

THE CORRECTIONAL ASSOCIATION OF NEW YORK

PROPOSED NEW YORK PENAL LAW\*

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In 1961 the State Commission on the Revision of the Penal Law and Criminal Code was created and presented with a monumental mandate to prepare for submission to the Legislature a revised simplified body of substantive laws relating to crime and offenses in the State as well as a revised simplified code of rules and procedures relating to criminal and quasi-criminal actions and proceedings. This was to be the first overall study and revision of the Penal Law and the Code of Criminal Procedure since 1881 - 83 years.

The Correctional Association of New York was a moving force in the 1881 codification of the Penal Code and Code of Criminal Procedure. In its report in 1880 to the Legislature the Association stated the following:

"The body of evidence in this report shows that as regards the local prisons and jails in this State, and as regards our laws relating to them, there is urgent necessity for greater improvements and more radical changes than have hitherto been attempted by the Legislature.

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As the great reforms now most urgently needed are twofold: First and most obviously, because the common jails and their inmates are in a deplorable condition, and are literally the common schools of crime and vice; and second, because the laws and administration of them relating to crime and the movements of public justice, are in an unsatisfactory state, this report will present fresh evidence of the former, and also submit a carefully prepared digest of the laws which show the latter, fact. The design is to facilitate any necessary legislation, and at the same time prevent needless and injurious laws from being enacted, while offering the means of ready reference to, and consultation of, the existing laws relating to jails and prison and their inmates. This compilation of the prison laws (Appendix E of Report) has been prepared under the supervision of Mr. Carleton T. Lewis, the present Chairman of the Executive Committee of the Association, for uses of this body, and as a means of serving the Legislature, and all public authorities who are concerned for this Association's faithful discharge of its obligations. By the act of incorporation the Association is required 'annually to report to the Legislature the state of all prisons, and all such other things in regard to them as may enable the Legislature to perfect their government and discipline' ".

As it was with the first codification in 1881, The Correctional Association of New York was most pleased at the mandate presented in 1961 to your Commission.

The diligence and energy with which the Commission and staff have undertaken the assigned task is commendable and laudable. The Association feels that the Commission has done a monumental task in bringing order to and eliminating much extraneous material from the Penal Law of the State.

The Association is pleased to have this opportunity to testify before the Commission and of publicly acknowledging its commendation to the Commission and staff.

The scope and details of the Proposed New York Penal Law are so vast that we will be testifying only on selected sections and those important areas which we feel the Commission might reconsider.

Staff notes dealing with Article 30 in the Proposed Penal Law - sentences of imprisonment - succinctly state the three basic objectives of modern correction and criminal law, namely, deterrence, incapacitation and rehabilitation.

1. Deterrence. In its effort to control the behavior of individuals the sovereign state through laws prescribes acceptable and unacceptable behavior. Any deviation places the individual in conflict with the law and libels him to prosecution and punishment. The underlying philosophy of the criminal code is that through the

use of penalties individuals will be deterred from acting in an undesirable way and the community be protected from undesirable behavior or behavior deviating from the accepted.

2. Incapacitation. The use of penal sanctions primarily that of incarceration, protects the community from affronts during the time that the individual is "incapacitated" - that is removed from the community in a secure correctional institution, and,
3. The rehabilitation of those individuals as a result of the sanction imposed be it probation, institutionalization, or parole so that the community is safeguarded from future affronts.

Maintaining the proper balance among these three, one must take into consideration the act of the individual, the situation in which the act occurred as well as the actor or offender - his potential, his understanding, and his reason. It is fundamental in the American way of life to emphasize the importance and value of the individual.

#### MAXIMUM SENTENCES

We recognize that in determining the maximum sentence to be allowed by law for specific offenses the more intractable and dangerous offender must be considered as well as the average offender who commits the particular crime.

In general, we feel that the maxima prescribed for the various felony classifications in the Proposed Penal Law are too severe for the average offender and would in many cases be excessive. However, in that there are a number of factors entering into the length of sentence of incarceration which in a few cases might indicate the need for these high maxima, we concur with the Commission's proposals. We would propose, however, that in the imposition of all sentences greater than two-thirds of the maximum authorized by the Proposed Law, the court be required to state on the record the reason for the exercise of its discretion in imposing such a long sentence. By this procedure we believe that the courts will retain their discretionary power and at the same time individual defendants will be protected from unduly excessive punishments. I have been asked to state that the Grand Jurors Association concurs fully with our thinking on this proposal.

#### MINIMUM SENTENCES

The Association continues its long time position in opposition to the mandating of excessively high minima for particular offenses. In our estimation high minima mandated by statute tend to work in opposition to the true protection of the community. With extremely high minima, just as with prohibitions against probation and parole in specific cases, the necessary sentencing flexibility is so markedly reduced that the disposition cannot be geared properly to the offender-offense-situation. We would therefore like to commend the Commission for its proposal to abolish high minima.

