

January 26, 1966.

FINAL REPORT AND RECOMMENDATIONS
OF
COMMITTEE ON REVISION OF THE PENAL LAW.

The revision of the Penal Law was a monumental task, undertaken by a Commission composed of conscientious and dedicated individuals, and formalized only after the most comprehensive research and impartial consideration of the many problems involved. An earnest attempt has been made to bring the law in step with modern thinking and to define areas heretofore left untouched or suspended in the shadows of uncertainty. While our committee did not agree in toto with all the revisions, it was in general agreement with the philosophy and it was also of a mind that the new law must be given a fair trial before a proper evaluation can be made.

Each member of the Committee on Revision of the new Penal Law was assigned specific articles of the Revised Penal Law for study and report. These reports were circulated among the members of the Committee who, after due consideration, attended a meeting of the Committee on October 29, 1965, at the Bar Association of the City of New York, 42 West 44th Street, New York. The reports were discussed and fully reviewed. The Committee approved most of the provisions. Those with which it disagreed or suggested changes are hereinafter mentioned.

In considering and analyzing the Revised Penal Law due consideration must be given to the fact that the 1965 revised statute represents the culmination of three and one-half years of revisional endeavors on the part of the Commission. The

Commission's purpose was to overhaul the Penal Law and the Code of Criminal Procedure. The old Penal Law was adopted in 1881 and an overall revision had not been had for some 83 years. It was soon discovered that great emphasis had to be put on the Code of Criminal Procedure and that the Code must be interwoven and meshed with the Penal Law as well as the Correction Law and other laws affected. It was decided, therefore, that there must be one effective date as to both the Penal Law and the Code of Criminal Procedure.

At a recent meeting with a member of our Committee the Commission's counsel and its Secretary agreed that it was necessary and essential that both laws have one effective date, and that they will be unable to make a suitable report at the 1966 Session of the Legislature with reference to the Code. It may be necessary, therefore, to request a delay in the effective date of the new Penal Law because the preparation of the Code of Criminal Procedure will require additional time. The timetable of action is that the report and the passage of the Code of Criminal Procedure will be had during the 1967 Session of the Legislature and that the effective date of the Revised Penal Law (set for September, 1967) be adjourned to a later date, to wit, September, 1968. It is anticipated that this request will be made of the Legislature.

The additional time may enure to the benefit of those public forces which are interested in strengthening the powers and the rights of the public in the administration of the criminal law. This Penal Law comes at a time when there is substantial controversy between the law enforcement authorities and those who would further enlarge the rights of an individual as against the State.

The following action was taken by our Committee:

ARTICLES 1.00 through 125.

(1) The Committee decided to recommend that the original draft of Article 35.15 [2] be substituted for the one passed by the Legislature. The original draft provided that a citizen may not resist an arrest made by a public officer whether or not the arrest was legal. The substitute apparently was brought forth to appease certain organizations representing liberal views and the Commission felt that this revision was more acceptable to the Legislature. We are advised that there is to be filed in the Legislature this year a bill which incorporates our ideas on this subject. The bill is to read as follows:

"Limitation of the use of force in resisting arrest. The use of force is not justifiable to resist an arrest when the person being arrested knows that the person making such arrest is a police officer, by reason of his uniform or if he is not in uniform by some official identification which he displays, although the arrest may be unlawful. However, should the arrest be unlawful, the person arrested shall retain all civil remedies and all rights to suppress such evidence as has been obtained as a result of the unlawful arrest."

(2) According to the Revised Penal Law, there is no provision that gives the sentencing judge the right to impose a sentence and suspend the execution thereof. It was felt that this power is something that the sentencing court should not surrender and that, in the interest of justice, should remain with the sentencing court for psychological reasons. A defendant who realizes that a sentence hangs over his head and that any wrong will permit the judge to order him incarcerated under that sentence is a great deterrent, even though the judge does not ultimately choose to exercise the

right. The Committee recommends that Articles 60 and 65 be amended to include this power.

(3) As part of the general revision Article 7-A of the Correction Law, which permits the imposition of an indefinite sentence to the New York City Penitentiary for violation of a misdemeanor, is being repealed. It is the opinion of our Committee that a large metropolis like New York City is confronted with special problems and there must be some deviation from state wide uniformity in order to cope with these special situations. Article 7-A is a safety valve which permits the courts in New York City to dispose of many cases which it might otherwise have to try. Prosecutors and Judges have found it of great assistance in the disposition of cases and permitted the Court to impose proper punishment where they found it necessary to reduce a felony to a misdemeanor. Mr. Justice Saul S. Streit, Administrative Judge of the First Department, (who served for many years as a Judge of the Court of General Sessions), is opposed to abolishing this Article. The Criminal Court Committee of the First Department is similarly opposed, as well as all the District Attorneys in New York City with the exception of New York County. Counsel for the Commission, however, feels that this Article should be abolished for the sake of state wide uniformity. The Committee, however, ^{THINKS} feels that this is not a sufficient reason to do away with a provision of law that has been time-tested and found of great value in the administration of criminal justice. The Committee recommends a retention of Article 7-A of the Correction Law.

