500 sections either defining crimes or specifying criminal penalties. Though not all of these could be replaced by or incorporated in revised criminal code provisions without inconvenience or impairment of effective enforcement,\(^\text{22}\) nearly 2,000 of them could be replaced by the approximately 350 sections of a revision without any diminution in effective coverage. The history of New York law revision showed that this goal could

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15. Prop. Pen. Law, Comm'n foreword at V.
17. *Id.*, §§ 750.171-750.173.
18. *Id.*, § 750.42.
19. *Id.*, commentary to § 2707.
20. *Id.*, commentary to § 3208 at 226-27.
21. *Id.* at 228-29.
22. For example, the motor vehicle code, election law, liquor law and tax statutes were left untouched except to recommend substitution of penalty categories for existing punishments.
be effectively realized. At the same time, the welter of legislation left some modern problems either without coverage or with ineffective controls. This, however, constituted a goal in itself, to be discussed below.23

Improvement in code organization. The original Michigan Penal Code was topically arranged, though only basic in coverage. Degrees of crime were not utilized except for murder. Probably because of the large number of individual sections enacted over the decades that did not fit easily within the original scheme, and because the goal of the legislature in 1931 was compilation and not codification, a changeover was made to an alphabetical arrangement of crimes by title. If this was designed to promote ease of access, then the rearrangement accomplished no more than a good index might have. No classifier ever escapes the need for a miscellaneous category,24 but an alphabetical arrangement very quickly creates problems in assigning highly specific provisions. A good indexer lists all the variations in subject and title he can think of in an effort to out-guess all the future users of his index. But assignment of a statutory section to a category can be made only once. Therefore, the result is an often frustrating search for an applicable provision, and in some instances a failure to discover a section relevant to the particular case; this phenomenon seems an inevitable result of an alphabetical classification system.25

Therefore, the Michigan revisers quickly resolved to follow the New York drafters in returning to a topical arrangement, in which the specific definitions of crime fall into the nine major categories of offenses involving danger to the person, offenses involving damage to or intrusion upon property, offenses involving theft and related activity, forgery and fraudulent practices, offenses against public administration, offenses against public order, offenses against public health and morals, offenses against the family and miscellaneous offenses. This does not mean that problems of allocation do not exist. Robbery of course involves danger to the person, and it might be lodged in that category rather than that of offenses related to theft. The close relationship it bears to theft, however, coupled with the cross-use of definitions from the theft chapter, caused the Michigan drafters, like their New York predecessors, to place robbery after theft (larceny). Abortion can be classified as a homicide-related offense or as conduct essentially affecting the family, depending on which aspect of the problem one prefers to emphasize. The New York drafters chose the homicide context; the Michigan drafters followed the Model Penal Code26 by placing abortion with family-related crimes. On the whole, however, a topical arrange-

23. See infra notes 35-38 and accompanying text.
24. Not even the Michigan Draft lacks such a category. Ch. 75 covers miscellaneous offenses.
25. See Israel, supra note 2 at 785-86; Kuh, supra note 11 at 608-09. An unparalleled achievement is Mich. Comp. L. Ann. § 750.110b (1968) (dumping garbage, etc. from boats), which was classified with breaking and entering (ch. XVI); a clerk's careless finger probably prevented it from being where it belongs, in ch. XV on boats and navigation.
26. MPC § 230.3.
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ment coupled with a good index promotes efficient use of the code, so that the use of that format early prevailed in the Michigan committee.

The Michigan committee also borrowed another aspect of New York legislative practice that had required no reconsideration by the New York drafters, i.e., the division of crimes into degrees. Though on the basis of intrinsic definition or judicial fiat some offenses came to be viewed as lesser included offenses in relation to more serious crimes, there has been no easy way by which this interrelationship can be ascertained. The Michigan committee thought it saw in the New York tradition and in the history of the Michigan first- and second-degree murder statutes several advantages in a degree format. The comparative gravity of criminal conduct, at least in the eyes of the legislature, is clearly indicated through a degree format. In contrast with a "simple—aggravated" dichotomy, a greater degree of refinement in functional distinctions can be achieved through multiple degrees. Many pleading problems are removed, particularly in connection with joinder of alternative counts. The possibility of a variance between pleading and proof is reduced if not eliminated; the plea-bargaining process is also enhanced. Although the Michigan draft does not always divide into degrees when the New York statute does, on the whole there is a great similarity that is not accidental.

