

MEMORANDUM

With Respect To The
PROPOSED NEW YORK STATE PENAL CODE

We beg leave to submit herewith to you some additional comments and criticisms of the draft Proposed Penal Law which has been the subject of recent hearings before the Commission.

General Observations

1. We believe that the statement of General Purposes on the Penal Law found in Section 1.05 is an inadequate expression of the role of the Penal Law in our society. We believe that the Penal Law has a broader role than is expressed in subparagraph 1 when it is stated

"To proscribe conduct which unjustifiably and inexcusably causes or threatens substantial harm to individual or public interest."

We would urge that it say:

"To proscribe conduct which causes or threatens to cause harm to society, the public interest or individuals."

Age

Throughout the draft proposed Penal Code, the so-called 'age of consent' has been lowered one year from the present law, from "under eighteen" to "under seventeen".

We do not find any studies or findings which would support this change in New York. We know that the age grouping of 15 through 17 is considered to warrant special court treatment as a protected class. This is reflected in the proposed extension of age jurisdiction for the Family Court recommended by the Albert Commission in 1964.

Persons through age 17 are not deemed to be fully matured and are accorded special considerations in law. The use of this age grouping in New York has continued for many years and there is no showing that it is unrealistic or unreasonable. We urge that the "age of consent" be made through age 17".

It is noted that this special consideration to persons 'under eighteen' as immature is proposed by the Commission in the changes made in §265.15 (2) and (3).

SEX OFFENSES - ARTICLE 135

Consensual Sodomy

We have urged that the crime of sodomy between consenting adults be retained in the Penal Law of New York. It has been urged that this act, when performed in private, is solely a matter between the two parties and not one of concern to the common weal. We disagree.

It is true that the civil law is concerned with the good of the community and is not concerned with the moral conduct of the individual as such. Individual conduct comes within the scope of civil law only insofar as it affects the community. However, one cannot simply write off private acts as inept material for civil legislation; to the extent that they are external acts, they can have social importance.

It is averred that various forms of homosexual conduct engaged in in private by consenting adults

have an important bearing on the common good. There can be no doubt that a change in the law which would occasion an increase in homosexual practices among adults acting in private would not serve the best interests of the community.

In view of the public consequence of the acts in question, namely the harm which would result to the common good if homosexual conduct became widespread or an accepted mode of conduct in the public mind, the civil law does not exceed its legitimate scope if it attempts to control these acts by making them crimes.

We know today that there are organized groups of homosexuals and lesbians who are striving to obtain acceptance of their deviations so that they will be socially, morally and legally accepted. Their efforts make the consideration of this matter in New York of special significance because New York City is gaining a current reputation as one of would-be meccas of sexual deviates. (See Life Magazine, 1964, article by Paul Welch)

The proposed change in our penal treatment of

consensual sodomy by adults would give to these deviate groups support for their effort to establish a deviate society within our society, which would be deemed fully legitimate. Such action would tend to increase homosexual practices in the adult population with a consequence effect upon the whole of society.

Furthermore, we must be concerned with the risk involved in relaxing a law now in effect. While we know that to remove the act of consensual sodomy from the sanction of law is not the equivalent of "legalizing", yet it will have this view in the popular mind. It is a subtle distinction which can easily escape the average person.

The philosophy of legal positivism has fostered the view that only civil law makes acts right or wrong. In the light of such a concept of the civil law, one could hardly blame the general public for misinterpreting the relaxation of such law.

Consensual Sodomy - Illinois

This crime was not included in the Illinois Code in spite of objections raised by groups in

Illinois, including an early reference by Cardinal Strick. (See America, 1/25/58, article by J. R. Connery).

It has been ascertained that the Illinois Catholic Welfare Committee did protest the deletion of the crime of consensual sodomy.

§ 135.20. Sexual Misconduct

We urge that this crime be changed in name to "rape in the fourth degree" and separately to "sodomy in the fourth degree". We understand that the section only involves conduct by persons under 21 with persons between 17 and 21.

We believe that the characterization of the crime as rape should be retained for this age group as well.

Prostitution - Article 235

1. § 235.00.

We have concern that the designation of crime as a "violation" will mean that little opportunity will be afforded to work towards rehabilitation of offenders. We fear that the offense will

involve a "revolving door" process in which the offender would find the penalty to be an acceptable risk. Thus, no deterrence can be anticipated.

