

University of Pennsylvania Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 109

FEBRUARY, 1961

No. 4

SENTENCING, CORRECTION, AND THE MODEL PENAL CODE*

HERBERT WECHSLER †

I am honored by the invitation to address you on this annual occasion and happy to join—or may I say rejoin—the fellowship of this great school, if only for an evening. The honor and the pleasure are increased for me by knowing that our meeting is in memory of Mr. Justice Roberts. History paints its portraits with too broad a brush for us to feel secure that it will capture a discriminating image of the Justice's judicial work. The least enduring of his votes and his opinions were so highly and, in one respect, so falsely publicized¹ that there is danger that they may obscure the many contributions of his great career. Even a finer brush would be hard put to show the subtle graces of his character and personality: his forthrightness and modesty, his courtesy and helpfulness, his twinkle and compassion, his noble bearing and his total lack of side. For those of us who knew him, there is thus a special reason for declaring our affection and regard. This rostrum calls on us to cast our tribute in a form I think the Justice might have welcomed—not by encomium which he despised but

* This paper was delivered on September 29, 1960, as the Owen J. Roberts Memorial Lecture under the auspices of the Pennsylvania Chapter of the Order of the Coif and the University of Pennsylvania Law School.

† Harlan Fiske Stone Professor of Constitutional Law, Columbia University School of Law; Chief Reporter, Model Penal Code of the American Law Institute. A.B. 1928, College of the City of New York; LL.B. 1931, Columbia University.

¹ See FRANKFURTER, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311 (1955), in *OF LAW AND MEN* 204 (1956).

by devoting our powers, as he did his own, to the great tasks of law and its improvement.

INTRODUCTION

The American Law Institute has been engaged for many years in the attempt to formulate a Model Penal Code. It is a project born and nurtured close to home, conceived by Judge Goodrich as director of the Institute, developed by Professor Louis B. Schwartz as co-reporter for specific crimes, enriched by the wise counsel of Judge Bok, Judge Flood, Judge Sloane, Judge McBride, Professor Sellin, and Mr. Samuel Dash, who have participated as advisers.

Tentative drafts concerned with different topics have been appearing annually since the spring of 1953, have been considered and debated by the Institute, and have been referred back in many cases for revision which has been proceeding as we move along.² We are at long last close to the completion of a code that will encompass formulations on general principles of liability and exculpation, the definition of at least the common crimes, and provisions governing the sentencing and treatment of offenders and the organization and authority of the main organs of correctional administration. Our target is to present any new material at the next meeting of the Institute in May and to propose one year thereafter a revised and final text for promulgation. If nature grants us her indulgence for some two years more, the Code and Comments should accordingly be published in completed form during the course of 1963.

Familiar though the point must be, it bears repeating that this enterprise has differed in its object from most of those previously undertaken by the Institute. Unlike the Restatements, we are not attempting to articulate prevailing law, although the actual has normative significance for all of us, as we repeatedly have found. Unlike the Commercial Code, promoting uniformity of law throughout the country has not appeared to us to be a major value; differences in social situation or in point of view among the states are bound to be reflected in their penal laws. Unlike the Tax Code, we have not been focusing upon the law of any single jurisdiction; nor have we dared to hope the draft will be enacted as a whole, as was perhaps true of the Code of Criminal Procedure promulgated thirty years ago.

I can perhaps describe our purpose best by saying that we aim to build the source materials required for the reexamination and revision

² The inevitable result of this procedure is that the printed drafts do not, in many instances, contain the revised code provisions that will be submitted to the Institute for final promulgation.

of our penal codes that is so badly needed throughout the country. Such efforts typically must be made—if they are made at all—by committees armed with totally inadequate appropriations, working under pressure as to time. We hope that our formulations will advance the starting point of projects of this kind, whether they are limited as many are to discrete problems we have dealt with or extend to the entire penal field.

Having assumed the discipline of drafting, we are not without ambition that our models will seem worthy of adoption or at least of adaptation. The work consists, however, not alone of the suggested statutory text but also of extensive comments canvassing existing law and practice, formulating legislative issues, and analyzing possible solutions. Hence, even if our drafting or our view of proper legislative policy should be rejected on a given point, the work may still be useful in informing legislative choice. That is, in any case, the faith that animates the undertaking.

I propose in this paper to discuss the main provisions of the draft addressed to that most vital problem in the law of crime, the sentencing and treatment of offenders. Those of you who have seen the September issue of the *American Bar Association Journal* will have noted that Mr. Sol Rubin, counsel for the National Council on Crime and Delinquency (formerly the National Probation and Parole Association), thinks that our formulations on this point are almost totally unsound.³ I mean, however, to describe them and defend them.

If my descriptions do not always jibe with Mr. Rubin's, there are two reasons for the deviations the close reader will perceive. The first is that Mr. Rubin's picture of the draft involves some grave distortions, as in the case of his account of our position with respect to young adult offenders.⁴ The second is that we have been revising for four years (as Mr. Rubin knows) since issues were first raised on these provisions by members of the Advisory Council of Judges and the Parole Council of NPPA and a committee of the American Correctional Association. Aided especially by Paul W. Tappan, associate reporter on sentencing and correction, and by Sanford Bates as our adviser and consultant, we have removed or greatly narrowed much of the initial controversy by changes approved by the Council of the Institute, though they have not as yet been taken to the floor. But issues of importance still remain and I shall try to put them to you as succinctly and as fairly as I can.

³ See Rubin, *Sentencing and Correctional Treatment Under the Law Institute's Model Penal Code*, 46 A.B.A.J. 994 (1960).

⁴ *Id.* at 997; compare notes 48-56 *infra* and accompanying text.

UNDERLYING THEORY OF THE DRAFT

Much that is thought and written on the treatment of offenders views the problem as a war of ideology in which the good side and the bad are readily discerned, depending on one's own allegiance. Those on one side of the curtain judge the merit of a disposition solely by the rigor of the punishment that it entails. For them the goal to be achieved is maximum deterrence of the actor and of others and the most enduring isolation of the culprit that conceivably can be decreed. Those on the other side find punishment entirely antipathetic, the product of a savage urge that ought to be restrained. For them the criminal is a disordered person who requires therapeutic measures; his reformation and redemption are the only valid aims. The treatment, to be sure, may call for institutional commitment but not as a vindictive deprivation. Its length is, therefore, immaterial, so long as it is needfully maintained.

The Institute is not without its advocates of both of these positions, but neither, I am glad to say, prevailed. The Code is drafted with the view that here, as elsewhere in the realm of law and government, wisdom is unlikely to inhere in action guided by a single value when a multiplicity of values is involved. The course of prudence normally is to shape policy in terms that take account of the diversity of interest, ordering and harmonizing in so far as possible the conflicts that emerge. That is, we think, the course required here.

When the legislature declares conduct to be criminal, it affirms a purpose to forbid it and to meet defiance of the prohibition by the moral condemnation of conviction and a judicious application of the sanctions that the law provides. The least that is demanded is that the disposition be so cast that it does not depreciate the gravity of the offense, whatever that may be, and thus imply a license to commit it. But how much more than this the prohibition should be taken to connote is obviously indeterminate. Deterrence (both general and special), incapacitation, and correction are all possible objectives of the sanctions that may be employed in dealing with offenders; all are means to crime prevention and as such are entitled to be weighed. But not even crime prevention is the sole value to be served. The rehabilitation of an individual who has incurred the formal condemnation of the law is in itself a social value of importance, a value, it is well to note, that is and ought to be the prime goal of correctional administration and that often will be sacrificed unduly if the choice of sanctions is dictated only by deterrence. Finally, it surely is important that the deprivations incident to dispositions not be arbitrary, excessive, or disproportionate, measured by the common sense of justice. And

arbitrariness, I scarcely need to add, may inhere not only in distinctions drawn among offenses or offenders upon insufficient grounds but also in the absence of distinctions when substantial grounds for making them arise.

The Code sets forth these multiple objectives in its statement of the purposes of the provisions governing the sentencing and treatment of offenders.⁵ Pursuant to their logic, it does not affirm a programmatic principle to guide all dispositions. In this respect, it is, of course, in the tradition of prevailing law. There are, however, some significant departures from existing statutory patterns, both in the role we deem appropriate for legislation and in the distribution of authority between the courts and the administrative organs of correction. It is to these that I now turn.

⁵ Section 1.02. *Purposes; Principles of Construction.*

(1) The general purposes of the provisions governing the definition of offenses are:

(a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual and public interests;

(b) to subject to public control persons whose conduct indicates that they are disposed to commit crimes;

(c) to safeguard conduct that is without fault from condemnation as criminal;

(d) to give fair warning of the nature of the conduct declared to constitute an offense;

(e) to differentiate on reasonable grounds between serious and minor offenses.