Simplification of statutory language. Much inherited statutory language is totally unacceptable as a guide to conduct. Its repetitiveness and verbosity are explainable for several reasons. One is the attitude of lawyer and lay legislators alike that a statute is not really a statute unless it is filled with "suches," "aforesaids" and "whereases," a phenomenon that also appears in deed and contract drafting. Another is the counterpart to the "survival of the marginal pleading," in which the atrocious is recognized as valid without attack, and only borderline language subjected to protracted litigation. If a complicated or convoluted pleading is reluctantly sustained as operative, it is then copied because it is the only one that has received the judicial imprimatur, no matter how gingerly given. The same thing can be true of a statute. The most obvious instance of this is the Michigan verbatim enactment of the Roth test, even though later explanations by the Supreme Court probably render this language out of date. A third is a specific legislative reaction to a prior judicial decision, in which the statutory language is aimed at one narrow point but no other. To make its purpose clear, the legislature uses elaborate language that makes the legislation very narrow in coverage. Much of the proliferation of larceny and embezzlement legislation mentioned earlier has this as its underlying cause. A fourth

is a misplaced sense of legislative delicacy, typified by the "definition" of sodomy as "the abominable and detestable crime against nature" that smacks even more of vagueness than the vagrancy statutes struck down in recent years. Whatever the reasons, inherited statutory language is usually difficult for a lawyer and impossible for an average layman to understand.

The physical organization of individual sections also hinders comprehension, in that complicated definitions, often including definitions of definitions, are woven into a single sentence or paragraph, to the point that only the most skilled sentence diagramer might be able to dissect the verbiage and glean its meaning.

There is also usually no consistency in term usage, particularly with regard to those terms that define mental condition for criminality. "Wilful," "wanton," "malice," "purpose" and "intent" are used indiscriminately without definition and without pattern, with the result that judicial construction of the intent element of crime is often as hopelessly confused as the legislative usage.

The Michigan draft follows the lead of the New York revision, and in some instances carries it further by simplifying the code language in three ways. First, it looks for terms in ordinary usage to replace traditional circumlocutions. For example, sexual intercourse is called exactly that, and deviate sexual intercourse is defined as an act of sexual gratification involving the sex organs of one person and the mouth or anus of another. Some segments of the community may prefer not to talk about the subject at all or use euphemisms, but the statutory meaning and usage should be clear. Second, it places all definitions either in a special definitional section at the beginning of a chapter, if the terms defined appear in several sections, or as a subsection if the term is not used outside the particular section. Though each word in a fairly simple definition of a crime may be further defined elsewhere, and even though a word in one definition may be elaborated on in yet another provision, there is an easy transition from the simple to the complex that should promote understanding of the legislative purpose and standardization of jury instructions. Third, the provisions on culpability, or mental state, comprehend only four terms, "intentionally," "knowingly," "recklessly" and "with criminal negligence," each of which is defined. In each substantive section the choice of culpability element is deliberate, and usage remains constant throughout the code. The

34. Compare Michigan Draft § 305 with N.Y. Pen. Law § 15.05.
end product is a statute much easier to understand and administer than present law.

Completion of statutory coverage. Despite the welter of statute law in Michigan, there are serious omissions in coverage the draft code is designed to remedy. One of the principal defects in the present Michigan compilation is its failure to set out what continental European codes call the "general part," which normally includes the exposition of territorial and temporal applicability, as well as the requirements of criminality, culpability, justification and the defenses which modify the individual definitions of crime in the "special part." Michigan case law on important matters like causation and mistake is fragmentary or lacking, yet judges still must instruct juries on these points. Though New York has long covered some of these problems in its Penal Law, the new Penal Law and the Model Penal Code together provide an augmentation of the sketchy provisions of an earlier era, and serve as the pattern on which the Michigan revision was based.

A second problem of coverage lay in the failure of all the statutes together to touch on problems that trouble a modern urban community. As examples, the Michigan false pretenses statute does not include "promissory fraud," even though that is a common means of committing fraud. A number of persons might be defrauded of small amounts cumulating to a considerable sum, but the maximum penalty the criminals face under the present statutes is concurrent jail terms or fines on misdemeanor counts. Even an offense as obvious as riot has not until late 1962 been specifically covered by a substantive statute. Nor does Michigan have a true extortion statute. A careful study of the present law shows a number of serious omissions in coverage that leave citizens without the protection they deserve. Therefore, with the New York revision as a starting point, these and other problems were covered by the proposed Code.

