Penal Law
(1963-1964

Document 181

Note from Archivist:

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11. (continued)
Governor will extend mercy; (c) pleas of insanity are induced; (d) Governors are inclined to exercise their powers to commute or pardon.

12. If the death penalty were abolished, punishment would be more certain: juries would be more willing to convict, and judicial machinery would operate more effectively.

13. Life imprisonment could be regarded as sufficiently harsh punishment. It could, perhaps, be provided that in certain cases pardon or commutation would not be available. At present, with regard to life sentences, there are few pardons or commutations.

14. The supposed exemplary features of capital punishment are largely dissipated in light of increasing measures for the concealment of actual executions.

15. Executions at times are attended by improper and offensive performances--especially in the publication of certain of the details.

16. Capital punishment diverts attention into channels which are inconsistent with what ought to be in focus--the prevention of crime and the swift administration of justice.

17. The death penalty is incompatible with modern theories of punishment which insist upon investigation, application of subjective tests, individualization, reformation and the like.

18. Capital punishment is largely imposed upon those who are least able to defend themselves.

(See Best, Harry, Crime and the Criminal Law in the United States, New York: Macmillan [1930]; McCafferty, James A., Capital Punishment in the United States, 1930 to 1952, typescript at pages 8-10 [1954]).

Foreign Countries

The death penalty has been completely abolished in many foreign states. In a few states, however --included in the following list-- only limited or de facto abolition has been effected. Explanations, qualifications, and observations, where necessary or noteworthy are set forth below the following list (an asterisk indicates the states that will be commented upon).

Foreign State	Date of Abolition
1. Luxembourg *	1822
2. Greece	1862
3. Belgium *	1863
4. Venezuela	1863
5. Portugal	1867
6. Netherlands *	1870
7. Costa Rica	1880
8. Brazil *	1891
9. Honduras	1894
10. Ecuador	1897
11. Peru *	1900
12. Panama	1903
13. Norway *	1905
14. Uruguay	1907
15. Colombia	1910
16. Sweden	1921
17. Argentina	1922
18. Queensland, Australia	1922
19. Dominican Republic	1924
20. Mexico *	1928
21. Greenland	1930
22. Nepal	1931
23. Denmark *	1933
24. Switzerland *	1942
25. Iceland	1944
26. Italy *	1944
27. Travancore, India	1944
28. Finland *	1949
29. West Germany *	1949
30. Austria *	1950
31. Nicaragua	1950
32. Turkey	1950
33. Israel	1951
34. Guatemala *	1955

Luxembourg: Although there has been no formal repeal, this country has had no execution since 1822.

Belgium: Although Parliament has not acted, no death sentence has been carried out since 1863.

Netherlands: The death penalty was abolished in 1870. It was restored, temporarily, at the close of World War II and, between 1945 and 1949, 120 death sentences were pronounced.

Brazil: While capital punishment was abolished in 1891, it was revived in 1936 "for extreme cases of perversity only."

Peru: The death penalty was abolished in 1900, except for "political crimes," and, as of 1949, for "highway banditry."

Norway: The last execution ensued in 1876, and the death penalty was formally abolished in 1905.

Mexico: In 1928, the death penalty was abandoned by federal law and by all but eight states.

Denmark: The last execution took place in 1892, and the

death penalty was formally abolished in 1933. It appears, however, that the death sentence is now available for treason.

Switzerland: It abolished the death penalty in 1874. A series of murders in the years 1876-1878 "greatly stirred public indignation" and moved it to restore capital punishment in 1879. It was abolished again in 1942. The last execution took place in 1924. In relatively recent years, "Switzerland has from time to time discussed the restoration of the penalty, especially on account of criminal aliens entering from across the frontiers." See Joyce, Capital Punishment 88-89 (1961).

Italy: The death penalty was abolished in 1890, but it was restored by the Fascists in 1931. It was abolished again in 1944.

Finland: Capital punishment was formally abolished in 1949. The last execution took place in 1826.

West Germany: Although the death penalty had been reintroduced under Hitler, it was abolished in 1949.

Austria: The death penalty was abolished in 1787; it was restored in 1796; it was abolished again in 1919; and, after it was reintroduced by the Nazis, it was finally abolished in 1950.

Guatemala: As of 1955, the death penalty is no longer available for women and children.

* * *

The following foreign states or areas of the world have retained capital punishment (further observations will be made where indicated by an asterisk).

1. Africa (most of the nations).
2. Asia (except Israel, Nepal, Travançore, and Turkey).
3. Australia (except Queensland).
4. Canada
5. Eastern Europe (most of the nations).
6. England *
7. France *
8. Irish Republic
9. New Zealand *
10. South and Central America (only a few of the nations).
11. Spain *

New Zealand: The death penalty was abolished in 1941,

but was restored in 1950.

Spain: Capital punishment was abolished in 1932, but was restored by the Franco regime.

France: In 1956, a poll was taken by the French Institute of Public Opinion. It disclosed in part: 55 per cent favored the retention of the death penalty in certain cases; and, if the death penalty were abolished, 47 per cent felt that the number of crimes would increase, while 39 per cent felt that it would remain the same. See Joyce, Capital Punishment 91-92 (1961).

England: While in the latter part of the 18th century three hundred crimes were capital, the number had dwindled to four by the year 1861. Indeed, as of 1948, in practice, the death penalty was invoked solely for murder. See Capital Punishment, Staff Research Report No. 46, Ohio Legislative Service Commission, p. 16 (1961).

Before 1957, any "murder" was subject to the penalty of death. However, great reliance was "placed on the perogative of mercy, exercised by the Home Secretary, to mitigate the rigors of the law in proper cases. In the years 1900-1948, over 46% of all death sentences were thus commuted." (See Model Penal Code, Tentative Draft No. 9, p. 66).

Under the Homicide Act of 1957, England in effect subdivided murder into degrees. In brief, only the following murders were deemed capital: (1) A murder in the course of theft; (2) a murder by shooting or by explosion; (3) a murder in the course of resisting arrest or of effecting escape; (4) a murder of a police officer executing his duty; (5) a murder by a prisoner of a prison officer executing his duty; and (6) a second murder. All other murders were deemed non-capital and subject to the penalty of life imprisonment.

The following table, entitled "Number of Murders Known to the Police in England and Wales," may be noteworthy. See Sellin, The Death Penalty, a Report for the Model Penal Code, p. 50 (1959):

Year	Number of Murders
1950	165
1951	157
1952	180
1953	174
1954	166
1955	152
1956	179
1957	223 (The Homicide Act took effect in March 1957)

From March, 1957 up to the close of 1960, there were twenty-nine convictions for capital murder, of which number sixteen were executed--two of such convictions involved the murder of police officers. See Joyce, Capital Punishment p. 130 (1961).

A statement by the retentionist, John Stuart Mill--speaking in debate in defense of capital punishment in Great Britain in 1868--may be regarded as a possible explanation for the apparent need and success of abolition on the Continent. See Capital Punishment within Prisons Bill, p. 1053 (1868), as quoted in Joyce, Capital Punishment 116 (1961):

> "There are on the Continent great and enlightened countries, in which the criminal procedure is not so favourable to innocence, does not afford the same security against erroneous conviction, as it does among us; countries where the Courts of Justice seem to think they fail in their duty unless they find somebody guilty, and in their really laudable desire to hunt guilt from its hiding-places, expose themselves to a serious danger of condemning the innocent. If our own procedure and Courts of Justice afforded ground for similar apprehension, I should be the first to join in withdrawing the power of inflicting irreparable punishment from such tribunals. But we all know that the defects of our procedure are the very opposite. Our rules of evidence are even too favourable to the prisoner: and juries and judges carry out the maxim, 'It is better that ten guilty should escape than that one innocent person should suffer,' not only to the letter, but beyond the letter."

"American" Jurisdictions

Variety of Capital Offenses

There are thirty-two separate offenses for which the penalty of death may be imposed in the United States:

Capital Offense	Number of States
1. Murder	43
2. Kidnapping	35
3. Treason	25
4. Rape	20
5. Lynching	7
6. Certain use of explosives	7
7. Arson	6
8. Trainwrecking	3
9. Burglary	3
10. Dueling	18
11. Perjury in a capital trial	10
12. Dynamiting	7
13. Armed Robbery	7
14. Train Robbery	5
15. Killing by abortion	4
16. Aggravated assault by life prisoner	2
17. Attempted murder of President	1
18. Inciting assault upon President	1
19. Killing by obstruction of canal	1
20. Shooting or throwing stones at trains	1
21. Burning a railroad bridge	1
22. Insurrection	1
23. Castration	1
24. Foeticide	1
25. Killing during syndicalism or sedition	1
26. Assault with deadly weapon while disguised	1
27. Aiding in a suicide	1
28. Killing by collision with a steamboat	1
29. Killing of victim resisting a felony	1
30. Killing a prisoner	1
31. Killing during a riot	1
32. Killing while violating anarchy and sedition laws	1

(A recent addition, in 1961, is the crime of aircraft piracy. 49 U. S. C. 1472).

It should be noted, however, that for the period 1930-1960, the death sentence has been used for only six of the above-described offenses: Murder, kidnapping, rape, armed robbery, burglary and aggravated assault by a life prisoner.

Death Sentence Discretionary

In virtually all of the States, the application of the death penalty is not mandatory. The usual option is death or life imprisonment.

Split-Verdict Procedure

A relatively recent innovation in a handful of states

(such as Pennsylvania and California) is the so-called "split-verdict" procedure. In substance, if the jury finds the accused guilty of a capital offense, an independent hearing is held (usually before the same jury) to determine whether the death penalty ought to be imposed. The Model Penal Code includes a similar procedure which it recommends for those states that see fit to retain capital punishment (See Proposed Official Draft, Model Penal Code, Sec. 210.6).

Methods of Execution

Method	Jurisdictions
Electrocution	24
Gas Chamber	11
Hanging	7
Choice by offender between firing squad and hanging	1 (Utah)

First Movement Toward Abolition

William Bradford, when Attorney General of Pennsylvania, achieved moderate success as early as 1794 when he succeeded in persuading the legislature of that state to subdivide murder into degrees. Thenceforth, the death penalty was reserved only for certain described murders--homicides by poison, by lying in wait, with premeditation and deliberation, and felony-murder--which were characterized as murder in the first degree. All other murders (at common law) were deemed murder in the second degree and non-capital. Many other states adopted a similar approach.

Pure Abolition Jurisdictions

Jurisdiction	Date of Abolition
Wisconsin	1853
Maine	1887
Minnesota	1911
Puerto Rico	1929
Alaska	1957
Hawaii	1957
Virgin Islands	1957

Qualified Abolition Jurisdictions

Jurisdiction	Date of Abolition
Michigan	1846
Rhode Island	1872
North Dakota	1915

Explanation: In Michigan, the death penalty is available only for treason. Rhode Island abolished capital punishment in 1852, but restored it in 1872 for murder committed by a prisoner serving a life sentence for murder. North Dakota abandoned the death penalty in 1915 for murder, but retained it for treason and for murder committed by a prisoner serving a life sentence for murder. None of these states has had occasion to apply the death penalty in the limited situations preserved.

States That Have Experimented with Abolition

State	Abolished	Restored
Iowa	1872	1878
Kansas	1887	1935
Colorado	1897	1901
Washington	1913	1919
Oregon	1915	1920
South Dakota	1915	1939
Tennessee	1915 (except rape)	1919
Arizona	1916 (except treason)	1918
Missouri	1917	1919
Delaware	1958	1961

The following statistics have been selected from Professor Sellin's study--(Sellin, The Death Penalty, A Report for the Model Penal Code, pp. 36-38, 1959):

Iowa: The annual average number of murder convictions during the seven years prior to abolition was 2.6; during the abolition period, 8.8; and during the next seven years, 13.1.

Kansas: The annual average homicide rate was 6.5 during the five years prior to restoration of the death penalty, and 3.8

during the next five years.

Colorado: The annual average number of murder convictions during the five years prior to abolition was 16.3; during the abolition period ,18; and during the next four years, 19.

Washington: The annual average homicide rate during the five years prior to abolition was 6.5; during the abolition period, 6.8; and during the next six years, 5.8.

Oregon: During the five years prior to abolition, 59 murderers were received in State Prison, and 36 were received during the five years of abolition.

South Dakota: The homicide rate for corresponding periods before and after the restoration of the death penalty was the same.

Tennessee: The death penalty was abolished in 1915 for murder, and restored in 1919. Rates of homicide are available however, only since 1918, and for the white and the colored population separately:

Year	Whites	Colored
1918	6.9	29.2
1919	8.8	41.3
1920	7.0	42.4
1921	11.4	39.5
1922	10.7	45.9
1923	10.5	49.8
1924	10.8	52.5

Arizona: During the two years prior to abolition, there were 41 murder convictions; during the abolition period, 46; and during the next two years, 45.

Missouri: During the five years prior to abolition, the homicide rate rose from 7.8 in 1912 to 10.0 in 1916. During the abolition period, 1917-1919, the rates were 12.3, 10.1, and 9.7 , respectively. During the next five years, the rates were 7.9, 10.1, 11.4, 12.3, and 13.2, respectively.

Delaware: Capital punishment was abolished in 1958, and restored over Governor's Carvel's veto in 1961. In his veto message (according to the New York Times, dated December 15, 1961), Governor Carvel declared: "The function of the criminal

law is to protect the law-abiding and not to fulfill a lust for revenge. Anything that tends to associate the law with the idea of vengeance impairs its dignity and subtracts from the respect that intelligent people accord it." In 1957, the last full year before abolition, there were 27 criminal homicides; in 1958, 14; and in 1959, 18.

Executions in the United States Since 1930

Year	Number of Executions
1930	154
1931	153
1932	140
1933	160
1934	168
1935	199
1936	192
1937	147
1938	185
1939	159
1940	124
1941	123
1942	141
1943	130
1944	120
1945	116
1946	131
1947	152
1948	114
1949	119
1950	81
1951	105
1952	83
1953	58
1954	80
1955	76
1956	64
1957	63
1958	48
1959	49
1960	57
1961	42

(Not included in the above figures are executions carried out by the armed services. During the period, 1930-1961, the Army, including the Air Force, carried out 160 executions--148 of such executions took place during the period 1942-1950. In the Navy, the last execution took place in 1849.)

The data which follows, for the period 1930-1957, was selected from figures prepared by Professor Sellin. See Sellin, The Death Penalty, a Report for the Model Penal Code, pp. 5-11 (1959).

For the period 1930-1957, there was a total of 3,568 executions in the United States. (In addition, there was a total of 157 military executions--104 for murder, 52 for rape, and 1 for desertion).

For the period 1930-1957, the following states had the greatest number of executions:

	State	Number of Executions
1.	Georgia	342
2.	New York	311
3.	North Carolina	260
4.	Texas	259
5.	California	250

For the period 1930-1957, the following states had the least number of executions.

	State	Number of Executions
1.	New Hampshire	1
2.	South Dakota (no capital punishment during nine years)	1 1
3.	Idaho	3
4.	Nebraska	3
5.	Vermont	4
6.	Montana	6
7.	Wyoming	6
8.	New Mexico	7

For the period 1930-1957, 3,096 of the total number of executions (3,568) were for murder.

The following states had the greatest number of executions for murder:

	State	Number of Executions for Murder
1.	New York	309
2.	Georgia	280
3.	California	242
4.	North Carolina	205
5.	Texas	189
6.	Ohio	158
7.	Pennsylvania	146

The following states had the least number of executions for murder:

	State	Number of Executions for Murder
1.	New Hampshire	1
2.	South Dakota (no capital punishment during nine years)	1 1
3.	Idaho	3
4.	Nebraska	3
5.	Vermont	4
6.	Montana	6
7.	Wyoming	6
8.	New Mexico	7
9.	Delaware	8

For the period 1930-1957, 472 of the total number of executions (3,568) were for crimes other than murder:

Crime	Number of Executions
1. Rape	411
2. Armed robbery	21
3. Kidnapping	17
4. Burglary	11
5. Espionage	8
6. Aggravated assault by life prisoner	4

The breakdown of the foregoing crimes state-wise:

1. Rape--The states which stand out: Texas-69, Georgia 57, North Carolina-46, South Carolina-39.

2. Armed robbery--The leading states: Georgia, Kentucky, and Alabama, with five each.

3. Kidnapping--The leaders: Federal-5, California-4.

4. Burglary--The standout state: North Carolina-9.

5. Espionage--All 8 executions were Federal.

6. Aggravated assault by life prisoner--All 4 executions were by California.

For the period 1930-1957, the total number of executions (3,568) may be broken down by section of the country:

Section of Country	Number of Executions
Federal	31
Northeast	578 (including New York with 311, and Pennsylvania with 146)
North Central	372 (including Ohio with 158)
South	2,142 (including Georgia with 342, North Carolina with 260, Texas with 259, and each of 7 other states had over 100)
West	445 (including California with 250)

Some recent detailed figures--set forth in 26 Fed. Prob. 76 (June 1962)--may be illuminating:

1. During the year 1961, 42 persons were executed in the United States--a new record low.

2. All 42 were males.

3. For murder--33, for rape--8, and for kidnapping--1.

4. The median age of those executed was 31.2 years, and the age ranged from 19 to 51.

5. The median elapsed time between sentence and execution was 16.2 months, and the range was from 2 months, 5 days to 6 years, 5 months, 13 days.

6. During the year 1961, 136 persons received death sentences--2 of whom were females.

7. At the close of 1961, 120 of the 136 were still under the death sentence--9 had been executed, the sentences of 6 had been commuted to life imprisonment, and 1 had been granted a new trial.

8. When the year 1961 began, 212 persons were under the death sentence. With the 136 received during 1961, the total number of persons under a sentence of death during the calendar year 1961 was 348. At the close of 1961, the number of persons still under sentence of death was 257.

9. Of the 257: 207 had been convicted for murder, 43 for rape, 3 for kidnapping, 2 for robbery, 1 for burglary, and 1 for assault while serving a life sentence.

NEW YORK

Of course, New York's subdivision of murder into degrees represents a compromise of sorts with the application of the death penalty, at least when judged by pre-1957 English standards. New York, however, is virtually alone in the United States in continuing to provide that the penalty of death is mandatory in capital cases--this statement is explained and qualified later, in this Memorandum.

First Electrocution

The first electrocution in the United States took place in 1890 at Auburn State Prison, New York. Theretofore, the usual method of execution throughout most of the United States had been

hanging. The existing method of carrying out the death sentence in New York is electrocution.

Capital Offenses

The death sentence is available in New York for convictions of murder in the first degree (Penal Law, §1045); kidnapping (Penal Law, §1250), and treason (Penal Law, §2382).

The death penalty is mandatory for treason. It is mandatory, also, for murder in the first degree, except that the jury may recommend life imprisonment where the basis for the conviction was "an act imminently dangerous to others, and evincing a depraved mind, regardless of human life," or "felony--murder" (Penal Law, §1045-a). This recommendation is not binding upon the court.

The punishment for kidnapping is death, except that the jury may recommend imprisonment in lieu of death, in which case the defendant must receive an indeterminate sentence in the form of a minimun of 20 years and a maximum of life. Where, however, the victim is "released and returned alive prior to the opening of the trial," the death penalty is not available, and the defendant must receive an indeterminate sentence of 20 years to life. Nor is the penalty of death available where the kidnapper is a parent of the victim--in such case, the punishment is "imprisonment for not more than ten years" (Penal Law, §1250).

Rank of New York in United States

As noted earlier, for the period 1930-1957, 3,568 executions took place in the United States. Georgia was the leader with 342, and New York ranked second with 311. With regard to executions for murder, New York ranked first with 309--its two other executions were for "kidnapping". Georgia ranked second with 280 --its 62 other executions were for rape (57) and for armed robbery (5).

New York Statistics

The following tables contain statistics, to the extent that they are available, relating to the application of the death penalty in New York for the period 1890 to 1961. It is to be

noted that the last execution in New York took place on June 8, 1961 (this statement is accurate at least as of October 15, 1962). The source of the following statistics is the New York Department of Correction, per Herbert L. Bryan, Director of Research, and Alexander Barraco, Senior Research Analyst. In turn, their main stated sources are: 1931-1944, Annual Reports of the Commissioner of Correction on Crime Statistics; 1945-1961, Annual Tabulations of Monthly Reports to Department of Correction (Returns A, B, C, D, E); and Execution File, Department of Correction.

Headings used in the Tables which require qualification have been noted and will be explained in the text following such Tables. The symbol NA means that, for a given year, the relevant data is "not available".

TABLE I

PERSONS SENTENCED TO DEATH, AND PERSONS EXECUTED

Year[1]	Persons Sentenced to Death	Persons Executed
1890	NA	1
1891	NA	5
1892	NA	5
1893	NA	10
1894	NA	2
1895	NA	6
1896	NA	5
1897	NA	8
1898	NA	2
1899	NA	7
1900	NA	3
1901	NA	7
1902	NA	3
1903	NA	13
1904	NA	8
1905	6	7
1906	4	0
1907	5	8
1908	12	6
1909	27	11
1910	11	12
1911	24	14
1912	19	22
1913	20	13
1914	23	11
1915	15	19
1916	11	14
1917	20	6

(Continued on p. 19)

Year[1]	Persons Sentenced to Death	Persons Executed
1918	17	8
1919	20	2
1920	32	16
1921	22	11
1922	13	17
1923	20	16
1924	14	4
1925	21	15
1926	18	14
1927	16	14
1928	10	14
1929	17	4
1930	27	15
1931	34	12
1932	38	20
1933	23	18
1934	12	15
1935	20	16
1936	32	21
1937	17	14
1938	15	7
1939	21	15
1940	23	13
1941	22	15
1942	20	18
1943	29	12
1944	4	20
1945	5	0
1946	12	4
1947	16	12
1948	16	6

(Continued on p. 20)

Year[1]	Persons Sentenced to Death	Persons Executed
1949	6	14
1950	11	3
1951	2	8
1952	5	3
1953	8	7
1954	8	9
1955	9	7
1956	5	6
1957	9	4
1958	5	4
1959	8	4
1960	13	6
1961	9	2

Explanation:

(1) For the period 1890-1961, the figures relating to "Persons Executed" are based on the calendar year. With regard to the heading "Persons Sentenced to Death", the calendar year is the basis for the figures for the period 1935-1961. For purposes of collecting "Persons Sentenced to Death" statistics, the Department of Correction used a fiscal year, October 1 to September 30, for the period 1905-1916. Thereafter, until December 31, 1934, the fiscal year employed was July 1 to June 30. For the convenience of the reader, the Staff has rounded off the years under the "Persons Sentenced to Death" heading for the period October 1, 1905 to December 31, 1934.

TABLE II

REPORTED HOMICIDES AND DISPOSITIONS GENERALLY

Year	Homicides Reported(1)	Persons Arrested	Indictments for Homicides(2)	Indictments for Murder-1, and 2(3)
1931	767	586	295	NA
1932	705	588	330	NA
1933	674	572	324	NA
1934	555	487	337	NA
1935	578	531	331	NA
1936	506	488	365	NA
1937	487	392	270	211
1938	413	361	309	220
1939	397	345	280	172
1940	382	399	314	230
1941	384	336	260	166
1942	373	362	270	160
1943	327	283	208	128
1944	335	306	198	133
1945	373	352	246	173
1946	473	443	283	192
1947	450	407	318	183
1948	491	465	308	193
1949	416	376	260	151
1950	411	356	290	192
1951	360	334	244	151
1952	445	376	280	178
1953	455	408	294	185
1954	450	411	305	189
1955	441	417	312	207
1956	468	428	263	137
1957	463	399	322	186
1958	509	503	392	239
1959	531	549	399	264
1960	542	510	349	205
1961	632	646	488	286

(Continued on p. 22)

TABLE II

REPORTED HOMICIDES AND DISPOSITIONS GENERALLY
(Continued)

Year	Pleas of Guilty of Murder-2[4]	Guilty by Verdict of Murder-1, and 2	Persons Sentenced to Death	Persons Executed
1931	NA	NA	34	12
1932	NA	NA	38	20
1933	NA	NA	23	18
1934	NA	NA	12	15
1935	NA	NA	20	16
1936	NA	NA	32	21
1937	89	57	17	14
1938	87	50	15	7
1939	57	50	21	15
1940	81	54	23	13
1941	95	47	22	15
1942	78	57	20	18
1943	84	48	29	12
1944	74	31	4	20
1945	91	22	5	0
1946	92	57	12	4
1947	98	56	16	12
1948	107	44	16	6
1949	92	24	6	14
1950	87	47	11	3
1951	77	23	2	8
1952	90	23	5	3
1953	91	29	8	7
1954	121	19	8	9
1955	148	19	9	7
1956	126	16	5	6
1957	97	28	9	4
1958	118	23	5	4
1959	147	38	8	4
1960	154	42	13	6
1961	147	32	9	2

Explanation:

(1) "Homicides Reported" include Murder-1, Murder-2, and non-negligent manslaughter.

(2) "Indictments for Homicides:" Homicides include Murder-1, Murder-2, and non-negligent manslaughter.

(3) "Indictments for Murder-1, and 2:" The Correction Department's records do not contain a breakdown between Murder-1 and 2.

(4) "Pleas of Guilty of Murder-2:" While it is clear that guilty pleas were of Murder-2, no breakdown is available indicating the extent to which such pleas were addressed to Murder-1 or Murder-2 indictments.

CONCLUSION

While no attempt was made in this memorandum to interpret or evaluate statistics or factual observations, or to detect trends, it may be useful to include at this point what James A. McCafferty (Criminologist, U. S. Bureau of Prisons, Washington, D. C.) regards as "seven major trends in the use of capital punishment" (25 Fed. Prob. 15, 20, Sept. 1961):

> "1. There is a decided trend toward repealing the death sentence by disuse or by dropping it and substituting life imprisonment or a term of years.
> 2. Though we have 31 capital offenses in this country, since 1930 only 7 of the offenses have resulted in an execution.
> 3. Our laws have provided for the permissive rather than mandatory application of the death sentence in all jurisdictions having the penalty except the District of Columbia. There is evidence that the District's mandatory death provision for first degree murder may be changed to permit the jury and/or the court the responsibility for determining the sentence.
> 4. The trend in executions for murder continues downward. During the decade of the 1950's the average has been 60 per year as compared with 151 per year in the 1930 decade.
> 5. There is evidence that about half of those persons sentenced to death are actually executed. Also, the periods of time between sentence to death and execution vary considerably. The average number of homicides each year is about 7,000, which means, in effect, that there is 1 execution carried out for each 115 homicides.
> 6. The general public has been removed from the death chamber.
> 7. The form of the lethal appliance is being changed to make the death penalty quicker and painless for the condemned person. Needless to say, it reduces the "dehumanizing" influences for those responsible for carrying out the task."

EJMcL;CET/pjc/rc/cd
October 18, 1962

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Sec #2

PART THREE

ADMINISTRATIVE AND CIVIL PROVISIONS

TITLE 1.

SEIZURE AND DESTRUCTION OF CONTRABAND

ARTICLE 400

IN RELATION TO GAMBLING

§ 400.00

~~§1.~~ Seizure of gambling implements authorized.

A person who is required or authorized to arrest any person for a violation of the provisions of article 230 ~~of the chapter~~ is also authorized and required to seize any table, cards, dice or other apparatus or article, suitable for gambling purposes, found in the possession or under the control of the person so arrested, and to deliver the same to the magistrate before whom the person arrested is required to be taken.

§ 400.05

~~§2.~~ Gambling implements to be destroyed or delivered to district attorney.

The magistrate, to whom any thing suitable for gambling purposes is delivered pursuant to the last section, must, upon the examination of the defendant, or if such examination is delayed or prevented, without awaiting such examination, determine the character of the thing so delivered to him, and whether it was actually employed by the defendant in violation of the provisions of article 230 ~~of this chapter~~, and if he finds that it is of a character suitable for gambling purposes, and that it has been used by the defendant in violation of such article, he must cause it to be destroyed, or to be delivered to the district attorney of the county in which the defendant is liable to indictment or trial, as the interests of justice may, in his opinion, require.

§ 400.10

~~§3.~~ Gambling implements to be destroyed upon conviction.

Upon conviction of the defendant, the district attorney must cause to be destroyed every thing suitable for gambling purposes, in respect whereof the defendant stands convicted, and which remains in the possession or under the control of the district attorney.

§ 400.15

~~§4.~~ Seizures of slot machines and arrest of person in possession.

It shall be the duty of every officer authorized to make arrests to seize every machine, apparatus or device answering to the description contained in article 230 and to arrest the person actually or apparently in possession or control thereof or of the premises in which the same may be found, if any such person be present at the time of the seizure, and to bring the machine, apparatus or device, and the prisoner, if there be one, before a committing magistrate.

§ 400.20

~~§5.~~ Destruction of slot machines by magistrate.

The magistrate before whom any machine, apparatus or device is brought pursuant to section 400.15 must, if there be a prisoner, and if he shall hold such prisoner, cause the machine, apparatus or device to be delivered to the district attorney of the county to be used as evidence on the trial of the said prisoner. If there be no prisoner or if the magistrate does not hold the prisoner, he must cause the immediate destruction of the machine, apparatus or device.

§ 400.25

~~§6.~~ Destruction of slot machines by the trial court.

It shall be the duty of the district attorney of the county to see that every person held in pursuance of section 400.20 shall be brought to trial within thirty days from the date of his final examination before the magistrate; and the machine, apparatus or device shall be produced in court on the trial.

It shall be the duty of the trial court, after the disposition of the case, and whether the defendant be convicted, acquitted or fails to appear for trial, to cause the immediate destruction of the machine, apparatus or device.

X §400.30

~~§7.~~ Disposition of contents of destroyed gambling articles and apparatus.

X The officer destroying any article or apparatus suitable for gambling purposes pursuant to the provisions of section 400.25 shall pay over any moneys found in or on such article or apparatus to the police pension fund of the city in which such destruction occurs, or, if there be no such fund or such destruction occurs outside the city, such money shall be paid to the county treasurer of the county in which such destruction occurs, and shall be paid by such county treasurer into the general fund of such county and shall be available or expended for any lawful county purpose. If such article or apparatus have contents of value other than money, the same shall be sold by the officer destroying the article or apparatus and the proceeds disposed of as above provided for the disposition of money contents. The provisions of this section shall apply to any and all moneys heretofore found as herein described, and not otherwise disposed of in accordance with the provisions of law.

ARTICLE ~~2~~ 405

IN RELATION TO OBSCENITY

§ 405.00.

~~8.~~ Warrant to sheriff to search.

A magistrate having jurisdiction to issue warrants in criminal cases, upon complaint that any person within his jurisdiction is offending against the provisions of article 240, supported by oath or affirmation, must issue a warrant, directed to the sheriff or to any constable, marshal, or public officer within the county, directing him to search for, seize, and take possession of any of the articles specified in article 240, in the possession of the person against whom complaint is made. The magistrate must immediately transmit every article seized by virtue of the warrant, to the district attorney of the county, who must, upon conviction of the person from whose possession the same was taken, cause it to be destroyed, and the fact of such destruction to be entered upon the records of the court in which the conviction is had. Nothing in this section shall be construed as preventing the district attorney of any county, from delivering any seized article to a duly authorized agent of the federal bureau of investigation or of the New York state police or to a state or federal legislative committee, for the purpose of investigation, laboratory examination or classification.

§ 405.05

~~9.~~ Signature and forfeiture of equipment used in photographing, filming, producing, manufacturing, projecting or distributing pornographic still or motion pictures.

1. Any peace officer of this state may seize any equipment used in the photographing, filming, printing, producing, manufacturing or projecting of pornographic still or motion pictures and may seize any vehicle or other means of transportation, other than a vehicle or other menas of transportation used by any person as a common carrier in the transaction of business as such common carrier, used in the distribution of

such obscene prints and articles and such equipment or vehicle or other means of transportation shall be subject to forfeiture as hereinafter in this section provided.

2. The seized property shall be delivered by the peace officer having made the seizure to the custody of the district attorney of the county wherein the seizure was made, except that in the cities of New York and Buffalo, the seized property shall be delivered to the custody of the police department of such cities, together with a report of all the facts and circumstances of the seizure.

3. It shall be the duty of the district attorney of the county wherein the seizure was made, if elsewhere than in the cities of New York or Buffalo, and where the seizure is made in either such city it shall be the duty of the corporation counsel of the city, to inquire into the facts of the seizure so reported to him and if it appears probable that a forfeiture has been incurred, for the determination of which the institution of proceedings in the supreme court is necessary, to cause the proper proceedings to be commenced and prosecuted, at any time after thirty days from date of seizure, to declare such forfeiture, unless, upon inquiry and examination such district attorney or corporation counsel decides that such proceedings cannot probably be sustained or that the ends of public justice do not require that they should be instituted or prosecuted, in which case, the district attorney or corporation counsel shall cause such seized property to be returned to the owner thereof.

4. Notice of the institution of the forfeiture proceeding shall be served either (a) personally on the owners of the seized property, or (b) by registered mail to the owners' last known address and by publication of the notice once a week for two successive weeks in a newspaper published or circulated in the county wherein the seizure was made.

5. Forfeiture shall not be adjudged where the owners established by preponderance of evidence that (a) the use of such seized property was not intentional on the part of any owner, or (b) said seized property was used by any person other than an owner thereof,while such seized property was unlawfully in the possession of a person who acquired possession thereof in violation of the criminal laws of the United States, or of any state.

6. The district attorney or the police department having custody of the seized property, after such judicial determination of forfeiture, shall, by a public notice of at least five days, sell such property at public sale. The net proceeds of any such sale, after deduction of lawful expenses incurred, shall be paid into the general fund of the county wherein the seizure was made except that the net proceeds of the sale of property seized in the cities of New York and Buffalo shall be paid into the respective general funds of such cities.

7. Whenever any person interested in any property which is seized and declared forfeited under the provisions of this section files with a justice of the supreme court a petition for the recovery of such forfeited property, the justice of the supreme court may restore said forfeited property upon such terms and conditions as he deems reasonable and just, if the petitioner establishes either of the affirmative defenses set forth in subdivision five of this section and that the petitioner was without personal or actual knowledge of the forfeiture proceeding. If the petition be filed after the sale of the forfeited property, any judgment in favor of the petitioner shall be limited to the new proceeds of such sale, after deduction of the lawful expenses and costs incurred by the district attorney, police department or corporation counsel.

8. No suit or action under this section for wrongful seizure shall be instituted unless such suit or action is commenced within two years after the time when the property was seized.

9. For the purpose of this section only, a pornographic still or motion picture, is defined as a still or motion picture showing acts of sexual intercourse or acts of sexual perversion. This section shall not be construed as applying to bona fide medical photographs or films.

ARTICLE ~~31~~ 400.

IN RELATION TO FIREARMS AND OTHER DANGEROUS WEAPONS.

§ 410.00. ~~§10.~~ Destruction of weapons and dangerous instruments, appliances and substances.

1. Any weapon, instrument, appliance or substance specified in article 270, when unlawfully possessed, manufactured, transported or disposed of, or when surrendered or voluntarily delivered pursuant to section 270.20, is hereby declared a nuisance. When the same shall come into the possession of any peace officer, it shall be surrendered immediately to the official mentioned in paragraph (d) of subdivision one of section 270.20, except that such weapon, instrument, appliance or substance coming into the possession of the state police shall be surrendered to the superintendent of state police.

2. The official to whom the weapon, instrument, appliance or substance is so surrendered shall, at any time but at least once each year, destroy the same or cause it to be destroyed, or render the same or cause it to be rendered ineffective and useless for its intended purpose and harmless to human life.

3. Notwithstanding subdivision two of this section, the official to whom the weapon, instrument, appliance or substance is so surrendered shall not destroy the same if (a) a judge or justice of a court of record, or a district attorney, shall file with the official a certificate that the non-destruction thereof is necessary or proper to serve the ends of justice; or (b) the official directs that the same be retained in any laboratory conducted by any police or sheriff's department for the purpose of research, comparison, identification or other endeavor toward the prevention and detection of crime.

4. In the case of any machine-gun or firearm taken from the possession of any person, the official to whom such

weapon is surrendered pursuant to subdivision one of this section shall immediately notify the executive department, division of state police, Albany, giving the calibre, make, model, manufacturer's name and serial number, or if none, any other distinguishing number or identification mark. A search of the files of such division and notification of the results of the search to such official shall immediately be made.

5. Before any machine-gun or firearm is destroyed pursuant to subdivision two of this section, (a) the official to whom the same has been surrendered shall forward to the executive department, division of state police, Albany, a notice of intent to destroy and the calibre, make, model, manufacturer's name and serial number, or if none, any other distinguishing number or identification mark of the machine-gun or firearm; (b) such division shall make and keep a record of such description together with the name and address of the official reporting the same and the date such notice was received; and (c) a search of the files of such division and notification of the results of the search to such official shall be made without unnecessary delay.

ARTICLE 415.

IN RELATION TO FIREWORKS

§ 415.00 Seizure and destruction of fireworks.

Fireworks possessed unlawfully may be seized by any peace officer, who must deliver the same to the magistrate before whom the person arrested is required to be taken. The magistrate must, upon examination of the defendant, or if such examination is delayed or prevented, without awaiting such examination, determine whether the fireworks had been possessed by the defendant in violation of the provisions of section 275.00; and if he finds that the fireworks had been so possessed by the defendant, he must cause such fireworks to be destroyed, in a way safe for the particular type of such fireworks, or to be delivered to the district attorney of the county in which the defendant is liable to indictment or trial, as the interests of justice and public safety may, in his opinion, require. Upon the conviction of the defendant, the district attorney must cause to be destroyed, in a way safe for the particular type of such fireworks, the fireworks in respect whereof the defendant stands convicted, and which remain in the possession or under the control of the district attorney.

TITLE ~~II~~ W

LICENSING PROVISIONS

ARTICLE ~~[illegible]~~ 420

IN RELATION TO FIREARMS

§ 420.00 ~~§ 1.~~ Licenses to carry, possess, repair and dispose of firearms.

1. Eligibility. No license shall be issued or renewed pursuant to this section except by the licensing officer, and then only after investigation and finding that all statements in a proper application for a license are true. No license shall be issued or renewed except for an applicant (a) of good moral character; (b) who has not been convicted anywhere of a felony or any one of the misdemeanors or offenses mentioned in section five hundred fifty-two of the code of criminal procedure; (c) who has stated whether he has ever suffered any mental illness or been confined to any hospital or institution, public or private, for mental illness; and (d) concerning whom no good cause exists for the denial of the license. No person shall engage in the business of gunsmith or dealer in firearms unless licensed pursuant to this section. An applicant to engage in such business shall also be a citizen of the United States, more than twenty-one years of age and maintain a place of business in the city or county where the license is issued. For such business, if the applicant is a firm or partnership, each member thereof shall comply with all of the requirements set forth in this subdivision and if the applicant is a corporation, each officer thereof shall so comply.

2. Types of licenses. A license for gunsmith or dealer in firearms shall be issued to engage in such business. A license for a pistol or revolver shall be issued to (a) have and possess in his dwelling by a householder; (b) have and possess in his place of business by a merchant or storekeeper; (c) have and carry concealed while so employed by a messenger

employed by a banking institution or express company; (d) have and carry concealed while so employed by a regular employee of an institution of the state, or of any county, city, town or village, under control of a commissioner of correction of the city or any warden, superintendent or head keeper of any state prison, penitentiary, workhouse, county jail or other institution for the detention of persons convicted or accused of crime or held as witnesses in criminal cases, provided that application is made therefor by such commissioner, warden, superintendent or head keeper; and (e) have and carry concealed, without regard to employment or place of possession, by any person when proper cause exists for the issuance thereof.

3. Applications. Applications shall be made and renewed, in the case of a license to carry or possess a pistol or revolver, to the licensing officer in the city or county, as the case may be, where the applicant resides, is principally employed or has his principal place of business as merchant or storekeeper; and, in the case of a license as gunsmith or dealer in firearms, to the licensing officer where such place of business is located. Blank applications shall, except in the city of New York, be approved as to form by the superintendent of state police. An application shall state the full name, date of birth, residence, present occupation of each person or individual signing the same, whether or not he is a citizen of the United States, whether or not he complies with each requirement for eligibility specified in subdivision one of this section and such other facts as may be required to show the good character, competency and integrity of each person or individual signing the application. An application shall be signed and verified by the applicant. Each individual signing an application shall submit one photograph of himself and a duplicate for each required copy of the application. Such photographs shall have been taken within thirty days prior to filing the application. In case of a

license as gunsmith or dealer in firearms, the photographs submitted shall be two inches square, and the application shall also state the previous occupation of each individual signing the same and the location of the place of such business, or of the bureau, agency, subagency, office or branch office for which the license is sought, specifying the name of the city, town, or village, indicating the street and number and otherwise giving such apt description as to point out reasonably the location thereof. In such case, if the applicant is a firm, partnership or corporation, its name, date and place of formation, and principal place of business shall be stated. For such firm or partnership, the application shall be signed and verified by each individual composing or intending to compose the same, and for such corporation, by each officer thereof.

4. Investigation. Before a license is issued or renewed, there shall be an investigation of all statements required in the application by the duly constituted police authorities of the locality where such application is made. For that purpose, the records of the department of mental hygiene concerning previous or present mental illness of the applicant shall be available for inspection by the investigating officer of the police authority. In order to ascertain any previous criminal record, the investigating officer shall take the fingerprints and physical descriptive data in quadruplicate of each individual by whom the application is signed and verified. Two copies of such fingerprints shall be taken on standard fingerprint cards eight inches square, and one copy may be taken on a card supplied for that purpose by the federal bureau of investigation. When completed, one standard card shall be forwarded to and retained by the division of criminal identification, department of correction, at Albany. A search of the files of such division and written notification of the results of the search to the investigating officer shall be made without unnecessary delay. Thereafter,

such division shall notify the licensing officer and the executive department, division of state police, Albany, of any criminal record of the applicant filed therein subsequent to the search of its files. A second standard card, or the one supplied by the federal bureau of investigation, as the case may be, shall be forwarded to that bureau at Washington with a request that the files of the bureau be searched and notification of the results of the search be made to the investigating police authority. Of the remaining two fingerprint cards, one shall be filed with the executive department, division of state police, Albany, within ten days after issuance of the license, and the other remain on file with the investigating police authority. No such fingerprints may be inspected by any person other than a peace officer, except on order of a judge or justice of a court of record either upon notice to the licensee or without notice, as the judge or justice may deem appropriate. Upon completion of the investigation, the police authority shall report the results to the licensing officer without unnecessary delay.

5. Filing of approved applications. The application for any license, if granted, shall be a public record. Such application shall be filed by the licensing officer with the clerk of the county of issuance, except that in the city of New York and county of Nassau, the licensing officer shall designate the place of filing in the appropriate division, bureau or unit of the police department thereof. A duplicate copy of such application shall be filed by the licensing officer in the executive department, division of state police, Albany, within ten days after issuance of the license.

6. License: validity. Any license issued pursuant to this section shall be valid notwithstanding the provisions of any local law or ordinance. No license shall be transferable to any other person or premises. A license to carry or possess a pistol or revolver, not otherwise limited as to place or time

of possession, shall be effective throughout the state, except that the same shall not be valid within the city of New York unless a special permit granting validity is issued by the police commissioner of that city. A license as gunsmith or dealer in firearms shall not be valid outside the city or county, as the case may be, where issued.

7. License: form. Any license issued pursuant to this section shall, except in the city of New York, be approved as to form by the superintendent of state police. A license to carry or possess a pistol or revolver shall have attached the licensee's photograph, and a coupon which shall be removed and retained by any person disposing of a firearm to the licensee. Such license shall specify the weapon covered by calibre, make, model, manufacturer's name and serial number, or if none, by any other distinguishing number or identification mark, and shall indicate whether issued to carry on the person or possess on the premises, and if on the premises shall also specify the place where the licensee shall possess the same. If such license is issued to an alien, or to a person not a citizen of and usually a resident in the state, the licensing officer shall state in the license the particular reason for the issuance and the names of the persons certifying to the good character of the applicant. Any license as gunsmith or dealer in firearms shall mention and describe the premises for which it is issued and shall be valid only for such premises.

8. License: exhibition and display. Every licensee while carrying a pistol or revolver shall have on his person a license to carry the same. Every person licensed to possess a pistol or revolver on particular premises shall have the license for the same on such premises. Upon demand, the license shall be exhibited for inspection to any peace officer. A license as gunsmith or dealer in firearms shall be prominantly displayed on the licensed premises. Failure of any licensee to so exhibit or

display his license, as the case may be, shall be presumptive evidence that he is not duly licensed.

9. License: amendment. Elsewhere than in the city of New York, a person licensed to carry or possess a pistol or revolver may apply at any time to his licensing officer for amendment of his license to include one or more such weapons or to cancel weapons held under license. If granted, a record of the amendment describing the weapons involved shall be filed by the licensing officer in the executive department, division of state police, Albany.

10. License: expiration and renewal. Any license for gunsmith or dealer in firearms and, in the city of New York and the counties of Nassau and Suffolk, any license to carry or possess a pistol or revolver, issued at any time pursuant to this section or prior to the first day of July, ninetwen hundred sixty-three and not limited to expire on an earlier date fixed in the license, shall expire on the first day of the second January after the date of issuance. Elsewhere than in the city of New York and the counties of Nassau and Suffolk, any license to carry or possess a pistol or revolver, issued at any time pursuant to this section or prior to the first day of July, nineteen hundred sixty-three and not previously revoked or cancelled, shall be in force and effect until revoked as herein provided. Any application to renew a license that has not previously expired, been revoked or cancelled shall thereby extend the term of the license until disposition of the application by the licensing officer. In the case of a license for gunsmith or dealer in firearms, in counties having a population of less than two hundred thousand inhabitants, photographs and fingerprints shall be submitted on original applications and upon renewal thereafter only at six year intervals.

11. License: revocation. The conviction of a licensee anywhere of a felony or any one of the misdemeanors or offenses

mentioned in section five hundred fifty-two of the code of criminal procedure shall operate as a revocation of the license. A license may be revoked and cancelled at any time in the city of New York and county of Nassau by the licensing officer, and elsewhere than in the city of New York by any judge or justice of a court of record. The official revoking a license shall give written notice thereof without unnecessary delay to the executive department, division of state police, Albany, and shall also notify immediately the duly constituted police authorities of the locality.

12. Records required of gunsmiths and dealers in firearms. Any person licensed as gunsmith or dealer in firearms shall keep a record book approved as to form, except in the city of New York, by the superintendent of state police. In the record book shall be entered at the time of every transaction involving a firearm the date, name, age, occupation and residence of any person from whom a firearm is received or to whom a firearm is delivered, and the calibre, make, model, manufacturer's name and serial number, or if none, any other distinguishing number or identification mark on such firearm. Before delivering a firearm to any person, the licensee shall require him to produce either a license valid under this section to carry or possess the same, or proof of lawful authority as a peace officer or other exempt person pursuant to section nineteen hundred. The licensee shall remove and retain the attached coupon and enter in the record book the date of such license, number, if any, and name of the licensing officer, in the case of the holder of a license to carry or possess, or the shield or other number, if any, assignment and department or unit, in the case of an exempt person. The record book shall be maintained on the premises mentioned and described in the license and shall be open at all reasonable hours for inspection by any peace officer. In the event of cancellation or revocation of the license for gunsmith

or dealer in firearms, or discontinuance of business by a licensee, such record book shall be immediately surrendered to the licensing officer in the city of New York and county of Nassau, and elsewhere in the state to the executive department, division of state police.

13. Expenses. The expense of providing a licensing officer with blank applications, licenses and record books for carrying out the provisions of this section shall be a charge against the county, and in the city of New York against the city.

14. Fees. In the city of New York, the annual license fee shall be twenty-five dollars for gunsmiths and fifty dollars for dealers in firearms. In such city, the city council shall fix the fee to be charged for a license to carry or possess a pistol or revolver and provide for the disposition of such fees. Elsewhere in the state, the licensing officer shall collect and pay into the county treasury the following fees: for each license to carry or possess a pistol or revolver, not less than three dollars nor more than five dollars as may be determined by the board of supervisors of the county; for each amendment thereto, one dollar, and two dollars in the county of Suffolk; and for each license issued to a gunsmith or dealer in firearms, four dollars.

X 15. Any violation by any person of any provision of this section is a class A misdemeanor.

ARTICLE ~~2~~ 425

IN RELATION TO FIREWORKS

§ 425.00

~~§ 2.~~ Permits for public displays of fireworks.

1. Definition of "permit authority." The term "permit authority," as used in this section, means and includes the agency authorized to grant and issue the permits provided in this section, which agency in the territory within a state park shall be the regional state park commission, in the territory within a county park shall be the county park commission, or such other agency having jurisdiction, control ~~and~~ or/operation of the parks or parkways within which any fireworks are to be displayed, in a city shall be the duly constituted licensing agency thereof and, in the absence of such agency, shall be an officer designated for the purpose of the legislative body thereof, in a village shall be an officer designated for the purpose by the board of trustees thereof and in the territory of a town outside of villages shall be an officer designated for the purpose by the town board thereof.

2. Permits for public displays. Notwithstanding the provisions of section 275.00, the permit authority of a state park, county park, city, village or town may, upon application in writing, grant a permit for the public display of fireworks by municipalities, fair associations, amusement parks or organizations of individuals. The application for such permit shall set forth:

(a) The name of the body sponsoring the display and the names of the persons actually to be in charge of the firing of the display.

(b) The date and time of day at which the display is to be held.

(c) The exact location planned for the display.

(d) The age, experience and physical characteristics of the persons who are to do the actual discharging of the fireworks.

(e) The number and kind of fireworks to be discharged.

(f) The manner and place of storage of such fireworks prior to the display.

(g) A diagram of the grounds on which the display is to be held showing the point at which the fireworks are to be discharged, the location of all buildings, highways and other lines of communication, the lines behind which the audience will be restrained and the location of all nearby trees, telegraph or telephone lines or other overhead obstructions.

(h) Such other information as the permit authority may deem necessary to protect persons or property.

3. Applications for permits. All applications for permits for the public display of fireworks shall be made at least five days in advance of the date of the display and the permit shall contain provisions that the actual point at which the fireworks are to be fired shall be at least two hundred feet from the nearest permanent building, public highway or railroad or other means of travel and at least fifty feet from the nearest above ground telephone or telegraph line, tree or other overhead obstruction, that the audience at such display shall be restrained behind lines at least one hundred and fifty feet from the point at which the fireworks are discharged and only persons in active charge of the display shall be allowed inside these lines, that all fireworks that fire a projectile shall be so set up that the projectile will go into the air as nearly as possible in a vertical direction, unless such fireworks are to be fired from the shore of a lake or other large body of water, when they may be directed in such manner that the falling residue from the deflagration will fall into such

lake or body of water, that any fireworks that remain unfired after the display is concluded shall be immediately disposed of in a way safe for the particular type of fireworks remaining, that no fireworks display shall be held during any wind storm in which the wind reaches a velocity of more than thirty miles per hour, that all the persons in actual charge of firing the fireworks shall be over the age of eighteen years, competent and physically fit for the task, that there shall be at least two such operators constantly on duty during the discharge and that at least two sodaacid or other approved type fire extinguishers of at least two and one-half gallons capacity each shall be kept at as widely separated points as possible within the actual area of the display. The legislative body of a state park, county park, city, village or town may provide for approval of such permit by the head of the police or fire department or both where there are such departments. No permit granted and issued hereunder shall be transferable. After such permit shall have been granted, sales, possession, use and distribution of fireworks for such display shall be lawful solely therefor.

4. Bonds. Before granting and issuing a permit for a public display of fireworks as herein provided, the permit authority shall require an adequate bond from the applicant therefor, unless it is a state park, county park, city, village or town, or from the person to whom a contract for such display shall be awarded, in a sum to be fixed by the permit authority, which, however, shall not be less than five thousand dollars, conditioned for the payment of all damages, which may be caused to a person or persons or to property, by reason of the display so permitted and arising from any acts of the permittee, his agents, employees, contractors or subcontractors. Such bond shall run to the state park, county park, city, village or

town in which the permit is granted and issued and shall be for the use and benefit of any person or persons or any owner or owners of any property so injured or damaged, and such person or persons or such owner or owners are hereby authorized to maintain an action thereon, which right of action also shall accrue to the heirs, executors, administrators, successors or assigns of such person or persons or such owner or owners. The permit authority may accept, in lieu of such bond, an indemnity insurance policy with liability coverage and indemnity protection equivalent to the terms and conditions upon which such bond is predicated and for the purposes herein provided.

TITLE ~~III~~ X

CIVIL PROVISIONS

ARTICLE ~~A~~ 430

IN RELATION TO GAMBLING

§430.00 ~~§ 1.~~ Illegal wagers, bets and stakes.

All wagers, bets or stakes, made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contigent event whatever, shall be unlawful.

§430.05 ~~§ 2.~~ Contracts on account of money or property wagered, bet or staked are void.

All contracts for or on account of any money or property, or thing in action wagered, bet or staked, as provided in article 230 _____, shall be void.

§430.10 ~~§ 3.~~ Securities for money lost at gaming void.

All things in action, judgments, mortgages, conveyances, and every other security whatsoever, given or executed, by any person, where the whole or any part of the consideration of the same shall be for any money or other valuable thing won by playing at any game whatsoever, or won by betting on the hands or sides of such as do play at any game, or where the same shall be made for the repaying any money knowingly lent or advanced for the purpose of such gaming or betting aforesaid, or lent or advanced at the time and place of such play, to any person so gaming or betting aforesaid, or to any person who during such play, shall play or bet, shall be utterly void, except where such securities, conveyances or mortgages shall affect any real estate, when the same shall be void as to the grantee therein, so far only as hereinafter declared.

When any securities, mortgages or other conveyances, executed for the whole or part of any consideration specified in

the preceding paragraph shall affect any real estate, they shall inure for the sole benefit of such person as would be entitled to the said real estate, if the grantor or person incumbering the same, had died, immediately upon the execution of such instrument, and shall be deemed to be taken and held to and for the use of the person who would be so entitled. All grants, convenants and conveyances, for preventing such real estate from coming to, or devolving upon, the person hereby intended to enjoy the same as aforesaid, or in any way incumbering or charging the same, so as to prevent such person from enjoying the same fully and entirely, shall be deemed fraudulent and void.

X §430.15.

~~§ 4.~~ Certain transfers of property in pursuance of lottery, void.

Every grant, bargain, sale, conveyance, or transfer of any real estate, or of any goods, chattels, things in action, or any personal property, which shall hereafter be made in pursuance of any lottery, or for the purpose of aiding and assisting in such lottery, game or other device, to be determined by lot or chance is hereby declared void and of no effect.

X §430.20.

~~§ 5.~~ Contracts, agreements and securities on account of lottery, void.

All contracts, agreements and securities given, made or executed, for or on account of any lottery, or distribution of money, goods or things in action, for the payment of any money, or other valuable thing, in consideration of a chance in such lottery or distribution, or for the delivery of any money, goods or things in action, so raffled for, or agreed to be distributed as aforesaid, shall be utterly void.

X §430.25.

~~§ 6.~~ Property staked may be recovered.

Any person who shall pay, deliver or deposit any money, property or thing in action, upon the event of any wager or

bet prohibited, may sue for and recover the same of the winner or person to whom the same shall be paid or delivered, and of the stakeholder or other person in whose hands shall be deposited any such wager, bet or stake, or any part thereof, whether the same shall have been paid over by such stakeholder or not, and whether any such wager be lost or not.

§ 430.30.

~~§ 7.~~ Losers of certain sums may recover them.

Every person who shall, by playing at any game, or by betting on the sides or hands of such as do play, lose at any time or sitting, the sum or value of twenty-five dollars or upwards, and shall pay or deliver the same or any part thereof, may, within three calendar months after such payment or delivery, sue for and recover the money or value of the things so lost and paid or delivered, from the winner thereof.

In case the person losing such sum or value shall not, within the time aforesaid, in good faith and without collusion, sue for the sum or value so by him lost and paid or delivered, and prosecute such suit to effect without unreasonable delay, the overseers of the poor of the town where the offense was committed, may sue for and recover the sum or value so lost and paid, together with treble the said sum or value, from the winner thereof, for the benefit of the poor.

§ 430.35

~~§ 8.~~ Money paid for lottery tickets may be recovered by action.

Any person who shall purchase any share, interest, ticket, certificate of any share or interest, or part of a ticket, or any paper or instrument purporting to be a ticket or share or interest in any ticket, or purporting to be a certificate of any share or interest in any ticket, or in any portion of any lottery, may sue for and recover double the sum of money, and double the value of goods or things in action, which he may have paid or delivered in consideration of such purchase, with

double costs of suit.

Any person who shall have paid any money, or valuable thing, for a chance or interest in any lottery or distribution, prohibited by article 230, may sue for and recover the same of the person to whom such payment or delivery was made.

§ 430.40.

~~§ 9.~~ Property offered for disposal in lotteries, forfeited.

All property offered for sale, or distribution, in violation of article 230, is forfeited to the people of this state, whether before or after the determination of the chance on which the same was dependent. And it is the duty of the respective district attorneys, to demand, sue for and recover, in behalf of the people, all property so forfeited, and to cause the same to be sold when recovered, and to pay the proceeds of the sale of such property, and any moneys that may be collected in any such suit, into the county treasury, for the benefit of the poor.

§ 430.45.

~~§ 10.~~ Prizes in lotteries, forfeited.

Any prize that shall be drawn in any lottery shall be forfeited to the use of the poor; and it shall be the duty of the overseers of the poor of the town where the person or persons drawing such prize, or any of them, shall reside, to sue for the same, in their names; and they shall recover the same, in an action for money had and received.

§ 430.50.

~~§ 11.~~ Removal of tenants using premises for game of policy.

Any person having information of any place, building or room where policy playing or the sale of what are commonly called "lottery policies" is carried on, may serve personally upon the owner, landlord, agent, superintendent, janitor or caretaker of the premises, so used or occupied, a written notice, requiring the owner, landlord, agent, superintendent, janitor or caretaker, to make an application for the removal

Repealed L 1962, c. 310, eff. 9/1/63

of the person so using or occupying the same. If the owner, landlord, agent, superintendent, janitor or caretaker, does not make such an application within five days thereafter, or, having made it, does not in good faith diligently prosecute it, the person giving the notice may make such an application, stating in his petition, the facts so entitling him to make it. Such an application has the same effect, as if the applicant were the landlord or lessor of the premises. The omission, or neglect of the owner, landlord, agent, superintendent, janitor or caretaker, to make such an application, or having made it, the omission or neglect in good faith diligently to prosecute it, shall be presumptive evidence against the person on whom such notice shall be served of a violation of the provisions of article 230. And in case the person giving said notice shall make an application as hereinbefore provided, and a final order shall be made as specified in real property actions and procedure law such order shall be evidence of a violation of the provisions of article 230 by the occupant of said premises and by the person on whom the notice herein provided for shall have been served. For the purpose of such applications, summary proceedings to recover possession of the premises so used or occupied may be maintained under the provisions of the real property actions and procedure law.

