

## BOOK REVIEWS

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**Crime and Juvenile Delinquency.** By Sol Rubin. New York: Oceana Publications, 1958. Pp. 240. \$4.50.

It is indeed a confident and bold author who presents for current consideration his writings over a period of ten years without extensive editing and revision. This is especially true when they deal with such dynamic and fluid subjects as delinquency, crime and correction. Yet this is what Mr. Sol Rubin, Counsel, National Probation and Parole Association, has ventured. All but three of the chapters in his book are based on articles previously published in professional journals between 1949 and 1957 (p. iv).

Although Mr. Rubin states that the articles "have been revised to add new material" (p. iv), his "revision" appears to consist mainly of appending brief notes and references at the end of each chapter. These addenda sometimes omit important developments after the date of the original article. For example, one of the most significant efforts of our time to make sense of the criminal law is the Model Penal Code Project of the American Law Institute. Its sections on the sentencing, probation and parole of adult offenders are highly controversial.<sup>1</sup> While Mr. Rubin devotes nearly half of his book to these matters there is only a meager discussion of the relevant Model Penal Code provisions and this is in a different context.<sup>2</sup> In addition, careful editing could have eliminated duplication and repetition.

Notwithstanding these strictures, Mr. Rubin does raise many lasting and large questions. He has definite opinions concerning their solution and does not hesitate to state them, although his style is sometimes irritatingly argumentative and shrill. Among his many conclusions are these:

1. Laws holding parents strictly responsible—whether criminally or civilly—for delinquent acts of their children should be repealed. They neither reduce delinquency nor "make parents more responsible—better parents" (p. 41).
2. Until juvenile courts are adequately staffed and supported it is desirable

<sup>1</sup> See Ohlin and Remington, *Sentencing Structure: Its Effect upon Systems for the Administration of Criminal Justice*, 23 *Law & Contemp. Prob.* 495 (1958); Tappan, *Sentencing under the Model Penal Code*, id., at 528; Turnbladh, *A Critique of the Model Penal Code Sentencing Proposals*, id., at 544.

<sup>2</sup> In Chapter 6, entitled "Sentencing Youthful Offenders," Mr. Rubin does have a brief criticism of the penalties proposed for adult offenders by the Model Penal Code but this is in the context of their applicability to youthful offenders. See pp. 96-103. And in the references following Chapter 7 on "The Youth Authority Plan," he refers to Tentative Draft No. 3 of the Model Code (1955) as repudiating the Model Youth Correction Authority Act. See p. 113. He fails to mention, however, Tentative Draft No. 7 (1957) that represents the views of the ALI after reconsideration of Draft No. 3.

In his chapters on the sentencing, probation and parole of adult offenders there is not even a footnote reference to the Model Penal Code.

to use the categories of "delinquent" and "neglected." If they are not retained there is a danger "that the thinking of a court may become too vague for the proper protection of the child. A court without categories may engage in deciding that a child before it might benefit from the court facilities, without concerning itself with a clear legal test of jurisdiction and proof. . . . Of course the terms 'delinquency' and 'neglect' are not complete or necessarily sound psychological descriptions. But they do make a generally accurate distinction, in gross terms, between two categories that are in fact psychologically distinguishable" (p. 52).

3. If the purpose of the delinquency jurisdiction of the juvenile court is to remove child offenders from the criminal courts, delinquency should be confined to behavior that would be criminal if committed by adults. But no juvenile court law so limits its definition. Most states expand the term to include such acts or conditions as "habitual truancy from school," "knowingly associating with thieves, vicious or immoral persons," "incurability," "beyond control of parent or guardian," and "growing up in idleness and crime" (pp. 46-51). Although such children may require attention, a determination of "delinquency" is probably not the kind of attention required.

4. A child committed by a juvenile court is committed for the duration of his minority. The younger the offender the longer the possible term of his commitment. There is a risk that he may be held unduly long in an institution or too long on probation. Mr. Rubin believes, following the English practice, that three years should be the maximum term of commitment for adjudicated juvenile delinquents (p. 69).

5. Prison sentences are entirely too long and parole is not used adequately. Except in extraordinary cases, prison terms should be limited to a maximum of five years (pp. 121-23).

6. The "superior form of sentence (call it what you will) is a judge-fixed maximum, within the maximum allowed by law; no minimum term; and early parole eligibility so that a parole authority will have substantial latitude in which to work" (p. 137).

