# The Model Penal Code: An Invitation to Law Reform

The monumental Model Penal Code, product of the American Law Institute, is an invitation to courts and legislatures to reform archaic and anomalous provisions of criminal jurisprudence. Here Mr. Schwartz gives a clear and useful explanation of a proposal that should engage the deepest attention of the Bar.

by Louis B. Schwartz • *Professor of Law, University of Pennsylvania Law School*

In May, 1962, just as the American Law Institute was considering the proposed final draft of the Model Penal Code, the highest courts of two states handed down decisions that neatly illustrate the necessity for reform of the criminal law. In *People* v. *Young*, 11 N. Y. 2d 274, the Court of Appeals of New York upheld the criminal conviction of a man who might well be regarded as a hero. In *State* v. *Immel*, 228 Md. 566, the Court of Appeals of Maryland reversed the conviction of a man who was clearly a swindler. In both instances the unjust results would not have been possible if the Model Penal Code had been in force.

In *Young*, the defendant saw two men attacking a third. He ran to the aid of the man being attacked and pushed one of the attackers, who fell and broke his leg. The attackers then revealed themselves as policemen in plain-clothes, engaged in making an arrest. Young was convicted of criminal assault.

In *Immel*, the defendant made fraudulent misrepresentations to a bank for the purpose of obtaining a loan. The bank credited the amount of the loan to his account, but the fraud was discovered before he withdrew the money from the account. He was prosecuted for obtaining property by false pretenses and convicted. On appeal, his conviction was set aside on the ground that as long as he had not withdrawn the funds in his account he had not yet "obtained" anything.

Under the Model Penal Code, Young would have been acquitted because mistake excuses if the actor was not reckless, and because Section 3.05 affirmatively declares, contrary to much present law, that a person is justified in using force to protect another if, "under the circumstances as the actor believes them to be", the person protected would be justified in self-defense. Under the Model Penal Code, Immel's conviction would not have been set aside because "property" is defined for purposes of the law of theft and fraud as "anything of value, including ... interests in or claims to wealth" (Section 223.0). In addition the code abrogates the rule that criminal laws are to be "strictly construed". It declares instead that the code provisions "shall be construed according to the fair import of their terms". "Strict construction" was a proper rule for a system of penal law in which offenses were loosely defined and savage penalties were the rule rather than the exception. The Model Penal Code aspires to say exactly what it means to prohibit and its sentencing system aims to be no harsher than public safety requires.

## *Model Penal Code Is Product of Many*

The code is the result of ten years' labor by a corps of professors, judges, practicing lawyers, prison administrators, probation and parole specialists, psychiatrists and criminologists. Its preparation cost over $500,000, which was given for this purpose by the Rockefeller Foundation to the American Law Institute. The Institute is an extraordinary professional organization, comprising 1,500 leading lawyers and judges from every part of the United States. It has been engaged for forty years in a series of projects for clarification and improvement of the law. In its earlier years the Institute was occupied chiefly in preparing authoritative "restatements" of the common law on such subjects as property, contracts and trusts. More recently it has concerned itself with legislative reforms, such as the Model Penal Code. Since the membership is drawn from every branch of the legal profession, the

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Institute's proposals cannot represent the views of special groups of practitioners—criminal defense lawyers, for example, constitute a small fraction of the Institute—but must win the approval of a cross-section of the Bar, including corporation lawyers, tax lawyers, negligence lawyers, international lawyers, etc.

Among the famous judges on the Council of the Institute who have been actively concerned with the Model Penal Code were Learned Hand, John J. Parker, Joseph C. Hutcheson, Jr. and Herbert F. Goodrich, long Director of the Institute. A special advisory committee on the code numbered among its members world-famous criminologists Sheldon Glueck and Thorsten Sellin; James V. Bennett, Director of the Federal Bureau of Prisons; Sanford Bates, who had headed the correctional systems of Massachusetts and New Jersey; and Dr. Manfred S. Guttmacher, chief psychiatrist of the criminal courts of Baltimore. Reporters for the Model Penal Code, in charge of research and preparation of drafts, were Professors Herbert Wechsler, of Columbia University Law School; Louis B. Schwartz, of the University of Pennsylvania Law School; and Paul W. Tappan, of New York University Law School. Each had substantial experience in actual administration of criminal law in the United States Department of Justice and elsewhere.

The proposed final draft of the code, which has been approved subject to minor editorial changes, is a 346-page printed document setting forth the text of the law. Final publication of the text and of several accompanying volumes of commentary is scheduled for 1963.

### *Code Is Divided into Four Parts*

The code is in four parts. Part I, "General Provisions", deals with issues that arise regardless of the nature of the particular offense, *e.g.*, the effect of mistake, intoxication, consent or entrapment; the privileges to use force in law enforcement, self-defense and the like; special rules and procedures in dealing with the mentally ill; and the general structure of the sentencing plan. Part II defines the specific offenses, grouping them in classes: offenses against the person, against property, against the family, against public administration, and against public order and decency. Part III, "Treatment and Correction", regulates probation, fines, short-term imprisonment, long-term imprisonment and parole. Part IV deals with the administration of the correctional system, defining the structure and the responsibilities of the department of correction and the board of parole.

