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**Model Penal Code Approved
by American Law Institute**

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On May 24 of this year the American Law Institute finally gave its approval to the draft of the Model Penal Code on which it had been working for ten years.

The purpose of the Institute in preparing the Model Penal Code has been stated by the chief reporter of the project, Professor Herbert Wechsler. That purpose is to build the source material required for the re-examination and revision of the existing penal codes.

**RELATION TO THE TASK OF THE
NEW YORK COMMISSION**

It is to be hoped that in fulfillment of that purpose the Model Penal Code may be of great assistance to the New York Commission on Revision of the Penal Code and Criminal Law which, pursuant to chapter 346 of the Laws of 1961, is now engaged on its labors, and is directed to make its final report on February 1, 1963. The purpose of that commission is to consider revision of the existing provisions in their entirety of the Penal Law and Code of Criminal Procedure. Its duties have been well summarized in the Legislative Manual for 1961-62 as follows:

"The commission is to prepare a modernized version of these laws, eliminating the many unnecessary and archaic substantive provisions, simplifying provisions grown confusing through repeated amendment, improving substantive content and simplifying court procedure to facilitate the disposition of criminal cases. Specific objectives include sentencing practices and the theory of punishment in criminal cases; adequate and equal representation for all accused; uniformity of procedure in courts throughout the state; insanity and other special defenses in criminal cases; trial costs; special proceedings relating to commitment of persons to various state institutions and the overall efficiency of police and court personnel. In addition, problems of youth in the courts and the possibility of waiver of indictment in proper cases should be among the matters on which the commission will report."

The members of the commission are the following:

[Judge Dimock, the author of the accompanying article, is a member of the council of the American Law Institute and of its special advisory committee on criminal law.—Editor.]

Appointed by governor: Timothy N. Pfeiffer, New York City, vice-chairman; Howard A. Jones, New Rochelle; William B. Mahoney, Buffalo.

Appointed by Temporary President of Senate: Justice Philip Halpern, Buffalo; Professor Herbert Wechsler, New York City; John J. Conway, Jr., Rochester.

Appointed by Speaker of Assembly: Assemblyman Richard J. Bartlett, Glens Falls, chairman; Assemblyman William Kapelman, New York City, secretary; Nicholas Atlas, New York City.

Two of the members of the commission, Timothy N. Pfeiffer, Esquire, vice-chairman, and Professor Herbert Wechsler, have been intimately connected with the preparation of the American Law Institute's Model Penal Code, Professor Wechsler as chief reporter and Mr. Pfeiffer as one of the advisers to the reporters and to the council of the American Law Institute.

**THE PREPARATION OF THE MODEL
PENAL CODE**

Work on the Model Penal Code has been financed by a grant from the Rockefeller Foundation. Two reporters have been in charge, Professor Wechsler of the Columbia University School of Law and Professor Louis B. Schwartz of the University of Pennsylvania. Associate reporters were Morris Ploscowe of New York, whose subjects were the Authorized Disposition of Offenders, the Authority of the Courts in Sentencing and Suspension of Sentence and Probation, and Professor Paul W. Tappen of New York University, whose subjects were Sentencing and Treatment of Offenders and Organization of Correction. In addition, a staff of thirteen special consultants have given the reporters the benefit of their experience in criminology, penology, psychiatry and sociology. A special advisory committee on criminal law made up of about forty judges, lawyers and public officials and law professors in that field have assisted in the work. Among its members were Justice Charles D. Breitell, Judge Stanley H. Fuld, Judge Learned Hand, Presiding Justice Florence M. Kelley and Judge Joseph Sarafite.

As the work progressed it was submitted piecemeal to the council of the American Law Institute after submission to smaller groups who acted as advisers to the reporters and to the council. If and when the provisions met the approval of the council they were submitted to the meeting of the full membership of the Institute held annually in Washington in May. The first part was submitted in 1953 and the last in 1962. In many instances the work of the reporters was revised by the council and the material approved by the council revised as a result of action of the full membership of the Institute. The final work thus represents the views of a majority of the members of the Institute expressed through the draftsmanship of the reporters finally approved by the Institute membership.