ARTICLE 2 435

IN RELATION TO PROSTITUTION

§ 435.00, ~~§ 12~~. Removal of tenants using premises for prostitution purposes.

When the tenant, proprietor, or keeper of premises being used for prostitution purposes is convicted under article 235, the lease or contract for letting the premises or the part thereof in which such violation occurred shall, at the option of the owner, agent or lessor, become void and the owner, agent or lessor may have the like remedy to recover the possession as against a tenant holding over after the expiration of his term.

10/10/63

MEMORANDUM IN EXPLANATION OF TITLE J.

(OFFENSES INVOLVING THEFT OF PROPERTY)

Title J in general

This Title, labeled "Offenses Involving Theft of Property," contains four articles:

Art. 155 -- Larceny

Art. 160 -- Robbery

Art. 165 -- Extortion

Art 170 -- Other Offenses Relating to Theft

The first three articles deal with the three main theft offenses. The fourth (Art. 170) collates and creates several offenses which do not constitute larceny as such but are closely related thereto and have a distinct flavor of "theft" - a term which has no specific legal meaning in this code and which is here used merely as a word of general description.

Article 155 - Larceny

In general

The existing Penal Law Article covering the area of larceny is Article 122, and the basic statute defining the crime of larceny is §1290.

Prior to 1942, larceny was defined in §1290 in terms of, and by enumeration of, the specific common law offenses which are generally deemed to comprise the crime of larceny; stealing by (1) physical taking or asportation; (2) embezzlement; (3) false pretenses; and (4) trick and device [Penal Law (1941) §1290].

The effect of that definition was to require the prosecutor to select, plead and prove a particular theory of larceny in each case and to permit the defendant-theif to escape conviction and punishment if the chosen theory turned out to be incorrect. Since the distinction between the forms of larceny are in many instances extremely fine, many a defendant clearly guilty of "stealing" and "larceny" slipped through the fingers of the law by virtue of sophistic technicalities. [See People v. Noblett 244 N. Y. 355, 359-360, 368 (1927); People v. Miller 169 N. Y. 339, 351-352 (1902);

Smith v. People 53 N. Y. 111, 113-114 (1873)]

That situation was rectified by legislation in 1942 (see present §1290, 1290-a). Although larceny still consists of the old common law forms, it is now defined in general terms of unlawful acquisition of property with intent to deprive, defraud, or appropriate. Generally speaking, it may be charged in that simple language without specific designation of embezzlement, trick and device, etc., and proof of any form of larceny suffices to establish guilt thereof. The old technical distinctions based upon such considerations as where title or possession lay at a particular moment are eliminated (§1290).

The proposed Penal Law approves and follows the existing pattern in that respect , making no drastic change of substance in the basic law of larceny.

As indicated below, however, there are many relatively minor but important changes of substance was well as considerable changes of form.

§ 155.00 Definitions of terms

This article begins with a section chiefly designed to clarify certain existing and here adopted principles of larceny, by definition of five key terms: "property," "obtain," "deprive," "appropriate," and "owner." Although these definitions are largely self-explanatory, the following observations are in order.

The definition of "property" is expanded to include "real property" (cf. Penal Law, §1290, first par.). Especially in view of the next definition (of the word "obtain"), immovable real property as well as personal property may readily be transferred in such fashion as to be the subject of larceny. It is doubtful, however, that this extension materially enlarges the present law, for larcenous conduct resulting in a wrongful acquisition of real property almost invariably involves a wrongful acquisition of some written instrument constituting personal property, which is, of course, a subject of larceny under present law.

The terms "deprive" and "appropriate" are defined in order to give meaning to the larcenous intent designated in the following section: "intent to deprive another of property" or "to appropriate" it (§155.05; see, also, Penal Law, §1290). By virtue of these definitions, the intent must be, in effect, to deprive the owner of his property or of the use thereof completely or almost completely, or to appropriate the same to oneself or another completely or almost completely. It is this intent that distinguishes larceny from other subsequently treated offenses in which an intent merely to borrow or to use for a time is sufficient.

§155.05 Definition of larceny

Subdivision 1 of this section contains a general definition of larceny which is in substance the same as the existing one (Penal Law §1290) but which is more briefly phrased, such brevity being permitted by the definitions of the previous section.

Subdivision 2 first confirms that larceny includes the four above-mentioned common law forms or offenses. It then proceeds, for reasons set forth below, to encompass, also, two types of larcenous conduct presently defined in separate or individual statutes.

The Penal Law contains several sections which define specific offenses and then declare offenders to be "guilty of larceny," sometimes adding, "and punishable accordingly." Typical of these are the statutes defining the crimes of "appropriating lost property" (§1300), issuing a bad check (where a present consideration is obtained therefor) (§1292-a), and what is commonly known as joy-riding (§1293-a).

It would seem that, if an offense does not actually fall within the definition of larceny, it should not be treated as larceny; and that if it does constitute larceny it should be included within the definition thereof and not separately defined.

As subsequently indicated, "joy-riding" as such does not, because of intent factors, constitute larceny and is not here defined in terms thereof (see §170.10). However, obtaining property by means of a bad check and culpably appropriating property

of another which one knows to have been lost or mislaid, do appear to constitute larceny when committed with the described larcenous intent. Accordingly, those two "offenses" are not separately defined and punished but are, instead, expressly included within the definition of larceny. In this connection, it may be added that the existing Penal Law separately defines several other theft offenses which so clearly fall within the general definition of larceny that they are not mentioned in this proposed code, either by special statute or by express inclusion in the definition of larceny (see Penal Law §§930, 937, 988, 1293, 1313; see, also, §§925-b, 949, 963, 1302-b, 1302-c, 1310).

Subdivision 3 of §155.05, merely repeating the latter part of present §1290, ennumerates several factors-largely relating to the location of title or possession of unlawfully obtained property-which formerly served to distinguish between the various forms of the crime and thereby to defeat many larceny prosecutions on technical grounds, and declares that these factors or circumstances no longer constitute defenses.

§ 155.10 Pleading and proof

This section carries over into the proposed coce the main feature of present Penal Law §1290-a, relating to the simplified pleading and proof of larceny. No longer is it necessary, the statute declares, to allege a specific form of larceny (by asportation, embezzlement, etc.), but the crime, regardless of its basic nature, may be charged in the general language of the statute defining larceny (§155.05, subd. 1); and a conviction based upon proof establishing larceny as so defined is valid regardless of what form of the offense may be spelled out by the evidence.

The proposed section differs from the existing one, however, in one important respect.

The 1942 Penal Law ammendments retained one traditional feature of the larceny area, dealing with the pleading and proof of larceny of the false pretense variety. Despite the general

simplification of pleading and proof, §1290-a once required that, if the theft "was effected" by means of any false representation, proof of such misrepresentation could not be received unless specifically alleged in the indictment or information, adding that such an allegation permitted proof of any other unalleged but "related representation or pretense." This requirement was made more rigid by a 1950 amendment (the present law) which demands the allegation of a false pretense not only when the larceny was "effected thereby" but when "the defendant made use of" it "in the course of accomplishing, or in aid of, or in facilitating the theft" (§1290-a). Thus, a false representation must now be alleged not only where the theory of the case is false pretenses but in every larceny case, whether of false pretense, embezzlement or any other form, where some false statement by the defendant played a part in the crime.

It is difficult to discern any logical basis for either requirement. Presumably, the purposes are (1) to earmark the particular form of larceny in issue, and (2) to point out to the defendant at least one of the misrepresentations upon which the case is predicated. The first purpose is antithetical to the entire principle of simplification so laboriously wrought by the 1942 amendments. The second is inconsistent with the modern pleading pattern of the Penal Law, which advocates brevity and generality for the charge and leaves specificity and detail to the bill of particulars. In the existing scheme, there is no more necessity for specification of a particular false representation in a larceny case than there is for specification of a particular threat in an extortion or coercion case, or, for that matter, of the particular means by which a crime was committed in any other kind of case.

In brief, this phase of present §1290-a is not based on logic, is at odds with modern simplified pleading and procedural theories which the very sections in issue otherwise seek to apply to the

larceny area, and it survives solely as a vestige of tradition. Accordingly, it is here excised.

§155.15 Value of stolen property, how ascertained

Rules for evaluating stolen property are found in __1303, 1304 and 1305 of the present Penal Law. The general principle is that "market value" determines (§1305), but more complex standards are enunciated with respect to commercial documents and other written instruments (§1303).

Proposed §155.15 is addressed to clarification and partial alteration of these standards.

While "market value" is probably as workable a standard as any for the average item, it may not suffice in some instances: for example, linens with expensive embroidered initials which decrease or render indeterminable the market value of the linens but enhance their worth to the particular possessor. Borrowing from the recent Proposed Minnesota Criminal Code (§609.52), subdivision 1 of proposed §155.15 makes market value the regular standard but, "in case such cannot be satisfactorily ascertained," it substitutes "the cost of replacement of the property within a reasonable time after the larceny."

Subdivision 2, dealing with the value of stolen written instruments, substantially adopts the standards of present §1303. These are considerably clarified, however, by grouping the kinds of instruments involved into three categories and by expressly specifying the standard of value applicable to each category.

Subdivision 3 declares that, if the value of an item cannot be determined by reference to the first two subdivisions, it shall be deemed to be less than $100.00.

§§ 155.20, 155.25, 155.30, 155.35 Petit larceny and grand larceny in the third, second and first degrees

Larceny is here divided into four degrees in contrast to the three degrees of the present Penal Law.

The simplicity and greater accuracy achieved by first defining the lowest degree of a "degree" crime and then adding the

aggravating or degree-increasing factors as one ascends the ladder, is aptly illustrated by comparing these four sections with their counterparts in the existing Penal Law where the customary descending system is employed (§§1294, 1296, 1298).

The basic offense is, of course, always the lowest degree. This is necessarily committed upon every commission of a higher degree, which is the reason why a defendant charged with a higher degree may always be properly convicted of the lowest. Accordingly, petit larceny is defined as any stealing of property (§155.20), as those words are defined in preceding sections.

The crime is raised to grand larceny in the third degree (§155.25) when, as is the case under the existing second degree section (P. L., §1296), any of three aggravating factors is present: (1) the value of the property exceeds $100, or (2) it consists of a public record, or (3) it is taken from the person.

The proposed second and first degree offenses (§§155.30, 155.35) differ materially from the existing first degree crime (§1294), which is raised to its high stature by virtue of any of the following three aggravating factors: (1) a taking from the person in the night time; or (2) the property exceeds $25 in value and is taken from a "dwelling-house, vessel, or railway car" in the night time; or (3) the value of the property exceeds $500.

The first two criteria or series of criteria, emphasizing the "night time," dwelling-houses, vessels and railway cars, are not carried over into proposed §§155.30 and 155.35. In general, these are aggravating factors more appropriate to burglary and arson than to larceny, which is not in itself a dangerous crime of violence, destruction or intrusion. A taking from the person here constitutes third degree grand larceny in any event (§155.25), and little purpose is to be served by attaching first or second dgreee liability to, for example, a surreptitious theft of $5 from the person because it happens to occur at night. Similarly, a theft from a "dwelling-house" or "vessel" (P. L., §1294, subd. 2),

whether amounting to $25 or any other sum, will almost invariably constitute burglary, especially under this proposed code where a "breaking" is no longer an element of the latter crime (§§140.25, 140.30, 140.35).

The proposed second and first degree offenses, therefore, rest solely upon the value of the property stolen. For reasons set forth below, the present $500 demarcation line (§1294, subd. 3) is here raised to $100 for the second degree offense and to $10,000 for the first degree offense.

Before proceeding further on this subject, it will be helpful to compare the degree structures of the existing and proposed larceny sections with reference to the factors of pecuniary value of the stolen property and maximum sentences imposable with respect to each degree:

	Existing Law	Proposed Law
	Petit Larc.	
Value of Property	up to $100	up to $100
Maximum sentence	misd. (1 yr.)	misd. (1 yr.)
	Grand Larc. 2nd.	Grand Larc. 3rd.
Value of property	$100-$500	$100-$1000
Maximum sentence	5 yrs.	4 yrs. (Class E felony)
	Grand Larc. 1st.	Grand Larc. 2nd.
Value of property	$500-infinity	$1000-$10,000
Maximum sentence	10 yrs.	7 yrs. (Class D felony)
		Grand Larc. 1st.
Value of property		$10,000-infinity
Maximum sentence		15 yrs. (Class C felony)

Disregarding for the moment the highest or first degree section of the "proposed" group, it may be observed that the other two proposed felony offenses carry somewhat lesser penalties than their existing counterparts. It is believed that even large thefts committed without force and without intrusion upon real property should entail sentences less than those for first degree

burglary and second degree robbery (class C felonies), and that, generally speaking, a sentence carrying a seven year maximum is adequate punishment for most larcenies, even those involving several thousand dollars worth of property. It is true that thefts between $1,000 and $10,000 are subject to a ten year maximum under existing law and to only a seven year maximum under the proposed article; and that thefts of between $500 and $1,000 presently carry a ten year maximum also, as contrasted to a mere four year maximum under the proposed article. This is partially due to the fact that the upper limit of the lower felony offense is here raised from $500 to $1000, a proposal emanating from the circumstance that the dollar has decreased mightily in value over the past many years, concomitantly decreasing the pecuniary significance of larcenies of the $500 to $1000 class.

Despite the foregoing, there is one category of larceny for which adequate punishment is not provided even under the existing provisions with their ten year maximum for the highest degree of the offense (see P. L., §1295). This is the huge stock swindle, confidence game or jewelry theft involving tens or even hundreds of thousands of dollars. With these in mind, another degree of larceny is added to the proposed structure. This provision (prescribing a new first degree offense) renders a theft of more than $10,000 a class C felony, thus subjecting the grandiose offender to a fifteen year maximum penalty instead of the ten year maximum now prevailing.

Article 160 - Robbery

This robbery article, consisting of three sections, does not make any earth-shaking changes in the present law.

§ 160 Definition of robbery or forcible stealing

The definition of robbery or "forcible stealing" here propounded is substantially the same as that collectively enunciated in existing Penal Law §§ 2120 and 2121. The proposed definition is more thorough and precise, however, in that (1) it explicitly requires the same intent for robbery - an aggravated form of larceny- as for the included crime of larceny, and (2) it more clearly and accurately describes the kinds of fear production essential to a robbery case not involving actual physical force.

The proposed definition differs materially from the existing definition in one respect. While present §2120 speaks of "fear of injury, immediate or future," proposed §160.00, omitting the threat or fear of "future" injury, requires "fear of immediate physical injury." This change is made in order to eliminate an overlapping of robbery and extortion which, according to statutory definitions at least, exists under the present law [cf. P. L. §§850, 851 (subd. 1) and §2120]. Under the proposed code, the crime is robbery when theft is accomplished by a threat of immediate injury (§160.00) and extortion when the threat is of future injury (see §165.00, subd. 1).

§§ 160.05, 160.10 Robbery in the second and first degrees

Robbery is presently divided into three degrees. It is aggravated to the first degree when the defendant (1) is armed with a dangerous weapon, or (2) is aided by an active accomplice, or (3) uses an automobile, or (4) seriously injures someone (§2124). The second degree seems to consist of just plain, basic robbery as defined (§2126; cf. §2120). Although this actually leaves nothing for any lower degree, a third degree is nevertheless added which, employing the confusing descending system of degree definitions, assertedly consists of all robbery "not amounting to robbery

in the first or second degree" (§2128). What this means and what the third degree comprises has always been a mystery, and it has practical value only for purposes of pleading [People v. Troche 9 Misc. 2d 452, 458, 459 (Co. Ct. Albany Co. 1958)].

The proposed article defines only two degrees of robbery, which conform closely to the existing first and second degree offenses. Using the ascending scale, the second degree is defined simply as any forcible stealing or robbery (§160.05), which is actually the same as the present second degree crime (§2126). The first degree offense (§160.10) is approximately the same as the present one (§2124) except that the use of an automobile is eliminated as an aggravating factor, leaving (1) infliction of serious injury, (2) carrying a deadly weapon and (3) accomplice assistance, as the alternative degree-raising factors. The circumstance that the defendant committing a solo, weaponless robbery drives to or away from the scene in an automobile does not appear to be so heinous a consideration as to raise his offense to one of the most serious on the books.

It may be observed that subdivision 2 of the proposed first degree section (§160.10) requires a "deadly" weapon (§2124, subd. 1). By definitions of this proposed code, a "deadly weapon" means a "weapon" designed as a "weapon," such as a gun, blackjack or metal knuckles, while a "dangerous weapon" includes any utilitarian article capable of producing serious injury when used in a certain manner (§10.00). The term "deadly" weapon is here employed so as not to attach first degree liability solely on the basis that the defendant happened to have a pen-knife or comparable object in his pocket during the robbery.

Under the proposed article, first degree robbery is a class B felony, carrying a maximum penalty of 25 years (§160.10). This is considerably less severe than the present penalty, which carries a 30 year maximum and being one of the few crimes entailing a mandatory minimum term- a minimum term of ten years (§2125).

The second degree offence (a class C felony) carries precisely the same penalty as the present one, namely an indeterminate term with a 15 year maximum (§160.50 P. L., §2127).

Article 165 - Extortion

§§ 165.00, 165.05 Extortion in the second and first degree

The Penal Law's extortion statutes (Art. 80; §§850-861) are typical of most extortion legislation. In substance, they define the crime as "the obtaining of property from another, ...with his consent, induced by wrongful use of force or fear, or under color of official right" (§850), and proceed to list six different types of threats by which the requisite "fear" may be produced: to injure the person or property of the victim or of other designated parties; to accuse him or a relative of a crime; to impute disgrace to certain persons; to expose a secret; to kidnap; and to cause personal or property injury by means of weapons or explosives (§851). Extortion by either of the latter two kinds of threats is punishable more severely than otherwise (§852).

There has been much confusion in the extortion area, partially owing to the Penal Law's unsatisfactory definition of the crime, to its descriptions of and limitations upon the kinds of underlying threats, and to its failure to distinguish clearly between extortion and robbery.

Basically, extortion is a form of larceny and should be defined and treated as such (see A. L. I. Model Penal Code, §223.4). The proposed article, proceeding upon that premise, requires the same intent as for larceny, namely an "intent to deprive another of property or to appropriate the same to himself or a third person" (§§165.00, 165.05).

The sections do not characterize extortion as the obtaining of property "with his [the victim's] consent" (P. L., §850) - a highly unrealistic definition, to say the least - nor do they require a "threat" (P. L., §851), which may or may not occur in a subtly conducted extortion enterprise. What they do require is that the defendant, acting with larcenous intent, compel or induce the victim to turn over property by "instilling in him a fear that "certain unfavorable consequences will follow if he fails to comply

with the demand (§§165.00, 165.05).

One of the difficulties with the Penal Law's list of extortionate threats (§851) is that they are not broad or inclusive enough, either individually or collectively. One example of the former is the threat to accuse of a crime, which is extortionate only when the threat is to accuse the victim or a relative or a member of his family (id., subd. 2). Thus it is not extortion to threaten a person that unless he delivers up $25,000, his best friend or his business partner or his fiancee will be accused of a serious offense; nor is even a threat to kill extortionate under such circumstances (subd. 1). The proposed article expands the individual categories of threatened harm in this respect to cover threats to injure any person, regardless of his particular relationship to the victim or person threatened (see §165.05).

More important, however, is the fact that no list of threats such as that found in the Penal Law (§851) can encompass the spectrum of conduct commonly conceived to be extortionate. Illustrative of situations not covered are the following. A college professor threatens a student that he will flunk him if he does not pay over a sum of money. With the same objective, a man threatens his highly allergic neighbor that he will grow ragweed in abundance; or that he will erect some structure (lawfully) which will be of no benefit to himself but which will ruin the value of the neighbor's property.

In an attempt to blanket all truly extortionate situations, the proposed article makes it extortion to obtain property from another by instilling in him a fear that, unless the property is turned over, the actor or someone else "will do some act which would not in itself materially benefit the actor or any other person but which is calculated to harm some person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships" (§165.00).

This catchall offense is designated extortion in the second

degree. The crime is then raised to the frist degree when the threat or instilled fear is of a type falling within any of seven specific categories which describe seven of the more heinous kinds of extortion; fear of personal injury, accusation of crime, exposure of a secret, etc. (§165.05).

The second degree crime is made a class E felony and the first degree crime a class C felony.

Article 170 - Other offenses relating to theft

This article defines a series of theft offenses which savor of larceny and which, for the most part, would constitute larceny were it not for one missing or different factor.

§170.00 Misapplication of property

One of the most prominent elements or requirements of larceny, as seen, is an intent to "appropriate" the wrongfully obtained property or to "deprive" the owner thereof (see §155.05). Absent such intent, no taking of property amounts to a larceny; and speaking in generalities, one who wrongfully takes property of another with intent to benefit temporarily from its use, or temporarily to deprive the owner thereof, does not commit any offense.

In this state of the criminal law, an area of unpenalized misconduct exists; and if any wrongful taking or disposition of property committed with some mental state short of the indicated larcenous intent is to be made criminal, such must be accomplished by statute.

The general policy of the criminal law is not to penalize a "borrowing" type of unauthorized taking. If there is no intent to "appropriate" or "deprive," it is not a crime to take another person's lawn mower, watch, clothing or jewelry, or even his money. Various jurisdictions, however, define special offenses to cover specific kinds of unauthorized takings of a "borrowing" nature which they deem particularly obnoxious or worthy of something more than civil liability. It is out of these considerations that proposed §170.00 defines the offense of "Misapplication of property."

This offense, penalizing the unauthorized disposition of property of another which the offender has lawfully in his possession, is of the embezzlement genus. However, the disposition, whether by sale, pledge or otherwise, need not be made with intent to "appropriate" or "deprive" but only in such

fashion as to create a risk that the owner will not be able to recover it or will suffer pecuniary loss (§170.00).

In general, this offense, graded a class A misdemeanor, covers two types of cases. One (partially covered by existing Penal Law §941) deals with the bailee or trustee of property who pledges it with a third person, without the consent of the owner and for his own advantage, expecting or at least hoping to retrieve it from the pledges in time to avoid financial loss and censure or more vigorous action by the owner. If such conduct involves a risk of loss of the property or of other pecuniary loss to the owner, the offense of "misapplication of property" is prima facie established. It is a defense to such a prosecution, however, that the defendant had recovered possession of the property, unemcumbered, before the institution of the prosecution, and that the owner in fact suffered no material loss as a result of the unlawful disposition.

The other type of case at which this section is aimed involves the defendant who misapplies property entrusted to him for a specific purpose. In brief, A turns over $10,000 to B under an explicit agreement that B will purchase shares of a certain blue chip stock for A. Instead, B, unbeknownst to A, buys a more speculative stock for A or invests the money in some other unauthorized fashion. More aggravated situations are posed where B bets the money on horse races or in effect gambles it on some extremely speculative venture. Under the proposed section, actual loss of money or property, or a substantial percentage thereof, is not an element of the crime. The primary issue concerns the defendant's motive. If he violated the trust and incurred the risk of loss in the hope of profiting personally from the transaction (for example, in the hope of tripling the expected profit of the original deal and keeping the excess for himself), he is guilty of "misapplication of property." It is a defense to such a prosecution that, even though ill-advised, his sole purpose or

motive was to benefit his principal and that he honestly believed that events would so materialize.

It is believed that, especially with respect to the latter phase of the crime, §170.00 is needed to fill a gap in the existing law. It is true that certain specialized provisions, notably those relating to investments by banks, executors and the like, place criminal sanctions upon unauthorized dispositions of trust property in certain narrow areas. It seems desirable, however, to create a general criminal sanction against a fiduciary playing ducks and drakes for personal profit with the property of another entrusted to him for a specific purpose. Such is the reason for proposed §170.00.

It may be argued that, in the absence of larcenous intent, criminal liability may appear harsh in some situations. A partial answer is that venal mishandling of another's property constitutes morally culpable conduct, and that in many cases losses suffered by owners through such misconduct may greatly exceed those in other cases where technical larcenous intent is established. Despite this factor, the offense is only a misdemeanor no matter what the amount of loss.

§170.05, 170.10 Joy riding

"Joy riding" is another crime which falls short of larceny only in that no intent to "appropriate" or "deprive" is necessary, and which would not constitute any offense at all in the absence of special statute.

This offense is contained in the Penal Law under the title, "Unauthorized use of aircraft, motor vehicles and boats" (§1293-a). Somewhat anomalously, the section speaks of taking, using or operating such aircraft, vehicles and boats "under circumstances not constituting larceny" and then decrees that the offender "is guilty of larceny and shall be punishable accordingly."

"Joy riding," as it is termed both in ordinary parlance and in this proposed code, is a more complex crime than would appear on the surface. In practice, it includes, generally, three different kinds or forms of cases, each requiring the application of different principles. The proposed section (§170.10), using four subdivisions, breaks the offense down into its basic forms.

Speaking in terms of motor vehicles, the three general categories of cases or offenders are as follows:

(1) The person who, without the owner's consent, takes a car parked on the street or in some other place and drives it around for a while, finally either returning it or abandoning it somewhere.

(2) The person found riding around, either as a driver or a passenger, in a car which has been taken as in (1), but who either is not or cannot be proven to be the actual taker of the car.

(3) The person who has received lawful possession of a car from the owner for a specific purpose or for a specific period of time, and then uses it for his own purposes in a fashion constituting a gross abuse of or deviation from the agreement with the owner.

Subdivision 1 of the proposed §170.10 covers the primary offender who, "knowing that he does not have the consent of the owner thereof," simply "takes a propelled vehicle" - a term defined in the preceding section (§170.05).

Subdivision 2 applies to the person who cannot be proved to have taken a vehicle but who, "knowing that he does not have the consent of the owner or of anyone authorized to give such consent, . . . operates, exercises control over, rides in or otherwise uses a propelled vehicle" unlawfully taken by someone.

This provision, of course, applies primarily to the

difficult situation where two or more persons are found riding in a car recently taken and perhaps reported as stolen, where none has the consent of the owner, and where each or some of the group claim ignorance of the ownership of the car and assert a belief that some other member was lawfully in possession thereof. Despite suspect circumstances and possibly unpersuasive explanations, it is still necessary to establish the requisite scienter, namely that the particular defendant knew that he did not have the owner's consent to operate, ride in, use, etc.

Such circumstances logically call for a presumption. A blanket presumption of such knowledge might, perhaps, be unfair if applied to mere passengers. It does not seem unfair, however, as applied to the driver of the car or to one who "exercises control over" it (as, for example, by keeping it on his premises over night), and such a presumption is included in the subdivision.

Subdivisions 3 and 4 deal with the bailee situation; in short, where a person lawfully in possession of an automobile for a limited purpose or time flagrantly abuses the privilege or agreement for his own purposes or advantage. Apt illustrations are posed by the person who borrows a car for an afternoon and drives it to Florida on a six months vacation, and by the garage attendant who without authority "borrows" a patron's car for a two day spree.

In delineating this type of "joy riding" case, caution must be employed in order not to envelope in the criminal orbit many minor, harmless incidents which no reasonable person would seek to penalize: for example, the garage attendant who, after calling for a car, deviates two blocks en route to the garage in order to stop at a store and buy some groceries; or the person who borrows a car for a morning in order to move some belongings but keeps it until late evening for recreation purposes.

The drafting of provisions in a fashion to exclude such inconsequential transgressions but to include the truly serious ones is not a simple task. Proposed §170.10 selects two types of bailment abuses, requiring for each offense a "gross deviation from the agreed purpose."

The first of these (subd.3) encompasses the person who has lawful possession of a vehicle from the owner under an agreement to perform some service for compensation; in short, the garage or repair man whose right to possession is limited to a very narrow, specific purpose under a pecuniary contract of hire. When he uses the car to visit relatives two hundred miles distant, or in some other manner "constituting a gross deviation from the agreed purpose" (subd.3), he seems worthy of some form of punishment.

The companion bailment offense covers the person who, for hire or otherwise, lawfully obtains possession of a car for a limited, specified time and "retains or withholds possession thereof, without consent of the owner, for so lengthy a period beyond the specified time as to render such retention or possession a gross deviation from the agreement" (subd.4). This is aimed, inter alia, at the six months vacation type of case upon a "borrowing" for an afternoon, which obviously constitutes "a gross deviation from the agreement." It is true that the term "gross deviation" is not precise and that border-line cases may be visualized. Whether a week or three days would amount to a "gross deviation" under particular circumstances may be debatable. A mathematical formula, however, is impossible, and the term"gross deviation" seems descriptive enough to provide a workable basis under intelligent judicial construction.

As indicated, the present law somewhat incongruously renders the joy riding offender "guilty of larceny and . . . punishable accordingly" (P.L., §1293-a), thus gearing the penalty to the value of the vehicle. Among the criticisms which may

be cast at this punishment pattern is the fact that it subjects the youthful "joy-rider" to the same penalty as the professional car thief. As a practical matter, most genuine joy riding cases terminate in guilty pleas to misdemeanor offenses or in Youthful Offender adjudications. With these considerations in mind, though with some reservations, joy riding is here flatly graded a class A misdemeanor, with no penalty variations arising from vehicle value or any other factor.

§170.15, 170.20 Theft of services

It is apparent that some services rendered for hire can, in effect, be stolen in the same manner as property is stolen. While a service, being intangible, cannot be physically taken, asported or embezzled, it can be obtained by false pretenses or by what corresponds to larceny by trick and device.

Since a service is not "property" and, hence, cannot be the subject of larceny, no "theft" of a service is criminal unless so rendered by special statute. How far a penal code should go in punishing such "thefts" is highly debatable. The extremes are, perhaps, represented by the present New York Penal Law, on the one hand, and the Model Penal Code of the American Law Institute on the other.

The Penal Law contains but a few narrow, scattered section of this nature, such as those rendering criminal a wrongful and fraudulent entry into agricultural fair grounds without paying the fee (§927) and fraudulent acquisition of telephone service (§967). Other provisions punishing interference with gas, electric and water meters and telephone coin boxes are primarily aimed at thefts of public utility services (§§1431, 1432 and 1432-a).

In contrast to the Penal Law's sparsity in this area, the Model Penal Code offers the broadest statute conceivable couche in the broadest language conceivable. Entitled "Theft of Services," this offense applies to a person who "obtains services

which he knows are available only for compensation, by deception or threat, or by false token or by other means to avoid payment for the service" (§223.7).

While the Penal Law's virtual disregard of this field undoubtedly leaves a gap, the Model Penal Code's blanket offense seems too vague and difficult of application, and would probably give rise to a mass of petty criminal charges of a basically civil character. Most of the cases would doubtless be predicated upon asserted misrepresentations concerning terms or time of payment. It is not difficult to visualize countless criminal accusations of fraud by upholsterers, electricians and television repair men engaged in essentially civil disputes with their customers over the quality of their work and the agreed compensation therefor.

The proposed legislation seeks a middle ground that will fill the gap left by the existing Penal Law and, at the same time, exclude from criminality and wrangling, civil types of action involving a misunderstanding between the average service supplier and a patron, which belongs, if anywhere, in a civil court under the heading of breach of contract.

The average service, such as plumbing, carpentering and numerous types of repair work, may or may not call for immediate payment, depending upon the agreement or relationship between supplier and customer. While people do sometimes perpetrate blatant frauds upon such service merchants, the typical dispute over time and amount of payment rests upon disagreement concerning previously arranged oral payment terms or quality of work performed. There are, however, certain kinds of services which rarely spawn essentially civil disagreements of that nature and which, in absence of some special credit arrangement, are clearly understood to require payment on the spot. Among these are hotel and restaurant accommodations, transportation service, entertainment, barbering, bootblacking and numerous other services which traditionally call for immediate compensation. Whatever

justification or reason a person may have for refusing to make immediate or full payment for plumbing or mechanical repair work in any particular instance, he clearly transgresses an established system when he walks out of a restaurant without paying for his meal, sneaks into a motion picture theater, refuses to pay a taxi driver or cheats a hotel by means of a false or expired credit card.

The sections here proposed distinguish between these two types of services by defining a term entitled "immediately compensable service" (§170.15). The first three of the six subdivisions of proposed §170.20 define offenses applicable only to "immediately compensable services," thus excluding so-called "thefts" of other types.

The six offenses here defined (§170.20), though largely self-explanatory, may possibly be clarified by illustration of the kinds of cases covered by each.

Subdivision 1 deals with the person who, avoiding a fee payable in advance, sneaks into a place of entertainment, jumps a subway turnstile, obtains a telephone service in a public booth by tampering with the coin box, and the like.

Subdivision 2 covers a person who, avoiding a fee commonly payable immediately upon rendition of a service, refuses or evades payment of a restaurant bill, a taxi fare, a barber's fee, etc.

Subdivision 3 is aimed primarily, though not exclusively, at frauds upon hotels and restaurants. It penalizes the person who, by means of a false, forged, expired or otherwise inadequate credit card, or by other false pretenses, induces the supplier of an immediately compensable service (e.g., a hotel or restaurant) either to render such service or to extend credit for payment thereof.

Subdivision 4 covers primarily the person who tampers with a gas or other public utility meter for the purpose of fraudulently avoiding payment for such service (see existing Penal Law, §§1431,1432).

Subdivision 5, a companion provision, covers the person who has been refused gas, electricity or water service and who nevertheless obtains or attempts to obtain the same by tampering with the utility's equipment.

Subdivision 6 is added to plug the gap in the law noted and emphasized in the decision of People v. Ashworth, 220 App.Div. 498 (4th Dept.1927). The defendants therein, a mill superintendent and his brother, were convicted of grand larceny as a result of having made unauthorized and personally profitable use of the mill's machinery, facilities and labor to spin a substantial quantity of wool for a certain company. The judgment was reversed upon the ground that the corrupt use of the mill's facilities and labor did not constitute a theft of "property" and, hence, could not be the subject of larceny. Subdivision 7 of proposed §170.20 renders such conduct a "Theft of services."

With respect to punishment, no attempt is made to grade any of the six above-described offenses upon the basis of the value of the service obtained or sought to be obtained, and the offense of "Theft of services," no matter how committed, is a class A misdemeanor.

§170.25 Fraudulently obtaining a signature

This section is directed at a person who obtains the signature of another to a written instrument by means of any misrepresentation of fact which he knows to be false. The section requires that the actor's conduct be coupled with an intent to defraud or injure another or to acquire a substantial benefit for himself or a third person. The offense is designated a class A misdemeanor.

The proposed section is substantially a restatement of a number of sections in the existing Penal Law which deal with this problem of fraudulently procuring a signature to a written instrument (§§932,934,935,937,937-a,938). These sections were designed to fill a gap in the law of larceny which is limited

to the obtaining of "property." These provisions were derived from the Revised Statutes of 1828. In People v. Stone 9 Wend. 181 (1832) the defendant was charged with obtaining an endorsement to a promissory note by false pretenses and with fraudulent intent. In commenting on the relevant statute, the court wrote:

> "Our revised statutes. . . make it an offence in express terms to obtain the signature of any person to any written instrument by any false pretence, with intent to cheat or defraud another. Under this statute, the offence is complete when the signature is obtained, if it were obtained by false pretences and with a fraudulent intent, although it may never be used to the prejudice of any person."

A relevant section in the Model Penal Code provides: "A person commits a misdemeanor if by deception he causes another to execute any instrument affecting or purporting to affect or likely affect the pecuniary interest of any person." Like the proposed draft, this Model Code provision is designed to reach such cases as execution of releases or negotiable instruments. Unlike the proposed draft, the Model Code formulation does not extend to non-pecuniary instruments, e.g., an agreement on custody of children. There appears to be no danger of injustice by extending the section to transactions having a non-pecuniary significance, especially since the section expressly requires an "intent to defraud or injure another or to acquire a substantial benefit for himself or a third person."

§§170.30 - 170.50 Criminal possession of stolen property

Draft §§170.30 through 170.50, dealing with criminal possession of stolen property, are derived in large part from, and are intended to replace, P.L.§§1308, 1308-a and 1309, which concern, generally, receiving stolen property.

The major change in this area is best illustrated by comparing the pertinent language of P.L.§1308 (1) (a) with draft §§170.35 and 170.40. Under §1308 (1) (a), the crime is committed when a person "buys," "receives," "conceals" or "withholds" stolen property; while under the draft the crime is

committed when a person "possesses property which has been stolen." The term "possess" has a specific meaning and, since the concept is applicable to a number of provisions in other parts of the draft, it is defined in the General Provisions:

> "Possess means to have physical possession or otherwise to exercise dominion or control over tangible, movable property." (§10.00)

Analysis of the various acts that may constitute the crime of receiving stolen property under the present law indicates that, in essence, each of them constitutes "possession" as defined above, since one cannot "buy," "receive," "conceal" or "withhold" stolen property without also possessing it.

One effect of the draft formulation is to include within the ambit of the crime constructive as well as actual possession of stolen property. This problem is highlighted in People v. Fein, 292 N.Y. 10 (1944), where property was stolen in New York County. The thieves were unknown but the property was later found in the defendant's garage in Kings County. The defendant was indicted in New York County for receiving. In response to the defendant's challenge to the jurisdiction in New York County, the People argued that the defendant exercised in New York County such dominion and control as to amount to constructive possession in New York County. The Court of Appeals sustained the defendant's position but said (at p. 14):

> "If evidence of constructive possession is to constitute legal proof of criminal concealment and withholding within section 1308 of the Penal Law, the process by which that rule is established is legislative not judicial."

This draft seeks to accomplish that result through the definition of possession; thereby eliminating an anachronistic situation that has no place in today's environment of instant communication and speedy transportation.

Another result of making the gravamen of the crime the "possession" of stolen goods is to obviate the necessity for a provision such as that contained in P.L. §1301, which provides that a person who steals or who receives stolen property outside

the state and brings it into the state is guilty of larceny or receiving as if the crime were committed within this state. As to the thief himself, he may be extradited and should be prosecuted in the state wherein he committed the larceny. As to a "receiver," provision is no longer necessary since the place where he brings, receives or conceals the stolen property is immaterial. If he brings it into New York, he "possesses" it here and thereby commits a crime.

Draft §§170.35 and 170.40 specifically divide criminal possession into two degrees in a manner substantially the same as P.L.§1308 now does by implication. The basic crime,"Criminal possession of stolen property in the second degree," is a class A misdemeanor and covers all criminal possession of stolen property (§170.35). The first degree (§170.40), which is a class D felony, consists of three situations which constitute aggravations of the second degree crime: the property is worth over $100 (subd.1); or, regardless of value, the property is a firearm or motor vehicle (subd.2); or the defendant is a "dealer" (subd.3).

Like P.L.§1308 (1), the point at which criminal possession becomes a felony is when the value of the property is over $100. The designation of criminal possession of a firearm or motor vehicle as a felony, regardless of the value of the items, is new and is similar to the provision contained in the Model Penal Code (§223.1). The rationale of this provision is indicated in the A.L.I. commentary (Tent.Draft #2, p.112). Automobiles and firearms are often used to facilitate the commission of other crimes or to aid in flight. Stolen cars and guns are sought after and are therefore attractive items for a receiver to handle. By making the possession of such property a felony, though its actual value may be under $100.00, the temptation to steal or possess a stolen car or gun may be lessened with consequent diminution of armed or mobile crimes.

As in the prior instance, the value of the stolen property is immaterial and the crime is a felony when the defendant is a "dealer," This accords with present law [P.L., §1308(1)] but, whereas that section speaks specifically only of dealers in junk, metals or second hand material [subd.1(b)],dealers in second hand books [subd.1(c)], and dealers who furnish or rent articles [subd.1(d)], the draft provision is not so restrictive. It defines a "dealer" as "a person in the business of buying, selling or otherwise dealing in goods, or a pawnbroker"(§170.30). This definition is the same as M.P.C., §223.6 (2).

It has been pointed out that the most serious problem in this area is the one posed by the professional "fence,"rather than by the casual, amateur receiver. Many of the professionals operate behind the facade of a legitimate business and are, consequently, more difficult to prosecute successfully. The imposition, therefore, of more severe penalties on dealers who handle stolen property is warranted.

Draft §170.45 sets forth two presumptions: one relating to any person who possesses stolen property; the other only to a dealer who possesses such property. Both presumptions are rebuttable and their effect, therefore, is to require the defendant, by way of affirmative defense, to explain how he came to be in possession of stolen property or to justify his innocent possession of it. Under subdivision 1, the mens rea, "intent to benefit himself or another" (see §§170.35 and 170.40), is presumed from the fact that the defendant possesses stolen property. If, for instance, the defendant knowingly possessed stolen property for the purpose of returning it to its proper owner, he can successfully rebut the presumption and no crime has been committed. [See: People v. Hartwell, 166 N.Y.361(1901)].

The presumptions that apply only to a dealer who possesses stolen property (subd.2) are different. They relate not to the mens rea, but to the knowledge that the property is stolen.

Subdivision 2 (a), which provides that the presumption applies if a dealer obtains property without first ascertaining that the one from whom he obtained it had the right to possess it, is derived without substantive change from P.L.§1308 (3). The question of the constitutionality of the requirement that a dealer must make diligent inquiry concerning the offeror's right to sell the goods to him was long ago answered in the affirmative [People v. Rosenthal, 197 N.Y. 394 (1910), affirmed, 226 U.S.260].

The presumption in subdivision 2 (b), which charges a dealer with knowledge that the property was stolen if he pays a price for it far below its reasonable value, is new and was suggested by a like provision in the Model Penal Code [§223.6(2)(c)].

Draft §170.50 deals with matters concerning liability for the crime of possession of stolen property and proof thereof.

Subdivision 1 provides that the fact that the thief has not been convicted, apprehended or identified is no defense to a prosecution for criminal possession. It is derived, in part, from P.L.§1309. "Larceny and criminally receiving stolen property are distinct and independent crimes" [People v. Spivak, 237 N.Y. 460 (1924); see also: People v. Marino, 271 N.Y. 317 (1936)].

In conjunction with the alteration of the existing crime of receiving, concealing and withholding to one of possession, subdivision 2 works a significant change in prevailing case law principles with respect to the possibility of dual guilt of both larceny and criminal possession of the same property. The present law is that a thief may not be convicted of receiving (or concealing or withholding) the property which he stole; the one exception to this rule is that one guilty of the larceny not as the actual taker of the property or as an accomplice present at the taking, but as a non-present conspirator or a common law accessory before the fact, may be convicted of receiving, concealing or withholding as well as of larceny [People

v. Daghita, 301 N.Y. 223 (1950); People v. Vivello, 39 App. Div. 454,456 (1st Dept. 1899)].

The general rule precluding conviction for both larceny and receiving, etc., though logically sound, creates an awkward situation in the not uncommon case where a defendant is found in possession of fairly recently stolen property and the evidence does not satisfactorily show whether he is a theif or a receiver. Despite a presumption dealing with recent possession of stolen property, the prosecutor may not know which crime to pursue and, even after hearing all the trial evidence, a jury may be at sea upon the issue of whether the defendant stole the property or obtained it from someone else knowing its stolen character.

The proposed provision avoids this difficulty by permitting conviction of an actual thief found knowingly in possession of the stolen property, of either larceny or criminal possession - but not both. There is nothing legally unsound or artificial about this proposition. While there may be inconsistency in convicting a thief of receiving under the present law, there is no inconsistency in convicting him of possession under the proposed sections. Thus, a person found in possession of stolen property under circumstances establishing guilty knowledge at the least may safely and properly be prosecuted and convicted of criminal possession even though it develops somewhere along the line that he actually stole it.

Under such circumstances, however, the protection of the accomplice corroboration rule (C.C.P., §399) should be available to the thief charged with possession to the same extent as if he were charged with larceny; in brief, he should not be convicted of possession upon the uncorroborated testimony of an accomplice in the larceny when he could not be convicted of the larceny itself upon such evidence. Subdivision 3 of draft §170.50 assures that protection.

This is especially necessary in the light of the existing provision (P.L.§1308-a) which eliminates the corroborative requirement in receiving, concealing and withholding cases and which is here perpetuated in subdivision 4 of §170.50 with respect to "possession" cases. Thus, except for the aforementioned thief-possessor situations, a defendant may be convicted of possession upon the uncorroborated testimony of the thief from whom he obtained the property or of a person to whom he (the defendant-possessor) disposed of it.

§§170.55, 170.60, 170.65. Obscuring identity of a machine

A common method of concealing the true identity of stolen property is defacement or obscuring of serial numbers and other identification marks upon motor vehicles and other machines. Especially with respect to automobiles, this is an effective if difficult means of preventing detection and recovery of stolen vehicles, and such work is ordinarily assigned to professionals in the field.

Such activity is rendered criminal by §436-a of the existing Penal Law, entitled "Defacing or removing identification marks," which penalizes both the removal, defacement, destruction, etc.,of identification marks on motor vehicles and other machines (subds.1,3) and the knowing possession, purchase, receipt, concealment, etc.,of machines in that condition (subds. 2,4). The crime is a felony when motor vehicles are involved, (subds.1,2), and a misdemeanor when any other "machine or . . . electrical or mechanical device" is the subject of the offense (subds.3, 4).

The substance of this section (both the defacement and the possession phases) is preserved in draft §§170.55 and 170.60, entitled "Obscuring identity of a machine," with some simplification, clarification and sharpening of language and intent elements. The offense is presented in two degrees. The second degree, a misdemeanor, covers "any machine, vehicle, or electri-

cal or mechanical device" (§170.55) and the first degree, a class D felony, is addressed exclusively to motor vehicles (§170.60). This pattern, while carrying over the substance of the existing sections with their severer penalty for motor vehicle offenses, creates an included crime situation permitting lesser pleas. Thus, a defendant charged with the first degree or felony offense involving motor vehicles may legally plead guilty to the second degree or misdemeanor offense which is inclusive in that it applies to identification defacement or possession of "any machine, vehicle,"etc. (§170.55,subd.1).

§170.65 predicates two presumptions and one defense in connection with this crime, all of which are self-explanatory and, it is submitted, collectively necessary for efficient prosecution and for prevention of unjust results.

§170.70 Unlawfully recovering stolen property

Finally, draft §170.70, dealing with the return of stolen property, is derived from P.L.§1307-a. The present section is directed against persons who hire out to secure the return of the stolen property (except motor vehicles), particularly insurance company investigators and private detectives. If this provision has any utility in discouraging theft or criminal possession of stolen property, its application should not be limited to those individuals, nor should motor vehicles be excluded. Therefore, the draft provision is directed at any person who engages in the prohibited conduct and there are no exceptions to the type of stolen property included.

MEMORANDUM

TO: ALL MEMBERS AND EX-OFFICIO MEMBERS

FROM: RICHARD G. DENZER,
CHIEF COUNSEL
N.Y.S. TEMPORARY COMMISSION ON REVISION OF
THE PENAL LAW AND CRIMINAL CODE.

October 9,1963

Enclosed are (1) the printed draft of the first two "Parts" of the proposed Penal Law prepared by the staff; (2) a copy of "Part 3" in mimeograph form, and (3) a memorandum explaining "Title J," containing "Offenses Involving Theft."

Certain observations are pertinent with respect to explanatory memoranda. The staff would, of course, like to have ready by the time of the forthcoming meeting a complete set of memoranda fully explaining every title, article and section of the proposed code in its currently numbered form. Time limitations, however, render this impossible. The explanatory material which is available or will be available prior to the meeting shapes up as follows:

You have already received a number of memoranda which were compiled during the formulation of this proposed Penal Law. These are far from ideal in that (1) the numbers of the articles and sections there explained do not correspond to those of the draft, since the numbering system ultimately employed had not been adopted or even contrived at the time they were written, and (2) the originally drafted articles and sections to which the memoranda refer have since been changed in many respects. Despite these drawbacks, the memoranda in question, it is hoped, present the theories of and approaches to their particular legislative areas with sufficient clarity to permit one reading them in conjunction with the draft to acquire a pretty good idea of the purposes, directions and innovations which the proposed code is pursuing in the indicated fields. A list of these earlier memoranda comprises the following:

(1) Assault (see Title H, Art. 120, pp. 52-54)

(2) Homicide (see Title H, Art. 125,pp.55-59)

(3) Burglary (see Title I, Art. 140, pp.72-74)

(4) Criminal Mischief (see Title I,Art.145,pp.74-75).

(5) Arson (see Title I, Art.150, pp.76-77

(6) Perjury (see Title L, Art. 122, pp. 122-126)

(7) Gambling (see Title N,Art.230, pp. 135-140)

(8) Riot, Unlawful Assembly, dis. con. harassment,etc. (see Title N, Arts. 245, 250, pp.145-151)

In addition to the above, you will, between the present time and the date of the meeting, receive further memoranda explaining other and more recently formulated titles and articles. These will be geared to the draft's numbering system. One of these (Title J), as indicated, is enclosed herein. Soon to follow are memoranda dealing with Title K ("Offenses Involving Fraud") and Title L ("Offenses Against Public Administration"). The "theft," "fraud" and "public administration" titles represent the bulk of the more important phases of "Part 2" of the proposed code which have not yet been seen by the members of the Commission.

All in all, I am confident that the totality of this explanatory material will be adequate to familiarize the Commissioners with the tenor and major points of interest of the proposed draft for purposes of discussion thereof at the November meeting. I realize that the very volume of material - including both the code itself and the accompanying commentary - places a heavy reading burden upon the members of the Commission, especially in the light of the time factors which we are all battling. In that regard, I can only hope that you will continue to give unselfishly of your time so that everyone will be on speaking terms with the draft during the coming discussions.

NEW YORK STATE TEMPORARY COMMISSION ON REVISION
OF THE PENAL LAW AND CRIMINAL CODE

TO: ALL COMMISSIONERS AND EX-OFFICIO MEMBERS

FROM: RICHARD G. DENZER
CHIEF COUNSEL

June 20, 1963

The enclosed "Title" includes, as you see, an article addressed to Homicide, which has been previously distributed and discussed to some extent.

You will find considerable change in the instant Article from the last draft. This is due to the fact that several problems in connection therewith have arisen and are awaiting some solution. The present draft seeks a temporary solution of these problems. In so doing, the changes reject some formulae which the Commission has apparently decided upon. I have not done this with the idea of bucking the Commission's desires, but simply in an attempt to contrive a completed Article which will serve as a basis for discussion.

You will note that I have also changed the title of the Article and Crime previously labeled "Assault." Time and space do not permit a full explanation of this change, the reason for which is somewhat deep-seated, but I hope that you will keep this issue in mind as one which deserves discussion at the next meeting.

Cordially,

encl
RGD/pjc

Richard G. Denzer

TITLE X

OFFENSES AGAINST THE PERSON INVOLVING PHYSICAL INJURY, DEFILEMENT, RESTRAINT AND INTIMIDATION.

ARTICLE 1.

PHYSICAL INJURY AND RELATED CRIMES

§1. Physical injury; definition of terms.

Physical injury means pain, illness or any impairment of physical condition.

Serious physical injury means physical injury which creates a substantial risk of death, or which causes protracted disfigurement, protracted impairment of health, or protracted loss or impairment of any bodily function.

Maim means to disfigure a person seriously and permanently, or to destroy, amputate or permanently disable any member or organ of his body.

§2. Definition of the crime of physical injury.

The crime of physical injury consists of unjustifiably causing physical injury to another person either intentionally or recklessly.

§3. Physical injury in the third degree.

A person is guilty of physical injury in the third degree when:

1. With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or

2. He recklessly causes physical injury to another person.

§4. Physical injury in the second degree.

A person is guilty of physical injury in the second degree when:

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

2. With intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly or dangerous weapon.

§5. Physical injury in the first degree.

A person is guilty of physical injury in the first degree when:

1. With intent to kill another person, he causes serious physical injury to such person or to a third person; or

2. He intentionally maims another person; or

3. Under circumstances evincing a depraved indifference to human life, he recklessly causes serious physical injury to another person; or

4. In the course of and in furtherance of the commission or attempted commission of a felony, he causes serious physical injury to another person by means of a deadly weapon.

§6. Menacing.

A person is guilty of menacing when, by physical menace, he attempts to place another person in fear of imminent serious physical injury.

§7. Reckless Endangerment in the second degree.

A person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which places or may place another person in danger of serious physical injury.

§8. Reckless Endangerment in the first degree.

A person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which places or may place another in danger of death.

ARTICLE 2.

HOMICIDE, ABORTION AND RELATED OFFENSES

§9. Criminal Homicide defined.

Criminal homicide is the killing of a person or of an unborn child by the act, procurement or omission of another person under circumstances constituting murder, manslaughter, criminally negligent homicide, killing an unborn child or filicide of an unborn child as defined in this article.

§10. Criminal homicide; definitions of terms.

Physical injury and serious physical injury have the meanings given to them in section one of this title.

Person means a human being who has been born and is alive.

Unborn child means a child with which a female has been pregnant for more than twenty-six weeks.

Abortional act. A female commits an "abortional act" upon herself when she takes or submits to the administration of medicine or drugs or does or submits to any physical act to or upon herself which she believes is calculated to procure the miscarriage of pregnant females. A person commits an "abortional act" upon a female when he commits a physical act upon her which he believes is calculated to procure her miscarriage, whether directly upon her body or by the administration of drugs or medicine or by other means or treatment, or when he causes her to do or to submit to such an act to or upon herself.

Unlawful abortional act means an abortional act which is not necessary to preserve the life of the female or of an unborn child with which she is pregnant.

§11. Criminally negligent homicide.

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

§12. Manslaughter.

A person is guilty of manslaughter when:

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

2. With intent to kill another person he causes the death of such person or of a third person under circumstances which would constitute murder in the first degree as defined in subdivision one of section fourteen of this article or murder in the second degree as defined in section thirteen of this article except that the homicidal act is comitted under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse, or under an erroneous belief of fact for which there is a reasonable explanation or excuse. In either instance, 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; or

3. He intentionally aids another person to commit suicide under circumstances which would constitute murder in the first degree as defined in subsection one of section fourteen of this article except that (a) his aid is rendered solely as a result of solicitation thereof by such other person, or (b) at the time his aid is rendered, he himself intends immediately to commit suicide or otherwise to die; or

4. He recklessly causes the death of another person; or

5. With intent to procure a miscarriage of a female whom he believes to be pregnant, he commits an unlawful abortional act upon her which causes her death.

§13. Murder in the second degree.

Except when his crime constitutes manslaughter as defined in subdivision two of section twelve of this article, a person is guilty of murder in the second degree when, with intent to

cause serious physical injury to another person, he causes the death of such person or of a third person.

§14. Murder in the first degree.

A person is guilty of murder in the first degree when:

1. With intent to kill another person, he causes the death of such person or of a third person, except when the crime constitutes manslaughter as defined in subdivisions two and three of section twelve of this article; or'

2. Under circumstances evincing a depraved indifference to human life, he recklessly commits an act involving a grave risk of human fatality and thereby causes the death of another person; or

3. Either alone or in concert with others, he commits or attempts to commit a felonious crime of robbery, burglary, kidnapping, arson, escape, or a felonious sex crime, and, in the course of and in furtherance of such crime or of the immediate flight of the perpetrator or perpetrators thereof or any one of them, one or more commits an act inherently dangerous to human life which causes the death of a person other than one of the perpetrators.

§15. Murder in the first degree; punishment; plea of guilty.

1. Murder in the first degree is punishable by life imprisonment unless the death sentence is imposed as provided by section sixteen of this article.

2. When the court and the district attorney consent, a person indicted for murder in the first degree may plead guilty to murder in the first degree with a sentence of life imprisonment, in which case the court shall sentence him accordingly.

3. When a defendant has been found guilty after trial of murder in the first degree, the court shall discharge the jury and shall sentence defendant to life imprisonment if it is satisfied that he was under eighteen years of age at the time of the

commission of the crime, or that the sentence of death is not warranted because of substantial mitigating circumstances.

§16. Murder in the first degree; proceeding to determine sentence; appeal.

1. When a defendant has been found guilty after trial of murder in the first degree, and such verdict has been recorded upon the minutes, it shall not thereafter be subject to jury reconsideration.

2. Unless the court sentences defendant to life imprisonment as provided in subdivision two or three of section fifteen, it shall, as promptly as possible, conduct a proceeding to determine whether the defendant should be sentenced to life imprisonment or to death. Such proceeding shall be conducted before the court sitting with the jury that found defendant guilty unless the court for good cause discharges the jury and impanels a new jury for that purpose.

3. In such proceeding, evidence may be presented by either party on any matter relevant to sentence including, but not limited to the nature and circumstances of the crime, defendant's background and history, and any aggravating or mitigating circumstances. Any relevant evidence, not legally privileged, shall be received regardless of its admissibility under the exclusionary rules of evidence.

4. The court shall charge the jury on any matters appropriate in the circumstances, including the law relating to the possible release on parole of a person sentenced to life imprisonment.

5. The jury shall then retire to consider the penalty to be imposed. If the jury report unanimous agreement on the imposition of the penalty of death, the court shall discharge the jury and shall impose the sentence of death. If the jury report unanimous agreement on the imposition of the penalty of life imprisonment, the court shall discharge the jury and shall impose

the sentence of life imprisonment. If, after the lapse of such time as the court deems reasonable, the jury report themselves unable to agree, the court shall discharge the jury and shall, in its discretion, either impanel a new jury to determine the sentence or impose the sentence of life imprisonment.

6. On an appeal by the defendant where the judgment is of death, the court of appeals, if it finds substantial error only in the sentencing proceeding, may set aside the sentence of death and remand the case to the trial court, in which event the trial court shall impose the sentence of life imprisonment.

§17. What proof of death is required.

No person can be convicted of murder, manslaughter or criminally negligent homicide unless the death of the person alleged to have been killed is established by direct proof.

§18. Abortion.

A person is guilty of abortion when, with intent to procure a mischarriage of a female whom he believes to be pregnant, he commits an unlawful abortional act upon her.

§19. Killing an unborn child.

A person is guilty of killing an unborn child when, with intent to procure the miscarriage of a female pregnant with an unborn child, he commits an unlawful abortional act upon such female which causes the death of such unborn child.

§20. Self-abortion.

A female is guilty of self-abortion when, being pregnant and intending to procure her miscarriage, she commits or submits to an unlawful abortional act upon herself.