(2) The general purposes of the provisions governing the sentencing and treatment of offenders are:

(a) to prevent the commission of offenses;

(b) to promote correction and rehabilitation of offenders;

(c) to safeguard offenders against excessive, disproportionate or arbitrary punishment;

(d) to give fair warning of the nature of the sentences that may be imposed on conviction of an offense;

(e) to differentiate among offenders with a view to a just individualization in their treatment;

(f) to define, co-ordinate and harmonize the powers, duties and functions of the courts and of administrative officers and agencies responsible for dealing with offenders;

(g) to advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of offenders;

(h) to integrate responsibility for the administration of the correctional system in a State Department of Correction [or other single department or agency].

(3) The provisions of the Code shall be construed according to the fair import of their terms but when the language is susceptible to differing constructions it shall be interpreted to further the general purposes stated in this Section and the special purposes of the particular provision involved. The discretionary powers conferred by the Code shall be exercised in accordance with the criteria stated in the Code and, in so far as they are not decisive, to further the general purposes stated in this Section.

This section was presented to the Institute in MODEL PENAL CODE § 1.02 (Tent. Draft No. 2, 1954), and was considered at the May 1954 meeting. It is reprinted with slight change in MODEL PENAL CODE § 1.02 (Tent. Draft No. 4, 1955). For commentary, see MODEL PENAL CODE § 1.02, comment at 4 (Tent. Draft No. 2, 1954). See also Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 440-41 (1958).

SUSPENSION OF SENTENCE AND PROBATION

Section 6.02 of the Code defines the sanctions that the court may use in sentence, ranging from suspension through probation, fine, or imprisonment, or fine in combination with probation or imprisonment.⁶ Probation is envisaged as a mode of disposition in itself rather than as a mere incident of suspension, though this is less a matter that is legally significant than a nuance of emphasis, since probation like suspension is conditional for its duration and there is a power to revoke. What is of great significance is that, death sentences apart, suspension or probation may be used in any case.

The Institute thus disapproves all legislative efforts to direct the court to impose sentence of imprisonment, efforts which usually take the form of barring a probationary disposition on conviction of particular offenses or when the defendant has a record of some specially obnoxious kind.⁷ Serious limitations of this kind obtain in perhaps half our jurisdictions, many of which make a prior felony conviction an insuperable bar.⁸ How far these legislative mandates are observed in practice is, of course, a very different question; "swallowing the gun," to use the jargon of the courthouse, is, of course, a common method of surmounting such obstructions. But such evasions normally require prosecutive acquiescence, vesting a discretion as to sentence in the organ where it least belongs. The Code provision is designed as a correction of this flagrant error in the policy of much prevailing law.

The Code, moreover, goes much further than merely to forego arbitrary limitations of this kind. Section 7.01 prescribes criteria that should be followed by the court in withholding sentence of imprisonment. It provides⁹ that the court "shall" deal with a convicted person without passing a prison sentence unless, "having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for protection of the public" on one or more of the following grounds:

⁶ See MODEL PENAL CODE § 6.02 (Tent. Draft No. 4, 1955); MODEL PENAL CODE § 6.02 (Tent. Draft No. 2, 1954).

⁷ See, e.g., CAL. HEALTH & SAFETY CODE § 11715.6; CAL. PEN. CODE § 1203; ILL. ANN. STAT. ch. 38, §§ 192.28-38, 785 (Smith-Hurd Supp. 1960); MO. ANN. STAT. §§ 549.080, .110, .190 (Supp. 1960); N.Y. PEN. LAW § 2188; ORE. REV. STAT. §§ 137.510, .550, 166.230, .270, .410 (1959); TEX. CODE CRIM. PROC. art. 781d, § 3 (Supp. 1960).

⁸ The statutes, as of 1953, are summarized in MODEL PENAL CODE § 6.02, comment 3, at 14-21 (Tent. Draft No. 2, 1954).

⁹ The section, as quoted here, differs substantially from the original formulation in MODEL PENAL CODE § 7.01 (Tent. Draft No. 2, 1954). See also MODEL PENAL CODE § 7.01 (Tent. Draft No. 4, 1955). The revision was approved by the Council of the Institute in March 1958.

(a) there is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or

(b) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or

(c) a lesser sentence will depreciate the seriousness of the defendant's crime.

The duration of suspension or probation is fixed by section 301.2¹⁰ as five years upon a felony conviction and two upon conviction of a lesser crime, with discharge permissible at any time.

To facilitate a judgment favoring suspension or probation, the Code also sets forth a check list of factors which, while not controlling the discretion of the court, should be accorded weight in favor of withholding sentence of imprisonment.¹¹ The enumerated factors are, of course, considerations of the kind that courts would now regard as tending to support a judgment of this kind. Their inclusion in the draft is designed to give legislative support to such judgments in cases where they are made.

The grounds of policy that warrant thus according a priority to dispositions which forego an institutional commitment by conditional suspension or probation are not difficult to state. No other mode of sentence serves as many of the values that are relevant on the analysis set forth above. The judgment and the order give expressive voice

¹⁰ MODEL PENAL CODE § 301.2 (Tent. Draft No. 4, 1955); MODEL PENAL CODE § 301.2 (Tent. Draft No. 2, 1954).

¹¹ Section 7.01(2), as revised, see note 9 *supra*, reads:

(2) The following grounds, while not controlling the discretion of the Court, shall be accorded weight in favor of withholding sentence of imprisonment:

(a) the defendant's criminal conduct neither caused nor threatened serious harm;

(b) the defendant did not contemplate that his criminal conduct would cause or threaten serious harm;

(c) the defendant acted under a strong provocation;

(d) there were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;

(e) the victim of the defendant's criminal conduct induced or facilitated its commission;

(f) the defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained;

(g) the defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime;

(h) the defendant's criminal conduct was the result of circumstances unlikely to recur;

(i) the character and attitudes of the defendant indicate that he is unlikely to commit another crime;

(j) the defendant is particularly likely to respond affirmatively to probationary treatment;

(k) the imprisonment of the defendant would entail excessive hardship to himself or his dependents.

to the community's collective condemnation of the conduct constituting the defendant's crime and the insensitivity to the demands of social life that it implies upon his part. It is made clear that he has forfeited his independence and subjected himself to direction and control of the sort that the immature must have. At the same time, as Henry Hart has said, the regime thus established "can provide an environment favorable to rehabilitation, both by conveying to the defendant a sense of the community's confidence in his ability to live responsibly and by giving him a special incentive to do so."¹² A well-equipped probation service, drawing on community resources, can supply both help and guidance of the type that it is difficult to give in institutions. The inevitable negative results of a commitment in terms of poor associations, on the one hand, and the loss of usefulness, upon the other, are of course avoided. Finally, but certainly not least important, the burden upon public budgets is reduced to a small fraction of the cost of an imprisonment.

Were it not for the accident of history that prisons emerged as a humane substitute for death or transportation, which had previously been the normal fate of criminals, would the sense that imprisonment is somehow the right penal sanction, rather than the grave exception, ever have attained the influence it has? In many jurisdictions, practice is approaching the correction of this most unfortunate inversion.¹³ The Code provision would articulate and ratify what the best practice already has achieved.¹⁴

THREE DEGREES OF FELONY

No branch of penal legislation is, in my view, more unprincipled or more anarchical than that which deals with prison terms that may

¹² Hart, *supra* note 5, at 438.

¹³ See, e.g., TAPPAN, CRIME, JUSTICE AND CORRECTION 559-60 (1960).

¹⁴ The Code also sets forth criteria for the imposition of fines, designed to limit their routine employment. MODEL PENAL CODE §7.02 (Tent. Draft No. 4, 1955); MODEL PENAL CODE §7.02 (Tent. Draft No. 2, 1954) reads as follows:

(1) The Court shall not sentence a defendant only to pay a fine, when any other disposition is authorized by law, unless having regard to the nature and circumstances of the crime and to the history and character of the defendant, it is of the opinion that the fine alone suffices for protection of the public.

(2) The Court shall not sentence a defendant to pay a fine in addition to a sentence of imprisonment or probation unless:

(a) the defendant has obtained a pecuniary profit from the crime; or

(b) the Court is of opinion that a fine is specially adapted to deterrence of the crime involved or to the correction of the offender.

(3) The Court shall not sentence a defendant to pay a fine unless:

(a) the defendant is or will be able to pay the fine; and

(b) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime.

