Report to the Colorado General Assembly:

COLORADO CRIMINAL LAW

COLORADO LEGISLATIVE COUNCIL

RESEARCH PUBLICATION NO. 68

DECEMBER 1962

LEGISLATIVE COUNCIL

OF THE

COLORADO GENERAL ASSEMBLY

* * * * * * * *

The Legislative Council, which is composed of five Senators, six Representatives, and the presiding officers of the two houses, serves as a continuing research agency for the legislature through the maintenance of a trained staff. Between sessions, research activities are concentrated on the study of relatively broad problems formally proposed by legislators, and the publication and distribution of factual reports to aid in their solution.

During the sessions, the emphasis is on supplying legislators, on individual request, with personal memoranda, providing them with information needed to handle their own legislative problems. Reports and memoranda both give pertinent data in the form of facts, figures, arguments, and alternatives.

COLORADO CRIMINAL LAW

Legislative Council

Report To The

Colorado General Assembly

Research Publication No. 68
December, 1962

COLORADO GENERAL ASSEMBLY

LEGISLATIVE COUNCIL

ROOM 341, STATE CAPITOL
DENVER 2, COLORADO
ACOMA 2-9911 - EXTENSION 2285

December 4, 1962

To Members of the Forty-fourth Colorado General Assembly:

As directed by the terms of Senate Joint Resolution No. 14 (1961), the Legislative Council is submitting herewith its report and recommendations concerning criminal law revision. The report covers several areas of criminal law, but because of the complexity and scope of the study, it was not possible to give full study and consideration to a number of important subjects.

The Committee appointed by the Legislative Council to make this study submitted its report on November 30, 1962, at which time the report was accepted by the Legislative Council for transmission to the General Assembly.

Respectfully submitted,

James E. Donnelly
Chairman

COLORADO GENERAL ASSEMBLY

LEGISLATIVE COUNCIL

ROOM 341, STATE CAPITOL
DENVER 2, COLORADO
ACOMA 2-9911 - EXTENSION 2285

December 4, 1962

Senator James E. Donnelly, Chairman
Colorado Legislative Council
341 State Capitol
Denver 2, Colorado

Dear Senator Donnelly:

Transmitted herewith is the report of the Legislative Council Criminal Code Committee appointed pursuant to Senate Joint Resolution No. 14 (1961). This report covers the areas of criminal law studied by the committee during the past two years and the recommendations relating thereto. The subjects presented in the report include: sentencing, regulation of professional bail bondsmen, provision of counsel for indigent defendants, inchoate crimes, crimes against property, criminal insanity, narcotics, and statutory changes resulting from the adoption of the Rules of Criminal Procedure by the Colorado Supreme Court.

Because of the scope and complexity of the field of criminal law, the committee did not have sufficient time to consider such subjects as crimes against the person; crimes against public health, safety, and decency; arrest, arraignment, and other pre-trial procedures; and probation and parole. Further study is also needed on sentencing, criminal insanity, and crimes against property.

Respectfully submitted,

/s/ Charles E. Bennett, Chairman
Criminal Code Committee

FOREWORD

This study was authorized by Senate Joint Resolution No. 14 (1961). This resolution directed the Legislative Council to appoint a committee to continue the study of the Colorado criminal statutes and their application, including, but not limited to such related subjects as parole, probation, sentencing, criminal insanity, narcotics, bail bonds, and criminal jurisdiction.

The Legislative Council Committee appointed to make this study included: Senator Charles E. Bennett, Denver, chairman; Senator Wilkie Ham, Lamar, vice chairman; Senator Edward J. Byrne, Denver; Senator Carl W. Fulghum, Glenwood Springs; Senator J. William Wells, Brighton; Senator Paul E. Wenke, Fort Collins; Senator Earl A. Wolvington, Sterling; Representative Robert S. Eberhardt, Denver; Representative Frank E. Evans, Pueblo; Representative Bert A. Gallegos, Denver; Representative Harry C. Johns, Sr., Hygiene; Representative John L. Kane, Northglenn; Representative Phillip Massari, Trinidad; Representative Harold L. McCormick, Canon City; and Representative Walter R. Stalker, Joes.

Senate Joint Resolution No. 14 (1961) authorized the Legislative Council to appoint in its discretion an advisory committee representing a cross section of knowledge and interest in criminal law and related matters. Pursuant to this authorization the Legislative Council appointed the following advisory committee members: Justice Edward Pringle, Colorado Supreme Court; Justice Leonard v.B. Sutton, Colorado Supreme Court; Judge Jean Jacobucci, 17th Judicial District; Judge Gerald McAuliffe, 2nd Judicial District; Judge George McLachlan, 15th Judicial District; Judge Hilbert Schauer, 13th Judicial District; Judge David Brofman, Denver County Court; Judge Hal Chapman, Otero County Court; Judge Daniel J. Shannon, Jefferson County; Judge Rex Scott, Boulder Municipal Court; Warden Harry Tinsley, Chief of Corrections, Department of Institutions; Warden Wayne Patterson, Colorado State Reformatory; Edward Grout, Director, Division of Adult Parole; Frank C. Dillon, Director, 2nd Judicial District Probation Department; District Attorney Marvin Dansky, 17th Judicial District; District Attorney Martin P. Miller, 18th Judicial District; District Attorney Fred Sisk, 16th Judicial District; Assistant District Attorney Leonard Carlin, 2nd Judicial District; Assistant District Attorney David Hahn, 18th Judicial District; Assistant District Attorney James P. Johnson, 8th Judicial District; Dr. Mark P. Farrell, consulting psychiatrist, state penitentiary and reformatory; Dr. John McDonald, Assistant Director, Colorado Psychopathic Hospital; Dr. Charles E. Rymer, Denver; Tom Adams, Juvenile Delinquency Project, Western Interstate Commission on Higher Education; Frank Dell' Apa, Colorado Prison Association; William L. Rice, Colorado Bar Association Criminal Law Committee; Professor Austin W. Scott, University of Colorado Law School; Chief Harry Cable, Salida Police Department; Lieutenant J. F. Moomaw, Denver Police Department; Captain James F. Shumate, Denver Police Department; Sheriff Ray K. Scheerer, Larimer County; Sheriff Guy Van Cleave, Adams County; and the following attorneys: Donald Brotzman, Boulder; Fred Dickerson, Denver; John Gibbons, Denver; Ernest Hartwell, Loveland; Dean C. Mabry, Trinidad; Isaac Moore, Denver; John Sayre, Boulder; Vasco Seavy, Pueblo; and Anthony Zarlengo, Denver.

The staff work on this study was the primary responsibility of Harry O. Lawson, Legislative Council senior research analyst. Professor Jim R. Carrigan, University of Colorado Law School, served as legal consultant to the committee.

The Legislative Council Criminal Code Committee held 11 meetings between May 1961, and November 1962. One two-day meeting was held at the penitentiary and reformatory to review correctional problems and another two-day meeting was held in connection with the 1962 Colorado Judicial Conference and the annual meeting of the Colorado Bar Association. One committee meeting was devoted to a discussion of narcotics legislation and control with William Eldridge, American Bar Foundation, who directed the foundation's study on this problem.

The subject matter of criminal law is extremely diversified and complex, so the committee was forced to select certain areas upon which to concentrate its efforts. The subjects studied during the past two years and covered in this report include: sentencing, regulation of professional bail bondsmen; provision of counsel for indigent defendants; inchoate crimes; crimes against property; criminal insanity; narcotics legislation and control; and statutory changes resulting from the adoption of the Rules of Criminal Procedure by the Colorado Supreme Court.

The committee wishes to express its deep appreciation to the advisory committee, many members of which gave considerably of their time to attend the committee meetings at their own expense. The assistance provided by advisory committee members in exploring the many complex problems involved in criminal code revision was invaluable.

December 4, 1962

Lyle C. Kyle
Director

TABLE OF CONTENTS

RECOMMENDATIONS AND FINDINGS

1) The Criminal Code Committee makes no specific recommendations on the sentencing of criminal offenders at this time. The committee is of the opinion, however, that if any change is made in sentencing procedures, such change should follow one of three alternatives:

a) Sentence set by statute. Either the maximum and minimum sentences would be set by statute, or the maximum would be set by statute and the court could impose a minimum not to exceed one-third of the maximum. Good time allowances would apply only against the maximum sentence. The parole board would have the authority to review and release an offender after half of the minimum sentence is served. Offenders not paroled prior to the expiration of their maximum sentence (less their good time allowance) would be released under parole supervision at that time, such supervision to continue until the date of maximum sentence expiration. Offenders released on regular parole could be kept under supervision until expiration of their maximum sentence, unless released sooner by the parole board.

b) Court provided with sentencing options. In sentencing an offender the court could choose among several options:

i) The court could designate the length of sentence within the maximum prescribed by statute and also the minimum term which must be served before an offender would become eligible for parole, which term may be less than but could be no more than one-third of the maximum sentence imposed.

ii) The court could set the maximum sentence as prescribed by statute, in which event the court may specify that the offender would become eligible for parole at such time as the parole board may determine.

iii) The court could commit the defender to the Department of Institutions for extensive study and evaluation. Under this alternative, it would be assumed that the maximum statutory sentence has been imposed, pending the results of the study and evaluation which would be furnished to the committing court within three months, unless the court granted additional time to complete the study. After the court receives the department's report and recommendations, it may do one of several things: place an offender on probation; affirm the sentence already set and let the parole board determine the date of parole eligibility; affirm the maximum sentence and set a minimum, not to exceed one-third of the maximum; or reduce the sentence already imposed and set a date for parole eligibility not to exceed one-third of the sentence.

(Under both a) and b) above, the court could also place an offender on probation or commit him to the state reformatory.)

c) Adopt the Model Penal Code Provisions. All crimes would be divided into several grades: felonies of the first degree, second degree, and third degree; misdemeanors; and petty misdemeanors. The court would fix the minimum and maximum terms within the limits specified for the grade of crimes within which the offense falls. The limits would be higher for persistent offenders, professional criminals, and dangerous mentally abnormal persons. The court would be prevented from imposing what in effect would be a fixed sentence by the requirement that the minimum could not be more than half of the maximum. The parole board would determine parole release after the minimum sentence (less any good time allowance) had been served.

There are good and bad points to all three of these approaches to sentencing, and these are discussed in considerable detail along with other sentencing problems and considerations in the research report pp. 1-36.

Findings. The subject of sentencing is an extremely complex one, especially when considered within the context of the total correctional process. Further, it is difficult to recommend specific changes in sentencing until the entire criminal code has been reviewed and revised as needed. As an illustration of the complexity of this subject, the following questions have been considered by the committee in the course of its study:

a) What should be the basic approach to sentencing? Assuming that protection of society is the major objective, how may this best be achieved? Should the underlying philosophy (in addition to society's protection) be rehabilitation, punishment, or retribution? how can these different approaches to sentencing be reconciled? Does sentencing serve as a deterrent? if so, to what extent, and should this be a prime consideration?

b) What should be the extent of judicial authority in setting sentences? Should courts be limited to a finding of guilt? Should sentences be set by statute? If so, should this apply to both maxima and minima, or just one end of the sentence (which one)? Should it be possible to release an offender before completion of his minimum; on what basis and under what circumstances? If continuation of judicial sentencing authority (at least to a limited extent) is desirable, what would be a satisfactory combination of judicial and board sentencing authority, not only with respect to the role of each, but also in relationship to the basic approach to sentencing? Are the offender's rights safeguarded under the methods of sentencing being considered?

c) If greater responsibility is given to the parole board, what should the composition of the board be (number, qualifications, method of appointment, civil service) and should it serve on a full-time basis?

d) What should be the relationship between the board and the institutions (as to scope of authority, division of responsibilities, supervision)? Specifically, should the board play any role or have any responsibility in initial classification, assignment, and placement of offenders? if so, to what extent?

e) To what extent should present institutional programs be augmented or changed if the method of sentencing is changed? What do the institutions now have in the way of professional personnel and rehabilitation programs? What is needed and how far-reaching should changes be? What should be done if no changes are contemplated in institutional programs?

f) Are the present statutory penalties for crimes satisfactory? If not, which ones should be changed? How should statutory good time provisions be handled? What provision should be made for offenders already committed?

2) The Criminal Code Committee recommends the adoption of legislation to license and regulate professional bail bondsmen. A professional bail bondsman is defined as any person who furnishes bail in five or more criminal cases in one year in any county with a population of 50,000 or more or as any person who furnishes bail in criminal cases in any two or more counties, one of which has a population of 50,000 or more. (The explanation of the proposed legislation will be found on pp. 42-44 of this report and the text of the proposed legislation will be found on pp. 44-54.)

Findings. There are no provisions in the Colorado statutes regulating bail bondsmen or prescribing the terms and conditions for the issuance of bail bonds. Members of the judiciary, the bar, and the press, as well as the general public, have been concerned over this lack of regulation, primarily because of happenings in the Denver metropolitan area in recent months. The proposed legislation regulates bondsmen only in counties of 50,000 population or more, because the committee's study indicates that professional bondsmen operate in urban areas, and it is in these areas where problems have arisen.

3) The Criminal Code Committee recommends the adoption of permissive legislation to give counties the authority, if they so desire, to establish a public defender system or make other arrangements for counsel for indigent defendants. (An explanation of the proposed legislation will be found on pp.57-58, and the text of the proposed measure will be found on pp. 59-62.)

Findings. In district court criminal actions, statutory authority is given the judge to appoint counsel for indigent defendants, but this authority is permissive rather than mandatory. There are no provisions for court-appointed counsels in cases before county, juvenile, and municipal courts. The method of providing counsel in Colorado has been criticized for several shortcomings:

1) lack of authority to appoint counsel in trial courts other than the district court;

2) practice of appointing counsel at the time of arraignment rather than shortly after arrest;

3) appointment of inexperienced attorneys;

4) lack of investigatory assistance for court-appointed counsels;

5) payment of fees not commensurate with the work involved in preparing an adequate defense; and

6) total cost of providing court-appointed counsel in some of the larger counties.

The proposed legislation has been adopted from the Model Public Defender Act and is entirely permissive, so that each county can make its own determination as to whether it wishes to adopt public defender system or any of the other alternatives in the act.

4) The Criminal Code Committee recommends the adoption of proposed legislation which would define attempted crime and provide the penalties therefor. (The text of the proposed legislation on criminal attempt will be found on pp.71-75.)

Findings. Present Colorado law has many gaps with respect to attempted crimes. There are a number of statutes in which the commission of a serious crime is punishable, but which provides no penalty for an attempt to commit the crime. Therefore, a person whose criminal intent is shown in conduct falling short of completing a crime, or whose attempted crime is aborted by alert police work, legal impossibility to commit the crime,or an effective defense against the intended crime by the intended victim cannot be prosecuted.

5) The Criminal Code Committee recommends the adoption of proposed legislation which would define criminal solicitation and provide the penalties therefor. (The text of the proposed legislation on criminal solicitation will be found on pp.78-80.)

Findings. In Colorado, one who advises or encourages another to commit a crime which the party thus solicited actually commits is guilty as a principal and punished as if he had personally committed the crime. There is no general criminal statute, however, defining as a crime the solicitation of another to commit a crime when the party solicited does not commit the offense. While there are several statutes defining the solicitation of certain specific crimes as criminal and providing penalties, there are many gaps in the coverage of these provisions, and there is a wide divergence in the penalties provided.

6) The Criminal Code Committee recommends that further study be made before any changes are made in criminal insanity definitions and proceedings. The committee calls special attention to the chapter on criminal insanity in this report (pp. 102-127) for an explanation of the problems and the presentation of some alternatives to present Colorado law. Attention is also directed to the addendum to this report covering some of the constitutional questions involved.

Findings. There has been considerable dissatisfaction with the present criminal insanity statute. Some of this dissatisfaction is centered on the criminal insanity tests used, limitations on evidence, and jury determination.

Other objections are related to the number of times the plea is made and the number of times it is successful. A study of Denver District Court criminal cases, however, shows that the plea actually

is seldom used and is even less often successful (pp. 119-121). Several proposals have been made to change both the procedure in criminal insanity trials and the test to be used to determine insanity. One proposal goes much further in that it substitutes a three-judge panel for the jury and eliminates criminal insanity as a defense, substituting a new procedure therefor. There are several constitutional questions related to all of these recommendations, and further study and careful consideration is needed.

7) The Criminal Code Committee recommends the statutory changes and deletions listed on pp. 149 through 154 to be made to bring the criminal statutes in conformance with the Rules of Criminal Procedure adopted in September 1961 by the Colorado Supreme Court. Further, the committee requests that the Colorado Supreme Court consider the changes in the Rules of Criminal Procedure listed on pp. 154 and 155.

Findings. The statutory conflicts and duplications resulting from the adoption of the Rules of Criminal Procedure have been studied for over a year by a subcommittee of the Colorado Bar Association's Criminal Code Committee and reviewed extensively by the Criminal Code Committee. Existing statutes which parallel the rules, whether the language is exactly the same or not, should be repealed as creating unnecessary duplication and confusion. Existing statutes which are inconsistent with the rules should be repealed to avoid the even greater confusion resulting from the question of which law to follow. Some statutes should be amended rather than repealed.

8) The Criminal Code Committee recommends that the study of criminal law revision be continued under the auspices of the Legislative Council through the passage of a joint resolution to this effect at the first session of the Forty-fourth General Assembly.

Findings. Although the Criminal Code Committee has studied and considered many subjects in the state's criminal laws and has made recommendations concerning several, there is a large amount of work yet to be completed. The ultimate goal of further study should be the complete revision and codification of Colorado's criminal laws. In other states, such revision and codification has been a four to six-year project. Subjects already considered by the committee on which further work is needed include crimes against property, sentencing, narcotics control, and criminal insanity.

Subjects which are still to be considered include: a) crimes against the person; b) crimes against public health, safety, and decency; c) crimes against the government; d) arrest, arraignment, and other pre-trial procedures; and e) probation and parole.

CRIMINAL CODE STUDY: AN INTRODUCTION

The Legislative Council Criminal Code Committee was charged by Senate Joint Resolution No. 14 (1961) with the responsibility of examining all of Colorado's criminal laws, including, but not limited to, parole, probation, sentencing, criminal insanity, narcotics laws and their enforcement, bail bonds, and criminal jurisdiction.

As an initial step in making an over-all study of Colorado's criminal laws, an index has been compiled of all statutes related in any way to crime and criminal proceedings. These statutes are scattered throughout the volumes of the 1953 Colorado Revised Statutes and the 1960 Cumulative Supplement. A detailed cross index to all of these statutes will be published as a supplement to this report.

The area of property crimes was focused upon as the starting point in making a complete revision of the criminal statutes. A general theft statute has been considered by the committee, but a number of questions have yet to be answered. Closely related to the property crime area are inchoate crimes (acts which are criminal even though a crime has not been committed) such as attempt and solicitation, and considerable attention has been given to these offenses.

Extensive material has been compiled on the sentencing of criminal offenders and the possible effect of adopting certain approaches in Colorado. Generally, sentencing legislation and procedures should be considered within the context of over-all criminal code revision.

Criminal insanity and narcotics control problems are among other subjects studied by the committee and covered in this report. Attention was also directed to the regulation of professional bail bondsmen and the problems of the indigent offender in criminal actions.

As can be seen from the foregoing, the subject of criminal law is a complex and detailed one. Many other aspects are worthy of study, and more work is needed on some of the matters already given consideration by the committee.

Sentencing

In Colorado, the statutes presently provide for a form of indeterminate sentencing for convicted felons (i.e., rather than a fixed sentence, an offender is given a maximum and a minimum sentence by the judge, which must be within the maximum and mimimum limits set by statute).[1] An offender must serve his minimum sentence, less statutory

1. Some statutes provide only for a sentence of not more than a certain number of years. The supreme court has ruled, however, that the judge shall also set a minimum. If an offender is sentenced to the reformatory, he receives an indefinite sentence; no minimum or maximum is set, but the offender cannot be incarcerated for a period longer than the maximum set by statute for confinement in the penitentiary. The offender may be released at any time within the maximum at the discretion of the parole board. Usually, six months must be served before the parole board even considers the case.

good time, before he is eligible for parole. He receives statutory good time for good behavior and work performance while he is in the penitentiary.

Sentencing Difficulties

Several impediments to the successful functioning of the sentencing process in Colorado have been identified by a number of judges, correctional officials, and members of the bar. Some of these impediments result from sentencing practices within the statutory limits and others appear to be inherent in the system itself. Because of these problems and in light of the methods of sentencing followed in other jurisdictions, there has been considerable support for a reexamination of Colorado's sentencing provisions and practices.

Sentencing Disparity. A problem of great concern to correctional officials is sentencing disparity. With respect to sentencing disparity, Warden Harry Tinsley of the state penitentiary has made the following comments:[2]

> It is obvious that in the population of over sixteen hundred in the Colorado State Penitentiary, going there pursuant to sentences imposed in seventeen [sic] separate judicial districts, there is a great disparity in the sentences of prisoners who have been sentenced for similar crimes committed under rather similar circumstances. The prisoners at the penitentiary work closely together, are celled closely together, take their recreation in the same places, do the same things every day and, in general, receive the same general type of treatment. Those persons who have received severe sentences are thrown in daily contact with those who have received more lenient sentences for what may be the same crime committed under similar circumstances by those with much the same individual backgrounds. The person who has received the light sentence generally feels fortunate, but also he may think that his sentence was not so long but what he can afford to have another try at his criminal activities. On the other hand, the individual who has received the longer sentence is understandably embittered toward society in general and toward authority in particular. This natural feeling may be heightened when he finds his short-term fellow prisoners back again in prison for crimes committed after their release, while he himself is still serving his original long sentence. This makes it extremely difficult to effect any positive change for the better in this prisoner's makeup during the time he is in the institution; for whether or not there has been an actual injustice, he himself is convinced that he has received unfair treatment. Often this conviction makes it impossible

2. Rocky Mountain Law Review, "Indeterminate Sentencing of Criminals," by Harry C. Tinsley, Volume 33, Number 4, June, 1961, pp. 536-543.

> to produce any positive or corrective change in him during his stay at the penitentiary. Because his minimum sentence is near his maximum sentence, he leaves the institution with a comparatively short period of parole which he, probably, can and will do in a satisfactory manner. But he often feels that he must get his revenge against society for being unfair to him. This, no doubt, is unsound thinking, but it is to be remembered that those who populate our correctional institutions are not here because they have done sound and constructive thinking in their past lives.

Relationship Between Maximum and Minimum. It has been the opinion of most correctional authorities that an indeterminate sentence is much more satisfactory than one of a set number of years. The flexibility provided by a maximum and minimum offers a greater probability that an offender may be released at the time when he is best able to make a successful return to society. Society is further protected by a system of indeterminate sentencing, because the offender is placed under parole supervision until the expiration of his maximum sentence. With a sentence of a fixed duration it is assumed that his debt to society is paid upon its completion, and he is free to do as he wishes.

The potential advantages of indeterminate sentencing may be negated in two ways: 1) by the imposition of sentences with the minimum and maximum set so close together that the effect is the same as if a determinate sentence is imposed, e.g., nine years and 11 months to 10 years or four years and six months to five years; 2) by the use of statutory good time allowances to decrease the minimum sentence which must be served.

An examination of the penitentiary's annual statistical report shows that almost 10 per cent of the offenders confined in that institution as of June 30, 1961 received sentences in which the maximum and minimum were set so close together that these sentences were not actually indeterminate.[3] Slightly more than one-third of the inmates as of June 30, 1961 received sentences in which the minimum was more than one-half of the maximum.

3. Statistical Report and Movement of Inmate Population, Annual Report, July 1, 1960 through June 30, 1961, Colorado State Penitentiary.

Good Time Allowances. Statutory good time allowances reward an inmate for good behavior while he is in the institution. The subtraction of good time allowances from the minimum sentence advances considerably the date at which an offender is eligible for parole.[4] Unfortunately there is not necessarily any correlation between good behavior during confinement and an offender's readiness to return to society. While the parole board has the sole authority to determine release, each inmate knows that he is eligible for parole upon completion of his minimum sentence, less his good time credit. It has been the general practice over the years to release most inmates on this basis, and it is expected. The parole board will turn men down with good reason, but should there be a wholesale refusal of parole, the penitentiary might be faced with a difficult situation.

Reason for Concern. Approximately 95 per cent of all committed offenders return to society sooner or later, even if some return only for relatively short periods of time. It is the opinion of correctional authorities and some judges and attorneys that the inadequacies of Colorado's present sentencing procedures result in some offenders being incarcerated longer than necessary to assure society's protection and in some being released who should remain for a much longer period or perhaps not be released at all.

It is the observation of the wardens of both the penitentiary and the reformatory and the director of the adult parole division that unless an offender is released at the time he appears to have the best opportunity for a successful return to society, the chances of rehabilitation are considerably lessened and perhaps eliminated entirely.

Many of those who have expressed concern over the sentencing of offenders feel that only minor changes are needed. Others have expressed the opinion that a complete revision is needed. It is the committee's judgment based on its study and discussion thus far that no method of sentencing is perfect, although the approaches taken in some jurisdictions may be more satisfactory than the present procedures in Colorado.

Purpose of Incarceration

During the colonial period and for at least the first hundred years of the nation's history, punishment was considered the major reason for imprisonment. This approach was more sophisticated than the

4. 105-4-4. Reduced time for good conduct. -- Every convict who is, or may be imprisoned in the penitentiary, and who shall have performed faithfully, and all who shall hereafter perform faithfully, the duties assigned to him during his imprisonment therein, shall be entitled to a deduction from the time of his sentence for the respective years thereof, and proportionately for any part of a year, when there shall be a fractional part of a year in the sentence: For the first year, one month; for the second year, two months; for the third year, three months; for the fourth year, four months; for the fifth year, five months; for the sixth and each succeeding year, six months. Inmates may receive an additional 10 days per month as trusty time (105-4-5).

"eye for an eye" concept. It was assumed that punishment was a crime deterrent to the incarcerated criminal with respect to future offenses and to others who would be less likely to commit offenses because of the fear of retribution. The concept of rehabilitation as it is known at present did not play an important role in penal confinement, except that if imprisonment as punishment actually acted as a deterrent to further crime, then, in that sense, rehabilitation can be said to have been accomplished.

Although the concept of punishment is still an important factor to a varying degree, modern penology is based on the premise that institutional confinement has two purposes: 1) the protection of society; and 2) rehabilitation of the offender. The second cannot be stressed to the detriment of the first, so that both probation and parole should be judiciously granted and competently supervised. The aspect of punishment through confinement for at least a specified number of years has been tempered by the desire to release an offender at the time at which he is considered to have a chance to make a successful return to society under parole supervision for as long a period as necessary.

The adoption of minimum and maximum sentences is an implementation of the approach to penology which incorporates protection of society and rehabilitation of the offender. It provides a latitude within which an offender may be released, while at the same time the length of the minimum and maximum reflect the punishment aspect, inasmuch as these minima and maxima are usually set according to the severity of the various categories of crime in relationship to one another.

While views on the purposes of incarceration have changed generally, the concepts of punishment, retribution, and deterrence are still cited as important reasons for penal confinement. To a certain extent, these three purposes of confinement are not necessarily incompatible with rehabilitation, but, according to many correctional authorities, their emphasis diminishes the possibility of developing meaningful rehabilitation programs. They argue that such programs, even with their present limitations, offer the best possible for the protection and safety of society and for the offender to become a useful citizen.

Generally, law enforcement officials have placed considerable emphasis on the concepts of punishment and deterrence, and they have been joined in this point of view by many citizens who have been the unwilling victims of criminal acts and who also would like to see retribution made. This point of view is understandable, but carried to an extreme would result in lengthy sentences for most offenders, regardless of other considerations. Institutional personnel and programs also exhibit in varying degrees the concepts of punishment, deterrence, and retribution, even though there is more and more emphasis on rehabilitation. For this reason, there appears to be no state or other jurisdiction where correctional programs embody all aspects of the rehabilitative approach to penology to the exclusion of other concepts; given the general public reaction to the criminal offender it is little wonder that this is true. It can and has been argued that until much more is known about man and his reaction to his environment, society is best served through continued reliance on older and established concepts of incarceration, although these concepts more and more are being questioned.

Different Approaches to Sentencing

In the broadest sense indeterminate sentencing may be defined as any method of sentencing which includes a variable rather than a fixed period of incarceration. This definition applies, regardless of whether sentencing is a judicial prerogative, set by statute, or the responsibility of a parole board or similar authority.

While the broad definition of indeterminate sentencing encompasses at least some part of the penal codes of more than two-thirds of the states, a more restricted definition would apply to relatively few. Advocates of sentencing reform usually refer to indeterminate sentencing as a system of sentencing in which judicial authority and responsibility extend only to the finding of guilt; the determination of actual sentence is the responsibility of the parole board or some similarly constituted commission. When sentence is passed by the courts under this system only the statutory limits may be imposed.[5] Discretion within these limits passes from the judiciary to the paroling authority.

Some indeterminate sentencing advocates (within the narrow definition used above) believe in a flexible sentencing structure which allows an immediate parole in cases where such release is justified and likewise permits detention for a lifetime where that is justified -- both without regard for the particular crime for which the conviction was had. This approach assumes that knowledge of human behavior has advanced to the stage that legal safeguards are unnecessary because the vesting of this power in a parole board or similar commission would not result in its arbitrary and/or capricious exercise. This method of sentencing in actuality provides an indefinite sentence rather than an indeterminate one and is similar to Colorado's sex offender law and to S.B. 188, introduced during the Forty-second General Assembly, First Session, 1959, and H.B. 42, introduced during the Forty-third General Assembly, First Session, 1961.[6]

Because of the interest in this approach shown in Colorado, the following comments by the American Correctional Association are appropriate:[7]

> ...The only form of sentencing which would place full discretion with the parole board to select and to release prisoners on parole at the time they are most ready for release and to retain in confinement as long as necessary those who are not ready for release would

---

5. Variations of this approach include: a) imposition of statutory maximum only, minimum established by parole authority; or b) maximum set by judge within statutory limit, minimum established by parole authority. If the latter plan is followed, it is usually recommended that parole supervision be extended to the end of the statutory maximum term at the discretion of the paroling authority rather than be terminated at the end of the judicially imposed maximum.
6. Provisions of these bills are discussed in a subsequent section.
7. Manual of Correctional Standards, American Correctional Association, 1959, p. 535.

be an indeterminate sentence of one day to life for every offense for which a prison sentence could be given. In a model correctional system with all the necessary diagnostic and treatment resources within the institution to prepare prisoners for release, with a professional board of parole to determine the optimum time for release, and with sufficient trained parole staff to give supervision, the complete indeterminate sentence law would be workable and practical. However, to place the power of life sentence over all prisoners with parole board members who were not appointed for their professional knowledge and competence, to permit lifelong confinement without legal safeguards in institutions without sufficient staff or facilities for effective treatment would be unthinkable (underlining added for emphasis).

Dr. John MacDonald has also made some comments on the wholly indeterminate or indefinite sentence drawn in part from the views of other psychiatrists.[8]

The demands of some criminologists for wholly indeterminate sentences has been criticized by Jerome Hall. 'From a medical viewpoint, it may be absurd to release an offender at a fixed time that in fact has no relation to rehabilitation. But if no law fixes an upper limit, there is no adequate protection from life imprisonment.' Certainly there is the danger of unnecessarily prolonged imprisonment and this danger might be greater if the medical and psychological experts on the parole board were administratively rather than therapeutically oriented.

Indeed the tyranny of the harsh judge might well be replaced by the tyranny of the scientist. The moral judgement /sic/ so often condemned by psychiatrists, might be replaced by the last word of science. Yet the complexity of mental and social phenomena allows many a fallacy to be taken for the last word of science...

Unfortunately psychiatry lacks reliable predictive techniques and it is not always possible to predict, with any degree of confidence, the future career of an individual offender. Even the experienced psychiatrist is liable to serious error in prognosis...

Some psychiatrists have suggested that criminals should be divided into 2 groups; those who should be treated, and those who should be confined indefinitely. It is not clear, however, upon what criteria the differential diagnosis is to be made...

8. Psychiatry and the Criminal, Dr. John M. MacDonald, 1958, pp. 199 and 200.

> ...Although psychiatry has much to offer in regard to the rehabilitation of offenders, few psychiatrists would be willing to accept responsibility for confining a non-psychotic criminal, regardless of the crime for which he has been convicted, for the remainder of his life.

It is not surprising that none of the states have gone this far with indeterminate sentencing. Those states which are considered the most advanced in this respect provide that no one may be incarcerated for a period longer than the maximum prescribed by law; although in some of these states it is possible to be released prior to the statutory minimum.

Sentencing in Other States

Sentencing as a Judicial Function

In twenty-four of the states having indeterminate sentencing as broadly defined, setting the sentence is a judicial responsibility. In five of these twenty-four states, one of the two extremes is fixed mandatorily by statute while the other may be varied by the sentencing authority. These five states include: Michigan, South Dakota, Tennessee, Texas, and Wisconsin. In all except Michigan, the court may set the maximum term, but not the minimum, which is set by statute. In Michigan, the maximum term imposed is the statutory maximum, while the judge has the discretion to set the minimum.

In eighteen of these twenty-four states, the judge sets the maximum and minimum at his discretion within the statutory limits. These states include: Arizona, Arkansas, COLORADO, Connecticut, Illinois, Maine, Massachusetts, Minnesota, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oregon, Pennsylvania, Vermont, and Wyoming. In Georgia, sentence is prescribed by the jury within the statutory minima and maxima.

In three of these states, there are statutory provisions designed to prevent a judge from fixing a minimum term so closely identical to the maximum that the combined effect would approximate a definite sentence (e.g., 4½-5 years). The statutes in these states (Maine, New York, and Pennsylvania) provide that the minimum term may not exceed half of the maximum term imposed.

Generally, in these twenty-four states, parole eligibility depends upon completion of the minimum sentence. The exceptions are as follows:

State	Earliest Date of Possible Parole Release
Georgia	when one-third of minimum sentence has been served
New Hampshire	parole possible after two-thirds of minimum sentence, if minimum is two years or more

State	Earliest Date of Possible Parole Release
New Mexico	when one-third of minimum sentence is served, if minimum less than 10 years; if more than ten years, must serve one-third of first ten plus one month for each additional year
North Carolina	when one-fourth of minimum sentence has been served
Texas	with perfect prison conduct record, when either minimum or one-fourth the maximum has been served, whichever is less; with imperfect conduct record, one-third of maximum or fifteen years, whichever is less, must be served
Wisconsin	after two years, or one-half maximum sentence, whichever is less

Several of these states allow prisoners time off for good behavior (known as statutory good time and trusty good time). This "good time" is subtracted from the minimum sentence in determining eligibility for parole release.[9]

In the states which allow release prior to completion of the minimum sentence, the parole authority in effect has some of the powers of the sentence-fixing board in that it can release an inmate sooner than was prescribed in the minimum sentence. It would appear that the parole authorities in the states where the minimum (less good time) must be served still has some sentencing discretion, because the parole boards have the discretionary power to withhold release until the maximum is served. In actual practice this may not be the case, if the Colorado practice of releasing almost every inmate of the penitentiary on parole upon completion of minimum sentence less statutory good time is an example of the procedures in these other states.

Sentence Set by Statute

In twelve states, the courts have the responsibility only for the determination of guilt. In seven of these states (California, Indiana, Kansas, Nevada, New Mexico, Ohio, and West Virginia), the sentence imposed is a restatement of the maximum and minimum set by statute. In the other five states (Florida, Idaho, Iowa, Utah, and Washington), there is no minimum sentence and the statutory maximum sentence is imposed.

Maximum and Minimum Set by Statute. Parole board authority and application of statutory good time varies among the seven states in which both the maximum and minimum are set by statute. These differences are indicated in the following table:

9. In Wisconsin, statutory good time is deducted from the maximum sentence to insure that every inmate will be subject to at least some parole supervision after release.

State	Parole Eligibility	Good Time Allowance
California	after one-third of minimum if more than one year, if minimum less than one year, six months or end of minimum	applies to maximum sentence
Indiana	must serve at least one year of minimum sentence (less good time)	applies to minimum sentence
Kansas	after minimum sentence (less good time)	applies to minimum sentence
New Mexico	if minimum sentence is 10 years or less, must serve at least one-third of minimum; if minimum is more than 10 years, must serve one-third of 10 years plus one month for each year over 10	applies to maximum sentence
Nevada	must serve at least one year of minimum sentence (less good time), unless three prior felony convictions; seven years must be served with three prior felony convictions	applies to minimum sentence
Ohio	statutes not clear as to whether minimum (less good time) must be served or board can release prior to expiration of minimum sentence	applies to minimum
West Virginia[a]	after minimum sentence, if conduct record good for three months prior to date of eligibility, except those with definite sentence must serve one-third	applies to definite sentences only

a. The provision for parole eligibility after one-third of a definite sentence is served was apparently designed to cover inmates incarcerated prior to the adoption of indeterminate sentences.

As shown by the above table, in four of the states (California, Indiana, Nevada, and New Mexico), an inmate may be paroled prior to the expiration of his minimum sentence. In two of these states (Indiana and Nevada), good time allowances are subtracted from the minimum time to be served. It has been indicated that many correctional authorities feel that good behavior and parole readiness do not necessarily coincide, yet these two states as well as Kansas and Ohio (which require the minimum, less good time, to be served) provide for good time deductions from the minimum time to be served. This conflict was apparently

recognized in Indiana where another statutory section states that parole release is not a reward for good conduct or efficient performance of duties in the institution, but depends on the inmate's readiness to return to society and the reasonable probabilities of his success.[10]

In addition to Kansas and Ohio, West Virginia also requires that the minimum sentence be served. It is the only one of the three, however, in which good time allowances do not apply to the minimum sentence.

No Minimum - Statutory Maximum. In the five states where there is no minimum, good time is deducted from the maximum sentence. There are, however, some differences in the date of parole eligibility and parole board authority among these states. In Utah, the Board of Paroles and Pardons has full authority to set the minimum sentence but both the judge and the prosecutor make sentence recommendations to the board. These recommendations are accompanied by information concerning the crime and surrounding circumstances and any other pertinent data. The board is not bound by these judicial recommendations but must review them prior to setting the minimum sentence.

Judges and prosecutors may also make recommendations as to sentence to the Washington Parole Board. While the board is not bound by these recommendations, there are certain statutory restrictions which must be adhered to in setting the minimum sentence. Any first offender who is sentenced for a crime involving the use of a deadly weapon must serve at least five years. Any offender with a previous felony conviction who is sentenced for a crime involving a deadly weapon must serve at least seven and one-half years. Habitual offenders (three previous felony convictions) must serve at least 15 years, and embezzlers of public funds must serve at least five years.[11]

In Iowa, the parole board may release a first offender after conviction, but prior to incarceration. (A further examination of the Iowa statutes indicates that there are no provisions for probation, so that this method of parole is actually a probation substitute. This premise is confirmed further by the statute providing that the committing judge may recommend immediate parole release.) Offenders in Florida must serve at least six months before being considered for parole release. Florida has a statutory provision very similar to Indiana's, which specifies that parole is not a reward for good conduct and efficient performance and that: "No person shall be placed on parole until and unless the commission shall find that, there is reasonable probability that if he is placed on parole, he will live and conduct himself as a respectable and law abiding person, and that his release is compatible with his own welfare and the welfare of society."[12]

---

10. 13-15-33, Burns Indiana Statutes Annotated. It is not known how the Indiana Parole Board reconciles the two different philosophies expressed by statute; that of rewarding an inmate for good institutional behavior by good time deductions, while at the same time specifying that parole release is not a reward for such behavior.
11. 9.95.040, Revised Statutes of Washington.
12. 947.18, Laws of Florida, 1957.

