

I. FUNDAMENTAL AREAS OF THE CRIMINAL LAW

A. Capital Punishment

Perhaps the most controversial of all subjects attached to the criminal law is that of capital punishment. This issue has been vigorously debated in virtually all American jurisdictions with widely varying results. Some states have abolished the death penalty, apparently permanently. Others have at some point abolished it only to restore it later on. The vast majority of jurisdictions have retained capital punishment. However, in all American jurisdictions except New York, the death penalty for murder is optional rather than mandatory; that is, life imprisonment or some other prison sentence is an alternative; the determination of which penalty is to be imposed rests with the jury, the court or a combination thereof depending upon the procedural laws of the particular jurisdiction.

In New York, the death penalty for murder is, in some instances at least, still mandatory. While New York permits the optional or alternative sentence of life imprisonment for first degree murder convictions in two kinds of cases [felony murder and the wanton or depraved type of killing; Penal Law § 1044, subd. 2, and § 1045-a], conviction for premeditated or so-called common law murder (*id.*, §1044, subd. 1) still requires imposition of the death penalty.

For those who question New York's harsh stand, two prime issues naturally arise: (1) Should the death penalty be completely abolished?, and (2) If not, should New York be taken out of the *mandatory* class by permitting alternative imposition of life imprisonment in *all* types of first degree murder cases? The Commission has given extensive consideration and study to each of these questions.

Upon the primary question of whether capital punishment should be abolished altogether, a vast amount of material has been written and compiled by deeply interested persons and agencies throughout the world. A considerable portion of this material has been intensively studied by the Commission and its staff. Intra-office reports and memoranda have been compiled, reducing this material to its substance and marshaling the arguments, *pro* and *con*, for the purpose of assisting the members of the Commission to crystalize their thinking in this intricate area.

The next step taken was the soliciting of representative views of the community. To that end, three public hearings were held in widely separated sections of the State: one in Albany, on November 30, 1962; a second in New York City, on December 7, 1962; and the third in Rochester, on December 14, 1962. At these hearings, a total of fifty-seven persons appeared and testified, some offering their views as individuals but the majority appearing as representatives of associations, agencies or organizations, both public and private. Stenographic transcripts of all these proceedings are in the process of preparation but are not as yet complete.

At this stage of its study and investigation, the Commission's plans, in the main, include four further steps.

First, the transcripts of the aforementioned hearings will be carefully studied and discussed.

Second, opinions of certain persons who did not testify at the hearings will be sought. While these hearings adduced a wealth of valuable information, the speakers did not, of course, include everyone in whose views the Commission is interested. There are a number of others who, either because of their peculiarly appropriate experiences or because of official or other representative capacities in fields most pertinent to this subject, may well be of great assistance to the Commission in its attempt to resolve this problem. Their opinions will be solicited.

Third, with these various preparatory and investigatory projects completed, an extensive, detailed report will be compiled by the Commission in the near future. The report will include, *inter alia*, a general treatment of the subject of capital punishment; the basic arguments and factual data supporting abolition, on the one hand, and retention on the other; the recommendation of the Commission concerning what legislative action, if any, should be taken; and its reasons for making such recommendation.

Fourth and finally, this report will, it is hoped, be completed in time for submission to the Legislature and to the Governor for study before the end of the 1963 legislative session.

Whatever the Commission's final recommendation, and whatever the Legislature's view of that recommendation or of the issue as a whole, it is clear that the question of whether capital punishment will be abolished in this State cannot now be answered. That being so, practicality and the interests of justice demand that the Commission address itself to the second issue posed above: namely, pending the determination of the ultimate question of abolition, should action be taken at the current session of the Legislature terminating New York's solitary adherence to the mandatory death penalty?

The Commission's answer is unequivocally in the affirmative, and it is, therefore, proposing a bill to achieve that purpose (see Appendix B).

As now prescribed in Penal Law §§ 1045 and 1045-a, the death penalty is mandatory upon a conviction for first degree murder of the intentional and premeditated variety (§ 1044, subd. 1). Upon conviction for the two types of murder defined in the second subdivision of the first degree murder statute (felony murder and the depraved type of killing), the death penalty is *not* mandatory. Here, the jury must, as a part of its verdict, either recommend or refuse to recommend an alternative sentence of life imprisonment. This decision upon the penalty aspect, as well as upon the main issue of guilt, must be unanimous, and a failure to agree one way or the other represents a disagreement upon the case as a whole and precludes any verdict even though the jurors are fully agreed with respect to the defendant's guilt of first degree murder. In case of a verdict of guilty without a recommendation, the court must

impose the death penalty. In case of a verdict of guilty with a recommendation of life imprisonment, the court need *not* follow the recommendation but may, notwithstanding, sentence the defendant to death.

The proposed bill works two drastic changes in this pattern.

The first extends the jury's power of recommending life imprisonment to all cases of first degree murder—common law or premeditated murder included—and, further, renders the jury's determination binding on the court. It is this feature, of course, that eliminates the *mandatory* death penalty to which New York alone has clung.

The other fundamental change involves the procedure whereby the jury or court may decree life imprisonment rather than death as the punishment to be imposed. The steps in this procedure are as follows.

(1) At the conclusion of the trial proper, the jury renders a verdict only upon the issue of guilt or innocence, with no penalty or sentence questions involved. A verdict of guilty of first degree murder stands final and recorded, regardless of any further proceedings with respect to sentence.

(2) The basic sentence is life imprisonment. In fact, the court must automatically impose that sentence if the defendant was under eighteen years of age at the time of the crime. Regardless of age, moreover, the court may impose life imprisonment, if, in its opinion, the death sentence "is not warranted because of substantial mitigating circumstances."

(3) If neither of the factors in (2) is present, the court must conduct a second proceeding, with the jury still participating (ordinarily the same jury). In this, the customary exclusionary rules of evidence do not apply and a wide variety of information, similar to that ordinarily contained in a pre-sentence investigation report, is admissible. At the conclusion of the evidence, summations and court instructions, the jury deliberates and renders a special penalty verdict of either death or life imprisonment.

This two-stage procedure—also made applicable to kidnapping prosecutions, which likewise involve the death penalty and a jury power of recommendation (see Appendix B)—is generally modeled upon comparable provisions recently enacted in California and Pennsylvania, as well as upon those adopted by the American Law Institute in its Model Penal Code. The main purpose of the two-stage proceeding is to permit the jury to make the penalty determination upon the basis of comprehensive information pertinent to that issue. The one-stage or single-verdict system now prevailing in New York (Penal Law § 1045-a) and in the vast majority of other jurisdictions necessarily restricts the scope of the jury's information to matters legally relevant and admissible upon the issue of the defendant's guilt or innocence of the charge, and the jurors are, therefore, ordinarily compelled to make the penalty determination almost exclusively upon the facts of the case itself. The proposed expansion of the orbit of relevancy and admissibility for purposes of the penalty determination, to include background

factors and the like, provides a fairer and more enlightened medium for decision of this issue.

Another virtue of the proposed system, as contrasted with the existing single-verdict procedure (Penal Law § 1045-a), is that it eliminates the illogical and wasteful situation arising when a jury determination of guilt is negated by failure to agree upon the penalty or recommendation aspect. Through severance of the two issues and prescription of separate verdicts for each, the primary verdict of guilty stands final and recorded regardless of any further proceedings or determinations with respect to sentence.

Still another advantage over the existing system inheres in the procedure which permits jurors to give separate and individual treatment to each of the issues before it—(1) guilt and (2) punishment—rather than being compelled to decide both issues simultaneously under circumstances creating a likelihood that consideration and determination of one will affect or obstruct consideration and determination of the other.

One further phase of the bill is worthy of comment, namely the provision which permits, upon consent of the court and the prosecutor, a plea of guilty to murder with a sentence of life imprisonment. Pleas of guilty to first degree murder are presently precluded by virtue of the provision prohibiting guilty pleas "where the crime charged is or may be punishable by death" (Code Crim. Proc. § 332). The spirit and purpose of that provision are to outlaw any possibility of a defendant pleading himself into the electric chair. Such a possibility, of course, is *a fortiori* non-existent where the plea is to murder with a sentence of life imprisonment. Accordingly, no reason appears why the regular pleading system, with its recognized salutary features, should not be applied in this area.

It is worthy of comment that the theory and principal features of this bill—elimination of the mandatory death penalty and the two-stage trial—meet with the approval of the District Attorneys' Association of New York State, which has, in the past, submitted proposed legislation of this very nature. It is also significant that, at the aforementioned public hearings, some of the staunchest adherents of the abolition of capital punishment indicated that, failing achievement of that objective, elimination of the mandatory death penalty in itself represents a worthy goal.

B. The Insanity Defense

Another highly controversial subject of a fundamental nature is that which deals with the proper standard to be predicated for the defense of insanity. In the majority of American jurisdictions, including New York, the old and familiar principal known as the *McNaghten* rule prevails. The validity of this standard has frequently been challenged, and this Commission has given considerable attention to re-examination of that rule and of the entire area of insanity as a defense to a criminal charge.

A public hearing on this subject was held by the Commission on November 30, 1962, in Albany to elicit the opinions and positions

of individuals and organizations. Previously, the problems posed by the present standard were explored by a Study Committee of the Governor's Conference on the Defense of Insanity designated by former Governor Harriman and continued by Governor Rockefeller. The members of the Committee were Richard V. Foster, M.D., David Abrahamsen, M.D., Christopher F. Terrence, M.D., Rev. S. Oley Cutler, S. J., Hon. Edward S. Silver, Francis E. Shaw, M.D., Hon. John Van Voorhis and Professor Herbert Wechsler. The Committee issued a report in 1958, known as the Foster Report, in which all the members concurred in making certain recommendations. That report reads, in part, as follows:

"1. The Statutory Criterion of Criminal Responsibility.

The criterion of criminal responsibility as affected by mental disease, disorder or defect is defined in New York by statute.

Section 1120 of the Penal Law provides as follows:

An act done by a person who is an idiot, imbecile, lunatic or insane is not a crime. . . .

A person is not excused from criminal liability as an idiot, imbecile, lunatic or insane person, except upon proof that, at the time of committing the alleged criminal act, he was laboring under such a defect of reason as:

1. Not to know the nature and quality of the act he was doing; or

2. Not to know that the act was wrong.

Section 34 of the Penal Law further provides:

A morbid propensity to commit prohibited acts, existing in the mind of a person who is not shown to have been incapable of knowing the wrongfulness of such acts, forms no defense to a prosecution therefor.

These statutory provisions bind the New York courts to the criterion of criminal responsibility declared by *McNaghten's* case in 1843, without the possibility of adaption in the light of modern scientific knowledge of the nature and effects of mental disease or defect. 'Whatever the views of alienists and jurists may be, the test in this state is prescribed by statute and there can be no other.' (Cardozo, J. in *People v. Schmidt*, 216 N. Y. 324, 339). As the Court of Appeals has repeatedly said, if there is reason for dissatisfaction with the law, the argument must be addressed to the legislature, not the courts. See *e.g. People v. Horton*, 308 N. Y. 1, 13.

Dissatisfaction with the *McNaghten* rule as the sole test of criminal responsibility when insanity is interposed as a defense has been widespread for many years in both England and in the United States. In some seventeen states, in our federal law and in our military law it has long been supplemented by other criteria, making some allowance for the case where the actor knows the nature and the wrongfulness of his behavior

but is otherwise bereft by reason of disease of the capacity for self-control. In many other states the problem is receiving fresh attention now. In this state, speaking ex-judicially, Judge Cardozo said thirty years ago of our statute (*Law and Literature* 106-108):

'. . . Every one concedes that the present definition of insanity has little relation to the truths of mental life. There are times, of course, when a killing has occurred without knowledge by the killer of the nature of the act. A classic instance is the case of Mary Lamb, the sister of Charles Lamb, who killed her mother in delirium. There are times when there is no knowledge that the act is wrong, as when a mother offers up her child as a sacrifice to God. But after all, these are rare instances of the workings of a mind deranged. They exclude many instances of the commission of an act under the compulsion of disease, the countless instances, for example, of crimes by paranoiacs under the impulse of a fixed idea. . . . If insanity is not to be a defense, let us say so frankly and even brutally, but let us not mock ourselves with a definition that palters with reality. Such a method is neither good morals nor good science nor good law. . . .'

We are unanimously of the view that there are compelling practical, ethical and religious reasons for maintaining the insanity defense; and that the time has come to frame a definition which does not palter with reality. We believe, moreover, that it is entirely feasible to cast a formulation which, without resolving every aspect of the difficulty, will sufficiently improve the statute to meet working standards of good morals, good science and good law.

Without attempting a full statement of the defects of the *McNaghten* rule, in the rigid form in which the statute fastens it upon the state, we are agreed that an amendment should be drawn to overcome the following objections:

(1) There is, first, the difficulty that inheres in the ordinary meaning of the word "know," as applied to persons suffering from serious mental disease. The fact that the defendant is able to verbalize the right answer to a question, to respond, for example, that murder or stealing is wrong, or the fact that he exhibited a sense of guilt as by concealment or by flight, is often taken as conclusive evidence that he knew the nature and the wrongfulness of his behavior. Yet one of the most striking facts about the abnormality of many psychotics is that their way of knowing is entirely different from that of the ordinary person. In psychiatric terms, their knowledge is usually divorced from all affect, which is to say that it is like the knowledge children have of propositions they can state but cannot understand; it has no depth and is divorced from comprehension. The present statute makes it very difficult to put this point before the jury, though it often is the crucial point

involved. See e.g. the extracts from the record in *People v. Roche*, 309 N. Y. 678, quoted in Morris, *Criminal Insanity: The Abyss Between Law and Psychiatry*, 12 THE RECORD 471 at 483-84; *People v. Horton*, 308 N. Y. 1. The great student of the English criminal law, Sir James Fitzjames Stephen thought that properly construed *McNaghten* did not force this limited conception of the nature of the requisite knowledge. See *History of English Criminal Law*, Vol. II, p. 171. Other students have embraced his view. See e.g. Jerome Hall, *Principles of Criminal Law*, p. 518. The point had not, however, received explicit recognition by the New York courts and should, in our view, be met by an amendment of the statute. The knowledge that should be deemed material in testing responsibility is more than merely surface intellection; it is the appreciation sane men have of what it is that they are doing and of its legal and its moral quality.

(2) The *McNaghten* rule improperly confines the inquiry to the effect of mental disease or defect upon the actor's cognitive capacity; the finding must be that he did not know the nature or wrongfulness of the act. The limitation is, as Judge Cardozo pointed out, faithful neither to the facts of mental life nor to the demands of legal, ethical or social policy.

Mental disease, even in its extreme forms, may not destroy the minimal awareness called for by *McNaghten*, while destroying power to employ such knowledge in determining behavior, the capacity that rational human beings have to guide their conduct in the light of knowledge. The point is a related one to that which we have made respecting the impairment of capacity to know. Capacity to know the nature and wrongfulness of conduct may not have been discernibly destroyed and yet the transformations in ability to cope with the external world, worked by severe psychosis, may have otherwise destroyed the individual's capacity for self-control. In cases such as this *McNaghten* decrees legal responsibility. But since it is precisely the destruction of capacity for self-control, in consequence of mental disease or defect, which from the point of view of morals and of legal policy warrants the special treatment of the irresponsible, the statute forces a discrimination which is neither logical nor just. We think that the discrimination should be rectified by an amendment of the statute.

