

October 9, 1967

To: RJB

From: PJM

In a letter to you, dated September 20, 1967, Richard A. Myren stated:

"Enclosed is a copy of our first research proposal here at the School which is of interest to you:

1. In your capacity as coordinator of crime related matters in New York;
2. As one intimately concerned with criminal law revision; and
3. As one who may be asked to fund this project if no money is available to O.L.E.A. under the new Federal legislation."

The enclosure consists of a 66-page application to the Office of Law Enforcement Assistance seeking LEAA support in the amount of \$187,984. Item 6, on page one of the application form (Applicant Agency or Institution), is left blank. Since Dean Myren's letter characterizes the application as "our first research proposal here at the School," may I assume that the State University of New York is the "applicant"? I note on page two of the application that SUNY is making a contribution of \$34,097.

The proposal does not appeal to me on three grounds:

1. The benefits to be derived from this project for the State of New York are nil or, at best, marginal.
2. The project's principal task is to especially collect and disseminate material that any good law library should have at hand or that any ambitious and competent researcher could readily obtain.
3. The project could not possibly achieve its extremely broad objectives for \$200,000.

I will briefly discuss, seriatim, the three grounds of my opposition to this proposal.

I New York will not benefit.

New York has completed a revision of its Penal Law and Criminal Code. The proposed project, therefore, will have minimal relevance for our state because the sole beneficiaries of this project are states that contemplate or currently have underway a revision of their criminal laws. The bases for this conclusion are at least twenty statements in the application (I quote at length only because a hurried reading of the application could suggest that there are multiple beneficiaries):

(1) p.4: "Both the director and his assistant must be mature professionals who can successfully link the academic community with law revisor practitioners."

(2) p.4-a: "A large portion of the [travel money] will enable the director and assistant director to travel to law revision centers, both to collect data and to explain the functions of the project to practitioners."

(3) p.4-a: "One of the most important goals of the project is the dissemination of information to both practitioners and academics relative to code revision."

(4) p.5: "A survey annexed hereto shows that 18 states are in the process of revising ....[T]he methods now being used by revisionists are little different from those employed to prepare the codes they seek to revise. These efforts are frequently poorly organized, poorly financed and without direction.... The Project [will devise] methods for systematically bringing revision-related legal and social science materials to the attention of code revisors.... The Project is so structured that its involvement in the process of code revision allows it to be a participant-observer of that process."

(5) p.6: "This is a proposal for a Project on Penal Code and Criminal Procedure Revision which will be responsive to the needs of state law revision and the academic community."

(6) p.9: "The project's purpose, is not only to act as a distribution center, so as to free the reporter of the burdens just described, but, by its own interaction with many law revision reporters, to promote and provoke new concepts of law revision and reform."

(7) pp.10-11" "A large part of the Project's efforts ...should involve a personalized service for the revisors. Thus, ideally, a beginning revisor should be able to write the Project the type of letter annexed hereto ... which requests a 'criminal

procedure reporter revision' kit. We should be able to bring the revisor to our facilities, or to visit his, to spend the necessary time with him to establish a relationship, and key him into the various systems we have developed; to learn from him and to aid him with his special revision problems."

(8) p.11: "The initial target group will be the penal code and criminal procedure code revisors. It is not immediately conceived that any other group will benefit directly from the Project's activities" (emphasis in original).

(9) pp.13-14: "It is not the purpose of the Project to draft model codes. It is thus unlike the American Law Institute ....It is perhaps closer to the Council of State Governments which aids state governments and their agencies with state problems, legislative or administrative. But this organization.....performs more of the services described for the Project."

(10) p.14: "Approximately the first two months of the project will be concerned with....surveying the operations of revisors throughout the country. A number of reporters and law revision commissions will be visited within the first three months of the project....Problems of the revisors will be assessed and an estimate will be made of the needs of each and how they may be aided by the Project."

(11) p.15: "The assistant director... will design a system whereby the mass of legal materials ... may be made available to each revision reporter in some organized fashion peculiarly adapted to his working needs."

(12) p.16: "Before the end of the first year, the Project will make plans through the School of Criminal Justice to enter into an in-training program in law revision. This may be arranged as a credit course [whereby] the student may [work] in the 'field' with a law revision commission or reporter."

