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DRAFT

Report on Homicide Provisions,
Proposed New York Penal Law

This report concerns the homicide provisions, Article 130, of the Proposed New York Penal Law as presently revised by the Staff of the Temporary Commission on Revision of the Penal Law and Criminal Code.

The principal accomplishment of the Commission is in the return to the common law homicide principles and the creation of order out of considerable statutory confusion. The Commission has laid aside such absurdities as the necessity of establishing "heat of passion" as an element of manslaughter rather than allowing the aggravated emotional state to be grounds for a reduction in the degree of homicide. It proposes to eliminate the problem faced by the Courts in distinguishing in the charge to the jury the difference between "a deliberate and premeditated design to affect the death" (murder in the first degree) and "with a design to affect the death" (murder in the second degree). This problem is aggravated by appellate interpretation which limits the time needed to form a premeditated design, to the time needed to reach the intention to kill.

The Commission proposes three degrees of homicide to replace the present four statutory degrees; murder, manslaughter in the first degree, and manslaughter in the second degree. Murder in the second degree is eliminated as are the sections dealing with

the following topics; "Duels fought out of New York by previous appointment made in New York" (Sec. 1047), vehicle homicide (Sec. 1053-A) and criminal negligence while engaged in hunting (Sec. 1053-C). In addition, the numerous paragraphs of manslaughter in the second degree relating to criminal negligence but specifically referring to such matters as "Overloading passenger vessel"; "Acts of physicians while intoxicated"; "Negligent use of machinery", etc., are eliminated.

In addition to the foregoing reasons the provisions relating to death by abortion are substantially revised and the punishment for homicide is geared to the class penalties which pertain to the entire proposed Penal Law with the addition of provision for the death penalty in murder cases.

The principal provisions of Article 130 are as follows:

"§ 130.25 Murder

A person is guilty of murder when:

1. With intent to kill another person, he causes the death of such person or of a third person, except when: . . . "

The basic crime of murder is thus defined as an "intentional killing", avoiding the need for semantics by the court and confusion by the jury in distinguishing between a premeditated design to affect death and a non-premeditated design to affect death referred to above. As has been indicated, the judicial construction of premeditation is so broad as to include decisions

made an instant before the act.

There are two exceptions in the proposed law which reduce murder to a lesser degree of homicide. The first under subparagraph (a) is homicidal conduct "under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse." The sub-division goes on to apply the subjective test to "reasonable explanation or excuse." As has been indicated, this exception serves the valid purpose of reducing a homicide committed under an emotional disturbance or "heat of passion" rather than making it a necessary element of the crime which is now a statutory necessity for manslaughter in the first and second degree. Under the present law the man who attacks in cold blood but without intent to kill is technically innocent of a crime.

The language of this sub-division does present one problem. It might well be preferable to avoid entirely any reference to "a reasonable explanation or excuse" and end the affirmative defense with a period after the words "extreme emotional disturbance." Although the subjective test is to be applied, it is feared that the necessity that the emotional disturbance be "reasonable" will require the defendant to develop a rational argument showing a rational cause for an irrational mental state. This could lead to considerable confusion and contradictory psychiatric testimony. It may be advisable to simply afford this exception to any defendant who can establish that he was emotionally disturbed

regardless of the reasons for his disturbance.

The second exception to murder through an intentional killing excludes the assistance to suicide unless aggression or devious means are used. In the absence of such action, viz. the suicide pact cases, the crime is manslaughter in the second degree.

In addition to intentional killing, murder is further defined to include (sub-division 2) death caused by reckless conduct. This sub-division is substantially a restatement of the first clause of Sec. 1044.2 of the Penal Law. Finally, felony murder is retained, (sub-division 3) with several changes in existing law (Sec. 1044,2 - second clause). The proposed law would now embrace killings committed during "immediate flight" but would be applicable only to deaths during the commission of specified felonies and from acts" inherently dangerous to human life." These revisions are in accord with the majority of American jurisdictions although they amend the present law.