In summary, in terms of maturation of drafting process, congruence of environment and shared objectives, the New York revision offered to the Michigan drafters an excellent model that in a majority of instances became the adopted pattern. There were, however, several points on which there is major divergence between the two revisions. On occasion this was because of a need for legislation felt in one state but not in the other. Part of the explanation,

38. E.g., Michigan Draft §§ 3201 (1) (definition of "threat"); 3201 (m) (definition of "value" permitting cumulation); 3245-3247 (extortion). See also Israel note 2, supra at 805-13.
however, lies in the difference in the drafting process itself, a matter to which we turn briefly.

II. A Comparison of the Drafting Structure

Code revisions may be undertaken at the instance of the legislature itself, or as a project by a bar association, particularly in a state having an integrated bar. More often than not, the legislature itself has been the initiating agency, in form at least, and has resolved that either a special joint committee, a special commission or a permanent law revision commission is to prepare a bill for later legislative consideration. New York fits the majority pattern, and was able to assign the task of drafting a revised penal law to a comparatively well-funded commission able to make long-term personnel appointments. Under this drafting structure, the primary scrutiny of proposals came from within the commission and the legislature itself; other organizations expressed themselves through hearings and communications to the commission.

The Michigan procedure, like that of Texas, has been entirely different. The Michigan Supreme Court indicated to the commissioners of the integrated State Bar of Michigan the desirability of a revision of the criminal law, criminal procedure, and statutes affecting mentally-ill offenders; the commissioners thereupon approved the creation of a special Committee to Revise the Criminal Code, the members of which were drawn from both state bar rolls and non-legal specialties like law enforcement, correctional administration and the clergy. Shortly after the committee was formed, members of the regular committee on criminal jurisprudence of the State Bar asked to join in the work of revision, so that mailings of drafts were made to about 150 lawyers and non-lawyers. Funds provided by the State Bar itself went little beyond providing meeting rooms and printing costs, and the non-involvement at that time of the legislature meant that no funds were (or have been) appropriated to support the drafting process. Therefore, the commissioners had to turn to the law schools of the state, particularly the University of Michigan Law School, for the necessary subsidy. This subsidy was achieved first by designating two criminal law specialists as reporters, and then by providing them with released time and research assistance from funds available to them as faculty members. Assistance of this sort is not unusual, and is probably indispensable if no

40. The author served as reporter on Chapters 1, 3, 6, 7, 12-15, 20-23, 26-28, 32-33, 40-42, 55-57, 60-62, 70, 75 and 99 of the Michigan Draft. Professor Jerold H. Israel was reporter on Chapters 4, 10, 45-50 and 63. For the criminal procedure draft under preparation, Professor Edward M. Wise of Wayne State University Law School has also been designated a reporter.
41. Cf. California Joint Legislative Committee for the Revision of the Penal Code, Penal Code Revision Project Report 7-11 (1967); Pirsig, supra note 8; Bill No. 100, A., Introduction ii.
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legislative support is forthcoming, since few state bar budgets are ample enough to underwrite two or three years salary for a high-priced specialist.

However, a code prepared exclusively by law teachers is likely to be of limited practical utility even if it is reasonably literate and conceptually complete. Therefore, the reporters submitted preliminary drafts to the large committee, and on occasion to a smaller, so-called "drafting committee" for their criticism and suggestions. Both were abundantly given, and the reporters submitted from three to seven drafts of each chapter before final committee approval was given. The fate of a number of tentative draft provisions drawn directly from the Proposed New York Penal Law, or at later stages from the new Penal Law itself, suggests that terms and coverage which the New York Revision Commission and legislature found acceptable or desirable were rejected somewhat summarily by a cross-section of Michigan professionals. Moreover, in many instances the rejection or alteration was not the product of different needs or historical background, but of the differences between the drafting mechanisms themselves. In any event, an appraisal of compared code provisions alone, without some consideration of drafting procedures, may well lead to distorted conclusions.

Whatever the reason, the Michigan draft duplicates the New York Penal Law in many respects. Within the scope of this article, however, a consideration of the differences is perhaps more productive than a listing of similarities.