(13) p. 16: "[T]he Project would begin by involving itself in and aiding the individual projects. This would be a learning period for the Project in which the scope and direction of the various revisions around the country would be evaluated. During this period, the project would survey the needs of the revisions and determine in what ways the Project might be of aid."

(14) p.16: "The Project's intimate involvement in state code revision and the accommodation of code reporters...."

(15) p.17: "The primary purpose of the advisory council...will be to evaluate the project's progress in adequately meeting the needs of its 'customers'."

(16) p.18: "[S]tates cannot or do not often provide their law revisors with sufficient resources for adequate law revision. The Project will do this by tending to improve the capability of law reform in all states."

(17) p.18: "[T]he innovative features of the proposal: no central service is now available to aid individual states in criminal law revision."

(18) p.18: "When the project has demonstrated its success in reducing research costs on the part of state revisors, support can shift to state contributions or to state payment for specific benefits provided."

(19) p. 18: "The very substance and life of the Project is the dissemination of the varied materials which it collects and produces. It will be in constant communication with law revisors across the country and in other countries...."

(20) Letters from various state representatives commenting on the proposal:

p. 42 (Maine) "...I would say that I endorse wholeheartedly your proposal for an interchange among code reporters..."

p. 43 (Ohio): "The proposal for the exchange of information among reporters of criminal code revision would meet a great need....We have little if any contact with other states engaged in a particular project, and only get detailed information from other states when their complete revision is published."

p. 44 (Vermont): "At this time the State of Vermont is not engaged in such a program of statutory revision....[S]uch an exchange of information would be extremely helpful in any work that we might do, and I would hope that some of our thoughts might be helpful to other states implementing such a program of statutory revision."

p.45 (Montana): "The proposed exchange of drafts, comments and organizational schemes utilized in revising state criminal codes should prove valuable."

p.46 (Massachusetts): "At the present time there is no general revision of the Massachusetts criminal laws being made....If such revision is undertaken [we] would be most anxious to participate in this program."

p. 47 (Maryland): "I think that a clearing house for information on the developing state codes is an excellent one. I am uncertain about the usefulness of conferences among the various state reporters."

p.48 (Iowa): "[T]he system of exchange of information set out in your proposal is excellent."

p. 49 (Hawaii): "Hopefully, Hawaii will soon embark on its revision project. An exchange center ...will be of inestimable value as an instant-source of new ideas."

p.50 (Delaware): "Your proposal to share information is a very good one.... One problem is obviously going to be the cost of making the materials available to 50 or so potential recipients."

p.51 (Connecticut): "I have received your proposal for exchange of information between state criminal law revision reporters. I think that the proposal is excellent..."

p. 52 (Montana): "An exchange of information between various states in this field is indeed desirable. We, in our work, have wished to have such service available. We have not found it. We would, though, be most pleased to have such service available and would desire to contribute our material to it. Presently we are completing our Proposed Criminal Procedure Act for Montana. It is now printed and available for distribution."

p. 55 (Montana): "As to your proposal for a systematic interchange among criminal code reporters, I concur fully. Each of us have been 'going it alone' and an interchange would be most helpful. The biggest deterrent that I see is availability of funds. Our work has been completed to date with an annual appropriation of but \$6,000 which has not covered the cost of Commission meetings, much less other attendant expenses. By voluntary help and some begging and borrowing we have gotten along, but I would not suggest it for anyone else."

p.56 (North Carolina): "There is not at present any group in North Carolina engaged in a revision of the criminal code.... I feel sure that the agency which eventually works on this project will be interested in such exchange."

The application states (p. 22) that "Appendix II contains some of the correspondence indicating a willingness on the part of many states to co-operate in this Project." (emphasis supplied) This Appendix contains 16 letters relevant to the Project. Three of the 16, however, are from Montana (pp. 45, 52, 55). It is not immediately apparent why three letters from one state are included in an appendix of "selected" correspondence.

## II Project is essentially a specialized library service.

The application suggests that it is of prime importance for a code revisor to have the work product of all other code revisors and that it is difficult to obtain such material. This observation is based on several statements in the application:

1. p. 8: "Not only is the revisor faced with insufficient resources but such resources as he has are unnecessarily taxed as each reporter goes over essentially the same ground. Thus, even where one state allows adequate resources there is no way for another to benefit from it."