(4) In determining the amount and method of payment of a fine, the Court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose.

or sometimes must be imposed on conviction of specific crimes. The legislature typically makes determinations of this order not on any systematic basis but rather by according its *ad hoc* attention to some discrete area of criminality in which there is a current hue and cry. Distinctions are thus drawn which do not have the slightest bearing on the relative harmfulness of conduct and the consequent importance of preventing it so far as possible, on the probable dangerousness of the individual whose conduct is involved, or even on a public demand for heavy sanctions which is so inexorable that it cannot safely be denied. What dictates legislation is the simple point of politics that reelection demands voting against sin, whenever ballots on the question must be cast.

It is inevitable that systems which do not impose a disciplined restriction on the size and number of discriminations to be taken at the legislative level will run wild, as ours have. In New York, for example, statutory maxima for felonies upon a first conviction include at least the following: two, three, four, five, seven, ten, fifteen, twenty, twenty-five, thirty, and forty years, and life imprisonment.¹⁵ In Pennsylvania, I find in the statutes limits of five, six, seven, ten, twelve, fifteen, twenty, and twenty-five years, apart from sentences for life, with distinctions among lesser crimes that involve five, ten, thirty, sixty, and ninety days, three and six months, and one, two, and three years.¹⁶ In California, to give one more example, the felony dis-

¹⁵ The New York Penal Law provides a maximum of two years for abandonment of children (§ 480) and compounding a crime (§ 570); three years for injury to domestic animals (§ 190-a) and misconduct of election officials (§ 753); four years for abortion (§ 80); five years for second degree assault (§ 243) and third degree forgery (§ 893); seven years for abandonment of children under fourteen (§ 481) and as punishment for felonies when not otherwise fixed by statute (§ 1935); ten years for abduction (§ 70) and first degree assault (§ 241); fifteen years for third degree arson (§ 224) and extortion (§ 852); twenty years for sodomy (§ 690) and first degree manslaughter (§ 1051); twenty-five years for second degree arson (§ 224) and attempt of crime punishable by death (§ 261); thirty years for first degree burglary (§ 407) and first degree robbery (§ 2125); forty years for first degree arson (§ 224); and life imprisonment for second degree murder (§ 1048) and lynching (§ 1391).

¹⁶ The Pennsylvania Penal Code, PA. STAT. ANN. tit. 18, §§ 4101-5201 (1945), as amended, provides a maximum of five years for incest (§ 4507) and larceny (§ 4807); six years for misprision of treason (§ 4202); seven years for perjury (§ 4322) and assault with intent to kill (§ 4710); ten years for pandering (§ 4513) and robbery (§ 4704); twelve years for voluntary manslaughter (§ 4703); fifteen years for rape (§ 4721) and counterfeiting (§ 5009); twenty years for second degree murder (§ 4701) and burglary (§ 4901); twenty-five years for aiding kidnapers (§ 4724); and life imprisonment for treason (§ 4201) and kidnapping for extortion (§ 4723). As to lesser crimes, a maximum of five days is provided for failure of minor to divulge information (§ 4649); ten days for throwing rubbish on streets (§ 4694); thirty days for disorderly conduct (§ 4406); sixty days for fire balloons (§ 4632) and destruction of milk bottles (§ 4867); ninety days for discrimination (§ 4653); three months for delivering articles at penal institutions (§ 4622); six months for desecration of the flag (§ 4211); one year for extortion (§ 4318) and adultery (§ 4505); two years for bigamy (§ 4503) and assault and battery (§ 4708); and three years for involuntary manslaughter (§ 4703) and blackmail (§ 4801).

criminations are as numerous as in New York, except that there is no maximum of thirty years. In compensation, however, fourteen is used as well as ten and fifteen years; and fifty years is used as well as forty.¹⁷

It needs no argument to make the point that such a plethora of limits cannot rest upon a rational foundation. There is, I think, a vital need that legislation should distinguish between major and minor offenses and should reasonably differentiate among the major crimes for purposes of sentence possibilities; those who deny that this is so are quite as wrong as Draco, though they sometimes make his error in reverse. But it is no less vital that the legislature recognize the scope, both psychological and logical, of reasonable judgments of this kind. Too many distinctions of this order either must reduce the force of all and thus be nullified in practice or must produce results that are unjust and an impediment to the administration of correction.

The Code offers a remedy upon this point that has proved workable in drafting, permitting us upon the whole to take account of the discriminations that seem worthy of attention at the legislative level. The remedy is to establish, for the purposes of sentence, only three degrees of felony and to distribute all the major crimes or different forms thereof among the categories they provide.¹⁸ Lesser offenses are in turn divided into misdemeanors and petty misdemeanors—only two distinctions for the purposes of sentence.¹⁹

While I shall presently make clear the import that the Code accords these three degrees of felony upon the possible duration of

¹⁷ The California Penal Code provides a maximum of two years for corporal injury to wife or child (§ 273d) and attempted arson (§ 451a); three years for compounding or concealing certain crimes (§ 153) and arson of personal property (§ 449a); four years for abduction to live in illicit relation (§ 266b); five years for punishment of felonies not otherwise fixed by statute (§ 18) and abortion (§ 274); seven years for substituting one child for another (§ 157) and duel, death resulting (§ 226); ten years for conspiracy (§ 182) and manslaughter (§ 193); fourteen years for perjury (§ 126) and mayhem (§ 204); fifteen years for perversion (§ 238a); twenty years for assault with intent to commit certain serious felonies (§ 220) and child stealing (§ 405b); twenty-five years for kidnapping (§ 208); forty years for burglary with explosives (§ 464); fifty years for statutory rape (§ 264) and incest (§ 285); and life imprisonment for second degree murder (§ 190) and for crimes declared punishable by not less than a specified term of years when the maximum of such term is unspecified (§ 671), *e.g.*, sodomy, imprisonment not less than one year (§ 286).

¹⁸ The Code also makes alternative provision for the possibility that a death sentence may be authorized for aggravated murder, though the Institute has taken no position with respect to the retention or abolition of capital punishment in the jurisdictions where it is employed. See MODEL PENAL CODE § 201.6 & commentary 59-80 (Tent. Draft No. 9, 1959). For modifications of the printed draft voted by the Institute at the May 1959 meeting, see 36 ALI PROCEEDINGS 192 (1959).

¹⁹ The Code employs a further category of offense, which it denominates a violation, for which the gravest sanction is a fine. It provides, however, that a "violation does not constitute a crime" and that "conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense." MODEL PENAL CODE § 1.04(5) (Tent. Draft No. 4, 1955); MODEL PENAL CODE § 1.04(5) (Tent. Draft No. 2, 1954).

imprisonment, I wish to emphasize the point that the utility of the device does not depend upon agreement with the limits or the form of sentence we have used. Even employing different limits, the gradation still would introduce the kind of discipline in legislative use of penal sanctions that I must submit again is so much needed in this field.

IMPRISONMENT: MAXIMUM AND MINIMUM TERMS

Under the Code²⁰ the maxima implied by the degrees of felony are these: first degree—life imprisonment; second degree—ten years; third degree—five years. If a prison sentence is imposed upon conviction of a felony, the Code prescribes a minimum of one year, in the view that such a period, or a substantial part thereof, is necessary for a useful commitment to a state correctional institution.²¹ The court is also authorized, however, to impose a longer minimum, varying again with the degree, as follows: first degree—up to ten years;²² second degree—up to three years; third degree—up to two years. Thus the longest sentences that may be passed are ten years to life for felonies of the first degree, three to ten years for those of the second, and two to five years for those of the third.

Under the draft, as put before the Institute, the court would not be authorized to control the maxima of these terms. They would be fixed by statute at the levels I have noted, with reliance placed on the parole board to effect and time an earlier release; such release, of course, is contemplated in most cases. Eligibility for parole would arise upon expiration of the minimum,²³ less deductions for good behavior which would normally amount to one-fifth of the term and can reach two-fifths for exceptional performance. Similar good-time deductions also reduce the maximum, except when it is life imprisonment.²⁴

This form of sentence was preferred for reasons which may be summarized as follows:

When a prison sentence is imposed, its motivation should inhere, as I have said,²⁵ in the court's judgment that it is required to meet the

²⁰ MODEL PENAL CODE § 6.06 (Tent. Draft No. 4, 1955); MODEL PENAL CODE § 6.06 (Tent. Draft No. 2, 1954).

²¹ *But cf.* § 6.12, discussed in text accompanying note 29 *infra*; § 6.05, discussed in notes 48-56 *infra* and accompanying text.