(3) A final difficulty which we think demands attention turns on the degree of the impairment of capacity to know or to control that ought to be demanded before irresponsibility may be acknowledged. Taken on its face, the present statute calls for an impairment that is total; the actor must not know. This extreme conception poses what some have thought the largest problem in the just administration of the test.

Even in the most extreme psychoses, there is often some residual capacity to know or to control; and, judging after the event, the psychiatric expert hardly can declare on oath that at the time of the disputed action the actor was totally bereft

of knowledge or control. Yet this is a dilemma that it certainly is not deliberate legal policy to pose. In other situations, where the facts of life do not submit to any absolute appraisal, the law has been content to recognize that it must tolerate distinctions of degree. We think that such recognition is required here. People of relative sanity, on whom the threats of penal law can exert a deterrent force and who are within the range of influence of programs for correction, differ from the seriously deranged in the respect that theirs is an appreciable or substantial capacity to know and to control. We think the statute should be framed to recognize that this is so and to avoid a finding of responsibility for those psychotics who may have some remnant of capacity, however grossly it has been impaired by their disease.

The foregoing appraisal of the defects of *McNaghten* is substantially that made by the American Law Institute in the process of the formulation of its *Model Penal Code*. See A. L. I., *Model Penal Code*, Tentative Draft No. 4, (1955) pp. 156-159. The remedy that we propose also is adapted from the formulation which has had the tentative approval of the Institute. We recommend that Section 1120 of the Penal Law be modified to read substantially as follows:

(1) A person may not be convicted of a crime for conduct for which he is not responsible.

(2) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity:

(a) to know or to appreciate the wrongfulness of his conduct; or

(b) to conform his conduct to the requirements of law.

The changes that this formulation would effect may be summarized as follows:

1. The present statutory reference to a person who is an "idiot, imbecile, lunatic or insane" would be superseded by reference to mental disease or defect, the modern terms which designate mental disorders of the most serious kind and undeveloped intellectual capacity.

2. With respect to the question which now is material under *McNaghten* and the present statute, the inquiry would be not merely whether the actor lacked *knowledge* of the nature and the wrongfulness of his behavior but also whether he was lacking in capacity to *appreciate* its wrongfulness. By adding the requirement of appreciation to that of knowledge, we would expect the courts to grant some leeway to an explication of the distinction between mere verbalization and a deeper comprehensive, which we have discussed above. Moreover, since a person who is lacking in capacity to know or to appreciate the *nature* or the *quality* of his action, as those terms are understood in law, is necessarily incapable of an appreciation

of its wrongfulness, we have thought it unnecessary to deal with the former possibility explicitly in statement of the principle, as the present statute does.

3. Instead of asking whether the defendant did not know, we think the legal inquiry should be addressed to his *capacity* to know or to appreciate. The reason is that any testimony by the psychiatric expert, addressed to the actor's mental state at a time in the past, will necessarily involve an inference upon his part from his judgment as to the actor's powers or capacity. We think the statute gains in clarity by making this explicit.

4. The inquiry is not confined to the impairment of capacity to know or to appreciate the wrongfulness of the defendant's conduct. For reasons stated earlier, it extends also to the capacity of the actor to conform his conduct to the requirements of law.

5. Finally, both in dealing with capacity to know or to appreciate and with capacity to conform, the question posed is not whether the actor wholly lacked the requisite capacity but whether he lacked *substantial* capacity—meaning, thereby, the quantum of capacity that represents a fair appraisal of the wide range that in our culture excludes a diagnosis of severe mental disease or defect. The scope of that range is essentially a problem for the psychiatric sciences, to be reflected in the testimony of the expert witness, but sifted and evaluated by the court and jury in the light of common sense.

We also recommend in this connection the repeal of Section 34 of the Penal Law (supra. p. 2). In substitution for this formulation we propose a further paragraph for Section 1120, as follows:

(3) The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

The purpose of this paragraph is to exclude from the concept of 'mental disease or defect' and thus from the standard of irresponsibility so-called psychopathic or sociopathic personalities. These terms are employed by some psychiatrists to categorize persons who are insensitive to moral and social norms, as evidenced by their persistent and repeated conduct. Those psychiatrists who would regard such persons as the victims of disease proceed upon the theory that capacity for law-abiding living in society is a constituent of mental health, with the conclusion that its absence is disease; or else on the hypothesis that psychical disorder underlies all maladjustment of this kind, although the present state of knowledge may not serve to explicate the nature of the psychical disorder except in terms of its results.

It seems quite clear, however, that *McNaghten* cannot safely be relaxed, as we propose to recommend, unless a stricter view

of mental disease underlies the principle to be applied. For it is wholly circular in reasoning, as many psychiatrists agree, to define the concept of disease solely by reference to the phenomena which must be the product of disease for irresponsibility to be established. Thus whether the matter is viewed in terms of its intrinsic logic or, even more clearly, in terms of social policy, the statute must make clear that diagnoses of psychopathy shall not suffice to lay the basis for a claim of irresponsibility. In the present state of knowledge we are satisfied that there is no escape from treating persons of this order as subject to conviction and a problem for the organs of correction.

It should be added that in framing our recommendation we gave consideration to the principle formulated in the *Durham* case, which would refer responsibility solely to whether the criminal act was the product of mental disease or defect. While we appreciate the value of this concept as opposed to strict *McNaghten*, and its usefulness in freeing psychiatric testimony from the arbitrary limits now imposed, no member of the Study Committee would prefer its adoption to the formulation we propose. We think, indeed, that our more specific formulation, delineating as it does the type of causal relationship between disease and act that is required to negate responsibility, will lend itself more readily to fair administration. We also are quite clear that it will prove to be far more acceptable to lawyers and to laymen as a basis for amendment of the law.

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2. *The Scope of Psychiatric Expert Testimony When Responsibility Is Drawn in Issue.*

So long as the defense of irresponsibility by reason of insanity is recognized in any form, the law needs to be aided in its administration by psychiatric expert testimony. The problems posed to the psychiatrist in the performance of this vital public function have been acutely felt for many years. Psychiatric disaffection with the legal criterion determining responsibility, the complex, technical vocabulary of psychiatry which does not easily translate to terms of common speech, the strain which cross-examination puts upon all expert witnesses, the use of long and involved hypothetical questions, the histrionics that so commonly accompany a trial for crime—these are all factors which contribute to creation of the difficulty.

We do not undertake to frame a panacea for these ills. Nor have we yet been able to agree on all the palliatives that have been proposed. There is one point, however, as to which we have no disagreement; and it goes some distance towards alleviating the deep tension that prevails. We think it plain that if the legal process calls for psychiatric expert testimony, as it obviously must, the expert must be given reasonable leeway in

presenting his conclusions in his own scientific terms. Obvious as this is, we do not hesitate to say that there is ample evidence that it is far from universal practice to conduct proceedings in this way.

If illustration is required it is readily at hand. In *People v. Horton*, 308 N. Y. 1, the dissenting opinion of Judge Van Voorhis, a member of our Committee, summarizes a part of the record as follows (308, N. Y. at 20-21):

“ . . . The testimony offered by Dr. Brancale was to the effect that appellant's act was the product of persecution by his father and that being actuated by such a delusion, appellant did not understand that his act was wrong. He testified that, although apparently aware that he was killing his father, only 'seemingly' did appellant even know what he was doing. This answer was stricken out by the trial court. The next question was: 'Q. Doctor, did he know what he was doing when he committed those acts? A. The answer is no. He was psychotic at the time and did not know the nature and quality of his acts.' This answer also was stricken out. In response to a similar question, the answer was: 'A. No, he was in a schizophrenic state.' All but 'no' was stricken out. This doctor then said: 'I wish to qualify my responses.' In answer to the next question of similar import, the doctor said he was still responding to his delusional idea. This answer was also stricken out by the court. Finally, the doctor was compelled to answer categorically 'No'. He added, however: 'Your Honor, I think I should be permitted to qualify my answers on this in all fairness.

'The Court: You should answer the question.' Defendant's attorney took an exception to holding the witness to a 'yes' or 'no' answer. A little later the District Attorney stated: 'You concede, then, Doctor, that this series of connected activities seemed to be rational? A. Seemed to be rational just as the case of a paranoid praecox. They are a whole series of connected activities, yet they are a most serious and most malignant form of schizophrenia. Just the ability to rationalize doesn't make it rational.' This answer was stricken out and the jury instructed to disregard it.”

As Judge Van Voorhis pointed out, the trial court in the *Horton* case felt obliged to rule as he did by section 34 and 1120 of the Penal Law. The problem posed by such obstruction of the explanations of the witness will, therefore, be lessened if our recommendation for the relaxation of *McNaghten* is enacted into law. Enlargement of the psychiatric inquiry that is material for legal purposes will necessarily enlarge the freedom of the witness to present the facts that in his scientific view describe the mental state of the accused. We agree, however, with the American Law Institute that there is need

for a specific legislative formulation on the point involved. See *Model Penal Code*, Tentative Draft No. 4 (1955) § 4.07 (a) and Comments p. 198. To defer a solution to the courts is to insist upon progressing only at the cost of the reversal of convictions in protracted trials. Accordingly, we recommend that a provision be added to the Code of Criminal Procedure substantially as follows:

When a psychiatrist who has examined the defendant testifies concerning his mental condition at the time of the conduct charged to constitute a crime, he shall be permitted to make a statement as to the nature of his examination, his diagnosis of the mental condition of the defendant and his opinion as to the extent, if any, to which the capacity of the defendant to know or to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law or to have a particular state of mind which is an element of the crime charged was impaired as a result of mental disease or defect at that time. He shall be permitted to make any explanation reasonably serving to clarify his diagnosis and opinion and may be cross-examined as to any matter bearing on his competency or credibility or the validity of his diagnosis or opinion.

With such a statute on the books, the courts, the public and the medical profession may be confident that psychiatric expert testimony will proceed without obstruction or arbitrary limitation, while preserving every reasonable safeguard of its relevancy and materiality as well as the time-honored test of its validity afforded by the cross-examination. The expert will have no excuse for shunning testifying in the courts. And court and jury both will be assisted in arriving at a judgment on the evidence, which is the final and high purpose of a trial."

Opinions on the recommendations of the Foster Report were sought from individuals and groups throughout the State. The following supported the formulation on the defense of insanity: Hon. Sydney F. Foster; Daniel Gutman, Dean of New York Law School; Andrew V. Clements, Dean of Albany Law School; Rev. Joseph T. Tinnely, C.M., Dean of St. John's University Law School; J. D. Hyman, Dean of The School of Law, University of Buffalo; William C. Warren, Dean of Columbia University School of Law; Monrad S. Paulsen, Professor of Law, Columbia University School of Law; Saul Touster, Professor of Law, The School of Law, University of Buffalo; Solomon A. Klein, Professor of Law, Brooklyn Law School; Sheldon Glueck, Professor of Law, Law School of Harvard University; Arthur W. Pense, M.D., State Department of Mental Hygiene; Henry Brill, M.D., State Department of Mental Hygiene; Benjamin Apfelberg, M.D., Associate Director, Psychiatric Division, Bellevue Hospital; Thomas J. McHugh, Director of the New York State Committee for the 1960 White House Conference on Children and Youth; Manfred S. Guttmacher, M.D., Chief Medical Officer of the Medical Service of

the Supreme Bench of Baltimore; A. B. Fisher, M.D., LL.B., Chairman of the Legal Committee of the Brooklyn Psychiatric Association; G. E. Winkler, M.D., Chairman of the Committee on Forensic Aspects of Psychiatry; Arthur N. Seiff, Esq.; and Alfred Berman, Esq., New York County Lawyers' Association. Also unqualifiedly endorsing the recommendation on the defense of insanity were the Committee on Mental Hygiene of the New York State Bar Association, the Committee on Penal Law and Criminal Procedure of the New York State Bar Association, and the Committee on Criminal Courts, Law and Procedure of the Association of the Bar of the City of New York. The recommendation on the scope of psychiatric testimony received the unanimous support of those mentioned above and many others.

The Foster Report, along with numerous other reports and studies, were carefully and thoroughly examined by this Commission; and, as indicated, it held a public hearing on the subject. The ultimate conclusion of the Commission was that the recommendations of the Foster Report are eminently sound and, accordingly, it has prepared bills incorporating these recommendations and proposing a new standard of responsibility which would replace the *McNaghten* rule.*

It is noteworthy that, at the Commission's public hearing, the support previously given to the Foster Report recommendation was reiterated by the New York State Department of Mental Hygiene and the Committee on Mental Hygiene of the New York State Bar Association.

On the other hand, support for retention of the *McNaghten* doctrine was voiced by the District Attorneys' Association of New York State.

The position of that Association is as follows: that *McNaghten* remain the law of New York for the reason that any other test is unrealistic in a traditional jury trial setting, and that *McNaghten* is a practical, workable rule couched in everyday language which jurors can understand. However, the Association does recognize that, under the rules of evidence, many forms of psychiatric testimony are irrelevant and immaterial to the narrow issue of responsibility as set forth by the *McNaghten* rule. Therefore, the Association would broaden the scope of psychiatric testimony admissible in evidence in order to give the jurors a more complete picture of the defendant's personality, even though, technically speaking, such evidence might not be relevant.

It is, perhaps, in order to note that, in the course of its study, the Commission gave considerable attention to the previously mentioned *Durham* rule, which has prevailed in the District of Columbia since 1954. The adoption of this standard has been frequently considered and consistently rejected by other jurisdictions. As a matter of fact, the United States Attorneys for the District of Columbia who were in office during the years following the *Durham* decision have expressed dissatisfaction with the rule and have been

* Commissioner Conway dissented, favoring no change in the present New York law.

urging that it be interpreted or modified in accordance with the formulation proposed by this Commission. It is also worthy of mention that the latter formulation has been adopted, in nearly identical form, in two states, Vermont and Illinois. [Vermont Stats. Ann. Title 13, § 4801 (1959); Ill. Crim. Code, § 6-2 (1961)]. A variation thereof has been enunciated by the United States Court of Appeals, Third Circuit [*United States v. Currens*, 290 F.2d 751 (1961)].

Turning to the specific proposals drafted by the Commission, the first contains the standard of criminal responsibility. It provides that a person is not criminally responsible for conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to know or to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of law. As used in the bill, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct. A copy of this bill is included in this report in Appendix C.

A second bill is concerned with the scope of psychiatric testimony when the defense of insanity is in issue. A psychiatrist who has examined the defendant as to his mental condition at the time of the allegedly criminal conduct shall be permitted to make a statement as to the nature of the examination, his diagnosis of the mental condition of the defendant and his professional opinion concerning the impairment of the defendant's capacity in terms of the criteria enunciated in the standard described above. A copy of this bill is included in Appendix D of this report.