2. pp.8-9: "Until the annexed list of reporters was compiled there was no such list. If he wished to obtain drafts or memoranda of current material prepared by other reporters doing the same work and individually write for their drafts.[sic] If the work arrived, it would only by chance be useful because the most useful material is that on which he is working at the moment. [sic?]"

3. p. 15: "The assistant director...will design a system whereby the mass of legal materials, codes, parallel statutory sections, cases, drafts and memoranda of other reporters... may be made available to each revision reporter in some organized fashion...."

4. p. 16: "The Project's intimate involvement in state code revision ... will allow not only the collection of a complete library of revision materials...."

5. p. 18: "Although diversity of approach is one of the gains of our federal system, diversity should come through consideration which is best suited for one's state. [sic?] It should not result from mere lack of knowledge of what other states are doing."

I have found that proposed and recently enacted codes of foreign states and countries are helpful: possessing them, however, is not the sine qua non to a successful revision. They are only one of the many sources that a code revisor must tap for ideas. (And by no means at all are they difficult to obtain.) Indeed, all of the literature on criminal justice is relevant to the code revisor. I fail to see what meaningful role this Project (financed at \$200,000 for 2 years) can play in helping two dozen states to revise their criminal laws. The assistance-no matter how capable the two-man staff may be-would be simply superficial.

The application states (p.14) that the Project is "unlike the American Law Institute," and that it "will not do factual research into the criminal justice system as did the American Bar Foundation." I detect a suggestion by the applicant that the work of ALI and ABA does not adequately answer the needs of the code revisor. (For example, p. 9: "There is little but a scattering of articles to be found about the ultimate objectives to be attained by a code....There is little discussion of the uses to which...the behavioral sciences may be put in revision.") May I quote Professor Wechsler at this point:

"The American Law Institute [is] trying to think through the major problems of the law of crimes. This means that we are seeking to identify the basic issues that are generally posed in the employment of the criminal sanction and the special questions within each area of the most serious offenses; to explore the way these issues are resolved in our existing systems; to appraise competing possibilities that may involve more satisfactory solutions; and to formulate in statutory form a draft that may be useful as a model. By 'model', let me add, that we mean nothing more than formulations that may be suggestive and commend themselves to legislative imitation.... Modern legislative aids are badly needed in the field of penal law.... Our belief that such a model can contribute to the sound development of the criminal law does not... imply that we are seeking uniformity in penal law throughout the country or that we wish to standardize the law of crimes. Uniformity is not as such a value of importance in this field, as it is, for example, in the case of the commercial code. It is to be expected that substantial differences of social situation or of point of view among the states should be reflected in substantial variations in their penal laws. But what is generally needed...is systematic re-examination of the subject - to the end that the law may

represent the mature sentiment of our respective jurisdictions- sentiment formed after a fresh appraisal of the situation, with attention to the goals to be achieved, the legislative possibilities for their attainment and the knowledge or experience that bears upon the choices to be made. This is the type of enterprise that we are seeking to assist in any jurisdiction where there is a will to undertake it. We hope to provide a reasoned, integrated body of material that will be useful in such legislative effort, as a solid treatise on a legal subject often aids adjudication by the courts. That there is need for such material will not ... be doubted by persons familiar with the subject.... The work that we are doing, like the studies now projected by the American Bar Association, is envisaged as an answer to that call. Where the Association puts its emphasis upon procedure and the processes of penal law administration, our prime concern is with the law that is administered - the substantive criminal law." Weschler, The American Law Institute: Some Observations on Its Model Penal Code, ABA Journal, April, 1956.

It should be noted that the Model Penal Code was "the result of ten years' labor by a corps of professors, judges, practicing lawyers, prison administrators, probation and parole specialists, psychiatrists and criminologists. Its preparation cost over \$500,000, which was given for this purpose by the Rockefeller Foundation to the American Law Institute." Schwartz, The Model Penal Code: An Invitation to Law Reform, ABA Journal, May, 1963.

