Sentencing and Correctional Treatment Under the Law Institute's Model Penal Code

Mr. Rubin examines critically many of the features of the American Law Institute's treatment of sentencing and correctional measures in the drafts of its Model Penal Code. The A.L.I.'s proposals, he finds are unsound and out of harmony with the goal of rehabilitation of the offender.

by Sol Rubin • *Counsel for the National Council on Crime and Delinquency*

FOR HALF A DOZEN years the American Law Institute has been working on the drafting of a "Model Penal Code". The project is scheduled for completion in two or three years. The Code will be issued against the background of the great prestige that the Institute has earned through the *Restatements* and its other work in the field of civil law. Although an article descriptive of the project has appeared in the *Journal*[1], the Bar generally is not aware that the various model code drafts have aroused considerable opposition among leading people in the correctional field as well as among the rank and file.

Most of the project is devoted to definitions of crimes and problems of responsibility, taking into account the vast volume of statute and decision law. However, the Institute has also undertaken to draft model provisions on sentencing and correction as part of this project. It is these provisions that not only interested the correctional field but aroused them.

At several national and state correctional conferences the project has been a subject of anxious discussion, and articles on it have appeared in the correctional journals. Unlike the descriptive article in the *Journal*, the conference discussions and the articles in the correctional journals have been critical, dealing with various aspects of the project as matters of controversy. For example, Judge Luther W. Youngdahl wrote in this vein on the youth treatment phase of the project in *Federal Probation* in March, 1956. Of the proposal to reject the youth authority idea, Judge Youngdahl wrote, "I find all this quite incredible." He commented on the fact that youths could be sentenced to very long terms, the same as any other offenders: "This seems to me to be punishment to fit the crime at its crudest." He decried the proposal to abolish the non-criminal status provided in the New York youthful offender law.

Will C. Turnbladh, former director of the National Council on Crime and Delinquency, now the Director of the Minnesota Department of Corrections, writing in *Law and Contemporary Problems* (Summer, 1958), referred to the high proportion of sentences today that are extremely long. One third of commitments to penitentiaries and reformatories are for ten years or over. He wrote: "Such terms are inconsistent with present correctional knowledge and experience. They mislead the public as to the dangerousness of most offenders. Montesquieu wrote: 'As freedom advances, the severity of the penal law decreases.' Under the Code proposals, commitments would be lengthened, through the proposed maximum terms, minimum terms, parole terms, and other provisions. Public protection does not require and is not best served by a punitive penal code. Rather, one providing the framework for the fuller development and more effective application of correctional treatment is a better guarantee of public protection and, in the broader sense, of our freedom."

Criticism of the American Law Institute drafts has come from the National Probation and Parole Association (whose name was changed in May to National Council on Crime and Delinquency) the leading national organization representing the correctional field; the Advisory Council of Judges of the N.C.C.D., a group of approximately fifty judges of federal, state, and local appellate and trial courts; the Advisory Council on Parole of N.C.C.D., representing leading administrators from approximately a dozen states; representatives of the youth authorities, who initiated a meeting with the American Law Institute to express their concern about the youth treatment proposals of the model penal code; and committees of correctional associations.

Before the Model Penal Code drafts are finally adopted it would be well for the Bar generally to be alerted to the view of many in the correctional field

1. Herbert Wechsler. *The American Law Institute: Some Observations on Its Model Penal Code*, 42 A.B.A.J. 321 (April, 1956).

One of the earliest ABA articles

MAIL BOXES ETC.®
STOLL PARK SHOPPING CENTER
11936 W 119TH ST.
OVERLAND PARK, KS 66213
(913) 663-1095 FAX (913) 663-1091

that much of what has thus far been drafted in the project for sentencing and correctional treatment is not sound.