A third bill (set forth in Appendix E of this report) requires that the defendant give certain notice to the District Attorney in order to avail himself of the defense of insanity. In the present state of the law, the defendant may, as a matter of right, raise such defense at any time whatsoever, including the final stages of the trial. This, manifestly, may place the People at a great and unfair disadvantage in that, surprised by the sudden interposition of this collateral defense, they may have insufficient opportunity to obtain the psychiatric and other evidence necessary to refute it and to establish, as they must, the defendant's sanity beyond a reasonable doubt. The proposed provision rectifies this situation by requiring notice to the People within twenty days after a plea of not guilty to the indictment, or at any time thereafter as the court may permit for good cause shown.

In summary, the Commission is convinced that the vigorous demand for abandonment of the antiquated *McNaghten* rule and its replacement by a more enlightened standard is well merited; that the test here proposed recognizes the advancement of modern psychiatric thinking while preserving a workable standard to measure criminal responsibility, geared to traditional concepts of our criminal law; and that the legislative action essential to abrogation of *McNaghten* and replacement thereof with a fairer and more enlightened standard is long overdue and should not be further delayed.

C. Sentencing Structure

In April, 1962, the Commission commenced a detailed survey of the existing sentencing structure in New York. This survey, which has now been completed, involved a study of the statutes relating to sentences and sentencing in the Penal Law, the Code of Criminal Procedure, and the Correction Law. Subjects such as parole, probation, fines, and commitment of mental defectives and insane persons also were covered.

The Commission found the present structure to be anything but a cohesive, well organized unit, permeated as it is with inconsistencies, ambiguities, inequities and archaisms. Instead of a modern set of guidelines to help effectuate the deterrence of crime and the segregation and reformation of criminals, the State of New York has a few modern procedures engrafted by amendment upon a structure designed for a retributive system.

The following will serve to illustrate the need for a complete overhaul of the structure.

In colonial New York and during the early years of our statehood, sentences usually called for corporal punishment or posting of a bond to keep the peace, or both, and it was not the custom to impose sentences of imprisonment, as such. Imprisonment was relied upon primarily where the offender was unable to post a bond and county jails were the only institutions for the confinement of persons convicted of crime. The reform act of 1796 abolished corporal punishment, reduced the number of capital felonies, and established the state prison system. Since at that time prison was thought of mainly as a more merciful alternative to corporal or capital punishment, it is not surprising to find that, as prison sentences evolved, separate punishments were prescribed for each crime based upon an evaluation of the amount of retribution society should exact for the offense. This basic method has been retained through the years and today—although the criteria for evaluating the punishment to be prescribed may have changed—the procedure of fixing a separate and distinct punishment for each crime is still followed.

A statutory structure with separate sentences for individual crimes contains a tremendous amount of repetition and also lends itself to unjustifiable distinctions in the treatment of various crimes. Moreover, it makes periodic review and reappraisal of punishment a very difficult task because of the separate evaluation of many different provisions and the necessity of amending numerous sections.

To illustrate the repetition involved, there are approximately forty-five separate provisions in the Penal Law prescribing maximum sentences of five years, and almost as many separate provisions setting a maximum sentence of ten years. About seventeen separate provisions are used to authorize a three year maximum and approximately eleven to authorize a maximum sentence of fifteen years.

As for the distinctions in the treatment of various crimes, the Penal Law contains thirteen different maximum prison sentences

for felonies (*i.e.*, 2 years, 3 years, 4 years, 5 years, 7 years, 10 years, 15 years, 20 years, 25 years, 30 years, 40 years, 50 years and life imprisonment). There are, also, many different sentences prescribed for misdemeanors and offenses. Whatever may have been the reasoning of the Legislature at the time these distinctions were written into the law, it certainly would be difficult, if not impossible, to justify them at this time. In other words, while it is quite logical to provide for a distinction in sentences between crimes that ought to be punishable by short-term imprisonment and crimes that ought to be punishable by long-term or medium-term imprisonment, there seems to be no reason at all for making minor distinctions within each group.

Prescribing separate sentences for individual crimes is an invitation to inconsistency. For example, one would expect that the distinction between a misdemeanor and an offense would be reflected in the sentence provided by statute. Yet an inspection of the Penal Law reveals that there is no relationship between the sentences for these two categories, and many offenses can be punished more severely than various misdemeanors. As another example, it might be noted that in 1956 the Penal Law section covering obscene prints and articles was amended to make a third offense punishable by "an indeterminate term of not less than six months nor more than three years." (§ 1141, subd. 2). Such a sentence cannot be served anywhere. Sentences to county penal institutions (*i.e.*, county jails, workhouses and penitentiaries) are not for indeterminate terms, and, except where specifically authorized, cannot be for more than one year (Penal Law § 2183). Sentences to state prison cannot be for less than 1 year (Penal Law § 2182, subd. 2, § 2183). The only way this provision can lawfully be used is to make the sentence "not less than 1 year nor more than 3 years (or some lesser period)" in state prison. Also, the crime involved is defined as a misdemeanor, but the punishment prescribed for the third offense (*i.e.*, imprisonment for a term longer than one year) raises the degree of the crime to a felony.

What has been said with respect to sentences of imprisonment also applies to fines. An inspection of the Penal Law reveals that, in addition to repetitious provisions and enigmatic distinctions in amounts, some fines were put on the books so long ago that inflationary trends have emasculated their effect and made them totally out of line with fines prescribed in recent years; some fines for "offenses" are greater than fines for misdemeanors; and some fines for misdemeanors are greater than fines for felonies. For example, manslaughter in the second degree is punishable by a maximum term of 15 years imprisonment or a maximum fine of \$1000 or both. And fraudulent disposition of property subject to lease or hire, which is a misdemeanor punishable by imprisonment for not more than 1 year (Penal Law § 960), also is punishable by a fine of \$1000. The crime of presenting a false proof of loss in support of a claim upon a policy of insurance is a felony, punishable by a maximum term of 5 years imprisonment or a maximum fine of \$500 or both (Penal Law § 1202). However, the misdemeanor

committed by failure to pay wages of employees in accordance with the provisions of the Labor Law (Penal Law § 1272) is punishable by imprisonment for not more than 1 year and a fine of not more than \$10,000.

High mandatory minimum sentences tie the hands of the courts and probation officers in determining a sentence tailored to the circumstances of the offense and the character of the individual defendant. The crime of burglary in the first degree, for example, is punishable by a minimum term of ten years imprisonment (actually this would mean parole eligibility after 6 years, 8 months if the prisoner receives maximum credit for good behavior). However, the court might be of the opinion that, although the offender should be institutionalized for some period, such a term is more than the time required in the circumstances to reform him and may, in fact, serve to destroy him and his family. Yet the court if it incarcerates the offender at all, must pronounce the 10 year minimum. The alternatives include a suspended sentence or a plea to a lesser or different crime.

The multiple offender provisions also present a problem with respect to mandatory minimum sentences. These rules make it difficult for the court to exercise discretion in individual cases and may cause the court to suspend sentence rather than impose the minimum. (Second and third offenders receive a minimum which is not less than one-half the maximum prescribed by statute; fourth offenders must receive a sentence with a minimum equal to the maximum that could be imposed for a first offense, but in no case less than fifteen years and cannot receive a suspended sentence.)

In addition to this, the multiple offender laws are blind to the circumstances of the previous felony. Thus, a young man may be convicted of grand larceny for an auto theft when he is twenty years old, avoid brushes with the law for the next thirty years and then be convicted of a second felony. Upon this conviction, the court—if it feels the offender should be institutionalized for any period—must sentence the offender to prison for a term with a minimum of not less than one-half the maximum prescribed by statute for the new crime. Of course, the court can give limited recognition to the circumstances of the first felony by not imposing a longer term.

Although a court generally has discretionary power to determine whether its sentence shall be served concurrently or consecutively with another sentence imposed by it or another court of this State, there are two situations where consecutive sentences are mandatory, one of which serves as an interesting illustration.

Where a defendant is convicted of two or more offenses before sentence is pronounced upon him for either, and the offenses were not charged in the same indictment or separate indictments consolidated for trial, then the defendant, if he is sentenced on both offenses, must receive consecutive sentences (Penal Law § 2190, subd. 1). This seems to make an important issue depend upon when the trials are had or the pleas taken. If the defendant pleads, or is found guilty in one court and before he is sentenced or pleads or

is found guilty in another court, the sentences must be consecutive. But, if the defendant can hold up the second trial or plea until he has been sentenced on the first charge, he can receive a concurrent sentence on the second charge.

A situation with respect to parole and consecutive sentences might also be noted. Penal Law § 1945 provides that a person sentenced to life imprisonment is eligible for parole in the same manner as a person serving an indeterminate term with a minimum of forty years (subd. 6) and a person sentenced to an indeterminate term with a minimum in excess of thirty years is eligible for parole as though he had been sentenced to an indeterminate term with a minimum of thirty years (subd. 7). But there is no provision to cover the aggregate minima of consecutive sentences and, hence, if a person is sentenced to consecutive terms with an aggregate minimum of more than forty years, he must be held in prison longer than a person sentenced to life imprisonment.

Even the fairly simple subject of "jail time" seems to call for statutory revision. A prisoner is entitled to credit for time spent in confinement on a particular charge prior to sentencing but there is no provision for time spent in confinement after sentence and before arrival at the place named in the commitment. Also, the statute (Penal Law § 2193) is ambiguous as to the manner of crediting jail time on consecutive sentences.

It is anachronistic that in the year 1963 one can open the Code of Criminal Procedure of this State and find a provision that authorizes "the binding out" of disorderly persons. However, § 910 provides for this and further provides that: "The binding out or contract, pursuant to this section, has the same effect as the indenture of an apprentice, with his own consent and that of his parents, and subjects the person bound out or contracted, to the same control of his master and of the county court of the county, as if he were bound as an apprentice."

An example of a provision which has lost its utility is Penal Law § 2184 which vests the court with discretionary authority to commit children under twelve years of age convicted of crimes amounting to a felony, or children between the ages of twelve and sixteen convicted of any crime, to certain training schools rather than imprisonment in a state prison or in a penitentiary.

The Commission is considering methods for revamping and improving the existing sentencing structure. This phase of the work is still in its initial stages, but the Commission already has had preliminary exchanges of ideas with the Chairman of the State Board of Parole, the Commissioner of Correction and a committee representing the New York State County Judges' Association. Also, the Commission was represented at the annual state conference on probation, and the staff has been conferring with the correction and parole officials of the City of New York.

One of the first steps in the reconstruction is to design a system wherein each crime and each degree of each crime is classified and assigned, by such classification, to a sentence category. In this way several clearly defined categories could be used to set forth the

statutory guidelines for all terms of imprisonment. As a part of this step the Commission must formulate sentences for the various categories and, in this connection, it is working on the problem of striking a balance among legislative, judicial and executive controls. The Legislature, of course, defines and must define the limits, but in so doing it deals with principles and not individuals. The courts have an opportunity to take individuals and particular details into account and thus can tailor sentences to fit needs. But the courts in most cases lose control of the offender after he has been sentenced, and the executive must deal with him from that point on. Too much discretion in the courts can result in unjustifiable sentencing disparity and too little can result in injustice in individual cases. Either situation may lead to unwarranted hampering of correction authorities. As noted above, the Commission is conferring with members of the judiciary and parole and correction authorities on the problem.

In addition to structural changes and changes involving the elimination of outdated and inconsistent provisions, the Commission is devoting attention to procedural innovations. Thus, the Commission is considering certain procedures now being used by the Federal Government and sister states, as well as suggestions contained in the Model Penal Code of the American Law Institute.

Proposals in this field will not be offered separately but will be woven into the fabric of the revision of the Penal Law, Code of Criminal Procedure and related statutory material.

D. Grand Jury Reports

For about three centuries, grand juries in this State, after an investigation which did not result in an indictment, have from time to time issued reports critical of the conduct of public affairs in their jurisdiction. The long-existing uncertainty concerning the legality of such reports (sometimes referred to as "presentments") was finally settled by the Court of Appeals in 1961, in *Wood v. Hughes*, 9 N. Y. 2d 144. It here held—in a 4 to 3 decision—that no statutory authority existed for the issuance of reports dealing with misconduct in office by public officials which did not amount to an indictable offense.

Aside from the question of their legality, these reports had also engendered sharply divergent views concerning their over-all propriety. Far from settling this ideological controversy, *Wood v. Hughes* only intensified disagreement on the subject. Proponents of grand jury reports, on the theory that the decision deprived the public of a valuable practice that had long served it well, have striven arduously for the enactment of legislation to permit the restoration of reports. Their opponents, hailing the pronouncements of the majority in *Wood v. Hughes*, have been equally adamant in insisting that the now-outlawed practice should not be permitted to return.

The 1962 session of the Legislature saw the introduction of a number of bills seeking to undo the effects of the Court of Appeals'

decision. In February of that year, the Senate Codes Committee held a public hearing at which the principal proposals discussed were the bi-partisan Mitchell-Bonom bill (Senate Print. 2486, Intro-2381; Assembly Print. 4802, Intro. 4532) and the Brook bill (Assembly Print. 1235, Intro. 1235). However, no action was taken at this session and, in a joint statement dated March 30, 1962, the majority and minority leaders of the Senate and Assembly referred the problem to this Commission. This statement reads, in part, as follows:

"Ever since the State Court of Appeals ruled that grand juries were not authorized to hand up presentments, the Legislature has been caught in a crossfire of controversy.

"Many public officials and private citizens have called on us to take action to restore this practice to grand juries, although there has been some broad disagreement on what restrictions, if any, should be placed on this procedure.

"Others, including the State Bar Association and civil liberties groups, have held that presentments often point an accusing finger at an individual without giving him any legal recourse to defend himself.

"We have been unable at this session to resolve this thorny conflict. Accordingly, we have agreed to defer action this year and to turn the entire question over to the Temporary State Commission on Revision of the Penal Law and Code of Criminal procedure. . . ."

Accordingly, the Commission undertook an intensive study of the history and background of grand jury reports and, on November 30, 1962, held a public hearing thereon in Albany. In the course of the hearing, many well-informed witnesses, representing interested public and private groups, offered well-reasoned statements of position and, upon questioning by Commission members and counsel, supplied informative and cogent answers.

Much of the testimony offered centered on a proposed bill, prepared by the Grand Jury Association of New York County, providing for limited grand jury reports. This proposal was based largely on the Mitchell-Bonom bill of 1962. One troublesome aspect particularly engaged the attentions of witnesses and the members of the Commission. This was the problem of how a public official censured in a grand jury report could be afforded a proper forum to present his side of the story. Therefore, in the testimony—*pro* and *con*—concerning the Grand Jury Association's proposed bill, much interest developed in a new feature therein which provided that before a report is made public, the court must conduct a hearing and give any person or group of persons criticized the right to contest the validity of the report. Such hearing was to be held in public or in private, at the court's discretion.