Finally, the proposed revision gives the co-defendant who did not commit the fatal act a defense if he can establish that he was unarmed, did not know that any co-defendant was armed and had no reason to ^{anticipate} attempt any act "inherently dangerous to human life."

The foregoing revisions appear reasonable.

The only radical departure is the opportunity which will

be sought by every co-defendant who did not commit the fatal act to evade responsibility for felony murder. This opportunity for a defendant in a casual stickup to avoid a murder conviction from an accidental killing, or one in which he took no part, appears reasonable.

Sec. 130.20 Manslaughter in the first degree. The first and principal paragraph reads as follows:

"A person is guilty of manslaughter in the first degree when:

1. With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or . . . "

This common law definition of manslaughter does not constitute murder or manslaughter under New York statutes unless the "heat of passion" element can be proved by the prosecutor to comply with the present manslaughter provisions.

Sub-division 2 relates to sub-division 1 of the murder section. It embraces an intentional killing under emotional disturbance. In addition, a new sentence suggested by the Staff specifically avoids the current statutory need for the prosecutor to establish "emotional disturbance."

This new language reads as follows:

"The fact that the homicidal conduct does not constitute murder is not an element of the offense defined ⁱⁿ this subdivision and need not be established upon any prosecution therefor; . . . "

Sub-division 3 raises to manslaughter in the first degree an act causing death of a female pregnant with an unborn

child (more than 24 weeks) unless the abortion is justified. Under present law it is manslaughter in the second degree. (Abortion will be discussed below.) The greater liability of manslaughter one is predicated on the greater danger to a female at this advanced stage of pregnancy.

§130.15 Manslaughter in the second degree.

"A person is guilty of manslaughter in the second degree when:

1. He recklessly causes the death of another person;"

This defines a more serious and culpable death through negligence than "criminally negligent homicide" which appears in Sec. 130.10 in the following language:

"A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person.

Criminally negligent homicide is a class E felony."

The definitions of "criminally negligent" and "recklessly" appear in Sec. 45.

These two provisions are designed to embrace the host of miscellaneous homicide offenses presently included and referred to above within the definition of manslaughter in the second degree and elsewhere in the Penal Law. Most "vehicle homicide" cases should fall within the "criminally negligent" homicide which, with its four year maximum penalty, should be of service in pleading.

Sub-division 3 of manslaughter in the second degree which concerns assistance to a person contemplating suicide but without force or duress, is a substantial restatement of existing law.

Abortion

The body of the recent revisions proposed by the Staff and not appearing in the published edition of the Proposed New York Penal Law deal with abortion and are designed to place the duty on the defendant of establishing by affirmative defense that the abortion was "justifiable". Under the published draft it appears that the prosecutor would have the burden of establishing that it was not justifiable for he would have to prove an "unlawful abortional act." Under the existing draft, death from abortion is manslaughter in the first degree or in the second degree depending upon whether the pregnant female is with an unborn child. The lawfulness or justification of the act is specifically made an affirmative ^{de} offense.

The kernel of the offense is the same in both drafts and reads "commits an unlawful abortional act upon her which causes her death."

"Justifiable abortional act "as defined in the ~~New~~ Staff draft reads as follows:

"An abortional act is justifiable when committed upon a female by a duly licensed physician acting under a reasonable belief that such is necessary to preserve the life of such female. A pregnant female's commission

of an abortional act upon herself is justifiable when she acts upon the advice of a duly licensed physician that such is necessary to preserve her life. The submission by a female to an abortional act is justifiable when she believes that it is being committed by a duly licensed physician, and when she acts upon the advice of a duly licensed physician that such is necessary to preserve her life."

This language allows the defense only to a duly licensed physician or the pregnant female which is not the case under existing law or under the prior draft. There is no quarrel with this change. It is respectfully suggested, however, that the definition be broadened beyond those cases where there is a reasonable belief that the act is necessary to preserve the life of the female, to include those cases where it is necessary to preserve the physical and mental health of the mother (or of the child), and in those instances where conception resulted from foreceable rape.

There is no further quarrel with the other abortion provisions which in effect collect and clarify existing abortion provisions.