III. THE MAJOR DIFFERENCES

An idea of the extent of the similarity between the two codes can best be gained by a close examination of sections side by side. I prefer, however, to illustrate differences in terms of the reasons for their existence, and not their substantive content.

"Try-again" provisions. There is fairly general agreement among specialists that some traditional crimes, particularly those relating to sexual conduct and preservation of the traditional family structure, are either ineffective or productive of incidental effects like blackmail or forced divorce, marriage or separation, and are, if anything, worse than the traditional evil aimed at. Therefore, most modern drafts at some stage of their generation have tried to exempt from coverage adultery, seduction, private gambling and consensual adult homosexuality, and to reduce the scope of incest to siblings, ascendants and descendants, and of abortion to non-therapeutic abortion. Since, however, legislators are notoriously more conservative about or fearful of these topics than many lawyers and judges who see the effect of the older provisions, the fate of these innovations has been unfortunate. In New York, the provision on abortion was conservative to begin with, and the legislature required the addition of provisions on consensual sodomy and adultery to the final version. Only in

42. Id.
43. N.Y. Pen. Law § 130.38.
44. Id., § 255.17.
Illinois was there any breakthrough; a comparison of the proposal with the final Illinois statute suggests that relaxed homosexuality provisions were the bargain for a continued tight abortion law.\textsuperscript{45} 

Despite this, the Michigan committee, though not without dissent, decided to place before the Michigan legislature and citizens a code similar to the ones rejected in other states, by eliminating criminality for adultery, seduction and adult consensual homosexuality,\textsuperscript{46} and by urging a fairly broad exception in favor of therapeutic and eugenic abortion. When the draft was released, the news media of course seized on this as a topic of discussion, practically to the exclusion of what are far more significant provisions, functionally speaking, in other segments of the code. They continue to be major foci of criticism.\textsuperscript{47} The fact that six states\textsuperscript{48} have since enacted therapeutic abortion statutes and that a bill for that purpose was pending in the 1968 and 1969 legislative sessions has brought some muting of the attack on the abortion provisions, but there is no guarantee that Michigan will join the minority group with therapeutic abortion laws. The fate of the other efforts to bring professed mores into line with those practiced is in the balance; meanwhile, the Michigan draft stands as still another challenge to inherited verbal traditions of morality.

\textit{Abolition of death penalty.} Much of the emotionalism affecting substantive criminal law focuses on administration of the death penalty, if it has not been abolished. Michigan for over a century has not provided for the death penalty except in cases of treason, and in 1963 prohibited that penalty by constitution.\textsuperscript{49} Perhaps as a result, the disputes in the Michigan committee over homicide coverage revolved principally about whether the equivalent to voluntary manslaughter at common law should be retained, if so whether it should constitute second-degree murder or manslaughter, and whether there should be two degrees of manslaughter. Though committee members felt strongly about these issues, the reasons were a fondness for traditional common-law terminology and a distrust of too wide a choice of alternatives in jury deliberations, and not the stated or unstated belief that the death penalty should be encouraged or discouraged. The want of this highly-charged issue also meant that fairly severe limitations on the felony-murder doctrine were accepted without demur.

Absence of the death penalty also materially affected the Michigan approach to mental disease or defect. The issue of mental condition relieving the actor of criminal responsibility is most likely to arise in prosecutions for crimes


\textsuperscript{46} See Michigan Draft, commentary to §§ 2305, 7010.

\textsuperscript{47} \textit{E.g.}, Comment, 14 Wayne L. Rev. 934 (1968).


\textsuperscript{49} Mich. Const., art. 4, § 46 (1963).
of violence, and is almost a certainty in murder prosecutions if the death penalty may be invoked. As a result, in a capital penalty state, debates about the insanity defense very often cloak a dispute over whether or not evidence of mental condition should be available if the result is jury refusal to authorize punishment of death. Whatever the explanation, the New York provision\(^{50}\) is hardly a radical extension of the insanity defense.