§21. Filicide of an unborn child.

A female is guilty of filicide of an unborn child when, being pregnant with an unborn child and intending to procure her miscarriage, she commits or submits to an unlawful abortional

act upon herself which causes the death of such unborn child.

§22. Issuing abortional articles.

A person is guilty of issuing abortional articles when he manufactures, sells or delivers any instrument, article, medicine, drug or substance with intent that the same be used in unlawfully procuring the miscarriage of a female.

ARTICLE 3.

SEX OFFENSES.

§23. Lack of consent defined.

1. A person is deemed incapable of consenting to a sexual act when he is

(a) Less than seventeen years old; or

(b) Mentally defective.

A person is "mentally defective" when he suffers from a disease or defect which renders him incapable of appraising the nature of his conduct; or

(c) Mentally incapacitated.

A person is"mentally incapacitated"when,owing to the influence of drugs or other factors, he is rendered temporarily incapable of appraising or controlling his conduct; or

(d) Physically helpless.

A person is "physically helpless" when, owing to the influence of drugs,illness or any other factor, he is unconscious or physically unable to offer even verbal resistance to an act; or

(e) Unaware.

A person is "unaware" when he does not realize that a sexual act is being committed upon him; or

(f) Factually mistaken.

A female is "factually mistaken" when, owing to a mistake of identity,she submits to a sexual act with a person whom she mistakenly supposes to be her husband or with a male with whom she is at the time cohabiting.

2. A person capable of consenting to a sexual act who engages in or submits to sexual intercourse or deviate sexual intercourse is deemed to consent thereto unless he is compelled to do so or is overcome by force or by severe intimidation.

Force means physical force that overcomes earnest resistance.

Severe intimidation means a threat, express or implied, which places a person in fear of immediate serious physical injury to himself or another, or in fear that he or another person will immediately be kidnapped.

§24. Rape; definitions of terms.

Female means any female person who is not married to the actor.

Sexual intercourse is used in its ordinary meaning and occurs upon penetration, no matter how slight.

§25. Rape in the third degree.

A male is guilty of rape in the third degree when he engages in sexual intercourse with a female without her consent; except that, when the female's lack of consent is due solely to incapacity to consent because of mental defectiveness, mental incapacitation, unawareness, or factual mistake, the male is not guilty of rape unless he knows or should have known of such condition or mistake.

§26. Rape in the second degree.

A male is guilty of rape in the second degree when he engages in sexual intercourse with a female without her consent, and when:

1. The female is less than seventeen years old and the actor is more than twenty-one years old; or

2. The female is less than fourteen years old; or

3. The female is mentally defective, and he knows such to be the case; or

4. The female is mentally incapacitated as a result of an act committed upon her without her knowledge or consent, and he knows such to be the case; or

5. The female is factually mistaken, and he knows such to be the case.

§27. Rape in the first degree.

A male is guilty of rape in the first degree when he engages in sexual intercourse with a female without her consent, and when:

1. He overcomes her resistance by force or severe intimidation; or

2. The female is physically helpless and he knows such to be the case; or

3. The female is less than eleven years old.

§28. Rape; necessity for corroboration.

No person may be convicted of rape upon the testimony of the female allegedly defiled, unsupported by other evidence.

§29. Sodomy; definition of deviate sexual intercourse.

Deviate sexual intercourse means sexual conduct between persons not married to each other consisting of intercourse or contact between the penis and the anus, the mouth and the penis, or the mouth and the vagina.

§30. Sodomy in the third degree.

A person is guilty of sodomy in the third degree when:

1. He engages in deviate sexual intercourse with another person without the latter's consent; except that a person is not guilty of sodomy when (a) the other person's lack of consent is due solely to incapacity to consent because of mental defectiveness, mental incapacitation, unawareness or factual mistake, and the actor does not know of such condition or mistake, or (b) each person is less than seventeen and more than fourteen years old, and the act would be

mutually consentual were it not for the incapacity of each to consent by virtue of his age; or

2. He engages in any form of sexual intercourse with an animal or with a dead human body.

§31. Sodomy in the second degree.

Z person is guilty of sodomy in the second degree when he engages in deviate sexual intercourse with another person without the latter's consent, and when:

1. The other person is less than seventeen years old and the actor is more than twenty-one years old; or

2. The other person is less than fourteen years old; or

3. The other person is mentally defective and the actor knows such to be the case; or

4. The other person is mentally incapacitated as a result of an act committed upon him without his knowledge or consent, and the actor knows such to be the case.

§32. Sodomy in the first degree.

A person is guilty of sodomy in the first degree when he engages in deviate sexual intercourse with another person without the latter's consent, and when:

1. He compels the other person's submission or act, or overcomes his resistance, by force or by severe intimidation; or

2. The other person is physically helpless and the actor knows such to be the case; or

3. The other person is less than eleven years old.

§33. Sexual assault; definition of sexual contact.

Sexual contact means any touching of the sexual or other intimate parts of the person of another for the

purpose of arousing or gratifying sexual desire of either party.

§34. Sexual assault in the second degree.

A person is guilty of sexual assault in the second degree when he subjects another person, not his spouse, to sexual contact without the latter's consent; except that a person is not guilty when (a) the other person's lack of consent is due solely to incapacity to consent by virtue of factors unknown to the actor, or (b) each person is less than seventeen and more than fourteen years old, and the act would be mutally consentual were it not for the incapacity of each to consent by virtue of his age.

§35. Sexual assault in the first degree.

A person is guilty of sexual assault in the first degree when he subjects a person, not his spouse, to sexual contact without the latter's consent, and when:

1. He compels the other person's submission or act, or overcomes his resistance, by force or by severe intimidation; or

2. The other person is physically helpless and the actor knows such to be the case; or

3. The other person is less than eleven years old.

ARTICLE 4.

KIDNAPPING, COERCION AND RELATED OFFENSES.

§36. Definitions of terms.

Remove means to abduct a person or to cause him to go or be taken from one place to another without consent.

Confine means to hold or imprison a person without consent, secretly or under other circumstances calculated to prevent his liberation.

Restrain means to remove, hold, keep, confine or in any way restrict a person's movements without consent, for a brief period or otherwise, in such fashion as to interfere substantially with his liberty.

Without consent. A person is removed, restrained or confined "without consent" when he is compelled or induced to go or to remain in a place (a) by means of force, intimidation or deception, or (b) if a child less than fourteen years old or an incompetent person, without the consent of a parent, guardian or other person responsible for his general supervision or welfare.

§37. False imprisonment in the second degree.

A person is guilty of false imprisonment in the second degree when he unlawfully restrains another person.

§38. False imprisonment in the first degree.

A person is guilty of false imprisonment in the first degree when he unlawfully restrains another person under circumstances which expose such person to a risk of serious physical injury.

§39. Kidnapping in the second degree.

A person is guilty of kidnapping in the second degree when he unlawfully confines another person, or removes him with intent to confine him, and when either (a) the confine-

ment covers or is intended to cover an extensive period of time, or (b) the actor's purpose is:

1. To hold such person for ransom; or

2. To use him as a shield or a hostage; or

3. To inflict physical injury upon him, or to violate or abuse him sexually; or

4. To terroize him or a third person; or

5. To interfere with the performance of any governmental or political function.

§40. Kidnapping in the first degree.

A person is guilty of kidnapping in the first degree when he unlawfully confines another person, or removes him with intent to confine him, under circumstances constituting kidnapping in the second degree, and when such person is not voluntarily returned alive or voluntarily released alive under circumstances enabling him to return to safety without substantial risk of death.

§41. Kidnapping in the first degree; punishment; plea of guilty.

1. Kidnapping in the first degree is punishable by _____unless the death sentence is imposed as provided by section_____of this article.

2. When the court and the district attorney consent, a person indicted for kidnapping in the first degree may plead guilty to kidnapping in the first degree with a sentence of_____, in which case he shall be sentenced accordingly.

3. When a defendant has been found guilty after trial of kidnapping in the first degree, the court shall discharge the jury and shall sentence the defendant to----------if is is satisfied that he was less than eighteen years old at the time of the commission of the crime, or that the sentence

of death is not warranted because of substantial mitigating circumstances.

§42. Kidnapping in the first degree; proceeding to determine sentence; appeal.

1. When a defendant has been found guilty after trial of kidnapping in the first degree, and such verdict has been recorded upon the minutes, it shall not thereafter be subject to jury reconsideration.

2. Unless the court sentences the defendant to life imprisonment as provided in subdivision two of section_____. it shall, as promptly as possible, conduct a proceeding to determine whether the defendant should be sentenced to_____ or to death. Such proceeding shall be conducted in the manner prescribed in section sixteen of this title for determination of the penalty for murder in the first degree, and, except for the difference in the prison sentence which may be determined and imposed, all the provisions of said section sixteen relating to procedure and to determination and imposition of sentence, appeal, remand and re-sentence are here applicable.

§43. Kidnapping and false imprisonment; defenses

It is a defense to any prosecution for kidnapping or false imprisonment that the person allegedly removed, restrained or confined was less than eighteen years old at the time thereof, that the accused is a parent or a relative, and that his sole purpose was to exercise custody, permanent or temporary, over such child.

A "relative" means a parent, ancestor, brother, sister, uncle, aunt or cousin, and any person married to the same.

§44. Custodial interference in the second degree.

A person is guilty of custodial interference in the second degree when:

1. Being a parent or a relative of a child less than

eighteen years old, intending to exercise permanent or protracted custody or control over him, and having no right to do so, he entices such child or, if an infant unable to accompany him voluntarily, takes such child from the lawful custody of a parent or other lawful custodian; or

2. Having no legal right to do so, he knowingly takes or entices from lawful custody any incompetent person, orphan, delinquent child or other person committed by authority of law to the custody of another person or an institution.

§45. Custodial interference in the first degree.

A person is guilty of custodial interference in the first degree when he commits the crime of custodial interference in the second degree under circumstances involving a substantial risk that the health of the person taken or enticed from lawful custody will be materially impaired or his safety endangered.

§46. Substitution of children.

A person is guilty of substitution of children when, having been temporarily entrusted with a child less than fourteen years old and intending to deceive a parent, guardian or other lawful custodian of such child, he substitutes, produces or returns to such parent or custodian a child other than the one entrusted.

§47. Coercion in the second degree.

A person is guilty of coercion in the second degree when, with intent to injure or deprive someone of a benefit or to obtain a benefit for himself or a third person, he compels or induces a person to do an act which the latter has a legal right to abstain from doing, or to abstain from doing an act which he has a legal right to do, by means of instilling in him a fear that, if the demand is not complied with, the

actor will:

1. Cause physical injury to some person; or

2. Cause damage to property of some person; or

3. Accuse some person of a crime or cause criminal charges to be instituted against him; or

4. Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or

5. Cause a strike, boycott or other collective labor group action injurious to some person's business; except that such a threat shall not be deemed coercive when the act or omission compelled is for the benefit of the group in whose interest the actor purports to act; or

6. Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

7. Use or abuse his position as a public official by performing some act within or related to his official duties, or by refusing or omitting to perform an official duty in such fashion as to affect some person adversely; or

8. Do any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships.

§48. Coercion in the first degree.

A person is guilty of coercion in the first degree when he commits the crime of coercion in the second degree and when he thereby compels or induces another person:

1. To commit or attempt to commit or aid in the commission of a felony; or

2. To inflict or attempt to inflict physical injury upon some person; or

3. To violate his duty as a public officer.

June 20, 1963---RGD

RICHARD J. BARTLETT, CHAIRMAN
TIMOTHY N. PFEIFFER, VICE CHAIRMAN
WILLIAM KAPELMAN, SECRETARY
NICHOLAS ATLAS
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STATE OF NEW YORK
TEMPORARY COMMISSION ON REVISION
OF THE
PENAL LAW AND CRIMINAL CODE

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RICHARD G. DENZER
COUNSEL

December 28, 1962

Dear

Enclosed is the latest draft of the Homicide Article to be discussed at the meeting of January 18, 1963.

If you have any thoughts with respect to the bill which you think worthy of comment, I will appreciate it if you communicate them to me prior to the meeting.

Also to be discussed at the January 18 meeting will be the M'Naghten rule. Dick Bartlett pointed out that if the Commission is going to recommend the Model Code rule, he should introduce his bill before February 1st.

Cordially,

encl
RGD/pjc

Richard G. Denzer

DRAFT 7 [?]

ARTICLE 94

HOMICIDE

§ 1040. Definitions

Homicide. Homicide is the killing of one human being by the act, procurement or omission of another.

Excusable homicide. Homicide is excusable when committed by accident and misfortune, in lawfully correcting a child or servant, or in doing any other lawful act, by lawful means, with ordinary caution, and without any unlawful intent.

Justifiable homicide. Homicide is justifiable when committed by a public officer, or a person acting by his command and in his aid and assistance:

1. In obedience to the judgment of a competent court; or,

2. Necessarily, in overcoming actual resistance to the execution of the legal process, mandate or order of a court or officer, or in the discharge of a legal duty; or,

3. Necessarily, in retaking a prisoner who has committed, or has been arrested for, or convicted of a felony, and who has escaped or has been rescued, or in arresting a person who has committed a felony and is fleeing from justice; or in attempting by lawful ways and means to apprehend a person for a felony actually committed, or in attempting by lawful ways and means to apprehend a person for a crime actually committed, when the circumstances are such that one would have reasonable

cause for believing the committed crime was a felony, or in lawfully suppressing a riot, or in lawfully preserving the peace.

Homicide is also justifiable when committed:

1. In the lawful defense of the slayer, or of his or her husband, wife, parent, child, brother, sister, master or servant, or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony, or to do some great personal injury to the slayer, or to any such person, and there is imminent danger of such design being accomplished; or,

2. In the actual resistance of an attempt to commit a felony upon the slayer, in his presence, or upon or in a dwelling or other place of abode in which he is.

Criminal homicide. Criminal homicide is homicide which constitutes murder, manslaughter or criminally negligent homicide as defined in this article, and which is neither justifiable nor excusable. A homicide which is either justifiable or excusable does not, regardless of any other factors, constitute murder, manslaughter or criminally negligent homicide.

Criminal negligence. A person who creates a substantial and unjustifiable risk of human fatality, does so with criminal negligence, within the meaning of this article, when he should be aware of that risk but fails to perceive it. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, his failure to perceive it involves a gross deviation from the standard of care that a reasonable person would observe in

his situation.

Recklessly. A person who creates a substantial and unjustifiable risk of human fatality, does so recklessly, within the meaning of this article, when, though aware of that risk, he consciously disregards it. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, his disregard thereof involves a gross deviation from the standard of care that a reasonable person would observe in his situation.

§ 1041. Murder

A person is guilty of murder when:

1. With design to kill another person, he causes the death of such person or of a third person, except when the crime constitutes manslaughter as defined in subdivision three of section ten hundred forty-four.

2. Under circumstances evincing a depraved indifference to human life, he recklessly causes the death of another person.

3. Either alone or in concert with others, he commits or attempts to commit a felony and, in the course of and in furtherance of such crime or of the immediate flight of the perpetrators thereof or any one of them, one or more commits an act [involving a grave risk of human fatality]* which causes the death of a person other than one of the perpetrators; [except that it shall constitute an affirmative defense to a prosecution under this

---

*Alternatives:

1. inherently dangerous to human life;
2. which he knows to be dangerous to human life;
3. likely to cause serious physical injury [either directly or through the operation of fear or fright].

subdivision, which defense must be established by a preponderance of the evidence, that a defendant

(a) did not commit the homicidal act, nor aid, abet, induce, counsel or procure it in such fashion as to render him a principal therein, and

(b) did not carry any weapon [capable of inflicting serious physical injury] or know that any of his confederates carried such a weapon, and

(c) did not contemplate that either he or any confederate might commit an act [involving a grave risk of human fatality].]

Alternative Subdivision 3

[3. Either alone or in concert with others, he commits or attempts to commit a felony and, in the course of and in furtherance of such crime or of the immediate flight of the perpetrators thereof or any one of them, one or more commits an act [involving a grave risk of human fatality] which causes the death of a person other than one of the perpetrators, and when, in addition, the actor

(a) is the person who commits the homicidal act or aids, abets, induces, counsels or procures it in such fashion as to render him a principal therein, or

(b) carries a weapon (capable of inflicting serious physical injury), or

(c) knows that a confederate is carrying such a weapon, or

(d) contemplates that he himself might, under certain circumstances or eventualities, commit an act (involving a grave risk of human fatality), or

(e) contemplates that a confederate might, under

certain circumstances or eventualities, commit an act (involving a grave risk of human fatality).

It shall be presumed that a person participating in such a felony enterprise, though not in the homicidal act, (a) contemplated that one or more of his confederates might, under certain circumstances or eventualities, commit an act or acts (involving a grave risk of human fatality), and (b) knew that any confederate carrying a weapon (capable of inflicting serious physical injury) was so armed.]

§ 1042. Punishment for murder; plea of guilty to murder with a sentence of life imprisonment

1. Murder is punishable by life imprisonment, unless the death sentence is imposed as provided in section ten hundred forty-three.

2. With the consent of the court and the district attorney, a defendant indicted for murder may plead guilty to murder with a sentence of life imprisonment, in which case he must be sentenced accordingly.

3. When a defendant has been found guilty of murder after trial, the court shall impose the sentence of life imprisonment if it is satisfied that: (a) the defendant was under eighteen years of age at the time of the commission of the crime; or (b) the sentence of death is not warranted because of substantial mitigating circumstances.

§ 1043. Determination of sentence for murder

1. When a defendant has been found guilty of murder after trial, and such verdict has been recorded

upon the minutes, it shall not thereafter be subject to reconsideration by the jury.

2. Unless the court imposes the sentence of life imprisonment pursuant to subdivisions two or three of ten hundred forty-two, it shall, as promptly as practicable, conduct a proceeding to determine whether defendant should be sentenced to life imprisonment or to death. Such proceeding shall be conducted before the court sitting with the jury that found defendant guilty unless the court for good cause shown discharges that jury, and impanels a new jury for that purpose.

3. In such proceeding, evidence may be presented on any matter relevant to sentence including, but not limited to, the nature and circumstances of the crime, defendant's background and history, and any aggravating or mitigating circumstances. Any relevant evidence, not legally privileged, shall be received regardless of its admissibility under the exclusionary rules of evidence.

4. The proceeding shall be in the same order as in the trial of an indictment as provided in section three hundred eighty-eight of the Code of Criminal Procedure. The court shall charge the jury on any matters appropriate in the circumstances, including the law relating to the possible release on parole of a person sentenced to life imprisonment.

5. The jury shall then retire to consider the penalty to be imposed. If the jury report unanimous agreement on the imposition of the penalty of death, the court shall impose the sentence of death. If the jury report unanimous agreement on the imposition of the penalty of life imprisonment, the court shall impose the sentence of life imprisonment. If, after the lapse of such time as

the court deems reasonable, the jury report themselves unable to agree, the court shall discharge the jury and shall impose the sentence of life imprisonment.

6. On an appeal taken by the defendant from a conviction where the judgment is of death, the court of appeals, if it finds substantial error in the sentencing proceeding only, may set aside the sentence of death and remand the case to the trial court, in which event the trial court shall [impanel a new jury to determine the sentence] [either impose the sentence of life imprisonment or impanel a new jury to determine the sentence] [impose the sentence of life imprisonment].

§ 1044. Manslaughter

A person is guilty of manslaughter when:

1. With design to inflict serious [severe, substantial, appreciable] physical injury upon another person, he causes the death of such person or of a third person; or,

2. He recklessly causes the death of another person; or,

3. With design to kill another person, he causes the death of such person or of a third person under circumstances which would constitute murder under subdivision one of section ten hundred forty-one except that the crime is committed (a) under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse, the reasonableness thereof to be determined from the viewpoint of a person in the actor's situation under the circumstances as the actor believes them to be, or [(b) under an unreasonable misapprehension of fact concerning the circumstances at the time of the

killing, which misapprehension would have, if reasonable, rendered the killing justifiable pursuant to the definition of that term contained in section ten hundred forty.]

Alternate:

[(b) under a mistaken belief at the time of the killing that the circumstances were such that, if they existed, they would justify or exonerate the killing under the principles of justifiable homicide as defined in section ten hundred forty, but the belief is unreasonable.]

4. With intent to kill an unborn quick child, he injures the mother and thereby causes the death of such unborn quick child; or,

5. With intent to procure the miscarriage of a woman, whether she is actually pregnant or not, he provides, supplies or administers to her, or advises or procures her to take, any medicine, drug or substance, or uses or employs, or causes to be used or employed, any instrument or other means of aborting her, and thereby causes the death of such woman or of any quick child of which she is pregnant, except that this subdivision shall not apply to the commission of such acts when they are necessary to preserve the life of the woman; or,

6. Being a woman quick with child and intending to produce her own miscarriage, she takes, uses or submits to the use of any drug, medicine or substance, or any instrument or other means, and thereby causes the death of such child, except that this subdivision shall not apply to the commission of such acts when they are necessary to preserve the life of either the woman or the child.

Manslaughter is punishable by imprisonment for a term not exceeding fifteen years.

§ 1045. Criminally negligent homicide

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

Criminally negligent homicide is punishable by imprisonment for a term not exceeding five years.

§ 1046. What proof of death is required

No person can be convicted of murder, manslaugter or criminally negligent homicide unless the death of the person alleged to have been killed and the fact of killing by the defendant, as alleged, are each established as independent facts; the former by direct proof, and the latter beyond a reasonable doubt.

RGD and Staff/rc
December, 1962

RICHARD J. BARTLETT, CHAIRMAN
TIMOTHY N. PFEIFFER, VICE CHAIRMAN
WILLIAM KAPELMAN, SECRETARY
NICHOLAS ATLAS
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RICHARD G. DENZER
COUNSEL

December 4, 1962

_____
_____
_____

Dear

Enclosed is a fourth draft of our homicide article, composed on the basis of the discussion at our November 29th meeting in Albany.

In large part, this merely represents a combination of what the Commission appeared to feel were the best features of the second and third drafts, which I presented to you simultaneously and alternatively on a previous occasion.

The one significant departure from both of the latter versions is found in the felony murder provision (§2, subdivision 3), which I hope you will examine carefully for purposes of discussion at the next meeting, on December 7th.

Cordially,

Richard G. Denzer
Chief Counsel

RGD/cd
enclosures

12/3/62

PROPOSED HOMICIDE ARTICLE

NO. 4

Pertinent definitions of General Provisions

Act. The noun "act" means not only a physical movement, but also a verbal utterance and, where relevant, an omission or failure to act.

Criminal negligence. A person who commits an act which creates a substantial and unjustifiable risk of human fatality, physical injury, property damage, public catastrophe or public disorder, does so with "criminal negligence" when he should be aware of that risk but fails to perceive it. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, his failure to perceive it involves a gross deviation from the standard of care that a reasonable person would observe in his situation.

Recklessly. A person who commits an act which creates a substantial and unjustifiable risk of human fatality, physical injury, property damage, public catastrophe or public disorder, does so "recklessly" when, though aware of that risk, he consciously disregards it. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, his disregard theeof involves a gross deviation from the standard of care that a reasonable person would observe in his situation.

ARTICLE X

HOMICIDE

§1. Definitions

Mitigating circumstances. A person commits a homicide under "mitigating circumstances" when he kills under (1) the influence of extreme emotional disturbance for which there is reasonable explanation or excuse, or (2) an erroneous belief that he has a right to kill or to inflict grievous physical injury, when such erroneous belief is based entirely upon a mistake of fact on his part for which there is reasonable explanation or excuse.

In either instance, 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.

§2. Murder

Except when his crime constitutes manslaughter as defined in subdivision 1 of section 4 of this Article, a person is guilty of murder when:

1. With intent to kill another person, he commits an act which causes the death of such person or of a third person.

2. Under circumstances evincing a depraved indifference to human life, he recklessly commits an act involving an extremely grave risk of human fatality and thereby causes the death of another person.

3. Either alone or in concert with others, he commits or attempts to commit a felony, and a person other than one of the perpetrators thereof is killed by an act inherently dangerous to human life committed by

one or more of the felony perpetrators in the course of and in furtherance of their felonious enterprise or of their immediate flight from the scene thereof; except that it shall constitute an affirmative defense to prosecution under this subdivision that a defendant, though an accomplice in the felonious enterprise,

(a) did not commit the homicidal act, nor aid, abet, induce, counsel or procure it in such fashion as to render him a principal therein pursuant to standards of accessorial responsibility enunciated in this code, and

(b) did not contemplate or intend, under any circumstances, personally to commit any act inherently dangerous to human life, and carried no weapons designed for or capable of such use, and

(c) at no phase of the felonious enterprise when effective withdrawal on his part was possible, was aware of the existence of a reasonable possibility that any of his confederates might commit an act inherently dangerous to human life if such should become necessary or helpful to the effectuation or advancement of the felonious enterprise or of the perpetrators' escape from the scene of the crime.

§3. Punishment for murder; plea of guilty to murder with lesser penalty

Murder is punishable either by death [life imprisonment] or by a lesser penalty consisting of life imprisonment [a prison term or not less than twenty nor more than forty years], as provided in section X of this Article.

With the consent of the court and the district attorney, a person indicted for murder may plead guilty to murder with a lesser penalty, in which case he must be sentenced accordingly.

§4. Manslaughter

A person is guilty of manslaughter when:

1. With intent to inflict severe physical injury upon another person, he commits an act which causes the death of such person or of a third person.

2. Under mitigating circumstances, he commits an act which causes the death of another person, which act, absent such mitigating circumstances, would constitute murder as defined in subdivision 1 of section 2 of this Article.

3. He recklessly commits an act involving a substantial and unjustifiable risk of human fatality and thereby causes the death of another person.

§5. Criminally negligent homicide

A person is guilty of criminally negligent homicide when, with criminal negligence, he commits an act involving a substantial and unjustifiable risk of human fatality and thereby causes the death of another person.

RGD/cd
12/3/62

9/26/62

COMMENTS IN CONNECTION WITH NEW DRAFTS OF HOMICIDE ARTICLE

In connection with the proposed homicide Article submitted to the Commission and discussed at the July, 1962, meeting (which I did not attend), my understanding is that the principal criticisms and suggestions made were as follows:

(1) Second degree murder should be eliminated and all forms of homicide to be classified as murder should be contained in a single,degreeless murder statute.

(2) There should be alternative penalties for murder, the greater being either death or life imprisonment, depending upon the ultimate decision with respect to capital punishment, and the lesser being something appreciably short of the greater (i.e., life imprisonment or some specified shorter term if the greater is death, and something more lenient than life imprisonment if the latter is the greater).

The determination of which penalty shall be imposed should be made by the court and/or jury pursuant to procedures along the lines of those proscribed in the California and A. L. I. Model Codes (§210.6), sometimes involving a separate post-trial proceeding before the trial jury.

A defendant indicted for murder should be permitted, under certain conditions, to plead guilty to murder entailing the lesser penalty.

(3) Felony murder--

While the minutes of the July meeting are not entirely clear upon the matter, I gather that two suggestions--conflicting ones--were made in connection with felony murder.

(a) The first appears to be that the felony murder provisions and pattern of the original Article (§3, subd. 3; §4, subd. 3) should be eliminated and replaced by a provision

(in the murder statute) limiting this doctrine or crime to killings in the course of felonies perpetrated by acts inherently dangerous to life; and that the application of the statute should be further limited to the actual killer and those in privity with the homicidal act.

(b) The other suggestion would retain the selective felony murder provision of the original draft (§3, subd. 3) substantially in its present form, but would delete the residue or felony-manslaughter provision (§4, subd. 3) designed to cover killings occurring during felonies not enumerated in the first section.

(4) The manslaughter provision dealing with killings caused by acts committed with intent to inflict "substantial physical injury" (§4, subd. 1) should be eliminated. The reasons for this are: (a) that the distinction between "substantial" physical injury and "grievous" physical injury--the term used in one of the second degree murder provisions (§3, subd. 1)--is not clear or sharp enough for practical application; and (b) that a killing resulting from conduct intended to inflict bodily harm short of the "grievous" kind probably should not constitute homicide anyway.

(5) The second degree murder provision defining the <u>depraved</u> type of killing is awkward and inartistic. Founded upon a definition of the word "depravedly" (in the preliminary definitions), it refers to one who "depravedly commits an act involving an extremely grave risk of human fatality xxx." The word "depravedly" and the definition thereof should be eliminated, and the crime should be described and defined in the provision itself.

(6) The crime of "Reckless homicide" (§5 of the original draft) should be augmented by another crime--the

lesser offense of criminally negligent homicide--as in the A. L. I. Model Code. Reckless homicide should be raised a notch and inserted in the manslaughter statute (§4), while negligent homicide, under that or a similar label, should replace it as the lowest degree (§5).

While not agreeing with all these suggestions, I have attempted to incorporate them in an amended Article (Code A of Appendix hereto). In addition, I have drafted an alternative Article (Code B, idem) which adopts some of the above suggestions, rejects others, and inserts some new ideas.

Code A

Pursuant to the Commission's suggestion, degrees of murder are here eliminated and all forms of murder are placed in a single "Murder" statute containing three subdivisions (§2).

The first subdivision combines intentional killing and that committed with intent "to inflict grievous physical injury" (second degree murder in the original draft (§3, subd. 1).*

Subdivision 2 defines the depraved type--with phraseological changes from the original draft (see §3, subd. 2 thereof) believed to accord with the Commission's above-noted suggestion.

Subdivision 3 is the felony murder provision. While not limiting the kinds of felonies which may underlie the crime, it requires--in accordance with one of the suggestions made--a homicidal act "inherently dangerous to human life," and applies only to the killer and those accomplices privy to the act. This replaces and eliminates the two provisions of the original draft (§3, subd. 3; §4, subd. 3).

The next section (§3) of this Article adopts the suggestions with respect to punishment and pleading. Two possible sentences for murder are proscribed. The greater is death or life imprisonment, depending upon future decisions. The lesser or "reduced penalty" is also set forth in the

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*It should be noted that the definition of "grievous physical injury," contained in the original Article (§1), is here eliminated. The definition was reluctantly formulated and presented for the sole purpose of distinguishing "grievous" from "substantial" injury, the basis for a lesser included crime of manslaughter (§4, subd. 1 of original Article). Since the latter is being excised here and the distinction is, therefore, no longer necessary, the definitions of both "grievous" and "substantial" are sticken.

alternative: life imprisonment (obviously usable as a lesser sentence only if the death penalty is retained for the greater); or a shorter term, arbitrarily designated as twenty to forty years, which is usable whether the greater penalty be death or life imprisonment.

As indicated, the determination of whether the greater or "reduced" sentence shall be imposed in any particular case is to be made pursuant to some post-trial procedure of the California or Model Code sort. The drafting of such statutory machinery is an intricate task in itself and is not attempted at this point. The prospective procedural statute is referred to as "section X," and the alternative punishment provision at hand (§3) simply declares that the determination shall be made "as provided in section X of this Article."

Also included in this section (§3) is the suggested provision conditionally permitting a defendant under indictment for murder to plead guilty to "murder with a reduced penalty."

Coming to Manslaughter (§4), the first subdivision of the original Manslaughter section, proscribing a form of homicide committed by an act intended "to inflict substantial physical injury" (§4, subd. 1), is deleted pursuant to the Commission's suggestion. Also eliminated--by virtue of the revised felony murder pattern--is the third subdivision of the original section, dealing with felony homicide.

The only subdivision retained is the one reducing murder to manslaughter when an otherwise murderous killing is committed "under mitigating circumstances" (§4, subd. 2 of the original Article; §4, subd. 1 of "Code A").

In addition, however, "Reckless homicide" (§5 of the original draft) is raised to manslaughter and, bereft of its old title but without change of context, is inserted as

subdivision 2 of the manslaughter section (§4).

Completing the Commission's recommendations in this area, a new and lesser crime of "Criminally negligent homicide" is added as section 5 (Reckless homicide's old location). This involves the formulation of another definition ("criminal negligence"), which is inserted in the "definitions" portion of the general provisions. As with the word "Recklessly," the definition of "Criminal negligence" substantially follows the Model Code definition; and, also as in the Model Code, the <u>negligent</u> brand of homicide becomes a lesser degree of the <u>reckless</u> variety.

Code B

Many of the Commission's suggestions are incorporated in this draft, also. Among those retained are what may probably be termed the primary recommendations--concerning a single, degreeless murder section, alternative penalties for murder, and the plea of guilty to murder with a reduced penalty.

The variations from "Code A" involve (1) felony murder; (2) homicide by acts intended to inflict physical injury ("grievous" and "substantial"); and (3) reckless and negligent homicide.

1. Felony murder

I am not enamored of the "Code A" felony murder provision (§2, subd. 3), which limits the application of this crime to one who, in the course of a felony or felony attempt, either directly or accessorily kills a person by an act "inherently dangerous to human life." While appreciating the theory of the requirement, it seems to me to render felony murder a toothless crime which, in the indicated form, might just as well be abandoned. This opinion requires considerable explanation.

The thrust of the recommendation, as I understand it, is that the felony murder doctrine should not be automatically applicable to every kind of killing in the course of a felony, or to each of the felony perpetrators irrespective of his actual contribution or lack of contribution to the actual homicide; that individual or personal homicidal culpability of a certain degree should be an important factor and, indeed, a requisite; and, hence, that one should not be guilty of this crime unless, either directly or by accessorial conduct related to the killing itself (not merely to the

felony), he causes or aids in causing death by an act inherently dangerous to life. The "Code A" section is so worded (§2, subd. 3); and, in that form, it exempts, inter alia, (1) the felony perpetrator who more or less accidentally kills by, for example, an average blow with his fist, and (2) the non-killer accomplice whose contributions are exclusively to the underlying felony and who, not being privy to the homicidal act, is not criminally responsible therefor even though it be a savage one.

This seems fair and practical enough with respect to the actual killer. Rarely, however, would the statute reach the non-killer accomplices.

The typical multiple-offender felony murder is a robbery conducted by two or more armed bandits during which one of them, because of resistance, interference or some other factor, fatally shoots or stabs someone. The killer, of course, has committed "an act inherently dangerous to human life" and, hence, in addition to being guilty of some form of common law homicide, is also guilty of felony murder under the postulated provision. Not so, however, his holdup confederates. Though guilty of robbery, they are not guilty of felony murder--nor of any other form of homicide.

In partial answer to this assertion, the suggestion has been made that, in many instances, complicity in the "dangerous" homicidal act may be constructively attributed to the accomplices. When several persons arm themselves and set out upon a criminal enterprise requiring concerted action, it is urged, a conditional intent to kill, if necessary, for attainment of the common objective may legally be implied. By principles of criminal conspiracy and accessorial responsibility (Penal Law, §2), the argument goes, this type of situation furnishes legally sufficient basis for a jury finding

that the non-killer confederates were accomplices in the "dangerous" homicidal act as well as in the underlying felony. Stated in another way, the contention is that, absent any felony murder provision, all would share the killer's homicidal responsibility and would be guilty of any form or degree of common law homicide of which the killer himself might be convicted. Upon this theory rests the claim that the "dangerous act" felony murder provision in question is broad enough to encompass non-killer accomplices in many instances.

The gist of my position is that this proposition is legally erroneous. Possibly it stems from certain superficially pertinent but actually inapplicable language of the opinion in People v. Emieleta (1924) 238 N. Y. 158. This affirmed a first degree murder conviction resulting from a killing during a robbery committed by the defendant and A. By joint and individual assaultive acts, the two men had brutally beaten the deceased with weapons, but it could not be determined who had struck the fatal blow. For some strange reason, the case was submitted to the jury on a common law rather than a felony murder theory, and the defendant contended that the evidence of homicidal intent and premeditation as to him was insufficient because of failure to establish that he rather than A had struck the fatal blow. That factor was held to be immaterial on the ground that, even though A had struck it, there was ample to justify a finding of intent to kill by virtue of a combination between the two "to kill in case killing is necessary to overcome resistance" to the common objective, or "a confederacy to oppose resistance to the death" (238 N. Y., at p. 163).

That decision in no wise supports the contention here mentioned. Dealing with the responsibility of an actual

participant in a fatal assault, Emieleta does not enunciate any proposition to the effect that felony accomplices taking no part in a killing perpetrated by a confederate share the latter's homicidal responsibility by virtue of knowledge that weapons were carried and other considerations of that nature. As a matter of fact, the law of New York is clearly to the contrary.

There is no principle more firmly imbedded in New York's homicide law than that which requires unequivocal proof of a specific intent to kill on the part of a defendant who, though he did not personally commit the homicidal act, is charged with common law murder upon an accessorial or conspiratorial basis [People v. Agron (1961) 10 N. Y. (2d) 130, 135; People v. Weiss (1943) 290 N. Y. 160; People v. Emieleta, supra, 238 N. Y. 158, 163; People v. May (1st Dep't. 1960) 9 App. Div. (2d) 508, 510, 512]. Scrutiny of these and other decisions on the subject proves persuasive that the appellate courts of this state are most reluctant to approve such convictions in the absence of overwhelming proof of homicidal intent, even when the accessorial conduct includes active participation in the fatal assault.

In this state of the law, it is virtually impossible to convict, or sustain a conviction of, the average non-killer participant in a fatal felony of any form of common law homicide; and, most significantly, it was for that very reason that the present felony murder provision was enacted. As observed in People v. May, supra [9 App. Div. (2d), at p. 512]:

> "The difficulties in proving intent to commit a murder attributable to the main actor and binding on all conspirators in a plan to commit another crime, a robbery, for example, where one of them kills a victim, were found in practice to have been so great that they were met by a statute (Penal Law, §1044, subd. 2), which defines as murder in the first degree an act causing the death of another while engaged in committing a felony without design to effect death."

The foregoing is further confirmed by a line of decisions dealing with the trial judge's duty to charge the degrees of common law homicide in a felony murder case. It is settled law in New York that, even though a murder charge is prosecuted upon a felony murder theory, the court, except in rare instances, must, if the defense so desires, charge the degrees of common law homicide in addition to felony murder. The significant principle here lies in the qualification that this general rule applies only to the actual killer and not to any non-killer accomplices who may be involved. The reason is that the latter are not guilty of common law homicide, but of felony murder or nothing, and, hence, that submission of the former constitutes error [People v. Hicks (1941) 287 N. Y. 165, 171; People v. Martone (1931) 256 N. Y. 395, 397; People v. Seiler (1927) 246 N. Y. 262, 266-268].

This rule finds succinct expression in Hicks, supra (287 N. Y., at p. 171):

> "Ordinarily where the evidence shows that the accused has actually killed another in the commission of a felony, or otherwise, the trial judge must charge the degrees of homicide, but the trial judge may not do so where the accused is an accomplice in the felony and is not otherwise a party to the homicide."

This doctrine is applied even when the accomplice's conduct is most aggressive with respect to weapons and the general conduct of the felony. In Seiler, supra, for example, involving a fatal shooting by one of four bandits conducting a holdup of a liquor resort, the defendant had brandished a pistol and taken money from the cash register, although there was no proof that it was he who fired the fatal shot. Convicted of felony murder, he assailed the trial judge's refusal to charge common law homicide and its degrees. Upholding that refusal, the Court of Appeals pointed to the

lack of evidence stamping him the killer and declared that, accordingly, there was no basis for a conviction of common law murder or manslaughter (246 N. Y., at p. 268):

> "Unless Masterson [the deceased] was killed during the commission of a felony by the defendant, no evidence here presented would justify an affirmative finding which upon any logical theory would make the defendant share in the guilt of the slayer."

It seems apparent, therefore, that, apart from exceptional cases, the "Code A" felony murder provision under discussion would cover, at most, only actual killer-defendants and accomplices who clearly and aggressively aid or encourage such homicides; and that it would not reach the typical non-killer accomplice. The statute's application to the <u>killer</u> group is relatively unimportant, since these defendants are almost invariably guilty of common law homicide as well. The importance of the felony murder doctrine lies in its application to the non-killers, who are not otherwise chargeable with homicide, and, as seen, it was for that very reason that New York's present felony murder provision was enacted. Bearing all this in mind, adoption of the suggested "dangerous act" provision would amount to virtual abolition of the felony murder doctrine.

Whether such is desirable or not is not the subject of comment here. The point stressed is that, if abolition is the aim, then it should be accomplished by explicit legislation; not by a watered down statute that superficially purports to retain the doctrine but actually destroys it.

It may be observed that, with a change of draftsmanship, the "dangerous act" phase of the crime could be retained without exempting non-killer accomplices. In short, the statute could require an inherently dangerous homicidal act but decree that, with that established, each of the felony perpetrators is guilty of murder whether or not he participated

in the actual killing.

The objections to this would seem to be: (1) that it dilutes or destroys the central thought underlying the "Code A" provision, namely the concept or requirement of individual homicidal culpability; and (2) that it would not represent much of a change from the existing law, covering non-dangerous as well as dangerous acts, since most of the homicidal acts in felony murder cases are "dangerous" ones anyway.

In view of all these considerations, the "Code A" felony murder section is not adopted here, and the prime provision of the original Article (§3, subd. 3) is left intact--though now, of course, a subdivision of the single murder statute (§2) rather than of the old second degree section. "Code B" does, however, adopt the Commission's other suggestion is this area by excising the lesser or residue felony homicide provision (§4, subd. 3 of original Article) from the manslaughter section (§4 of Code B).

2. With intent to inflict "grievous," "substantial" or "severe" physical injury

There is considerable merit, in my opinion, to the Commission's conclusion that the distinction between the terms "grievous physical injury" (the basis of a murder provision) and "substantial physical injury" (the basis of a manslaughter provision), as defined, is not clear enough to form a demarcation line between murder and manslaughter. However, rather than drop the "substantial" or manslaughter crime, as suggested, I would retain it (with one change noted below) and delete the "grievous" or murder offense instead. My reasons are as follows:

As set forth in the commentary to the original

Article, the existing Penal Law homicide statutes proscribe no crime of either murder or manslaughter consisting of a killing caused by a cold, unprovoked assault committed without intent to kill but with intent to inflict bodily harm. It was for the purpose of plugging that large gap that the two provisions in question were inserted in the original draft (§3, subd. 1; §4, subd. 1).

Were it not for a desire to exclude from the homicide orbit cases of trivial assault accidentally resulting in death, the lower or manslaughter crime would have been drafted in terms of assaults or other acts committed with intent to inflict just plain "physical injury"--not "substantial physical injury." In order to eliminate the trivial cases, however, the word "substantial" was employed; and this was designed to cover all cases lying between the "grievous" and the trivial.

This manslaughter offense is, in my judgment, more important than the "grievous physical injury" or murder offense. The greatest need in this area is for a manslaughter provision that will cover killings by assaults of a "substantial" or severe--though not necessarily grievous--nature. Without such a crime, a vast group of killings resulting from substantial or severe beatings will hang in limbo. If one of the two crimes must be eliminated, therefore, it should be the higher or murder offense involving intent to inflict "grievous physical injury."

From a practical standpoint, moreover, this would not be a great loss despite the deep-rooted common law background of that crime. In the more aggravated fatal assault cases--shootings, stabbings, extremely brutal beatings, etc.--rarely can a defendant persuade a jury that his intent was not homicidal but merely "to inflict grievous physical injury."

In New York, at least, such killings are charged as murder (with intent to kill) and submitted to the jury under instructions that homicidal intent may be circumstantially inferred from the weapons used, the nature of the wounds, etc., and that a person is presumed to intend the natural and probable consequences of his acts unless the evidence is clearly to the contrary [People v. Chiaro (1911) 200 N. Y. 316, 319; People v. Schmidt (1901) 168 N. Y. 568, 576; People v. Conroy (1884) 97 N. Y. 62, 78]. Thus, in practical effect, most of the "grievous" injury cases are covered by the straight intentional killing provisions.

Assuming, however, jury acceptance of the claim of intent to inflict grievous injury rather than to kill, such would not exonerate the defendant from all homicidal responsibility under the suggested legislation. Since severe or "substantial" injury includes "grievous" injury, the verdict would properly and probably be manslaughter.

While "Code B" herein thus retains the manslaughter provision (§4, subd. 1), one phraseological alteration is made. The word "substantial" is changed to "severe." "Severe," it is felt, though weaker than "grievous," is stronger than "substantial," thus increasing the requirements of the crime a bit and further insuring exclusion of the trivial assault cases.

The term "severe physical injury" is not defined. "Grievous" and "substantial physical injury" were defined in the original Article purely for purposes of distinction. With the "grievous" crime eliminated and only the "severe" provision on the books, no distinction is necessary. Such statutory definitions are never satisfactory and are better left to judicial construction, if possible.

3. "Reckless" and "Culpably negligent" homicide

Most jurisdictions, including New York, proscribe a form of involuntary homicide described as criminally negligent, culpably negligent or reckless homicide, which is designated manslaughter and/or by some other title (usually containing the word "negligent") when applied to a special field such as vehicle homicides. Regardless of terms, titles and the number of statutes of this nature, each jurisdiction ordinarily has a single case law definition or standard of criminal negligence or recklessness. New York's definition--applicable to its negligence manslaughter, vehicle homicide and reckless driving provisions [Penal Law, §1052 (subd. 3), 1053-a; Vehicle and Traffic Law, §1190]--is in terms of conduct committed in "disregard of the consequences which may ensue from the act, and indifference to the rights of others" [People v. Angelo (1927) 246 N. Y. 451, 457; see, also, People v. Bearden (1943) 290 N. Y. 478, 482; People v. Grogan (1932) 260 N. Y. 138, 144].

The A. L. I. Model Code creates two crimes rather than one in this area: reckless homicide, placed in its manslaughter section (§210.3, subd. 1a), and "Negligent Homicide," a crime bearing that title (§210.4) which is, in effect, a lower degree of the reckless brand. By definitions (§2.02), the gist of recklessness is a conscious disregard of a substantial and unjustifiable risk, and the kernel of negligence is a culpable failure to perceive the same. The definition of the higher concept, recklessness, is substantially similar to New York's single definition for all these terms (recklessness, culpable or criminal negligence, etc.). The definition of the lower, negligence, veers towards civil negligence, and is one that I have not seen approximated in the criminal statutes or

case law of any jurisdiction.

It is evidently the recommendation of the Commission that this two-pronged pattern of the Model Code be adopted, and that has been done in "Code A" herein (§5).

In my comments concerning the original Article (p. 40), I criticized this dual-crime arrangement as intellectually sound but probably impractical. Feeling the distinction between Model Code recklessness and negligence to be too ephemeral from a jury or realistic standpoint, I ignored the lower or negligence crime and proscribed only the higher one of "Reckless homicide" (§5).

For the same reason, "Code B" herein is left in the original form, with negligent homicide omitted. This is not done petulantly, but merely for the purpose of highlighting an issue which I hope is still open for discussion.

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9/26/62

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APPENDIX

CODE A

PROPOSED HOMICIDE ARTICLE
NO. 2

Pertinent definitions of General Provisions

Act. The noun "act" means not only a physical movement, but also a verbal utterance and, where relevant, an omission or failure to act.

Criminal negligence. A person who commits an act which creates a substantial and unjustifiable risk of human fatality, physical injury, property damage, public catastrophe or public disorder, does so with "criminal negligence" when he should be aware of that risk but fails to perceive it. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, his failure to perceive it involves a gross deviation from the standard of care that a reasonable person would observe in his situation.

Recklessly. A person who commits an act which creates a substantial and unjustifiable risk of human fatality, physical injury, property damage, public catastrophe or public disorder, does so "recklessly" when, though aware of that risk, he consciously disregards it. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, his disregard thereof involves a gross deviation from the standard of care that a reasonable person would observe in his situation.

ARTICLE X

HOMICIDE

§1. Definitions

Mitigating circumstances. A person commits a homicide under "mitigating circumstances" when he kills under (1) the influence of extreme emotional disturbance for which there is reasonable explanation or excuse, or (2) an erroneous belief that he has a right to kill or to inflict grievous physical injury, when such erroneous belief is based entirely upon a mistake of fact on his part for which there is reasonable explanation or excuse.

In either instance, 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.

§2. Murder

Except when his crime constitutes manslaughter as defined in subdivision 1 of section 4 of this Article, a person is guilty of murder when:

1. With intent to kill or to inflict grievous physical injury upon another person, he commits an act which causes the death of such person or of a third person.

2. Under circumstances evincing a depraved indifference to human life, he recklessly commits an act involving an extremely grave risk of human fatality and thereby causes the death of another person.

3. In the course of committing or attempting to commit a felony, or in the course of his immediate flight from the scene thereof, he commits or participates in the commission

of an act inherently dangerous to human life and thereby causes the death of a person other than a participant in such felony or felony attempt.

§3. Punishment for murder; plea of guilty to murder with reduced penalty

Murder is punishable either by death [life imprisonment] or by a reduced penalty consisting of life imprisonment [a prison term of not less than twenty nor more than forty years], as provided in section X of this Article.

With the consent of the court and the district attorney, a person indicted for murder may plead guilty to murder with a reduced penalty, in which case he must be sentenced accordingly.

§4. Manslaughter

A person is guilty of manslaughter when:

1. Under mitigating circumstances, he commits an act which causes the death of another person, which act, absent such mitigating circumstances, would constitute murder as defined in subdivision 1 of section 2 of this Article.

2. He recklessly commits an act involving a substantial and unjustifiable risk of human fatality and thereby causes the death of another person.

§5. Criminally negligent homicide

A person is guilty of criminally negligent homicide when, with criminal negligence, he commits an act involving a substantial and unjustifiable risk of human fatality and thereby causes the death of another person.

CODE B

PROPOSED HOMICIDE ARTICLE
NO. 3

Pertinent definitions of General Provisions

Act. The noun "act" means not only a physical movement, but also a verbal utterance and, where relevant, an omission or failure to act.

Recklessly. A person who commits an act which creates a substantial and unjustifiable risk of human fatality, physical injury, property damage, public catastrophe or public disorder, does so "recklessly" when, though aware of that risk, he consciously disregards it. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, his disregard thereof involves a gross deviation from the standard of care that a reasonable person would observe in his situation.

ARTICLE X

HOMICIDE

§1. Definitions

Mitigating circumstances. A person commits a homicide under "mitigating circumstances" when he kills under (1) the influence of extreme emotional distrubance for which there is reasonable explanation or excuse, or (2) an erroneous belief that he has a right to kill or to inflict grievous physical injury, when such erroneous belief is based entirely upon a mistake of fact on his part for which there is reasonable explanation or excuse.

In either instance, 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.

§2. Murder

Except when his crime constitutes manslaughter as defined in subdivision 2 of section 3 of this Article, a person is guilty of murder when:

1. With intent to kill another person, he commits an act which causes the death of such person or of a third person.

2. Under circumstances evincing a depraved indifference to human life, he recklessly commits an act involving an extremely grave risk of human fatality and thereby causes the death of another person.

3. Either alone or in concert with others, he commits or attempts to commit a felonious crime of arson, robbery, burglary, kidnapping, escape, forcible rape or other forcible sex crime, and a person other than one of the perpetrators is killed as a proximate result of such felony, or as a result of an act of one or more of the perpetrators committed in the course of and in furtherance of such felony or of the perpetrators' immediate flight from the scene thereof.

§3. Punishment for murder; plea of guilty to murder with reduced penalty

Murder is punishable either by death [life imprisonment] or by a reduced penalty consisting of life imprisonment [a prison term of not less than twenty nor more than forty years], as provided in section X of this Article.

With the consent of the court and the district

attorney, a person indicted for murder may plead guilty to murder with a reduced penalty, in which case he must be sentenced accordingly.

§4. Manslaughter

A person is guilty of manslaughter when:

1. With intent to inflict severe physical injury upon another person, he commits an act which causes the death of such person or of a third person.

2. Under mitigating circumstances, he commits an act which causes the death of another person, which act, absent such mitigating circumstances, would constitute murder as defined in subdivision 1 of section 2 of this Article.

§5. Reckless homicide

A person is guilty of reckless homicide when he recklessly commits an act involving a substantial and unjustifiable risk of human fatality and thereby causes the death of another person.

RGD:cd
9/26/62

COMMENTARY IN EXPLANATION OF PROPOSED HOMICIDE ARTICLE

Introduction

This report is submitted in explanation of a proposed homicide Article, set forth as the first "Code" in the Appendix hereto.

The report offers: (1) a brief summary of certain principles of homicide at common law; (2) a more detailed analysis of American homicide statutes and statutory patterns; (3) specific treatment of the homicide Article of the New York Penal Law; (4) analysis of the homicide Article of the American Law Institute Model Penal Code; and, finally, (5) a detailed explanation of the proposed Article in the light of the foregoing.

As is readily observable, these topics cover a vast amount of ground and, concededly, this report is in some respects superficial, especially in contrast to a number of far more exhaustive treatises upon various phases of the law of homicide. The report seeks to present a bird's-eye view of the common law, American statutory law, and New York statutory law, in order to treat and crystalize some of the main issues and defects of homicide legislation in general and New York homicide legislation in particular. The proposed Article is then drafted and discussed against that background.

Neither the Article nor the report concerns itself with questions of sentencing, which are being dealt with in other phases of the Commission's work.

In addition to the proposed Article, the Appendix--detached from this report in order to make it easily available for reference purposes--contains homicide Articles of several other penal codes which may prove of interest: that of the New York Penal Law (Code 2), of the recent Illinois and Wisconsin Codes (Codes 3 and 4, respectively), and of the A. L. I. Model Penal Code (Code 5).

I.

THE COMMON LAW

At common law, homicide--the killing of a human being not justifiable or excusable--is either murder or manslaughter.

A. Murder

A treatment and analysis of murder at common law is presented at pages 25-46 of the British Report of the Royal Commission on Capital Punishment (1949-1953) (hereafter cited as Gower), and the present comments on this subject are largely based thereon.

Common law murder is defined as homicide committed with "malice aforethought," and is thus distinguished from manslaughter, defined as homicide committed without "malice aforethought." The term "malice aforethought" is not satisfactorily descriptive and there is considerable controversy concerning its precise meaning and scope (Gower, pp. 26-27). It is divided into two general categories: (1) express malice and (2) implied or constructive malice.

Broadly speaking, murder with express malice includes the following three categories of killings (see Gower, p. 28):

(1) intentional killings, whether premeditated or not;

(2) killings committed with intent to inflict grievous bodily harm (as those resulting from a brutal beating but without actual homicidal purpose); and

(3) killings committed without specific intent to kill or injure but resulting from wanton, highly reckless or depraved conduct imminently perilous to human life--such as firing a gun into a crowd or exploding a bomb in a public place. This category is hereafter referred to as the depraved type of murder.

The principal form and application of implied or "constructive malice" appears in connection with what is now classified as "felony murder." The theory is that the fact that the actor was engaging in the commission of a felony when the killing occurred--

even though an accidental one--supplies the requisite "malice." In a sense, this is an extension of the depraved type of malice, which does not involve specific intent to kill or injure [Gower, p. 29; see Wechsler and Michael, A Rationale of the Law of Homicide (1937) 37 Col. L. R., pp. 702-703].

The principle of felony murder and constructive malice is a highly controversial one. Many believe the unlimited felony murder doctrine far too harsh. It is, of course, a public policy crime, the policy being that one who endangers society by engaging in a felony must, for deterrent purposes, take the full consequences of his wrongdoing, even though accidental or unintended. The critics of this doctrine feel that the policy is either unsound or outweighed by basic considerations of justice (see Gower, pp. 34-45; M.C.C., pp. 33-39[1]). Technically, at least, according to the Gower Report (pp. 31-32), the straight or unqualified felony murder doctrine was still the law of England (common law) in 1953, although, in practice, cases of unintentional killing in the course of non-violent felonies were invariably steered into manslaughter convictions.

The opposite extreme of the straight felony murder rule is, of course, complete abolition of the whole doctrine, which England accomplished by statute in 1957 (M.C.C., p. 36). There is considerable support, however, for an intermediate rule limited in application either to the commission of felonies involving violence or to those in which death results from an act of violence (Gower, p. 37).

B. Manslaughter

There is no area of the common law more cloudy or chaotic than that of manslaughter. Perhaps, the situation is most aptly summarized in a study of homicide made by the New York State Law

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[1]"M.C.C." means "Model Code Commentary" and refers specifically to pp. 28-59 of Tentative Draft No. 9 of the Model Penal Code of the American Law Institute, this section thereof being devoted to comments on the law of homicide and the homicide provisions of the Model Code.

Revision Commission [Law Revision Commission Report (1937) p. 517, at p. 702]:

> "At common law, manslaughter was a conglomerate group of culpable homicides. Both courts and commentators, with complete unanimity, defined manslaughter to include all unlawful killing 'without malice aforethought.' Nevertheless what seemed to be a very complete definition was in fact no definition at all; it was merely a statement that all unlawful homicide not murder was manslaughter. The formless mass of judicial precedent which gradually shaped the lines of demarcation in the field of homicide, and especially in the category of manslaughter, had no universally accepted common law classification."

Some text writers, endeavoring to give shape to this field, have succeeded in presenting a few ostensibly neat definitions, though little over-all clarification.

Illustrative is the text of Professor Warren (see 1 Warren on Homicide (Perm. ed.). As there enunciated, manslaughter, at common law, "is the unlawful killing of a human being without malice, express or implied" (op. cit., §83, p. 409), "malice" being the factor which distinguishes murder from manslaughter (id., p. 416). The author then elaborates as follows (id., p. 414):

> "It [manslaughter] can result from the commission of an unlawful act, not amounting to a felony, or from the commission of a lawful act which might produce death in an unlawful manner, or the commission of a lawful act without due caution and circumspection."

Manslaughter, it is said, is of two kinds: voluntary and involuntary (id., p. 415). The voluntary type consists mainly of the familiar killing in the heat of passion, upon a sudden quarrel, or under provocation deemed to require some leniency (id., §85, pp. 416-417):

> "Manslaughter is voluntary when committed with a design or intent to kill, under the influence of a sudden and

> sufficient passion caused by adequate provocation or in mutual combat, which the law, in its tenderness to the infirmity of human nature, considers such a palliative of the offense as to rebut the presumption which would otherwise arise of malice."