Various Methods of Sentencing: A Summary

As seen from the sentencing practices of other states, there are various approaches which are used. These may be summarized as follows:

1) Definite Sentence: No maximum or minimum, sentence could be set by statute or court; a limited amount of flexibility could be provided by deduction of good time credit.

2) Maximum and Minimum Limits Set by Statute, Court Sets Sentence Within Statutory Limits: This approach followed by several states, including Colorado. Most of these states allow good time deductions from minimum sentence. Parole release is usually not possible until expiration of minimum term (less good time).

3) Either Maximum or Minimum Sentence Set by Statute, With the Other End of the Sentence Set by the Court: If the minimum is set by statute, the court's authority extends only to the determination of the maximum period of incarceration. The parole board may fix a release date after completion of the minimum sentence or sooner, if so provided by law. Good time may be allowed and in some jurisdictions applies to the minimum sentence and in others to the maximum. If the maximum sentence is set by statute, the court's discretion extends only to the determination of the minimum sentence. The parole board then has discretion between completion of the judicially-imposed minimum and the statutory maximum, although eligibility for release after completion of a certain portion of the minimum term may be provided by law. Again good time may be allowed, with a difference among the states which have this provision as to whether good time is deducted from the minimum or maximum sentence.

4) Maximum and Minimum Limits Set by Statute, Court Sets Sentence Within Statutory Limits, Except that Court is Restricted on the Length of the Minimum Sentence: This approach is very similar to 2) above except that the court may impose a minimum not to exceed a certain proportion of the maximum (e.g., one-third or one-half).

5) Maximum and Minimum Sentence Set by Statute: The court's only function is the determination of guilt. The paroling authority determines release within the statutory sentence limits, although the statutes may provide that an offender is eligible for parole after completion of a specified portion of the statutory minimum. Good time may also be allowed under this approach, applying to the minimum sentence in some jurisdictions and to the maximum sentence in others.

6) Maximum Sentence Set by Statute, No Minimum: As in the preceding approach, the court's function is limited to a determination of guilt. The paroling authority fixes the minimum sentence by determining the release date. Good time allowances apply to the maximum sentence.

It should be noted that 2) through 6) above do not apply to capital crimes or certain others where life imprisonment is the penalty. There may be other crimes as well, such as armed robbery, or multiple convictions for which a specified term of confinement is provided by law before an offender is eligible for release. A number of states

provide that an offender may be considered for parole release after a specified number of years of a life sentence has been served. In others, the life term offender may be considered for commutation of sentence after serving a specified number of years.

Good Time Applied to Maximum Sentence

While correctional authorities appear to be in general agreement that there is little relationship between institutional good behavior and societal readiness, a good case can be made for allowing good time credits to be applied to the maximum sentence. Good time deduction from the maximum sentence, however, should not result in an offender being released without supervision prior to the expiration of his maximum sentence. Rather it should be used as a method of providing parole supervision, even if only for a limited time, for every offender.

The offender who has not been released on parole prior to completion of his maximum sentence or who has failed on parole poses the greatest potential menace to society. Yet if he is released after completion of his maximum sentence, he has paid his debt to society and is free to do as he chooses. It is possible that such an offender could accumulate good time credit for his institutional behavior, even though the parole board has not considered him ready for release. In Wisconsin, for example, he would be released under parole supervision after he completed his maximum sentence, less good time, and would remain under supervision until expiration of the maximum sentence.

Sentence Determination by Board -- Some Pros and Cons

Following is a brief summary of some of the major arguments for and against giving broad sentencing determination powers to a parole board.

Pro

1) Legal training does not necessarily equip judges to be able to make proper determination of the sentence to be imposed. Consequently, the sentence may bear no relationship to the period of incarceration needed before an offender is ready for a successful return to society. Some violators need little if any confinement, while others may never be released safely.

2) The courts for the most part do not have enough adequately trained probation officers to provide judges with sufficient pre-sentence data to assist them in setting sentences commensurate with an offender's possibilities for rehabilitation.

3) Sentencing practices differ among judges -- not only among those whose courts are in different districts, but also among judges in the same district. This disparity is known to convicted offenders who compare sentences and it lessens the success of institutional rehabilitation programs for this reason.

4) Judicial sentencing when combined with statutory good time deductions results in virtually automatic parole for all inmates upon completion of their minimum sentence minus good time allowance. Such parole release may or may not coincide with the inmate's potential for successful return to society. In those cases where inmates are not ready for parole, an injustice is done both to them and society. An injustice is also done to those inmates who perhaps are ready for release, but are held up because their minimum sentence was lengthy and has not yet been completed. The inclusion of statutory good time presumes that there is a direct correlation between institutional good behavior and readiness for release, which may not be the case, especially in regard to the institution-wise prisoner.

5) Length of sentence can be more adequately and fairly determined by a full-time qualified board removed from the heat and emotionalism of the court room and local attitudes toward crime. This is especially true, when the board has the assistance of competent, professional, institutional personnel who can observe and evaluate the offender during his period of incarceration.

Con

1) The judge is the person most acquainted with the case. He has presided during the trial, has observed the offender, and is acquainted with his record. Consequently, the judge can do a better job of setting sentence than a board whose determination will be based primarily on secondary written reports and brief personal observation.

2) There is no basis for assuming that a board would be any better at sentencing than the courts, either with respect to length of sentence, or sentence variation for the same offense. In fact, a qualified board could do much worse than the courts, if the institutions are not adequately staffed to provide the data the board needs, and if the board members are not well qualified and cannot devote full time to their deliberations.

3) There is the possibility of recourse in the courts, if the offender believes that he has been given an unfair sentence. What recourse would be available from an unjust sentence determination on the part of the parole board?

4) There are institution-wise prisoners who can con professional personnel as easily as they can accumulate good time credits. Institutional conduct may not indicate that a man is ready for release, but it does show an effort to get along and obey rules and regulations; therefore, it should be considered in determining release.

5) The paroling authority will be subjected to undue public pressure and criticism if it exercises sentencing authority. Mistakes made by the board will cause public reaction which in turn could limit the board's effectiveness by forcing it to be more conservative in its actions regardless of the worthiness of the cases before it.

Method of Sentencing Proposed in the Model Penal Code

The following description of and comment on the sentencing method proposed in the Model Penal Code is abstracted from a recent Rocky Mountain Law Review article by Professor Austin W. Scott, Jr. University of Colorado Law School:[13]

> The American Law Institute has been at work for about ten years (with one more year to go for completion of its task) on a Model Penal Code, which, in addition to defining the various principal crimes from murder down to disorderly conduct, and stating the various general principles (e.g., insanity, self-defense, mistake, coercion) applicable to several or to all crimes, contains a number of sentencing and parole provisions.
>
> The Code divides all crimes into several categories: felonies of the first degree, second degree, and third degree; and misdemeanors and petty misdemeanors. For felonies other than some forms of murder, and for misdemeanors calling for an extended term of imprisonment, the Code provides for a type of indeterminate sentence in which the court, as well as the parole authority, plays a substantial part in determining the length of the imprisonment. The court (besides having power to suspend the imposition of sentence and place the convicted defendant on probation) generally fixes the minimum and maximum terms within limits provided by the Code for the particular type of offense; the limits are, of course, placed somewhat higher in the case of extended terms given to persistent offenders, professional criminals and dangerous mentally abnormal persons. The Code prevents the court from imposing (as a Colorado court may impose) what is in effect a fixed sentence (e.g., 9½-to-10 years imprisonment) by requiring, where the court fixes both the minimum and the maximum, that the minimum be no more than half the maximum. Within these minimum and maximum limits, as they may be reduced by good time deductions, the parole board determines the actual date of the prisoner's release under parole supervision.
>
> The Model Code also concerns itself with the problem of concurrent versus consecutive sentences for a defendant tried and convicted in a single trial on a single accusation charging several crimes or on several accusations consolidated for trial; in general, the Code imposes some limitations upon the discretionary power of the trial court to aggregate to

13. Rocky Mountain Law Review, "Comment on Indeterminate Sentencing of Criminals," Professor Austin W. Scott, Jr., Vol. 33, Number 4, June, 1961, pp. 547-549.

great lengths the terms of imprisonment for the various crimes. On the other hand, the Code gives the sentencing court some discretionary power, which it does not now enjoy in Colorado and elsewhere, to alleviate hardship in a particular case, by entering a judgment of conviction for a lesser degree of crime than the degree of crime for which convicted, when in view of all the circumstances the punishment would otherwise be too harsh.

Besides the above provisions concerning length of imprisonment, the Model Penal Code introduces a new concept into the handling of parole. In each case where the defendant is sentenced for an indefinite term of imprisonment, the sentence automatically includes as a separate portion of the sentence an indefinite "parole term" -- of from one to five years, for most crimes. The parolee may be discharged from parole by the parole board any time after one year and before five years. If he violates the terms of his parole before his discharge, however, he may be recommitted.

The new Code provision thus does away with the anomalous situation, which exists in Colorado as in other states, whereby those who need parole the most get it the least, and those who need it the least get it the most -- the situation which necessarily prevails when the term of parole terminates when the maximum sentence has been served.

Besides these provisions relating to length of imprisonment and length of parole, the Model Penal Code calls for a full-time, salaried, nonpolitical parole board consisting of persons possessing skill, evidenced by training or past experience, in correctional administration or criminology.

Classification of Offenses and Penalties as Proposed in the Model Penal Code

Felony--Ordinary Term

Grade of Felony	Minimum (fixed by court)	Maximum (fixed by court)
first degree	1 to 10 years	20 years or for life
second degree	1 to 3 years	not more than 10 years
third degree	1 to 2 years	not more than 5 years

Felony--Extended Term

Grade of Felony	Minimum (fixed by court)	Maximum
first degree	5 to 10 years	life imprisonment
second degree	1 to 5 years	10 to 20 years
third degree	1 to 3 years	5 to 10 years

Misdemeanor--Extended Term

Grade of Misdemeanor	Minimum (fixed by court)	Maximum (fixed by law)
Misdemeanor	not more than 1 year	3 years
Petty misdemeanor	not more than 6 months	2 years

Parole Board Composition

If considerable sentencing discretion is given to the parole authority, it is extremely important that the board be composed of professionally trained and experienced personnel who serve in this capacity on a full-time basis. The American Correctional Association recommends the following qualification standards for parole board members:[14]

> 1) Personality: He must be of such integrity, intelligence, and good judgment as to command respect and public confidence. Because of the importance of his quasi-judicial function, he must possess the equivalent personal qualifications of a high judicial officer. He must be forthright, courageous, and independent. He should be appointed without reference to creed, color, or political affiliation.
>
> 2) Education: A board member should have an educational background broad enough to provide him with a knowledge of those professions most closely related to parole administration. Specifically, academic training which has qualified the board member for professional practice in a field such as criminology, education, psychiatry, psychology, social work, and sociology is desirable. It is essential that he have the capacity and desire to round out his knowledge, as effective performance is dependent upon an understanding of legal process, the dynamics of human behavior, and cultural conditions contributing to crime.
>
> 3) Experience: He must have an intimate knowledge of common situations and problems confronting offenders. This might be obtained from a variety of fields, such as probation, parole, the judiciary, law, social work, a correctional institution, a delinquency prevention agency.

14. A Manual of Correctional Standards, op. cit., pp. 537 and 538.

4) Other: He should not be an officer of a political party or seek or hold elective office while a member of the board.

It might be expected that most small states would have part-time parole boards, even though the paroling authority has a considerable amount of discretionary sentencing power. Most of these states do not have a sufficient number of offenders appearing before the board to require a full-time parole authority. What is surprising, however, is that some of the larger states have part-time parole boards, when these boards have considerable authority in setting sentences. States in this category with part-time boards include: Iowa, Indiana, Kansas, and Tennessee, although the Tennessee board has one full-time member.

Full-time parole boards with broad sentencing authority are found in Michigan, Texas, Ohio, Washington, West Virginia, Wisconsin, California, and Florida.

Eight of the states under discussion (both large and small) have no statutory qualifications for parole board members: Idaho, Tennessee, Texas, Nevada, New Mexico, Utah, Washington, and Indiana. The statutory qualifications in three additional states (Kansas, South Dakota, and Iowa) do not specifically require knowledge and experience in corrections or related fields. Wisconsin is the only state in which the parole board is under civil service. In most of the other states, board members are appointed by the governor, usually with senate approval.

New Federal Approach to Sentencing

Federal judges have several alternatives in sentencing offenders as a consequence of the adoption of Public Law 85-752 (1958). This law applies only to offenders for which the court feels that a sentence of at least one year is required to serve "the ends of justice and the best interests of the public."

First, the court may designate the length of the sentence within the maximum prescribed by statute and also the minimum term which must be served before an offender shall become eligible for parole, which term may be less than but shall be no more than one-third of the maximum sentence imposed. This alternative incorporates the features of indeterminate sentencing, because even though a definite sentence is imposed (e.g., 10 years), the offender will be eligible for parole no later than the completion of one-third of this sentence (three years and four months if sentence is 10 years) and possibly sooner if the court so indicates.

Second, the court may set the maximum sentence as prescribed by statute, in which event the court may specify that the offender may become eligible for parole at such time as the board of parole may determine. This alternative is very similar to the method of sentencing followed in some states in which the maximum sentence is set by statute and the minimum is determined by the parole authority.[15]

Third, if the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the attorney general for purposes of extensive study and evaluation. If this alternative is followed by the court, it is deemed that the sentence imposed is the maximum prescribed by law, although the results of this study and evaluation shall be furnished to the committing court within three months, unless the court grants additional time, not to exceed three months, for completion of the study. After the court receives the report and any recommendations which the director of the Bureau of Prisons believes may be helpful in determining disposition, the court may do one of several things:

1) place the offender on probation;

2) affirm the maximum sentence already imposed, and leave it up to the parole board to determine the date of parole eligibility;

3) affirm the maximum sentence already imposed and set a date for parole eligibility which may be less than but not more than one-third of the maximum; or

4) reduce the sentence already imposed and set a date for parole eligibility which may be less than but not more than one-third of the maximum.

There are also two other sentencing alternatives afforded the court. The court has the following authority with respect to offenders convicted of any offense not punishable by death or life imprisonment;

1) Regardless of the maximum penalty provided by law, the court may suspend sentence and place the offender on probation for a period not to exceed five years.

2) If the maximum penalty provided by law is more than six months, the court may fix a sentence in excess of six months and provide that the offender be confined in a jail-type or treatment institution for a period not exceeding six months. After completion of this six-month period, the remainder of the sentence is suspended, and the offender is placed on probation for a period not to exceed five years.

In all instances where probation is granted the court has the authority to revoke or modify any condition of probation or may change the period of probation; however, the total period of probation shall not exceed five years.

---

15. Washington, Utah, Florida, and Iowa.

Sentencing and Institutional Programs

Sentencing, incarceration, and parole are all integral parts of a continuous correctional process. Regardless of how this process is organized, 95 per cent of all committed offenders sooner or later return to society, even if some return only for relatively short periods of time. The separate components of the correctional process should be coordinated to achieve maximum results with respect to the protection of society and the rehabilitation of offenders, and, insofar as possible, the same philosophy should underlie the total program.

Sentencing is the key to a successful corrections program. Even if the institutions and parole department are staffed with qualified, dedicated personnel and programs are aimed at rehabilitation, the possibilities of success are minimized if the method of sentencing used does not make it possible for the parole authority to release an offender at the time that he is considered to be a good societal risk. If he must remain in the institution for a longer period, the effects of the program are diminished or perhaps even negated. If he must be released from the institution before he is considered ready, then the program has little chance of being helpful and both society and the offender are losers.

Conversely, it is dubious that much can be accomplished by a change in the method of sentencing if accompanying changes, as needed, are not made or at least initiated in institutional programs. In addition to a qualified parole board, correctional institutions and facilities must have properly qualified and experienced professional personnel on their staffs, not only to develop and emphasize rehabilitation programs, but also to make evaluations and prepare the pertinent data needed by the board in making its decisions.

As examples, some of the more important components of the correctional program in this respect are: 1) initial evaluation, classification, and placement; 2) vocational training and education programs; 3) counseling and testing; 4) psychiatric services; and 5) pre-parole planning and guidance.

During the past few years in Colorado, major advances have been made in these areas at both adult correctional institutions, and further improvements are planned.

Wisconsin's Correctional Program - An Example

Wisconsin's correctional program has received national recognition. The following description of the Wisconsin program is taken from a speech made by Sanger B. Powers, Director, Wisconsin Division of Corrections.[16]

16. "Wisconsin's Answer," a speech by Sanger B. Powers, Director, Wisconsin Division of Corrections, presented to the Oklahoma Health and Welfare Association, Oklahoma City, November 20, 1958.

We believe that our basic responsibility established by law and public policy is the protection of society, for this is why institutions are built, why provisions are made for probation and parole services. We feel, however, that society will receive maximum protection only from a positive program focused on the treatment of each offender as an individual -- one with problems, a person who is frequently maladjusted socially, mentally, physically, or spiritually -- who might be characterized as socially ill.

Nationally something like 95 per cent of all persons committed to institutions are released through parole, conditional release, or discharge . . . It should be obvious that if society is to receive any long-term protection as the result of an offender being taken out of circulation and incarcerated for a limited period of time, that protection must come from something other than locking him up and throwing the key away . . . Long-term protection can come only through positive programs in institutions and through probation and parole -- through programs aimed at retraining rather than restraining, through efforts to rehabilitate rather than being content to restrict, through programs geared to reformation through a professionalized service rather than mere repression.

. . . the job of an institution or a corrections service is not to punish. Punishment might properly be the function or aim of a court in depriving a person of his liberty by commitment to an institution, but the job of the institution . . . is . . . to make the maximum efforts to train, retrain, educate, guide and counsel, and through the use of psychological and psychiatric and social services, to get at and treat the causes, the things responsible for anti-social or criminal conduct.

We believe in the value of the maximum use of treatment and rehabilitative services . . . Such services must be individualized, for each offender differs from all others in terms of aptitudes, attitudes, emotional make up, cultural, and social background and prior record.

. . . we are operating six institutions and a statewide probation and parole service, all of which are integrated and enmeshed and designed to protect society through

> the restoration of people to useful living at the earliest possible time consistent with the protection of the public and the readiness of each individual offender to resume his place in the community. I am not naive about all this business and I am not seeking to give the impression that we turn out only successes or that every prisoner received is a hopeful person interested in re-establishment of himself in society . . . The great majority of the offenders committed to our custody are not hopeless . . . There may be people in prisons . . . to whom hope has been denied, but there are few /who are/ hopeless.

Mr. Powers then went on to describe institutional programs as follows:[17]

> . . . a copy of the pre-sentence investigation accompanies the offender to the institution and is used by the institution in planning a positive program for the offender . . . Shortly after an offender is received . . . he will appear before a classification committee, which will determine the treatment and training program for him . . . at this time . . . the pre-sentence social history will be supplemented and amplified by appraisals and reports from the psychiatrist, psychologist, director of education, supervisor of vocational training, chaplain, director of recreation, and the institutional social service worker assigned to the specific case . . . complete information is available to the classification committee which will permit them /sic/ to make an intelligent determination with respect to the security classification, education, and vocational training or work assignment, and type of guidance or counselling necessary.
>
> As an inmate progresses through an institution, a social worker keeps close tab on his progress and adjustment and his response to the program set up for him. When the prisoner is initially seen by the Parole Board, the Board will have a report from the social service department which is up-to-date and which will supplement all of the material previously referred to and which is also utilized by the Parole Board. Thus the Parole Board in making its decision is able to use the pre-sentence social history,

17. Ibid.

> all of the institution classification material, and the up-to-date progress report in determining the readiness for parole of any particular applicant . . . Board members are qualified by training and experience to properly assess and appraise this type of material, are conversant with the dynamics of human behavior and are able to understand the meaning and significance of the psychiatric and psychological data which frequently bear significantly on the question of readiness for parole.
>
> . . . during an offender's stay at an institution he is seen at regular intervals by the parole officer who will be his supervisor upon release. . . Thus there is a continuous link between the community and the offender, between the offender's parole officer and the institution, and the parole officer has access to all of the institutional information in an offender's record which will go with the offender to the field when he is released under parole supervision. This we feel makes for an integrated and coordinated total correctional process.

This description of the correctional process was followed by some comments on the costs of the Wisconsin program:[18]

> . . . we do this in Wisconsin because we are not a wealthy state and because we cannot afford a program which does not provide for adequate probation and parole supervision and which does not provide society with the protection afforded through the supervision of offenders upon release from institutions. . . As of November 1, /1958/ the Division of Corrections had 8,120 persons under its supervision. Of this number 3,018 were in institutions while 5,102 were under supervision in the field/(on probation and parole/ . . . 63 per cent of the offenders . . . were in the community under the supervision of a probation and parole officer while only 37 per cent were institutionalized . . . the average weekly per capita cost of supervision on probation or parole /was/ $4.25 . . . the average per capita cost of institutionalization . . . approximates $37.50 per week. If the 5,102 persons presently being supervised on probation and parole were in institutions an extra $9,180,000 of state funds would be

18. Ibid.

required. . . This added annual operating cost of $9,180,000 does not include the tremendous capital outlay necessary to provide bed space in institutions for an additional 5,102 prisoners. At current construction costs averaging $10,000 per bed, this would represent a minimum added capital outlay of $51 million. . . none of this takes into consideration other "hidden" costs which would have to be reckoned with: 1. . . the economic contribution of these 5,102 people to society in terms of productivity. . . 2 . . . the approximate $16 million in wages of these people are currently earning and spending . . . 3 . . . the taxes being paid on this $16 million. . . this loss would have to be made up along with the added tax necessary to keep these people confined. . . 4 . . . /the/ cost to maintain the families of the productive wage earners now . . . on probation and parole.

So all in all we are really dealing with staggering added costs if we were to consider abandoning our program in favor of a program which substituted institutionalization for adequate probation and parole services. And none of this reckons with the human values involved, the effect on people of the grinding routine and monotony of institution life, particularly if the institution program and staff are such that people are not kept constructively occupied with programs intelligently designed to retrain, re-educate, reform, and return to useful living.

For these reasons Wisconsin does not feel it can afford what on the surface might seem to be a cheaper operation, but which would actually be substantially more expensive. The state does not want and cannot afford institutions and institutional programs which do not do anything to rehabilitate, which do nothing to improve an offender during his period of institutionalization. We do not want people released on parole or by discharge who are not ready for release.

Difficulty in Measuring Success of Sentencing Practices and Institutional Programs

Most correctional authorities agree that a program such as Wisconsin's (described above) represents the most successful approach as yet developed to sentencing, incarceration, and release. Yet it is extremely difficult, even for correction officials in states with such programs, to measure accurately the extent to which their programs contribute to parole success. This is especially true when comparisons are attempted. Several reasons why measurement is difficult were cited in correspondence from correction officials in California, Wisconsin, and other states.[19]

1) It is difficult to compare present results with results in the state previous to adoption of the present program.

a) Few records were kept formerly.

b) Very few offenders were released on parole previously, and these were the ones most likely to succeed.

c) There have been changes in the nature and type of crimes and criminals which make comparisons impossible.

2) It is impossible to compare states because of:

a) differences in use of probation and parole (In some states parole is not used extensively so that those who are paroled are more likely to be successful. Use or nonuse of probation has a great bearing on institutional population. First offenders who perhaps should have been placed on probation are committed and then paroled with better chance for success than a two or three-time loser.); and

b) regional and local differences in crime rates, community attitudes, and related factors.

3) It is very difficult to measure parole success or to determine accurately the reasons therefor.

a) The rate of success depends on how parole success is defined and the length of time being considered. Should technical violations be included or just new offenses? Should two, three, or five years be used, or should the successful completion of parole - regardless of length of time - be the criterion?

b) There are so many factors involved in each parole success, and they vary from case to case, it is hard to tell precisely which is the most important. Among these are: institutional programs, time of release, family and community acceptance, employment, parole supervision, and previous background and record.

19. These responses were a result of a staff questionnaire sent to selected states in April, 1960.

Previous Proposals to Change the Method of Sentencing in Colorado

1957 Parole Department Proposal

In 1957, legislation suggested by the Adult Parole Department provided for statutory maximum sentences and no minimum, except that the court could, if it so desired, set the minimum sentence; however, the minimum could not exceed one-third of the statutory maximum or 10 years, whichever was less. The court was also empowered to reduce a minimum term at any time before expiration thereof upon the recommendation of the parole board, if the court was satisfied that such reduction would be in the best interests of the public and the welfare of the prisoner. This proposed measure made no change in parole board composition nor did it provide for institutional transfer.

S.B. 188 (1959) and H.B. 42 (1961)

This proposal introduced in two different sessions was far reaching in scope and would have made a drastic change in sentencing. Under the provisions of this measure a three-member corrections and parole authority would be established under civil service. The court would determine guilt and commit to the authority. The court, if it so desired, could set a sentence, but such sentence would be purely advisory.

The parole and corrections authority would determine the institution in which the offender would be incarcerated (penitentiary, reformatory, state hospital) and would also have the authority and responsibility for transferring offenders among the three facilities. The authority would also have the responsibility for providing psychiatric services and diagnostic facilities at the three institutions.

Authority members would be required to have a broad background in and ability for appraisal of law offenders and the circumstances of the offenses for which convicted Members selected, insofar as possible, should have a varied and sympathetic interest in corrections work, including persons widely experienced in the fields of corrections, sociology, law, law enforcement, and education.

Previously-sentenced offenders would have the choice of coming under the jurisdiction of the proposed act or continuing to serve their sentences under the statutes in effect upon the date of sentence, with allowances for good behavior.

Discussion of S.B. 188 (1959) and H.B. 42 (1961). This proposal would have established one day to life sentences in all cases. The parole and corrections authority would have both parole and administrative responsibility. The requirement that the authority provide for both psychiatric services and diagnostic facilities conflicts with institutional functions and programs and the general authority of the Department of Institutions. This overlapping could lead to unnecessary

expense, duplication, and confusion of functions between the proposed authority and the Department of Institutions, with its divisions of corrections and psychiatric services.

While the authority would be required to classify each offender and assign him to an institution, it would be required only to interview him and study his case some time during the initial six months of his confinement. The question arises as to what would be the status and placement of the offender during the period (which might be as long as six months) before the authority interviews him and reviews his case. Further, there is no provision for the assistance of professional personnel on the institutional staffs in making these determinations.

It would be possible under the terms of the act for one authority member to interview an offender and make recommendations concerning his status for consideration by the authority sitting en banc. It would be far better if each authority member could have equal opportunity to interview offenders and review cases prior to determining status or disposition. In addition to the possible overlapping of functions with the Department of Institutions, the authority would be given the administrative responsibility for the Adult Parole Division. This change would increase the administrative confusion. No provision is made, however, for giving the authority administrative control over the correctional institutions. So if one purpose of the measure is to create an independent correctional agency embracing all facets of the correctional program, it falls short in this respect. Rather the result would be a considerable amount of administrative confusion. The authority would not have control of the correctional institutions but would have the responsibility of establishing and administering certain programs within the institutions as well as administration of the Division of Adult Parole.

Three Possible Approaches to Sentencing in Colorado: Some Implications

Three possible approaches to sentencing in Colorado were subjected to further examination by the Criminal Code Committee. These included:

1) limitation on judicial sentencing discretion accompanied by broader parole board authority similar to the practice in California, Utah, Washington, and Wisconsin;

2) the sentencing alternative embodied in the 1958 federal legislation; and

3) the method of sentencing outlined in the Model Penal Code.

To determine how these approaches to sentencing might be adopted in Colorado the following subjects were examined:

1) administrative changes, staff needs and cost;

2) effect on other aspects of the judicial and law enforcement processes;

3) broad social implications; and

4) possible statutory changes.

As a first step in making this analysis, these three approaches to sentencing were defined more precisely in the form in which they might be applied in Colorado.

1) Sentence Set by Statute.[20] This approach was limited to two variations:

a) maximum and minimum sentences would be set by statute; and

b) maximum set by statute, court could impose minimum, not to exceed one-third of the maximum. Good time allowances would apply only against the maximum sentence.

The parole board would have the authority to review and release an offender after half of the minimum sentence is served. Offenders not paroled prior to the expiration of their maximum sentences less good time allowance could be released under parole supervision at that time, such supervision to continue until the date of maximum sentence expiration. Offenders released on regular parole could be kept under supervision until expiration of their maximum sentence, unless released sooner by the parole board.

2) Federal Sentencing Option. In sentencing an offender, the court could choose among several options:

a) The court could designate the length of sentence within the maximum prescribed by statute and also the minimum term which must be served before an offender would become eligible for parole, which term may be less than but could be no more than one-third of the maximum sentence imposed.

b) The court could set the maximum sentence as prescribed by statute, in which even the court could specify that the offender would become eligible for parole at such time as the parole board may determine.

c) The court could commit the offender to the custody of the Department of Institutions for extensive study and evaluation. Under this alternative, it would be considered that the maximum statutory sentence has been imposed, pending the results of this study and evaluation which would be furnished to the committing court within three months, unless the court granted additional time to complete the study (not to exceed three months). After the court receives the department's report and recommendations, it could do one of several things.

20. Under all three approaches, the court would have the discretionary authority to place offenders on probation as at present.

i) place the offender on probation;

ii) affirm the maximum sentence already imposed and let the parole board determine the date of parole eligibility;

iii) affirm the maximum sentence already imposed and set a date for parole eligibility which could be less than but not more than one-third of the maximum; or

iv) reduce the sentence already imposed and set a date for parole eligibility which could be less than but not more than one-third of the maximum.

(In Colorado, another option would be commitment to the state reformatory, unless the reformatory commitment laws were changed. The court could commit to the reformatory initially or after diagnosis and evaluation by the Department of Institutions.)

3) Model Penal Code. All crimes would be divided into several grades: felonies of the first degree, second degree, and third degree; misdemeanors; and petty misdemeanors, The court would fix the minimum and maximum terms within the limits specified for the grade of crimes within which the offense falls. The limits would be higher for persistent offenders, professional criminals, and dangerous mentally abnormal persons. The court would be prevented from imposing what in effect would be a fixed sentence by the requirement that the minimum could not be more than half of the maximum. The parole board would determine parole release after the minimum sentence less any good time allowance has been served.

There would be some limitations on the authority of the court to impose an extensive consecutive sentence on an offender convicted of several crimes in a single trial. On the other hand, the court would have the discretionary authority to alleviate hardship in a particular case by entering a judgment of conviction for a lesser degree of crime than the offense for which found guilty when, in view of all the circumstances, the punishment would otherwise be too harsh.

Sentences for felony convictions would include, as a separate portion thereof, an indefinite parole term of one to five years. A parolee could be discharged from parole by the parole board any time after one year and before five years.

Possible Costs Involved in Changing the Method of Sentencing

Full-time Parole Board. Many of the states in which sentencing discretion is vested to a considerable extent in the parole authority have full-time parole boards, and such boards are generally recommended by correctional and parole officials. It would appear that the adoption of either of the first two approaches to sentencing outlined above would require a full-time professional parole board in order to be successful. A full-time board would be less necessary under the method of sentencing which follows the Model Penal Code, because the authority of the parole board would be more limited than in either of the other two approaches.

Full-time parole boards in other states vary in size from three to seven members. Qualifications for board members vary, but they usually include experience and training in one or more of the following fields:

1) parole and probation;

2) law;

3) law enforcement and/or corrections;

4) psychology; and

5) social work.

Colorado's present part-time parole board costs the state approximately $10,000 per year. A full-time parole board in Colorado might cost from $68,000 to $90,000 annually, depending on whether it would be a three or five-member board. This cost estimate is based on the following:

1)	Parole board members (annual salary, $12,000) three board members	$36,000
2)	Administrative secretary	4,800
3)	Legal stenographer	4,200
4)	Clerk-typist	3,300
5)	Supplies, travel expense, etc.	20,000
		$68,300
	(two additional board members)	24,000
	Total	$92,300

It might be possible initially for a full-time board to use the staff of the Adult Parole Division for clerical work, and thus reduce the annual cost $7,000 to $8,000.

Diagnostic Center. If Colorado adopted the federal sentencing program, a professionally staffed diagnostic facility would be needed for offenders who might be referred by the courts for diagnosis and evaluation. At least 1,200 offenders are sentenced each year to the reformatory and penitentiary. (In addition, there are a large number placed on probation, many of whom might be committed by the courts for evaluation, should such a facility and service be available.) Even if only 10 per cent of the committed offenders (plus the same proportion of potential probationers) were referred for evaluation, at least 180 to 200 violators would be involved, and it is likely that this estimate is low. Even on the basis of three or four commitments per week, a facility for 35 to 50 inmates would be needed if most of them were to be kept for observation and evaluation for the full 90 days provided in the federal system.

It is very difficult to present even a fairly adequate estimate of construction and operation costs for such a facility and program. Many policy questions are involved such as, but not limited to, the following:

1) Should the diagnostic facility be located near the penitentiary?

2) Should the penitentiary be responsible for overall administration and correctional services?

3) Should the reformatory and penitentiary be permitted to send offenders already incarcerated to the center for evaluation and study upon approval of the director of institutions, or should the facility be limited to court referrals?

4) Should the center be operated in conjunction with a facility for the criminally insane?

If the answers to the first two questions are in the affirmative, the costs would be considerably less, because it would be extremely expensive to staff a small facility with a sufficient number of correctional officers in addition to professional, clerical, and maintenance personnel. Professional staff is very expensive and extremely difficult to recruit; thus, it would appear more feasible to share professional personnel, insofar as possible. This could be accomplished by having such a diagnostic center attached either to the penitentiary or to a special facility for the criminally insane, although separated from it.

If the reformatory and penitentiary are allowed to send inmates to the diagnostic facility for evaluation and study, it would more than likely increase the size facility needed and perhaps the number of professional staff members. On the other hand, it might be quite shortsighted to have such a facility and not to use it as needed as an adjunct to the institutional rehabilitation program.

From the few examples cited above it can be seen that a change in sentencing involves much more than statutory revision or policy decisions which relate only to sentencing. These broader implications should be considered: 1) in order to decide whether Colorado should follow the federal system; 2) in order to present the General Assembly with a comprehensive picture of the factors and costs involved in adopting such an approach; and 3) in order to avoid potential difficulties through careful planning.

Cost estimates, as indicated above, are almost impossible to make without basic policy decisions; however, construction might cost at least $500,000, depending on whether inmate labor is used. It would cost approximately $26,000 annually to employ a psychiatric team (psychiatrist, clinical psychologist, and psychiatric social worker) based on present civil service salary levels. It is doubtful whether one team would be adequate, but the number of additional professional employees needed would depend on whether professional staff is to be shared and what the function of the diagnostic center would include.

Additional Institutional Staff. Under two of the three sentencing approaches (excluding the Model Penal Code), it is likely that additional professional staff would be required at the penitentiary and reformatory within a short period of time, if not initially. These professional employees (psychologists, counselors, social workers) would be necessary, if the experience of other states is indicative (Wisconsin, for example), to provide the full-time parole board with information, analyses, and evaluations which it would require as reference material in reviewing cases and making parole determination.

Again it is difficult to make an accurate cost estimate, but such additional personnel to the two institutions whether employed by the institution or the Adult Parole Division could easily cost from $50,000 to $100,000 per year.

Summary. The cost estimates and related material presented in this section indicate some possible impacts of sentencing changes upon institutional facilities, staffs, and programs. These are not all the factors and costs involved, nor are the cost estimates to be considered accurate; and further study is needed.

Broader Implications of Sentencing Changes

Judicial Functions. Under the first two suggested approaches to sentencing, judicial discretion would be limited. In the first proposal, judges would have the responsibility only to determine guilt, sentence would be according to statute (although as an alternative it is suggested that there might be a judicially imposed minimum not to exceed one-third of the maximum). If changes in sentencing followed the federal system, judges would have more assistance and options in the disposition of offenders, but they would also be subject to certain limitations with respect to the imposition of a minimum sentence. The method of sentencing embodied in the Model Penal Code would leave the judge considerable latitude, but not as much as at present, because statutory maxima and minima would not only be determined by the type of crime but also by the severity of the offense. Further, the court could not impose a minimum that is more than one-half the maximum.

A comprehensive survey of the attitudes of district judges towards sentencing and possible changes was made by the Legislative Council Administration of Justice Committee, which discussed this topic at its regional meetings. In its report to the General Assembly, the Administration of Justice Committee summarized the sentencing discussions at the regional meetings as follows:[21]

> Two-thirds of the 27 district judges with whom sentencing was discussed at the committee's regional meetings favored a change in the method of sentencing. The other nine

21. Judicial Administration in Colorado, Research Publication no. 49, Colorado Legislative Council, 1960, p. 139.

judges advocated retention of the present judicial sentencing authority. Most of the judges favoring change felt that the California system had merit and recommended that the maximum and minimum sentences be set by statute, with the courts' function confined to a determination of guilt. One district judge advocated one day to life sentences in all felonies, with the parole board to determine release within this range. Another district judge felt that the parole board should be given the discretionary authority to determine release at any time after six months had been served. These judges were unanimous in the opinion that a qualified full-time parole board would be necessary to make such a change in sentencing procedures successful. Fixed statutory sentences were favored rather than open-ended sentences to limit the effect of arbitrary parole board action, which might result in incarceration of unjust length.

Several reasons were given by the district judges in favor of adopting a system of statutory sentencing. Some judges said that it is not possible to determine at the time sentence is imposed what the offender's possibility for rehabilitation might be five to 10 years in the future. It was pointed out that legal training does not give judges special competence to determine what to do with a man after he has been found guilty. Even recognizing differences between individual cases, several judges felt that there was inequality in the imposition of sentences and that the proposed change would provide more opportunity for release on the basis of an offender's prospects for a successful return to society.

The judges who opposed a change in the method of sentencing pointed out that the sentencing judge is much more acquainted with the case and the offender than any board would be after reviewing the record and interviewing the offender months or years after the crime had been committed. In imposing sentence, these judges said they took into consideration the crime and extenuating circumstances as well as the information developed through the pre-sentence investigation.

Attorneys and other judges with whom the committee discussed sentencing at the regional meetings were also divided two to one on this question; the reasons advanced for both positions were very similar to those of the district judges.

Law Enforcement Officials. A change in sentencing which would limit the courts' discretion might be looked upon by law enforcement officers, especially district attorneys, as hampering their efforts because, with fixed maxima and minima, elimination of good time, and the placement of prison release determination in the parole board, there is no way in which a lighter sentence can be guaranteed to an offender for cooperation. The best that could be promised is that a report on the offender's cooperation would be included in the material reviewed by the parole board and a recommendation made for a short minimum sentence before parole eligibility.