(4) It is suggested that further study be given to Article 80 with a view in mind that any fine imposed as to crimes which result in gain to the defendant be given to the victim in the nature of reparation for the victim's loss. A reading of the section discloses that it is worded so as to make the fine dependent upon the question whether the felon gained money or property through the commission of his crime. The court, having ascertained the "gain" from the crime, could then order it paid to the victim. This would merely be an extension of the present thought, already under discussion in the Legislature, to have the State compensate the victim of a crime.

(5) The defense of entrapment (Article 35.40) was the topic of much discussion particularly with relation to the effect it might have in the prosecution of narcotics cases. Since New York State is apparently the only jurisdiction in which entrapment is no defense, it was decided *NOT To Oppose* ~~to permit~~ the revision so as to allow the defense of entrapment but that it would have to be raised by the defendant on a pre-trial motion to dismiss on that specific ground, and that the determination of that issue be resolved at a pre-trial hearing in the same fashion as we resolve the voluntariness of confessions under Huntley.

(6) The question of Renunciation (Article 35.45) was also raised by a number of committee members and after much discussion it was decided to not disturb this section inasmuch as it is not something new to the law but merely a codification of the defense of abandonment. It must be noted that this defense includes not only an act of renunciation but to be available to a defendant he must also show that he made a

substantial effort to prevent the commission of the crime.

ARTICLES 130 through 165

The Committee adopted a recommendation that some distinction between sexual misconduct (Art. 130.20) and Rape First Degree (Art. 130.35) be more clearly defined. It recommends that Art. 130.35 be amended so that the words "without her consent" follow the word "female". Thus sexual misconduct becomes a generic term and rape is sexual misconduct with added elements.

ARTICLES 170 through 260

These Articles generally deal with offenses involving fraud and offenses against public order, public safety, public health and morals. Essentially, they have provided a well-revised and simplified body of substantive law, which previously had been scattered throughout the existing Penal Law. The revisers have achieved their goal of brevity and whether problems of interpretation have thus been created, remains only to be seen. Numerous unwieldy and lengthy sections of the old Penal Law have been remodeled and tailored to fit present day needs.

Some preliminary objections to a few of the studied Articles were expressed. However, after a thorough and exhaustive discussion, the Committee concluded that these newly enacted sections remain as adopted by the legislature. It is well to here add that in many instances, former decisional law has been translated into statutory

form, creating a very salutary result.

It is respectfully recommended that no changes in Articles 170 through 260 be entertained or proposed at this time; and that full opportunity for a fair trial be had of such innovations as are therein set forth.

ARTICLES 265 through 500.

Specific proposals for amendments to Articles 265 and 400 are submitted herewith in the form of a legislative bill.

Additionally we commend to the attention of the State Commission on Revision of the Penal Law and Criminal Code for its consideration the following:

(a) In subdivisions 8 and 9 of section 265.00 "a wholesale dealer" is excluded from the definitions of "gunsmith" and "dealer in firearms". Nowhere is the term "wholesale dealer" defined or its scope delimited and neither in Article 265 nor in Article 400 is there any restriction on the activities of a "wholesale dealer" or is a "wholesale dealer" required to be licensed.

It is suggested that the term "wholesale dealer" be defined and that, perhaps in concert with Congressional action, if that ensues, some legislation be enacted to control mail order sales of weapons and to restrict the sale of prohibited weapons and concealable weapons to licensees or persons exempted from the license requirements. (Reference is made to the bill submitted in the United States Senate by Senator Thomas J. Dodd [Conn.] and on which the Senate Judiciary Committee held public hearings in May of 1965).

(b) While some specific amendments have been proposed to conform pistol permit sections of the Penal Law, as they affect persons who are mentally ill, to the new provisions of Article 5 of the Mental Hygiene Law, there is still some uncertainty as to whether the authors of Section 70, subdivision 5, of the Mental Hygiene Law, intended that even though a person was being treated for mental illness such condition did not bar his right to a pistol permit. Perhaps it is sufficiently covered as to new licenses or renewals by clause (d) of subdivision 1 of Section 400.00 of the new Penal Law, which reads: "concerning whom no good cause exists for the denial of the license". However, actual mental illness, whether it is treated by a private psychiatrist, at a clinic or in a private or state hospital, should be reason enough for the revocation of a license, and, at least in those areas where the license is good until revoked, provisions should be made for notice to the licensing authority of the existence of the illness so the license may be revoked. It seems odd that the hospital authorities are required to certify unsuitability to possess a rifle or shotgun (§265.05, [10]) but not as to a licensee to possess or carry a concealable weapon.

This subject should be considered jointly with the legislative committee on the Mental Hygiene Law for study and possible revision of Section 70, subdivision 5 of that law so as to exclude pistol licenses from the protected privileges.

(c) As to Section 400.05 it is suggested that a study be made as to the feasibility of the delivery of confiscated weapons which may be in good condition to a

National Guard, State Guard or police unit for its use.

(d) As to Section 405.05 it is suggested that a study be made as to the practicability of selling seized fireworks to any organization licensed to display such fireworks, with the proceeds realized on the sale to go to the welfare of the county where the seizure occurred.

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We in the legal profession do not yield easily to change. There are a number of provisions about which we have our doubts. Much of the phraseology will be subject to interpretation by our courts. Yet we cannot properly judge the benefits or shortcomings of the revised Penal Law until it has been given a fair trial. This has been the general attitude of the Committee in making its appraisal.

Respectfully submitted,

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