Although the Model Penal Code covers the whole range of substantive penal law, sentencing and correctional administration, it does not pretend to be all-inclusive. Criminal procedure, including the law of arrest, was outside the scope of the project. Treatment of juveniles is left to juvenile court acts. Certain classes of offenses remain unrevised for special reasons. Treason, sedition and espionage, for example, are not dealt with, because these are primarily the responsibility of the Federal Government rather than the states.

The Institute did [illegible]ake with liquor, narcot[illegible] [illegible]abling offenses, because thes[illegible] [illegible]ields hav[illegible] intensively studied by other ag[illegible] and are subject to extensive cont[illegible] a regulatory character integrate[illegible] divergent state judicial and ad[illegible] trative systems. Therefore they [illegible] lend themselves to "model" sol[illegible]

The code reforms which hav[illegible] selected for discussion below t[illegible] the nature and range of the ent[illegible] fall into six groups: (1) provisi[illegible] suring the exoneration of "blam[illegible] behavior resulting from innocen[illegible] takes or associated with incapac[illegible] mental illness; (2) the system [illegible] tence and parole designed to saf[illegible] the public without excessive seve[illegible] arbitrary differences in treatment[illegible] revision of the law of murder an[illegible] those states that choose to retain[illegible] tal punishment, the procedure f[illegible] posing it; (4) the sexual offens[illegible] illustrative of situations where p[illegible] ing criminal law has to be restr[illegible] (5) the area of criminal fraud, [illegible] lustrative of situations where p[illegible] ing criminal law, being too restr[illegible] must be extended by creating [illegible] offenses or enlarging old ones; an[illegible] provisions dealing with obscenit[illegible] orderly conduct and loitering. [illegible] the code provisions carefully rec[illegible] the conflicting requirements of la[illegible] forcement and civil liberty.

## I

### *Blameless Conduct Shoul[illegible] Not Be Criminal*

Law must be respectable to [illegible] spected. Nothing undermines g[illegible] respect for law more than a f[illegible] that the law is arbitrary in assi[illegible] guilt. Penal law must not conden[illegible] criminals people who are not [illegible] blameworthy. Laws which purp[illegible] penalize conduct that is "blamel[illegible] the ordinary sense of the term are [illegible] common than is generally realiz[illegible] policeman is in some states guil[illegible] criminal homicide if he fires at a[illegible] ing suspect and kills him should i[illegible] out that the deceased was not the [illegible] although the policeman had every[illegible] son to think him so. A man ma[illegible] guilty of bigamy if he marries a s[illegible] wife after obtaining what he mista[illegible]

believ[illegible] valid divorce. A tavern-keeper [illegible] convicted of selling liquor to [illegible] although he takes every preca[illegible] to do so and is the victim of [illegible] A man who is incontrovertibly [illegible]atic, unable to control his own behavior, remains subject to criminal conviction in many states unless his mental illness is such as to prevent him from "knowing" what he is doing and that it is against the law.

Section 2.02 of the code deals with the general requirement of culpability. Ordinarily, there must be proof that the accused acted "purposely, knowingly or recklessly". Negligence suffices only where it is expressly made the basis of liability, and negligence as defined in Section 2.02(2) (d) must be a "gross deviation" from proper behavior. In other words, mere failure of the actor to observe "reasonable" care —the standard appropriate for imposing damages in a civil suit—is not enough for criminal conviction. Serious crimes like manslaughter (Section 210.3) or causing a catastrophe (Section 220.2) require recklessness rather than negligence, and recklessness can be proved only by showing "*conscious* disregard" of the risks, as well as gross deviation from proper behavior.

Honest Non-Negligent Mistake Excuses. Section 2.04 of the code revises the traditional law of mistake as a defense to a charge of crime. Mistakes of law as well as mistakes of fact will excuse, unless the mistake was reckless or negligent. A person cannot be convicted of crime if he relied on an official interpretation of law. It is plainly an abuse of criminal law to permit a district attorney to prosecute an individual who thought he was complying with the law as interpreted to him by a previous district attorney or an appropriate administrative agency. Of course, the code does not prevent a change or withdrawal of a previous official interpretation, after which the actor could no longer reasonably rely on the earlier interpretation.

An example of the numerous changes in substantive criminal law made by the code to carry out the general principle of nonculpability of innocent mistakes is provided by the section prohibiting "deceptive business practices", *e.g.*, adulteration or mislabeling of goods, misleading advertising, use of false weights and measures. Existing law frequently purports to make the liability absolute, regardless of the absence of fraudulent intent or even negligence. The code, however, makes it a defense for the defendant to prove "by a preponderance of the evidence that his conduct was not knowingly or recklessly deceptive" (Section 224.7). This solution recognizes the possibility of innocent mistake, but also puts the burden of proof on the business practitioner caught in a deception, so that law enforcement is not made impossibly difficult.

Another illustration of desirable expansion of the defense of mistake is provided in Section 230.1 — bigamy. The section makes it a defense to prosecution for bigamy that the remarrying person "reasonably believes that he is legally eligible to remarry". Where one of the parties to a marriage was previously married and divorced and there may be some question as to the validity of the divorce, the section goes even further to protect the remarrying person. It precludes bigamy conviction unless the defendant *knew* that the divorce was invalid, *i.e.*, it is enough that he remarried in good faith, whether or not he was "reasonable" in relying on the legal system's operation in granting him a divorce.

