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Revision and Codification of Penal Law in the United States

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Articles

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I am honored by the invitation to address you and happy to join in your tribute to the memory of Horace Read.

Dean Read was a pioneer in the perception that this is a legislative age, one of the greatest legislative eras of all time. He was concerned that lawyers be equipped to deal effectively with the ever growing corpus of the statutory law and he made valuable contributions to that end. Whether the larger legislative role in the development of law that he depicted and foresaw was a phenomenon that he regarded with approval or regret, I must confess I do not know. But speaking for myself, I do not hesitate to say that I regard it—and I have regarded it for almost half a century—as essential to maintain a living law.

Courts have, to be sure, an important role to play in the refreshment and refurbishing of legal norms, and I do not depreciate their contributions. But judicial capacity and function do not extend to the critical, creative reexamination and rethinking that our law so badly needs in many fields. Law must be regarded for this purpose through legislative rather than judicial eyes, for only at the legislative level is it possible, as Justice Roger J. Traynor of California put it long ago, "to write on a clean slate, in terms of policy transcending case or controversy, and to erase and rewrite in response to community needs."[1]

You in Canada surely have endorsed this point of view as the Law Commission concept has now taken hold both nationally and provincially. We in the United States agree increasingly in principle, though we are not disposed to place reliance on a single public agency but rather on a plurality of centers of initiative—private as well as governmental—to carry on what is assuredly an endless task. The progress we have made leaves much to be desired but there have been

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1. "Comment on Courts and Lawmaking" in *Legal Institutions Today and Tomorrow* (Paulsen ed. 1959) at 50.

significant achievements. I place in this category the revision and codification of the penal law in many of our jurisdictions.

I

In the United States, as in Canada, criminal law began with the reception of the English common law and antecedent legislation, plus a small addendum of colonial enactments. It was an obscure system, if indeed it may be called a system, fraught with technicalities and bloody in the punishments that it endeavored to impose on the unfortunates within its toils. Livingston and others made a valiant effort to refurbish this inheritance but on the whole their efforts were abortive. Legislation did reduce the number of the capital offenses but generally went no further than to fix the lesser penalties to be imposed. If it undertook a definition of offenses, the text was very likely to be drawn from Blackstone's repetition of judicial formulations. Principles, rules and doctrines measuring the scope of liability and of defenses were dealt with very rarely in the statutes and remitted consequently to the common law.

The first protest against this state of things to bear substantial fruit was that of David Dudley Field. His crusade for written law produced results in New York State, including a penal code proposed in 1865 and enacted in 1882. The draft was copied in a number of our western states, including California, where codification was a popular program a century ago. The Code was, however, a minor achievement, for Field was not at home in penal law and neither he nor his colleagues were disposed to confront its basic problems. Hence, their draft purported only to compile and organize existing statutes, with minor additions thought—sometimes erroneously—to restate the common law. Even the systematic arrangement that the Code developed was abandoned in New York in later years in favor of an alphabetical sequence, totally obscuring any sense of function or relation in the statutory norms.

The result, as I appraised the situation thirty years ago,[2] was that, notwithstanding the importance of the penal law to society and to the individual, we did not have an integrated, reasoned *corpus juris* in this field. Such statutes as we had were fragmentary, old, disorganized and even accidental in their coverage, far more important in their gloss than in their text, producing a medley of enactment and of common law that only local history explained. Basic doctrines governing the scope and measure of the liability had received scant

2. See "The Challenge of a Model Penal Code" (1952), 65 *Harv. L. Rev.* 1097.

attention from the legislature; and discriminations that distinguished minor crime from major criminality, or otherwise had large significance for the offender's treatment, rested all too often upon factors unrelated to the ends that law should serve.

The growth of the law had been, moreover, very largely fortuitous: the statutes of an older state simply transplanted to a younger, as from Georgia to Illinois or New York to the Dakotas; accretions formulated on an *ad hoc* basis by a multitude of most particular enactments, often inconsistent or redundant, responding to the pressures and excitement that arose from time to time; systematic inventories of the total system rarely made and if made totally abortive, as in Illinois in 1935. In the first half of this century, the only one of our jurisdictions that produced a reexamination and revision of its penal law was Louisiana in the Code of 1942, a project with immediate practical objectives that forced a limited conception of the goal to be achieved.