It is to be noted that the "intent to kill" element necessarily confines "heat of passion" manslaughter to homicides which, absent "heat of passion" or provocation, would be murder. In short, the provocation feature nullifies the "malice," thus permitting reduction to manslaughter, which is without malice. Examination of the hoards of decisions in this field, however, discloses that, in many jurisdictions, that principle is only theoretical: that many "heat of passion" cases stamped voluntary manslaughter would not fall into the murder category under any circumstances, and, further, that many homicides jammed into this classification are not really "heat of passion" cases at all but simply killings which, for one reason or another, fall short of murder, or, indeed, seem to constitute murder by accepted standards but are arbitrarily treated as manslaughter by virtue of individual views of particular jurisdictions. While there are countless decisions clearly following the "heat of passion" theory, there are many which seem to ignore the provocation aspect and loosely treat as voluntary manslaughter assaultive or comparable homicide committed under no provocation of a mitigating sort. Thus, voluntary manslaughter sometimes is treated as including killings resulting from unprovoked assaults with intent to inflict bodily injury of varying degrees, from deliberately placing or leaving children in situations dangerous to life or health, etc. (id., §85, pp. 418-419). The total impression conveyed by this area of law is that voluntary manslaughter is not so much a concept of homicide as a loose, catch-all category employed to penalize all voluntary homicide which any particular jurisdiction does not wish to classify as murder.

Coming to "involuntary manslaughter," we again find neat, if not truly meaningful, definitions (Warren, op. cit., §86, pp. 420-421):

> "Involuntary manslaughter embraces a killing without malice and intent, in doing some unlawful act not amounting to a felony nor naturally

> tending to cause death or great bodily injury, or in doing negligently some lawful act, or in omitting to perform a legal duty. It is the unlawful killing of a human being without malice, either express or implied, and without intent to kill or inflict the injury causing death, committed accidentally in the commission of some unlawful act not felonious, or in the improper or negligent performance of an act lawful in itself."

And further (id., p. 422):

> "The peculiarity of involuntary manslaughter is that the killing is without criminal intent, but it is always by misadventure, and it is only made a crime because of being brought about by some negligent or unlawful act."

One fairly clear point with respect to involuntary manslaughter is that it includes killing by negligence. Without treating the varying standards of negligence deemed to raise that concept from a civil to a criminal grade, it is apparent that all cases of death resulting from such negligence fall into the involuntary manslaughter fold: fatality caused by criminal or culpable negligence in the operation of vehicles, in building construction, in the administering of drugs etc.

A difficult facet of involuntary manslaughter lies in the language covering unintended or accidental death from some "unlawful act" -- "some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily injury" (id., pp. 420-422).

It is noteworthy that this crime does not require negligence but seems to be committed when death results from not inherently dangerous conduct constituting a misdemeanor, a lesser criminal offense, a violation of a local ordinance or even a tort. Ostensibly, it covers cases of unintended and accidental death resulting from such non-negligent conduct as firing a rifle while hunting without a license, inadvertently frightening a woman in the course of a trespass, unavoidably striking a grossly careless pedestrian while driving without a license, and so on. It appears, however, that, with these considerations in mind, the courts strove to narrow this form of manslaughter by requiring that the unlawful act be malum in se, and later, that it be of a dangerous nature, although even these

qualifications left the area in an uncertain state with many problems posed, including some relating to proximate causality [Wechsler and Michael, A Rationale of the Law of Homicide, 37 Col. L. R. (1937), pp. 722-723].

II.

AMERICAN STATUTORY LAW

All American jurisdictions possess statutory homicide law, although some of the provisions do no more than declare, in effect, that the common law definition of murder or manslaughter is the law of the jurisdiction, and then proscribe punishment therefor.

A. Murder

In 10 states, murder is a single, degreeless crime (Ga., Ill., Ky., La., Me., Miss., Okla., S.C., S.D., Tex.).* Three states divide it into 3 degrees (Fla., Minn., Wis.). Virtually all of the other jurisdictions have 2 degrees.

To an immense extent, the American codes rely upon, declare, adopt, repeat and assume the common law principles and definitions of murder. With respect to statutory patterns and language, however, the jurisdictions differ greatly in amount of departure from the common law. In this regard, they seem to fall mainly into 3 categories: (1) those which do little or nothing but declare and adopt the common law without elaboration or explanation; (2) those which define some forms of murder but refer to the common law for the rest; and (3) those which explicitly spell out every form of murder desired to be penalized, making no reference to the common law.

In the first or pure common law category are 5 states (Ga., Ky., Me., S.C., Tex.). Typical is South Carolina, which merely "defines" murder as an unlawful killing committed "with malice

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*Statute citations are not generally given in this report for fear of cluttering it up unnecessarily. The citations are available in the Commission files.

aforethought, either express or implied," and sets the punishment [2 Code of Laws of S.C. (1952) Ch. 2, Art. 1, §16-572]. Others, like Maine, go beyond this only in specifically designating as murder killings resulting from certain narrow kinds of conduct such as dueling and damaging railroad equipment [4 Rev. Stats. of Me. (1954) Ch. 130, §§1-3].

In these five states, therefore, murder normally includes the categories of homicide previously listed in the summary of common law murder (including felony murder), and any variations or interpretations involved can be ascertained only by reading the case law of the particular state.

By far the largest category of jurisdictions (26 in number) select certain kinds of common law murder as first degree and then declare all other murder to be second degree (Fed., Ala., Ark., Ariz., Cal., Conn., Colo., Del., Id., Ia., Md., Mass., Mich., Mo., Mont., Nev., N.H., N.J., N.M., N.C., Pa., R.I., Tenn., Vt., Va., W.Va.). Usually, the degree statutes are preceded by a general provision defining murder in common law terms as homicide committed with "malice aforethought," thus pointing out that the residue thrown into the second degree category is to be determined by subtracting the designated first degree forms from the common law total.

Before further treating this category, it is well to recall the kinds of homicide deemed murder at common law:

(1) premeditated, intentional killing;

(2) unpremeditated, intentional killing;

(3) killing caused by assault or other conduct committed with intent to inflict grievous bodily harm;

(4) the depraved type (shooting into a crowd); and

(5) felony murder.

The vast majority of the jurisdictions under discussion designate as first degree murder (1) premeditated killings (adding language about "lying in wait," by "poison," "torture," etc.), and (2) some limited or selective form of felony murder. They then declare "all other" murder to be second degree. The second degree,

therefore, would appear to consist of (1) unpremeditated, intentional killing, (2) killing by conduct intended to inflict grievous bodily harm, (3) the depraved type, and (4) felony murder not covered by the first degree provision.

This pattern is sometimes varied slightly. Two states (Colo., N.M.), for example, specifically include the depraved type as first degree murder along with the premeditated and felony murder types, thus lifting it out of the second degree. By and large, however, these provisions exist numerously and routinely as described above, one being virtually a carbon copy of the next. Illustrative is the federal statute (United States Code):

> "Title 18, §1111. Murder
>
> (a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.
>
> Any other murder is murder in the second degree."

The third type of statutory pattern, as indicated, is that which does not refer one to the common law, either totally or partially, for definition of murder or any stated degrees thereof, but spells out everything. This category embraces 12 states, including New York (Fla., Ill., Ind., Kan., Minn., Neb., N.Y., N.D., Ohio, Wash., Wis., Wyo.).

Five of these (Ind., Kan., Neb., Ohio, Wyo.) have an

identical two-degree pattern: the first degree includes (a) premeditated killing and (b) a limited or selective form of felony murder, and the second degree is addressed exclusively to intentional but unpremeditated killing. Neither the depraved type nor killing with intent to inflict grievous bodily harm is mentioned.

New York is the same except for (a) an unlimited rather than a selective or qualified felony murder provision, and (b) the addition of the depraved type of murder, which is placed in the first degree category. Washington is the same as New York except that felony murder is split into two types: one selective (made first degree), and the other for the residue (second degree). North Dakota is almost the same as Washington, except that the depraved type (including by case law intentional but unpremeditated killing) is made second degree instead of first. Florida is about the same as North Dakota, except that the lower or residue felony murder provision, instead of being second degree, is placed in a third degree category especially created for it.

Minnesota, also a three-degree state, presents a rather unusual twist. The first degree is reserved exclusively for premeditated murder. The second contains (a) intentional but unpremeditated murder and (b) a selective felony murder provision. The third degree penalizes all other felony murder, but only when depravedly committed.

Another three-degree state is Wisconsin with its fairly recent code of 1955 (see Appendix, herein, "Code 4"). An unusual feature--and a laudable one, as later shown--is that the ephemeral distinction between premeditated and unpremeditated intentional murder is eliminated. Without mention of premeditation, intentional killing is made first degree murder. The second degree proscribes only the depraved type. The third degree is a felony murder provision of a limited scope--limited by virtue of a proximate cause requirement.

The even more recent Illinois Criminal Code of 1961 (Appendix, "Code 3") offers a single degreeless murder statute, which includes, in effect, (a) intentional killing, (b) with intent to inflict great bodily harm, (c) the depraved type and (d) a limited

felony murder provision (Ch. 38, §9-1).

The above discussion has been limited to the manner in which United States jurisdictions legislatively present the basic forms of murder, all of which derive from the common law. In addition, however, many states offer special statutes of a narrow sort designating specific types of conduct as murder of one degree or another. These are addressed to situations where death results from acts such as dueling, tampering with railroad equipment, lynching, recklessly handling explosives, and the like. It is felt that no purpose would be served here by treatment of statutes of this sort, especially since, in a carefully framed and organized homicide Article, the conduct defined should be covered by the basic provisions, thus largely dispensing with this specific kind of statute.

The important and controversial subject of felony murder calls for a special analysis of the American provisions dealing with that subject. This has been thoroughly and painstakingly done in the A. L. I. Model Code commentary. Rather than attempt to improve upon that analysis, we quote most of it (M. C. C., pp. 33-37):

> "The prevailing law of felony-murder, both statutory and decisional, varies substantially throughout the country.
>
> The statutes may be classified as follows:
>
> A. <u>Jurisdictions which do not explicitly differentiate among felony-murders</u> (12). Five jurisdictions continue to use the common law definition of murder. Ga. Code §§26-1001-26-1004 (Harrison 1935); Ill. Rev. Stats. c. 38 §358 (1957)*; Ky. Rev. Stats. §435.010 (1956); Me. Rev. Stats. c. 130 §1 (Michie 1954); S. C. Code §16-51 (Michie 1952). One, although not following common law definitions, retains the

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*The new Illinois Criminal Code of 1961 limits the felony murder doctrine to cases of a "forcible felony" (§9-1, subd. 3; see Appendix, "Code 3").

felony-murder doctrine. Tex. Pen. Code, Art. 1241, 1256 (Vernon 1948). Two, varying somewhat in their general murder definitions, include homicides "perpetrated without any design to effect death by a person engaged in the commission of any felony." Okla. Stats. Ann. tit. 21 §701 (West 1958); S. D. Code §13.2007 (1939). Four include all homicides committed in the perpetration or attempted perpetration of any felony, in their first degree murder definitions, in effect retaining the common law felony-murder doctrine to delineate the capital offense. Kan. Gen. Stats. §21-401 (Corrick 1949); N. M. Stats. Ann. §40-24-4 (Allen Smith 1954); N. Y. Pen. Law §1044; N. C. Gen. Stats. §14-17 (Michie 1953).

B. Jurisdictions dividing felony-homicides into two or more grades (36). Thirty-one jurisdictions include as first degree murders only those felony-murders committed in the perpetration or attempted perpetration of arson, rape, robbery and burglary, occasionally adding larceny (Arkansas, Tennessee, Washington), mayhem (Arizona, California, Colorado, Idaho, Iowa, Maryland, Missouri, Montana, North Dakota, District of Columbia), kidnaping (Florida, Idaho, New Hampshire, New Jersey, Pennsylvania, District of Columbia), sodomy (Florida, Maryland, New Jersey, North Dakota). In most of these jurisdictions other felony-murders are second degree murder. In Indiana, Nebraska, and Wyoming second degree murders must be purposely committed; therefore, the felony-homicide residue is manslaughter. In Florida the residue is third degree murder.

In Minnesota homicides in the perpetration

or attempted perpetration of rape, indecent assault or sodomy are second degree murder and other felony-homicides third degree murder. Minn. Stats. §§619.08, 619.09 (1957).

Two jurisdictions which do not employ degrees of murder, Mississippi and Louisiana, place homicides in the course of arson, rape, robbery and burglary (Louisiana adds kidnaping) in the murder category. Other felony-homicides are manslaughter. Miss. Code Ann. §§2215, 2232 (1942); La. Stat. Ann. §§14:30, 14:31 (West 1951).

In Delaware murder in perpetrating or attempting to perpetrate kidnaping and rape is first degree murder. Del. Code Ann. tit. 11 §571 (Thompson 1953). In Massachusetts murder in the commission or attempted commission of a crime punishable by death or life imprisonment, i.e., armed burglary, robbery, rape, kidnaping, is first degree murder. Mass. Ann. Laws c. 265 §1 (Michie 1956). By implication, since all other kinds of murder are second degree murder, other felony-homicides fall in that category.

C. Jurisdictions which have modified or abandoned the felony-murder rule (2). The Wisconsin Code of 1955 deals with the felony-murder problem by the following Section entitled third-degree murder:

> "Whoever in the course of committing or attempting to commit a felony causes the death of another human being as a natural and probable consequence of the commission of or attempt to commit the felony, may be imprisoned not more than 15 years in excess of the maximum provided by law for the felony."

Wis. Stat. Ann. §940.03 (West 1958).

In Ohio the rule was abandoned initially by judicial decision and later by statute.

* * * * *

Judicial interpretation of the scope of the felony-murder rule has varied considerably.

Some courts have made no effort to qualify its application. See e.g., People v. Kaye, 43 C. A. 2d 802, 111 P.2d 679 (1941); People v. Rye, 33 C.2d 688, 203 P.2d 748 (1949); Commonwealth v. Almeida, 362 Pa. 596, 68 A.2d 595 (1949); Commonwealth v. Bolish, 381 Pa. 500, 113 A.2d 464 (1955); Commonwealth v. Thomas, 382 Pa. 639, 117 A.2d 204 (1955). But cf. Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958) overruling Thomas. See Morris, The Felon's Responsibility for the Lethal Acts of Others, 105 U. of PA. L. REV. 50 (1956); Ludwig, Foreseeable Death in Felony Murder, 18 U. of PITT. L. REV. 51 (1956). The earlier English writers also articulated an unqualified rule. See, e.g., FOSTER, CROWN LAW 258 (1809 ed.); 1 HALE, PLEAS OF THE CROWN 474 (1846 ed.); 1 EAST, PLEAS OF THE CROWN 255 (1803). The demand for limitations was, however, frequently expressed. See e.g., FOURTH REPORT OF THE COMMISSIONERS ON CRIMINAL LAW xxviii (1839); REPORT OF THE CRIMINAL CODE BILL COMMISSION 100 (1879). The Royal Commission on Capital Punishment thought it a reasonable conclusion in 1953 that the felony-murder rule would apply 'only if the act from which death results in the course or in furtherance of such a felony is an act of violence.' REPORT at

32. The Commission rather cautiously concluded that 'where death is caused in the commission of a felony involving violence, a lesser degree of violence may justify a verdict of murder than would be necessary in other circumstances.' Id. at 30-31.

Some American courts have responded to the plea for limitation by imposing one or more of the following requirements:

(1) The felonious act must be dangerous to life. See, e.g., People v. Pavlic, 227 Mich. 562, 199 N.W. 373 (1924); State v. Diebold, 152 Wash. 68, 277 Pac. 394, 395-396 (1929); cf. People v. Goldvarg, 346 Ill. 398, 178 N.E. 892 (1931).

(2) The homicide must be a natural and probable consequence of the felonious act. See, e.g., Power v. Commonwealth, 110 Ky. 386, 61 S.W. 735 (1901).

(3) Death must be 'proximately' caused. See, e.g., Burton v. State, 122 Tex. Cr. 363, 55 S.W. 2d 813 (1933).

(4) The felony must be malum in se. See, e.g., People v. Pavlic, supra.

(5) The act must be a common law felony. See, e.g., Commonwealth v. Exler, 243 Pa. 155, 89 Atl. 968 (1914); State v. Burrell, 120 N.J.L. 277, 199 Atl. 18 (1938).

(6) The period during which the felony is in the process of commission must be narrowly construed. See, e.g., State v. Diebold, 152 Wash. 68, 277 Pac. 394 (1929); People v. Smith, 232 N.Y. 239, 133 N.E. 574 (1921); Huggins v. State, 149 Miss. 280, 115 So. 213 (1928); State v. Taylor, 173 La. 1010, 139 So. 463 (1931); People v. Marwig,

227 N.Y. 382, 125 N.E. 535 (1919).

(7) The underlying felony must be 'independent' of the homicide. People v. Moran, 246 N.Y. 100, 158 N.E. 35 (1927); People v. Huter, 184 N.Y. 237, 77 N.E. 6 (1905); State v. Fisher, 120 Kan. 226, 243 Pac. 291 (1926); State v. Severns, 158 Kan. 453, 148 P. 2d 488 (1944); State v. Shock, 68 Mo. 552 (1878)."

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B. Manslaughter

In line with the common law manslaughter situation, there is no more confusing group of criminal statutes than the American manslaughter provisions in their entirety, and it is difficult, and perhaps impossible, to depict them in intelligible patterns.

"In most states," as the Model Code commentary points out, "manslaughter is either undefined by statute or is the subject of the barest skeletal delineation, which taken literally would encompass all homicides which are neither justifiable or excusable, on the one hand, nor murder, on the other. Such definitions as there are are usually drawn in common law terms" (M.C.C., pp. 41-42). In 17 jurisdictions, the commentary continues, manslaughter is not defined at all; and many others simply offer vague, general definitions in the common law vein to the effect that manslaughter is "the unlawful killing of a human being, without malice," or "the killing of a human being by the act, procurement or culpable negligence of another" when not justifiable or excusable (id., p. 42).

Passing to the jurisdictions which indulge in more elaboration, it is found that 5 states have divided manslaughter into two degrees (Minn., N. H., N. Y., N. D., Okla.) and that one employs no less than 4 degrees [Kan.; Gen. Stats. of Kan. Ann. (1949) Tit. 21, Art. 4, §§407-420].

It will be recalled that, at common law, manslaughter is divided into "voluntary" and "involuntary" types; that voluntary

manslaughter, traditionally at least, consists of intentional killing under certain provocation or in the "heat of passion;" and that involuntary manslaughter is of the unintentional and accidental sort that stems from culpably negligent or reckless conduct, or from the commission of some unlawful act, crime or offense. This sharp distinction is properly and explicitly honored in the provisions of at least 17 jurisdictions, where the voluntary and involuntary forms are separately defined along the above lines (Fed., Ariz., Ark., Cal., Colo., Ga., Ida., Ill., Ind., Me., Mont., Neb., Nev., N. M., Or., Tenn., Wyo.).

It might be expected that the 6 degree states would employ their degrees to distinguish between, or give separate treatment to, those two categories, but such is not the case. To the contrary, voluntary and involuntary forms of manslaughter are jumbled together as separate phases or subdivisions of the same degree statute or statutes. The degrees are employed to delineate alleged grades of culpability within the orbit of each category (voluntary and involuntary). This kind of grading sometimes appears over-refined, technical and unrealistic.

Increasing the confusion in the manslaughter legislation--both the degree and the single-section types--is the tendency of many jurisdictions to insert narrow, specialized provisions among the basic ones. Many of these do no more than particularize certain conduct covered--or which should be covered--by more general provisions dealing with involuntary manslaughter of the culpable negligence variety. Typical of these sections are those which declare manslaughter liability when fatality results from negligent use of machinery, from certain kinds of negligent operation of steamboats and their equipment, from overloading passenger vessels, from acts of intoxicated physicians, from keeping explosive substances contrary to law, from failure to control vicious animals, etc. (Ala., Fla., Minn., Miss., Mo., Nev., N. M., N. Y., N. D., Okla., Or., S. D., Wash.). Other sections specifically manslaughterize the killing of unborn children and certain forms of abortion homicide (Fla., Kan.,

Mich., Minn., Mo., N. H., N. Y., Okla., Wash.). One provision is addressed exclusively to death caused by careless shooting while hunting (Minn.) and another to fatality resulting from failure to provide properly for children and other dependents (Me.). Still others throw "aiding suicide" into the manslaughter category (Kan., N. M.). Especially when a number of these specialized crimes or provisions are scattered throughout manslaughter degree statutes, already overloaded with fine distinctions with respect to the basic forms of manslaughter, the result is a hodge-podge. Kansas, with its four degrees, and New York are prime examples [Gen. Stats. of Kan. Ann. (1949) Tit. 21, Art. 4, §§21-407--21-420; N. Y. Penal Law, §§1050, 1052].

Returning to the more basic forms of manslaughter, virtually every jurisdiction, either by specific language or by reference to the common law, regards voluntary manslaughter in terms of homicide committed in the heat of passion or under provocation of a certain character. In line with the common law, most states, either expressly or by judicial construction, treat this crime as a killing which would be murder--that is, as one committed with homicidal intent or "malice"--were it not for the mitigating factor of provocation. Oddly enough, however, most of the degree states, [see, also, Wis.; Wis. Crim. Code (1948) §940.05], including New York, present it entirely differently. By express statutory language, this "heat of passion" form of homicide is manslaughter only "when committed without a design to effect death" (see N. Y. Penal Law, §1050). In short, as observed in the Model Code commentary (M. C. C., p. 43):

> "It is an important feature of the statutes in this group xxx that passion and provocation do not reduce to manslaughter unless there was no intent to kill." (Underlining ours.)

The result of this, as the above commentary further points out, is that many intentional killings committed under great provocation are not reduced to manslaughter, as at common law, but end up on the second degree murder category, which, in the statutory pattern of

those states, is intentional but unpremeditated murder (see N. Y. Penal Law, §1046).

Concerning involuntary manslaughter--which, at common law, largely comprises unintentional killing by (1) unlawful acts other than felonies, and (2) negligent conduct--the American provisions quite uniformly cover the negligent phase, either explicitly or by reference to the common law, although the terms used to describe negligence (culpable negligence, criminal negligence, etc.) and the decisional standards of definition vary considerably

The unsatisfactory character of the unlawful act classification of involuntary manslaughter has been briefly discussed in the previous summary of the common law. This form, however, is also generally perpetuated in the American provisions, at least 9 of which contain express language labeling as involuntary manslaughter homicide occurring "in the commission of an unlawful act not amounting to a felony," or words to that effect (Ga., Ind., Kan., Mont., Neb., Nev., N. M., Or., Tenn.). A step further in this direction is taken by 7 states, which present the more specific crime of manslaughter by one engaging in the commission of a "misdemeanor" (Kan., Minn., Miss., N. H., N. Y., N. D., Okla.).

The Model Code Commentary terms this crime "the misdemeanor-manslaughter analogue of the felony-murder rule" (M. C. C., pp. 40-41). Justifiably enough, it criticizes this and the whole unlawful act classification of involuntary manslaughter as resting upon the unsound "conception that a homicide is ipso facto manslaughter if it resulted from an otherwise unlawful act" (id., p. 40).

Somewhat related to the misdemeanor-manslaughter provision is a rarer second-class felony homicide provision. Three states which have in effect split felony-murder into degrees (Ida., La., Miss.) place the selective or more serious form in the murder category and make the general or residue form manslaughter.

While other variations of American manslaughter legislation might be cited, sufficient has been shown to paint the following very broad picture.

(1) In general, the statutes preserve and perpetuate the common law conception of manslaughter. Voluntary manslaughter (under provocation or "heat of passion") is, for the most part, adopted in its traditional form, meaning a killing with homicidal intent or "malice" which would be murder except for the mitigating provocation element. Some states, however, drastically change this concept and drastically limit the scope of the crime by declaring it operative only in the absence of malice or intent to kill. Involuntary manslaughter is largely preserved in its common law form of unintentional killing by virtue of either an unlawful act or negligence.

(2) The manslaughter provisions include far more than the foregoing common law doctrine. In many respects, they do not present forms of homicide which are clearly and traditionally distinguishable from murder but, on the contrary, they are employed, in effect, as a lowest degree of murder. In brief, they are used as a basement store room for any kind of homicide which a legislature deems serious, but not serious enough to be classified or penalized as murder.

III.

THE NEW YORK PENAL LAW

The "Homicide" Article of the New York Penal Law (Art. 94, §§1040-1055) is set forth in the "Appendix" hereto (Code 2), and the reader of the following material will be aided by keeping that portion of the Appendix available for reference.

While an historical account of New York homicide legislation leading up to the current law might be interesting and possibly constructive, practical considerations dictate against the inclusion of such a treatise herein.* The existing Penal Law Article is here discussed and criticized chiefly in the light of some of the principles, issues and above-treated homicide statutes of other

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*For a detailed historical account and analysis of New York homicide legislation, see State of New York Law Revision Commission Report (1937) pp. 540-804.

jurisdictions.

As already noted, New York is one of 12 states in the category which has made the greatest departure from the common law in so far as framing homicide legislation is concerned; in other words, it never refers one to the common law to ascertain the scope of its crimes but spells out every form of homicide to be punished.

A. Murder

In line with the general approach of this group of states, New York's two-degree murder pattern is:

First degree murder (§1044)

1. Deliberate and premeditated killing (subd. 1);
2. The depraved type (subd. 2);
3. Felony murder (subd. 2).

Second degree murder (§1046)

Intentional killing but without deliberation and premeditation.

Probably the most difficult feature of this legislation lies in the distinction drawn between deliberate and premeditated killing (1st degree) and killing which is intentional but not deliberate or premeditated (2nd degree). This distinction has a long, complicated and controversial background rooted in the common law (see Law Revision Commission Report, op. cit., pp. 22 et seq.), but the basic thorn is quite obvious.

It is logical enough to differentiate between killings which are coldly and calculatingly planned and prepared far in advance, and those where the homicidal intent is formed virtually on the spur of the moment. Could the concepts of deliberation and premeditation be defined purely in terms of time, the distinction in question would doubtless be workable. Such, however, is not the case.

In wrestling with the meaning of deliberation and premeditation, the courts, including those of New York, invariably reach the

conclusion that time is only one factor and that other circumstances are to be considered. This inevitably leads to the doctrine that the requisite period of time need only be long enough to make a choice to kill or not to kill; that it may be extremely brief; that premeditation and deliberation may be formed in the second or fraction of a second when the killer raises his arm to strike, and so on [People v. Harris (1913) 209 N. Y. 70, 75; People v. Governale (1908) 193 N. Y., 581, 590; People v. Rodawald (1904) 177 N. Y. 408, 420; People v. Majone (1883) 91 N. Y. 211, 212]. Characteristic of these pronouncements is the opinion in the leading Majone Case (91 N. Y., at p. 212):

> "Under the statute, there must be not only an intention to kill, but there must also be a deliberate and premeditated design to kill. Such design must precede the killing by some appreciable space of time. But the time need not be long. It must be sufficient for some reflection and consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill. And when the time is sufficient for this, it matters not how brief it is. The human mind acts with celerity which it is sometimes impossible to measure, and whether a deliberate and premeditated design to kill was formed must be determined from all the circumstances of the case."

It would appear that, if the premeditating and deliberating process can occur in a fleeting moment before a knife, for example, is driven into the victim, there is no room for the formulation of an unpremeditated design or intent to kill before the actual contact; in other words, that unpremeditated homicidal intent is not formed until the killer is actually sinking his knife into flesh. Factors such as this render the distinction in issue an absurdity in many instances. Judicial construction in this area frequently boils down to an intellectual exercise in semantics. It is submitted that the differential provided by the deliberation-premeditation concept is

neither clear enough nor sound enough to use as a boundary line between degrees of murder, especially where, as in New York, human life hangs upon the determination (see A Rationale of the Law of Homicide, supra, 37 Col. L. R. 701, 709). The proposed abolition of this distinction and the suggested method of dealing with intentional killings is treated in a subsequent portion of this report.

The homicidal intent accompanying a killing is, of course, the purest form of common law "malice." It should be remembered, however, that "malice" also includes intent to inflict grievous bodily harm, and the majority of American jurisdictions, in drawing common law murder within their statutory orbits, necessarily include--largely as second degree murder--killings committed with intent to inflict grievous bodily harm. In this connection, it is to be observed that New York is not numbered among those jurisdictions and does not incorporate this type of murder by reference to the common law. Neither does it do so by express provision (§§1044, 1046).

In short, a killing resulting from an assault committed with intent merely to inflict grievous bodily harm does not constitute murder in New York. If this be regarded as a gap, the gap grows wider when it is considered that, according to the statutory language at least, such a killing--unless committed in the "heat of passion"--is not even manslaughter (see §§1050, 1052).

And jury can recommend life for both

The second subdivision of the first degree murder statute (§1044) covers both the depraved and felony murder forms. The fact that these two types are contained and strung together in one subdivision, rather than being separately enunciated in two, does not indicate any particular affinity between them but, undoubtedly, is merely the result of loose draftsmanship.

The depraved form--killing "By an act imminently dangerous to others, and evincing a depraved mind," etc. (subd. 2)--covers, of course, the shooting-into-a-crowd kind of case. It is expressly distinguished from, and made mutually exclusive of, intentional or premeditated murder, by the clause "without a premeditated design to effect the death of any individual." This crime has been further

narrowed, moreover, by a judicial construction which excludes a depraved act directed towards a single individual and requires one of a more general nature that endangers a whole group or crowd of people [People v. Ludkowitz (1935) 266 N.Y. 233, 243; Darry v. People (1854) 10 N.Y. 120, 144-157]. This raises a query concerning cases of a sort where a person with a gun, mischievously intending to frighten another (one person) by firing a few feet over his head, kills him through poor marksmanship. This, apparently, would not fall within the depraved murder provision; nor, perhaps, within any other homicide provision of the Penal Law.

With all these limitations of scope, the depraved provision is seldom used as a basis for murder prosecution and there have been very few convictions thereunder.

Concerning felony murder, New York, with its first degree murder clause encompassing killings in the course of any felony (subd. 2), belongs to that relatively small group of states which has retained the straight or unlimited felony murder rule of the common law. Of the jurisdictions which have expressly codified the felony murder form--all but a handful--only five, including New York, have clung to the original strict doctrine (N. M., N. Y., N. C., Okla., S. D.). The vast majority, as seen, have modified it by designating only a few of the more serious and forcible felonies as bases for the crime, although some have placed killings in the course of any other felony (really meaning any felony) in the manslaughter category. There have been other modifications of a different character, and one state (Ohio) has flatly abolished the whole doctrine.

Thus, New York stands with a few other jurisdictions at the harsh extreme. While the Model Code Commentary asserts that there has been some judicial "limitation" in New York to the effect that the "underlying felony must be 'independent' of the homicide," and that the period during which it "is in the process of commission must be narrowly construed" (M.C.C., p. 37), such "limitations" are not of great significance. Their main import is merely that a killing resulting from a felonious assault upon the victim is not a felony

murder, since the assault is not independent of, but merges with, the homicide; and that one who fatally assaults a person while fleeing from an already completed independent felony (e.g., a robbery) does not commit felony murder because (1) the assault is not an underlying felony by virtue of the merger doctrine and (2) the independent felony (robbery) is over [People v. Luscomb (1944) 292 N.Y. 390, 395; People v. Moran (1927) 246 N.Y. 100, 102-104; People v. Marwig (1919) 227 N.Y. 382; People v. Marendi (1915) 213 N.Y. 600, 606].

The third and fourth subdivisions of the statute (§1044) require but brief comment.

Subdivision 3, which specifically mentions "arson in the first degree" as a basis for felony murder, is superfluous, redundant and meaningless in view of the previously discussed all-inclusive felony murder provision (subd. 2). It found its way into the statute by error and has remained merely because no one has bothered to excise it [People v. Greenwall (1889) 115 N.Y. 533].

Subdivision 4, making it first degree murder to cause death by wrecking a railroad train, is one of those particularizing provisions that seems never to have been used, at least judging by the lack of case law on the subject. Furthermore, it appears unnecessary, since a homicide of that nature seems readily prosecutable either under the depraved provision or as a felony murder (see §1991).

B. Manslaughter

Coming to the manslaughter statutes (§§1050, 1052), New York, as already seen, is one of 5 states having two degrees. These contain a host of provisions, and are surpassed in complexity and fine distinctions only by the four-degree manslaughter legislation of Kansas. Each degree includes crimes which either are, or phraseologically resemble, traditional common law forms of voluntary and involuntary manslaughter, and there are many miscellaneous offenses.

It should be noted that each degree is confined to homicide "committed without a design to effect death" (§1050, 1052). This is significant in connection with the second subdivision of each section,

dealing with killings committed in the "heat of passion." Such homicides are first degree manslaughter when perpetrated "in a cruel and unusual manner, or by means of a dangerous weapon" (§1050), and second degree when neither of those factors is present (§1052).

As partially indicated above, the striking and downright erroneous feature of the provoked or "heat of passion killing" as defined in the Penal Law is the mandate that it must be unintentional. The "heat of passion" terminology indicates that New York here intended to adopt the common law form of voluntary manslaughter. That crime, however, applies only to killings committed with homicidal intent or "malice"--killings which would ordinarily be murder but are reduced to manslaughter by virtue of provocation or "heat of passion." That factor is, of course, a mitigating and not an aggravating one. It must be present in order to reduce a homicide from murder to manslaughter. It is not, however, an affirmative element of manslaughter and need not be shown for any purpose or in any kind of case other than the foregoing. In this theme, homicidal intent and "heat of passion" are not inconsistent concepts but corelative ones.

One idea which New York undoubtedly had in mind when it commenced its manslaughter statutes with the requirement of no homicidal intent (§§1050, 1052) was to cover killings resulting from assaults committed with intent to inflict bodily injury. Apparently, in a confused sort of way, it thought it was accomplishing this in the clauses that speak of intentional homicide committed either with or without cruelty and dangerous weapons (subd. 2 of each section). The difficulty is that, evidently without an understanding of the common law background, the "heat of passion" concept was inserted or added. We now have, therefore, two different theories of homicide combined in one offense, which thereby becomes so limited as to cover very little ground.

Some of the results of this are as follows. There is no provision whereby, a la common law, intentional killing is reduced from murder to manslaughter by reason of provocation or "heat of passion." There is no provision--either of murder or manslaughter--

covering killings caused by unprovoked or deliberate assaults with intent to inflict bodily injury. All there is in this area is a provision making it manslaughter to commit an unintentional killing in the "heat of passion." Contrary to the true and original theory, "heat of passion" is no longer a mitigating factor but an affirmative element of the manslaughter crime. A person who, intending to inflict serious injury but not to kill, beats or stabs another to death, cannot be convicted of manslaughter unless it is proven that he acted in the "heat of passion." If he acted coldly and deliberately, he is not guilty of any form of homicide [People v. Moon (4th Dep't. 1945) 269 App. Div. 725; People v. Risico (2nd Dep't. 1920) 191 App. Div. 355, 358]. People v. Plitz 7 N.Y.2d 147 "heat of passion nailed down"

It might well be asked how the judiciary deals with the latter type of case. The answer is that the more practical courts, without comment, simply ignore the "heat of passion" requirement and blandly classify such killings as manslaughter despite the lack of legal basis therefor [see People v. May (1st Dep't. 1960) 9 App. Div. (2d) 508; People v. Dillon (2d Dep't. 1910) 142 App. Div. 64, aff'd 204 N.Y. 678; People v. De Garmo (4th Dep't. 1902) 73 App. Div. 46, rev'd on other grounds, 179 N.Y. 130].

Another form of voluntary manslaughter contained in the Penal Law is that of "Abetting and advising suicide," which is proscribed in a separate statute placed in a separate Penal Law Article (Art. 202; §2304). Absent this section, one who intentionally causes or aids another to commit suicide would be guilty of murder. Apparently out of sympathy for the survivor of a suicide pact, the Penal Law arbitrarily lifts this crime out of the murder category and stamps it first degree manslaughter.

With respect to involuntary manslaughter--traditionally unintentional killing by means of an unlawful or negligent act--the negligent aspect is presented in the second degree provision which, in conventional terms, penalizes unintentional homicide, not amounting to any higher degree, committed "By any act, procurement or culpable negligence of any person" (§1052, subd. 3). The same subdivision

follows with a series of seemingly superfluous particularizing clauses devoted to special facets of criminal negligence (negligent operation of machinery, steamboats, etc.); and the lilly is further gilded by three ensuing individual statutes of the same ilk, not labeled manslaughter, proscribing crimes of fatal "criminal negligence" in the realms of vehicle operation, vessel operation and hunting (§§1053-a, 1053-c, 1053-e).

The main problem posed by negligent homicide is always the virtually insoluble one of achieving a satisfactory definition of criminal or culpable negligence. The Penal Law offers no statutory definition, thus relegating this task to the judiciary. The Court of Appeals has responded with the following [People v. Angelo (1927) 246 N.Y. 451, 457]:

> "Culpable negligence is therefore something more than the slight negligence necessary to support a civil action for damages. It means, disregard of the consequences which may ensue from the act, and indifference to the rights of others. No clearer definition, applicable to the hundreds of varying circumstances that may arise, can be given."

While many might question the validity of the last sentence, this is New York's standard.

Concerning the unlawful act phase of involuntary manslaughter, the Penal Law, as seen, indulges in the misdemeanor-manslaughter form, proscribing a first degree manslaughter crime of homicide "By a person engaged in committing, or attempting to commit, a misdemeanor, affecting the person or property, either of the person killed, or of another" (§1050, subd. 1). A further refinement creates a sort of lower degree of this crime--trespass-manslaughter--with a second degree provision penalizing homicide committed "By a person committing or attempting to commit a trespass, or other invasion of a private right, either of the person killed or of another, not amounting to a crime" (§1052, subd. 2).

These provisions point up the previously discussed unsatisfactory character of all legislation of this sort.

In practical application, so-called misdemeanor-manslaughter is not similar to felony murder. The usual felony murder involves aggressive commission of some inherently dangerous crime, such as robbery, kidnaping or arson. It is a bit difficult to conceive of comparable misdemeanors or of analogous situations in the misdemeanor field. Possibly, one might kill during the commission of an unlawful entry or a petit larceny, although no instances of that nature appear in the decisions.

In actuality, prosecutions under this provision have been largely confined to vehicle homicides entailing traffic or vehicular violations of misdemeanor grade, and to those involving misdemeanor crimes of omission, such as building violations, where it is deemed that death caused by fire or building collapse would probably have been avoided had there been compliance with the laws relating to building construction and maintenance [People v. Nelson (1955) 309 N.Y. 231; People v. Alexander (1944) 293 N.Y. 870; People v. Darragh (1st Dep't. 1910) 141 App. Div. 408, aff'd 203 N.Y. 527].

Especially since a causal relationship between the misdemeanor and the death must be shown in these cases, they are basically nothing more than homicides of negligence or recklessness and should be treated as such. In brief, the misdemeanor itself is of no significance unless it causally contributes to the death. If it does, there is unquestionably some form of negligent homicide; and, if it does not, there is not, and should not be, any form of homicide.

IV.

THE A. L. I. MODEL CODE

Before proceeding to the proposed Homicide Article here submitted, it will be of value to observe the homicide provisions and approaches of the A. L. I. Model Code (set forth as "Code 5" of the Appendix hereto).

Upon the theory that involuntary homicide of the negligent variety is a different animal from any of the other forms, the Model Code places "Negligent Homicide" in a separate category (§210.4). All other homicide is defined, classified and grouped as Murder (§210.2) or Manslaughter (§210.3). Negligent homicide is treated as the least culpable form and, from a punishment standpoint, is graded below manslaughter.

A. Murder-Manslaughter (§§210.2, 210.3)

There are no degrees of murder or manslaughter.

Intentional killing, or homicide "committed purposely or knowingly," is, of course, stamped murder [§210.2(a)]. There is no mention of premeditation or deliberation, and the familiar if shadowy distinction between intentional killing of a premeditated sort, on the one hand, and of an unpremeditated sort, on the other, is not made.

Most of the remaining forms of homicide covered by the murder and manslaughter statutes are based upon the word "recklessly," which is defined in the general provisions of the Code (§2.02; also set forth in "Code 5" of Appendix herein). Without here quoting that definition or analyzing it in detail, it can be seen that, as applied to homicide, recklessness connotes conduct of an inherently dangerous character committed with a conscious disregard of a "substantial and unjustifiable risk" that fatality or serious injury will result. For purposes of the homicide Article alone, an aggravated form of recklessness is also enunciated, being in terms of reckless conduct committed "under circumstances manifesting extreme indifference to human life" [§§210.2(b)]. This is designated murder, while the lower form is placed in the manslaughter section [210.3(a)].

Reckless homicide, under the Model Code, is a tent-like concept that covers a great deal of ground. It includes not only the familiar depraved type of killing, which it suggests, but also homicide committed with intent to inflict physical injury; and it even reaches into the felony murder doctrine.

The aggravated or extremely reckless provision (murder) is, in one of its facets, roughly the equivalent of the depraved or shooting-into-a-crowd type found in many jurisdictions, including New York, where it constitutes first degree murder (M.C.C., p. 29). The lower form of reckless homicide (manslaughter) covers fatal conduct of the same genus but of a less culpable sort. While the distinction may not always be easy or clear, it is partially illustrated by reference to a case where a policeman shot at a car which failed to stop at his command, killing one of the five occupants [M.C.C., p. 29; Hill v. Commonwealth (1931) 239 Ky. 646, 40 S.W. (2d) 261]. According to both the court in that case and the Model Code authors, this would be murder if the policeman had fired or aimed into the car knowing that it was occupied, but manslaughter if he had merely aimed at the tires.

Contrary to the New York version of this species of crime, the reckless, extremely reckless or depraved act can be directed towards a single individual (e.g., aiming a shot over a person's head, or playing Russian Roulette) and need not be of a sort to endanger a whole group of people (M.C.C., p. 29).

The reckless homicide provisions, as already indicated, are intended to extend beyond the depraved type of case and to cover killings perpetrated by assaults committed with a specific intent to inflict bodily harm, which are not expressly or otherwise covered. The theory is that a severe assault which produces death is essentially a form of recklessness and should be prosecuted on that basis. As the Commentary explains (M.C.C., pp. 32-33):

> "The proposed definition of murder accords no express significance to an intent to cause grievous bodily harm, though such a purpose establishes malice aforethought at common law and thus suffices for murder or, where murder is divided into two degrees, for murder in the second degree under the usual formulation. We think, however, that such cases are more

> satisfactorily judged by the standards of recklessness and extreme recklessness as to causing death. In making that determination the fact that the actor's purpose was to injure is, of course, a relevant consideration, as also are the nature and the gravity of the injury intended or foreseen."

Thus, the degree of homicide (murder or manslaughter) in such cases depends upon the degree of recklessness, which, in turn, depends largely upon the gravity of the injuries intended and inflicted (M.C.C., pp. 33, 44). While the concept of recklessness includes intention to inflict bodily harm that is something less than grievous, it does not include cases of trivial assaults which, through accidental mishap (e.g., reeling back from a slap in the face and cracking one's skull against a hard object), result in death (M.C.C., p. 44).

Upon extensive analysis of the felony murder doctrine, the Model Code architects conclude that "principled argument in its defense is hard to find" (M.C.C., p. 37) and, hence, eliminate it, partially at least, as a form of homicide. Nevertheless, a vestige of the doctrine is retained as a facet of reckless homicide in its higher or murder degree. In short, extreme recklessness is "presumed" when the killing occurs during the commission of any of certain specified felonies, and this presumption applies not only to the actual killer but to non-killer accomplices [§210.2(b)].

The final provision of the murder-manslaughter category is a counterpart of the common law doctrine which reduces what would otherwise be murder to manslaughter when the killing is committed under certain "provocation" or "heat of passion." In proscribing this form of manslaughter [§210.3(b)], the Code does not employ such traditional terms as "provocation" and "heat of passion" as criteria of mitigation. It substitutes the concept of a person "under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse," the "reasonableness" thereof to "be determined from the viewpoint of a person in the actor's situation

under the circumstances as he believes them to be."

In their Commentary, the Code authors, discussing various other criteria and their defects, conclude that the stated standard, while liberal towards defendants, is the most logical and fair one (M.C.C., pp. 46-48).

B. Negligent Homicide (§210.4)

"Negligent Homicide" is defined simply as that which "is committed negligently" (§210.4). This crime, therefore, rests wholly upon the meaning of the word "negligently," which is defined in the general provisions of the Code (§2.02; also set forth in "Code 5" of the Appendix hereto).

Broadly speaking, that definition is in terms of culpable failure to "perceive" a "substantial and unjustifiable risk." The factor which distinguishes negligence from recklessness (also defined in §2.02 and quoted in the Appendix) is that, while the nub of the former is a failure to perceive a risk, the kernel of the latter is a conscious disregard of a risk which the actor does in fact perceive.

Beyond mention of these features, no further treatment of negligent homicide as defined in the Model Code is included here. An extensive analysis of the whole area and of the reasons for the given definition are contained in the Code Commentary (M.C.C., pp. 49-55).

V.

THE PROPOSED ARTICLE ("CODE 1" OF APPENDIX)

In the interests of a thorough understanding of the homicide Article here proposed, a few preliminary observations are in order.

(1) A "Definitions" section is included, devoted to terms which are used in, and vital to, some of the substantive provisions (§1). Preceding this section are some definitions of other terms similarly employed. These latter are not made a part of the homicide Article proper because, not being exclusively applicable to homicide but of general application, they belong in the as yet unformulated

general provisions of our prospective Code.

(2) Unlike the present Penal Law Homicide Article (§§1054, 1055), this proposed Article does not contain any provisions defining justifiable or excusable homicide. The reasons for this are as follows. Justification and excusability are across-the-board principles of general application and, as such, belong in the general provisions of any penal code rather than in individual Articles (see A.L.I. Model Code, §2.04-3.11). No general provisions of that nature are presented here because the task of formulating them is itself a substantial and complex one requiring far more time than is available for present purposes.

(3) The drafting technique here employed is one of attempting to be as explicit as possible without being prolix. The Article avoids the somewhat vague and awkward kind of phraseology that declares homicide to be murder or manslaughter of a particular degree when committed in such and such a fashion. Instead, it declares, in effect, that a person is guilty of the particular crime when, with a specified intent or state of mind, he commits a certain act which causes death, etc.

Another facet of this explicit approach entails the incorporation into the statutes of some important case law principles which have become so firmly attached to or intertwined with the crimes that many have forgotten the fact that they are enunciated purely by judicial construction rather than by legislative pronouncement, as should be the case (see, primarily, §3, subd. 3, and §4, subd. 3).

(4) For grading and sentencing purposes, homicide is divided into four sections or categories: (1) murder in the first degree, (2) murder in the second degree, (3) manslaughter, and (4) reckless homicide. Among these four <u>degree</u> sections, eight crimes or forms of homicide are distributed. Generically, these eight crimes fall roughly into three classifications: (1) specific intent crimes, (2) the <u>depraved</u> and <u>reckless</u> type, and (3) felony murder.

A. Specific intent crimes

The term specific intent crimes or homicides is meant to encompass killings committed with a specific intent either to kill or to harm a specific person. Chief of these, needless to state, is intentional killing.

1. Intentional killing (§2)

For reasons already fully elaborated, neither premeditation nor deliberation is made an element of this crime, and the conventional distinction between mere intentional killing and that involving a premeditated homicidal design is eliminated. While determinations with respect to the existence of an intent to kill may sometimes be difficult, the general meaning of that state of mind is fairly clear. At any rate, nothing but confusion, it is submitted, is to be gained by a requirement of premeditation and by a grading scheme resting upon its presence or absence.

Intentional killing, of course, is here made homicide of the highest degree, namely murder in the first degree.

2. With intent to inflict grievous physical injury ($3, subd. 1)

As already observed, an intention to inflict grievous bodily harm, though something short of homicidal, constitutes "malice" at common law, and a fatal assault or other act so committed constitutes murder. Also as seen, the great majority of American jurisdictions retain this form of murder--usually as second degree--although the New York Penal Law, apparently through inadvertence, does not.

Such a killing is highly culpable and should, it is submitted, be defined and punished as murder.

With respect to the form of definition, it will be recalled that the A. L. I. Model Code proceeds upon the premise that such assaults are essentially reckless in nature and, accordingly, that this type of killing is covered by its tent-like crime of reckless homicide. While this may be theoretically sound, considerable legal

analysis and judicial construction is required to reach and postulate the asserted conclusion. A more satisfactory result, it is felt, is attained by explicitly defining the crime in simple terms, and that is the method employed here.

Though an extremely serious offense, a killing committed with intent to inflict grievous physical injury appears, by its very terms, slightly less culpable than an intentional killing. Accordingly, as in most jurisdictions, it is here designated murder in the second degree.

3. With intent to inflict substantial physical injury (§4, subd. 1)

Though seldom defined, grievous bodily harm or physical injury obviously imports extremely serious injury. With homicide perpetrated under this intent classified as second degree murder, certain questions arise with respect to killings committed under an intent to inflict something less than grievous harm. One of these is whether an assault of a trivial nature which very unexpectedly results in death--such as a slap or a light punch in the face which causes the victim to fall against a hard object and suffer a fatal head injury--should be penalized as homicide.

The Model Code authors, as already indicated, answer this question emphatically in the negative. Contending that the predication of homicidal responsibility in such cases is so inherently inequitable as to be "abusive," they would limit the assailant's criminal liability to assault. (M.C.C., p. 44).

Accepting the soundness of that proposition, a further and equally debatable question is presented. Giving the words grievous and trivial their natural meanings, there would appear to be an appreciable intermediate area between those two extremes. Without intending grievous bodily harm in the sense of permanent or extremely serious injury, but with considerably more than a trivial slap or punch in mind, an assailant may calculatingly administer a sound and painful beating, resulting in a fatality which is unexpected but not,

perhaps, in the highest degree unlikely.

If this is to constitute homicide--and most would probably agree that it should--and there being no crime of homicide including killing by infliction of any physical injury (because of the trivial cases), then it is manifest that some form must be established to cover cases lying between the grievous and the trivial.

This is not a simple task. It is undertaken here by formulation of two definitions: (1) "grievous physical injury," and (2) a lesser form arbitrarily termed "substantial physical injury." No purpose would be served by extensive discussion of these definitions (set forth in §1 of the proposed Article). Suffice it to point out that the grievous brand is defined in terms of the extremely serious, with emphasis upon permanent or long-enduring harm or disability; and that the substantial variety steers a course between that and the trivial type.

Under these postulates, two crimes of this genus are predicated: (1) the already proscribed killing by conduct designed to inflict grievous physical injury (second degree murder; §3, subd. 1), and (2) killing by conduct designed to inflict substantial physical injury. The latter is graded as manslaughter (§4, subd. 1).

Concededly this is not a perfect solution to the problems in this area, for the distinction between an intent to inflict "grievous" injury and an intent to inflict "substantial" injury may frequently be blurred. The only discernible alternative, however, is the uninviting one of attaching homicidal responsibility to trivial though fatal assaults.

4. Reduction from murder to manslaughter by virtue of "mitigating circumstances" (§4, subd. 2)

This proposed Article adopts the general common law proposition reducing homicide committed with intent to kill or to inflict grievous physical injury from murder to manslaughter when perpetrated in the "heat of passion" or under certain kinds of provocation. That

principle, it will be recalled, though indorsed and perpetuated in most American jurisdictions, is ignored by the current New York Penal Law, quite clearly through error and misconception of basic doctrine.

A most difficult, and perhaps impossible, task in proscribing this crime--or, more accurately, this factor of mitigation--is the formulation of a standard that will satisfactorily delineate the kind of emotional condition or state of mind required to reduce the degree of homicide.

In attacking that subject, the Model Code Commentary accurately points out numerous defects of familiar formulae employing terms such as "heat of passion," "provocation," "reasonable man," etc. (M.C.C., pp. 46-49). For reasons carefully explained, the Code abandons traditional standards and substitutes that of "extreme mental or emotional disturbance for which there is reasonable explanation or excuse," the "reasonableness" thereof to "be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be" [Model Code, §210.3(b); see Appendix, Code 5]. Analysis of that formula and of the problem in general indicates that it is an improvement upon existing standards and may be about as satisfactory a solution as can be found in a highly troublesome area.

It may be observed, however, that the phrase "extreme mental or emotional disturbance" does not necessarily cover cases where the killer acts out of a mistaken though not highly unreasonable belief that he has a right to kill under the circumstances: for example, where he mistakenly thinks that the deceased is about to kill someone, to blow up a dam and thereby cause a catastrophe, etc.. This type of "excuse," though not necessarily involving "extreme mental or emotion disturbance," seems a valid type of "provocation" within the spirit of the doctrine. It is specifically recognized and extensively dealt with in the recent Wisconsin Criminal Code of 1955 (§940.05; see Appendix, Code 4).

The Model Code authors also take cognizance of this phase of the mitigation principle, but assert that it is more than adequately covered by the Code's general "justification" provisions

which, in appropriate cases of this nature, negate rather than merely mitigate or reduce criminal liability (M.C.C., pp. 44-46).

Whether the general "justification" provisions of our prospective New York Penal Law will be similarly drawn or will have a similar effect is conjectural at this point. In any event, in line with Wisconsin, the mistaken belief aspect is here added to the Model Code's "mental or emotional disturbance" standard of mitigation. These two concepts are combined to form a definition of a term entitled "mitigating circumstances" (§1); and a homicide perpetrated with intent to kill or to inflict grievous physical injury, but under "mitigating circumstances," is classified as manslaughter (§4, subd. 2).

It is to be noted that merely defining this crime as manslaughter does not necessarily, or at least clearly, take it out of the murder category. On their faces, the intentional killing provision §2; first degree murder) and the second degree murder provision dealing with killing with intent to inflict grievous physical injury (§3, subd. 1), still seem to include all such cases, even though committed under "mitigating circumstances." In order to provide clarification or assurance that they do not, and that such homicides constitute manslaughter only, a proviso or excepting clause to that effect is placed in the introductory part of each murder statute (§§2, 3).

B. Killings caused by reckless and depraved conduct

1. Recklessly (§5)

Perhaps the most troublesome field in the entire law of homicide is that relating to what is variously termed negligent, criminally negligent, culpably negligent and reckless homicide. The vast majority of cases in this area deal with fatal automobile accidents. The definitions and standards of negligence or recklessness--usually the products of case law--differ with the jurisdiction and are frequently superficial.

The A. L. I. Model Code, as indicated, has carefully defined both the terms "recklessly" and "negligently" (§2.02; see "Code 5" of

Appendix), and has then proscribed two crimes of this genus: (1) homicide "committed recklessly," classified as manslaughter [§210.3(a)], and (2) "Negligent Homicide," bearing that label and graded below manslaughter (§210.4). The gist of criminal negligence, as defined, is a culpable failure to "perceive" a "substantial and unjustifiable risk" entailing certain consequences. Recklessness, involving a higher degree of culpability, occurs when a person is aware of such a risk and "consciously disregards" it.

These definitions appear sound and draw a clear intellectual distinction between the two concepts. It is questionable, however, whether that distinction is workable and whether it does not constitute an over-refinement from a practical standpoint. To demand a factual determination as to whether a defendant's state of mind was one of failure to perceive a risk, on the one hand, or of awareness and conscious disregard thereof, on the other, would be to saddle a jury with a task quite probably beyond its capabilities. The distinction and refinements involved, moreover, become even more difficult in the light of a third concept, namely that of ordinary civil negligence. Presumably, the Model Code's criminal negligence lies delicately and precariously somewhere between civil negligence and recklessness.

The decision reached here involves (1) substantial adoption of the Model Code's definition of the term "recklessly" ("Code 1" of Appendix, §1); (2) establishment of a crime of "Reckless homicide" (id., §5); and (3) no proscription of any lower crime of "negligent" homicide.

It is important to observe that the reckless conduct here predicated, though of a more culpable character than the Model Code's negligent conduct, does not raise or materially change New York's present standard of culpability, even though the Penal Law uses the word negligence rather than recklessness. The "culpable negligence" of the Penal Law's second degree manslaughter statute (§1052, subd. 3) and the "criminal negligence" of its special vehicle homicide section (§1053-a) are defined in terms of "disregard of the consequences which

may ensue from the act, and indifference to the right of others" [People v. Angelo (1927) 246 N.Y. 451, 457]. This approximates the definitions of recklessness presented by the Model Code and by the Article submitted herein--not the Model Code's definition of negligence. As a matter of fact, the Penal Law's vehicle homicide statute, speaking of "a reckless or culpably negligent manner" (§1053-a), uses those words interchangeably; and the decisions construing the section proscribing the crime of "Reckless driving" (Vehicle and Traffic Law, §1190) treat the terms "reckless" and "culpably negligent" as synonymous [People v. Bearden (1943) 290 N.Y. 478, 482; People v. Grogan (1932) 260 N.Y. 138, 144; People v. Bowles (4th Dept. 1952) 280 App. Div. 476, 480; Matter of Kafka v. Fletcher (1st Dept. 1947) 272 App. Div. 364, 368].

Some comment is necessary in explanation of the labeling and grading of this crime of "Reckless homicide."

It is designed to cover what is broadly known at common law as involuntary homicide or involuntary manslaughter. With the exception of those killings falling within the depraved classification (a higher degree of recklessness, which is treated below) and felony murder (also treated below), it includes all cases within the orbit of punishable homicide in which death results more or less accidentally from conduct, whether lawful or unlawful in itself, which is committed neither with homicidal intent nor with any specific intent to inflict harm upon the victim or to create a condition hazardous to life or safety. It encompasses fatally reckless acts of commission and omission in the fields of building construction and maintenance, prescription and administering of drugs, control of animals, use of machinery, and in a thousand and one kinds of occupational, recreational and other activity which is a part of every day life. Most important of all, however, at least from a volume standpoint, it includes automobile homicides.

Probably the chief difficulty in the prosecution of these vehicle cases as manslaughter of the reckless or culpably negligent variety is that jurors are loath to convict because of a feeling that

both the label and the penalties of "manslaughter" are too harsh for this kind of transgression. To meet that problem, some states have wholly or partially detached the vehicle homicide from their regular manslaughter statutes by creating special provisions with lower penalties and, sometimes, with changed labels. One of those states is New York, which has done both. In addition to its general second degree manslaughter crime of "culpable negligence" (Penal Law, §1052, subd. 3), it has created a special crime entitled "Criminal negligence in operation of vehicle resulting in death" (§1053-a; enacted in 1936), with a maximum prison sentence of five years (§1053-b) in contrast to the fifteen-year maximum for second-degree manslaughter (§1053).

The Article here proposed follows that pattern to the extent of severing the reckless type of killing from the manslaughter crimes, of labeling it "Reckless Homicide" (§5) and of grading it below manslaughter. It does not, however, follow the Penal Law system of placing only the automobile homicide in the lower category, with all other reckless or culpably negligent killing retained as manslaughter. There is a visceral reaction here against particularizing forms of misconduct falling within the same principle and degree of culpability, and grading them differently. If one who kills by reckless driving is guilty only of the lowest grade of homicide, no greater liability should attach to the construction worker who, with fatal results, recklessly lets a piece of lumber fall upon a passer-by.

