

## Interim Report

THE ACT CREATING THE COMMISSION

The Act creating this temporary Commission, effective July 1, 1961, provides for a nine-man commission, three members to be appointed by the Governor, three by the Temporary President of the Senate, and three by the Speaker of the Assembly. The Commission is empowered to employ counsel, consultants and other personnel; "to undertake any studies, inquiries, surveys and analyses it may deem relevant through its own personnel, or in cooperation with public and private agencies;" to obtain testimony and evidence by means of legal process; "to hold public and private hearings and otherwise have all of the powers of a legislative committee under the legislative law."

The extensive purposes, functions and duties of the Commission are outlined in the second section of the Act, as follows:

"§ 2. The commission shall make a study of existing provisions of the penal law and the code of criminal procedure and shall prepare, for submission to the legislature, a revised, simplified body of substantive laws relating to crimes 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

in or connected with the courts, departments and institutions of the state, affecting the rights and remedies of the people. More specifically, the commission shall make such changes and revisions as will:

a. restate, enumerate and accurately define substantive provisions of law relating to crimes and offenses by adding or amending language where necessary so as to improve substantive content and remove ambiguity and duplication;

b. eliminate existing substantive provisions of law which are no longer useful or necessary;

c. rearrange and regroup, topically, substantive provisions of law so as to make for orderly and logical grouping of related subject matter;

d. reappraise, in the light of current knowledge and thinking, existing substantive provisions relating to sentencing, the imposing of penalties and the theory of punishment relating to crime;

e. provide for equality of treatment of all persons accused of crime regardless of their financial means;

f. simplify and improve court procedure so as to shorten the time now spent between arrest and disposition in criminal cases and to facilitate the processes of arraignment, indictment, trial and/or sentence;

g. establish greater uniformity of procedure in the various criminal courts in the state;

h. improve existing trial procedures for the determination of factual issues relating to guilt or innocence, sanity or insanity, or any other defenses known to criminal law;

i. reduce costs of trials and appeals;

j. regulate existing procedures for commitment of persons to the various state institutions;

k. improve the quality and efficiency of police and court personnel and the various services which they provide."

Among other requirements, the commission is directed to make an interim report to the Governor and the Legislature not later than February 1, 1962, and the report herein is submitted in compliance with that mandate.

INTRODUCTORY COMMENTS

In view of the brief period of time elapsing since the creation and organization of the Commission and its staff, and in view of other factors outlined below, the Commission, with one exception treated hereinafter, has not as yet submitted any bills to the Legislature and quite possibly will not submit any during the current year of 1962. The primary purpose of this interim report is to present a realistic picture of the assignment being undertaken and to explain the approaches and techniques by which the Commission plans to carry out that assignment.

Some indication of the immensity of the tasks lying ahead is demonstrated by the above-quoted section of the creating Act, which, in defining the Commission's functions with respect to the Penal Law and the Criminal Code, speaks of study, revision, restatement, simplification, elimination, removal of ambiguity and duplication, rearrangement, regrouping, reappraisal of sentencing procedure and philosophy, uniformity of procedure, and, in brief, virtually every concept of change in the areas of both substance and

form. Even this, however, does not begin to depict the problems at hand, for a full comprehension thereof is possible only with an understanding of the present condition of the Penal Law and the Code.

Through the years, these two bodies of law, with emphasis on the Penal Law, have greatly deteriorated. In partial explanation of what has to be done to them, it is necessary to describe them as they presently stand.

It should be noted, at this point, that, owing to manpower limitations, the Commission's staff cannot conduct full-scale attacks upon both codes simultaneously, and that the intention is to devote the major share of its earlier effort to the body most in need of thorough revision, namely the Penal Law. Accordingly, this report, though in some measure treating the Criminal Code, focuses mainly on the Penal Law.

→ Consolidator's Report: "... there has been no effort to revise."

### THE PENAL LAW AS OF 1962

In 1881, many of New York's criminal provisions were codified in a body of law known as the "Penal Code." The structural arrangement was largely categorical, a substantial portion of the crimes being grouped under broad classifications such as "Crimes against property," "Crimes against the person," and the like. The organization was poorly conceived, however, and proved unsatisfactory.

In 1909, the "Penal Code" was superseded by the "Penal Law," which, without much change of substance, abandoned the category structure and presented a rearrangement of the Penal Code on an alphabetical basis. (Even adopting sections of the Code previously declared unconstitutional e.g., Trading Stamps)

Following its birth fifty-three years ago, the Penal Law, like Topsy, began to grow in all directions, becoming a rambling, repetitious body both in its general structure and in its individual components. Partly responsible for this condition were thousands of amendments enacted through the years, many without full consciousness of their effects and implications upon the particular statute amended, upon related provisions or upon the Penal Law as a whole.

