

# REFORM OF STATE CRIMINAL LAW AND PROCEDURE

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## INTRODUCTION

Although the mid-nineteenth century saw many states adopting penal codes, many influenced by the work of David Dudley Field,<sup>1</sup> thereafter, until the early 1960s, little attention was paid to systematic revision of state criminal law. Most states saw simply a gradual accretion of conflicting provisions, as successive legislative sessions reacted to problem cases or the vagaries of judicial construction of statutory language. The consequence in most jurisdictions was an unwieldy, unsystematic, bloated body of penal legislation, shot through with obsolete provisions, plagued by overlapping standards with inconsistent penalties, yet on occasion not reaching new forms of conduct, particularly conduct acquisitive in character. Legal specialists could manage under (or manipulate) the criminal law, but the function of notifying laypersons what the law required of them became largely lost from view.

In similar fashion, many states relied essentially on common-law criminal procedure, or adopted codes of criminal procedure suitable to rural or frontier conditions, but then left them unrevised on important points after urbanization had rendered the formal provisions of law archaic. Although, in practice, courts and attorneys, with or without the benefit of local court rules, generally responded to the demands of crowded dockets administered in overcrowded facilities, to the uninitiated it was difficult to distinguish those provisions still in application from those fallen into disuse.

In both the substantive criminal law and criminal procedure, however, the beginnings of a new codification and revision movement surfaced in the late 1950s and early 1960s. This movement has grown to the extent that the third quarter of this century may well be called an era of criminal law reform. The greatest single influence on revision or codification of criminal law has been the American Law Institute Model Penal Code.<sup>2</sup> Of the twenty-nine states which have enacted new codes and the fourteen jurisdictions which developed proposals currently pending before legislative bodies,<sup>3</sup> the overwhelming ma-

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1. See Reppy, *The Field Codification Concept*, in DAVID DUDLEY FIELD: CENTENARY ESSAYS CELEBRATING ONE HUNDRED YEARS OF LEGAL REFORM 17 (A. Reppy ed. 1949); Yntema, *Jurisprudence of Codification*, in *id.* at 251.

2. MODEL PENAL CODE (Prop. Official Draft, 1962) [hereinafter cited as CODE, referring to Proposed Official Draft unless otherwise indicated].

3. Current information about codification efforts can be obtained from the American Law

majority relied heavily on the Model Penal Code or predecessor state drafts or codes based on it.<sup>4</sup>

Further impetus toward modernization has also come from the National Advisory Commission on Criminal Justice Standards and Goals, the 1973 report of which calls for criminal code revision, supported by federal and state funding, in jurisdictions which have not revised their codes since the mid-1960s.<sup>5</sup> On mandate of the Law Enforcement Assistance Administration, states have been required to prepare state comprehensive plans from fiscal year 1978 forward on the basis of state standards and goals derived from the National Advisory Commission standards; some have included the principle of code revision.<sup>6</sup> While local initiative is a prerequisite to state activity, the availability of partial federal funding may well make an important difference.

The past few years have also seen the development of several important resources for criminal procedure revision. One is the American Bar Association Standards for Criminal Justice, issued between 1968 and 1973.<sup>7</sup> A second is the 1975 Uniform Rules of Criminal Procedure.<sup>8</sup> A third is the work of the National Advisory Commission on Criminal Justice Standards and Goals.<sup>9</sup> Finally, the American Law Institute Model Code of Pre-Arrestment Procedure<sup>10</sup> provides a legislative model for pretrial phases of criminal

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Institute, 435 West 116th Street, New York, N.Y. 10027. See also Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914, 914-15 nn. 1-3 (1975) [hereinafter cited as *Justification Defenses*].

4. See, e.g., Baldwin, *Criminal Law Revision in Delaware and Hawaii*, 4 U. MICH. J.L. REF. 476, 479-82 (1971); Fox, *Reflection on the Law Reforming Process*, 4 U. MICH. J.L. REF. 443, 444-45, 459 (1971); Israel, *The Process of Penal Law Reform—A Look at the Proposed Michigan Revised Criminal Code*, 14 WAYNE L. REV. 772, 773 (1968). The Model Penal Code also influenced the work of the National Commission on Reform of Federal Criminal Laws: see Clark, *Prologue to Symposium on the Proposed Federal Criminal Code*, 68 NW. U.L. REV. 817, 819 (1973). The basic organization proposed by the Commission continues in the Criminal Code Reform Act of 1977, S. 1437, 95th Cong., 1st Sess. (1977).

5. NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON THE CRIMINAL JUSTICE SYSTEM standard 13.1 (1973) [hereinafter cited as NAC REPORT]. See also NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, A NAT'L STRATEGY TO REDUCE CRIME 137 (1973). A less focused recommendation to the same effect was made by the PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 126, 143, 282-83 (1967).

6. See, e.g., MICH. ADVISORY COMM'N ON CRIMINAL JUSTICE, CRIMINAL JUSTICE GOALS AND STANDARDS FOR THE STATE OF MICHIGAN §§ 64.2, .6-.8 (1975).

7. The most accessible format is a 1974 compilation with index, containing the black letter text of and an introduction to each of the seventeen sets of standards. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, COMPILATION (1974).

8. NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM RULES OF CRIMINAL PROCEDURE (1975) [hereinafter cited as UNIFORM RULES].

9. NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON COURTS (1973) [hereinafter cited as COURTS REPORT]; NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON CORRECTIONS (1973) [hereinafter cited as CORRECTIONS REPORT].

10. Complete text and commentaries were published in a single volume in 1975, following

cases.<sup>11</sup> The availability of these resources and the interest in procedural reform they have generated, coupled with the possibility of federal funding to support in part the cost of revision,<sup>12</sup> should accelerate the modernization of criminal procedure in states that have not devoted concentrated attention to the matter for decades.

It is hardly feasible within the scope of this article to survey all areas of concern in the preparation of revised penal codes and codes or rules of criminal procedure. What follows touches on some of the most controversial and/or important areas, particularly those not covered in detail elsewhere in this symposium.

## I

### PROBLEM AREAS IN SUBSTANTIVE CODE REFORM

#### A. Code Organization and Structure

Outside the Anglo-American sphere, the logic of the criminal law has always been to differentiate those doctrines which affect all or many crimes (the general part) from definitions and interpretations of specific crimes (the special part). Hence, penal codes in that tradition have been comprehensive in scope, comprising both a general part with important definitions and concepts, and a special part, generally organized topically according to inflicted harms, *e.g.*, crimes against the person, against property, inimical to governmental operations, and against the family.

The same elements, of course, are part of Anglo-American law. However, American states in creating their early penal codes rarely attempted to restate general doctrines of culpability, justification, and defenses, leaving that to traditional judicial decision. Moreover, when legislation was organized to cover specific crimes, a number of states arranged sections alphabetically according to names of crimes. As new crimes were created, they were either attached to apparently related offenses somewhere in the alphabet or inserted as new chapters in alphabetical sequence. By this stress on a function which an adequate index could have served, a great many difficulties were created. For example, it frequently became difficult to identify hierarchical relationships between crimes for such purposes as joinder and instructions on lesser-included offenses. As related crimes were placed in different contexts, their

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Institute approval at the May 1975 annual meeting. AMERICAN LAW INSTITUTE, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (1975) [hereinafter cited as PRE-ARRAIGNMENT PROCEDURE].

11. Also useful on certain procedural problems are ABA COMM'N ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO TRIAL COURTS (App. Draft, 1976); ABA STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS (Tent. Draft, 1976). The National District Attorneys Association promulgated new standards in 1977, and the National Legal Aid and Defender Association also is drafting standards for promulgation in 1977 or 1978, some of which relate to criminal procedure statutes and rules.

12. See NAC REPORT standard 13.6.

interrelationships were hidden; thus statutory coverage became duplicative and penalties inconsistent. A common discovery in the course of code modernization has been that one act may fall within two or more statutory provisions carrying widely divergent penalties. A consequence of this is uncontrolled discretion in the hands of police and prosecutors to determine potential punishment for an individual through selection of the statutory section on which charges are to be based.

Hence, one of the greatest contributions the Model Penal Code has made to substantive code reform in the United States has been to confirm that a functional code must be organized into a general and special part, and that crimes should be hierarchically related according to harms and the degree of dangerousness manifested by modes of inflicting them. That such an approach to codification is functionally valid is attested to by the fact that all the new codes and draft codes are organized in that fashion.<sup>13</sup>

It must be noted, however, that provisions in the general part are among the most difficult to draft in a form acceptable to legislatures. Doctrinal statements which might be received uncritically or with unfocused grumbling if laid down by courts are likely to draw virulent criticism when put forth in statutory language. Indeed, at times it may be necessary to consider elimination of the general part (thus continuing in a common-law tradition the principles stated there) in order to secure passage of a topically arranged special part.<sup>14</sup>

## B. The Relevance of Mental Condition

### 1. *Definitions of Culpable States of Mind*

Although common-law principles supported a division of culpable states of mind into a limited number of categories, American legislatures until recently showed little awareness of the fact. Where statutes included any terms at all indicative of the state of mind required to accompany given activity, they fell into no obvious pattern. Hence, one finds words like "intentionally," "purposely," "knowingly," "deliberately," "wilfully," "wantonly," "recklessly," and "negligently" attached to criminal statutes, seemingly at the whim of the legislature. Seldom has a set statutory definition been provided for any of these terms, so that courts usually appear to have ignored a particular legislative

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13. See also *id.* standard 13.2, embodying these principles.

14. This is precisely the approach taken in the Criminal Code Reform Act of 1977, S. 1437, 95th Cong., 1st Sess. (1977). Because of the controversy which many of its predecessor's general part provisions aroused, section 501 provides that matters in bar, justifications and defenses (listed by name) are to be determined by federal courts "according to the principles of the common law as they may be interpreted in light of reason and experience." Congressman Rodino noted that "[i]t is expected that sometime in the next few years the Congress may be able to attempt a codification of the basic elements of the more common defenses." 123 CONG. REC. H.3960 (May 3, 1977).

choice of culpable indicator as without significance, and have construed the mens rea element of statutes in light of common-law principles, effectuation of legislative objectives of preventing identified harm, and severity of punishment.

Once more, the Model Penal Code<sup>15</sup> has indicated the path to rational code structure, by limiting culpability states of mind to four: purposely, knowingly, recklessly, and negligently. Each has its own definition, and in general the seriousness of each can be judged from that definition. Each specific offense is then qualified by a culpability designator consonant with prevention of the particular harm described there. That this approach, too, is recognized as functionally sound is attested to by the fact that all enacted codes and pending drafts incorporate essentially the Model Penal Code system.<sup>16</sup>

## 2. *The Defense of Mental Disease and Disorder*

The Model Penal Code has also served to generate a more functional statement of mental state as a defense to criminal prosecutions<sup>17</sup> than the earlier *M'Naghten*-based concepts.<sup>18</sup> In the slightly variant form of the *Currens*<sup>19</sup> test, it has now become standard in all federal circuits.<sup>20</sup> The Model Penal Code formulation has proven popular among state code reformers, having been adopted in the great majority of states with new codes.<sup>21</sup> Nevertheless, this, too, is an aspect of the general part of a proposed code which can arouse controversy before a legislature, as witnessed by some codes which preserve a right-and-wrong test<sup>22</sup> or even reject any statutory definition, leav-

15. CODE § 2.02.

16. Quite commonly, "intentionally" is substituted for "purposely," e.g., COLO. REV. STAT. § 18-1-501(6) (Supp. 1976); CONN. GEN. STAT. ANN. § 53a-3(11) (West 1972); N.Y. PENAL LAW § 15.05 (McKinney 1975); PA. STAT. ANN. tit. 18, § 302 (Purdon 1973); TEX. PENAL CODE ANN. § 6.02 (Vernon 1974); WASH. REV. CODE § 9A.08.010 (1976). A definition of "wanton" is found in KAN. STAT. § 21-3201(3) (1974) (in lieu of recklessness); KY. REV. STAT. § 501.020(3) (Supp. 1975) (in lieu of Model Penal Code "reckless"; "reckless" is used in place of "negligent"), and of "willful" in KAN. STAT. § 21-3201(2) (1974) (comprising intentional and purposeful conduct), and N.D. CENT. CODE § 12.1-02-02(e) (1976) (including intentional, knowing, or reckless conduct).

17. CODE § 4.01.

18. Daniel M'Naghten's Case, 10 Clark & Fin. 200, 8 Eng. Rep. 718 (1843); see A. GOLDSTEIN, *THE INSANITY DEFENSE* 45-53 (1967).

19. *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961).

20. Authorities are discussed in *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972), which abandoned the circuit's earlier *Durham* rule, *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), in favor of the *Currens* test.

21. E.g., ARK. STAT. ANN. § 41-601 (1976); CONN. GEN. STAT. ANN. § 53a-13 (West 1972); ILL. ANN. STAT. ch. 38, 6-2 (1972); KY. REV. STAT. ANN. § 504.020 (Baldwin 1975); ME. REV. STAT. tit. 17-A, § 58 (Supp. 1976); MONT. REV. CODES ANN. § 95-501 (1969); N.Y. PENAL LAW § 30.05 (McKinney 1975); N.D. CENT. CODE §§ 12.1-04-03 (1976); OR. REV. STAT. § 161.295 (1975); TEX. PENAL CODE ANN. § 8.01 (Vernon 1974); UTAH CODE ANN. § 76-2-305 (Supp. 1975); WIS. STAT. ANN. § 971.15 (West 1974).

22. E.g., COLO. REV. STAT. § 16-8-101 (1973); GA. CODE ANN. § 26-702 (1972); WASH. REV. CODE § 9A.12.010 (1976).

ing the matter to traditional judicial doctrine.<sup>23</sup>

One cynically inclined is likely to conclude that, however laudable the objectives, enactment of the Model Penal Code test or a variant will not actually produce much change; the objective of enabling qualified diagnosticians to describe the pathology of individuals in medically significant language probably will be little better realized than it could be under *M'Naghten* and like rules, since terms such as "substantial," "capacity," "mental disease," "mental defect," and "conform" are as much legal in character as "knowledge," "right," and "wrong" have been. Inadequate diagnostic reports are no more effective aids to suitable dispositions under the new language than they were under the old, and new terms can be manipulated as easily by behaviorists before complaisant jurists as could the old.<sup>24</sup>

Consequently, there is considerable merit in abandoning the apparently futile Anglo-American effort to devise legal tests for relevant mental condition, in favor of a simple statement that mentally ill persons need not be punished for their acts. This is the established pattern of all legal systems based on Roman law<sup>25</sup>, and has two clear analogies in modern codes. One is the doctrine that evidence of intoxication or influence of controlled substances may be used to negate culpable states of mind.<sup>26</sup> The second is the so-called diminished responsibility concept, which allows evidence of mental condition to be offered to negate the existence of culpable states of mind, apart from the general insanity defense.<sup>27</sup> True, there is a difference between what is in form a complete defense and what is a limited, essentially factual, defense to a charged culpability element. Nevertheless, the insanity defense is almost never invoked against a strict liability offense or crime in which the culpability element is negligence. In other words, abolition of the insanity defense in favor of enactment of a diminished capacity defense would work little change in the actual coverage of the criminal law.

In sum, there may be functional merit in a movement away from even the Model Penal Code test toward a simple relevancy test, in the application of which courts and juries can bring to bear the notions of basic justice which in

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23. See the commentary to a proposed Minnesota code provision based on the Model Penal Code test, MINN. STAT. ANN. § 609.07 (West 1964).

24. See George, *Emerging Constitutional Rights of the Mentally-Ill*, 2 NAT'L J. CRIM. DEFENSE 35, 48-50 (1976).

25. *E.g.*, PENAL CODE OF JAPAN art. 39 (Law No. 45 of 1907 as amended): "An act of a mentally ill person is not punishable."

26. CODE § 2.08(1); see, e.g., COLO. REV. STAT. § 18-1-804 (1973); N.D. CENT. CODE § 12.1-04-02 (1976); UTAH CODE ANN. § 76-2-306 (Supp. 1975). Although most formulations state that voluntary intoxication is not a general defense, admissibility to negate culpability is functionally close to the genesis of the insanity defense.