NOT A UNIFORM ACT

Despite the care that was lavished upon the preparation of the code and the pains taken to make it a unified whole, it was recognized that there would be few instances in which it would be adopted in toto in any state. Unlike such documents as the Uniform Commercial Code prepared by the American Law Institute, it did not have as its primary object the attainment of uniformity in the law of the various jurisdictions.

Not the least valuable of the features of the Model Penal Code are the commentaries which support the draft of each section. These commentaries and the code provisions which they support are thought in combination to present material in the form most useful to legislators. Members of a state Legislature who wish, for example, to review the law of their state with respect to Attempts, as in need of possible revision, would quite justifiably balk at the study of a mere commentary on the subject and welcome a precise provision supported by the commentary. In that way, though the precise provision might not be adopted, the commentary would exert an influence on the resulting legislation which would have been unlikely had it not been presented in relation to a concrete provision. It was most gratifying to those who worked on the Model Penal Code to find that, even prior to its adoption, sections of it as soon as approved—and some even prior to approval—were cited by the courts or used by the legislatures. A notable example was the wholesale reliance on the Model Penal Code in the Illinois Criminal Code of 1961, approved July 28, 1961, effective January 1, 1963.

The commentary on each section is the result of intensive research into the existing law in the various jurisdictions and the best thought on the subject of the legal, medical and sociological discipline.

THE STRUCTURE OF THE CODE

The Model Penal Code is divided into four parts:

- Part I. General provisions.
- Part II. Definition of specific crimes.
- Part III. Treatment and correction.
- Part IV. Organization of correction.

These parts are divided into separate articles, such as article 2 of Part I, "General Principles of Liability," and the various articles are divided into sections with a number corresponding to the number of the article followed by a period and a number corresponding to the position of the section in the article as, for example, "2.01, Requirement of Voluntary Act; Omission as Basis of Liability; Possession as an Act; 2.02 General Requirements of Culpability." In all there are 265 sections numbered from 1.01 to 405.4.

PART I. GENERAL PROVISIONS

Before dealing with specific crimes the code lays down the rules which apply generally in criminal prosecutions on such subjects as time limitations, prosecution when conduct constitutes more than one offense, bar by former prosecution, proof beyond a reasonable doubt, affirmative defenses, burden of proving a fact when not an element of offense, general principles of liability and of justification, respon-

sibility, inchoate crimes such as attempts, solicitation and conspiracy, sentences and other authorized disposition of offenders, and finally, authority of the court in sentencing.

There follows below a description of some of the more interesting or important of the rules laid down in these general provisions.

Offenses are classified [1.04] as felonies, misdemeanors or petty misdemeanors and violations. Violations are those offenses for which a sentence of imprisonment is not authorized. A violation does not constitute a crime.

When there is evidence of facts which, pursuant to a provision in the code, gives rise to a presumption, the court is required [1.12(5)(b)] to charge that, while the presumed fact must on all of the evidence be proved beyond a reasonable doubt, the law declares that the jury may regard the facts giving rise to the presumption as sufficient evidence of the presumed fact.

The code attempts to do away with the intolerable confusion in the administration of the criminal law, which arises from the use in statutes of such words as "criminal intent," "presumed intent," "malice," "wilfulness" and the like, by the use of but four kinds of culpability, "purposely," "knowingly," "recklessly" and "negligently" [2.02(2)].

The code tries to substitute something meaningful for the almost meaningless rule that intoxication is admissible when relevant to disprove "specific intent" which is an element of the crime charged, but not to disprove "general intent" when that is the required mental element. The code's plan is to provide [2.08(1)(2)] in substance that intoxication is not a defense unless it negates an element of the offense but that, where the element involved is recklessness, the fact that the actor is unaware of the risk because of self-induced intoxication does not prevent his conduct from being reckless.

