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

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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

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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

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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]

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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.

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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.

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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.

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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, since "dangerous proximity to success" is not an element.[2]

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:

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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:

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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 . . .
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> 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