That the possibility of such opposition to a change in sentencing by law enforcement officials is not farfetched is demonstrated by what happened in the state of Washington when the statutory sentencing system was adopted in 1934. For several years district attorneys and sheriffs opposed the system and the parole board. The crux of the opposition can be found in two questions raised by the Washington State Association of Prosecuting Attorneys in a meeting with the state parole board. "Why do the sentences you set vary so much from what we recommended?" "Why doesn't the Board back our deals with inmates?"[22] After numerous conferences and years of experience working with the new sentencing system, it became generally accepted by law enforcement officers and prosecuting attorneys, many of whom decided that the board knew more about the offenders than they did and also asked how they could assist the board by preparing better statements of the crimes and their investigations.[23]

The foregoing comments are not intended as criticism of prosecuting attorneys or law enforcement officers. Rather, its purpose is to show the need for cooperation and the problems which can result from the lack of communication. It is understandable that law enforcement officials might become upset if they feel that their efforts are being hampered because of restrictions placed upon them through the adoption of a sentencing system which, unless explained, is perceived as a means of rapidly returning dangerous offenders to society.

Changes in Society's Approach to Crime. The first two sentencing alternatives would give more legal sanction to the current trend in the handling of criminals away from retribution, punishment, and deterrence and toward emphasis on society's protection and rehabilitation efforts. On the surface this may appear as a "get soft" approach. Those who support this shift in emphasis argue that

22. Law and Contemporary Problems, "Sentencing by an Administrative Board," Vol. XXIII, No. 3, Norman S. Hayner, Duke University School of Law, p. 481.
23. Ibid.

the contrary is true because: 1) Release of an offender at the time he appears to be best able to return to society successfully protects society far more than if the is released after serving the required amount of time, regardless of his chances to be a good citizen. 2) Parole supervision protects society and helps the offender to keep from backsliding; release without supervision is far more dangerous. 3) If an offender has an incentive, he is more likely to try to face reality and the real causes of his problems; such incentive is provided if an offender knows the time of his release depends to a great extent upon himself. There is little motivation if he knows he has to serve a certain length of time anyway. 4) Focusing more attention on the offender rather than concentrating on the crime committed makes it possible to release offenders at the time they are considered ready to be returned to society and to hold dangerous offenders as long as the law will allow.

The problem, therefore, is not one only of equalizing sentences for like crimes (although disparity has been demonstrated by penitentiary statistics) but also to provide a sentence tailored to a particular offender to the extent that through his own efforts (with assistance) he can be released sooner if it is determined to be safe to do so and can be held for the maximum period if it is in society's best interest.

Both the California-Wisconsin-Washington method of sentencing and the federal system are in line with this approach. Equalization of sentences for like crimes is recognized by imposition of statutory maxima and by either statutory minima or limitations on the length or minimum sentence which may be judicially imposed. (The court may request diagnostic assistance under the federal system in considering carefully what is best for the offender and for society.) Within these sentence limitations, there is no automatic formula to guarantee the date of release, it is dependent upon the offender and an evaluation of his chances of becoming a useful citizen.

The same remarks apply, but to a lesser extent, with respect to the method of sentencing embodied in the Model Penal Code, because the Model Penal Code places much more emphasis on the severity of the crime in establishing maximum and minimum sentences, provides for good time allowances, and allows the court to set both a minimum and a maximum sentence, although the minimum cannot exceed one-half the maximum.

Complexity of Problem

The subject of sentencing is an extremely complex one, expecially when considered within the context of the total correctional process. Consequently, the following questions should be considered in reaching a decision on changes in present sentencing procedures:

1) What should be the basic approach to sentencing? Assuming that protection of society is the major objective, how may this best be achieved? Should the underlying philosophy (in addition to society's protection) be rehabilitation, punishment, or retribution?

How can these different approaches to sentencing be reconciled? Does sentencing serve as a deterrent? If so, to what extent, and should this be a prime consideration?

2) What should be the extent of judicial authority in setting sentences? Should courts be limited to a finding of guilt? Should sentences be set by statute? If so, should this apply to both maxima and minima, or just one end of the sentence (which one)? Should it be possible to release an offender before completion of his minimum; on what basis and under what circumstances? If continuation of judicial sentencing authority (at least to a limited extent) is desirable, what would be a satisfactory combination of judicial and board sentencing authority, not only with respect to the role of each, but also in relationship to the basic approach to sentencing? Are the offender's rights safeguarded under the methods of sentencing being considered?

3) If greater responsibility is given to the parole board, what should be the composition of the board (number, qualifications, method of appointment, civil service), and should it serve on a full-time basis?

4) What should be the relationship between the board and the institutions (as to scope of authority, division of responsibilities, supervision)? Specifically, should the board play any role or have any responsibility in initial classification, assignment, placement, and transfer of offenders? If so, to what extent?

5) To what extent should present institutional programs be augmented or changed if the method of sentencing is changed? What do the institutions now have in the way of professional personnel and rehabilitation programs? What is needed and how far reaching should changes be? What should be done if no changes are contemplated in institutional programs?

6) Are the present statutory penalties for crimes satisfactory? If not, which ones should be changed? How should statutory good time provisions be handled? What provision should be made for offenders already committed?

LICENSING AND REGULATION OF BAIL BONDSMEN

There are no provisions in the Colorado statutes regulating bail bondsmen or prescribing the terms and conditions for the issuance of bail bonds. Members of the judiciary, the bar, and the press, as well as the general public, have been concerned over this lack of regulation, primarily because of happenings in the Denver metropolitan area in recent months.

Although there is presently more general concern, the lack of regulation and control of bail bondsmen has been recognized as a serious problem by judges and attorneys for a number of years. At the March 18, 1960, Denver regional meeting of the Legislative Council Administration of Justice Committee, the following allegations were made about bail bondsmen:

1) Many ex-convicts are in the bail bond business.

2) Fees charged by many bail bondsmen are exorbitant.

3) It is not uncommon for a bondsman to request the court to terminate bond after the fee has been paid on the grounds that the alleged violator was a poor risk, even though this is not the case.

4) There is no way to prohibit possible agreements between bail bondsmen and attorneys.[1]

Regulatory Legislation in Selected States

The statutory regulation of bail bondsmen was surveyed in seven states known to have such legislation as a guide to possible legislative action in Colorado. These states included: Arizona, Connecticut, Florida, Indiana, Massachusetts, New Hampshire, and New York. A summary analysis of the bail bondsmen regulatory legislation of each of these states is presented below.

Arizona

Arizona requires only that each professional bondsman (other than a surety company) be registered with the clerk of the superior court.

Connecticut

This act requires that each professional bondsman be licensed by the state and includes other regulations.

Bondsmen Licensed. Any person who makes bail in five or more criminal cases, whether for compensation or not, must be licensed.

1. Judicial Administration In Colorado, Colorado Legislative Council, Research Publication No. 49, December 1960, p. 154.

Licensing Authority. The state police commissioner is charged with the licensing and regulation of professional bondsmen.

Qualifications. Each applicant must make a sworn statement which contains the following:

a) a list of assets and liabilities
b) applicant's fingerprints and photo
c) proof of sound moral character
d) proof of financial responsibility
e) statement that applicant has never been convicted of a felony

The commissioner may deny or suspend a license if any of the above are not truthfully provided.

License Fee. The license fee is $100.

Maximum Bond Fees. First $100 of bond -- $5 fee; $100 to $5,000 -- five per cent of bond amount; over $5,000 -- 2.5 per cent of bond amount.

Annual Report. Each bondsman must submit an annual report to the commission showing: 1) the number of bonds handled; 2) amount of bonds; and 3) the fees charged.

Penalty. For violation of any of the above laws, sentence may be $1,000 fine and/or two years in jail.

Florida

Florida's legislation is quite detailed and comprehensive and also covers runners (who are leg men for professional bondsmen).

Bondsmen Licensed. The state licenses sureties, bail bondsmen, and runners.

Licensing Authority. The state treasurer is the designated insurance commissioner and enforces the law regulating bondsmen and runners.

Qualifications for Bondsmen. Each applicant for a license must take an examination administered by the commissioner of insurance. In addition, he must show the following qualifications:

a) 21 years of age
b) citizen and resident for six months
c) experience in bonding business by previous employment or completion of correspondence course
d) high moral character
e) a detailed financial report
f) the rating plan the applicant will use (bond fees)

License Fee. The license fee in Florida is $10.

Annual Report. Once a year the professional bondsman must file a statement of his assets and liabilities and must list every bond forfeiture.

Penalty. Any violation of law may be punished by $500 fine and/or six months in jail.

Other. Several specific prohibitions are made in the law pertaining to the conduct of bondsmen, including:

a) Bondsmen may not advise employment of a particular attorney.
b) Bondsmen may not solicit business in court.
c) Bondsmen may not pay any fee to a jailer, attorney, policeman or public official.
d) No bond agency may hold itself out as a surety company.

Indiana

Indiana has the most recent and most comprehensive legislation among the states surveyed.

Bondsmen Licensed. No person shall act in the capacity of a bail bondsman or runner or perform any of the functions, duties or powers prescribed for bail bondsmen or runners under the provisions of this act unless that person shall be qualified and licensed as provided. None of the provisions of the act shall prohibit any person or persons from pledging security for a bail bond if such person or persons are neither promised nor receive money or anything of value therefor.

Licensing Authority. The state insurance commissioner is charged with the authority and responsibility for the licensing and regulation of bail bondsmen and runners.

Qualifications for Bondsmen. The commissioner of insurance may require from an applicant information concerning his qualifications, residence, prospective place of business, and any other matters which the commissioner deems necessary or expedient to protect the public and ascertain the qualifications of the applicant. The commissioner may also conduct any reasonable inquiry or investigation to determine the applicant's fitness to be licensed or have his license renewed. A deposit of from $10,000 to $25,000 as determined by the commissioner is required before any licensed bondsman may write cash or security bail bonds.

License Fee. The annual license fee (including renewals) is $10.

Annual Report. An annual detailed financial statement must be filed under oath, and such statement shall be subject to the same examination as is prescribed by law for domestic insurance companies. On or before August 15 of each year, each bondsman must file a sworn statement listing every bond forfeiture, amount of forfeiture and name of court where the forfeiture is recorded, and the date of payment.

Penalty. Violation of any provisions of the act is punishable by a fine of not more than $500 or six months in jail or both.

Other. Several specific prohibitions are made in the law pertaining to the conduct of bondsmen including:

a) suggest or advise the employment of or name for employment any particular attorney to represent his principal;
b) pay a fee or rebate or give or promise anything of value to a jailer, policeman, peace officer, committing magistrate or any other person who has the power to arrest or hold in custody, or to a public official or employee in order to secure a settlement, reduction, remission, or compromise in the amount of any bail bond or the forfeiture thereof;
c) pay a fee or rebate or give anything of value to an attorney in bail bond matters, except in defense of any action on a bond;
d) pay a fee or rebate or give or promise anything of value to the principal or anyone in his behalf;
e) participate in the capacity of an attorney at a trial or hearing of one on whose bond he is surety;
f) accept anything of value from a principal except the premium, provided that he may be permitted to accept collateral security or other indemnity from the principal which shall be returned upon final termination of liability on the bond; and
g) solicit business in or about any place where prisoners are confined.

Massachusetts

Bondsmen are required to register but are subject to very few regulations; they are regulated by the local courts.

Bondsmen Registered. All bondsmen, other than surety companies, who make bond on five or more occasions must be registered.

Registering Authority. Each bondsman must register with and be approved by the superior court (similar to Colorado's county court) and be subject to the rules of the court.

Monthly Report. A 1959 amendment to the Massachusetts law requires each bondsman to submit a monthly report to the chief judge of each superior court showing the bail or surety, defendant's name, offense charged, and fee charged on each case bonded for that month.

Penalty. Any violation of Massachusetts law is subject to $1,000 fine and/or one year in jail.

New Hampshire

The law requires registration of all bondsmen and makes them subject to limitations on the fees that may be charged.

Bondsmen Registered. All professional bondsmen who receive compensation for making bail must register.

Registering Authority. The clerk of the superior court registers and administers an oath of financial responsibility to each bondsman.

Registration Fee. The clerk of each superior court sets the fee.

Maximum Fees. Professional bondsmen are prohibited from charging more than five per cent of the amount of bail and in no instance can charge more than $100 for a bond.

Penalty. Failure to comply with any of the above requirements may result in a $100 fine or 30 days in jail.

New York

New York has a rather rigid set of license requirements for bondsmen.

Bondsmen Licensed. Any person other than a surety company who makes bond on more than two occasions within a two-month period must be licensed.

Licensing Authority. The superintendent of insurance licenses and regulates all professional bail bondsmen.

Qualifications. Each applicant must submit to a written examination over any phase of the bonding business administered by the superintendent of insurance. In addition, each applicant must show proof of good character and reputation.

Qualification Bond. Each applicant must post a $5,000 bond in order to do business in New York State.

License Fee. Examination fee of $5 and a license fee of $25 is charged to applicants.

Other. The superintendent of insurance may suspend or revoke such licenses for any "fraudulent or dishonest conduct" after due notice and opportunity for hearing is given the licensee.

Suggested Legislation for Colorado

Proposed legislation for the regulation of professional bail bondsmen in Colorado has been studied and considered favorably by the Legislative Council Criminal Code Committee.

Analysis of Proposed Legislation

Following is an analysis of the major provisions of the proposed legislation to regulate bail bondsmen and their key employees. Licensing is limited to those bondsmen who operate in counties with 50,000 population or more because of the consensus of opinion that the problem is confined primarily to metropolitan areas.

Professional Bondsmen, Solicitors, and Runners. Professional bondsmen, soliciting agents, and runners, as defined in the act, would be licensed. A professional bondsman is defined as any person who shall furnish bail, whether for compensation or otherwise, in five or more criminal cases per year in any court in counties having a population of 50,000 or more, or any person who furnishes such bail in criminal cases in any two or more counties, one of which has a population of 50,000 or more. A soliciting agent is defined as any person who as an employee of a professional bondsman or as an independent contractor shall solicit, advertise, or actively seek bail bond business for or in behalf of a professional bondsman. A runner is defined as a person employed by a professional bondsman to assist him: 1) in presenting the defendant in court when required; 2) in the apprehension and surrender of the defendant to the court; or 3) in keeping the defendant under necessary surveillance. Insurers as defined in the act are exempt from this provision.

License Fee. The annual fee for a professional bail bondsman's license would be $100. The annual license fee for soliciting agents and runners would be $10.

Responsible Agency. The department of insurance is vested with the authority and responsibility of licensing and regulation of bail bondsmen, soliciting agents, and runners.

License Application and Requirements

A license applicant (whether for bondsman, soliciting agent, or runner) must provide the following information on forms provided by the insurance department: 1) full name, age, residence during previous 12 months, occupation and business address; 2) complete financial statement; 3) whether he has ever been convicted of a felony or a crime involving moral turpitude; 4) a set of fingerprints certified by a law enforcement official and a full face photograph; 5) evidence of good moral character; and 6) such other information as the department may require. Each professional bondsman would be required to post a qualification bond of $5,000 if he furnishes bail in less than 50 criminal cases. If he furnishes bail in more than 50 criminal cases, the amount of the qualification bond would be $10,000.

Reports. Each professional bondsman licensed under the proposed act would be required to file a report under oath semi-annually with the insurance department. These reports would be filed prior to January 31 and July 31 of each year and would include: 1) the names of the persons for whom the bondsman has become surety; 2) the dates and amounts of the bonds issued and the courts in which such bonds were posted; 3) the fee charged for each bond; 4) the amount of collateral or security received from insured principals or persons acting in their behalf; and 5) financial statements, other business activities, names and addresses of soliciting agents and runners if any employed, and any other information required by the department.

Restrictions on Licensing. No firm, partnership, association, or corporation, as such, would be licensed. Licenses would also be denied to: 1) any person convicted of a felony or any crime involving moral turpitude; 2) any person not a resident of the state; 3) any person under age of 21; and 4) any person engaged as a law enforcement or judicial official.

License Denial, Suspension, and Revocation. If the department denies, suspends, revokes or refuses to renew any license, the aggrieved person would be given the opportunity for a hearing subject to judicial review as provided in the administrative procedures act.[2]

The insurance department would have the authority to deny, suspend, revoke or refuse to renew a license for a bondsman, soliciting agent, or runner for the following reasons:

1) any cause for which the issuance of the license could have been refused had it then existed and been known to the department;

2) failure to pose a qualified bond in the required amount with the department during the period such person is engaged in the business within this state, or if such bond has been posted, the forfeiture or cancellation of such bond;

3) material misstatement, misrepresentation, or fraud in obtaining the license;

4) misappropriation, conversion, or unlawful withholding of moneys belonging to insured principals or others;

5) fraudulent or dishonest practices in the conduct of the business under the license;

6) willful failure to comply with, or willful violation of any provisions of the act or of any proper order, rule, or regulation of the department or any court;

7) any activity prohibited in the act; and

8) default in payment to the court, should any bond issued by such bondsman be forfeited by order of the court.

2. Article 16, Chapter 3, Colorado Revised Statutes 1953 (1960 Perm. Supp.).

Prohibited Activities and Penalties. It would be illegal for any licensee to engage in any of the following activities:

1) specify, suggest, or advise the employment of any particular attorney to represent his principal;

2) pay a fee or rebate, or to give or promise to give anything of value to any law enforcement or judicial officer or employee;

3) pay a fee or rebate or to give anything of value to an attorney in bail bond matters, except in defense of any action on a bond, or as counsel to represent such bondsman, his agent, or employees;

4) pay a fee or rebate, or to give or promise to give anything of value to the person on whose bond he is surety;

5) accept anything of value from a person on whose bond he is surety, or from others on behalf of such person, except the fee or premium on the bond, but the bondsman may accept collateral security;

6) coerce, suggest, aid and abet, offer promise of favor, or threaten any person on whose bond he is surety or offers to become surety, to induce that person to commit any crime; and

7) secure any bond with real property located outside of Colorado.

A licensee convicted of any of the activities listed above would be guilty of a misdemeanor and subject to a fine of not more than $1,000 or a jail sentence of not more than one year or both. Any person who attempts or who acts as a professional bail bondsman, soliciting agent, or runner and who is not licensed would be subject to the same fine and imprisonment.

Text of Proposed Legislation

BY BILL NO.

A BILL FOR AN ACT

RELATING TO BAIL, BAIL BONDS, AND BAIL BONDSMEN.

Be It Enacted by the General Assembly of the State of Colorado:

SECTION 1. Chapter 72, Colorado Revised Statutes 1953, as amended, is hereby amended by the addition of the following NEW ARTICLE:

ARTICLE 22

Bail Bondsmen

72-22-1. Definitions. The following terms when used in this article shall have the following meanings:

(1) "Department" shall mean the department of insurance.

(2) "Commissioner" shall mean the commissioner of insurance.

(3) "Insurer" shall mean any domestic or foreign corporation, association, partnership, or individual engaged in the business of insurance or suretyship which has qualified to transact surety or casualty business in this state.

(4) "Professional bondsman" shall mean any person who shall furnish bail, whether for compensation or otherwise, in five or more criminal cases in any court or courts in any county having a population of fifty thousand or more, as determined by the latest decennial federal census, during any one calendar year; or any person who furnishes such bail in criminal cases in any two or more counties, one of which has a population of fifty thousand or more.

(5) "Soliciting agent" shall mean any person who, as an agent or employee of a professional bondsman, or as an independent contractor, for compensation or otherwise, shall solicit, advertise, or actively seek bail bond business for or in behalf of a professional bondsman.

(6) "Runner" shall mean a person employed by a professional bondsman for the purpose of assisting the professional bondsman in presenting the defendant in court when required, or to assist in the apprehending and surrender of the defendant to the court, or in keeping the defendant under necessary surveillance. Nothing herein shall affect the right of professional bondsmen to have counsel or to ask assistance of law enforcement officers.

(7) "Obligor" shall mean any person, association, partnership, or corporation who shall execute a bail bond either as principal or surety.

72-22-2. License required - enforcement. (1) No person shall act in the capacity of professional bondsman, soliciting agent, or runner, as defined in 72-22-1, or perform any of the functions, duties, or powers of the same unless that person shall be qualified and licensed as provided in this article; provided that the terms of this article shall not apply to insurers regulated under article 3, chapter 72, Colorado Revised Statutes 1953, as amended. Any person other than a professional bondsman as defined herein may furnish such bail as may be approved by the judge.

(2) No license shall be issued except in compliance with this article and none shall be issued except to an individual. No firm, partnership, association, or corporation, as such, shall be so licensed. No person who has been convicted of a felony or any crime involving moral turpitude, or who is not a resident of this state, or who is under twenty-one years of age shall be issued a license hereunder. No person engaged as a law enforcement or judicial official shall be licensed hereunder.

(3) The department is vested with the authority to enforce the provisions of this article. The department shall have authority to make investigations and promulgate such rules and regulations as may be necessary for the enforcement of this article.

(4) Each license issued hereunder shall expire annually on January 31, unless revoked or suspended prior thereto by the department, or upon notice served upon the commissioner by the insurer or the employer or user of any soliciting agent or runner that such insurer, employer, or user has cancelled the licensee's authority to act for or in behalf of such insurer, employer, or user.

(5) The department shall prepare and deliver to each licensee a pocket card showing the name, address, and classification

of such licensee and shall certify that such person is a licensed professional bondsman, soliciting agent, or runner.

72-22-3. License requirements - application - qualification bond - forfeiture. (1) Any person desiring to engage in the business of professional bondsman, soliciting agent, or runner in this state shall apply to the department for a license on forms prepared and furnished by the department. Such application for a license, or renewal thereof, shall set forth, under oath, the following information:

(a) Full name, age, residence during the previous twelve months, occupation, and business address of the applicant.

(b) Complete financial statement.

(c) Whether the applicant has ever been convicted of a felony or a crime involving moral turpitude.

(d) Such other information, including, but not limited to, a complete set of fingerprints certified to by an authorized law enforcement official and a full face photograph, as may be required by this article or by the department.

(e) In the case of a professional bondsman, a statement that he will actively engage in the bail bond business.

(f) In the case of a soliciting agent or a runner, a statement that he will be employed or used by only one professional bondsman and that such professional bondsman will supervise his work and be responsible for his conduct in his work. Such professional bondsman shall sign the application of each soliciting agent and runner employed or used by him.

(2) Each applicant shall satisfy the department of his good moral character by furnishing references thereof.

(3) Each applicant for professional bondsman shall be required to post a qualification bond in the amount of five thousand

dollars with the department, provided that any such professional bondsman making application for license renewal, as herein provided, who shall have furnished bail in fifty or more criminal cases shall post such bond in the amount of ten thousand dollars. The qualification bond shall meet such specifications as may be required and approved by the department. Such bond shall be conditioned upon the full and prompt payment on any bail bond issued by such professional bondsman into the court ordering such bond forfeited. The bond shall be to the state of Colorado in favor of any court of this state, whether municipal, justice of the peace, county, superior, district, or other court. In the event that any bond issued by a professional bondsman is declared forfeited by a court of proper jurisdiction, and the amount of the bond is not paid within a reasonable time, to be determined by the court, but in no event to exceed ninety days, such court shall order the department to declare the qualification bond of such professional bondsman to be forfeited. The department shall then order the surety on the qualification bond to deposit with the court an amount equal to the amount of the bond issued by such professional bondsman and declared forfeited by the court, or the amount of the qualification bond, whichever is the smaller amount. The department shall suspend the license of such professional bondsman until such time as another qualification bond in the required amount is posted with the department. The suspension of the license of the professional bondsman shall also suspend the license of each soliciting agent and runner employed or used by such professional bondsman.

(4) The department shall, upon receipt of the license application, the required fee, and proof of good moral character, and, in the case of a professional bondsman, an approved qualification

bond in the required amount, issue to the applicant a license to do business as a professional bondsman, soliciting agent, or runner, as the case may be.

(5) No licensed professional bondsman shall have in his employ in the bail bond business any person who could not qualify for a license under this article, nor shall any licensed professional bondsman have as a partner or associate in such business any person who could not so qualify.

72-22-4. License fees. Each license application and application for license renewal to engage in the business of professional bondsman shall be accompanied by a fee of one hundred dollars. Each license application and application for license renewal to engage in the business of soliciting agent or runner shall be accompanied by a fee of ten dollars.

72-22-5. Semi-annual reports required. Beginning January 31, 1964, each professional bondsman licensed under the provisions of this article shall, under oath, report semi-annually to the department on forms prescribed by the department. The reports shall be made prior to January 31 and July 31 of each year and shall contain the following detailed information for the preceding calendar year:

(1) The names of the persons for whom such professional bondsman has become surety.

(2) The date and amount of the bonds issued by such bondsman, and the court or courts in which such bonds were posted.

(3) The fee for each bond charged by such professional bondsman.

(4) The amount of collateral or security received from insured principals or persons acting on behalf of such principals by such professional bondsman on each bond.

(5) Such further information as the department may require, including, but not limited to, residence and business addresses, financial statements, other business activities, and the name and address of each soliciting agent and runner, if any, employed or used by such professional bondsman.

72-22-6. Denial, suspension, revocation, and refusal to renew license - hearing. (1) The department may deny, suspend, revoke, or refuse to renew, as may be appropriate, the license of any person engaged in the business of professional bondsman, soliciting agent, or runner for any of the following reasons:

(a) Any cause for which the issuance of the license could have been refused had it then existed and been known to the department.

(b) Failure to pose a qualified bond in the required amount with the department during the period such person is engaged in the business within this state, or, if such bond has been posted, the forfeiture or cancellation of such bond.

(c) Material misstatement, misrepresentation, or fraud in obtaining the license.

(d) Misappropriation, conversion, or unlawful withholding of moneys belonging to insured principals or others and received in the conduct of business under the license.

(e) Fraudulent or dishonest practices in the conduct of the business under the license.

(f) Willful failure to comply with, or willful violation of any provisions of this article or of any proper order, rule, or regulation of the department or any court of this state.

(g) Any activity prohibited in 72-22-9 (1).

(h) Default in payment to the court should any bond issued by such bondsman be forfeited by order of the court.

(2) If the department shall deny, suspend, revoke, or refuse to renew any such license, the aggrieved person shall be given an opportunity for a hearing subject to judicial review as provided in article 16, chapter 3, Colorado Revised Statutes 1953 (1960 Perm. Supp.).

72-22-7. Notice to courts - to the department. (1) The department shall furnish to all courts in this state the names of all professional bondsmen licensed under the provisions of this article, and shall forthwith notify such courts of the suspension, revocation, or reinstatement of any bondsman's license to engage in such business. No court shall accept bond from a professional bondsman unless such bondsman is licensed under the provisions of this article and unless such bondsman shall exhibit to such court a valid pocket card or license issued by the department and the license of such bondsman shall not have been suspended or revoked.

(2) The clerk of each court of this state shall report to the commissioner prior to January 31 and July 31 of each year the name of each bondsman furnishing bail in such court and the number of bonds posted and outstanding by each such bondsman.

72-22-8. Maximum commission or fee. No professional bondsman shall charge for his premium, commission, or fee an amount more than ten per cent of the amount of bail furnished by him.

72-22-9. Prohibited activities - penalties. (1) It shall be unlawful for any licensee hereunder to engage in any of the following activities:

(a) Specify, suggest, or advise the employment of any particular attorney to represent his principal.

(b) Pay a fee or rebate, or to give or promise to give anything of value to a jailer, policeman, peace officer, clerk, deputy clerk, any other employee of any court, district attorney or any of his employees, or any person who has power to arrest or to hold any person in custody.

(c) Pay a fee or rebate or to give anything of value to an attorney in bail bond matters, except in defense of any action on a bond, or as counsel to represent such bondsman, his agent, or employees.

(d) Pay a fee or rebate, or to give or promise to give anything of value to the person on whose bond he is surety.

(e) Accept anything of value from a person on whose bond he is surety, or from others on behalf of such person, except the fee or premium on the bond, but the bondsman may accept collateral security or other indemnity.

(f) Coerce, suggest, aid and abet, offer promise of favor, or threaten any person on whose bond he is surety or offers to become surety, to induce that person to commit any crime.

(g) Secure any bond with real property located outside this state.

(2) Any licensee who violates any provision of subsection (1) of this section shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than one thousand dollars, imprisonment in the county jail for not more than one year, or both such fine and imprisonment.

(3) Any person who acts or attempts to act as a professional bondsman, soliciting agent, or runner as defined in this article and who is not licensed as such under this article shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than one thousand dollars, imprisonment in the county jail for not more than one year, or both such fine and imprisonment.

72-22-10. Penalty for violation of bond conditions. Any person charged with a criminal violation who has obtained his release from custody by having a professional bondsman, surety company, or person other than himself furnish his bail bond, and who fails to appear in court at the time and place ordered by the court, with intent to avoid prosecution and trial shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than one thousand dollars, imprisonment in the county jail for not more than one year, or both such fine and imprisonment.

72-22-11. Forfeiture - exoneration - continuance of bonds. (1)(a) If there is a breach of condition of a bond, the court shall declare a forfeiture of the bail.

(b) The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

(c) By entering into a bond the obligor submits to the jurisdiction of the court. His liability may be enforced without the necessity of an independent action when a forfeiture has not been set aside. The court shall order the issuance of a citation directed to the obligor to show cause, if any there be, why judgment should not be entered against him forthwith and execution issued thereon. Said citation may be served personally or by certified mail upon the obligor directed to the address given in the bond. Hearing on the citation shall be held not less than 20 days after service. The defendant's attorney and the prosecuting attorney shall be given notice of the hearing.

(d) After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (b) of this subsection. If a

bond forfeiture has been paid into the general fund of the county, the commissioners thereof shall be notified of any application for remission.

(2) The obligor shall be exonerated as follows: (1) When the condition of the bond has been satisfied; or (2) When the amount of the forfeiture has been paid; or (3) Upon surrender of the defendant into custody before judgment upon an order to show cause, upon payment of all costs occasioned thereby. The obligor may seize and surrender the defendant to the sheriff of the county wherein the bond shall be taken, and it shall be the duty of such sheriff, on such surrender and delivery to him of a certified copy of the bond by which the obligor is bound, to take such person into custody, and by writing acknowledge such surrender.

(3) In the discretion of the trial court and with the consent of the surety or sureties, the same bond may be continued until the final disposition of the case in the trial court or pending disposition of the case on review.

SECTION 2. Effective date. This act shall become effective on July 1, 1963.

SECTION 3. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

COUNSEL FOR INDIGENT DEFENDANTS

In district court criminal actions, statutory authority is given the judge to appoint counsel for indigent defendants.[1] This authority is permissive rather than mandatory, but if counsel is appointed he receives a fee fixed by the judge and paid by the county in which the case is tried.[2] There are no provisions for court-appointed counsels in cases before county, juvenile, and municipal courts. The method of providing counsel for indigent defendants in Colorado has been criticized for several shortcomings: 1) Counsel is provided only for district court defendants when there is often need for counsel in other courts as well. 2) Usually counsel is not appointed until the defendant is arraigned, and to prepare an adequate defense, counsel should be appointed as shortly after arrest as possible. 3) The alleged violator is entitled to the best possible defense, but often inexperienced attorneys are appointed. 4) The present system does not provide the investigatory and other facilities necessary for a complete defense. 5) In some counties, the fees paid are too small for the work involved in preparing an adequate defense. 6) In some of the larger counties where the fees paid are more commensurate with the work required, the total cost is too great for the services provided.

Other Methods of Providing Counsel

These criticisms have also been made of the assigned-counsel system in other states. As a result, several alternate approaches to providing counsel for indigent defendants have been developed. These include the voluntary-defender system, the public-defender system, and the mixed private-public system.[3]

These systems may be described as follows:[4]

The Voluntary-Defender System

> Voluntary-defender organizations.../are/ private, non-governmental organizations representing indigent defendants accused of crime. They may or may not be affiliated with a civil legal aid organization...
>
> The voluntary-defender system is characterized by what may be termed the "law-office" approach to the representation of the indigent defendant. While the assigned-counsel system generally results in a number of different lawyers being assigned from time to time to represent indigent

1. 39-7-29, Colorado Revised Statutes, 1953.
2. Ibid.
3. Equal Justice for the Accused, Special Committee of the New York City Bar Association and the National Legal Aid Association, Doubleday & Company, Inc., Garden City, New York, 1959, p. 25.
4. Ibid., pp. 50-52.

defendants, the voluntary-defender system creates a law office which the court may assign to represent any and all indigent defendants. These law offices vary in size from the substantial organizations of New York and Philadelphia to smaller offices such as New Orleans. Nevertheless, under this system the function of defending indigents is centralized in a professional defense unit.

Voluntary-defender offices are privately controlled and supported. Private control is usually achieved through an independent governing body to which the staff of the organization is responsible. Financial support is sought either through independent efforts to secure charitable donations or through participation in cooperative charitable efforts such as the Community Chest. In some instances, both methods are used.

The voluntary-defender system may utilize trained, salaried investigators to assist its legal staff. It may also be aided by volunteers from private law offices or local law schools...

The Public-Defender System

The public defender, like the public prosecutor, is a public official. The former is retained by the government to fulfill society's duty to see that all defendants, irrespective of means, have equal protection under the law; the latter is retained by the government to serve society's interest in law enforcement. Generally, whenever there is a public-defender office, that office represents all indigent defendants in those courts in which the public defender regularly appears.

Public-defender systems vary in size from large offices such as those in Los Angeles County and Alameda County, California, to a single-lawyer office such as the public defender in the New Haven District in Connecticut. Some, such as certain offices in California, have facilities for investigation; others have only limited funds and facilities.

The staff of public-defender offices may be selected through civil service procedures, appointed by the judiciary or the appropriate local officials, or elected. On the whole, the legal staffs of public-defender offices appear to be relatively stable and in a number of instances these staffs have developed the characteristics of career services.

The larger public-defender offices receive office facilities from the government. However, smaller public-defender offices often are operated from the private law office of the attorney serving as public defender.

Public-defender systems are financed by public funds. In some instances, they are treated in the same manner as other government institutions and submit a yearly budget to the proper appropriating body. Others operate on a fixed retainer basis, the public defender being paid a yearly salary or fee for his services and being expected to finance his office expenses from his compensation.

The Mixed Private-Public System

The cities of Rochester and Buffalo, New York, have a mixed private-public system which is unique in the United States.

Rochester has had for some time a Legal Aid Society which is active in civil cases. In 1954, pursuant to an enabling statute, the Legal Aid Society requested and received from the Board of Supervisors of Monroe County an appropriation to establish a defender service to function in the inferior criminal courts of the county. A lawyer employed by the Society has since performed this function.

Thus, Rochester furnishes counsel to the indigent defendant in lower court criminal cases within the organizational framework of a private legal aid society and supports this system by public funds. Buffalo has recently instituted a similar program of operation.

Recommendations for the Defense of the Indigent in Colorado

In both the 1957 and 1959 sessions of the General Assembly, a bill was introduced to establish a public defender system in judicial districts with more than 50,000 population. A public defender was to be appointed for each such district by the governor from persons recommended to him by the district judge or judges. The salaries set for public defenders were comparable to those for district attorneys. In neither session was this measure approved by the General Assembly.

Permissive Public Defender System

In September, 1960, the Metropolitan Public Defender Committee was formed with its membership composed of representatives from the Legal Aid Society, Denver Mental Health Association, League of Women Voters, Catholic Welfare, American Civil Liberties Union, and other organizations. After considerable study, this group recommended legislation patterned after the Model Defender Act, which was drafted by the National Legal Aid and Defender Association in conjunction with the American Bar Association. This model act was adopted in 1959 by the National Conference of Commissioners on Uniform State Laws.

This legislation in slightly modified form was introduced in both houses of the General Assembly in 1961 but was not adopted. Supporters of the proposed measure still are of the opinion that this legislation is a desirable step toward the adequate provision of counsel for indigent defenders, and there are plans to submit this proposal to the Forty-fourth General Assembly in 1963.

This legislation differs from the measures introduced in 1957 and 1959 in three important respects: 1) The act is permissive rather than mandatory. 2) All counties, singly or in groups, may establish a defender system, instead of limiting the office of public defender to judicial districts of a certain size. 3) The public defender would be authorized to represent indigent defendants charged with crimes in county and municipal court, as well as in district court. In addition, he would also be authorized to represent juveniles in delinquency actions.

In those counties where the office of public defender is established as permitted in this act, the county commissioners would appoint the defender, set his salary, and provide adequate office space and supplies. The commissioners would also determine the number of additional professional and clerical staff members, prescribe their method of appointment, and set their salaries. If a public defender office were established on a multi-county basis, the county commissioners of the several counties would make the appointment of the defender jointly and devise a formula for sharing the expense of the office. In the City and County of Denver, the bill provides that the public defender would be appointed by the city council.

Even if the office of public defender is established, the court would have the authority to appoint an attorney other than the public defender in the same way as now provided by law in district courts. If the defender were appointed, however, it would be his duty to represent the indigent defendant and provide counsel at every stage of the proceedings following arrest.

The proposed act also would permit the court to appoint a representative of a local legal aid and/or defender organization as counsel, if the county does not wish to establish the office.

Proponents of this measure feel that the permissive and flexible provisions will make it possible for each local area to adopt a system tailored to meet its own needs. Those areas which do

not desire to take advantage of any of the permissive features of the proposed legislation would continue to appoint counsel for indigent defendants in district court criminal actions as already provided by statute.

Text of Proposed Legislation

A BILL FOR AN ACT

RELATING TO PUBLIC DEFENDERS

Be It Enacted by the General Assembly of the State of Colorado:

SECTION 1. Definitions. As used in this act, unless the context clearly indicates otherwise:

(1) The term "governing authority" shall mean the board of county commissioners in the case of a county, and the city council in the case of a city and county.

(2) The term "county" shall include a city and county.

SECTION 2. Permissive authority to establish office of public defender - qualification. In any county the governing authority may establish the office of public defender. Any county may join with one or more counties to establish one office of public defender to serve those counties. The public defender shall be a qualified attorney, licensed to practice law in this state, and shall be appointed by the governing authority.

SECTION 3. Representation of indigent persons. (1) The public defender shall represent as counsel, without charge, each indigent person who is under arrest for or charged with committing a felony, if:

(a) The defendant requests it; or

(b) The court, on its own motion or otherwise, so orders, and the defendant does not affirmatively reject of record the opportunity to be so represented.

(2) The public defender may represent indigent persons charged in district or county court with crimes which constitute misdemeanors, juveniles upon whom a delinquency petition has been filed, and persons charged with municipal code violations as such defender in his discretion may determine, subject to review by the court, if:

(a) The defendant, or his parent or legal guardian in delinquency actions, requests it; or

(b) The court, on its own motion or otherwise, so orders, and the defendant, or his parent or legal guardian in delinquency actions, does not affirmatively reject of record the opportunity to be so represented.

(3) The determination of indigency shall be made by the public defender, subject to review by the court.

SECTION 4. Term of public defender - assistant attorneys and employees - compensation. (1) The term and compensation of the public defender shall be fixed by the governing authority.