Assuming this means 2000: has there been an average of 40 per year? There are about 1190 sections; of course, some have been amended several or more times. The N.Y. Legislative Index shows that between 1940-1961 (incl.) there was an average of 19.5 amendments per year to the Penal Law, e.g., 1957:25 1958:18 1959:15 1960:24 1961:13. In 1920 there were 13 amendments; in 1930:14. Could we change this to "hundreds" or "about one thousand"?

Structurally, as indicated, the Penal Law purports to present an alphabetical format as distinguished from a category type. Actually, it is a hybrid arrangement clumsily attempting to combine the alphabetical and category systems. Thus, while it commences alphabetically enough with crimes or "Articles" such as Abduction, Abortion, Anarchy, Arson and Assault, one soon comes upon extremely broad "Articles" like "Business and Trade," "Children," "Frauds and Cheats," "Public Safety," etc., each of which constitutes a category covering a varied multitude of sins. The "Business and Trade" Article (Art. 40), for example, includes such diverse crimes as misleading advertising, (§421), commercial bribery (§439) and illegal sale of hack stands (§444). The crimes defined in the "Public Safety" Article (Art. 172) range from the dangerous weapon crimes (§§1894-1899) to offenses of overloading passenger vessels (§1890), riding bicycles on sidewalks (§1909) and failing to cover abandoned cesspools (§1904-a)

Under its pseudo-alphabetical system, the Penal Law soon began to gather moss promiscuously and to develop a sprawling, disorganized appearance. The reasons for this are many. From the standpoint of sheer volume, the greatest difficulty lies in the insertion of hosts of provisions which either never did, or do not

*Note the inconsistency re Art. 40 contains defense (§33, 34, 42) matter: 1057-5 See*

The alphabetized scheme fails in 2 other respects:

- (1) where an "Article" relates to all crimes e.g. Art. 22 (Attempts) & Art. 174 (Penalties)
- (2) where a section relates to all crimes in an article purportedly relating to one crime e.g., §1220 (Intox. as w defense) in Art 114 (Intoxication); incompetent 1120.

now, belong in the Penal Law.

① The chief ogre here is a huge category of statutes which are only superficially criminal in nature. In its entirety, the Penal Law is not, as some vaguely consider it, a compilation of familiar offenses with emphasis upon the common law crimes of homicide, arson, robbery, larceny, rape, and the like. These form a relatively small portion and seem lost in an avalanche of extremely narrow sections defining highly specialized and seldom prosecuted offenses.

Realistically, these sections are merely regulatory provisions to which criminal sanctions have been attached. While it is impossible to describe their limited character and the extent to which they saturate the Penal Law, the flavor may be caught by scanning "Articles" such as those entitled "Animals," "Banking," "Billiard and Pocket Billiard Rooms," "Bills of Lading, Receipts and Vouchers," "Budget Planning," "Business and Trade," "Canals," "Corporations," "Elective Franchise," "Ferries," "Ice," "Indians," "Insurance," "Labor," "Military," "Navigation," "Oysters," "Passage Tickets," "Pawnbrokers," "Platinum Stamping," "Portable Kerosene Heaters," "Quarantine," "Railroads," "Real Property," "Sepulture,"

See Agriculture & Markets Law  
Article 15-A, Sales of Baby Chicks,  
§§ 175-m - 175-r.

Navigation Law § 113 (City of 50,000+)  
Penalty: 50. per day to  
be paid when  
found in violation  
of law § 113  
Transportation Code

"Societies and Orders," "Trade Marks," "Trading Stamps," "Weights and Measures," and "Wrecks."

Exploration in these lands leads to discovery that it is criminal to sell or give away "baby chicks, ducklings or other fowl under two months of age in any quantity less than six" (§185-a); to post an incorrect schedule of ferry rates in a ferry house if the ferry operates to or from a city of a half million or more inhabitants (§871); and to operate a billiard parlor with interior rooms the doors to which do not have sections of clear glass permitting unobstructed views (§349). For the scientifically minded, there are offenses like illegal platinum stamping, the criminality of which appears to rest upon whether stamped articles consist of 750, 950 or 985 thousandths parts of "platinum, iridium, palladium, ruthenium, rhodium and/or osmium," the mathematics of the situation being complicated by different standards when solder is used (§639). And those with localized geographical interests will find that it is criminal for an Indian to chop down a tree on the Onondaga reservation "except on the written permission of a majority of the chiefs of the Onondaga tribe" (§1161).