²² Section 6.06, as presented to the Institute, authorized a minimum of up to twenty years. This has been reduced to ten, with the approval of the Council of the Institute.

²³ MODEL PENAL CODE § 305.10 (Tent. Draft No. 5, 1956). This provision has been renumbered § 305.6.

²⁴ MODEL PENAL CODE § 305.5 (Tent. Draft No. 5, 1956). This provision has been renumbered § 305.1.

²⁵ See text accompanying note 9 *supra*.

risk that the defendant will commit another crime during the period of a suspension or probation, or to subject the defendant to correctional treatment that can be provided best within an institution, or, finally, to avoid the depreciation of the seriousness of the crime, under the circumstances of its perpetration.

The point on which the court can make the best and most decisive judgment at the time of sentence is the last, which calls for an appraisal of the impact of the disposition on the general community, whose values and security have been disturbed. When a sentence of imprisonment is deemed to be essential on this ground, it often will be sufficient for the purpose if the sentence does no more than give the organs of correction reasonable scope for dealing with the individual in light of their evaluation of the case. In that event, the sentence should employ a maximum but not a minimum—beyond the year which is regarded as an institutional necessity for any constructive program to proceed. Cases will arise, however, where a sentence with a maximum alone will not afford the community the reassurance it should have. To enable it to deal with cases of this kind, the court should be empowered to prescribe a minimum duration of the term. The minima that may be used should ordinarily be short, since any loss of liberty measured by years is a substantial deprivation. Hence, only for the very gravest crimes—felonies of the first degree—is a long minimum allowed.

Even when aided by a competent presentence study and report, the court is poorly equipped at the time of sentence to make solid and decisive judgments on the period required for the process of correction to realize its optimum potentiality or for the risk of further criminality to reach a level where release of the offender appears reasonably safe. The organs of correction, on the other hand, are best equipped to make decisions of this order and to make them later on in time, in light of observation and experience within the institution. If limits are to be imposed on their determination of these questions in the interest of protecting prisoners against undue protraction of release, the limits are best framed as legislative standards based upon a general appraisal of the gravity of various offenses, rather than on judicial assessments of the discrete case. Whether and how long the prisoner ought to be held beyond the minimum, if any, fixed by the court should, therefore, be remitted to correctional administration, that is, to the Board of Parole—within statutory limits varying with the degree of the offense. Professional parole administration, recognizing that the statutory limits envisage the worst cases in a class—not the ordinary or the best—should be relied upon to effect earlier release when the extremes are not involved. There is, accordingly, no reason to look to the

court to set a maximum duration of the term other than the legislative maximum prescribed for the offense.

Furthermore, and certainly of prime importance, it is an abiding difficulty of judicial sentencing that different judges vary in their judgments, producing a disparity in the terms of commitments transcending any that can be attributed to the just individualization of each sentence. The problem can be mitigated slightly by procedural devices like review of sentences on appeal or by a special court,²⁶ but these are not solutions. The best approach to a solution lies in reducing the variety of the commitments. This can be done with the least sacrifice of other values by employing a fixed maximum determined by the grade and the degree of the offense. That type of maximum, precisely for the reason that it is based upon a generalized legislative judgment governed by the character of the offense, ought to exert far less restraint upon parole boards in their timing of an earlier release than would a maximum purporting to reflect a judgment of the court upon the case at hand. It should, therefore, be most conducive to the application by the board of similar criteria to all the cases it must judge, with consequent reduction of disparity.

This was the reasoning accepted by the Council and the Institute upon its first consideration of the draft. The position has its critics upon both the points involved. The Advisory Council of Judges of the National Probation and Parole Association, for example, opposed judicial power to impose a minimum and argued for judicial power to control the maximum within the statutory limits. Its concept of the proper form of sentence is, accordingly, the court's determination of a maximum alone, within the maximum prescribed by statute, with authority in the parole board to release at any time.²⁷

The argument against the minimum was not developed in detail, beyond the statement that minimum terms which "may be inordinately high" constitute one of "the truly destructive elements in sentencing." This is, of course, a truism that will not be disputed. The Council of

²⁶ See, e.g., Sobeloff, *The Sentence of the Court: Should There Be Appellate Review?*, 41 A.B.A.J. 13 (1955); Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L.J. 1453 (1960).

²⁷ This form of sentence seems to be prescribed, either overtly or in legal effect, in Delaware, Minnesota, and Oregon, with some approach thereto in Alabama, Georgia, Iowa, Missouri, and Oklahoma. The fixed statutory maximum, coupled with many mandatory statutory minima, is the prevailing form of sentence in California, Indiana, Nevada, New Mexico, Ohio; coupled with parole eligibility at any time, in Utah and Washington; and coupled with discretionary minima in Hawaii and Michigan. In the remaining jurisdictions, the court or jury usually is empowered to control both maximum and minimum, within statutory limits and subject to varying restrictions as to the relationship of minimum and maximum; or else to fix a maximum alone, of which the statute prescribes some fraction as the minimum. For a detailed analysis, see Note, *Statutory Structures for Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134 (1960).

the Institute did not regard the proposed discretionary minima as such and hence was not persuaded by the submission. Some form of minimum, fixed either legislatively or judicially or by jury, or derived from the fact that parole eligibility does not arise until some fraction of the maximum is served, will now be found, it may be useful to observe, in most of our jurisdictions.²⁸

The argument against the fixed maximum stressed the infinite variations in the gravity of crimes which fall within a single statutory definition and in the character of individual offenders. Justice demands, it was contended, that the court be authorized to take account of such diversities by shortening the maximum where mitigating circumstances are present. This is, of course, a point that has its substance. The answer to it was that insofar as it is valid there are other means provided by the draft to effect needed mitigations, notably a section which provides that whenever the court "is of the view that it would be unduly harsh to sentence the offender in accordance with the Code, the Court may enter judgment of conviction for a lesser degree of felony or for a misdemeanor and impose sentence accordingly."²⁹ The contemplation of the Code, in short, was that such mitigation be effected by a reduction of degree rather than by introducing the much greater variation in the maxima that full judicial control would necessarily entail. The rejoinder to this answer, however, was that a court should be expected to be more reluctant to adjudicate reduction in degree than to exercise discretion to impose a shorter sentence than the statutory limit. There is, I think, some force in this rejoinder, though whether it should be regarded as decisive is, of course, another question.

A further point of somewhat different nature has been made by Professors Remington and Ohlin of the Code Advisory Committee.³⁰ Their argument is that denial of discretion to the judge respecting maximum commitment may be less likely to enlarge the discretion of parole boards than to enhance the prosecutor's influence on dispositions. The argument is that practical administration presupposes a preponderance of pleas of guilty. If the court is not empowered to reduce the maximum upon a plea, the prosecutor will take up the slack in his selection of the charge, offering a lesser charge as the consideration for a plea. Judicial control of the maximum has, it is urged, a tendency at least to keep this process in the court so far as possible.

²⁸ See note 27 *supra*.

²⁹ MODEL PENAL CODE § 6.11 (Tent. Draft No. 4, 1955); MODEL PENAL CODE § 6.11 (Tent. Draft No. 2, 1954). This provision has been renumbered § 6.12.

³⁰ See Ohlin & Remington, *Sentencing Structure: Its Effects Upon Systems for the Administration of Criminal Justice*, 23 LAW & CONTEMP. PROB. 495, 500-07 (1958).

Evaluation of the point is difficult because reduction of the charge by the prosecutor is a general phenomenon, regardless of the form of sentence. We did, however, seek to test it by experience in California, where statutory maxima which the judge is not empowered to control are employed.³¹ Our conclusion was that practice there does not substantially diverge from that in states where the judicial power to vary maxima is conferred. However, it is still the case that mitigation of this kind will occur necessarily in practice. To the extent that this is so, there is a limit on the possibility of really dealing with disparity by legislation with respect to form of sentence.

Efforts to do so may, indeed, sometimes produce ironical results, as in the case of the new amendments modifying the federal sentencing process.³² Those changes, which permit the court to fix a lower minimum than the one-third of the fixed sentence that was formerly prescribed by law, are wholly sound in policy, since minima should not be mandatory on the court. Yet the amendments obviously will increase and not reduce disparity, since variations formerly confined to maxima will now extend to minima as well.

