ARTICLE 9. AUTHORITY OF COURT IN SENTENCING

Preliminary Draft No. 1; April 1970

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See: Minutes of Subcommittee on
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CRIMINAL LAW REVISION COMMISSION
311 Capitol Building
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ARTICLE 9. AUTHORITY OF COURT IN SENTENCING

Preliminary Draft No. 1; April 1970

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Subcommittee on
Grading and Sentencing

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Section 1. Sections 4 to 7 of this Article are added to and made a part of ORS 137.010 to 137.990.

COMMENTARY

The purpose of this section is to incorporate the new proposals of this Article into the existing body of statutes compiled in ORS chapter 137 dealing with judgment, sentencing and parole and probation in criminal cases.

Section 2. ORS 137.075 is amended to read:

137.075. Report to court and to convicted person. (1) Within 60 days after completing the diagnostic examination, the Administrator of the Corrections Division shall file with the court a written report of findings and conclusions relative to the examination. [~~The immunities granted under ORS 137.115 are applicable to the examination and report under this section and ORS 137.072, 137.124, 137.320, 423.020 and 423.090.~~]

(2) A certified copy of the report shall be sent by registered mail by the clerk of the court to the [~~convicted person~~] defendant, his counsel and the district attorney.

(3) No statement made by a defendant in the course of an examination under this section or ORS 137.072, 137.124, 137.320, 423.020 and 423.090 shall be used against him in any civil proceeding or in any other criminal proceeding.

(4) No person shall be examined in any civil or any other criminal proceeding as to any statement made by the defendant in the course of the examination without the consent of the defendant.

(5) No statement contained in any report made under this section shall be the subject of any civil suit or action.

COMMENTARY

Section 2 amends ORS 137.075 which deals with diagnostic examinations of criminal defendants. The statute presently incorporates by reference certain immunities that are set forth in ORS 137.115, one of the sex offender sentencing statutes which would be repealed by section 6 of this Article.

The amendments proposed by section 2 would retain the immunity provisions now found in ORS 137.115 by making them a part of 137.075 itself.

Section 3. ORS 137.124 is amended to read:

137.124 (1) If the court imposes a sentence of imprisonment upon conviction of a felony, it shall not designate the penal or correctional institution in which the defendant is to be confined but shall commit the defendant to the legal and physical custody of the Corrections Division.

(2) Upon commitment to the Corrections Division all convicted male persons under the age of 26 who have not been convicted of the crime of murder or rape where actual force is involved or treason, or who have not served a previous term of imprisonment in an adult penal institution, shall be assigned initially to the Oregon State Correctional Institution. All other convicted male felons shall be assigned initially to the Oregon State Penitentiary.

(3) After assuming custody of the convicted male person and notwithstanding the initial assignment pursuant to subsection (2) of this section, the Corrections Division may transfer inmates from one penal or correctional institution to another such institution for the purposes of diagnosis and study, rehabilitation and treatment, as best seems to fit the needs of the inmate and for the protection and welfare of the community and the inmate.

(4) If the court imposes a sentence of imprisonment upon conviction of a misdemeanor, it shall commit the defendant to the custody of the sheriff for confinement in the county jail or other correctional facility for the imprisonment of misdemeanants.

COMMENTARY

ORS 137.124 shall require amendment to accomplish two things:

(1) To provide the courts with legislative direction regarding imprisonment of misdemeanants which, under the proposed new code, will not be set out in the statute defining each particular crime; and

(2) To provide flexibility in the statute by not limiting confinement of misdemeanants to a county jail but to allow for the use of a "correctional facility" (other than one for felons) if such facilities become available in the future.

Section 4. Reduction of Class B or C felony to misdemeanor; authority of court. Notwithstanding section _____, when a person is convicted of a Class B or C felony, if the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that it would be unduly harsh to sentence the defendant for a felony, the court may enter judgment of conviction for a Class A misdemeanor and make disposition accordingly.

COMMENTARY - REDUCTION OF CLASS B OR C FELONY TO MISDEMEANOR; AUTHORITY OF COURT

A. Summary

This section would empower the court with authority to reduce a Class B or C felony to a misdemeanor. As observed in the Model Penal Code commentary:

> "However carefully offenses are defined, it is inevitable that cases will arise where a conviction and a disposition in accordance with the Code will seem unduly harsh to those responsible for its administration. Such cases are now dealt with typically by a plea of guilty or conviction of a lesser degree or grade of crime than the defendant actually has committed. In some jurisdictions, the Court is authorized in its discretion to impose either a state prison sentence or a jail sentence and when the Court pursues the latter course, the conviction in some states stands as for a misdemeanor rather than a felony." (Commentary, Tent. Draft No. 2 (1956) pp. 28-29).

B. Derivation

The section is based on Model Penal Code section 6.12 and Connecticut Penal Code section 37; however, the section proposed is limited to Class ~~B or~~ C felonies.