Multiplied into the hundreds, these have diluted the basic

ferry operates to or from a city of a half million or more inhabitants (§871); and to operate a billiard parlor with interior rooms the

cf § 8 35, which so far as villages & towns are concerned is a ~~absolute~~ duplication of 349.

(Added L. 1922)

material of the Penal Law and rendered it unamenable to orderly arrangement. Especially in the context of the prevailing alphabetical format, they produce an incongruous effect as one progresses from "Extortion" to "Ferries" to "Forgery," or from "Homicide" to an archaic "Horse Racing" Article to "Ice"--containing a lone section penalizing the cutting of ice in bodies of water in front of privately owned land with certain exceptions including the Hudson and Mohawk rivers and the tidewaters of Rondout and Catskill Creeks (§1100).

② Further contributing to the Penal Law's inflated condition are numerous misplaced provisions that do not prescribe criminal offenses, many bearing a most indirect relation to the criminal law. Among these are directory statutes stipulating in exhaustive detail how licenses and certificates may be issued and obtained for various kinds of premises, businesses and weapons, where such certificates must be posted or kept, what fees must be paid, when and how they may be refunded, and the like (see, e.g., 344-347, 440, 1897 subds. 7-12). There are minute directions concerning the seizure, disposition and destruction of gambling instruments, equipment used in the production of pornographic material, and dangerous weapons (§§977-999, 983-985a, 1141-c, 1899), and there are statutes extensively defining

civil remedies and exemptions in connection with gambling transactions and other matters (§§512-b, 976, 989, 991-995). Even in the purely criminal field, the Penal Law is permeated with provisions patently belonging in the Code of Criminal Procedure, dealing, as they do, with procedural matters like the jurisdiction of the Children's Court, ~~(the creation of a probation office for certain New York City courts)~~ and resentencing procedure (§§487, 610, 938-a, 1943, 2213). Conversely, it may be noted in passing, the Code of Criminal Procedure contains considerable material belonging in the Penal Law, one example being a series of sections defining offenses of vagrancy and disorderly conduct (C.C.P., §887, 887-a, 888, 891, 891-a, 898-a, 899, 901; see, also, Wayward Minor adjudications, §913-b, et seq.).

*delete*  
*error in Gilbert*

③ A third major cause of the Penal Law's overweight condition appears in numerous sections of a distinctly archaic character which have somehow survived the transition from crinoline days to modern times (see, e.g., §§484, 987, 1020, 1081-1082, 1650, 1710, 1907-1908, 1987, 2370-2371). Some prescribe such quaint violations as heating railroad cars by stoves and furnaces, and driving cattle and sheep on city sidewalks (§§1907, 1908, 1987). Others, though dealing with ancient crimes which possibly should remain on the books in some

*Heat in cars*  
*Tramps*  
*Hot, crim.*  
*Horse Racing*  
*Poor Persons*  
*Fire*  
*1710*  
*Sidewalks*

*delete*  
*same as Unconsol Law §7912*

form, treat them at undue length and fail to conform them to intervening developments which have all but sterilized them. While it may be debatable whether a criminal sanction against dueling for example, is still desirable (§731), no one could reasonably assert a present necessity for several ancillary provisions, possibly of significance in the era of Alexander Hamilton and Aaron Burr, attaching criminality to dueling challenges, attempts to challenge, publicly reproaching a person for not challenging or accepting a challenge, and leaving the state for the purpose of evading the provisions of the Article in question (Art. 72, §§732-735). In the same vein is an Article rendering criminal all prize-fighting and various facets thereof, which was doubtless appropriate in the colorful days when Sullivan and Corbett jostled illegally on barges beyond the arm of the law (Art. 164; §§1710-1715). As these sections read, all professional boxing is still criminal. About the only factor not mentioned is the all-important one that, since the passage in 1922 of the Act known as the Walker Law (Unconsol. Laws, §9107), prize-fighting conducted under the auspices of a then created State Athletic Commission--as all prize-fighting now is--is legal and not within the prohibition of these Penal Law sections, which, therefore,

are virtually dead letters.