The Mentally Ill. Section 4.01 of the code offers a new solution to the centuries-old controversy about what sort of person should be excused on the ground of mental illness or defect. Under the traditional M'Naghten Rules only impairment of the defendant's "knowledge" is taken into account; there is no inquiry into the degree to which his self-control is impaired. He can be convicted despite an admittedly severe mental illness, if he is aware of what he was doing and that it is evil or proscribed behavior. Some later revisions of the M'Naghten doctrine allowed a partial inquiry into self-control by recognizing "irresistible impulse" as a defense. But this is unsatisfactory both because of the difficulty of distinguishing an irresistible impulse from any impulse which in fact was not resisted, and because overwhelming compulsion to misbehave may result from long, insane brooding as well as from momentary "impulse".

The code solution: the test of responsibility is whether the defendant "lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law". Thus, a defendant will not be convicted of crime if mental illness has deprived him of effective power to make the right choices in governing his own behavior. The defense is available even though his mental incapacity is not absolute or total: the prosecution must prove that his capacity to behave as required by law is "substantial", notwithstanding his mental illness or defect. On the other hand, he does not escape responsibility merely because he is, by some psychiatric standard, in need of therapy and therefore classifiable for some purposes as "mentally ill".

Besides revising the rule of responsibility, the code includes important provisions assuring that suitable psychiatric examination will be made in advance of trial, that psychiatric testimony as to the defendant's mental state will be given only by experts who have examined the defendant and that these experts will have full freedom to put their professional findings and conclusions before the court and jury without being restricted to the terms of a particular legal formula. (See, especially, Sections 4.05 and 4.07.) These provisions should go far toward building mutual respect between lawyers and psychiatrists and developing public confidence in the disposition of cases involving the defense of insanity. A defendant acquitted on the ground of mental disease or defect must be committed to a mental hospital until he can "safely be discharged" (Section 4.08).

## II

## *Sense in Sentencing and Parole*

In most states today there is hardly any rational pattern to the penalties attached to different offenses. Similar offenses carry very different maximum

| | *Minimum* | *Maximum* |
|---|---|---|
| Felony of the First Degree (murder, aggravated rape, robbery, or kidnaping) | 1-10 years | life imprisonment |
| Felony of the Second Degree (violent felonies generally, forgery, illegal abortion at late stages of pregnancy) | 1-3 years | 10 years |
| Felony of the Third Degree (non-violent serious crime) | 1-2 years | 5 years |
| Misdemeanor | — | 1 year |
| Petty Misdemeanor | — | 30 days |

prison terms. Successive legislatures create new offenses and fix the limits of imprisonment almost without regard to what previous legislatures have regarded as appropriate levels of severity. In contrast to this, the Model Penal Code provides a classification scheme under which all offenses fall into one of five categories, as shown in the table above (Section 6.06).

There is in addition a category of noncriminal "violations" for which only fines may be imposed.

Of course, the value of a classification scheme depends largely on the care taken in defining particular offenses and placing them in an appropriate category. Existing law affords many illustrations of arbitrary grading. Under some state laws, a robbery or sex offense may be converted into a kidnaping punishable by death if the victim is compelled to move a few feet. This was the situation in the Chessman case. Section 212.1 of the code precludes that result. Rape is generally penalized with the utmost severity, even death, without distinction between savage attacks by strangers and situations involving dating couples where the girl has tolerated considerable intimacies. Section 213.1 makes the necessary distinction, classifying the first case but not the second as a felony of the first degree. The commentary on arson in the Model Penal Code points out the arbitrary nature of arson grading under prevailing law:

> For example, the burning of an empty, isolated dwelling may lead to a 20-year sentence, while setting fire to a crowded church, theater or jail is a lesser offense. The destruction of a large dam, factory or public service facility is regarded less seriously than destruction of a private garage on the grounds of a suburban home. Moreover, it makes little sense to treat the burning of miscellaneous personal property, whether out of malice or to defraud insurers, as a special category of crime apart from risks associated with burning. Thus, to destroy a valuable painting or a manuscript by burning it in a hearth or furnace cannot be distinguished criminologically from any other method of destruction.

All these relics of history are jettisoned by the code.

**Extended Terms for Specially Dangerous Offenders.** The code authorizes courts to impose extended sentences on specially dangerous offenders. For example, the extended second-degree felony sentence may go up to twenty years, as compared with the ordinary ten-year maximum; the extended sentence for a third-degree felony may go as high as ten years, as compared with the ordinary five-year maximum. (See Section 6.07.) The classes of specially dangerous offenders for whom extended sentences are authorized are: "persistent" offenders (prior convictions of two felonies or one felony and two misdemeanors), "professional criminals" (criminal activity as "a major source of livelihood" or wealth "not explained to be derived from a source other than criminal activity"), "mentally abnormal" offenders ("pattern of repetitive or compulsive" criminality making the defendant "a serious danger to others"), and "multiple offenders" (those being sentenced at one time for a number of offenses, who do not necessarily have previous convictions).