In a state like Michigan, however, the determination of criminal guilt or of mental condition excluding responsibility is important only in selecting a place of confinement, since convicts are dealt with by the Department of Corrections, while persons adjudicated to be "criminally insane" are the province of the Department of Mental Health. As a result, relatively little committee attention was focused on the definition of mental condition as such; the existence in early Michigan cases\(^{51}\) of fairly broad definitions of mental illness excusing responsibility certainly made the very broad draft code definition\(^{52}\) far more acceptable than it might have been in a state firmly committed to the M'Naghten Rule. Instead, the concern was over early or unsupervised release of those acquitted of crime and committed to mental health facilities. This concern, however, cuts two ways, because due process shortcomings of the civil commitment and release procedures\(^{53}\) suggest that as many inmates may be held too long as are released prematurely. In any event, a consideration of the mental health problem within a procedural framework is preferable to a debate about the insanity defense with the death penalty as the backdrop.

**Differing local policies.** Michigan and New York each have their own problems, their own local needs and attitudes that must be taken account of in examining differences between the two revisions.

Perhaps the most noticeable difference in treatment is in the theft (larceny) area. Experience under the existing Michigan law has shown that the traditional three-way distinction between larceny, embezzlement and false pretenses, an historically explainable division, creates many problems of pleading and proof; in a reaction to many abortive prosecutions terminating in a finding that what was charged as larceny was actually embezzlement, or some other combination of the possibilities, Michigan law in effect makes an allegation of one of them an allegation of the other two as well.\(^{54}\) The Michigan statute thus attempts a procedural solution of what intrinsically is a problem of substantive law drafting.

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50. N.Y. Pen. Law § 30.05.
52. Michigan Draft § 705 provides:
   A person is not criminally responsible for his conduct if at the time he acts, as a result of mental disease or defect, he lacks capacity to conform his conduct to the requirements of law.
A comparison of the New York larceny section\textsuperscript{55} with the Illinois\textsuperscript{56} and Indiana\textsuperscript{57} provisions led the Michigan committee to believe that the New York approach was less well suited to a reform of Michigan law than the Illinois and Indiana examples. In particular, the New York provision lumps together an expanded definition of larceny that comprehends common-law larceny, embezzlement and obtaining by false pretenses, with larceny based on acquisition of lost property, false promises not within the concept of false pretenses, and extortion. The sorting-out of the specific concepts is managed principally in the degree sections.\textsuperscript{58} In rejecting this approach, the Michigan draft makes use of a much broader list of definitions in the first section of the chapter,\textsuperscript{59} a definition of theft relatively short in compass,\textsuperscript{60} three degrees of theft incorporating most of the basic New York structure,\textsuperscript{61} completely separate extortion sections,\textsuperscript{62} and specialized statutes on problems like appropriation of lost property,\textsuperscript{63} theft of services,\textsuperscript{64} and failure to make proper disposition of funds received or held.\textsuperscript{65} The net coverage of the two codes may not differ substantially, but the fundamental approach to drafting is different.

There were instances in which the Michigan committee thought the New York revision failed to take into account practical problems of administration. For example, the New York first-degree robbery section\textsuperscript{66} aggravates the penalty if the defendant is armed with a deadly weapon. The experience of Michigan law enforcement officers, however, is that it is very often difficult to prove that the actor was in fact in possession of a deadly weapon as defined\textsuperscript{67} unless he actually used it or was immediately apprehended with the weapon in his possession. The present Michigan legislation punishes the use of anything appearing to be a deadly weapon as heavily as if it were a weapon.\textsuperscript{68} This, however, is too sweeping, and in effect encourages the actor to be armed because he is under no threat of greater punishment if he is in fact armed rather than armed in appearance only. The Michigan choice, therefore, was to change what might be called the strict liability features of the present Michigan statute into a prima facie evidence provision based on appearances,\textsuperscript{69} thus reaching what is hopefully a more satisfactory solution to the law enforcement problem than the New York provision achieved. A difference in enforcement policy also under-

\begin{itemize}
\item \textsuperscript{55} N.Y. Pen. Law § 155.05.
\item \textsuperscript{56} Ill. Ann. Stat. ch. 38, art. 16 (Smith-Hurd 1964).
\item \textsuperscript{57} Ind. Ann. Stat. § 10-3030 (Burns 1964).
\item \textsuperscript{58} N.Y. Pen. Law §§ 155.25-155.40.
\item \textsuperscript{59} Michigan Draft § 3201.
\item \textsuperscript{60} Id. § 3205.
\item \textsuperscript{61} Id. §§ 3206-3208.
\item \textsuperscript{62} Id. §§ 3245-3247.
\item \textsuperscript{63} Id. § 3215.
\item \textsuperscript{64} Id. § 3220.
\item \textsuperscript{65} Id. § 3225.
\item \textsuperscript{66} N.Y. Pen. Law § 160.15.
\item \textsuperscript{67} Id. § 10.00(12).
\item \textsuperscript{68} Mich. Comp. L. Ann. § 750.529 (1968).
\item \textsuperscript{69} Michigan Draft § 3305(2).
\end{itemize}
lies the Michigan rejection of claim of right as a defense to robbery, a position apparently rejected in the New York statute.