C. Relationship to Existing Law

Section 4 would replace the so-called "indictable misdemeanor" treatment that is now allowed for certain crimes under ORS 161.030 (2):

> ". . . When a crime punishable by imprisonment in the penitentiary is also punishable by a fine or im isonment in the county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes, after a judgment imposing a punishment other than imprisonment in the penitentiary or in the Oregon State Correctional Institution."

There are roughly 65 crimes in the criminal code chapters of ORS whose penalty sections provide for optional felony-misdemeanor treatment by the court. These include negligent homicide (163.091), assault with a dangerous weapon (163.250), third degree arson (164.040), shoplifting (164.390) and larceny in a building (164.320), to mention a few.

Section 5. Criteria for discharge of defendant. (1) Any court empowered under ORS 137.510 to suspend imposition or execution of sentence or to place a defendant on probation may unconditionally discharge the defendant if:

(a) The conviction is for an offense other than murder or a Class A felony; and

(b) The court is of the opinion that no proper purpose would be served by imposing any condition upon the defendant's release.

(2) If a sentence of discharge is imposed for a felony, the court shall set forth in the record the reasons for its action.

(3) If the court imposes a sentence of discharge, the defendant shall be released with respect to the conviction for which the sentence is imposed without imprisonment, fine, probationary supervision or conditions.

(4) If a defendant pleads not guilty and is tried and found guilty, a sentence of discharge is a final judgment on a conviction for all purposes, including an appeal by the defendant.

(5) If a defendant pleads guilty, a sentence of discharge is not appealable, but for all other purposes is a final judgment on a conviction.

COMMENTARY - CRITERIA FOR DISCHARGE OF DEFENDANT

A. Summary

The sentence of unconditional discharge provides the court with the means to make an appropriate disposition of a case where it does not have any reason to impose any conditions or to otherwise keep a "string" on a defendant. If

the court believes that the fact of conviction itself constitutes sufficient punishment, it can use this section to permit the defendant to go hence without any conditions and without the possibility of later bringing him back before the court on the original conviction. The court in felony cases is required to state its reasons for the record.

B. Derivation

Section 5 is based on New York Revised Penal Law s. 65.20 and Michigan Revised Criminal Code s. 1335.

C. Relationship to Existing Law

The courts now have the power to suspend the imposition of sentence in a criminal case under ORS 137.510 which provides:

> "The indictment shall be set aside by the court upon the motion of the defendant in either of the following cases:
>
> "(1) When it is not found, indorsed and presented as prescribed in ORS 132.360, 132.400 to 132.430 and 132.580.
>
> "(2) When the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment or indorsed thereon."

Suspension of the imposition of sentence is an authorized disposition most closely approximating an unconditional discharge.

If a defendant pleads not guilty and is tried and found guilty, he may appeal the conviction even though the court suspends the imposition of sentence and places him on probation. State v. Gates, 230 Or 84, 368 P2d 605 (1962). However, if he pleads guilty and the imposition of sentence is suspended, he cannot appeal because under ORS 138.050 the only grounds for appeal from a sentence on a plea of guilty are the imposition of an excessive fine or excessive, cruel or unusual punishment.

Subsections (4) and (5) of section 5 are in accord with Gates and ORS 138.050, and are intended to allow the defendant to appeal on the merits if he is tried and convicted following a plea of not guilty, even though the court imposes a sentence of discharge. However, if the defendant pleads guilty and is discharged by the court, there would be no grounds for appeal since no fine or other "punishment" would be imposed.

Section 5 is not meant to be an annulment of the conviction or a means to expunge the record, so for all other purposes a sentence of discharge under either subsection (4) or (5) would be a judgment on a conviction. As a result, the section would enable the court to make a final disposition instead of suspending imposition of sentence in those cases where it has good reason to believe that the defendant will not be back.

Section 6. Criteria for sentencing of dangerous offenders. The maximum term of an indeterminate sentence of imprisonment for a dangerous offender is 30 years, if the court finds that because of the dangerousness of the defendant an extended period of confined correctional treatment or custody is required for the protection of the public and if it further finds, as provided in section 7 of this Article, that one or more of the following grounds exist:

(1) The defendant is being sentenced for a felony in which he caused or attempted to cause serious physical injury to another, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity;

(2) The defendant is being sentenced for a crime that seriously endangered the life or safety of another, has been previously convicted of one or more felonies not related to the instant crime as a single criminal episode, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity;

(3) The defendant is being sentenced for conviction of a felony committed as part of a continuing criminal activity in concert with one or more persons.

COMMENTARY - CRITERIA FOR SENTENCING OF DANGEROUS OFFENDERS

A. Summary

Section 6 establishes the criteria for identifying dangerous offenders. An offender may be sentenced as dangerous if he fits into any one of three categories: (1) commission of a crime that caused or attempted to cause serious physical injury to another, and propensity to commit crime; (2) commission of a crime (such as arson) which,

intended or not, seriously endangered the life or safety of another, previous criminal conviction and propensity to commit crime; (3) participation in organized crime.

Subsection (3) is intended to enable the courts to sentence to long terms the professional criminal or racketeer defendant.

