

1961

PROSPECTUS FOR OPERATION OF
TEMPORARY COMMISSION ON REVISION
OF PENAL LAW AND CRIMINAL CODE

The Act under which this Commission operates calls for the broadest and most comprehensive attack upon the Penal Law and the Criminal Code. It speaks of study, revision, re-statement, simplification, enumeration, elimination, removal of ambiguity and duplication, rearrangement, regrouping, re-appraisal of sentencing procedure and philosophy, uniformity of procedure, and, in brief, virtually every concept of change in the areas of both substance and form. While thus imbuing the Commission with almost unlimited discretion of approach, the Act is of little assistance in delineating the strategy of battle. That is one of the huge tasks left to us.

Wallowing in this sea, I begin with two basic suggestions. The first is that, although the Criminal Code is certainly not to be ignored at any stage, our initial and earlier endeavors be addressed mainly to the Penal Law. My second suggestion is that the Penal Law be attacked from four angles or categories, which, broadly speaking, may be labeled as follows:

- (1) important changes of substance;

- (2) clarification and less important changes of substances;
- (3) excision and relocation; and
- (4) reorganization and regrouping.

The more precise meaning and scope of these categories is set forth below.

Important Changes of Substance

The word "important" is here intended to suggest substantive amendments of a basic, far-reaching and sociologically or philosophically significant nature. It imports possible changes of a highly controversial sort, such as a revision of the whole theory of sentencing, with elimination of the Baumes Law pattern, etc.; replacement of the McNaughton rule with a more enlightened definition of insanity as a defense to criminal charges; the abolition of capital punishment or some modification of the present rule rendering the death penalty mandatory in first degree, common law murder cases; an extension of the crime of larceny by false pretenses to include thefts accomplished by promissory misrepresentations; and many more suggested changes of a deep-rooted character.

These subjects inherently call for high policy decisions by the Commission, to be rendered on the basis of thorough studies of an extensive and intellectual nature. The suggestion has been advanced that much of this work be delegated or "farmed out" to individuals and organizations especially suited to and interested in the conduct of such studies--as, for example, Bar Association committees and law school professors or entities willing to undertake projects of that ilk. In my opinion, this is not only desirable but essential, for, manpower-wise, the Commission's legal staff will not be nearly adequate to cope with such tasks in addition to others, detailed below, which must also be undertaken.

Clarification and Less Important
Changes of Substance

To understand fully the intended meaning of this broad and very important category, one must appreciate the extent and manner of deterioration of the Penal Law and Criminal Code over the past fifty odd years.

Apart from any defects and ambiguities in their original forms, these bodies of law have been prolifically

amended down through the years, frequently without full realization of the effects of the alterations, either upon the particular statute amended or upon related provisions. Sometimes, subsequent legislatures noted the defects or omissions and tried to patch them up with afterthought insertions and additions. Clauses have been stuck in here and there in the hope that they might produce the desired result without going through the more arduous but probably essential process of overhauling an entire statute or series of statutes.

As with most codes, initial vagueness in various provisions, confusion stemming from multiple alteration, and a natural human inability to make every statute a model of clarity and thoroughness, have necessitated a mass of judicial construction with respect to our criminal provisions. Some have been merely polished up a bit by case law. Many, however, are so ambiguous and generally inadequate in their definitions as to be comprehensible only with the aid of extensive judicial authority. Thus, the practitioner frequently does not find all the elements of a crime in the appropriate statute but-- assuming he is aware of that--must do a case law research job to determine its true definition and scope.

One simple though not too heinous illustration of this is presented in the definitions of two forms of second degree assault (Penal Law, §242, subds. 3, 4). These render guilty of that crime one who "Wilfully and wrongfully wounds or inflicts grievous bodily harm upon another, either with or without a weapon" (subd. 3), or who "Wilfully and wrongfully assaults another by the use of a weapon or other instrument or thing likely to produce grievous bodily harm" (subd. 4). These provisions are virtually silent upon the kind of intent required, and one might well conclude from their language that a general assaultive intent is all that is necessary so long as grievous bodily harm results or the attack is perpetrated with a weapon capable of inflicting such. The Court of Appeals has held, however, that, although these sections do not spell it out, each crime requires a specific intent to inflict grievous bodily harm. Obviously, that element should be written into the statute.