Moved by considerations of the sort I have set forth, the American Law Institute (a private organization of judges, lawyers and law teachers devoted to the clarification and improvement of the law) undertook, with the generous financial support of the Rockefeller Foundation, to formulate and draft what we boldly called a Model Penal Code. The method of procedure, as in all the projects of the Institute, was to designate reporters whose submissions were reviewed by an eclectic body of Advisers and thereafter by the Council of the Institute and by the Institute itself in its annual meetings. In nine successive years the Institute considered a succession of printed drafts presenting formulations covering different aspects of the Code, with a complete official draft considered and approved in 1962.

The hope that animated this substantial undertaking was not to achieve uniformity in penal law throughout the country, where, as you know, criminal legislation is primarily a state and not a national responsibility, reversing the Canadian position. The goal was rather to facilitate and stimulate the systematic reappraisal of existing systems, based upon a fresh consideration of the problems they must face and of their possible solutions. It was a hope that has been realized beyond our fondest expectations.

Revision work was started in a number of the states even as the Institute began its work, producing new codes in Wisconsin effective in 1956; Illinois in 1962; Minnesota and New Mexico in 1963; New York in 1967; Georgia in 1969; Kansas in 1970; Connecticut in 1971; Colorado and Oregon in 1972; Delaware, Hawaii, New Hampshire,

Pennsylvania and Utah in 1973; Ohio, Montana and Texas in 1974; Florida, Kentucky, North Dakota and Virginia in 1975; Arkansas, Maine and Washington in 1976; South Dakota and Indiana in 1977; Arizona and Iowa in 1978; Missouri, Nebraska and New Jersey in 1979; and Alabama and Alaska in 1980. Of these 34 enactments it is fair to say that 33 (excluding only Wisconsin) were in some part influenced by the positions taken in the Model Code, though the extent to which particular formulations or approaches of the Model were adopted varied extensively from state to state. Georgia, Kansas, Minnesota, New Mexico and Virginia, for example, were content with much less ambitious efforts in their revisions than Delaware, Hawaii, Kentucky, New Jersey, New York, Pennsylvania, Oregon and Utah. What is important is, however, that the legislative process has at long last made a major effort to appraise the content of the penal law by a contemporary reasoned judgment — the prohibitions it lays down, the excuses it admits, the sanctions it employs, and the range of the authority that it distributes and confers.

Nor is the process over yet. Draft codes prepared in jurisdictions where enactment failed, notably California, Massachusetts, Michigan, Oklahoma, Tennessee and Vermont, may still be revived (though not I suppose in Idaho where the model was enacted effective January 1, 1972, but promptly repealed as of the following April 1, in response to the objection of the prosecutors). There are also pending bills in West Virginia and Wyoming that may pass.[3] Congress, moreover, has been working a full decade on the drafting of an integrated code of our federal criminal law, based on the 1971 report of the National Commission on Reform of Federal Criminal Laws. Many bills have been prepared and hearings held; and there may still be motion on the project.[4]

Finally, I should note that quite apart from the general revisions I have mentioned, there was much reliance on the Model Code in legislation addressed to specific problems, such as jurisdiction, double jeopardy, responsibility, attempts, theft, abortion, obscenity and capital punishment. There has also been a gratifying use of the material by courts as an interpretative aid and in restating or reshaping areas of the unwritten law. From July 1959 to April 1, 1981, drafts of the Model, tentative or final, were cited by our appellate courts in 1339 cases, 134 of them in Pennsylvania, 89 in New York, 86 in Massachusetts and 58 in the Supreme Court of the United States.

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3. The Wyoming Code has now been enacted, effective July 1, 1983.
4. I have added as an Appendix a chart describing the current status of criminal code revision in the jurisdictions of the United States. See *infra* at 233-235.

Such is the magnitude of the legislative development in penal law that I wished to call to your attention. It is a movement that developed strength without a pre-commitment to particular reforms, its impetus essentially a moral sentiment: the need for reassurance that when so much is at stake for the community and for the individual, care has been taken to make law as rational and just as law can be. Would I be wrong in thinking that this is essentially the sentiment that animates the approach of your national Law Reform Commission to the revision of the Criminal Code, as expressed, for example, in its 1977 report (*Our Criminal Law*), which I regard as a distinguished document?