27. CODE § 4.02(1); COLO. REV. STAT. § 18-1-803 (1973); MONT. REV. CODES ANN. § 95-502 (1969); OR. REV. STAT. § 161.300 (1975). Equivalent doctrine has been established by judicial decision in some jurisdictions; representative citations may be found in J. HALL, B. GEORGE, & R. FORCE, *CRIMINAL LAW AND PROCEDURE: CASES AND READINGS* 474 (3d ed. 1976).

theory they now apply against the background of the more formal insanity definitions. Behaviorists would be much less able to testify in legal conclusory terms than they can today, and inadequate diagnosis might be apparent where now it is obscured in legal technical nomenclature. The Criminal Justice Reform Act of 1975 utilized this premise,<sup>28</sup> but has been eliminated in the 1977 version.<sup>29</sup> Nevertheless, it is submitted, this is a matter on which more extended debate is warranted than has been devoted to it thus far.<sup>30</sup>

### C. Defenses Under the New Codes

Before the current codification movement, little legislative attention was devoted to a restatement or redefinition of general defenses to or justifications for activities otherwise criminal. Delineation of these matters through an accretion of judicial decisions proved generally unsatisfactory, probably because most clearly justifiable or even marginal cases were screened out of the system through exercise of police and prosecutor discretion; usually only homicide cases in which there was a clear excess use of force survived to the appeals stage.

Under the Model Penal Code, general principles of justification which should affect all crimes in the special part are set forth systematically.<sup>31</sup> Because the influence of this aspect of the Code has been well developed elsewhere,<sup>32</sup> it is enough to note here a few points at which drafting groups encounter difficulty.

One is the degree to which police are allowed to use deadly force to arrest or prevent the escape of a felon.<sup>33</sup> The Code premise is that deadly force should not be used except by law enforcement officers, and then only if a crime involving use or threatened use of deadly force forms the basis for the arresting officer's response and there is substantial risk the arrestee will cause death or serious bodily harm if arrest is delayed.<sup>34</sup> As a test more restricted in scope than the common law, it has not met with marked favor in state legisla-

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28. S. 1, 94th Cong., 1st Sess. § 522 (1975).

29. As indicated in note 14 *supra*, the 1977 Criminal Code Reform Act defines none of the justifications and defenses covered by S.1, leaving all of them, including the insanity defense, to common-law principles interpreted in the light of reason and experience. S. 1437, 95th Cong., 1st Sess. § 501 (1977). The several federal circuits no doubt will continue to follow the *Currens* test; see note 20 *supra*.

30. See also Bocchino, *Second Thoughts About Mental Competency and the Insanity Defense*, on file at Duke University School of Law, Durham, North Carolina.

31. CODE art. 3.

32. See *Justification Defenses*.

33. The well established law is that deadly force never can be used solely in connection with a misdemeanor arrest. W. LAFAYE & A. SCOTT, JR., *CRIMINAL LAW* 402-07 (1972).

34. CODE § 3.07(2). The limitation does not apply to use of deadly force believed to be immediately necessary to prevent escape from a prison, jail, or other detention facility. *Id.* § 3.07(3). It has been suggested that a statute which allows officers to use deadly force against one who has not used and is not reasonably expected to use deadly force is unconstitutional. *Mattis v. Schnarr*, 547 F.2d 1007 (8th Cir. 1976).

tures, which generally allow use of deadly force if a forcible felony underlies officers' activity or, in some states, if any felony at all is involved.<sup>35</sup> To the extent that statutes refer to official use of deadly force in the setting of resistance by an arrestee which poses or reasonably appears to pose a threat to the life of an officer or others present, they add little to what is already set forth under the rubric of self-defense and defense of others.<sup>36</sup>

A related matter is the power, or want of it, of private citizens to resist unlawful arrest. The premise underlying the Model Penal Code provision is that legality of law enforcement should be contested in the courts, not on the street, so that force may not be used to resist even an unlawful arrest known to be made by a peace officer.<sup>37</sup> While most codes and proposals accept this approach,<sup>38</sup> one may expect resistance to it in certain quarters, particularly among minority group urban residents concerned about claimed harassment by police, and rural residents maintaining orthodox common law concepts of personal freedom from improper official acts.

A third feature of Model Penal Code influences on state code revision is the creation of what might be viewed as a form of *ejusdem generis* provision, allowing a defense based on choice of evils or balance of harms, in which an actor is justified in acting if the harm generated by compliance with a criminal norm outweighs that inflicted if the otherwise prohibited activity occurs.<sup>39</sup> Although a court without such legislation can respond to changing concepts of necessity,<sup>40</sup> it is preferable to legislate a standard, as have several states.<sup>41</sup>

The defense of entrapment has proven difficult to administer and restate. Until 1976 it was dealt with in its federal guise as an aspect of culpability or mens rea, in that Congress was assumed to have intended not to include within the ambit of at least some federal criminal statutes those whose purpose to commit otherwise prohibited acts was the product of improper importunities by federal authorities or their agents.<sup>42</sup> As the dissenting Justices had maintained over the years, what actually is involved is a form of exclusionary rule, in that those benefitting from its coverage are exempt from criminal prosecution. Hence, rather than torturing the entrapment doctrine into a dimension of the subjective element of crimes, it would have been far prefera-

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35. See *Justification Defenses* 951-53.

36. CODE §§ 3.04, 3.05; *Justification Defenses* 932-34.

37. CODE § 3.04(2)(a)(i).

38. *Justification Defenses* 935-37.

39. CODE § 3.02.

40. See, e.g., *People v. Unger*, 21 CRIM. L. REP. (BNA) 2113 (Ill., April 5, 1977), *People v. Luther*, 394 Mich. 619, 232 N.W.2d 184 (1975); *People v. Harmon*, 394 Mich. 625, 232 N.W.2d 187 (1974), allowing a defense, under the aegis of duress, to criminal escape charges when flight was impelled by homosexual assault or imminent threat thereof.

41. *Justification Defenses* 925-28.

42. *United States v. Russell*, 411 U.S. 423 (1973); *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932).



ble to treat it as a specialized problem of jurisdiction over the person.<sup>43</sup>

Nonetheless, the Model Penal Code places its version of entrapment, a more sweeping one than the *Russell-Sorrells-Sherman* doctrine, in the context of culpability,<sup>44</sup> as do typical state provisions.<sup>45</sup> Although most of these statutes designate entrapment as an affirmative defense which defendants must establish by a preponderance of the evidence,<sup>46</sup> their constitutionality seems settled by *Patterson v. New York*.<sup>47</sup> Moreover, the United States Supreme Court at least *sub silentio* has abandoned its original rationale for entrapment and now recognizes that it has a due process basis, albeit with extremely narrow coverage.<sup>48</sup> This further undercuts the Model Penal Code adaptation of *Sorrells-Sherman* to state needs and suggests placement of the entrapment doctrine in the context of jurisdiction, which has already occurred in Kentucky.<sup>49</sup>

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43. Probably as an exception to the orthodox rule that jurisdiction attaches when defendants are present in court, no matter what the legality of their arrests or return to the prosecuting jurisdiction, *e.g.*, *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886). Support for the analysis in the text may be found in *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1975), *cert. denied*, 421 U.S. 1001 (1975); *United States v. Toscanino*, 500 F.2d 267, 273 (2d Cir. 1974), indicating that if a person is returned from another country and subjected in the process to outrageous treatment which "shocks the conscience," the government might be denied the fruits of its unlawful conduct through release of a defendant.

44. CODE § 2.13 covers known false representations about legality of conduct (thus constituting a special exception to the general mistake of law doctrine in section 2.04), and methods of persuasion or inducement "which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it." *Id.* § 2.13(1)(b).

45. *E.g.*, ARK. STAT. ANN. § 41-209 (1976); COLO. REV. STAT. § 18-1-709 (1973); CONN. GEN. STAT. ANN. § 53a-15 (West 1972); DEL. CODE tit. 11, § 432 (Supp. 1976); GA. CODE ANN. § 26-905 (1972); ILL. ANN. STAT. ch. 38, § 7-12 (Smith-Hurd 1972); KAN. STAT. ANN. § 21-3210 (1974); MONT. REV. CODES ANN. § 94-3-111 (Supp. 1976); N.Y. PENAL LAW § 40.05 (McKinney 1975); N.D. CENT. CODE § 12.1-05-11 (1976); PA. STAT. ANN. tit. 18, § 313 (Purdon 1973); TEX. PENAL CODE ANN. tit. 2, § 8.06 (Vernon 1974); WASH. REV. CODE ANN. § 9A.16.070 (Supp. 1976).

46. On the pattern of CODE § 2.13(2).

47. 97 S. Ct. 2319 (1977) distinguishing *Mullaney v. Wilbur* 421 U.S. 684 (1975).

48. *Hampton v. United States*, 425 U.S. 484 (1976), building on an aside in *United States v. Russell*, 411 U.S. 423, 431-32 (1973), that the Court "may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." Justice Rehnquist's plurality opinion would not permit any defendant who is found to have, or admits to, a predisposition to commit a given crime to assert the entrapment defense, while Justices Powell and Blackmun, concurring to form a five-Justice majority on the merits, would require that "police overinvolvement in crime . . . reach a demonstrable level of outrageousness before it could bar conviction." 425 U.S. at 495 n.7.

49. KY. REV. STAT. § 505.010 (1975), in a chapter entitled "Protection Against Unfair or Oppressive Prosecution" which also covers statutory double jeopardy. *Cf.* UTAH CODE ANN. § 76-2-303(4)-(6) (Supp. 1975), which requires the matter to be presented to a trial court by special motion before trial. The case is dismissed if the court finds entrapment, but if the motion is denied the defendant has a second opportunity to present the matter to the trial jury, subject to cross-examination about earlier convictions if he or she elects to testify. For recent state decisions achieving similar results, *see* *People v. Turner*, 390 Mich. 7, 210 N.W.2d 336 (1973); *People v. Moore*, 73 Mich. App. 514, 252 N.W.2d 507 (1977); *People v. Garza*, 73 Mich. App. 58, 250 N.W.2d 76 (1976) (issue under *Turner* is for court, not jury); *State v. Talbot*, 71 N.J. 160, 364 A.2d 9 (1976).

#### D. Sexual Offenses: Offenses Against the Family

Space limitations preclude discussion of all major areas of concern in defining specific crimes. Simply to illustrate the sorts of problems encountered in code drafting and enactment, however, it is well to describe the quite controversial areas of sexual offenses, for it is here that one observes perhaps the greatest conflict between pragmatism and philosophy, secular law and morals.

##### 1. Rape

In the common law tradition, rape was limited to one form of intercourse only, heterosexual intercourse in which a male was the aggressor. At its inception, the criminal standard clearly reflected a desire to safeguard the life of a raped woman, in that the earliest definitions incorporated the element of physical force, or immediate threat of such force, sufficient to overcome the victim's resistance. Over the years, however, legislation has come to protect other interests. Thus, intercourse with an unconscious woman constitutes rape. In such cases, there is no danger to the life of the woman; instead, the protected interest must be the psychic injury which accrues when the victim becomes aware of what has happened to her. In other applications of the rape concept, the underlying rationale must have been the need to protect certain females who could not (at least in a legislature's judgment) rationally decide for themselves whether to engage in sexual intercourse. Accordingly, it was rape to have intercourse with a mentally incompetent female (generally not defined further) or with one below a stated age. In most jurisdictions, there was no legislative gradation of such sexually aggressive conduct into degrees of crime punished with varying severity; differentiation between offenses and offenders could not be achieved except at sentencing, assuming a flat penalty were not prescribed for all such acts.<sup>50</sup>

At the same time, the common law proscription of sodomy developed as an essentially theological norm<sup>51</sup> translated into a heavily punished felony. In its original penal version, the norm extended only to anal intercourse, thus restricting offenders to males alone. Although some restatements of the common law standard extended criminality to include oral intercourse involving males and females,<sup>52</sup> there was no clear indication of a purpose to protect interests equivalent to those recognizable in the context of heterosexual common law rape.<sup>53</sup>

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50. In general on the above points see R. PERKINS, CRIMINAL LAW 110-29 (1957); MODEL PENAL CODE § 207.4, Comment at 241-52 (Tent. Draft No. 4, 1955).

51. See *Lev.* 18:22. See also 4 W. BLACKSTONE, COMMENTARIES \* 216.

52. *Cf. Rose v. Locke*, 423 U.S. 48 (1975) (rejecting a constitutional attack, on vagueness grounds, against a state statute prohibiting "crimes against nature, either with mankind or any beast," construed to include cunnilingus perpetrated by a male aggressor against a female victim).

53. See generally R. PERKINS, *supra* note 48, at 333-34; MODEL PENAL CODE § 207.5, Comment at 279-80 (Tent. Draft No. 4, 1955).

Granted the evident shortcomings in the inherited penal law system affecting sexual activities, all code revision efforts devote attention to the creation of a rational system. In a sense, the first determination which ought to be made is where the minimum line of criminality should be drawn, specifically, whether any consensual activity in private<sup>54</sup> between consenting adults<sup>55</sup> should be made criminal. Although several recent codes continue to punish extramarital heterosexual as well as homosexual intercourse,<sup>56</sup> only a handful of those states which have decriminalized heterosexual activity have also done away with criminal penalties for consensual homosexuality.<sup>57</sup> Hence, in many states the line between criminal and noncriminal conduct is drawn on the basis of the marital status of the parties at the time of the act.<sup>58</sup>

Once the minimum line of criminality has been established, a major goal of modern codes is to provide a rational system of graded penalties based on the seriousness of offenders' conduct.<sup>59</sup> In all the codes, the influence of the Model Penal Code<sup>60</sup> is strong: The most serious penalties are reserved for those who use force or threat of imminent serious force to induce submission,

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54. Cf. GA. CODE ANN. § 26-2011(d) (1972) (lewd caress or indecent fondling of another person in a public place); OHIO REV. CODE ANN. § 2907.09 (Baldwin 1975) (sexual conduct in a place likely to be viewed and considered an affront by others not in the offender's household); OR. REV. STAT. § 163.465 (1975) (sexual intercourse or deviate sexual intercourse in a public place).

55. Without exception, new codes perpetuate the concept of protecting (or regulating the sexual activities of) minors below a stated age by penalizing those who engage in sexual activity with them.

56. E.g., FLA. STAT. ANN. § 798.03 (West 1976); GA. CODE ANN. § 26-2010 (1972); ILL. ANN. STAT. ch. 38, § 11-8 (Smith-Hurd Supp. 1976); UTAH CODE ANN. § 76-7-104 (Supp. 1975); WIS. STAT. ANN. § 944.15 (West 1958). Open cohabitation by unmarried persons is also specially punished in, e.g., FLA. STAT. ANN. § 798.02 (West 1976); N.D. CENT. CODE § 12.1-20-10 (1976).

57. CAL. PENAL CODE § 288a (West Supp. 1977); see *People v. Rossi*, 20 CRIM. L. REP. 2199 (BNA) (Cal., Nov. 10, 1976); DEL. CODE tit. 11, § 765 (Supp. 1976) punishes only deviate sexual intercourse without the other person's consent. CONN. GEN. STAT. ANN. § 53a-67(b) (West Supp. 1977) and MINN. STAT. ANN. § 609.349 (West Supp. 1977) exempt for purposes of either heterosexual or homosexual intercourse activities of adults who cohabit in an ongoing voluntary sexual relationship at the time of the act charged. Judicial attitudes seem hostile toward efforts at achieving decriminalization through invocation of constitutional standards of vagueness, *Rose v. Locke*, 423 U.S. 48 (1975), or right to privacy, *People v. Mehr*, 87 Misc. 2d 257, 383 N.Y.S.2d 798 (App. Term, 1976); *State v. Bateman*, 113 Ariz. 107, 547 P.2d 6 (1976). But see *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976) (finding a statute penalizing consensual homosexual acts an unconstitutional invasion of privacy). An attack based on establishment of religion grounds has been rejected. *Stewart v. United States*, 364 A.2d 1205 (D.C. App. 1976).