Among the useful features of this plan is that it enables the legislature t[o] be more moderate in the sentenci[ng] limits for the ordinary offender sin[ce] appropriately extended sentences a[re] available for the minority of offen[d]ers found to be specially dangerou[s]. Another advantage of the extende[d] term arrangement is that it substitut[es] a single reasonably prolonged perio[d] of confinement for the virtually u[n]limited discretion which present law[s] confer on judges to cumulate sentenc[es] of multiple offenders. Under prese[nt] law, for example, a man apprehende[d] after committing a half dozen robberi[es] might be sentenced to six times twent[y] years (assuming twenty years to b[e] the maximum for one offense) or 12[0] years. Such vindictive and absurd sen[]tences, designed to defeat the operatio[n] of parole, are not unheard of. Unde[r] the Model Penal Code, the offende[r] would receive a maximum of up t[o] double the ordinary code maximum fo[r] simple robbery, namely twenty years.

**Parole.** The code incorporates [a] number of improvements in the la[w] relating to parole. Notably, it is re[]quired that *all* prisoners serving sen[]tences in excess of one year be unde[r] parole supervision for a period afte[r] release from prison (Section 6.10 (2)). This corrects a fundamental and ob[]vious flaw in traditional parole: tha[t] the period of parole supervision is *in[]versely* proportioned to the need fo[r] supervision. This paradoxical situatio[n] is the result of the historical origin o[f] parole as an act of mercy mitigating the severity of long sentences for thos[e] who showed themselves worthy o[f] being trusted outside the prison walls. In theory, the convict on parole was simply serving the uncompleted portion of his original sentence. Thus, if a man sentenced to an indeterminate term of one to ten years is deemed a good risk and the parole board releases him at the end of one year, he will have nine years of parole. But if the parole board judges him to be a dangerous criminal and refuses to release him on parole, he will emerge at the end of ten years with no parole supervision at all, since he has served his full term. Moreover, in case of violation of parole by a man who was released on parole shortly be[-]

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All this would be changed under Section 6.10 of the code. A parole term of one to five years is automatically a part of every sentence to long imprisonment. An offender released near the end of his prison term may be kept under supervision for five more years, and, if he violates parole, he may have to serve up to five years notwithstanding that he had served nearly all of his original prison term.

Another significant advantage of the code parole plan is that *unnecessary* parole supervision is eliminated. In the case previously mentioned of a man judged worthy of early release under a sentence of one to ten years, he remains a charge of the parole board for nine years. It seems clear that such a man, who confirms the parole board's judgment by blameless conduct for several years after release, should not continue under burdensome parole restraints; the five-year limit set by the code is surely enough to warrant the unconditional return of the parolee to freedom. Equally important, the parole board should be relieved of the burden of looking after men who have demonstrably reformed, so that it can concentrate its resources on the numerous and difficult problems of men recently released from prison.

Other code improvements in parole include a careful listing of the criteria for release and a declaration of policy in favor of early release unless the parole board is of the opinion that release should be deferred on specified grounds (Section 305.9). Parole may be subject to reasonable conditions (Section 305.13), including a requirement that the parolee reside for a time in a "parole hostel . . . or other special residence facility" (Section 305.14). This allows for hopeful new penological experiments in providing transitional stages of partial freedom for men emerging from long periods of confinement. A related provision in the portion of the code regulating the conditions of long-term imprisonment (Article 304) authorizes "pre-parole furloughs" for several weeks to enable the prospective parolee to find work, lodgings, etc.

## III
## *Capital Punishment and Criminal Homicide Grading*

The American Law Institute gave careful consideration to the question of capital punishment, but finally refrained from making a recommendation on the issue of abolition. Murder is declared in Section 210.2(2) to be a felony of the first degree, which is normally punishable by life imprisonment. However, there is a bracketed alternative text for the death penalty in states which choose to retain it. A special report on capital punishment by Thorsten Sellin is included in the commentaries to the code. It provides a definitive review of the known facts on the basis of which a legislature should make the choice.

The application of the highest penalties for murder will in any event be restricted and regularized by the code's innovations in the definition of murder and by improvements proposed in the procedure for determining which murderers shall be condemned to death, where the death penalty is retained.

The code abandons the traditional classification of murder into two degrees, the first of which is characterized by the presence of "deliberation" and "premeditation", or by killing in the commission of designated felonies, or by the use of "poison" or "torture". Centuries of experience demonstrate that while each of these factors has some significance in appraising the heinousness of a criminal homicide, arbitrary results follow from any effort to put a murder in the first degree on the basis of one of these factors without considering other circumstances. For example, using deliberation and premeditation as the sole determinant, we place in the worst category of killers the loving husband who "deliberately" kills his wife to spare her the torture of slow death from an agonizing, fatal disease; but we put in second degree the brutal, dangerous killer "on impulse". A robber who purposely shoots his victim or a guard during the commission of the robbery certainly merits the severest penalty, which would in any event be imposed because of the intentional killing without the slightest justification or mitigating circumstance; but the felony-murder rule can also be applied to condemn for first-degree murder an unarmed man fleeing from arrest for burglarious entry of a warehouse, if police bullets aimed at him accidentally kill a bystander.