The draftsmen of the bill envisaged this procedure as providing an appropriate forum for the persons criticized or named in the report. As questioning developed this point, however, its fundamental weakness was revealed: that all or part of the report might

well be made public in the course of the hearing, thus defeating its main objective. Discussion of appeal provisions of the bill—which were substantially the same as those contained in the Mitchell-Bonom and Brook bills—pointed up the same weakness. In an appeal situation, inevitably, the record on appeal would make public the very information the appellate court was being called upon to suppress or not to suppress.

As the hearing progressed, a broad spectrum of opinion was elicited concerning the grand jury function. There were those who, expressing great confidence in the good judgment of grand jurors, favored giving the grand jury broad powers to report, unfettered by statutory safeguards; in other words, a return to the practice before *Wood v. Hughes*. Then, at the opposite pole, there were those who felt that any statutory power to report given to the grand jury, no matter how much it was ringed by so-called safeguards, was undesirable because the accused public official lacked a proper forum, had not opportunity to cross-examine or to be represented by counsel. Some, such as the sponsors and endorsers of the Grand Jury Association's proposal, adopted the middle ground, namely, to give the grand jury only limited authority to report and surround even that authority with safeguards. In sum, the hearing was fruitful, materially aiding the Commission in its evaluation of the problem.

Following this public hearing the Commission held a series of meetings at which it explored and debated the philosophic, legal and practical issues involved. It then voted on the question: "Shall the Commission recommend a change in the present law respecting grand jury reports?" The vote was 5 to 4 in favor of maintaining the status quo.*

Therefore, this Commission respectfully recommends to the Legislature that no change be made in the present law.

It is the Commission's opinion that adequate official agencies and machinery for investigation and report are already on the scene and new ones are added periodically as need for them arises. Such agencies, in the Commission's view, are well equipped for critical evaluation of non-criminal behavior.

Although it recommends that the law not be changed, the Commission realizes—as, indeed, its own vote on the subject indicates—that considerable sentiment exists for restoring at least some form of grand jury reports. In the event, therefore, that the Legislature is disposed to enact such an enabling statute, the Commission has prepared, as its recommended alternative, a bill to accomplish this result. A copy of this bill is included in this report as Appendix F.

Briefly, the Commission's proposed bill authorizes grand jury reports for two purposes only: (1) those which criticize public officers or employees whose acts or failures to act, though reprehensible, fall short of constituting indictable offenses; and, comple-

* Chairman Bartlett and Commissioners Conway, Halpern and Jones dissented and voted for restoration of the power of grand juries to make reports, subject to appropriate limitations and safeguards.

mentary thereto, (2) those reports which exonerate such officials when the grand jury finds that they have been falsely accused.* The Commission also carefully considered, but eventually rejected, a provision giving grand juries the additional right to submit reports relating to matters of general public concern and containing recommendations for legislative, administrative or executive action.**

The primary function of the critical report is to serve as a vehicle for apprising a public official's superiors of the grand jury's findings coupled with its recommendation that the subject official be removed or disciplined. The court to whom such a report is submitted is required to reject it unless the evidence adduced before the grand jury justifies the report, and each person named therein was given an opportunity to testify before the grand jury prior to the submission of the report.

As to a report which exonerates a public official, the court may accept it only if its rendition was requested by the subject official. Thus, the situation is avoided wherein an exonerating report brings to public attention for the first time a matter involving an official which had not theretofore been publicized. Either type of permissible report may be suppressed temporarily by the court in the interests of justice.

One major respect in which the proposed bill differs from those introduced at the 1962 session and the one discussed at the Commission's public hearing is that this bill, unlike the others, contains neither hearing nor appeal provisions. Not only are such procedures unnecessarily complicated and cumbersome but they probably would fail, ultimately, to serve the purposes for which they were intended.

In drafting this bill, the Commission sought to achieve a realistic balance that would restore to the grand jury—though in limited fashion—some of its pre-*Wood v. Hughes* functions, yet would, consistently therewith, afford effective protection of the rights of individuals who become involved in these investigations. As a result, the permissible scope of grand jury reports in the proposed bill is substantially more limited than was the case before *Wood v. Hughes*, while the bill itself is less ponderous than those introduced at the 1962 session and the one discussed at the public hearing.

The Commission, therefore, respectfully urges that if, despite its recommendation to the contrary, any legislation on the subject is to be adopted, the statutory authority of a grand jury to render reports not exceed that contained in the Commission's proposed bill.

* Commissioners Atlas, Pfeiffer and Wechsler opposed inclusion of the provision permitting a grand jury to issue a report exonerating a public official. They are of the opinion that it would only create additional difficulties, especially where a grand jury, after investigation, fails to indict and fails also, when requested to do so, to submit a report exonerating the public official concerned.

** Commissioners Conway, Halpern and Jones favored the inclusion of such power.

II. OVER-ALL REVISION OF THE PENAL LAW

A. Excision and Relocation

In accordance with the plan stated in the 1962 report, the Commission staff systematically reviewed the approximately 1200 sections in the Penal Law in order to identify two types of provisions: (1) those essentially administrative in nature, which, therefore, belong in a more appropriate body of law dealing with the same or cognate subject matter; and (2) those which should be repealed because they have no further utility due to changed economic and social conditions, or because they duplicate sections in other chapters of the Consolidated Laws, or because they have been held unconstitutional. Staff memoranda summarized the scope of sections thus identified, cited relevant statutes and background material, and recommended specific dispositions. These explanatory memoranda were circulated for comment to the respective governmental departments and agencies concerned, to bar associations, and to numerous interested organizations and individuals. The replies received have furnished valuable assistance to the Commission. This study, now substantially completed on the staff level, will again be reviewed by the Commission before formal recommendations are made. Ultimately, these decisions, cast in bill form, will be presented to the Legislature concurrently with the submission of the revised Penal Law and Code of Criminal Procedure. A tabular summary of the tentative proposals relating to excision and relocation appears in Appendix G of this report.

The first phase of this initial project involved the identification of Penal Law sections which are essentially of a regulatory or administrative character, *i.e.*, provisions that could be more suitably housed in other bodies of law dealing with the same or similar subject matter.

The following Penal Law sections illustrate the kind of provision that is being recommended for relocation elsewhere. Penal Law § 185-a regulates the sale of baby chicks. The suitable place for this provision is Agriculture and Markets Law Article 15-A, "Sales of Baby Chicks." Penal Law §§ 188-a and 943, relating to auctions, can properly be placed in General Business Law Article 3, "Auctions and Auctioneers." Article 26 of the Penal Law, "Banking," should be transferred to the Banking Law. Penal Law § 440 requires the filing of certificates in the office of the county clerk by persons conducting a business under an assumed name or as partners. Penal Law § 964 authorizes an injunction to restrain an actual or threatened use of a corporate or trade name with intent to deceive. Both sections are of such a regulatory and civil nature that they properly belong in the General Business Law.

As was pointed out in the last report, many chapters of the Consolidated Laws, other than the Penal Law, provide criminal sanctions for violations of some or all of their sections. These provisions, though rarely the basis for prosecution are, nevertheless,

integral parts of the criminal law of this State. The Commission staff estimates that scattered among these chapters outside the Penal Law there are about 2000 misdemeanor and about twenty felony provisions. Several chapters in the Consolidated Laws have a "dragnet" clause stating that a violation of any section in the chapter, or of a particular article therein, constitutes a misdemeanor [*e.g.*, Agriculture and Markets Law § 41, Banking Law § 71, Multiple Dwelling Law § 304, and Public Service Law § 56]. Approximately one-half of the sections in the General Business Law contain misdemeanor sanctions. Some sections in the Penal Law expressly state that a violation of a specific section or article, or any section, in some other chapter of the Consolidated Laws constitutes a misdemeanor [*e.g.*, §§ 446, 783, 1878].

Although the Banking Law contains numerous penal sanctions, there are, nevertheless, in Penal Law Article 26, "Banking," fifteen sections relating to such technical matters as investment of bank funds in securities, the issuance of certificates of deposit, loans, insolvency etc. Insurance, labor and public health are illustrative of some other areas in which the Penal Law contains only a fractional part of the criminal law relating to the subject. Compounding the difficulty is the absence of a workable index to the presence or content of these hundreds of criminal sanctions outside the Penal Law. This structuring of the New York criminal laws is a hindrance rather than an aid to the researching of penal sanctions in any specialized field, for at least two bodies of law must be canvassed.

This structural dichotomy is due historically to shifting concepts of the appropriate location of penal provisions in New York's general laws. The Revised Statutes of 1828, for the first time, codified the traditional areas of criminality into a single chapter, "Crimes and their Punishment." Other penal sanctions, *e.g.*, those relating to banking, were placed in the Revised Statutes among the several subjects to which they were related. A regulatory provision was not isolated merely because it carried a criminal penalty. Compilers of subsequent editions of the Revised Statutes followed this scheme and inserted new legislation "in those titles and articles where the same or similar subjects are contained." [Preface to Revised Statutes, 3rd Ed. (1846)].

In 1857, David Dudley Field and two others were appointed by the Legislature as Commissioners and charged with the task of codifying the laws of this State. By statute, they were directed to ". . . divide their work into three portions; one containing the political code, another the civil code, and a third the penal code. The . . . penal code must define all the crimes for which persons can be punished, and the punishment for the same." [Laws 1857, ch. 266]. In 1864, when the draft of a Penal Code was submitted, the plan followed was briefly outlined:

"In compiling the system of Penal Law embodied in this Code, the following have been the leading objects of the Commissioners: 1. To bring within the compass of a single volume the whole body of the law of crimes and punishments in force

within this state. . . . The value of the Penal Code must ultimately depend, in great measure, upon its containing provisions which embrace every species of act or omission which is the subject of criminal punishment." *Draft of a Penal Code for the State of New York*, iii-iv, (1864).

After the enactment of the Penal Code in 1881, the next reclassification occurred when the present Penal Law was adopted in 1909. This law, drafted by the Board of Statutory Consolidation, was simply a rearrangement of the old Penal Code without any change of substance. However, many other chapters of the Consolidated Laws, adopted simultaneously with the Penal Law, contained criminal penalties. Field's concept of a "single volume of crimes" was recognized as unworkable by the consolidators because at about this time the area of conduct regulated by penal sanctions was expanding. Much of this regulation, as noted before, is done by penal statutes not incorporated in the Penal Law proper.

What criteria should determine which provisions belong in the Penal Law and which belong in some other body of law? This Commission has adopted the view that a sound penal code should not cover the entire field of criminality, but instead, should comprise the more fundamental and familiar offenses. Sections in the Penal Law that are essentially regulatory or administrative in scope should be relocated in other bodies of law dealing more fully with the activity regulated or with cognate subject matter. That, generally, has been the approach taken in Illinois and Wisconsin which have recently revised their penal codes.

The following Penal Law sections are offered as illustrations of the type of anachronistic provision being recommended for repeal. Section 443 prohibits the transfer of tickets issued by the People's Institute entitling a person to a reduced fee for admission to any dramatic performance; this institute ceased operating twenty-five years ago. Section 1194 relates to the premiums charged by a marine insurance corporation for insurance of property transported upon the canals of this State. Inquiry by the Commission reveals that the situation which this section was designed to correct no longer exists. Sections 1960-1964, relating to the quarantine of "vessels arriving in the port of New York," have no utility today because the Federal Government has assumed and now exercises quarantine jurisdiction over vessels entering the port of New York. Additionally, under Section 556-4.0 of the Administrative Code of the City of New York, the City Department of Health is vested with broad authority to inspect and quarantine vessels entering the port of New York.

Among the Penal Law sections that are duplicative of provisions in some other chapter of the Consolidated Laws are §§ 435-a, 435-b and 435-c, relating to the sale and labeling of Kosher food products; these three sections are similar to Agriculture and Markets Law §§ 201-a, 201-b and 201-c. Penal Law § 1276, forbidding the use of unsafe scaffolding and hoists, duplicates Labor Law § 200. Penal Law § 1743, relating to the sale of specified poisons, duplicates Education Law § 6813. Penal Law § 1980, proscribing certain

conduct by railroad officials, is covered by Public Service Law §§ 15 and 46. The subject matter in Penal Law Article 216, "Weights and Measures," is covered in a much more comprehensive and meaningful manner in Agriculture and Markets Law Article 16, "Weights and Measures."

Among the Penal Law provisions held unconstitutional is § 436-d, prohibiting the sale of periodicals from which the title page or other identification marks have been removed or obliterated [*People v. Bunis*, 9 N. Y. 2d 1 (1961)]. The two sections in Penal Law Article 208, "Trading Stamps," were declared unconstitutional by New York courts [*People ex rel Madden v. Dycker*, 72 App. Div. 308, (3rd Dept., 1902), *People ex rel Appel v. Zimmerman*, 102 App. Div. 103 (4th Dept., 1905)]. In 1915 the Attorney-General of New York was of the opinion that these two sections were dead-letters [1915 Atty. Gen., Vol. II, 379]. In the following year, the United States Supreme Court upheld, against a challenge based on the Fourteenth Amendment, legislation prohibiting the use of trading stamps [*Pitney v. Washington*, 240 U. S. 387 (1916)]. In 1959 the Attorney-General issued an opinion stating that despite the Supreme Court's ruling "the cited decisions of the Courts of this State are final and conclusive as to the unconstitutionality of these sections under the State Constitution." [1959 Atty. Gen. 96].

This reorganization of administrative material in the Penal Law, coupled with the compilation of a comprehensive index addressed to the totality of New York's criminal laws, will facilitate the finding of law applicable to a specialized field. Excising Penal Law provisions relating to baby chicks, pocket billiard rooms, budget planning, ferries, passage tickets, and the like will lend stature and dignity to the formulations contained in the revised penal code.

B. Internal Revision of Basic Material

While the Penal Law is being thus stripped of its dead wood, surplusage and unwelcome encumbrances, the basic crimes and articles are being analyzed, re-appraised, condensed, regrouped and re-written. Many new sections and articles, accompanied by extensive explanatory reports and memoranda, have been formulated by the staff, though not as yet approved by the Commission. Among these are completely revised articles and sections dealing with homicide, burglary, arson, malicious mischief, perjury, contempt, gambling and the vast area that includes disorderly conduct, vagrancy, riot, nuisance and related offenses. In the process of revision are other sections and articles involving bribery, extortion, larceny and related crimes, and sex offenses.

From the standpoints of both substance and form, most of these tentative new articles present drastic changes from the existing ones dealing with the same areas; and one prominent feature pervading this new material is that the number of sections covering any particular field of crime is greatly reduced.

Illustrative is a new homicide article—virtually completed except

for two or three as yet unsettled controversial points—which not only presents an entirely new structure of crimes and penalties but numbers only seven sections in contrast to the twenty-three contained in the existing article (Art. 94; §§ 1040-1055). Since this proposal, along with others mentioned below, is soon to be circulated for study with a detailed explanatory memorandum, a complete description of the article and all its novel facets will not be attempted here.

One of its features is a single, degreeless murder statute, replacing the existing two-degree pattern. Containing three subdivisions, this section defines the three traditional, basic forms of murder: (1) intentional killing, (2) the wanton or depraved type, and (3) felony murder.