58. The trend is to exclude from statutes defining deviate sexual intercourse relations between spouses, e.g., DEL. CODE tit. 11, § 772(b) (Supp. 1976); KY. REV. STAT. § 510.010(1) (1975); OR. REV. STAT. § 163.305(1) (1975); UTAH CODE ANN. § 76-5-407 (Supp. 1975).

Naturally, couples, either married or living together unmarried, benefit from statutes decriminalizing all sexual acts involving consenting adults. E.g., COLO. REV. STAT. §§ 18-3-401 to 410 (Supp. 1976); MAINE REV. STAT. tit. 17a, § 251 (Supp. 1976); ORE. REV. STAT. §§ 163.335, .445 (1975).

59. See generally Note, *Recent Statutory Developments in the Definition of Forcible Rape*, 61 VA. L. REV. 1500, 1517-29 (1975).

60. CODE § 213.1.

or who render the victim unconscious or in a condition precluding resistance.<sup>61</sup> Where an actor's course of conduct amounts to fraud or unfair taking of advantage, lesser punishment attaches;<sup>62</sup> young persons continue in a protected category.<sup>63</sup>

The Model Penal Code and many codes based on it have equivalent sections covering heterosexual rape and deviate sexual assault.<sup>64</sup> One may well question the point of maintaining parallel provisions; if gradation is achieved through a description of aggravating factors common to rape and aggressive deviate sexual acts, consolidation makes sense. This in fact has occurred in several recent enactments.<sup>65</sup>

Another Model Penal Code innovation in the field of sexual offenses is its gradation of statutory rape in terms of the relative ages of the younger and older participants in intercourse.<sup>66</sup> This form of gradation in various degrees of elaboration is observable in many new statutes.<sup>67</sup> The chief purpose of such a revision is to avoid imposition of heavy penalties on those who are roughly contemporaries and who thus, within current mores, may engage in sexual activity, while at the same time recognizing that the older one actor and the younger the other, the more exploitation of inexperience there may be. Nevertheless, a tabular scheme is difficult to administer,<sup>68</sup> so that it might be

61. Section 213.1(1)(d) and codes following it include any sexual intercourse with a young girl (ten being the critical age in the Model Penal Code) as one of the most heavily punished modes of committing rape. This is clearly aimed at preventing serious physical injury to one who has not reached puberty, as contrasted with protecting a class of young females who are physically capable of intercourse but classified by legislatures as unsuitable partners. *See, e.g.*, Commonwealth v. Grassmyer, 237 Pa. Super. 394, 352 A.2d 178 (1975).

62. CODE § 213.1(2) (entitled "gross sexual imposition").

63. *Id.* § 213.3 (corruption of minors and seduction).

64. CODE § 213.2 (deviate sexual intercourse by force or imposition); DEL. CODE tit. 11, §§ 765-66 (Supp. 1976); GA. CODE ANN. § 26-2002 (1972); KY. REV. STAT. §§ 510.070-.100 (1975); ME. REV. STAT. tit. 17-A, § 253 (Supp. 1976); N.Y. PENAL LAW §§ 130.40-.50 (McKinney 1975); OR. REV. STAT. §§ 163.385-.405 (1975); PA. STAT. ANN. tit. 18, §§ 3123-3124 (Purdom 1973); TEX. PENAL CODE ANN. § 21.04 (Vernon 1976); UTAH CODE ANN. §§ 76-5-403-404 (Supp. 1975).

65. ARK. STAT. ANN. § 41-1803 (1976); CONN. GEN. STAT. ANN. §§ 53a-70 to -71 (West Supp. 1976); FLA. STAT. ANN. § 794.011 (West. 1976) (titled "sexual battery"); MINN. STAT. ANN. §§ 609.341-.345 (West Supp. 1977); MONT. REV. CODES ANN. §§ 94-5-502 to -503 (Supp. 1976); N.M. STAT. ANN. § 40A-9-21 (Supp. 1975); N.D. CENT. CODE § 12.1-20-03 (1976); OHIO REV. CODE ANN. §§ 2907.02-.05 (Baldwin Supp. 1975); WASH. REV. CODE ANN. §§ 9.79.170-.79.220 (Supp. 1975). *See also* MICH. COMP. LAWS ANN. §§ 750.520a-.520l (Supp. 1977-78) which, although not part of an enacted code, takes the same approach; its coverage is discussed in Note, *supra* note 59, at 1513-16, 1523-29.

66. CODE § 213.3(1)(a).

67. *E.g.*, COLO. REV. STAT. §§ 18-3-405, 406 (Supp. 1976); KY. REV. STAT. §§ 510.050, .060, .080, .090, .130 (1975); ME. REV. STAT. tit. 17-A, §§ 254, 255 (Supp. 1976); MINN. STAT. ANN. §§ 609.293(4), .342(b), .343(b), .344(a)-.344(b), .345(a)-.345(b) (West Supp. 1977); MONT. REV. CODES ANN. §§ 94-5-502(3), -503(3) (Supp. 1976); N.Y. PENAL LAW §§ 130.25, .30, .40, .45, .55 (McKinney 1975); OHIO REV. CODE ANN. §§ 2907.02, .05 (Baldwin 1975); UTAH CODE ANN. § 76-5-401(2) (Supp. 1975); WASH. REV. CODE ANN. §§ 9.79.210-.79.220 (Supp. 1975).

68. *Cf.* Comment, *Sex Offenses and Penal Code Revision in Michigan*, 14 WAYNE L. REV. 934, 944-45, 950-51 (1968).

wisest to include intercourse with those between, for example, thirteen to fifteen in a lesser included category of sexual assault, punishable as a serious misdemeanor, and leave screening of offenders to prosecutors and judges.<sup>69</sup> Certainly, with the rapidly changing attitudes toward extramarital sexuality observable in the past decade or so, the process of nullification through nonenforcement of the law would likely operate to render obsolescent existing complicated schemes for grading sexual misconduct.

To the extent that the age of a protected participant continues to be legally important in gauging the criminality of heterosexual or homosexual relations, the problem of mistake of fact about that legally significant element must be dealt with. The great weight of authority interpreting traditional statutory rape norms treats that form of rape as in effect a strict liability crime, in which the only culpability element is intent to engage in sexual intercourse. Consequently, mistakes, even though reasonable, about the age of a "protected" participant are immaterial.<sup>70</sup> Arguably, all that should be required to abrogate this tradition is to couple the Model Penal Code premise that the culpability element extends to every material element of an offense<sup>71</sup> with its doctrine that mistake of fact is always admissible to negate the existence of a required culpability factor.<sup>72</sup> Nonetheless, some codes explicitly restate what could be derived from the general part provisions on culpability and mistake expressly in the context of sex offenses.<sup>73</sup> Others also take special account of the counterpart problem of mistake as to the mental condition of one legally considered unable to consent.<sup>74</sup>

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69. See text at notes 178-83 *infra*.

70. *E.g.*, State v. Silva, 53 Haw. 232, 491 P.2d 1216 (1971); State v. Moore, 105 N.J. Super. 567, 253 A.2d 579 (1969); State v. Randolph, 12 Wash. App. 138, 528 P.2d 1008 (1974). The leading case for the opposing interpretation is People v. Hernandez, 61 Cal.2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964).

71. CODE § 2.02(1).

72. *Id.* § 2.04(1)(a).

73. *E.g.*, ARK. STAT. ANN. § 41-1802(3) (1976) (reasonable belief is defense if child older than eleven); COLO. REV. STAT. § 18-3-406 (Supp. 1976) (reasonable belief is defense if child older than fourteen); DEL. CODE tit. 11, § 772(a) (Supp. 1975) (reasonable belief is defense if child older than twelve); KY. REV. STAT. § 510.030 (1975) (affirmative defense of lack of knowledge); MONT. REV. CODES ANN. § 94-5-506(1) (Supp. 1976) (reasonable belief is defense if child is fourteen or fifteen); N.D. CENT. CODE § 12.1-20-01(1) (1976) (reasonable belief is defense if child older than fourteen); OR. REV. STAT. § 163.325(1)-(2) (1975) (affirmative defense of reasonable belief if child older than sixteen (subsection (1) refers to those under sixteen, while subsection (2) refers to age other than sixteen, leaving age sixteen in a legislative limbo); PA. STAT. ANN. tit. 18, § 3102 (Purdon 1973) (proof by preponderance of reasonable belief if child older than fifteen); WASH. REV. CODE ANN. § 9.69.160 (Supp. 1975) (affirmative defense of reasonable belief in age based on declaration by alleged victim). Florida specifically excludes a defense based on mistake, whether or not it is generated by a complainant's statements. FLA. STAT. ANN. § 794.021 (West 1976).

74. *E.g.*, CONN. GEN. STAT. ANN. § 53a-67(a) (West Supp. 1976) (affirmative defense); N.Y. PENAL LAW § 130.10 (McKinney 1975) (affirmative defense); OR. REV. STAT. § 163.325(3) (1975) (affirmative defense); WASH. REV. CODE ANN. § 9.79.160(1) (Supp. 1975) (proof by preponderance).

Two problems are raised by such legislation. One is that use of an affirmative defense analysis may raise *Mullaney v. Wilbur*<sup>75</sup> problems, depending on the extent to which mistake of fact is viewed as a necessary integral aspect of the culpability element of crime. A second is that to the degree statutory statements are in terms of a "reasonable belief" in the other participant's age, the statutes allow negligent commission of the offense. Thus, actors who believe their partners are above a statutory diacritical age and hence lack knowledge important to a purpose to violate are nevertheless criminals if their mistake is unreasonable. If enforcement of a legislative purpose requires a culpability alternative of negligence, it should be expressed directly.<sup>76</sup>

As noted above,<sup>77</sup> several codes still cover heterosexual intercourse and homosexual activities in separate provisions; some of these continue the crime of statutory rape where the aggressor is male and the protected participant is female, but do not provide expressly for heterosexual intercourse in which a male is the younger party, leaving the latter for prosecution under a "contributing to the delinquency of a minor" or similar law. Other statutes do not exactly describe the same ages for males and females. Thus far, equal protection attacks based on such discrepancies have not been successful,<sup>78</sup> but it clearly seems a better legislative technique to eliminate differentiations in sex and age from such legislation, there being no obvious basis for these discriminatory classifications.<sup>79</sup>

As noted earlier,<sup>80</sup> modern legislation tends to continue the common law tradition that a husband cannot be convicted of raping his wife, except when there is accomplice responsibility for the acts of another male.<sup>81</sup> The exclusion from penal law responsibility, as previously indicated,<sup>82</sup> commonly extends as well beyond vaginal intercourse to any consensual activity between spouses.

75. 421 U.S. 684 (1975); see note 45 *supra*. The matter is not necessarily resolved by *Patterson v. New York*, 97 S. Ct. 2319 (1977), which governs affirmative defenses and diminished responsibility.

76. Cf. CODE §§ 2.02(1), (2)(d), (4).

77. See text at notes 64-65 *supra*.

78. E.g., *State v. Craig*, 545 P.2d 649 (Mont. 1976); *State v. Elmore*, 24 Or. App. 651, 546 P.2d 1117 (1976); *Finley v. State*, 527 S.W.2d 553 (Tex. Crim. App. 1976); *Flores v. State*, 69 Wis.2d 509, 230 N.W.2d 637 (1975).

79. A statute extending the period of minority for males to twenty-one and of females to eighteen, in the context of divorce support decrees, was held a denial of equal protection. *Stanton v. Stanton*, 421 U.S. 7 (1975).

80. See text at note 50 *supra*.

81. E.g., *State v. Flaherty*, 128 Me. 141, 146 A. 7 (1929); *State v. Martin*, 17 N.C. App. 317, 194 S.E.2d 60 (1973); *Rozell v. State*, 502 S.W.2d 16 (Tex. Crim. App. 1973). A woman also can incur accomplice liability for her role in precipitation of rape by a male of another woman, e.g., *People v. Hernandez*, 18 Cal. App. 3d 651, 96 Cal. Rptr. 71 (1971). This is sometimes legislatively restated, e.g., CODE § 213.6(2); ARK. STAT. ANN. § 41-1802(1) (1976); DEL. CODE tit. 11, § 772(b) (Supp. 1976); MINN. STAT. ANN. § 609.349 (West Supp. 1977); MONT. REV. CODES ANN. § 94-5-506(2) (Supp. 1976); N.D. CENT. CODE § 12.1-20-01(2) (1976); PA. STAT. ANN. tit. 18, § 3103 (Purdon 1973).

82. See note 50 *supra*.

There are two related matters, however, which remain to be resolved. One is whether a spousal relationship is still viewed to exist when a couple no longer lives together. On the pattern of the Model Penal Code,<sup>83</sup> several codes provide for protection of a spouse living in separate premises on the strength of a judicial decree of separation.<sup>84</sup> However, since many spouses live apart, often for long periods of time, a fact not particularly difficult to establish in most cases, the Model Penal Code formulation appears unduly restrictive; living apart as such should restore the full coverage of the criminal law, as it does in Delaware.<sup>85</sup>

The second related question is whether, granted the high statistical frequency with which persons live together in a de facto marital relationship because of a disinclination or legal inability to marry, the fact of a formal marriage bond should be determinative of whether sexual assaults between the partners are within or without the coverage of this particular part of a code. While most of the statutes continue the common law assumption that a legally valid marriage is required for the exception to apply, a few expand it to include those living together as spouses<sup>86</sup> or in a consensual state of adult cohabitation.<sup>87</sup> The latter of course is broad enough to comprehend a homosexual relationship.

The crime of rape, perhaps more than other major crimes, has been governed by a number of special procedural requirements which the women's movement legitimately views as discriminatory in character. One has to do with whether a victim's testimony must be formally corroborated by independent evidence.<sup>88</sup> If a comprehensive code is enacted without a corroboration requirement, there should be no leeway to add one through judicial construction. The Model Penal Code,<sup>89</sup> however, included a corroboration require-

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83. CODE § 213.6(2).

84. *E.g.*, KY. REV. STAT. § 510.010(3) (1975); MONT. REV. CODES ANN. § 94-5-506(2) (Supp. 1976); N.D. CENT. CODE § 12.1-20-01(2) (1976); PA. STAT. ANN. tit. 18, § 3103 (Purdon 1973); UTAH CODE ANN. § 76-5-407(1) (Supp. 1975). MINN. STAT. ANN. § 609.349 (West Supp. 1977) triggers the doctrine at filing for separate maintenance or dissolution of marriage.

85. DEL. CODE tit. 11, § 772(b) (Supp. 1976).

86. *E.g.*, DEL. CODE tit. 11, § 772(b) (Supp. 1976); KY. REV. STAT. § 510.010(3) (1975); ME. REV. STAT. tit. 17-A, § 252(2) (Supp. 1976) (stated as affirmative defense); OR. REV. STAT. § 163.335 (1975) (affirmative defense); PA. STAT. ANN. tit. 18, § 3103 (Purdon 1973).

Of related interest is the California Supreme Court holding that persons living together without marriage develop a community of property which gives a claim to a division of that property upon de facto separation. *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

87. CONN. GEN. STAT. ANN. § 53a-67(b) (West Supp. 1976); MINN. STAT. ANN. § 609.349 (Supp. 1977).

88. *See generally* Washburn, *Rape Law—Need for Reform*, 5 N.M. L. REV. 279 (1975); Note, *supra* note 57, at 1529-33.