A final argument advanced against the draft was that fixed maxima result in longer prison terms than sentences in which the maximum is subject to control. By hypothesis, they do result in longer maxima, assuming that the legislative limit is the same, since judicial control can only result in reduction of the maximum in some proportion of the cases in which sentence is imposed. But the contention that fixed maxima result in longer actual retention before release upon parole is most emphatically not established. Paul Tappan's studies suggest strongly that the opposite is probably the case,³³ a position fortified on a priori grounds by the consideration, previously stated, that parole boards normally will give far more attention to a maximum fixed for the special case than one decreed for cases as a class. Moreover, a reduction in the length of terms can hardly furnish a sufficient policy for legislation. The goal is surely to devise the best among imperfect instruments for shaping terms to serve the proper ends of sentencing and of correction, making them long when long terms are in order and short when they are not. What is involved is a most subtle problem in the distribution of authority

³¹ A memorandum on the subject by Professor Tappan was submitted to the Council of the Institute in Council Draft No. 26, at 34-46 (1960). It has not as yet been published.

³² 18 U.S.C. § 4208 (1958). See STAFF OF HOUSE COMM. ON THE JUDICIARY, 85TH CONG., 2D SESS., REPORT ON FEDERAL SENTENCING PROCEDURES 1 (Comm. Print 1958).

³³ See TAPPAN, *op. cit. supra* note 13, at 450, 452; Tappan, *Sentencing Under the Model Penal Code*, 23 LAW & CONTEMP. PROB. 528, 537 (1958).

between the courts and other organs of correction—to give each agency the power and responsibility that each is best equipped to exercise, given the time when it must act, the nature of the judgments called for at that stage, the type of information that will be available for judgment, and the relative dangers of unfairness and abuse.

On total balance, we believe that our choice of the fixed maximum was right but we are also clear that there is room for reasonable disagreement on the issue. The Institute Council has accordingly approved an alternate provision under which the court would be empowered to set shorter maxima within the statutory limit.³⁴ The provisions as to minima remain, subject, however, to the limitation that the minimum may not exceed one-half the maximum—a limitation that becomes essential once the maximum may be reduced by the court. Thus if the court, under the alternate provision, were to set a maximum of five years on a sentence for a second degree felony, the minimum could not exceed two and one-half, rather than three—the limit otherwise imposed.

EXTENDED TERMS OF IMPRISONMENT

The prison terms I thus far have described are what the Code denominates the ordinary terms. Authority would also be conferred upon the court to sentence to extended terms upon a finding that the defendant is a persistent offender, a professional criminal, or a dangerous, mentally abnormal person, whose commitment for an extended term is necessary for protection of the public. Negative protective limitations bar such findings unless specified minimal grounds obtain, such as two prior felony or one felony and two misdemeanor convictions in the case of the persistent offender and certain psychiatric findings in the case of the abnormal.³⁵ The Code relies, however, less

³⁴ Alternate § 6.06. In the case of first degree felonies, where the fixed maximum is life imprisonment, the court would be authorized under the alternate to fix the maximum at not more than twenty years or at life imprisonment. This provision was approved by the Council at its March 1960 meeting. It has not yet been submitted to the Institute.

³⁵ Section 7.03. *Criteria for Sentence of Extended Term of Imprisonment; Felonies.*

The Court may sentence a person who has been convicted of a felony to an extended term of imprisonment if it finds one or more of the grounds specified in this Section. The finding of the Court shall be incorporated in the record.

(1) The defendant is a persistent offender whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant is over twenty-one years of age and has previously been convicted of two felonies or of one felony and two misdemeanors, committed at different times when he was over [insert Juvenile Court age] years of age.

(2) The defendant is a professional criminal whose commitment for an extended term is necessary for protection of the public.

on these negative exclusions than on the positive requirements of the ultimate findings to be made. The court is called upon to recognize and to develop these criminological categories, which are of obvious significance for sentence. It should be added that a sentence for an extended term is also authorized in dealing with the multiple offender—that is, the person convicted of and being sentenced for a number of offenses, whose criminality was so extensive that some increase in the sentence is warranted on that account. Here, however, the extended term is a substitute for cumulative sentences which generally are permitted and even may be required by existing law, with results often shocking, but which the Code would generally bar.³⁶

The Court shall not make such a finding unless the defendant is over twenty-one years of age and

(a) the circumstances of the crime show that the defendant has knowingly devoted himself to criminal activity as a major source of livelihood; or

(b) the defendant has substantial income or resources not explained to be derived from a source other than criminal activity.

(3) The defendant is a dangerous, mentally abnormal person whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant has been subjected to a psychiatric examination resulting in the conclusions that his mental condition is gravely abnormal; that his criminal conduct has been characterized by a pattern of repetitive or compulsive behavior or by persistent aggressive behavior with heedless indifference to consequences; and that such condition makes him a serious danger to others.

(4) The defendant is a multiple offender whose criminality was so extensive that a sentence of imprisonment for an extended term is warranted.

The Court shall not make such a finding unless:

(a) the defendant is being sentenced for two or more felonies, or is already under sentence of imprisonment for felony, and the sentences of imprisonment involved will run concurrently under Section 7.06; or

(b) the defendant admits in open court the commission of one or more other felonies and asks that they be taken into account when he is sentenced; and

(c) the longest sentences of imprisonment authorized for each of the defendant's crimes, including admitted crimes taken into account, if made to run consecutively would exceed in length the minimum and maximum of the extended term imposed.

This section was presented to the Institute in Tentative Draft No. 2, and was considered at the May 1954 meeting. It is reprinted with slight change in MODEL PENAL CODE § 7.03 (Tent. Draft No. 4, 1955). For commentary, see MODEL PENAL CODE § 7.03, comment (Tent. Draft No. 2, 1954). Verbal changes in subsection (4)(c) have been made by the Reporter but not yet considered by the Council.

³⁶ Section 7.06. *Multiple Sentences of Imprisonment; Concurrent and Consecutive Terms.*

(1) *Sentence for more than one crime.* When multiple sentences of imprisonment are imposed on a defendant for more than one crime, including a crime for which a previous suspended sentence or sentence of probation has been revoked, such multiple sentences shall run concurrently or consecutively as the Court determines at the time of sentence, except that:

(a) a fixed and an indefinite term shall run concurrently and both sentences shall be satisfied by service of the indefinite term; and

(b) the aggregate of consecutive fixed terms shall not exceed one year; and

(c) the aggregate of consecutive indefinite terms shall not exceed in minimum or maximum length the longest extended term authorized for the

It remains to state the impact of the extension upon the terms that may be used.³⁷ When sentence is for a felony of the first degree, the impact is primarily informative to the correctional authorities, since the minimum, as in the ordinary term, may not exceed ten years³⁸ and the maximum in both is life imprisonment. On a second degree conviction, however, the court may impose a minimum of five years rather than three and a maximum of up to twenty years in contrast to but ten. On a third degree conviction, the maximum may be increased from five to ten and the minimum from two to three. These are substantial consequences in the case of felonies of second and of third degree, the most important classes of the serious offenses, since the Code is very sparing in assigning crimes to first degree.³⁹

highest grade and degree of crime for which any of the sentences was imposed; and

(d) not more than one sentence for an extended term shall be imposed.

(2) *Sentences imposed at different times.* When a defendant who has previously been sentenced to imprisonment is subsequently sentenced to another term for a crime committed prior to the former sentence, other than a crime committed while in custody, the multiple sentences imposed shall so far as possible conform to Subsection (1) of this Section. If the Court determines that the terms shall run consecutively, the defendant shall be credited with time served on the prior sentence in determining the permissible aggregate length of the term or terms remaining to be served.

(3) *Sentence for crime committed while on parole.* When a defendant is sentenced to imprisonment for a crime committed while on parole in this State, such term of imprisonment and any period of reimprisonment that the Board of Parole may require the defendant to serve upon the revocation of his parole shall run concurrently, unless the Court orders them to run consecutively.

(4) *Multiple sentences in other cases.* Except as otherwise provided in this Section, multiple terms of imprisonment shall run concurrently or consecutively as the Court determines when the second or subsequent sentence is imposed.

(5) *Calculation of concurrent and consecutive terms.*

(a) When indefinite terms run concurrently, the shorter minimum terms merge in and are satisfied by serving the longest minimum term and the shorter maximum terms merge in and are satisfied by discharge of the longest maximum term.

(b) When indefinite terms run consecutively, the minimum terms are added to arrive at an aggregate minimum to be served equal to the sum of all minimum terms and the maximum terms are added to arrive at an aggregate maximum equal to the sum of all maximum terms.

(c) When a definite and an indefinite term run consecutively, the period of the definite term is added to both the minimum and maximum of the indefinite term and both sentences are satisfied by serving the indefinite term.