The author of the legislation creating the National Commission on Reform of Federal Criminal Laws did not put state revision work at the top of a list of source material for this new Commission:

"The Reform Commission will have the advantage of the studies of the President's Crime Commission, the American Law Institute's recently completed work on criminal justice, which culminated its Model Penal Code, the American Bar Association's studies on criminal law and the minimal standards of criminal justice, plus continuing research being undertaken by many university law schools. Another valuable source of information will be the revision of criminal codes at the State level, recently completed in Illinois, Michigan, New York, and other States." Poff, A Means to Improve Our Federal Criminal Laws, FBI Law Enforcement Bulletin, March, 1967.

(Incidentally, Appendix I [p. 23], which is a "Compilation of States Revising Penal Codes or Codes of Criminal Procedure as of April 20, 1967," does include the Commonwealth of Puerto Rico [p.29] - which, of course, is not a State - but does not include the National Commission on Reform of Federal Criminal Laws. Could this Commission become a "customer" [p.17] of the project?)

### III Project's goals are too broad.

The application states (p. 17) that the "enunciated goals" of the project "are specific and measurable." It is my view that the goals are vague or overly broad. I will try to illustrate the basis for my view.

The application states (p. 10) that "the Project will facilitate the development of pilot projects which may aid in the resolution of [such] policy conflicts [as:] Is a public defender system, an assigned counsel or some combination system appropriate for a particular jurisdiction?" This is a very big order! It must be pointed out that in 1962 the Ford Foundation provided funds to the National Legal Aid and Defender Association for experiments in several cities and counties to demonstrate what "indigent defense work" ought to be like. The experiments became known as the National Defender Project (N.D.P.). By 1965, N.D.P. had received \$6.1 million from the Ford Foundation. A director and three assistant directors are now running the program with the aid of a national advisory council of 20 lawyers and judges. As was stated in an August, 1967, report from the Ford Foundation: "N.D.P. offers help in two main ways to communities that request it. First, it provides advice on how to establish or improve defender services. Second, it provides funds in partial support for experimental programs." It is ludicrous to suggest that the proposed project could explore the area of "defender services" when N.D.P. - with its wealth in resources - is available to any community upon request.

I will try to list some of the other stated "goals" of this project:

(1) pp.57-58: The preparation of a "criminal procedure reporter revision kit" which will consist of articles "describing the usefulness of behavioral scientists in aiding research" and "lists of those scientists in the [revisor's] area who are engaged

in code-related research, the work they are engaged in and hints on how to interest social scientists in [the] research." The "kit" will also consist of: "6. Usefulness of the computer in searching present statutes;..." The "kit" will also contain "brochures" prepared by the Project, e.g., "History of selected law revision projects, their rise and decline." Other "brochures" include "Goals and their importance in drafting a code" and "Relationship between a code of criminal procedure and a penal code."

(2) p. 4: "The employment of graduate and law students as research assistants will further the aims of the project in two ways. First the graduate students (not the law students?) will be exposed to the problems of law revision and to the applications of Social Science to revision...." p.6: "The Project will...educate students in the conceptual and technical needs of law revision and reform." P. 11: The Project "will include the use of students as research assistants and eventually as student legislative internes. Part of such training will be as aides to law revisors where they may translate the School's systematic approach to criminal justice into a practical legislative outlet." P. 13: "Placing its trainees in law revision projects will... ..[i]ncrease the number of persons trained in law revision."

(3) p.4-a: "By using the consultants as subject matter task force teams of lawyers, code revisor, social scientist, it is hoped...that interdisciplinary relationships will be established which will have a continuing positive effect on the involvement of academics with the problems of criminal law."

(4) p. 4-a: "One of the most important goals of the project is the dissemination of information to ... academics relative to code revision." P. 6: "This is a proposal for a Project ...which will be responsive to the needs of... the academic community."

(5) p. 5: The Project will devise "methods for systematically bringing revision-related legal and social science materials to the attention of code revisors." P. 6: "The Project will do more than merely collect information for dissemination to code revisionists." P. 11: "Legal and non-legal, revision-related materials, available from time to time, will be collected, edited and redistributed in such form that it is current and available at the time the revisor is in need of such materials." P. 13: The project will allow "each revisor, regardless of state resources, to obtain the latest research information."