89. Section 213.6(6). The provision also calls for a cautionary instruction about a duty "to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private." *See also* Note, *supra* note 57, at 1503-08.

ment which might have influenced legislatures to codify such a special evidentiary rule, but which in fact has not.<sup>90</sup> Instead, several codes proscribe a corroboration condition,<sup>91</sup> and some also expressly eliminate a requirement that physical resistance be proven as part of the prosecution case.<sup>92</sup> Although, occasionally a statute calls for a special cautionary instruction about complainant credibility,<sup>93</sup> others disallow it.<sup>94</sup>

A related issue is the extent to which the defense is to be allowed to explore a complainant's prior sexual conduct, either in general or with the defendant.<sup>95</sup> As long as consent remains a factor in a sexual offense affecting an adult victim, it appears difficult to bar the defense from advancing evidence that may bear on the existence or nonexistence of an element the prosecution is required to prove.<sup>96</sup> A desire to protect a complainant from embarrassment alone during testimony is probably an insufficient basis for prohibiting a probe into prior sexual activity relevant to the issue of consent.<sup>97</sup> Consequently, a compromise resolution of the problem, encountered with increasing frequency, is to require an *in camera* hearing at which the trial court determines whether and to what extent inquiry will be allowed.<sup>98</sup>

Of related concern is the question of whether prompt notification that a sex offense has been committed should be a condition to prosecution. If one

90. GA. CODE ANN. § 26-2001 (1972) is a rare exception. New York originally included such a requirement in PENAL LAW § 130.15, but repealed it in 1974 (L. 1974, c. 14, § 1). The present corroboration statute, PENAL LAW § 130.16 (McKinney 1975), covers only sodomy and crimes involving underage protected participants.

91. *E.g.*, FLA. STAT. ANN. § 794.022(1) (West 1976); MINN. STAT. ANN. § 609.347(1) (West Supp. 1977); N.M. STAT. ANN. § 40A-9-25 (Supp. 1975); WASH. REV. CODE ANN. § 9.79.150(1) (Supp. 1975). *See also* MICH. COMP. LAWS ANN. § 1750.520h (Supp. 1977-78).

92. MINN. STAT. ANN. § 609.347(2) (West Supp. 1977); OHIO REV. CODE ANN. §§ 2907.02(C) (rape), 2907.05(c) (sodomy) (Baldwin Supp. 1975).

93. FLA. STAT. ANN. § 794.022(1) (West 1976).

94. MINN. STAT. ANN. § 609.347(5) (West Supp. 1977); N.M. STAT. ANN. § 40A-9-25 (Supp. 1975).

95. *See generally* Note, *supra* note 59, at 1508-16, 1531-33.

96. *Cf.* United States v. Nixon, 418 U.S. 683 (1974) (executive privilege subordinate to defendants' need for data); Davis v. Alaska, 415 U.S. 308 (1974) (privilege affecting juvenile court status could not prevent impeachment of then-adult witness through proof of that status); Chambers v. Mississippi, 410 U.S. 284 (1973) (witness voucher rule and restricted concept of declaration against interest could not prevent admission of relevant, probative defense evidence); State v. Farrow, 366 A.2d 1177, 1179 (N.H. 1976) (physician-patient privilege cannot exclude "such materials as are found to be essential and reasonably necessary to permit counsel adequately to cross-examine for the purpose of showing unreliability or bias").

97. *Cf.* Marshall v. State, 254 Ind. 156, 258 N.E.2d 628 (1970) (the constitutional disability on clearing the courtroom in sex cases); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (restricting media coverage of sensational cases).

98. *E.g.*, DEL. CODE tit. 11, §§ 3508, 3509 (Supp. 1976); FLA. STAT. ANN. § 794.022(2) (West 1976); MICH. COMP. LAWS ANN. § 750.520j (Supp. 1977-78); MINN. STAT. ANN. § 609.347(4) (West Supp. 1977); MONT. REV. CODES ANN. § 94-5-503(5) (Supp. 1976); N.M. STAT. ANN. § 40A-9-26 (Supp. 1975); OHIO REV. CODE ANN. §§ 2907.02(D)-(F) (rape), 2907.05(D)-(F) (sodomy) (Baldwin Supp. 1975); OR. REV. STAT. § 163.475 (1975); TEX. PENAL CODE ANN. § 21.13 (Vernon Supp. 1976); WASH. REV. CODE ANN. § 9.79.150(2)-(4) (Supp. 1975). For a judicial consideration of the problem, *see* Wynne v. Commonwealth, 216 Va. 335, 218 S.E.2d 445 (1975).



eliminates the element of sex bias, there seems no reason to impose any special requirement that sex offenses be promptly reported. Nevertheless, the Model Penal Code includes such a provision,<sup>99</sup> and a few codes have followed along.<sup>100</sup> This is one aspect of the Model Penal Code which deserves burial.<sup>101</sup>

## 2. *Prostitution Offenses*

All American jurisdictions punish prostitution to achieve various purposes, including regulation of morals, protection of public health against venereal disease, and prevention of exploitation of prostitutes.<sup>102</sup> For the most part, the new codes, following the lead of the Model Penal Code,<sup>103</sup> continue the customary coverage of legislation, but in simpler language. All recent laws punish most severely those who force others into prostitution, facilitate prostitution activities, or profit from prostitution, reserving relatively minor penalties for acts of prostitution and solicitation to prostitution.

Two aspects of this legislation merit note. One is whether males are included in statutory definitions, thus reaching homosexual prostitution and the relatively rare situation of male prostitutes whose customers are women. Although courts have not been willing to strike down as unconstitutionally discriminatory legislation that covers only female activity,<sup>104</sup> the new statutes include both males and females, generally by defining the prohibited sexual conduct to comprehend homosexuality,<sup>105</sup> or including deviate sexual activity,<sup>106</sup> or by noting that both males and females are included in the masculine gender of the statutory language.<sup>107</sup>

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99. CODE § 213.6(4).

100. N.D. CENT. CODE § 12.1-20-01(3) (1976) (three months); UTAH CODE ANN. § 76-5-407(2) (Supp. 1975) (three months).

101. See, e.g., MONT. REV. CODES ANN. § 94-5-503(6) (Supp. 1976) (failure to make timely complaint alone is no bar to conviction).

102. George, *Legal, Medical and Psychiatric Considerations in the Control of Prostitution*, 60 MICH. L. REV. 717 (1962) (surveys traditional law on the matter).

103. CODE § 251.2.

104. *State v. Butler*, 331 So. 2d 425 (La. 1976). An equal protection argument was rejected, based on the contention that to punish male customers less severely than female prostitutes denied equal protection. *State v. Hicks*, 360 A.2d 150 (Del. Super. 1976). Objections based on discriminatory arrest practices also have been discounted, *State v. Gaither*, 236 Ga. 497, 224 S.E.2d 378 (1976); *City of Minneapolis v. Buschette*, 240 N.W.2d 500 (Minn. 1976); *City of Yakima v. Johnson*, 553 P.2d 1104 (Wash. App. 1976); *United States v. Wilson*, 342 A.2d 27 (D.C. App. 1975), but the Wisconsin Supreme Court ruled that if a defendant should show systematic prosecution of women prostitutes when male customers are not charged, the burden would shift to the state to show a valid exercise of prosecutorial discretion justifying what otherwise might be discriminatory law enforcement violative of the equal protection clause. *State v. Johnson*, 246 N.W.2d 503 (Wis. 1976).

105. E.g., CONN. GEN. STAT. ANN. § 53a-82 (West 1972); KAN. STAT. ANN. § 21-3512 (Vernon 1974); KY. REV. STAT. § 529.010(3) (1975); ME. REV. STAT. tit. 17-A, § 851(1) (Supp. 1976); N.D. CENT. CODE § 12.1-29-03 TEX. PENAL CODE ANN. § 43.02(a)(1) (Vernon 1974); UTAH CODE ANN. § 76-10-1302 (Supp. 1976).

106. E.g., COLO. REV. STAT. § 18-7-201 (1973); MINN. STAT. ANN. 609.32(1) (Supp. 1976).

107. This is usually achieved either through a general construction provision indicating that

A second question deserving attention is whether a prostitute's customer also should be viewed as a criminal. In this context, too, courts seem disinclined to strike down on equal protection grounds enforcement of legislation only against women prostitutes and not their customers.<sup>108</sup> The many new statutes which specifically penalize those who patronize prostitutes are designed to eliminate any basis for an equal protection attack on prostitution legislation.<sup>109</sup> Naturally, if only providers of prostitution services are covered, their patrons cannot be denominated as criminal.<sup>110</sup> The decision whether or not to penalize customers requires resolution of seriously conflicting demands. On the one hand, threats by law enforcement officials to prosecute customers may be necessary to obtain the latter's testimony, and a sense of equality of treatment between prostitutes and customers may be a prerequisite to whatever limited rehabilitation is possible.<sup>111</sup> On the other hand, reformers and correction authorities stress the need to decriminalize as many minor offenses subject to civil regulation as possible.<sup>112</sup> Probably no legislative solution will satisfactorily harmonize all these concerns.

### 3. *Abortion*

Abortion is not a crime the classification of which is generally agreed upon. In its historical inception, it belonged with crimes of homicide and assault, since it was aimed at protecting the lives of pregnant women at a time when abortion generally was substantially riskier than childbirth.<sup>113</sup> Today, such concerns have been completely displaced to the point that limitations on abortion techniques are unconstitutional unless the techniques are statistically more dangerous to maternal health than uninterrupted pregnancy and childbirth.<sup>114</sup> Although advocates of the so-called "right to life" movement prefer a homicide context for abortion, with fetuses as the protected entities, a federal constitutional amendment would be required to sanction such a clas-

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both genders are included in a masculine designation unless the context clearly indicates otherwise, or by cross-referring to the sexual crimes definitions which are gender-comprehensive. Sometimes a defense based on male gender is specifically rejected in prostitution provisions, *e.g.*, DEL. CODE tit. 11, § 1344 (1975); WASH. REV. CODE ANN. § 9A.88.050 (Supp. 1976).

108. See 104 *supra*.

109. *E.g.*, COLO. REV. STAT. § 18-7-205 (1973); CONN. GEN. STAT. ANN. § 53a-83 (West 1972); DEL. CODE tit. 11, § 1343 (1974); KAN. STAT. ANN. § 21-3515 (1974); MINN. STAT. ANN. § 609.32(4)(4) (West Supp. 1967); N.Y. PENAL LAW § 230.05 (McKinney 1967); TEX. PENAL CODE ANN. § 43.02(b) (Vernon 1974); UTAH CODE ANN. § 76-10-1303 (Supp. 1975); WIS. STAT. ANN. § 944.31 (West 1958); KY. REV. STAT. § 529.060(1) (1975) (requires the patron's testimony to be corroborated).

110. *But see* *Leffel v. Municipal Court*, 54 Cal. App. 3d at 569, 126 Cal. Rptr. at 773.

111. See *George*, *supra* note 102, at 729-30, 758-60.

112. See NAC REPORT 177-78.

113. See *George*, *The Evolving Law of Abortion*, 23 CASE W. RES. L. REV. 708, 709-11, 722 (1972).

114. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976).

sification since the Supreme Court has clearly ruled that fetal life as such is not constitutionally subject to special preservative legislation.<sup>115</sup> The Model Penal Code<sup>116</sup> chose for abortion the context of offenses against the family, since as a specialized form of birth control,<sup>117</sup> it affects the existence and dimension of families. That clearly seems the context in which United States Supreme Court decisions place the matter, particularly the holding that spousal or parental consent cannot be made a condition to an abortion desired by a pregnant woman.<sup>118</sup>

Whatever the placement, the key concern on the part of legislatures ought to be to revamp even the most recent codes to conform to *Planned Parenthood of Central Missouri*, *Roe*, and *Doe*. Several aspects of what had been regarded as liberal abortion legislation<sup>119</sup> are unconstitutional under *Doe v. Bolton*. Similarly, legislative efforts to restrict abortions have been denied.<sup>120</sup> Of course, some of the pressure for prompt statutory revision has been relieved by the Court's holding that *Doe-Roe* does not cover abortions performed under any circumstances by medically unqualified persons;<sup>121</sup> thus, legislation that is invalid as far as medical practitioners are concerned, is fully enforceable against clandestine abortionists. Granted the highly volatile nature of the abortion law controversy, which renders objective legislative consideration of abortion law reform unlikely, no immediate amendment of even the newest code provisions is probable. Nevertheless, one may hope that in years ahead statutes will express the operative law within the constitutional limits established by the Supreme Court.

#### 4. *Bigamy, Adultery, and Incest*

Modern codes continue longstanding efforts to control formation and integrity of family units through penal sanctions. Thus, on the pattern of the

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115. *Id.* See also *Doe v. Bolton*, 410 U.S. 179 (1973); *Roe v. Wade*, 410 U.S. 113 (1973).

116. CODE § 230.3.

117. See *George*, *supra* note 113, at 712.

118. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52. See also *Bellotti v. Baird*, 428 U.S.132 (1976). Although the contraceptive (more accurately, birth control) features of abortion were a matter of controversy at one time, see *George*, *supra* note 110, at 713-14, they are minimized today, particularly in light of Supreme Court decisions removing contraception from the arena of valid legislative authority. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Carey v. Population Services International et al*, 97 S. Ct. 2010 (1977).

119. See *George*, *supra* note 113, at 740-49.

120. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. at 75-79, invalidated a legislative prohibition against use of saline amniocentesis as a means of inducing abortion; it accepts certain record keeping requirements as long as they are "not abused or overdone," "utilized in such a way as to accomplish, through the sheer burden of recordkeeping detail, what we have held to be an otherwise unconstitutional restriction." 428 U.S. at 81. *Contra* *Beal v. Doe*, 97 S. Ct. 2366 (1977), a recent Supreme Court decision construing federal legislation not to require convenience abortions under Medicaid.

121. *Connecticut v. Menillo*, 423 U.S. 9 (1975).

Model Penal Code,<sup>122</sup> the crime of bigamy remains in force. In a time of increasing use of no-fault divorce and a general unwillingness to disallow divorces obtained in other, even foreign, states without obvious ties of either party to the divorcing jurisdiction,<sup>123</sup> elimination of bigamy as an offense would produce no observable consequences. Nevertheless, because many legislators and their constituents place importance on what legislation says and not what occurs after enactment, it is inevitable that even the most modern codes will continue to define bigamy as a crime.

The chief question is whether, on the pattern of the Model Penal Code, there is to be no criminality for one who "reasonably believes" eligibility to remarry exists, even though in fact an earlier spouse is alive and undivorced. Some statutes follow this pattern,<sup>124</sup> while others require that the earlier spouse be dead, divorced, or not heard from for a specified number of years.<sup>125</sup> Functionally speaking, the first group allows negligence as an alternative culpability element,<sup>126</sup> while the latter makes bigamy a form of strict liability offense. Consequently, the Model Penal Code to the contrary notwithstanding, the conceptually most orthodox formulation is to define the offense as intentional marriage with knowledge that one is legally ineligible.<sup>127</sup>

To the extent that the crime of incest is designed to promulgate legislative standards governing eligibility to marry, it might better be merged into a statutory offense of marrying in violation of statutory requirements, if preserved at all. To the extent that it is designed to protect against sexual activity initiated by parents against their children or stepchildren, it could be eliminated in favor of statutory rape and harm to minors laws which either exist or can be readily drafted as part of a modern code. In short, as a remnant of canon law engrafted on the common law of crimes, it should disappear as a special offense. Nevertheless, a few codes continue it. Most of them rest on a short or a lengthy list of prohibited degrees of relationship, either by affinity, consanguinity, or both.<sup>128</sup> If the offense is to be preserved at all, a more satisfactory technique is to refer to the marriage eligibility statute without further elaboration.<sup>129</sup>

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122. CODE § 230.1.

123. A leading illustration is *Rosenstiel v. Rosenstiel*, 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965), *cert. denied*, 384 U.S. 971 (1966) (recognizing transient Mexican divorces).

124. *E.g.*, FLA. STAT. ANN. § 826.01 (West 1976); ILL. ANN. STAT. ch. 38, § 11-12 (Smith-Hurd Supp. 1977); TEX. PENAL CODE ANN. § 9A.64.010 (Supp. 1976).

125. *E.g.*, N.C. GEN. STAT. § 14-183 (1969); OHIO REV. CODE ANN. § 2919.01 (Baldwin 1975).

126. *Cf.* the counterpart problem in statutory rape, text at notes 75-76 *supra*. See also PA. STAT. ANN. tit. 18, § 4301 (Purdom 1973).