Section 210.2 classifies all intentional and extremely reckless killings as murder, and creates a *rebuttable presumption* of the necessary recklessness where the killing is associated with the actor's engaging in certain violent felonies. An intentional killing may be reduced to manslaughter if the killer was in a state of reasonably excusable "extreme mental or emotional disturbance" (Section 210.3). This last provision gets rid of some arbitrary restrictions which have grown up in the law of voluntary manslaughter regarding the types of provocation which might cause ordinary law-abiding people to fly into a homicidal passion. No longer will it be possible for a court to rule that a scurrilous public insult, or a wife's sudden taunting confession of adultery, is insufficient provocation as a matter of law, being "mere words".

The improvement in the procedure relating to the death penalty is embodied in Section 210.6. Its essential features are (1) listings of "aggravating circumstances" and "mitigating circumstances", (2) exclusion of the death penalty unless at least one of the aggravating circumstances is present, (3) a required finding that "there are no mitigating circumstances sufficiently substantial to call for leniency", and (4) a division of the trial into two separate stages, the first confined to the determination of defendant's guilt of murder and the second dealing with the choice between life imprisonment or death. At the second stage the jury may hear evidence of aggravating circumstances that would be extremely prejudicial to fair trial of the accused on the issue of guilt, notably evidence relating to his prior record of crime. Several states, including California and Pennsylvania, have already adopted the two-stage procedure, and the United States Court of Appeals for the Third

Circuit recently held that the common single-stage procedure violates the due process clause when the jury is allowed to hear prejudicial evidence of other crimes before it has found the defendant guilty of the particular crime charged.

## IV

## *Sexual Offenses: Withdrawing Law from Some Areas*

Private Illicit Sexual Relations. The Model Penal Code does not penalize private, illicit sexual relations, whether heterosexual or homosexual, except where children are victimized, or coercion is employed or other serious imposition is practiced. (See Article 213.) Prostitution, deviate as well as heterosexual, is penalized, with special severity for organizers and managers of such illegal businesses (Section 251.2). Solicitation of deviate sexual relations in public places is covered by Section 251.3, even if no money is involved. Needless to say, this limited withdrawal of the criminal law from the field of sexual morality does not express the slightest inclination of the American Law Institute to approve illicit sexuality. Rather, it expresses a sober, expert judgment, documented fully in the comments to Article 213, that this is an area in which the criminal law is ineffective, if not positively harmful.

From the Kinsey reports and other sources we know that very large proportions of the population engage in illicit sexual activity at some time. The incidents occur in private between willing partners, so that complaints are rarely brought to the authorities and even more rarely result in prosecution. Complaint and prosecution are, especially in the case of homosexuality, likely to be aspects of some subsequent quarrel between the participants or of an effort by one to blackmail the other. Criminal complaints of adultery lend themselves to use as weapons by which one spouse may force a favorable divorce settlement on the other.

As regards the nonpenal character of fornication and adultery, the Model Penal Code aligns itself with the law of England, a number of European countries and the carefully considered Louisiana Criminal Code of 1942. As regards homosexual relations, the code aligns itself with the law of such countries as Denmark, Sweden, Switzerland, France and Italy. The code also has the support of the famous Wolfenden Report, in which leading British clergymen joined with medical and legal experts in recommending reform of English law on the point. The Model Penal Code recommendation with respect to illicit homosexual relations was in substance incorporated in the Illinois Criminal Code of 1961.

Rape and "Statutory Rape". Ravishment by force is everywhere regarded as among the gravest offenses. So the Model Penal Code treats it, even extending the definition of rape to include deviate forms of sexual intercourse imposed on a female victim (Section 213.1). The code, however, introduces some safeguards and discriminations which are essential in dealing with an offense which may be punishable by life imprisonment. For example, the traditional definition of rape excludes intercourse with a "wife", for the very good reason that it is too dangerous to put a man's freedom in jeopardy in a trial where the issue is what happened in the intimacy of marital relations, and because we see separation and divorce as available civil remedies for sexual incompatibility. But these reasons apply regardless of the legal relationship existing between parties living together as man and wife. Accordingly, the code excludes the possibility of a rape prosecution where the parties have been cohabiting in a bigamous or other extended meretricious relationship (Section 213.6).

A more far-reaching innovation, essential to a rational law of "rape", is the discrimination which the code makes between sexual relations forced on a woman and so-called "statutory rape" involving a willing or even aggressive adolescent girl. The code, in the first place, classifies the latter offense as a form of "corruption of minors", not rape (Section 213.3(1)(a)). The offense entails a maximum imprisonment of only five years. More important, the offense of "statutory rape" is restricted to situations where the man involved has a substantial age advantage over the girl. Only in this way can the law make sense. I treat a willing, physically apt tee girl as a "victim", it is becaus significance of her consent is vit by her emotional and intellectua maturity. But if her partner is lik an adolescent, emotionally and i lectually immature, it is absurd to him as guilty of felonious rape she is regarded as innocent even i is older than he and played the r seductress. Accordingly, the code s fies that the boy must be at least years older than the girl and mak a defense that the girl had previ been sexually promiscuous with o (Sections 213.3(1)(a) and 213.6