(2) The public defender may appoint as many assistant attorneys, clerks, investigators, stenographers, and other employees as the governing authority considers necessary to enable him to carry out his responsibilities. Appointments under this section shall be made in the manner prescribed by the governing authority. An assistant attorney must be a qualified attorney licensed to practice law in this state.

(3) The compensation of persons appointed under subsection (2) of this section shall be fixed by the governing authority.

SECTION 5. Duties of public defender. When representing an indigent person, the public defender shall (1) counsel and defend

him, whether he is held in custody or charged with a criminal offense, at every stage of the proceedings following arrest; and (2) prosecute any appeals or other remedies before or after conviction that he considers to be in the interest of justice.

SECTION 6. Appointment of other attorney in place of public defender. For cause, the court may, on its own motion or upon the application of the public defender or the indigent person, appoint an attorney other than the public defender to represent him at any stage of the proceedings or on appeal. The attorney shall be awarded reasonable compensation and reimbursement for expenses necessarily incurred, to be fixed by the court and paid by the county.

SECTION 7. Report of public defender. The public defender shall make an annual report to the governing authority covering all cases handled by his office during the preceding year.

SECTION 8. Office space, equipment, etc. - expenses- sharing by counties. The governing authority shall provide office space, furniture, equipment, expenses, and supplies for the use of the public defender suitable for the conduct of the business of his office. However, the governing authority in any case may provide for an allowance in place of facilities. Each such item is a charge against the county in which the services were rendered. If the public defender serves more than one county, expenses that are properly allocable to the business of more than one of those counties shall be prorated among the counties concerned, as shall be agreed upon by the governing authorities of the counties concerned.

SECTION 9. Absence of office of public defender. If the governing authority does not create the office of public defender, then, at county expense, either:

(1) The services prescribed by this act may be provided by a qualified attorney appointed by the court in each case and awarded reasonable compensation and expenses by the court; or

(2) The services prescribed by this act may be provided through nonprofit legal aid or defender organizations designated by the governing authority, which organizations may be awarded reasonable compensation and expenses by the governing authority or courts.

SECTION 10. Repeal. 39-7-29 and 39-7-31, Colorado Revised Statutes 1953, are hereby repealed.

SECTION 11. Short title. This act may be cited as the "Colorado Defender Act".

SECTION 12. Effective date. This act shall take effect on July 1, 1963.

SECTION 13. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Fees Paid Court-Appointed Attorneys

The last comprehensive survey of fees paid court-appointed attorneys was made by the Legislative Council Administration of Justice Committee. This survey covered calendar year 1958. At that time only three judicial districts of the 12 for which data was compiled had averaged court-appointed attorney fees of more than $100 (2nd, 17th, 18th districts). In five judicial districts (3rd, 7th, 8th, 15th, 16th), the average fee was less than $75.[5]

Many of the attorneys and judges who appeared before the Administration of Justice Committee at its regional meetings complained of the low fees paid but pointed out that the county commissioners refused to allow larger amounts. The attorneys stated generally that they tried to do an adequate job, even if the fees were not commensurate

5. Judicial Administration in Colorado, Colorado Legislative Council, Research Publication No. 49, December 1960, p. 151.

with the work involved. However, many felt that they lacked sufficient time for investigation to do a thorough job.[6]

Defendants Represented by Counsel in Criminal Cases

The Administration of Justice Committee found that one-fourth of the defendants in criminal cases filed in the district courts in 1958 were not represented by counsel. In three judicial districts (11th, 12th, and 14th), more than three-fourths of the defendants were not represented by counsel, and there were three others (4th, 9th, and 16th) where counsel appeared for less than half of the defendants. In contrast, there were five districts (2nd, 3rd, 8th, 15th, and 17th) where 88 per cent or more of the defendants had attorneys. In one of these districts (15th), all defendants were represented by counsel.[7]

Sixty per cent of the defendants represented by counsel had court-appointed attorneys. This proportion varied from almost 80 per cent in the 3rd District to 12.5 per cent in the 12th District. In a number of cases in which no counsel appeared, the docket analysis shows that a plea of guilty was entered on arraignment and that no counsel was requested. Some criminal cases in which there was no representation by counsel were dismissed at the request of the district attorney without prosecution, and in a few instances the alleged offender had not been apprehended or had been returned to prison for parole violation rather than prosecuted on a new charge.[8]

Obstacles and Objections to Public Defender System

One of the major obstacles to adopting a public defender system in most of the judicial districts is the small number of criminal cases filed each year. Only eight judicial districts have more than 100 criminal cases filed annually. Proponents of the public defender system contend that the appointment of a part-time public defender and assistants in these districts at salaries equal to those received by the district attorney and his assistants would provide better defense counsel at less cost. At the Administration of Justice Committee's regional meetings, very few attorneys and judges in non-urban districts wished to adopt the public defender system in their areas, although conceding that perhaps such a system would work in Denver and the surrounding counties. Expense and the small number of criminal cases were cited as the reasons why a defender system would not be satisfactory in rural areas.

There have also been objections to the adoption of the public defender system in Denver and other metropolitan areas. Some judges and attorneys feel that adequate defense is now being provided and at less cost than through a public defender's office.

---

6. Ibid.
7. Ibid., p. 152.
8. Ibid., p. 153.

INCHOATE CRIMES

Inchoate, as defined by Webster, is an adjective meaning: recently or just begun being in the first stages, or rudimentary. Inchoate crimes are, therefore, not completed crimes but proposed criminal acts in their initial stages. Included in this category are attempted crimes and solicitation or attempted solicitation of others to commit or assist in the commission of a criminal act. Colorado has no general attempt or solicitation statutes, although many statutes relating to a specific crime also contain a penalty for attempt or solicitation. In considering possible general attempt and solicitation legislation, the Criminal Code Committee has examined the legislation and the supreme court cases related thereto of some of the states which have recently revised their criminal codes, as well as the Model Penal Code.

Attempt

Wisconsin

Wisconsin attempt legislation was selected for examination because Wisconsin adopted a new criminal code in 1955 after six years of work by legislative committees aided by the University of Wisconsin Law School and the Wisconsin Bar Association. The new criminal code has been in effect long enough so that a body of case law has developed interpreting various provisions including the sections on attempt. Following is the Wisconsin attempt statute:

Attempt Legislation. Whoever attempts to commit a felony or a battery as defined by section 940.20 or theft as defined by section 943.20 may be fined or imprisoned or both not to exceed one-half the maximum penalty for the completed crime; except that for an attempt to commit a crime for which the penalty is life imprisonment, the actor may be imprisoned not more than 30 years.

An attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that he does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that he formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

Post-1955 Wisconsin Supreme Court Cases on Attempt. There are several post-1955 cases dealing with this general attempt statute and matters related to it. These cases are discussed separately below:

1) State v. Carli, 2 Wisconsin 2d 429, 86 N.W. 2d 434 (1957). The defendant was charged with mayhem and attempted mayhem, allegedly committed by biting off the complaining witness's ear during a bar room brawl. He was convicted of assault with intent to do great bodily harm, and on appeal he contended that his conviction should be set aside on the

ground that assault with intent to do great bodily harm is not a lesser offense included in a charge of mayhem. His conviction was affirmed. From this case it would seem to follow that by enacting a general attempt statute making it a crime to attempt to commit any felony, Wisconsin did not do away with the doctrine allowing conviction of a lesser included offense -- even in a case such as this where there is not only a charge of the completed crime of mayhem but also a charge of an attempt to commit mayhem.

2) State v. Bronston, 7 Wisconsin 2d 627, 97 N.W. 2d 504 (1959). The defendant entered a liquor store and struck the woman attendant on the head with a wrench and then fled when she regained consciousness and threw a bottle of whiskey at him. The defendant was charged with aggravated battery and attempted robbery and was convicted of both by the trial court. On appeal the supreme court reversed the conviction of aggravated battery on the ground that the harm caused the injured woman was not up to the statutory standard of "great bodily harm" which must actually be caused (not merely intended) in an aggravated battery case. However, the supreme court directed the trial court to enter a judgment of guilty of an attempt to commit aggravated battery, apparently on the theory that the attempt was a lesser included offense. In addition, the conviction of attempted robbery was sustained.

3) State v. Damms, 9 Wisconsin 2d 183, 100 2d N.W. 2d 592 (1960) is destined to become a leading case on the law of attempt in Wisconsin. The charge was attempt to commit murder in the first degree. Damms had held a gun to his estranged wife's head and pulled the trigger, but the gun had not fired because it was not loaded. He had left the clip containing cartridges in his car. Damms was convicted in the trial court. On appeal the chief issue was whether the fact that it was actually impossible for Damms to commit murder with the unloaded gun precluded convicting him of an attempt to murder. The court felt that this issue boiled down to whether the impossibility of completing the target crime because the gun was unloaded fell within the statutory words, "except for the intervention of...some other extraneous factor." 100 N.W. 2d at 594.

In holding that this requirement of the statute was satisfied -- and thus holding the fact that the gun was unloaded to be an "extraneous factor," the court followed the majority view that impossibility not apparent to the defendant does not absolve him of an attempt to commit an intended crime. Said the majority of the court:

> "An unequivocal act accompanied by intent should be sufficient to constitute a criminal attempt. Insofar as the actor knows, he has done everything necessary to insure the commission of the crime intended, and he should not escape punishment because of the fortuitous circumstance that by reason of some fact unknown to him it was impossible to effectuate the intended result."

The court rejected the defense argument that because a subsection expressly stating that impossibility brought about by mistake of fact or law was not a defense was eliminated during revision of the code, it should follow that the legislature intended impossibility to be a defense regardless of the defendant's awareness. (Of course if the defendant is aware that it is impossible to complete the target crime, he does not have the requisite intent for an attempt conviction.)

4) State v. Dunn, 10 Wisconsin 2d 447, 103 N.W. 2d 36 (1960), involved a conviction of attempt to murder where the defendant had hidden in the back seat of his lover's husband's car, and when the husband entered, the defendant had pulled a cloth bag over his face. Defendant also had with him some wire with which he might have strangled the husband. After a brief struggle the intended victim escaped. The trial court's judgment of conviction was affirmed on appeal.

Law Review Comments. One of the draftsmen of the Wisconsin Criminal Code has written:[1]

> Attempt requires acts toward the commission of the crime which demonstrate unequivocally that the actor had the intent to and would commit the crime unless prevented.

1. Platz, The Criminal Code, 1956 Wisconsin Law Review pp. 350, 364, and 365.

> No 'assaults with intent' will be found among the crimes defined in the code; such acts are all covered by the general attempt statute which applies to felonies and to two misdemeanors, battery and (petty) theft.
>
> 'Attempt' is defined for the first time in the law of this state, and in a more intelligible fashion than by using such expressions as 'beyond mere preparation,' 'locus poenitentiae,' or 'dangerous proximity to success.' By avoiding such wording it is intended to forestall any possibility of Wisconsin courts following the New York case of People v. Rizzo /The defendant planned to rob a payroll messenger but was apprehended while driving about looking for the messenger, before locating him; and the court reversed the conviction of attempted robbery because there was no act tending to accomplish robbery and coming sufficiently close to success./

In other words Wisconsin chose to make the test of attempt turn on whether the defendant's conduct sufficiently demonstrated dangerous propensities to justify punishimg him, rather than on how close he came to success in accomplishing the target crime. This rationale was considered by the Wisconsin committee more appropriate to the purposes of criminal law to protect society and reform offenders or at least isolate them where they could cause no harm.

The question of impossibility is not specifically covered due to deletion of the provision in the 1953 code relating to that subject. While it is clear under case law that the completed crime need not be capable of accomplishment, as where the attempt is to pick an empty pocket or to produce a miscarriage upon a woman who is not actually pregnant, courts have refused to hold the actor guilty of an attempt in some circumstances where the effort was doomed to failure, as where one shoots at an inanimate object mistaking it for a man who he intends to kill. In the writer's opinion, even without the deleted provision the code definition of "attempt" does not require proof that the completed crime was possible of accomplishment[2], since "dangerous proximity to success" is not an element.

Illinois

The new Illinois Criminal Code went into effect in January 1962. This code is an example of the most recent approaches to criminal law revision. The language is simplified, sections are brief, and many statutes were eliminated through general provisions with wide application. The Illinois Criminal Code was the product of many years of study by committees of the Illinois and Chicago bar associations. There is no case law as yet because the code has been in effect for less than a year. Following is the attempt provisions in the new Illinois Criminal Code:

2. Ibid.

§8-4. Attempt

(a) Elements of the Offense.
A person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense.

(b) Impossibility.
It shall not be a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the offense attempted.

(c) Penalty.
A person convicted of an attempt may be fined or imprisoned or both not to exceed the maximum provided for the offense attempted: Provided, however,

(1) that the penalty for attempt to commit treason, murder or aggravated kidnapping shall not exceed imprisonment for 20 years, and

(2) that the penalty for attempt to commit any other forcible felony shall not exceed imprisonment for 14 years, and

(3) that the penalty for attempt to commit any offense other than those specified in Subsections (1) and (2) hereof shall not exceed imprisonment for 5 years.

Model Penal Code

The provisions of the Model Penal Code pertaining to attempt are much more specific than those contained in the Illinois Code. Following are the attempt provisions in the Model Penal Code:

Section 5.01. Criminal Attempt

(1) Definition of attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result, without further conduct on his part; or

(c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is a substantial step in a course of conduct planned to culminate in his commission of the crime.

(2) Conduct which may be held substantial step under paragraph (1)(c). Conduct shall not be held to constitute a substantial step under paragraph (1)(c) of this Section unless it is strongly corroborative of the actor's criminal purpose. Without negativing the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:

(a) lying in wait, searching for or following the contemplated victim of the crime;

(b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;

(c) reconnoitering the place contemplated for the commission of the crime;

(d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;

(e) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;

(f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;

(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

(3) Conduct designed to aid another to commit crime. A person who engages in conduct designed to aid another to commit a crime which would establish his complicity under Section 2.06 if the crime were committed by such other person, is guilty of an attempt to commit the crime, although the crime is not committed or attempted by such other person.

(4) Renunciation of criminal purpose. When the actor's conduct would otherwise constitute an attempt under paragraph (1)(b) or (1)(c) of this Section, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting renunciation of his criminal purpose. The establishment of such defense does not, however, affect the liability for the attempt of an accomplice who did not join in such abandonment or prevention.

Louisiana

The Louisiana Criminal Code was revised in 1942. In this code attempt is defined as follows:

Section 27. Attempt

Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose.

Mere preparation to commit a crime shall not be sufficient to constitute an attempt; but lying in wait with a dangerous weapon with the intent to commit a crime, or searching for the intended victim with a dangerous weapon with the intent to commit a crime, shall be sufficient to constitute an attempt to commit the offense intended.

An attempt is a separate but lesser grade of the intended crime; and any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was actually perpetrated by such person in pursuance of such attempt.

Proposed Attempt Legislation for Colorado

Present Colorado law has many gaps with respect to attempted crimes. There are a number of statutes in which the commission of a serious crime is punishable, but which provide no penalty for an attempt to commit the crime. Because there are many instances of attempts to commit serious crimes in which the attempt is not a crime, one whose criminal intent is shown in conduct falling short of completing a crime, or whose attempted crime is aborted by alert police work, legal impossibility, or an effective defense by the intended victim, cannot be prosecuted. Examples of such anti-social conduct

carrying no penalties under present Colorado law include attempted larceny (not covered by crime of assault with intent to commit larceny, for in most larceny there is no assault), attempted kidnapping, attempted malicious mischief, attempted abortion on a woman not in fact pregnant, attempted murder where there is no assault (as where intended victim is asleep or unconscious), attempted robbery by acts falling short of assault (as where defendant is arrested while lying in wait for a bank messenger). Moreover, the case of People v. Dolph, 124 Colorado 553 (1951) holds that there is no common law crime of attempt in Colorado because Colorado adopted the English common laws as of 1607, a date prior to recognition of the common law crime of attempt by the English courts. Professor Austin W. Scott of the University of Colorado School of Law has done extensive research in this area and has found that every state, except Colorado, has a general statute covering criminal attempts.

Because some attempts are presently crimes, a new general attempt statute should state whether its provisions for punishing those attempts are in lieu of or merely alternatives to the penalties already provided. Otherwise, upon enactment of the general attempt statute, present statutes should be amended to eliminate specific definitions of attempt crimes.

Provisions of Suggested Statute. The suggested statute generally follows the substantive definition of attempt contained in the Model Penal Code. Added are several provisions adapted from the codes of Illinois, Louisiana, California, and Wisconsin. This definition is far more comprehensive than any contained in the recently adopted criminal codes of other states. This more comprehensive definition was used in order to try to cover problems which otherwise might require case law determination.

The penalty provision generally follows that contained in the Illinois code, but the maximum penalty for attempt would be one-half of the penalty which would be applicable if the target crime had been completed, subject to certain express limitations.

The text of the proposed attempt statute as reviewed, amended, and approved by the Criminal Code Committee follows.

A BILL FOR AN ACT

RELATING TO CRIMES AND PUNISHMENTS

Be It Enacted by the General Assembly of the State of Colorado:

SECTION 1. Chapter 40, Colorado Revised Statutes 1953, is hereby amended by the addition thereto of a NEW ARTICLE 25, to read:

ARTICLE 25

Inchoate Crimes

40-25-1. Criminal attempt. (1)(a) A person is guilty of an attempt to commit a crime if, acting with the state of mind otherwise required for the commission of the crime, he:

(b) Purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

(c) When causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result, without further conduct on his part; or

(d) Purposely does or omits to do anything which, under the circumstances as he believes them to be, is a substantial step in a course of conduct planned to culminate in his commission of the crime.

(2)(a) Such person's conduct shall not be held to constitute a substantial step under paragraph (1)(c) of this section unless it is strongly corroborative of the actor's criminal purpose. Without negativing the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:

(b) Lying in wait for, searching for, or following the contemplated victim of the crime;

(c) Enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;

(d) Reconnoitering the place contemplated for the commission of the crime;

(e) Unlawful entry of a vehicle, into a structure, into any enclosure, or onto any real property in which or on which it is contemplated that the crime will be committed;

(f) Possession of items or materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;

(g) Possession, collection, or fabrication of items or materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection, or fabrication serves no lawful purpose of the actor under the circumstances; or

(h) Soliciting an accomplice or an innocent agent to engage in conduct constituting an element of the crime.

40-25-2. Conduct in aid of another. Any person who engages in conduct intended to aid another to commit any crime which would establish his complicity under section 40-1-12 or 40-1-13, if the crime were committed by such other person, is guilty of an attempt to commit a crime, although the crime is not committed or attempted by such other person.

40-25-3. Defenses available - not available. (1) When the actor's previous conduct would otherwise constitute an attempt to commit a crime, as defined in this article, it is a defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting the renunciation of his criminal purpose. The establishment of such defense shall not affect the liability for the attempt of an accomplice who did not join in such abandonment or prevention.

(2) It shall not be a defense to a conviction of the crime of attempt to commit a crime that:

(a) Because of a misapprehension of the circumstances it would have been factually or legally impossible for the accused to commit the offense attempted; or

(b) Under the circumstances, the accused could not have actually accomplished his purpose; or

(c) The crime attempted or intended was actually perpetrated by the accused.

40-25-4. Multiple convictions. No person shall be convicted of both the perpetration of a crime and the attempt to commit that crime where the acts constituting such attempt were part of the same conduct constituting the completed crime.

40-25-5. Penalties. (1)(a) A person convicted of an attempt to commit a crime may be fined or imprisoned or both in the same manner as for the offense attempted, but such fine or imprisonment shall not exceed one-half of the largest fine, or one-half of the longest term of imprisonment, or both, prescribed for the offense attempted; provided that:

(b) If the offense attempted is punishable by death or life imprisonment, such person shall be imprisoned in the state penitentiary at hard labor for not less than one year nor more than twenty years;

(c) If the offense is an attempt to commit any felony involving bodily injury of or an assault on any person, other than one punishable by death or life imprisonment, the penalty shall not exceed fourteen years imprisonment in the state penitentiary;

(d) If the offense is an attempt to commit any felony other than those referred to in paragraphs (1)(b) and (1)(c) of this section, the penalty shall not exceed five years imprisonment in the state penitentiary; and

(e) If the offense is an attempt to commit any misdemeanor, the penalty shall not exceed six months imprisonment in the county jail.

SECTION 2. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Solicitation

Other States

The solicitation statutes of Wisconsin and Illinois were surveyed as was the case law and law review comments on solicitation in Wisconsin. In addition, the provisions of the Model Penal Code on solicitation were examined.

Wisconsin. The new Wisconsin Criminal Code provides the following on solicitation:

> Whoever, with intent that a felony be committed, advises another to commit that crime under circumstances which indicate unequivocally that he has such intent may be fined not more than $2,500 or imprisoned not to exceed the maximum provided for the completed crime, but in no event to exceed five years, or both; except that for a solicitation to commit a crime for which the penalty is life imprisonment the actor may be imprisoned not more than 10 years.

There are no Wisconsin cases construing the solicitation statute but there have been several law review comments. An article by an assistant attorney general of Wisconsin states that the 1953 code as originally prepared had contained a general provision that the inchoate crimes -- solicitation, conspiracy and attempt -- be punished the same as the completed crime except that instead of life imprisonment the maximum imprisonment should be thirty years. But the committee which revised the code between 1953 and 1955 changed this penalty provision for solicitation and attempt while leaving it intact as to conspiracy. Thus, the code as enacted in 1955 provided for a fine for solicitation of up to $2,500 or imprisonment up to the maximum provided for the completed crime, but not exceeding five years, or both. (For attempt, the code as enacted provides a fine or imprisonment, or both, not to exceed one-half the maximum provided for the completed crime. For conspiracy one may draw the maximum fine or imprisonment, or both, provided for the complete crime.) The assistant attorney general commented on these penalty changes as follows: "It is difficult to explain this rearrangement of penalites, particularly when it is considered that many attempts and solicitations under the old law were state prison offenses while 'common law conspiracy' was but a misdemeanor.

"All of the inchoate crimes require more than a mere criminal intent. Solicitation requires advice to another to commit a felony under circumstances which indicate unequivocally that the actor intends that the felony be committed.[3]"

These comments imply that solicitation and the other inchoate crimes defined in the 1955 Wisconsin Code require a specific rather than merely a general criminal intent. In solicitation this specific intent is to induce or persuade the person solicited to commit the target crime. The solicitation offense, of course, is complete where the person solicited declines to commit the suggested crime.

It should be noted that the Wisconsin statute covers only solicitation to commit felonies. At common law it was a misdemeanor to solicit another to commit any felony, and furthermore was a misdemeanor to solicit another to commit a serious misdemeanor which may tend to a breach of the peace -- and perhaps to solicit any indictable misdemeanor. The Wisconsin statute in effect makes solicitation a felony in many cases. This crime was never a felony at common law. It is not a crime at all in Colorado today, except in the case of specific offenses whose solicitation is expressly made criminal.

The Wisconsin statute differs from the solicitation legislation in several other states in that it covers the solicitation of all felonies while the solicitation in these other states is limited to enumerated offenses. For example, California restricts the crime of solicitation to offenses involving bribery, murder, robbery, burglary, grand theft, receiving stolen property, extortion, rape by force and violence, perjury, subornation of perjury, forgery or kidnapping.

Illinois. The Illinois Criminal Code defines solicitation and provides the penalty therefore as follows:

> §8-1. Solicitation
>
> (a) Elements of the offense.
> A person commits solicitation when, with intent that an offense be committed, he commands, encourages or requests another to commit that offense.
>
> (b) Penalty.
> A person convicted of solicitation may be fined or imprisoned or both not to exceed the maximum provided for the offense solicited: Provided, however, that no penalty for solicitation shall exceed imprisonment for one year.

Model Penal Code. Solicitation is defined in the Model Penal Code as follows:

---

3. Ibid.

Section 5.02. Criminal Solicitation

(1) Definition of solicitation. A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission.

(2) Uncommunicated solicitation. It is immaterial under Subsection (1) of this Section that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication.

(3) Renunciation of criminal purpose. It is an affirmative defense that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a renunciation of his criminal purpose.

Proposed Solicitation Legislation for Colorado

In Colorado, one who advises or encourages another to commit a crime which the party thus solicited actually commits is guilty as a principal and punished as if he had personally committed the crime (40-1-7,40-1-8, 40-1-12, C.R.S. 1953). But there is no general criminal statute in Colorado defining as a crime the solicitation of another to commit a crime when the party solicited does not commit the offense.

Unsuccessfully soliciting another to commit a crime was not well established as a common law offense in England until 1801. Since that time it has been the accepted view that to solicit another to commit a felony, or a serious misdemeanor tending toward a breach of the peace, is a misdemeanor.

States which have recently adopted new penal codes all have included a provision on criminal solicitation. The draftsmen of the Model Penal Code concluded that solicitation is socially dangerous enough to be considered a crime.

There are several present Colorado statutes defining the solicitation of certain specific crimes as criminal and providing penalites therefore. There are many gaps in the coverage of these provisions, and there is wide divergence in the penalties provided. Among crimes which may be solicited in Colorado without fear of penalty are murder, rape, robbery, larceny, kidnapping and most other serious crimes against the person.

Text of Proposed Legislation. In reviewing and approving proposed general solicitation statute, the Criminal Code Committee decided that this legislation should not apply in those instances of solicitation presently covered by law. The text of the proposed general solicitation legislation follows:

A BILL FOR AN ACT

CONCERNING CRIMINAL SOLICITATION AND PUNISHMENTS THEREFOR

Be It Enacted by the General Assembly of the State of Colorado:

SECTION 1. Criminal solicitation. A person is guilty of criminal solicitation if with the purpose of promoting or facilitating its commission he commands, encourages, or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime, or which would establish his complicity in its commission or attempted commission.

SECTION 2. Uncommunicated solicitation. It is immaterial under section 1 of this act that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication.

SECTION 3. Renunciation of criminal purpose. It is a defense that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a renunciation of his criminal purpose.

SECTION 4. Corroborating evidence required. No person shall be convicted of criminal solicitation on the mere testimony of the party allegedly solicited to commit a crime, but to support a conviction there must be, in addition to or in lieu of testimony by the party allegedly solicited, any of the following:

(a) A confession by the accused;

(b) Testimony of two witnesses, one of whom may be the party allegedly solicited; or

(c) Other evidence direct or circumstantial.

SECTION 5. Penalties. (1)(a) A person convicted of criminal solicitation may be fined or imprisoned, or both, in the same manner as for the offense solicited, but such fine or imprisonment shall not exceed one-half of the largest fine, or one-half of the longest term of imprisonment, or both, prescribed for the offense solicited; provided that:

(b) If the offense solicited is punishable by death or life imprisonment, such person shall be imprisoned in the state penitentiary at hard labor for not less than one year nor more than twenty years;

(c) If the offense is a solicitation to commit any felony involving bodily injury of or an assault on any person, other than one punishable by death or life imprisonment, the penalty shall not exceed fourteen years imprisonment in the state penitentiary;

(d) If the offense is a solicitation to commit any felony other than those referred to in paragraphs (1) (b) and (1) (c) of this section, the penalty shall not exceed five years imprisonment in the state penitentiary; and

(e) If the offense is a solicitation to commit any misdemeanor, the penalty shall not exceed six months imprisonment in the county jail.

SECTION 6. Applicability. Where by the provisions of any other law, solicitation of specific conduct is included in the definition of any felony or misdemeanor, and a penalty provided therefor, such other law shall control and the provisions of this act shall not apply.

SECTION 7. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

General Theft Statute

There are more than 50 Colorado statutes covering crimes against property. These include among others: larceny of various kinds, false pretenses, embezzlement, forgery, extortion, blackmail, receiving stolen property, and joy riding. Study of these statutes has indicated that many of them are burdened with overcomplicated and highly technical language. Further, they are scattered throughout all volumes of the present Colorado revised statutes.

The simplification and codification of these statutes was considered by the Criminal Code Committee to be a proper starting point for an over-all revision and codification of the criminal statutes. The practice in other states which have recently revised their criminal codes has been to adopt a general theft statute which is sufficiently broad in definition and application to make it possible to eliminate most if not all of the previous specialized statutes relating to crimes against property. For example, the general theft statutes in the new Illinois criminal code cover larceny, false pretenses, embezzlement, larceny by bailee, extortion, and blackmail. Fraud is covered in the new Illinois code in the section on deception, and joy riding is covered in the section on trespass.

If a general theft statute is to replace most if not all of the existing specialized statutes, the definition must be carefully worded so as to cover the gamut of property crimes. No matter how carefully such a statute is drafted, it usually takes several years of experience and case law from state supreme court decisions to determine which property crimes, if any, are excluded. Consequently, there is always the possibility that additional legislation might be needed.

The Illinois code has been in effect for too short a time for there to be any case law as yet. However, a considerable body of case law has been developed in several other states which have adopted general theft statutes in recent years.

Experience in Other States

The simplified general theft statutes and related case law in several states were studied. These statutes, related court cases, and comments for two states (Louisiana and Wisconsin) which are of particular help in further study of this subject in Colorado are presented below:

Louisiana

In 1942, Louisiana adopted a new penal code which greatly simplified the substantive criminal law of that state. One of the most extensive changes was in the theft area where pre-1942 Louisiana statutes

had been a confusing morass of highly detailed and frequently overlapping statutes which all too often had been given overly technical restrictive interpretation by the courts. The Louisiana State Law Institute, charged by the legislature with responsibility of preparing a draft code, sought to consolidate statutes, simplify language, and close loopholes by eliminating technicalities. All property crimes were reduced to 25 sections organized under three main classifications. In 1948 one section was repealed, reducing the total to 24 sections.

General Theft Statute. § 67. Theft

Theft is the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices or representations. An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential.

Whoever commits the crime of theft, when the misappropriation or taking amounts to a value of one hundred dollars or more, shall be imprisoned, with or without hard labor, for not more than ten years.

When the misappropriation or taking amounts to a value of twenty dollars or more, but less than a value of one hundred dollars, the offender shall be fined not more than three hundred dollars, or imprisoned, with or without hard labor, for not more than two years, or both.

When the misappropriation or taking amounts to less than value of twenty dollars, the offender shall be fined not more than one hundred dollars, or imprisoned for not more than six months, or both. In such cases, if the offender has been convicted of theft once before, upon a second conviction he shall be fined not less than one hundred dollars nor more than two hundred dollars, or imprisoned for not less than six months nor more than one year, or both. If the offender in such cases has been convicted of theft two or more times previously, upon any subsequent conviction he shall be fined not less than one hundred dollars nor more than three hundred dollars, or imprisoned for not less than six months nor more than two years, or both.

When there has been misappropriation or taking by a number of distinct acts of the offender, the aggregate of the amount of the misappropriations or takings shall determine the grade of the offense.

Several points should be noted in reading this statute. Most important is the first paragraph, which in two brief, simple sentences defines the substantive elements of all the crimes previously defined by multitudinous special provisions on various types of larceny, embezzlement, and obtaining by false pretenses. The important elements are: (a) a "misappropriation or taking . . . without the consent" of the owner or by practicing on him "fraudulent conduct, practices or representations;" (b) "intent to deprive the other permanently" of his property -- i.e., the classical specific intent requirement of larceny; and (c) property subject to theft -- here defined in

the broadest possible terms as "anything of value." The draftsmen avoided language which had settled technical meaning in the case law of larceny. There is also apparent elimination of the "asportation" requirement and of the traditional restriction of the theft crimes to "chattels" or "personal property."

Reporter's Comments on General Theft Statutes. Serving as reporters, and therefore as the actual draftsmen of the code, were three law professors, one each from the law schools of Tulane, Louisiana State, and Loyola. After completion and adoption of the code, these reporters prepared explanatory notes on each new section. These comments on the general theft section, abridged to eliminate matters of no special interest or utility to Colorado, are as follows:[1]

> General purpose of section: This section has the effect of combining the traditional offenses of larceny, embezzlement, and obtaining by false pretenses. In spite of the tremendously complicated nature of the problem as a matter of historical development, there seems to be absolutely no reason why today the fundamental notion that it is socially wrong to take the property of another, in any fashion whatsoever, cannot be stated as clearly and simply as it has been above. There is eminent theoretical and practical authority for this step . . .
>
> Technical common law distinctions abolished: Louisiana has not defined larceny by statute, but has looked to the common law for its definition . . . The common law restricted the concept in a number of ways which seem unnecessary . . . For instance, only personal property, not real property or 'fixtures,' might be the subject of larceny. This rule caused absurd distinctions between standing trees and trees which have been cut . . . and also caused the enactment of . . . special statutes . . . on stealing plumbing and electric fixtures. At common law, also, electricity, gas, etc., and many animals were not 'property' and subjects of larceny . . . In Louisiana (as in Colorado today) special statutes have been enacted to take care of this defect . . .
>
> Accordingly, in the'theft' section of the code, very broad language has been used: 'anything of value which belongs to another,' which is intended to eliminate all of the common law distinctions and to include all of the objects mentioned above. The word 'property' was not used, since it might be

1. Louisiana Revised Statutes, Reporter - Comments following 14:67

narrowly construed and have read into it all of the traditional dogmatic distinctions as to those things which might be the 'subject of ownership.' By saying, 'which belongs to another' the way is clear for the court to interpret this broadly in the popular sense of that phrase, and not as synonymous with the technical legal term 'property.' This intended broad meaning of 'anything of value which belongs to another' is made clear in the code itself in the definition section.

Larceny and 'embezzlement' merged: One of the most important single changes made by the 'theft' section is the combination of what was 'larceny' and what was 'embezzlement.' This was accomplished by the elimination of the element of common law larceny known as 'a trespass in the taking' or 'taking out of the possession' was originally a requirement, so that a misappropriation by one lawfully in possession was not larceny. This fact alone led to the enactment of statutes denouncing a new offense, 'embezzlement,' which included a taking by one in 'possession' who necessarily could not 'take out of the owner's possession.' . . . The important factor is clearly the misappropriation, and the matter of who has possession (which involves the further refinement of 'custody' as distinguished from 'possession') seems entirely immaterial. This phase of the section, of course, represents an innovation in the Louisiana criminal law . . . It is a reform which has been instituted in a number of states, however, and one which has been urged earnestly by authorities in the field generally . . .

'Asportation' and consent of owner: There are other problems in connection with the law of larceny at common law about which it does not appear to be necessary to set out details in the code. Obviously, in particular cases, there may be some question as to whether there has been sufficient 'asportation' of the stolen thing in the common law sense. The slightest 'asportation' or misuse of anything belonging to another should be sufficient, but in any case it would be a question for the court to decide whether the offender's activity was sufficient to amount to a 'taking.' So also of the question of

the owner's consent: if he was not aware of the taking, or if he turned over the thing knowingly but unwillingly, clearly the taking would be 'without his consent.' Again the court must determine, in particular cases, whether the circumstances fall within the legislative language.

Embezzlement: Some observations should be made about the former concept of 'embezzlement,' which is merged in the crime of 'theft.' As indicated above, embezzlement as a separate offense from larceny is a historical accident. Generally speaking it involved a misappropriation by one lawfully 'in possession,' usually by reason of the offender's holding a position of trust and confidence. Under this section, which provides that anyone can commit theft of anything, all of the acts which formerly amounted to 'embezzlement' will be 'theft' under the code and much statutory material and many historical distinctions eliminated. It will no longer be necessary, for instance, to try to enumerate every conceivable type of fiduciary relationship in particular . . . Whether the offender was in 'possession' or had 'custody,' etc., will clearly be immaterial.

Obtaining by false pretenses: This section concerns itself also with the offense of obtaining by false pretenses, but it is stated broadly to include much more than that traditional offense. . . .

Originally 'obtaining by false pretenses' was accomplished in the English law only by the use of false weights, measures, and 'tokens,' but it has been extended by statute in most jurisdictions to include a great variety of conduct. . . . In general, it consists of depriving someone of property (of various descriptions in various statutes) under circumstances in which the owner intends to relinquish ownership, not merely 'possession' or 'custody.' Thus a type of consent is secured and larceny does not result. . . . It is a consent affected by the vice of fraud, however, . . . The analogy to civil fraud was not complete, however, because the concept as it exists in Anglo-American law included only false 'pretenses' or 'representations' about present or past facts. . . . Inducing another to part with his property by means of representations or promises as to

future events was not included. . . . By not including this latter concept in the definition of 'theft,' it is intended to produce identity of meaning between civil and criminal fraud. Whenever the situation is such that the transaction between the parties could be avoided because of fraud, the defrauder is guilty of theft.

The phrase 'anything of value which belongs to another' is particularly necessary here. . . . The word 'taking' also has been used advisedly, rather than 'obtain,' since the only significant consideration is whether someone lost, not whether the offender or anyone else gained by 'obtaining.'

Intent: No matter what approach was used with reference to the problem of intent in the code, it was necessary to include a special mental element as an essential in this section's definition. It is well established that an intent to deprive the owner permanently of his property is a necessary element in any 'stealing' crime . . .

Case Law and Law Review Comments. The 1942 Louisiana Code has been cited in at least 29 Louisiana appellate court opinions and at least 28 articles or comments in the Tulane Law Review and the Louisiana Law Review. Some of these cases and law review articles are of particular interest to Colorado.

One of the earliest Louisiana Supreme Court interpretations of the criminal code was a theft case in which the defendant launched a five-pronged attack on the constitutionality of the theft provision in particular and the code in general. In this case the defendant was prosecuted under an information charging simply, "the theft of an automobile, of the value of . . . ($1,200) . . .

The defendant attacked the code and the theft provision as unconstitutional on these grounds:

1) their effect was to deprive the defendant of liberty without due process because, "he has not been charged with any specific crime";

2) they violate the Louisiana Constitution by embracing more than one subject and being broader than their titles (Cf. Colo. Const. Art. V, § 21, imposing the same restrictions on legislation as those contained in the Louisiana Constitution);

3) they violate the Louisiana Constitution by seeking to revise and amend articles of the code merely by reference without fully reciting all sections being affected;

4) they derive from an unconstitutional delegation of legislative power to draft statutes to the State Law Institute: and

5) they make changes in the substantive law of crimes so drastic as to be outside the power of the legislature acting without an express authorization by constitutional amendment.

The Louisiana Supreme Court rejected all five defense theories and upheld the constitutionality of the theft provision and the code itself.

In answer to the defense contention that the legislature could not constitutionally combine in one theft definition the separate crimes of larceny, embezzlement, and false pretenses, the supreme court said:[2]

> Clearly the legislature could define such crimes as were intended to be covered by the criminal code, and in so defining them, could group all offenses of the same character in a single article, as was done in defining the crime of 'theft' in article 67. By such a definition the legislature sought to denounce under the single heading of 'theft' all of the crimes that it considered constituted the culpable taking of anything of value belonging to another, whether such taking was without the consent of the owner, commonly known as larceny or the taking with his consent, as is the case in confidence games, embezzlement, and false pretenses. This is in accordance with the modern trend, followed in numerous states, of simplifying the law by discarding ancient and outmoded forms and redefining offenses to prevent confusion and injustices.

