

MEMORANDUM TO THE COMMISSION ON  
REVISION OF THE PENAL LAW AND CRIMINAL CODE

In the February, 1962 Interim Report the Commission announced that its first task with respect to Penal Law revision was one of excision and relocation. This project involves an examination of 112 Penal Law Articles, which collectively contain approximately 1200 sections. Articles range in length from a single section (Articles 3, 13, 92, 100, 102, 156, 160, 194, 214) to sixty-one sections (Article 170, "Public Office and Officers"). Sections vary from five words (§321: "Common barratry is a misdemeanor") to approximately 4,000 words (§1897: dangerous weapons). Two general provisions (immunity and leaving the state to elude prosecution) are scattered regularly through the Penal Law (see, e. g., §§165, 166, 1713, 1716), violating the drafting principle of avoiding redundant treatment of recurrent questions. The staff, using an index card system, has identified approximately 600 sections as candidates for repeal or removal to some other body of law. Each section was examined with this question in mind: is this provision regulatory in nature, obsolete, or duplicative? Several sections have been declared unconstitutional by New York courts.

The Commission is engaged in correspondence with all official agencies and organizations concerned with particular tentative proposals. Suggestions and comments are being received, and informal conferences planned. The staff will also maintain contact with the Bill Drafting Commission of the legislature as to the

formalities and technical requirements to be observed in setting forth in proper bill form the changes finally approved. Each bill will be accompanied by an explanatory comment. A special endorsement will be added to these mechanical revision bills to distinguish them from other Commission bills involving more fundamental changes in the Penal Law. A Distribution or Disposition Table will be prepared.

No substantive or style changes will be made to sections which have been designated for relocation. This procedure, of course, will not always promote internal consistency and good organization in the repository statutes. For example, Penal Law Article 32, "Bills of Lading, Receipts and Vouchers," §§360-367, is much older than the Uniform Bills of Lading Act (Personal Property Law §§187-241). This Penal Law Article recognizes no distinction as to negotiability and non-negotiability. One commentator wrote that "this uncertainty and confusion should be remedied." Leg. Doc. (1934) No. 50 Q, p. 18. A minor amendment was made to Article 32 by L. 1941, ch. 309. Recognizing that this is not the most ideal disposition, the staff recommends that Article 32 be transferred in toto, without change, to the Personal Property Law as a new Article immediately following the Uniform Act. Penal Law Article 64, "Corporations," relates to a matter recently reviewed by the Joint Legislative Committee to Study Revision of Corporation Laws.

Their work was the basis for the new Business Corporation Law, effective April 1, 1963. We have communicated with the chairman of this Committee to determine if they plan to recommend changes to this Penal Law Article.

No effort is being made at this stage of the project to declassify regulatory legislation carrying penal sanctions to a category of non-criminal offense. Many of these Penal Law misdemeanor sections violate the principle that social condemnation is, and ought to be implicit in the concept of "crime." When transferred they will join numerous acts denoted as crimes which are dispersed through the general laws, e. g., Banking Law §563, Education Law §224 (felony), Executive Law §8, Highway Law §323, Judiciary Law §813, Mental Hygiene Law §205, Navigation Law §62 (felony), Personal Property Law §46-f, Village Law §333, State Sanitary Code Chapter I, Regulation 4, and Unconsolidated Laws §9903. One study found that some 400 crimes are provided by statutes (not including local laws) other than the Penal Law. MacDonald, The Classification of Crimes, 18 Corn. L. Q. 524, 526 (1933). Several "civil" laws have a "dragnet" provision stating that a violation of any section in the chapter or a particular article thereof constitutes a misdemeanor, unless otherwise indicated, e. g. Agriculture and Markets Law §41, Conservation Law §65, Multiple Dwelling Law §304, and Public Service Law §56. In 1957

many offenses in the Conservation Law, classified as misdemeanors, were downgraded to "infractions." L. 1957, ch. 827. On approving this bill, the Governor wrote these comments.

"The result of long study and cooperative efforts of the Conservation Department and the Joint Legislative Committee on Revision of the Conservation Law, this bill seeks to modernize and make more effective the enforcement provisions of the Conservation Law. Its principal objective is to reclassify the many methods of violating the Conservation Law, continuing the more serious as misdemeanors, but relegating the less serious to the status of infractions ....Under present law many relatively minor violations result in criminal records against the offenders because they are classed as misdemeanors. Such records may bring about consequences out of proportion to the offense when a minor offender later applies for public employment, for licensing of an occupation under government control, or seeks to enter the armed forces...." McKinney's 1957 Session Laws of New York, p. 1908.