Eliminated here is the ephemeral and frequently unintelligible distinction between intentional killing which is deliberate and premeditated [presently first degree murder (§ 1044, subd. 1)] and that which is not deliberate and premeditated [presently second degree murder (§ 1046)]. Although the determination of whether premeditation occurred in any particular case often boils down to no more than an intellectual exercise in semantics, premeditation or the lack of it is nevertheless the yardstick under existing law which measures the defendant's crime as first degree murder, requiring the death penalty, or as second degree murder, entailing a prison sentence of from twenty years or more to life.

Incorporated in the revised article is the new penalty and sentencing pattern of the bill (previously described in the discussion of "Capital Punishment") being submitted by the Commission at the 1963 legislative session. In this scheme, the sentence for any form of "murder" is either death or a specified prison term. The determination, made by the jury or court, does not depend upon narrow factual issues of the case such as premeditation, but upon a variety of considerations some of which reach beyond the case itself and delve into the defendant's background and history.

Another important aspect of this revised homicide article is a complete overhauling of the field of manslaughter. The current manslaughter sections present two degrees (Penal Law §§ 1050, 1052). Each statute contains several subdivisions and subclauses, devoted to a variety of miscellaneous kinds of killings. There is little order or structure to either statute and, in both substance and form, the provisions are frequently unclear and sometimes illogical as well as prolix. The more familiar types of homicides found therein include so-called misdemeanor-manslaughter, killings in "the heat of passion" and those resulting from "culpable negligence" (§ 1050, subds. 1, 2; § 1052, subds. 2, 3).

While the existing manslaughter sections cover a host of offenses, many of which are superfluous and some downright purposeless, they actually fail to prescribe at least two basic common law forms of manslaughter which definitely belong in any homicide article.

One of these is a killing perpetrated by an act coldly committed with intent to inflict substantial physical injury upon the victim, though not with homicidal intent. This is not manslaughter, nor

any other form of homicide, under the existing article. Only if the assault is committed "in the heat of passion" do the manslaughter provisions apply (§ 1050, subd. 2; § 1052, subd. 2).

Another traditional and sound form of manslaughter, emanating from the common law and carried over into the law of most American jurisdictions, is that which takes cognizance of an intentional killing committed in the "heat of passion" or under comparable mitigating circumstances. The true theory of this crime is that a killing which ordinarily would, by virtue of its intentional character, constitute murder, is reduced to manslaughter by virtue of "heat of passion" or whatever standard of mitigation prevails in the particular jurisdiction. Homicidal intent and "heat of passion" are not inconsistent concepts, as the Penal Law now depicts them (§§ 1050, 1052), but consistent and correlative ones. "Heat of passion" is not an affirmative element of manslaughter, as under the existing statutory pattern, but a mitigating factor which reduces murder to manslaughter.

Bearing in mind these two above-described fundamental forms of manslaughter—(1) a killing by an act coldly and deliberately intended to inflict bodily harm, and (2) an intentional killing committed in the heat of passion or other extenuating circumstances—it becomes apparent that the existing manslaughter sections misconceive both offenses and, because of this, inadvertently fail to proscribe either. Examination of certain current manslaughter provisions (§ 1050, subd. 2; § 1052, subd. 2) proves persuasive that, while vaguely aware of these two offenses, the Penal Law has so confused them as to leave a gaping hole in this area of homicide. The revised article in question plugs this gap with two manslaughter provisions squarely defining those crimes.

Equally subject to criticism is the handling of involuntary manslaughter in the existing article. The Penal Law's second degree manslaughter statute includes homicide committed by "culpable negligence" (§ 1052, subd. 3). The same subdivision then proceeds to list or particularize a host of specific kinds of acts, all of a negligent character, which constitute second degree manslaughter when death results: negligent use of machinery, overloading passenger vessels, negligently operating steam boiler, and the like.

The second degree manslaughter section (§ 1052) is followed by three other sections proscribing further homicides of the negligence variety but not labeled manslaughter: "Criminal negligence in operation of vehicle resulting in death" (§ 1053-a), "Criminal negligence while engaged in hunting resulting in the death of another" (§ 1053-c), and "Criminal negligence in operation of vessel resulting in the death of another" (§ 1053-e). These crimes carry penalties entailing a maximum prison term of only five years (§§ 1053-b, 1053-d, 1053-f) in contrast to second degree manslaughter's fifteen year maximum (§ 1053). The purpose, at least insofar as the vehicle homicide section (§ 1053-a) is concerned, is to provide a crime of homicide for fatal automobile negligence cases carrying less stature and punishment than does "manslaughter," the theory being that juries are reluctant in this type of case to convict of manslaughter with its severe penalty.

The proposed article considerably changes the pattern of this entire area. Eliminating all narrow or particularizing provisions, sections and crimes addressed to specific kinds of negligent acts (e.g., vehicle homicides, overloading steamboats, etc.), it prescribes and precisely defines two terms or standards which apply to and cover every form of involuntary manslaughter of the negligence genus. The two terms in question are "criminal negligence" and "recklessly." These definitions, and the whole theme of the proposed article in this respect, are substantially taken from the recent Model Penal Code of the American Law Institute (§§ 2.02, 210.3(1)(a), 210.4).

Without here analyzing those definitions, it may be said that the *reckless* brand of homicide is more culpable than the *criminally negligent* type; and, hence, that homicide committed "recklessly" is graded as a more serious crime than homicide committed by "criminal negligence." More specifically, one who "recklessly causes the death of another person" is guilty of manslaughter; and one who causes death through "criminal negligence" is guilty of the lesser crime of "criminally negligent homicide."

These two crimes or forms of homicide would replace not only the general "culpable negligence" provisions of the existing second degree manslaughter statute (Penal Law §1052, subd. 3) but the numerous particularized negligence offenses of the same statute and of the three previously mentioned ensuing sections (§§ 1053-a, 1053-c, 1053-e). Eliminated in this structure are all the Penal Law's special and little used negligent homicide provisions relating to use of machinery, mischievous animals, overloading passenger vessels, mismanagement of boilers and other apparatus of steamboats and railways, acts of intoxicated physicians, keeping of gunpowder and explosives (§ 1052, subd. 2), operation of vehicles (§ 1053-a), hunting accidents (§ 1053-c) and operation of ships (§ 1053-e). Just why these narrow provisions or offenses are necessary and why the proposed general standards of criminal negligence and recklessness cannot readily and adequately be applied to fatally remiss conduct in these particular fields, is not apparent. If a fatal act is committed with "criminal negligence" as here defined, the offender is guilty of "criminally negligent homicide" whether the act relates to a steamboat, an automobile, a building construction job or any other item, project or field of endeavor; and if the fault involved does not amount to "criminal negligence," no form of homicide is committed. If the faulty conduct, regardless of its specific nature, transcends "criminal negligence" and falls within the more culpable concept of *recklessness*, it constitutes manslaughter.

Also representing a drastic change from the existing Penal Law pattern is a tentative new "Gambling" article. Designed to replace two existing articles entitled "Gambling" (Art. 88) and "Lotteries" (Art. 130), it reduces the whole field to six sections in contrast to the fifty-four now found in the Penal Law. This is accomplished largely by analysis of the prolific existing provisions and by ascertainment of certain basic principles which most of them

reflect. The theme of all the present gambling crimes is that the mere player in any particular gambling game, scheme or enterprise is not guilty of any crime, but that anyone who directly or indirectly creates, promotes, operates or in any way, other than as a player, advances the ends of a gambling project, is guilty of a crime. This theme is repeated over and over again in a host of sections addressed to specific forms of gambling schemes and devices: ordinary games of chance, policy, lottery, bookmaking, slot machines and other machines capable of gambling use. Partly through a careful set of definitions of elementary terms, the tentative revised article finds a common denominator and crystallizes it in the form of a tent-like crime entitled "Promoting gambling activity." Without itemizing every form of gambling scheme and the various facets thereof, as is the existing pattern of the Penal Law, this proposed statute, though not prescribing the only crime of the article, applies to all persons in the entrepreneur class and none in the player category; and, hence, without exhaustive enumeration and specificity, it covers all types of gambling operations whether in the nature of policy, lottery, bookmaking or any other form of gambling.

The condensation approach in question is also evidenced by another tentative article devoted to a vast area of largely minor offenses which sprout at random all over the Penal Law and the Code of Criminal Procedure as well. Broadly speaking, the field in question comprises offenses resulting in public disorder, disturbance and inconvenience; unsavory conduct of a public "loitering" nature, and acts of a public or semi-public character which harass, annoy or alarm individual persons rather than the public in general or segments thereof. Falling into this category are literally dozens of scattered sections in the Penal Law and the Code. Some contain numerous subdivisions, and the totality of provisions and offenses of this nature actually runs into the hundreds. Among the crimes and offenses of this classification are disorderly conduct, vagrancy, disorderly persons, tramps, public intoxication, nuisance, riot and unlawful assembly. The disorderly conduct and vagrancy statutes, to name two (Penal Law § 722; Code Crim. Proc. § 887), contain a wide variety of offenses, many of which are of a dubious nature and appear archaic in both substance and phraseology.

The new, proposed article was arrived at by culling out the manifold provisions of the indicated sort; analyzing the field in its entirety; eliminating many archaic and useless offenses; classifying the residue—together with other offenses not presently defined—into natural categories; and, finally, arranging the resultant material in a new format consisting of relatively few sections.

The best illustration of this technique, perhaps, appears in a revised "Malicious Mischief" article. As pointed out at some length in the 1962 report, the existing malicious mischief article (Penal Law Art. 134) constitutes an example of unbridled itemization and specificity. It contains twenty-five sections, some with numerous subdivisions and sub-clauses which ramble on with interminable verbosity. A vast portion of the article is devoted to completely

unnecessary enumeration of hundreds of different kinds of property subject to criminal destruction. Some of the provisions, on the other hand, prescribe crimes which are not of the malicious mischief genus at all but belong in other articles, such as larceny or public safety.

The proposed, tentative article substitutes for this whole structure three simple, concise sections defining three graded forms of malicious mischief. These three sections cover every genuine malicious mischief crime found in the present multiple-provisioned malicious mischief article and some which belong there but have been misplaced in other articles. Some of the offenses of the existing article, not being truly of the malicious mischief genus, have been deliberately excluded with a view to eventual inclusion in other new articles representing more natural repositories for them.

The revision work with respect to sections and articles dealing with some of the more familiar crimes, such as burglary, arson and perjury, does not ordinarily present as formidable a task from the standpoint of structural reorganization. However, numerous important changes of substance are proposed and these, in turn, require formal arrangements strikingly different from those of existing articles.

In dealing with burglary, for example, a significant substantive change appears in the elimination of a *breaking* as an element of that crime. Presently, burglary, a felony divided into three degrees, consists of *breaking* and *entering* premises with intent to commit a crime, the degree depending upon the presence or absence of certain specified circumstances (Penal Law §§ 402-404). Absent a breaking but with the same criminal intent still present, the crime is reduced to a misdemeanor, namely "Unlawfully entering building" (§ 405). If no intent to commit a crime in the invaded premises can be established, the intrusion ordinarily is not criminal at all even though it was perpetrated by a breaking (*cf.* § 2036).

The main defects in this structure are: (1) that the requirement of a breaking for the felony of burglary places too much emphasis and importance upon that technical factor, especially since the term "breaking" is judicially construed so broadly as to render many unlawful entries burglaries even though no force in a realistic sense is used; and (2) that the absence of any offense covering situations where intent to commit a crime in the premises entered cannot be established, leaves an appreciable gap in the criminal law, especially since such intent, even though realistically evident, is frequently difficult to prove by case law standards.

The revised article rectifies the latter deficiency by prescribing a crime of "Criminal trespass," containing three degrees, which is committed by unlawful entry into or upon premises regardless of whether intent to commit a crime therein can be established. It then prescribes the higher crime of burglary, in two degrees, which is committed by an unlawful entry with intent to commit a crime. As in several other jurisdictions, the occurrence or non-occurrence of a breaking is immaterial, and the word is nowhere mentioned in the proposed statutes.

Further significant changes of substance, accompanied by appropriate changes of form, have been made in other revised articles, including those dealing with arson and perjury. With respect to the latter crime, the existing law predicates two degrees of perjury and makes the *materiality* of the false testimony the element which raises the crime to the first degree (Penal Law §§ 1620-a, 1620-b). While not abandoning the rather loose concept of materiality as an aggravating factor for grading or degree purposes, the revised article also notes and employs another kind of distinction bearing upon the relative seriousness of different types of false swearing. This involves the kind of statement which is the subject of a perjury charge. Traditionally, and as defined in the Penal Law, perjury consists of false swearing in almost any form, from mere affidavits which never reach a court to trial testimony. In a realistic sense, actual testimonial falsehood is usually more culpable than sworn falsehood in an affidavit, especially one prepared by a lawyer for the affiant's signature. The existing perjury article does not take cognizance of this distinction (see § 1620), but the revised article does. With a new three-degree format, it uses both the *testimonial* and *materiality* considerations as factors of aggravation. This, it is believed, makes for a more equitable and realistic grading system.

The foregoing is not intended as a thorough description of the staff's work in this field up to the present time, but as an indication of the type of revision being undertaken with respect to the main crimes and the body of the Penal Law. It is contemplated that, in the near future, a series of suggested new articles of the sort referred to, together with explanatory memoranda, will be compiled and circulated for study among bar associations and other agencies, both public and private, which have a special interest in such legislation and which are so constituted as to be capable of offering helpful criticism.

C. Structural Regrouping

As indicated in the 1962 report, an entirely new structure for the Penal Law is contemplated. In brief, the present alphabetical format is to be replaced by a category arrangement (e.g., Crimes against the person, Crimes against property, etc.).

Following considerable experimentation in the devising of category formats, it has been decided to postpone this task until the internal revision of the basic material is almost complete. The experience of the staff indicates that no purpose is to be served by over-all grouping activity until virtually all the components are constructed and ready for final assembly.

III. THE CODE OF CRIMINAL PROCEDURE

While the Commission has in the first instance been addressing the major share of its effort to a full-scale study of the Penal Law, it has also been analyzing the existing provisions of the Criminal Code with a view toward providing a workable foundation for the Code's ultimate revision. When revision of the Penal Law has been substantially completed, the Commission will be in a position to devote its total time to the Criminal Code. It is envisaged, in light of the preliminary groundwork on the Code, that the general direction which the Code revision ought to assume will have become crystallized, thereby expediting the remaining task of the Commission.

The Criminal Code, adopted by the Legislature in 1881, was the product of a Report in 1850 by the then Commissioners of Practice and Pleading. It has never been the subject of general revision, although such an effort was made in the 1930's by the Commission on the Administration of Justice.

Some of the Code's weaknesses and deficiencies, and the nature and scope of some of the problem areas may be mentioned.