In a law review article one of the Louisiana code's draftsmen stated that most of the defendant's constitutional objections in the Pete case were "far-fetched" and had never caused any concern among proponents of the code. Nevertheless, he said:[3]

> There was one basis of attack on the code's validity, however, which was more to be feared . . . The all too familiar requirement under the Louisiana Constitution that a legislative act must have but one object and

---

2. State v. Pete, 206 La. 1078, 20 So. 2nd 368,372 (1944).
3. Morrow, "The 1942 Louisiana Criminal Code in 1945: A Small Voice from the Past," 19 Tulane Law Review 483, 485 (1945).

> that its title must be 'indicative of such object' had always been a source of concern during work on the code. (Cf. Colo. Const. Art. V, § 21.) The Louisiana Law Institute accepted the recommendation of the draftsmen that as simple a title as could be devised should be employed, and the wisdom of this step has been thoroughly vindicated by the decision in the Pete case.

When the new criminal code definitions of crimes were adopted in 1942, the legislature also amended the Code of Criminal Procedure by specifying simplified forms which could be followed in informations and indictments. In State v. Pete, the information followed the new statutory form precisely by charging, "the theft of an automobile, of the value of . . . ($1,200) . . . the property of Gordon's Drug Store, Inc."

The defendant attacked the information as invalid on the grounds (a) that it failed to charge any recognized crime in that it failed to state the element of intent to deprive the owner of his property permanently, and (b) that it violated the defendant's constitutionally guaranteed right to be fully appraised of the charge against him.

The Louisiana Supreme Court dealt with contention (a) by noting that the information followed the form set out in the new statute and that the form was adequate. In rejecting contention (b), the court stated that another provision of the Code of Criminal Procedure protected the defendant's right to a bill of particulars where appropriate, and held that the latter provision adequately protected his constitutional right to fair notice of the charge against him.[4]

When the special simplified form of charging theft, as prescribed by the 1942 amendments to the Code of Criminal Procedure was not followed, and it was not clear from the indictment which of the prior crimes consolidated in the new theft statute had been charged, the supreme court upheld a trial court's action in quashing the indictment on the ground it failed sufficiently to charge a crime, and fell short of satisfying the constitutional requirement that the accused be informed of the nature of the accusation. It was held not sufficient merely to charge the crime in the language of the statute defining the crime -- as under the pre-1942 code procedure -- for under the prior law each criminal statute specifically defined a single crime -- whereas the 1942 theft statute combined several crimes in one general statute.[5]

A 1948 Louisiana Supreme Court opinion noted that under the present code a theft from the person is not always a felony as under prior Louisiana law. The prior statute, like the present Colorado

---

4. State v. Pete, op. cit.
5. State v. Kendrick, 203 La. 63, 13 So. 2nd. 387 (1943).

statute, 40-5-2 (6) Perm. Supp. 1960, had declared it a felony to steal from the person of another without regard to the value of the property stolen. The new code provision makes theft from the person a felony only where it involves property of such value that the theft would have been a felony if not from the person.[6]

In another case the defendants were charged with theft allegedly committed by taking and hauling away 20 steel rails. When taken, the rails were integral parts of a highway bridge across a stream. One defendant was in the scrap iron business and had a market for the rails. The defendants contended that since the rails were affixed to realty they were not property subject to theft. Such a contention would have been sound if the charge had been common law larceny, for that crime could be committed only by taking and carrying away the personal property of another with intent to deprive him permanently of it. This common law requirement was strictly enforced and therefore most American jurisdictions adopted special statutes declaring the stealing of fixtures to be larceny (e.g., Colo. Rev. Stat. 40-5-7, 40-5-8 (1953)). The Louisiana court held, as the code's draftsmen clearly intended, that the broad phrase "anything of value" was intended to eliminate such common law subtleties and embrace all possible objects of theft within a single, simple phrase.[7]

The meaning of "anything of value" was involved in a case in which an attorney was charged with theft allegedly committed by fraudulently inducing a client to sign a 20 per cent contingent fee contract. The question was whether the 20 per cent interest thus acquired in the client's case, a tort claim, was "anything of value" within the theft statute. The court held that the tort cause of action was not within the phrase, "anything of value," because a cause of action has no present value as distinguished from mere potential value.[8]

Prior to the 1942 Louisiana Criminal Code, one who obtained property by false representations as to future facts was not criminally responsible under Louisiana law. The new 1942 theft provision defined the false pretenses type of crime broadly to include any taking by "fraudulent conduct, practices or representations."

A used car dealer was charged with theft in acquiring three cars. He obtained the cars in exchange for a draft payable two days after the date of purchase, knowing at the time of purchase that he did not have sufficient funds in the bank to cover the draft. His defense to the theft charge was that the draft constituted merely a promise to pay in the future and therefore he committed no theft at the time he acquired the cars. The Louisiana Supreme Court held that the defendant had committed theft within the new statute even though his actions amounted to a mere misrepresentation of future facts. The court felt that this was "fraudulent conduct" within the new code provision.[9]

---

6. State v. Ambrose, 34 So. 2nd 883 (1948).
7. State v. Mills, 214 La. 979, 39 So. 2d. 439 (1949).
8. State v. Picou, 236 La. 421, 107 So. 2d. 691 (1959). This interpretation was critized as being unreasonably restrictive in a law review article, 19 Louisiana Law Review 872 (1919).
9. State v. Dabbs, 228 La. 960, 84 So. 2d. 601 (1956).

Wisconsin

The 1955 Wisconsin Criminal Code, which took effect July 1, 1956, has consolidated into its Chapter 943 nearly all crimes against property. This chapter is subdivided into the three main types of property offenses under the headings of "Damage," "Trespass," and "misappropriation."

Under the subdivision "Damage" are set out five sections defining property crimes which cover causing physical injury to property, malicious mischief, and arson.

Under the subdivision "Trespass" are set out five sections dealing with property crimes which cover unlawful entry into or upon another's property, including burglary; entering locked motor vehicles; and trespass to land or dwellings.

The major subdivision of property crimes, which contains seventeen sections, is "Misappropriation." This subdivision sets out definitions of the theft type offenses, of various forms of obtaining property by fraud, forgery, bad checks, extortion, and robbery. In addition it contains the section on receiving stolen property.

The following discussion will deal only with the Wisconsin statutes and case law on property crimes of "Misappropriation." It will first treat separately the general "Theft" provision (§ 943.20) then set out the sixteen other statutes covering specific forms of misappropriation.

General Theft Statute. The 1955 Wisconsin Criminal Code defines the crime of "Misappropriation" in the form of "Theft" in three subsections. The first subsection in four paragraphs defines the conduct punishable as theft; the second subsection defines the four key terms used in the section; and the third subsection sets out the penalties which apply to various forms of theft:

> § 943.20 Theft.
>
> (1) Whoever does any of the following may be penalized as provided in subsection (3):
>
> (a) Intentionally takes and carries away, uses, transfers, conceals, or retains possession of movable property of another without his consent and with intent to deprive the owner permanently of possession of such property.
>
> (b) By virtue of his office, business or employment, or as trustee or bailee, having possession or custody of money or of a negotiable security, instrument, paper or other negotiable writing of another, intentionally uses, transfers, conceals, or retains possession of such money, security, instrument, paper or writing without the owner's consent, contrary to his authority, and with intent

to convert to his own use or to the use of any other person except the owner. A refusal to deliver any money or a negotiable security, instrument, paper or other negotiable writing, which is in his possession or custody by virtue of his office, business or employment, or as bailee, upon demand of the person entitled to receive it, or as required by law, is prima facie evidence of an intent to convert to his own use within the meaning of this paragraph.

(c) Having a legal interest in movable property, intentionally and without consent, takes such property out of the possession of a pledgee or other person having a superior right of possession, with intent thereby to deprive the pledgee or other person permanently of the possession of such property.

(d) Obtains title to property of another by intentionally deceiving him with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made. "False representation" includes a promise made with intent not to perform it if it is a part of a false and fraudulent scheme.

(2) Definitions. In this section:

(a) "Property" means all forms of tangible property, whether real or personal, without limitation including electricity, gas and documents which represent or embody a chose in action or other intangible rights.

(b) "Movable property" is property whose physical location can be changed, without limitation including electricity and gas, documents which represent or embody intangible rights, and things growing on, affixed to or found in land.

(c) "Value" means the market value at the time of the theft or the cost to the victim of replacing the property within a reasonable time after the theft, whichever is less, but if the property stolen is a document evidencing a chose in action or other intangible right, value means either the market value of the chose in action or other right or the intrinsic value of

the document, whichever is greater. If the thief gave consideration for, or had a legal interest in the stolen property, the amount of such consideration or value of such interest shall be deducted from the total value of the property.

(d) "Property of another" includes property in which the actor is a co-owner and property of a partnership of which the actor is a member, unless the actor and the victim are husband and wife.

(3) Penalties. Penalties for violation of this section shall be as follows:

(a) If the value of the property does not exceed $100, a fine of not more than $200 or imprisonment for not more than six months or both.

(b) If the value of the property exceeds $100 but not $2,500, a fine of not more than $5,000 or imprisonment for not more than five years or both.

(c) If the value of the property exceeds $2,500, a fine of not more than $10,000 or imprisonment for not more than 15 years or both.

(d) If the value of the property is less than $2,500 and any of the following circumstances exist, a fine of not more than $5,000 or imprisonment for not more than five years or both:

1. The property is a domestic animal; or

2. The property is taken from the person of another or from a corpse; or

3. The property is taken from a building which has been destroyed or left unoccupied because of physical disaster, riot, bombing or the proximity of battle; or

4. The property is taken after physical disaster, riot, bombing, or the proximity of battle has necessitated its removal from a building.

(Note: Subsection (1) (b) was amended by Wisconsin Law 1959 c. 193 which added the final clause of the first sentence, reading "or to the use of any other person except the owner.")

Case Law. Several cases have construed the new general theft provision of the 1955 Wisconsin criminal code, but only one is significant in determining the meaning of the 1955 statute.

In this case, the defendant appealed a conviction on several counts of larceny and burglary of gasoline service stations. The prosecution's case was based entirely on circumstantial evidence. This evidence showed that when the defendant was arrested in his car, the auto contained several tools which had been taken from burglarized service stations. Moreover, other property taken during the burglaries was found hidden under and about the cottage where the defendant lived alone. The defendant, who twice had been convicted of other felonies, did not testify, nor did other witnesses testify in his behalf.

On appeal of his conviction by a judge without a jury, the defendant contended that the evidence that the stolen merchandise was found in his sole possession was insufficient to support a conviction. In upholding the conviction, the majority of the Wisconsin court declared:[10]

> Mere possession of stolen property raises no inference of guilt, but Wisconsin from early times has followed the rule that unexplained possession of recently stolen goods raises an inference of greater or less weight, depending upon the circumstances that the possessor is guilty of the theft and also of burglary if they were stolen in burglary. Such inference being in the nature of a presumption of fact calls for an explanation of how the possessor obtained the property . . . The nature of the possession of the stolen goods is important, whether it is open and unconcealed and whether the goods are such as the person found in possession thereof would probably be possessed of in an unlawful way. This is what is meant by an inference of greater or less weight depending upon the circumstances.

Since the defendant had failed to rebut the "presumption of fact" by explaining sufficiently his possession of the recently stolen items, the presumption remained sufficient to support his conviction.

10. State v. Johnson, 11 Wisconsin 2d 130, 104 N.W. 2d 379 (1960).

Law Review Comment. In a 1956 article, one of the code's authors wrote:[11]

> A major achievement of the code is the drawing together of the crimes of larceny, larceny by bailee, embezzlement, obtaining property by false pretenses and the confidence game into a single offense labeled "theft." The old crimes are not as fully amalgamated as they were in the 1953 draft, since the various ways in which "theft" can be committed correspond roughly to the old crimes and many of their distinguishing characteristics are preserved. Yet most of the difficulties which have been encountered in the past are eliminated. The reduction in the number of statute sections is alone a great boon; yet the law is much more fully stated in fewer words than in the previous statutes. And the inclusion of "promissory" fraud will make it possible to deal with a class of swindles which have heretofore gone unpunished because a promise made with intent not to perform it was not a "false pretense" under the old law. The code sentence changing the rule is, "'False representation' includes a promise made with intent not to perform it <u>if it is a part of a false and fraudulent scheme</u>." The italicized clause will prevent any tendency to prosecute ordinary breaches of contract.
>
> The concept of theft of services has been dropped, except if they are obtained by putting a slug in a coin box (§ 943.22), which is a minor part of the problem. Why, one may ask, if it is theft to obtain property by false pretenses, is it not equally reprehensible by like means to get someone to perform labor?

A later article points out that § 943.20 (1) (a) contains an ambiguity. That is, the sentence may be construed to mean that the act prohibited by it always includes a "taking." This would result by reading the series as one following "takes and" -- thus arriving at the result that one who "takes and carries away,"

---

11. Platz, "The Criminal Code," 1956 Wisconsin Law Review, 350, 374,375.

"takes and uses," "takes and transfers," etc., commits the forbidden act. Yet the sensible and plainly intended meaning seems to be one which would limit the requirement of "taking" to cases where one "takes and carries away." This would include the classic cases of common law larceny where there was a trespass in the taking together with an asportation. Thus the prosecution would not have to prove a taking when it is alleged that this subsection was violated by use, transfer, concealment or detention of another's property. This ambiguity could have been avoided by a different drafting technique.[12]

Professor Baldwin pointed out in his article that the term "property" as defined in § 943.20 (2) (a) was intended to bring the broadest possible range of subjects within the theft provision. Such a broad definition of "property" (in some recent statutes the term used is "anything of value") makes it possible to eliminate numerous sections, each enacted to bring within the ambit of property subject to larceny a particular form of property or evidence of property not subject to larceny at common law. Even items which are contraband may be subject to larceny if within this broad definition. Services and labor are not included in "property." But any tangible thing is made subject to theft, "including negotiable notes, commercial paper, and the like."[13]

In theft the thing misappropriated must be the property "of another." Professor Baldwin noted that the definition of "property of another" (found in § 939.22 (28)) is: "property in which a person other than the actor has a legal interest which the actor has no right to defeat and impair, even though the actor may have a legal interest in the property." Thus, he asserts, property which has been abandoned is not the subject of theft, for it is not the property "of another." But the term includes, "property in which the actor is a co-owner and property of a partnership of which the actor is a member, unless the actor and the victim are husband and wife." Note that although a spouse may not steal property co-owned with the other spouse alone, there may be theft of property co-owned by the thief, his spouse, and a third person. Moreover a spouse may be convicted for theft of property solely owned by the other spouse.[14]

Even though abandoned property may not be the subject of theft in Wisconsin, property merely lost may be. The mere finding of lost property is not a crime, but if the finder retains the property with required criminal intent theft may be committed. Conviction of a finder would require a showing that the finder knows or by reasonable efforts could learn the identity of the owner and the finder purposely omits taking reasonable measures to restore the property to its owner. The criminal conduct in this instance is an omission to act after lawful conduct gives rise to a duty to act. The new section has eliminated the common law rule that to hold a finder of lost property guilty of larceny with respect to that property it was necessary to find that he had a criminal intent at the time of finding in order to make his initial taking trespassory.

12. Baldwin, "Criminal Appropriation in Wisconsin -- Part I," 44 Marquette Law Review 253, 256 (1961).
13. Ibid.
14. Ibid.

The mental element requisite to theft under § 943.20 (1) (a) requires both (1) that the act be done "intentionally" and (2) that it be done "with intent to deprive the owner permanently of possession . . ." The first requirement is satisfied by showing that the defendant knew the property belonged to another and that his actions with respect to the property were without the owner's consent. The second requirement is the traditional element of common law larceny and could be negatived by the defendant's showing that he intends to return the property. An intention to return the property, however, does not preclude conviction of theft in the nature of embezzlement under § 943.20 (1) (b). Moreover, § 943.23 defines as a separate theft offense the operation of a vehicle without the owner's consent, without regard to intent to deprive permanently.[15]

Professor Baldwin also made several other comments on the meaning intent of the Wisconsin general theft statute which shows the intent of the code's drafters:[16]

> The act required to support a conviction under 943.20 (1) (b) is an intentional "use, transfer, concealment or retention" of the kind of property covered. Such acts amount to "dealing with property as if it were the actor's own. It is the purpose of the criminal code to proscribe such a conflict with the right of the true owner. Wisconsin case law has established that the test is not the benefit to the defendant, but the use by him of another's property. Thus if a defendant uses the property of "O" for the benefit of a third party, "X," rather than for the defendant's own benefit, he may nevertheless be convicted.
>
> The mental element under § 943.20 (1) (b) is quite different from that required by § 943.20 (1) (a). Under (1) (b) the intent is "to convert to his own use or to the use of any other person except the owner." Because the property covered by (1) (b) is peculiarly susceptible to loss by theft, the law accords it special protection by (1) (b) generally and by eliminating the defense of an intent to repay or return it later. Thus the bank teller who surreptitiously "borrows" money from his employer -- intending to repay it from huge anticipated profits in a racetrack venture -- may be convicted. This is in accord with prior law in Wisconsin as elsewhere.

---

15. Ibid.
16. Ibid.

/Although fraud is not expressly stated as an element of the § 943.20(1)(b) offense, it was required by the prior Wisconsin code provision and the cases thereunder./. . . fraud is still required and a mere civil conversion of the property would not suffice for conviction under (1)(b). "The element of fraud was recited in the prior law and in cases because of the natural unwillingness of courts to make an ordinary breach of contract the basis for criminal liability." Thus mere conversion is not enough without showing it was an intentional conversion; mere use is not enough without showing it was an intentional use. The jury must consider all the facts and circumstances before finding that there was an intentional conversion or use. Thus the mental element is recited "in a manner more precise, but no different in effect, than the common law." Confusion arising from the phrase 'fraudulent and felonious' is eliminated.

Subsection (1) (c) proscribes the conduct of a person who having a legal interest in movable property, takes it out of the possession of another with superior right of possession. He must act with intent to defeat the other's interest in the property, or must believe that his act will effect a permanent deprivation of another of a superior right of possession.

An illustration of how this section might work is supplied by a Minnesota decision, State v. Cohen (196 Minn. 39, 263 N.W. 922 (1935)). The defendant was the owner of a Hudson seal fur coat which was delivered to the complainant, a furrier, for alterations. A fictitious name was given by the owner's husband at the time of delivery, and when the coat was ready the defendant refused to pay. The furrier refused to deliver the coat without payment, and there matters stood for several weeks. After repeated efforts to get paid the furrier took the coat to the defendant's home. The defendant took the coat for the announced purpose of trying it on before a mirror; the furrier was left waiting at the door. The defendant in response to repeated requests refused to pay for the alterations or return the coat to the furrier. On this evidence, the court sustained a conviction for larceny on the

ground that the evidence could disclose an intention to deprive the furrier of his lien. Hence a person can be guilty of larceny where the object taken is his own property if another has a superior right to possession, and if the taking is intended to result in a deprivation of that right.

The requisite act under § 943.20 (1) (c) is a taking of unauthorized control by taking possession. The common law is in accord because of the definition given to property "of another." "Of another" has referred to possession rather than to title or ownership.

Subsection 943.20 (1) (d) covers the common law crime of obtaining property by false pretenses. Here the theft is accomplished by deceit, as distinguished from theft by stealth -- the classic case of larceny. Hence, the element of trespass, a requisite of common law larceny, is not present. Absent also is the lawful possession or custody present in . . . embezzlement.

To be guilty under (1) (d), the defendant must have acquired title to another's property. "This requirement is a carry-over from the old law which required that the victim relinquish property intending to transfer not only possession but title also. Accordingly, a person might or might not be guilty of a crime if he obtained the property by a false promise, depending on whether he obtained title to the property or only possession of it. The crime of false pretenses required that the actor obtain title to the property." But this does not mean that to be convicted one must have obtained absolute or clear title; any title obtained by fraud is voidable. Generally acquisition of bare legal title is the means of violating this subsection, but even that is not required in Wisconsin.

/This/ requirement refers to obtaining title to property. Hence it is not criminal under this subsection to induce another to render personal services by false representation, or to induce another to extend credit. Criminal liability, if any, must be founded on other sections of the code or statutes.

Another requisite of the § 943.20 (1) (d) crime is that the victim must have been in fact deceived. If he was deceived, the fact that he was utterly careless or very stupid and that a reasonable man would not have been deceived is no defense. In addition to the fact of deception there must be a showing that the victim was deprived of his property as a result of the deception, but the facts misrepresented need not have been the sole matter on which the victim relied.

Subsection (1) (d) has substantially enlarged the crime of theft through false pretenses by including as a false representation sufficient to support conviction, a promise made with intent not to perform it if it is a part of a false and fraudulent scheme. The general rule, previously followed in Wisconsin, was that a misrepresentation as to a future act or fact was insufficient. The promise of future action must be made with intent not to perform it.

The mental element under (1) (d) is an intention to deprive the owner of title. Thus an intent to return the property is a defense. Moreover, the defendant must deceive his victim "intentionally" by a representation "known" by defendant to be false, and there must be an "intent to defraud."

Value of the property lost by theft is to be determined, under the Wisconsin code, according to the rules set out in § 943.20 (2) (c). Generally the value to be taken is the lesser of (a) market value at the time of the theft, or (b) cost of replacement within a reasonable time after the theft. If the thing taken is a document evidencing a chose in action or intangible right, its value for purposes of theft is the greater of the document's intrinsic value or the market value of the chose or right it represents. The value of any consideration given by the thief or of any property interest he had in the item is to be deducted. The fact that the property is contraband does not preclude its having a market value, but it is to be considered in establishing what the market value is, for illegality of the victim's possession certainly affects usefulness and salability.

Proposed Legislation for Colorado

The foregoing discussion of general theft statutes in two of the states in which they have been adopted indicates some of the problems involved in application and interpretation. For this reason, further study and consideration of proposed general theft legislation is needed and no recommendation is being made at this time by the Criminal Code Committee.

Text of Proposed Legislation

The Illinois criminal code was followed in preparing proposed general theft legislation for consideration by the Criminal Code Committee for the following reasons:

1) The Illinois code follows the Model Penal Code quite closely, so that benefit is obtained not only of the thinking of the American Law Institute, but also of the six years of intensive study and work by the combined Illinois State and Chicago Bar Associations' Joint Committee to Revise the Illinois criminal code.

2) Following the Illinois code will retain, for whatever benefit it may have, the historical tradition of Colorado statutory law being based upon Illinois law.

3) Following a code already enacted in a heavily populated state should make available, at an early date, numerous court interpretations of the code's provisions.

4) The Illinois code seems the best model, simply because of its great clarity of expression, simplicity of terminology, logical organization, and unification of the several kinds of crimes conceptually within individual subdivisions of the code.

This proposed legislation was designed to provide a starting point for further study and not as a final product for adoption. Much research is needed to determine its effect on present Colorado substantive law.

The text of this preliminary proposal follows:

Section 1: Theft.

A person commits theft when he knowingly:

a) Obtains or exerts unauthorized control over property of the owner; or

b) Obtains by deception control over property of the owner; or

c) Obtains by threat control over property of the owner; or

d) Obtains control over stolen property knowing the property to have been stolen by another, and

1) Intends to deprive the owner permanently of the use or benefit of the property; or

2) Knowingly uses, conceals or abandons the property in such manner as to deprive the owner permanently of such use or benefit; or

3) Uses, conceals, or abandons the property knowing such use, concealment or abandonment probably will deprive the owner permanently of such use or benefit.

Section 2: Penalty.

A person first convicted of theft of property not from the person and not exceeding $150 in value shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both. A person convicted of such theft a second or subsequent time, or after a prior conviction of any type of theft, shall be imprisoned in the penitentiary from one to 5 years. A person convicted of theft of property from the person or exceeding $150 in value shall be imprisoned in the penitentiary from one to 10 years.

Section 3:

An indictment or information charging the crime of theft is sufficient if it alleges that the defendant committed theft by unlawfully dealing with the property of another.

Section 4: Theft of Lost or Mislaid Property.

A person who obtains control over lost or mislaid property commits theft when he:

a) Knows or learns the identity of the owner or knows, or is aware of, or learns of a reasonable method of identifying the owner, and

b) Fails to take reasonable measures to restore the property to the owner, and

c) Intends to deprive the owner permanently of the use or benefit of the property.

Penalty.

A person convicted of theft of lost or mislaid property shall be fined not to exceed $500 or double the value of such property, whichever is greater.

Section 5: Theft of Labor or Services or Use of Property.

a) A person commits theft when he obtains the temporary use of property, labor or services of another which are available only for hire, by means of threat or deception or knowing that such use is without the consent of the person providing the property, labor or services.

b) Penalty.

A person convicted of theft of labor or services or use of property shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both.

Section 6: Offender's Interest in the Property.

a) It is no defense to a charge of theft of property that the offender has an interest therein, when the owner also has an interest to which the offender is not entitled.

b) Where the property involved is that of the offender's spouse, no prosection for theft may be maintained unless the parties were not living together as man and wife and were living in separate abodes at the time of the alleged theft.

Brief History and Discussion of Criminal Insanity Tests and Procedures

Early English Tests

Insanity was not a defense to a criminal charge in England until the fourteenth century. Prior to that time the mentally incompetent were held fully accountable for their criminal acts.[1] In 1724, a leading case established the "Wild Beast Test" to be applied by the jury in drawing a line between mental illness serious enough to constitute a defense in a criminal case and that which would not. In that case, the trial judge instructed the jurors as follows: "It is not every kind of frantic humor or something unaccountable in a man's actions that points him out to be such a madman as to be exempted from punishment; it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or wild beast, such a one is never the object of punishment; therefore I must leave it to your consideration, whether the condition this man was in, as it is represented to you on one side, or the other, doth show a man, who knew what he was doing, and was able to distinguish whether he was doing good or evil, and understood what he did."[2]

In 1812, in the murder trial of one Bellingham who suffered under a delusional mental disorder causing him to believe that the government owed him large sums of money and who shot and killed a treasury official who refused to pay him, the "right and wrong" test was set out in the following words (which seem to eliminate consideration of a mere insane delusion): "If such a person were capable, in other respects, of distinguishing right from wrong, there was no excuse for any act of atrocity which he might commit under this description of derangement... The single queston was whether, when he committed the offense charged upon him he had sufficient understanding to distinguish good from evil, right from wrong, and that murder was a crime not only against the law of God, but against the law of his Country."

M'Naghten's Rule

The most important English case on criminal insanity is the M'Naghten Case. Daniel M'Naghten labored under an insane delusion that he was being harassed by personal enemies, including Sir Robert Peel. In that condition he shot and killed Sir Robert Peel's private secretary, believing him to be Sir Robert. In his murder trial, the

1. Weihofen, Mental Disorder as a Criminal Defense (1954) p. 53.
2. Arnold's Case, 16 How. St. Tr. 695 (1724).
3. Weihofen op. cit. p. 58.

defendant submitted medical evidence that he was affected by morbid delusions robbing him of self-control and leaving him without an appreciation of right and wrong. The jury found him not guilty on the ground of insanity.[4] The public clamor at the acquittal of one who had killed such a popular figure and had attempted to take the life of Sir Robert Peel caused the House of Lords to submit five questions concerning the existing law on the defense of insanity in criminal trials to the fifteen judges of England. Two of the questions dealt with cases in which defendants labored under insane delusions. In answer to those questions the judges declared that one suffering an insane delusion must have his act judged as if the facts with respect to which the delusion existed had been real. "For example, if under the influence of his delusion he supposed another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self defense, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury on his character and fortune, and he killed him in revenge for such proposed injury, he would be liable to punishment."[5]

The second and third questions asked the judges what instructions might be given a trial jury regarding the test of insanity. In reply, the judges stated that "The jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason and to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defense on a ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act that he was doing, or if he did know it that he did not know he was doing what was wrong. . . ."[6]

The "right and wrong" test has been amplified by explaining that the knowledge of right and wrong refers to such knowledge with respect to the very act charged, rather than knowledge of right and wrong in the abstract. Furthermore it refers not only to knowledge of legal right and wrong, but also knowledge of moral right and wrong.[7]

The M'Naghten Rule has been severely criticized by both legal and medical authorities. Professor Weihofen has summarized the most significant criticisms as follows:

1) The concepts of "right" and "wrong" are ethical or moral concepts and have no proper place in a scientific or legal test of mental disorder. Society's moral standards of right and wrong change from one era to the next, as certainly our morals have changed somewhat since 1843 when the M'Naghten Case opinion was written. A legal test of insanity based on a moral standard of right and wrong lacks the precision that such a test should have.

2) The "right and wrong" test was based on psychopathological notions which are now dated and fail to conform to present day psychiatric conceptions. The test over-values the intellectual factor

4. 10 Clark and Fin. 200 (1843)
5. Weihofen, op. cit.,p. 61.
6. Ibid.
7. Ibid.

and ignores the role played by the emotions in personality disorders. Modern psychiatry emphasizes the importance of the emotional rather than the intellectual genesis of crime. Moreover, the test ignores the role of the unconscious, since it predated the work of Sigmund Freud by 50 years. The concept of attenuated responsibility is not recognized, and the psychopathic personality is entirely ignored.

3) The "right and wrong" test provides a defense only for those whose mental disorder affects the cognitive or intellectual phase of the mind and makes no allowance for disorders causing deficiency or destruction of will power. Thus one who has no control over his instinctive urgings and impulses because of mental deterioration would not be accorded the defense of insanity because he would be able to understand the wrongness of his act, although unable to resist performing it.[8]

British Royal Commission

In 1953 the British Royal Commission on Capital Punishment recommended substituting for the M'Naghten Rule the following test: "The jury must be satisfied that, at the time of committing the act, the accused, as a result of a disease of the mind or mental deficiency a) did not know the nature and quality of the act or b) did not know that it was wrong or c) was incapable of preventing himself from committing it."[9] The effect of this, of course, would be to add to the present M'Naghten test that "irresistible impulse" test. A majority of the Royal Commission would have preferred to eliminate the M'Naghten test entirely and substitute the simpler test, to be determined by the jury, "Whether at the time of the act the accused was suffering from a disease of the mind or mental deficiency to such a degree that he ought not to be held responsible."[10]

Irresistible Impulse

The M'Naghten test is still used in England and Canada. In the United States the M'Naghten formula is the sole test of criminal responsibility in most states and in nearly all of the others it is the main test but is supplemented by the "irresistible impulse" test. Colorado is one of the minority of states recognizing both tests. The leading Colorado case, Ryan v. People, 60 Colo. 425, 153 Pac. 756, (1916), established the dual standard still followed in this state. The language of the Ryan case has been adopted in statutory form together with a legislative mandate that this form be used in instructing the jury in any case where insanity is claimed as a defense.

8. Ibid., p. 66.
9. Ibid., p. 67.
10. Ibid.

Colorado Statutes

Colorado law provides, "The applicable test of insanity in such cases shall be, and the jury shall be so instructed: a person who is so diseased in the mind at the time of the act as to be incapable of distinguishing right from wrong with respect to that act, or being able so to distinguish, has suffered such an impairment of mind by disease as to destroy the will power and render him incapable of choosing the right and refraining from doing the wrong, is not accountable; and this is true howsoever such insanity may be manifested, whether by irresistible impulse or otherwise. But care should be taken not to confuse such mental disease with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred or other motives, and kindred evil considerations, for when the act is induced by any of these causes the person is accountable to the law."[11]

Durham Rule

In 1954 the United States Court of Appeals for the District of Columbia, which until that date had adhered to a combination M'Naghten - irresistible impulse test of insanity similar to that now used in Colorado, decided to simplify the legal test of insanity so that the trier of fact would be free to consider all pertinent testimony from relevant scientific disciplines. The court criticized the right and wrong test as follows:[12]

> The fundamental objection to the right-wrong test, however, is not that criminal irresponsibility is made to rest upon an inadequate, invalid or indeterminable symptom or manifestation, but that it is made to rest upon any particular sympton. In attempting to define insanity in terms of a symptom, the courts have assumed an impossible role, not merely one for which they have no special competence. As the Royal Commission emphasizes, it is dangerous to abstract particular mental faculties, and to lay it down that unless these particular faculties are destroyed or gravely impaired, an accused person, whatever the nature of his mental disease, must be held to be criminally responsible .... In this field of law as in others, the fact finder should be free to consider all information advanced by relevant scientific disciplines.

Moreover, the same court criticized the "Irresistible Impulse" test as carrying "the misleading implication that 'diseased mental conditions' produce only sudden, momentary or spontaneous inclinations to commit unlawful acts."[13] The court illustrated its point that a

---

11. 39-8-1, C.R.S. 1953.
12. Durham v. United States, 214 F. 2d 862, 872 (D.C. Circ. 1954)
13. Ibid.

diseased mental condition may bring about or cause criminal action which is recognized as wrong and yet is not the result of the sudden impulse, by quoting from the findings of the Royal Commission: "In many cases. . . this is not true at all. The sufferer for example) experiences a change of mood which alters the whole of his existence. He may believe, for instance, that a future of such degradation and misery awaits both him and his family that death for all is a less dreadful alternative. Even the thought that the acts he contemplates are murder and suicide pales into insignificance in contrast with what he otherwise expects. The criminal act, in such circumstances, may be the reverse of impulsive. It may be coolly and carefully prepared; yet it is still the act of a madman. This is merely an illustration; similar states of mind are likely to lie behind the criminal act when murders are committed by persons who suffer from schizophrenia or paranoid psychoses due to disease of the brain."

Summarizing, the Court of Appeals for the District of Columbia declared: "We find that as an exclusive criterion the right-wrong test is inadequate in that a) it does not take sufficient account of psychic realities and scientific knowledge, and b) it is based upon one symptom and so cannot be applied in all circumstances. We find that the "irresistible impulse" test is also inadequate in that it gives no recognition to mental illness characterized by brooding and reflection and so relegates acts caused by such illness to the application of the inadequate right-wrong test. We conclude that a broader test should be adopted."[14]

The court then declared a new test of criminal insanity for the District of Columbia: "It is simply that an accused is not criminally responsible if his unlawful act is the product of mental disease or mental defect." Further elucidating the terminology of this test, the court declared: "We use 'disease' in the sense of a condition which is capable of either improving or deteriorating. We use 'defect' in the sense of a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease.[15]

Without purporting to formulate an instruction appropriate or binding in all cases, the court stated that any instruction under the new test should in some way convey to the jury the sense and substance of the following: "If you the jury believe beyond a reasonable doubt that the accused was not suffering from a diseased or defective mental condition at the time that he committed the criminal act charged, you may find him guilty. If you believe he was suffering from a diseased or defective mental condition when he committed the act but believe beyond a reasonable doubt that the act was not the product of such mental abnormality, you may find him guilty. Unless you believe beyond a reasonable doubt, either that he was not

14. Ibid., p.874.
15. Ibid., p. 875.

suffering from a diseased or defective mental condition, or that the act was not the product of such abnormality, you must find the accused not quilty by reason of insanity. Thus, your task would not be completed upon finding, if you did find, that the accused suffered from a mental disease or defect. He would still be responsible for his unlawful act if there was no causal connection between such mental abnormality and the act. These questions must be determined by you from the facts which you find to be fairly deducible from the testimony and the evidence in this case."[16]

New Hampshire and Maine

The test laid down by the Durham case is strikingly similar to the test which has been in effect for over 80 years in New Hampshire and which was established in State v. Pike, 49 N.H. 399 (1870). The same basic test has been adopted by statute in Maine.

Criticism of Durham Rule

In a recent article, a professor of psychiatry severely criticized the Durham rule. He pointed out that the M'Naghten rule requires that the jury be told that a man is to be presumed sane until the contrary, i.e., his insanity, has been proved to their satisfaction. "This is a doctrine of responsibility and one which places the burden upon the defendant to establish a defense, not the court to prove him sane."[17]

Doctor Scher added: "To my mind the Durham rule contains several questionable aspects, some of which have been discussed elsewhere. The ambiguity of the terms "product", "mental disease", and "mental defect" has been remarked upon. One area which has perhaps not received sufficient attention is, I believe, the negative approach in the charge to the jury, which instead of asking them to pass on whether the defendant has adequately demonstrated his defense of insanity, reverses this situation. The jury is given the burden of determining 'the act was not the product of. . . mental abnormality . .. beyond a reasonable doubt.' This reversal of the roles whereby the burden is thrown to the jury to accept the plea, places the jury in a very difficult position indeed. It is difficult enough for the psychiatrist as expert to make such a determination and undoubtedly impossible for the jury to do so. Neither psychiatrists nor jurors can be mind readers or antegnosticians. Furthermore, much as I would not wish to state it, I think that we must face the fact that there are psychiatrists, like many another in our society, who see their testimony as something to merchandise, rather than something to be expended only with the greatest of caution and censure."[18]

Doctor Scher appears to suggest that the insanity issue be tried by a panel of medical experts rather than by a jury. This suggestion involves the serious question of whether the right of trial

16. Ibid.
17. Scher, "Expertise and the Post Hoc Judgment of Insanity", Northwestern Law Review (1962).
18. Ibid.

by jury would be denied. Under Doctor Scher's proposal, a person who successfully pleaded insanity would be sentenced to treatment for an undetermined period until his recovery could be certified by a competent board of qualified psychiatrists.[19] This would of course raise a question whether one could be "sentenced" after having been found not guilty by reason of insanity. Doctor Scher would obviate this problem by holding the insane defendant legally responsible but merely substituting psychiatric treatment for imprisonment. (Serious constitutional problems are obvious.)

Model Penal Code

In 1955 the American Law Institute published a tentative draft of the proposed provisions of the Model Penal Code relating to the test for mental disease or defect which would exclude responsibility for crime:[20]

> 1) 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 capactiy either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.
>
> 2) The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

The Model Penal Code test (in the first paragraph at least) follows closely the Durham test. The words "substantial capacity" are intended to provide a certain amount of leeway for a psychiatrist called upon to testify. Thus, it would not be necessary for a psychiatrist to find that a defendant claiming insanity was, at the time of the act, entirely incapacitated to appreciate the criminality of his conduct or conform that conduct to law.

The portion of the test concerning capacity to appreciate the criminality of his conduct deals, as does the "right and wrong" test, with the cognitive aspect of mental illness. The portion pertaining to capacity to "conform his conduct" to the requirements of law deals with the "volitional" aspect of mental illness. The phrase "irresistible impulse" is not used, for it tends to imply that there must be suddenness or spontaneity in the urging to commit the criminal act and tends to eliminate very common cases accompanied by brooding or reflection where the defendant is, nevertheless, not a free agent.

---

19. Ibid.
20. Model Penal Code, Proposed Final Draft No. 1, The American Law Institute, Philadelphia, Pa., April 24, 1961, p. 4.

This test really amounts to a simplification and modernization of the present combination of "right and wrong" and "irresistible impulse" tests. The draftsmen intended that, in applying the "Volitional" aspect of the test, the fact finder must make a distinction between incapacity to conform one's conduct to legal standards and mere indisposition to do so. Obviously it is not intended that the latter be excused.

Psychopathic Personality. Paragraph 2) of the Model Penal Code's test is designed to exclude from the concept of "mental disease or defect" the cases commonly known as "psychopathic personality" or "sociopathic personality." This follows the recommendation of the British Royal Commission on Capital Punishment in its 1953 report which noted that psychopathy "is a statistical abnormality; that is to say, the psychopath differs from a normal person only quantitatively or in degree, not qualitatively; and the diagnosis of psychopathic personality does not carry with it any explanation of the causes of the abnormality."