That our development was greatly facilitated by the Model Penal Code and its availability as a point of departure for revision work is not only my own opinion; that influence has been attested by the scholars and, indeed, by the revisers themselves. The Model Code, however, did not stand alone. The American Bar Association Standards Relating to the Administration of Criminal Justice, prepared during the years from 1964 to 1973 (and since republished in a revised edition), the 1967 report of the President's Commission on Law Enforcement and the Administration of Criminal Justice (*The Challenge of Crime in a Free Society*), the support in a later administration of the National Advisory Commission on Criminal Justice Standards and Goals, the establishment by Congress of the Law Enforcement Assistance Administration and its willingness to provide substantial grants in aid for penal law revision—yielded in combination supporting stimuli of great significance. Moreover, once the Illinois and New York codes had been enacted in 1961 and 1965, they functioned most effectively as models for the work in other jurisdictions, mitigating the political hazard of reliance on a source that might be denigrated as theoretical or academic. As the process advanced from year to year, traditional habits of legislative imitation were thus accorded ever wider scope, facilitating new enactments.

II

I come now to the hardest portion of my task, to give some indication of the content of the codes and of the progress I believe they have achieved. Their variations in the treatment of specific subjects, not to speak of the details of legislative language, are, of course, too numerous to canvass in a lecture. That they merit more attention than they thus far have received from legal scholars is quite clearly indicated by the three-volume study our Institute has published on the definitions of specific crimes (Model Penal Code and

Commentaries, Part II, 1980) and will be demonstrated further by forthcoming volumes on Part I, the general provisions. I shall attempt no more than to describe some of the common characteristics of the codes, adding as time permits selected illustrations of their treatment of important problems.[5]

Following the example of the Model Penal Code, the new codes are organized in general and special parts, with the general much more extensive in its treatment of pervasive problems than was heretofore the case in our tradition, and the special, embodying the definitions and gradations of specific crimes, organized functionally in terms of the interests sought to be protected or the evils sought to be averted by the penal law.

In the Model Code the general provisions begin with a preliminary article addressed to purposes and principles of construction, territorial applicability, the classification of offenses, time limitations, multiple prosecutions and double jeopardy, the burden of proof and presumptions. Article 2 attempts to formulate general principles of liability and exculpation, including the modes of culpability, with emphasis upon the mental element; causality; strict liability; complicity; the criminal liability of corporations and associations and of persons acting or responsible for acting on their behalf; the defensive significance of mistake, intoxication, duress, consent, military orders and entrapment. Article 3 deals with the general principles of justification for conduct that would otherwise be criminal, including broad provisions on the choice of evils and privileged instrusions upon property and narrower provisions on the use of force in self-protection, the protection of other persons and of property, in crime prevention, law enforcement and the discharge of various responsibilities for care, discipline and safety. Article 4 is addressed to the significance of mental disease or defect and immaturity in excluding criminal responsibility, along with the procedural problems presented when such issues have been raised. Article 5 deals with inchoate crimes: attempts, solicitation and conspiracy and the prohibited possession of offensive weapons or the instruments of crime. Article 6 delineates the authorized methods of disposing of offenders on conviction, including fines, suspension of sentence, probation and imprisonment, fixing the limits of all prison sentences for the several grades and degrees of offenses that the code employs. Article 7, finally, sets

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5. For earlier but somewhat more extensive descriptions, see, *e.g.*, Wechsler, "Codification of Criminal Law in the United States: The Model Penal Code" (1968), 68 *Colum. L. Rev.* 1425, "The Model Penal Code and the Codification of American Criminal Law" in *Crime, Criminology and Public Policy* (R. Hood ed. 1974) at 419.

forth criteria for withholding sentence of imprisonment, placing the defendant on probation, imposing fines, ordering imprisonment for an extended term, and multiple sentences for multiple offenses. It also deals with many aspects of sentencing procedure.