Structurally, the Code moves chronologically from provisions relating to arrest, through the subjects of grand jury, indictment, arraignment, pleas, trial, judgment, and appeals. Many provisions, however—seemingly the result of sporadic piece-meal amendatory legislation through the years—are scattered throughout the Code with little in the way of order and consistency. An unfortunate, albeit convenient, residuum for a varied assortment of material is Title 12 of Part IV, appropriately entitled "Miscellaneous Proceedings." In this Title (which follows the "Appeals" Title), in addition to detailed and unnecessarily strung-out provisions relating to "Bail" (§§ 550-606)—which ought to be located in an earlier portion of a Code—the gamut is run from provisions dealing with "Examination of Witnesses, Conditionally" (§§ 620-635), "Compromising Certain Crimes by Leave of the Court" (§§ 663-666), through "Disposal of Property, Stolen or Embezzled" (§§ 685-691), to "Reprieves, Commutations and Pardons" (§§ 692-697).

Similarly, although the main provisions relating to the grand jury are found in §§ 223-272-a, other provisions appear toward the end of the Code, under Title 14 of Part VI, relating to "Grand Jury Stenographers" (§§ 952-p to 952-y). Section 952-t, which constitutes the statutory basis for the significant motion to inspect grand jury minutes is, misleadingly, entitled "Stenographers' duties." An obviously more appropriate location of the statutory authority for such motion would be in the main "grand jury" provisions (§§ 223-272-a), or under a new head such as "motions" generally. It is further noteworthy that another isolated provision, § 39, dealing with the jurisdiction of the County Courts, expressly provides that the County Court has jurisdiction, concurrently with the Supreme Court, "to determine any motion for an order of inspection of such grand jury minutes."

Again, provisions relating to insanity are widely dispersed throughout the Code. Section 336 provides that a plea of insanity may be interposed at the arraignment. Section 454 describes the commitment procedure consequent upon an acquittal of a defendant on the ground of insanity. Section 495-a describes the proceeding available at the instance of the Governor where "a defendant in confinement under sentence of death appears to be insane" (see also, § § 498, 499). Sections 658-662-f deal with the procedures available for "Inquiry into the Insanity of Defendant, before or during the Trial, or after Conviction." The misplacement of the latter provisions becomes plainly evident when the material that precedes and follows is noted: "Examination of Witnesses, on Commission" (§ § 636-657) and "Compromising Certain Crimes by Leave of the Court" (§ § 663-666), respectively. Sections 870-876 relate to "Proceedings when a Defendant appears to be Insane or a Mental Defective." Again, it may be worthy of note that the latter material is sandwiched between such unrelated material as the "Uniform Close Pursuit Act" (§ 860), and "Proceedings Respecting Vagrants" (§ § 887-898-a).

Another category illustrative of the scattering of provisions deals with the defendant's representation by counsel (see *e.g.*, § § 8, 188, 219, 308, 699).

The unnecessary stringing-out of material dignified by innumerable separate sections, constitutes a further weakness which permeates the Code. Illustrative of such disseminated material are the sections found under the following major heads: "Security to Keep the Peace" (§ § 84-99); "Prevention and Suppression of Riots" (§ § 102-117); "Arrest by an Officer under a Warrant" (§ § 167-176); "Examination of the Case, and Discharge of the Defendant or Holding Him to Answer" (§ § 188-221-b); "Formation of the Grand Jury, its Powers and Duties" (§ § 223-260); "Demurrer" (§ § 321-331); and "Arrest of Judgment" (§ § 467-470). By the sensible compression of strung-out material into a far fewer number of sections, clarity, consistency and economy of expression may be realized.

It may be noted that the Criminal Code in numerous respects proscribes acts for which ordinary criminal sanctions or a varied assortment of other penalties may be visited upon the offender. There are: two felonies (§ § 813-b, 839); twelve misdemeanors (§ § 104, 109, 507, 554-b(1), 554-b(4), 611-a, 811, 812, 839, 897, 944, 952-u); two, "misdemeanor *and* contempt" (§ § 350, 926-e); "misdemeanor *and* treble damages" (§ 554-b(4)); "misdemeanor *and* forfeiture of office" (§ 220); seven, "criminal contempt" (§ § 554(9), 618-a, 619, 635, 729, 776, 952); and other penalties of a varied sort. This state of affairs, of course, suggests questions which in time must be met: whether, or to what extent, a procedural code ought to contain sanctions of a penal nature for its violation; and whether the more appropriate home of such proscriptions is in some other body of law?

There are a number of provisions in the Code which, it is contemplated, will be included in some form in the revised Penal Law.

The material relating to "Vagrants" (§ § 887-898-a) and "Disorderly Persons" (§ § 889-913) is illustrative. These sections involve substantive offenses which do not belong in a procedural Code. Indeed, as mentioned in an earlier part of this report, in connection with the Commission's task of revising the Penal Law, these Code provisions, together with the related offenses found in the Penal Law (*e.g.*, "Disorderly Conduct, § § 720-727; "Intoxication in a Public Place," § 1221), are being studied with a view toward arriving at a general restatement of this class of offenses.

Provision such as § § 79-81, dealing with the lawfulness of force to prevent the commission of a crime, will also, it is contemplated, be eliminated from the Code. These provisions are duplicative of the broader Penal Law provisions, § § 42 and 246, and, in any event, belong in a substantive penal code. The Commission, of course, will consider these Code provisions when it addresses itself to the general study of principles of "justification" and "excuse" as part of its revision of the Penal Law.

There are many Code provisions which substantially duplicate provisions found in the Penal Law. The following are illustrative: § 108 of the Code and § 2095 of the Penal Law; § 133 of the Code, and § § 735 and 1713 of the Penal Law; § 169 of the Code, and § 1848 of the Penal Law; § 182 of the Code, and § 1849 of the Penal Law. The questions raised here are whether such provisions are to be retained; if so, what form are they to assume, and in which body of law will their inclusion be more appropriate?

There are a host of other Code provisions which probably will be relocated in some form with related provisions in some other body of law. The following is illustrative of this class of provisions: "Duties of Public Officers in Enforcement of Laws Relating to Animals" (§ § 117-a to 117-f); "Proceedings against Corporations" (§ § 675-682); "Proceedings Respecting the Support of Poor Persons" (§ § 918-926); "Proceedings Respecting the Support of Patients and Inmates of Certain State Institutions" (§ § 926-a to 926-g); "Violations of the Provisions of the Penal Law Relating to the Manufacture or Sale of Spurious Silverware or Goldware" (§ § 952-a to 952-g).

Of course, antiquated provisions will be discharged and archaic language found in some of the statutes will be modernized.

Another Code weakness might be regarded as antithetical to a deficiency noted earlier—a tendency throughout the Code to string out provisions. It is the inclusion toward the end of a section of language which is sufficiently significant and important to warrant independent treatment under a separate head. At the same time, the latter weakness constitutes an aggravation of the earlier-noted deficiency of scattering related provisions throughout the Code. At least this is true in the sense that by dint of such misplacement, the language (placed under an inappropriate head and in an inappropriate setting) may not receive the attention it deserves or indeed may not be observed at all. The following are illustrative: (1) Under the main head "The Verdict" (§ § 433-454) appears § 444 which is entitled "Upon Indictment for Crime Consisting of

Different Degrees, Jury May Convict of any Degree, or of any Attempt to Commit the Crime; Conviction of Assault upon Trial for Murder and Manslaughter." Hidden at the end of § 444 is the following language: "A conviction upon a charge of assault is not a bar to a subsequent prosecution for manslaughter or murder, if the person assaulted dies after the conviction." (2) Tacked on at the end of § 528, entitled merely "Stay, upon Appeal to Court of Appeals, etc.," is this highly significant provision: "When the judgment is of death, the court of appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial."

The Code is obviously in need of a sound and comprehensive scheme of definitions. At the very end of the Code under the head "General Provisions and Definitions Applicable to this Code" (§ § 953-963) appear only four "definitions" (§ § 958-961). Section 958 defines "signature," and § 961 defines "county court." The remaining two sections are patently redundant: § 960 defines "peace officer" as "any one of the officers mentioned in section one hundred and fifty-four;" § 959 defines "magistrate" as "any one of the magistrates mentioned in section one hundred and forty-seven." Still another provision (§ 146) defines magistrate as "an officer, having power to issue a warrant for the arrest of a person charged with a crime. Although there are definitions interspersed throughout the Code geared to the relevant subject matter, they are, on the whole, inadequate. In this connection, it may be noted that two statutes (§ § 223 and 224) are used to define the term "grand jury." What is necessary, then, is a comprehensive scheme defining terms of general applicability. Thus, consistency of language as well as clarity and economy of expression throughout the entire Code will be promoted. Of course, terms peculiar to specific subject matter will be defined with precision under each head.

The content of the Code, which will be reduced to workable "blocks" for study purposes, will be analyzed with a view toward modernizing the machinery for the administration and enforcement of the criminal law. Particular problem areas, *inter alia*, which stand out and warrant deep scrutiny are: arrest, bail, right to and assignment of counsel, commitment procedures generally, grand jury, motions generally, trial procedures, appeals, post-conviction remedies, and significant evidentiary matters.

A formulation of more useful subject headings will be undertaken. The standards which will govern the construction of the Code's skeletal framework will be two fold: (1) related provisions will be pulled together under appropriate heads; (2) at the same time, since this is a procedural code, a chronological format will be preserved. While these interests may often be competing and antagonistic, each requires recognition. An attempt will be made, to the extent that it is possible, to strike a congenial balance.

An important problem which must be resolved during the course of revision is what ought to be the ingredients of a sound "procedural" criminal code, as opposed to the content of a "substantive" penal law. The criteria ultimately adopted will be dispositive of the

troublesome problem of the location of such subject matter as "territorial jurisdiction" and "time limitations." At present, territorial jurisdiction provisions may be found in both bodies of law (see *e.g.*, § 133 of the Code of Criminal Procedure, and § § 735 and 1713 of the Penal Law). Virtually all the provisions dealing with time limitations are located in the Criminal Code (§ § 141-144-a). It may be noted that the American Law Institute has included such provisions in the general part of its Model Penal Code (see Model Penal Code, § § 1.03, 1.06). In any event, in the course of revision, a continuing effort will be made to mesh the Penal Law and Criminal Code in such a manner as will avoid duplication and inconsistency, and achieve a complementary and harmonious substantive-procedural penal scheme.

Although, as observed above, revision of the Code is in a preliminary stage, certain necessary amendments of the Code are being advocated at this time in order to complement the Commission's earlier-described proposals dealing with the two-stage sentencing procedure and with the insanity defense (see Appendices B, D, E). These Code provisions are § § 308, 332, 336, 373, 377, 398-b, 451, 485, and 538.

APPENDIX A

ACT creating the New York State Temporary Commission on
Revision of the Penal Law and Criminal Code.

Laws 1961, Chapter 346, as amended by Laws 1962, Chapter 548.

Section 1. a. A temporary state commission is hereby created to be known as the commission on revision of the penal law and criminal code. The commission shall consist of nine members to be appointed as follows: three members shall be appointed by the governor; three members shall be appointed by the temporary president of the senate; and three members shall be appointed by the speaker of the assembly. Any vacancy that occurs in the commission shall be filled in the same manner in which the original appointment was made. The governor shall designate a chairman and vice-chairman of the commission.

b. No member, officer or employee of the commission shall be disqualified from holding any other public office or employment, nor shall he forfeit any such office or employment by reason of his appointment hereunder, notwithstanding the provisions of any general, special or local law, ordinance or city charter.

§ 2. The commission shall make a study of existing provisions of the penal law, the code of criminal procedure, the correction law and other related statutes, 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.

For the accomplishment of its purposes, the commission shall be authorized and empowered to undertake any studies, inquiries, surveys and analyses it may deem relevant through its own personnel, or in cooperation with public and private agencies including bar associations, research organizations, universities, law schools, foundations, educational and civic organizations.

§ 3. The commission may employ and at pleasure remove an executive director, secretary, counsel, consultants and such other personnel as it may deem necessary for the performance of its functions and fix their compensation within the amounts made available by appropriation therefor. The commission may meet within and without the state; take testimony, subpoena witnesses and require the production of books, records and papers; hold public or private hearings and otherwise have all of the powers of a legislative committee under the legislative law.

§ 4. The members of the commission shall receive no compensation for their services but shall be allowed their actual and necessary expenses incurred in the performance of their duties hereunder.

§ 5. The commission may request and shall receive from any court, department, division, board, bureau, commission or agency of the state or any political subdivision thereof such assistance and data as will enable it properly to carry out its powers and duties hereunder.

§ 6. The commission is hereby authorized and empowered to make and sign any agreements, and to do and perform any acts that may be necessary, desirable or proper to carry out the purposes and objectives of this act.

§ 7. The commission shall from time to time make a report or reports to the governor and the legislature. It shall, not later than February first, nineteen hundred sixty-two, and thereafter not later than February first in each of the years nineteen hundred sixty-three and nineteen hundred sixty-four, make an interim report to the governor and the legislature, and not later than February first, nineteen hundred sixty-five, a final report to the governor and the legislature of its studies, together with its proposed revision of the penal law and the code of criminal procedure.

§ 8. The commission shall continue in existence until March thirty-first, nineteen hundred sixty-five.

§ 9. The sum of one hundred fifty thousand dollars (\$150,000) or so much thereof as may be necessary is hereby appropriated from any funds in the state treasury in the general fund to the credit of the state purposes fund, not otherwise appropriated, and made immediately available to the temporary state commission for its expenses, including personal service and travel in and outside the state, in carrying out the provisions of this act. Such monies shall be payable on the audit and warrant of the comptroller on vouchers certified or approved by the chairman of the commission or by an officer or employee of the commission designated by the chairman.

§ 10. This act shall take effect July first, nineteen hundred sixty-one.

APPENDIX B

AN ACT to amend the penal law and the code of criminal procedure, in relation to punishment for murder in the first degree and kidnapping.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section ten hundred forty-five of the penal law, as amended by chapter sixty-seven of the laws of nineteen hundred thirty-seven, is hereby amended to read as follows:

§ 1045. Punishment for murder in first degree; *plea of guilty thereto; sentence of life imprisonment by court.*

1. Murder in the first degree is punishable by [death, unless the jury recommends life imprisonment] *life imprisonment unless the death sentence is imposed* as provided by section ten hundred forty-five-a.