Sometimes procedural traditions account for differences in drafting technique. Under the New York statute, affirmative defenses are used which the defendant must establish by a preponderance. In Michigan, however, the profession traditionally abhors the idea of an affirmative defense, and the case law in general requires the prosecution to disprove matters like self-defense. While in one instance of a completely new justification or excuse in the code, the committee accepted an affirmative defense in the technical sense, in general it refused to change the Michigan tradition. On the other hand, however, many definitions designed to limit an otherwise too broad definition of criminality would be generally unenforceable if the prosecution had to disprove the existence of the exceptions as a part of its case in chief. Therefore, the committee devised the concept of "burden of injecting the issue," which requires the defendant to "offer some competent evidence relating to all matters subject to the burden," but which then requires the state to disprove the existence of those matters beyond a reasonable doubt.

Occasionally the Michigan committee felt the New York draft failed to touch on a matter deserving coverage. A prime example is the want of a definition of causation. Though the case law on the question is not abundant, the cases that have arisen have produced such divergent results that some definitive statement ought to be made; in addition, juries often must be instructed about causation. Therefore, the Michigan draft followed the example of the Model Penal Code by including a causation provision. The committee also thought there was merit in restating legislatively the New York case law permitting the cumulation of small amounts taken pursuant to a scheme to enhance penalties. The New York revisers may have intended to change this law; the Michigan committee thought the idea had merit as a means of protecting neighborhoods against petty consumer fraud schemes, so that it should be specifically incorporated.

Some of the discrepancies turn on the characterization of a problem as substantive or procedural. Michigan has taken the position, shared with other

70. Id. § 3310.
72. The term is defined in N.Y. Pen. Law § 25.00(2).
73. See, e.g., People v. Stallworth, 364 Mich. 528, 111 N.W.2d 742 (1961); People v. Robinson, 228 Mich. 64, 199 N.W. 622 (1924).
75. The concept is defined in Michigan Draft § 135(n). Examples are §§ 645 (burden of injecting issues of justification), 720 (burden of injecting issues of culpability), 1010(2) (renunciation of criminal purpose in criminal solicitation), 2005(2) (homicide under extreme mental or emotional disturbance), 2330 (mistake as to consent in sexual offense), 3240(1) (claim of right in theft), 7015(3) (therapeutic abortion).
76. M.P.C. § 2.03.
77. Michigan Draft § 320.
78. People v. Cox, 286 N.Y. 137, 36 N.E.2d 84 (1941).
79. Michigan Draft § 3201(m).
domestic and foreign codes, that matters of jurisdiction (territorial applicability of the substantive penal law) and venue (choice of forum) should be dealt with in the substantive code, that the statute of limitations is more a matter of substance than procedure, and that an expanded statutory form of double jeopardy should be set out. The New York revisers took a more restricted view of the scope of a penal law, but have since proposed coverage of these matters in a revised criminal procedure law.

It is in the area of sentencing, however, that the most obvious differences in policy appear. This deserves independent examination.

IV. A COMPARISON OF SENTENCING STRUCTURES

In many respects the Michigan draft adopts the same sentencing system as the New York revision. There are, however, a number of important differences that make the Michigan proposal perhaps more progressive or modern than New York's. Whether the Michigan legislature will be as liberal-minded as the Michigan drafters remains to be seen. At any rate, some comparison of the sentencing structures is in order.

First, the Michigan draft accepts the basic judgment of the New York revisers and Model Penal Code that there should be classes of felonies and misdemeanors uniform throughout the code and assigned rationally to each offense. However, it embodies fewer felony categories and somewhat lower penalties than the New York statute. Michigan has three felony categories in comparison with New York's five, and four sub-felony categories in comparison with New York's three. This tends to shift the classification scheme somewhat downward on the scale. Furthermore, Michigan sets its maxima somewhat lower than New York, and provides a life imprisonment possibility only for first-degree murder.