The section authorizes commitment of dangerous offenders for a period up to 30 years, a period long enough to protect the public and to allow sufficient time for treatment and reformation. As with the ordinary term authorized for felonies under the proposed code, the extended term under this section would be an indeterminate sentence -- the statutory maximum is not mandatory and the court may fix the maximum at any period less than 30 years. The court is permitted to invoke the provisions of the section if one or more of the three grounds exist; however, it is not mandatory under the section, thereby affording the sentencing judge flexibility to use this as a sentencing tool in appropriate cases.

B. Derivation

The section is taken from section 5 of the Model Sentencing Act (1963) with minor language changes to conform to terminology employed elsewhere in the proposed code.

C. Relationship to Existing Law

Oregon, like most states, has a number of statutes that provide for enhanced penalties for certain offenses and/or offenders. ORS chapter 168 (the habitual criminal act) now permits the court to impose extended terms of imprisonment up to life for second, third and fourth felony offenders. Before amendment by the Legislature in 1967 the imposition of an enhanced penalty was mandatory upon a finding by the court that the defendant who was convicted had been formerly convicted of one or more felonies. The trial court cannot proceed to act until an information has been filed by the district attorney and filed on the defendant pursuant to ORS 168.055. ORS 168.085, which sets forth the terms of imprisonment that may be imposed for subsequent convictions, does not attempt to distinguish between dangerous and non-dangerous felonies. The habitual criminal act would be repealed by sections 6 and 7 of this Article.

Under the provisions of ORS 137.111 to 137.119 any person convicted under ORS 163.210 (rape), ORS 167.040 (sodomy), ORS 163.220 (rape of sister, daughter or step-daughter), ORS 163.270 (assault with intent to rob or commit

rape or mayhem), ORS 167.035 (incest), ORS 167.045 (removal, detention or inducement of child with intent to commit certain sex offenses) may be sentenced to an indeterminate term not exceeding his natural life if:

(1) The offense involved a child under 16; and

(2) The court finds that the person has a mental or emotional disturbance, deficiency or condition predisposing him to the commission of any of the above-mentioned sex offenses.

ORS 167.050 provides for an enhanced penalty for the second conviction of any of the same sex offenses. (See, Commentary, Sexual Offenses, pp. 64-67 for further discussion of the above statutes.) ORS 137.111 to 137.119 and ORS 167.050 would be repealed by the draft.

ORS 166.230 provides for enhanced penalties for committing or attempting to commit a felony while armed with a firearm. The degree structure of the code's specific crimes, i.e., robbery in the first degree, burglary in the first degree, assault in the first degree, etc., take into account whether or not the felony is committed by a person who is armed in determining the grade of offense and maximum penalty. Therefore, additional enhancement of the penalties beyond that already built into the definitions of the crimes seem unnecessary. Furthermore, many of such offenses with firearms would fall within the purview of subsection (1) of the proposed section and permit sentencing as a dangerous offender.

For a critical analysis of sex offender and habitual criminal legislation see, ABA Standards Relating to Sentencing (Tent. Draft 1968) pp. 100-107, 160-171.

Section 7. Dangerous offenders; procedure and findings. (1) Whenever, in the opinion of the court, there is reason to believe that the defendant falls within the category of subsection (1) or (2) of section 6 of this Article, the court shall order a presentence investigation and a psychiatric examination. The court may appoint one or more qualified psychiatrists to examine the defendant or may order that he be taken by the sheriff to a state hospital designated by the Mental Health Division for the examination.

(2) When the examination is conducted at a state hospital the superintendent shall notify the sheriff upon completion of the examination, and the sheriff shall return the defendant to the county in which he was convicted. The defendant shall remain in the custody of the sheriff subject to further order of the court. All costs connected with the examination shall be paid by the county in which the defendant was convicted.

(3) The psychiatric examination shall be completed within 30 days, subject to additional extensions not exceeding 30 days on order of the court. The psychiatrist shall file with the court a written report of his findings and conclusions, including an evaluation of whether the defendant is suffering from a severe personality disorder indicating a propensity toward criminal activity.

(4) The immunities granted under ORS 137.075, as amended by section 2 of this Article, are applicable to the psychiatric examination made under this section 7.

(5) Upon receipt of the psychiatric examination and presentence reports the court shall set a time for a presentence hearing, unless the district attorney and the defendant waive the hearing. At the presentence hearing the district attorney and the defendant may examine the psychiatrist who filed the report regarding the defendant.

(6) If, after considering the presentence report, the psychiatric report and the evidence in the case or on the presentence hearing, the court finds that the defendant comes within subsection (1) or (2) of section 6 of this Article, the court may sentence the defendant as a dangerous offender.

(7) The defendant shall not be sentenced under subsection (3) of section 6 of this Article unless the court finds, on the basis of a presentence investigation or the evidence in the case or on a presentence hearing that the defendant comes within the purview of subsection (3). In support of such findings it may be shown that the defendant has had in his own name or under his control substantial income or financial resources not explained to the satisfaction of the court as derived from lawful activities or interests.