Another form of superfluousness and survival of the archaic is presented in provisions which apparently once had legal basis but currently have no intelligible meaning, and which remain alive either as vestigial appendages of a long since liquidated statutory scheme, or because they are vaguely deemed to have some unascertained purpose. There is, for instance, a crime entitled robbery in the third degree, which is defined as any robbery "not amounting to robbery in the first or second degree" (§2128). Since no one is able to figure out any form of robbery that does not amount to at least the second degree as now defined (§2126), the section in issue (§2128) is a nonentity under which no prosecutions are ever instituted, and it is used purely for pleading purposes. Of analogous character is a clause of the first degree murder statute (§1044) rendering a killing murder in the first degree "When perpetrated in committing the crime of arson in the first degree" (subd. 3). Since arson murder is fully covered by the general felony murder provision making all felonies a basis for first degree murder (subd. 2), the third or arson subdivision serves no purpose other than to encourage unsound contentions that killings resulting from arson in the second and

Same for manslaughter 1° (abortion)  
and manslaughter 2° (overloading  
vessel etc.)

third degrees do not fall within the felony murder principle. It was originally placed or carried over into the Penal Law, as the Court of Appeals has noted, because the draftsmen did not comprehend the fact that this once purposeful clause had lost its meaning and utility in the new statutory pattern; and it has remained simply because no one has bothered to excise it.

Apart from the above-described structural and inflationary defects, thorough examination of the Penal Law discloses that many basic statutes are not artistically phrased; that related crimes are not necessarily grouped but are often scattered indiscriminately from cover to cover; and, indeed, that identical offenses are sometimes found or repeated in widely separated locations.

& in other chapters  
of the Consol. Laws  
of New York

In the last connection, it often occurs that, partly owing to the Penal Law structure, a newly enacted provision bears some relationship to two or more "Articles" rather than just one, and hence is susceptible of placement in any of several locations. In many instances, the spot selected has not been the most appropriate one from the standpoint of grouping crimes of a basically similar nature. An accumulation of these mislocation occurrences has produced a scattering of homogeneous provisions and, eventually, not

Leg. Doc 1934, 502 p 13: There are  
approx 400 misd. & felonies  
provided in the consol. laws.  
There are only 16 of 68 chapters  
of the consolidated laws in  
which there are no penal  
provisions

(See p 25-1st sentence)

*a miscd (see 351)*

infrequent cases of virtual repetition in different portions of the Penal Law.

So-called "forgery" statutes, for example, are by no means collated in one "Forgery" Article but are spread throughout the Penal Law, and the same is true of statutes defining larceny and other offenses. One area especially subject to this criticism is that of disorderly conduct and vagrancy, for sections of that ilk grow like weeds all over the Penal Law (§§<sup>miscd</sup>348, <sup>720 is miscd-726-727</sup>710, 720-727, 1140, <sup>miscd</sup>1221, <sup>offense</sup>1321, <sup>miscd.</sup>1470, <sup>miscd</sup>1530, <sup>miscd</sup>1990-a, <sup>offense</sup>2071-2072, <sup>miscd</sup>2090, <sup>miscd.</sup>2092, <sup>miscd-felony</sup>2370-2371) and in the Code of Criminal Procedure as well (§§887 et seq., 899 et seq.).

The field of bribery is, perhaps, as illustrative as any of this kind of deterioration. Insofar as public officials are concerned--whether they be termed "public," "executive," "judicial," "legislative" or "administrative" officers--it would seem that two basic provisions would suffice: one making it a crime for a public officer or employee to solicit or receive a bribe in consideration for action or omission, or promised action or omission, within the orbit of his official duties; and the other making it a crime to offer or give a bribe to a public officer or employee for the purpose of affecting his official action. Actually, the Penal Law presents

*also include §150 (offense) <sup>and also Terminals</sup>; 2220 (disturbing funerals) <sup>miscd</sup>*

no less than six scattered sections collectively and repetitiously enunciating the substance of the above (§§372, 378, 1822, 1823, 1826, 1837). In addition, there are provisions--superfluous in the light of the general sections--penalizing bribery, bribe receiving and unlawful fee taking specifically in connection with judicial officers, legislators, sheriffs, canal officers, etc., as well as further miscellaneous and equally scattered sections also prescribing bribery crimes of a sort that fall or should fall within one or two comprehensive statutes (see §§371, 372, 374, 465, 1327, 1328, 1831, 1833, 1839, 2320). *And bribery in other chapters of Consol. Laws*

Somewhat in line with this characteristic is a general verbosity which blurs the outlines and obscures the kernels of many offenses. Rarely does a statute define a crime or a field of crime by skillful description inclusively covering the type of conduct to be punished, the classes of persons within its purview, or the kinds of property involved. Seldom does the Penal Law pursue the technique of laying the groundwork for a criminal sanction by appropriate definitions and following with a clear and simple punitive provision. There appears to have been a fear of oversimplification and a misapprehension that many a crime is incapable of adequate definition

without detailed specification of every way or device by which it can be committed as well as by enumeration of specific persons and property affected. As a result, the Penal Law suffers from a disease which may be labeled itemization.