This type of defect, however, is a relatively minor one. For previously stated reasons, the Penal Law is permeated with sprawling, rambling sections and groups of sections, seemingly without much organizational pattern and frequently phrased in archaic language which is unclear, equivocal and

even inconsistent. Repeated amendments have sometimes obscured original legislative meaning and intent, and have even altered language in such fashion as ostensibly to declare rules which no one ever intended. Examples are numerous (see, e.g., §§884, 887, 889; 974, 974-a, 975; 986; 1308; 1423, 1425, 1431, 1432, 1435; 1620, 1620-a, 1620-b, 1627, 1627-a; 1751, 1751-a; 1896-1899; 2145-2153; 2460).

While this category is a broad one and includes many types of statutory defects, one group of sections, contained in an Article entitled "Forgery" (art. 84), may, perhaps, be presented as illustrative. The basic provisions are sections 884, 887, and 889 of the Penal Law, defining Forgery in its three so-called degrees. The first two, for the most part, list in separate subdivisions a number of miscellaneous kinds of papers and documents which are the subjects of "forgery" in its commonly accepted meaning. There is no particular pattern to these subdivisions or any apparent reason why some are classified as first and others as second degree forgery. By far the most important provision for practical purposes is one in the second degree statute which attempts to cover forgery of most documents, papers and negotiable instruments used in

every day commercial life. This is inserted as the last of several paragraphs of the second subdivision of the second degree statute (§887), following a series of other paragraphs and provisions which have little relation to it. The provision in question is so poorly and vaguely framed that no one has a clear concept of its meaning or scope.

One of the unlettered paragraphs in the subdivision just mentioned (§887, subd. 2, par. 3) is not a "forgery" provision in its pure sense but deals with false entries in books of account kept by villages, towns, etc. Why that provision should be so located is somewhat mystifying, especially since the ensuing third degree "forgery" statute (§889) is addressed exclusively to false entries and deceptive bookkeeping practices. The latter itself (§889) is so obviously a horror of confusion from so many standpoints that no purpose would be served by dwelling upon them.

All this represents a condition quite common throughout the Penal Law. Without here treating the revisional techniques and approaches required to rectify this broad deficiency, it suffices to say that the general condition described

poses one of the Commission's most important tasks.

Excision and Relocation

Both the Penal Law and the Code contain numerous provisions of a vestigial nature which, for one reason or another, no longer serve any purpose--if they ever did--other than confusion, and should be eliminated. One simple illustration is found in the third subdivision of the first degree murder statute (§1044), which renders a killing perpetrated in the course of the commission of first degree arson, murder in the first degree--a wholly unnecessary provision since such homicide is fully covered by the general felony murder clause contained in the previous subdivision. Another example is the section purportedly defining third degree robbery (§2128). No one has the faintest idea what this crime is; no prosecutions therefore are ever undertaken, and it is used exclusively for pleading purposes.

In addition to this category of sections, which may be termed unnecessary or superfluous for legal reasons, there are a number of ancient "crimes" which now appear archaic and susceptible of strong excision arguments for that reason (see

e.g., the Article relating to "Duelling," §§730-737).

The Penal Law also includes numerous provisions which not only do not define or punish crimes, but, being of a purely procedural, administrative or civil character, do not belong in that body of law.

Some of these, if not excised completely, should be transferred to the Code of Criminal Procedure (see, e.g., §§279, 487, 516, 610, 1251, 1628, 1699-a, 1715). For example, an obviously procedural section permitting conviction of a lesser degree of, or an attempt to commit, the crime charged should be transferred to the Code and lodged there with its sisters (C.C.P., §§444, 445), although it might be argued that it is merely repetitious of the latter and, hence, should simply be repealed. In my opinion, all the Penal Law immunity statutes are procedural in nature and should be removed to the Code.

On the other hand, the Code contains sections which rightfully belong in the Penal Law. Perhaps the most prominent of these are the vagrancy statutes (C.C.P., §§887 et seq.). Defining and punishing penal offenses in the nature of disorderly conduct, they should join their Penal Law relatives. In this connection, there is need for a complete overhauling of all

legislation dealing with offenses of this classification. Offenses of disorderly conduct, vagrancy and nuisance are spread at random all through the Penal Law and, as seen, the Code as well. This is one area especially conducive to condensation, clarification and considerable revision of substance.

Many of the Penal Law sections belong neither there nor in the Code. This is true, for example, of various provisions pertaining to licensing and to certain civil remedies (e.g., §§345-347, 510-a, 511, 995, 1522, 1897, subs. 7-12). While relocation of these may not always be easy, other homes should be found for them.