COMMENTARY - DANGEROUS OFFENDERS; PROCEDURE AND FINDINGS

A. Summary

Section 7 establishes the procedures for determining whether a defendant comes within the dangerous offender provisions of section 6. The purposes of the section are to provide procedural safeguards for the defendant, while at the same time furnishing the court with as much information as can be obtained on which to base an intelligent decision.

B. Derivation

The section is derived from Model Sentencing Act s. 6, but ORS 137.112 to 137.115 is the source of most of the language regarding the time and manner for conducting the psychiatric examination and presentence hearing. These are essentially the same procedures outlined in the statutes for utilization of the indeterminate sentence procedures for certain sex offenders.

C. Relationship to Existing Law

See Commentary to sections 2 and 6 supra.

NOTE REGARDING USE OF FINES AND METHOD OF COLLECTION: The draft does not contain any sections providing for criteria to be followed for imposing fines, alternative fines or methods of enforcement or collection. But these are areas that the Commission may want to examine closely. Therefore, the following analysis of the proposals advanced by the American Bar Association Standards on Sentencing, the Model Penal Code and the Model Sentencing Act is submitted to aid the Commission in determining whether to include additional sections concerning fines in the Article.

The ABA recommends that some method of assigning fines to offenses be chosen by the legislature which assures consistency in their use. The MPC, s. 6.03, provides a maximum allowable fine to be imposed for all classes of crimes, ranging from $10,000 for a first degree felony to $500 for a petty misdemeanor or violation. As the commentary to this section (Tentative Draft No. 2, p. 22) points out, the fine is authorized for all offenses, in the view that they may be appropriate sanctions in any type of case, but limiting criteria for their imposition are set forth in section 7.02. Although the reporter believed the maximum amounts provided in subsections (1) through (4) would generally be sufficient for both deterrent and correctional purposes, paragraph (5) permits a fine up to double the offender's gain where he has gained a pecuniary benefit from the offense. Paragraph (b) envisages that other higher limits may be used in special cases "specifically authorized by statute."

The MSA does not provide such a gradation of maximum fines authorized. Section 9 states: "Where a sentence of fine is not otherwise authorized by law, in lieu of or in addition to any of the dispositions authorized in this paragraph, the court may impose a fine of not more than $1,000. In imposing a fine the court may authorize its payment in installments." This section allows for a sentence of a fine for any nondangerous offender. The provision does not alter a state's existing statutes providing for fines but extends the possible use of fines to additional cases.

Subsections (a) and (c) of section 2.7 of the ABA Standards provide criteria for the imposition of a fine. Subsection (a) states that the legislature should authorize a fine in felony cases only in the event that the defendant has gained money or property through the commission of the offense. In offenses against the person the ABA could see no positive advantage to

punishment in the form of a fine. It was of the view that in the very few cases where imprisonment would be too severe and probation not severe enough, the Committee felt restitution or reparation to the victim as a condition of probation would be a more satisfactory disposition.

The MPC authorizes the imposition of a fine as a single sanction in any case and the imposition of a fine in conjunction with a sentence of imprisonment or a sentence to probation only if (a) the defendant has derived a pecuniary gain from his offense, or (b) "the Court is of the opinion that a fine is specially adopted to deterrence of the crime involved or to the correction of the offender." See MPC s. 7.02 (1) and (2).

The MSA would authorize the imposition of a fine up to $1,000 either "in lieu of or in addition to" a sentence of imprisonment or a sentence of probation without the limitations expressed by the MPC. The fine authorized would be available only where a fine is not otherwise authorized.

The ABA would reject the use of the fine in felony cases, whether as the only sanction or in conjunction with a sentence of imprisonment or probation, in instances where the defendant did not gain from the commission of the offense. In cases where there was a gain, or for misdemeanors and other lesser offenses, four additional factors which should be considered prior to the imposition of a fine are recommended in s. 2.7 (c). These criteria are based on the principle that the fine is an alternative to a jail or prison sentence, thus a system which routinely provides for imprisonment following default in payment of a fine is self-destructive of the goal sought.

Existing Oregon law provides:

ORS 137.150

> "A judgment that the defendant pay a fine shall also direct that he be imprisoned in the county jail until the fine is satisfied, specifying the extent of the imprisonment, which notwithstanding any other provision of thelaw to the contrary except ORS 164.440, shall not exceed one day for every $5 of the fine. In case the entry of judgment should omit to direct the imprisonment and the extent thereof, the judgment to pay the fine shall operate to require the imprisonment of the defendant until the fine is satisfied at the rate above mentioned."

Two approaches to the problem are suggested. The first is the development of a more flexible collection method. The MPC innovation for this purpose is the utilization of the installment payment. The MPC suggests that when one is sentenced to pay a fine, "the Court may grant permission for the payment to be made within a specified period of time or in specified installments," MPC s. 302.2 (1), with power in the court to allow additional time if nonpayment is without fault or, if necessary, to change the terms and conditions of payment. See MPC s. 302.2 (2).

Section 9 of the MSA also authorizes a court to direct payment of a fine in installments.