There is considerable dispute among American psychiatrists on the question whether or not psychopathy should be considered a mental disease. Some leading psychiatrists have strongly criticized paragraph 2) as making it possible for the wealty psychopath to rely on the defense of insanity but rendering the defense inaccessible to the psychopath without sufficient funds to obtain private psychiatric examination. This criticism is based on the opinion that it is possible to find through psychiatric testing and examination some mental disease or defect in nearly every psychopathic personality, in addition to the mere abnormality manifested only by repeated criminal conduct.

Paragraph 2) has been adopted by statute in Maine as a modification of the statutory Durham rule in effect there. In addition, the Maine statute excludes drug addiction and alcoholism from the definition of mental disease or defect.[21] All of the psychiatrists who participated in drafting the Model Penal Code provision repudiated paragraph 2). The criticisms of this paragraph have been summarized as follows:[22]

> Then why not do what the American Law Institute recommends... and exclude the sociopath and his ilk from the benefits of mental irresponsibility? The answer is that such special restrictive clauses aimed at excluding certain specified categories of individuals from exculpation simply do not make any psychiatric sense. They are as arbitrary and capricious as excluding defendants with red hair or blue eyes or Negro blood from the benefits of the law of criminal responsibility. They define by legislative fiat

21. Maine Revised Statutes Annotated, Chapter 49 §38A (1961 Supp.).
22. Diamond, "From M'Naghten to Currens and Beyond," 57 California Law Review, 189 (May 1962).

what is and what is not a psychiatric condition. Further, they grossly discriminate against the defendant who is poor. In practically any case where the crime itself, or alcoholism or drug addiction is supposedly the only evidence of mental disease, a skilled, competent and interested psychiatrist who spends sufficient time could discover other manifestations of mental abnormality sufficient to exculpate under the A.L.I. or Maine rules. But the routine case, superfluously examined by court appointed psychiatrists devoting a wholly inadequate time to the study of the defendant, would seldom end in acquittal. It costs a good deal of money for a defendant to engage psychiatric experts to make a full study of his case. The defendants who have such money would have no difficulty in demonstrating to the trier of fact that their behavior was not the only thing that troubled them. In all likelihood, defendants without such funds would be routinely passed by as "sane." Thus a type of economic discrimination, which is bad enough under our present rule of M'Naghten would become much worse.

Currens Case

On May 1, 1961, the United States Court of Appeals for the Third Circuit laid down a new test of insanity in the case of United States v. Currens, 290 F. 2d 751 (3d Cir. 1961). Currens had been convicted of violating the Dyer Act by interstate transportation of a stolen automobile. He had pleaded "not guilty" and also "not guilty because of insanity." At the trial, the psychiatrist who had examined him on behalf of the government described Currens as a "sociopathic personality possessing an emotional instability reaction but that he knew the difference between right and wrong but would not adhere to the right." Doctor Bowers, the psychiatrist, examining would not say that Currens was subject to irresistible impulses which caused his criminal behavior but stated rather that he reacted without due regard for consequences and that his illegal and antisocial conduct was repetitive and an outgrowth of his type of personality. Doctor Bowers testified that it was his opinion that Currens' theft of the car, . . . was the result of Currens' sociopathic personality and that a person with such a personality cannot be considered to be 'a mentally healthy person'. When asked if the 'sociopathic condition' was itself a mental disease, Doctor Bowers replied, "We consider it under the classification of mental illness but we do not consider them (persons possessing psychopathic personalities) in the legal sense 'insane'.[23]

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

The defendant's attorney asked the court to charge the jury using the test of insanity approved in the Durham case. The trial court, however, refused this request and charged the jury according to the M'Naghten test and the "irresistible impulse" rule. The jury found the defendant guilty.

Insanity Defense for Psychopaths. Chief Judge Biggs of the Third Circuit faced the question whether the defense of insanity should in all cases be made unavailable to the psychopath or sociopath. After reviewing the psychiatric literature and noting the conflict of opinion among psychiatrists whether or not a psychopath can be considered a victim of mental illness, the court noted that the chief objection to including psychopaths among those entitled to raise the defense of insanity assumes a particular definition of psychopathy: "the term psychopath comprehends a person who is a habitual criminal but whose mind is functioning normally." The court continued, "Perhaps some laymen and, indeed some psychiatrists, do define the term that broadly; and insofar as the term psychopathy does merely indicate a pattern of recurrent criminal behavior we would certainly agree that it does not describe a disorder which can be considered insanity for purposes of a defense to a criminal action. But, we are aware of the fact that psychopathy, or sociopathy, is a term which means different things to experts in the fields of psychiatry and psychology. Indeed, a confusing wealth of literature has grown about the term causing some authorities to give up its use in dismay, labeling it a "waste basket category."[24]

The court concluded, however, that there were "two very persuasive reasons why this court should not hold evidence of psychopathy as insufficient, as a matter of law, to put sanity or mental illness in issue. First, it is clear that as the majority of experts use the term, a psychopath is clearly distinguishable from one who merely demonstrates recurrent criminal behavior."[25]

Chief Judge Biggs noted that a leading authority, Doctor Winfred Overholser, superintendent of Saint Elizabeth's Hospital in the District of Columbia, and his staff, have taken the unequivocal position that sociopathy is a mental disease. Moreover, Chief Judge Biggs noted, in 1952 the American Psychiatric Association altered its nomenclature to remove sociopathic personality disturbance and psychopathic personality disturbance from a non-diseased category and place them in a category of "mental disorders".[26]

Chief Judge Biggs also relied heavily on Doctor Hervey Cleckley's definition of psychopathic or sociopathic personality. Cleckley rules out those cases in which social standards are rejected only in respect to some one particular kind of behavior: for example, alcoholism or deviant sexual behavior in a person otherwise adapted to social demands. He also rules out those cases in which delinquency and crime have been adopted as a positive way of life - in which the person is an enemy of society but is capable of being a loyal and stable member of a delinquent gang. There remains a group characterized by a diffuse and chronic incapacity for persistent, ordered living of any kind. These are, in Cleckley's point of view, the true psychopathic

24. Ibid., p. 761 and 762.
25. Ibid.
26. Ibid.

personalities. They need not be diagnosed negatively, by exclusion of other possibilities. They constitute a true clinical entity with a characteristic pattern of symptoms.[27]

From his review of the medical authorities Judge Biggs concluded that in many cases the term "psychopath" is applied by medical experts to persons who are very ill indeed. Thus, he asserted, "it would not be proper for this court in this case to deprive a large heterogeneous group of offenders of the defense of insanity by holding blindly and indiscriminately that a person described as psychopathic is always criminally responsible."[28]

The Third Circuit's second reason for refusing to hold that psychopaths are sane as a matter of law is that the term itself is too indefinite. Rather the court felt, "in each individual case all the pertinent symptoms of the accused should be put before the court and jury and the accused's criminal responsibility should be developed from the totality of his symptoms. A court of law is not an appropriate forum for a debate as to the meaning of abstract psychiatric classifications. The criminal law is not concerned with such classifications but with the fundamental issue of criminal responsibility. Testimony and arguments should relate primarily to the subject of the criminal responsibility of the accused and specialized terminology should be used only where it is helpful in determining whether a particular defendant could be held to the standards of the criminal law."[29] Noting that the Court of Appeals for the District of Columbia Circuit has applied the Durham test to all types of mental illness, including psychopathy or sociopathy, the court held that the question whether a particular sociopath is insane within the meaning of the law is a question of ultimate fact for the jury. In the instant case, the court concluded that there was sufficient evidence on which a reasonable jury might find that Currens did not possess the requisite guilty mind when he committed the alleged crime.

Criticism of M'Naghten Rule. Next, addressing attention to the question of the proper test of insanity in a criminal case, the court traced the history of the M'Naghten rule and concluded that it was actually over 375 years old, having first been published "in a year in which belief in witchcraft and demonology even among well educated men was widespread."[30] Summarizing, the court concluded that the M'Naghten is also unworkable for many reasons, among them the following: One who violates a criminal law will be held responsible even in instances where he may believe his act to be morally right. For example, one who is sane as to most matters but suffers under a delusion as to a particular matter might well be found sane under the right and wrong test of M'Naghten. Our institutions for the mentally ill today contain many patients who are fully cognizant of the difference between right and wrong.

---

27. Ibid.
28. Ibid.
29. Ibid., p. 763.
30. Ibid.

the basic aims, purposes and assumptions of the criminal law."[36] Criminal law is based on the assumption that a person has the capacity to control his behavior and choose his own course of conduct. Thus, Judge Biggs said, "where there exists a reasonable doubt whether a defendant possessed capacity of choice and control there is a reasonable doubt whether he possessed the necessary guilty mind to justify conviction. An adequate test of insanity should make clear to the jury that the fact that a defendant was suffering from a mental disease is not determinative of his criminal responsibility in and of itself, but is significant only in so far as it indicates the extent to which he lacked normal powers of control and choice when the allegedly criminal conduct was committed. In other words the test must provide the jury with a verbal tool by which it can relate the defendant's mental disease to his total personality and by means of which it can render an ultimate social and moral judgment."[37]

The court found the Durham formula failed to meet these requirements. Under the Durham test, the prosecution has the burden of proving that the act committed was not the product of a mental disease or defect. "The test stresses, to the complete exclusion of all other considerations, a possible causal connection between the mental disease with which the defendant is afflicted and the act which he committed. When considering this test it is natural to think of the mental disease as a distinct vital force in the defendant's mind, producing some acts but not others. In so far as it has this effect, the test is, in much the same way as the M'Naghten rule, subject to the criticism that it wrongly assumes that the mind can be broken up into compartments, one part sane and the other part insane. Moreover, the test, limited as it is to a supposed causal connection between mental diseases and criminal acts omits the most important step in deciding the issue of criminal responsibility, namely that of determining the total mental condition of the defendant at the time he committed the act, and providing the jury with a standard by means of which an ultimate social and moral judgment can be rendered."[38]

The following formula was then adopted as the test for insanity in the Third Circuit: "The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated."[39]

This test borrows heavily from the first paragraph of the Model Penal Code test. However, the court deleted the phrase "to appreciate the criminality of his conduct." A footnote to the opinion explains the court's feeling that this deleted phrase would "over-emphasize the cognitive element in criminal responsibility and thus distract the jury from the crucial issues while being little more than surplusage."[40] Moreover, the court expressed its full agreement with the

36. Ibid., p. 773.
37. Ibid.
38. Ibid.
39. Ibid., p. 774.
40. Ibid.

Model Penal Code test's second paragraph, excluding from the definition of "mental disease or defect" abnormalties manifested only by repeated criminal or otherwise anti-social conduct.

To assist trial courts, the opinion formulated the following jury charge which would have been acceptable in the Currens case:[41]

> If you the jury believe beyond a reasonable doubt that the defendant, Currens, was not suffering from a disease of the mind at the time he committed the criminal act charged, you may find him guilty. If you believe that he was suffering from a disease of the mind but believed beyond a reasonable doubt that at the time that he committed the criminal conduct with which he is charged he possessed substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated you may find him guilty. Unless you believe beyond a reasonable doubt that Currens was not suffering from a disease of the mind or that despite that disease he possessed substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated, you must find him not quilty by reason of insanity. Thus, your task would not be completed upon finding, if you did find, that the accused suffered from a disease of the mind. He would still be responsible for his unlawful act if you found beyond a reasonable doubt that at the time he committed the act, the disease had not so weakened his capacity to conform his conduct to the requirements of the law which he is alleged to have violated that he lacked substantial capacity to conform his conduct to the requirements of that law. These questions must be determined by you from the facts which you find to be fairly deducible from the evidence in this case.

Critique of Currens Test

Dr. Bernard L. Diamond, a California psychiatrist, has recently published a critique of the Currens formula. Doctor Diamond asserts that both the Durham rule and the Currens rule are far superior to the M'Naghten and "irresistible impulse" tests. Furthermore he states:[42]

> Currens is superior to Durham, if for no other reason, than because it omits the troublesome 'product' clause of both the Durham and the New Hampshire rules. Criminal behavior is not the "product" of mental disease in the strict cause and effect relationship that the law would like

41. Ibid., p. 775.
42. Diamond, op. cit., pp. 189-191.

There is no reason why the law should be wedded to the state of psychological knowledge in 1843. These rules cannot "be rationally justified except by a process of interpretation which distorts and often practically nullifies them. . . ." Judge Biggs then quoted from Mr. Justice Frankfurter's testimony before the British Royal Commission, "The M'Naghten rules are in large measures shams. That is a strong word, but I think that the M'Naghten rules are very difficult for conscientious people and not difficult enough for people who say, 'We'll just juggle them'."[31]

Judge Biggs then asked: "How, conceivably, can the criminal responsibility of a mentally ill defendant be determined by the answer to a single question placed on a moral basis?"[32] He concluded that all that the M'Naghten rules accomplish is to put the testifying psychiatrist in a verbal straight jacket.[33]

Furthermore, the court voiced the criticism that the "right-wrong" test places the psychiatrist in a position where he must state a moral judgment and cannot avoid usurping, to some extent at least, the function of the jury. The court noted that many European nations have adopted legal rules relating to criminal responsibility of offenders suffering from mental disorder or weaknesses which bear no relation to the "right and wrong" test. The administration of criminal justice in those countries has not suffered by these improvements. Finally, the court concluded that the M'Naghten rules are not only unfair to the defendant but are dangerous to society, because instead of resulting in the isolation and treatment of those who are dangerously mentally ill until such time as it is safe for society to release them, the present rules result in imprisonment of these persons for definite periods after which they are released and frequently commit criminal conduct in the very community where they have been thrown back "untreated, and uncured."[34]

Formulation of Modern Test. The Currens opinion next dealt with the problem of formulating a modern test of criminal insanity for jury trials. First, said the court, an effective test must make it possible for the experts to present the entire picture of the defendant, including all of his symptomatology, before the court and to allow a full explanation. "The way must be cleared in any case, in which the mental condition of the defendant is at issue, for the psychiatrist to explain the condition of the defendant to the jury in understandable terms."[35] Second, an adequate test must provide the jury with a standard or formula by means of which it can translate the mental condition described by the psychiatrist into an answer to the ultimate question of whether the defendant possessed the necessary guilty mind to commit the crime charged. The test must make it possible "to verbalize the relationship between mental disease and the concept of 'guilty mind' in a way which will be both meaningful to a jury charged with the duty of determining the issue of criminal responsibility and consistent with

31. Ibid., p. 766.
32. Ibid., p. 767.
33. Ibid.
34. Ibid.
35. Ibid., p. 772

to believe. The vast majority of mental illnesses result in no criminal behavior of any kind. But certain psychological abnormalities in certain individuals so affect the motivational, ideational, and volitional psychology of those individuals that, under special environmental circumstances, aggressive, destructive, or immoral anti-social behavior occurs. In most of these instances the psychiatrist can say with probability, but never with certainty, that if it were not for the mental illness, the overt act would not have occurred.

The essential phrase of Currens, 'lacked substantial capacity to conform,' should, I think, be much simpler for both the psychiatric expert and the lay juror to ponder over. Further, it provides an opportunity for the expert to describe any aspect of the defendant's psychology that he thinks may have some relevancy to his capacity to conform, whether it is a lack of knowledge of the wrongfulness of his act, or of its nature and quality, as required under M'Naghten or whether it is the defect of volitional control specified by the irresistible impulse test, or the "product" relationship of Durham.

Currens is thus more inclusive than any other previous rule of responsibility. This will make Currens more appealing to those who believe the existence of mental illness of any kind should be given the fullest possible consideration in a criminal trial. But for all those who believe that mental illness and what they regard as the fantasies of psychiatrists and humanist reformers already receive more attention than what they deserve in our courts of law, Currens will be a threat and vigorous opposition is to be expected.

The United States Court of Appeals for the Eighth Circuit recently expressed its views on the various proposed legal tests of insanity as follows:[43]

> It is sufficient to say here that if the issue were now before us [comprising this particular panel of the Eighth Circuit], which it is not, we would hesitate to reverse a case where the trial court had employed instructions on insanity which this court has heretofore approved and henceforth we would be loath, indeed, to reverse where, as here, the trial court has used instructions, whether based theoretically on a M'Naghten variation or on the test set forth in the Model Penal Code . . . or on that form revised as suggested by the Third

43. Dusky v. United States, 295 F2d 743, 759 (8th Cir. 1961).

> Circuit in Currens, or whether couched in still other language, if the charge appropriately embraces and requires positive findings as to three necessary elements, namely the defendant's cognition, his volition, and his capacity to control his behavior. If those three elements--knowledge, will and choice--are emphasized in the court's charge as essential constituents of the defendant's legal sanity, we suspect that the exact wording of the charge and the actual name of the test are comparatively unimportant...

Court Decisions and Tests in Other Jurisdictions

Since the Currens decision, the highest appellate courts of Maryland and Pennsylvania have expressly rejected the suggestion that the "right-wrong" test be abandoned in their respective jurisdictions in favor of the Durham rule or the Currens standard.[44]

New Hampshire. Since 1870 New Hampshire courts have applied a simple test requiring the jury to find only whether or not the defendants at the time of the allegedly criminal act had a mental disease, and if so whether that act was a product of his disease. Within that test an uncontrollable, insane impulse to commit the act would render the act a product of mental disease.[45]

Alabama. In 1887 the Alabama Supreme Court declared that the "right and wrong" test had been repudiated by modern and advanced authorities, both legal and medical. The Alabama court then laid down these inquiries to be submitted to the jury:[46]

> First. Was the defendant at the time of the commission of the alleged crime, as matter of fact, afflicted with a disease of the mind, so as to be either idiotic, or otherwise insane? Second. If such be the case, did he know right from wrong, as applied to the particular act in question? If he did not have such knowledge, he is not legally responsible. Third. If he did have such knowledge, he may nevertheless be not legally responsible if the two following conditions concur: 1) If, by reason of the duress of such mental disease, he had so far lost the power to choose between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed; 2) and if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it solely.

44. Armstead v. State, 227 Md. 73, 175 A. 2d 24 (1961); Commonwealth v. Melton, 406 Pa. 343, 178 A. 2d 728 (1962).
45. State v. Jones, 50 N.H. 399 (1871).
46. Parsons v. State, 81 Ala. 577, 2 So. 854, 866-867 (1887).

Illinois. The new Illinois criminal code insanity test is based on the Model Penal Code. The Illinois Code section follows:[47]

§ 6-2. Insanity.

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

(b) The terms "mental disease or mental defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

Vermont. In 1957 Vermont adopted a new test of insanity as follows:[48]

§ 4801. Test of insanity in criminal cases. The test when used as a defense in criminal cases shall be as follows:

(1) 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 adequate capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

(2) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct. The terms "mental disease or defect" shall include congenital and traumatic mental conditions as well as disease.

Virgin Islands. The new Virgin Islands Code of 1957 declares:[49]

All persons are capable of committing crimes or offenses except--

(4) Persons who are mentally ill and who committed the act charged against them in consequence of such mental illness. . .

(This provision was suggested to the Advisory Committee on the V.I. Code by Chief Judge Biggs of the U.S. Court of Appeals for the Third Circuit. Note, however, that when Chief Judge Biggs wrote the Currens opinion he did not adopt for the Third Circuit this test which he had recommended to the Virgin Islands.)

47. Illinois Revised Statutes, c. 38, § 6-2 (1961).
48. Vermont Statutes Annotated, Title 13, § 4801 (1958).
49. Virgin Islands Code, 14 § 14 (1957).

Cause for Concern in Colorado

There has been much recent concern in many jurisdictions, as shown in the previous section, over the tests, definitions, and procedures for determining criminal insanity. This concern has been shared in Colorado for several reasons: First, there has been constant criticism over the continued use of the M'Naghten and irresistible impulse tests. Second, there has been a general feeling that a plea of not guilty by reason of insanity is offered in many cases only as a delaying tactic. Third, it is believed generally that many such pleas are made and that often criminals escape capital punishment or lengthy imprisonment by being found insane. Fourth, a finding of not guilty by reason of insanity might lead to almost immediate release, because the state hospital at Pueblo may find an alleged offender sane and the jury finds him insane. He is committed to the hospital where he has already been considered sane, so he is released. Fifth, there is a need for a special institution for the criminally insane and potentially dangerous offenders.

Insanity as a Defense

The apparent general public impression that many alleged offenders are avoiding "punishment" by making a successful plea of not guilty by reason of insanity is not borne out by a study of the use and success of this plea in Denver District Court during the five years from 1957 through 1961.[50]

The statistics in this study cover the criminal indictments and informations for murder, burglary, larceny, forgery, and rape filed in the Denver District Court. These figures are based upon the number of indictments and informations filed and not upon the number of cases. (For example, a single case may involve three defendants, each separately charged with larceny and larceny by bailee. This situation would be counted as one case and six counts of larceny.)

MURDER

	1957	1958	1959	1960	1961	Total
Charges	14	24	33	24	26	121
Insanity plea	6	8	12	7	8	41
Defense withdrawn before trial	2	2	5	3	2	14
Insanity issue submitted to jury	4	6	7	4	6	27
Found insane and committed to hospital	3	4	6	3	5	21

50. These data were presented to the Criminal Code Committee at its September 21, 1962 meeting by Dr. Hans Schapire, Chief of Psychiatric Services, Department of Institutions, and were taken from a research paper prepared by a Denver University law student.

RAPE[51]

	1957	1958	1959	1960	1961	Total
Charges	28	35	26	34	15	138
Insanity plea	1	3	1	3	2	10
Defense withdrawn before trial	1	1	0	2	2	6
Insanity issue submitted to jury	0	2	1	1	0	4
Found insane and committed to hospital	0	2	1	1	0	4

LARCENY[52]

	1957	1958	1959	1960	1961	Total
Charges	118	134	185	349	499	1,285
Insanity plea	8	6	4	26	26	70
Defense withdrawn before trial	4	6	4	19	17	50
Insanity issue submitted to jury	4	0	0	7	9	20
Found insane and committed to hospital	3	0	0	6	6	15

BURGLARY[53]

	1957	1958	1959	1960	1961	Total
Charges	248	317	341	310	407	1,623
Insanity plea	18	14	26	30	21	109
Defense withdrawn before trial	15	9	22	21	11	78
Insanity issue submitted to jury	3	5	4	9	9	30
Found insane and committed to hospital	3	3	4	6	7	23

FORGERY[54]

	1957	1958	1959	1960	1961	Total
Charges	33	58	74	76	101	342
Insanity plea	1	7	5	16	8	37
Defense withdrawn before trial	1	7	4	10	4	26
Insanity issue submitted to jury	0	0	1	6	3	10
Found insane and committed to hospital	0	0	0	3	2	5

51. Included statutory rape, but not assault to commit rape, indecent liberties, or unnatural copulation.
52. Included larceny by bailee and larceny of mortgaged property, not conspiracy to commit larceny or petty larceny.
53. Did not include conspiracy to commit burglary, attempted burglary or breaking and entering a motor vehicle.
54. Did not include no account check charges or conspiracy to commit forgery.

As shown by these tables, insanity was used as a defense in murder 33.8 per cent of the time. It was withdrawn 34.1 per cent of the time. It was successful 17.3 per cent of the time.

Insanity was used as a defense in rape 7.3 per cent. The defense was withdrawn 60 per cent of the time. It was successful 2.8 per cent of the time.

Insanity was used as a defense in larceny 5.4 per cent. The defense was withdrawn 71.4 per cent of the time. It was successful 1.1 per cent of the time.

Insanity was used as a defense in burglary 6.8 per cent. The defense was withdrawn 71 per cent of the time. It was successful 1.4 per cent of the time.

Insanity was used as a defense in forgery 10.7 per cent. The defense was withdrawn 70 per cent of the time. It was successful 1.4 per cent of the time.

These percentages seem to indicate that, except in murder cases, this defense is used infrequently and is rarely successful when based on the total number of indictments and informations filed. Perhaps the infrequency of the plea is the reason why the public believes the opposite, because when the defense is used the newspaper coverage is usually complete and perhaps this may be what creates the erroneous impression.

Criminal Code Committee Meeting, September 21, 1962

At the September 21, 1962 meeting of the Criminal Code Committee, several psychiatrists discussed the problems connected with present criminal insanity procedures. Dr. John MacDonald assistant director, Colorado Psychopathic Hospital, the following remarks:

1) A major problem is that psychiatrists are not asked to give a medical opinion about a defendant's mental condition, but are asked to give an opinion as to whether the defendant knew right from wrong, which is a moral concept and not subject to verification by medical standards.

2) The present tests used in Colorado are inadequate as is the Durham rule. Perhaps, the best test devised thus far is Currens.

3) No person who has shown anti-social tendencies should be release from custody until he is no longer a danger to society. In this connection, there is a great need for research on how to treat the psychopathic offender.

4) Trial attorneys try to lump all of an alleged offender's irrational actions together, so that the jury may be given an unbalanced picture of the person being adjudged. This practice often leads to acquittal on the grounds of insanity. Conversely, many alleged offenders who are severely psychotic are found to be sane by juries because of their appearance and deportment in the courtroom.

5) Colorado needs a separate and adequately staffed facility for the criminally insane.

Dr. James Galvin, Director of Institutions, agreed with Dr. MacDonald on the need for a separate facility for the criminally insane. Dr. Galvin also said that under the present circumstances the M'Naghten rule probably works as well as anything else. He added that he would prefer having the determination of sanity made by a three-judge panel, if such procedure would be constitutional.

Dr. Hans Schapire, Chief of Psychiatric Services, and Dr. Mark Farrell, psychiatric consultant, Colorado State Penitentiary, both stressed the need of a separate facility for the criminally insane. Dr. Farrell recommended the creation of a full-time parole board and the adoption of a one day to life indeterminate sentence for all offenders. Dr. Schapire urged the adoption of the Massachusetts statute which allows the court to have any person examined and evaluated who is charged with a crime of violence or who has a history of aggressive anti-social behavior and crime. Both of them agreed that present procedures were not satisfactory, but had no specific suggestions on the test which should be used or the procedures which should be followed.

Recommendations for Colorado

Several recommendations, some including drastic changes in present procedures, have been made for changes in the present procedures for determining criminal insanity.

Elimination of Plea

Following is the outline of a proposal presented to the Criminal Code Committee by Senator Edward J. Byrne at its October 11, 1962 meeting.

The statutory plea of "not guilty by reason of insanity" would be repealed and the common law plea of "not guilty by reason of insanity" would be specifically abolished by statute. Instead there would be the following statutory provision:

"No information shall be filed or an indictment returned by a grand jury wherein the defendant at the time of the alleged offense because of mental disease or defect lacked substantial capacity to conform his conduct to the requirement of the law which he is alleged to have violated, provided that evidence of mental condition may be offered in a proper case, as bearing upon the capacity of the accused to form the specific intent essential to constitute a crime."

When an information is filed or an indictment returned, the defense may make a motion to quash as provided in 39-7-7, C.R.S., 1953, on the grounds that the information or indictment should not have been filed because the defendant had a mental disease or defect and lacked substantial capacity to conform his conduct to the requirement of the law which he is alleged to have violated. Following the motion to quash but prior to a hearing on the motion, the court would commit the defendant (as at present) for observation and evaluation.

After the period of observation and evaluation, a hearing would be held on the motion to quash the information. A three-judge panel would preside at this hearing, and there would be no jury. The three judges would be designated by the departmental justice of the supreme court upon petition from the presiding judge in the district where the case is to be tried.

It would be the duty of the defense attorney to put the question in issue in the first instance by offering evidence to show that the defendant was mentally diseased or defective to the extent that he substantially lacked capacity to conform his conduct to the requirement of the law he is alleged to have violated. It would then be the function of the district attorney to prove that the defendant was competent within the above definition at the time of the alleged offense.

The psychiatrists who examined the defendant and other professional witnesses, if desired by the court, would be required to give expert testimony regarding the defendant's mental condition. The test to be used in the special proceedings on the motion to quash is the same as the Currens rule:

"The.../court/ must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated."

If the court finds that the defendant was not mentally diseased or defective within the test as defined, the motion would be denied, and the prosecution could proceed on the information. If the court determines that the defendant was suffering from mental disorder which resulted in his lacking capacity to conform his conduct to the requirements of the law, the court would quash the indictment or information, enter one of the two following findings, and commit the defendant to the director of institutions:

1) mentally diseased and not accountable for the crime as charged; or

2) mentally defective and not accountable for the crime as charged.

After receiving the patient, the director of institutions would be required to study and evaluate him and place him in the appropriate state institution. Such person would remain in the custody of the state until such time as he or the director of institutions shall petition the committing court for release. Such petition would include a complete report on the patient's current condition and would set forth specific information on why the patient may be considered a safe risk back in society. The petition would be heard by another three-judge panel, and this panel would have the authority to engage psychiatrists to make an independent study. If the petition is rejected, there would be a time limitation before another petition could be presented.

If the patient is released, the court would still have the authority (in its discretion) to exercise supervision over the patient for a maximum of five years. The court could (in its discretion) make an arrangement with the state department of institutions or any other public agency to provide such supervision under the court's direction or to assist the court in providing such supervision.

Comments. By abolishing the plea of not guilty by reason of insanity, the constitutional need for a jury trial on the question may be eliminated. The proposed procedures, while generally similar to those used now, differ in several important respects. The M'Naghten rule and "irresistible impulse" would be eliminated as tests and would be replaced by a test which: 1) is more in keeping with modern psychiatric thought; and 2) does not include the moral question of right and wrong. The psychiatrists testifying at the special proceeding would not be straight-jacketed by outmoded rules and definitions; therefore, they would have a chance to offer a freer expression of their findings.

The commitment procedure would assure that a person who is found to be mentally diseased or defective would not be set free. The procedure for release provides adequate safeguards for society, while at the same time affording a defendant a means for release, so his rights are protected. The court's authority to extend supervision after release is an added safeguard for society.

Research is currently underway to determine the constitutionality of Senator Byrne's proposal. The main questions to which answers are sought are:

1) Can the plea of not guilty by reason of insanity be abolished?

2) Under the procedures outlined in this proposal, can a jury trial be eliminated?

Modification of Present Procedures

Representative Roy Romer and Representative Roland Mapelli have also presented several recommendations concerning criminal insanity procedures to the Criminal Code Committee. These include the following:

1) A maximum security unit designed specifically for the criminally insane should be constructed as soon as possible.

Explanation: The present facility for the criminally insane at Pueblo is only a temporary answer and is not an adequate "maximum security" facility. The more dangerous of the criminally insane now have to be confined at the penitentiary in Canon City. The number of escapes from Pueblo in the past few years is evidence of the need for this unit. It should be a separate unit designed specifically for the criminally insane, incorporating the necessary facilities required for adequate security and treatment.

2) An individual committed to the Colorado State Hospital as being criminally insane should not be released until (1) he is determined to be restored to sanity, and (2) until it is also determined that he is no longer a danger to society.

Explanation: Under present procedure, a person may be found to be insane by a jury and committed to the State Hospital at Pueblo to be held there until he is restored to sanity, even though the psychiatrists at the hospital have already testified under oath that the individual is now sane. Therefore, when his release is requested, the hospital must certify that he is sane and he may be released within a short time even though there has been no significant change in his mental condition. Yet the person, though legally sane, may by medical standards be a menace to society because of a mental disease or mental disorders which do not amount to legal insanity. The public would be better protected if the institution were permitted to hold the individual not only until he is determined to be restored to sanity but also until it is determined that he is no longer a danger to society. The present procedures relating to the confinement of sex offenders may serve as a guide. A person given an indeterminate sentence for a sex offense may be held by the institution until the parole board determines that it is safe to release him on parole. Consideration should be given to the establishment of some similar "review board" for those committed as criminally insane. On request for a person's release, this board would evaluate not only the question of "legal insanity" but also would evaluate the evidence concerning other mental disorders, not amounting to strict legal insanity, but which may cause the person to be a danger to society.

The board would then report to the court whether or not it is safe to release the individual on parole or otherwise. Premature release of the criminally insane could be lessened and the public given better protection under this changed procedure. A similar recommendation has been made by a study commission in California to the governor and legislature of that state.

3) The legal definition of what constitutes criminal insanity should be modified or clarified to permit the psychiatrist to testify accurately in the area of his professional competence, namely, the medical or mental condition of the accused and the degree of his mental illness or disorder, thus leaving to the jury the moral question whether in light of this evidence the accused should or should not be held responsible for this act.

Explanation: The combined efforts of the medical and legal professions should be enlisted to develop more adequate standards to assist the jury in its deliberations. These standards or the legal test, should clearly separate the role of the psychiatrist (to testify concerning the degree of mental illness or disorder) and the role of the jury (to determine the moral question of whether the accused shall be held accountable).

4) A panel or commission of competent psychiatrists should be established from which the court could appoint one or more psychiatrists, depending on the nature of the case, to report concerning the accused's sanity, with procedures which would permit the psychiatrists appointed in a particular case to adequately share with each other the information and facts upon which they base their opinion of sanity and which would permit the appointed psychiatrists to have adequate access to police files and other information relevent to this determination.

Explanation: Under present procedures, a part of the reason for the great divergence of psychiatric opinion in any one case is due to the fact that the various psychiatrists that testify do not have available to them the same information or facts concerning the case. The court-appointed psychiatrists often have access to more complete information than do the defense psychiatrists, for example. With better sharing of the information concerning the accused and the circumstances surrounding the crime between and among the psychiatrists who testify, the wide variance in the opinion of the various psychiatrists should be reduced. The establishment of such a commission or panel of competent psychiatrists, and its use by the court, might cut down on the number of psychiatrists hired independently by the accused, although this alternative would still be available to the defense.

5) An accused should be denied bond, if the plea of not guilty by reason of insanity is entered, until that issue is determined.

Explanation: By the nature of the plea, the accused is contending that he is not responsible for his actions and is asking for commitment and observation until such time as there shall be a judicial determination of his sanity. Therefore, it is dangerous to subject society to the risk of this individual until the question of his sanity is determined.

6) There has been considerable discussion concerning the pros and cons of changing the burden of proof so that an accused who claims to have been insane at the time of the crime would have the burden of proving his insanity rather than to have the state prove his sanity beyond reasonable doubt. This suggested change raises constitutional questions that should be investigated in order that further discussion of this proposal will fully consider the problem of protecting the constitutional rights of the accused and of protecting the public. The attorney general has been asked to comment on the constitutional questions involved in this question.

ROBBERY AND NARCOTICS VIOLATIONS AND INCARCERATED OFFENDERS

Introduction

The Criminal Code Committee appointed a five-member subcommittee in July 1961 to study robbery and narcotic offenses and the characteristics of convicted robbers and narcotics violators.[1] This subcommittee was charged with the responsibility of developing factual material on the following:

1) incarcerated offenders -- previous record, use of alcohol and narcotics, family background, education and employment, mental condition, and related matters;

2) number of unsolved offenses; and

3) number of offenders before the courts and disposition of their cases, including dismissal, probation, and sentence.

This information was desired by the Criminal Code Committee as background for considering statutory changes related to robbery (particularly aggravated robbery) and narcotics violations.

The characteristics of incarcerated offenders convicted of various degrees of robbery and narcotics violations were summarized from an analysis of the case histories of all offenders in these categories in the state penitentiary. The data on unsolved cases and offenders before the courts were compiled from questionnaires sent by the subcommittee to selected police departments, district attorneys, probation departments, and courts.

The subcommittee made its report to the Criminal Code Committee on September 22, 1961 and the chairman of the subcommittee reported the following findings:

1) The courts in Colorado are performing their jobs well. In particular, sentences have been heavy for aggravated robberies.

2) In many cases, the aggravated robber graduates from burglary to his present offense.

3) Probation has been granted sparingly, if at all, to aggravated robbers, and probation has been quite successful in these cases, although for some the time on probation has been too short to determine the results.

4) There is a particular problem with the aggravated robber who recognizes that he can realize more money from taking narcotics than emptying the till in drug store holdups. He is usually not a user but sells the narcotics he acquires through robbery to a pusher.

---

1. Members of the subcommittee were: Representative Robert Eberhardt, chairman; Senators Edward J. Byrne and Paul Wenke; and Representatives Frank Evans and John Kane.

5) The living pattern among the various categories of robbers and narcotics violators is quite similar. These men are usually young -- in their twenties; have limited or no occupational skills; dull normal I.Q.'s and an eighth grade education or less; poor military service records, if any; and almost all have been characterized as having deep-seated emotional problems, making adjustment to society difficult and offering a very poor future prognosis.[2]

In accepting the subcommittee report, the Criminal Code Committee decided unanimously that it should be included in the committee's final report to the General Assembly.[3] Accordingly, the subcommittee's report is presented below.

Characteristics of Incarcerated Offenders

Armed Robbers

As a rule, the armed robber is young -- between 20 and 22 years of age. In approximately 65 per cent of the cases, his ethnic background is Anglo, as opposed to Negro, Spanish-American, Indian, or combinations thereof. If he is a member of a minority group, that group is more likely to be Spanish-American than Negro. As for marital status, the probability of his being single (with no marriage history) is strong (10 cases out of 17). Cases of divorce or separation are few (two out of 17). If he does have children, the number ranges from one to three.

Seldom is the armed robbery which led to his present incarceration his initial offense or arrest. If he does have a police record, the number of entries (e.g., previous arrests) is likely to be four. On the average he has committed one felony and one juvenile offense. However, in nearly half the cases, there is no juvenile record, and in 29 per cent of the cases, no history of previous felony convictions can be found.

The intelligence quotient of the armed robber is likely to fall within the "dull normal" range (90-92). Rarely does his I.Q. exceed 105, and in 14 per cent of the cases it is below 70. Educational achievement appears to be closely related to the degree of intelligence. On the average, the armed robber has completed eight grades, and only in isolated instances has he continued his education beyond ninth grade. From a vocational standpoint he is poorly equipped for life; occupational skills, as such, are strikingly absent. In approximately 65 per cent of the cases, he has been employed as a laborer, and the incidence of short-term employment is quite high (71 per cent). In half of the cases he has not served in the armed forces, and where there is a record of military service, the discharge, in only one out of two cases, is honorable.

---

2. Legislative Council Criminal Code Committee, Minutes of September 22, 1962.
3. Legislative Council Criminal Code Committee, Minutes of October 27, 1962.

In practically all cases the armed robber is emotionally disturbed. The chances are three out of four that he has been identified as a neurotic or psychopathic personality. In a number of instances, his "reality ties" are strained; he can withstand pressure or stress only to a point, and beyond this point he lashes out at the world. In effect, he translates his inner conflicts into aggressive, antisocial acts. Perhaps some correlation can be established between emotional disturbance and home environment. It is interesting to note that in more than half of the cases, the environment in which the inmate was reared can be classified as "poor." On the other hand, the number of "good" home environments should not be minimized (five out of 17 cases). Surprisingly enough, perhaps, 44 per cent of the "poor" home environments are ones in which the marital union remained relatively intact (both parents) during the inmate's childhood and adolescence. On the average he has three siblings.