Thus, in framing legislation dealing with bribery of public officials, as already seen, it was evidently not deemed sufficient to enact inclusive provisions covering all public officials (see §§378, 1822, 1823, 1826, 1837). Additional sections had to be inserted applying to judges, legislators, sheriffs, canal officers and others (§§371, 372, 374, 1327, 1328, 1831, 1839, 2320). Similarly, the forgery sections (Art. 84) make little or no effort at definitive summary or general classification of the kinds of instruments and documents involved, but, instead, list instrument after instrument (wills, certificates, indorsements, judgment rolls, etc.) in a series of protracted and extremely unclear subdivisions (§§884, 885, 887).

Possibly the most glaring illustration of the itemization fetish is presented by the "Malicious Mischief" Article (Art. 134). A substantial portion of its many sections do no more than penalize malicious damage to property, real or personal, by way of destruction, mutilation and other forms of injury (§§1420 et seq.). This area,

it would appear, could readily be covered by a comprehensive statute to that effect, and, in the end, that point seems to have been recognized (see §1433). Yet, the "Article" labors through page after page of sprawling sections with dozens of subdivisions devoted chiefly to explicit designation of items of real and personal property which are the subjects of malicious mischief. In encyclopedic style, these provisions list bridges, piers, dams, trees, rocks, posts, buildings, cables, machines, telegraph poles, grain, grass, crops, sewers, pipes, flowers--including several specified kinds of flowers--and so on ad infinitum (see §§1420, 1421, 1423, 1425, 1435). Understandably, this enumeration created an impression in some quarters that items not explicitly mentioned do not fall within the purview of the statutes. Accordingly, certain public utilities, cultural entities and religious organizations, quite evidently apprehensive lest the failure to specify certain of their property and equipment might exclude them from the protection of the Malicious Mischief Article, obtained further and even narrower legislation. Compounding the situation, a number of special statutes were enacted punishing malicious injury to electric light poles, lamp posts, gas, electric and water meters, steam valves, water pipes, telephone coin boxes, pipe lines of pipe

line corporations, books and objets d'art of libraries, museums and art galleries, and certain property in churches and cemeteries, including vestments, silverware and musical instruments (§§1423-a, 1423-b, 1427, 1428, 1430, 1431, 1432, 1432-a).

A somewhat different though equally unfortunate facet of the itemization disease appears in sections and groups of sections dealing with a basically narrow field of crime where there are several similar or related ways of committing the fundamental offense, all having an obvious common denominator. In most of these instances, artistic draftsmanship should produce a concise provision or two stamping the particular brand of misconduct criminal regardless of the precise manner of transgression. The Penal Law tendency, however, is to "define" the crime by detailed enumeration of every kind of act or device by which it can be committed.

This is exemplified by a statute defining the crime of "Prostitution of Women" (§2460). In essence, that offense is committed by one who in any way participates in inducing a female into prostitution or an immoral life, who has any part in so maintaining her, or who in any way profits financially therefrom. The statute, however, "defines" this crime in no less than eight

lengthy subdivisions devoted to monotonous enumeration of kinds of criminal acts of inducement, procurement and receipt of money, many of which have hair-line distinctions, if any at all.

The Articles, sections and defects noted above are presented largely as illustrative and by no means constitute an inclusive list of the Penal Law's ailments. Apart from these more obvious weaknesses, moreover, the Penal Law has received increasingly severe criticism from many quarters as a code that has failed to keep abreast of the times in controversial areas needing enlightened approaches to the administration of criminal justice. In the minds of many individuals and groups, it is sociologically and psychologically archaic in its retention of capital punishment, in its adherence to the McNaughton definition of legal insanity, in its system and philosophy of sentencing, in its handling of narcotic offenders, and in other fields where penal and sociological considerations are inextricably interwoven,

THE CODE OF CRIMINAL PROCEDURE

Since a full-scale revision of the Code of Criminal Procedure will not be attempted until the Penal Law work is largely completed, this report does not present a detailed analysis of the Code but merely offers a few general observations thereon.

The larger part of the Code deals with procedural rules relating to all phases of a criminal case from its initiation to its completion. Accordingly, in contrast to the complex structural problems inherent in the compilation of the Penal Law, the Code readily lends itself to a simple over-all arrangement of a chronological sort, which, to a great extent, has been employed. For the most part, it progresses quite logically from provisions concerning arrests and the commencement of actions to the subjects of grand juries and indictments, arraignments and pleas, trial matters, judgments, post-judgment motions, appeals, and so on. Thus, its format, at least, is superior to that of the Penal Law.