The second development to alleviate the problem is that fines be imposed only on those who are likely to be able to pay them. The MPC has implemented this idea by suggesting a legislated criterion that the court not be empowered to impose a fine unless "the defendant is or will be able to pay it." MPC s. 7.02 (3) (a). The first two criterion established for the imposition of a fine by the ABA Standards follow these provisions.

The third criterion specified in subsection (c) directs the court to consider the extent to which restitution or reparation to the victim will be impaired by a fine. MPC s. 7.02 (3) (b) likewise provides that a court may not impose a fine if the defendant is unable to pay it and the fine will "prevent the defendant from making restitution or reparation to the victim of the crime."

The fourth requirement, likewise, is based on the MPC s. 7.02 (2) (b). It expresses a presumption against imposition of a fine unless there are clear reasons which make the fine appropriate as a deterrent to the offense involved or as a corrective measure for the defendant.

In accord with the basic purpose of the fine the ABA recommends that the effect of nonpayment of a fine should be determined after an examination of the conditions which brought it about. The ABA rejects the automatic "thirty dollars or thirty days" type of sentence as suggesting an equivalence which is totally unrealistic as well as a process of sentence selection which is not tuned to the proper correctional goals.

The system proposed by the ABA Advisory Committee is outlined in its commentary at page 288-89 as follows:

> ". . . [I]n the first place, fines should never be levied unless it is reasonably clear that the defendant is going to be able to pay, either immediately or over time. With respect to defendants who cannot or will not be able to pay, a more appropriate sanction should be chosen. With respect to defendants who appear to be able to pay but ultimately do not, the proposal (in section 6.5) is that there first should be an inquiry into the reason for nonpayment. Only in the case where such a hearing discloses no excuse for nonpayment would jail be an appropriate response. For this class of offenders . . . jail is surely an appropriate remedy -- not as an alternative or an equivalent to a fine, but as a device to secure payment or as a sanction for the inexcusable failure to pay.
>
> "The Advisory Committee has again relied on the Model Penal Code, although its recommendation differs in two respects from the Code proposal. The Code invokes the analogy of contempt of court and permits the defendant to avoid jail for nonpayment by showing that he did not wilfully refuse to pay and that he made a good faith effort to pay. See Model Penal Code s. 302.2 (1) . . . The Advisory Committee would agree that the defendant should have the burden of showing a proper excuse, particularly if there has been, as there should be, an initial determination of the likelihood that he could pay. But the Committee has rejected the contempt analogy out of the fear that it might bring with it other aspects of the contempt sanction which were undesirable in this context. The Committee has also not spelled out with such particularity the grounds on which the defendant should be excused, preferring to leave it to the courts with the general admonition that it should make an inquiry to determine the reason for nonpayment and exercise the powers of subsection (a) if it finds a valid excuse."

The ABA Advisory Committee, in subsection (b) of section 6.5, has expressed its approval of the MPC provision of a specific outside limit on the jail sentence which can be imposed in such a context. See MPC s. 302.2 (1). Subsection (b) also deals with two other issues, whether service of the term should discharge the obligation to pay the fine and whether, once imprisonment has been imposed, payment of the fine should result in release of the offender.

In keeping with the theory that imprisonment should not be substituted for payment but instead an enforcement device used in the case of those who have failed inexcusably to pay, it could be argued that service of the term should not discharge the obligation to pay the fine. The Advisory Committee would recommend to the contrary, however, on the ground that there should be an end to the continued harassment of the defendant which could result from repeated use of coercive payment techniques. The MPC would seem to agree although the Code does provide for reduction of the fine according to a statutory formula based on the number of days actually imprisoned. See MPC s. 302.2 (1).

Finally, on the question of whether payment of the fine after a commitment should result in the release of the offender, theory again might suggest a position contrary to the one expressed in subsection (b). If imprisonment is imposed only after an inexcusable refusal to pay, it could be argued that the defendant should be made to serve out the entire time in order to vindicate the authority of the court. Subsection (b) adopts a contrary position, however, on the previously stated ground that the major objective to be served by imprisonment is to aid the collection process. Once that objective has been attained, little more would seem to be accomplished by the continued detention of the offender. The MPC, s. 302.2 (1) appears to give no determination of a result in such an instance; however, section 302.2 (3), allowing discharge of a defendant after collection under civil process,would seem to indicate that payment by the defendant would discharge the remaining term.

Subsection (c) of section 6.5, ABA Standards, follows the MPC in suggesting that it is entirely appropriate for civil collection techniques to be available for the enforcement of a fine. See MPC s. 302.2 (3). However, the ABA would add the restriction that civil process should only be used where it is ordered by the court, to prevent the possibility of its abuse.

Section 2.7 (g) of the ABA Standards is inserted to alert penal code draftsmen to the possibility of fines in connection with offenses by corporations. The MPC s. 6.04 (1), authorizes a court to impose a fine, authorized by section 6.03, on a corporation or unincorporated association which has been convicted of an offense. Subsection (2) provides important supplementary sanctions in the area of corporate crime by suggesting the utility of a broader resort to charter forfeitures as an adjunctive criminal sanction in the corporate case.