2. *When the court and the district attorney consent, a defendant indicted for murder in the first degree may plead guilty to murder in the first degree with a sentence of life imprisonment, in which case the court shall sentence him accordingly.*

3. *When a defendant has been found guilty after trial of murder in the first degree, the court shall discharge the jury and shall sentence defendant to life imprisonment if it is satisfied that defendant was under eighteen years of age at the time of the commission of the crime, or that the sentence of death is not warranted because of substantial mitigating circumstances.*

§ 2. Section ten hundred forty-five-a of such law, as added by chapter sixty-seven of the laws of nineteen hundred thirty-seven, is hereby REPEALED and a new section, to be section ten hundred forty-five-a, is hereby inserted in such law in lieu thereof, to read as follows:

§ 1045-a. *Proceeding to determine sentence for murder in the first degree; appeal*

1. *When a defendant has been found guilty after trial of murder in the first degree, and such verdict has been recorded upon the minutes, it shall not thereafter be subject to jury reconsideration.*

2. *Unless the court sentences defendant to life imprisonment as provided in subdivision two or three of section ten hundred forty-five, it shall, as promptly as practicable, conduct a proceeding to determine whether defendant should be sentenced to life imprisonment or to death. Such proceeding shall be conducted before the court sitting with the jury that found defendant guilty unless the court for good cause discharges that jury and impanels a new jury for that purpose.*

3. *In such proceeding, evidence may be presented on any matter relevant to sentence including, but not limited to, the nature and*

circumstances of the crime, defendant's background and history, and any aggravating or mitigating circumstances. Any relevant evidence, not legally privileged, shall be received regardless of its admissibility under the exclusionary rules of evidence.

4. The proceeding shall be conducted in the same order as in the trial of an indictment as provided in section three hundred eighty-eight of the code of criminal procedure. The court shall charge the jury on any matters appropriate in the circumstances, including the law relating to the possible release on parole of a person sentenced to life imprisonment.

5. The jury shall then retire to consider the penalty to be imposed. If the jury report unanimous agreement on the imposition of the penalty of death, the court shall discharge the jury and shall impose the sentence of death. If the jury report unanimous agreement on the imposition of the penalty of life imprisonment, the court shall discharge the jury and shall impose the sentence of life imprisonment. If, after the lapse of such time as the court deems reasonable, the jury report themselves unable to agree, the court shall discharge the jury and shall, in its discretion, either impanel a new jury to determine the sentence or impose the sentence of life imprisonment.

6. On an appeal by the defendant where the judgment is of death, the court of appeals, if it finds substantial error only in the sentencing proceeding, may set aside the sentence of death and remand the case to the trial court, in which event the trial court shall impose the sentence of life imprisonment.

§ 3. Section twelve hundred fifty of such law, as last amended by chapter seven hundred seventy-three of the laws of nineteen hundred thirty-three, is hereby amended to read as follows:

§ 1250. Kidnapping [defined].

A. A person who wilfully: 1. Seizes, confines, inveigles, or kidnaps another, with intent to cause him, without authority of law, to be confined or imprisoned within this state, or to be sent out of the state, or to be sold as a slave, or in any way held to service or kept or detained, against his will; or,

2. Leads, takes, entices away, or detains a child under the age of sixteen years, with intent to keep or conceal it from its parents, guardian, or other person having the lawful care or control thereof, or to extort or obtain money or reward for the return or disposition of the child, or with intent to steal any article about or on the person of the child; or,

3. Abducts, entices, or by force or fraud unlawfully takes, or carries away another, at or from a place without the state, or procures, advises, aids or abets such an abduction, enticing, taking, or carrying away, and afterwards sends, brings, has or keeps such person, or causes him to be kept or secreted within this state,

is guilty of kidnapping, which is a felony and is punishable, if a parent of the person kidnapped, by imprisonment for not more than ten years and, if a person other than a parent

of the person kidnapped, by [death. Provided, however, that the jury, upon returning a verdict of guilty against a person whom the death penalty would otherwise be imposed, may recommend imprisonment of the convicted person, in lieu of death, and upon such recommendation such person shall be punished by] imprisonment under an indeterminate sentence, the minimum of which shall be not less than twenty years and the maximum of which shall be for the natural life of such convicted person, unless the death penalty is imposed as provided herein. Provided, [further,] that notwithstanding the foregoing [provisions] provision of this section with respect to punishment by death, if the kidnapped person be released and return alive prior to the opening of the trial, the death penalty shall not apply nor be imposed and the convicted person shall be punished by imprisonment [in the same manner as though the jury had recommended imprisonment.] under an indeterminate sentence, the minimum of which shall be not less than twenty years and the maximum of which shall be for the natural life of such convicted person.

B. When the court and the district attorney consent, a defendant indicted for kidnapping upon whom the death penalty would otherwise be imposed, may plead guilty thereto with a sentence of imprisonment for an indeterminate term the minimum of which shall be not less than twenty years and the maximum of which shall be for his natural life, in which case he shall be sentenced accordingly. When a defendant has been found guilty after trial of kidnapping the court shall discharge the jury and shall sentence defendant to imprisonment for such an indeterminate term if it is satisfied that defendant was under eighteen years of age at the time of the commission of the crime, or that the sentence of death is not warranted because of substantial mitigating circumstances.

C. When a defendant has been found guilty after trial of kidnapping and such verdict has been recorded upon the minutes, it shall not thereafter be subject to jury reconsideration.

D. Unless the court sentences defendant to imprisonment for an indeterminate term as provided in subdivision B hereof, the proceeding to determine sentence shall be as follows:

1. The court shall, as promptly as practicable, conduct a proceeding to determine whether defendant should be sentenced to imprisonment for an indeterminate term the minimum of which shall be not less than twenty years and the maximum of which shall be for his natural life, or to death. Such proceedings shall be conducted before the court sitting with the jury that found defendant guilty unless the court for good cause discharges that jury and impanels a new jury for that purpose.

2. In such proceeding, evidence may be presented on any matter relevant to sentence including, but not limited to, the nature and circumstances of the crime, defendant's background and history, and any aggravating or mitigating circumstances. Any relevant

evidence, not legally privileged, shall be received regardless of its admissibility under the exclusionary rules of evidence.

3. The proceeding shall be conducted in the same order as in the trial of an indictment as provided in section three hundred eighty-eight of the code of criminal procedure. The court shall charge the jury on any matters appropriate in the circumstances, including the law relating to the possible release on parole of a person sentenced to imprisonment for such an indeterminate term.

4. The jury shall then retire to consider the penalty to be imposed. If the jury report unanimous agreement on the imposition of the penalty of death, the court shall discharge the jury and shall impose the sentence of death. If the jury report unanimous agreement on the imposition of the penalty of imprisonment, the court shall discharge the jury and shall sentence the defendant to imprisonment for an indeterminate term the minimum of which shall be not less than twenty years and the maximum of which shall be for his natural life. If, after the lapse of such time as the court deems reasonable, the jury report themselves unable to agree, the court shall discharge the jury and shall, in its discretion, either impanel a new jury to determine the sentence or sentence the defendant to imprisonment for an indeterminate term the minimum of which shall be not less than twenty years and the maximum of which shall be for his natural life.

5. On an appeal by the defendant where the judgment is of death, the court of appeals, if it finds substantial error only in the sentencing proceeding, may set aside the sentence of death and remand the case to the trial court, in which event the trial court shall sentence the defendant to imprisonment for an indeterminate term the minimum of which shall be not less than twenty years and the maximum of which shall be for his natural life.

§ 4. Section three hundred eight of the code of criminal procedure, as last amended by chapter three hundred thirty-three of the laws of nineteen hundred fifty-seven, is hereby amended to read as follows:

§ 308. Defendant appearing for arraignment without counsel to be informed of his right to counsel.

If the defendant appear for arraignment without counsel, he must be asked if he desire the aid of counsel, and if he does the court must assign counsel. When services are rendered by counsel in pursuance of such assignment in a case where the offense charged in the indictment [is punishable] may be punished by death or where a defendant under eighteen years of age at the time of the commission of a crime is indicted for such a crime which if committed by an adult might be punishable by death or an appeal from a judgment of death or on an appeal as of right from a judgment of life imprisonment [following a recommendation of a jury pursuant to] imposed in accordance with section ten hundred forty-five or ten hundred forty-five-a of the penal law, the court in which the defendant is tried, or the trial results in a disagreement of the jury, or the action or indictment is otherwise disposed of, or by

which such appeal is determined, or the court in which an action is suspended or discontinued or otherwise disposed of on the ground that the defendant has been heretofore or is hereafter declared incompetent by a duly appointed commission, may allow such counsel his personal and incidental expenses upon a verified statement thereof being filed with a clerk of such court, and also reasonable compensation for his services in such court, not exceeding the sum of fifteen hundred dollars in cases where one counsel has been assigned and not exceeding the sum of two thousand dollars in cases where two or more counsel have been assigned. In such a case where it shall appear to the satisfaction of the court that a daily copy of the testimony is necessary to be furnished by the stenographer to the counsel for the defendant upon an order duly signed by the presiding justice that the stenographer furnish the same, the same shall be furnished to the counsel for the defendant, and the cost of said daily copy shall be a charge upon the county. In any case in which experts may be employed as witnesses and in case it shall appear to the satisfaction of the court or a judge thereof that the defendant is not financially able to employ experts, the court to which the indictment is presented or sent or removed for trial or a judge or justice thereof may direct the employment of expert witnesses for the defendant in number not exceeding the number sworn or to be sworn for the prosecution or, where the affirmative presentation of evidence on the issue is incumbent on the defendant, and the prosecution has not indicated any number of experts to be employed, the court or judge may upon satisfactory proof of the necessity therefor, permit the employment of an expert or experts not to exceed two in number, at an expense in the aggregate of not exceeding the sum of ten hundred dollars. Allowances under this section shall be a charge upon the county in which the indictment in the action is found, to be paid out of the court fund, upon the certificate of the judge or justice presiding at the trial or otherwise disposing of the indictment, or upon the certificate of the appellate court, but no such allowance shall be made unless an affidavit is filed with the clerk of the court by or on behalf of the defendant, showing that he is wholly destitute of means.

§ 5. Section three hundred thirty-two of such code, as last amended by chapter four hundred twenty-seven of the laws of eighteen hundred ninety-seven, is hereby amended to read as follows:

§ 332. The different kinds of pleas

There as three kinds of pleas to an indictment:

1. A plea of guilty.
2. A plea of not guilty.
3. A plea of a former judgment of conviction or acquittal of the crime charged, which may be pleaded either with or without the plea of not guilty.

A conviction shall not be had upon a plea of guilty where the crime charged is or may be punishable by death [·], *except as otherwise provided in sections ten hundred forty-five and twelve hundred fifty of the penal law.*

§ 6. Section three hundred seventy-three of such code, as last amended by chapter one hundred fifty-two of the laws of nineteen hundred thirty-eight, is hereby amended to read as follows:

§ 373. Number of peremptory challenges

Peremptory challenges shall be allowed to the following number:

1. If the crime charged *may* be [punishable] *punished* with death, thirty for the regular jury; and three for each alternate juror;

2. If punishable with imprisonment for life, or for a term of ten years or more, twenty for the regular jury; and two for each alternate juror;

3. In all other cases, five for the regular jury, and one for each alternate juror.

Peremptory challenges for alternate jurors shall be computed separately, and shall be in addition to the number of peremptory challenges actually taken, and not the maximum number of such challenges herein permitted to be taken, in obtaining the regular jury.

§ 7. Subdivision eight of section three hundred seventy-seven of such code is hereby amended to read as follows:

8. If the crime charged *may* be [punishable] *punished* with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he shall neither be permitted nor compelled to serve as a juror.

§ 8. Section four hundred fifty-one of such code is hereby amended to read as follows:

§ 451. Recording the verdict.

When the verdict is given, and is such as the court may receive, the clerk must immediately record it in full upon the minutes, and must read it to the jury and inquire of them whether it is their verdict. If any juror disagrees, the fact must be entered upon the minutes, and the jury again sent out; but if no disagreement be expressed, the verdict is complete, and the jury must be discharged from the case [·], *except as otherwise provided in sections ten hundred forty-five, ten hundred forty-five-a and twelve hundred fifty of the penal law.*

§ 9. Subdivision four of section four hundred eighty-five of such code, and subdivision eight of section four hundred eighty-five of such code as last amended by chapter two hundred eight of the laws of nineteen hundred forty-four, are hereby amended to read as follows:

4. A copy of the minutes of the trial; and, when the judgment is of death a copy of the minutes of the proceeding to determine sentence;

8. When the judgment is of death or of life imprisonment [following a recommendation of a jury pursuant to] *imposed in accordance with section ten hundred forty-five or ten hundred forty-five-a of the penal law*, the clerk of the court in which the conviction was had shall, within thirty days after a notice of appeal shall be served upon him, cause to be prepared and printed, as required by the general rules of practice, the record and judgment-roll upon which the appeal is to be heard as prescribed in this section and in section four hundred and fifty-six of this act and, after being duly certified by him, cause the same to be filed with the clerk of the court of appeals or with the clerk of the appellate division of the supreme court, as the case may be, and must cause to be forwarded to the said clerk, the number of copies of the record and judgment-roll which are required by the rules of the court of appeals or of the appellate division of the supreme court, as the case may be, which shall form the case and exceptions upon which the appeal shall be heard, and three copies shall also be furnished to the defendant's attorney and three to the district attorney and, where the judgment is of death, one to the governor of the state, and the remainder distributed according to the rules of the court of appeals or of the appellate division of the supreme court, as the case may be. In such cases of life imprisonment as hereinbefore specified, where a further appeal is allowed to the court of appeals, said appeal shall be heard by the court of appeals upon seven copies of the record in the appellate division of the supreme court, said copies to be furnished by the clerk of the court in which the conviction was had. The expense of preparing and printing the judgment-roll in such case shall be a county charge, payable out of the court fund upon the certificate of the county clerk, approved by the county judge or a justice of the supreme court residing in the county in which the conviction was had.

§ 10. Section five hundred thirty-eight of such code, as last amended by chapter nine hundred forty-two of the laws of nineteen hundred forty-six, is hereby amended to read as follows:

§ 538. Papers upon appeal, by whom furnished, and effect of omission

When the appeal is called for argument, the appellant must furnish the court with copies of the record upon which the appeal is to be heard, except where the judgment is of death or of life imprisonment [following a recommendation of a jury pursuant to] *imposed in accordance with section ten hundred forty-five or ten hundred forty-five-a of the penal law*. If he fail so to do, the appeal must be dismissed, unless the court otherwise direct.

§ 11. This act shall take effect

Note—Section ten hundred forty-five-a of the penal law, proposed to be repealed by this act, provides for a jury recommendation of life imprisonment where a person is found guilty of murder in the first degree under subdivision two of section ten hundred forty-four of the penal law.

APPENDIX C

AN ACT to amend the penal law, in relation to the defense of insanity.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Sections thirty-four and eleven hundred twenty of the penal law are hereby REPEALED and a new section, to be section eleven hundred twenty, is hereby inserted in such law, to read as follows:

§ 1120. *Mental disease or defect excluding responsibility.*

1. *A person is not criminally responsible for conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity:*

(a) *To know or to appreciate the wrongfulness of his conduct;*

or

(b) *To conform his conduct to the requirements of law.*

2. *As used in this section, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.*

§ 2. This act shall take effect

Note—Section thirty-four of the penal law, proposed to be repealed by this act, states that a morbid propensity to commit prohibited acts is not a defense to a criminal prosecution. Section eleven hundred and twenty of such law, proposed to be repealed by this act, provides that a person is not excused from criminal liability except upon proof that, at the time of the criminal act, he was laboring under such a defect of reason as not to know the nature and quality of the act he was doing, or not to know that the act was wrong.