This is a revision of MODEL PENAL CODE §7.06 (Tent. Draft No. 4, 1955); MODEL PENAL CODE §7.06 (Tent. Draft No. 2, 1954). For commentary, see MODEL PENAL CODE §7.06, comments 1, 2 (Tent. Draft No. 2, 1954). The revised draft has not yet been considered by the Council. Attention should also be directed to MODEL PENAL CODE §§1.08(2), (3) (Tent. Draft No. 5, 1956), which require multiple charges to be included in a single prosecution in specified cases.

³⁷ See MODEL PENAL CODE §6.07 (Tent. Draft No. 4, 1955); MODEL PENAL CODE §6.07 (Tent. Draft No. 2, 1954). For commentary, see MODEL PENAL CODE §6.07, comments 1-4 (Tent. Draft No. 2, 1954).

³⁸ This represents a revision of the printed draft, *supra* note 37, which authorized a minimum of up to thirty years. The revision was approved by the Council at its March 1957 meeting but has not yet been submitted to the Institute.

³⁹ For offenses classified as first degree under the Code, see MODEL PENAL CODE §201.2 (Tent. Draft No. 9, 1959) (murder); §212.1 (Tent. Draft No. 11, 1960)

You will observe, however, that the use of the extended term, when it is authorized, has its effect primarily upon the maximum sentence that the court may impose. The reason is, of course, that the extension is effected not because of the offense but rather because of the character of the offender, a matter that correctional administration will be better able to appraise as time goes on than is the judge at time of sentence. Even here, however, there may be a problem of the need of the community for reassurance. The modest scope for increase in the minima on sentence for the second and third degrees of felony has been included as an answer to that need. The longer minima that may be used in cases of this kind should help to make acceptable the shorter minimum sentences we have used for an ordinary term.

The extended term provision, I should add, emerged from our study of habitual offender laws now on the books; the consensus is that they are a failure, productive of chaotic and unjust results when they are used, and greatly nullified in practice. Their difficulty, in our view, inheres in four defects: first, they are mandatory wholly or in part in over half the jurisdictions; second, the extensions often are too long or appear arbitrary in their length, especially when they import long minima or otherwise exclude parole; third, the extension, especially when it involves life sentence, takes inadequate account of the gravity of the offense of last conviction, for which the sentence is imposed; and fourth, the extension rests entirely upon prior record and takes no account of other types of special danger that particular offenders may present.

These defects are overcome, we think, in the provision in the Code. Even our critics seem to think that our conception is correct and I shall not take time to state such questions of detail as have been raised upon the draft.

PAROLE

The meaning of the prison terms I have described is qualified by the provisions of the Code dealing with release upon parole. Those provisions are, moreover, of importance in themselves.

Parole, with its substitution of conditional and supervised release for mere ejection of the prisoner upon the expiration of his term, is surely one of the main contributions to the arsenal of penology. It would be quite unthinkable to build a model code in which the insti-

(kidnapping unless the victim is released alive in a safe place prior to trial); § 222.1 (Tent. Draft No. 11, 1960) (robbery coupled with infliction or attempted infliction of serious bodily injury or attempt to kill); § 207.4 (Tent. Draft No. 4, 1955) [re-numbered § 213.1 (Tent. Draft No. 11, 1960)] (forcible rape by stranger or coupled with infliction of serious physical injury).

tution did not play a central part. But since parole has been superimposed upon our systems in the course of their development rather than dealt with as a factor in a system being built, the natural tendency has been to find scope for its employment only in release before the time that otherwise would mark the termination of the sentence has arrived. The pressure has been mainly to establish the authority for such release as early in the term as possible.

The theory of parole is not, however, that it is an act of leniency by the Board—like Christmas pardons by a governor hard pressed for reelection—but rather that a period of supervised conditional release is a rationally necessary intermediate stage between institutionalization and full restoration to the free community, a stage that is both helpful to the individual and needful for community protection. So long as release on parole must be effected by reduction of the period that otherwise might measure institutional commitment, it is difficult to make the theory hold. Moreover, the system works an obvious anomaly. The worst risks, held the longest time by the parole board, have the shortest period of supervision while the best risks, released early in their terms, are subject to the longest period of control.

The anomaly has not escaped the attention of the leaders of parole. As long ago as 1940, Frederick A. Moran of the New York Board of Parole, purporting to speak for "an increasing number of practical prison administrators and members of boards of parole," said that "they raise the question whether any individual should be released from prison without parole supervision," adding that: "As long as parole is limited in its use to carefully selected prison inmates, its value to prison administrators, to the prisoner, and to the community must necessarily be limited."⁴⁰ We thought the answer to the question put by Moran was clear and we resolved to make it in the Code.

The answer calls for treating every sentence as embodying two separate parts: first, the maximum period for which the prisoner may be held prior to his first release upon parole; and second, a term of parole or recommitment for the violation of parole, which starts to run when the parole release occurs. The Code now so provides.⁴¹

⁴⁰ Address by Frederick A. Moran, New York State Conference of Social Work, in N.Y. ST. DIVISION OF PAROLE, TRENDS IN PAROLE 6-7 (1940).

⁴¹ Section 6.10. *First Release of All Offenders on Parole; Sentence of Imprisonment Includes Separate Parole Term; Length of Parole Term; Length of Recombitment and Reparole After Revocation of Parole; Final Unconditional Release.*

(1) *First release of all offenders on parole.* An offender sentenced to an indefinite term of imprisonment in excess of one year under Section 6.05, 6.06, 6.07, 6.09, or 7.06 shall be released conditionally on parole at or before the expiration of the maximum of such term, in accordance with Article 305.

(2) *Sentence of imprisonment includes separate parole term; length of parole term.* A sentence to an indefinite term of imprisonment in excess of one year

The consequence is that the terms that I have previously stated have their meaning only in establishing the earliest and latest time when the prisoner will have his first release upon parole. Once that release is made, that portion of the sentence no longer has significance. The second portion then begins and governs the duration of conditional release or recommitment if parole is violated.

We have had difficulty, I confess, in shaping the dimensions of this second term. Paul Tappan's first idea was that its measure be determined by the length of time the prisoner was held before release, so that those released early would be subject to short periods of supervision, those released after long confinement to control for a long time. This is the concept in our printed draft.⁴² Criticism of the complexity of the idea, upon the one hand, and of the possibility of excessive periods of supervision, on the other, led us to adopt in substitution a proposal by Thorsten Sellin to measure the parole term by a minimum of one year and a maximum of five, with power in the Board to discharge in between.⁴³ That is the present version of the section and the form that I believe will stand. The Code requires that every first release be upon parole for such a period, whenever it is made.

If such a system were employed, parole would cease to be, in Moran's words, "limited in its use to carefully selected prison inmates."

under Section 6.05, 6.06, 6.07, 6.09 or 7.06 includes as a separate portion of the sentence a term of parole or of recommitment for violation of the conditions of parole which governs the duration of parole or recommitment after the offender's first conditional release on parole. The minimum of such term is one year and the maximum is five years.

(3) *Length of recommitment and reparole after revocation of parole.* If an offender is recommitment upon revocation of his parole, the term of further imprisonment upon such recommitment and of any subsequent reparole or recommitment under the same sentence shall be fixed by the Board of Parole but shall not exceed in aggregate length the unserved balance of the maximum parole term provided by Subsection (2) of this Section.

(4) *Final unconditional release.* When the maximum of his parole term has expired or he has been sooner discharged from parole under Section 305.12, an offender shall be deemed to have served his sentence and shall be released unconditionally.

This is a substantial revision of the original formulation, presented to the Institute as § 6.09A (Tent. Draft No. 5, 1956). The revised provision was approved by the Council at its March 1957 meeting.

⁴² MODEL PENAL CODE § 6.09A (Tent. Draft No. 5, 1956).

⁴³ Section 305.12. *Termination of Supervision; Discharge from Parole.*

If, in the opinion of the Board of Parole, a parolee does not require guidance and supervision, the Board may dispense with or terminate such supervision. When a parolee is eligible for discharge from parole in accordance with Section 305.11, the Board may discharge him from parole, if, in its opinion, such discharge is not incompatible with the protection of the public. A parolee's discharge from parole or from recommitment for violation of parole becomes mandatory upon completion of the maximum parole term less reductions for good behavior.

This section, formerly numbered § 305.16 (Tent. Draft No. 5, 1956), has been revised with the approval of the Council at its March 1957 meeting. For commentary, see MODEL PENAL CODE § 305.16, comment (Tent. Draft No. 5, 1956).

The question for parole boards would then cease to be *whom* to release upon parole and would become *when* the first release ought to be made. The Board would not be thought to underwrite the future of each parolee, with the resulting implication that a failure on his part involves a failure of the Board—the sense that now makes a parole release so vulnerable to public criticism. It would be recognized that failure and success are both inherent in the system, as it is recognized respecting sentence of the court.