Terms of Imprisonment

Starting in 1953 the project has produced a series of drafts, each dealing more or less with a distinct phase. Draft No. 2 dealt with sentencing. In it the A.L.I. tentatively proposed (and later drafts reaffirmed the plan) that the great variety of penalties now provided for in all states be simplified, suggesting uniform penalties for three grades of felony—first, second and third degree—and other, lesser penalties for misdemeanors and petty offenses, these again uniform within their own classification. The goal of simplification seems desirable. The problem arises, first, in the suggested maximum terms. The scale proposed for felonies is as follows:

Grade of Felony	Maximum Term—Ordinary	Maximum Term—Extended
1st degree	life	life
2d degree	10 years	10 to 20 years
3d degree	5 years	5 to 10 years

Although severe, these terms are not very much different from codes in some states now. But the Model Code plan contains certain features that make this scale far more punitive than any existing state penal code. First, except for the limited control of the maximum in extended terms, the maximum is mandatory in every commitment, a provision existing in few states. In forty or more states the judge has discretion to fix a maximum less than the maximum of the statute.

The Advisory Council of Judges said in a brief submitted to the Council of the A.L.I.: "The scale of prison terms is too high. We have a mounting number of prisoners, and the ratio of prisoners to the general population is constantly increasing. It has resulted in a round of overcrowding and need for new institutions, and the trend certainly will be continued unless the means are found to change the sentencing picture. We should look for a pattern of *lower* rather than *higher* maximum terms. Our experience today is that we can safely release individuals earlier, particularly if we provide professional help to supervise them on parole."

The brief pointed out that the fixing of the maximum term affects parole board attitude and performance: "The parole board has a considerable interest in the maximum term provided. It is not sufficient to suggest that if a parole board considers a maximum term to be excessive, it can discharge the individual from parole, thus terminating the commitment altogether. There are several things which such a suggestion overlooks. First of all, it is not the province of a parole board to be the absolute master of the duration of a commitment, and it is not helpful to give it that complete authority. The judge should be equipped with a presentence investigation, just as the parole board should be equipped with a parole study. The judge, like the parole board, must exercise his discretion with respect to individualized treatment. If he fails to do so with respect to the maximum term, the parole board is deprived of the guidance of the judge's discretion.

"Of course the judge's maximum term is not binding on the parole board and yet it is not without significance. If a parole board is faced with a very high maximum term, however it is fixed, and whether or not the judge exercises discretion, the parole board is responsible to the people of the state and cannot ignore the length of that maximum term. The statistics show that the parole board keeps a man in the institution and under supervision longer if the maximum term imposed is longer."

The brief pointed out that in the face of the existing penal system, two things are necessary. The first is that the judge must have a discretion to fix a maximum term less than the maximum provided under the statute; and second, that the scale of punishments should be brought down substantially below what they are now.

Perhaps one circumstance might make the judge's control of the maximum term unnecessary: situations where the maximum term, if automatically fixed, would nevertheless be reasonably limited, perhaps three to five years. Some of the youth authority acts, and the New York Youthful Offender law, so provide; and the Advisory Council of Judges endorses such plans, as we point out below. But where maximum terms are as lengthy as they are under the codes in most states and certainly under the A.L.I. code, the realities of correctional treatment, the sheer economics of correctional costs, and fairness to sentenced individuals call for a judge-controlled maximum.

What of the third column in the table above, the provision for "extended terms"? The code proposes these increased penalties for a wide variety of cases—for repeated offenders, loosely defined "professional" offenders, and others. The A.C.J. pointed out that the classification of defendants who could thus receive extended terms was so broad that in fact a very large percentage of defendants being sentenced could be subject to them, more than under existing definitions of habitual offenders, since in some cases an individual could be sentenced to an extended term without a previous conviction.

"Parole terms", an invention of the code, would substantially increase the time served by prisoners, and would have other detrimental effects. We defer discussion of this, for the moment, to consider the *minimum terms* provided for by the code, and the effect of minimum terms on duration of sentences and rational correctional operations.