Abortion. The code enlarges categories of justifiable abortion. states penalize abortion except w the operation is necessary to pre the mother's death or, perhaps, se impairment of her health. Section 2 makes it clear that preserving mental health of the mother is a cient justification and additionally mits abortion (a) where in the opi of physicians there is substa risk that the child would be born a grave physical or mental defe (b) where the pregnancy resulted rape, incest or other felonious i course. The need for moderate lib zation of the law of abortion recently been underlined by the t birth of thousands of maimed crippled infants to mothers who taken thalidomide and by the acqu in Belgium of parents and a d who administered lethal drugs to of these pitiable infants. The se class of justifiable abortion recogn by the code solves the horrible dicament of the devout young mar woman who, refusing offers of ill abortion, was compelled to bea rapist's child. This case received i national publicity in 1956 and widely treated by the press as expo of an unrealistic and cruel legal quirement.

## V

## *Criminal Fraud: Filling Gaps in Penal Law*

Just as it has been found neces to narrow the scope of the penal la some areas, so also has it been fo

necessary to expand the boundaries of traditional offenses to deal with new forms of antisocial behavior. Notably, this is the case in the field of fraud. An increasingly complex society offers new opportunities for sophisticated swindlers. The Model Penal Code fills numerous gaps in the law of fraud as well as in other areas where old definitions fail to meet new conditions. However, one of the most striking innovations proposed is not a change in the scope of any particular property offense but the consolidation of many separate property offenses into a single statutory offense called "theft". This includes larceny, embezzlement, false pretense, extortion, blackmail, fraudulent conversion, receiving stolen property, and the like. The consolidation greatly simplifies the statement of the law. It also relieves prosecutors, courts and juries of the necessity of making technical distinctions between different kinds of stealing.

Under existing law a woman convicted of attempting to defraud Clark Gable by falsely representing that she had had a child in consequence of sexual intimacy with him could have her conviction set aside on the ground that the transaction was blackmail rather than fraud. *Norton* v. *U. S.*, 92 F. 2d 753 (1937). The result would have been otherwise under Section 223.1 of the Model Penal Code, which provides that "an accusation of theft may be supported by evidence that it was committed in any manner that would be theft under this article".

Fraudulent Use of Credit Cards. The traditional offense of obtaining property by false pretense does not reach a type of fraud made possible by the latest development in credit devices—the credit card. This is because the user of a stolen or revoked credit card, presenting it to a supplier of goods and services, is not in fact making a false statement. The statement made or implied in such a transaction is that the issuer of the credit card will reimburse the supplier. And he will indeed, since cards would not be honored by suppliers if they had to bear the risk of unauthorized use. Accordingly, it is the issuer who is defrauded. Section 224.6 makes appropriate penal provision against such fraud.

Criminal Betrayal of Trust (Commercial Bribery). The traditionally penalized breach of trust is embezzlement, *i.e.*, the fraudulent taking or mishandling of *property* by one to whom it has been entrusted. In general, the only nonproperty betrayals of which the penal laws take cognizance are bribery of public officials and a few special cases of bribery of private agents, *e.g.*, the purchasing agent of a corporation or the business agent of a union. Section 224.8 of the Model Penal Code reaches every person who takes a bribe for knowingly violating a legal or professional duty of fidelity, *e.g.*, as lawyer, physician or accountant, or as arbitrator or other purportedly disinterested adjudicator. Moreover, "a person who holds himself out to the public as being engaged in the business of making disinterested selection, appraisal, or criticism of commodities or services" is penalized if he takes a bribe to recommend this play or that product.

Rigging Public Contests. A gap in the penal law was revealed in recent scandals involving certain television shows purporting to present contests of memory or erudition. Sponsors, producers and participants had in fact rigged the contests by making questions and answers available in advance to some contestants. A variety of laws make comparable tampering punishable in particular kinds of publicly exhibited contests, *e.g.*, horse racing, baseball, basketball and athletic contests generally. Section 224.9 of the Model Penal Code lays down a principle of general application that the public may not be deceived (and bribing gamblers enriched) in this fashion.

Defrauding by Misrepresentations of Value, Intention or Other "Non-Facts". Although the federal mail-fraud statute long ago adopted the principle that any kind of conscious deception would suffice for criminal fraud, many state laws incorporate older, narrower views of punishable fraud, requiring a misrepresentation of "present facts". In such states the professional swindler need not fear imprisonment if he confines his lies to such matters as the "value" of land, jewelry or securities that he is peddling or to misrepresentation of his "opinion" as to the authenticity of a painting or the legality of a title. Section 223.3 of the Model Penal Code modernizes the law of "theft by deception".

Other Gaps. Outside the field of fraud, the Model Penal Code fills many other gaps in the criminal law. For example, *all* behavior which recklessly endangers others will be penalized under Section 211.2, whereas existing law generally covers only specific types of reckless conduct, such as reckless driving or reckless use of firearms. It seems clear that the penal law should extend to recklessness in the conduct of many dangerous activities involved in a highly industrialized society, *e.g.*, the handling of deadly chemicals, nuclear radiations or high voltage electrical currents; the control of aircraft, ships, cranes, elevators or high temperature furnaces. Moreover, suitably severe penalties must be provided for those who cause a "catastrophe", *i.e.*, widespread or serious property loss or injury to persons, as by explosion, flood, avalanche, release of poisons in air or flowing waters. The primitive law of arson recognizes only fire as the potentially devastating means of uncontrollable destruction. A modern penal law treats the misuse of equally devastating forces on a par with fire. (See Section 220.2.)