MANDATORY 2nd and 3rd FELONY SENTENCES

Just as the Association is opposed to high mandatory minima so does it feel that the courts are not permitted proper latitude in sentencing the offense-offender-situation unit when mandatory sentences for second and third offenses exist. The high maxima for the various felony classes allowed in the Proposed Law mentioned above together with the efficient State Parole Commission can, without the rigidity of mandatory sentences for second and third felony offenses, provide sufficient safeguards to the community as well as consider the circumstances surrounding the particular crime, the nature and circumstances of previous crimes as well as the history, character, and condition of the offender.

We would disagree with that section of the Proposed Law (30.10) dealing with the persistent felony offender to the extent that we feel that a persistent felony offender should be defined as a person who stands convicted of a felony after having previously been convicted of three or more felonies rather than the proposed two or more felonies.

The specific act, the situation in which the act occurred, and the individual we have referred to as the offense-offender-situation unit. The Correctional Association of New York an impartial objective organization whose primary concern is the protection of the community has attempted to evaluate the complex phenomena of crime and punishment weighing all three factors realizing the great difficulty of evaluating the impact imprisonment will have upon a particular offender as well as the difficulty of making an honest

assessment of threatened punishment upon potential offenders. The Association is cognizant that "failure to impose a sentence of imprisonment may involve a risk to the community and the use of imprisonment may involve a risk of destroying an individual indeed many times a family" to quote from the Commission's staff notes. In the latter instance we do not believe that the community is truly protected from future efforts.

With an increase and knowledge about human behavior and motivation, with improvements in the predictability of human behavior, we continue to maintain that flexibility in the handling of offenders is imperative in any penal code. This is the basic philosophy underlying our observations today.

#### GOOD BEHAVIOR TIME

Under the Proposed Penal Law, time allowances earned for good behavior are applied only to the maximum sentence and do not apply against the minimum. This we believe to be unrealistic. The incentive of an inmate towards self-improvement, good behavior and diligent work in an institution, would, in our estimation, be markedly reduced if his conduct in the institution could in no way affect his parole eligibility date. I emphasize the word eligibility as good time credits applied to the minimum would simply affect eligibility for parole consideration and not dictate release from the institution.

We would therefore propose that the Commission reconsider 30.40 to permit the application of good behavior time credits to the minimum sentence establishing parole eligibility as well as to the maximum sentence.

SPECIFIC OFFENSES

The Association would like to comment on two specific "violations" mentioned in the Proposed Penal Law.

Article 250:10 (harassment) classifies "jostling" as a "violation" and as such authorizes a sentence of 15 days. Since the individuals generally involved in jostling or pickpocketing are professional offenders, we feel that sufficient latitude is not permitted the court by classifying this particular offense as a violation. We would propose instead that such sections 6 and 7 of Section 250.10 be changed to a misdemeanor category.

The Commission and staff should be complimented on the revision to the State's Public Intoxication Statute (old 1221). The substitute proposal (250.20 - Public Intoxication) overcomes two of the objections the Association has had to the existing public intoxication law. First, the new section requires that an individual, because of intoxication, "may endanger himself or other persons or property". This is not in the present statute. Secondly, the substance which caused the intoxication is broadened to include narcotics and other drugs. As an aside it is interesting to note that under present law it is an offense for an individual to be publicly intoxicated in all counties outside New York City from a substance which can be purchased legally at any bar or package store - namely alcohol, while at the same time it is not an offense to be publicly intoxicated as the result of the use of a substance banned even for medical usage in the United States - namely heroin.

Proposed Section 250.20 makes public intoxication a violation with the period of incarceration being 15 days. The Association wonders about the effect such a 15 day incarceration would have on some of the longer term programs being developed to treat alcoholics in county correctional institutions. While we do not believe that the alcoholic who is defined by the American Medical Association as being an ill individual, should be handled in a correctional setting, we also recognize that the mere presence of a statute which reflects a generally accepted mode of behavior when enforced does affect the actions of healthy normal people. A fundamental dilemma exists on the matter of public intoxication. Questions are raised even about the constitutionality of such laws. On the one hand the condition of repeated public intoxication which can evoke penal institution commitment is the very symptom which would lead one to suspect alcoholism - a disease. Repeatedly, studies of success or failure of cases of alcoholism committed to local correctional institutions, have shown an excessively high recidivism rate. So much so the term the "revolving door" has been applied to the jail because of the number of individuals addicted to alcohol who have been committed, released, re-committed, again released, committed and again released. These individuals constitute the "in and out" or the perennial jail habitue, they are the individuals "who are serving a life sentence on the installment plan".