Minimum Terms

The A.L.I. provision regarding minimum terms is as follows:

Grade of Felony	Minimum Term—Ordinary	Minimum Term—Extended
1st degree	not less than 1 nor more than 10 years	not less than 5 nor more than 10 years
2d degree	not less than 1 nor more than 3 years	not less than 1 nor more than 5 years
3d degree	not less than 1 nor more than 2 years	not less than 1 nor more than 3 years

Briefs submitted by the Advisory

Council of Judges and the Advisory Council on Parole said, "One of the truly destructive elements in sentencing is the existence of minimum terms which (at the discretion of the sentencing judge) may be inordinately high. It must be remembered that a high minimum term limits parole flexibility and the entire correctional process. Parole boards need power to release when they see fit according to the adjustment of the individual. Many correctional administrators recognize the feasibility of a short, intensive correctional program.

"One of the laudable goals of the Institute plan in the present draft is to encourage (indeed, the present plan would mandate) the broad use of parole. However, parole as a rehabilitative process achieves only a fraction of its value if it is granted so late that the individual released has already suffered the deterioration resulting from an unduly lengthy prison commitment. We would consider it most desirable that minimum terms be held as low as possible, and in fact there should be no minimum. . .

"... We must ... disapprove minimum terms which may regularly be as much as three and five years. In certain individual cases it may be necessary to retain an individual in the institution for this number of years, or more. However, duration of confinement should not be governed by the minimum term fixed by the judge, but rather by the parole board. It must be stressed that we are here referring to *minimum* terms fixed by the *sentence.* Although we prefer no minimum, if first degree felony is limited to one or two crimes, there would be no objection to allowing a judge to fix a minimum term of perhaps between one and five years. For second degree felons, a minimum of not more than one year would be acceptable. For third degree felons there should be no minimum whatever."

Parole Term

We come to an original feature of the model code proposal, the invention of the "parole term". The prison terms we have been talking about thus far are unlike prison terms in existence anywhere else. As high as we have said the terms are, they are higher still under the A.L.I. code, because they are terms of actual imprisonment only, and to them are added another term, a parole term. And since a parole term may become a term of imprisonment (in case of a violation, whether for a new crime or not) the offender, every offender, faces *two* terms, two consecutive terms, instead of one.

Under the A.L.I. model penal code plan when a man is released from prison, either on expiration of his sentence or by action of the parole board, he then starts serving another term, the parole term. The minimum parole term would be at least one year or one-half of the period of time that the offender actually served in the institution, whichever was longer; the maximum parole term would be ten years or twice the period of time actually served in the institution, whichever was shorter. Thus, under the law everywhere today, a commitment of ten years may represent five years in the institution and five years on parole. But under the code proposal, a ten-year term of which the offender served five years would actually be a term of five years plus (if he was released after five years) a possible maximum term of ten years on parole, or a total of fifteen years. In fact, it would be possible for the so-called ten-year term to become a term of ten years in an institution plus a term of ten years on parole, or a total of twenty years for a term which was designated as only ten years.

This feature of the Model Penal Code sentencing plan would not only greatly lengthen prison and parole terms; it would also adversely affect the parole-granting process. The plan might well create a predisposition on the part of parole boards to defer release and discharge. A prisoner who might be eligible and suitable for release after a year or two in prison, and who might have two, three or more years remaining on his prison term, might be held back from parole for two or three years, so that the parole term would be longer. If parole is to succeed, it will succeed usually in two or three years. The experience is, in fact, that the first six months are the crucial period. California is demonstrating that earlier releases are at least as successful as those that are delayed. But the code plan would—by this "parole term" device—delay parole releases, and increase parole periods for many. It is hard to see anything but an increase in parole failures as another product.

And how much arithmetic is involved in this code! The symmetry it seeks—not too difficult to attain in another fashion—is here secured at the cost of a mechanization of correction. Mr. Turnbladh said, "The Code proposal would . . . foster a mechanical approach to administration. All too often, parole boards, like prisoners, become more concerned with arithmetic than with attitudes, more solicitous about calculating the term than preparing for release at the most beneficial time." Under the Code plan, this tendency would be enormously increased.

Sol Rubin has served since 1945 as Counsel for the National Council on Crime and Delinquency, formerly the National Probation and Parole Association. He is the author of *Crime and Juvenile Delinquency: A Rational Approach to Penal Problems,* and at present is engaged, with others, in writing a treatise on the law of criminal correction. He is a member of the New York Bar and of the American Law Institute.