Within that superstructure, however, it displays many of the Penal Law's internal defects. As with the Penal Law, prolific amendment has extended statutes to aggravating length, confused and

obscured their meaning, and scattered homogeneous provisions. Many sections of ancient vintage are not only phrased in archaic language, but plainly need amendatory action to conform them to the realities of modern times. Also, the Code is beset with ambiguities, conflicts, hiatuses and provisions widely deemed to establish poor procedural law, all combining to require considerable change of substance.

THE TASKS AT HAND AND THE  
METHODS AND APPROACHES  
BEING EMPLOYED TO MEET THEM

Passing over the later project of thoroughly overhauling the Criminal Code, the Commission's tasks and functions fall mainly into three classifications, which may be broadly stated as (1) over-all revision of the Penal Law; (2) re-examination and possible alteration of laws of both codes dealing with fundamental areas of a sociological nature; and (3) current legislation.

I. Over-all Revision of the Penal Law

In the light of preceding commentary on the present condition of the Penal Law, some of the Commission's tasks and aims become almost self-evident. In terms of the ultimate, the plan is to reduce this <sup>law</sup> code--perhaps to a fifth, or even a tenth, of its present size; to mold it into a clear, concise and basically comprehensive body of law under a suitable category type of arrangement; and to make numerous substantive changes of both major and minor importance.

The steps by which it is hoped to accomplish this objective will not necessarily be taken in any rigid or chronological order.

It is apparent, however, that, before any final format or appropriate structural rearrangement can be submitted, the Penal Law must be drastically boiled down, purged of dead wood, and hammered into a size and content that render it amenable to organizational sculpture. The first logical step in this process is that of excision.

A. Excision and Relocation

As already seen, the Penal Law is saturated with provisions which, for one reason or another, either definitely do not belong there or are subject to strong argument on that score.

In the first category are the numerous statutes of a civil, directory, procedural and administrative character, and those criminal provisions which have no utility because they have become archaic or for other reasons. All these should be culled out and excised, either by flat repeal or by relocation in other bodies when such is feasible and desirable.

The larger and more troublesome category is that immense group of narrow regulatory sections with criminal sanctions, involving ice, Indians, portable kerosene heaters, etc. Examination of various other New York bodies of law discloses that most of these provisions

could find natural homes in specialized bodies dealing with the same or similar subject matter. As a matter of fact, these other bodies frequently contain penal as well as directory provisions in the same narrow areas, and, in some instances, the Penal Law includes only a smattering of the totality. It is often a hindrance, therefore, rather than an aid to one canvassing criminal sanctions in a specialized field, for he must search two bodies of law rather than one. The answer to this situation is either that all of these Penal Law regulatory sections should be transferred to other <sup>laws</sup> codes, or that every New York criminal provision, whatever its present site, should be in the Penal Law.

There is one faction which advocates the latter on the simple theory that it would be orderly and helpful to have every penal section in one <sup>law</sup> code. That view, however, appears unrealistic and impractical. Many of the criminal sanctions of other New York bodies are in the blanket form that cursorily makes it a misdemeanor to violate any provision of a section or of an entire Article <sup>or an entire Chapter.</sup> Transfer to the Penal Law, therefore, would require either incorporation of large chunks of explanatory matter, or--if the penal provisions alone

were to be transferred--countless insipid clauses stipulating that any violation of such and such a section or Article of such and such a body of law constitutes a misdemeanor. Without detailing other difficulties and impracticalities, it may safely be asserted that any attempt to make the Penal Law an all-inclusive compendium of criminal statutes would serve only to aggravate its already over-expanded condition. *[Practical solution: detailed & comprehensive index. Index in McKinney's & Kellett is poor]*

The other school of thought on this subject views a proper penal code as one making no endeavor to cover the entire field of criminality but comprising the more fundamental and familiar offenses, defined with simplicity and grouped under a thoughtful category format. That, generally, has been the approach in other jurisdictions, including Illinois and Wisconsin, which have recently enacted penal code a small fraction of the Penal Law size. That, also, is the approach of this Commission.

In their entirety, the excision and relocation tasks involved are most formidable. The first of these is a weeding out process designed to wring the Penal Law dry of its unwelcome encumbrances. While most of the unwanted provisions are clearly marked as such, there are a number in the debatable class which must be analyzed in

the light of several factors before any decision is made as to excision or retention. Upon a determination to excise, it must be decided whether repeal, on the one hand, or relocation, on the other, is in order. And, if the latter be the case, the problem of finding a suitable body of law and a suitable place in that body must be attacked.