127. See HAW. REV. STAT. § 709-900 (Supp. 1976); ME. REV. STAT. tit. 17-A, § 551 (Supp. 1976).

128. *E.g.*, DEL CODE tit. 11, § 771 (1975); GA. CODE ANN. § 26-2006 (1972); N.M. STAT. ANN. § 40A-10-3 (1972); UTAH CODE ANN. § 76-7-102 (Supp. 1975); WASH. REV. CODE ANN. § 9A.64.020 (Supp. 1976).

129. *E.g.*, N.D. CENT. CODE § 12.1-20-11 (1976).

Adultery, too, is an offense which today has stronger theological than sociological underpinnings. Particularly in light of the legislative trend toward either no-fault divorce or an expansion of divorce grounds well beyond adultery, it is incongruous to continue criminal code regulation of conduct which in fact is only rarely prosecuted, and then probably for reasons that would not survive public scrutiny, such as private retribution, harassment, or promotion of private claims. Nevertheless, several jurisdictions retain the crime, usually as a misdemeanor.<sup>130</sup> If public sensibilities constitute the only interest deserving of penal code protection, then the statutory prohibition might be restricted to open and notorious cohabitation, thus not penalizing intercourse as such.<sup>131</sup> An alternative means of pandering to public hypocrisy is to provide such light penalties that nobody will bother to prosecute.<sup>132</sup> The crime has no functional role to play in a modern code, but is the sort of issue on which a penal code revision can founder in a legislature, serving as it can as a target for those who deem criminal statutes an important medium for proclaiming moral concepts accepted perhaps in form by a majority, but otherwise widely ignored.

#### E. Sentencing Structure

A perusal of unrevised criminal statutes quickly reveals hopeless disorganization of penalties; at times quite serious misconduct is punished less heavily than relatively trivial misconduct. It is perhaps in its sentencing provisions that the seminal influence of the Model Penal Code is greatest.<sup>133</sup> All codes enacted in the past decade have used its class scheme of felonies and misdemeanors, by which each class bears a standard range of penalties, and by which one or more classes is assigned to each criminal definition to reflect its relative seriousness. Provided the latter process is rationally carried out, conflict between penalties as a source of sentencing disparity largely disappears. Adoption of such a system of penalties is a stated goal under federal funding

130. *E.g.*, COLO. REV. STAT. § 18-6-501 (1973) ("prohibited" without specific penalty); CONN. GEN. STAT. ANN. § 53a-81 (West 1972) (Class A misdemeanor); GA. CODE ANN. § 26-2009 (1972) (misdemeanor); KAN. STAT. ANN. § 21-3507 (Vernon 1974) (Class C misdemeanor); MINN. STAT. ANN. § 609.36 (West 1964) (one year misdemeanor; statute applies only to married woman, which seems to invite equal protection attack); N.Y. PENAL LAW § 255.17 (McKinney 1967) (Class B misdemeanor); UTAH CODE ANN. § 76-7-103 (Supp. 1975) (Class A misdemeanor). WIS. STAT. ANN. § 944.16 (West 1958), however, provides for a three year maximum penalty.

131. *E.g.*, FLA. STAT. ANN. § 798.01 (West 1976) (second degree misdemeanor); ILL. ANN. STAT. ch. 38, § 11-7 (Smith-Hurd Supp. 1977) (Class A misdemeanor); N.M. STAT. ANN. § 40A-10-2 (1972) (petty misdemeanor on second conviction). On modes of stating the crime traditionally, see Moore, *Diverse Definitions of Criminal Adultery*, 30 U. KAN. CITY L. REV. 219 (1963).

132. The Colorado statute, COLO. REV. STAT. § 18-6-501 (1973), states simply that adultery is prohibited, without attaching a penalty. The New Mexico provision, N.M. STAT. ANN. § 40A-10-2 (1972), provides only for a warning after a first conviction, and a petty misdemeanor penalty for subsequent convictions.

133. CODE arts. 6, 7.

programs.<sup>134</sup> The 1977 Criminal Code Reform Act embodies this system.<sup>135</sup>

Corrections law revision is touched on below.<sup>136</sup> Accordingly, only a few issues important to revision of sentence structure warrant mention here.

One is the extent to which mandatory penalties must be included as a condition to enactment of a revised code in a law-and-order period. The position of most authorities in the field of sentencing is that mandatory sentences should not be a part of penal legislation.<sup>137</sup> It is also felt that there should be a functional presumption in favor of probation,<sup>138</sup> and a range of terms of imprisonment if probation is not to be granted, the actual release date to be determined by paroling authorities.<sup>139</sup> Nevertheless, community frustration over rising levels of serious crime expresses itself in demands for restricted probation and parole, "presumptive sentencing,"<sup>140</sup> mandatory minimum terms,<sup>141</sup> and extended maximum terms of imprisonment, all of which militate against enactment or preservation of a Model Penal Code-based sentencing structure.

This being so, perhaps the preferable response is to urge provisions for extended terms for dangerous offenders, based on criteria to be assessed by courts at the time of sentencing.<sup>142</sup> Pressures toward mandatory minima probably cannot be countered on the level of either theory or experience;<sup>143</sup>

134. See NAC REPORT standard 13.3, commentary at 179-81. Recommendations closely paralleling those of the Model Penal Code are also to be found in CORRECTIONS REPORT 141-196; see also ABA STANDARD FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES (App. Draft, 1968).

135. See 134.1. S. 1437 95th Cong., 1st Sess. § 2301 (1977). Factors to be considered in sentencing are set out in section 2003(a).

136. See text at notes 257-262 *infra*; Miller, *New Concepts in Sentencing and Corrections*, 41 LAW & CONTEMP. PROB. no. 1, at \_\_\_\_ (1977).

137. See ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES, *supra* note 134, § 2.1(c).

138. *Id.* § 2.3; CORRECTIONS REPORT standard 5.2.

139. STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES, *supra* note 134, §§ 3.1, 3.2; cf. CORRECTIONS REPORT standard 5.9, leaving some continuing control in sentencing courts to reduce or modify sentences at the request of offenders or corrections authorities.

140. Presumptive sentencing is a system in which a flat standard sentence is affixed for each crime, but in which either a lower or a higher fixed sentence can be assessed on the basis of ascertained aggravating or mitigating circumstances. See TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING REPORT, FAIR AND CERTAIN PUNISHMENT (1976). The policy arguments in favor are canvassed in a background paper by Professor Alan M. Dershowitz of Harvard Law School. *Id.* at 69-124. In 1976 the California legislature adopted a presumptive sentencing pattern, S.B. 42, approved Sept. 20, 1976. Its provisions appear in a new chapter 4.5 of the California Penal Code. The logic of presumptive sentencing is not pursued to its extreme, however, because probation is not ruled out; the statutory scheme operates only when a trial court determines to award imprisonment. CAL. PENAL CODE § 1170(b), (c) (West Supp. 1977).

141. *E.g.*, the Massachusetts and Michigan statutes fixing minimum prison terms for crimes committed with firearms, and the New York statute providing minimum terms for certain narcotics offenders, MASS. GEN. LAWS ANN. ch. 269, § 10B (West 1968); MICH. COMP. LAWS ANN. § 750.227 (Supp. 1977-78); N.Y. PENAL LAW § 60.05 (McKinney 1975).

142. *E.g.*, CODE § 6.07; CORRECTIONS REPORT standard 5.3; STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES, *supra* note 134, § 2.1(d).

143. On the inutility of the New York narcotics legislation, *supra* note 137, see N.Y. Times, Sept. 5, 1976, § 1, at 1, col. 6.

the fact that mandatory penalties always become discriminatorily enforced or else fall into disuse does not seem to affect the thinking of legislators bent on satisfying an uninformed electorate. In the late 1970s, these aspects of sentencing provisions may well require the compromise of principle in the interest of enactment.

A more rational response can be expected to the question of fines. The thrust of modern policy proposals is that economic sanctions should be imposed only against essentially white collar defendants who are able to pay, in amounts which exceed actual gains from criminal enterprises.<sup>144</sup> Since equal protection outlaws jail time for default in payment of fines by those unable to pay,<sup>145</sup> a system of fines based on established deterrent impact is likely to be accepted by legislators, particularly as they are persuaded that no diminution will be experienced in revenue to local public treasuries from criminal fines and costs.

The issue of capital punishment is perhaps the most sensitive of all in determining the coverage of criminal law. From the standpoint of code drafters, some of the uncertainty existing since the 1962 *Furman*<sup>146</sup> decision has been eliminated as a result of the Supreme Court's 1976 capital punishment rulings.<sup>147</sup> While there is no clear majority rationale in these decisions to be relied on as a guide for drafters, there are three patterns of legislation sustained as constitutional in *Gregg*, *Proffitt*, and *Jurek*, and two invalidated in *Woodson* and *Roberts*. Although other forms of legislation<sup>148</sup> may ultimately receive federal constitutional approval in future terms, the safe course of action in a state wishing to institute or continue the death penalty is to select either the Georgia, Florida, or Texas statute as a pattern.

## II

### CRIMINAL PROCEDURE MODERNIZATION

#### A. Mode of Revision

Modernization of criminal procedure deserves a priority as great as, if not greater than, that given to substantive penal law reform.<sup>149</sup> Indeed, a strong

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144. *E.g.*, CODE § 6.03(5); CORRECTIONS REPORT § 5.5; STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES, *supra* note 134, § 2.7. This is included in the Criminal Code Reform Act of 1977, S. 1437, 95th Cong., 1st Sess. § 2201(c) (1977).

145. *Tate v. Short*, 401 U.S. 395 (1971).

146. *Furman v. Georgia*, 408 U.S. 238 (1972).

147. *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

148. The Supreme Court has disallowed the mandatory death penalty for rape, *Coker v. Georgia* 97 S. Ct. 2861 (1977), and murder of a peace officer *Roberts v. Louisiana*, 97 S. Ct. 1993 (1977).

149. See NAC REPORT standard 13.6.

case may be made that citizens' rights are more adversely affected by archaic procedural laws than by outmoded substantive criminal laws; certainly, delay in proceedings is a greater cause for concern than inadequate criminal standards, and delay is guaranteed as long as courts must function under procedural systems devised more than a century ago. Given the array of excellent model proposals and standards now available,<sup>150</sup> there is no reason why procedural revision cannot proceed expeditiously in any state.

Substantive law modernization can occur only through legislative action. In many jurisdictions the same is not true, however, when it comes to changes in procedural law. In states with plenary rule-making power vested in their highest courts,<sup>151</sup> there is no need to seek legislation to accomplish most basic changes in procedure.<sup>152</sup> This is a superior approach in that legal professional advisory committees can be assigned the task of drafting, and the principal critical impact comes from the legal profession itself. Because of the difficulty of steering "lawyers' bills" through many state legislatures, invocation of judicial rule authority may prove indispensable to prompt procedural reform. A discussion of some of the principal problems of procedure reform follows.

#### B. Regulation of Investigatory Activities

Arrest and search warrants are one aspect of criminal investigation that has long been subject to statutory regulation. Although common law doctrines governed both, principal governance of arrests with and without warrant and of searches under warrant has been achieved by state statutes and, more recently in some jurisdictions, supplemented by court rule. Presumably, this law will be restated as the foundation of any contemporary codification of procedural law.<sup>153</sup>

Two significant policy issues are likely to arise, however. One is the extent to which a procedure code should purport to govern police investigatory practices, particularly scope of search incident to arrest and other warrantless searches, rules of interrogation, stop-and-frisk, and witness identification pro-

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150. See text at notes 7-12 *supra*; Erickson, *The Standards of Criminal Justice in a Nutshell*, 32 LA. L. REV. 369 (1972).

151. See Parness & Korbakes, *A Study of the Procedural Rule-Making Power in the United States*, in ABA SECTION OF CRIMINAL JUSTICE, COMM. ON IMPLEMENTATION OF STANDARDS FOR THE ADMINISTRATION OF CRIMINAL JUSTICE, PATTERN RULES OF COURT AND CODE PROVISIONS 328 (rev. ed. 1976).

152. Legislation probably is required, however, to change the law of arrest, authorize use of appearance tickets in lieu of custodial arrest, and regulate the subject matter of search warrants. Legislation is also required, in conformity with federal statute, to institute eavesdropping warrant practice. 18 U.S.C. §§ 2516(2), 2518 (1970).

153. Granted this lengthy history of statutory regulation of grounds for arrest and issuance of warrants, it is unlikely that a court's rule-making power will be thought to extend to them, as contrasted with procedures to be followed in applying for and making return on warrants or on production of arrested persons before judicial officers. See note 152 *supra*.



cedures. Certainly, for any jurisdiction wishing to embark on such an endeavor, the Model Code of Pre-Arrest Procedure<sup>154</sup> and the Uniform Rules of Criminal Procedure<sup>155</sup> provide conceptually integrated patterns. State statutes also cover specific problems, not as part of a comprehensive regulation of police practices, but as legislative responses to particular enforcement problems, *e.g.*, stop-and-frisk,<sup>156</sup> administrative inspections,<sup>157</sup> and particular search situations.<sup>158</sup> In light of the rapidly changing patterns of constitutional case law on these matters, however,<sup>159</sup> it may be preferable not to endeavor to restate principles of constitutional law in statutory form, unless of course a legislature desires to preserve Warren Court era doctrines as a new state legislative standard higher than current federal norms.<sup>160</sup>

A second matter warranting close attention is development of a system to place control over the acquisition and preservation of evidence in the judiciary, using simple, expeditious, *ex parte* proceedings conducted by a law-trained judge. Search and arrest warrant practice traditionally follows such a pattern, but in many states warrants are issued by lay magistrates, and there may be a question after formal charges have been laid whether it is appropriate to issue them from an inferior court in a matter pending before a superior court. Of course, the grand jury has been widely used as an investigatory tool for the prosecution; by the expedient of grand jury subpoenas, witnesses can be questioned and documents and demonstrative evidence garnered before a grand jury. This, however, is a cumbersome mode of gathering evidence in that a number of citizens must be forced at county expense to remain on duty over a span of time in order to allow the prosecution to take advantage of process which traditionally only a grand jury or the court from

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154. PRE-ARREST PROCEDURE §§ 110.1-2 (requests for cooperation; stop-and-frisk), §§ 140.1-8 (interrogation), §§ 160.1-7 (identification procedures), §§ 230.1-260.6 (searches and seizures).

155. UNIFORM RULES 212, 241, 243 (interrogation).

156. *E.g.*, ARK. STAT. ANN. §§ 43-429-436 (Supp. 1975); DEL. CODE tit. 11, §§ 1902-1903 (1975); ILL. ANN. STAT. ch. 38, § 107-14 (Smith-Hurd 1970); KAN. STAT. ANN. § 22-2402 (1974); *see Meyer, Arrest Under the New Kansas Criminal Code*, 20 KAN. L. REV. 685, 733-44 (1972); MONT. REV. CODES ANN. § 95-719 (Supp. 1975); N.Y. CRIM. PROC. LAW § 140.50 (McKinney Supp. 1976); OR. REV. STAT. §§ 131.605-.625 (1973); UTAH CODE ANN. §§ 77-13-33 to -35 (Supp. 1975); VA. CODE § 19.2-83 (1975); WIS. STAT. ANN. §§ 968.24-.25 (West 1971).

157. TEX. CODE CRIM. PROC. ANN. art. 18.05 (Vernon Supp. 1976).

158. CONN. GEN. STAT. ANN. § 54-33b (West Supp. 1977) (search of person incident to execution of search warrant); DEL. CODE tit. 11, §§ 2302 (hot pursuit), 2303 (incident to arrest), 2321-22 (vehicle seizures) (1975); ILL. ANN. STAT. ch. 38, § 108-1 (Smith-Hurd 1970) (search of person incident to arrest); VA. CODE § 19.2-59 (Supp. 1976) (searches in general).

159. *See George, Future Trends in the Administration of Criminal Justice*, 69 MIL. L. REV. 1 (1975); in the 1975-76 term *see, e.g.*, *South Dakota v. Opperman*, 428 U.S. 364 (1976) (search of impounded vehicle); *Stone v. Powell*, 428 U.S. 465 (1976) (fourth amendment grounds not ordinarily assertable in federal habeas corpus); *United States v. Janis*, 428 U.S. 433 (1976) (scope of exclusionary rule).