...hful Offenders

...ore the Model Penal Code proj... the only other effort of the A.L.I. ...correctional field was the Model ...h Correction Authority Act, pub... ...d in 1940. This is generally con... ...ed by almost every interested or... ...ization except the American Law ...itute itself a successful project. It ...mulated the legislatures in ten or ...ve states to give special attention ...statutory provisions for correctional ...tment of youthful offenders, and it ...generally agreed that by and large ...der these statutes the quality of the ...titutions and other correctional serv... ...es has improved.

As pointed out above, the correctional field became particularly aroused when Draft No. 3 of the Model Penal Code was published in 1955. This draft dealt with the youthful offender and proposed, in brief, to repudiate the Model Youth Correction Authority Act. Many administrators, particularly those in charge of youth authorities or similar activities, were deeply concerned, as it was obvious that such repudiation might well affect the continued support of the youth programs by the legislatures.

The result of this concern was that N.C.C.D. requested a meeting between the youth authority representatives and the representatives of the American Law Institute. A group of the leading spokesmen for the youth authorities around the country came to New York for the meeting. The subject was pursued on other occasions and through the submission of briefs, principally by the N.C.C.D. Advisory Council of Judges.

None of the persons opposing the A.L.I. proposal—the youth authority people, the Advisory Council of Judges, and those who spoke to similar effect at the annual A.L.I. meetings—were able to sway the A.L.I. from its stand on the youth authorities. Draft No. 7 does what Draft No. 3 proposed—it rejects the youth authority plan. It declares that an offender sixteen years of age or over but less than twenty-two years of age shall be committed to the custody of the Division of Young Adult Correction of the Department of Correction, one of a large number of divisions, with little promise of enjoying the identity and autonomy of the youth authorities. It would not have—as the youth authorities do have—separate institutional facilities for youthful offenders, including central reception and diagnosis; and responsibility for standard setting and assistance to localities in other correctional services, including probation.

The plan would also set up a Young Adult Division of the Board of Parole. Although such a plan has some realistic meaning for a board like the United States Board of Parole—which has eight members, three of whom serve as a youth correction division—for most boards this is not feasible. Few boards have more than three full-time members. A youth division of the board would, therefore, consist of the same members as the adult parole board. It should, however, rather be a separate board of three members or more, depending on the volume of work, and it should be empowered to grant a parole at any time, as is true of all the existing youth authorities.

Under Draft No. 7 a youth could be sentenced to the same terms as any other offender. Nor did the A.L.I. adopt (as the Advisory Council of Judges urged it to) the successful Youthful Offender procedure utilized in New York, under which, on a discretionary basis, a youth may be sentenced under a noncriminal adjudication. As Mr. Turnbladh said in his article, "All too often, we encounter the tragic experience of youthful offenders, many of whom are convicted of crimes which are the results of youthful impulse and not representative of a criminal pattern, youth who are headed for successful careers or respectable lives, whose future opportunities for professional work or satisfactory employment are grievously impaired, to their own detriment and to that of the community, by the existence of the criminal conviction which inexorably follows them. This effect can be mitigated and the community, at the same time, can be amply protected by the provision that the disposition shall be deemed noncriminal, so that the youth may accurately say that he has not been convicted of a crime. Expunging the record later on comes too late."

Other Problems

The foregoing are the main features of the code drafts that are disturbing to the correctional field, the Advisory Council of Judges and others. Other proposals also have been criticized. For many years the correctional field has had a progressive model probation act to draw upon, the Standard Probation and Parole Act (published in 1955, and an earlier model act of 1940, both published by the National Council on Crime and Delinquency). The A.L.I. draft of a probation act injected a new, long list of statutory criteria conditioning the judge's power to use probation. We conducted a questionnaire survey among the criminal courts of the country, and the results were clear—most judges feared that a statute drafted on the A.L.I. model would deter the use of probation. We made the survey available to the A.L.I. reporters, we discussed it in a brief, our respective staffs corresponded on it, and we are led to believe that this draft section will be revised.