7. Civil rights lost on conviction should be held to a minimum and only where clearly needed for public protection. For example, Mr. Rubin would permit a convict to sue as well as be sued while in prison. He would eliminate "civil death" for life termers and would not make conviction a disqualification for voting or jury service. Imprisonment should not be a distinct ground for divorce. Civil rights lost should be restored automatically upon completion of parole or a prison term. He would give the court of conviction the discretion to annul and expunge the record of conviction upon completion of probation, parole or prison term (pp. 140-54).

8. A defendant should ordinarily have access to the pre-sentence report and opportunity to comment on it and controvert it (pp. 187, 192-98).<sup>3</sup>

<sup>3</sup> See Employment of Social Investigation Reports in Criminal and Juvenile Proceedings, 58 Col. L. Rev. 702 (1958).

9. A probationer (and presumably a parolee) should be entitled as a matter of due process to a hearing before probation (or parole) is revoked (pp. 189-91).

10. Research is needed regarding (1) the nature and causation of crime and (2) the treatment of criminals. As to (1) he recommends "life history studies" (pp. 206). As to (2) he suggests studies of the impact of correctional practices on the lives of the people involved. This would require not only an analysis "of the correctional services, but their living constitutions, the attitudes, personalities, of the people performing them, and the manner in which the acts are done" (p. 213).

Each of Mr. Rubin's conclusions could be discussed at length. This review, however, will be confined to a few observations on the juvenile court, sentencing and parole.

Procedures of juvenile courts, particularly in delinquency cases, have become targets of criticism by the legal profession. These procedures are much less formal and ritualistic than criminal procedures. Although a child may lose his liberty until majority, all the protections of a criminally accused are not extended to him. This is because juvenile court proceedings are labeled "civil" rather than "criminal" in character. The state, acting through the juvenile courts, is considered *parens patriae* for the child's protection. It is not intervening with a view to punishment as it does in a prosecution for crime. But this rationalization slights three factors: (1) Any restraint by the state, even one springing from paternal motives, is nevertheless a restraint and should be justifiable; (2) Children are sometimes treated vindictively and arbitrarily; and (3) Institutions to which children are sent are often little less than prisons.

A child should be entitled to due process of law whether the juvenile court administers civil or criminal justice. That he does not require the protection given an accused adult is not necessarily determined by the fact that the judge is presiding over a civil proceeding. On the other hand, it is superficial to jump to the conclusion that the child should have all the safeguards surrounding an accused adult. Fairness is a relative standard. The proper inquiry is: What does fairness require in a juvenile court case?<sup>4</sup>

Although an effectual juvenile court should have reasonable discretion to act in the best interest of the child and should have facilities essential for study, care and treatment, certain principles are applicable to even the most enlightened courts.

1. The conditions under which the court is empowered to intervene in the upbringing of a child should be specifically and clearly delineated by statute. Whenever the court is asked to intervene, the state should be required to show that the conditions do in fact exist with respect to the child and that intervention is necessary to protect the child or the community, or both.

2. The child and his parents are entitled to know the bases upon which the

<sup>4</sup> For an excellent analysis of this problem, see Paulsen, *Fairness to the Juvenile Offender*, 41 *Minn. L. Rev.* 547 (1957).

state seeks to intervene and predicates its plan for the care and treatment of the child. They should have the right, with the assistance of counsel, to rebut these bases by questioning witnesses and by presenting evidence to the contrary. Rules of evidence designed to assure due process should be applicable to juvenile court cases but they should be formulated or modified in the light of the policies involved. They should support the informality of the hearing but assure an orderly presentation of credible facts in a way protective of the rights of all concerned.

3. The court should be authorized to take specific steps with regard to stated situations rather than allowed an unlimited discretion to make any disposition it considers advisable. Within the range of specific actions authorized the court should have a wide discretion.<sup>5</sup>

Sentences authorized and imposed are significantly related to what a correctional program can and does accomplish by way of rehabilitating offenders. There are three main criticisms of present sentencing practices. First, there is wide inequality in the sentences imposed by different judges for the same offense. These disparities are not only difficult to explain to resentful prisoners but lead to serious administrative problems within the prison. A prisoner who feels his sentence unfair or unduly harsh is a source of trouble in the institution and rehabilitative efforts are impeded.<sup>6</sup>

Second, sentences in the United States are unnecessarily long and seem to be getting longer.<sup>7</sup> Long sentences are, of course, a major factor in the high and increasing prison population. In addition, it has not been demonstrated that long sentences have any general deterrent effect. On the other hand, if the purpose of a long sentence is punishment alone, history and experience show how self-defeating this can be. Although certain dangerous criminals must be kept out of circulation for the protection of society and special provisions should cover them, a long sentence for the ordinary offender rejects the basic correctional concept that he should have the opportunity to retake his place in society when there are reasonable grounds to expect he can do so without again violating the law.