160. *See Michigan v. Mosley*, 423 U.S. 96, 120-21 (1975) (Brennan, J. dissenting), urging state courts to follow such a policy.

which it operates can issue.<sup>161</sup> Moreover, these proceedings benefit the prosecution alone; at best, defendants can secure only summonses and subpoenas duces tecum in the course of proceedings initiated by the government.

In short, what the Anglo-American system generally has lacked is a procedure by which the prosecution before formal charging, and the defendant after, can ask a judge of a court of record to examine witnesses conditionally, require the production of documentary and demonstrative evidence, and mandate the performance of expert tests and examinations, a procedure well known to Roman law-based systems.<sup>162</sup> Fortunately, the Uniform Rules of Criminal Procedure offer an excellent model for revamping state procedure to provide for what might be called creative discovery. The prosecution may obtain nontestimonial evidence from defendants<sup>163</sup> and others,<sup>164</sup> while accused persons have similar powers to bring about tests involving themselves<sup>165</sup> and to obtain evidence from other sources.<sup>166</sup> Since the Uniform Rules procedures are available to the prosecution before as well as after arrests are made or formal charges laid, their adoption would dispense with the necessity of adapting traditional search warrant practice to cover nontestimonial evidence not ordinarily subject to seizure under warrant, and of using the grand jury as a pretext to garner such evidence. Moreover, in the face of the Uniform Rules provisions for liberal deposition practice to perpetuate testimony<sup>167</sup> and an investigatory deposition ultimately enforceable by court order,<sup>168</sup> there would be no need to preserve the grand jury as an institution in any jurisdiction in which grand jury indictment is not constitutionally required.<sup>169</sup>

For jurisdictions not wishing to go so far, but faced with the need to augment the scope of nontestimonial evidence obtainable by warrant during crim-

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161. See Note, *The Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590 (1961). A few states have created a special proceeding, usually conducted by a judge of a court of record, for investigating crimes specified in a convening order. MICH. COMP. LAWS ANN. §§ 767.3-.6b (1968); see R. SCIGLIANO, *THE MICHIGAN ONE-MAN GRAND JURY* (1957). The cognomen "one-person grand jury" is misleading, because only the equivalent to a complaint, not an indictment, can be issued at the conclusion of an inquiry.

162. *E.g.*, JAPAN CRIM. PROC. LAW arts. 99-174, 179 (Law No. 131 of 1948, as amended); see S. DANDO, *JAPANESE CRIMINAL PROCEDURE* 320-22 (B. George transl. 1965).

163. UNIFORM RULES 434.

164. *Id.* 436.

165. *Id.* 435.

166. *Id.* 437. Defendants may also move to have the prosecution procure a scientific comparison of nontestimonial evidence in the prosecution's control if this might "contribute to an adequate defense." *Id.* 438.

167. *Id.* 431.

168. *Id.* 432. The prosecution conducts closed hearings if a person believed to possess information cooperates, under subsections (a) and (e), but recalcitrant sources of information can be ordered by a court, on prosecution motion, to testify if no privileges apply or valid immunity has been conferred under subsection (h) or R. 732, by virtue of subsection (j).

169. States, of course, are not required by the fourteenth amendment to indict by grand jury in felony cases. *Gerstein v. Pugh*, 420 U.S. 103 (1975).

inal investigation,<sup>170</sup> the ALI Model Code of Pre-Arrest Procedure<sup>171</sup> and ABA Standards<sup>172</sup> offer patterns, at least for identification evidence.<sup>173</sup>

A related concern with which legislatures and rule drafters may have to contend is the exclusionary rules of evidence. As long as these rules were viewed as an integral part of the fourth, fifth, and fourteenth amendments, state constitutional or legislative efforts to legitimate evidence which the Federal Constitution rendered inadmissible were futile.<sup>174</sup> However, since 1974 the current majority of the United States Supreme Court has apparently converted the fourth amendment<sup>175</sup> and *Miranda*<sup>176</sup> exclusionary rules into rules of evidence which may be applied or withheld using a balancing process, in which the need to deter wilful or negligent misconduct by officers is weighed against the need for valid probative evidence in judicial proceedings. This may create options for legislatures either not available or not of concern in the years following *Mapp*. One response might well be to allow admission of evidence of certain kinds<sup>177</sup> of material garnered without major infringement of defendants' rights.<sup>178</sup> Effectiveness of such legislation will turn on the ex-

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170. Some courts have found inherent power, independent of grand jury proceedings, to issue orders, *e.g.*, for suspects or defendants to participate in identification proceedings, *United States v. Greene*, 429 F.2d 193 (D.C. Cir. 1970); submit to finger printing, *In re Fingerprinting of M.B.*, 125 N.J. super. 115, 309 A.2d 3 (1973); *United States v. Allen*, 408 F.2d 1287 (D.C. Cir. 1969); and *cf. People v. Vega*, 51 App. Div. 2d 33, 379 N.Y.S.2d 419 (1976) (court before charges filed could not order suspect to shave beard and appear in lineup; question reserved whether this could be done after formal charging) or to submit to minor surgery for removal of demonstrative evidence, *United States v. Crowder*, 543 F.2d 312 (D.C. Cir. 1976) (in bank). However, a court may also insist on a special rule or statute to authorize acquisition of evidence in this way, at least to the extent that existing search warrant practice cannot be adapted to the need. *People v. Marshall*, 69 Mich. App. 288, 244 N.W.2d 451 (1976).

In federal practice, a United States Attorney cannot seek directly from a district court an order for the production of such evidence. Instead, the grand jury participating in the investigation in question must direct the source of evidence to produce it; the district court enters the picture only if the source fails or refuses to comply with a grand jury subpoena. *In re Melvin*, 546 F.2d 1 (1st Cir. 1976).

171. PRE-ARRAIGNMENT PROCEDURE §§ 170.1-8.

172. ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL § 3.1 (App. Draft, 1970).

173. See also N.Y. CRIM. PROC. LAW §§ 160.10-40 (McKinney Supp. 1976) (fingerprinting and photography for records identification); UTAH CODE ANN. § 77-13-37 (Supp. 1975); Israel, *Legislative Regulation of Searches and Seizures: The Michigan Proposals*, 73 MICH. L. REV. 221, 238-41 (1974).

174. See *People v. Pennington*, 383 Mich. 611, 178 N.W.2d 471 (1970), finding MICH. CONST. art. 1, § 11 (1963), void in violation of *Mapp v. Ohio*, 367 U.S. 643 (1961), to the extent that its proviso allowed in evidence guns, explosives, and narcotics, no matter how obtained.

175. See note 159 *supra*.

176. *Miranda v. Arizona*, 384 U.S. 436 (1966), as interpreted in *Oregon v. Hass*, 420 U.S. 714 (1975), and *Michigan v. Tucker*, 417 U.S. 433 (1974). See also *Oregon v. Mathiason*, 97 S. Ct. 711 (1977); *Michigan v. Mosley*, 423 U.S. 96 (1975).

177. See note 168 *supra*.

178. *E.g.*, MONT. REV. CODES ANN. § 95-717 (1969) (substantial rights must be affected); WIS. STAT. ANN. § 968.22 (West 1971) (same); *cf. PRE-ARRAIGNMENT PROCEDURE* §§ 150.3 (confessions), SS 290.2(2)-(4) (search and seizure).

tent to which state courts preserve *Mapp*- and *Miranda*-type doctrines in local constitutions.<sup>179</sup> Naturally, legislatures might also choose to enact rules forbidding use in state proceedings of evidence admissible under the Federal Constitution, but this seems unlikely in most states at the present time, when the trend appears to be toward increased rates of conviction and incarceration.<sup>180</sup>

One other dimension of legislation relating to exclusionary rules merits consideration. As indicated earlier, the controlling majority of the United States Supreme Court is curtailing the scope of fourth and fifth amendment-based exclusionary rules by examining both knowledge and motivation of investigating officers, and the trustworthiness and importance of given evidence to the ascertainment of truth. Some Justices have intimated that if adequate alternative remedies were created to enforce constitutional rights, the exclusionary rules themselves might be done away with as having served their original purposes but now no longer appropriate for the judiciary to create and enforce.<sup>181</sup> Legislatures wishing to create an atmosphere favorable to that development should legislate clear standards of criminality for wilful police misconduct<sup>182</sup> and civil recovery.<sup>183</sup>

### C. Diversion

One reason for the present saturation of criminal courts throughout the country is the long-standing assumption that the criminal law is the most effective cure for most of society's ills. Enough disillusionment has set in about

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179. See note 160 *supra*.

180. The exception appears to be eavesdropping under court order; less than half the states have enacted legislation conforming to 18 U.S.C. §§ 2510-2520 (1970 & Supp. 1976), which means that all evidence acquired through electronic eavesdropping is inadmissible. See NAT'L FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE, REPORT xv, 128-30 (1976).

181. See *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Janis*, 428 U.S. 433 (1976). In *Janis*, the Court noted, "there comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches." 428 U.S. at 459. See also Justice White's dissent in *Powell*, in which he feels "constrained" to say "that I would join four or more other Justices in substantially limiting the reach of the exclusionary rule as presently administered under the Fourth Amendment in federal and state criminal trials." 428 U.S. at 537. See also *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 421 (1971) (Burger, J. dissenting).

182. Cf. COLO. REV. STAT. §§ 18-8-403 to 404 (1973); MINN. STAT. ANN. § 629.402 (West Supp. 1977); cf. the comment in the Supreme Court plurality opinion in *Hampton v. United States*, 425 U.S. 484, 490 (1976): "If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law." An illustration of some vintage is *Reigan v. People*, 120 Colo. 472, 210 P.2d 991 (1949) (detectives who induced youths to trap animals unlawfully guilty of conspiracy).

183. Cf. ME. REV. STAT. tit. 15, § 704 (1965) (recovery of a fixed statutory recovery plus punitive damages, as well as costs and a reasonable attorney fee, might be a useful device). See 18 U.S.C. § 2520 (Supp. 1976).

the effectiveness of that policy that decriminalization is a major concern everywhere, sometimes under the aegis of "victimless crime."<sup>184</sup> Another technique for purging the criminal justice system of bootless prosecutions is screening and diversion of cases, otherwise criminal, which can best be handled through other social agencies.<sup>185</sup> A federal agency has recommended that *screening* embrace "the discretionary decision to stop, prior to trial, or plea, all formal proceedings against a person who has become involved in the criminal justice system," and that *diversion* refer to "a decision to encourage an individual to participate in some specific program or activity by express or implied threat of further formal criminal prosecution."<sup>186</sup> In this usage, actual or potential defendants are essentially passive figures in the course of screening, whereas, if diversion is invoked to delay or replace criminal proceedings they must actively participate in what in substance is pre-conviction probation.

Of course, discretion is always exercised by complainants, police and prosecutors in deciding whether or not to start or continue criminal proceedings.<sup>187</sup> Thus, the thrust of current recommendations to codify the concepts of screening and diversion is to bring into view the standards according to which prosecutions are halted or suspended. While the ALI Model Code of Pre-Arrestment Procedure recommends rather formal screening conferences,<sup>188</sup> federal proposals prefer what might be called an administrative law approach in which judicial participation is minimal.<sup>189</sup> The latter, to the author, seems the preferable course to adopt, at least during the first stage of legislative regulation.

#### D. Pretrial Release

There seems little disagreement that inherited systems of pretrial release, turning on surety bonding and, more recently, deposits of public securities and cash, are most inadequate. On the one hand, to the extent that they require significant assets before release is feasible, they unfairly penalize low- and middle-income citizens, however likely it is that they will appear when required. On the other hand, criminally inclined defendants with available

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184. Cf. J. HALL, B. GEORGE, & R. FORCE, *CRIMINAL LAW AND PROCEDURE: CASES AND READINGS* 142-46 (3d ed. 1976).

185. See generally J. MULLEN, *THE DILEMMA OF DIVERSION: RESOURCE MATERIALS ON ADULT PRE-TRIAL INTERVENTION PROGRAMS* (Nat'l Inst. of Law Enforcement & Crim. Justice 1975); R. NIMMER, *DIVERSION: THE SEARCH FOR ALTERNATIVE FORMS OF PROSECUTION* (1974).

186. COURTS REPORT 17.

187. F. MILLER, *PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME* (1969); Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 *YALE L. J.* 543 (1960).

188. PRE-ARRAIGNMENT PROCEDURE §§ 320.1-.9.

189. COURTS REPORT 39-45; CORRECTIONS REPORT 73-97. See also ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE URBAN POLICE FUNCTION §§ 3.1-.3, 4.1-.5, 8.1, 10.1 (App. Draft, 1973).

funds can obtain release, and remain free to prey on the community during what may be a protracted period until trials and convictions can occur. Code and rule drafters are under strong pressure today to revamp the entire pre-trial release system, with public concern seemingly greater about the latter problems than the former.

One way to reduce the numbers of defendants who must be released is to avoid custodial arrests in the first place. As long as defendants are not physically reduced to control and conveyed to police detention facilities and then to court, there is no reason to make special provision for them unless they default at court appearances. Consequently, all proposals for modernized procedure incorporate provisions for routine use of summonses or appearance tickets in all (or most) misdemeanor cases and for preferred use in lieu of arrest with or without warrant in nondangerous felony cases if defendants seem likely to appear when required.<sup>190</sup> Examples of such provisions have begun to appear.<sup>191</sup>

For suspects taken into custody and thus rendered subject to judicial control, certain key revisions of the traditional bail system have become popular. The most common are so-called ROR (release on own recognizance) programs for those with roots in the community who consequently are likely to appear when required,<sup>192</sup> and "ten-percent deposit" rules under which defendants obtain their release by paying in that portion of the face amount of the bond which otherwise usually went to professional bonders.<sup>193</sup> Abolition of professional bonding companies has also been urged, chiefly because they exact financial payments from defendants and their families without, in most instances, exercising controls significant to the criminal justice system.<sup>194</sup>

A more controversial matter is whether courts may be authorized to condi-

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190. ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PRETRIAL RELEASE §§ 2.1-3.4 (App. Draft, 1968); PRE-ARRAIGNMENT PROCEDURE §§ 120.2, 120.4; UNIFORM RULES 221-26; CORRECTIONS REPORT standard 4.3.

191. MINN. R. CRIM. P. 610.

192. *E.g.*, DEL. CODE tit. 11, § 2105 (1975); KAN. STAT. ANN. § 22-2802(2) (1974); ME. R. CRIM. P. 46(d); MINN. R. CRIM. P. 6.02(1); N.M. R. CRIM. P. 22(a); [N.M. STAT. ANN. § 41-23-22(a) (Supp. 1975)]; N.D. R. CRIM. P. 46(a)(i); OHIO R. CRIM. P. 46(C); OR. REV. STAT. § 135.245 (1975); PA. R. CRIM. P. 4003; TEX. CODE CRIM. PROC. ANN. art. 17.04 (Vernon 1966); VA. CODE § 19.2-123 (1975); WIS. STAT. ANN. § 969.03(1) (West Supp. 1976-77). *See also* CORRECTIONS REPORT 108, 109.

193. *E.g.*, ILL. ANN. STAT. ch. 38, § 110-7 (Smith-Hurd Supp. 1977); *see* Bowman, *The Illinois Criminal Code of 1961 and Code of Criminal Procedure of 1963*, 4 U. MICH. J. LAW REFORM 461, 471-73 (1971); WIS. STAT. ANN. § 969.03(c) (West 1971). Such statutes do not violate the equal protection clause. *Schilb v. Kuebel*, 404 U.S. 357 (1971).