(6) p. 5: The project "will promote studies of the evolution of law revision efforts."

(7) p. 10: "Studies of previous efforts at reform will be encouraged, for example, the fate of New York's earlier legislative [sic; proposed?] definition of homosexual offenses as compared with the Illinois experience would be of great value (???) as practical and long-range scholarly documents."

(8) p. 5: The project "will encourage social scientists to interest themselves in law revision problems." P. 6: "The Project will...encourage lawyers, historians and behavioral scientists to interest themselves in the goals of legislation in a criminal justice system." P. 13: The project will "[i]ntroduce into law revision persons trained in disciplines other than law." P. 16: "The Project will try to move social scientists to interest themselves in law revision....Political scientists should also be urged to study the process of revision from its beginnings."

(9) p. 5: The project "will encourage ...law revisionists to utilize social scientists."

(10) p. 5: The project "will, in cooperation with the School of Criminal Justice, train persons in the skills of law revision and the behavioral sciences."

(11) p. 5: "Studies will be undertaken to develop techniques for following the effects of legislation so as to better evaluate the limits of legislation as a means of social control." P. 6: The project "will collect data and conduct and encourage research on the consequences of revision efforts throughout the nation."

(12) p. 10: The project "will promote studies concerning the limits and uses of legislation as a means of social control."

(13) pp. 9-10: "The Project's purpose [is] to promote and provoke new concepts of law revision and reform." P. 19: "A most important part of its work will be to publish and promote publication of analyses of problems in criminal justice legislation."

(14) p. 13: The project will "[d]evelop new educational materials and techniques of code revision training."

(15) p. 10: The project "will encourage thinking and writing about the organization framework of codes and the influence of the substantive code on its procedural twin."

(16) p. 10: "By enlisting the active participation of social scientists, the Project will be able to provide empirical data concerning law revision."

(17) p. 16: "[T]he Project will encourage members of the interdisciplinary staff of the School and other centers of learning, along with their students, to devote time to the difficult conceptual problems relating to legislation and its role in the criminal justice system."

(18) p. 11: "Systems will be developed and suggested to the revisor for organizing his files, organizing research, organizing statutory modification by use of computers in statutory searching and duplication of drafts." [sic?]

(19) pp. 16-17: "The Project's intimate involvement in state code revision... will allow not only the collection of a complete library of revision materials but will make possible an entrée into revision projects not heretofore attained. This involvement will permit the Project to make a comparative analysis of the varied approaches to revision with the tools of the political scientist and sociologist."

(20) p. 17: "The 'service' aspect of the Project ... has the unique merit of providing otherwise unavailable intelligence for the solution of the long term behavioral and conceptual problems described herein." [sic and emphasis supplied]

(21) p. 17: "[O]ne of the main deficiencies leading to the present crisis in law enforcement, has been the lack of adequate laws to define the tasks and responsibilities of the various participants in the criminal process. [sic?] ....[S]tates cannot or do not often provide their law revisors with sufficient resources for adequate law revision. The Project will do this...."

#### IV. Miscellaneous.

There are a number of minor errors in the application. For example, on page 7 we are told that "Appendix I shows that... six [states] are just beginning revision." The summary of contents (p. 23) in Appendix I, however, shows that five states are beginning revision. (But my count of the states beginning revision in Appendix I is seven.) This summary also sets forth figures (8, 17, 18, 8, 5) and asserts that the "Total" is 50. The correct total is 56, but something is obviously wrong. My reading of the Appendix suggests that the figures should be 8, 10, 16, 9, 7 (Total 50).

Also, the application makes clear that the project will have only one secretary (pp. 3,4-a). But the equipment list (p. 3-a) shows "2 chairs for secretaries" at \$41.87 each; "2 typing stands for secretaries" at \$29.95 each; and two IBM typewriters at \$435.60 each.

Also, we are told on page 15 that an "advisory council will be formed and will meet periodically from the beginning of operation of the Project. The council will consist of present and past reporters or representatives of revision commissions... One or more social and political scientists will also be included." However, on page 3 (Detailed Project Budget), nothing is budgeted for transportation and subsistence for the "advisory council" members.

I have some other thoughts which I'll discuss with you.