Part II of the Model contains the definitions of specific crimes. It does not purport to be exhaustive but there is a full treatment of crimes involving danger to the person, such as homicide, assault, reckless endangering, threats, kidnapping, false imprisonment and criminal coercion; the sexual offenses; the major offenses against property, including arson, criminal mischief, burglary, robbery, theft, forgery and fraudulent practices; offenses against the family, such as bigamy, incest, abortion, endangering child welfare and persistent non-support; offenses against public administration, including bribery and corrupt influence, perjury and other falsifications, obstructions of governmental operations and abuse of office. Lastly, offenses against public order and decency, like riot, disorderly conduct, public drunkenness, crimes of desecration and the violation of privacy, as well as lewdness, prostitution and obscenity are dealt with in detail.[6]

The codes reflect to a remarkable degree these concepts of organization and coverage, with the result that there is now in place an elaborate set of general provisions, formulating elements of liability and grounds of exculpation deemed to qualify or supplement the definition of specific crimes, save as exceptions may be made on special grounds; and there is a full legislative treatment of the definitions and gradations of the common crimes.

Not all the codes, I hasten to make clear, address all the problems dealt with in the Model but most of them, I think it fair to say, confront most of the issues that the Model undertook to draw. This works a quite dramatic change, I hardly need to say, in the content of our statutory law.

III

Passing beyond these general descriptions, I wish, before concluding, to present the substance of some common features of the codes involving major substantive improvements, drawing examples from both general and special parts, within the limits of my time.

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6. Parts III and IV of the Model Code dealing with correctional matters and the organization of a Department of Correction address problems that are not upon the whole treated in the new codes and I, therefore, pass their content by in this discussion.

1. Mens Rea and the Modes of Culpability.

It is, I think, the general opinion that the most dramatic breakthrough in the general provisions inheres in the widespread acceptance of the treatment of *mens rea* in Article 2 of the Model Code.

This analysis begins by classifying the material objective elements of crimes as involving either the nature of the actor's conduct (shooting a gun, driving a car, writing a check) or the attendant circumstances (a crowded street, a drunken driver, an empty bank account) or a result of conduct (causing death, injury, deception or financial loss). The problem of the mental element arises obviously with respect to each of the objective elements that give the actor's conduct its offensive quality and are included for that reason in the definition of the crime or that negate an excuse or justification that would otherwise obtain.

After declaring that "a person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable," the Code defines the further elements of culpability in terms of only four familiar concepts: purpose, knowledge, recklessness and negligence. The minimal statement is that one may not be convicted of a crime "unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." This formulation recognizes that the required mode of culpability may not only vary from crime to crime but also from one to another material element of the same offense, meaning by material element, you will recall, those aspects of conduct, attendant circumstances or result that give behavior its offensive quality. In homicide, for example, the law may require proof that the defendant killed purposely or knowingly to establish that a murder was committed. But if self-defense is claimed in exculpation, it may suffice to negative the defense that the actor's belief in his peril did not rest on reasonable grounds. When and if that is so, negligence is all the law requires with respect to the existence of attendant circumstances precluding the defense—which in this context it is useful to treat as an element of the offense.

One of the virtues of this method of analysis is that it invites attention to the wisdom of such stark distinctions as to culpability respecting different elements of an offense. The Code makes some attempt to promote uniformity upon this issue by providing that when "the law defining an offense prescribes the kind of culpability that is sufficient for" its commission "without distinguishing among the material elements thereof, such provision shall apply to all the

material elements of the offense, unless a contrary purpose plainly appears." It also states what we believed to be the common law position that when "the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto." The legislature in defining crimes may thus draw such distinctions among offenses or the elements thereof as it deems wise, but if it fails to articulate decisions of this kind, the Code prescribes the norms that shall prevail.

The basic culpability conceptions are defined. The distinction between acting purposely and knowingly is very narrow, since awareness that the requisite external circumstances exist is a common element. But action is not deemed purposive with respect to the nature or results of an actor's conduct, unless "it was his conscious object to engage in conduct of that nature or to cause such a result." Though acting knowingly suffices to establish liability for most offenses, there are situations where the law requires purpose, such as treason, complicity, attempt, solicitation and conspiracy, to cite but few examples. Purpose is, moreover, frequently employed in determining the gravity of crimes for purposes of sentence.