Two strong threads run through the Penal Law: (1) excessive itemization and (2) inclusion of regulatory legislation carrying penal sanctions. The source for this defect may be traced largely to the Field Code Commissioners' conception of a penal law:

(1) "Where a statute forbidding a particular species of acts has for years existed along with a general provision impliedly embracing the same cases, there is danger in omitting the special provision, however needless it may be, lest an inference should be drawn from the omission, that the act was designed to be made no longer punishable. Where provisions of existing statutes have been thought objectionable in themselves, but useless because

embraced in effect in other provisions of a more general character, they have, therefore, in many cases been retained in this draft, in the belief that the omission of them may more safely be made in the ultimate revision of the work, than at present." Draft of a Penal Code for the State of New York, vi, (1864).

(2) "The value of the Penal Code must ultimately depend, in great measure, upon its containing provisions which embrace every species of act or omission which is the subject of criminal punishment." Id. at iv. The Commissioners wrote that their "leading object [was] to bring within the compass of a single volume the whole body of the law of crimes and punishments in force within this state." Id. at iii.

A decidedly different view has been expressed by our Commission: a well-articulated general formulation obviously avoids itemization; a proper penal code should not cover the entire field of criminality. The difficulties created by the Field Code were compounded by the Consolidators at the turn of the century:

"There are several independent statutes relating to subjects included in the Penal and Criminal Codes. These codes are therefore incomplete, and the practicable use has also been rendered inconvenient by reason of the manner in which a large number of sections have been added. We have therefore concluded to present a Penal Code [which has] not been rewritten, except so far as occasionally necessary to bring together in a new arrangement the subjects included in them, and like subjects now in other statutes." (emphasis added) Board of Statutory Consolidation, Plan For Collating the Statutes for Consolidation and Revision, 594 (1904).

The present project involves the distribution of "not really

penal laws" to some other chapter dealing with cognate subject matter, and the identification of obsolete or duplicative sections. The following is illustrative of Penal Law provisions that are essentially regulatory in scope:

- (1) Some articles are of such a nature that there will be little doubt as to the advisability of their relocation to chapters which deal more fully with the activity regulated: "Banking" --(26), "Elective Franchise" --(74), "Insurance"--(112), "Labor" --(120), "Military"--(142), "Navigation" --(144), and "Railroads"--(178). All proposals affecting particular State agencies have been submitted to the heads of such departments for review and suggestions.
- (2) Some Penal Law sections readily find "natural homes" in other chapters:
  - (a) §185-a, "Sale of baby chicks," to Agriculture and Markets Law Article 15-A, "Sales of Baby Chicks".
  - (b) §943, "Mock auction," to General Business Law Article 3, "Auctions and Auctioneers".
  - (c) §§951-957, relating to securities, to General Business Law Art. 23-A which covers fraudulent practices in respect to securities.
  - (d) §§1590-1593, relating to pawnbrokers, to General Business Law, Article 5, "Pawnbrokers".
  - (e) §1610, "Unlicensed Peddlers," to General Business Law, Article 4, "Peddlers".
- (3) Some sections of the Penal Law state that a violation of a specific provision of the "civil" consolidated laws constitutes a misdemeanor, e. g., §§446, 783, 1231, 1275, 1277, 1500, 1740, 1744, 1763, 1878, 1902-3.

These sections will be transferred to appropriate places. Some sections refer to specific enactments in other chapters of the consolidated laws that have been repealed or renumbered after the effective date of the Penal Law, e. g., §§1791, 1874-1875, 1912, 2410.

- (4) Some Penal Law sections are germane to a certain topic, but are found in separate parts:
  - (a) Article 159, "Platinum Stamping," §§1635-1643, §§422-429 (silver), and §431 (gold): all can be transferred to the General Business Law under a new Article 2 entitled "Platinum, Silver and Gold."
  - (b) Several sections proscribe the unauthorized use of certain names: §421-d (government), §440-b (World's Fair 1964-1965), §945 (benevolent), §958 (government), §964 (any name which may deceive), §§964-a, 966 (United Nations). All can be transferred to the General Business Law as new §§397-a--397-g.
  - (c) Three sections relate to flammable liquids and materials: §§433, 1902, 1921. All can be transferred to the General Business Law which treats this topic comprehensively (G.B.L Articles 19, 20, 20-A and 29).
- (5) Some Penal Law sections apply only to New York City: §722-a (unmuzzled dog), §1423-b (lamp-posts), §1425-a (bean-shooters), §1438 (bridge), §1573 (non-transferable railroad tickets), §§1876-7 (judges and criminal process), and §1917 (receptacles on window sills). Laws having local application belong in the Administrative Code.
- (6) It is recommended that all Penal Law sections relating to "cruelty to animals" be treated under a new Article 25-C in the Agriculture

and Markets Law. (The present Article 25-B is entitled "Abandoned Animals."). This proposal has received the approval of the Commissioner of Agriculture and Markets. The staff has conferred with counsel to the A. S. P. C. A., who has this recommendation under consideration.

