## ANALYSIS OF PROPOSED ARTICLE 130:

## "HOMICIDE, ABORTION AND RELATED OFFENSES"

Article 130 of the proposed New York Penal Law as drafted and recommended by the Temporary State Commission on Revision of the Penal Law and Criminal Code deals with Homicide, Abortion and related offenses.

Generally speaking, while the classifications of Murder, Manslaughter and Homicide as a result of criminal negligence are retained, substantial changes are made in the "yardsticks" or elements that constitute these various classifications. In the main, this is done with a view toward eliminating, especially in the Manslaughter category, the various factual distinctions which presently exist giving rise to Manslaughter in the Second Degree, Criminal Negligence Homicide or similar closely related acts.

One of the more radical departures from the existing Penal Law is the formulation of a single degreeless Murder statute. There is neither a Murder in the First Degree nor a Murder in the Second Degree provision, but merely the crime of "Murder".

### MURDER

Section 130.25 defines Murder (a Class A felony unless the death sentence is imposed under a bifurcated trial) in three basic forms.

A. Intentional killing.

B. Killing as the result of a wanton or depraved indifference to human life.

C. Felony murder

Intentional Killing:

The distinction between premeditated and deliberate killing (presently defined as Murder in the First Degree) and intentional killing not premeditated or deliberate (presently defined as Murder in the Second Degree) has been eliminated. Under proposed Section 130.25, Subdivision 1, it is "Murder" where death results when, with intent to kill a person, the defendant causes the death of such person or of a third person. However, a substantial exception, and radical departure from existing law, appears in this definition: notwithstanding an intent to kill, if the defendant kills "under the influence of extreme emotional disturbance" it is Manslaughter in the First Degree and not Murder. Also, if he kills, causing or aiding a suicide, it is Manslaughter in the Second Degree.

The phrase "under the influence of extreme emotional disturbance" contained in the proposed exception above stated, may very well create difficult prosecution problems in the trial of a murder case. It would, in my opinion, create a "built-in" insanity issue in almost every such case, and provide a "field day" for the psychiatrists. The Commission Staff Notes do not explain the rationale for this exception other than to state that in such instances this provision would guarantee "not only that such conduct constitutes manslaughter ..." "but also that it does not constitute murder."

As will be seen in the discussion of the proposed new manslaughter statute, the "heat of passion" element of manslaughter, as it presently exists, has been eliminated. Perhaps the explanation aforesaid, relating to "extreme emotional disturbance", may have been intended to cover a "heat of passion" situation, but, in my opinion, it goes far beyond that, and raises much more serious problems in the prosecution of a case.

Wanton or Depraved Indifference to Human Life:

This provision is substantially similar to that presently contained in subdivision 2 of Section 1044 of the Penal Law.

Felony Murder

The concept of felony murder has been preserved in proposed subdivision 3 of Section 130.25. However, it does not include all felonies "upon or affecting the person killed or otherwise" as is presently embodied in our Penal Law, but limits itself to killing which occurs as the result of an act committed which is "inherently dangerous to human life" with respect to the crimes of robbery, burglary, kidnapping, arson, escape or a forcible felonious sex crime. A desirable feature in this subdivision is that it enunciates in statutory form that responsibility will lie for felony murder where the killing is (a) in the course of and in furtherance of the crime, or (b) in the course of immediate flight of the perpetrators thereof or any one of them, thereby codifying existing case law, and broadening coverage to include "immediate flight". By requiring that the killing must be the result of any act which is "inherently dangerous to human life", accidental or not reasonably forseeable death would be excluded. Whether such a killing would be manslaughter or criminal negligence homicide if either, is not clear. Another substantial change appears in that one engaged in a felony of the type enumerated, wherein a life is taken under circumstances which might otherwise give rise to the charge of felony murder, may avail himself of an affirmative defense to prosecution for such crime although a participant in the underlying felony, where the defendant:

(a) Did not commit the homicidal act or in any way solicit, counsel, encourage, cause or aid the commission thereof; and

(b) Was not armed with any deadly weapon, or any implement, article or substance capable of inflicting serious injury and of a sort not ordinarily carried about in public places by law-abiding persons; and

(c) Did not know that any of his confederates was armed with such a weapon, implement, article or substance; and

(d) Had no reasonable ground to believe that any of his confederates intended to commit an act inherently dangerous to human life.

This exemption from prosecution raises serious questions, in my opinion. There is the strong possibility that a defendant charged with felony murder, where he is one of several perpetrators, will fabricate a defense so as to come within the aforesaid exemption. In such event it would be extremely difficult for the prosecution to disprove such a defense, especially as to items "(c)" and "(d)" which involve the operations of the defendant's mind.

If this exemption is to be retained, it is suggested that the burden of proof as to the existence of this defense should be placed upon the defendant.

MANSLAUGHTER AND CRIMINALLY NEGLIGENT HOMICIDE

The provisions of proposed new Penal Law Sections 130.10, 130.15 and 130.20 deal with those categories of homicide presently designated as manslaughter, and death resulting from criminal negligence.