2. Depravedly (§3, subd. 2)

Scrutiny of the definition of the word "depravedly" contained in this Article (§1) will demonstrate that depravity, as here used, is an extremely aggravated form of recklessness. As applied to homicide, it entails far more than a conscious and culpable disregard of a "substantial" risk of death or serious physical injury. It speaks of an act involving an "extremely grave risk" of human fatality committed viciously and with extreme indifference to the value of

human life.

Homicide committed "depravedly" is, of course, the equivalent of the familiar shooting-into-a-crowd form of murder, established by common law, adopted by most American jurisdictions, and described in the New York Penal Law as a killing "By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a design to effect the death of any individual" (§1044, subd. 2).

In most degree jurisdictions, this is classified as second degree murder, although some, including New York, place it in the first degree category. The inclination here might be towards first degree murder were it not for the second degree classification of killing by an act committed with intent to inflict grievous physical injury (§3, subd. 1). Whether the depraved type is more culpable than this is debatable; and, if not, it should doubtless join it in the second degree category, leaving intentional killing as the exclusive form of first degree murder and undisputed king of homicide. That is the somewhat reluctant decision reached here.

C. Felony homicide (§3, subd. 3; §4, subd. 3)

As indicated in other parts of this report, the felony murder doctrine is a highly controversial one. At one extreme are those, including the New York legislature, who regard felony murder as an important public policy crime, suitably designed to deter the commission of felonies through imposition of the highest criminal sanctions upon anyone engaging in any felony when death results, whether accidentally or intentionally. At the other extreme is a faction which, quoting statistics of sorts (see M.C.C., pp. 38-39), contends that the deterrent effect is either minimal or nil; that, as with most other crimes malum in se, responsibility should be predicated largely from a subjective viewpoint; and, hence, that the felony murder doctrine is monstrously inequitable. Between these extremes is a much more popular middle course which renders a killing first

degree murder when perpetrated in the commission of certain specified felonies of a more serious and forcible character, and which allots the residue of the doctrine to second degree murder or, occasionally, to manslaughter.

Although this is a subject susceptible of discussion ad infinitum, considerations of time and practicality preclude any such endeavor in this report. The decision reached here is to follow the middle course approach with certain downgrading qualifications.

This process is begun by making the familiar division between homicide perpetrated in the commission of certain selected felonies (arson, robbery, burglary, kidnaping, forcible rape, other forcible sex crimes, and felonious escape) and those perpetrated in the commission of a (meaning any) felony--not any other felony, as the customary phraseology goes.* The higher crime is classified as second degree murder (§3, subd. 3)--contrary to the usual first degree designation--and the lower as manslaughter (§4, subd. 4).

In partial answer to anticipated complaints that a fatal shooting during an armed robbery, for example, should constitute first rather than second degree murder, it may be pointed out that, if the killing is a vicious or callous one, it will usually be prosecutable as an intentional one under the first degree statute. If, on the other hand, it is unintentional or accidental, a second degree murder conviction does not seem too small a penalty, especially for the non-killer accomplices.

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*The usual reference to "any other felony" entails a basic error of draftsmanship. The degrees of felony murder comprise what is obviously intended to be a degree or included crime situation. In such situations, the higher crime always includes the lower, and one who commits the higher always commits the lower as well. That is what enables him to plead to, or be convicted of, the lower upon a charge of the higher. If, however, the higher crime speaks of a killing in the commission of felonies A, B or C, and the lower or residue crime speaks of any other felony (X, Y, Z, etc.), one who commits the higher does not also commit the lower and there is no included crime pattern. Proper drafting renders the lower degree all-inclusive--a or any or all felonies--and aggravates the crime to the higher degree when the felony happens to be A, B or C. Then, one who kills during the commission of felony A commits both degrees and, if charged with the higher, may plead to the lower or be convicted thereof by a jury.

Some comment is necessary concerning a few matters relating to the unusual phraseology of these provisions.

It is virtually axiomatic that the felony murder rule encompasses not only the actual killer but any and all non-killer accomplices who may be implicated in the underlying felony. This principle is so familiar to those acquainted with the criminal law, in New York at least, that some undoubtedly have forgotten that no doctrine of accomplice liability is enunciated in the statute itself (Penal Law, §1044, subd. 2). All the statute does is to attach first degree responsibility to a person who kills while engaged in the commission of a felony or a felony attempt. The concomitant liability of non-killer accomplices is established entirely by case law, and the reasoning required to reach that result involves considerable judicial construction in the realm of conspiratorial responsibility [People v. Giro (1910) 197 N.Y. 152, 157-158].

Despite the uniform acceptance of this doctrine, there would seem to be no valid reason for not expressly writing it into the statutes, and the present provisions are so worded.

Some explanation is also in order concerning the references to "proximate" cause or "result" and related phrases. This entails an understanding of what are, for present purposes, really two different categories of felonies.

The first and narrower category is exemplified by crimes of arson and felonious use of bombs and other explosives. In an arson murder, for example, it is the very commission of the highly dangerous felony itself, unaugmented by any other or separate homicidal act, which causes death. This is what may be termed a delayed-action homicide in the sense that the causal act constituting the killing (the arson or setting of the fire) ordinarily does not take fatal effect until an appreciable time after its commission.

In these cases, the issues are not the usual felony murder ones of whether the killing occurred in the course of or in furtherance of the commission of the underlying felony. Those questions are not pertinent and simply have no place in this type of case. The issues

here are ones of proximate cause: whether the arson was a proximate cause of the ultimate fatality. This may be easily enough resolved in the simple case where a fire caused by arson of a building results in the death of an occupant. More difficult questions arise, however, when the victims are firemen responding to the alarm, police officers who appear and meet death under odd circumstances, and so on [see People v. Keshner (1953) 304 N.Y. 968, 971; State v. Glover (1932) 330 Mo. 709, 50 S.W. (2d) 1049, 1056].

The other and far more common kind of felony murder is typified by a fatal shooting or stabbing during the commission by one or more persons of a robbery. The killing here is not directly caused by the felony itself, as in the arson case, but, ordinarily, by a specific act of one of the felony perpetrators; and there is seldom any issue as to whether that act (e.g., a shooting) is the proximate cause of the fatality. While the issues most commonly presented in these cases may basically be ones of proximate causality as between the felony itself and the death, they are not discussed in those terms. The usual questions which arise are whether the killing occurred during the commission of the felony and in furtherance of its execution; for it is a defense to a felony murder charge of this nature that the killing occurred after the felony was over (e.g., during flight), or, if during its commission, that it was not an act perpetrated in furtherance of the crime but represented a personal or individual venture on the part of one of the perpetrators not designed to advance the common enterprise [People v. Elling (1943) 289 N.Y. 419, 422; People v. Ryan (1934) 263 N.Y. 298, 302-304; People v. Sobieskoda (1923) 235 N.Y. 411, 417; People v. Marwig (1919) 227 N.Y. 382, 385-386].

The proposed statutes in question are framed with the foregoing considerations in mind. Thus, the fatality must be either "a proximate result" of the felony (directly applicable to the arson or delayed-action type of case) or "a result of an act by one or more of the perpetrators committed in the course of and in furtherance of such crime or of the perpetrators' immediate flight from the scene thereof"

[§§3(3), 4(4)].

In the last connection, the reference to "immediate flight" obviously extends the felony period beyond the lines presently staked out by New York law. No logical or realistic reason appears for differentiating between a killing during a holdup of a store, for example, and one committed immediately outside the store as the robbers are attempting to escape [see Model Code, §210.2(b)]. Moreover, the present distinction, technical at best, is non-existent in many instances. While flight may often signify the termination of a robbery or robbery attempt, the crime is deemed to continue if the escaping robbers have the loot in their possession. Thus, the occurrence or non-occurrence of a felony murder may depend upon the seemingly irrelevant question of whether the holdup was a success or a failure.

Finally, it may be noted that these provisions do not contain the present Penal Law phrase: "without a design to effect death" (§1044, subd. 2). That phrase is not only superfluous but misleading in so far as it implies that a lack of homicidal intent is essential to felony murder. This was not the legislative purpose. Actually, the phrase was unnecessarily inserted for the purpose of emphasizing that homicidal intent is immaterial [People v. Sobieskoda, supra, 235 N.Y. 411, 419].

D. Miscellaneous Comments

It is not expected that the proposed Article will meet with unanimous approval. It is susceptible of some easily contrived alternatives, especially with respect to grading. Some might prefer to raise the depraved type of killing from second to first degree murder, as it is presently classified in the Penal Law. Assuming approval of the two-degree felony homicide form, some might prefer to raise each degree a notch, thus adopting the rather prevalent felony murder scheme which makes the higher crime first degree murder and the lower second degree murder. Perhaps, all three of the predicated

second degree murder crimes (including the form involving intent to inflict grievous physical injury) might be raised a degree to join intentional killing in a single, degreeless murder statute.

For those who might feel that a killing resulting from even a trivial assault should be penalized as manslaughter, the result can be accomplished by striking out the word "substantial" in the appropriate provision (§4, subd. 1).

No provision relating to aiding suicides has been proscribed in the Article, and some may agree with the sympathetic attitude of the Penal Law and the Model Code which, by special provision, takes the form of relatively lenient treatment for the survivor of a suicide pact.

These are but some of various possible amendments which can be readily made.

Richard G. Denzer

RGD:rc
6/19/62

APPENDIX

CODE 1

PROPOSED HOMICIDE ARTICLE

Pertinent definitions of General Provisions

Act. The noun "act" means not only a physical movement, but also a verbal utterance and, where relevant, an omission or failure to act.

Mech objects

Mechler ??

Recklessly. A person who commits an act which creates a substantial and unjustifiable risk of human fatality, physical injury, property damage, public catastrophe or public disorder, does so "recklessly" when, though aware of that risk, he consciously disregards it. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, his disregard thereof involves a gross deviation from the standard of care that a reasonable person would observe in his situation.

Depravedly. A person who commits an act which creates an extremely grave and unjustifiable risk of human fatality, grievous physical injury, substantial property damage or public catastrophe, does so "depravedly" when, though aware of that risk, he consciously disregards it, and when, though not specifically intending the consequences inherent in the risk, he acts out of wanton mischievousness or with vicious indifference to such consequences.

ARTICLE X

HOMICIDE

§ 1. Definitions

Substantial physical injury. "Substantial physical injury" is injury which causes extremely severe pain, or which causes the injured person to suffer, for an appreciable though

not necessarily extensive period of time, considerable discomfort, substantial disablement, loss of the use of some organ or bodily function, or some noticeable disfigurement.

Grievous physical injury. "Grievous physical injury" is extremely serious injury which endangers life, or which causes the injured person to suffer, either permanently or for an extensive period of time, substantial disfigurement, loss of the use of some organ or bodily function, substantial disablement, or general impairment of health.

call it provocation (Halpern)

Mitigating circumstances. A person commits a homicide under "mitigating circumstances" when he kills under (1) the influence of extreme emotional disturbance for which there is reasonable explanation or excuse, or (2) an erroneous belief that he has a right to kill or to inflict grievous physical injury, when such erroneous belief is based entirely upon a mistake of fact on his part for which there is reasonable explanation or excuse.

In either instance, 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.

§ 2. Murder in the first degree

Except when his crime constitutes manslaughter as defined in subdivision 2 of section 4 of this Article, a person is guilty of murder in the first degree when, with intent to kill another person, he commits an act which causes the death of such person or of a third person.

§ 3. Murder in the second degree

Except when his crime constitutes manslaughter as defined in subdivision 2 of section 4 of this Article, a person is guilty of murder in the second degree when:

1. With intent to inflict grievous physical injury upon another person, he commits an act which causes the death of such person or of a third person.

2. He depravedly commits an act involving an extremely grave risk of human fatality and thereby causes the death of another person.

3. Either alone or in concert with others, he commits or attempts to commit a felonious crime of arson, robbery, burglary, kidnapping, escape, forcible rape or any other forcible and felonious sex crime, and a person other than one of the perpetrators is killed as a proximate result of such felony, or as a result of an act of one or more of the perpetrators committed in the course of and in furtherance of such felony or of the perpetrators' immediate flight from the scene thereof.

§ 4. Manslaughter

A person is guilty of manslaughter when:

1. With intent to inflict substantial physical injury upon another person, he commits an act which causes the death of such person or of a third person.

2. Under mitigating circumstances, he commits an act which, absent such mitigating circumstances, would constitute murder as defined in section 2 or in subdivision 1 of section 3 of this Article.

3. Either alone or in concert with others, he commits or attempts to commit a felony, and a person other than one of the perpetrators is killed as a proximate result of such felony, or as a result of an act of one or more of the perpetrators committed in the course of and in furtherance of such felony or of the perpetrators' immediate flight from the scene thereof.

§ 5. Reckless homicide

A person is guilty of reckless homicide when he recklessly

commits an act involving a substantial risk of human fatality and thereby causes the death of another person.

CODE 2

NEW YORK PENAL LAW (ART. 94)

§ 1040. Common law petit treason is homicide

The rules of the common law, distinguishing the killing of a master by his servant, and of a husband by his wife, as petit treason, are abolished; and those homicides are punishable, when not justifiable or excusable, as prescribed in this chapter.

§ 1041. What proof of death is required

No person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed and the fact of killing by the defendant, as alleged, are each established as independent facts; the former by direct proof, and the latter beyond a reasonable doubt.

§ 1042. Homicide defined

Homicide is the killing of one human being by the act, procurement or omission of another.

§ 1043. Different kinds of homicide

Homicide is:

1. Murder; or
2. Manslaughter; or
3. Excusable homicide; or
4. Justifiable homicide.

§ 1044. Murder in first degree defined

The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:

1. From a deliberate and premeditated design to effect the death of the person killed, or of another; or

2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual

or without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise; or

3. When perpetrated in committing the crime of arson in the first degree.

4. A person who wilfully, by loosening, removing or displacing a rail, or by any other interference, wrecks, destroys or so injures any car, tender, locomotive or railway train, or part thereof, while moving upon any railway in this state, whether operated by steam, electricity or other motive power, as to thereby cause the death of a human being, is guilty of murder in the first degree, and punishable accordingly.

§ 1045-a. Life imprisonment for felony murder; jury may recommend

A jury finding a person guilty of murder in the first degree, as defined by subdivision two of Section ten hundred forty-four may, as a part of its verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the court may sentence the defendant to imprisonment for the term of his natural life.

§ 1046. Murder in second degree defined

Such killing of a human being is murder in the second degree, when committed with a design to effect the death of the person killed, or of another, but without deliberation and premeditation.

§ 1047. Duel fought out of this state

A person who, by previous appointment made within the state, fights a duel without the state, and in so doing inflicts a wound upon his antagonist, whereof the person injured dies; or who engages or participates in such a duel, as a second or assistant to either party, is guilty of murder in the second degree, and may be indicted, tried and convicted in any county of this state.

§ 1048. Punishment for murder in the second degree

Murder in the second degree is punishable by imprisonment under an indeterminate sentence, the minimum of which shall not be

less than twenty years and the maximum of which shall be for the offender's natural life; and any person serving a term of imprisonment for life, under an original sentence for murder in the second degree, on the first day of September, nineteen hundred and seven, shall be deemed to be thereafter serving under such an indeterminate sentence.

§ 1049. Manslaughter defined

In a case other than one of those specified in Sections ten hundred and forty-four, ten hundred and forty-six and ten hundred and forty-seven, homicide, not being justifiable or excusable, is manslaughter.

§ 1050. Manslaughter in first degree

Such homicide is manslaughter in the first degree, when committed without a design to effect death:

1. By a person engaged in committing, or attempting to commit, a misdemeanor, affecting the person or property, either of the person killed, or of another; or

2. In the heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon.

The wilful killing of an unborn quick child, by an injury committed upon the person of the mother of such child, is manslaughter in the first degree.

A person who provides, supplies, or administers to a woman, whether pregnant or not, or who prescribes for, or advises or procures a woman to take any medicine, drug, or substance, or who uses or employs, or causes to be used or employed, any instrument or other means, with intent thereby to procure the miscarriage of a woman, unless the same is necessary to preserve her life, in case the death of the woman, or of any quick child of which she is pregnant, is thereby produced, is guilty of manslaughter in the first degree.

§ 1051. Punishment for manslaughter in first degree

Manslaughter in the first degree is punishable by imprisonment for a term not exceeding twenty years.

§ 1052. Manslaughter in second degree defined

Such homicide is manslaughter in the second degree, when committed without a design to effect death:

1. By a person committing or attempting to commit a trespass, or other invasion of a private right, either of the person killed, or of another, not amounting to crime; or

2. In the heat of passion, but not by a dangerous weapon or by the use of means either cruel or unusual; or

3. By any act, procurement or culpable negligence of any person, which, according to the provisions of this article, does not constitute the crime of murder in the first or second degree, nor manslaughter in the first degree.

Women producing miscarriage.--A woman quick with child, who takes or uses, or submits to the use of any drug, medicine, or substance, or any instrument or other means with intent to produce her own miscarriage, unless the same is necessary to preserve her own life, or that of the child whereof she is pregnant, if the death of such child is hereby produced, is guilty of manslaughter in the second degree.

Negligent use of machinery.--A person who by any act of negligence or misconduct in a business or employment in which he is engaged, or in the use or management of any machinery, animals, or property of any kind, intrusted to his care, or under his control, or by any unlawful, negligent or reckless act, not specified by or coming within the foregoing provisions of this article, or the provisions of some other statute, occasions the death of a human being, is guilty of manslaughter in the second degree.

Mischievous animals.--If the owner of a mischievous animal knowing its propensities, wilfully suffers it to go at large, or keeps it without ordinary care, and the animal, while so at large, and not confined, kills a human being, who has taken all the precautions, which the circumstances permitted, to avoid the animal,

the owner is guilty of manslaughter in the second degree.

Overloading passenger vessel.--A person navigating a vessel for gain, who wilfully or negligently receives so many passengers or such a quantity of other lading on board the vessel, that, by means whereof, the vessel sinks, or is overset or injured, and thereby a human being is drowned, or otherwise killed, is guilty or manslaughter in the second degree.

Persons in charge of steamboats.--A person having charge of a steamboat used for the conveyance of passengers, or of a boiler or engine thereof, who, from ignorance, recklessness, or gross neglect, or for the purpose of excelling any other boat in speed, creates, or allows to be created, such an undue quantity of steam as to burst the boiler, or other apparatus in which it is generated or contained, or to break any apparatus or machinery connected therewith, whereby the death of a human being is occasioned, is guilty of manslaughter in the second degree.

Persons in charge of steam engines.--An engineer or other person, having charge of a steam boiler, steam engine, or other apparatus for generating or applying steam, employed in a boat or railway, or in a manufactory, or in any mechanical works, who wilfully, or from ignorance or gross neglect, creates or allows to be created, such an undue quantity of steam as to burst the boiler, engine, or apparatus, or to cause any other accident, whereby the death of a human being is produced, is guilty of manslaughter in the second degree.

Acts of physicians while intoxicated.--A physician or surgeon, or person practicing as such, who, being in a state of intoxication, without a design to effect death, administers a poisonous drug or medicine, or does any other act as a physician or surgeon, to another person, which produces the death of the latter, is guilty of manslaughter in the second degree.

Persons making or keeping gunpowder contrary to law.--A person who makes or keeps gunpowder or any other explosive substance within a city or village, in any quantity or manner prohibited by

law, or by ordinance of the city or village, if any explosion thereof occurs, whereby the death of a human being is occasioned, is guilty of manslaughter in the second degree.

§ 1053-a. Criminal negligence in operation of vehicle resulting in death

A person who operates or drives any vehicle of any kind in a reckless or culpably negligent manner, whereby a human being is killed, is guilty of criminal negligence in the operation of a vehicle resulting in death.

§ 1053-b. Punishment for criminal negligence in operation of vehicle resulting in death

A person convicted of the crime defined by Section ten hundred fifty-three-a is punishable by imprisonment for a term of not exceeding five years or by a fine of not more than one thousand dollars, or by both.

§ 1053-c. Criminal negligence while engaged in hunting resulting in the death of another

Any person who while engaged in hunting shall discharge a firearm or operate a long bow in a culpably negligent or reckless manner, whereby a human being is killed, is guilty of criminal negligence while engaged in hunting.

§ 1053-d. [Penalty for violations of preceding Section]

A person convicted of the crime defined in Section ten hundred fifty-three-c is punishable by imprisonment for a term of not to exceed five years or by a fine of not more than one thousand dollars, or by both.

§ 1391. Lynching defined; punishment

Any act or acts of violence committed by a mob on the body of a person in custody of any peace officer, or suspected of, charge with or convicted of the commission of any criminal offense, which act or acts result in the death of a person, shall constitute lynching; provided, however, that lynching shall not be deemed to include violence occurring between members or groups of law breakers such as are commonly defined as gangsters or racketeers, nor violence

occurring during the course of picketing or boycotting incidental to any labor dispute, and each and every person who is a member of a mob which commits such an act or acts of violence is guilty of lynching, and is punishable by imprisonment under an indeterminate sentence the minimum of which shall be not less than twenty years and the maximum of which shall be for the offender's natural life.

§ 2301. No forfeiture imposed for suicide

Although suicide is deemed a grave public wrong, yet from the impossibility of reaching the successful perpetrator, no forfeiture is imposed.

§ 2304. Abetting and advising suicide

A person who wilfully, in any manner, advises, encourages, abets, or assists another person in taking the latter's life, is guilty of manslaughter in the first degree.

CODE 3

ILLINOIS CRIMINAL CODE OF 1961

"ARTICLE 9. HOMICIDE

Sec.

9-1. Murder.

9-2. Voluntary Manslaughter.

9-3. Involuntary Manslaughter and Reckless Homicide.

9-4. Concealing Death of Bastard.

9-1. § 9-1. Murder.] (a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or

(3) He is attempting or committing a forcible felony other than voluntary manslaughter.

(b) Penalty.

A person convicted of murder shall be punished by death or imprisonment in the penitentiary for any indeterminate term with a minimum of not less than 14 years. If the accused is found guilty by a jury, a sentence of death shall not be imposed by the court unless the jury's verdict so provides in accordance with Section 1-7 (c) (1) of this Code.

9-2. § 9-2. Voluntary Manslaughter.] (a) A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:

(1) The individual killed, or

(2) Another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed.

Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

(b) A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable.

(c) Penalty.

A person convicted of voluntary manslaughter shall be imprisoned in the penitentiary from one to 20 years.

9-3. § 9-3. Involuntary Manslaughter and Reckless Homicide.]

(a) A person who kills an individual without lawful justificatio commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly.

(b) If the acts which cause the death consist of the driving of a motor vehicle, the person may be prosecuted for reckless homicide or if he is prosecuted for involuntary manslaughter, he may be found guilty of the included offense of reckless homicide.

(c) Penalty.

(1) A person convicted of involuntary manslaughter shall be imprisoned in the penitentiary from one to 10 years.

(2) A person convicted of reckless homicide shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or in the penitentiary from one to 5 years, or both fined and imprisoned.

9-4. § 9-4. Concealing Death of Bastard.] (a) A woman commits the offense of concealing the death of a bastard when she conceals the death of any issue of her body which if born alive would be a bastard.

(b) Nothing herein contained shall be so construed as to prevent such mother from being indicted for the murder or manslaughter of such bastard child.

(c) Penalty.

A person convicted of concealing the death of a bastard shall be imprisoned in a penal institution other than the penitentiary not to exceed one year."

CODE 4

WISCONSIN CRIMINAL CODE

940.01 FIRST-DEGREE MURDER. (1) Whoever causes the death of another human being with intent to kill that person or another shall be sentenced to life imprisonment.

(2) In this chapter "intent to kill" means the mental purpose to take the life of another human being.

940.02 SECOND-DEGREE MURDER. Whoever causes the death of

another human being by conduct imminently dangerous to another and evincing a depraved mind, regardless of human life, may be imprisoned for not less than 5 nor more than 25 years.

940.03 THIRD DEGREE MURDER. Whoever in the course of committing or attempting to commit a felony causes the death of another human being as a natural and probable consequence of the commission of or attempt to commit the felony, may be imprisoned not more than 15 years in excess of the maximum provided by law for the felony.

940.05 MANSLAUGHTER. Whoever causes the death of another human being under any of the following circumstances may be imprisonec not more than 10 years:

(1) Without intent to kill and while in the heat of passion; or

(2) Unnecessarily, in the exercise of his privilege of self-defense or defense of others or the privilege to prevent or teminate the commission of a felony; or

(3) Because such person is coerced by threats made by someone other than his co-conspirator and which cause him reasonably to believe that his act is the only means of preventing imminent death to himself or another; or

(4) Because the pressure of natural physical forces causes such person reasonably to believe that his act is the only means of preventing imminent public disaster or imminent death to himself or another.

940.06 HOMICIDE BY RECKLESS CONDUCT. (1) Whoever causes the death of another human being by reckless conduct may be fined not more than $2,500 or imprisoned not more than 5 years or both.

(2) Reckless conduct consists of an act which creates a situation of unreasonable risk and high probability of death or great bodily harm to another and which demonstrates a conscious disregard for the safety of another and a willingness to take known chances of perpetrating an injury. It is intended that this definition

embraces all of the elements of what was heretofore known as gross negligence in the criminal law of Wisconsin.

940.07 HOMICIDE RESULTING FROM NEGLIGENT CONTROL OF VICIOUS ANIMAL. Whoever knowing the vicious propensities of any animal intentionally suffers it to go at large or keeps it without ordinary care, if such animal, while so at large or not confined, kills any human being who has taken all the precautions which the circumstances may permit to avoid such animal, may be fined not more than $2,500 or imprisoned not more than 5 years.

940.08 HOMICIDE BY NEGLIGENT USE OF VEHICLE OR WEAPON. (1) Whoever causes the death of another human being by a high degree of negligence in the operation or handling of a vehicle, firearm, airgun, or bow and arrow may be fined not more than $1,000 or imprisoned not more than one year in county jail or both.

(2) A high degree of negligence is conduct which demonstrates ordinary negligence to a high degree, consisting of an act which the person should realize creates a situation of unreasonable risk and high probability of death or great great bodily harm to another.

940.09 HOMICIDE BY INTOXICATED USER OF VEHICLE OR FIREARM. Whoever by the negligent operation or handling of a vehicle, firearm or airgun and while under the influence of an intoxicant causes the death of another may be fined not more than $2,500 or imprisoned not more than 5 years or both. No person shall be convicted under this section except upon proof of causal negligence in addition to such operation or handling while under the influence of an intoxicant.

940.12 ASSISTING SUICIDE. Whoever with intent that another take his own life assists such person to commit suicide may be imprisoned not more than 10 years.

939.22 WORDS AND PHRASES DEFINED. In the criminal code, the following words and phrases have the designated meanings unless the

context of a specific section manifestly requires a differenct construction:

. . . (4) "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.

. . . (10) "Dangerous weapon" means any firearm, whether loaded or unloaded, or any device designated as a weapon and capable of producing death or great bodily harm, or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.

. . . (14) "Great bodily harm" means bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.

. . . (16) "Human being" when used in the homicide sections means one who has been born alive.

CODE 5

AMERICAN LAW INSTITUTE MODEL PENAL CODE

Pertinent general provisions

Section 2.02. General requirements of Culpability.

x x x

(c) Recklessly.

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of care that a reasonable person would observe in his situation.

(d) Negligently.

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would exercise in his situation.

Section 210.1. Criminal Homicide.

(1) A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being.

(2) Criminal homicide is murder, manslaughter, or negligent homicide.

Section 210.2. Murder.

(1) Except as provided in Section 210.3 (1) (b), criminal homicide constitutes murder when:

(a) it is committed purposely or knowingly; or

(b) it is commited recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing robbery, rape or deviate sexual intercourse by force or intimidation, arson, burglary, kidnapping or felonious escape.

(2) Murder is a felony of the first degree [but a person convicted of murder may be sentenced to death, as provided in Section 210.6].

Section 210.3. Manslaughter.

(1) Criminal homicide constitutes manslaughter when:

(a) it is committed recklessly; or

(b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. 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 he believes them to be.

(2) Manslaughter is a felony of the second degree.

Section 210.4. Negligent Homicide.

(1) Criminal homicide constitutes negligent homicide when it is committed negligently.

(2) Negligent homicide is a felony of the third degree.

Section 210.5. Causing or Aiding Suicide.

(1) Causing Suicide as Criminal Homicide. A person may be convicted of criminal homicide for causing another to commit suicide only if he purposely causes such suicide by force, duress, or deception.

(2) Aiding or Soliciting Suicide. A person who purposely aids or solicits another to commit suicide is guilty of a felony of the second degree is his conduct causes such suicide or an attempt at suicide, and otherwise of a misdemeanor.

RGD:cd

COMMENTS IN CONNECTION WITH NEW DRAFTS OF HOMICIDE ARTICLE

In connection with the proposed homicide Article submitted to the Commission and discussed at the July, 1962, meeting (which I did not attend), my understanding is that the principal criticisms and suggestions made were as follows:

(1) Second degree murder should be eliminated and all forms of homicide to be classified as murder should be contained in a single, degreeless murder statute.

(2) There should be alternative penalties for murder, the greater being either death or life imprisonment, depending upon the ultimate decision with respect to capital punishment, and the lesser being something appreciably short of the greater (i.e., life imprisonment or some specified shorter term if the greater is death, and something more lenient than life imprisonment if the latter is the greater).

The determination of which penalty shall be imposed should be made by the court and/or jury pursuant to procedures along the lines of those proscribed in the California and A. L. I. Model Codes (§210.6), sometimes involving a separate post-trial proceeding before the trial jury.

A defendant indicted for murder should be permitted, under certain conditions, to plead guilty to murder entailing the lesser penalty.

(3) Felony murder--

While the minutes of the July meeting are not entirely clear upon the matter, I gather that two suggestions--conflicting ones--were made in connection with felony murder.

(a) The first appears to be that the felony murder provisions and pattern of the original Article (§3, subd. 3; §4, subd. 3) should be eliminated and replaced by a provision

(in the murder statute) limiting this doctrine or crime to killings in the course of felonies perpetrated by acts inherently dangerous to life; and that the application of the statute should be further limited to the actual killer and those in privity with the homicidal act.

(b) The other suggestion would retain the selective felony murder provision of the original draft (§3, subd. 3) substantially in its present form, but would delete the residue or felony-manslaughter provision (§4, subd. 3) designed to cover killings occurring during felonies not enumerated in the first section.

(4) The manslaughter provision dealing with killings caused by acts committed with intent to inflict "substantial physical injury" (§4, subd. 1) should be eliminated. The reasons for this are: (a) that the distinction between "substantial" physical injury and "grievous" physical injury--the term used in one of the second degree murder provisions (§3, subd. 1)--is not clear or sharp enough for practical application; and (b) that a killing resulting from conduct intended to inflict bodily harm short of the "grievous" kind probably should not constitute homicide anyway.

(5) The second degree murder provision defining the <u>depraved</u> type of killing is awkward and inartistic. Founded upon a definition of the word "depravedly" (in the preliminary definitions), it refers to one who "depravedly commits an act involving an extremely grave risk of human fatality xxx." The word "depravedly" and the definition thereof should be eliminated, and the crime should be described and defined in the provision itself.

(6) The crime of "Reckless homicide" (§5 of the original draft) should be augmented by another crime--the

lesser offense of criminally negligent homicide--as in the A. L. I. Model Code. Reckless homicide should be raised a notch and inserted in the manslaughter statute (§4), while negligent homicide, under that or a similar label, should replace it as the lowest degree (§5).

While not agreeing with all these suggestions, I have attempted to incorporate them in an amended Article (Code A of Appendix hereto). In addition, I have drafted an alternative Article (Code B, idem) which adopts some of the above suggestions, rejects others, and inserts some new ideas.

Code A

Pursuant to the Commission's suggestion, degrees of murder are here eliminated and all forms of murder are placed in a single "Murder" statute containing three subdivisions (§2).

The first subdivision combines intentional killing and that committed with intent "to inflict grievous physical injury" (second degree murder in the original draft (§3, subd. 1).*

Subdivision 2 defines the depraved type--with phraseological changes from the original draft (see §3, subd. 2 thereof) believed to accord with the Commission's above-noted suggestion.

Subdivision 3 is the felony murder provision. While not limiting the kinds of felonies which may underlie the crime, it requires--in accordance with one of the suggestions made--a homicidal act "inherently dangerous to human life," and applies only to the killer and those accomplices privy to the act. This replaces and eliminates the two provisions of the original draft (§3, subd. 3; §4, subd. 3).

The next section (§3) of this Article adopts the suggestions with respect to punishment and pleading. Two possible sentences for murder are proscribed. The greater is death or life imprisonment, depending upon future decisions. The lesser or "reduced penalty" is also set forth in the

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*It should be noted that the definition of "grievous physical injury," contained in the original Article (§1), is here eliminated. The definition was reluctantly formulated and presented for the sole purpose of distinguishing "grievous" from "substantial" injury, the basis for a lesser included crime of manslaughter (§4, subd. 1 of original Article). Since the latter is being excised here and the distinction is, therefore, no longer necessary, the definitions of both "grievous" and "substantial" are sticken.

alternative: life imprisonment (obviously usable as a lesser sentence only if the death penalty is retained for the greater); or a shorter term, arbitrarily designated as twenty to forty years, which is usable whether the greater penalty be death or life imprisonment.

As indicated, the determination of whether the greater or "reduced" sentence shall be imposed in any particular case is to be made pursuant to some post-trial procedure of the California or Model Code sort. The drafting of such statutory machinery is an intricate task in itself and is not attempted at this point. The prospective procedural statute is referred to as "section X," and the alternative punishment provision at hand (§3) simply declares that the determination shall be made "as provided in section X of this Article."

Also included in this section (§3) is the suggested provision conditionally permitting a defendant under indictment for murder to plead guilty to "murder with a reduced penalty."

Coming to Manslaughter (§4), the first subdivision of the original Manslaughter section, proscribing a form of homicide committed by an act intended "to inflict substantial physical injury" (§4, subd. 1), is deleted pursuant to the Commission's suggestion. Also eliminated--by virtue of the revised felony murder pattern--is the third subdivision of the original section, dealing with felony homicide.

The only subdivision retained is the one reducing murder to manslaughter when an otherwise murderous killing is committed "under mitigating circumstances" (§4, subd. 2 of the original Article; §4, subd. 1 of "Code A").

In addition, however, "Reckless homicide" (§5 of the original draft) is raised to manslaughter and, bereft of its old title but without change of context, is inserted as

subdivision 2 of the manslaughter section (§4).

Completing the Commission's recommendations in this area, a new and lesser crime of "Criminally negligent homicide" is added as section 5 (Reckless homicide's old location). This involves the formulation of another definition ("criminal negligence"), which is inserted in the "definitions" portion of the general provisions. As with the word "Recklessly," the definition of "Criminal negligence" substantially follows the Model Code definition; and, also as in the Model Code, the negligent brand of homicide becomes a lesser degree of the reckless variety.

Code B

Many of the Commission's suggestions are incorporated in this draft, also. Among those retained are what may probably be termed the primary recommendations--concerning a single, degreeless murder section, alternative penalties for murder, and the plea of guilty to murder with a reduced penalty.

The variations from "Code A" involve (1) felony murder; (2) homicide by acts intended to inflict physical injury ("grievous" and "substantial"); and (3) reckless and negligent homicide.

1. Felony murder

I am not enamored of the "Code A" felony murder provision (§2, subd. 3), which limits the application of this crime to one who, in the course of a felony or felony attempt, either directly or accessorily kills a person by an act "inherently dangerous to human life." While appreciating the theory of the requirement, it seems to me to render felony murder a toothless crime which, in the indicated form, might just as well be abandoned. This opinion requires considerable explanation.

The thrust of the recommendation, as I understand it, is that the felony murder doctrine should not be automatically applicable to every kind of killing in the course of a felony, or to each of the felony perpetrators irrespective of his actual contribution or lack of contribution to the actual homicide; that individual or personal homicidal culpability of a certain degree should be an important factor and, indeed, a requisite; and, hence, that one should not be guilty of this crime unless, either directly or by accessorial conduct related to the killing itself (not merely to the

felony), he causes or aids in causing death by an act inherently dangerous to life. The "Code A" section is so worded (§2, subd. 3); and, in that form, it exempts, inter alia, (1) the felony perpetrator who more or less accidentally kills by, for example, an average blow with his fist, and (2) the non-killer accomplice whose contributions are exclusively to the underlying felony and who, not being privy to the homicidal act, is not criminally responsible therefor even though it be a savage one.

This seems fair and practical enough with respect to the actual killer. Rarely, however, would the statute reach the non-killer accomplices.

The typical multiple-offender felony murder is a robbery conducted by two or more armed bandits during which one of them, because of resistance, interference or some other factor, fatally shoots or stabs someone. The killer, of course, has committed "an act inherently dangerous to human life" and, hence, in addition to being guilty of some form of common law homicide, is also guilty of felony murder under the postulated provision. Not so, however, his holdup confederates. Though guilty of robbery, they are not guilty of felony murder--nor of any other form of homicide.

In partial answer to this assertion, the suggestion has been made that, in many instances, complicity in the "dangerous" homicidal act may be constructively attributed to the accomplices. When several persons arm themselves and set out upon a criminal enterprise requiring concerted action, it is urged, a conditional intent to kill, if necessary, for attainment of the common objective may legally be implied. By principles of criminal conspiracy and accessorial responsibility (Penal Law, §2), the argument goes, this type of situation furnishes legally sufficient basis for a jury finding

that the non-killer confederates were accomplices in the "dangerous" homicidal act as well as in the underlying felony. Stated in another way, the contention is that, absent any felony murder provision, all would share the killer's homicidal responsibility and would be guilty of any form or degree of common law homicide of which the killer himself might be convicted. Upon this theory rests the claim that the "dangerous act" felony murder provision in question is broad enough to encompass non-killer accomplices in many instances.

The gist of my position is that this proposition is legally erroneous. Possibly it stems from certain superficially pertinent but actually inapplicable language of the opinion in People v. Emieleta (1924) 238 N. Y. 158. This affirmed a first degree murder conviction resulting from a killing during a robbery committed by the defendant and A. By joint and individual assaultive acts, the two men had brutally beaten the deceased with weapons, but it could not be determined who had struck the fatal blow. For some strange reason, the case was submitted to the jury on a common law rather than a felony murder theory, and the defendant contended that the evidence of homicidal intent and premeditation as to him was insufficient because of failure to establish that he rather than A had struck the fatal blow. That factor was held to be immaterial on the ground that, even though A had struck it, there was ample to justify a finding of intent to kill by virtue of a combination between the two "to kill in case killing is necessary to overcome resistance" to the common objective, or "a confederacy to oppose resistance to the death" (238 N. Y., at p. 163).

That decision in no wise supports the contention here mentioned. Dealing with the responsibility of an actual

participant in a fatal assault, Emieleta does not enunciate any proposition to the effect that felony accomplices taking no part in a killing perpetrated by a confederate share the latter's homicidal responsibility by virtue of knowledge that weapons were carried and other considerations of that nature. As a matter of fact, the law of New York is clearly to the contrary.

There is no principle more firmly imbedded in New York's homicide law than that which requires unequivocal proof of a specific intent to kill on the part of a defendant who, though he did not personally commit the homicidal act, is charged with common law murder upon an accessorial or conspiratorial basis [People v. Agron (1961) 10 N. Y. (2d) 130, 135; People v. Weiss (1943) 290 N. Y. 160; People v. Emieleta, supra, 238 N. Y. 158, 163; People v. May (1st Dep't. 1960) 9 App. Div. (2d) 508, 510, 512]. Scrutiny of these and other decisions on the subject proves persuasive that the appellate courts of this state are most reluctant to approve such convictions in the absence of overwhelming proof of homicidal intent, even when the accessorial conduct includes active participation in the fatal assault.

In this state of the law, it is virtually impossible to convict, or sustain a conviction of, the average non-killer participant in a fatal felony of any form of common law homicide; and, most significantly, it was for that very reason that the present felony murder provision was enacted. As observed in People v. May, supra [9 App. Div. (2d), at p. 512]:

> "The difficulties in proving intent to commit a murder attributable to the main actor and binding on all conspirators in a plan to commit another crime, a robbery, for example, where one of them kills a victim, were found in practice to have been so great that they were met by a statute (Penal Law, §1044, subd. 2), which defines as murder in the first degree an act causing the death of another while engaged in committing a felony without design to effect death."

The foregoing is further confirmed by a line of decisions dealing with the trial judge's duty to charge the degrees of common law homicide in a felony murder case. It is settled law in New York that, even though a murder charge is prosecuted upon a felony murder theory, the court, except in rare instances, must, if the defense so desires, charge the degrees of common law homicide in addition to felony murder. The significant principle here lies in the qualification that this general rule applies only to the actual killer and not to any non-killer accomplices who may be involved. The reason is that the latter are not guilty of common law homicide, but of felony murder or nothing, and, hence, that submission of the former constitutes error [People v. Hicks (1941) 287 N. Y. 165, 171; People v. Martone (1931) 256 N. Y. 395, 397; People v. Seiler (1927) 246 N. Y. 262, 266-268].

This rule finds succinct expression in Hicks, supra (287 N. Y., at p. 171):

> "Ordinarily where the evidence shows that the accused has actually killed another in the commission of a felony, or otherwise, the trial judge must charge the degrees of homicide, but the trial judge may not do so where the accused is an accomplice in the felony and is not otherwise a party to the homicide."

This doctrine is applied even when the accomplice's conduct is most aggressive with respect to weapons and the general conduct of the felony. In Seiler, supra, for example, involving a fatal shooting by one of four bandits conducting a holdup of a liquor resort, the defendant had brandished a pistol and taken money from the cash register, although there was no proof that it was he who fired the fatal shot. Convicted of felony murder, he assailed the trial judge's refusal to charge common law homicide and its degrees. Upholding that refusal, the Court of Appeals pointed to the

lack of evidence stamping him the killer and declared that, accordingly, there was no basis for a conviction of common law murder or manslaughter (246 N. Y., at p. 268):

> "Unless Masterson [the deceased] was killed during the commission of a felony by the defendant, no evidence here presented would justify an affirmative finding which upon any logical theory would make the defendant share in the guilt of the slayer."

It seems apparent, therefore, that, apart from exceptional cases, the "Code A" felony murder provision under discussion would cover, at most, only actual killer-defendants and accomplices who clearly and aggressively aid or encourage such homicides; and that it would not reach the typical non-killer accomplice. The statute's application to the killer group is relatively unimportant, since these defendants are almost invariably guilty of common law homicide as well. The importance of the felony murder doctrine lies in its application to the non-killers, who are not otherwise chargeable with homicide, and, as seen, it was for that very reason that New York's present felony murder provision was enacted. Bearing all this in mind, adoption of the suggested "dangerous act" provision would amount to virtual abolition of the felony murder doctrine.

Whether such is desirable or not is not the subject of comment here. The point stressed is that, if abolition is the aim, then it should be accomplished by explicit legislation; not by a watered down statute that superficially purports to retain the doctrine but actually destroys it.

It may be observed that, with a change of draftsmanship, the "dangerous act" phase of the crime could be retained without exempting non-killer accomplices. In short, the statute could require an inherently dangerous homicidal act but decree that, with that established, each of the felony perpetrators is guilty of murder whether or not he participated

in the actual killing.

The objections to this would seem to be: (1) that it dilutes or destroys the central thought underlying the "Code A" provision, namely the concept or requirement of individual homicidal culpability; and (2) that it would not represent much of a change from the existing law, covering non-dangerous as well as dangerous acts, since most of the homicidal acts in felony murder cases are "dangerous" ones anyway.

In view of all these considerations, the "Code A" felony murder section is not adopted here, and the prime provision of the original Article (§3, subd. 3) is left intact--though now, of course, a subdivision of the single murder statute (§2) rather than of the old second degree section. "Code B" does, however, adopt the Commission's other suggestion is this area by excising the lesser or residue felony homicide provision (§4, subd. 3 of original Article) from the manslaughter section (§4 of Code B).

2. With intent to inflict "grievous," "substantial" or "severe" physical injury

There is considerable merit, in my opinion, to the Commission's conclusion that the distinction between the terms "grievous physical injury" (the basis of a murder provision) and "substantial physical injury" (the basis of a manslaughter provision), as defined, is not clear enough to form a demarcation line between murder and manslaughter. However, rather than drop the "substantial" or manslaughter crime, as suggested, I would retain it (with one change noted below) and delete the "grievous" or murder offense instead. My reasons are as follows:

As set forth in the commentary to the original

Article, the existing Penal Law homicide statutes proscribe no crime of either murder or manslaughter consisting of a killing caused by a cold, unprovoked assault committed without intent to kill but with intent to inflict bodily harm. It was for the purpose of plugging that large gap that the two provisions in question were inserted in the original draft (§3, subd. 1; §4, subd. 1).

Were it not for a desire to exclude from the homicide orbit cases of trivial assault accidentally resulting in death, the lower or manslaughter crime would have been drafted in terms of assaults or other acts committed with intent to inflict just plain "physical injury"--not "substantial physical injury." In order to eliminate the trivial cases, however, the word "substantial" was employed; and this was designed to cover all cases lying between the "grievous" and the trivial.

This manslaughter offense is, in my judgment, more important than the "grievous physical injury" or murder offense. The greatest need in this area is for a manslaughter provision that will cover killings by assaults of a "substantial" or severe--though not necessarily grievous--nature. Without such a crime, a vast group of killings resulting from substantial or severe beatings will hang in limbo. If one of the two crimes must be eliminated, therefore, it should be the higher or murder offense involving intent to inflict "grievous physical injury."

From a practical standpoint, moreover, this would not be a great loss despite the deep-rooted common law background of that crime. In the more aggravated fatal assault cases--shootings, stabbings, extremely brutal beatings, etc.--rarely can a defendant persuade a jury that his intent was not homicidal but merely "to inflict grievous physical injury."

In New York, at least, such killings are charged as murder (with intent to kill) and submitted to the jury under instructions that homicidal intent may be circumstantially inferred from the weapons used, the nature of the wounds, etc., and that a person is presumed to intend the natural and probable consequences of his acts unless the evidence is clearly to the contrary [People v. Chiaro (1911) 200 N. Y. 316, 319; People v. Schmidt (1901) 168 N. Y. 568, 576; People v. Conroy (1884) 97 N. Y. 62, 78]. Thus, in practical effect, most of the "grievous" injury cases are covered by the straight intentional killing provisions.

Assuming, however, jury acceptance of the claim of intent to inflict grievous injury rather than to kill, such would not exonerate the defendant from all homicidal responsibility under the suggested legislation. Since severe or "substantial" injury includes "grievous" injury, the verdict would properly and probably be manslaughter.

While "Code B" herein thus retains the manslaughter provision (§4, subd. 1), one phraseological alteration is made. The word "substantial" is changed to "severe." "Severe," it is felt, though weaker than "grievous," is stronger than "substantial," thus increasing the requirements of the crime a bit and further insuring exclusion of the trivial assault cases.

The term "severe physical injury" is not defined. "Grievous" and "substantial physical injury" were defined in the original Article purely for purposes of distinction. With the "grievous" crime eliminated and only the "severe" provision on the books, no distinction is necessary. Such statutory definitions are never satisfactory and are better left to judicial construction, if possible.

3. "Reckless" and "Culpably negligent" homicide

Most jurisdictions, including New York, proscribe a form of involuntary homicide described as criminally negligent, culpably negligent or reckless homicide, which is designated manslaughter and/or by some other title (usually containing the word "negligent") when applied to a special field such as vehicle homicides. Regardless of terms, titles and the number of statutes of this nature, each jurisdiction ordinarily has a single case law definition or standard of criminal negligence or recklessness. New York's definition--applicable to its negligence manslaughter, vehicle homicide and reckless driving provisions [Penal Law, §1052 (subd. 3), 1053-a; Vehicle and Traffic Law, §1190]--is in terms of conduct committed in "disregard of the consequences which may ensue from the act, and indifference to the rights of others" [People v. Angelo (1927) 246 N. Y. 451, 457; see, also, People v. Bearden (1943) 290 N. Y. 478, 482; People v. Grogan (1932) 260 N. Y. 138, 144].

The A. L. I. Model Code creates two crimes rather than one in this area: reckless homicide, placed in its manslaughter section (§210.3, subd. 1a), and "Negligent Homicide," a crime bearing that title (§210.4) which is, in effect, a lower degree of the reckless brand. By definitions (§2.02), the gist of recklessness is a conscious disregard of a substantial and unjustifiable risk, and the kernel of negligence is a culpable failure to perceive the same. The definition of the higher concept, recklessness, is substantially similar to New York's single definition for all these terms (recklessness, culpable or criminal negligence, etc.). The definition of the lower, negligence, veers towards civil negligence, and is one that I have not seen approximated in the criminal statutes or

case law of any jurisdiction.

It is evidently the recommendation of the Commission that this two-pronged pattern of the Model Code be adopted, and that has been done in "Code A" herein (§5).

In my comments concerning the original Article (p. 40), I criticized this dual-crime arrangement as intellectually sound but probably impractical. Feeling the distinction between Model Code recklessness and negligence to be too ephemeral from a jury or realistic standpoint, I ignored the lower or negligence crime and proscribed only the higher one of "Reckless homicide" (§5).

For the same reason, "Code B" herein is left in the original form, with negligent homicide omitted. This is not done petulantly, but merely for the purpose of highlighting an issue which I hope is still open for discussion.

RGD:rc
9/26/62

APPENDIX

CODE A

PROPOSED HOMICIDE ARTICLE NO. 2

Pertinent definitions of General Provisions

Act. The noun "act" means not only a physical movement, but also a verbal utterance and, where relevant, an omission or failure to act.

Criminal negligence. A person who commits an act which creates a substantial and unjustifiable risk of human fatality, physical injury, property damage, public catastrophe or public disorder, does so with "criminal negligence" when he should be aware of that risk but fails to perceive it. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, his failure to perceive it involves a gross deviation from the standard of care that a reasonable person would observe in his situation.

Recklessly. A person who commits an act which creates a substantial and unjustifiable risk of human fatality, physical injury, property damage, public catastrophe or public disorder, does so "recklessly" when, though aware of that risk, he consciously disregards it. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, his disregard thereof involves a gross deviation from the standard of care that a reasonable person would observe in his situation.

ARTICLE X

HOMICIDE

§1. Definitions

Mitigating circumstances. A person commits a homicide under "mitigating circumstances" when he kills under (1) the influence of extreme emotional disturbance for which there is reasonable explanation or excuse, or (2) an erroneous belief that he has a right to kill or to inflict grievous physical injury, when such erroneous belief is based entirely upon a mistake of fact on his part for which there is reasonable explanation or excuse.

In either instance, 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.

§2. Murder

Except when his crime constitutes manslaughter as defined in subdivision 1 of section 4 of this Article, a person is guilty of murder when:

1. With intent to kill or to inflict grievous physical injury upon another person, he commits an act which causes the death of such person or of a third person.

2. Under circumstances evincing a depraved indifference to human life, he recklessly commits an act involving an extremely grave risk of human fatality and thereby causes the death of another person.

3. In the course of committing or attempting to commit a felony, or in the course of his immediate flight from the scene thereof, he commits or participates in the commission

of an act inherently dangerous to human life and thereby causes the death of a person other than a participant in such felony or felony attempt.

§3. Punishment for murder; plea of guilty to murder with reduced penalty

Murder is punishable either by death [life imprisonment] or by a reduced penalty consisting of life imprisonment [a prison term of not less than twenty nor more than forty years], as provided in section X of this Article.

With the consent of the court and the district attorney, a person indicted for murder may plead guilty to murder with a reduced penalty, in which case he must be sentenced accordingly.

§4. Manslaughter

A person is guilty of manslaughter when:

1. Under mitigating circumstances, he commits an act which causes the death of another person, which act, absent such mitigating circumstances, would constitute murder as defined in subdivision 1 of section 2 of this Article.

2. He recklessly commits an act involving a substantial and unjustifiable risk of human fatality and thereby causes the death of another person.

§5. Criminally negligent homicide

A person is guilty of criminally negligent homicide when, with criminal negligence, he commits an act involving a substantial and unjustifiable risk of human fatality and thereby causes the death of another person.

CODE B

PROPOSED HOMICIDE ARTICLE
NO. 3

Pertinent definitions of General Provisions

Act. The noun "act" means not only a physical movement, but also a verbal utterance and, where relevant, an omission or failure to act.

Recklessly. A person who commits an act which creates a substantial and unjustifiable risk of human fatality, physical injury, property damage, public catastrophe or public disorder, does so "recklessly" when, though aware of that risk, he consciously disregards it. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, his disregard thereof involves a gross deviation from the standard of care that a reasonable person would observe in his situation.

ARTICLE X

HOMICIDE

§1. Definitions

Mitigating circumstances. A person commits a homicide under "mitigating circumstances" when he kills under (1) the influence of extreme emotional distrubance for which there is reasonable explanation or excuse, or (2) an erroneous belief that he has a right to kill or to inflict grievous physical injury, when such erroneous belief is based entirely upon a mistake of fact on his part for which there is reasonable explanation or excuse.

In either instance, 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.

§2. Murder

Except when his crime constitutes manslaughter as defined in subdivision 2 of section 3 of this Article, a person is guilty of murder when:

1. With intent to kill another person, he commits an act which causes the death of such person or of a third person.

2. Under circumstances evincing a depraved indifference to human life, he recklessly commits an act involving an extremely grave risk of human fatality and thereby causes the death of another person.

3. Either alone or in concert with others, he commits or attempts to commit a felonious crime of arson, robbery, burglary, kidnapping, escape, forcible rape or other forcible sex crime, and a person other than one of the perpetrators is killed as a proximate result of such felony, or as a result of an act of one or more of the perpetrators committed in the course of and in furtherance of such felony or of the perpetrators' immediate flight from the scene thereof.

§3. Punishment for murder; plea of guilty to murder with reduced penalty

Murder is punishable either by death [life imprisonment] or by a reduced penalty consisting of life imprisonment [a prison term of not less than twenty nor more than forty years], as provided in section X of this Article.

With the consent of the court and the district

attorney, a person indicted for murder may plead guilty to murder with a reduced penalty, in which case he must be sentenced accordingly.

§4. Manslaughter

A person is guilty of manslaughter when:

1. With intent to inflict severe physical injury upon another person, he commits an act which causes the death of such person or of a third person.

2. Under mitigating circumstances, he commits an act which causes the death of another person, which act, absent such mitigating circumstances, would constitute murder as defined in subdivision 1 of section 2 of this Article.

§5. Reckless homicide

A person is guilty of reckless homicide when he recklessly commits an act involving a substantial and unjustifiable risk of human fatality and thereby causes the death of another person.

RGD:cd
9/26/62

April 16, 1963

MEMORANDUM IN EXPLANATION OF PROPOSED ASSAULT ARTICLE

This memorandum explains a proposed article entitled "Assault and Related Crimes," set forth in Appendix A attached hereto.

Also included in the appendices are the present New York Penal Law Articles entitled "Assault" and "Maiming" (Appendix B) and the Model Penal Code Article entitled "Assault; Reckless Endangering; Threats" (Appendix C).

The memorandum first describes the existing Penal Law provisions, with some comment upon their background and upon common law principles of assault and battery, and then goes on to discuss the proposed Article.

I. THE EXISTING LAW

The existing "Assault" provisions are contained in Article 20 of the Penal Law (§§240-248). A closely related crime, and one necessarily included within Assault, is "Maiming," dealt with in another article (Art. 132, §§1400-1404).

To understand fully the nature and pattern of the existing Assault crimes, defined in three degrees (§§240, 242, 244), one must briefly advert to the common law.

The common law divides this field into two crimes or concepts: (1) assault and (2) battery. Assault does not include actual striking or touching of the victim but only an attempt to do so. It has been defined as [People v. Ryan, 55 Hun 214, 216 (1st Dept. 1889)]:

> "an attempt, with force or violence, to do a corporal injury to another, and may consist of any act tending to such corporal injury, accompanied with such circumstances as denote at the time an intention, coupled with the present ability, of using actual violence against the person."

A battery or "assault and battery" consists of the actual "unlawful touching," "striking" or other injurious act (6 C. J. S. Assault and Battery, §57, p. 914). In other words (id):

> "A battery may be defined as the unlawful striking or beating of another. A battery, or, as it is sometimes called, an assault and battery, has also been defined as the unlawful touching of the person of another by the aggressor himself, or by any other substance put in motion by him. While a battery necessarily includes an assault, and is a consumated assault, an assault does not include a battery."

While some jurisdictions observe this distinction--by defining separate crimes of assault, on the one hand, and battery on the other (e. g., Ill. Crim. Code, §§12-1--12-4)--New York does not. Never using the word "battery" or any equivalent term, the Penal Law employs the label of "Assault" for all its crimes in this field, whether the particular conduct may consist of a mere common law assault (attempted battery) or whether it must comprise an actual battery as well. Thus, for example, first degree "Assault" may be committed by merely pointing a gun at another and pulling the trigger with "intent to kill" even though the gun fails to discharge and no battery occurs [§240, subd. 1; People v. Ryan, supra, 55 Hun 214, 216-217; see, also, People v. Hannigan, 42 App. Div. 617, 618 (1st Dept. 1899)]. On the other hand, the most prominent form of second degree "Assault" is committed only when one actually "inflicts grievous bodily harm" (§242, subd. 3), thus making a battery an element of that crime.

Since the Penal Law's crime of "Assault" may, in some of its phases, be no more than the traditional common law assault--merely an attempt to commit a battery--it would seem that, generally speaking, there could be no crime of attempted assault in New York. In brief, if an assault is but an attempt to commit a battery, it appears anomalous to speak of an attempt to commit an assault. Doubtless for this reason, the New York decisions do not disclose any charges or prosecutions for attempted assault. In some instances, however, "Assault" charges have resulted in pleas of guilty to Attempted Assault, and this practice has not been criticized by those appellate courts which have reviewed cases

involving such pleas [People v. Griffin, 7 N. Y. 2d 511, 513-514 (1960); People v. O'Connell, 60 Hun 109, 113-115 (1st Dept. 1891); People v. Dartmore, 48 Hun 321 (2d Dept. 1888)]. In one decision, the Court, though assuming that the usual Assault case does not logically include an attempted assault, pointed out that such is possible. While raising an axe to strike another is a completed and not an attempted assault, the opinion declares, one who sets out with an axe to find and injure his victim but is frustrated before getting within striking distance is not guilty of assault but is guilty of attempted assault [People v. O'Connell, supra, 60 Hun 109, 113-115].