But the parole draft has similar criteria, which, incidentally, were presented by the A.L.I. staff at the 1956 National Parole Conference and not adopted there. We have no reason to believe that this section is to be changed. The Code proposal declares that when the parole board deliberates it shall order the release of a prisoner unless any one of four specified criteria exists. Boards of parole use many criteria and guides in arriving at their decisions, but the variety of situations and kinds of offenders are such that no simple guides, such as are here proposed, are likely to be adequate. Furthermore, these criteria might be interpreted as creating a right to parole, inviting countless writs by prisoners whose paroles have been denied.

The Code draft would grant to a prisoner the right to consult with his own legal counsel in preparing for a hearing before the parole board. The provision was later amended to give the prisoner the right to be represented by counsel at the *hearing*. The Standard Probation and Parole Act provides that "the Board shall not be required

to hear oral statements or arguments by attorneys or other persons not connected with the correctional system", and this position is endorsed by most of the correctional and parole administrators in the country. Under the A.L.I. plan the conditions of parole would be limited to those spelled out in the statute, suggesting an undesirable rigidity. Under the Standard Probation and Parole Act no specific conditions are recited in the statute.

Draft No. 5, published in 1956, included not only the parole material but proposed sections on organization of a department of correction. The draft proposed a department of correction under a director of correction, the department consisting of ten divisions—treatment services, custodial services, young adult correction, fiscal control, prison industries, research and training, parole, probation, commission of correction and community services, and board of parole—all division heads serving at the pleasure of the director. It required that in each institution in the department there be a warden and two associate wardens, one for treatment and one for custody. Several of these provisions seem questionable: for example, the wide use of divisional heads not under civil service. The organization of the department is too big and too rigid and certainly does not appear to be a satisfactory pattern for the majority of states.

As important as anything else is the impact of the code on the use of community treatment (probation, suspended sentence, fines) as compared with institutional treatment. When terms of imprisonment generally are inordinately long, the relatively short term of imprisonment is used for persons who, in a less punitive system, would receive community treatment. In other words, the over-all impact of the A.L.I. sentencing plan would deter community treatment and would encourage commitments.

A Choice

Unless a surprising change of direction occurs, the Model Penal Code will not differ from the drafts that have already appeared. The correctional field, which enthusiastically received the A.L.I. Model Youth Correction Authority Act, is producing its own model statutes covering the same ground as the sentencing and correctional provisions of the model code. In addition to the Standard Probation and Parole Act, the National Council on Crime and Delinquency and the American Correctional Association are drafting (through a national committee) a Standard Act for State Correctional Services. The Advisory Council of Judges of the N.C.C.D. is at work on a model sentencing act, including sections on sentencing of youthful offenders. The N.C.C.D. has also published the Standard Juvenile Court Act (the sixth edition in 1959), and the Standard Family Court Act.

If the American Law Institute and the correctional field presented [illegible] positions, supporting each other [illegible] the legislatures, the outlook would [illegible] a hopeful one for improved penological systems in this country. In the absence of such a situation the legislatures will be faced with choices in many phases of this work. Although regrettable, perhaps this is not a totally unhealthy prospect either. With the model code on the scene—again, provided it is published in about the same form as its drafts indicate—we shall have a body of proposals epitomizing or aggerating (in the opinion of [illegible] writer, and many others) much that is undesirable in existing law, things we have been trying to correct with only limited success. Perhaps the most useful thing that will be accomplished by publication of the model code is that it will set forth clearly one of the two distinct philosophies of correction between which the legislatures will have to choose. Perhaps it will be easier for the legislatures to make a sound choice when they must act as arbiters between two outside proposals, and perhaps the prospect for change will be an improved one as against that of a single attitude of reformers attempting to change what already exists. For our part, we hope and expect that the correctional field will invest a great deal of energy in advocacy of the ideas it supports. For the most part, it seems clear that this effort will at the same time involve opposition to the A.L.I. model penal code.