Two criticisms of the plan have been offered. The first, which sounds like a neurotic clinging to his symptoms, objects that failures of bad risks held by the Board as long as possible would blacken the good name of parole. This is the view Moran denounced in language I have quoted and I rest upon his words. The second is that adding the separate parole term to the maximum of the initial form of sentence would result in making our sentences unduly long. But long for whom? Not for most persons, who will be released as they now are after a year or two or three, regardless of the fact that they might legally be held for a longer period—frequently for very long. For such prisoners, the separate parole term more probably will mean reduction of the period in which they will be subject to control and recommitment. Long only, then, for prisoners who are held to or close to expiration of the time when their release is made compulsory by law. Is length objectionable in such cases or are the retention judgments of our boards entitled to be given more regard?

Those who are apprehensive nonetheless about the possible length of our terms should find some reassurance in another section of the draft. Just as the Code attempts to formulate criteria for much discretionary action of the court,⁴⁴ as with respect to a probationary disposition or suspension, so it sets forth criteria to guide release decisions on parole. Section 305.9 provides as follows:

(1) Whenever the Board of Parole considers the first release of a prisoner who is eligible for parole, it shall be the policy of the Board to order his release, unless the Board is of the opinion that his release should be deferred because:

(a) there is substantial risk that he will not conform to the conditions of parole; or

(b) his release at that time would depreciate the seriousness of his crime or promote disrespect for law; or

⁴⁴ For discussion of the sentencing criteria, see, e.g., Flood, *Sentencing Function of the Judge*, 45 J. CRIM. L., C. & P.S. 531-32 (1955); Glueck, *The Sentencing Problem*, Fed. Prob., Dec. 1956, pp. 15, 20-21; Mannheim, *Some Aspects of Judicial Sentencing Policy*, 67 YALE L.J. 961, 965-66, 980 (1958); Remington, *Criminal Justice Research*, 51 J. CRIM. L., C. & P.S. 7, 16-18 (1960).

(c) his release will have a substantially adverse effect on prison discipline; or

(d) his continued correctional treatment, medical care or vocational or other training in the institution will substantially enhance his capacity to lead a law abiding life when released at a later date.⁴⁵

These criteria are designed to express the policy that first releases should take place when men are eligible, unless a substantial reason for postponing the release appears. We know of no substantial reason for postponement other than those specified and none has thus far been advanced. Nevertheless, there has been bitter criticism of the section.

It has been argued, first, that the section would establish release as a right and not a privilege, subverting the entire theory of parole. But it is clear that the provision as it stands would not result in the review of such release decisions by the courts and such review, which

⁴⁵ This is a revision of former § 305.13 (Tent. Draft No. 5, 1956). For commentary, see MODEL PENAL CODE § 305.13, comment at 97 (Tent. Draft No. 5, 1956). The revision was approved by the Council of the Institute at its March 1958 meeting. Subsection (2) of the section provides:

(2) In making its determination regarding a prisoner's release on parole, it shall be the policy of the Board of Parole to take into account each of the following factors:

(a) the prisoner's personality, including his maturity, stability, sense of responsibility and any apparent development in his personality which may promote or hinder his conformity to law;

(b) the adequacy of the prisoner's parole plan;

(c) the prisoner's ability and readiness to assume obligations and undertake responsibilities;

(d) the prisoner's intelligence and training;

(e) the prisoner's family status and whether he has relatives who display an interest in him, or whether he has other close and constructive associations in the community;

(f) the prisoner's employment history, his occupational skills, and the stability of his past employment;

(g) the type of residence, neighborhood or community in which the prisoner plans to live;

(h) the prisoner's past use of narcotics, or past habitual and excessive use of alcohol;

(i) the prisoner's mental or physical make-up, including any disability or handicap which may affect his conformity to law;

(j) the prisoner's prior criminal record, including the nature and circumstances, recency and frequency of previous offenses;

(k) the prisoner's attitude toward law and authority;

(l) the prisoner's conduct in the institution, including particularly whether he has taken advantage of the opportunities for self-improvement afforded by the institutional program, whether he has been punished for misconduct within six months prior to his hearing or reconsideration for parole release, whether he has forfeited any reductions of term during his period of imprisonment, and whether such reductions have been restored at the time of hearing or reconsideration;

(m) the prisoner's conduct and attitude during any previous experience of probation or parole and the recency of such experience.

we agree to be impractical, is barred specifically by another section which our critics do not usually read.⁴⁶

It is urged, second, that embodying criteria within the statute is in principle erroneous, that they should be developed, if at all, administratively or unofficially and not by law. I strongly disagree with this position. If sound criteria can be developed, the entire process of decision will be strengthened if the norms are given legislative approval. Were these criteria to be accepted, boards would be supported in their hardest task, that of ordering release when there is a clamor for retention, a clamor to which all too many boards are likely to succumb out of a sense of institutional necessity. I have attended many conferences on the question but have not been led to think that we are wrong.⁴⁷

While I have indicated that the prison and parole terms contemplated by the draft do not appear to me to be unduly long—given a judicious allocation of offenses to the three degrees of felony proposed—I readily admit that there is inescapably an arbitrary element in any judgment with respect to what the maxima of these respective terms should be. One who believes that shorter maxima suffice to serve the necessary ends of sentence and correction will not find it difficult to modify the plan in accordance with the limits he approves. The assumption of the system is that very few offenders should or will be held for the maximum period before a first release upon parole is legally required, or even be held on parole for the maximum of the parole term that the Code prescribes. The problem of limits is, in our contemplation, that of the special, not the ordinary case.

⁴⁶ Section 305.19. *Finality of Determinations with Respect to Reduction of Terms for Good Behavior and Parole.*

No court shall have jurisdiction to review or set aside, except for the denial of a hearing when a right to be heard is conferred by law:

(1) the action of an authorized official of the Department of Correction or of the Board of Parole withholding, forfeiting or refusing to restore a reduction of a prison or parole term for good behavior; or

(2) the orders or decisions of the Board of Parole regarding, but not limited to, the release or deferment of release on parole of a prisoner whose maximum prison term has not expired, the imposition or modification of conditions of parole, the revocation of parole, the termination or restoration of parole supervision or the discharge from parole or from re-imprisonment before the end of the parole term.

This provision was presented to the Institute in MODEL PENAL CODE § 305.25 (Tent. Draft No. 5, 1956). Minor revisions in wording have been made, and the section has been renumbered.

⁴⁷ See, e.g., the papers on and the discussion of criteria for parole selection at the 89th Annual Congress of Correction, in AM. CORRECTIONAL ASS'N PROCEEDINGS 221-58 (1958). The views expressed by Everette M. Porter of California as to the substance of appropriate criteria strikingly parallel the views reflected in the Code.

YOUNG ADULT OFFENDERS

I have reserved for last alluding to that other controversial feature of the draft, the provisions governing the sentencing and treatment of offenders over juvenile court age but still within the formative years of character and personality development—the group the Code calls “young adults” in recognition of the facts that they are young and that they also are no longer children.

Here we were faced initially with information that the Council of the Institute had been preparing for a reexamination of the Model Youth Correction Authority Act, approved in 1940, in the light of the experience reported in the survey made by Bertram Beck and published by the Institute in 1951.⁴⁸ The five states Beck examined (California, Massachusetts, Minnesota, Texas, and Wisconsin) all had purported to adopt the Model Act in some form but three had utilized it, contrary to its purpose, to deal with juveniles exclusively, rather than the older group for which it was designed. Only California and Minnesota had been faithful to the purpose of the model in employing it to deal with youthful offenders as distinct from juveniles, though both had used it for the younger group as well, and the legislation that they had enacted involved other deviations from the Institute proposal and much variation in detail. Moreover, as Professor Sellin has observed,⁴⁹ the draftsmen of the Youth Correction Authority Act dealt with youthful offenders as a first step towards a general improvement in the legal framework governing the sentencing and treatment of offenders. Had that committee been confronted with the broader task of dealing with the problems with respect to all offenders, it is doubtful that they would have proposed such a specialized administrative structure focused solely on the treatment of the young. The fact was inescapable that there was much in principle and in detail presented by the Youth Correction Act that called for the re-thinking of the Institute, especially as it embarked upon the preparation of a model penal code.

The first attempt at such re-thinking was a memorandum by Professor Tappan submitted for consideration in Tentative Draft No. 3 of 1955.⁵⁰ His proposal was that “the theory of the Authority Plan” should be “rejected” in the drafting of the Code. This was unhappy phrasing, I acknowledge, since it was conceived by some to imply that

⁴⁸ BECK, FIVE STATES (1951).