Finally, a very troublesome problem arises from the fact that a vast number of criminal statutes are not to be found in the Penal Law but in other bodies, such as the Banking Law, Insurance Law, General Business Law, etc. ad infinitum. It would be desirable, of course, if every penal statute could be lodged in the Penal Law. The difficulty here lies in the general form of some of these provisions, which merely spread a vague cloak of criminality over an entire body of law with a blanket declaration that any violation of the directives contained therein constitutes a misdemeanor. While this type

entirely true. In actuality, the arrangement is a hybrid one, clumsily attempting to combine the two systems. Thus, while all the headings or "Articles" are in alphabetical order, they range in scope from specific, narrow crimes (assault, burglary, larceny, kidnapping, etc.) to broader categories such as "children," "gambling," "elective franchise," "frauds and cheats," to even broader and more inclusive ones such as "Public Health," "Punishment," and "Public Safety."

This leaves much room for improvement. Perhaps a pure category type of arrangement would be preferable, although that conclusion would not solve the more difficult problem of precisely how to classify. The questions of whether there should be a different type of organization and, if so, what kind, are, it seems to me, issues of policy to be decided by the Commission as a whole.

Assuming that the Commission indorses some category type of arrangement requiring complete structural reorganization, a further problem arises with respect to the time or relative stage of our work when this should be undertaken. Should it be one of our first tasks, in other words, or one of our last?

My answer is the ostensibly anomalous one of both. I believe that the new structure, if there is to be one, should be created early in the game, not for purposes of immediate submission to the Legislature, but as a guide-post to our own operations. The thinking which goes into a revisional or structural project of this sort will inevitably affect to some degree our thinking with respect to the formal and substantive changes involved in the other categories of activity discussed above. Thus, almost every maneuver would be made with one eye upon the superstructure or with the master format in mind, even if only subconsciously at times.

On the other hand, it would be a mistake, in my opinion, to seek early legislative acceptance of such a re-grouping plan. To attempt this at the outset, before the submission of any material changes of substance, would be to tell the Legislature: "Here is our new structure. Please enact this with the idea that many of the individual statutes and groups of sections will be drastically altered and eliminated in the future when we get around to them." The awkwardness and impracticality of that approach is self-evident. The practical approach, in my view, is to leave submission of that project until last.

Even were we to reject a thoroughgoing structural reorganization, much regrouping of an internal nature would be in order. One of the Penal Law's worst features is that related provisions belonging together are spread all over the map. This is true, for example, of numerous forgery and false entry sections, which are found widely dispersed between the two covers, and of a variety of bribery provisions which turn up in the most unexpected places. Wholly apart from any master plan, therefore, considerable regrouping and condensation in this field is necessary.

The New Courts Act
and the Code of
Criminal Procedure

Another problem or field of endeavor has recently presented itself in connection with the new Court Reorganization Amendment to the Constitution, which, unquestionably, will soon become law by referendum.

This Amendment, among other matters, combines all New York City Supreme Courts, County Courts and General Sessions into one "Supreme Court," and most of the other or lower courts into one "Inferior Court." From the criminal

standpoint, that entails a multiplicity of changes--and hasty ones--in the Code of Criminal Procedure.

Primarily, this is the task of a legislative committee created to draft legislation implementing the new Constitutional Amendment. It is questionable how much effort that committee will be able to devote to this particular phase of its work, and how thoroughly or capably it can or will operate in the Criminal Code area, hampered as it is by time limitations and unfamiliarity with the Code. It is also a moot question how much work we can or should do in this garden; where their work leaves off and where ours begins; whether the two agencies should work on a cooperative basis, etc.

I have conferred with the counsel to the aforementioned committee, one Arthur Goldberg, Esq., upon these subjects, although the conference was not overly productive. It appears that Mr. Goldberg's committee has a January, 1962, deadline to meet, following which, as I gather it, it will continue its work for the purpose of improving upon the rush job imposed upon it. I advised Mr. Goldberg that, owing to the fact that our Commission is now in the process of struggling to establish itself and get off the ground, the extent of our

pre-January contributions would necessarily be dubious. Understanding that, he suggested that he call upon us informally for any assistance he might need during the next few months, and that, some time in January, we all confer more extensively upon the functions of each agency with respect to this phase of the Code and the dividing line of operation, if one can be found. I acquiesced in that plan. Meanwhile, at my suggestion, Mr. Peter McQuillan, an attorney quite familiar with the Code, who will officially join our staff in October, has agreed to study it during the month of September with a view to spotting the sections affected and with the idea of becoming an authority on that general subject.

The Starting Point?