194. *E.g.*, STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 190, § 1.2(c); COURTS REPORT standard 4.6; *cf.* ARK. STAT. ANN. § 43-732 (1964). The principal control is the sureties' right to arrest defaulted principals anywhere without warrant and return them without extradition to the court where prosecution is pending. *See* Murphy, *Revision of State Bail Laws*, 32 OHIO ST. L.J. 451, 483-84 (1971), for a compilation of statutes on the matter; Comment, *Bailbondsmen and the Fugitive Accused—The Need for Formal Removal Procedures*, 73 YALE L.J. 1098 (1964).

tion pretrial and pre-conviction release on other than appearance in court as required, specifically on lawful conduct during release in order to safeguard the community, or on participation in various therapeutic programs incident to formal diversion programs.<sup>195</sup> Under the essentially misleading rubric of "preventive detention," debate is impassioned over whether the Federal Constitution requires bail in all cases or all but capital cases, conditioned only on appearance.<sup>196</sup> It seems that the Supreme Court, as now constituted, views the question of pretrial detention as essentially a fourth, not an eighth, amendment matter.<sup>197</sup> Thus, if persons are held in pretrial detention or freed on conditions other than appearance in court, the question is whether "a fair and reliable determination of probable cause" has been provided.<sup>198</sup> Certainly, there are recommendations for systems revision which assume that conditional pretrial release aimed at community protection and defendant rehabilitation is appropriate.<sup>199</sup> Moreover, there are several recent statutes and rules which allow courts to place conditions on defendants' conduct pending trial, in some cases ostensibly related solely to return at the time of future proceedings,<sup>200</sup> but in others specifically to protect the community<sup>201</sup> or promote the orderly administration of justice.<sup>202</sup> Thus far, attacks on such provisions have failed.<sup>203</sup>

### E. Speedy Proceedings

Whether viewed from the standpoint of the community interest in preventing predatory crimes by those at large pending trial and conviction, or from that of detained defendants ineligible for or unable to secure pre-conviction release, prompt trial of criminal cases is imperative. Of course, the right to a speedy trial is a constitutional right,<sup>204</sup> but since relatively long

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195. See text at note 186 *supra*.

196. Compare *Carlson v. Landon*, 342 U.S. 524 (1952), with *Stack v. Boyle*, 342 U.S. 1 (1951), and Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 1125 (1965). Compare with Meyer, *Constitutionality of Pretrial Detention*, 60 GEO. L.J. 1139 (1972).

197. *Gerstein v. Pugh*, 420 U.S. 103 (1975).

198. *Id.* at 125.

199. UNIFORM RULES 341(a); CORRECTIONS REPORT standard 4.4; COURTS REPORT standard 4.6.

200. E.g., KAN. STAT. ANN. §§ 22-2802 to -2803 (1974); N.M. R. CRIM. P. 41-23-22(a); N.D. R. CRIM. P. 46(a)(1); OHIO R. CRIM. P. 46(C); OR. REV. STAT. § 135.260 (1975).

201. DEL. CODE tit. 11, §§ 2105, 2107-08, 2110, 2113(c) (1975); D.C. CODE §§ 23:1322-1324 (1973); ILL. ANN. STAT. ch. 38, §§ 110-6(b), 110-10(a) (Smith-Hurd Supp. 1977); MINN. R. CRIM. P. 6.02(1); VA. CODE §§ 19.2-120(2), 19.2-123 (1975).

202. N.M. R. CRIM. P. 41-23-22(c).

203. *Blunt v. United States*, 322 A.2d 579 (D.C. App. 1974); *State v. Roessell*, 132 Vt. 634, 328 A.2d 118 (1974). See also Note, *Preventive Detention: An Empirical Analysis*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 300, 362-65 (1971); cf. Rauh & Silbert, *Criminal Law and Procedure: D.C. Court Reform and Criminal Procedure Act of 1970*, 20 AM. U.L. REV. 252, 287-302 (1970-71).

204. *Klopfert v. North Carolina*, 386 U.S. 213 (1967).

periods must elapse before the constitutional barriers fall,<sup>205</sup> effective controls over time of trial must be achieved through statute or court rule.<sup>206</sup> Until a jurisdiction's criminal justice system is endowed with ample resources to handle large numbers of trials expeditiously, a key question for lawmakers is whether merely to provide periods for trial without special sanction,<sup>207</sup> to require unconditional release of those held beyond permitted time periods,<sup>208</sup> or to provide for absolute discharge of such persons without possibility of reinstatement of prosecution.<sup>209</sup> Experience under the federal statute after its time periods become fully effective in 1979 will probably establish whether the latter is a sound legislative approach.<sup>210</sup>

#### F. Discovery

Expedited trial proceedings require that as much as possible be known before trial about the issues and admissible evidence. Moreover, defendants aware of the strength of the prosecution case against them seem more willing to plead guilty than those who believe there may be a chance to defeat the government at trial. Consequently, all proposals for modernized criminal procedure include quite broad provisions for discovery.<sup>211</sup> Often on the pattern of the Federal Rules of Criminal Procedure,<sup>212</sup> many recent statutes and rules allow for broad discovery on behalf of defendants.<sup>213</sup>

Discovery in favor of the prosecution has created more difficulties for legislators. Contentions that somehow any discovery for the government denies due process or impairs the privilege against self-incrimination retain little credibility after the promulgation of what is now Federal Rule 16(b), since it

205. *Barker v. Wingo*, 407 U.S. 514 (1972).

206. See ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL §§ 2.1-3 (App. Draft, 1968); STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 190, § 5.10; COURTS REPORT standard 4.1 (1973); Erickson, *The Right to a Speedy Trial: Standards For Its Implementation*, 10 HOUSTON L. REV. 237 (1973).

207. See COURTS REPORT standard 4.1.

208. *E.g.*, MICH. GEN. CT. R. 789.2; *cf.* STANDARDS RELATING TO SPEEDY TRIAL, *supra* note 206, § 4.2 (incarcerated persons, short of absolute maximum period).

209. Speedy Trial Act of 1974, 18 U.S.C. § 3162 (Supp. 1975); *cf.* STANDARDS RELATING TO SPEEDY TRIAL, *supra* note 206, § 4.1; UNIFORM RULES 772(a). That, of course is the sanction which enforces the constitutional speedy trial right itself. *Strunk v. United States*, 412 U.S. 434 (1973).

210. *Cf.* Russ & Mandelkern, *The Speedy Trial Act of 1974: A Trap for the Unwary Practitioner*, 2 NAT'L J. CRIM. DEFENSE 1 (1976).

211. STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL, *supra* note 172, §§ 2.1-3.2; UNIFORM RULES 421-431; COURTS REPORT standard 4.9.

212. FED. R. CRIM. P. 15, 16.

213. *E.g.*, ARK. STAT. ANN. § 43-2011.2 (Supp. 1975); CONN. GEN. STAT. ANN. § 54-86a (West Supp. 1977); FLA. R. CRIM. P. 3.220(a); KAN. STAT. ANN. § 22-3212 (1974); KY. R. CRIM. P. 7.24; ME. R. CRIM. P. 16(a); N.M. R. CRIM. P. 41-23-27(a); N.Y. CRIM. PROC. LAW § 240.20 (McKinney 1971); N.D. R. CRIM. P. 16; OR. REV. STAT. § 135.851 (1975); TEX. CODE CRIM. PROC. ANN. art. 39.14 (Vernon 1966); VA. CT. R. 3A:14(b) (Supp. 1976); WIS. STAT. ANN. § 971.23(4)-(5) (West 1971).



may be assumed the Supreme Court would not have approved procedures for federal courts in conflict with the Federal Constitution as the Court viewed it. However, a number of states stayed with the federal rules pattern, allowing only discovery following and measured by defense discovery.<sup>214</sup> In light of the Supreme Court's recent clear indications, that discovery is not regulated by privilege considerations,<sup>215</sup> but by due process only,<sup>216</sup> there is little reason to doubt the constitutional validity of those statutes and rules that allow prosecution discovery independent of a defense request.<sup>217</sup>

Similar considerations underlie the fact that some state laws and rules allow depositions only at the instance of defendants.<sup>218</sup> However, there seems to be no self-incrimination problem in allowing prosecution use of depositions, as long as defendants cannot be deposed and witnesses may claim privilege to specific responses unless granted immunity. As a practical matter, prosecution depositions are useful in preparation for trial only if the defendants' right of confrontation is satisfied by allowing them to be present when a potential witness is deposed.<sup>219</sup> That being so, there seems to be no constitutional barrier to statutes and rules allowing depositions to be taken at prosecution request.<sup>220</sup>

Although nothing beyond a plea of not guilty (or standing mute) is needed in order to put the prosecution to its proof on every legal and factual issue raised by a criminal pleading, certain defenses are difficult to refute if the government becomes aware of them only after the close of its case-in-chief. Consequently, a number of jurisdictions have created provisions for notice of alibi,<sup>221</sup> mental disease or defect (insanity),<sup>222</sup> self-defense,<sup>223</sup> and even, in one contemporary version which may prove to be a model, any

214. *E.g.*, ARK. STAT. ANN. § 43-2011.2(c) (Supp. 1975); FLA. R. CRIM. P. 3.220(b); KAN. STAT. ANN. § 22-3212(3) (1974); KY. R. CRIM. P. 7.24(3); N.Y. CRIM. PROC. LAW § 240.0(4) (McKinney 1971); N.D. R. CRIM. P. 16(c).

215. *United States v. Nobles*, 422 U.S. 225 (1975). *See also* *Andresen v. Maryland*, 427 U.S. 463 (1976); *Fisher v. United States* 425 U.S. 391 (1976), placing very restrictive conditions on application of privilege to documents obtained under judicial process.

216. *Wardius v. Oregon*, 412 U.S. 470 (1973).

217. *E.g.*, MINN. R. CRIM. P. 9.02; N.M. R. CRIM. P. 41-23-28; OR. REV. STAT. § 135.835 (1975).

218. *E.g.*, ARK. STAT. ANN. § 43.2011.1 (Supp. 1975); KAN. STAT. ANN. § 22-3211 (1974).

219. *Mancusi v. Stubbs*, 408 U.S. 204 (1972).

220. *E.g.*, FED. R. CRIM. P. 15; KY. R. CRIM. P. 710; ME. R. CRIM. P. 15; MINN. R. CRIM. P. 21.01-.08; MONT. REV. CODES ANN. § 95-1802 (1969); N.M. R. CRIM. P. 41-23-29; N.D. R. CRIM. P. 15; OHIO R. CRIM. P. 15.

221. *E.g.*, FED. R. CRIM. P. 12.1; ILL. ANN. STAT. ch 38, § 114-14 (Smith-Hurd 1970); KAN. STAT. ANN. § 22-3218 (1974); ME. R. CRIM. P. 16(b); MONT. REV. CODES ANN. § 95-1803(d) (1969); N.M. R. CRIM. P. 41-23-32(a); N.Y. CRIM. PROC. LAW § 250.20 (McKinney Supp. 1976-77); N.D. R. CRIM. P. 12.1; OHIO R. CRIM. P. 12.1; OR. REV. STAT. § 135.455 (1975); UTAH CODE ANN. § 77-22-17 (Supp. 1975); WIS. STAT. ANN. § 971.23 (West Supp. 1976-77).

222. FED. R. CRIM. P. 12.2; MONT. REV. CODES ANN. § 95-1803(d) (1969); N.Y. CRIM. PROC. LAW § 250.10 (McKinney 1971); N.D. R. CRIM. P. 12.2; UTAH CODE ANN. § 77-22-16 (1953).

223. MONT. REV. CODES ANN. § 95-1803(d) (1969).

defense.<sup>224</sup> Although it has been argued that such statutes are unconstitutional *per se*,<sup>225</sup> the fact that the Supreme Court itself has promulgated such rules lends little credence to that position. However, under *Wardius*,<sup>226</sup> several of the alibi notice statutes that have been in effect for some time are probably unconstitutional because they do not require the prosecution to notify the defense of its rebuttal witnesses.<sup>227</sup>

### G. Guilty Pleas

The constitutionality of plea bargaining under federal standards is beyond question.<sup>228</sup> Thus, for most purposes the question of whether or not to continue plea negotiations and guilty pleas<sup>229</sup> as an element of state practice is left to local determination. Although one national commission urged the elimination of negotiated guilty pleas in the near future,<sup>230</sup> all other model proposals assume that guilty pleas are a part of American jurisprudence, and thus worthy of preservation if properly regulated.<sup>231</sup> The latter is clearly the premise on which the Federal Rules of Criminal Procedure<sup>232</sup> and state criminal statutes and rules continue to rest.

One issue for drafters is whether only the plea receiving process should be dealt with, or whether guidelines should be established for plea negotiations themselves. Following model patterns,<sup>233</sup> several jurisdictions have set forth standards according to which plea negotiations are to be conducted.<sup>234</sup> Most

224. MINN. R. CRIM. P. 9.02(1)(3).

225. Note, *Constitutional Implications of Notice-of-Alibi Provisions*, 21 WAYNE L. REV. 1415 (1975).

226. *Wardius v. Oregon*, 412 U.S. 470 (1973).

227. The Illinois statute was held unconstitutional on such grounds in *People v. Field*, 59 Ill. 2d 516, 322 N.E.2d 33 (1974), *cert. denied*, 423 U.S. 843 (1975). The Florida, Kansas, Maine, Montana, New York, Ohio, and Wisconsin statutes, as well as the Oregon statute dealt with in *Wardius*, are also vulnerable, as is the Montana statute governing self-defense.

228. *Blackledge v. Allison*, 45 U.S.L.W. 4435, 4437 (May 2, 1977), *Henderson v. Morgan*, 426 U.S. 637 (1976); *Santobello v. New York*, 404 U.S. 257 (1971).

229. Materials describing law and practice in a number of jurisdictions include D. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* (1966); Bishop, *Guilty Pleas in Wisconsin*, 58 MARQ. L. REV. 631 (1975); Bishop, *Guilty Pleas in the Eastern Midwest*, 2 OHIO N.L. REVIEW. 258 (1974) (Indiana and Ohio); Note, *Plea Negotiations—Legitimizing the Agreement Process*, 27 OKLA. L. REV. 487 (1974).

230. COURTS REPORT standard 3.1 & introductory note at 42-45. Standards 3.2-8, originally recommended by the Commission's Courts Task Force as the primary standards, and which parallel the other model provisions listed in note 231 *infra*, were offered by the Commission as interim standards only until most plea negotiations were abolished.

231. ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY (App. Draft, 1968); PRE-ARRAIGNMENT PROCEDURE art. 350; UNIFORM RULES 443-444. For other solutions, see Note, *Plea Bargaining: A Model Court Rule*, 4 U. MICH. J.L. REFORM 487 (1971); Comment, *Profile of a Guilty Plea: A Proposed Trial Court Procedure for Accepting Guilty Pleas*, 17 WAYNE L. REV. 1195 (1971).

232. FED. R. CRIM. P. 11.

233. STANDARDS RELATING TO PLEAS OF GUILTY, *supra* note 231, §§ 3.1-3; PRE-ARRAIGNMENT PROCEDURE § 350.3; UNIFORM RULES 443.

234. *E.g.*, FED. R. CRIM. P. 11(e); MINN. R. CRIM. P. 15.04; N.M. R. CRIM. P. § 41-23-21(g);

jurisdictions, however, focus attention only on the judicial process of receiving tenders of plea agreement. A few either provide no details whatever<sup>235</sup> or touch on but one or a few of the important matters into which trial courts should inquire.<sup>236</sup> A number of jurisdictions, however, set forth more detailed regulation;<sup>237</sup> the Michigan<sup>238</sup> and Minnesota<sup>239</sup> provisions, for example, are models of elaborate detail.