⁴⁹ Sellin, *The Youth Correction Authority Act (YCAA) and the Draft Code*, in MODEL PENAL CODE at 47, 49 (Tent. Draft No. 3, 1955).

⁵⁰ Tappan, *Proposals for the Sentencing and Treatment of the Young Adult Offender Under the Model Penal Code*, in MODEL PENAL CODE at 7, 15 (Tent. Draft No. 3, 1955). See also Tappan, *The Youthful Adult Offender Under the American Law Institute's Model Penal Code*, Fed. Prob., Dec. 1955, p. 20.

the Institute was asked to disapprove the idea that special rehabilitative measures were appropriate to and should be taken with the young. But that, of course, was not its meaning. What was meant was that the Institute should not continue to propose the fragmentation of correctional responsibility entailed in the idea of an authority independent of the general organs of correction. Most states had found that fragmentation unacceptable as a method of governmental organization, and California, which had adopted it in theory, had been altering it progressively in practice—a process that I venture to believe is not completed yet.⁵¹ Tappan's idea was that the purpose of the model act would generally be fulfilled most effectively within the ordinary framework of correction under unified direction and control. He was not by any means the first to take that view.⁵² It was the course that most states have insisted on pursuing even when progressive changes have been made or proposed within this field.⁵³

The other major point involved the form of sentence of the young offender. On this, the Youth Correction Act contained provisions that no state had found acceptable, such as the denial to the courts of the authority to grant probation and the idea that restraint might be continued for unlimited duration, without reference to the offense involved, if the authority should ask and receive court approval when the offender otherwise would have to be discharged.

Professor Tappan's memorandum urged that the problem of sentence should be met by a provision authorizing courts—in addition, of course, to their power to employ probation—to impose at their discretion commitments for a shorter term for young offenders than those otherwise employed. There was, I think, a difficulty with the terms of his proposal on this point, in that the alternate and optional sentencing provisions he suggested did not differ adequately from the ordinary terms.

This memorandum caused a storm⁵⁴ which had the happy consequence of helping to perfect the formulations. The special sentence which the court is authorized, in its discretion, to impose became a term without a minimum and with a fixed statutory maximum of but

⁵¹ See Tappan, *The California Youth Authority and the Model Penal Code*, in MODEL PENAL CODE at 109 (Tent. Draft No. 7, 1957); *Young Adults Under the Youth Authority*, 47 J. CRIM. L., C. & P.S. 629 (1957). See also Pirsig, *Juvenile Delinquency and Crime: Achievements of the 1959 Minnesota Legislature*, 44 MINN. L. REV. 363, 364-75 (1960) (discussing Minn. Laws 1959, ch. 263).

⁵² See, e.g., Chute, *The Youth Correction Authority in Theory and Practice*, 9 LAW & CONTEMP. PROB. 721 (1942); Pirsig, *supra* note 51, at 366-67.

⁵³ See MODEL PENAL CODE § 402.3, comment at 33-34, 94 (Tent. Draft No. 7, 1957).

⁵⁴ See, e.g., Youngdahl, *Give the Youth Corrections Program a Chance*, Fed. Prob., March 1956, p. 3.

four years, regardless of the degree of the crime. This is the way it stands in Tentative Draft No. 7.⁵⁵ The court, moreover, is empowered at the time of sentence to the special term, or to a sentence other than imprisonment, to order that so long as the defendant is not convicted of another felony, the judgment shall not stand as a conviction for the purposes of any disability imposed by law upon conviction of a crime. If a young adult offender is discharged from probation or parole before the expiration of the maximum term thereof, the court may also enter an order vacating the judgment of conviction. Finally, a special division of the Department of Correction is directed to provide for every young offender such specialized and individualized correctional and rehabilitative treatment as may be appropriate to his needs. A special division of the parole board is proposed to make release decisions in such cases.

⁵⁵ Section 6.05. *Young Adult Offenders.*

(1) *Specialized correctional treatment.* A young adult offender is a person convicted of a crime who, at the time of sentencing, is sixteen but less than twenty-two years of age. A young adult offender who is sentenced to a term of imprisonment which may exceed thirty days [alternatives: (1) ninety days; (2) one year] shall be committed to the custody of the Division of Young Adult Correction of the Department of Correction, and shall receive, as far as practicable, such special and individualized correctional and rehabilitative treatment as may be appropriate to his needs.

(2) *Special term.* A young adult offender convicted of a felony may, in lieu of any other sentence of imprisonment authorized by this Article, be sentenced to a special term of imprisonment without a minimum and with a maximum of four years, regardless of the degree of the felony involved, if the Court is of the opinion that such special term is adequate for his correction and rehabilitation and will not jeopardize the protection of the public.

(3) *Removal of disabilities; vacation of conviction.*

(a) In sentencing a young adult offender to the special term provided by this Section or to any sentence other than one of imprisonment, the Court may order that so long as he is not convicted of another felony, the judgment shall not constitute a conviction for the purposes of any disqualification or disability imposed by law upon conviction of a crime.

(b) When any young adult offender is unconditionally discharged from probation or parole before the expiration of the maximum term thereof, the Court may enter an order vacating the judgment of conviction.

(4) *Commitment for observation.* If, after presentence investigation, the Court desires additional information concerning a young adult offender before imposing sentence, it may order that he be committed, for a period not exceeding ninety days, to the custody of the Division of Young Adult Correction of the Department of Correction for observation and study at an appropriate reception or classification center. Such Division of the Department of Correction and the [Young Adult Division of the] Board of Parole shall advise the Court of their findings and recommendations on or before the expiration of such ninety-day period.

The section, as printed here, embodies the revisions made by the Institute at its meeting in May 1957. See 34 ALI PROCEEDINGS 117-55 (1957). It should be emphasized that the Institute does not recommend that those states which have utilized the Authority plan in dealing with young adult offenders should now alter their position. The present formulations are proposed for use in states which have found the Authority unacceptable as most states have. See MODEL PENAL CODE, Reporter's Note at 3, § 402.3, comment at 34 (Tent. Draft No. 7, 1957).

These provisions closely follow the pattern of the Federal Youth Corrections Act of 1950,⁵⁶ which indeed was consciously adopted as a model. That act has been extremely well received both by the courts and by the organs of correction. It is generally and quite rightly viewed by correctional authorities as a significant achievement. It may be wondered, therefore, why—if I may return again to Mr. Rubin's article in the *American Bar Association Journal*⁵⁷—substantially the same provisions in the Model Code are alleged to involve a major retrogression.

Distortion of this kind illustrates one of the great dangers in the whole field of correction: the tendency to view the issues as a battleground of slogans; to think, as Holmes so often put it, words instead of things. The youth correction issue does not pose a single question—whether one favors or opposes a Youth Correction Act. It raises rather a whole series of specific problems as to what the contents of the act should be—problems such as the form and length of sentence to be used, the locus of responsibility for the establishment of treatment facilities and the administration of correction, the agency to make release decisions, the mechanisms (if any) to be employed to limit or remove the stigma of conviction. Is it too much to ask that unless an evaluation is conducted in these terms, it should be treated with intelligent neglect by those concerned with legislative policy?

CONCLUSION

I have not tried, of course, to canvass all the sections of the Model Code addressed to sentence and correction or to deal with all the questions they present. There are many other issues in probation and parole. There are important questions of the form, organization, and relation of the diverse organs of correction. There are provisions dealing with administration. There is an effort to promote improved facilities, especially the new, diversified institutions all states so badly need. There are problems of the rights of prisoners. There is the grim question of when the death sentence should be available and who should order its employment in the jurisdictions where it is allowed.

⁵⁶ 18 U.S.C. §§ 5005-26 (1958). As originally enacted, these provisions dealt with offenders under twenty-two years of age at the time of conviction. 18 U.S.C. § 4209 (1958) raised the age limit to offenders under twenty-six, an extension which we do not propose to follow in the Model Penal Code.

⁵⁷ Rubin, *Sentencing and Correctional Treatment Under the Law Institute's Model Penal Code*, 46 A.B.A.J. 994 (1960).

I hope, however, that this survey will contribute to arousing interest in the subject. Lawyers and law schools have too long neglected this important area of law and of administration, which means so much to the community and to the individuals involved. The law that governs sentence and correction needs sustained and critical attention, without programmatic precommitments, of the kind the bench and bar and universities can give it. Promoting such attention is above all else the object of the Institute in working on the Model Penal Code. We dare to hope that this objective now is being gained.