With respect to batteries, at common law any physical touching or contact is sufficient to constitute a battery, no actual injury being required (6 C. J. S., supra, §70, p. 923). In line with this principle, those "Assault" provisions of the Penal Law which do require a battery are satisfied--unless some specific kind of injury is predicated [e. g., infliction of "grievous bodily harm" (§242, subd. 3)]--by a mere touching of the person without infliction of bodily harm [People v. Gibson, 232 N. Y. 458, 461 (1922); People v. Malark, 283 App. Div. 263, 264-265 (3rd Dept. 1954)]; or, to put it another way [People v. Moore, 50 Hun 356, 358 (3rd Dept. 1888)]:

> "One receives bodily harm, in a legal sense, when another touches his person against his will with physical force, intentionally hostile and aggressive, or projects such force against his person."

In one respect, the common law crimes of assault and battery seem to have greater scope than the Penal Law's crime of "Assault." The common law offenses are by no means confined to direct physical action such as striking, shoving, shooting, etc., but include virtually any conduct which, however indirectly, causes bodily harm. Illustrative of the indirect type of act constituting a constructive Assault and battery is the delivery of food containing

concealed poison or harmful drugs which the victim eats to his regret. In sustaining a common law assault and battery conviction based on such conduct, the Massachusetts Supreme Court held that

> "...it is sufficient that the cause is set in motion by the defendant, or that the person is subjected to its operation by means of any act or control which the defendant exerts." [Commonwealth v. Stratton, 114 Mass. 303, 305-306 (1873)].

In New York, however, conduct of that sort apparently is not regarded as falling inherently within the assault concept. It has been declared that mailing a package of poison to another with intent to kill or injure him does not constitute an assault [People v. Zielinski, 247 App. Div. 573, 574 (4th Dept. 1936); see, also, People v. McDonald, 159 N. Y. 309, 314 (1899)]. And it is significant that the Penal Law's Assault statutes contain certain specific provisions dealing with infliction of injury by administering poisons and drugs (§240, subd. 2; §242, subds. 1, 2), thus indicating that, absent these provisions, such conduct would not constitute Assault.

A. Assault in the First Degree (§240)

Turning to the specific statutes and the three degrees of Assault, it is found that first degree Assault (§240) bears considerable analogy to Murder (§§1044, 1046). There must be either "an intent to kill, " as in common law murder, or an intent "to commit a felony upon the person or property of the one assaulted, or of another" (§240), as in felony murder. In addition, the act must consist either of an attack with a deadly weapon "or by any means or force likely to produce death" (subd. 1), or of the administering of poison "or any other destructive or noxious thing, so as to endanger the life of such other" (subd. 2).

Bearing the intent elements in mind, the statute presents two distinct crimes: one requiring a specific intent to kill, and the other (hereafter referred to as "felony-assault") involving no intent to kill, or even to injure, but only to commit a felony of

the indicated sort [People v. Santoro, 229 N. Y. 277, 280-281 (1920)].

As to the physical nature of the act--(1) by forcible assault and (2) by poisoning--the latter, or poisoning, provision (subd.2) demands a battery (actual taking of the poison), while the former (subd. 1) does not. Thus, as already indicated, one who, with homicidal intent, points a pistol at another and pulls the trigger commits first degree Assault even though the gun fails to discharge and no injury occurs [People v. Ryan, supra, 55 Hun 214, 216-217; see, also, People v. Hannigan, supra, 42 App. Div. 617, 618; People v. Morehouse, 6 N. Y. S. 763, 764-765 (Sup. Ct. Gen. T. 4th Dept. 1889)].

First degree Assault with intent to kill, it is readily apparent, is "nearly identical" with Attempted Murder (§§260, 1044, 1046; People v. Zielinski, supra, 247 App. Div. 573, 574). Since premeditation is not an element of this crime, it includes Attempted Murders of the second as well as of the first degree (§§1044, subd. 1, 1046). First degree Assault with intent to commit a felony (felony-assault) however, does not, it is manifest, constitute attempted felony murder.

B. Assault in the Second Degree (§242)

Assault in the second degree, also a felony, is defined in section 242 of the Penal Law, containing five subdivisions, the most important of which are the third and fourth.

Subdivision 3 covers one who:

> "Wilfully and wrongfully wounds or inflicts grievous bodily harm upon another, either with or without a weapon."

Subdivision 4 applies to one who:

> "Wilfully and wrongfully assaults another by the use of a weapon, or other instrument or thing likely to produce grievous bodily harm."

These two provisions, and second degree Assault in general

(§242), are distinguished from the main facet of the first degree crime by the lack of a requirement of an "intent to kill" (§240). Just what intent is required by the third and fourth subdivisions is not clear from their language and was the subject of some controversy until the matter was finally settled by the Court of Appeals in People v. Katz, 290 N. Y. 361 (1943). It was there held that wilful and wrongful infliction of "grievous bodily harm" (subd. 3) means with specific intent to inflict grievous bodily harm (not some lesser degree of harm); and, further, that a wilful and wrongful assault with "a weapon...likely to produce grievous bodily harm" (subd. 4) also means an assault with specific intent to inflict grievous bodily harm. The reasoning of the Katz opinion is predicated largely upon the common law distinction between Aggravated Assault (a felony, as is the Penal Law's second degree Assault), and Simple Assault (a misdemeanor, as is the Penal Law's third degree Assault). Common law Aggravated Assault requires a specific intent while Simple Assault does not, and the Katz decision applies that differential to the New York statutory pattern.

On this subject, it is interesting to observe that, apart from the "felony-assault" provisions (§§240, 242, subds. 2, 5)--the Assault analogies to felony murder (§1044, subd. 1)--the felonious or first and second degree Assault crimes all require a specific intent to injure; none of them covers the infliction of serious injury through the extremely reckless or wanton type of conduct which, though not specifically designed to harm another, seems equally culpable. This is especially surprising in that even the common law, equating wantonness or extreme recklessness to specific intent, penalizes such conduct as Aggravated Assault [6 C. J. S. , supra, §76, p. 929; see Salisbury v. State, 90 Tex. Cr. 438, 235 S. W. 901 (1921)].

Subdivision 1 of the second degree statute (§242) is a poisoning provision similar to that of the first degree section

(§240, subd. 2). The distinctions are : (1) that the first degree crime requires that the poison or drugs be administered "with intent to kill...or to commit a felony" (§240) while the second degree crime requires only an "intent to injure" (§242, subd. 1); and (2) that the first degree crime requires that the drugs be such "as to endanger the life" of the victim (§240, subd. 2) while the second degree requires drugs "dangerous to life or health" (§242, subd. 1).

The two remaining second degree subdivisions (subds. 2,5) are basically "felony-assault" provisions.

Subdivision 5 has three phases: assault with intent (1) "to commit a felony," (2) "to prevent or resist the execution of any lawful process or mandate of any court or officer," and (3) to prevent or resist "the lawful apprehension or detention of himself, the actor, or any other person."

The first phase--assault "with intent to commit a felony"--is the most important and most widely used. It differs from the first degree "felony-assault" crime in two respects. The second degree provision speaks of a bare "intent to commit a felony" (§242, subd. 5) while the first degree statute specifies an intent "to commit a felony upon the person or property of the one assaulted, or of another" (§240). Just what this distinction involves certainly is not clear. The other difference is that, while the second degree provision does not mention any particular kind of assaultive act, the first degree section requires either an assault with a deadly weapon "or by any means or force likely to produce death," or a poisoning dangerous to life (§240). The latter distinction gives the second degree crime greater utility than the first, especially in sex cases. Since no actual injury nor intent to injure, seriously or otherwise, is required, the second degree provision (§242, subd. 5) covers attempted statutory rape and similar cases which otherwise would amount merely to simple or

third degree assaults where consenting, under-age girls are touched or fondled (a battery) without any semblance of real force or injury [People v. Gibson, supra, 232 N. Y. 458, 461; People v. Malark, supra, 283 App. Div. 263, 264-265]. Such cases, it may be noted--and, indeed, virtually all assaults "with intent to commit a felony" (§242, subd. 5)--would also seem to be prosecutable as Attempts to commit the particular felony (§260).

The only other facet of this subidvision (subd. 5) of any real utility is that dealing with assaults intended to prevent or resist "lawful apprehension or detention." This, also, sometimes transforms what would otherwise be but a third degree Assault into a felonious or second degree offense. The chief difficulty in its application, as might be expected, arises in cases posing troublesome issues of whether the underlying arrest which the defendant forcibly resisted was a "lawful" one. [See People v. Vest 11 App. Div. 2d 1080 (4th Dept. 1960); People v. Daniels 285 App. Div. 619, 623-624 (4th Dept. 1955)].

Also of the "felony-assault" genus is the remaining subdivision of the statute (§242, subd. 2), applying to one who, with intent to commit "any crime," administers to another "chloroform, ether, laudanum, or any other intoxicating narcotic or anaesthetic agent." Unlike the true "felony-assault" provisions which requires intent to commit a "felony" (§§240, 242, subd. 5), this requires intent merely to commit "any crime," misdemeanors included. The specific purpose of the provision is not entirely clear, although it does cover the familiar case of a woman accompanying a man to his home, putting "knockout drops" in his drink and then absconding with his money. Judging from the absence of any decisions in the annotations to the statute (§242) dealing with this subdivision (subd. 2), it is little used.

C. Assault in the Third Degree (§244)

Section 244 of the Penal Law, defining Assault in the third

degree, a misdemeanor (§245), contains three subdivisions.

By far the most important is the first. This simply places in the third degree category any "assault" or "assault and battery" not specified as first or second degree Assault in the appropriate statutes (§§240, 242).

This dragnet provision lucidly illustrates the inherent defects of an arrangement of a degree crime that starts with a definition of the highest degree, goes down the ladder subtracting elements on the way, and ends up with a catchall definition of the lowest degree as any form of the basic crime not constituting one of the higher degrees. In order to figure out the scope of this offense, one must subtract every form of Assault defined in the first and second degree statutes (§§240, 242) from the total crime or concept of criminal "assault" or "assault and battery" (§244). The difficulty of that operation is enhanced by the fact that the Penal Law does not even contain any definitions of "assault" or "assault and battery." Presumably, this relegates one to the common law.

Without writing a thesis on the scope of the common law offense and then going through the indicated subtracting process, it may be said that, in the main, third degree Assault under this provision includes the vast majority of cases where the attack, though including a battery, is intended to produce and actually results in mere bodily contact of one sort or another or, at most, minor injury [see, e. g., People v. Fein, 162 App. Div. 765 (1st Dept. 1914)(blow in the ear producing no blood or other injury); People v. Loporacaro, 285 App. Div. 1088 (2d Dept. 1955) (blow over head with wooden crate producing no injury)]; some cases where serious injury is intended but only minor injury or none at all results; some cases where minor injury is intended but serious injury results [see People v. Finn, 275 App. Div. 65, 67 (3rd Dept. 1949)]; and some cases where the assault consists

merely of a threat or menace to inflict bodily harm [see People v. Wood, 10 App. Div. 2d 231, 237 (3rd Dept. 1960)].

Certain features of third degree Assault can be understood only in the light of the previously stated principle that the basic forms of felonious Assault (first and second degree; §240; §242, subds. 3, 4) require a specific felonious intent (usually to kill or to inflict grievous bodily harm) while third degree Assault does not [People v. Young, 11 N. Y. 2d 274, 275; People v. Katz, supra, 290 N. Y. 361, 365-366; People v. Wood, supra, 10 App. Div. 231, 233]. The only intent required by the latter is the more general one of intending to commit a battery of some sort; in short, it "is sufficient that the defendant voluntarily intended to commit the unlawful act of touching" or "knowingly struck a blow" [People v. Young, supra, 11 N. Y. 2d 274, 275].

These principles, in conjunction with the New York Assault concept which includes mere attempted batteries as well as consummated ones, lead to some ostensibly strange results. In some instances, such as unsuccessful attempts to shoot a person with a loaded gun, first or second degree Assault is committed despite the lack of any injury or battery whatever [People v. Hannigan, supra, 42 App. Div. 617, 618; People v. Ryan, supra, 55 Hun 214, 216-217; People v. Morehouse, supra, 6 N. Y. S. 763, 765].*

In other instances where grievous bodily harm is actually inflicted, the crime amounts only to third degree Assault because of inadequate proof of a specific intent to commit grievous harm (see People v. Finn, supra, 275 App. Div. 65, 67).

Subdivision 2 of the statute (§244) renders it third degree Assault "to operate or drive any vehicle of any kind in a culpably negligent manner, whereby another suffers bodily injury." This is

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* Pointing an unloaded gun at another has been held to be third degree Assault in New York [People v. Wood, supra, 10 App. Div. 2d 231, 237].

the corollary of the vehicle homicide statute which penalized the same "reckless or culpably negligent" conduct as a felony when death rather than mere bodily injury results (§§1053-a, 1053-b; see, also, §1052, subd. 3, a second degree Manslaughter provision applying to homicide by "culpable negligence" generally). There has been considerable prosecution under the Assault provision (§244, subd. 2) and, as in the homicide cases, the main issue usually is whether the defendant's conduct was "culpably negligent" [see, e.g., People v. Bongiorno, 263 App. Div. 863 (1st Dept. 1942); People v. Saroff, 227 App. Div. 114 (2d Dept. 1929)].

The third and final subdivision, added in 1939, penalizes a striking or wilful injury to "the person or apparatus of any news reporter or news photographer" while engaged in his calling in a public place. This, apparently, is one of those very narrow provisions enacted as a result of pressure by a specific group aroused by one or two highly resented incidents. It is difficult to discern any logical reason or necessity for the provision since, without it, physical attacks upon members of the fourth estate are prosecutable as Assaults just as readily as any other kind, and since wilful injury to a news photographer's "apparatus" is prosecutable as Malicious Mischief or "Injury to property" (§1433) just as readily as any other kind. It is not surprising, therefore, that the annotations to the statute (§244) disclose no decisions dealing with this subdivision (subd. 3).

D. Maiming (Art. 132, §§1400-1404)

The crime of Maiming is defined in section 1400 of the Penal Law, which also prescribes the punishment as imprisonment for a term not exceeding fifteen years. This substantially exceeds the greatest Assault sentence [a ten year maximum for first degree Assault (§241)] and equals the second degree Manslaughter penalty (§1053).

The statutory crime of "Maiming" is derived from the common law crime of Mayhem. Mayhem consisted of depriving a person of the use of his organs and members to an extent that his ability to defend himself be substantially diminished; and that being the theory, mere disfigurement did not amount to mayhem (57 C.J.S. Mayhem, §1, p. 461). Common law mayhem required premeditation, and that element was carried over into many statutes, including the early New York provisions [Tully v. People, 67 N.Y. 15 (1876)].

This crime has generally been enlarged by statute, and that is true of the present Penal Law section (§1400). The injury must consist of either disfigurement (subd. 1)--an enlargement upon the common law--destruction or disablement of "any member or organ" of the body (subd. 2), or serious diminution of "physical vigor by the injury of any member or organ" (subd. 3). Concerning intent or mens rea, the element of premeditation has been eliminated; the crime must be committed "wilfully, with intent to commit [a] felony, or to injure, disfigure or disable."

In some respects, Maiming appears to have been here extended too far beyond its common law boundaries. Especially considering the very severe penalty, greatly exceeding that for any form of Assault, one tends to view Maiming as a very heinous kind of assault involving a specific intent and successful attempt to amputate a member, permanently destroy or impair an organ, or permanently disfigure the person. While the statute does stipulate such an intent, it also includes an intent merely "to injure" and an intent "to commit [a] felony" (§1400). In other words, one who, intending to injure or to commit a felony but with no intent to maim, assaults another and more or less accidentally causes a permanent stiffening of an arm, for example, is guilty of Maiming. From the standpoint of both culpability and scope, this brings the crime too close to the common, garden variety of Assault and

renders the penalty distinction between the two offenses unwarranted.

One might also question the word "disable" as used in the statute. Section 1400 speaks of an intent to "disable," and of an injury which "disables any member or organ" (subd. 2), possibly implying that temporary disablement constitutes sufficient injury. Both at common law and under the statute, however, the term "disable" or "disablement" has been construed to mean permanent disablement [Foster v. People, 50 N.Y. 598, 605 (1872); 57 C.J.S., supra, §3, p. 46]; and this is partially confirmed by an ensuing section of the Maiming article providing that substantial recovery of the victim by the time of trial precludes a conviction for Maiming, though not for Assault (§1404).

There are very few reported decisions dealing with prosecutions under section 1400. These few reflect genuine Maiming injuries [Tully v. People, supra, 67 N.Y. 15, permanently stiffened thumb; Godfrey v. People, 63 N.Y. 207 (1875), part of ear bitten off; United States v. Bando, 244 F.2d 833, 836 (U.S.C.A. 2d Cir. 1957), blindness by acid thrown in face].

Two other sections of the article (§§1402, 1403), proscribing offenses of "Maiming one's self" for purposes of avoiding legal duties and of begging, are of no interest for present purposes.

II. THE PROPOSED ARTICLE

This proposed article presents an over-all pattern quite different from that of the existing Assault article (Art. 20). Before explaining its specific provisions, certain observations and explanations relating to its theory and principles are in order.

A. Theory and General Principles

(1) The meanings of several crimes of the proposed article rest upon term definitions which are to appear either in the general provisions of our revised Penal Law or early in the "Chapter"

dealing with offenses involving physical injury to the person (Homicide, Kidnapping, Assault, etc.). Among these terms--individually discussed below--are "recklessly," "criminal negligence," "physical injury" and "serious physical injury." The most basic and important for present purposes is "physical injury," which, as in the A.L.I. Model Penal Code ["bodily injury," §210.0(2)], is defined as "physical pain, illness or any impairment of physical condition."

(2) As indicated hereinafter, the labeling of the main crime in the assault area presents a problem. At this point, it will be referred to merely as "Crime X."

Crime X, containing three degrees, consists of unjustifiably causing physical injury to another. It is obviously much narrower than the existing Penal Law crime of Assault, since the latter, in some of its phases, does not require actual "physical injury" or any other battery, but only a common law assault, or attempted battery. Crime X is even narrower than the common law crime of battery, or assault and battery. While a battery is established by a mere touching or other harmless contact, Crime X requires "physical injury"; in other words, a battery that produces "physical pain, illness or" an "impairment of physical condition."

One purpose of thus limiting Crime X to cases where some definable physical injury is actually inflicted is to clarify and simplify the basic offense, and to give it a meaning that is readily intelligible and as specific as that of other crimes such as Larceny, Robbery, Rape and Malicious Mischief. If Malicious Mischief, for example, were defined to include not only intentional and unjustifiable damage to property (its actual scope) but also some attempts to do so, and if a technical commission of the crime occurred with every unauthorized but harmless touching of another's property, its meaning and application would be confusing indeed,

and unnecessarily so. Yet, that is precisely the situation with respect to Assault as presently proscribed in the Penal Law; for, apart from the realistic Assault cases involving infliction of some personal injury, it includes cases of mere technical, harmless contact and, in many instances, unsuccessful attempts to strike or injure.

If one endeavors unsuccessfully to destroy another's property, he is not guilty of Malicious Mischief but of an attempt to commit that crime; and if one unjustifiably touches another's property without damaging it in any way, he is not guilty of Malicious Mischief, although, depending upon the circumstances, he may be guilty of some other offense (e.g., interfering with meters, etc., §1431). The proposed Article herein seeks the same simplicity. With the main crime (Crime X) restricted to actual causing of physical injury, one who unsuccessfully attempts such is not guilty of Crime X but of an Attempt to commit Crime X; and one who merely touches or harmlessly pushes another is not guilty of Crime X, but may, depending upon the circumstances, be guilty of some other offense.*

Even more important than the features of clarity and simplicity, moreover, is the fact that this statutory pattern separates the main or greatest crime from lesser or included ones. There is no logic to the existing Assault article which indiscriminately requires a battery in some of its provisions but is satisfied with an attempted battery (common law assault) in others, and which requires appreciable injury in some instances but merely a technical battery in others. The proposal herein, realistically delineating and crystalizing the main crime (Crime X) as one including only

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* The "other offenses" which may be committed by harmless batteries under this revision are treated in a subsequent part of this memorandum.

cases of actual physical injury, stamps as lesser offenses both unconsummated attempts and those completed batteries having no physically injurious consequences.

(3) Coming to the problem of labeling Crime X, several titles suggest themselves, each with its drawbacks:

1. Assault
2. Battery
3. Assault and Battery
4. Injurious Battery
5. Physical Injury (or Bodily Injury or Bodily Harm)

The difficulty with the label of "Assault" is that Crime X is so much narrower than or different from the common law and Penal Law concepts of assault that confusion might result from its use. For one thing, it is diametrically opposed to pure common law "assault" in the sense that the latter never includes a battery while X always does. Again, the Penal Law's Assault, as seen, partakes of common law assault (attempted battery) sufficiently to preclude logical use of the term "attempted assault"; yet, "attempted assault" will be a meaningful, necessary and much used crime under our proposed article if Crime X is to be labeled "Assault," for every common law assault intended but failing to produce physical injury would here constitute not assault but attempted assault.

The other four suggested labels, each of which connotes an actual battery of some sort, avoid the latter problem. The titles "Battery" and "Assault and Battery," however, are too broad in that a common law battery includes every sort of physical contact down to a mere harmless touching, while Crime X is limited to batteries involving "physical injury." This latter defect is cured by the other suggested labels--"Injurious Battery" and "Physical Injury" (or "Bodily Harm")--which seem adequately descriptive of Crime X.

Probably the most persuasive argument against these latter titles is that "assault" is such a traditional and universally employed term in the criminal law that any endeavor to substitute another label at this late stage would doubtless be met with vigorous protest by the legal fraternity.

It is most interesting to observe the labeling and related problems encountered by the A.L.I. Model Penal Code in this area and its struggle to reach a satisfactory solution. Originally, its main crime included, as does our Crime X, only the actual causing of "bodily injury." With the crime thus given a much narrower scope than assault, or even assault and battery, both at common law and under American statutory law, it was decided not to use the label of "assault." The title chosen was "Bodily Injury" (Model Code, Draft No. 9, §201.10, p. 80; see pp. 81-83). In this scheme, the traditional assault or attempted battery intended but failing to inflict "bodily injury" did not, of course, constitute the crime of "Bodily Injury" but was to be treated as an Attempt to commit that crime (id., p. 82).

Ultimately, however, the Institute concluded that abandonment of the time-honored "assault" label represented a drastic step that would not be well received. Accordingly, in its final draft, it went "back to the traditional term 'assault,' on the ground that retention of the familiar term will enhance acceptability of our proposals" (Model Penal Code, Proposed Official Draft, p. 135; see §211.1, p. 134).

Having done this, it felt further impelled to conform its main crime, "Assault," more closely to the familiar meaning of that term. Thus, in "deference to the traditional scope of the 'assault' concept," it "expressly included attempts within the definition of assault" (id., p. 135). The result is that the Model Code crime of "Assault" covers equally a person who "causes" bodily injury, etc., and one who "attempts to cause" such, making no distinction

of culpability or penalty between the two (§211.1).

Our proposed article compromises between the original and ultimate Model Code positions. It retains the revered "Assault" label for Crime X but does not expand the crime to include attempts to cause physical injury (common law assaults) within its scope. Thus, an attempt to cause physical injury is not Assault but Attempted Assault, and, for better or worse, the latter term becomes a logical and important one in this pattern.

In an endeavor to avoid confusion which might result from this alteration of the assault concept, the new crime of "Assault" is explicitly defined in the introductory "Definitions" section of the proposed article (§2). The definition is based upon the scope of the crime as enunciated in the three ensuing degree provisions (§§2, 3, 4) and elaborating language is added in order to clarify the attempt aspect. This provision reads as follows (§1):

> "The crime of assault consists of unjustifiably causing physical injury to another either intentionally or recklessly.
>
> An unsuccessful attempt to cause physical injury is not an assault but an attempt to commit the crime of assault pursuant to the provisions of section X [defining the crime of "Attempt"] of this Code."

(4) As in the existing Penal Law Article (Art. 20), Assault is here divided into three degrees, the first two of which are probably to be designated felonies and the third a misdemeanor. A separate section is devoted to each degree (§§2, 3, 4), each section containing two or more subdivisions defining the various forms of Assault included within the particular degree. Three other sections are added, largely for the purpose of covering culpably assaultive types of conduct probably falling within the existing Assault provisions but not constituting either Assault or Attempted Assault in our proposed article.

Since assault is, in the main, a crime similar to and

included within that of homicide, the proposed article follows the pattern of our proposed Homicide Article. The latter presents three distinct types of homicide delineated by three distinct types of mens rea: (1) specific intent homicides, requiring a specific intent either to kill or to injure; (2) homicides committed recklessly or with criminal negligence; and (3) felony murder. Similarly, the article herein presents three different types of crimes within the assault area: (1) specific intent crimes, requiring a specific intent to kill or to cause physical injury; (2) crimes involving the infliction of, or a risk of inflicting, physical injury through reckless conduct; and (3) a crime involving infliction of physical injury in the course of the commission or attempted commission of an independent felony--referred to herein as "felony-assault."

All told, eleven separate provisions are distributed among the five "crime" sections of this article, eight of them as subdivisions of the three assault sections and the other three as individual statutes. Six of these eleven provisions define specific intent crimes; four define crimes of the reckless variety; and one is a "felony-assault" provision.

(5) For reasons to be more fully discussed at a later date, the three Assault sections (§§2, 3, 4) are set forth in what is, according to prevailing practice, "reverse order"; that is, the third degree crime is presented first, followed by the second degree and then the third. Suffice it to observe here that, in dealing with true degree crimes, by far the most logical system is to commence with the lowest and basic offense and to ascend the ladder adding aggravating factors on way up. The defects of the traditional descending system, which starts with the highest degree and subtracts elements on the way down--usually ending with a dragnet lowest degree section assertedly covering all forms of the crime not mentioned in the highter ones--are lucidly illustrat-

ed by the existing Assault sections (Penal Law, §§240, 242, 244).

B. THE STATUTES

The blank superstructure of this article (Art. 2 of Appendix A) appears as follows:

§2. General definition of the crime of assult.

_____

§3. Assault in the third degree

1. _____
2. _____

§4. Assault in the second degree

1. _____
2. _____

§5. Assault in the first degree

1. _____
2. _____
3. _____
4. _____

§6. Menacing

_____

§7. Reckless endangerment in the second degree

_____

§8. Reckless endangerment in the first degree

_____

1. Specific intent crimes

Two essential terms to be kept in mind here are "physical injury," defined as "pain, illness or any impairment of physical condition," and "serious physical injury," defined in terms of

greater severity (Art. 1, §1).

a. Intentionally causing physical injury (§3, subd. 1)

The most basic crime of the whole article is simply that of intentionally causing "physical injury" to another. This is graded third degree Assault (§3, subd. 1), undoubtedly to be penalized as a misdemeanor.

b. Intentionally causing serious physical injury (§4, subd. 1)

If the "physical injury" is "serious," and intended to be such, the crime is, of course, aggravated, and that offense is here made second degree Assault (§4, subd. 1), slated to be a felony.

c. Intentionally causing physical injury by means of a deadly weapon (§4, subd. 2)

Another factor commonly regarded as aggravating a basic assault crime is the use of a dangerous or deadly weapon. Accordingly, when the basic offense herein--intentionally causing "physical injury" (§3, subd. 1)--is committed with a "deadly weapon" (a term defined in this "Chapter" [Art. 1, §1]), the crime is raised from the third to the second degree (§4, subd. 2).

It is to be observed that, unlike the first subdivision of this second degree section (§4), this provision requires neither serious physical injury nor an intent to cause serious physical injury--plain "physical injury" being sufficient with respect to both intent and result. The theory is that anyone who attacks and injures another with a "deadly weapon" a fortiori creates a grave risk of serious injury and should be guilty of felonious Assault even though he intended merely minor harm and was dexterous enough to so limit the result. Thus, one who shoots at another intending to inflict a mere flesh wound of the arm and aims well enough to achieve that result is guilty of second degree assault under this provision (§4, subd. 2).

In this respect, it differs from the comparable existing second degree Assault provision applying to one who "Wilfully and wrongfully assaults another by the use of a weapon...likely to produce grievous bodily harm" (Penal Law, §242, subd. 4). That, as seen, has been judicially construed to require an intent to inflict grievous bodily harm (People v. Katz, supra, 290 N.Y. 361). Accordingly, unlike the proposed provision (§4, subd. 2), it does not cover the aforementioned flesh wound shooting or any other "deadly weapon" attack not intended to inflict serious or grievous injury, and such cases are, under the present Penal Law pattern, relegated to third degree Assault. On the other hand, this existing provision (§242, subd. 4), while thus narrower or more demanding than the proposed one (§4, subd. 2) from the standpoint of intent, is broader with respect to result. In short, this is one of the existing Assault crimes that does not require a battery, in the form of grievous bodily harm or any other kind of harm or physical contact. Thus, one shooting at another with intent to inflict grievous bodily harm is guilty of second degree Assault even though he misses his target completely. Under the proposed provision (§4, subd. 2), this would not constitute second degree Assault but an Attempt to commit that crime.

d. Serious physical injury with homicidal intent (§5, subd. 1)

Perhaps the most culpable specific intent form of Assault is the attack or conduct which is intended to produce death and which, though fortuitously falling short of that goal, does achieve serious physical injury. Such infliction of serious injury "with intent to kill" is here classified as first degree Assault (§5, subd. 1).

This is comparable to but somewhat simpler than the "intent to kill" phase of the existing first degree crime (Penal Law §240). The latter is quite intricate. With respect to the

ordinary type of homicidal attack, no battery or physical harm need occur but the "Assault" must be committed "with a loaded fire arm, or any other deadly weapon, or by any other means or force likely to produce death" (subd. 1). If the homicidal Assault be in the form of administering poision or drugs, the drugs must be taken by the victim (a battery) and they or the incident must be such "as to endanger the life" of the victim (subd. 2), although no serious injury need actually occur.

The proposed provisions herein (§5, subd. 1), on the other hand, simply requires homicidal intent and the actual occurrence of "serious physical injury." Especially with the latter an element of the crime, no purpose is to be served by limiting its application to attacks with deadly weapons or by "other means or force likely to produce death" (240, subd. 1)--whatever that may mean--and to poisonings dangerous to life (subd. 2). Those requirements were apparently inserted for the purpose of excluding acts which, though committed with homicidal intent, not only fail to achieve death or serious injury but are of such character as to make either of those results extremely unlikely (e.g., merely punching a person with intent to kill him). However, where, as in the proposed provision (§5, subd. 1), the homicidal attack must actually cause "serious physical injury," it seems unnecessary to assure (by specifying dangerous weapons and the like) that the means employed be capable of producing death. In other words, anyone who tries to kill another and goes far enough in that direction to injure him seriously should be guilty of the highest Assault crime regardless of the precise means employed; or, to put it another way, when an assailant in that frame of mind produces that result, it is hardly necessary to worry whether the means employed by him were capable of producing or likely to produce death.

It is noteworthy that the Model Penal Code Assault provisions

(§211.1) do not proscribe any offense of Assault with intent to kill. This form was deliberately ommitted on the theory that such cases "will be dealt with as attempted murder" (Model Penal Code, Tent. Draft No. 9, p. 82).

While it is true that every assault with intent to kill constitutes attempted murder under our proposals, it may nevertheless be desirable to provide the Assault as well as the Attempted Murder sanction. Under existing New York law and practice, first degree Assault has much more utility in these cases than Attempted Murder of either degree. The reason is that it carries a penalty substantially less than the extremely severe ones for Attempted Murder and provides a fairer and more workable basis for pleas and convictions.

It is thus apparent that the agrument for retaining the first degree Assault sanction for Attempted Murder cases rests mainly upon the existence of a sentencing structure providing an appreciably severer penalty for the latter crime. The sentencing structure eventually to be adopted by the Commission may possibly eliminate the importance and utility of the Assault crime in question, but until that matter is determined it is here retained.

e. Maiming (§5, subd. 2)

In its purest form, maiming or mayhem is a very special and despicable kind of assault. Although the Penal Law separates Maiming from Assault, deals with it in a different article and imposes a much more severe penalty therefor (Art. 132, §1400), oddly enough it does not sharply preserve its special character; rather it defines "maiming" in such broad fashion as to dilute its true heinousness and render it little more than a serious but run-of-the-mine form of Assault. This defect, if such it be, stems from the fact that intent to maim is not required, but only intent "to injure" (§1400). Thus, one who attacks another with

ordinary assaultive intent (to injure) and with no idea of maiming him becomes guilty of the greatest of all crimes in the assault area (Maiming) if he happens to inflict an injury resulting in permanent disablement of a bodily member or organ.

The Model Penal Code presents no special crime or provision addressed to maiming and does not distinguish the mayhem type of injury from any other kind of "serious bodily injury" [Appendix C; §210.0, subd. 3; §211.1, subd. 2 (a)].

It is the belief here that, when narrowed to its most sinister meaning, mayhem is as culpable a crime as Assault with intent to kill; and, along with the latter, therefore, it is placed in the first degree Assault section (§5, subd. 2).

In boiling down this offense to its genuine evil self, the term "to maim" is first defined as (Art. 1, §1):

> "to disfigure him [a person] seriously and permanently, or to destroy, amputate or permanently disable any member or organ of his body."

Then, the true culpability of the crime is established by the mens rea: one is guilty of this form of first degree Assault only when he "intentionally maims another person" (§5, subd.2).

This means, of course, that one must not only cut off a person's ear, or permanently scar his face, or blind him, etc., but-- contrary to existing law (§1400)--must specifically intend to do so. While such conduct may be relatively rare--although acid-throwing designed to blind or permanently scar is hardly a phenomenon (see United States v. Bando, supra, 244 F.2d 833,836)--it seems undeniably deserving of the highest Assault penalty.

f. Menacing (§6)

One of the controversial points in the assault area, both common law and statutory, is whether threatening and menacing a person with a weapon ostensibly but not actually capable of inflicting serious injury constitutes an assault. The classic

case involves intimidation of the victim--for purposes of coercion, crime or just plain mischief--by pointing a gun at him which is unloaded but believed by him (the victim) to be loaded. In some jurisdictions, this is held not to constitute assault because of the weapon's incapacity and the impossibility of injurious consequences. In other's, assault is predicated upon the theory that fear of injury engendered in the victim rather than existence of actual danger to him is the vital factor. New York appears to follow the latter rule. The matter is not entirely free from doubt but it has been indicated by the Third Department at least, that, while not covered by the felonious Assault provisions (§§240, 242), pointing an unloaded gun in the indicated manner constitutes simple or third degree assault (People v. Wood, supra, 10 App. Div. 2d 231, 234-237).

The Model Penal Code also follows this doctrine, one of its provisions making it "Simple Assault" to attempt "by physical menace to put another in fear of imminent serious bodily harm" [§211.0, subd. 1 (c)]. By its terms, this includes not only weapon cases but other types of menacing (e.g., threat, augmented by physical gestures, to throw a person out of a window).

With some reservations, this offense is also adopted in the proposed Article (§6), and substantially in the Model Code language. It is not, however, placed in the third degree Assault or any other "Assault" section. Since "Assault" herein requires actual "physical injury" (§2), mere menacing does not fall within that concept; and, since all the other specific intent Assault crimes require intent to inflict some form of physical injury, menacing merely with intent to instill fear does not amount to Attempted Assault either. Accordingly, this offense is defined in a separate section, entitled "Menacing" (§6).

g. Batteries not resulting in "physical injury"

A battery involving physical contact but no "physical injury" as here defined--"pain, illness or any impairment of physical condition" (§1)--is nevertheless, as seen, a crime both at common law (battery or assault and battery) and under the existing Penal Law (third degree Assault). Such a battery, is not an Assault under our proposed article owing to the requirement of "physical injury." It constitutes an attempted Assault if accompanied by an intent to cause physical injury (§3, subd. 1; §4, subd. 1; §5, subd.1), but, absent such intent, it is ordinarily no crime at all under this article.

It might be urged that even an unjustified push, slap or touching which neither causes nor is intended to cause "physical injury" is rightfully excluded from criminality. While this may be so for the most part, there are two general categories of physically harmless batteries which seem deserving of some punishment.

One of these categories comprises improper sexual advances of a fondling or similar nature which, though not injurious in a physical sense, are unwelcome and offensive, or if consentual, culpable because of the victim's age, mental condition, etc. Batteries of that sort are covered in the Model Code by a special statute, placed in its "Sexual Offenses" Article (Art. 213) and prescribing a crime of misdemeanor grade entitled "Sexual Assault" (§213.4). This covers "sexual contact" which "is offensive to the other person" or which such person does not resist or reject because of mental incompetence, youth and like factors. The same approach is contemplated for our revision and a similar statute covering non-injurious physical contact of a sexual character will undoubtedly be included in a prospective article dealing with sex crimes.

A second category of non-injurious batteries, though less

important and of a minor nature, deserves some consideration. Broadly but simply, this includes harmless but unpleasant shoves, slaps, kicks, etc., administered in a taunting, grudging, challenging or generally petulant manner, or out of plain meanness.

Mere description of this classification of technical batteries, constituting third degree Assault under existing law (Penal Law, §244, subd. 1), earmarks its offenses as being of a harassing sort which should fit snugly into the "Harassment" section of our proposed article entitled "Offenses Against Public Order."

"Harassment" (undoubtedly to be graded as an offense or violation, below a misdemeanor) requires, in the main, an "intent to harass, annoy or alarm another." The first of the statute's seven subdivisions speaks of oral "insults, taunts or challenges...likely to provoke violent or disorderly response." This should be complemented by a provision--not presently included--addressed to physical or assaultive conduct, and the following is suggested. In brief, one will be guilty of "Harassment" who, "with intent to harass, annoy or alarm another, or with no legitimate purpose" [the preamble]:

> "2. Strikes, pushes, kicks or otherwise subjects a person to physical contact in a manner likely to provoke violent or disorderly response."

It is submitted that, by the creation of this new "Harassment" subdivision, technically assaultive conduct of the indicated sort, which currently constitutes third degree Assault, a misdemeanor, would find a statutory home more logical with respect to both the nature of the transgression and the penalty therefor.

2. Crimes of recklessness

In our memorandum accompanying the proposed Homicide Article, the terms "recklessly" and "criminal negligence"--ultimately to be defined in the general provisions of our revised Penal Law--were

explained. Suffice it to say here that for present purposes, "Criminal negligence," the lower concept, involves the creation of a substantial and unjustifiable risk of physical injury which the actor culpably fails to perceive; and that recklessness, the higher concept, involves the creation of such a risk by a person who does perceive it but consciously disregards it.

The Homicide article contains three crimes of this breed. The lowest, entitled "Criminally negligent homicide," consists of causing the death of another through "criminal negligence." The second, constituting "Manslaughter," consists of "recklessly" causing the death of another. The third and highest crime, constituting "Murder," consists of causing death "recklessly" and "under circumstances evincing a depraved indifference to human life."

There is a temptation to follow precisely the same format in the assault field. For reasons set forth more fully below, however, no Assault crime of "criminal negligence" is included.

a. Recklessly (§3, subd. 2)

Just as the proposed Homicide article includes the reckless causing of death as a lower degree of homicide (Manslaughter), so this proposed Assault article stamps the reckless causing of physical injury as a low degree of Assault (third degree).

It is impossible to list or delineate the kinds of acts falling within the category of reckless conduct creating a substantial and unjustifiable risk of physical injury, although many illustrations come to mind: mischievously throwing a baseball through the window of an occupied residence, placing a powerful lighted fire cracker near a person, riding a bicycle at great speed on a well populated sidewalk, swinging a club about in a crowded place, and of course, certain automobile accidents resulting from highly dangerous driving.

It is to be remembered here that recklessness transcends in

culpability the concept of "criminal negligence"; and that, unlike the proposed Homicide article with its "Criminally negligent homicide," this Assault article contains no crime of physically injuring through "criminal negligence." The Model Penal Code, from which our entire pattern of reckless and negligent criminality is taken, does prescribe one Assault crime of negligence ("Simple Assault") but of a very limited scope: "negligently" causing "bodily injury to another with a deadly weapon" [§211.0, subd. 1 (b)]. Similarly, the existing Penal Law Assault article defines a limited negligence offense in its third degree statute: causing bodily injury by operating a vehicle "in a culpably negligent manner" (§244, subd. 2).

The very narrowness of those provisions suggests a reluctance to create Assault sanctions for infliction of physical injury by negligence; a belief, perhaps, that negligence in this general area ordinarily should not be criminally punishable unless death results. That feeling is shared here, and no cogent reason is seen why weapon and motor vehicle cases should constitute exceptions.

The omission of a "criminal negligence" provision does not by any means exclude from the Assault orbit all irresponsible but unintentional or involuntary infliction of physical injury. It simply means that the culpability of such conduct must transcend "criminal negligence" and reach the level of recklessness (§3, subd. 2).

Nor does this mean that the proposed section demands a higher degree of culpability in vehicle Assault cases than does the existing law. It is true that the Penal Law's special vehicle Assault provision speaks of culpable negligence (§244, subd. 2) while the proposed provision (a general one including but not limited to vehicle cases) requires recklessness (§3, subd. 2). Analysis of those two terms, however, discloses that the Penal

Law's culpable negligence is construed as a concept of higher culpability than our "criminal negligence" and as the virtual equivalent of our recklessness [cf. People v. Angelo, 246 N.Y. 451, 457 (1927), and Model Penal Code, §2.02, subd. 2 (c)]. Thus, the standard of culpability and requirements of proof for third degree Assault cases of the vehicle accident variety remain approximately the same.

b. Extreme or depraved recklessness (§5, subd. 3)

Our proposed Homicide article makes one who "recklessly causes the death of another" guilty of Manslaughter, and further prescribes a crime of extreme recklessness which constitutes Murder. This must be committed not only "recklessly" but "under circumstances evincing a depraved indifference to human life."

The latter or Murder provision, which approximates an existing form of first degree murder (§1044, subd. 2), is designed to cover the most heinous sort of conduct of this genus and is exemplified by such acts as shooting into a crowd, placing a live bomb in a public place and opening the door of a lion cage in a zoo. The dividing line between ordinary and extreme or depraved recklessness may not always be crystal clear. There is, however, a sufficiently broad variation of culpability in this area to warrant a grading system that punishes the most highly dangerous and callous conduct far more severely than what may loosely be termed ordinary acts of recklessness.

One apt illustration of the distinction in question is found in the Model Penal Code commentary (Tent. Draft No. 9, p. 29) and in a decision there treated involving a policeman who shot at a car which failed to stop at his command, killing one of its five occupants [Hill v. Commonwealth, 239 Ky. 646, 40 S.W. 2d 261 (1931)]. If the policeman had merely shot at the tires, it was

agreed, this would constitute reckless conduct of a sort to warrant a manslaughter conviction; but if he had fired into the car, such would amount to the extreme or depraved type of recklessness essential to support a conviction for murder.

The Homicide pattern of reckless conduct is here retained for Assault. The higher crime covers one who,

> "Under circumstances evincing a depraved indifference to human life,...recklessly causes serious physical injury to another person" (§5, subd. 3).

This adds two aggravating factors to the lower or basic offense: (1) the "depraved indifference to human life"; and (2) the requirement of "serious physical injury" as distinguished from plain "physical injury" (§3, subd. 2). The crime is identical with the Murder offense except for the result (serious physical injury instead of death) and covers precisely the same kinds of acts. Thus, one who shoots into a crowd or liberates a lion in a zoo is guilty of Murder if death results and of first degree Assault if the damage is limited to serious physical injury. And just as the former deserves the highest Homicide rating (Murder), so the latter is given the highest Assault rating, namely Assault in the first degree (§5, subd. 3).

c. Reckless Engangerment--two degrees (§§7, 8)

Under our Assault format, as seen, one who intentionally causes ordinary or serious physical injury to another is guilty of the particular Assault Crime (§3, subd. 1; §4, subd. 1), and, if he unsuccessfully attempts to do so, he is guilty of an Attempt to commit the crime (§2). The same pattern does not prevail in the field of reckless Assault, for reckless conduct which engangers but does not injure does not constitute an attempt to cause physical injury. In other words, while there is some analogy between an act designed to injure but failing of its purpose and a reckless act which endangers but produces no injury, only the

former amounts to an attempt, since it is anomolous to speak of attempting to injure another person recklessly.

This factor, however, does not erase the culpability of, nor the desirability of criminal sanctions for, reckless conduct seriously endangering life or health but fortuitously not producing death or injury. Since such acts do not amount to Attempted Assaults, and are not covered by any of the other previously discussed provisions, they are here dealt with in special sections.

Out of the same considerations, the Model Penal Code presents a crime of misdemeanor grade, entitled "Recklessly Engangering Another Person," which is committed when one "recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury" (§211.2). Our only objection to this is that it does not distinguish between ordinary recklessness (e.g., throwing a baseball through a window) and that extremely depraved and perilous kind (e.g., shooting into a crowd) which constitutes Murder when someone is killed and first degree Assault when someone is seriously injured (§5, subd. 3). Surely, the crime of one who shoots into a crowd, to take the classic example, should not drop from Murder and first degree Assault all the way down to the misdemeanor level of the baseball thrower because his bullet miraculously misses the mass of humanity into which he fires or merely grazes someone's flesh.

With these factors in mind, two crimes, or degrees of a crime, entitled "Reckless Endangerment" are here postulated. The lower as second degree crime (undoubtedly to be graded a misdemeanor) penalizes one who

> "recklessly engages in conduct which places or may place another person in danger of serious physical injury" (§7).

The higher or first degree crime (undoubtedly to be graded a felony of some sort) is modeled upon the Murder and first degree Assault provisions and penalizes one who,

> "under circumstances evincing a depraved indifference to human life,...recklessly engages in conduct which places or may place another person in danger of death" (§8).

The difference between these two degree offenses, it may be observed, approximates the difference between the two crimes of reckless Homicide (Murder and Manslaughter) and the two crimes of reckless Assault [first degree Assault (§5, subd. 3) and third degree Assault (§3, subd. 2)].

3. Felony-Assault (§5, subd. 4)

The Penal Law, as indicated, contains two Assault provisions--one first and the other second degree--prescribing crimes of Assault "with intent to commit a felony." The chief difference between them is that the first degree provision requires, in the main, an Assault "with a loaded fire arm, or any other deadly weapon, or by any other means or force likely to produce death" (§240, subd. 1), while the second degree provision is satisfied by any sort of assault (§242, subd. 5). In neither instance is any actual injury or battery necessary.

The Model Code Assault statute (§211.0) does not include any crime of this nature, and the omission is deliberate. The theory is that such an offense is superfluous because any assault with intent to commit a felony is always prosecutable as an attempt to commit the particular felony (Tent. Draft, No. 9, p. 82).

In very tentative fashion, a felony-assault provision is here included (§5, subd. 4). Modeled upon the traditional felony murder provision and graded first degree Assault, it applies to one who,

> "In the course of and in furtherance of the commission or attempted commission of a felony,...causes serious physical injury to another person by means of a deadly weapon."

Whether a crime of this sort is necessary or desirable depends to a great extent upon several matters which are undetermined at this point. One unknown factor is whether the occurrence of

an assault is to constitute an aggravating factor or an integral element of most of our felonies of violence in their higher degrees (e.g., robbery graded first degree when accompanied by an assault?). If so, this provision in question carries coals to Newcastle. Another unknown factor concerns our prospective sentencing structure and its application to first degree Assault, on the one hand, and various independent felonies on the other.

Further, assuming a felony-assault crime modeled upon our felony murder offense to be feasible, the postualted provision is subject to change pending final determination of our as yet unformulated felony murder provision.

With all these uncertainties, the subdivision in issue is merely included as a suggestion and offered as such without further comment.

RGD/pjc/cd
April 16, 1963

APPENDIX A

GENERAL PROVISIONS

Terms "recklessly" and "criminal negligence" defined.

CHAPTER X
(to include Homicide and Kidnapping Articles as well as "Assault and Related Crimes")

ARTICLE 1.

§1. Definitions

Physical injury. "Physical injury" means pain, illness or any impairment of physical condition.

Serious physical injury. "Serious physical injury" means physical injury which creates a substantial risk of death, or which causes or creates a substantial risk of protracted disfigurement, of protracted impairment of health or of protracted loss or impairment of any bodily functions.

Maim. To "maim" a person means to disfigure him seriously and premanently, or to destroy, amputate or permanently disable any member or organ of his body.

Deadly weapon. A "deadly weapon" means

(1) any instrument or device constructed and designed primarily for use as a weapon capable of causing death or serious physical injury, and

(2) any device, instrument, article, material or substance which, regardless of its primary function is capable of causing death or serious physical injury when used in a particular manner and which, at the time in issue, is employed with intent to injure another.

ARTICLE 2
ASSAULT AND RELATED CRIMES

§2. Definition of the crime of assault generally

The crime of assault consists of unjustifiably causing physical injury to another intentionally or recklessly.

An unsuccessful attempt to cause physical injury to another is not an assault but an attempt to commit the crime of assault pursuant to the provisions of section X of this code.

§3. Assault in the third degree

A person is guilty of assault in the third degree when:

(1) With intent to cause physical injury to another person, he causes such injury to such person or to a third person.

(2) He recklessly causes physical injury to another person.

§4. Assault in the second degree

A person is guilty of assault in the second degree when:

(1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person.

(2) With intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon.

§5. Assault in the first degree

A person is guilty of assault in the first degree when:

(1) With intent to kill another person, he causes serious physical injury to such person or to a third person.

(2) He intentionally maims another person.

(3) Under circumstances evincing a depraved indifference to human life, he recklessly causes serious physical injury to another person.

(4) In the course of and in furtherance of the commission or attempted commission of a felony, he causes serious physical injury to another person by means of a deadly weapon.

§6. Menacing

A person is guilty of menacing when, by physical menace, he attempts to place another person in fear of imminent serious physical injury.

§7. Reckless Endangerment in the second degree

A person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which places or may place another person in danger of serious physical injury.

§8. Reckless Endangerment in the first degree

A person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which places or may place another person in danger of death.

APPENDIX B

NEW YORK PENAL LAW
"ASSAULT" AMD "MAIMING" ARTICLES

Article 20
Assault

§240. Assault in first degree defined.

A person who, with an intent to kill a human being, or to commit a felony upon the person or property of the one assaulted, or of another:

1. Assaults another with a loaded fire arm, or any other deadly weapon, or by any other means or force likely to produce death; or,
2. Administers to or causes to be administered to or taken by another, poison, or any other destructive or noxious thing, so as to endanger the life of such other,

Is guilty of assault in the first degree.

§241. Punishment for assault in first degree.

Assault in the first degree is punishable by imprisonment for a term not exceeding ten years.

§242. Assault in second degree.

A person who, under circumstances not amounting to the crime specified in section two hundred and forty,

1. With intent to injure, unlawfully administers to, or causes to be administered to, or taken by another, poison, or any other destructive or noxious thing, or any drug or medicine the use of which is dangerous to life or health; or,
2. With intent thereby to enable or assist himself or any other person to commit any crime, administers to or causes to be administered to, or taken by another, chloroform, ether, laudanum, or any other intoxicating narcotic or anesthetic agent; or,
3. Wilfully and wrongfully wounds or inflicts grievous bodily harm upon another, either with or without a weapon; or
4. Wilfully and wrongfully assaults another by the use of a weapon, or other instrument or thing likely to produce grievous bodily harm; or
5. Assaults another with intent to commit a felony, or to prevent or resist the execution of any lawful process or mandate of any court or officer, or the lawful apprehension or detention of himself, or of any other person,

Is guilty of assault in the second degree.

§243. Punishment for assault in second degree.

Assault in the second degree is punishable by imprisonment in a penitentiary or state prison for a term not exceeding five years, or by a fine of not more than one thousand dollars, or both; provided, however, any person convicted of assault in the second degree for an assault upon another with intent to commit the felony of rape in the first degree, rape in the second degree, sodomy in the first degree, sodomy in the second degree or carnal abuse may be punished by imprisonment for an indeterminate term, the minimum of which shall be one day and the maximum of which shall be the duration of his natural life.

§244. Assault in third degree.

A person who

1. Commits an assault, or an assault and battery, not such as is specified in sections two hundred and forty and two hundred and forty-two, or

2. Operates or drives or directs or knowingly and wilfully permits any one subject to his commands to operate or drive any vehicle of any kind in a culpably negligent manner, whereby another suffers bodily injury, or

3. Strikes, beats, or wilfully injures the person or apparatus of any news reporter or news photographer during the time when such reporter or photographer is engaged in the pursuit of his occupation or calling in any public place or gathering,

Is guilty of assault in the third degree.

§245. Punishment for assault in third degree.

Assault in the third degree is punishable by imprisonment for not more than one year, or by a fine of not more than five hundred dollars, or both.

§246. Use of force not unlawful in certain cases.

To use or attempt, or offer to use force or violence upon or towards the person of another is not unlawful in the following cases:

1. When necessarily committed by a public officer in the performance of a legal duty; or by any other person assisting him or acting by his direction;

2. When necessarily committed by any person in arresting one who has committed a felony, and delivering him to a public officer competent to receive him in custody;

3. When committed either by the party about to be injured or by another person in his aid or defense, in preventing or attempting to prevent an offense against his person, or a trespass or other unlawful interference with real or personal property in his lawful possession, if the force or violence used is not more than sufficient to prevent such offense;

4. When committed by a parent or the authorized agent of any parent, or by any guardian, master, or teacher, in the exercise of a lawful authority to restrain or correct his child, ward, apprentice or scholar, and the force or violence used is reasonable in manner and moderate in degree;

5. When committed by a carrier of passengers, or the authorized agents or servants of such carrier, or by any person assisting them, at their request, in expelling from a carriage, railway car, vessel or other vehicle, a passenger who refuses to obey a lawful and reasonable regulation prescribed for the conduct of passengers, if such vehicle has first been stopped and the force or violence used is not more than sufficient to expel the offending passenger, with a reasonable regard to his personal safety;

6. When committed by any person in preventing an idiot, lunatic, insane person, or other person of unsound mind, including persons temporarily or partially deprived or reason, from committing an act dangerous to himself or to another, or in enforcing such restraint as is necessary for the protection of his person or for his restoration to health, during such period only as shall be necessary to obtain legal authority for the restraint or custody of his person.

§247. Criminal negligence while engaged in hunting resulting in an injury to another.

Any person who while engaged in hunting shall discharge a firearm or operate a long bow in a culpably negligent or reckless manner, whereby a person is injured, is guilty of criminal negligence while engaged in hunting.

§248. [Punishment.]

A person convicted of the crime defined in section two hundred forty-seven is punishable by imprisonment for a term of not to exceed one year or by a fine of not more than five hundred dollars, or by both.

Article 132
Maiming

§1400. Maiming defined; punishment.

A person who wilfully, with intent to commit felony, or to injure, disfigure or disable, inflicts upon the person of another an injury which:

1. Seriously disfigures his person by any mutilation thereof; or,
2. Destroys or disables any member or organ of his body; or,
3. Seriously diminishes his physical vigor by the injury of any member or organ,

Is guilty of maiming, and is punishable by imprisonment for a term not exceeding fifteen years.

The infliction of the injury is presumptive evidence of the intent.

§1401. What injury may constitute maiming.

To constitute maiming, it is immaterial by what means or instrument, or in what manner, the injury was inflicted.

§1402. Maiming one's self to escape performance of a duty.

A person who, with design to disable himself from performing a legal duty, existing or anticipated, inflicts upon himself an injury, whereby he is so disabled, is guilty of a felony.

§1403. Maiming one's self to obtain alms.

A person who inflicts upon himself an injury, such as if inflicted upon another would constitute maiming, with intent to avail himself of such injury, in order to excite sympathy, or to obtain alms, or any charitable relief, is guilty of a felony.

§1404. Subsequent recovery of injured person, when a defense.

Where it appears upon a trial for maiming another person, that the person injured has, before the time of trial, so far recovered from the wound, that he is no longer by it disfigured in personal appearance, or disabled in any member or organ of his body, or affected in physical vigor, no conviction for maiming can be had; but the defendant may be convicted of assault in any degree.

APPENDIX C

MODEL PENAL CODE
ARTICLE--ASSAULT AND RELATED CRIMES

Section 211.0 Definitions.

In this Article, the definitions given in Section 210.0 apply unless a different meaning plainly is required.

[Section 210.0. Definitions.

* * *

(1) "human being" means a person who has been born and is alive;

(2) "bodily injury" means physical pain, illness or any impairment of physical concition;

(3) "serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ;

(4) "deadly weapon" means any firearm, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used is known to be capable of producing death or serious bodily injury.]

Section 211.1. Assault.

(1) Simple Assault. A person is guilty of assault if he:

(a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or

(b) negligently causes bodily injury to another with a deadly weapon; or

(c) attempts by physical menace to put another in fear of imminent serious bodily harm.

Simple assault is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.

(2) Aggravated Assault. A person is guilty of aggrated assault if he:

(a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or

(b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.

Aggravated assault under paragraph (a) is a felony of the second degree; aggravated assault under paragraph (b) is a felony of the third degree.

Section 211.2. Recklessly Endangering Another Person.

A person commits a misdemeanor if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury. Recklessness and danger shall be presumed where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded.

Section 211.3. Terroristic Threats.

A person is guilty of a felony of the third degree if he threatens to commit any crime of violence with purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience.

RGD/pjc
April 16, 1963

3/19/63

MEMORANDUM IN CONNECTION WITH PROPOSED
ARTICLE OF "OFFENSES AGAINST PUBLIC ORDER"

A vast number of provisions in the Penal Law and the Code of Criminal Procedure define, punish and otherwise deal with a host of largely minor offenses which, in a rather broad sense, are of the same genus. This general category includes misconduct tending to cause public disturbance, alarm and annoyance; similar misconduct which, though of a public or semi-public nature, results chiefly in annoyance or alarm to individual persons rather than to groups of people, or the public; various kinds of public loitering activity of an unsavory character; public intoxication; certain status offenses, aimed at the pursuit of specified illegal occupations and disreputable ways of life deemed detrimental to society; crimes of "nuisance," consisting of the creation or maintenance of physical conditions unhealthy or offensive to the surrounding community; the operation of illegal and unsavory resorts tending to impair the health and morals of their invitees; and mob action in the nature of riot and unlawful assembly which seriously disturbs or threatens to disturb the public peace and safety.