2. § 235.10

We have the opposite concern here. Perhaps this crime should be a Class A misdemeanor, so that prosecution may not be deterred by the requirements of Grand Jury presentment and Jury Trial.

3. Presumption

We believe that serious consideration should be given to the retention of the presumption now found in Section 1148. This section is very helpful to the enforcement of law, in a situation where other proof is lacking.

4. § 235.20

We have the same concern over the change made in the age, from 17 to 16. We urge that "under eighteen" be restored.

ARTICLE 240 - OBSCENITY AND RELATED OFFENSES

We urge that the whole of the present law should be carried over verbatim into Article 240. We believe that any suggestions by the Penal Law Commission for change in the law on this subject matter should be referred to the Joint Legislative Committee on Obscene Publications.

With respect to the proposed change in the law of obscenity which is made in the proposed Article 240, we wish to make the following comment and criticism for the information of the Penal Law Commission and for the consideration of the Joint Committee:

1. Legislative Findings:

We believe that the provisions of present penal law §484-e should be continued in the law. Not only is a statement of legislative findings of great value in the defense of the article against attack in court proceedings, but also the

deletion of the findings might be used to indicate legislative intent to reject the previous statement.

2. We urge that the detailed provisions of §1141 be continued in the law, including the proscription of any "obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic, or disgusting . . ."

3. We urge that the A.L.I. definition of "obscene" be deleted from the proposal and that no statutory definition be carried in the law. (Ref. §240.00.)

4. We urge that the specific prohibition of nudism and nudist camps now found in §1140-b of the present Penal Law be restored to the proposal.

5. We urge that the arrangement of progressively severe penalties now found in the Penal Law (§1141) be restored to the proposal.

6. We urge that the whole of §240.15 be deleted from the proposal. This newly-created section would give to the purveyors of obscenity several defenses which would be susceptible of easy abuse. There is no justifi-

cation for making the defense task so simple. It is difficult enough today to obtain convictions.

7. We urge that the special provisions relating to tie-in sales (§1141-b) be restored to the proposal.

8. We support the continuance of §484-f and §484-h as found in proposed §240.20 and §240.25. We recognize that a recent case in the Court of Appeals has held as unconstitutionally indefinite the phrase

"the cover or content of which exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality".

We urge that adequate substitute language be formulated to take the place of this phrase.

ARTICLE 250 - DISORDERLY CONDUCT

250.00 "Public Place". We suggest that this definition be revised to make clear that "open

spaces" such as parks, playgrounds, etc. are included in the definition.

250.00. There is no definition of a "lewd act". Consideration should be given to such a definition to include sodomy, adultery, bestiality, fornication and sexual abuse.

250.05

250.10

250.15

There is concealed in these three sections certain offenses which relate to sexual misconduct and deviate sexual conduct. These are found in 250.05 (4), 250.10 (4) and 250.15 (3). We respectfully urge that it is in the public interest and for the common good that these acts be specifically and separately categorized, perhaps under the phrase "Sexual Misconduct". We relate this suggestion to our separate proposal that Section 135.20 (1) be revised to describe the crime therein defined as "rape in the fourth degree", and 135.20 (2) be revised to describe the crime "sodomy in the fourth degree".

INDECENCY

§ 250.05(d) (P. 157)

(a) Former misdemeanor of Indecent Exposure (Sec. 1140) is carried over, in part, into this section and is made a part of the general vio-

lation "disorderly conduct".

(b) It is urged that indecent exposure be continued as a separate section and that it be a misdemeanor.

(c) This shall be done in order that prompt and effective action and identification can take place of persons who expose their person; as such action is symptomatic of a distorted mentality which should be firmly dealt with and adequately identified and classified for the protection of the community.

§250.10 (4) (P. 157)

(a) Former misdemeanor of Indecent Exposure (Sec. 1140) is carried over in part into this section and is made a part of the violation "harrassment".

(b) It is urged that Indecent Exposure be continued as a separate section and that it be made a misdemeanor.

(c) This should be done in order that prompt and effective action and identification can take place of persons who expose their person; as such action is symptomatic of a distorted mentality which should be firmly dealt with and adequately

identified and classified for the protection of the community.