82. Michigan Draft §§ 140, 145.
83. Id. § 130.
84. Id. §§ 151-154.
86. Michigan Draft § 1201(1).
87. N.Y. Pen. Law § 55.05(1).
88. Michigan Draft § 1201(2), (3).
89. N.Y. Pen. Law § 55.05(2).
90. The maxima under Michigan Draft §1401 and N.Y. Pen. Law § 70.00 are:

<table>
<thead>
<tr>
<th>Class</th>
<th>Michigan</th>
<th>New York</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>20 years</td>
<td>life imprisonment</td>
</tr>
<tr>
<td>B</td>
<td>10 years</td>
<td>25 years</td>
</tr>
<tr>
<td>C</td>
<td>5 years</td>
<td>15 years</td>
</tr>
<tr>
<td>D</td>
<td>—</td>
<td>7 years</td>
</tr>
<tr>
<td>E</td>
<td>—</td>
<td>4 years</td>
</tr>
</tbody>
</table>
91. Michigan Draft § 2005(5), authorizing a term of from 10 years to life. The ten-
A COMPARATIVE ANALYSIS

The Michigan and New York revisions also differ materially on minimum sentences. New York permits the court to fix a minimum sentence if it does not exceed a third of the maximum. The present Michigan statute permits the judge to set a minimum as high as he wishes; release earlier than that time is possible only if the judge approves a request by parole authorities to that effect. Data available to the Michigan committee suggested that some judges set high minima which they thereafter refuse to modify, and that this has been productive of uncurable disparity. The committee, therefore, took the position that except in the case of first-degree murder there should be no minimum sentences, and that commitment should be to the Department of Corrections for up to the statutory maximum. To guarantee somewhat against arbitrary parole procedures that could prove as productive of disparity as arbitrary sentencing practices, the committee provided minimum due process through a set of required parole procedures. Michigan thus moved toward the California concept of sentence and release, and away from the New York system.

Third, the Michigan code contains no recidivist statutes like those in present Michigan law and the New York revision. The explanation in part is one of usage. The change some years ago from a mandatory to a discretionary repeated offender law caused the Michigan statute to fall practically into disuse. Very few commitments as habitual offenders have been ordered in the past decade, and the parole board has tended to release habitual offender prisoners on exactly the same basis as other prisoners not so committed. In only a handful of cases did the judicial specification of an augmented term enable the Department of Corrections to retain in custody a person whom they viewed to be clearly dangerous. The recommendations of the committee's corrections experts were that the recidivism statutes be repealed, and that clear provision be made for the post-imprisonment civil commitment of convicted felons who on the basis of mental condition and institutional record were highly dangerous. The draft code would accomplish the first; other legislation facilitates the second. In a similar vein, the almost completely unused "sexually delinquent person" statute decreeing indeterminate incarceration up to life for certain sexual of-

92. N.Y. Pen. Laws 70.00(3).
95. Michigan Draft § 1401(3).
96. Id. § 1410. The section in fact restates present parole practice developed administratively by the Department of Corrections.
98. N.Y. Pen. Law § 70.10.
99. See Michigan Draft, commentary to § 1401 at p. 131.
fenses would be abolished; the recent repeal of the Michigan criminal sexual psychopath law suggests that the Michigan legislature will not find this proposal unacceptable.

Fourth, the Michigan proposal makes extensive use of a diagnostic commitment to the Department of Corrections, the Department of Mental Health, or both serially, in order to promote an intelligent choice between conditional release and imprisonment, the only choice open to the sentencing judge under the draft. This rests on favorable experience under the counterpart federal statutes, an analogous procedure if competence to stand trial is at issue, and the availability of Department of Corrections facilities for diagnosis; it goes further than the New York procedural proposals.

Fifth, the Michigan draft encourages a transition from criminal proceedings to civil commitment proceedings if a diagnostic commitment reveals a mental condition warranting non-penal custody. The committee rejected an earlier companion provision calling for dismissal of the prosecution under those circumstances, but this option is in fact available to any judge who might invoke the section. This formal approval of a procedural retracking does not seem to appear in any other new code.