The troublesome point that one who alleges entrapment must, under most existing laws, open the door to proof before the jury that he has committed other crimes is avoided in the Model Penal Code by providing [2.13] for trial of the issue of entrapment to the court under the rule that the defendant must prove it by a fair preponderance of the evidence.

The Model Penal Code goes farther than any of the three most recent codes in justifying the use of deadly force to protect property. The code's formulation is in section 3.06, subsection (3)(d)(ii). It, in substance, makes justifiable the use of deadly force to protect property if the person against whom the force is used is attempting to commit or consummate arson, burglarly, robbery or other felonious theft or property destruction and either: (1) such person has employed or threatened deadly force against or in the presence of the actor; or (2) the use of force other than deadly force to prevent the commission or consummation of the crime would expose the actor or another in his presence to substantial danger of serious bodily harm. One of the liveliest debates among the members of the Institute was triggered by those who believe that a householder ought to be justified in shooting a burglar. The formulation arrived at was intended to go a little farther in this direction than the most recent modern codes.

On the matter of insanity, as a defense, the Model Penal Code rejects the rule of *Durham v. United States* (214 F. 2d 862) that an accused is not criminally responsible if his unlawful act was the product of mental disease or defect. It also rejects the M'Naghten rule, which resolves the problem solely in regard to the capacity of the individual to know what he was doing and to know that it was wrong. Instead, the Model Penal Code [4.01(1)] adds the requirement that a person is not responsible if, as a result of mental disease or defect, he lacks substantial capacity to conform his conduct to the requirements of law. The rule as stated by the code has won widespread approval. In its entirety, it reads as follows:

"A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."

A number of groups that have considered the formulation, including the governor's committee on the insanity defense in New York State, have suggested the substitution of the word "wrongfulness" for "criminality" and the American Law Institute would not disapprove that modification.

Instead of fixing a penalty for each offense, the code fixes the penalties for each of three degrees of felony and for misdemeanors and for petty misdemeanors. A felony is of the first or second degree when it is so designated by the code. An offense declared to be a felony without specification of degree is of the third degree [6.01]. A feature of the sentencing provisions of the code is its provision for ordinary terms and extended terms. In the case of a felony of the first degree the ordinary term is one the minimum of which is not less than one year nor more than ten years and the maximum of which shall be life imprisonment. In the case of a felony of the second degree the ordinary term is one, the minimum of which is not less than one year nor more than three years and the maximum of which shall be ten years. In the case of a felony of the third degree, the ordinary term is one the minimum of which is not less than one year nor more than two years and the maximum of which shall be five years [6.06].

Section 7.03 of the code provides criteria for sentence of an extended term of imprisonment for felonies. These are, in general, that defendant is a persistent offender or that he is a professional criminal or that he is a dangerous mentally abnormal person whose commitment for an extended term is necessary for the protection of the public or that he is a multiple offender whose criminality is so ex-

tensive that his sentence of imprisonment for an extended term is warranted. The facts which must exist for making these findings are set forth. The permissible extended terms increase the minimum and maximum terms permissible in ordinary cases [6.07]. The purpose is to reach, with greater flexibility, the result aimed at in such laws as the Baumes Law.

Definite terms are to be imposed for misdemeanors and petty misdemeanors not to exceed one year in the first case and thirty days in the second [6.08].

Extended term sentences for misdemeanors and petty misdemeanors are, in the first case, a minimum of one year to a maximum of three years and, in the second, not more than six months to a maximum of two years. Extended terms for misdemeanors and petty misdemeanors may be imposed where the defendant is a persistent offender whose commitment for an extended term is necessary for the protection of the public or where he is a professional criminal or where he is a chronic alcoholic, narcotic addict, &c., who requires rehabilitative treatment or, finally, where the defendant is a multiple offender with such an extensive record as to warrant an extended term [7.04].

(Concluded in to-morrow's issue.)