ARTICLE 260 - MARRIAGE

§260.00

We urge that the crime of adultery be continued in the law for many of the same reasons which we have urged above on the subject of consensual sodomy.

§260.20

We question the desirability of establishing a new affirmative defense to bigamy.

ARTICLE 265 - CHILDREN

§265.15

1. We have concern that the crime described in subsection 2 warrants a higher classification, to a Class A. misdemeanor. This subdivision describes, to our mind, a far more serious crime than the other subdivisions of the section.

2. Children in Drug Traffic

The draft proposes that Section 484-c of the Penal Law be dropped on the ground it is included in §50.00.

We do not believe that §50.00 adequately covers the crime covered by present Section 484-c. The use of children in the narcotic traffic is a serious crime which should be separately and firmly stated. We urge that Section 484-c be continued in the Penal Law, and that the age limit be raised from 16 to 18.

3. Concealing Birth of a Child

We believe that the provisions of Section 492 of the Penal Law should be retained in the revised penal law. We do not find any place where this crime is otherwise covered.

SABBATH OBSERVANCE

We urge the continuance of Article 192 of the present Penal Law verbatim in a new article in the proposed Penal Law. We oppose the transfer of these provisions to the General Business Law. We believe that these provisions are properly a part of the Penal Law as they require the continued attention and action of law enforcement officers. We do not accept as a valid ground for transfer the

argument made by the Commission page VII of its report, that the sections "dilute the traditional penal provisions" and "hamper effective revision". We find no virtue in shortness or brevity in an area of law of such importance.

BIRTH CONTROL DEVICES

1. We urge that the present provisions of §1142 and §1145 of the Penal Law and the appropriate parts of §1141 be continued in their present language in the proposed Penal Law. We believe that these provisions are properly a part of the Penal Law as they require the continued attention and action of law enforcement officers. We do not accept as a valid ground for transfer the argument made by the Commission on page VII of its report, that the sections "dilute the traditional penal provisions" and "hamper effective revision". We find no virtue in shortness or brevity in an area of law of such importance.

2. We support the provisions of §1142 and §1145 of the Penal Law as they express an appropriate basis upon which devices used for the artificial prevention of conception may be prescribed for medical reasons. The statute is an expression of the public

policy of our state, that such devices not be sold or distributed on any other premise. It is significant protection against the wholesale dissemination of such devices, which would be an invitation to immorality, particularly among the young.

3. It is our firm opinion that these provisions would be inappropriately placed in and would be out of context in the Public Health Law. The provisions on the prevention of conception (P.L. §1142) are not matters of "definition" or "general provisions". The provisions on advertisements deal with nine topics of which venereal disease is only one. It does not belong in the article of the Public Health Law dealing with the specifics of the care and treatment of venereal disease.

4. We do not find any basis for the novel suggestion made, that certain medical materials used in the determination of the menstrual cycle may be construed to be articles in violation of §1142. These medical materials include a thermometer. These materials are not peculiar to the purpose but are objects of general use. It would be as absurd

to indicate that calendars would also be included in the coverage §1142.

5. We note that the provisions relating to articles "for causing unlawful abortion" are proposed to be carried into Section 130.60. We raise no question on this point except to urge that the full scope of the present law be carried over by adding to Section 130.60 the phrase "advertising or offering for sale".

ARTICLE 130 - ABORTION

§130.05

1. Definition of an "Unborn Child"

We urge that this definition be changed to describe a "quick child", as is presently interpreted in the law. We believe that the use of the '26 week' definition fails to cover many instances where the crime of killing the child should be charged.

2. Definition of "Unlawful Abortive Act"

It is urged that the phrase "reasonable belief" be deleted.

The word "unborn" should be deleted in the last line.

§130.20 Manslaughter

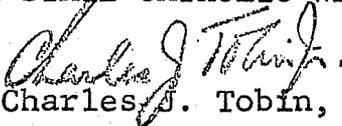
We urge that the phrase "or the death of said child" be added to the end of subparagraph 3.

We believe that this objective might be best accomplished by making the crime of killing a quick child "manslaughter in the third degree", as a Class D felony, in place of §130.45.

RESPECTFULLY SUBMITTED,

NEW YORK STATE CATHOLIC WELFARE COMMITTEE

By


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