I believe that the legal staff as a whole should not, during any particular period, attack any one project or devote itself to any one of the above categories of operation to the exclusion of the others. It would be a mistake to concentrate our entire manpower for a month or two upon a project involving some new theory of larceny, homicide or

insanity. It would also be inadvisable to commence by working exclusively upon problems of clarification and condensation of the sort included within the second category; upon excising and relocating; or upon creation of a new superstructure. I see no reason at the moment why we cannot move fairly evenly in all directions at once. I envision, for example, two men attacking fields such as bribery, forgery, perjury, etc. with a view to drawing the provisions together, clarifying these fields and recommending certain changes of substance; another man examining various bodies of law for relocation purposes; another attempting to evolve a new structural plan; and other external lawyers or entities simultaneously cooperating with us by making studies in areas of great controversy and high policy.

Perhaps my thinking on this subject will change as time progresses, or perhaps unforeseen considerations of necessity will temporarily require undesirable concentration upon a narrow area. It is my hope, however, that we may proceed continuously on all fronts.

Miscellaneous Observations

1. This project in its entirety will involve prolific legal research, an immense quantity of memoranda, and resourcefulness in the creation of an adequate filing system.

No amendments, especially those of an intricate nature, can be recommended or submitted without detailed analyses of the current law, of its defects, and of the manner in which those defects are being cured. I visualize a snow-balling mass of memoranda and treatises--not to mention correspondence and external suggestions--emanating from both within and without the Commission. These will require most careful and astute filing lest, as time passes, an attempt to lay hands on any particular document become a search for a needle in a haystack.

Though not the most important function of this Commission, the compilation of a vast quantity of memoranda and annotations of a critical and analytical nature is both inevitable and desirable. Apart from any other feature of our work, I hope that we will end up with a mass of intelligent, accurate and well-organized commentary of almost encyclopedic

proportions which may serve as the most complete and reliable text upon the criminal law of New York.

2. One of the pitfalls to be avoided, in my judgment, is that of being drawn unduly into problems and controversies dealing with current legislative proposals.

Every year, of course, significant legislation is discussed and submitted, and 1962 will be no exception. As the primary agency concerned with the Criminal Law, we will inevitably be importuned for ideas, effort and support. Already, as seen, we are being drawn into the project of conforming the Criminal Code to the new Courts Amendment. The recent Supreme Court decision of *Mapp v. Ohio* has created a need for immediate legislation in the hitherto foreign field of search and seizure, and we will undoubtedly be requested to pitch in there. And there will be many other legislative endeavors which the sponsoring groups, deeming them of vital importance, will partially cast at us under the assumption that vigorous assistance therein is one of our natural functions.

If we are to yield substantially to these various demands, we will find ourselves expending or draining most of our strength in these channels. We cannot lose sight of the

fact that the principle purpose of the Commission is over-all revision of two bodies of law suffering from deep-seated illnesses which have been accumulating for more than fifty years.

We must maintain that perspective. To address ourselves chiefly to current problems would be to forget our mission. While we might attain temporary gratitude or even applause, the end result would be disappointment over our failure to accomplish the fundamental job for which we were created.

I realize that it will frequently be difficult, and sometimes impossible, to avoid involvement in contemporary issues. I recommend, however, that we exert every effort in that direction.

3. While it is ordinarily of little help to indulge in broad generalizations, one quality for which the Commission should strive is elasticity--of both operation and thought.

As to the former, we cannot afford rigid formats which do not permit changes of plan. We should not establish adamant structures which cannot be readily demolished and rebuilt to accommodate new lines of attack. We cannot devote most of our power to some unusual, extensive and ill-fated campaign where failure means complete waste. Somehow or

other, the whole project must resemble a loose-leaf notebook with changeable pages, alternatives, and adjustable parts.

The same elasticity should govern our general thinking. We should not fear bold ventures simply because they appear unprecedented or revolutionary. Iconoclasm, however, must be tempered by pragmatism and compromise. It is easy to become usurped by an original or imaginative concept in the certainty that it is a magnificent solution to a previously unsolved problem, and to visualize a neat legislative product constituting near perfection. However, there may be seemingly unimportant, though sturdy, obstacles of a practical sort which limit accomplishment to half a loaf and destroy some of the most cherished features. In such instances, we should probably be ready to compromise and settle for the available gain even though the result may fall considerably short of our original image of a thing of beauty and a joy forever.

4. The Act creating the Commission calls for an interim report to be submitted to the Legislature by February 1, 1962. I naturally hope that this report will include some accomplishment in the way of legislation actually submitted. On that score, however, prediction is difficult in view of the obvious time limitation. All that can be said at the moment is that we will try our best.

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