There is clearly a dilemma here which drafters may find troublesome to resolve. On the one hand, if no details are provided, judges and attorneys must resort to precedent to determine what is required of them; if trial courts err in discovering or interpreting current case law, pleas must be vacated and trials conducted on matters which by then may have become quite stale. On the other hand, excessive detail can prove a trap if United States Supreme Court decisions later render aspects of state procedure of doubtful validity. An example is *Henderson v. Morgan*,<sup>240</sup> which requires that defendants, to plead guilty, must know the important legal elements of offenses to which they plead; the fact that their pleas would likely be the same with or without such knowledge is not controlling.<sup>241</sup> Instead, it must be established on the record that a given defendant knew these elements, and somehow the trial court record must reflect an acknowledgment of such knowledge, or an equivalent of that acknowledgment. The latter can be accomplished in several ways: (a) a finding after earlier proceedings;<sup>242</sup> (b) a voluntary admission by defendant that intent existed; (c) a stipulation by counsel<sup>243</sup> that there was intent; (d) judicial explanation of the details of the charge to a defendant, followed by an acknowledgment of guilt; (e) a representation by counsel "that

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N.D. R. CRIM. P. 11(d); OR. REV. STAT. §§ 135.405-425 (1975); PA. R. CRIM. P. 319. COURTS REPORT standard 3.3, recommends establishment of uniform prosecutor's office standards governing plea negotiations. Cf. Kuh, *Plea Bargaining: Guidelines for the Manhattan District Attorney's Office*, 11 CRIM. L. BULL. 48 (1975). On judicial participation see, e.g., FLA. R. CRIM. P. 3.171(c); MINN. R. CRIM. P. 15.04(3); OR. REV. STAT. § 135.432 (1975); Gallagher, *Judicial Participation in Plea Bargaining: A Search for New Standards*, 9 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 29 (1974).

235. E.g., GA. CODE ANN. § 27-1404 (1972); WIS. STAT. ANN. § 971.06 (West 1971).

236. KY. R. CRIM. P. 8.08 (1972) (to determine plea is voluntary); MONT. REV. CODES ANN. § 95-1902 (1969) (to inform defendant of consequences of plea and maximum penalty); UTAH CODE ANN. § 77-24-6 (1953) (to explain consequences of plea); VA. CT. R. 3A:11(c) (to determine voluntariness in light of understanding nature of charge and consequences of plea).

237. FED. R. CRIM. P. 11; COLO. REV. STAT. § 16-7-302 (Supp. 1976); ILL. ANN. STAT. ch. 38 § 113-4 (Smith-Hurd 1970); KAN. STAT. ANN. § 23-3210 (1974); N.M. R. CRIM. P. 41-23-21; N.D. R. CRIM. P. 11; OHIO R. CRIM. P. 11(C); TEX. CODE CRIM. PROC. ANN. art. 26.13 (Vernon Supp. 1976-77).

238. MICH. GEN. CT. R. 785.7; Guilty Plea Cases (*People v. Nicholson*), 395 Mich. 96, 235 N.W.2d 132 (1975), serves as a pre-promulgation commentary on the rule.

239. MINN. R. CRIM. P. 15.01-.08.

240. 426 U.S. 637 (1976).

241. *Id.* at 644 n.12.

242. Cf. *North Carolina v. Alford*, 400 U.S. 25 (1970).

243. Presumably in the defendant's presence.

the nature of the offense has been explained to the accused";<sup>244</sup> and (f) absent express representation of advice, a presumption "that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit."<sup>245</sup> Any of these alternatives, if satisfied, will suffice, constitutionally speaking. But if a detailed court rule nevertheless obscures such concerns under the guise of completeness, trial courts are as subject to being misled as they would be if no details were provided and trial judges were relegated to inadequate local law libraries to discover new precedent for themselves.<sup>246</sup> Perhaps the most practical resolution of the problem is to regulate guilty plea practice (where possible under local law) by court rule rather than by statute, and to change local rules as quickly as possible to reflect altered constitutional standards.

Once a guilty plea<sup>247</sup> has been accepted, the question may arise as to under what circumstances, if any, it may be withdrawn. Although occasionally a jurisdiction may allow for withdrawal of right,<sup>248</sup> the usual approach is to leave the matter within the ambit of trial court discretion.<sup>249</sup> Naturally, to preserve the integrity of the plea negotiation process and guard against possible incursions on the privilege against self-incrimination, the prosecution is

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244. *Henderson v. Morgan*, 426 U.S. at 647.

245. *Id.*

246. *Cf.* MINN. R. CRIM. P. 15.01 ("Before the court accepts a plea of guilty, the defendant shall be sworn and questioned by the court with the assistance of counsel as to the following: . . . 2. Whether he understands the charge against him"); MICH. GEN. CT. R. 785.7(1)(a) ("Speaking directly to the defendant, the court shall tell him: (a) the name of the offense to which he is pleading; the court is not obliged to explain the elements of the offense, or possible defenses").

247. Whether a plea of *nolo contendere* is legally recognized is likely to turn on whether it is mentioned in a comprehensive rule or statute, *e.g.*, FED. R. CRIM. P. 11(b); ARK. STAT. ANN. § 43-1220 (1964); KAN. STAT. ANN. § 22-3208(1) (1974); N.M. R. CRIM. P. § 41-23-21(c)(3) ("no contest"); OHIO R. CRIM. P. 11(A) ("no contest"); PA. R. CRIM. P. 319(a); VA. CT. R. 3A:11(a); WIS. STAT. ANN. § 971.06(c) (West 1971) ("no contest"). Whether the plea should be established or continued is a matter of dispute. *See STANDARDS RELATING TO PLEAS OF GUILTY*, *supra* note 231, at 14-16, § 1.1(a), Comment; UNIFORM RULES 444(a) recommends replacement of pleas of guilty and *nolo* with a single "plea of admission." Where the plea is retained, some variation in practice may be required so that defendants are not required to recite facts relating to their criminal activities (that being the chief point of distinction between guilty and *nolo* pleas); *cf.* MICH. GEN. CT. R. 785.7(3)(b).

248. *E.g.*, GA. CODE ANN. § 27-1404 (1972). MICH. GEN. CT. R. 785.7(6)(a) allows a tendered plea to be withdrawn of right until acceptance, which has its chief operation when a trial court reserves its decision on the matter for a time.

249. *E.g.*, ARK. STAT. ANN. § 43-1222 (1964); KY. R. CRIM. P. 8.10; MINN. R. CRIM. P. 15.05 (but mandatory to correct manifest injustice); MONT. REV. CODES ANN. § 95-1902 (1969); N.Y. CRIM. PROC. LAW § 220.60(3) (McKinney Supp. 1976-77). UNIFORM RULES 444(e)(1) adopts what may be an intermediate rule: "The court shall allow the defendant to withdraw his plea: (1) Before sentencing or other disposition for any fair and just reason unless the prosecution shows it has been substantially prejudiced by reliance upon the plea." Defendants who do not receive a bargained-for disposition of course have a constitutional right (in the discretion of the court) either to have the bargain enforced or the plea withdrawn. *Santobello v. New York*, 404 U.S. 257 (1971); *see* FED. R. CRIM. P. 11(e)(4).

not allowed to use either statements made during plea bargaining<sup>250</sup> or a withdrawn plea<sup>251</sup> as evidence of guilt.

#### H. Review Procedures

Proliferating appeals reflecting the open-ended nature of criminal cases are a matter of substantial concern; state prisoners have eleven different opportunities for review, the last three of which may be repeated as long as prisoners' fertile imaginations devise new grounds to apply for federal habeas corpus.<sup>252</sup> Even though the Supreme Court appears bent on reducing the burden on federal district courts generated by state prisoner habeas corpus applications,<sup>253</sup> the American system of regular and extraordinary appeals consumes far more time than that in any other modern legal system.

Some problems in administering an appellate court system<sup>254</sup> or system of post-conviction review<sup>255</sup> can be dealt with through revisions in procedure and internal management. There is, however, a question as to whether a fundamental reordering of the American appellate system should be instituted in a pattern reminiscent of civil law-based systems,<sup>256</sup> so that only one plenary

250. *E.g.*, FED. R. CRIM. P. 11(e)(6); FLA. R. CRIM. P. 3.171(d); MINN. R. CRIM. P. 15.06; N.M. R. CRIM. P. 41-23-21(9)(6); N.D. R. CRIM. P. 11(d)(6); OR. REV. STAT. § 135.435 (1975). The same policy is set forth in STANDARDS RELATING TO PLEAS OF GUILTY, *supra* note 231, § 3.4; PRE-ARRAIGNMENT PROCEDURE § 350.7; UNIFORM RULES 444(f).

251. *E.g.*, FED. R. EV. 410; FED. R. CRIM. P. 11(e)(6); GA. CODE ANN. § 27-1404 (1972); MINN. R. CRIM. P. 15.06; N.M. R. CRIM. P. § 41-23-21(g)(6); N.D. R. CRIM. P. 11(d)(6); OR. REV. STAT. § 135.445 (1975).

252. *See* COURTS REPORT 113.

253. *See* *Stone v. Powell*, 428 U.S. 465 (1976), disallowing federal district courts from entertaining habeas corpus petitions based on fourth amendment questions if petitioners have had a full and fair opportunity to raise them in state proceedings. The Court indicated a clear purpose to make its doctrine retroactive, *id.* at 3052 n.38, which to date has caused federal courts of appeals to reverse district court grants of habeas or refuse to reverse denials of applications, *Holmberg v. Parratt*, 548 F.2d 745 (8th Cir. 1977) *e.g.*, *Chavez v. Rodriguez*, 540 F.2d 500 (10th Cir. 1976); *Fankboner v. Paderick*, 538 F.2d 324 (4th Cir. 1976); *Poindexter v. Wolff*, 540 F.2d 390 (8th Cir. 1976). *Stone v. Powell* has also been invoked to prevent reconsideration of a state conviction, attacked in a "2255" proceeding because of its use to enhance a federal sentence. *Tisnado v. United States*, 547 F.2d 452 (9th Cir. 1976).

A state prisoner who fails to invoke an available objection to pretrial activities waives the matter for purposes of federal habeas corpus, *Francis v. Henderson*, 425 U.S. 536 (1976); *Murch v. Mottram*, 409 U.S. 41 (1972) (loss of right for failure to take advantage of available state appellate remedy).

Congress has also sharply reduced the scope of the Three Judge Court Act, 28 U.S.C. § 2284 (Supp. IV 1976), by allowing such a form of proceeding only when statute expressly calls for it or an apportionment question is presented.

254. *See* ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO CRIMINAL APPEALS (App. Draft, 1970); ABA COMM'N ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS (App. Draft, 1977).

255. ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO POST-CONVICTION REMEDIES (App. Draft, 1968). *See also* COURTS REPORT standard 6.2.

256. *See* S. DANDO, *supra* note 162, at 408-468.

appeal would be enjoyed by defendants of right. Thereafter, further review would be to remedy gross malfunctioning of the appellate review system itself, or to achieve regularity of doctrine and practice if intermediate appellate decisions are in conflict. Such a system has recently been both strongly urged,<sup>257</sup> and criticized on its merits.<sup>258</sup> Whatever one's position on the desirability or feasibility of a sweeping reordering of state appellate systems,<sup>259</sup> most states require a tightening up of appellate review procedures which usually can be accomplished through amended rules of court.<sup>260</sup>

### III

#### CORRECTIONS LAW REVISION

In most American states there has been no systematic revision of laws relating to the operation of corrections systems for decades. That a fundamental rewriting of the statute law in this field is sorely needed is attested to by the growing volume of litigation over prisoners' rights,<sup>261</sup> as well as by several recent decisions of the United States Supreme Court.<sup>262</sup> Consequently, the National Advisory Commission has called for corrections law reform as part of a trilogy of revised codes,<sup>263</sup> and the Model Penal Code devoted substantial attention to the area.<sup>264</sup> Thus far, however, only Illinois has produced a com-

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257. See COURTS REPORT §§ 6.1, 6.3, 6.5-8; Swindler, *Simplification of Court Structure*, in ABA SECTION OF JUDICIAL ADMINISTRATION, *THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE* 7, 8-9 (5th ed. 1971); Robinson, *Proposal and Analysis of a Unitary System for Review of Criminal Judgments*, 54 B.U.L. REV. 485 (1974).

258. Nejeleski & Emory, *Unified Appeal in State Criminal Cases*, 7 RUTGERS-CAMDEN L. REV. 484 (1976).

259. In many if not most states, a constitutional amendment would be necessary to convert the highest level of review to a purely discretionary one. To do so, however, should pose no federal constitutional difficulty; cf. *Ross v. Moffitt*, 417 U.S. 600 (1974).

260. To allow review of sentence in an otherwise error-free proceeding is also likely to be a salutary reform, since convicted persons on probation seem seldom to lodge criminal appeals. See generally ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES (App. Draft 1968); Mueller, *Penology on Appeal: Appellate Review of Legal But Excessive Sentences*, 15 VAND. L. REV. 671 (1972); Note *Appellate Review of Sentences in Florida: A Proposal*, 23 U. FLA. L. REV. 736 (1971). On English practice, see Thomas, *Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience*, 20 ALA. L. REV. 193 (1968).

261. See generally J. PALMER, *CONSTITUTIONAL RIGHTS OF PRISONERS* (1973); R. SINGER & W. STATSKY, *RIGHTS OF THE IMPRISONED* (1974); SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, *THE EMERGING RIGHTS OF THE CONFINED* (1972); W. TOAL, *RECENT DEVELOPMENTS IN CORRECTIONAL LAW* (1975). Draft ABA standards have been promulgated relating to the legal status of prisoners. See 14 AM. CRIM. L. REV. 377 (1977). *Recent Developments in Correctional Law*, in *RESOLUTION OF CORRECTIONAL PROBLEMS AND ISSUES* 3 (Fall 1975); *CORRECTIONS REPORT* 17-72.

262. *Bounds v. Smith*, 97 S Ct. 1491 (1977); *Montanye v. Haymes*, 427 U.S. 236 (1976); *Meachum v. Fano*, 427 U.S. 215 (1976); *Baxter v. Palmigiano*, 425 U.S. 308 (1976); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Procunier v. Martinez*, 416 U.S. 396 (1974); *O'Brien v. Skinner*, 414 U.S. 524 (1974); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972). On press or media interviews with prisoners, see *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974).

263. See NAC REPORT standard 13.4.

264. CODE arts. 303-405.

prehensive code within the past decade.<sup>265</sup> Given the emotional response to sentencing and punishment issues in today's legislative bodies, one may well wonder whether it is prudent to submit a draft corrections code for consideration, lest a system, functioning reasonably well in many regards, be thrown into substantial disarray. Perhaps the preferable approach to change, in light of the looseness of the language in most inherited statutes, is to use a state administrative procedure act to promulgate comprehensive corrections administrative regulations.<sup>266</sup>

#### CONCLUSION

What has gone before is but a sampling of the many problems with which law revisers must contend. Moreover, practical problems of placement of the law revision function, mode of organization, staffing, and finances are often more crucial to success or failure of revision efforts than the contents of final drafts.<sup>267</sup> Other important concerns include the scope of commentaries to new drafts essential to later correct judicial interpretation of statutory language,<sup>268</sup> and the task of educating criminal justice system professionals and citizens about new laws and rules as they become effective.<sup>269</sup>

Beyond these concerns, however, a much more fundamental lesson should be learned: Namely, that massive revisions in the past have been necessary only because no responsible agency or agencies constantly monitored statutes and rules on criminal law and procedure and corrections law. Accordingly, jurisdictions ought to develop machinery so that new legislative proposals can be reviewed to see whether they in fact are needed to cure inadequacies in existing law, whether penalty provisions are consonant with existing penal code patterns, whether they fill functional gaps in the law, and whether they are compatible with civil statutes and rules.<sup>270</sup> If this can be done, the nation may not require new codification movements for decades to come.

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265. Ill. Unified Corrections Code, 38 ILL. ANN. STAT. §§ 1001-1-1 to 1008-6-1 (Smith-Hurd 1973). See also McAnany, *Imprisonment Under the Illinois Unified Code of Corrections: Due Process, Flexibility, and Some Future Doubts*, 49 CHI.-KENT L. REV. 178 (1972); Pusateri & Scott, *Illinois' New Unified Code of Corrections*, 61 ILL. B.J. 62 (1972).

266. A process in the final process of completion in Michigan. See MICH. DEP'T OF CORRECTIONS, GENERAL RULES (1977).

267. See NAC REPORT standard 13.5; George, *A Guide to State Criminal Code Revision*, in STUDIES IN COMPARATIVE CRIMINAL LAW 65, 67-68 (E. Wise & G. Mueller eds. 1975).

268. NAC REPORT standard 13.7.

269. *Id.* standard 13.8.

270. *Id.* standard 13.9.