On the other hand in our zealouslyness to treat a disease we must not overlook the fact that the public intoxication of those not addicted to alcohol may be and undoubtedly is affected because of the existence of state sanctions, yet should such state sanctions exist?

We would propose that the Commission staff discuss that section of Article 250.20 dealing with public intoxication with the Governor's Advisory Committee on Alcoholism, as well as the State Division of Alcoholism within the Department of Mental Hygiene, as we feel that this particular article requires the best thinking not only in the field of law and correction but also in the field of alcoholism.

For the record I am submitting a paper on this dilemma of alcoholism and the administration of justice prepared for presentation before the European Institute on the Prevention and Treatment of Alcoholism in August of 1964, London England, which attempts to more clearly define this problem.

#### MISDEMEANANT PAROLE

A constant striving for flexibility in dealing with the offender-offense-situation unit has been a guiding principle of the Correctional Association throughout the years. The Association has also recognized the short-sightedness of releasing individuals to the community without parole supervision. Work many years ago by The Correctional Association of New York brought about the use of the indeterminate sentence and parole in New York.

For the two reasons stated above we are in favor of the principle of misdemeanor parole expressed in the Proposed Penal Law. The proposals would allow the desired flexibility in the amount of time an individual would be incarcerated and would also bring about the parole supervision of individuals who have been sentenced to from 60 days to one year.

The community protection value of parole is well established in the instance of more serious offenses and we believe that the experience of the New York City Parole Commission attests to the desirability of the application of the parole concept to lesser offenders.

There is some confusion, however, over the terminology used in this particular section. We feel that the term "definite sentence parole" is not only ambiguous but also contains conflicting concepts. Some other phrase such as "misdemeanor parole" or "lesser offender parole" might be used instead.

The term "institution parole board" is likewise a misnomer and we would propose that it be changed either to "misdemeanor parole board" or "lesser offender parole board". Either we feel would be a more descriptive and accurate title.

We are not at the present time in the position to make any observations on the constitutionality of the proposal allowing for a two-year period of parole supervision after an individual may have completed the full maximum of his incarceration in a short-term institution. We would wonder, however, about the effectiveness of parole supervision in the event no sanction could be imposed in the instance of a technical parole violation.

#### PROPOSALS RELATING TO EXISTING ARTICLE 7A OF THE CORRECTION LAW

In 1915 legislation was enacted authorizing cities of the first class to create a parole commission and allowing for the commitment of misdemeanants on an indeterminate sentence with a maximum of three years or in certain

cases two years, to institutions under the City Department of Correction. This enabling legislation represented the most advanced thinking in its time and was the City's effort to bring rehabilitation, training and individualization of treatment to the many thousands of individuals committed to the New York City's correctional institutions. The Commission's proposal to completely abolish this Article of the Correction Law would, in our estimation, be a mistake.

The desirability of equalizing the maximum sentence allowed in the City of New York and that of other counties of the State for individuals convicted of a misdemeanor is readily seen. We feel that this can be done in such a way as to maintain those parts of Section 7A which are desirable yet at the same time overcome the disparity between authorized maximum sentences for misdemeanors in the City of New York and other counties of the State.

We would propose an alternative in lieu of the abolition of existing Section 7A of the Correction Law which has been in operation for 49 years.

We believe that the proposed misdemeanant parole statute and certain sections of existing Article 7A of the Correction Law can co-exist and would submit the following proposal.

1. Maintain the existing section of 7A which allows for sentencing to the City Reformatory, restricting the age to 16 to 21 years. At the same time extend the period from the existing three to a four year maximum. This could be done through modifying Section 35.05 of the Proposed Penal Law referring to reformatory sentences of imprisonment for young adults to read as follows:

"When reformatory sentence of imprisonment is imposed the court shall commit the young adult to the custody of the State Department of Correction or a reformatory under Article 7A of the Correction Law of the City Department of Correction for a reformatory period and until released in accordance with law". Such changes in both the existing section of 7A dealing with reformatory sentences and the Proposed Penal Law would allow the courts in the City of New York either to sentence a young adult age 16 to 21 to the custody of the State Department of Correction or to the custody of the New York City Department of Correction.

2. Modify Section 30.05 which allows alternative definite sentences for Class D and E Felonies where "the court having regard to the nature of circumstances of the crime and to the history and character of the defendant and is of the opinion that the sentence of imprisonment is necessary that it would be unduly harsh, etc." to include an indeterminate sentence to the City penitentiary under the existing section of Article 7A as well as authorizing a definite sentence of one year or less.

In the instance of New York City this would allow three alternatives to the court in sentencing Class D or E Felony cases.

- (a) The imposition of the sentence to the State Department of Correction for a Class D or E Felony, the maximum term of the Class D felony being 7 years, maximum for Class E Felony four years.