Subsection (2) (a) of MPC s. 6.04 states the criteria for forfeiture. The emphasis is on persistent misconduct and the need to prevent recurrence. However, the commentary to the section (Tentative Draft No. 4, p. 203) notes that proof of persistent misconduct need not be restricted to prior convictions of the corporation or its agents for criminal offenses. Moreover, forfeiture ought not to be regarded as an automatic consequence even of persistent misconduct; a substantial degree of discretion should be recognized in the court in which the case is brought.

The case is to be brought in a court of general jurisdiction. Section 6.04 (2) (a). However, the court trying the criminal case is granted the power to order the prosecutor to institute forfeiture proceedings where such action seems required. See MPC s. 6.04 (2) (b).

The power to initiate the action is placed in the hands of the local prosecutor who has the primary responsibility for criminal law enforcement.

Paragraph (c) provides that the proceedings conform to the procedures authorized by the statutes of the state for comparable proceedings.

Section 6.5 (d) of the ABA Standards adopts the suggestion of the MPC s.302.2(1), authorizing the sanction of imprisonment to compel corporate officers of a defaulting corporation to comply with an order imposing a fine on the corporation. The ABA contains the additional provision that corporate assets be subject to civil process for collection.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 6.07. Sentence of Imprisonment for Felony; Extended Terms.

In the cases designated in Section 7.03, a person who has been convicted of a felony may be sentenced to an extended term of imprisonment, as follows:

(1) in the case of a felony of the first degree, for a term the minimum of which shall be fixed by the Court at not less than five years nor more than ten years, and the maximum of which shall be life imprisonment;

(2) in the case of a felony of the second degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than five years, and the maximum of which shall be fixed by the Court at not less than ten nor more than twenty years;

(3) in the case of a felony of the third degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than three years, and the maximum of which shall be fixed by the Court at not less than five nor more than ten years.

Section 6.12. Reduction of Conviction by Court to Lesser Degree of Felony or to Misdemeanor.

If, when a person has been convicted of a felony, the Court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the view that it would be unduly harsh to sentence the offender in accordance with the Code, the Court may enter judgment of conviction for a lesser degree of felony or for a misdemeanor and impose sentence accordingly.

Section 7.02. Criteria for Imposing Fines.

(1) The Court shall not sentence a defendant only to pay a fine, when any other disposition is authorized by law, unless having regard to the nature and circumstances of the crime and to the history and character of the defendant, it is of the opinion that the fine alone suffices for protection of the public.

(2) The Court shall not sentence a defendant to pay a fine in addition to a sentence of imprisonment or probation unless:

(a) the defendant has derived a pecuniary gain from the crime; or

(b) the Court is of opinion that a fine is specially adapted to deterrence of the crime involved or to the correction of the offender.

(3) The Court shall not sentence a defendant to pay a fine unless:

(a) the defendant is or will be able to pay the fine; and

(b) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime.

(4) In determining the amount and method of payment of a fine, the Court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose.

Section 7.03. Criteria for Sentence of Extended Term of Imprisonment; Felonies.

The Court may sentence a person who has been convicted of a felony to an extended term of imprisonment if it finds one or more of the grounds specified in this Section. The finding of the Court shall be incorporated in the record.

(1) The defendant is a persistent offender whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant is over twenty-one years of age and has previously been convicted of two felonies or of one felony and two misdemeanors, committed at different times when he was over [insert Juvenile Court age] years of age.

(2) The defendant is a professional criminal whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant is over twenty-one years of age and:

(a) the circumstances of the crime show that the defendant has knowingly devoted himself to criminal activity as a major source of livelihood; or

(b) the defendant has substantial income or resources not explained to be derived from a source other than criminal activity.

(3) The defendant is a dangerous, mentally abnormal person whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant has been subjected to a psychiatric examina-

tion resulting in the conclusions that his mental condition is gravely abnormal; that his criminal conduct has been characterized by a pattern of repetitive or compulsive behavior or by persistent aggressive behavior with heedless indifference to consequences; and that such condition makes him a serious danger to others.

(4) The defendant is a multiple offender whose criminality was so extensive that a sentence of imprisonment for an extended term is warranted.

The Court shall not make such a finding unless:

(a) the defendant is being sentenced for two or more felonies, or is already under sentence of imprisonment for felony, and the sentences of imprisonment involved will run concurrently under Section 7.06; or

(b) the defendant admits in open court the commission of one or more other felonies and asks that they be taken into account when he is sentenced; and

(c) the longest sentences of imprisonment authorized for each of the defendant's crimes, including admitted crimes taken into account, if made to run consecutively would exceed in length the minimum and maximum of the extended term imposed.

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Text of New York Revised Penal Law

§ 65.20 Sentence of unconditional discharge

1. Criteria. The court may impose a sentence of unconditional discharge in any case where it is authorized to impose a sentence of conditional discharge under section 65.05 if the court is of the opinion that no proper purpose would be served by imposing any condition upon the defendant's release.

When a sentence of unconditional discharge is imposed for a felony, the court shall set forth in the record the reasons for its action.