Recklessness, as the Model Code defines the term, involves conscious risk creation. It resembles acting knowingly in that a state of awareness is involved but the awareness is of risk, short of practical certainty with respect to a result or deliberate blindness to a high probability with respect to the existence of a fact. The risk consciously disregarded must be "substantial" and must, moreover, be "unjustifiable", since even substantial risks often may be taken properly, depending on their nature and the character and purpose of the conduct. A surgeon may perform an operation though he knows it very likely to be fatal, if he thinks that it affords the patient's only chance. The ultimate question put, when all is weighed, is whether the actor's disregard of the known risk "involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." That is a standard that can be given further content only in its application to a concrete case.

Negligence is distinguished from acting purposely, knowingly or recklessly in that it does not involve a state of awareness. It is the case where the actor "should be aware of a substantial and unjustifiable risk that a material element [of an offense] exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross

deviation from the standard of care that a reasonable person would observe in the actor's situation." Gross deviation is again the ultimate standard that can gain further content only in its application to a concrete case. Much more than the "ordinary negligence" of tort law is, of course, involved. Even so, the Model accepts negligence as sufficient for liability only in exceptional cases where maximum preventive effort is essential, as in homicide or causing bodily injury, or where it alleviates strict liability or otherwise effects a mitigation in the rigor of the antecedent law.

As I reflect upon this recitation, I am appalled, as you must be, by its inordinate abstraction. I say, however, in defense that compared to the judicial exegesis of *mens rea* that these formulations were intended to supplant, with its plethora of words and phrases of the most uncertain meaning—the Code concepts are a model of clarity and of precision. Their adoption now with only minor verbal variations in the penal codes of half of our states and their inclusion in all of the federal proposals provide assurance that they have not been too abstruse for sympathetic legislative comprehension, that, indeed, they present a viable statutory treatment of this ancient and elusive problem.

2. Strict Liability.

The emphasis on culpability does not, of course, preclude the legislature from insisting on strict liability in given areas, as there is a strong tendency to do with respect to such matters, for example, as mistake respecting the age of the victim when that is material in a sexual offense. It can be said, in general, however, that the new codes have responded to the efforts in the Model to cut down upon such areas. They have unhappily been less responsive to the frontal attack that the Model mounted on strict liability in regulatory statutes located outside the penal code but employing penal sanctions.

The Code proposal is, in substance, that unless negligence at least is proved, a violation of the statute may be dealt with only by a fine or civil penalty or forfeiture, not by a sentence of probation or imprisonment; and the conviction does not constitute a crime. The result would be quite similar to that favored by the Canadian Law Reform Commission in recommending that "every offence outside the Criminal Code admits of a defence of due diligence" (*Our Criminal Law*, at 32-33), except that the burden of persuasion would not necessarily be shifted to the defendant. No more than a handful of the codes have thus far accepted this solution. Most go no further than to provide, as New York does, that a "statute defining a crime, unless clearly

indicating a legislative intent to impose strict liability" shall "be construed as defining a crime of mental culpability."[7] This is a declaration that could have a large effect, however, since statutes of this kind are typically silent with respect to any culpability requirement, simply condemning doing or not doing this or that. I see signs in our decisions now that judicial hospitality to strict liability is very much on the decline. With deregulation on the rise, legislative hospitality may be declining too.

It is surely not a subtle point to insist that the law of crime cannot be insulated from the demands of justice with respect to allocating blame and punishment. The court that pronounces a conviction must be able to declare that the defendant acted wrongly in the conduct held to constitute a crime. This is a matter of intrinsic fairness to the person who is judged, but it is more than that as well. The law promotes the general security by building confidence that those whose conduct does not warrant condemnation, those who seek and take care to live within the law, will not be condemned as criminal. This is a value of enormous moment in a free society. It is intrinsic to the sense of justice that alone gives moral force to the proscriptions of the penal law.