There are some Penal Law sections which no longer apply to present day conditions, and no reason exists for their further continuance, e. g.:

- (1) §432 (Illegal charges for elevating grain): grain storage charges are no longer regulated by law. Source: State Department of Agriculture and Markets.
- (2) §443 (Tickets issued by People's Institute not transferable): this corporation ceased operating in 1938. Source: Cooper Union librarian.
- (3) §1904 (Ice cutting and patrol of the St. Lawrence River by the sheriff): ice cutting is extinct, and patrols are no longer made by the sheriff. Source: Sheriff of St. Lawrence County.
- (4) §2170 (Injuries to the Onondaga salt works): the State ceased salt manufacturing many years ago. Source: State Department of Commerce.

Note: In the 1931 session of the Legislature, a series of bills was introduced to repeal many Penal Law provisions considered obsolete by the bills' sponsors.

There is much overlapping due to different acts covering in part the same subject matter, e. g.:

- (1) §435, subd. 4 relates to Kosher food.

The subject is duplicated in §§ 435-a, 435-b and 435-c. The language in the latter three sections is repeated verbatim in Agriculture and Markets Law §§201-a, 201-b, and 201-c.

- (2) Penal Law Article 82 is entitled "Ferries." This business is also regulated by Navigation Law Article 8, "Ferries, " and Transportation Corporations Law Article 6, Ferry Corporations."
- (3) The subject of weights and measures is duplicated in Penal Law Article 216 and Agriculture and Markets Law Articles 16 and 16-A.
- (4) Penal Law Article 206, "Trade-Marks," is similar to General Business Law Article 24; the latter Article, however, does "not affect a registrant's right to prosecute under any penal law of this state." (G.B.L. §368-c, subd. 2). Prof. Milton Handler made a study of this subject for the Law Revision Commission and recommended the repeal of almost all criminal provisions relating to the protection of trade-marks. Leg. Doc. (1953) No. 65 T.
- (5) Discrimination against servicemen is prohibited by Penal Law §517 and §1481; unauthorized wearing of military uniforms is proscribed by §1484 and §2240-a.
- (6) Article 108, "Indians," §§1160-1161, is duplicated in Indian Law §§22 and 56. The recommendation that these Penal Law provisions be repealed was approved by the Interdepartmental Committee on Indian Affairs.
- (7) Penal Law §835 is similar to §349, the latter under Article 31, "Billiard and Pocket Billiard Rooms." This "sport" is licensed by the Department of State. It is recommended that §835 be repealed and that Article 31 be transferred to the General Business Law. The Secretary of State has this proposal under study.

- (8) Article 160, "Poor Persons," and Social Welfare Law §148 are synonymous. The Commissioner of Social Welfare recommends repeal of Penal Law Article 160.
- (9) Penal Law §1743 (Selling poison without labeling) is substantially similar to Education Law §6813. The recommendation to repeal or remove 35 Penal Law sections relating to public health is under consideration by the State Department of Health.
- (10) The subject of "Wrecks" is covered in Penal Law Article 222, §§2480-2482, and in Navigation Law Article 10, §§130-139.

Some Penal Law provisions have been declared unconstitutional,

e. g.,

- (1) §436-d (sale of periodical with title page removed) was held unconstitutional in People v. Bunis, 9 N. Y. 2d 1 (1961).
- (2) The two sections in Article 208, "Trading Stamps," were declared unconstitutional by New York courts in People ex rel Appel v. Zimmerman, 102 App. Div. 103 (4th Dept. 1905), People ex rel Madden v. Dycker, 72 App. Div. 308 (3rd Dept. 1902). In 1915, the New York Attorney General was of the opinion that these two sections were dead-letters. 5 St. Dept. 530. In 1916, the United States Supreme Court upheld, against a challenge based on the Fourteenth Amendment, legislation prohibiting the use of trading stamps. Pitney v. Washington, 240 U. S. 387. Again, in 1959, the Attorney General issued an opinion stating that despite the Supreme Court's ruling "the cited decisions of the Courts of this State are final and conclusive as to the unconstitutionality of these sections under the State Constitution." 1959, Op. Atty. Gen. 96.
- (3) §936-a (secret fraternities) was held unconstitutional by Erie County Supreme Court in

People v. Van Dell, 85 Misc. 92 (1914). And §531 (coercion by employers) was held unconstitutional in People v. Marcus, 185 N. Y. 257 (1906). Both sections probably are valid today.

The foregoing, of course, is only briefly illustrative of the kind of material included in the Penal Law and the various possible dispositions to be made of regulatory, obsolete or duplicative matter. The staff proposes to submit to the Commissioners for their decisions, weekly reports recommending repeal or relocation of various Penal Law sections. The reports will summarize briefly the scope of each section reviewed, cite related provisions and background material, recommend a particular relocation (or repeal where appropriate) and the reasons therefor, and state whether this recommendation has the approval or disapproval of interested organizations and state agencies.