2. Sentence. When the court imposes a sentence of unconditional discharge, the defendant shall be released with respect to the conviction for which the sentence is imposed without imprisonment, fine or probation supervision. A sentence of unconditional discharge is for all purposes a final judgment of conviction. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 70.10 Sentence of imprisonment for persistent felony offender

1. Definition of persistent felony offender.

(a) A persistent felony offender is a person who stands convicted of a felony after having previously been convicted of two or more felonies, as provided in paragraphs (b) and (c) of this subdivision.

(b) A previous felony conviction within the meaning of paragraph (a) of this subdivision is a conviction of a felony in this state, or of a crime in any other jurisdiction, provided:

(i) that a sentence to a term of imprisonment in excess of one year, or a sentence to death, was imposed therefor; and

(ii) that the defendant was imprisoned under sentence for such conviction prior to the commission of the present felony; and

(iii) that the defendant was not pardoned on the ground of innocence.

(c) For the purpose of determining whether a person has two or more previous felony convictions, two or more convictions of crimes that were committed prior to the time the defendant was imprisoned under sentence for any of such convictions shall be deemed to be only one conviction.

2. Authorized sentence. When the court has found, pursuant to the provisions of the code of criminal procedure, that a person is a persistent felony offender, and when it is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest, the court, in lieu of imposing the sentence of imprisonment authorized by section 70.00 for the crime of which such person presently stands convicted, may impose the sentence of imprisonment authorized by that section for a class A felony. In such event the reasons for the court's opinion shall be set forth in the record. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 80.00 Fine for felony

1. Criterion for fine. The court may impose a fine for a felony if the defendant has gained money or property through the commission of the crime.

2. Amount of fine. A sentence to pay a fine for a felony shall be a sentence to pay an amount, fixed by the court, not exceeding double the amount of the defendant's gain from the commission of the crime.

3. Determination of amount. As used in this section the term "gain" means the amount of money or the value of property derived from the commission of the crime, less the amount of money or the value of property returned to the victim of the crime or seized by or surrendered to lawful authority prior to the time sentence is imposed.

When the court imposes a fine for a felony the court shall make a finding as to the amount of the defendant's gain from the crime. If the record does not contain sufficient evidence to support such a finding the court may conduct a hearing upon the issue.

4. Exception. The provisions of this section shall not apply to a corporation. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 80.10 Fines for corporations

1. In general. A sentence to pay a fine, when imposed on a corporation for an offense defined in this chapter or for an offense defined outside this chapter for which no special corporate fine is specified, shall be a sentence to pay an amount, fixed by the court, not exceeding: $50,000

(a) Ten thousand dollars, when the conviction is of a felony;

(b) Five thousand dollars, when the conviction is of a class A misdemeanor or of an unclassified misdemeanor for which a term of imprisonment in excess of three months is authorized;

(c) Two thousand dollars, when the conviction is of a class B misdemeanor or of an unclassified misdemeanor for which the authorized term of imprisonment is not in excess of three months;

(d) Five hundred dollars, when the conviction is of a violation;

(e) Any higher amount not exceeding double the amount of the corporation's gain from the commission of the offense.

2. Exception. In the case of an offense defined outside this chapter, if a special fine for a corporation is expressly specified in the law or ordinance that defines the offense, the fine fixed by the court shall be as follows:

(a) An amount within the limits specified in the law or ordinance that defines the offense; or

(b) Any higher amount not exceeding double the amount of the corporation's gain from the commission of the offense.

3. Determination of amount or value. When the court imposes the fine authorized by paragraph (e) of subdivision one or paragraph (b) of subdivision two for any offense the provisions of subdivision three of section 80.00 shall be applicable to the sentence. L.1965, c. 1030, eff. Sept. 1, 1967.

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Text of Michigan Revised Criminal Code

[Unconditional Discharge]

Sec. 1335. (1) If a person who has been convicted of a crime is not sentenced to imprisonment, the court may sentence him to unconditional discharge if it is of the opinion that no proper purpose would be served by imposing any condition upon the defendant's release.

(2) If a sentence of unconditional discharge is imposed for a felony, the court shall set forth in the record the reasons for its action.

(3) If the court imposes a sentence of unconditional discharge, the defendant shall be released with respect to the conviction for which the sentence is imposed without imprisonment, fine, or probationary supervision.

(4) A sentence of unconditional discharge is for all purposes a final judgment of conviction.

[Fines for Felonies]

Sec. 1501. (1) A sentence to pay a fine for a felony shall be a sentence to pay an amount, fixed by the court, not exceeding 2,500 dollars.

(2) If a person has gained money or property through the commission of any felony, then upon conviction thereof the court in lieu of imposing the fine authorized for the felony under subsection (1), may sentence the defendant to pay an amount fixed by the court, not exceeding double the amount of the defendant's gain from the commission of the crime.

(3) As used in this section the term "gain" means the amount of money or the value of property derived from the commission of the crime, less the amount of money or the value of property returned to the victim of the crime or seized by or surrendered to lawful authority prior to the time sentence is imposed. "Value" shall be determined by the standards established in section 320(m).