- (b)           Impose a penitentiary indefinite sentence with a three year maximum to an institution under the New York City Department of Correction, or,
- (c)           Impose a definite sentence of imprisonment fixing a term of one year or less.

There have been a substantial number of court appellate decisions upholding the existing 3-year indeterminate sentence possible in the City of New York based upon Article 7A of the Correction Law. These have been predicated on the reformation and rehabilitation of the individual. While we realize that the Commission is fully cognizant of these many decisions on the constitutionality of existing Article 7A we feel that it is appropriate to include several in the appendix of this testimony.

We cite the decisions to point out not only the court decisions upholding existing Article 7A of the Correction Law, but also to express the confidence of the Association in the efforts presently being made and the program now in operation for young adults committed to the City Department of Correction. The special education program being conducted for adolescents at Rikers Island as part of the 600 school system of the New York City Board of Education, the vocational training efforts are being made in that institution to prepare young adults for socially acceptable vocations coupled with the supervision, guidance and counsel provided by the New York City Parole Commission upon their release is in complete keeping with the original intent of those including the Correctional Association of New York who established this enabling legislation in 1915 and fully substantiates the many court decisions on the constitutionality of this law.

Arguments in opposition to this section of the existing law have been predicated upon the disparity between the maximum sentence for a misdemeanor committed in New York City and the same offense committed in one of the other counties of the State. We believe that our proposals mentioned above would obviate this criticism since in New York City because of its size and number of problems, the facilities available and the existence of the Department of Correction and City Parole Commission, the courts would be given and should have an additional set of facilities to utilize, yet the maximum time the individual might be incarcerated would not be greater than that in the Proposed Penal Law. For a young adult age 16 to 21 the individual could receive a reformatory sentence of imprisonment not to exceed four years in the custody of the State Department of Correction. The same would apply in our proposal of a reformatory sentence of imprisonment to the City Department of Correction.

The same would apply in the instance of the alternatives proposed for Class D or E Felony. Here the courts of the City of New York would have three dispositions available to them.

1. The sentencing of the individual to the State Department of Correction in the instance of a Class D Felony to imprisonment not exceeding 7 years and in the instance of a Class E Felony to a sentence not to exceed four years, or, imposing a definite sentence of imprisonment with a term of one year or less; or, utilizing that part of existing 7A relating to the indeterminate three-year maximum sentence to the City Penitentiary.

The other counties of the State would have 2 of the 3 alternatives available to them, namely, either imposing a sentence in the instance of a Class D Felony not exceeding 7 years or Class E Felony not exceeding 4 years; or, imposing a definite sentence of imprisonment not exceeding one year.

The Correctional Association is most appreciative of this opportunity to present its views on the Proposed New York Penal Law. We are certain that the Commission with the assistance of its staff will consider the observations that have been made not only by the Correctional Association of New York but also by the others who have testified at various hearings throughout the State.

May we again commend the Commission and staff for the work they have done in simplifying the Penal Law of the State of New York and personally thank Mr. Denzer and Mr. Preiser for their ready willingness to help the members of The Correctional Association of New York understand not only the Commission's thinking, but also their unbiased sincere evaluations of the improvements sorely needed in the Penal Law of the State of New York

Appendix attached

APPENDIX

COURT DECISION ON ARTICLE 7 A  
CORRECTION LAW

"Under this section relating to sentencing of offender to correctional institution if there is a possibility of reformation, offenders should be sentenced to such institutions, where there is possibility of substantial benefit from such sentence. People ex rel. Travatello V. Ashworth, 1943, 43 N.Y.S., 2b 397."

"This purpose of this section regulating confinement in reformatory institutions is to impose punishment for crime and at the same time to effect reformation of their inmates. People ex rel. Medina V. Slattery, 1942, 178 Misc. 741, 36 N.Y.S., 2 d 255."

"While reformation of persons who had not become hardened criminals was prime reason for enactment of L. 1915, c. 579, #4, as amended, from which this section was derived, yet sentences in indeterminate form therein provided are punitive as well as reformatory in nature. United States ex rel. Rizzio V. Kenny, 1931, 50 F. 2b 418."

"When a defendant is sentenced under sub-division (b) of this section to an indeterminate term in a reformatory, there follows the implication that the sentencing court duly considered the reformability of the defendant and concluded that correctional treatment would prove of benefit to the offender with ultimate reformation. People ex rel. Medina V. Slattery, 1942, 178 Misc. 741, 36 N.Y.S., 2d 255."

"When it appears to the sentencing court the defendant found guilty of misdemeanor is beyond hope of substantial benefit, he should not be sentenced under this article. People ex rel. Montana V. Warden of N.Y.C. Penitentiary, 1939, 171 Misc. 533, 13 N.Y.S., 2d 837."