3. Other General Provisions Relevant to Culpability.

The point of view I have expressed animates other general provisions of the codes that time does not permit me to discuss. I have in mind especially the widespread recognition of a defense based upon reasonable reliance on official statements of the law; the general insistence upon purpose as the mode of culpability in complicity rather than an objective test of probability; the mitigation of corporate liability when neither the board of directors nor a high managerial agent is involved in the commission of the offense; the extension of the defense of duress to all offenses, measured by whether "a person of reasonable firmness" in the actor's situation "would have been unable to resist" the pressure; the articulation of a general defense of entrapment; the introduction in some of the codes of a broad justification based on a necessary choice of evils, coupled in some jurisdictions with insistence that belief in the existence of justifying circumstances should suffice to exculpate, unless the belief is recklessly or negligently formed and recklessness or negligence, as the case may be, establishes the culpability required for commission of the offense charged; the effort to impose reasonable limits on the use of deadly

7. N.Y. *Penal Law* 15.15 (2).

force in law enforcement, especially to effect an arrest; the reformulation in more than half our jurisdictions of the criterion determining the significance of mental disease or defect as a ground of exculpation (in terms of lack of "substantial capacity" to appreciate the wrongfulness of conduct or to conform conduct to the requirements of law); the broadening of the concept of criminal attempt, subject to the introduction of a defense of voluntary renunciation; the limitation of criminal conspiracy to cases where the object is commission of a criminal offense and the introduction there as well of a defense of voluntary renunciation.

In net effect, I submit that these formulations and reformulations relate liability to culpability more fairly and precisely than the antecedent law. That is in my book a significant advance.

IV

I have spoken at such length about the general provisions because they are the most distinctive innovation of the new codes but there is much of interest in the special parts as well, to which a brief allusion should be made.

The treatment of homicide has been reworked in most of the revisions, employing the three categories of murder, manslaughter and negligent homicide, with murder often differentiated into two degrees. As to the scope of criminality, the most important change is the abandonment in many jurisdictions of the rule that any death causally attributable to an otherwise unlawful act is at least manslaughter and the narrowing, or in a few cases the elimination, of felony murder. With respect to the grading of criminal homicide, the most important change is the extensive abandonment of deliberation and premeditation as determinants of gravity in favor of a broad criterion for reducing an intentional homicide from murder to manslaughter if it is committed "under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse," judging the matter "from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." The further complications in states striving to maintain a capital sanction in the face of shifting constitutional adjudication would demand another lecture to describe.

I should add that most of the revisions now include a supplementary provision of the Model Code defining an offense of "reckless endangering", committed if a person "recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury." This generalization, with the definition of

recklessness carrying the main burden of its content, suffices typically to supplant a multitude of more particular enactments addressed to particular types of conduct or particular risks, with the inevitable gaps that they entail.

In the area of sex offenses, some twenty of our jurisdictions have thus far followed the example of the Model Code in excluding private consensual conduct from the scope of criminality, unless children are victimized or there is coercion or other imposition. Many jurisdictions had, moreover, greatly relaxed the condemnation of abortion, though only Hawaii and New York had gone as far in this regard as Britain in the Act of 1967, before we all discovered that a course that we thought wise in point of policy was a constitutional imperative.

Finally, I do not hesitate to say that even in the most familiar areas, rape, kidnapping, arson, property destruction, burglary, robbery, extortion, theft and criminal fraud, a study of the codes will demonstrate how large an opportunity obtained for disciplined reformulation, reducing abusive overkill, eliminating wild proliferation by simple consolidation, filling gaps that had developed through the years, and reconsidering distinctions, especially between the major crimes and minor criminality. It is modest judgment to aver that great improvements have been made.

V

I have reserved for last a comment on the way the codes have dealt with the most difficult and most intractable of all the problems of this field, the sentencing and treatment of offenders.

The Model Penal Code had recognized how totally anarchical our legislation was in every one of our jurisdictions in its prescriptions as to sentence, especially the length of prison terms that might be imposed upon conviction, the availability and size of fines, the permissibility of dispositions that do not involve detention, like probation or suspension or conditional discharge, the determinants of eligibility for release before the expiration of a prison term, either because of earned reductions or upon parole.

The anarchy was most extreme in relation to prison terms where it was not uncommon for the statutes to employ more than a dozen different minima and maxima, mandatory or permissive, attached in each case to the provision that defined the crime. The Code offered a remedy upon this point that proved quite workable in drafting, namely, to establish for the purposes of sentence a small number of categories to one of which every offense or degree of offense would be

assigned, with the nature of the disposition authorized the same for each offense within the category. The draftsmen of the Model thought that three degrees of felony, with maximum prison terms of life, ten years and five were all that were required for the serious offenses, with one year and thirty days for lesser crimes, misdemeanors and petty misdemeanors.[8]

The choice of three and two involved, of course, an element of arbitrary judgment. The crucial point was to confine the variation within reasonable bounds.