Third, sentences are frequently imposed in such a way as to deprive a parole board of the flexibility it should have in granting parole.<sup>8</sup>

In general, there are two types of sentences employed in the United States: the "definite" and the "indeterminate." Neither term is actually descriptive of the form of sentence to which it refers. Under a "definite" sentence the commitment is for a term fixed by the judge at some definite figure which may not exceed the maximum term authorized by statute. Parole eligibility occurs when

<sup>5</sup> See U.S. Children's Bureau, *Standards for Specialized Courts Dealing with Children*, 7 (1954).

<sup>6</sup> U.S. Bureau of Prisons, *Federal Prisons 1957*, 1-2 (1958).

<sup>7</sup> *Id.*, at 3.

<sup>8</sup> Donnelly, *The Connecticut Board of Parole*, 32 *Conn. B. J.* 26, 31-33 (1958); NPPA, *Guides for Sentencing 20-21* (1957).

a percentage of the term—for example, one-third—as been served. Until 1958,<sup>9</sup> the federal system was the leading example of this method. This purely arbitrary limitation on parole eligibility serves no constructive purpose and is a mechanical way of achieving indeterminacy. The duration of minimum and maximum terms are rigidly bound together so that no adjustment can be made in the former without altering the latter. In support of this form of sentence it has been argued that definite terms result in shorter incarceration. As with most criminal statistics, the data is unreliable, misleading and contains built-in biases. Furthermore, it is simplistic reasoning to infer that such a result, even if true, follows automatically. The length of imprisonment is related to a complex of local and regional factors rather than merely to the type of sentencing system or to the length of terms imposed by the courts. "The spread between minimum and maximum terms should be determined, instead, by considerations appropriate to each, rather than by an inflexible formula that controls one through the other."<sup>10</sup>

The indeterminate sentence originally meant a term without a maximum or minimum length. As used today it is only partially indeterminate—both a minimum and a maximum are set. The controversial issue is whether the upper and lower limits should be set by statute, court, or administrative agency. And this is the issue that divides the American Law Institute and the National Probation and Parole Association. Both organizations are in the process of formulating sentencing proposals and both approve the indeterminate rather than the definite sentence. The American Law Institute, however, currently proposed a legislatively-fixed maximum term.<sup>11</sup> The current position of the National Probation and Parole Association favors judicial discretion to fix a maximum term not in excess of that prescribed by statute.<sup>12</sup> The main argument for the legislatively-fixed term is that it affords the only means of achieving uniformity in sentencing. But the uniformity achieved is a mechanical one and it has been my experience that prisoners are more aggrieved by disparities and lack of uniformity in minimum sentences than they are with varying maximum terms. The judicially-fixed maximum is urged, on the other hand, in the belief that statutory maxima are much too high and that judges would correct the situation by imposing lower terms. Furthermore, it is claimed that the parole board should have the guidance of the court's judgment in the particular case.

As for the minimum term, the ALI provides that it be fixed by the judge within statutory ranges.<sup>13</sup> The position of the NPPA is not entirely clear. The

<sup>9</sup> See note 14 *infra*.

<sup>10</sup> Tappan, *Sentencing under the Model Penal Code*, 23 *Law & Contemp. Prob.* 528, 539 (1958).

<sup>11</sup> *Id.*, at 534.

<sup>12</sup> *Ibid.*

<sup>13</sup> In the case of a felony of the first degree the range is one to twenty years; one to three for second degree; and one to two for third degree. Model Penal Code Sec. 6.06 (Tent. Draft No. 2, 1954). This is for ordinary terms. When the sentence is to an extended term, the upper

1955 draft of its Standard Probation and Parole Act gives the court the discretion to impose either a minimum term up to one-third of the statutory maximum or no minimum term at all and this solution, in modified form, was adopted by Congress in 1958 for the federal system.<sup>14</sup> Apparently the present position of the NPPA is that there should be no minimum term and that the parole board should be permitted to intervene at any time.<sup>15</sup> This would also seem to be Mr. Rubin's view (p. 137).