An important lag in the development of the law of attempt has been remedied by Section 5.01 of the code. Traditional law does not penalize "mere preparation" to commit crime; the intending criminal must come quite close to actually committing the offense before he is guilty of criminal attempt. The principle is a good one as applied to some nondangerous early stages in a course of behavior that may end in crime if the actor doesn't change his mind. But the principle can be and has been pressed to absurd lengths. Thus it has been held that armed men arrested while proceeding by car to various points where they expected to encounter the chosen victim of a holdup had not yet advanced beyond

the noncriminal stage of preparation. Section 5.01 would reverse this by declaring it sufficient that the actor had taken any "substantial step . . . strongly corroborative of [his] criminal purpose", including "lying in wait, searching for or following the contemplated victim".

## VI

## *Needs of Law Enforcement and Civil Liberty Reconciled*

Law enforcement inevitably involves the use of force and other unpleasant measures against criminals. Moreover, we cannot know in advance of trial who are the guilty, so police must be authorized to arrest a person where there is reasonable ground for believing him guilty of a serious offense. Thus a person who may eventually prove to be innocent must occasionally suffer inconvenience, embarrassment or worse as an inevitable incident of law enforcement. The potential conflict between law enforcement and individual security or civil liberty appears in substantive law as well as in procedures, like arrest. For example, while most people want the law to repress pornography, it is essential to draft the law on obscenity so that it does not jeopardize the activities of publishers, authors and artists merely because they offend standards of taste held by particular groups in the population. The essential contribution of the Model Penal Code in these areas of controversy is to face up to the necessity of compromise between the unavoidably conflicting goals of law enforcement and maximum protection of civil liberty. In each case the problem is explicitly identified in the comments and the proposed text includes provisions specifically designed to achieve the best reconciliation. Too often existing law avoids the problems by vague terminology that gives little guidance to police or courts and sometimes transgresses due process.

Disorderly Conduct: Punishing the Peaceful for Violence of Their Opponents. The loosely defined common law offense of "breach of the peace" included conduct tending to provoke public disorder, although the conduct was in itself lawful. The same idea has survived in many statutes penalizing "disorderly conduct". As a result a man may face arrest and criminal conviction if he makes a lawful speech to a hostile audience which becomes disorderly or menaces him with violence. Negroes exercising their constitutional right to avail themselves of state and municipal facilities have been prosecuted for breach of the peace on the basis that their very presence in segregated public accommodations would provoke violence by whites.

Section 250.2 of the code makes it clear that "disorderly conduct" requires a showing that the defendant himself misbehaved. Other sections, however, do penalize carefully defined types of provocative speech and behavior, which might not warrant criminal penalties apart from the outrage to recognized public sensibilities. Thus, under Section 250.8 it would be a misdemeanor to taunt or otherwise outrage the sensibilities of a religious or patriotic group with purpose to disrupt its meeting or procession. In short, the code draws the necessary distinction between the right of a Protestant missionary, for example, to say his piece in public in a Catholic or Jewish neighborhood, although the group assembled to hear him becomes unruly, and, on the other hand, the wrongful disruption of a religious service by an attempt to present Protestant arguments in a Catholic church during Mass. The latter sort of behavior is not merely a provocative expression of opinion, but also an interference with others' freedom to practice their religion.

An interesting illustration of the American Law Institute's scrupulous weighing of opposing considerations of public order and individual freedom of speech was the determination made with respect to "group libel". The reporters submitted a draft penalizing defined types of public activity designed to foment group hatred or to intimidate members of racial or religious groups. (Tentative Draft No. 13, Section 250.7 (1961).) They acknowledged their own grave doubts as to the efficacy of such laws. On full consideration, the Institute excluded the draft from the text of the code. It directed, however, that the draft be set forth in the commentary on disorderly con to be published with the code, so states desiring to experiment with kind of legislation will have avail a text which is regarded as the objectionable in policy and the likely to survive constitutional att

Loitering. One of the most ve problems in reconciling public sa with freedom from arbitrary po action is resolved by Section 250.6 the code, which defines the offense loitering or prowling. Older laws, rived from social conditions of Middle Ages, authorize imprisonm for "vagrancy". In practice, this m amount to making it a crime to str in a prosperous neighborhood aft dark roughly dressed or carrying an thing which arouses a policeman's su picion, or to be too poor to pay for night's lodging.

But, while the law obviously must b changed to eliminate medieval, uncon stitutional provisions and practices, th Institute took cognizance of a ver real problem of public safety an police administration and refused to drop all vagrancy-loitering legislatio as some urged. The fearful householde who observes a dark figure lurking in an alley behind his home, the woman who notices a burly stranger apparently hiding in the park shrubbery, these citizens are entitled to some police action to dispel their alarm. Section 250.6 spells out an appropriate law-enforcement response. Loitering or prowling must be "in a place, at a time, or in a manner not usual for law-abiding individuals" and must be such as to "warrant alarm for the safety of persons or property in the vicinity". Before making an arrest the policeman must ask for an explanation which may suffice to dispel the alarm. He need not accept an incredible explanation. If the policeman proceeds with the arrest, as well he might under the circumstances, the suspect will be given an opportunity to establish that his incredible explanation was indeed true, and this will prevent conviction.