Almost all of the new codes employed this plan in drafting, though they differed markedly as to the number of the sentencing categories employed. New York, for example, used five classes for the serious offenses rather than three, primarily I think for added scope in plea bargaining, but the result was not unsuitable in my opinion.

There was, however, some acceptance of other positions of the Model Code, such as that judicial discretion to forego a sentence of imprisonment should be unfettered except, perhaps, in murder; that minimum prison sentences should not be mandated by statute but should rather be discretionary with the court, so long as a substantial spread between the minimum and maximum obtains; that all releases ought to be upon parole; that criteria should be developed and enacted calling on the courts to forego sentence of imprisonment unless it is adjudged essential in a given case for a reason that the Code declares to be sufficient, including to avoid depreciation of the offender's crime; and that parole criteria should call for release when eligibility had been attained unless retention is believed to be essential for a reason that the Code declares to be sufficient, including that release at that time would depreciate the seriousness of the crime.

I say that there was some acceptance of these positions and would have asserted with some confidence ten years ago that the acceptance would increase. I make no such prediction now. The protest against disparity in sentences, the miserable state of most of our penal institutions, the growth in the incidence of violent crime, the revolt against the paternalism inherent in the rehabilitative goal, the resurgence of retributive emotions clothed in philosophical pretensions have produced counter-forces in our culture the ultimate results of which are unforeseeable in my opinion. Certain it is that a number of our jurisdictions have moved backwards towards determinate sentences with a large element of legislative mandate; that parole has been

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8. See generally Wechsler, "Sentencing, Correction and the Model Penal Code" (1961), 109 *U. Pa. L. Rev.* 465.

abolished in some jurisdictions and now struggles to survive; that individualization, with all the benevolence that it implies, is charged to be tyrannical. Meanwhile, prison sentences grow longer, the prison population rises and resources for its maintenance decline!

I view none of this with equanimity but I expect the pendulum to swing again in a more hopeful direction. I envy those of you who are still young enough to witness this revival when it comes.

Appendix

Status of Substantive Penal Law Revision†

I. Revised Codes; Effective Dates: (38)

* Ala. Code tit. 13A (1978 Special Pamphlet: Criminal Code); 1/1/1980.
* Alas. Stat. tit. 11 (Oct. 1978 Pamphlet); 1/1/1980.
  Am. Samoa Code tit. 15 (1979 Cum. Pocket Supp.); 1/1/1980.
* Ariz. Rev. Stat. Ann. tit. 13 (1978); 10/1/1978.
* Ark. Stat. Ann. tit. 41 (1977 Replacement Vol. 4); 1/1/1976.
* Colo. Rev. Stat. Ann. tit. 18 (1978 Replacement Vol. 8); 7/1/1972.
  Conn. Gen. Stat. Ann. tit. 53a (West 1972); 10/1/1971.
* Del. Code Ann. tit. 11 (1979 Replacement Vol. 7); 7/1/1973.
  Fla. Stat. Ann. tit. 44 (West 1976); 7/1/1975.
* Ga. Code Ann. tit. 26 (1978); 7/1/1969.
* Haw. Rev. Stat. tit. 37 (1976 Replacement Vol. 7A); 1/1/1973.
* Ill. Ann. Stat. ch. 38, § 1-1 (Smith-Hurd 1972); 1/1/1962.
  Ill. Unified Code of Corrections, Ill. Ann. Stat. ch. 38, § 1001-1-1 (Smith-Hurd 1973); 1/1/1973.
* Ind. Code Ann. tit. 35 (Burns, 1979 Replacement Volume); 10/1/1977.
  Iowa Code Ann. tit. 35 (Criminal Code), tit. 37 (Corrections Code) (West 1979); 1/1/1978.
* Kan. Stat. Ann. ch. 21 (1974); 7/1/1970.
* Ky. Rev. Stat. Ann. chs. 500-534 (Bobbs-Merrill, 1975 Replacement Vol. 16); 1/1/1975.
  La. Rev. Stat. Ann. tit. 14 (West 1974); 1942.
* Me. Rev. Stat. Ann. tit. 17-A (1981 Pamphlet); 5/1/1976.
  Minn. Stat. Ann. ch. 609 (West 1964); 9/1/1963.
* Mo. Ann. Stat. tit. 38 (Vernon 1979); 1/1/1979.
* Mont. Code Ann. tit. 45 (1981); 1/1/1974.
  Neb. Rev. Stat. ch. 28 (1979 Reissue of Vol. 2A); 1/1/1979.
* N.H. Rev. Stat. Ann. tit. 62 (1974); 11/1/1973.
* N.J. Stat. Ann. tit. 2C (West, 1981 Special Pamphlet); 9/1/1979.