The armed robber is probably a moderate or "social" drinker. In only 12 per cent of the cases can his consumption of alcoholic beverages be regarded as "heavy," and in slightly less than 25 per cent of the cases, use of alcohol is excessive only on occasion. There are no instances of alcoholism. In addition, the armed robber is seldom a narcotics user (only five cases out of 17). Where a drug is used, the chances are excellent that it is marijuana.

Aggravated Robbers

While it is difficult to draw a picture of an aggravated robber which covers all offenders incarcerated for this crime, certain generalities may be made and a composite picture of the most usual characteristics may be developed.

The composite aggravated robber is likely to be young -- between 23 and 27 years of age. In more than one-half the instances, he is Anglo rather than a member of a minority group. If he is a member of a minority group, the chances are almost two to one that he is a Spanish-American rather than a Negro. He is most likely to be single -- either never having been married or is presently divorced. If he does have married status, the chances are one in two that the marriage is common law. It is also unlikely that he has any children (if married). If he does have children, it is usually only one.

His intelligence quotient is around 95 or dull normal; only rarely will he have an I.Q. of more than 110. Rather than an I.Q. above 95, he is more likely to have one between 75 and 95. His educational attainment reflects very much his I.Q. Generally, he will be found to have completed the 8th grade. Seldom has he attended high school, and the chances are one in three that he left school somewhere between the third and eighth grades. His occupational skills or lack thereof are about on a par with his I.Q. and educational attainment. Generally, he has no occupation or has been employed only as a laborer. It is very unlikely that he worked very long at one job or for one employer. Either he has never been employed, or his work experience has consisted of a number of unskilled jobs at low pay for short periods of time. His military history approximates the same pattern. If he has been in service (and less than one in two have), he will probably have been discharged for the good of the service,

under conditions other than honorable, or have received a dishonorable discharge. While he may have received an honorable discharge, his military record shows a number of minor violations and perhaps a court martial or two.

His ability to stay out of trouble in civilian life is no better than it was in military service. He probably has had one previous felony conviction. The chances are also good that he has a juvenile record. In addition. he has been arrested at least four times for investigation, drunkenness, vagrancy, or some other misdemeanor. All in all, he has had contact with law enforcement officials for one reason or another at least seven times.

From the foregoing it would appear that the composite aggravated robber has not learned from experience and has had considerable trouble adjusting to society. He has not been very successful at those things upon which our society places high value, such as educational achievement, occupational skills, steady employment, and satisfactory military service. It should come as no surprise that he has a considerable number of emotional problems, some of which are very serious and some of which make him potentially very dangerous. Being unable to compete and gain recognition on society's terms, he seeks another way to achieve gratification of his needs and to gain status. Often, he takes out his frustrations through assault on others and feels his weapon is an equalizer in his battle against society. The chances are 50-50 that he has been identified as a psychopathic personality, although he may exhibit either neurotic or psychotic tendencies as well. He is unsure of himself and has little respect either for himself or his fellow man. But he is not even successful in the role he has chosen to play. His crimes are not well thought out, even those involving considerable violence and large sums of money. More often than not, the amount of money involved is small. His emotional problems may have been identified as far back as his first arrest or his first commitment, but no one has done anything about it. He has been without help for so long that the prognosis is very dubious.

He is likely to drink, although moderately in 50 per cent of the cases. If he is a heavy drinker, his drinking has usually been involved in his criminal activity. He drinks to compensate for his inability to get along, takes on false courage, acquires a weapon, and sets forth to redress grievances. It is much less likely that he uses narcotics. If he is a narcotics user, it is probable that he only uses marijuana, although in a number of instances he has been a user both of marijuana and heroin. In only a few cases will he both drink and use narcotics. Usually in these circumstances, he is a moderate drinker. There are a few instances, however, where he is both a heavy drinker and a "main liner." It is in these few instances that psychiatric evaluation indicates an extremely troubled and potentially dangerous pyschopathic personality.

He is more likely to come from a poor home environment, usually from a broken home. It is surprising, however, how often his home background is either good or average, the same being true of the family's financial situation. He probably has three siblings. A family background with five or more brothers or sisters is not unusual, but not as prevalent as might be expected. It is interesting to note,

too, that usually he is the only one in the family to have gotten into trouble repeatedly with the law. In most cases, his brothers and sisters have made some kind of an adjustment and accept society. They may also have emotional problems, but these problems have not brought them as often in conflict with society.

Narcotics Violators

The narcotics violator tends to be a man in his late twenties (28 to 30 years of age). In approximately eight cases out of ten, he shares membership in a minority group: Spanish-American, 44 per cent; Negro, 37 per cent; and Indian, one per cent. He is likely to have some matrimonial record: either he is legally married or involved in a common-law relationship (26 cases out of 70); or he is divorced or separated (22 cases). The average number of children born to the inmate and his partner is one.

Among narcotics violators, 93 constitutes the average I.Q., and in 16 out of 56 cases the degree of intelligence falls below 90. It should be noted, however, that in 27 per cent of the cases, the intelligence quotient lies somewhere between 100 and 110. It would appear that very low intelligence is partially offset by scores in the "bright normal" category. The I.Q. of the composite narcotics violator is an index to his educational attainment -- a median of nine grades. In only scattered instances has he earned a high school diploma, or the equivalent thereof (three out of 69 cases). In 18 cases his education has not extended beyond the seventh grade. His employment record tends to be sketchy; in the majority of cases he has worked as a laborer, and as a rule, jobs are of short duration. As for service in the armed forces, no history can be found in 42 cases. Where the inmate has served in a military branch, the discharge, in more than half the cases, is one of the following types: honorable, with a court martial or courts martial record (three cases); conditions other than honorable (six); dishonorable or "bad conduct" (two); and undesirable (two).

Serious emotional problems are common among narcotics violators. The personality of the violator, in one out of three cases, is marked by a psychopathic disorder. As might be suspected, he is very likely to use drugs in some form (56 out of 70 cases), especially marijuana (31 cases), and frequently he is addicted to narcotics (26 cases). As for alcohol, moderate consumption is the rule. Only four per cent of narcotics violators are alcoholics.

In more than half the cases (33 out of 65) the home environment can be characterized as "poor." There appears to be some correlation between the "one-parent" home and an undesirable environment. In 29 per cent of the cases the environment can be described as "good." The median number of siblings is four.

In nearly all cases the narcotics violator has run afoul of the law prior to his present offense. The chances are almost one out of two that he has a juvenile record, and in approximately 69 per cent of the cases there is a history of felony convictions. Of those 48 inmates with prior felony records, 14 (or 29 per cent) have committed a previous felonious act involving the possession or use of narcotics.

In each case of narcotics violation, the individual involved was charged with "possession of narcotics" or "possession of narcotic drugs." Nothing else (such as use of drugs) was specified. However, other information reveals that at least five of the violators who used drugs were also peddlers of narcotics.

Simple Robbery

The robber is likely to be an individual in his middle twenties (25 to 27). In the majority of cases the ethnic background is Anglo (54 per cent), as opposed to Spanish-American (31 per cent) and Negro (15 per cent). As for marital status, the probability of his being single (with no marriage record), or divorced or separated, is strong (66 per cent). In 40 out of 123 cases he is either legally married or involved in a common law relationship. Where children have been born to the inmate and his partner, the number ranges from one (in 26 cases) to five (in three cases).

Among robbers 94 is the median intelligence quotient, and in only two cases out of 92 does the level of intelligence fall within the "superior" range (above 120). However, 35 inmates are clustered in the 100-120 bracket. It appears that scores of "normal," "bright normal," and "superior" are balanced against scores below 91. The I.Q. of the composite robber serves as a clue to his educational achievement -- usually eighth grade. In 32 cases out of 122, his education has been discontinued at the end of seventh grade, or before. Yet, it is noteworthy that six inmates have completed twelve grades, and that two have attended one year of college. Because of lack of occupational skills, the robber is ill-equipped for life; in only 20 to 25 per cent of the cases does he possess what could be labeled a "skill." No occupation can be listed in 18 of the 123 cases, and in 52 of the remaining 105 cases, he has been employed as a laborer. Jobs, in the majority of cases (57 per cent), have been on a short-term basis, although 21 per cent have a record of relatively steady employment.

As for membership in the armed forces, no service history can be found in 57 cases out of 121. Where the inmate has served in a military branch, the discharge, in 84 per cent of the remaining 64 cases, is one of the following types: honorable, with a court martial record, or violation of the 104th Article of War (11); honorable, inaptness (two); convenience of the government (two); unsuitability (two); conditions other than honorable (17); dishonorable or "bad conduct" (12); and undesirable (six).

In most cases the behavioral pattern of the robber points to emotional disturbance. In 51 cases out of 111, a psychopathic disorder characterizes his personality; and in 29 cases he has been identified as neurotic. Only in nine cases is there no evidence of emotional problems. It would appear that the robber's emotional condition can be related, in part at least, to the type of home environment in which he was raised. In 57 of 121 cases, the environment can be classified as "poor." Of these homes 18 were headed by one parent. On the other hand, 44 of the home environments can be described as "fair," and 20 as "good." On the average, the inmate has three to four siblings.

The robber, in 108 out of 122 cases, consumes alcoholic beverages. In nearly half of these cases (108), such consumption is moderate, but in 27 cases, the drinking is heavy, with 11 identified as alcoholics. As a rule, the robber refrains from the use of narcotics (93 cases in 122). If a drug is used, the chances are excellent that it is marijuana alone, or marijuana combined with other narcotics (e.g., heroin, morphine, dilaudid).

Rarely is the robbery for which he is now serving time the inmate's first offense or arrest. On the average he has collided with the law eight previous times (i.e., prior arrests, juvenile offenses, felonies). The average number of felony convictions is one; juvenile offenses, one. In only 19 of 122 cases has he been convicted of a felony or felonies in the same category as the present offense.

Summary of Questionnaire Responses[4]

Narcotics

The questionnaire responses indicate that narcotics violations are not a serious problem anywhere but Denver, although they have been on the increase in Pueblo. Westminster was the only other metropolitan area city to report a narcotics violation. Only three cities (Denver, Aurora, and Pueblo) reported aggravated robberies involving narcotics, with Denver having both the highest number and incidence. There were fewer aggravated robberies involving narcotics in 1960 than in 1959, but the increase during the first half of 1961 indicated that 1961 would be the highest of the three years. Of the total aggravated robberies reported, 6.5 per cent involved narcotics.

Aggravated Robberies

The number of aggravated robberies reported by eight cities increased from 516 in 1959 to 555 in 1960 (or 7.5 per cent).[5] The largest increase was in Pueblo -- from nine to 26 (or 188.9 per cent). Denver's aggravated robberies increased from 482 in 1959 to 497 in 1960 (slightly more than three per cent). It was estimated that Denver would have almost 600 aggravated robberies or almost a 20 per cent increase over 1960. A large increase was anticipated in Aurora and a decrease in Pueblo, with no significant change in other cities.

The incidence of aggravated robbery (number per 100,000 population) for the eight cities was 69.2 in 1959 and 74.5 in 1960. Denver had the highest incidence followed by Aurora, Westminster, and Grand Junction. Slightly more than 40 per cent of those arrested for aggravated robberies in Denver were released without charges during the two and a half years covered in the study.[6] Westminster was the only other city with releases.

---

4. Replies from police departments, district attorneys, courts and probation departments.
5. Aurora, Denver, Englewood, Fort Collins, Golden, Grand Junction, Littleton, Pueblo, and Westminster.
6. Denver was also the only city to have narcotics violators released without charge -- (54.4 per cent in two and a half years).

Over-all, almost 59 per cent of the aggravated robberies reported were unsolved in 1959, 1960, and the first half of 1961. Westminster had the highest proportion unsolved (83.3 per cent), followed by Grand Junction (77.7 per cent), Fort Collins (66.6 per cent), Denver (59.8 per cent), and Aurora (52.4 per cent).

Aggravated Robbers Before the Courts

It is difficult to make a precise analysis of aggravated robbers before the courts because of variations in the charge as indicated on the court dockets. 40-5-1, C.R.S. 1953, defines three different kinds of robbery: a) armed robbery -- weapon, no injury, death, or violence; b) aggravated robbery -- injury, assault, violence in connection with the robbery; and c) robbery -- all other. Charges are filed, however, and cases docketed to include four categories -- simple robbery having been added. From the examination of penitentiary case histories, it appears that many inmates incarcerated for robbery committed crimes which were more likely within the definition of armed or aggravated robbery. There is also no apparent difference between robbery and simple robbery.[7] It is also possible that charges on some defendants may have been reduced prior to filing, so that an analysis of charges reduced after filing may not present an accurate or complete picture.

With these reservations, the following findings were made:

1) During the two and a half year period, charges were reduced in at least 28 per cent and perhaps as many as 36 per cent of the cases.[8]

2) Charges were dismissed in approximately 12 per cent of the cases.[8]

3) The highest proportion of dismissed charges for judicial districts with a significant number of cases was the 1st, followed by the 10th, 17th, and 2nd.

4) The highest proportion of reduced charges during the two and a half years was in the 2nd District (Denver), followed by the 17th, 10th, and 1st.

Narcotics Violators Before the Courts

Almost 20 per cent of the charges of narcotics violations were dismissed, not including those charges dismissed before filing. In the 1st District, 36 per cent of the cases were dismissed; in the 10th District, 18 per cent were dismissed; and in the 2nd District, 17 per cent were dismissed.

---

7. For example, Denver's criminal docket shows that in 1959 only 13 aggravated robbers were docketed and 105 robbers; in 1960 the totals were 18 aggravated robbers and 128 robbers.
8. The proportion may have been higher after action was taken in the sizeable number of cases which had been filed in 1961, but were still pending at the time the questionnaires were returned.

In only 15 per cent of the cases were charges reduced. Again the 1st District had the highest proportion of cases in which charges were reduced (36 per cent), followed by the 17th (25 per cent) and the 2nd (13 per cent).

Probation

It appeared from the limited information available, that probation is granted sparingly to aggravated robbers and narcotics violators and that there are surprisingly few instances of probation violation, although many of these probationers have not finished their terms of probation and have considerable time left, so that it is likely that the number of violations would increase.

NARCOTICS CONTROL

Colorado's statutes on narcotics offenses and control were last amended in 1960 when much more severe penalties were adopted and addiction was made a misdemeanor offense. Despite these recent changes, narcotics legislation was included among the subjects listed in Senate Joint Resolution No. 14 (1961) for study by the Criminal Code Committee. The Criminal Code Committee began consideration of narcotics problems at its March 9, 1962 meeting at which time the committee heard from William B. Eldridge, American Bar Foundation, who was staff director for the foundation's recently published study entitled Narcotics and the Law, A Critique of the American Experiment in Narcotic Drug Control. A summary of Mr. Eldridge's discussion of narcotics problems follows:[1]

Scope of Study

After the joint committee of the American Bar Association and the American Medical Association completed its report on narcotics control and problems, it recommended five additional research projects. Two of these were medical, two were legal, and the other was sociological, which dealt with education. The two legal research proposals were given to the American Bar Foundation for its consideration. They were extremely large, sweeping proposals, and the foundation did not feel at the time that the areas were well enough defined or that money or personnel were available to go into them to the degree that these two proposals suggested. So it was decided to take these projects piecemeal and try to provide some useful information to the people concerned about narcotics control.

It's an area which is ripe with division and dissension among the people who espouse one method or another for controlling narcotics, and the most clearly defined area and the sharpest division occurs over the effectiveness of current policies. Consequently, the study was directed primarily at an empirical examination of the administration of narcotics drug laws throughout the United States to determine how well they are working, i.e., leaving aside for a moment all questions of humanity, sociology and everything else -- do they work?

Seven states and the District of Columbia were selected for intensive study and the laws of all the states were examined. New York, Massachusetts, Illinois, Ohio, Missouri, California, New Jersey, and the District of Columbia were examined in depth, including the reports of all the agencies that could be contacted and interviewed in those states. In addition to this, of course, the staff talked extensively with Federal Narcotics Bureau personnel and examined reports made available by the commissioners.

(Now, before I go any further, I want to say that any assistance I can offer this committee is limited. I am not an expert on narcotics drugs or narcotic addiction. If I am an expert on anything, it is what people know about it. I can tell you something

1. Excerpted from Legislative Council Criminal Code Committee, Minutes of Meeting of March 9, 1962.

about what people know and what they don't know. This is the first study that we have been able to find that is based purely on empirical use of reports and statistics. We put aside, for the most part, studies and reports on addict population in this country, because they are largely based on opinion.)

Narcotics Census. The Federal Bureau of Narcotics keeps an addict census. It is based on who reports what to the Federal Bureau of Narcotics, and I am sure that most of you are aware that when you have to take things at face value from a reporting agency, you have to accept the fact that the things are not accurate. The Federal Bureau of Narcotics only holds them out as reported statistics. However, very dangerous comparisons are made in justification of narcotics control policies by using the figures which are based on reported addicts. Currently, there are something like 45,000 addicts known by name. This figure is often used to balance against estimates from the early nineteen hundreds. Estimates at that time ranged from 100 to 200,000, and in some cases, up as high as a million. In using estimates, let's take the most conservative one of 100,000 and compare it with 44,000 now, and it is highly impressive. But 44,000 is not an estimate, it is an enumeration, and there is no factor added to it.

In these seven states people were contacted who either had the statutory responsibility for narcotics control or whose names were given us by people connected with narcotic drug control. Information was requested on the number of narcotic offenses, the sentences which were imposed, the length of sentences actually served, recidivism, and narcotic-associated crimes.

The replies to these initial inquiries were unbelievably disappointing. In most places the bureau or division or department charged by statute with maintaining information or with responsibility of the administration of drug laws had no idea what was going on. Other places, especially where records were kept, tried to do very, very little to enlighten us on what was going on. The statistics which can be marshalled can support any view you wish to take. If I were hired as a statistical consultant by this committee and I knew which way the committee was leaning, I could provide you with whatever kind of information you wished, and someone else could provide the exact opposite. It is one area where there is a wealth of statistical information, and very little of it is any good.

I think this is an extremely important point for all of you to keep in mind when you are considering modification in your own narcotic laws -- that almost all the information which can be provided to you is subject to rebuttal.

Ohio and Michigan

Ohio is frequently cited as the model jurisdiction in narcotics, supposedly having the stiffest law in the country. We have been told that narcotic addiction has fallen off at some dramatic rate in Ohio, but there is no way to prove or disprove this. The number of narcotic arrests has declined in Ohio, but not nearly so markedly as the supposed decline in addiction. Remember the tie-up between narcotic addiction and crime everywhere; the toll of narcotics addiction is said to provide 50 per cent of the crime in the large cities and

25 per cent of the crime throughout the United States. Narcotic addiction in Ohio is supposed to have declined something like 80 per cent since it enacted its harsh legislation, but the crime normally associated with narcotics has not. Larceny, robbery, burglary, forgery, and prostitution have not declined at all.

Now it seems to me that one must come to one of two conclusions on this kind of evidence. Either addiction has not declined in Ohio, or addiction does not promote the crime to the extent we are told it promotes. This is the confused picture all over the country.

Now, the next thing to keep in mind when examining the results of particular legislative efforts is that there is a world of difference between writing harsh legislation and having it applied. Michigan has a 20-year minimum mandatory penalty for the sale of narcotics. That's fine, but hardly anyone gets convicted in Michigan for the sale of narcotics, something less than three per cent. The charges are usually reduced to possession. This happens because the judges just will not impose the mandatory penalty. The American Bar Foundation has undertaken an extensive study of the administration of criminal justice, and this study has been going on for six years. When the staff was working in Detroit, it was found that people were not convicted for sale of narcotics, and there the answer they were given was that the judge would not allow it, because they would not impose 20-year minimum sentences on these people.

The California Narcotics Commission went to Michigan to talk with the judges, and their answer was that the juries would not convict. Whatever it is, they don't do it. Now, because of this, the proponents of heavy penalties for narcotics addicts will suggest (despite the fact that Michigan comes closest to their ideal of stiff sentences) that you must have cooperation from district attorneys and from the judiciary to make the law work. This is quite true, and I don't know how you are going to get it, unless you conduct an education program to convince the judges and the juries that such sentences are desirable.

Let us assume now that a state has severe penalty legislation and a cooperative judiciary and prosecuting body. Suspension, probation, and parole aren't stopped; they are going to get out. I could not find out from the course of this study very satisfactory answers on how many months people convicted of various narcotic offenses actually spent in prison. I could find it out in the federal system. There is no parole for narcotic addicts and there is a minimum five-year penalty, so they spend it all in prison. In examining these matters, we all need a lot more information than is available. One of the greatest services any state legislature could provide now is (regardless of whatever kind of control measures you feel are necessary) the development of some system for checking the effectiveness of these controls over a period of time; there is no way to do this now. Also the information that you need to know now about people charged and convicted of narcotics offenses is very extensive.

What causes addiction? Doctors state that many people can spend a long time in the hospital under severe pain. During this time they are being administered morphine or some less potent drug, and when the pain subsides, they are not addicted; another individual, however, under similar circumstances is addicted. Why? If it's true in

hospitals, it'll be true in prisons. When one individual starts using narcotics drugs, if he is removed from the source by imprisonment, he may come out fine and never need it again. The majority apparently do not. This does not mean, however, that addiction is not curable, that it cannot respond adequately to treatment. But the difficulty thus far in developing treatment and rehabilitation procedures in penal and medical institutions is that nobody (legislatures, appropriation committees, public health services, and such) has provided the funds to conduct follow-up studies to find out what happened.

I was really moved with great pity when I went to the Lexington Narcotics Hospital, which is staffed by an extremely dedicated group of people, but their job seems to be like that of a surgeon who operates on a patient for cancer today and never knows whether the man lived or died. Tomorrow he has to perform the same operation again, and he doesn't know whether to modify his procedure because he knows nothing about its success. If you are going to provide facilities to aid narcotics addicts, they will be valueless unless you provide additional facilities to find out what happened to them; and they have to be fairly extensive facilities.

In New York, a few studies have been conducted, and some of them have been most gratifying, particularly those on intensive parole care with narcotics patients. And when you remember that it costs something like $350 a year per parolee for this intensive care as compared to the $250 for a regular parolee, it sounds a little bit high at first, but in New York it costs about $2,000 a year to keep a person in prison. It costs money to support his dependents while he is there (they usually don't have any income), plus, we are told, millions and millions of dollars in depredation by narcotics addicts. Intensive care for parolees and rehabilitation services in penal institutions are really a small investment in comparison to what it costs without it.

Solutions to the Narcotics Problem

Now, let us turn for a moment to the proposed solutions to the narcotics problems. Generally, there are about five major ones. First, and the most important is the one now followed, that of applying criminal sanction. The proponents of criminal sanction as a method of control argue that for practical reasons you cannot make distinctions about people who have narcotic drugs in their possession. I can cite you an example, I think, which points up most of the criticism of the approach: I can have 10 pounds of uncut heroin in my possession and you can have one capsule, and under the federal laws we both go to prison for the same length of time. Now, it may be practical to administer such a law, but it is also justifiably unrealistic. There are severe problems about allowing and making distinctions in the amount of drugs possessed. It has been tried in New York. New York policemen tell me that the narcotics pushers carry one grain less than the statutory minimum for a misdemeanor, and their business flourishes. This may very well be true.

I don't see, myself, why the discretion that has been vested in judges for years in all sorts of criminal offenses has to be denied in this particular area. Judicial discretion allows the determination

of the sentence according to what the conditions are in the particular case, what the background of the defendant is, and what his prospects for recovery are. But the proponents of stiff penalty legislation apparently lose all their confidence in the judiciary. They maintain that the criminal sanction system will not work without uniform, severe application of sentences and contend there are always soft-hearted judges who let some go.

The converse of this is the fact that the statute is unyielding; there are always promising people who go to jail for five years, and who come out in worse condition than when they started. If you are going to operate on the assumption that the judges cannot be given the discretion to sentence in the area of narcotics as they are in other areas, then there is nothing to do except to impose a severe statutory minimum mandatory penalty without benefit of suspension, probation, and parole, which is done in several jurisdictions. If you can operate on the assumption that your judges can apply discretionary sentences with an eye to correcting the problems of particular individuals, then you are well on the way toward bringing together some of the best aspects of all of the proposals.

Narcotic Clinics. The antithesis of the criminal sanction approach is the narcotic clinic, which was tried in this country in the 1920's immediately after the Harrison Anti-Narcotic Act began to produce some chaos for a while because thousands of narcotic addicts who had been getting drugs freely before suddenly didn't, and they were apparently in very distressing circumstances. There are a lot of various methods proposed in connection with narcotics clinics. One proposal is that they be operated by the state on a 24-hour day basis, where the addict has to come and get every shot one at a time. Obviously this is unrealistic; a man who has to go to the hospital every four hours cannot hold a job. Another proposal is that he be given a one-day's supply or up to a two-days' supply. Of course, these proposals are all connected with registration requirements, photographs, fingerprints, etc., in order to prevent, insofar as possible, diversion of the drugs by the people registered.

The biggest advantage which the proponents of the narcotic drug clinics espouse is that it will cut into the illicit traffic. Doubtless it will; I don't think it will eliminate it. There is considerable evidence that narcotic addicts are associated with criminal activity in other ways than using narcotic drugs. Is this the cause or an effect? Which comes first, addiction or criminal activity? Here again various statistics are open to speculation. But there are going to be people who for reasons of their criminal activity are not going to register and are going to seek to continue to get drugs from illicit sources.

There is also a good possibility that if narcotic drug clinics are established where confirmed addicts can get their supply, there will be more active proselytizing by pushers. If this business is worth all we are told it's worth to the pushers, they are probably going to try and continue to develop new markets. I might say, right here, that certainly there is evidence of this. Most of the intensive investigation, like the senate and house hearing in this connection, indicate that proselyting to induce people into addiction is really not a very large problem. Certainly, addiction is a contagious

thing, but most people appear, as far as can be determined, to take it up like we take up smoking, because some of their friends did, or it was a clever thing to do. The first thing they know, they smoke all the time and cannot help it, but not because somebody came out and induced them to do it behind the barn or in the corn field.

There is a strong possibility, however, that if legitimate supplies are provided to existing addicts, then the pushers might turn to this kind of development. If one state sought to establish narcotic clinics before all states did, it probably would become an Eden for addicts. If they were established uniformly everywhere, there might be a different result.

British System. This same kind of problem arises in connection with the employment in the United States of something like the British system. The British system was something we were told for years didn't exist. This is because the British dangerous drug act reads very much like the Harrison Anti-Narcotic Act. Both of them have the usual terms that are subject to much interpretation, such as "in the course of the doctor's professional practice," "in good faith," and "for the relief of pain," etc. In Great Britain when the question of proper professional practice arose, a committee of doctors was formed to determine what proper professional practice was, or is. In the United States it was determined by non-medical arbiters.

On paper there are three things which distinguish the British system. (I mention the British system because it is widely advocated in this country.) This committee set forth three circumstances under which drugs could be administered to addicts: 1) when the patient is under treatment by a gradual withdrawal method with a view toward cure; 2) when, after attempts at cure, it appears that the drug cannot be completely discontinued because of the severity of withdrawal symptoms; and 3) when it has been demonstrated that the patient is capable of leading a relatively normal life if given drugs and that he cannot lead such a life without drugs.

Many American authorities say there is no such thing as this third condition, where a person can function successfully with drugs and cannot function without it. A number of others say that there are many such circumstances. The British say that they find them fairly often. Great Britain with a population of 50 million people has about 400 reported narcotic addicts. The United States, with something less than 200 million people, has a reported 44,000 narcotic addicts and an estimated 60,000, which is a very conservative estimate. Without doubt, the British reporting techniques are not as good as ours. I think that their addict population is doubtless higher than 400. But it requires the application of a pretty high error factor to raise that 400 up to a level comparable to our 60,000.

Recent studies in Great Britain have shown opposite conclusions. Two doctors sent by Governor Rockefeller to study the program in Great Britain came back and reported that addiction in Great Britain is not the result of their system, but their system is the result of the fact that they do not have a large addict problem. Mr. Scheerer, who has written a new book on the subject, reports the

opposite, that the British law has been instrumental in the shaping of public attitude about narcotics addiction and that public attitude in combination with the laws and the freedom of the doctors to treat addiction has resulted in their low addiction rate.

Now, if any attempt were made in this country by each state to adopt the British system, there would be some of the same problems that would occur with narcotics clinics, unless there was excellent cooperation from the medical society.

Medical Practice and the Harrison Act

After the enactment of the Harrison Act and the closing of narcotic clinics, many doctors continued to administer drugs to their patients (their addicted patients); some in an attempt to cure, some doubtless because it was easier and they were faced with no trouble as long as they kept giving the patient his morphine tablets, and some to make money. But the law enforcement authorities started putting doctors in jail at a fantastic rate, and the doctors immediately backed off from the problems of narcotic addiction. It is still basically a medical problem.

Today, in most places a sincere narcotic addict who wished to kick his habit would probably get politely turned away from the offices of most doctors because: 1) they are afraid of prosecution; and 2) because they have avoided the problem so long that they don't know how to treat narcotics addiction. The problem of the role of the doctor is basic and elemental in narcotics control statutes, administration, and policy. Right now there are some states where the doctor has virtually no discretion in treating an addict who comes to him for care. In California, ambulatory treatment is absolutely forbidden or addicts must be treated in prison or a medical institution approved by the state. And the required treatment, of course, is set forth in the statutes. "He shall not have more than X grains of morphine for 15 days, on the 16th day he shall be reduced to a smaller amount which continues on for another 15 days, and thereafter nothing." I think that this represents the extreme of intervention in medical practice by the legislatures. It allows for no variation by the doctor. The question of ambulatory treatment, of course, I think is an area in which legislatures have substantial interest because of their responsibility to protect the public. I think, however, that legislatures should examine very closely the improvements which have been made in narcotic addiction treatment, largely through psychiatry and through after-care provisions of parole facilities. Legislatures should determine anew whether it is really necessary for addicts to be locked up in order to be treated.

I would like to point out this fact about treatment. I know when I started this study I had what I believe was a typical view, that when a person becomes addicted to narcotic drugs, there is no way to stop the addiction without going through horrible ordeals, some of which may kill. Apparently, from what I have been able to discover, this isn't so under the withdrawal techniques now available at Lexington Hospital and at other treatment facilities. In most cases a narcotic drug user can be taken off narcotic drugs relatively painlessly in a matter of 10 days to two weeks, so that

his body does not require them any more. His psyche probably continues to require them in most cases thereafter, but this is where rehabilitation can bring about some dramatic changes in some people.

Talking with federal correctional institution people, however, I have been informed that their rehabilitation responsibilities have been completely undermined by mandatory minimum penalties. Psychiatric care and counselling services and parole and probation techniques, which have proven themselves in so many areas of general activity, require a motivation of some kind, and obviously the best kind of motivation when you are in prison is to get out. But the narcotic addict in the federal prison and the narcotic offender (and all addicts are offenders if possession is implicit in use) know that no matter how well they perform, how well they respond to treatment, how promising their future is, not one single solitary thing they can do can get them out one day earlier. You don't get very good cooperation in a rehabilitation program this way. And it's not a willful refusal to cooperate; you've just got to have a motivation, and it's not there.

Now a few comments about a couple of other suggestions and approaches: one is isolation, to put everybody away in a leper colony. There have been also recent suggestions (especially in New York and in other places) to create mass institutional facilities. In New York City, it was suggested that the facilities should have in excess of 10,000 beds for narcotic addicts to be taken off the streets and placed in medical-penal facilities for a period of a year or so for attempts at rehabilitation and then in long-term facilities thereafter. Obviously, this has a lot of merit to it, but the cost would be enormous, and in view of other problems that states are faced with, they are not justified in spending this amount of money on a problem as small as addiction.

Report Recommendations

I have suggested three things basically in the conclusion to my report: First, in the absence of compelling considerations, which I did not find in the course of the report, people who are charged with the responsibility of dealing with narcotic addicts ought not to be denied the means which have been found to be effective in other areas of criminal activity. And in this category I include judicial discretion in sentencing and the use of probation and parole procedures in the same way in which they are used in other criminal activities. There may be compelling considerations, but I think that they should be examined very carefully in light of what you are attempting to do, what the cost to the community is of maintaining people for extensive periods of time in prison, and what the result is when the people finally get out.

The second large conclusion I offered is that the adoption of new and untried approaches to narcotics problems should be postponed until additional information has been systematically gathered which will enable enlighted planning and avoid tragic steps. I have also prepared in the conclusion a statement of what I consider the minimum information which must be gathered in order to make a valid evaluation of narcotic rehabilitation, treatment, and correction

programs. These should be amplified by consultation with sociologists, psychiatrists, medical men, correctional people, and law enforcement officers. The ones that I have offered have been submitted to people representing all of these disciplines and have been generally accepted by them as important ingredients in such a plan.

Without bringing together for the purposes of study the kind of information I have suggested at the end of this report, people will continually be able to do as I am able to do right now, offer you a rebuttal to any kind of authority you quote for any kind of proposition. I don't believe that the proponents of harsh penalty legislation, who have had 20 to 40 years of experience, can prove their claims that it deals effectively with the narcotic problem. I feel quite sure that if they had incontrovertible demonstrative evidence, they would have offered it. And they didn't offer it, and I couldn't find it.

Mr. Eldridge provided the following additional information in answer to questions from committee members:

1) No state attempts to control addiction by confinement and treatment. Some states even make addiction a crime. A number of states, however, have some kind of provision for confinement of narcotic addicts if they don't commit a crime, but this is unrealistic because most of them don't have any facilities to treat these people.

2) Most officials and others concerned with narcotic problems agree that a) the pusher for profit should be penalized very heavily; and b) the addict should be provided with care. But there is considerable disagreement about what to do about the people in between, those who just sell enough dope to support their habit.

I don't have a satisfactory solution to offer for the people in between, because they present problems. The only suggestion I can offer is that this is best left to judicial discretion. When an addict is brought before a judge under circumstances that indicate that he is not really a profit-motivated pusher, even though he may have sold small quantities of drugs, let the judge determine whether he should be committed for treatment and care or whether he should be confined as a seller. It has been our experience that statutes alone which try to detail everything on this subject are not satisfactory, and they don't allow for exceptional conditions.

3) Narcotic addiction is a medical problem and the British regard it as such, but we don't. Sometimes, lip service is paid to this concept by law enforcement people and by legislators, who then go right ahead and legislate on medical matters. I think that the medical profession should be encouraged to participate again in efforts to cope with the problem. Today, the only thing medicine has to do with narcotics addiction, essentially, is through the public health service at the two federal hospitals. I would say that if we were to adopt the British system effectively in this country, we would not get the same results the British get, probably. And I say too, that this is not all due to the sociological differences, which are so often offered. One major difference is the amount of money that is available in this country as compared with Great Britain and other countries. We are the prime target for international narcotics sellers.

4) If a clinic program is something more than a dope cafeteria, I think you might also accomplish perhaps an even more important objective of educating the public about narcotic addiction and what kind of a threat it really offers. Despite the fact that I say that physical and moral problems are not so bad, there is something basically wrong with addiction from my ethical point of view, and I think mine is fairly typical. The addicts are people who have to depend on a crutch in order to live, in order to orient themselves to their community. Of course, we all have crutches of one sort or another, but addiction is a particularly dangerous one because there is no realism involved with people who are under the influence of drugs. With the clinic you could strike at illicit traffic, you could remove serious health problems that result from the way in which some people use drugs rather than from the use itself, things such as absesses and perforated navels and emaciation because they spend all their money on drugs, etc. These things could be reduced through the clinic, and if you add some real treatment facilities, you could accomplish a good deal.

5) The New York Academy of Medicine has proposed a plan for dealing with addiction problems through the establishment of treatment clinics. These clinics would have the power to dispense narcotic drugs in connection with treatment. Addicts would be registered, photographed, fingerprinted, etc.; they would receive a three days' supply during the time they are trying to work with them. Their view is one that I have expressed earlier: an effective cure to addiction must be based on real life circumstances, and you must persuade the addict to give up drugs of his own free will. Clinic personnel would try to diminish the narcotic dose gradually, establishing, if necessary, a stabilized dose while they continue to work with him on some cure. You must realize that some people will not respond to any kind of treatment, blandishment, coercion or anything else, and they recommend that these people be given a stabilized dose.

Now, one of the things that is wrong with this approach is the problem about the amount of the stabilized dose. They have found thus far no maximum toleration that an addict can develop. Seventy-five grains is the highest I have heard of, but this man apparently could have gone on indefinitely taking more and more and more; the body will adjust to it. It is easy, however, to establish a dosage at which withdrawal symptoms can be forestalled. For most confirmed addicts, the experiments at Lexington suggest that 10 grains a day will take care of most everybody. The problem is that a stabilized dose, as the body becomes accustomed to it, produces no real kicks anymore; the euphoria is gone. All addicts are not necessarily after euphoria. Here you get into arguments with the psychiatrists and physicians about what the addicts are really after. Some say that their real motivation is to stave off withdrawal symptoms, which are very acute. In most cases, a stabilized dose will do it, but if they are really after euphoria, a stabilized dose will not do it. If there is any kind of ambulatory arrangement where the addict is to be supplied with drugs, either on a permanent basis or as part of the treatment, you will have a problem, with some of them at least. They may have to be given ever increasing doses or they may continue to turn to underworld traffic in order to achieve euphoria.

6) The majority of addiction occurs in areas not so much characterized by poverty as characterized by dislocation, for example, East Harlem in New York and the south side in Chicago are areas where people live who have come to the city recently from some place else. They are people without stability, who are transients, live in crowded conditions, and are not established in the community. Currently, they are mostly Negroes and Puerto Ricans. Sometimes certain areas are always a problem. We know that in Chicago, for instance, the south side has always been the area of addiction. Before the Negroes and the Puerto Ricans, who live in this area now, it was the Irish, because they were the people who were displaced, immigrants who left a community with which they were familiar and oriented and whose lives were disturbed and torn up, and they turned to narcotics too.

7) Usually, the only determinant as to whether the state or federal government prosecutes narcotics offenders is who has the stiffest penalty. Federal authorities, if there is a favorable situation in a given state (for example, if the penalty is high enough and/or if the judges are harsh), will let these offenders be tried before the state court. If it is a federal addiction offense such as possession or sale, and they think the local climate is not good enough, then they will try them in a federal court. As a general rule the Federal Bureau of Narcotics says it is not interested in little people. Its aim is to strike at the traffic itself, and it assists the local people a great deal in finding little pushers and the end men, while it works on the big promoters.

CRIMINAL PROCEDURE RULES AND STATUTORY CHANGES

The Colorado Supreme Court adopted the rules of criminal procedure on September 1, 1961. These rules were originally drafted by the Criminal Law Committee of the Colorado Bar Association. Since the adoption of the rules, a subcommittee of the bar association's criminal law committee has been examining the rules and Colorado's criminal statutes to determine: 1) which statutes should be repealed or amended; and 2) which rules should be amended or added. This subcommittee submitted the following report to the Legislative Council Criminal Code Committee:

Report to the Criminal Code Committee

on

Effect of Colorado Rules of Criminal Procedure on Existing Colorado Statutes

Existing Colorado statutes which parallel the Colorado rules, whether the language is exactly the same or not, should be repealed as creating unnecessary duplication and confusion. Existing statutes which are inconsistent with the rules must be repealed to avoid the even greater confusion involved in the question of which law to follow. Some statutes should be amended rather than repealed.