(4) When the court imposes a fine for a felony the court shall make a finding as to the amount of the defendant's gain from the crime. If the record does not contain sufficient evidence to support a finding the court may conduct a hearing upon the issue, according to procedures established by rule of court.

(5) This section does not apply to a corporation.

[Costs]

Sec. 1525. (1) The court may require the convicted defendant to pay costs.

(2) Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant. They cannot include expenses inherent in providing a constitutionally-guaranteed jury trial or expenditures in connection with the maintenance and functioning of government agencies that must be made by the public irrespective of specific violations of law.

(3) The court shall not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

(4) A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment thereof may at any time petition the court which sentenced him for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or his immediate family, the court may remit all or part or the amount due in costs, or modify the method of payment under section 1530.

[Time and Method of Payment of Fines and Costs]

Sec. 1530. (1) When a defendant is sentenced to pay a fine or costs, the court may grant permission for payment to be made within a specified period of time or in specified installments. If no such permission is embodied in the sentence the fine shall be payable forthwith.

(2) When a defendant sentenced to pay a fine or costs is also sentenced to probation or conditional release, the court may make payment of the fine or costs a condition of probation or conditional release.

[Consequences of Nonpayment of Fines and Costs]

Sec. 1535. (1) When a defendant sentenced to pay a fine or costs defaults in the payment thereof or of any instalment, the court on the motion of the prosecuting attorney or upon its own motion may require him to show cause why his default should not be treated as in civil contempt, and may issue a summons or a warrant of arrest for his appearance. Unless the defendant shows that his default was not attributable to an intentional refusal to obey the order of the court, or to a failure on his part to make a good faith effort to obtain the funds required for the payment, the court shall find that his default constitutes a civil contempt and may order him committed until the fine or costs, or a specified part thereof, are paid.

(2) When a fine or costs are imposed on a corporation or unincorporated association, it is the duty of the person or persons authorized to make disbursement from the assets of the corporation or association to pay them from those assets, and their failure to do so shall be held a civil contempt unless they make the showing required in subsection (1).

(3) The term of imprisonment on civil contempt for nonpayment of fine or costs shall be specified in the order of commitment, and shall not exceed 1 day for each 10 dollars of the fine or costs, 30 days if the fine or costs were imposed upon conviction of a violation or misdemeanor, or 1 year in any other case, whichever is the shorter period. A person committed for nonpayment of a fine or costs shall be given credit toward payment for each day of imprisonment, at the rate specified in the order of commitment.

(4) If it appears that the default in the payment of a fine or costs is not in civil contempt, the court may enter an order allowing the defendant additional time for payment, reducing the amount thereof or of each instalment, or revoking the fine or costs or the unpaid portion thereof in whole or in part.

(5) A default in the payment of a fine or costs or any instalment thereof may be collected by any means authorized for the enforcement of a judgment under chapter 60 of Act No. 236 of the Public Acts of 1961, as amended. A defendant committed to imprisonment for nonpayment of fine or costs shall not be discharged from custody until the amount due has actually been collected through execution of process.

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Text of Model Sentencing Act

§ 5. DANGEROUS OFFENDERS

Except for the crime of murder in the first degree, the court may sentence a defendant convicted of a felony to a term of commitment of thirty years, or to a lesser term, if it finds that because of the dangerousness of the defendant, such period of confined correctional treatment or custody is required for the protection of the public, and if it further finds, as provided in section 6, that one or more of the following grounds exist:

(a) The defendant is being sentenced for a felony in which he inflicted or attempted to inflict serious bodily harm, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity. (b) The defendant is being sentenced for a crime which seriously endangered the life or safety of another, has been previously convicted of one or more felonies not related to the instant crime as a single criminal episode, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity. (c) The defendant is being sentenced for the crime of extortion, compulsory prostitution, selling or knowingly and unlawfully transporting narcotics, or other felony, committed as part of a continuing criminal activity in concert with one or more persons.

The findings required in this section shall be incorporated in the record.

§ 6. PROCEDURE AND FINDINGS

The defendant shall not be sentenced under subdivision (a) or (b) of section 5 unless he is remanded by the judge before sentence to [diagnostic facility][4] for study and report as to whether he is suffering from a severe personality disorder indicating a propensity toward criminal activity; and the judge, after considering the presentence investigation, the report of the diagnostic facility, and the evidence in the case or on the hearing on the sentence, finds that the defendant comes within the purview of subdivision (a) or (b) of section 5. The defendant shall be remanded to a diagnostic facility whenever, in the opinion of the court, there is reason to believe he falls within the category of subdivision (a) or (b) of section 5. Such remand shall not exceed ninety days, subject to additional extensions not exceeding ninety days on order of the court.

The defendant shall not be sentenced under subdivision (c) of section 5 unless the judge finds, on the basis of the presentence investigation or the evidence in the case or on the hearing on the sentence, that the defendant comes within the purview of the subdivision. In support of such findings it may be shown that the defendant has had in his own name or under his control substantial income or resources not explained to the satisfaction of the court as derived from lawful activities or interests.