APPENDIX D

AN ACT to amend the code of criminal procedure, in relation to the defense of insanity.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The Code of criminal procedure is hereby amended by inserting therein a new section, to be section three hundred ninety-eight-b, to read as follows:

§ 398-b. *Psychiatric testimony on the defense of insanity. When a psychiatrist who has examined the defendant testifies concerning the defendant's mental condition at the time of the conduct charged to constitute a crime, he shall be permitted to make a statement as to the nature of the examination, the diagnosis of the mental condition of the defendant and his opinion as to the extent, if any, to which the capacity of the defendant to know or to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect at that time. The psychiatrist shall be permitted to make any explanation reasonably serving to clarify his diagnosis and opinion, and may be cross-examined as to any matter bearing on his competency or credibility or the validity of his diagnosis or opinion.*

§ 2. This act shall take effect

APPENDIX E

AN ACT to amend the code of criminal procedure, in relation to the defense of insanity.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section three hundred thirty-six of the code of criminal procedure is hereby REPEALED and a new section, to be section three hundred thirty-six, is hereby inserted in such code, to read as follows:

§ 336. *Notice of defense of insanity. Evidence of mental disease or defect excluding responsibility is not admissible upon a trial unless the defendant serves upon the district attorney and files with the court a written notice of his purpose to rely on the defense of mental disease or defect excluding responsibility. Such notice shall be served and filed within twenty days from the date of entry of the plea of not guilty, or at such later time as the court, for good cause, may permit.*

§ 2. This act shall take effect

Note—Section three hundred thirty-six of the code of criminal procedure, proposed to be repealed by this act, relates to the plea of insanity at the time of arraignment, as a specification under the plea of not guilty.

APPENDIX F

AN ACT to amend the code of criminal procedure, in relation to grand jury reports.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The code of criminal procedure is hereby amended by inserting therein a new section, to be section two hundred fifty-three-a, to read as follows:

§ 253-a. *Grand jury reports*

1. *The grand jury, upon concurrence of twelve or more of its members, may submit to the court for which it was impanelled, a report:*

(a) *Concerning misconduct, nonfeasance or neglect in office by a public officer or employee as the basis for a recommendation of removal or disciplinary action; or*

(b) *Stating that after investigation of a public officer or employee it finds no misconduct, nonfeasance or neglect in office by him; provided that the public officer or employee involved has requested the submission of such report.*

2. *The court to which such report is submitted shall examine it and the minutes of the grand jury and, except as otherwise provided in subdivision four hereof, shall accept and file such report as a public record only if the court is satisfied that it complies with the provisions of subdivision one hereof and that:*

(a) *The report is based upon facts revealed in the course of an investigation authorized by section two hundred forty-five or two hundred fifty-three of this code; and*

(b) *When the report is submitted pursuant to paragraph (a) of subdivision one hereof, it is supported by credible and legally admissible evidence, and that each person named therein was afforded an opportunity to testify before the grand jury prior to the filing of such report.*

3. *Upon the filing of a report pursuant to paragraph (a) of subdivision one hereof, the court shall direct the district attorney to deliver a true copy of such report, for appropriate action, to the public officer or body having removal or disciplinary authority over each public officer or employee criticized therein.*

4. *Upon the filing of a report pursuant to subdivision one hereof, if the court finds that the filing of such report as a public record may prejudice fair consideration of a pending criminal matter, it shall order such report sealed during the pendency thereof, and it shall not be subject to subpoena or public inspection, except upon order of the court.*

§ 2. This act shall take effect

APPENDIX G

NOTE:—This table shows the Commission's tentative recommendations respecting the repeal or relocation of various Penal Law sections.

<i>Penal Law Section</i>	<i>Disposition</i>
Article 16 <i>Animals</i>	
185-a	Transfer to Agriculture and Markets Law, Article 15-A.
188	Transfer to Agriculture and Markets Law, Article 5.
188-a	Transfer to General Business Law, Article 3.
191	Repeal (duplicates Vehicle and Traffic Law § 1219).
192-a	Repeal (outmoded).
194	Repeal (outmoded).
194-a	Transfer to Agriculture and Markets Law, Article 7.
194-b	Repeal (outmoded).
195-a	Repeal (unconstitutional, <i>People v. Teter</i> , 35 Misc. 2d 823).
Article 26 <i>Banking</i>	
290-306	Transfer to Banking Law.
Article 28 <i>Barratry</i>	
320-323	Transfer to Judiciary Law.
Article 31 <i>Billiard and Pocket Billiard Rooms</i>	
344-355	Transfer to General Business Law.
Article 32 <i>Bills of Lading, Receipts and Vouchers</i>	
360-369-f	Transfer to General Business Law. (Note: Penal Law §§ 368-369-f, added by Laws 1962, ch. 552, eff. Sept. 27, 1964).

<i>Penal Law Section</i>	<i>Disposition</i>
Article 36 <i>Bucket Shops</i>	
390-395	Transfer to General Business Law.
Article 39 <i>Budget Planning</i>	
410-412	Transfer to General Business Law.
Article 40 <i>Business and Trade</i>	
420	Repeal (outmoded).
421-431	Transfer to General Business Law.
432	Repeal (outmoded).
433	Transfer to General Business Law.
434	Transfer to Agriculture and Markets Law, Article 16.
435	Transfer subs. 1, 2 and 3 to General Business Law; repeal subd. 4 (duplicates Agriculture and Markets Law §§ 201-a-201-d).
435-a-435-c	Repeal (duplicates Agriculture and Markets Law §§ 201-a-201-d).
435-d	Transfer to General Business Law.
436-436-a	Transfer to General Business Law.
436-b	Transfer to Navigation Law, Article 9.
436-c	Transfer to Agriculture and Markets Law, Article 5.
436-d	Repeal (unconstitutional, <i>People v. Bunis</i> , 9 N. Y. 2d 1).
437	Repeal (outmoded).
438	Transfer to Agriculture and Markets Law, Article 4.
438-a	Transfer to General Business Law.
440-441-a	Transfer to General Business Law.
442-a-442-c	Transfer to Insurance Law, Article 6.
443	Repeal (outmoded).
444-452	Transfer to General Business Law.

<i>Penal Law Section</i>	<i>Disposition</i>
Article 48 <i>Coercion</i>	
531	Repeal (outmoded).
Article 58 <i>Conviction</i>	
610	Repeal (duplicates Code of Criminal Procedure § 444).
Article 70 <i>Disorderly Conduct</i>	
722-a	Repeal (duplicates New York City Health Code § 161.05).
Article 74 <i>Elective Franchise</i>	Transfer to Election Law.
Article 78 <i>Exhibitions</i>	
835	Repeal (outmoded).
Article 82 <i>Ferries</i>	
870	Transfer to Navigation Law, Article 80
871	Repeal (duplicates Navigation Law § 113, Transportation Corporation Law § 72).
872	Repeal (outmoded).
Article 86 <i>Frauds and Cheats</i>	
920	Repeal (outmoded).
924	Transfer to General Business Law.
927	Repeal (outmoded).
932-a	Transfer to Agriculture and Markets Law, Article 2.
933	Transfer to Agriculture and Markets Law, Article 5.
936	Transfer to General Business Law.
936-a	Repeal (unconstitutional, <i>People ex rel Niger v. Van Dell</i> , 85 Misc. 92).

<i>Penal Law Section</i>	<i>Disposition</i>
Article 86 <i>Frauds and Cheats</i>	
940-a-940-b	Transfer to General Business Law. (<i>Note</i> : added to Penal Law by Laws 1962, ch. 552, eff. September 27, 1964).
943	Transfer to General Business Law, Article 3.
948	Transfer to General Business Law.
951-957	Transfer to General Business Law.
958	Transfer to Vehicle and Traffic Law.
962-962-a	Transfer to Labor Law, Article 6.
964-964-a	Transfer to General Business Law.
965	Transfer to Real Property Law, Article 7.
966	Transfer to General Business Law.
Article 96 <i>Horse Racing</i>	
1081-1082	Transfer to Laws 1926, ch. 440 as amended (<i>McKinney's Unconsolidated Laws §§ 7901-8052</i>).
Article 100 <i>Ice</i>	
1100	Repeal (outmoded).
Article 108 <i>Indians</i>	
1160	Repeal (duplicates Indian Law § 56).
1161	Repeal (duplicates Indian Law § 22).
Article 112 <i>Insurance</i>	
1190	Transfer to Insurance Law, Article 7.
1191	Repeal (duplicates Insurance Law §§ 5, 40, 188 and 209).
1192	Repeal (duplicates Insurance Law §§ 110, 111, 113, 114 and 119).
1194	Repeal (outmoded).
1195	Repeal (outmoded).

<i>Penal Law Section</i>	<i>Disposition</i>
Article 112	
<i>Insurance</i>	
1196	Transfer to Insurance Law, Article 5.
1196-a	Transfer to Insurance Law, Article 5.
1197	Repeal (outmoded).
1197-a	Transfer to Insurance Law, Article 4.
1198	Repeal (duplicates Insurance Law §§ 5, 112, 117).
1199	Transfer to Insurance Law, Article 4.
1200	Transfer to Insurance Law, Article 4.
1203	Transfer to Insurance Law, Article 4.
1204	Transfer to Insurance Law, Article 4.
Article 120	
<i>Labor</i>	
1270	Repeal (duplicates Labor Law §§ 31-32, 436).
1271	Repeal subdivisions 2, 3 and 4 (duplicates Labor Law §§ 163-165); transfer subdivision 1 to Labor Law § 220.
1272	Transfer to Labor Law, Article 6.
1274	Transfer to Labor Law, Article 18, Title 9.
1275	Transfer to Labor Law, Article 7.
1276	Repeal (duplicates Labor Law § 200).
1278	Transfer to Labor Law, Article 7.
1279	Transfer to General Business Law.
Article 142	
<i>Military</i>	
1480-1487	Transfer to Military Law.
Article 144	
<i>Navigation</i>	
1500-1505-a	Transfer to Navigation Law.
1510-1511	Transfer to Navigation Law.

<i>Penal Law Section</i>	<i>Disposition</i>
Article 146	
<i>Negotiable Instruments</i>	
1520-1522	Transfer to General Business Law.
Article 148	
<i>Nuisances</i>	
1534	Transfer to General Business Law, Article 10-B.
Article 150	
<i>Oysters</i>	
1550-1551	Repeal (duplicates Conservation Law §§ 302, 306-308, 312).
Article 152	
<i>Passage Tickets</i>	
1560-1574	Transfer to General Business Law.
Article 154	
<i>Pawnbrokers</i>	
1590-1593	Transfer to General Business Law, Article 5.
Article 156	
<i>Peddlers</i>	
1610	Repeal (outmoded).
Article 159	
<i>Platinum Stamping</i>	
1635-1643	Transfer to General Business Law.
Article 160	
<i>Poor Persons</i>	
1650	Repeal (duplicates Social Welfare Law § 148).
Article 164	
<i>Prize-Fighting and Sparring</i>	
1710-1716	Repeal (superseded by Laws 1920, ch. 912; McKinney's Unconsolidated Laws, Title 25, Chapter I, "Boxing and Wrestling," §§ 8901-8933).

<i>Penal Law Section</i>	<i>Disposition</i>
Article 166 <i>Public Health</i>	
1740-1741	Transfer to Public Health Law, Article 1.
1742	Transfer to Public Health Law, Article 13.
1743	Repeal (duplicates Education Law § 6813).
1744	Repeal (duplicates Education Law § 6823).
1745	Transfer to Education Law, Article 137.
1747-1747-a	Transfer to Education Law, Article 137.
1748	Repeal (subdivisions 1 and 2 duplicate Education Law § 6804, subd. 3 (k) and § 6808; subdivision 3 is outmoded).
1749-1750	Transfer to Agriculture and Markets Law, Article 17.
1754	Transfer to Public Health Law, Article 13.
1755	Repeal (outmoded).
1756	Repeal (duplicates Public Health Law § § 2100-2163, and State Sanitary Code Chapter II).
1757	Transfer to Agriculture and Markets Law, Article 14.
1758	Transfer to Public Health Law, Article 11.
1759	Transfer to Public Health Law, Article 13.
1762	Repeal (outmoded).
1763	Transfer to Public Health Law, Article 34.
1764	Transfer to Agriculture and Markets Law, Article 5.

<i>Penal Law Section</i>	<i>Disposition</i>
Article 172 <i>Public Safety</i>	
1891-1893	Repeal (duplicates Labor Law § 204 and Industrial Code Rule No. 14).
1902-1903	Transfer to General Business Law, Article 19.
1904	Transfer to General Business Law, Article 16.
1907-1909	Repeal (outmoded).
1912	Repeal (outmoded).
1916	Transfer to Vehicle and Traffic Law.
1917	Transfer to New York City Administrative Code.
1921	Transfer to General Business Law.
Article 176 <i>Quarantine</i>	
1960-1964	Repeal (outmoded).
Article 178 <i>Railroads</i>	
1980	Repeal (duplicates Public Service Law § 15 and § 46).
1981	Repeal (duplicates Public Service Law § 15).
1982	Repeal (outmoded).
1983	Repeal (outmoded).
1985	Transfer to Railroad Law, Article 3.
1987	Repeal (outmoded).
1988	Repeal (subd. 1 is outmoded; subd. 2 duplicates Railroad Law § 80).
1989	Repeal (outmoded).
Article 182 <i>Real Property</i>	
2030	Repeal (duplicates Indian Law § 7-a).
2039	Repeal (unconstitutional, <i>Keller v. Jamaica Motor Service Corporation</i> , 125 Misc. 825).

<i>Penal Law Section</i>	<i>Disposition</i>
Article 182 <i>Real Property</i>	
2040	Transfer to Real Property Law, Article 7.
2041-2042	Transfer to Real Property Law, Article 7.
Article 194 <i>Salt Works</i>	
2170	Repeal (outmoded).
Article 198 <i>Sepulture</i>	
2214-2220	Transfer to Public Health Law, Article 42.
2221	Repeal (outmoded).
Article 200 <i>Societies and Orders</i>	
2240-2241	Transfer to General Business Law.
Article 204 <i>Taxes</i>	
2320	Repeal (outmoded).
2322	Transfer to Tax Law, Article 1.
Article 206 <i>Trade-Marks</i>	
2350-2357	Transfer to General Business Law, Articles 17, 17-A and 24.
Article 208 <i>Trading Stamps</i>	
2360-2361	Repeal (unconstitutional, <i>People ex rel Madden v. Dycker</i> , 72 App. Div. 308, <i>People ex rel Appel v. Zimmerman</i> , 102 App. Div. 103; Ops. Atty. Gen., 1959, p. 96).
Article 214 <i>Usury</i>	
2400	Transfer to General Business Law, Article 25.

<i>Penal Law Section</i>	<i>Disposition</i>
Article 216 <i>Weights and Measures</i>	
2410-2416	Repeal (duplicates Agriculture and Markets Law Articles 16 and 16-A).
Article 222 <i>Wrecks</i>	
2480-2482	Repeal (outmoded).