These manifold provisions are scattered indiscriminately throughout the Penal Law and the Code. Devoid of any discernible pattern or grouping arrangement, this area of the criminal law is permeated with repetition, inconsistency and confusion. The purpose of this proposed article, entitled "Offenses Against Public Order, " is to gather together and condense most of the offenses of this broad category; to eliminate many existing offenses which, because of archaism or other reasons, no longer have any utility or justification; to prescribe new or additional offenses which would plug certain gaps in the existing law; and to reclassify, regroup and generally re-fashion this entire category into a single

article of comprehensive, intelligible, and readily prosecutable provisions and offenses.

Including a "Definitions" section, the proposed article comprises nine sections, some containing several subdivisions:

1. Definitions
2. Disorderly Conduct
3. Harassment
4. Loitering
5. Public Intoxication
6. Criminal Nuisance
7. Riot
8. Unlawful Assembly
9. Incitement to Riot.

These nine sections would replace an immense number of scattered, existing statutes; some are carried over in approximately their present form, some are partially carried over or incorporated in changed form, some are covered or partially covered in newly devised provisions, and some are not carried over but completely eliminated. All told, the proposed article with its nine new sections would, at the very least, replace the following seventy-nine existing statutes, some of which contain numerous subdivisions prescribing separate offenses:

Penal Law, §§

43	1146	1990
150 (3 subds.)	1221	1990-a (3 subds.)
550	1320	2071
551	1321	2072 (3 subds.)
555	1371	2090
720	1424 (3 subds.)	2091 (3 subds.)
722 (12 subds.)	1470	2092 (3 subds.)
722-b	1471	2093
723	1472	2094
724	1530 (3 subds.)	2095
725	1531	2095-a
727	1532	2096
972	1533 (4 subds.)	2097
1020	1610	2370
1021	1754	2371
1022	1755	2372
1030		

Code of Criminal Procedure, §§

887 (11 subds.)	895	904
887-a (3 subds.)	896	905
888	897	906
889	898	907
889-a	898-a	908
890	899 (9 subds.)	909
891	900	910
891-a	901 (3 subds.)	911
892	902	912
894	903	913

Also falling logically within the classification of "Offenses Against Public Order" are the Sabbath laws, contained in Article 192 of the Penal Law (§§2140-2153). The proposed article, however, does not, in its present form, include or attempt to revise those provisions. The Sabbath field is so difficult and controversial from the standpoint of both law and law enforcement as to require special and extreme study. That task will be undertaken at a later date.

The instant memorandum first summarizes and treats the numerous provisions of the area under discussion as they currently exist in the Penal Law and the Code. It then goes on to explain and discuss the proposed article.

I. THE EXISTING PROVISIONS

For purposes of this memorandum, the existing provisions and offenses are discussed under three broad classifications: (1) Disorderly Conduct, Vagrancy and related offenses; (2) Nuisance, and (3) Riot and Unlawful Assembly.

A. Disorderly Conduct, Vagrancy and Related Offenses

The three lengthiest and most prominent statutes in this area define the offenses of Disorderly Conduct [§722 (12 subdivisions)*], Vagrancy [C,** § 7 (9 subdivisions)] and Disorderly Persons [C, §899 (9 subdivisions)]. The Disorderly Conduct section, requiring "intent to provoke a breach of the

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* Unless otherwise indicated, references are ordinarily to Penal Law provisions.

** Letter "C" denotes Code of Criminal Procedure.

peace" or conduct involving a possible result of that nature (§722), is theoretically confined to activity having a tendency to cause public disorder, although several of the offenses are not actually of that nature. The Vagrancy and Disorderly Persons sections (C, §§887, 899), while primarily addressed to offenses of illegal occupation and disreputable status, in some instances penalize specific misconduct of the Disorderly Conduct type.

These three statutes occasionally slur into each other and there is considerable repetition, especially with respect to illicit sexual solicitation [§722 (8); C, 887 (4)], begging [§722 (7); C, §887 (5)] and the illegal occupation and status offenses [§722 (11); C, §887 (1, 6, 10); C, §899 (5)].

1. Disorderly Conduct

The main Disorderly Conduct statute is section 722 of the Penal Law. Seven of its twelve subdivisions (1-5, 9, 10) faithfully reflect the traditional public disorder or breach of the peace concept of this offense, which is contained in the preamble. Thus, these seven subdivisions are largely devoted to loud, offensive and abusive language and conduct involving some real likelihood of public disturbance.

Supplementing these provisions are several other Penal Law sections defining as crimes of misdemeanor grade certain acts which are basically disorderly conduct or breach of the peace offenses. Among these sections are those which make it a misdemeanor to disturb a meeting of the legislature, a religious meeting, or any other meeting not unlawful in character (§§1321, 1470, 2071, 2072), and sections or crimes dealing with false fire alarms and bomb scares (§§727, 1424).

Returning to the Disorderly Conduct statute itself (§722), five subdivisions (subds. 6, 7, 8, 11, 12), apparently added in later years, have strayed considerably from the true and original breach of the peace theme.

Two of these--a begging provision (subd. 7) and one dealing with sexual soliciation of males in public places (subd. 8)-- define offenses which have little or no realistic tendency to cause public disorder. Actually, they fall into a class of loitering violations, predicated not upon a fear of a breach of the peace, but upon a general premise that loitering in certain public places or by certain kinds of persons or under certain circumstances creates an unsavory, unsafe, unhealthy or uncomfortable atmosphere. This type of offense is found in various forms throughout the Penal Law in sections which make it a misdemeanor to loiter in certain ways or under certain conditions in transportation facilities (§§150, 1990-a) and school buildings (§722-b); to congregate, disguised with other disguised persons, in public places (§710); and to engage in unauthorized peddling, presumably on the street or in a public place (§1610).

Another subdivision of the regular Disorderly Conduct statute (§722; subd. 6), known as the "jostling" provision, constitutes a weapon against pickpockets. By unnecessarily crowding or "jostling" against another in a public place, or by putting his hand near a wallet or handbag, the culprit, regardless of the outcome of his presumed theft attempt, commits an offense (Disorderly Conduct). By a 1952 amendment, this subdivision was expanded to cover another breed of thief who frequently initiates his operations in public places: the one who "follows or accosts" a "person for the purpose of obtaining money or property from" him by some "trick, artifice, swindle, confidence game" and the like (subd. 6).

It is apparent that the two offenses of this subdivision, also, are not truly of the breach of the peace or public disorder type; and, though each has a slight loitering flavor, neither is basically a loitering offense. The pick-

pocket and the confidence man who seek victims in public places are not so much provokers of disorder or loiterers as annoyers and harrassers of individuals, one at a time.

The offense defined in subdivision 11 of section 722 is hardly one of "Disorderly Conduct" in any sense. Penalizing one who "Is engaged in some illegal occupation or who bears an evil reputation and with an unlawful purpose consorts with thieves and criminals or frequents unlawful resorts," it is obviously one of those status or occupation offenses which one would expect to find, if anywhere, in the Vagrancy or Disorderly Persons statutes (C, §887, 899) where, as shown below, others of similar ilk grow in profusion.

As may be gleaned from the foregoing, the chief difficulty in the operation and application of section 722 lies in its preamble requirement that the misconduct be "with intent to provoke a breach of the peace, or" of such character that "a breach of the peace may be occasioned." Frequently, with every element of an offense defined by a particular subdivision clearly established, the case fails for want of any real possibility of resultant public disorder.

This difficulty is most marked, of course, in prosecutions for those offenses which are not really of the breach of the peace genus and, hence, do not really belong in section 722. A glaring example is the offense of consorting with thieves and criminals by a person of illegal occupation or evil reputation (subd. 11). Since such consorting, as the Court of Appeals has noted, ordinarily does not have the slightest tendency to provoke a breach of the peace [People v. Pieri 269 N. Y. 315, 323, 326 (1936)], such cases are virtually unprosecutable and the subdivision virtually a nullity.

Subject to similar criticism are the subdivisions defining the begging, jostling, confidence game and sodomous

solicitations offenses (subds. 6, 7, 8)--all of the loitering or harrassing variety rather than of the breach of the peace type. Conviction under these is sometimes accomplished by judicial ignoring of the breach of the peace element; or, if the point is vigorously raised at the trial, by strained explanation of how or why a breach of the peace might conceivably have occurred [see, e. g., People v. Yonko 115 N. Y. S. 2d 560 (N. Y. C. Mag. Ct. 1952)].

At least one New York City magistrate, however, has squarely attacked these statutory defects by refusing to strain for a breach of the peace finding in such cases and by insisting that the remedy lies in legislation eliminating that requirement. In connection with two such prosecutions before him in the same year--one a jostling case with no real public disturbance possibility [subd. 6; People v. Harrison 11 Misc. 2d 445 (N. Y. C. Mag. Ct. 1958)] and the other a typical sodomous solicitation case [subd. 8; People v. Feliciano 10 Misc. 2d 836 (N. Y. C. Mag. Ct. 1958)]--he dismissed both charges for lack of the breach of the peace element, with vigorous recommendations that these subdivisions be legislatively revised to eliminate that factor as an element of the offenses. Thus in Harrison, supra, the jostling case, wrote [11 Misc. 2d, at p. 448]:

> "Section 722 gratuitously interposes substantial barriers to successful prosecution in this type of case xxx. Common sense, it seems to this court, demands revision of section 722 in the interest of more effective enforcement of the criminal law. xxxThe People in this type of case should not have to prove the preliminary underlying imperatives set forth in the preamble to section 722 [breach of the peace requirements]; xxx."

And the opinion then goes on to suggest a separate statute making the jostling offense Disorderly Conduct, but with no breach of the peace element (p. 449).

Even in the more genuine Disorderly Conduct type of case, involving violent or grossly offensive conduct, loud noise, etc. (subds. 1-5, 9, 10), the breach of the peace requirement frequently constitutes an obstacle to conviction for misconduct which appears to warrant punishment. In numerous instances, convictions under section 722 based upon very offensive, belligerent or abusive conduct in public or semi-public places have been reversed upon the ground that, for one reason or another, the place, setting or circumstances were not public enough to create a real breach of the peace possibility [People v. Kasen 8 N. Y. 2d 890 (1960); People v. Chesnick 302 N. Y. 58, 61 (1950); People v. Perry 265 N. Y. 362, 365 (1934); People v. Vest 11 App. Div. 2d 1080 (4th Dept. 1960); People v. Frank 245 App. Div. 777, 779-780 (3rd Dept. 1935)].

Perhaps the most controversial of the offenses in this category is that defined by subdivision 2, which renders one guilty of Disorderly Conduct who, with the breach of the peace element present, "acts in such a manner as to annoy, disturb, interfere with, obstruct or be offensive to others." The broadness and vagueness of this provision make it a catchall for prosecution of a variety of annoying and "offensive" acts which prosecutors and/or judges feel should be punishable under some provision and which do not seem to be covered by any other section. Many of these have little or no breach of the peace aspect and some are dismissed for that reason. If, however, the trial judge feels strongly about the particular case, he is likely either to ignore that element [see, e. g., People v. Kindstrom 152 Misc. 208; (Spec. Sess. N. Y. C. 1934): following girl into vestibule of apartment house] or to construct some flimsy, breach of the peace theory. A somewhat ludicrous illustration of the latter appears in an

opinion sustaining a subdivision 2 conviction of a woman who had hailed and stopped two cars on the street, presumably though not prouably for prostitution purposes [People v. Yergan 164 Misc. 83 (N. Y. C. Mag. Ct. 1937)]. Said the magistrate (p. 86):

> "The defendant's conduct was such that a breach of the peace might have been occasioned thereby. Whether or not the citizen who was last contacted xxx was actually annoyed or not is immaterial. He testified that he was not pleased. Either or both of these motorists might have resented the defendant's approach."

The extent to which the lower criminal court judges will go in this respect if impressed by the misconduct involved is exemplified by a conviction based upon a threatening telephone call. While an annoying or threatening telephone call ordinarily has no public or breach of the peace aspect and does not constitute Disorderly Conduct under section 722 [People v. Monnier 280 N. Y. 77, 78-79 (1939)]--or any offense at all until 1960 (see §555)--one magistrate managed to find a breach of the peace possibility in such a case because the caller threatened bodily harm and the complainant subsequently called the police [People v. Daly 154 Misc. 149, 150 (Spec. Sess. N. Y. C. 1935)].

It seems apparent that the principal defects of section 722, and of this statutory area in general, are (1) that many of the offenses which would otherwise be covered by section 722 are not prosecutable thereunder because of the breach of the peace element, and (2) that the misconduct involved in such cases frequently is not covered by any other provision and, hence, is not punishable at all.

In the latter connection, it is necessary to examine section 720, a peculiar statute also entitled "Disorderly Conduct," which, superficially at least, might be deemed to

plug the above-noted gap.

Section 720, a subdivisionless statute penalizing "Disorderly Conduct" as a misdemeanor rather than as an offense, speaks of annoying persons by "offensive or disorderly act or language" but makes no mention of a breach of the peace or public disturbance. The Court of Appeals has construed it as covering an offensive or disorderly act committed in a public place which causes or tends to cause annoyance or alarm to another individual rather than to a considerable number of persons (the public), thus distinguishing it from section 722 and its requirement of public disorder or breach of the peace [People v. Harvey 307 N. Y. 588, 590-591 (1954)].

At first blush, this would seem to resolve some of the aforementioned problems inherent in section 722, for it would appear that many offensive conduct cases lacking only the breach of the peace factor could be prosecuted as a misdemeanor "Disorderly Conduct" under section 720. However, despite scattered cases of that sort [see, e. g., People v. Solomon 125 App. Div. 424 (1st Dept. 1908): a jostling case], it has not been the general practice of prosecutors and judges to put section 720 to such use.

Perhaps this is due to the fact that section 720 is a poorly and archaically phrased provision of cloudy background, leaving the impression that it is an ancient, almost abandoned piece of legislation more or less superseded by the more modern section 722, rather than supplementary to it as was held in Harvey, supra. The Harvey construction and distinction between the two sections, moreover, is not very logical from the standpoint of legislative intent. It hardly seems likely that the Legislature, making "Disorderly Conduct" involving a public disturbance or breach of the peace an offense only (§720), intended to upgrade it to a

misdemeanor in the seemingly less serious situation where an individual rather than the public is offended or annoyed (§720).

Apart from a general uncertainty concerning section 720, its use as a non-breach-of-the-peace disorderly conduct statute is limited by a judicial construction which confines its application to conduct occurring in a "public place" (People v. Harvey, supra, 307 N. Y. 588, 590). While this requirement is not quite as onerous as the breach of the peace element, it is of the same nature and similarly serves to defeat many otherwise established charges of offensive and "disorderly" conduct. All in all, therefore, section 720 is by no means an adequate solution to the above treated problems created by the defects of section 722.

2. Vagrancy, Tramps, Disorderly Persons and Public Intoxication

The offense of Vagrancy is defined in section 887 of the Code, containing nine subdivisions describing nine different ways in which one attains a vagrant status. A comparable statute is section 899 of the Code, defining, in eight subdivisions, the offense of being a "disorderly person." Each of these statutes is followed by an extensive series of archaic procedural provisions purporting to establish complex machinery for prosecuting, punishing and generally handling "vagrants" and "disorderly persons" (C, §§888-898-a, 900-913). So far as appears, however, this machinery is never used and these cases are procedurally disposed of in the same way as any other offense not amounting to a crime.

A further related offense is found in section 887-a of the Code, defining a "tramp"; and paradoxically, the procedural ramifications of this offense are prescribed by three sections located in the Penal Law (Art. 210; §§2370-2372).

In many respects, these various statutes are obsolete atrocities. This may partially be illustrated by quotation of the

Vagrancy and Tramp provisions:

"§887. Who are vagrants. The following persons are vagrants:

1. A person who, not having visible means to maintain himself, lives without employment;
2. A person who, being an habitual drunkard, abandons, neglects, or refuses to aid in the support of his family;
3. A person who has contracted an infectious or other disease, in the practice of drunkenness or debauchery, requiring charitable aid to restore him to health;
4. A person (a) who offers to commit prostitution, or (b) who offers or offers to secure another for the purpose of prostitution, or for any other lewd or indecent act; or (c) who loiters in or near any thoroughfare or public or private place for the purpose of inducing, enticing or procuring another to commit lewdness, fornication, unlawful sexual intercourse or any other indecent act; or (d) who in any manner induces, entices or procures a person who is in any thoroughfare or public or private place, to commit any such acts; or (e) who receives or offers or agrees to receive any person into any place, structure, house, building or conveyance for the purpose of prostitution, lewdness or assignation or knowingly permits any person to remain there for such purposes; or (f) who in any way, aids or abets or participates in the doing of any of the acts or things enumerated in subdivision four of section eight hundred and eighty-seven of the code of criminal procedure; or (g) who is a common prostitute, who has no lawful employment, whereby to maintain herself.
5. A person wandering abroad and begging, or who goes about from door to door, or places himself in the streets, highways, passages, or other public places, to beg or receive alms;
6. A person wandering abroad and lodging in taverns, groceries, alehouses, watch or station houses, outhouses, market places, sheds, stables, barns or uninhabited buildings, or in the open air, and not giving a good account of himself;
7. A person who, having his face painted, discolored, covered or concealed, or being otherwise disguised, in a manner calculated to prevent his being identified, appears in a road or public highway, or in a field, lot, wood or inclosure;
8. Any child between the age of five and sixteen, having sufficient bodily health and mental capacity to attend the public schools, found wandering in the streets or lanes of any city or incorporated village, a truant without any lawful occupation;
9. (Repealed by L. 1910 ch. 381).
10. A person who has been more than once convicted as a pickpocket, thief, or burglar, and

to any significant degree is doubtful. At any rate, examination of the annotations to the "disorderly persons" statute (C, §899) discloses not a single decision under the ninth or "habitual criminal" subdivision.

B. Nuisance

Among the vaguest, most peculiar, and possibly most unsatisfactory crimes prescribed in the Penal Law is that of "Nuisance" or "Public Nuisance," which emanates from the common law.

The Penal Law contains an Article entitled "Nuisance" (Art. 148), and the principal statute is section 1530, defining a "Public nuisance," the maintenance of which is punishable as a misdemeanor (§1532). Section 1530 reads as follows:

> "Public nuisance defined.
>
> A 'public nuisance' is a crime against the order and ecomony of the state, and consists in unlawfully doing an act, or omitting to perform a duty, which act or omission:
>
> 1. Annoys, injures or endangers the comfort, repose, health or safety of any considerable number of persons; or,
>
> 2. Offends public decency; or,
>
> 3. Unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, a lake, or a navigable river, bay, stream, canal or basin, or a stream, creek or other body of water which has been dredged or cleared at public expense, or a public park, square, street or highway; or,
>
> 4. In any way renders a considerable number of persons insecure in life, or the use of property."

A few general observations concerning this offense are in order. In some respects, Nuisance, both at common law and in its New York statutory form, seems more of a tort than a crime, and civil actions grounded in nuisance appear more numerous than criminal prosecutions therefor. The third subdivision of section 1530, for example, dealing

sentence for the crime of which the defendant was just convicted, adjudges him an "habitual criminal" [People v. Rosen 208 N. Y. 169, 173-174 (1913)].

While the purpose of this legislation is supposedly to permit the imposition of more severe sentences for established recidivists [People v. Gibson 114 App. Div. 600, 603 (4th Dept. 1906)], the increased punishment is not in the customary form of longer prison terms (see §§1941, 1942). It consists of certain peculiar controls over the defendant set up by some antiquated sections long antedating the Baumes law provisions.

One of these makes the "habitual criminalxxx at all times subject to the supervision of every judicial magistrate of the county, and of the supervisors and overseers of the poor of the town where the criminal may be found, to the same extent that a minor is subject to the control of his parent or guardian" (§1021) ? ! Another section (C, §512)--the one pertinent here--renders him liable to summary arrest and "punishment as a disorderly person, when he is found without being able to account therefor, to the satisfaction of the court or magistrate, either,

> 1. In possession of any deadly or dangerous weapon, or of any tool, instrument, or material, adopted to, or used by criminals for, the commission of crime, or
> 2. In any place or situation, under circumstances giving reasonable ground to believe that he is intending or waiting the opportunity to commit some crime."

It is to that statute that subdivision 9 of Code section 899 refers when it stamps as "disorderly persons" those who are "Habitual criminals within the provisions of this Code."

It seems almost superfluous to remark that, especially in view of the more modern recidivist legislation, the entire "habitual criminal" structure appears dated, useless and unsatisfactory in every respect. Whether it was ever employed

evidently been no adequate machinery of that nature in that realm, the new Family Court Act appears to provide such (§§411-416). Law enforcement officials who have been using the Disorderly Persons Provision in this field hope that this new legislation will transfer the whole problem out of their hands and into the Family Court orbit, although only time will tell whether matters will work out that way.

The fortune telling provision (subd. 3) is frequently used by the New York City police, who regard it as a valuable one because these offenders frequently swindle people out of large sums in a confidence game fashion.

Visitors to New York City Night Court (a magistrates' court) will invariably observe a stream of defendants charged with playing craps and other gambling games on the street or in other public places. These are arrested and prosecuted as "Disorderly Persons" under subdivision 8 of section 899, covering "Persons who play in a public highway or place with cards, dice--or any other apparatus or device for gaming."

The ninth and final subdivision of section 899, declaring "habitual criminals" to be "disorderly persons," is far from self-explanatory and requires comment. The roots of this offense are laid in other sections of both the Code and the Penal Law.

Two repetitious sections of ancient origin--one in the Penal Law (§1020) and the other in the Code (§510)--provide that a person convicted of a felony who has a prior conviction for any crime, or a person convicted of a misdemeanor who has five prior misdemeanor convictions, may be adjudged an "habitual criminal." The "habitual criminal" status must be charged in the indictment or information for the crime under prosecution; proof of the requisite prior convictions must be introduced at the trial; and, if the prosecution is successful in every respect, the court, in addition to imposing

reads as follows (C, §899):

> "§899. Who are disorderly persons. The following are disorderly persons:
> 1. Persons who actually abandon their wives or children, without adequate support, or leave them in danger of becoming a burden upon the public, or who neglect to provide for them according to their means;
> 2. Persons who threaten to run away, and leave their wives or children a burden upon the public;
> 3. Persons pretending to tell fortunes or where lost or stolen goods may be found; but this subdivision shall not be construed to interfere with the belief, practices or usages of an incorporated ecclesiastical governing body of the duly licensed teachers or ministers thereof acting in good faith and without personal fee, nor shall it be construed to prohibit or prevent any show, trick, feat, display, or other act or exhibition, performed by a magician or mentalist for purposes of amusement or entertainment and without personal fee;
> 4. Keepers of bawdy houses or houses for the resort of prostitutes, drunkards, tiplers, gamesters, habitual criminals, or other disorderly persons;
> 5. Persons who have no visible profession or calling, by which to maintain themselves, but who do so, for the most part, by gaming;
> 6. Common showmen and mountebanks, who exhibit or perform for profit idle shows, acts or feats;
> 7. Persons who keep, in a public highway or place, an apparatus or device for the purpose of gaming, or who go about exhibiting tricks or gaming therewith in a public highway or place;
> 8. Persons who play, in a public highway or place, with cards, dice--or any other apparatus or device for gaming;
> 9. Habitual criminals within the provisions of this Code."

While the statute, with its references to "mountebanks" (subd. 6), "habitual criminals" (subd. 9), etc., is archaic in many respects, some of its provisions are widely used.

Outside of New York City, for example, the first subdivision is commonly employed to punish or bring into line men who abandon and financially neglect their families. Except under the most aggravated circumstances (see §50, making "Abandonment of pregnant women" a felony), this kind of transgression would seem more susceptible to civil or quasi-criminal procedures of a domestic relations tribunal. While there has

concerning this section, entitled "Intoxication in a public place" (§1221). The definitive part, simply and without elaboration, makes guilty of an offense "Any person intoxicated in a public place." The statute then goes on to set forth in eight detailed subdivisions the most complex sort of procedural machinery dealing with sentencing, commitment, probation and other handling of such offenders. There are references to commitment to "a hospital and industrial colony," to action by "the board of inebriety," and to many other highly mysterious matters. And the last subdivision concludes, as indicated, with a declaration that the statute "shall not apply to the city of New York" (subd. h).

Two questions which naturally occur to the reader of this strange section are : (1) what the meaning and purpose are of all the intricate procedural, commitment and probation provisions; and (2) why the statute is not applicable to New York City. The answers to both questions lie not in logic but in a long, hopelessly confused legislative history permeated with error, omission and oversight. It would be futile to relate here the numerous ramifications of that history, which is intertwined with, and only explainable by, various parallel legislative amendments to the General Municipal Law and the New York City Charter. Suffice it to state: (1) that there is now no logical reason for the complex procedural machinery, which is obsolete and meaningless; (2) that, procedurally speaking, this offense should be treated like any other "offense" over which a magistrate has jurisdiction, and should be disposed of with the same simplicity; and (3) that the exclusion of New York City has no more rational basis than the other matters mentioned and probably was not really intended.

Coming to the "Disorderly Persons" statute, the section

New York City, of course, has its thousands of alcoholic derelicts of the "Bowery bum" variety. In general, the other large and middle-size cities do not have either problem to any significant degree despite a smattering of genuine Vagrancy arrests and convictions under the above-discussed "visible means" provision (C, §887, subd. 1).

This provision is also used against the tramps of the rural areas, although the favorite weapon there seems to be an illegal "Hitchhiking" section of the Vehicle and Traffic Law (§1157); and, in appropriate cases, the Penal Law's Public Intoxication statute (§1221) is employed. The ostensibly appropriate "Tramp" provisions (§2370; C, §887-a) are seldom invoked because of a peculiar twist in their sentencing and imprisonment aspects. Convicted tramps may be imprisoned only in penitentiaries, the state paying the cost of their keep (§2370). Since penitentiaries are usually located in cities, and since, therefore, rural "Tramp" convictions involve extensive transportation and other annoyance to the rural police, the latter studiously avoid this offense.

For the "Bowery bums" or Skid Row group, the New York City police ordinarily use the broad, tent-like Disorderly Conduct provisions of the Penal Law punishing one who "Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others" (§722, subd. 2). They are not enamoured of this provision because most of the derelicts rounded up, though under the influence of liquor, are not annoying or obstructing "others" and are neither tending nor intending to provoke "a breach of the peace." The Public Intoxication section would doubtless be more appropriate in most of these cases were it not for a provision rendering it inapplicable to New York City (§1221, subd. h).

In the latter connection, some comment is in order

and that employment of the Vagrancy provision indicates a loose, promiscuous use of it undoubtedly prompted by the fact that it provides the easiest method.

When the aforementioned Rochester police official was asked whether the prolific Vagrancy arresting practice did not arouse considerable litigation in the way of habeas corpus writs and false arrest actions, he declared that they had never had any difficulty along those lines in his vicinity although the practice has been routine there from time immemorial. This happy state of affairs he credited to a combination of judicial cooperation, general acceptance of a time-honored system, and reluctance of local attorneys to make trouble for the police, whose problems in this regard they understand. He realizes, however, that the whole practice is extremely shaky and may explode some time, perhaps in the near future. He would prefer a straightforward pickup statute expressly authorizing suspicion arrests, etc., but he unapologetically uses the Vagrancy provision because nothing better is available for what he regards as essential police operation.

New York City police officials take the same view but are more conscious of the improprieties and dangers inherent in the present system. Evidently because of occasionally successful legal action by the vagrant arrestees, they have no liking for the practice, which they regard as a necessary evil, and they would be delighted with a direct or explicit pickup statute.

The second police problem mentioned--that of dealing with genuine vagrants, tramps and derelicts--seems to be most pressing in the rural areas, on the one hand, and in New York City, on the other. The rural counties claim to be beset by tramps and shiftless itinerants of one sort or another who are offensive and sometimes alarming to the small communities.

employment" (C, §887, subd. 1). The suspect is then convicted of Vagrancy; given a short prison sentence; questioned about the crime or matter which is actually the reason for the **pickup** ; eventually charged with the basic and more serious crime if a case can be made; or released if the investigation fails to produce anything,

In conversations with certain members of the New York State, New York City and Rochester police departments, every officer approached frankly admitted that the Vagrancy provision is employed primarily as a **pickup** device; that the facts do not warrant charges of Vagrancy in most instances; and that this practice is extremely wide-spread and constitutes routine police procedure. The only variation seems to be that the State Police use the "Tramp" section (C, §887-a) more than the Vagrancy provision (C,§887, subd. 1) as a **pickup** statute.

A Rochester police official candidly stated that his department consistently "vags" persons for a host of purposes in addition to the above: to hold a sex offender in the absence of a signed complaint in order to have him undergo a mental examination; to hold a person when a teletype from another county or jurisdiction has requested his detention pending forwarding of a warrant; to hold a witness or complainant who may be difficult to find when his testimony is needed; to hold a probation or parole violator until the probation or parole officer can take action; to hold a person without a draft card or suspected of being A. W. O. L. from the armed services until investigation can be made; and to hold a person whose actions indicate that he may be an escapee from a mental institution.

It is to be noted that temporary custody for most of the above-enumerated purposes can be attained through other sections explicitly addressed to the particular situations,

of one of the Disorderly Conduct provisions (§722, subd. 7).

It will probably surprise many to learn that, from the standpoint of utility, one of the most important provisions in the entire criminal law of New York is the first subdivision of section 887 of the Code, stamping as a vagrant

> "A person who, not having visible means to maintain himself, lives without employment."

On the surface, this appears as an insignificant offense which, like some of its sisters in the same statute, probably should not be a criminal offense at all and possibly might not withstand a vigorous constitutional attack. To appreciate its importance--and also the importance of the equally unimpressive "Tramp" section (C, §887-a)--one must have an understanding of certain police practices in this state relating to two distinct problems: (1) the problem of holding persons temporarily in custody pending an investigation; and (2) the problem of dealing with persons who are vagrants, tramps or derelicts in the true sense of those terms. The first of these problems is the more important one.

Whatever one's views of the propriety of the matter, the police in every area of New York State deem it vital that they be able to pick up persons suspected of crime but against whom there is as yet no legal case, and to hold them in custody for two or three days pending further investigation. Without such power, they claim, they would be helpless in many instances, especially where the suspect is not a resident of the particular county.

Requiring a so-called "pick up" statute of this nature, and having nothing which actually fills the bill, they use the above-quoted Vagrancy provision for that purpose, <u>picking up</u> suspects right and left upon charges that they have no "visible means" of support and are living "without

> having no visible means of support, found loitering about steamboat landings, railroad stations, banking institutions, crowded thoroughfares, cars, omnibuses, hotels, or any public gatherings or assembly, and unable to give a satisfactory explanation of his presence.
> 11. (Repealed by L. 1927 ch. 672)."

> "887-a. Tramp defined. A tramp is any person, not blind, over sixteen years of age, and who has not resided in the county in which he may be at any time for a period of six months prior thereto, who
> 1. Not having visible means to maintain himself, lives without employment; or
> 2. Wanders abroad and begs, or goes about from door to door, or places himself in the streets, highways, passages or public places to beg or to receive alms; or
> 3. Wanders abroad and lodges in taverns, groceries, alehouses, watch or station houses, outhouses, market places, sheds, stables, barns or uninhabited buildings, or in the open air, and does not give a good account of himself."

Turning to the Vagrancy statute (C, §887), no purpose would be served by detailed discussion of all the individual subdivisions, many of which are obviously outmoded, useless and, at times, ludicrous.

One subdivision having considerable utility, however, of the fourth, dealing with prostitution, lewdness and loitering for such purposes. This is the provision under which prostitutes are arrested and prosecuted. It is broad enough, however, to cover loitering for homosexual purposes of a sort also constituting Disorderly Conduct as defined in the Penal Law [§722, subd. 8; People v. Hale 8 N. Y. 2d 163, 164 (1960)]. Contrary to most of the other Vagrancy provisions, the prostitution offense does not require proof of status or occupation but is established by evidence of a specific act [People v. Lynn 307 N. Y. 683, 684 (1954); People v. Reitano 189 App. Div. 775 (2nd Dept. 1919)].

Another subdivision of some utility is the one addressed to beggars (subd. 5) , although this is but repetitious

with obstruction of bodies of water, highways, etc., has a distinctly civil flavor and has been the subject of some civil litigation but is virtually never used as a basis for criminal prosecution.

The crime of Nuisance requires little if any criminal intent; the legislative purpose is said to be remedial rather than punitive--to prevent continuation or recurrence--and it is sufficient that the particular unlawful or improper conduct have an injurious effect on the public [Bohan v. P. J. G. L. Co. 122 N. Y. 18, 32-33 (1890); People v. High Ground Dairy Co. 166 App. Div. 81, 82 (2d Dept. 1915); People v. Borden's Condensed Milk Co. 165 App. Div. 711 (2d Dept. 1915), aff'd. 216 N. Y. 658]. In its requirement that the public or a "considerable number of persons" be affected, this crime is somewhat similar to Disorderly Conduct (§722). Examination of the Nuisance decisions as a whole discloses that some of the activity prosecuted as such might also constitute Disorderly Conduct, but that, generally speaking, the latter relates to a specific act or acts of short duration, while the former (Nuisance) envisions the creation or maintenance of some continuing condition which is annoying or offensive to the public.

The vast majority of criminal Nuisance cases fall into two categories which have little in common. The first category encompasses largely the maintenance and operation of business establishments, manufacturing plants, entertainment resorts and the like, which, by virtue of excessive noise, noxious gasses, etc., annoy or offend groups or areas of the community. These cases are prosecuted under the first subdivision of section 1530, referring to conduct of commission or omission which "annoys, injures or endangers the comfort, repose, health or safety of any considerable number of persons."*

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* A comparable provision in this general category of Nuisance is section 1754 of the Penal Law, making it a misdemeanor to leave "any noisome or unwholesome substance" or to conduct "any business, trade or manufacture which is noisome or detrimental to public health" on or near a public travel route.

In some instances, the offensive conduct or condition involved is so obviously annoying to a large number of people, so unwarranted or unnecessary, and so clearly the result of callous indifference, that the courts, with practically no criminal intent element to resolve, have little difficulty in approving convictions [see, e. g., People v. Rubenfeld 254 N. Y. 245 (1930)]. Nevertheless, this type of case is one of the most troublesome to be found in the Penal Law; and not because of occasional disorderly-conduct-type issues of whether a sufficient number of people were affected to make the disturbance a public one [see People v. Cook 220 App. Div. 110 (1927), aff'd. 248 N. Y. 597].

The main problem here lies in those cases where, concededly, a "considerable number of persons" in a residential or partially residential vicinity are annoyed, offended or discomforted by some noisome or noxious manufacturing activity, and the defense position is that the plant cannot operate without the noise, smoke or gas which is the subject of the complaint [see Bohan v. P. J. G. L. Co., supra 122 N. Y. 18, 32-33; People v. Transit Development Co. 131 App. Div. 174 (2d Dept. 1909)]. It is not difficult to visualize some of the almost insoluable issues presented in such cases: whether the plant owner's right to operate his business is superseded by neighborhood considerations of health and comfort; whether he is justified or acting reasonably by virtue of the fact that the vicinity was once a purely industrial one which only lately has attained residential quality; whether the noise or smoke is unreasonable in the sense of being unnecessary; whether it could be substantially decreased, if not eliminated, by new and possibly expensive equipment; if so, whether the owner is obligated to act accordingly; and so on ad infinitum. In short, this type of Nuisance case is so permeated with

extremely controversial social problems as to render criminal prosecution an unsatisfactory method of handling such matters in many instances; and the more intricate the particular problem, the greater is the impression that the case is essentially civil in nature and belongs in the civil court.

The other main category of criminal Nuisance cases involves the maintenance of illegal and immoral resorts where, by invitation, people congregate for purposes of gambling, prostitution, etc. The operators of such establishments may be prosecuted under the second subdivision of the main Nuisance statute (§1530), referring to conduct that "Offends public decency," and/or under a variety of narrower sections scattered throughout the Penal Law prescribing crimes of this genus, either with or without the express label of Nuisance: "Gambling apparatus declared a nuisance" (§972); nudist colonies (§1140-b); "keeping disorderly houses" (§1146; see also, C, §899 subd. 4); "Lottery unlawful and a public nuisance" (§1371); and--in the Nuisance Article itself--a further section addressed mainly to the maintenance of premises where narcotics are used or sold.(§1533).

This facet of criminal Nuisance is rather peculiar in that it does not entail the classic Nuisance conduct which inflicts physical or other specific discomfiture upon a number of persons (the public). Though ordinarily reflecting some criminal conduct, the sanction is not against the crime committed but against the alleged general injury to public morals. The Court of Appeals presents the theory of this form of Nuisance as follows [People v. Vandewater 250 N. Y. 83, 93 (1928)]:

> "The basis of the decisions in these cases is that the maintenance of a house, where unlawful or vicious acts are habitual, tends to debauch public morals and to offend public decency, and constitutes a crime against the State

> independent of any crime which may be committed by each separate act done in the house. The State punishes the offense of inducing vice, rather than the vice itself; the indecency of such inducement--the injury to the public morals--constitutes the gist of the offense."

While this may be theoretically sound, the fact is that virtually every "nuisance" of this kind--gambling houses, bawdy houses, narcotics resorts, etc.--involves a crime covered by other provisions and, hence, this phase of the Nuisance crime appears almost superfluous and unnecessary. That conclusion, however, is somewhat affected by a decision holding that a criminal Nuisance consisting of keeping a place where abortions were performed could be established by proof which was insufficient to establish the commission of the abortion crime itself [People v. Curtis 152 App. Div. 372, (4th Dept. 1912), aff'd 206 N. Y. 747.]. From this, it might be argued that the Nuisance offense offers a convenient tool for conviction of persons strongly suspected of being engaged in criminal occupations but just beyond the pale of a provable charge for the main offense.

Use of the statute for that purpose presents a rather dubious moral proposition. The danger is accentuated, moreover, by the very case which suggests it. It is noteworthy that the main or underlying crime in Curtis, supra, was not maintenance of a gambling, bawdy, narcotics or other similar resort commonly associated with the Nuisance offense, but maintenance of premises for abortion purposes [see, also, People v. Hoffman 118 App. Div. 862 (1st Dept. 1907), aff'd 189 N. Y. 561 (another nuisance-abortion case); People v. Doris 14 App. Div. 117 (1st Dept. 1897) (allegedly indecent show held a nuisance)]. If criminal Nuisance were to be extended beyond its normal application or limits to the maintenance of premises where any sort of crime occurs with some degree of

regularity--and under a principle authorizing conviction upon a lesser degree of proof than that required for the main crime--it could justly be characterized as an unfair and improper prosecution implement.

Scrutiny of the decisions in this field of criminal Nuisance, however, discloses that most of the decisions are on the ancient side and indicates that, of recent years, the applicable Nuisance statutes have been sparingly used.

C. Riot and Unlawful Assembly
(Art. 188; §§2090-2097)

The crimes of Unlawful Assembly and Riot, closely related to Disorderly Conduct, are deeply rooted in the common law. Specifically, as explained in the A. L. I. Model Penal Code Commentary (Tent. Draft No. 13, p. 18):

> "The common law misdemeanor, 'unlawful assembly,' was the gathering of three or more persons with the common purpose of committing an unlawful act. When any act was done toward carrying out this purpose, e. g., starting toward the scene of the prospective unlawful act, the offense was 'rout.' With the beginning of the perpetration of the unlawful act, the offense became 'riot.' At some point, unlawful assembly came to include a lawful meeting under circumstances calculated to excite alarm."

The same Commentary briefly summarizes the American statutory situation, in part, as follows (id., p. 19):

> "All states penalize some form of unlawful assembly or riot. The simplest statutes merely make it a misdemeanor to participate in a riot, rout or unlawful assembly, without defining the terms. A number of other jurisdictions make unlawful assembly, rout and riot separate offenses, defining these terms along common law lines. Other jurisdictions eliminate any offense denominated rout. Some define unlawful assembly in such a way as to include common law rout. In Louisiana there are no offenses denominated riot or rout. Unlawful assembly is defined as a failure or refusal to disperse after being ordered to do so. Apparently what would be riot, rout or unlawful assembly at

> common law would be punished under the general disorderly conduct section. The District of Columbia Code contains no provisions dealing with riot, rout, or unlawful assembly as known to the common law. However, there are provisions dealing with assembling and engaging in disorderly conduct."

New York, eschewing "rout," prescribes the crimes of "Unlawful Assemblies" (§2092) and "Riot" (§2090), one common factor being that assemblage or activity by three or more persons is essential.

The "Unlawful Assemblies" section makes it a misdemeanor for three or more persons to assemble with intent "to commit any unlawful act by force" or "with intent to carry out any purpose in such manner as to disturb the public peace," or, having assembled, to attempt or threaten any unlawful, physically injurious or disorderly conduct (§2092). Ancillary provisions extend the crime to situations where initially lawful assemblies or meetings develop an unlawful or riotous character (§2094), and to persons who refuse to disperse after official or authoritative warning (§2093).

Prosecutions under these sections have been sparse and of little legal significance, the typical cases involving such incidents as an anarchist meeting at which people were exhorted to go out and commit armed violence, and an assembly of persons where plans were made to assault some policemen. [People v. Most 128 N. Y. 108 (1891); People v. Westfall 6 App. Div. 732 (3rd Dep't. 1958).

The "Riot" provision reads as follows (§2090):

> "Whenever three or more persons, having assembled for any purpose, distrub the public peace, by using force or violence to any other person, or to property, or threaten or attempt to commit such disturbance, or to do an unlawful act by the use of force or violence, accompanied with the power of immediate execution of such threat or attempt, they are guilty of riot."

It is to be noted that, in view of the requirement that the

culprit group must "disturb the public peace," Riot is essentially a disorderly conduct offense, although the disturbance must be of the designated character. The section is little used and the few reported cases of prosecutions thereunder are largely of ancient vintage, although there is a smattering of twentieth century cases arising from concerted labor union violence [People v, Van Arsdale 264 App. Div. 300 (2d Dep't. 1942); People v. Brown (4th Dep't 1920) 193 App. Div. 203.]

The penalties provieded are rather complex (§2091). If the purpose of the riot or assembly is to resist the enforcement of a federal or state statute or to obstruct a public officer in the performance of his duty, or if the offender is armed with a dangerous weapon or disguised, the crime is a felony carrying a maximum five-year prison term (subd. 1). If the offender exhorts others to acts of violence, the crime is a felony with a maximum two-year term (subd. 2). In all other cases, it is a misdemeanor (subd. 3).

D. The Dragnet Section (Penal Law, §43)

Pertinent to the field under discussion is the broadest and vaguest statute in the entire criminal law of New York, namely section 43 of the Penal Law, which reads as follows:

> Penalty for acts for which no punishment is expressly prescribed
>
> "A person who wilfully and wrongfully commits any act which seriously injures the person or property of another, or which seriously disturbs or endangers the public peace or health, or which openly outrages public decency, for which no other punishment is expressly prescribed by this chapter, is guilty of a misdemeanor; but nothing in this chapter contained shall be so construed as to prevent any person from demanding an increase of wages, or from assembling and using all lawful means to induce employers to pay such wages to all persons employed by them, as shall be a just and fair compensation for services rendered."

Speaking of this section, a Court of Appeals judge once wrote [People v. Tylkoff 212 N.Y. 197, 201 (1914)]:

> "The most casual reading of this statue at once reveals its peculiarities. It is obviously one of those 'dragnet' laws designed to cover newly invented crimes, or existing offenses that cannot be readily classified or defined. If there is the slightest doubt on this subjeect, one has only to refer to the former Penal Code (section 675), of which it was once a part, to ascertain that section 43 as it now stands is the result of a division of earlier sections and a re-distribution of subjects that is, to say the least, not palpably congruous."

As it reads, section 43 has a gigantic scope and, in practice, it has been applied to an extremely broad spectrum of allegedly culpable conduct. Among the acts held to be criminal within its purview are: causing a crowd to collect and refusing to desperse on police order [People v. Wallace 85 App. Div. 170 (3rd Dept. 1903)]; indecent exposure [People v. Jacoby 304 N.Y. 33 (1952)]; publicly urging resistance of the draft during wartime [People v. Nesin 179 App. Div. 869, 870 (2d Dept. 1917)]; publishing an article advocating revolution and murder [People v. Most 171 N.Y. 423 (1902)]; speeding [People v. Darragh 141 App. Div. 408, 417 (1st Dept. 1910) aff'd 203 N.Y. 527]; and writing a letter to another offering to commit sodomy [People v. Radaka 69 N.Y.S. 2d 722 (Co.Ct. Rockland Co. 1947)]. Inferences from other decisions add: exhibitions of indecent pictures [People v. Baylinson 211 App. Div. 40, 45 (1st Dept. 1924)]; unlawful assembly [Goldberg V. Kletz 199 App. Div. 186, 188 (2d Dept. 1921)]; and following a person about on the street [People v. Weiler 179 N.Y. 46 (1904)].

Since most of these acts obviously constitute crimes or offenses under other penal provisions, it is apparent that little attention has been paid to section 43's proviso that it applies only to miscounduct "for which no other punishment is expressly prescribed." On the other hand, in some of the cases where in fact "no other punishment is expressly prescribed" for the particular act, there seems to be a very good

reason therefore, namely that the conduct probably should not be stamped criminal at all--under section 43 or any other provision.

In short, the enormous broadness and vagueness of this dragnet statute leads to inevitable abuses. Chief of these are its virtual delegation to the courts of the power to spell out new crimes by judicial construction, and the promiscuous use of that power to proscribe dubious, novel offenses, some of which have been carefully excluded from more specific provisions dealing with the areas in question. Without commenting upon constitutional issues, it is safe to observe that section 43 is a highly unsatisfactory piece of criminal legislation, an unnecessary one, and possibly a dangerous one as well.

II. THE PROPOSED ARTICLE

Following a series of essential definitions (§1), the proposed Article first attacks that vast area involving minor offenses of the public distrubance, loitering and harassing variety, which area is presently covered, or sought to be covered, largely by the above-treated Disorderly Conduct, Vagrancy and Disorderly Persons statutes (§722; C, §§887, 899).

A. Disorderly Conduct, Harassment, Loitering, and Public Intoxication

In this field, the proposed Article takes considerable from the A.L.I. Model Penal Code (see Art. 250, §§250.1-250.8), both by way of analysis and organization and by way of specific provisions.

As partially indicated by the Model Code, the numerous offenses of this rather loose category, when carefully analyzed, fall mainly into three groups: (1) the genuine disorderly conduct type, involving acts of a sort that either

cause public disorder or alarm or create a substantial risk thereof; (2) the harassing type, where, even though of a public or semi-public character, the offensive conduct tends to annoy or alarm an individual person rather than a group or the public; and (3) the loitering type, involving loitering or "hanging around" public places for purposes which, for one reason or another, are either unlawful, unsalutary or offensive to society by virtue of considerations other than possible public disorder.

1. Disorderly Conduct (§2)

This proposed statute seeks to proscribe an all-inclusive list of disorderly conduct offenses of genuine breach of the peace quality, yet to avoid the Penal Law's mistake of including offensive or annoying conduct having no real tendency to disturb or annoy the public.

The preamble of the Penal Law's main Disorderly Conduct statute, it will be recalled, requires that the act be committed "with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned" (§722). Preferred and used here is the Model Penal Code's differently phrased requirement of an inent "to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof" (M.C., §250.2).

Also adopted here are the Model Code's three types of acts (subds. a, b, c) which comprise Disorderly Conduct when committed with the requisite intent. The first two of these, dealing with fighting, tumultuous behavior, unreasonable noise, abusive language, and offensively coarse display (M.C., §250.2, subds. a, b), are incorporated almost verbatim in the proposed section, although the second offense (subd. b) is here split into two offenses or subdivisions (§2, subds. 1, 2, 3).

The Model Code's third and last subdivision (c) speaks of creating "a hazardous or physically offensive condition by

any act which serves no legitimate purpose of the actor." Concerning the meaning and purpose of this, the Model Code authors say (Tentative Draft No. 13, p. 7):

> "Clause (c) of Subsection (1) is a catch-all that would reach 'stink bombs', the strewing of garbage, nails, or other noxious substances in public passages, turning off the lights in a theater, and an endless variety of other public annoyances which mischief can conceive."

This is, indeed, a "catch-all" offense and, in that sense, it is comparable to the existing Disorderly Conduct "catch-all" provision of the Penal Law referring to acting "in such manner as to annoy, disturb, interfere with, obstruct or be offensive to others" (§722, subd. 2). Some of the difficulties caused by the vagueness of the latter have been previously discussed, and tent-like provisions of this sort are probably to be avoided where possible. Unfortunately, however, such seems necessary here because of the unfeasibility or impossibility of enumerating in more specific fashion every type of act which should be punishable within the Disorderly Conduct orbit. Of the two tent provisions mentioned, the Model Code version is preferred; and it is incorporated as the seventh and last subdivision of the proposed statute (§2).

Subdivision 4 deals with disturbance of meetings and assemblies. In the Penal Law, this field is covered by scattered provisions which make it a misdemeanor to disturb, without lawful authority, "any assembly or meeting, not unlawful in character" (§1470), and, in particular, legislative and religious meetings (§§1321, 2071, 2072). Basically, these are of the Disorderly Conduct genus, and they are here transplanted for that reason. Some explanation of this subdivision however, is necessary.

There is, of course, no necessity for singling out a legislative, religious or other specific type of meeting

for special treatment, and the proposed subdivision (subd. 4) simply penalizes a person who, with the designated intent, and

> "Without lawful authority, disturbs <u>any</u> lawful assembly or meeting of persons."

One difficulty in bringing this offense within the disorderly conduct orbit arises from the <u>public</u> disturbance aspect and the requirement of "intent to cause <u>public</u> inconvenience, annoyance," etc. Most meetings are held indoors and, while some occur in meeting halls and other premises that might be termed <u>public places</u>, the majority are conducted in premises normally falling into the <u>private</u> category. This raises a problem for present purposes. For example, one charged with disturbing a meeting of eight parents gathered in a private home for the purpose of discussing local school problems might be expected to defend on the ground that, under the circumstances, there could have been neither intention nor reaonable likelihood of <u>public</u> annoyance. Although the word "public" is here defined as "affecting or likely to affect a substantial group of persons" (§1)--no mention of a "public place"being made--the issue raised by the defense in question might well be characterized as debatable, to say the least.

A meeting of the indicated sort has a sufficiently <u>public</u> flavor to warrant its characterization as such, or to warrant arbitrary designation of its situs as a "public place" during the tenure of the meeting. This is true, however, only if the meeting has a civic or other function divorced from purely social purposes. Whether a person disturbing eight people at a cocktail party in a private home would be guilty of Disorderly Conduct under any other subdivision of the statute is not an issue here. He should not be chargeable with disturbance of an "assembly or meeting of persons" under this subdivision (subd. 4).

The proposed Disorderly Conduct statute (§2) has been

drafted with these considerations in mind. The term "Public place" has been defined, in the "Definitions" section (§1), broadly enough to include "any place, even though normally private in character, which is at the time being used by five or more persons for a lawful meeting having a lawful purpose not purely social in nature." Thus, there can be no question of the public character of such a meeting, nor of the guilt of anyone who disturbs it "without lawful authority" (§2, subd.4).

The latter phrase is inserted mainly for the purpose of excluding police and other public officials who lawfully break up meetings and assemblies. It is true that difficult questions may arise concerning the lawfulness of both the meeting and the authority to disrupt it. Such issues, however, cannot be legislatively resolved but must be determined by the courts in each particular case. The importance of this phase of the provision, moreover, is dubious in any event. A police officer who lawfully and properly disperses an assembly of persons obviously will not be charged with or convicted of Disorderly Conduct; nor is such a prosecution very likely even if he somewhat exceeds his authority or errs in his judgment of the meeting's unlawfulness or of his right to disrupt it.

Subdivision 5 is addressed to congregating "with others in a public place and" refusing "to comply with a lawful order of the police to disperse." This is the same as one of the existing Disorderly Conduct provisions (§722, subd. 3), except that the term "public street" therein is here broadened to "public place."

It is also somewhat similar to a Model Penal Code provision which has been placed in its "Riot" statute (§250.1, subd. 2). This, however, requires, as a condition precedent to the refusal to disperse, disorderly conduct by three or

more persons. The crime is thereby brought into the area of "Riot," which is graded higher than the Model Code's Disorderly Conduct offense (§250.2). There is no Disorderly Conduct provision like the one here under discussion (§2, subd. 5), simply penalizing the refusal to disperse after lawful order.

In my opinion, the latter is a worthy provision. An unwarranted refusal to disperse may well lead to public disorder for reasons wholly unrelated to the prior commission of disorderly acts by three or more persons.

As with the previous subdivision herein, the word "lawful" in the provision at hand (§2, subd. 5)--"a lawful order of the police to disperse"--may be a controversial one in some instances. Again, however, the lawfulness of the order is an issue for resolution by the courts in individual cases.

The seven above-discribed subdivisions of the proposed "Disorderly Conduct" section (§2) seem to cover the field of offensive, annoying and alarming conduct having some real tendency to affect the public or a considerable number of persons. Scanning the present Penal Law section (§722), seven subdivisions thereof devoted to genuine breach of the peace offenses (subds. 1-5, 9, 10; cf. subd. 4) appear to fall within the proposed statute. Five of the Penal Law's subdivisions (§722, subds. 6, 7, 8, 11, 12) are not covered, and deliberately so because they are not of the true Disorderly Conduct genus.

2. Harassment (§3)

This section is devoted to a number of petty acts intended to annoy individual persons. Its title and theme are taken from the Model Penal Code (§250.4), where the intent is recited as a "purpose to harass another." That is expanded here with the preamble requirement that the act

be committed "with intent to harass, annoy or alarm another, or with no legitimate purpose" (§3).

The primary importance of this section is that it includes several types of conduct having no realistic tendency to provoke a breach of the peace, which are now "covered" only by the Disorderly Conduct section (§722) with its breach of the peace element. By thus severing these acts from "Disorderly Conduct," by eliminating the public disorder requirement, and by postulating a different intent in conformity with the true nature of the misconduct (intent to harass individuals), these offenses, bereft of their main obstacle, should become readily prosecutable.

The first subdivision, taken verbatim from one of the Model Code provisions (§250.4, subd. b), deals with one who "Insults, taunts or challenges another in a manner likely to provoke disorderly response." This bears considerable resemblance to the present Disorderly Conduct provision referring to one who "Stands on sidewalks or street corners and makes insulting remarks to or about passing pedestrians or annoys such pedestrians" (§722, subd. 10). It is true that such conduct may frequently tend to produce a public disturbance, and, in that case, it would be covered by our proposed Disorderly Conduct statute (§2, subd. 3) as well as by that of the Penal Law. Insults and taunts, however, may be issued under circumstances where public disorder is a most unlikely result, and still be "likely to provoke violent or disorderly response" from the person offended (§3, subd. 1 herein). The present provision covers that situation.

In many instances, people have been annoyed or alarmed by persons following them about for various reasons which need not be enumerated (see People v. Kundstrom, supra, 152 Misc. 208). While activity of that sort seldom has a breach

of the peace tendency, it is of the harassing variety that appears to call for some penalty. Subdivision 2 of the proposed section (§3) accomplishes this with a provision making it "Harassment" to follow "a person for an appreciable period of time in or about public places." This, it may be observed, does not apply to private detectives plying their trade, since, like all other forms of Harassment, the act must be "with intent to harass, annoy or alarm another, or with no legitimate purpose" [§3; see People v. Weiler 179 N. Y. 46 (1904)].

Subdivisions 3 and 4 transplant the Penal Law's jostling and confidence game provisions from Disorderly Conduct (§722, subd. 6) to Harassment (§3). Here again, the purpose is to do away with the breach of the peace requirement, seldom satisfied in these cases, and to substitute an intent (Harassment or "no legitimate purpose") which more closely fits the facts.

Subdivision 5, dealing with annoying and alarming communications "by telephone, telegraph or letter," is similar to one of the Model Code Harassment provisions (§250.4, subd. c). It is somewhat broader, however, especially in that a single communication of the designated kind may constitute the offense, whereas the Model Code requires "repeated communications." The proposed provision also covers the here pertinent phases of two misdemeanor crimes now prescribed in the Penal Law: "Sending threatening letters" (§551) and "Malicious telephone calls" (§555). It is broader than this collective pair, however, for the Penal Law's letter section is limited to missives "threatening to do any unlawful injury to the person or property of another" (§551), and the telephone section is limited to calls "threatening to commit a crime against the person called or any member of his family" or "using obscene

language to a person of the female sex" (§555).

Subdivision 6, almost identical with a Model Code subdivision (§250.4, subd. a), penalizes one who "Makes a telephone call, whether or not a conversation ensues, without purpose of legitimate communication." This is aimed largely at the vicious practices of (1) driving a person to distraction by repeatedly dialing his number, and (2) similarly jamming the lines of a business concern with the intention of obstructing its business. The first of these does not constitute any offense under the Penal Law of today. The second is a felony, inserted in the Malicious Mischief article, of all places (§1423, subd. 6).

The Penal Law includes a crime of misdemeanor grade entitled "Hazing." The statute, leaving the reader to the familiar meaning of that term, penalizes college and school students engaging in "hazing" activity (§1030). This is a typical "Harassment" offense and is placed in the proposed section as subdivision 7.

3. Loitering (§4)

This statute is designed to include true loitering offenses which ordinarily do not tend, and are not intended, to cause public disturbance or alarm, on the one hand, nor seriously to annoy, offend or harass individuals, on the other. Absent an intent of either sort, these offenses would not be readily prosecutable either as Disorderly Conduct (§2) or as Harassment (§3).

Generally speaking, the offenses in question involve little if any intent, and no intent requirement is mentioned in the preamble of the statute. The enumerated violations consist of hanging around public places--sometimes a or any public place, and sometimes a specified kind of public place--for purposes or under circumstances deemed unhealthy to society.

In some instances (e. g., public begging and gambling), the basis of the prohibition is simply a desire to keep off the streets, so to speak, activity which is annoying to the public in a general way. In other instances (e. g., loitering in or around school buildings), the provisions are primarily aimed at forestalling types of criminal activity which, according to experience, frequently commence with the kind of loitering in question.

While one may visualize numerous types of undesirable loitering activity of the above character, the proposed statute does not, in the main, poineer in this field. For the most part, it collects a number of genuine loitering crimes and offenses which are now strewn about the Penal Law and the Code--in the Disorderly Conduct, Vagrancy and Disorderly Persons sections, and in various narrower statutes--and assemble them under one banner, entitled "Loitering" (§4).