Intelligent excision legislation should boil this code down to perhaps half its present size, leaving a residue of basic material also badly in need of revision.

#### B. Internal Revision of Basic Material

Sufficient has been said in an earlier portion of this report to indicate the kinds of revisional endeavor required to bring internal order and clarity to the Penal Law's basic material. Broadly speaking, the problems are ones of collation, condensation, clarification, correction and substantive alteration.

One important line of attack must be addressed to the scattered condition of homogeneous provisions and the consequent repetition, conflict, waste and confusion. An appropriate guinea pig

1934 Reports. *Purposes of Revision:*

1. To remove technical defects: inconsistencies, duplications, unnecessary distinctions, uncertainties, obsolete crimes, & to remove from the category of crimes, acts better taken care of by a non-criminal sanction.
2. Reclassify and reorganize the criminal law:
  - (a) for a proper coordination of penalties
  - (b) as an aid in the collection of statistics
  - (c) to afford an opportunity for a more scientific approach to the treatment of criminals

for illustrative purposes is the field of bribery of public officials, now covered by a group of widely disseminated provisions. These must first be gathered together and analyzed in perspective with a view to determining both their collective scope and the desirability of changing that scope by increase or reduction of the totality of conduct within the criminal orbit. With those determinations made, a relatively few brief sections, including at least one devoted to term definitions, may be drafted, concisely summarizing the substance of the field. The end result should be drastic condensation, clarification, and elimination of repetition and ambiguity, with all bribery crimes to be found in the "Bribery" Article. Similar approaches are, of course, appropriate to numerous other areas, including forgery, larceny, disorderly conduct and sex crimes, to name a few.

Apart from these particular collation problems, considerable clarification and condensation is necessary in connection with dozens of statutes and groups of statutes which are in need of phraseological repair. Without attempting to classify the types of defects, one of the main weaknesses, as seen, is the persistent adherence to itemization. Among other tasks, it is planned to remodel a number of these so infested sections and Articles by a general technique of employing

Careful definitions and inclusive language instead of enumeration and specificity.

Upon the subject of definitions, it is felt that much confusion arises in connection with issues of intent and scienter from the Penal Law's failure to present well conceived definitions of words like "knowingly," "intentionally," "maliciously" and "recklessly," and to employ them throughout in a uniform pattern. While there are some definitions along these lines (§3), they are neither adequate in themselves nor consistently applied to the ensuing substantive provisions. The importance of this phase of code compilation is stressed in the Model Penal Code of the American Law Institute, which offers a carefully analyzed set of definitions of this sort and then uses them consciously and effectively in enunciation of its criminal offenses. A similar endeavor will be made in the present project.

The kind of revision under discussion will inevitably suggest, and occasionally compel, substantive changes of varying importance. Ideas concerning amendments of substance not only will occur to the Commission in the course of its work but unquestionably will be urged upon it in great numbers by outside agencies, associations and individuals. The tasks of evaluating them and incorporating those

adopted are interwoven with the tasks of formal revision.

C. Structural Regrouping--A New Format

With the Penal Law stripped to its essentials, condensed, clarified and substantively altered by these excisional and revisionary operations, the Commission contemplates a structural change which will replace the present unsatisfactory alphabetical arrangement with a category type of format.

This, of course, will entail much careful study and a more difficult kind of regrouping activity than the internal sort referred to immediately above. Since the new "master plan" has not yet been fully formulated, no purpose would be served here by discussion of prospective categories and orders of arrangement. Suffice it to remark, in line with certain thoughts expressed below, that, although this is the last operation from the standpoint of actual legislation, the job of erecting a superstructure is being begun early. One reason for this is that, since all the statutory furniture is eventually to be transferred to a new building, the remodeling, upholstering and repair work should be pursued with one eye on blueprint thereof.

D. Time and Method of Legislative Proposals

A delicate question in any code revision of this sort concerns the time and method of submitting legislative proposals.

In some code enterprises, the revising agency works on the project for a long period until completion and, submitting very few interim bills, ultimately offers the Legislature a giant package representing the finished product. This method, recently pursued with success in Illinois and Wisconsin in the compilation of new criminal codes there adopted, has certain obvious virtues. It is a logical procedure, permitting freedom of thought and operation by the revisers, who may work efficiently on a long-range basis, uninterrupted and unhampered by the annoyance of constantly submitting piece-meal legislation of one sort or another. Inherent in this system, however, is one dangerous factor. That is the possibility that the Legislature will not swallow the package whole.

