January 22, 1965

M E M O R A N D U M

To: Mr. Jerome Londin
From: Jay Goldberg

Subject: Report of Proposed Changes in the Sex Offenses (Article 135) Gambling Offenses (Article 230) Prostitution and related offenses (Article 235)

Sex Offenses

In this article the Revisers have brought together provisions in the Penal Law, Article 46 (children), Article 66 (crimes against nature) and Article 180 (rape).

The revision seeks more to clarify existing provisions of the Penal Law than to work a major substantive change in the present law.

The Committee expressly approved deletion of the crime of adultery and the elimination of the crime of sodomy as between consenting adults.

It was the sense of the Committee that the age contained in Section 135.05(3)(a) should be lowered to 16 and that it should be an affirmative defense that defendant has reasonably believed that the "victim" was over the age of consent.

It was the view of the Committee that if the Temporary State Commission should not adopt the aforesaid recommendation with respect to the age of consent and reasonable belief in the victim's age, then §135.10(2) should be altogether deleted, thereby leaving the courts free to formulate their own rules on this question.

By a closely divided vote, it was the sense of the

Committee that the victim's lack of prior chaste character should be an affirmative defense. The Committee disapproved an amendment proposing to delete the requirement of corrcboration (§135.15) in cases of sexual abuse in the second degree.

It was recognized that the term "sexual misconduct" contained in §135.20 to replace the term of "statutory rape" was a commendable change in terminology. While not formally discussed, it would seem that §135.55 should be retitled to eliminate the present title of bestiality.

The Committee recognized the need to provide for the crime of sexual abuse. Under the proposed definition of assault in the third degree, there would have to be proof of physical injury. This would leave acts of touching another's private parts without criminal penalty.

It was agreed that the proposed revision was commendable in lowering the penalty where the defendant is over the age of 21 years and the victim is under the age of consent from the present ten-year term of imprisonment to a possible four-year jail term (§135.25).

Gambling

Here, too, there have been few changes of substance but a general over-hauling of existing laws. Articles 88 and 130 which heretofore comprised 54 sections are under the proposed revision contained in 7 sections. The Committee agreed with the Revisers that it should be unnecessary to distinguish between the various forms of gambling and that no matter what form of gambling was involved, the law should seek only to

penalize the promoter, entrepreneur and others who advance gambling projects.

The proposed article in §230 sets forth a number of definitions of gambling and distinguishes between the activity of the player, entrepreneur and other person who in some way advances a gambling project. The Revisers in §230(3) specifically provided that one does not provide material assistance to a social game of chance where he facilitates the game, but the definition of "advancing gambling activity" contained in §234(4) was broadened from its present application to those who, as owners, agents, superintendents or caretakers of a premises allow the operation of gambling to exist and continue, to any other person who has"authoritative control" over the premises being used for gambling activity.

The Committee disapproved the definition contained in §230(11) providing that a bookmaking record means a writing made by a person engaged in bookmaking activity and recommended that the term "bookmaking record" mean any writing or paper, commonly possessed by a person engaged in bookmaking activity.

§230.10 substantially restates existing Penal Law §§986(c) and 974(a). §230(15) substantially restates the offenses defined in the existing Penal Law §§975 and 986(b).

The problem is that under §230.15 even a player who possesses lottery or policy records reflecting more than ten of his own bets may be found guilty of violating the gambling article even though the Revisers tell us that "the mere player, ... is not criminally liable as a matter of policy." (See Commission Staff notes, p. 283). The Committee took no stand with respect

to this apparent inconsistency in policy feeling that an accused would hardly be a player were he to possess lottery or policy records reflecting more than ten plays. I urged that for the purposes of consistency, there should still be available to an accused the right to prove that though possessing more than ten of his own plays, he is in fact a player and should not be subject to criminal penalty.

§230.30 restates §§975, 986(a) and (b), but subdivision 1 of 230.30 broadens the application of the statutory presumption not only to include slips and records of wagers but any gambling record or instrument.

Prostitution

This article revises the whole area of prostitution offenses. It defines the basic offense of prostitution as presently dealt with in §887(4), CCP. It then proceeds to the promotional and exploitational aspects of prostitution. Under present law, it is not clear whether compensated homosexual acts are punishable; the proposed section expressly includes such within the definition of prostitution.

The proposal that the customer of the prostitute be made guilty of a crime was rejected. It was felt that this would make it more difficult to obtain necessary evidence to make out a case against the prostitute.