For the past two years this reviewer has served as a member of the Connecticut State Board of Parole. In Connecticut the court fixes both the minimum and maximum sentence. The maximum can be no longer than the term fixed by law for each offense. Except for narcotics cases, the minimum term shall not be less than one year. A prisoner becomes eligible for parole upon expiration of the minimum sentence less good conduct time. I am convinced that if parole is to function properly sentences must be consistent with the spirit of parole and in a form that does not deprive the parole board of its flexibility. A judge convinced of the value of parole can set his two figures far apart—as far, if he wishes, as the statutory ones themselves. On the other hand, a judge who lacks confidence in parole generally or is apprehensive of a particular parole board can impose sentences that hamstring parole administration. Thus, not only is the board's discretion unduly reduced when the gap between minimum and maximum is as little as two years—in a sentence of 8 to 10 years—but the prisoner's incentive to rehabilitation is much less than it might well be were the sentence 1 to 10 years. Furthermore, from the prisoner's viewpoint, a 5 to 15 year sentence is less severe than an 8 to 10 year sentence.

Although it is essential to the operation of parole that there be a broad spread between the minimum and maximum terms, I feel the court should have a role in fixing both. The new federal legislation seems to me to be desirable. It makes a realistic distribution of authority between the court and the administrative organs of correction, rather than a wholesale shift of power. It attempts to give the agencies involved the type of power and responsibility each is best equipped to exercise, given the time when it must act, the nature of the judgments called for at that stage, the type of information available for judgment and the relative dangers of unfairness or abuse.

There is considerable evidence that the scale of prison terms imposed on

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limits of the minimum term are extended to thirty, five and three years respectively. Model Penal Code Sec. 6.07 (Tent. Draft No. 2, 1954).

<sup>14</sup> NPPA, Standard Probation and Parole Act, Sec. 12 (1955). The federal act of 1958 amends chapter 311 of Title 18 by adding a Section 4208 which permits the court: (1) to designate a minimum term at the expiration of which the prisoner shall become eligible for parole. The term may be less than, but shall not be more than, one-third of the maximum sentence; or (2) to fix the maximum sentence and specify that the prisoner may become eligible for parole "at such time as the board of parole may determine." This is a modification of the 1955 NPPA Act in that the judge fixes the maximum term.

<sup>15</sup> See Tappan, *op. cit. supra* note 10, at 534.

ordinary offenders is too high. On the other hand, provision should be made for dealing with the offender who is a persistent violator, a professional, or a dangerously deviated personality. If special provision is made for these offenders, the community will probably be more ready to accept a moderate sentencing structure for the ordinary offender. Mr. Rubin suggests that a judge who feels a penalty in excess of five years is justified be permitted to apply to an appellate bench of judges for an increased penalty (pp. 122-23). This seems unnecessarily awkward. Providing proper criteria are formulated, this is a matter for the trial judge. This is the position of the ALI in its provisions for an "extended term" and apparently has the approval of the NPPA although the latter is currently formulating an alternative "dangerous offender" provision which it believes will be an improvement over the ALI draft.<sup>16</sup>

Reviewers sometimes criticize an author for not writing a book he had no intention of writing. Mr. Rubin's book, as he puts it, is directed mainly toward "an interested layman or student," to enable him "to orient himself to the problems discussed, and to participate, as it were, with the professionals in the things that are the concern of all" (p. iv).

But given this goal, it does not seem captious to wish that he had spent more time in editing, revising, and bringing his materials up to date. It is also hard to excuse his failure to discuss more fully and critically the relevant sections of the Model Penal Code. However, Mr. Rubin has raised enough difficult questions to make both layman and professional uneasy about the state of delinquency, crime and correction in this country. In doing that he has rendered a valuable service.

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<sup>16</sup> Turnbladh, *A Critique of the Model Penal Code Sentencing Proposals*, 23 *Law & Contemp. Prob.* 544, 547 (1958).

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**Freedom To Travel—Report of the Special Committee To Study Passport Procedures of the Association of the Bar of the City of New York.** New York: Dodd, Mead Co., 1958. Pp. xxv, 144. \$4.00.

Since 1941, an American citizen who wishes to travel outside the Western hemisphere must have a passport in time of war or national emergency. Because the "national emergency" proclaimed by President Truman on December 16, 1950 during the Korean War still exists, we may be reasonably sure that its discontinuance will follow only the demise of the "Cold War." Thus in 1951 the State Department began to assume control over foreign travel by American citizens. Passports were denied to persons suspected of being Communists or of having left-wing beliefs or associations; to persons seeking to attend international congresses frowned upon by the State Department; and, finally, to individuals whose presence abroad was not deemed in the "national interest." To cite one