The search for statutes to be repealed or amended led to some discoveries of matter contained in the statutes which might properly be added to the rules. A list of suggested amendments to the rules is attached for the consideration of the Supreme Court. It will in some instances be quite important to amend the rules at or before the time when the statutes are repealed.

Portions of the original report of this subcommittee were allocated to members of the C.B.A. Committee on Criminal Law for careful checking before submission to the Criminal Code Committee of the Legislative Council for submission to the 1963 Legislature.

Since Colorado criminal procedure is now principally a compound mixture of Colorado Supreme Court rules and Colorado statutes, and because the rules do not purport to cover all phases of criminal procedure, it is recommended that the section numbers and titles of statutes which are repealed should be left

on the statute books, to which should be added a reference to the applicable Rule of Criminal Procedure, as was done by Congress in the case of the United States Code, title 18, part II (Criminal Procedure). Thus when the text of 39-2-3 of C.R.S. '53 (as amended) is repealed, what would remain in C.R.S. '53 would be:

39-2-3. Warrants on suspicion -- commitment -- bail.

See Colorado Rules of Criminal Procedure, rules 3, 4, 5, 9, 46.

On the other hand, 39-2-1 and 39-2-2, which deal with topics not covered by the rules, would remain as they now are.

Subcommittee on Repeal of Statutes

William L. Rice
Austin W. Scott, Jr.

The portion of the report enumerating the statutes to be amended or repealed was reviewed by the Legislative Reference Office and after a meeting with the bar association, further changes were made. Following is the list of statutes for which repeal or amendment is recommended:

Statutes to be Repealed or Amended

39-2-3 Repeal, as amend. Colo.L.'61	Covered by Rules 3, 4, 5, 9 and 46. And perhaps add bail bond terms concerning appearance in court to Rule 46.
39-2-4 "	Rule 7(b)(1), providing for names of witnesses when information is filed, is inconsistent with 39-2-4 on naming witnesses at preliminary examination in the case of those not admitted to bail.
39-2-5 Repeal,	but amend Rule 5 to allow defendant in custody to demand names of witnesses before the filing of the information as provided in Rule 7(b) (1).
39-2-7 Repeal, as amend. Colo.L.'61	because covered by Rules 4 and 5(a)(1), all but last sentence, which concerns hot pursuit across county lines by officers with warrant. This part of statute should be reenacted and include Chapter 103, Laws of '61 on hot pursuit of traffic violator across county or municipal lines. If is recommended that a statute be enacted as to who can execute a warrant or summons, e.g., authorizing police officer of X County to arrest on warrant issued by JP of Y County and sent to or communicated to him.

39-2-8	Repeal,	upon amending Rule 4(a) to permit issuance of warrant to a named person, as in 39-2-8, as well as to any officer authorized by law. 39-2-8 on taking arrestee before issuing JP must be repealed as inconsistent with Rules 4(a)(1)(ii) and 5(a)(1) on taking him before nearest JP.
39-2-10	Repeal,	because inconsistent with Rule 5(b)(2) and Rule 9 requiring taking arrestee before nearest JP.
39-2-11	Repeal.	Covered by Rule 4(b)(1)(v). Second sentence of 39-2-11, that technical mistakes in arrest warrant do not require release, though not mentioned in Rules, is in the spirit of the Rules.
39-2-12	Repeal.	Covered by Rules 5(d) and 46, which by implication provide that one for whom bail is fixed who cannot raise it till later is entitled to release when he later raises it.
39-2-16	Repeal.	Covered by Rule 46(a)(2). But perhaps Rule 46 should be amended to provide for return day on the bond.
39-2-17 as amend. Colo.L.'61	Repeal.	Covered by Rules 9(b)(1)(second sentence) and 46. (Perhaps Rule 46(c) should be amended to provide specifically for a return date on the bond.)
39-3-3	Repeal.	Covered by Rules 8(a) and 13.
39-3-4	Repeal.	Covered by Rules 8(a) and 13.
39-3-6	Repeal.	Covered by Rule 7. (But as Rule 7(b)(1) limits requirement of witnesses' names to informed-against defendants, Rule 7 should be amended to provide that indicted defendants are also entitled to names of witnesses. Perhaps Rule 10 should be amended to provide that a defendant at arraignment, or as soon thereafter as the jury panel is drawn and the list of those chosen compiled, be supplied on request with the list of names making up the jury panel.)
39-3-7	Repeal.	First sentence covered by Rules 12(b)(2) and 12(b)(3), the balance by Rule 7(c). See Rule 52 on harmless error.
39-4-1	Keep.	It is important to keep 39-4-1, since Colorado Constitution, Art. II, § 8, provides that "until otherwise provided by law" felony prosecutions require indictment, and "law" here probably means statutory law.
39-4-2	Repeal.	Covered by Rule 7(b)(1), Rule 7(b)(3) and Rule 7(c).
39-4-3	"	First sentence covered by Rule 7(c), second sentence by 8(a).
39-4-4	"	Covered by Rule 7(c) and Appendix of Forms, form 6.

39-5-1	Repeal.	First sentence is covered by Rule 7(b)(2), and the second sentence by Rule 7(b)(3).
39-5-2	"	Covered by Rule 5(d), last sentence.
39-6-7	"	Covered by Rule 17.
39-6-8	"	Covered by Rule 15(b).
39-6-9	"	Covered by Rule 15(b) and (d).
39-6-10	"	Covered by Rule 15(d) and (e).
39-6-11	"	Covered by Rule 15(f).
39-7-1	"	Covered by Rule 9. Sentence in 39-7-1 on transporting prisoner through counties is not necessary, though not provided for in Rules.
39-7-5	"	Covered by Rules 11(a) on arraignment and 55(a) on the criminal docket.
39-7-6	"	Covered by Rule 12(a) and Rule 47.
39-7-7	"	Covered by Rules 12(a) and 47.
39-7-8	"	First sentence covered by Rule 11(a), second by Rule 32(b).
39-7-9	"	Covered by Rule 11(a).
39-7-10	"	Covered by Rule 48(a).
39-7-11	"	Covered by Rules 8(b) and 14.
39-7-12 as amend. Colo.L.'61 c. 101	"	Covered by and inconsistent with Rule 48(b).
39-7-17	"	Covered by Rule 52 requiring disregard of immaterial variances and of defects and irregularities (including those at trial or in judgments or in informations and indictments) not affecting substantive rights.
39-7-18	"	Covered by Rule 30.
39-7-19	"	Covered by Rule 30.
39-7-20	"	Covered by Rule 31(a)(2).
39-7-22	"	Covered by Rules 37 and 51.
39-7-23	"	Covered by Rule 39(c).

39-7-24 as amend. Colo.L. '55		Should be retained, bacause of Rule 39(a) on continuing present writ-of-error procedure, until Colorado Supreme Court rewrites Rules 37, 38 and 39 on writ of error in criminal cases. (The Supreme Court has this rewriting task under advisement.)
39-7-26	Repeal.	Inconsistent with Rule 39(c).
39-7-27 as amend. Colo.L. '55		Same comment as for 39-7-24 applies here.
39-7-28	Repeal,	but only after Rule 38 is amended to provide (as 39-7-28 now provides) that the trial court may, at the time of sentence, stay a sentence of imprisonment on motion of a dependant who wishes to secure Supreme Court review on error.
39-7-29	Repeal.	Covered by Rule 44. (But perhaps add to Rule 44 that in misdemeanor case an attorney may, not shall, be appointed to represent an indigent defendant.)
39-7-30	Amend.	This might read: "When a court of record appoints an attorney to represent an indigent defendant, it shall be the duty of the appointing court to allow the attorney a fee, to be fixed by the judge of the court, and to be paid out of the county treasury of the county wherein the indictment or information is found. At the conclusion of the proceedings in the trial court the clerk of the appointing court shall give the attorney a certified copy of the order appointing him counsel, on which the judge of the court shall endorse the amount of the fee allowed, upon the presentation of which the county commissioners of the county shall order a warrant drawn upon the county treasurer in payment of such fee. If the trial court appoints an attorney to represent an indigent defendant for purposes of review by the Colorado Supreme Court, the trial court upon conclusion of such review shall allow the appointed attorney a fee as herein provided."
39-7-31	Repeal.	Covered by Rule 44.
39-7-32	"	Covered by and inconsistent with Rule 17(b) because Rule is not limited to judicial district or 100 miles.
39-8-1(1) as amend. Colo.L. '55	"	Covered by Rule 11(b).
39-9-1	"	Covered by Rules 18(b) and 21(b).
39-9-2	"	Covered by Rule 21(a)(2)(first sentence).
39-9-3	"	Inconsistent with Rule 21(a)(2) on selection of the new judge to try the case.

39-9-4	Repeal.	Covered by Rule 21(a)(1).
39-9-5	"	Covered by Rule 21(c)(1); inconsistent as to number of affidavits.
39-9-7	"	Inconsistent with Rule 21, which does not and should not limit number of venue changes.
39-9-8	"	Covered by Rule 21(c)(3).
39-9-9	"	Covered by Rule 21(c)(4).
39-9-10	"	Covered by Rule 21(c)(4).
39-9-11	"	Covered by Rule 21(c)(4).
39-9-12	"	Covered by Rule 21(c)(6).
39-9-13	"	Covered by Rule 21(c)(6).
39-9-14	"	Covered by Rule 21(c)(5).
39-9-15	"	Covered by Rule 21(c)(6).
39-9-16	"	Covered by Rule 21(c)(2).
39-9-17	"	Covered by Rule 21(c)(2).
39-9-18	"	Covered by Rule 21(a)(3).
39-9-19	Amend,	first sentence to read the same as Rule 21(c)(7). Retain second and third sentences of 39-9-19.
39-9-20	Repeal.	Covered by Rule 21(c)(2).
39-16-2	"	Covered by Rule 32(a)(1) and Rule 32(a)(2).
40-2-12	"	Covered by Rule 18(b). No need for specific statute on murder, for Rule 18(b) covers all crimes (including murder) committed across county lines, e.g., A in X County shoots BB gun through glass window in Y County. No need for special statute on death in another county or state.
40-9-19	"	Covered by Rule 41. It is suggested that all other special search and seizure statutes be repealed, so that rules on search and seizure will be uniform.
78-2-13	Repeal,	because covered by Rule 24(c). As to civil trials, the matter is covered by Colorado Rules of Civil Procedure, Rule 47.

78-5-1 Amend, by deleting from 78-5-1 the provision found in Rule 24 (a)(3) on petit jury in criminal case. But leave the part on grand jury now in 78-5-1.

78-5-2 Keep, because although the criminal aspect is covered by Rule 24 (a)(2)(iv) (second clause), it must be kept for purposes of civil trials, no Civil Rule covering the matter.

78-5-3 Repeal. Covered by Rule 24 (a)(2)(vi). (78-5-3 is a purely criminal statute.)

78-5-4 " Covered by Rule 24 (b)(1). (78-5-4 is purely criminal.)

78-5-5 Keep, because although the criminal aspect is covered by Rule 24 (a)(4), it must be retained for purposes of civil trials, since no Civil Rule covers the matter.

Suggested Amendments to Rules

1) Amend Rule 4(a) by adding in line 4 after "execute it" the words: "or to any other person named in the warrant to execute it."

2) Amend Rule 5(d) by inserting after next-to-last sentence and before last sentence this new sentence: "If the justice of the peace commits the defendant, either because the offense is not bailable or because the defendant is unable to procure bail, he shall endorse upon the warrant of commitment the names and addresses of the prosecution witnesses who testified at the preliminary examination and shall furnish the defendant with a copy of the warrant so endorsed."

3) Amend Rule 7(a) by adding a new sentence at the end: "The indictment shall be returned in open court and shall have endorsed thereon the names of witnesses in the same manner and with the same effect as in the case of the endorsement of witnesses upon an information."

4) Amend Rule 10 by adding a new subsection (f) at the end: "(f) As soon as the jury panel is drawn which will try the case, a list of the names of the jurors on the panel shall be made available by the Clerk of the court to defendant's counsel, and if the defendant has no counsel the list shall be served on him personally or by certified mail."

5) Amend Rule 21(a)(3) by inserting in line 4, after the word "any" and before the word "cause," the word "other."

6) Amend Rule 35(b) by adding the following sentence at the end: "The order of the trial court granting or denying the motion is a final order reviewable on writ of error."

7) Amend Rule 38(a)(2) by inserting the following sentence after "(2) Imprisonment": "The sentencing court shall on written motion of a defendant stating that he intends to seek review on writ of error stay a sentence of imprisonment."

8) Amend Rule 44 by inserting at the end thereof the following new sentence: "In any misdemeanor case, upon such a showing of indigency, an attorney may be assigned to represent the defendant at every stage of the trial court proceedings."

9) Amend Rule 46(c) by adding to the end of the first sentence the following: "in court on a designated day, or on the first day of the next term of court and from day to day thereafter, as the court may deem appropriate."

10) Amend Rule 21(c)(4) by changing the word "Recognizance" to read "Bail Bond" in the title and "bond" elsewhere.

11) Amend Rule 46 by striking the present 46(e) and adding the following:[1]

"(e) Forfeiture.

"(1) Declaration. If there is a breach of condition of a bond, the court shall declare a forfeiture of the bail.

"(2) Setting Aside. The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

"(3) Enforcement. When a forfeiture has not been set aside, the court shall on motion enter a judgment of default, and execution may issue thereon. By entering into a bond the obligor submits to the jurisdiction of the court. His liability may be enforced without the necessity of an independent action. The court shall order the issuance of a citation directed to the obligor to show cause, if any there be, why judgment should not be entered against him forthwith and execution issue thereon. Said citation may be served personally or by certified mail upon the obligor directed to the address given in the bond. Hearing on the citation shall be held not less than 20 days after service. The defendant's attorney and the prosecuting attorney shall be given notice of the hearing.

"(4) Remission. After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision. If a bond forfeiture has been paid into the general fund of the county, the commissioners thereof shall be notified of any application for remission.

"(f) Exoneration. The obligor shall be exonerated as follows: 1. When the condition of the bond has been satisfied; or 2. When the amount of the forfeiture has been paid; or 3. Upon surrender of the defendant into custody before judgment upon an order to show cause, upon payment of all costs occasioned thereby. The obligor may seize and surrender the defendant to the sheriff of the county wherein the bond shall be taken, and it shall be the duty of such sheriff, on such surrender and delivery to him of a certified copy of the bond by which the obligor is bound, to take such person into custody, and by writing acknowledge such surrender.

---

1. These provisions are also included in the recommended bail bond statute and should be deleted from the proposed statute, if the Colorado Supreme Court decides to incorporate them in the rules as set forth here.

"(g) Continuation of Bonds. In the discretion of the trial court and with the consent of the surety or sureties, the same bond may be continued until the final disposition of the case in the trial court to pending disposition of the case on review."

ADDENDUM

Proposed Revision of Criminal Insanity Statutes, Procedures, and Test: Some Constitutional Considerations

This analysis of the revision in criminal insanity statutes and procedures proposed by Senator Edward J. Byrne[1] was prepared at the request of the Criminal Code Committee by Professor Jim R. Carrigan, University of Colorado Law School and legal consultant to the committee. The committee asked Professor Carrigan to make this study because of the far-reaching changes proposed by Senator Byrne and the constitutional questions raised by these changes. Senator Byrne did not have the opportunity to review this analysis prior to its inclusion in this report because of time limitations resulting from the provision in Senate Joint Resolution No. 14 (1961) directing the Legislative Council to report the findings and recommendations of the Criminal Code Study no later than the convening of the Forty-fourth General Assembly in 1963. For this reason, Senator Byrne has not added his comments on the findings made by Professor Carrigan.

Features of the Proposed Revision

The proposal made by Senator Byrne has six salient features:

1) repeal of the present statutory plea of "not guilty by reason of insanity at the time of the alleged commission of the crime," (C.R.S. 39-8-1 (1) (Supp. 1960) and statutory abolition of the common law defense of insanity;

2) substitution of an immunity from prosecution on the ground of insanity at the time of the alleged crime for the present and common law defenses of insanity;

3) substitution of a three-judge panel to try the fact of insanity on the defendant's motion to quash the indictment or information for the present jury trial of the insanity plea;

4) substitution of the new, broader test adopted in the United States Court of Appeals for the Third Circuit in United States v. Currens, 290 F.2d 751, 774 (3d Cir. 1961) for the present legal test of insanity (C.R.S. 39-8-1 (2));

5) adoption of a greatly improved procedure for commitment and treatment following a finding of insanity constituting a ground for immunity from prosecution; and

6) adoption of a standard for release after commitment calculated to protect society while assuring the defendant reasonable means of obtaining his release upon successful treatment of his mental condition.

1. See pp. 122-124 of this report.

This analysis covers these features of the proposal in the order presented above.

Abolition of the Defense of Insanity

An attempt by the legislature to abolish the defense of insanity entirely in substance as well as in form -- and to treat the insane as fully responsible to the criminal law for their actions would no doubt be unconstitutional. (I Wharton, Criminal Law and Procedure 83 (Anderson ed. 1957)). Nevertheless, such an attempt to abolish the insane defendant's immunity from punishment for his act while insane must be distinguished from statutes merely subjecting that defense to procedural restrictions, while leaving the essence of the defense intact. "Statutes which are merely reasonable regulations of procedure do not destroy the right to raise the defense and are constitutional." (Ibid.) Thus, it was held that the due process guarantee of the United States Constitution, applied against the states by the Fourteenth Amendment, was not violated by an Oregon statute which imposed the burden of proving his defense of insanity beyond a reasonable doubt on a defendant charged with crime. The court declared that due process guarantees of the Fourteenth Amendment require that a state's criminal procedure not offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental...." (Leland v. Oregon, 343 U.S. 790 (1952)).

It would seem that the idea that an insane man cannot be punished by criminal prosecution for his act while insane is deeply enough rooted in the traditions of common law countries to be ranked as fundamental to our concept of fair procedure. The whole fabric of our criminal law is contrived on the premise that men are responsible for their actions. It is not a new idea that: "An involuntary act, as it has no claim to merit, so neither can it induce any guilt; the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable. Indeed, to make a complete crime cognizable by human laws, there must be both a will and an act." (4 Blackstone, Commentaries 20, 21.)

If it be argued that the purpose of the criminal law is not punishment but deterrence, the rejoinder may be that an insane man's inclination to commit crime will not be deterred either by the example of punishment meted out to others or the threat of punishment to himself. Nor can it be said that the many examples of modern statutes defining certain conduct as criminal without regard to specific intent or knowledge have established de facto that the legislative branch may make acts criminal without regard to the state of the defendant's mind when the act is committed. Even where the crime itself requires no wrongful intent (e.g., the sale of impure food or sexual relations with a girl under the statutory age of consent while fully believing she is of age) the act must be voluntary to be a crime. Thus, if one is forced to drive his car over the speed limit, he would have a defense, although no specific intent is required. His act was not his, it was not volational, and therefore he is not criminally responsible. All crime presupposes a sane mind capable of directing voluntary muscular action. The act of will is as much an element of the crime as the physical act which is prohibited. The legislature could no more abolish,

in the crime of selling liquor to minors, the mental element than it could abolish the requirement that to support a conviction the evidence be required to show a sale of liquor to a minor.

"An act done by me without my will, or in the absence of my will, is not my act." (State v. Strasburg, 60 Wash. 106, 110 Pac.1020, 1024 (1910)). "It is not at all certain that the courts would consider themselves powerless to question the constitutionality of legislation which undertook to eliminate the element of intelligent intention or volation as a requisite to criminal liability." (Weihofen, Mental Disorder as a Criminal Defense 478 (1954).) A 1928 Mississippi statute abolishing the defense of insanity in murder cases but allowing insanity at the time of the offense to be shown in mitigation was held unconstitutional as depriving the insane defendant of his life or liberty without due process. (Sinclair v. State, 161 Miss. 142, 132 So. 581 (1931).) Four of the six Mississippi Supreme Court Justices who held the statute unconstitutional also felt that it amounted to imposing "cruel and unusual punishment," and deprived the insane defendant of the constitutionally guaranteed right to be heard by himself or his counsel, which right could not be intelligently exercised by one not sane. (Id. at 587) This last argument is closely related to the right of the defendant to be present in person at his trial, a right which presupposes a mental presence as well as a physical presence.

At this point it is well to recall that the Colorado Constitution forbids deprivation of life, liberty, or property without due process of law (Art. II, §25), guarantees the right of the accused in a criminal case to appear and defend in person (Art II, §16), and prohibits "cruel and unusual punishment." (Art. II, §20.) In addition, the state constitution guarantees the defendant the right "to meet the witnesses against him face to face...," a right which would be of no value to the insane. (Art. II, §16). In State v. Strasburg, supra, Chief Justice Rudkin of the Washington Supreme Court felt that all of these guarantees were probably violated by a statute purporting to abolish the defense of insanity. (110 Pac. at 1028, concurring opinion.) In addition, he asserted that the defendant's right to be informed of the nature and cause of the accusation was denied, for the insane defendant could not be effectively informed. (Cf. Colo. Const. Art. II, §16).

In summary, it seems clear that the legislature could not wholly abolish the defense of insanity. Even though the United States Supreme Court has never expressly so held, it is likely that the court would hold such a statute to violate due process. (See Wharton, Criminal Law and Procedure 83, note 1, and the cases there cited.) The only attempts by state legislatures to abolish the defense have been rejected by state appellate courts in Mississippi and Washington (Sinclair v. State, 161 Miss. 142, 132 So. 581 (1931); State v. Strasburg, 60 Wash. 106, 110 Pac. 1020 (1910).)

It appears that the statute can be upheld only by finding that it is intended not to abolish the plea in substance, but merely to provide a new and different procedure for presenting the plea and trying the defense. Of course, any such new procedure must conform to state and federal constitutional requirements governing procedures in criminal cases.

The New Immunity and the New Procedure

Points (2) and (3) as set out above will be discussed together under this heading. The core of the proposal is to abolish both the common law and statutory defenses of insanity and substitute in their place an immunity from prosecution for one who meets the new test of insanity as of the date of the alleged offense. The procedure for determining whether the immunity is available in a particular case is by a motion to quash the indictment or information on the ground the defendant was insane when the acts on which the prosecution is based were committed. After psychiatric observation and examination similar to that under present procedures, a hearing on the motion to quash would be held before a panel of three judges.

Three-Judge Panel. The three-judge panel is ingenious in several respects. First, it would spread the responsibility for what could be a most unpopular decision to three judges. This is especially significant in view of the fact that our judges are popularly elected. It is apparently thought that the three-judge panel would provide a fact finding tribunal less susceptible of being swayed by emotional arguments and one which would be more capable of weighing the relative quality of conflicting medical testimony than a jury which now determines the fact of insanity. Moreover, the tribunal which would try the issue of insanity would apparently be entirely separate and different from the tribunal which would try the case on a not guilty plea in the event that the defendant should be found to have been sane at the time of the offense. Obviously this would allow the defense much greater freedom in presenting facts which would indicate insanity, but which might also tend to prejudice a jury against a defendant. Furthermore, the proposed new legal test of insanity would free the experts to testify far beyond the usual range of such testimony under the present "right-wrong" plus irresistible impulse tests and thus provide the tribunal a basis for decision more consonant with expert medical opinion on the defendant's mental condition. The real issue in such a trial would be whether the defendant should be institutionalized for a mental disease or defect, be imprisoned or otherwise punished for a voluntary anti-social act.

Procedural Change. The nub of the procedural change would be to eliminate the defendant's present right to trial of his insanity defense by a jury. This is candidly stated in the Criminal Code Committee memorandum of October 5, 1962: "By abolishing the plea of not guilty by reason of insanity, the constitutional need for a jury trial on the question would be eliminated." It appears incontrovertible that the denial of jury trial on an issue now and traditionally tried by jury is the net effect, if not the chief purpose, of the proposal. Whether or not such a change would be wise or desirable is a matter of policy for the General Assembly; however, whether or not such a change would be within the constitutional power of the General Assembly is a question of law for the courts.

Before turning to the constitutional issue, it should be noted that the proposal would allow a defendant who has been found sane at the hearing before the three-judge panel to offer evidence of mental condition "in a proper case, as bearing upon the capacity of the accused to form the specific intent essential to constitute a crime." Presumably this evidence would be offered before a trial jury, and therefore it

might be argued with prima facie plausibility that the right of jury trial is not being affected. The obvious answer is that unless the defendant is accorded substantially the same opportunity to contest the fact of insanity at the time of the offense before a jury as he now has, then his right of jury trial has been obliterated, at least in part.

The legislature has no more power to abolish constitutionally guaranteed rights piecemeal than it has to abolish them entirely. If it is contended, on the other hand, that the intent of the proposal is to retain the defendant's right to try the insanity issue fully before the trial jury, as that right exists now and existed immediately prior to adoption of the Colorado Constitution, then the proposal simply gives a criminal defendant two opportunities to escape via the insanity route. If it is contended that the proceeding before the three-judge panel is civil in nature -- and not a criminal proceeding required to be tried before a jury -- then there is no need for it, since adequate civil commitment procedures presently exist under which the district attorney could obtain a determination of status of a defendant thought to be insane. Moreover, the Colorado Supreme Court has held that an insanity hearing in a criminal case is not a civil, but a criminal proceeding. (Castro v. People, 180 Colo. 493, 503; 346 P. 2d 1020 (1959).) Finally, it should be noted that the provision reserving to the defendant his right to present evidence of mental condition at the main trial applies, by its terms, only to crimes including as an element a "specific intent." Many, if not most, modern statutory definitions of crimes require only a general criminal intent or merely require that the forbidden act has been done consciously and voluntarily; yet insanity is a defense. The saving provision would not reserve any jury trial rights except in specific intent crimes.

Constitutional Guarantees. Does the proposal violate federal or state constitutional guarantees of jury trial in criminal cases? The Sixth Amendment to the United States Constitution guarantees "trial by an impartial jury" in all criminal prosecutions.

It is fundamental that the first eight amendments were aimed at restricting the power of the federal government, not that of the states. Further, it has been uniformly held that the due process clause of the Fourteenth Amendment does not automatically apply against the states all the restrictions contained in the first eight amendments, but only those which the United States Supreme Court by a case by case process of exclusion and inclusion determines to be so fundamental as to be part of due process. (Bartkus v. Illinois, 359 U.S. 121, 124, 125 (1959).) The Sixth Amendment rights have not been incorporated in toto against the states by the Fourteen Amendment. (Betts v. Brady, in 316 U.S. 455, 461-62 (1941).) Thus the federal constituion would not be offended by the feature of the instant proposal denying jury trial, unless the United States Supreme Court would consider this feature a denial of due process as guaranteed by the Fourteenth Amendment. Federal due process has been interpreted as flexible enough to give the states considerable latitude in establishing their own procedural rules governing the insanity plea in criminal cases. (Leland v. Oregon, 343 U.S. 790 (1952) upholding the requirement that the defendant prove insanity beyond reasonable doubt.) In conclusion it may be said that it is not at all clear that federal constitutional rights would be denied by eliminating the right of jury trial on the issue of insanity in criminal cases.

A more serious question is whether the Colorado Constitutional provisions regarding trial by jury would be violated by the proposed procedure. The state constitution provides in Article II, Section 16 that "In criminal prosecutions the accused shall have the right to... a speedy public trial by an impartial jury...." This guarantee is repeated in Article II, Section 23, which declares: "The right of trial by jury shall remain inviolate in criminal cases...." These provisions should be read in the light of Article II, Section 24 which provides: "No person shall be deprived of life, liberty or property, without due process of law."

It is possible to rationalize the proposed procedure as not depriving the defendant of his right to jury trial by arguing that a jury will here the case on the general plea of not guilty and therefore provides the "jury trial" guaranteed by the state constitution. This argument assumes that what was once a single trial covering the issue of insanity as well as all other issues may be divided into two or more trials, leaving some issues for trial by the jury while turning other issues over to a judge or judges for trial. At first glance it would seem that the present Colorado procedure for a bifurcated trial when insanity is pleaded would support the "two trials" analysis. But the Colorado Supreme Court has held that even though the present procedure makes possible the separate trial of the insanity plea and the not guilty plea, this procedure constitutes only one trial, albeit in two sections. (Leick v. People, 136 Colo. 535, 543; 322 P. 2d 674 (1958).) Moreover it must be remembered that the defendant is entitled to a jury trial in each section of this single trial.

Could not the legislature provide that all questions except the defense of insanity are triable to a jury? It has been held that to take from the jury determination of the defense of self defense is a denial of the constitutional right to jury trial. (Young v. People, 47 Colo. 352, 107 Pac. 274 (1910).) How is the defense of insanity different? Addressing itself to this very point, the Washington Supreme Court declared that the "mental responsibility of the accused is a fact entering into the question of his guilt, upon which he has a right of trail by jury, the same as upon any other fact inherent in that question, even as the fact that the muscular action of his physical body did or did not commit the physical act charged as a crime against him." (State v. Strasburg, 60 Wash. 106, 110 Pac. 1020, 1021 (1910).) In holding unconstitutional as a deprivation of the right to jury trial a statute providing for determination of the defendant's insanity plea by a commission of experts, the Louisiana Supreme Court concluded: that where "the offense itself is triable, under the Constitution, by jury, the accused has the constitutional right to have his defense of insanity tried by jury." (State v. Lange, 168 La. 958, 123 So. 639, 642 (1929).) There is no authority to the contrary.

It may be contended that the General Assembly could rationalize taking determination of the insanity issue from the jury on the ground that the proposed procedure -- abolishing the defense of insanity -- merely provides a conclusive presumption of fact that all persons are sane for the purpose of criminal trials. In effect this would be a conclusive presumption that anyone charged with crime had the requisite mental capacity to commit the crime at the time of commission, unless he filed the motion to quash as provided. This would be tantamount to presuming conclusively that an infant two years of age has capacity to commit crime, a presumption which would be equally contra to common

law and to common sense. Such a presumption would violate both federal due process (Heiner v. Donnan, 258 U.S. 312 (1932) and state due process (Garcia v. People, 121 Colo. 130, 213 P. 2d 387 (1949)). It would be no more valid than a presumption abolishing the defense of alibi and thus conclusively presuming that a defendant was at a place where 100 witnesses swear he was not at the time of the offense. (See Sinclair v. State, 161 Miss. 142, 132 So. 581 (1931)(concurring opinion).)

It may be argued that the proposed change merely alters procedure without injury to the substance of the defendant's jury trial right. So long as the substance of the right to jury trial is preserved, the procedure or means by which the result is reached is wholly within the legislature's discretion, and the courts may not declare a statute unconstitutional merely because the procedure is different from that followed at common law. (Walker v. Southern Pac. R.R., 165 U.S. 593 596 (1897)); People v. Troche, 273 Pac. 767, 770 (Calif. 1928).) Thus, the test to be met by a statute to be upheld as merely altering the procedure for jury trial is whether it deprives the defendant of any right of substance which he had before its enactment.

It is therefore imperative to compare the defendant's practical problems in proving the insanity defense under the present procedure with the problems he would have under the proposed procedure. The defendant is now entitled to have his insanity defense tried as a fact by a jury of twelve. At the outset of the insanity trial, the defendant is presumed sane and it is incumbent on him "to generate a reasonable doubt" of his sanity. (Leick v. People, 136 Colo. 535, 546, 322 P. 2d 674 (1958).) The defendant may be acquitted, under present procedures by merely introducing a reasonable doubt of his sanity in the minds of the twelve jurors. Probably more important, from the practical point of view, he can escape conviction by merely raising a reasonable doubt of his sanity in the mind of a single juror, for any conviction must be by unanimous vote. He has, under present law, twelve chances -- twelve theoretically independent minds, any one of which can give him at least a hung jury.

Under the proposed procedure, only three persons act as triers of fact, and the proposal does not indicate whether their determination must be unanimous, nor is it indicated whether the defendant or the state has the burden of proof on the insanity issue or by what weight of evidence proof must be made. Assuming these points are settled in a manner leaving the statute as strong as possible -- that is that the defendant can be acquitted by raising a reasonable doubt of his sanity in the minds of the three judges and can obtain a second trial of the issue by raising such a doubt in the mind of only one judge, the proposal still leaves the defendant in a worse position than under present law. Instead of having twelve minds to which his plea may be addressed, he has only three. Thus he has been deprived of nine of the prior twelve chances to obtain at least a hung jury. Under the present rules, once the defendant has produced evidence tending to beget a reasonable doubt, he casts upon the prosecution the heavy burden proving beyond a reasonable doubt to twelve minds that he is sane. (Leick v. People, supra.) It appears clear that the state's burden is lightened when instead of being required to persuade twelve jurors, it is required only to persuade three. The proposal would indeed deprive the defendant of a jury trial right of practical, substantial value.

Comments From Other Authorities

The constitutionality of the proposed change was raised with several law professors who are nationally recognized authorities in the field of criminal procedure as it relates to constitutional law. Their respective opinions on the proposal follow.

Professor Henry Weihofen, who is presently serving as director of the Mental Competency Study at George Washington University Law Center, commented as follows on the jury trial problem:

> The more interesting change, as you say, is the procedural one. I assume that the proposal includes a provision not spelled out in the summary, namely, that the proceedings for quashing the indictment or information are dispositive - that is, if the court finds the defendant sane and denies the motion to quash, the defendant will be denied permission to introduce the insanity defense at the jury trial (except for the "specific intent" issue).
>
> Without that exception, I suppose most lawyers would be of the opinion that the scheme would be unconstitutional. With only few minor exceptions, the statutory definition of all crimes includes a mental element, and a statutory scheme that attempted to deny defendants the right to have the jury pass on the issue of whether that element of the crime was actually proved would probably be held unconstitutional....
>
> Is the "specific intent" exception enough to justify the opposite result? I'm inclined to doubt it. The mental element in some serious crimes, including common law murder, is usually regarded as general rather than specific. It seems difficult to justify a distinction under which a jury trial is constitutionally required for a crime involving specific intent but not for a crime involving mens rea generally. And since a charge of a more serious offense requiring specific intent usually includes lesser offenses...and the jury on an indictment for the greater may find the lesser, the distinction seems not only illogical but impractical. Even if the constitutional hurdle is overcome, there remains the broader question of whether the proposal seems desirable. The answer depends largely on what its objective is. I gather that the objective is to keep the bifurcated trial now used in Colorado but to eliminate the jury for the insanity issue. Except for eliminating the jury, I see nothing to be gained by having the insanity issue raised on a motion to quash the indictment instead of as a defense on the trial...
>
> Persons who may be inclined to favor the current proposal because they think juries are too prone to be misled by the "insanity dodge," may consider whether this proposal might not give juries more power rather than less. On a verdict of not guilty by reason of insanity, a defendant is not set free; he is sent to

a mental hospital and his stay there is indefinite. Statistics show that as a matter of fact such persons spend more time in the hospital than they would if they had been sent to prison. But under the "specific intent" exception, evidence of mental abnormality would be addressed to a verdict of not guilty, rather than not guilty by reason of insanity. An acquittal would therefore mean that the defendant walks out a wholly free man... (Letter dated November 5, 1962)

Professor David W. Louisell of the University of California School of Law (at Berkeley), who has devoted considerable thought and effort to studying California's problems with the insanity plea, writes as follows concerning the Byrne proposal:

> Speaking for myself, in all frankness, I must say that I am not very sanguine about the proposal to abolish trial by jury in the area of mental responsibility, whatever semantics may be used to achieve that formula. In this connection I do not worry much about the Fourteenth Amendment's guarantee of due process, but I do worry considerably about the Colorado constitutional guarantee of jury trial in criminal cases. Even more basically, however, I question the social desirability at this stage of removing the ultimate sanction of jury trial, even conceding that on many occasions it is wise to waive it. I do not think that we have yet reached the stage where it would be wise, from the standpoint of protecting individual rights, totally to destroy the protection implicit in jury trial against arbitrary judicial conduct. And, from the social standpoint, I question very much whether we are yet at the stage of psychiatric knowledge which justifies remitting the problem of responsibility to the psychiatrists and the judges. Complex and difficult though the problem is, in my opinion it is still one that society must bear. (Letter dated October 29, 1962)

Professor Arthur H. Sherry of the University of California School of Law at Berkeley, who is presently co-chairman of the California Special Commissions on Insanity and Criminal Offenders, writes as follows:

> The device of determining the issue of responsibility by a procedure which may result in the quashing of an indictment or information by a three-judge court is unique. In effect, it seems to me that this is simply making it possible to employ a civil commitment procedure where a criminal action is pending in lieu of determining the issue in the criminal proceeding. I suppose this can be done now under existing Colorado law should the District Attorney choose to invoke civil procedures in lieu of initiating a criminal prosecution.
>
> The practical considerations, however, cannot be avoided, and strong reasons may exist which would militate against the proposal for the three-judge court. Apart from the constitutionality of the

> procedure with respect to jury trial as it has been formulated in the proposal, some question might arise as to the constitutionality of depriving the defendant of his common law defense of not guilty by reason of insanity in the event the three-judge court found him sane. I realize that there is a clause which does preserve his right to introduce evidence of "mental condition" in a subsequent criminal proceeding, but this may well be interpreted to include evidence of "insanity." If so, the proposal may not effect any real improvement or change in present procedures. (Letter dated November 19, 1962)

Professor Robert B. McKay of New York University School of Law, concurs as follows:

> I must agree that the proposal for determination of insanity by a three-judge panel does seem to impinge upon the Colorado Constitution's guaranty of jury trial. Thus I would agree with your own judgment and that which you have received from Professors Weihofen and Louisell. I do not see in this a Fourteenth Amendment due process problem, however, since there is no jury trial guaranty incorporated into the Fourteenth Amendment. (Letter dated November 27, 1962)

In summary, it appears that the proposal for having the insanity plea heard by a three-judge court is unconstitutional as depriving defendants of the jury trial in criminal cases guaranteed by the Colorado Constitution. This hurdle, however, may not be insurmountable. Obviously it could be overcome by a constitutional amendment. Short of that, the proposal could be passed and an opinion as to its constitutionality could be obtained from the Colorado Supreme Court before signature by the governor. Finally, the proposal might be considered for enactment without this one feature which raises the constitutional problem.

Other Aspects of the Proposal

The remaining features of the proposal seem highly desirable and apparently raise no constitutional problems. The proposed new legal standard for determining the sanity of a defendant at the time of the allegedly criminal conduct would greatly modernize and improve present procedure. It would accord expert witnesses considerably more latitude in testimony and thus would bring law and psychiatry closer together in this vital area. One note of caution should be sounded, however. The proposed test of insanity, based on the standards adopted in United States v. Currens, 290 A. 2d 751 (3d Cir. 1961) would probably make the insanity defense available to more defendants than are now benefited by the present test. This is not a defect, but rather a great advantage, for it would enable the state thus to identify and treat persons whose illness is responsible for their anti-social conduct. Moreover, it would provide a means of identifying those who would probably repeat their anti-social conduct after a brief period in prison. These offenders could be held until it is determined by a competent board that it is safe for society to release them. A new maximum security facility where mentally ill or defective offenders may be treated appears to be required by the proposed test and confinement provision.