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† as of April 1982 (54 jurisdictions). This chart was prepared and is maintained by Rhoda Lee Bauch, The American Law Institute, 435 W. 116 St., New York City 10027.

* indicates publication of substantial commentary

N.M. Stat. Ann. ch. 30 (1978); 7/1/1963.
* N.Y. Penal Law (McKinney 1975); 9/1/1967.
N.D. Cent. Code tit. 12.1 (1976 Replacement Vol. 2); 7/1/1975.
* Ohio Rev. Code Ann. tit. 29 (Baldwin, Oct. 1979 Replacement Unit); 1/1/1974.
Ore. Rev. Stat. tit. 16 (1977 Replacement Part); 1/1/1972.
* Pa. Cons. Stat. Ann. tit. 18 (Purdon 1973); 6/6/1973.
* P.R. Laws Ann. tit. 33 (1980 Cum. Pocket Supp.); 1/22/1975.
S.D. Codified Laws tit. 22 (1979 Revision); 4/1/1977.
* Tex. Penal Code Ann. (Vernon 1974); 1/1/1974.
Utah Code Ann. tit. 76 (1978 Replacement Vol. 8B); 7/1/1973.
Va. Code tit. 18.2 (1975 Replacement Vol. 4); 10/1/1975.
* Wash. Rev. Code Ann. tit. 9A (1977); 7/1/1976.
* Wis. Stat. Ann. tit. 45 (West 1958); 7/1/1956.
* Wyo. Criminal Code of 1982, ch. 75, 1982 Wyo. Sess. Laws —; 7/1/1983.

II. Current Substantive Penal Code Revision Projects:

A. Revision Completed; Not Yet Enacted: (5)
* District of Columbia (Basic Criminal Code being reviewed by Council of the District of Columbia)
* Massachusetts (Special Legislative Committee preparing new bills)
* Michigan (Second Revised Criminal Code, H.B. 4842, introduced 9/18/1979, under study by Joint Senate/House Committee)
* United States (S. 1630, 97th Cong., reported with amendments by Senate Judiciary Committee 1/25/1982; H.R. 6915 reported favorably in 96th Cong. by House Judiciary Committee reintroduced in 97th Cong. as H.R. 1647 and referred to House Judiciary Committee)
* West Virginia (Proposed Code, printed in bill form with commentary, being studied by full Judiciary Committees of Senate and House; Hearings to be held prior to introduction in 1983 Legislature)

B. Revision Under Way: (2)
* North Carolina, South Carolina (second effort)

C. Contemplating Revision: (2)
Mississsippi, Rhode Island

III. Revision Completed but Abortive: (6)
* California (S.B. 27 not reported out of Assembly Committee on Criminal Justice in 1977)
Idaho (Idaho Penal & Correctional Code tit. 18, enacted effective 1/1/1972 but repealed effective 4/1/1972)
* Maryland (Partial enactments: responsibility; theft and related offenses. Further submission suspended.)

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* indicates publication of substantial commentary

Oklahoma (S.B. 46 not reported out of Senate Committee on Criminal Jurisprudence in 1977)

* Tennessee (S.B. 600 reported in 1977 to have failed in Committee)
* Vermont (Bill passed by House as amended; reported in 1976 to have failed in Senate Judiciary Committee)

IV. No Over-All Revision Planned: (1)

Nevada (recodification with minor changes enacted 1967)

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* indicates publication of substantial commentary