Sixth, the Michigan draft embodies a National Council on Crime and Delinquency model statute authorizing any person sentenced to probation or conditional or unconditional discharge to request annulment of his conviction if he behaves himself for a specific period of time. The statute expands upon as well as restates a Michigan statute extending this possibility to convicted minors. This, too, seems to go beyond most state statutes, including New York's.

Seventh, the Michigan committee found the Model Penal Code approach to fines and costs more congenial than New York's. Therefore, it requires the sentencing judge not only to determine that the defendant has gained money or property through his crime, but that he is able to pay the fine without

101. Mich. Comp. L. Ann. § 750.10(a) (1968) defines the concept, and § 767.61(a) covers the required pleading. The specific authorization is found in the punishment provisions of specific crimes, e.g., §§ 750.520 (carnal knowledge), 750.338 (gross indecency between males), 750.338b (gross indecency between females), 750.338b (gross indecency between male and female).
102. See Michigan Draft, commentary to § 1405.
103. Mich. Publ. Acts 143 (1968); the statute adds § 330.35(b) to govern the parole or release of those already committed under the statute, which was Mich. Comp. L. Ann. §§ 780.501-780.509 (1968).
104. Michigan Draft § 1220.
110. Found in Michigan Draft §§ 1315-1335; the New York counterpart provisions are N.Y. Pen. Law §§ 65.00-65.20.
112. Michigan Draft § 1501(2), corresponding to N.Y. Pen. Law § 80.00.
impairing reparation to the victim of his act or otherwise suffering an unfair burden.\textsuperscript{113} A similar limitation applies to costs,\textsuperscript{114} a matter apparently left untouched by either of the New York statutes. Moreover, nonpayment of fine or costs is not to work what is in effect an extension of the prison term that the legislature thought should be the maximum for the particular offense, the general practice under existing laws.\textsuperscript{115} If a defendant proves unable to pay, the amount should be reduced or remitted,\textsuperscript{116} but even a contumacious defendant is not to have his prison term as such extended. Instead, enforcement is in the nature of a civil contempt of a judicial order, with a time limitation placed on the maximum period of civil commitment.\textsuperscript{117}

A comparison of the two statutes, therefore, shows that in many respects the Michigan drafters have tried to experiment with dispositional alternatives far more than the New York revisers. Whether their experimentation is feasible turns on the legislative treatment of the Michigan code.

V. CONCLUSION

Whatever the differences between the New York revision and the Michigan draft, the New York statute very greatly influenced the text of the Michigan proposal. The fact that so many policies and so much statutory language survived the critical scrutiny of experts in another state attests in a significant way the wisdom of the New York revision commission and of the legislature that accepted its work.

The fate of the Michigan revision is uncertain at this writing. Because of the long calendar of bills in the 1968 legislative session, it was not possible to print the Michigan revision in time to meet the deadlines for bill submission set by the two houses of the legislature. As it turned out, this may have been fortunate, for in the aftermath to the Detroit riots of July, 1967, the atmosphere was unfavorable to a calm appraisal of a sweeping revision of the criminal law, particularly one designed to increase flexibility in sentencing. The draft was introduced in the 1969 legislative session, and a number of hearings held on it. In addition to transfer of the abortion provisions to a separate bill, adultery and consensual homosexual provisions were added, and the justification for use of deadly force by police officers considerably expanded. Although the governor and attorney-general expressed themselves favorably, the chief justice campaigned actively against it. Because of the pendency of several other controversial and politically more pressing bills, the draft was tabled for considera-

\begin{itemize}
  \item \textsuperscript{113} Michigan Draft § 1510.
  \item \textsuperscript{114} Id., § 1525 (3).
  \item \textsuperscript{115} Prop. N.Y. Crim. Proc. Law § 215.10(3) would also prohibit extending the maximum period authorized because of nonpayment of a fine, and otherwise imposes specific limits on the amount of extension within the statutory maximum.
  \item \textsuperscript{116} Michigan Draft §§ 1510(3) (fine), 1525(4) (costs); cf. Prop. N.Y. Crim. Proc. Law § 215.30.
  \item \textsuperscript{117} Michigan Draft § 1535.
\end{itemize}
tion in 1970, with additional committee hearings scheduled in the interim. In changing provisions, New York provisions are frequently looked to for guidance. If the proposed Michigan Criminal Code does become the new criminal law of Michigan, the New York Penal Law will have played an important role in its creation.