Notwithstanding the happy experiences of Illinois and Wisconsin, this is an ominous peril. Suddenly presented with an entirely new code containing hundreds of changes of both substance and form, it is not unlikely that each and every legislator will have many

objections and that the total complaints will add up to rejection, at least pending considerable alteration and compromise. It is not difficult to visualize the package being returned time after time for further renovation until it withers on the vine and expires. In short, the package system, in a sense, puts all its eggs in one basket and, despite its advantages, strongly courts catastrophe.

Were this the only reasonably efficient approach to the ultimate goal, it would be pursued regardless of the risk involved. No overpowering reason occurs, however, why the operative steps leading to that goal may not, at a rather small cost in efficiency, be legislatively effected in piece-meal fashion as the project progresses. In brief, as the excision phases are undertaken, as sections are drawn together, condensed and internally regrouped, as statutes are rephrased, and as substantive changes are made, individual bills embodying these alterations may constantly be submitted. Receiving substantial acceptance, they would gradually mold the Penal Law into a shape and size susceptible of a final reshuffling and regrouping operation.

One great virtue of this system, it would seem, is that much beneficial legislation should be accomplished even were the pro-

ject eventually frustrated with respect to its over-all revisionary objective and/or in certain of its intermediate endeavors. Wholly apart from the desirability of a new structural format, the Penal Law would certainly improve with excision of superfluous and inappropriate matter, with remodeling of, for example, the bribery and malicious mischief provisions, with salutary substantive amendments, and with effectuation of various other changes constituting steps in the enterprise as a whole. Thus, at worst, appreciable concrete gain would seem inevitable.

It is out of these considerations that the Commission has decided to follow the piece-meal rather than the package method of revision.

## II. Reexamination of Laws Dealing with Fundamental and Sociological Areas of Criminal Law

As previously indicated, there has been much criticism of the Penal Law and the Criminal Code with respect to important areas where the problems extend beyond every-day substantive and procedural issues into the more difficult realms of sociology and psychology. The most vigorous differences of opinion seem to have arisen in con-

nection with the laws prescribing or pertaining to capital punishment, insanity defenses, narcotic violations, sentencing procedures and philosophies, parole matters and penal institutions, although this is far from a complete list of highly controversial subjects. It is to be noted that the Act creating this Commission specifically mentions the field of sentencing, directing the Commission to "reappraise, in the light of current knowledge and thinking, existing substantive provisions relating to sentencing, the imposing of penalties and the theory of punishment relating to crime" (§2-d).

The appraisal activity required in areas of this character is of a sort that imports extensive studies--undoubtedly on a scale beyond the Commission's manpower capacity when its other functions are considered--and a thorough canvassing of public opinion. Quite evidently, the Legislature had largely this in mind when, in the creating Act, it authorized the Commission (1) "to undertake any studies, inquiries, surveys and analyses it may deem relevant through its own personnel, or in cooperation with public and private agencies" such as Bar Associations and law schools (§2); and (2) to hold public and private hearings (§3). In any event, the Commission intends to

employ these tools by engaging the assistance of outside agencies and individuals to conduct studies, and by holding hearings to obtain expert and representative opinion.

### III. Current Legislation

Every year, of course, hosts of bills proposing amendments to the Penal Law and the Criminal Code are prepared by public and private agencies, associations and organizations, and submitted to the Legislature. The proposals range from lengthy ones seeking intricate procedural and substantive changes in major areas, to those seeking minor amendments of very limited scope and significance.

The Commission is naturally interested in all current bills and proposals to amend these two codes, and especially in those of major importance and those closely tying in with the revisional effort described above. It cannot, however, lose sight of the fact that its primary function is the long-range task of drastically overhauling two huge bodies of law which have deteriorated to a condition requiring monumental revisionary effort. To expend a substantial proportion of its limited manpower and energy in formulating and assisting in the formulation of current, run-of-the-mill legislation, would be to drain

its resources in a secondary kind of endeavor at the expense of the main objective.

This observation becomes especially pertinent in the light of what appears to be a misapprehension on the part of some agencies and individuals to the effect that the Commission is to prepare, handle and sponsor virtually all legislation in the criminal field, and that a moratorium against such activity by others has been declared. Clearly, that highly unrealistic thought was neither voiced nor intended by the Legislature.

There are and will be, of course, some current legislative projects of sufficient importance and relevancy to the Commission's work that it will feel compelled to study the matters and to prepare and sponsor bills, either alone or in cooperation with other entities.

(Remainder of this heading to be completed after decisions and developments with respect to (1) search and seizure legislation and (2) implementation of the Code to conform to the new Courts Amendment.)