Where the defendant is convicted, he is liable only to a fine. That is the appropriate penalty for behavior which by hypothesis is no more than the creation of alarm; it is barbarous to

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larm; it is barbarous to authorize six months' imprisonment for being a frightening presence. On the other hand, by preserving the right of police action in these situations, real criminality may be exposed. The policeman who arrests the illegal loiterer may search the person arrested and find stolen goods or illegal weapons, or the arrested person may turn out to be a wanted felon. In that event severe penalties may be employed.

Obscenity Law. Section 251.4 of the code embodies the Institute's delicate adjustment of the conflicting demands for repression of pornography and for protection of artists and writers from deadening censorship under the standards of taste entertained by the most prudish segments of the community.

That section condemns material as obscene if its "predominant appeal" is to "shameful or morbid interest in nudity, sex or excretion". Thus the test will no longer be whether a book or movie is liable to stir lustful thoughts among adolescents, perverts or prudes. The section requires a work to be judged as a whole, not by appraising one short passage taken out of context. Conviction is excluded if the material does not substantially transgress "customary limits of candor", and the author or publisher is entitled to show that the work has had public acceptance elsewhere in the United States. The defense may also prove "the artistic, literary, scientific, educational or other merits of the material" and the good repute of the creators and distributors in the world of the arts. There is no criminal liability under the obscenity section unless the defendant knew the material was obscene or was reckless in this respect, for example, disregarding plain indications of the nature of the contents of a book from its cover or advertising.

Although the code therefore introduces desirable and constitutionally required modifications of the obscenity law, the Institute exercised its usual moderation in innovation. It rejected proposals for total repeal of the obscenity law as applied to books, despite the persuasive argument that adults should be free to acquire and read whatever they wish, including pornography, since there is no scientific proof that obscenity is criminogenic. The Institute also refused to restrict the offense to such forms of commercial exploitation of obscenity as might be held to constitute "pandering": this would have permitted a discreet, quiet trade in obscene books for those who desired them, while outlawing offensive public displays and advertising. However, the code moves partially toward the "pandering" concept of the obscenity offense by excluding prosecution of noncommercial passing of obscene material among personal associates. This is a typical practical judgment of the Institute. Noncommercial transactions are not the core of the evil, do not identify the participants as dangerous to society and cannot effectively be suppressed by police activity, which should rather be concentrated against those who commercially exploit morbid interest in sex.

The Model Penal Code is an invitation to law reform, not a dogmatic assertion of the only "right" solutions to the difficult problems of criminal law. It was recognized from the beginning of the project that the states would have to take into account differing needs and traditions. The code was conceived therefore as a "model" rather than a "uniform" act to be adopted in identical terms in every jurisdiction. There is, after all, no special virtue in having uniform penal laws, as there is in having a uniform commercial code to give the same effect to a check or note or bill of lading throughout our national "common market". The special virtue of the Model Penal Code is that it offers a draft, reviewed by many experts, which a state is free to adopt or modify; but, in addition, the commentaries provide extensive discussion of historical background, comparative law, social and psychological considerations and possible alternatives to text provisions finally approved by the Institute. Thus a legislative committee considering reform of the penal law can choose intelligently between the code and local variants.

But if the Model Penal Code is an invitation rather than a directive, it is nevertheless urgent that the invitation be accepted. It is essential to put the penal law on a rational basis if we desire the law to be respected by potential offenders and by those engaged in the administration of law. And there is another aspect of the matter, often overlooked. The image of America which influences our friends, enemies and neutrals throughout the world is not solely a reflection of our material resources or military power. The rest of the world appraises our civilization also, and sometimes primarily, by our intellectual creations and by the ideals and practices of our system of justice. We cannot afford to be content with a primitive or arbitrary penal system.

Fortunately, the invitation to reform seems likely to be accepted. Even before final publication of the code and commentaries, some of the proposals published as tentative drafts have been adopted by statute or incorporated by judicial decision. Vermont enacted a slightly modified version of the code provisions on insanity as a defense and explicitly abolished the M'Naghten test. Oregon and North Carolina have enacted the code's definition of obscenity. The Supreme Court of the United States in *Roth* v. *U. S.*, 354 U.S. 496 (1957), approved the same definition as the meaning to be given to the term in federal legislation. Pennsylvania adopted the "split-verdict" procedure for dealing with capital punishment. The Illinois Criminal Code of 1961 borrowed heavily from the Model Penal Code in many areas, including the general provisions, the sexual offenses and the fraud offenses. The American Law Institute's approval of the proposed final draft of the code was widely and favorably reported in the nation's press. The National Association of Citizens' Crime Commissions has adopted a resolution calling for revision of the state codes in the light of the Model Penal Code. Special commissions to revise criminal law are at work in New York, Pennsylvania, Georgia and other states.

One may hope then that the next decade will see a continuing and cordial response to the Model Penal Code's invitation to law reform.