The proposed statutes generally abolish the factual distinctions specifically addressed to automobiles, overloaded passenger vessels, negligent operation of steam boilers, negligent use of machinery, etc. They abolish the "heat of passion" concept of manslaughter as presently contained in our Penal Law, and deal with two general types of killing:

1. Criminally negligent homicide (a Class E felony)

2. Reckless killing: Classified as either
   Manslaughter in the First Degree (a Class B felony)
   or Manslaughter in the Second Degree (a Class C felony)

Section 45.00, subdivisions 6 and 7, define and make distinction between the terms "recklessly" and "criminal negligence". As defined therein "recklessly" denotes a situation where a person "consciously disregards a substantial and unjustifiable risk", whereas, "criminal negligence" occurs when he "fails to be aware of a substantial and unjustifiable risk". Under the definition, "recklessness" is more culpable than "criminal negligence".

According to Section 130.10 "A person is guilty of criminally negligent homicide" when, with criminal negligence he causes the death of another person.

Section 130.15 provides that a person is guilty of Manslaughter in the Second Degree where "he recklessly causes the death of another person". It is also Manslaughter in the Second Degree to cause the death of a female believed to be pregnant, with intent to commit an unlawful abortion upon her, or to intentionally cause or aid another person to commit suicide.

As mentioned above, the "heat of passion" concept of manslaughter has been omitted from both Manslaughter in the First Degree and Manslaughter in the Second Degree.

It is proposed under Section 130.20 that Manslaughter in the First Degree would result when "with intent to cause serious physical injury to another person", the defendant causes the death of such person or of a third person. It is also Manslaughter in the First Degree to cause the death of a female who is pregnant with an unborn child when, with intent to procure her miscarriage, the defendant commits an unlawful abortional act upon her. This abortion death differs from that defined in Manslaughter 2 in that in Manslaughter 2 the defendant need merely believe the female to be pregnant with an unborn child (more than 26 weeks pregnant). As stated above in discussing the new proposed Murder statute, it is Manslaughter in the First Degree, and not Murder, where death results when there is an intent to kill under circumstances which would constitute Murder as defined in subdivision 1 of proposed Section 130.25 except that "the homicidal act is committed under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse". The statute goes on further to say that "the reasonableness of such explanation or excuse" shall be determined from the viewpoint of a person in the actor's situation, under the circumstances as the actor believes them to be.

This, I submit, is objectionable and may create undue hardships and problems for the prosecution. What the circumstances in a given case in fact actually are, and what the actor "believes them to be" may be entirely different. When dealing with the operation of the defendant's mind rather than "a reasonable man" standard, there may be little opportunity for the People to disprove that which the defendant contends his belief to have been, since under the proposed statute, the actual facts are in no way relevant in considering this defense.

The proposed Manslaughter statutes appear to omit Misdemeanor-Manslaughter as presently contained in our law. Consideration should be given as to whether or not such omission is desirable. Certainly, it might be argued that Misdemeanor-Manslaughter should be continued, especially inasmuch as the concept of Felony Murder has been preserved in the proposed new statute. The Commission Staff Notes fail to discuss this omission.

The Commission Staff Notes do consider at some length the fact that, under existing law, our Manslaughter statutes fail to cover a situation where death results from intentional serious physical injury although not inflicted with homicidal intent. Theoretically, this is neither Murder nor Manslaughter under existing statutes inasmuch as neither "intent to kill" nor killing in the "heat of passion" exists. In this regard, I am inclined to agree with the Commission that the law requires amendment.

## ABORTION AND RELATED ACTS

Section 130.40 (abortion) is substantially the same as existing Penal Law Section 80 and makes a violation thereof the lowest form of Felony. The term "quick child" has been deleted and instead the term "unborn child" is used where the pregnancy is of more than 26 weeks duration.

The unlawful abortional killing of an "unborn child" as defined above, is a Class D Felony under Section 130.45. This relates to an unlawful abortional act by someone other than the mother. When the mother causes the death of her "unborn child" during the course of an unlawful abortion act, she is guilty of a new crime known as "filicide of an unborn child" which, under Section 130.55, is a Class A Misdemeanor instead of a Felony as heretofore.

Self-abortion, under Section 130.50 is substantially the same as that contained in present Section 81 Penal Law; however, here too it is a Misdemeanor (Class B) instead of a Felony as heretofore.

Section 130.60 deals with abortional articles and is substantially the same as Section 82 of the Penal Law as it presently exists.

Basically, the Commission has down-graded the penalties for the commission of unlawful abortional acts and the abortion deaths of unborn children. The Commission Staff Notes indicate that there is a controversy with regard to the concept of legal abortion and states that they are continuing to study the subject and are considering the possibility of recommending a more liberal standard.

PROOF OF DEATH

The omission of the provisions of present Section 1041 P.L. from the proposed new Penal Law represents another substantial change. Whereas, presently, death of the victims must be established by direct evidence, as opposed to circumstantial evidence, it would appear that, under the proposed new law, the fact of death, as well as the fact that the defendant was the killer, may be established by either direct or circumstantial evidence.

Respectfully submitted,

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