The first subdivision covers public begging, a recognized form of illegal loitering now penalized under both the Disorderly Conduct and Vagrancy statutes (§722, subd. 7; C, §887, subd. 5).

Subdivision 2 covers gambling in public places. One of the provisions of the present "Disorderly Persons" statute, it will be recalled, penalizes gambling in streets and other public places with cards, dice and other gambling paraphernalia (C, §899, subd. 8): and, as previously indicated, this provision is, in New York City at least, prolifically violated and frequently enforced. Accordingly, the offense is carried over into the proposed Article; and, falling clearly within the Loitering category, it is placed, with some changes of language, in that section (§4) as subdivision 2.

Subdivision 3 penalizes one who "Loiters or remains in a public place for the purpose of committing, attempting to

commit, or soliciting another person to commit, a lewd or sexual act." This encompasses, of course, loitering for homosexual purposes, and covers the existing Disorderly Conduct provision of the Penal Law punishing one who "Frequents or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness" (§722, subd. 8). It is broader than the latter, however, in several respects.

For one thing, the wording of the existing provision, indicating that the offender must actually solicit another man in order to commit the offense, has caused difficulty in cases where the solicitation is of a subtle nature and impossible to establish [People v. Liebenthal 5 N. Y. 2d 876 (1959); People v. McCormack 9 Misc. 2d 745, 747-748 (Spec. Sess. N. Y. C. , App. Pt., 1957)]. The proposed provision (§4, subd. 3) avoids that problem by eliminating the element of solicitation. It is so phrased as to permit conviction when the circumstances clearly show loitering for lewd or sexual purposes, regardless of any overt importuning by the defendant.

The other prominent defect of this offense as it presently exists in the Penal Law's Disorderly Conduct statute (§722, subd. 8) is, as already indicated, the seldom satisfied breach of the peace requirement, which frequently defeats prosecution for an otherwise clear violation [People v. Evans 7 N. Y. 2d 1030 (1960); People v. Feliciano 10 Misc. 2d 836, 841 (N. Y. C. Mag. Ct. 1958)]. Placing this offense in this "Loitering" category eliminates that element and thereby removes an unwarranted obstacle to prosecution for what should clearly be punishable misconduct.

Another existing offense related to this proposed provision (§4, subd. 3) is the present Vagrancy subdivision

dealing with prostitution and loitering for other lewd or sexual purposes (C, §887, subd. 4). This is used primarily for prostitution but is broad enough to cover homosexual loitering also, and, to that extent, is somewhat repetitious of the aforementioned Disorderly Conduct provision (§722, subd. 8).

Concerning prostitution, it is the general intention here to treat it and related offenses under the sex crime category rather than as a form of Loitering or Disorderly Conduct. Thus, no specific reference to prostitution is made in the proposed Loitering provision under discussion (§4, subd. 3). However, its language is broad enough to include the street-walking kind of prostitution activity; and, though our specific prostitution sections are as yet unformulated, the instant provision may, in the end, provide a partial alternative in the prostitution area.

Finally, this offense, though possibly constituting harassment in some instances, is placed in the Loitering section (§4), which, on the whole, seems more appropriate. While homosexual approaches may sometimes annoy or harass the persons approached, they are welcome in many instances, and the provision is primarily aimed at the unhealthy condition created by deviates loitering about subway toilets and other public places in search of kindred soul .

Subdivision 4 covers an existing Penal Law section, entitled "Loitering in school buildings" (§722-b). The latter prescribes a crime of obvious purpose, attempting rather ineptly to distinguish between persons who have a natural right to be on school property and those who do not and whose presence is inherently suspect. With some phraseological changes designed to clarify the latter aspect, this offense is carried over into our proposed Loitering statute

(§4, subd. 4).

Subdivision 5, dealing with a very difficult and controversial area, requires considerable explanation. It reads as follows:

> "Loiters, remains or wanders without apparent reason or business in a place or manner not usual for law-abiding persons, under circumstances which justify suspicion that he may be engaged or about to engage in crime, and, upon inquiry by a peace officer, refuses to identify himself or fails to give a reasonably credible account of his conduct and purposes."

This subdivision represents an attempt to resolve the problem of giving the police a constitutional pickup statute capable of honest and effective use. It will be remembered that, in the absence of any such provision, the police have long and prolifically employed one of the existing Vagrancy provisions--living without "visible means" of support (§887, subd. 1)--to pickup and hold for an appreciable time persons whom they wish to investigate; that legally unwarranted arrest and conviction thereunder is admittedly employed for that purpose; that the general police attitude is an unapologetic one to the effect that this dubious device is justified by the necessity of using some minor criminal offense as a pickup tool; but that they would be happier with a more appropriate provision which could be employed with honesty and would, at the same time, be workable.

In one sense, the drafting of a valid pickup statute seems impossible. One cannot, within the realm of constitutionality, frame a statute directly authorizing the arrest of a person on mere suspicion of crime and his detention for a period of three or four days pending investigation. It is worthwhile however, to examine certain "loitering" provisions devised with at least one eye on this problem.

One of these is a provision of the Uniform Arrest Act (§2), adopted by three states (Del., N. H., R. I.), authorizing a peace officer to "stop any person abroad whom he has reasonable ground to suspect is committing, has committed or is about to commit a crime, and xxx demand of him his name, address, business abroad and whither he is going." If such person "fails to identify himself or explain his actions to the satisfaction of the officer," he may be "detained"--not an arrest--for a period not exceeding two hours, "and further questioned and investigated."

The main difficulty with this, from the standpoint of a pickup statute, is that two hours of detention is not nearly sufficient for the kind of investigation which the police have in mind.

Turning to the A. L. I. Model Penal Code, one finds a statute, entitled "Loitering or Prowling" (§250.6), with a similar flavor but very different in one important respect. This permits a peace officer to demand identification and explanation of a person found loitering under unusual and suspicious "circumstances that warrant alarm for the safety of persons or property in the vicinity." Failure to make satisfactory response warrants arrest and conviction for the crime or "violation" of "Loitering or Prowling."

The great advantage of this over the above-discussed Uniform Arrest Act provision is that, in contrast to the latter's mere detention period of two hours, it permits actual arrest and conviction for a criminal offense with a possible prison sentence (although the Model Code does not have a prison sentence for this grade of violation) which will hold the defendant for several days. Its disadvantage is that, prescribing a criminal offense as it does, its requirements are considerably stricter and, hence, greatly narrow the

scope of persons who may be picked up and detained.

It is interesting and helpful to note, however, that an earlier draft of such a statute by the Model Code authors offered a section, entitled "Suspicious Loitering," which is more liberal from a police standpoint (A. L. I. Model Penal Code, Tent. Draft No. 13, p. 59). It is that provision which, in substance but with some change of language, has been incorporated in the present "Loitering" statute (§4, subd. 5). This has been done despite the fact that the Model Code ultimately abandoned this provision and changed to its narrower section out of a desire "to save the section from attack and possible invalidation as a subterfuge by which the police would be empowered to arrest and search without probable cause" (A. L. I. Model Penal Code, Proposed Official Draft, p. 227). It is the belief here that the possibility of eventual invalidation of the broader provision is outweighed by the fact that it is far more effective than the narrower one. Even in the form here proposed, the broader provision does not authorize arrest and conviction of everyone whom the police would like to detain for investigation. However, it appears to be as good a pickup statute as can be devised.

Subdivisions 6 and 7 of the "Loitering" statute (§4) preserve the substance of two existing sections (§§150, 1990-a) devoted to loitering in transportation facilities (railroad, subway, bus and air) for peddling, entertainment and other purposes, and in transportation stations and appurtenances thereto (a narrower concept than "transportation facilities" in general) without being able to give satisfactory explanation of one's presence.

4. Public Intoxication

As previously indicated, the Penal Law prescribes an offense labeled "Intoxication in a public place" (§1221).

Without definitions or explanation, it merely penalizes "Any person intoxicated in a public place" and then continues with a series of rambling, archaic and currently meaningless provisions addressed to special methods of dealing with such miscreants. Apart from the latter provisions, the statute's chief defects are: (1) that it enunciates no standards, circumstances or criteria for determining its scope or application; and (2) that, for no logical reason, it does "not apply to the city of New York" (subd. h).

As with the authors of the A. L. I. Model Penal Code (see Tent. Draft No. 13, p. 56), there is some question here whether criminal sanctions should be attached to public intoxication and whether such a statute might not occasionally be used to harass persons acting in a manner not truly within its scope or spirit. Also as in the Model Penal Code, however, the decision here is to include such an offense; and the provision proposed is substantially that of the Model Penal Code's "Public Drunkenness" section (§250.5).

With state-wide application--in contrast to the existing Penal Law section's exemption of New York City (§1221, subd. h)--and setting forth fair criteria for the kind of intoxication required for criminality, it penalizes one "who appears in any public place manifestly under the influence of alcohol to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity."

5. Offenses prescribed by existing Penal Law provisions but here eliminated

Broadly speaking, the above-discussed sections defining the offenses of Disorderly Conduct, Harassment, Loitering and Public Intoxication (§§2-5) are designed to replade, remodel, reorganize and generally cover the various offenses found in the present statutes dealing with Disorderly Conduct (§§720,722),

Vagrancy (C, §887), Tramps (C, §887-a) and Disorderly Persons (C, §899), as well as several other and narrower sections also defining crimes of this genus. Some of the existing provisions or offenses, however, have here been ignored and eliminated, and a word upon this subject is in order.

Many of the eliminated provisions define status offenses which are not only obviously obsolete but constitutionally dubious as well. Illustrative are the "Vagrancy" and "Disorderly Perons" provisions which penalize the "habitual drunkard" who neglects his family, the indigent "who has contracted an infectious or other disease in the practice of drunkardness or debauchery," truant children, "common showmen and mountebanks," and "habitual criminals" (C, §887, subds, 2,3,8; §899, subds. 6,9). Of similar character is the Disorderly Conduct provision penalizing one "engaged in some illegal occupation or who bears an evil reputation and with an unlawful purpose consorts with thieves and criminals or frequents unlawful resorts" (§722, subd. 11). It is difficult to visualize any sound arguments supporting retention of such offenses.

More controversial, perhaps, is a group of existing provisions in effect rendering it criminal merely to be indigent, unemployed and without funds. The classic example is the much abused Vagrancy subdivision penalizing one whose sins consist of having no "visible means of support" and living "without employment" (C, §887, subd. 1). Of the same breed is another subdivision of the same statute stamping as a vagrant "a person wandering abroad and lodging in taverns, groceries, alehouses," etc.," or in the open air, and not giving a good account of himself" (subd. 6). Other provisions of this nature also penalize loiterers or tramps not gainfully employed, adding a further element of one sort or another: that the offender be a convicted "pickpocket, thief, or burglar" (id, subd 10);

that he has not been a resident of the county for at least six months (§887-a, "Tramp defined"); or that he maintains himself, "for the most part, by gaming" (C. §899, subd. 5).

Apart from the questionable legal validity of this group of provisions, it seems unjust to convict a person of a criminal offense merely on the ground that he is wandering about in public places impecunious and unemployed; and this, whether or not he has a prior conviction for larceny, whether or not he has been a resident of the county for six months, and whether or not he tries to make a dollar by gambling. In short, being broke and without a job should not amount to criminality.

It is doubtless true that, in addition to their questionable use as pickup statutes, these provisions constitute convenient tools, especially in rural areas, for dealing with tramps, hoboes and itinerant workers resented by and annoying to the local inhabitants. Their existence is not justified, however, by the bare circumstance that they make life easy for the local police and magistrates in that regard.

It seems neither unfair nor unduly onorous to require, in addition to poverty and unemployment, some measure or strong suggestion of genuine culpability before even a shiftless indigent may be convicted of a criminal offense. The requirements of the proposed article do not appear evenly burdensome on that score. Under these provisions, such a person may readily be arrested and prosecuted if, inter alia, if his conduct is in any way physically or verbally offensive to the community (§2); if he annoys or alarms any individual in a public place by speech or action (§3, subds. 1-4); if he is publicly and offensively drunk (§5); if he begs (§4, subd. 1); if he gambles in public (id., subd. 2); or if he is found lurking about a locality under suspicious circumstances and fails satisfactorily

to account for his presence and purposes (id., subd.5). All this, it is submitted, should provide ample protection to both rural and urban communities against tramps, hoboes, itinerant workers and derelicts.

Also eliminated in this proposed article is section 43 of the Penal Law, the dragnet statute penalizing "any act: not otherwise punishable "which seriously injures the person or property of another, or which seriously distrubs the public peace or health, or which openly outrages public decency." The self-evident defects of this monstrously broad provision have been previously discussed in some detail. Suffice it to remark here that a criminal statute of this breadth can be justified only on the ground either that the more specific provisions of its Code are collectively inadequate, or that it is desirable to permit courts to read beyond carefully marked statutory lines and manufacture new offenses whenever, in their opinions, the facts of a particular case justify such judicial legislation.

B. Nuisance (§7)

Virtually the only types of criminal nuisance cases prosecuted under the various existing nusiance provisions are, as seen, (1) those involving the creation or maintenance of a condition which is detrimental to the health or comfort of a neighborhood or community (business premises exceeding excessive noise, noxious gases, etc.), and (2) those involving illegal or unsavory resorts where people congregate by invitation for immoral purpose (gambling, sexual lewdness, narcotics, etc.). Also as previously indicated, neither of these offenses, or facets of the nuisance offense, represents a very satisfactory or useful aspect of the criminal law.

The first (noisome or gaseous establishments, etc.) is susceptible of many criticisms: that the situations pre-

sented are basically more civil than criminal in nature and are assailable by civil remedies; that many of these cases entail difficult economic and social problems which, one instinctively feels, should not be resolved in the criminal courts; and that some of the activity covered also amounts to disorderly conduct and can be reached by that section (§2 herein), etc.

Perhaps for these reasons, the Model Penal Code does not include any nuisance crime of this nature--or of any nature--and there is a strong temptation here to do likewise. Flagrant or extreme cases can be visualized, however, involving conduct of a sort that most people would probably feel should be criminally punishable but which might not constitute Disorderly Conduct or any other offense. Disorderly Conduct, it should be remembered, ordinarily implies activity of short duration while nuisance imports a condition. While one of the proposed Disorderly Conduct provisions reaches a person who "creates a hazardous or physically offensive condition," this is qualified by the ensuing language: "by any act which serves no legitimate purpose of the actor" (§2, subd. 7). This offense doubtless would not apply to one unreasonably operating a factory exceeding loud noise and noxious gases in callous disregard of the surrounding residential community, since such operation could not be branded one "which serves no legitimate purpose of the actor."

With considerable reluctance--or, perhaps, in tentative fashion--a "Criminal Nuisance" section (§6) containing an offense of the indicated nature is here included. One is guilty of that crime who (subd. 1):

> "By conduct either unlawful in itself or unreasonable under all the circumstances, recklessly creates or maintains a condition which endangers the safety, health, comfort or convenience of a considerable number of perons."

This differs from the main Penal Law provision (§1530)

in several respects.

Most important, perhaps, is the requirement that the offensive conditon be "recklessly" created or maintained. Pursuant to the definition of that word which will probably be included in our general provisions--substantially as in the Model Penal Code (§2.02)--this means that the condition must be created or maintained in conscious disregard of a substantial and unjustifiable risk that it will endanger the safety, health, etc. of a considerable number of persons.

As already indicated, the existing Penal Law section (§1530) makes no mention of intent or scienter, and the case law on the subject is quite confusing, most of it indicating that the crime is malum prohibitum with no criminal intent of any sort required. It is partially this feature which imbues the crime with a civil flavor, leaving an impression that the bare creation of the condition is all that is necessary, that the offender's state of mind and knowledge of the havoc being created are completely irrelevant, and that not even civil negligence need be established. The requirement of recklessness adds an element of scienter commonly serving to distinguish criminal from tortious conduct, and renders the offense one which more logically falls within the criminal area.

The existing Penal Law section, it may be noted, declares that a public nuisance "consists in unlawfully doing an act" which has certain specified results there enumerated (§1530). The proposed provision, seeking to narrow the crime to conditions, does not speak of "doing an act" but of one who "creates or maintains a condition"(§6, subd. 1).

Another word subject to criticism in the existing section is "unlawfully"--"unlawfully doing an act" (§1530). This implies that the offensive condition must be unlawful per se; that is, in violation of some other provision of

either a criminal or administrative character. At least one decision seems to construe the section thusly [People v. Eckerson 133 App. Div. 220, 221 (2d Dept. 1909)], although the Court of Appeals, in a civil case, has referred to "unreasonable, unwarrantable or unlawful use of property" [Bolian v. P.J.G.L. Co. 122 N.Y. 18, 32 (1890)].

It seems apparent that this type of nuisance should not turn exclusively upon unlawfulness of the basic conduct or condition. A person may, in reckless and unnecessary fashion but without violating any specific ordinances or regulations, operate a factory so that it endangers the health of a community by virtue of noxious gases and excessive noise. This should be deemed a nuisance because the creation of the condition, whether otherwise unlawful or not, is unreasonable under all the circumstances. Unlawfulness (plus recklessness) may alone, in some instances, provide the basis for the crime (e.g., bituminous smoke in violation of a city ordinance), but should not constitute the exclusive foundation.

Out of these considerations, the proposed provision is so phrased as to encompass "conduct either unlawful in itself or unreasonable under all the circumstances" (§6 subd. 1).

Neither of those phrases, it must be conceded, is highly satisfactory. The phrase "unreasonable under all the circumstances" is perilously broad and leaves the entire construction to the courts in particular cases. Greater specificity in this area, however, is impossible.

Nor is the phrase "unlawful in itself" very precise. One difficulty here may occur when the unlawfulness of the conduct has no causal connection with the offensive result (e.g., a noxious factory which is operated unlawfully because of the owner's failure to renew his permit). The provison at hand is not, of course, intended to apply to such cases and

it is reasonable to expect that the judiciary would construe it to require a causal connection between the illegality and the result. While it might seem desirable expressly to include that requirement in the statute, the problem of draftsmanship is the stumbling block. Anyone attempting this project will soon find himself writing an essay on proximate cause.

The other phase of the nuisance crime occasionally prosecuted is, as indicated, the quite different one involving the conduct of immoral resorts. For previously stated reasons, there is even more doubt here whether this offense is desirable or necessary. In tentative fashion, however, it is included, with a narrowed scope, as subdivision 2 of the proposed statute (§6).

It will be recalled that this crime is primarily aimed at the conduct of resorts where invitees personally engage in immoral activity; but that it is sometimes unreasonably extended to include any place where any illegal or criminal activity regularly occurs (abortion mills, indecent shows, etc.). The endeavor here is to limit the sanction to the first and basic kind of resort and thereby prevent promiscuous spreading over a wide area of criminal activity. That is accomplished by restricting the premises or resorts covered to those "where persons gather for purposes of engaging in illegal or immoral conduct such as gambling, lewd or illicit sexual activity, and illegal narcotics activity." (subdivision 2).

C. Riot, Unlawful Assembly, Incitement to Riot

As previously seen, the common law background of this area of crime exhibits three offenses, each based upon the chronological status of a venture which, roughly speaking, starts with a gathering of people bent upon violent wrongdoing and ends with the accomplishment or attempted execution of

that purpose. The three common law crimes are: (1) unlawful assembly, dealing with the initial unlawful gathering of three or more persons; (2) "rout," involving the first overt acts committed in furtherance of the unlawful purpose; and (3) riot, the final stage comprising the execution or attempted execution of the contemplated wrongdoing.

Also as indicated, most jurisdictions have eliminated the second or intermediate crime (rout), though sometimes including elements thereof under other labels. New York, ignoring "rout," prescribes the crimes of "Riot" (§2090) and "Unlawful assemblies" (§2092).

The proposed Article, though ignoring "rout," prescribes three crimes in this field: "Riot," "Unlawful Assembly" and "Incitement to Riot."

1. Riot (§7)

Riot is, of course, a crime devoted to violent and unlawful mob action. In essence, it is an aggravated form of disorderly conduct, most of the aggravation steming from the circumstance that the resultant disorder or damage is a product of many or several persons acting in concert rather than of unorganized misconduct by one or two persons.

The Penal Law, recognizing both the mob and disorderly conduct features of the crime, requires activity by "three or more persons" and disturbance of "the public peace" (§2090). The A. L. I. Model Penal Code, also requiring participation by at least three persons, explicitly declares that their misbehavior must constitute "disorderly conduct" (§250.1, subd. 1).

In neither code is the commission by three persons of bare disorderly conduct sufficient; the disorderly conduct must be of a certain character. The Penal Law places the emphasis upon "force or violence" to persons and property (§2090). The Model Code specifies that the offender must

either intend to participate in a crime, intend "to prevent or coerce official action," use or plan to use a deadly weapon, or know that one of his colleagues is using or planning to use one (§250.1, subd. 1).

The proposed section at hand (§7) more or less combines the above elements. Along Model Code lines, it begins with the decree that " a person is guilty of riot who participates with two or more other persons in the commission of disorderly conductxxx." In addition, his intent must be either (1) "to commit a crime," (2) "to use illegal force or violence against another person," (3) "to cause property damage," or (4) "to prevent or coerce official action."

That phase of the section referring to an intent to use force against persons or property appears broader than the Model Code provision (§250.1, subd. 1). The latter does not speak of the use of such force generally, but only in connection with the employment or intended employment of deadly weapons. As a practical matter, however, this distinction is of little moment in view of the first <u>intent</u> specification of each section, permitting application of the statute where the intent is to commit a crime. Whether or not weapons are used, it is difficult to conceive of a Disorderly Conduct venture aimed at personal or property injury which does not involve an intent to commit a crime. Thus, a forcible project of that nature would ordinarily constitute Riot under the Model Code provision as well as under the instant one.

<u>2. Unlawful Assembly (§8)</u>

Speaking broadly of the area which includes riot and unlawful assembly, and treating those two common law crimes as quite similar or as aspects of one general concept, the Model Code authors speculate whether their Code should "include any offense of this sort" (Tent. Draft No. 13, p. 20).

To a large extent, their doubts stem from the assertion that, ordinarily, these crimes are covered "by other more specific prohibitions," since Riot is merely a form of Disorderly Conduct and Unlawful Assembly a form of conspiracy or attempt (id). Ultimately, the A. L. I. decided to include a crime of Riot (§250.1) but no crime of Unlawful Assembly. While the traditional unlawful assembly is basically a conspiracy and often prosecutable as such, the crime of Conspiracy may not, as a practical matter, always provide the answer to assembled groups bent upon violent public disorder. It may be noted, for example, that, while the first subdivision of the Penal Law's Conspiracy statute (§580) makes it criminal to conspire "To commit a crime," Disorderly Conduct is not a "crime" under the present law. The other specified forms of Conspiracy being extremely vague (subds. 2-6), difficulty might often be encountered, under the existing section at least, in framing a sound charge of Conspiracy. Several other problems also suggest themselves, including the Conspiracy requirement of overt acts.

With some reservations, it is here felt that the crime of Unlawful Assembly, though probably not a dire necessity, should be retained. For reasons set forth below, however, its scope is considerably narrowed.

One of the Model Code's main points in this area is that no provision should penalize "peaceful joint behavior" of a sort that produces public disorder by virtue of a hostile public response to the "assembly's" indicated objective, though public disturbance may not have been intended (Tent. Draft No. 13, pp. 22-23). In illustration, the Model Code commentary cites a questionable decision affirming a conviction for Riot of several defendants who had paraded with red flags, thus causing a violent public response and disturbance.

The gist of the decision is that the defendants knew what the public reaction would be and had no right to parade with the flags "when the natural and inevitable consequence was to destroy the public peace and tranquility" [People v. Burman 154 Mich. 150, 117 N. W. 589 (1908)]. The Model Code's Riot statute is so drafted as not to cover cases of that ilk, and its omission of any Unlawful Assembly section is prompted partly by a fear that that crime is particularly susceptible to such use.

This fear appears justified if Unlawful Assembly provisions are to take the form of that found in the Penal Law (§2092). The Penal Law crime is committed when, inter alia, persons "Assemble with intent to carry out any purpose in such manner as to disturb the public peace" (subd. 2), or, "Being assembled attempt or threaten any act tending towards a breach of the peace xxx" (subd. 3). As thus phrased, the section apparently covers assemblies having no actual purpose of public disturbance, but some other purpose--quite possibly a proper one--the accomplishment of which may indirectly or incidentally result in public disturbance. This is what the Model Code quite reasonably seeks to avoid.

It is possible, however, to draft an Unlawful Assembly statute devoid of that defect, and that has been done here (§8). The gist of the proposed section is that the assembly and each offender's intent must involve an explicit "purpose of committing acts constituting the crime of riot." By reference to the Riot section (§7), this means that one must gather with others of like objective for the purpose of planning, preparing or initiating a venture, the successful execution of which will, as the offenders specifically intend, not only produce public disorder (disorderly conduct) but the commission of a crime, the infliction of forcible injury upon

persons or property, or illegal interference with official action (§8). In that form, it seems clear, the provision does not reach assemblies having some basic goal other than disorder, violence or crime but which may indirectly--through violent public reaction--result in a public disorder.

That part of the proposed section thus far discussed, penalizing persons who deliberately assemble for the specified purposes, does not quite cover this field. An assembly may commence with a perfectly lawful and proper purpose but then develop into a gathering of riotous goal. Also, a person attending a meeting which either has or develops such a character may appear there in an innocent or negative frame of mind but ultimately join in the criminal project.

The Penal Law, taking partial cognizance of these situations, presents a separate and rather unclear section addressed to persons who do not "retire" after an initially lawful assembly has changed character (§2094).

Our proposed Unlawful Assembly section (§8) covers this phase of the crime. In short, it applies not only to one who "assembles" with others for a riotous purpose, but also to one "who,being present at an assembly which either has or develops such a purpose, remains there with intent to advance that purpose."

3. Incitement to riot (§9)

The crime of "Unlawful Assembly," as here postulated, covers, as indicated, assemblies of three or more persons preparing to commit Riot (§8). Frequently, such assemblies consist of meetings dominated by a militant leader who exhorts those present to go out and wreak the particular riotous havoc. If "two or more" of the gathering ratify the project with verbal approval or active assistance, the leader or prime culprit, along with the approvers, is guilty of Unlawful

Assembly (§8). If, however, no acceptance of his proposal by "two or more" persons is forthcoming or observable, he is not guilty of Unlawful Assembly--nor, under ordinary circumstances, of any other crime.

In short, neither the proposed nor existing Unlawful Assembly statute reaches the dangerous trouble maker who vigorously, if unsuccessfully in the particular instance, attempts to stir a group into violent mob action of a riotous nature: the fanatical rabble-rouser or hate monger who exhorts a street-corner gathering to go out and inflict personal or property injury against certain members of a minority group; the irresponsible labor union representative who eloquently urges an assembly of colleagues to rush out and wreck company property; the gang leader who tries to persuade his group to attack a rival mob, etc.

These and others of a similar breed seem more culpable than any of several assembled persons who jointly work themselves up and prepare for an abortive or ultimately frustrated riot venture. Yet, the latter are guilty of unlawful assembly while the individual <u>leader</u> offender cannot be convicted of any crime unless evidence of cooperative approval by at least two other persons is available. It is to plug that gap that a third proposed section, entitled "Incitement to riot" (§9), is added to this category of crimes. In simple terms, it applies to a person "who at an assembly of two or more persons, incites or urges those assembled to commit acts constituting the crime of riot."

It should be observed that, like the proposed Unlawful Assembly section (§8), this provision (§9) requires a direct and explicit intention of causing acts constituting the crime of Riot (§7). Also like the Unlawful Assembly section, therefore, it does not encompass the orator who merely espouses an

extremely unpopular cause, pursuit of which may well lead to trouble: the man who exhorts people to commit acts which are not per se riotous but which may indirectly result in violence and public disorder owing to public reaction. For example, it would not reach a hate monger who urges all members of a gathering to join him in a peaceful anti-Semitic demonstration in a Jewish neighborhood where violent response is not unlikely. If, however, the exhortation is to commit personal injury, to break windows, to deface synagogues, etc., the offender is guilty of "Incitement to riot" (§9) even though he fails to acquire support from a single member of his audience.

It may be contended that thus penalizing futile exhortation or rabble-rousing of this sort is unnecessary and undesirable; in short, that the offender, if successful or even partially successful, inevitably becomes guilty of Unlawful Assembly and possibly Riot, and that is sufficient. While appreciating the possible merit of that argument, the feeling here is that the type of conduct in question is so heinous as to warrant criminal sanction even though it fails to bear poison fruit.

Finally, it may be pointed out that this crime of "Incitement to riot" (§9) extends a step beyond prevailing principles as applied to the more familiar fields of Conspiracy and Attempt. Under the Penal Law pattern, one frequently may, with impunity, unsuccessfully urge others to commit a criminal act. Without affirmative acquiescence by at least one person plus at least one overt act, he is not guilty of Conspiracy (§580, subd. 1). Nor, in most instances, would he be guilty of an Attempt to commit the contemplated crime under present New York Law [Penal Law, §§2, 260; see People v. Rizzo 246 N. Y. 334, 338-339 (1927); People v. Werblow 241 N. Y. 55, 65 (1925)], although the result might

be different under the more liberal definition of "Criminal Attempt" offered by the Model Code (§5.01).

As a matter of fact, the Model Code explicitly covers the "gap" under consideration with a crime of "Criminal Solicitation" (§5.02), applying to one who "commands, encourages or requests" another to engage in criminal conduct, regardless of acquiescence by the person solicited or of the attainment of the solicitor's objective. This, undoubtedly, covers most "Incitement to riot" situations and, if eventually adopted in our revision, might well render the proposed section at hand unnecessary.

RGD/pjc
March 19, 1963

ARTICLE X

OFFENSES AGAINST PUBLIC ORDER

§ 1. Definitions

Public. "Public" means affecting or likely to affect a substantial group of persons.

Public place. A "public place" is one to which the public or a substantial group has access. Among the places included are highways, transportation facilities, schools, prisons, places of business, amusement and government functions which are open to the public, hallways, lobbies and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence, and any place, even though normally private in character, which is at the time being used by five or more persons for a lawful meeting having a lawful purpose not purely social in nature.

Transportation facility. A "transportation facility" means any conveyance, premises or place used for or in connection with public passenger transportation, whether by air, railroad, motor vehicle or any other method. It includes airplanes, railroad cars, buses, air, railroad and bus terminals and stations, and all appurtenances thereto.

§ 2. Disorderly Conduct

A person is guilty of disorderly conduct who, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:

1. Engages in fighting or in violent, tumultuous or threatening behavior;

2. Makes unreasonable noise;

3. Makes offensive, coarse or obscene utterance, gesture or display, or addresses abusive language to or concerning any person present;

4. Without lawful authority, disturbs any lawful assembly or meeting of persons;

5. Congregates with others in a public place and refuses to comply with a lawful order of the police to disperse;

6. By word or action, initiates or circulates a report or warning of a fire, impending bombing or other catastrophe, crime or impending crime or catastrophe, knowing such report or warning to be false or baseless;

7. Creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

§ 3. Harassment

A person commits harassment who, with intent to harass, annoy or alarm another, or with no legitimate purpose:

1. Insults, taunts or challenges a person in a public place in a manner likely to provoke violent or disorderly response;

2. Follows a person for an appreciable period of time in or about public places;

3. In a public place, intentionally jostles against a person or intentionally places his hand in the proximity of his pocket, wallet, pocketbook or handbag;

4. In a public place, accosts a person for the purpose of obtaining money or property from him by means of any trick, artifice, swindle or confidence game;

5. Communicates with a person, anonymously or otherwise, by telephone, telegraph or mail in a manner likely to

cause him annoyance or alarm by virtue of factors such as offensive or threatening language, the nature of the communication or communications, frequency or repetition thereof and the hour or hours thereof;

6. Makes a telephone call, whether or not a conversation ensues, without purpose of legitimate communication;

7. As a student in a school, college or other institution of learning, engages in conduct commonly called hazing.

§ 4. Loitering

A person is guilty of loitering who:

1. Loiters or remains in a public place for the purpose of begging;

2. Loiters or remains in a public place for the purpose of gambling with cards, dice or other gambling paraphenalia;

3. Loiters or remains in a public place for the purpose of committing, attempting to commit, or soliciting another person to commit, a lewd or sexual act;

4. Loiters or remains in or about a school building or grounds, not having any reason or relationship involving custody of or responsibility for a pupil nor any other specific, legitimate reason for being there, and not having written permission from the principal;

5. Loiters, remains or wanders without apparent reason or business in a place or manner not usual for law-abiding persons, under circumstances which justify suspicion that he may be engaged or about to engage in crime, and, upon inquiry by a peace officer, refuses to identify himself or fails to give a reasonably credible account of his conduct and purposes;

6. Loiters or remains in any transportation facility, unless specifically authorized to do so, for the purpose of soliciting or engaging in any business, trade or commercial transactions involving the sale of merchandise or services, or for the purpose of entertaining persons by singing, dancing or playing any musical instrument;

7. Loiters or remains in any air, railroad, subway or bus station or any appurtenance thereto for the purpose of sleeping, or under circumstances in which no specific, legitimate purpose is apparent and the actor is unable to give a satisfactory explanation of his presence.

§ 5. Public Intoxication

A person is guilty of public intoxication who appears in any public place manifestly under the influence of alcohol to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity.

§ 6. Criminal Nuisance

A person is guilty of criminal nuisance who:

1. By conduct either unlawful in itself or unreasonable under all the circumstances, recklessly creates or maintains a condition which endangers the safety, health, comfort or convenience of a considerable number of persons;

2. Conducts or maintains any premises, place or resort where persons gather for purposes of engaging in illegal or immoral conduct such as gambling, lewd or illicit sexual activity, or illegal narcotics activity.

§ 7. Riot

A person is guilty of riot who participates with

two or more other persons in the commission of disorderly conduct with intent to commit a crime, to use illegal force or violence against another person, to cause property damage, or to prevent or coerce official action.

§ 8. Unlawful Assembly

A person is guilty of unlawful assembly who assembles with two or more other persons for the purpose of committing acts constituting the crime of riot, or who, being present at an assembly which either has or developes such a purpose, remains there with intent to advance that purpose.

§ 9. Incitement to Riot

A person is guilty of incitement to riot who, at an assembly of three or more persons, incites or urges those assembled to commit acts constituting the crime of riot.

TITLE X

OFFENSES AGAINST PUBLIC ORDER AND PRIVACY

ARTICLE 1.

OFFENSES INVOLVING PUBLIC DISORDER AND INCONVENIENCE

§1. Definitions of terms.

Public. "Public" means affecting or likely to affect a substantial group of persons.

Public place. A "public place" is one to which the public or a substantial group has access. Among the places included are highways, transportation facilities, schools, prisons, places of business, amusement and government functions which are open to the public, hallways, lobbies and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence, and any place, even though normally private in character, which is at the time being used by five or more persons for a lawful meeting having a lawful purpose not purely social in nature.

Transportation facility. A "transportation facility" means any conveyance, premises or place used for or in connection with public passenger transportation, whether by air, railroad, motor vehicle or any other method. It includes airplanes, railroad cars, buses, air, railroad and bus terminals and stations, and all appurtenances thereto.

§2. Disorderly conduct.

A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:

1. He engages in fighting or in violent, tumultuous or threatening behavior; or

2. He makes unreasonable noise; or

3. In a public place, he uses abusive or obscene language, or makes any obscene gesture, to or concerning any person present; or

4. In a public place, he knowingly and lewdly exposes the private or other intimate parts of his person, or commits any lewd act; or

5. Without lawful authority, he disturbs any lawful assembly or meeting of persons; or

6. He congregates with others in a public place and refuses to comply with a lawful order of the police to disperse; or

7. By word or action, he initiates or circulates a report or warning of a fire, impending bombing or other catastrophe, crime or impending crime or catastrophe, knowing such report or warning to be false or baseless; or

8. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of himself.

§3. Harassment

A person commits harassment when, with intent to harass, annoy or alarm another, or with no legitimate purpose:

1. He assaults, taunts or challenges a person in a public place in a manner likely to provoke violent response; or

2. He uses obscene language or makes obscene gesture in a public place; or

3. He knowingly strikes, shoves, kicks or otherwise touches a person or subjects him to physical contact; or

4. In a public place, he knowingly and lewdly exposes the private or other intimate parts of his person, or commits any lewd act; or

5. He follows a person for an appreciable period of time in or about a public place or places; or

6. In a public place, he knowingly jostles against a person or places his hand in the proximity of his pocket, wallet, pocket-book or handbag; or

7. In a public place, he accosts a person for the purpose of obtaining money or property from him by means of any trick, artifice, swindle or confidence game; or

8. He communicates with a person, anonymously or otherwise, by telephone, telegraph or mail in a manner likely to cause him annoyance or alarm by virtue of factors such as offensive or threatening language, the nature of the communication or communications, frequency or repetition thereof and the hour or hours thereof; or

9. He makes a telephone call, whether or not a conversation ensues, without purpose of legitimate communication; or

10. As a student in a school, college or other institution of learning, he engages in conduct commonly called hazing.

§4. Loitering.

A person is guilty of loitering when he:

1. Loiters or remains in a public place for the purpose of begging; or

2. Loiters or remains in a public place for the purpose of gambling with cards, dice or other gambling paraphernalia; or

3. Loiters or remains in a public place for the purpose of committing, attempting to commit, or soliciting another person to commit, a lewd or sexual act; or

4. Loiters or remains in or about a school building or grounds, not having any reason or relationship involving custody of or responsibility for a pupil nor any other specific, legitimate reason for being there, and not having written permission from the principal; or

5. Loiters, remains or wanders without apparent reason or business in a place or manner not usual for law-abiding persons, under circumstances which justify suspicion that he may be engaged or about to engage in crime, and, upon inquiry by a peace officer, refuses to identify himself or fails to give a reasonably credible account of his conduct and purposes; or

6. Loiters or remains in any transportation facility, unless specifically authorized to do so, for the purpose of soliciting or engaging in any business, trade or commercial transactions

involving the sale of merchandise or services, or for the purpose of entertaining persons by singing, dancing or playing any musical instrument; or

7. Loiters or remains in any air, railroad, subway or bus station or any appurtenance thereto for the purpose of sleeping, or under circumstances in which no specific, legitimate purpose is apparent, and is unable to give a satisfactory explanation of his presence.

§5. Public Intoxication.

A person is guilty of public intoxication when he appears in any public place manifestly under the influence of alcohol to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity.

§6. Criminal Nuisance.

A person is guilty of criminal nuisance when:

1. By conduct either unlawful in itself or unreasonable under all the circumstances, he recklessly creates or maintains a condition which endangers the safety, health, comfort or convenience of a considerable number of persons; or

2. He conducts or maintains any premises, place or resort where persons gather for purposes of engaging in illegal or immoral conduct such as gambling, lewd or illicit sexual activity, or illegal narcotics activity.

§7. Riot.

A person is guilty of riot when he participates with two or more persons in the commission of disorderly conduct with intent to commit a crime, to use illegal force or violence against another person, to cause property damage, or to prevent or coerce official action.

§8. Unlawful Assembly.

A person is guilty of unlawful assembly when he assembles

with two or more other persons for the purpose of committing acts constituting the crime of riot, or when, being present at an assembly which either has or developes such a purpose, he remains there with intent to advance that purpose.

§9. Incitement to Riot.

A person is guilty of incitement to riot when, at an assembly of three or more persons, he incites or urges those assembled to commit acts constituting the crime of riot.

ARTICLE 2.

EAVESDROPPING AND RELATED OFFENSES

§10. Eavesdropping; definitions of terms.

Wiretapping means the interception and overhearing or recording of a telephonic or telegraphic communication by a person other than a sender or receiver thereof, without the consent of either the sender or receiver, by means of any mechanical or electronic device, instrument or equipment. Interception and overhearing of such communications in the course of the normal operations of a telephone or telegraph company, and overhearing or listening to a telephone conversation on a party line, do not constitute wiretapping.

Mechanical transmission of a conversation means the overhearing or recording of a conversation, without the consent of at least one party thereto, by a person not present thereat, by means of any mechanical or electronic device, instrument or equipment.

Unlawfully means without authorization of a court order issued pursuant to section eight hundred thirteen-a or section eight hundred thirteen-b of the code of criminal procedure.

§11. Eavesdropping.

A person is guilty of eavesdropping when he unlawfully engages in:

1. Wiretapping; or
2. Mechanical transmission of a conversation.

§12. Possession of eavesdropping devices.

A person is guilty of possession of eavesdropping devices when, under circumstances evincing an intent to use or to permit the same to be used unlawfully in violation of section eleven of this article, he possesses any device,

instrument or equipment designed for, adapted to or commonly used in wiretapping or mechanical transmission of a conversation.

§13. Failure to report eavesdropping.

A telephone or telegraph company, or any officer, employee or representative thereof, is guilty of failure to report wiretapping when he has knowledge of the occurence of unlawful wiretapping as defined and made criminal in section ten and in subdivision one of section eleven of this article, when he knows of the unlawful character of such wiretapping, and when he does not report such matter or attempt to cause it to be reported to an appropriate law enforcement officer or agency.

§14. Divulging an eavesdropping order.

A person is guilty of divulging an eavesdropping order when, possessing information concerning the existance or content of a court order issued pursuant to section eight thirteen-a or, section eight hundred thirteen-b of the code of criminal procedure, or concerning any circumstance attending an application, a granting or a denial of such an order, he discloses such information to another person; except that such disclosure is not criminal or unlawful when made in a legal proceeding, or to a law enforcement officer or agency connected with the application for such order, or to a legislative committee or temporary state commission, or to the telephone or telegraph company whose facilities are involved.

§15. Tampering with private communications.

A person is guilty of tampering with private communications when:

1. Knowing that he does not have the authority or consent of any person entitled to grant it, he opens or reads

and publishes, publicizes or divulges, whether in whole or in part, a sealed letter, telegram, private paper or other sealed communication, writing or written instrument of another, or a resumé of any portion of the contents thereof; or

2. Knowing that a sealed written instrument has been opened or read and divulged in violation of subdivision one of this section, he publishes or publicizes such instrument in whole or in part, or a resumé of any portion of the contents thereof; or

3. Without authority or privilege to do so, he obtains or attempts to obtain from a telephone or telegraph company, or from any employee or representative thereof, by means of stealth, deception, intimidation or in any other manner, information with respect to the content or nature of a telephonic or telegraphic communication; or

4. Being an employee of a telephone or telegraph company, he knowingly divulges to a person not entitled to such information, the content or nature of a telephonic or telegraphic communication.

§16. Tampering with private communications; defenses.

It is a defense to a prosecution for tampering with private communications that the accused:

1. Was a law enforcement officer performing official duties in the investigation or prosecution of crime; or

2. Acted at the request of a person whom he believed to be a law enforcement officer so engaged; or

3. Was furnishing information concerning crime to a law enforcement officer or agency pursuant to a duty prescribed in section seventeen of this article.

§17. Obstruction of justice by a communications representative.

1. It shall be the duty of a telephone or telegraph

company, and of any officer, employee or representative thereof having knowledge that such company's facilities are being used to conduct any criminal business, traffic or transaction, to furnish or attempt to furnish to an appropriate law enforcement officer or agency all pertinent information within his possession relating to such matter, and to cooperate fully with any law enforcement officer or agency investigating such matter.

2. A person is guilty of obstruction of justice by a communications representative when he knowingly violates any duty prescribed in subdivision one of this section.

R.G.D.
June 26,1963

11/20/62

COMMENTARY ON PROPOSED DRAFT OF ARTICLE ____: PERJURY, SUBORNATION OF PERJURY, AND FALSE STATEMENTS

Introduction

This report accompanies the proposed draft of the article on "Perjury, Subornation of Perjury, and False Statements," which is set forth as "Appendix A."

The report includes a brief look at perjury at common law and the development of New York's statutory law, analyses of New York's present statutory provisions, the American Law Institute's new Model Penal Code provisions and, finally, an analysis of the proposed draft with reference to all of the foregoing.

To supplement this commentary and to make for more convenient reference and comparison, the separate Appendices contain, in addition to the proposed draft (Appendix A): the present Penal Law provisions (Appendix B); the pertinent A. L. I. Model Penal Code provisions (Appendix C); the Model Act on Perjury (1952) by the National Conference of Commissioners on Uniform State Laws (Appendix D); and, a chart representing a 50 state survey of some of the major statutory provisions on the subject (Appendix E).

Perjury at Common Law

Perjury at common law has been defined as: "....the willful and corrupt taking of a false oath, lawfully administered in a judicial proceeding or the course of justice, with respect to a matter material to the issue or point of inquiry."[1]

The practice of perjury in England was quite widespread as far back as the middle ages, but not until the 17th century

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[1] 70 C. J. S. Perjury §1(a)(1).

did it become an offense at common law. This was due, as some legal historians contend, to the intense rivalry between the ecclesiastical courts, where the offense was first punished, and the common law courts, which habitually prevented punishment by the issuance of writs of prohibition. Thus, "....our ancestors perjured themselves with impunity."[2]

By the early 1600s, through a combination of legislative action, particularly the statute 5 Eliz. c.9,[3] and the exercise of its jurisdiction in this area by the Star Chamber,[4] the crime of perjury became firmly established in the English law. When Star Chamber was abolished in 1640 its jurisdiction and principles of handling perjury were taken over by the common law courts.

Further on in this report the common law development of some of the elements and aspects of the crime of perjury will be particularly discussed.

New York's Statutes on Perjury

The first important statutory provision on perjury was contained in the Laws of the Colony of New York, 1683. It was, in effect, a restatement of the English statute 5 Eliz. c.9 of 1562. In 1788[5] a re-enactment of the perjury statute made some changes in the penalties and added provisions for simplified forms of indictment and information. In 1801[6] minor changes were made and then in 1829,[7] in the great revision of that year, the perjury statutes began to assume

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[2]Pollack and Maitland, History of English Law, p. 541.

[3]Enacted in 1562, it was the first statute to provide for penalties--by way of fines--for subornation and for perjury itself.

[4]In 1613, Star Chamber, in Rowland ap Eliza, stated that perjury by a witness was punishable by the common law.

[5]New York Laws, 11th Session, 1788.

[6]Session Laws of 1801, Chapters 74 and 58.

[7]Rev. Stat. 1829, T. T. IV, Article First.

the basic form and substance of the present day provisions. Here, for the first time, materiality of the false statement was made an element of the statutory crime,[8] and the punishments prescribed, though not precisely the same as the present, were in line with today's provisions.[9] The revisors' notes do not explain the reasons, but it may be assumed that the substantive changes represented a codification of existing law.

The revision of 1881 based on the Field Commission Code of 1865 saw the perjury provisions placed in the Penal Code in substantially the same form as they appeared up until the 1935 revision. In the 1909 consolidation, the Penal Code became the present Penal Law, without substantive change.

Into more recent times, the State Crime Commission[10] in its 1929 Report, deplored the widespread moral turpitude that perpetuated perjury in public and private affairs.[11] It rejected the idea that punishment for the crime should be lessened, but recommended legislation to add "....a new crime to be known as 'false swearing,' triable in special sessions court,...for which the punishment is as for a misdemeanor."[12] The distinction between felony perjury and the suggested misdemeanor offense was that materiality, while an element of the first was not to be an element of the second. This recommendation was not adopted until six years later.

Succeeding the Crime Commission, the Commission on the Administration of Justice[13] also studied and reported on the

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[8]Id., §1.

[9]Id., §§2, 4.

[10]Created by Laws of 1926, Ch. 460.

[11]Leg. Doc. No. 99 (1929), p. 115.

[12]Ibid.

[13]Created by Laws 1931, ch. 186.

perjury problem,[14] and made recommendations for the adoption of court rules and statutory enactments. Their main recommendation was identical with the one proposed by the Crime Commission.[15]

That same year, 1934, saw the replacement of the Commission on the Administration of Justice by the Law Revision Commission. In its excellent report in 1935,[16] it made a number of recommendations and proposed the revision of Penal Law §1620 to set up the two degrees of perjury as previously also recommended by the two prior commissions. These proposals were adopted by the legislature in 1935. However, the two degrees were both felonies, so that the following year, Penal Law §1633 was again amended to make second degree perjury a misdemeanor.

With minor amendments and additions the perjury statutes have remained unchanged since then.[17]

New York's Present Perjury Statutes

The provisions on Perjury and Subornation of Perjury (Article 158) are covered in §§1620 through 1634 of the Penal Law. The following is an outline of these provisions, though not necessarily in the numerical order of the sections.

Section 1620 (1), defining perjury, declares a person

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[14]Report of the Commission on the Administration of Justice in New York State, 1934, pp. 829 et seq. (Leg. Doc. No. 50 (P)).

[15]Id., pp. 839-841.

[16]Law Revision Commission Report, 1935, pp. 233-324, (Leg. Doc. No. 60 [F]).

[17]Penal Law §1620 (3) was amended by Ch. 186 of the Laws of 1939 to conform false interpreting to the statute by removing the materiality requirement from the defined offense; Penal Law §1620 (4) was added by Ch. 149 of the Laws of 1957 as part of a revision of the Civil Service Law; §1621 (2) was added by Ch. 56 of the Laws of 1958 to conform to amendment of the Executive Law re notaries public; Penal Law §1631 was repealed by Ch. 891 of the Laws of 1953 because Penal Law §2447 (2) rendered it surplusage; and, Penal Law §1634 was added by Ch. 696 of the Laws of 1959 as part of a revision of Lien Law, Article 3A.

guilty thereof if he "Swears or affirms that he will truly testify....or depose...., in any action....or on any occasion in which an oath is required....or is necessary....or may lawfully be administered, and who....on such....occasion wilfully....testifies or deposes....falsely, or states.... any matter to be true which he knows to be false."

All the elements of the crime, except one, are spelled out in this subsection. The missing element--materiality of the false statement--is dealt with in §§1620-a and 1620-b and constitutes the distinction between the two degrees of perjury. If the perjurious testimony, or deposition is "....as to any material matter....", it is first degree perjury (§1620-a); if not, it is second degree perjury (§1620-b).

Penal Law §§1632 and 1632-a describe the crime of subornation of perjury in the first and second degree, respectively, as wilfully procuring or inducing another to commit perjury.

Penal Law §1633 prescribes the punishments for both crimes: First degree perjury and subornation thereof are felonies punishable by imprisonment up to 5 years and/or a maximum fine of $5,000; second degree perjury and subornation thereof are misdemeanors punishable by imprisonment up to one year and/or a maximum fine of $500.

The balance of the sections are concerned with matters of evidence, procedure, presumption and special situations. Several declare that specified conditions may not be used as defenses to perjury prosecutions, e.g.: irregularity in the taking or administration of an oath (§1621); the incompetency of a witness to testify or depose (§1623); and the fact that the witness did not know the materiality of his false statement (§1624).

Some sections create presumptions, e.g.: that swearing

in any form is lawful (§1622); that a writing is deemed complete when delivered with intent that it be published as true (§1625); that "an unqualified statement of that which one does not know to be true is equivalent to a statement of that which he knows to be false." (§1626); and that the making of contradictory sworn statements presumptively establishes the falsity of one of them (§1627).

A group of sections deals with some procedural aspects and court powers. Penal Law §1627-a provides for a simplified pleading and proof of contradictory sworn statements. Penal Law §§1628, 1629 and 1630 permit the summary committal, by a court, of a witness who probably has committed perjury before it, the binding over of witnesses and the detention of documents to prove such perjury.

Finally, there are a number of provisions concerning special situations. Thus, §1620 (2), (3) and (4) deal, respectively, with false writings that affect title to property, false interpreting, and false statements in civil service applications. Penal Law §1634, recently added, deals with false verification of statements by trustees under a particular section of the Lien Law.

All the foregoing provisions, their history and judicial interpretation, will be discussed more fully in the portion of this report dealing with the proposed draft.

The American Law Institute's Model Penal Code

As the latest and most comprehensive work on the subject of perjury, the Model Penal Code (hereinafter referred to as "MPC") provisions and the reporter's commentary were studied and analyzed in preparing the proposed draft. Its influence and the adoption of some of its concepts and substantive provisions is apparent. It should be helpful, therefore, to

examine the structure briefly at this point. In the subsequent analysis of the proposed article more detailed reference will be made to specific portions of the MPC.

Sections 241.0 through 241.3 of the MPC (see Appendix C) deal with "Perjury and Other Falsification in Official Matters." After defining a few terms (§241.0 and, by cross-reference, §240.0(4), (7)), three degrees of the crime are set forth. The highest degree (a felony) is "perjury" (§241.1(1) and deals with sworn false statements in an "official proceeding" (defined in §240.0(4) to include any official testimonial situation) which statement is "material" (as defined in §241.1(2)) and which is not believed by the defendant to be true. Materiality is stated to be a question of law (§240.1(2)). Perjury, in the MPC, though more restricted in its scope, is equivalent to first degree perjury under the Penal Law. Whereas the latter encompasses all types of false statements under oath, the MPC is limited to false statements in testimonial situations.

The middle degree (a misdemeanor) takes in two general situations: the "False Swearing in Official Matters" (§241.2(1)) and the "Unsworn Falsification to Authorities" (§241.3(1)). The first situation is a step down from the higher degree of "perjury." Where the false swearing occurs in an official proceeding but does not involve a material matter, it constitutes this lesser degree (§241.2(1)(a)). In this respect it makes the same differentiation as does Penal Law §1620-b, our second degree perjury. The MPC, however, covers another, separate situation in §241.2(1)(b)--where the falsification is made with respect to a material matter, not in an official proceeding, but with intent "to mislead a public servant in performing his official function." Then, in a new departure, the MPC makes it a crime, where there is intent to mislead a public servant, to make or use unsworn written false statements (§241.3(1)).

This has no counterpart in our Penal Law or in that of any other state. It was suggested, their reporter says, by the Federal Code (18 U. S. C. §1001). The proposed draft does not include the latter provision.

The lowest degree (petty misdemeanor) under the MPC formulation, deals with two situations, paralleling their middle degree. First, false swearing where the statement is one required by law to be sworn to (§241.2(2)). "It applies only to cases of immaterial falsification in official matters not involving a proceeding."[18] Thus it is a further step down from the middle degree. The stated purpose of the requirement that the statement must be one required by law to be sworn, is to exclude from the operation of this provision those situations involving falsification in private affidavits. The other petty misdemeanor offense covers the "Statements 'Under Penalty'" (§241.3(2)) which refers to unsworn written statements made on a form which bears an authorized notice that false statements are punishable. This provision has been adopted in the proposed draft for the reasons hereinafter stated.

Like the present New York provisions, it is no defense that the false statement was mistakenly believed to be immaterial (second sentence of §241.1(2)); that the oath was irregular; and that the declarant was not competent to make the statement (§241.1(3)). A provision concerning inconsistent statements (§241.1(5)) is substantially similar to the Penal Law provisions on contradictory statements.

Two situations which, by prevailing case law in New York as well as in other jurisdictions, constitute matters of defenses to perjury prosecution, are here codified: The

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[18]MPC Tent. Draft No. 6, p. 140.

provisions in §241.1(4) concerning retraction of the false statement; and in §241.1(6) concerning the necessity for corroboration where the sole evidence of perjury rests on the testimony of a single witness other than the defendant. Both these provisions are incorporated in the proposed draft and will be more fully discussed below.

This, then, with only the additional statements that the provisions on irregularity, retraction, inconsistent statements and corroboration (§241.1(3)-(6)) are equally applicable to false swearing and unsworn false statements (§§241.2(3) and 241.3(3)), outlines the MPC's material on the subject. As previously indicated, individual provisions will be discussed more fully in the following section.

The Proposed Draft

For as long as people have made statements under oath, so long has perjury been prevalent. In legal proceedings it casts a constant shadow and countless writers, public figures, committees and study groups have drawn attention to it, inveighed against it and sought means to control it. The solutions proposed are many in number and variety. Yet, it seems, none can hope to attain more than moderate success. Why? Professor Herbert L. Packer's answer probably comes as close to the truth as any, when he comments: "Although psychological explanations of the law are hazardous, it may be that the law of perjury in part reflects the ambivalence of our thoughts about lying."[19]

This draft proposes no radical or wholly new solutions, but attempts to present a practical and workable formulation not too dissimilar from the present structure. In considering

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[19]Packer, Offenses Against the State, 399 Annals 86 (1962).

the problem of perjury, some concepts are and always have been, particularly troublesome. These will be discussed in the context of the individual sections that deal with these problems.

As to format, this report will discuss the sections of the proposed draft seriatim, followed by comments on provisions presently in the Penal Law, but which are omitted from the proposed article.

§1. Definitions

Strictly speaking, only the first two phrases, "swear falsely" and "testimonial proceeding" are defined. The purpose of the others, wherein the operative word is "include," is to render the later substantive provisions clearer and sharper by cutting down the repetition of excess words and phrases.

(a) "Swear falsely"--This definition contains the six basic elements which, under this article, are common to all degrees of perjury. They are: (1) a statement (2) intentionally made, which is (3) false, made (4) under oath (5) where an oath is required by law and (6) not believed by the maker to be true. Upon this definition can then be superimposed the various other necessary elements which must be present to constitute the crime in its differing degrees. This definition refers to a "statement," a word not specifically defined here since it is used in its ordinary, accepted meaning. Note, however, that "statement" is defined in the MPC (§241.0(2)) because it includes "a representation of opinion, belief or other state of mind" under certain conditions. The concept is rather vague and might well tend to confuse rather than clarify the kind of statement to which perjury may attach.

(b) "Testimonial proceeding"--This definition is

substantively similar to the MPC definition of "official proceeding" (§240.0(4)). It is limited to those situations in which testimony is heard, but is broad in the range of possible testimonial situations.[20]

(c) "Oath"--The use of "oath" to include other forms of affirmation which are equivalent thereto, is suggested by present Penal Law §1621(3).

(d) "Swear"--This inclusion is a corollary of "oath" in the previous subsection.

Perjury

The following three sections (§§2, 3 and 4) describe the three degrees of the crime of perjury. In each the defendant has intentionally made, under oath required by law, a false statement which he did not believe to be true. The factors that determine whether such action constitutes a crime and if so, of what degree, are (1) the occasion upon which the perjury takes place and (2) the nature of the false statement. The lowest, or third degree, says that swearing falsely, as that term is defined, constitutes a crime. It forms the base upon which the successively more aggravated types of perjury are built, and includes within itself all the higher degrees. In the middle, or second degree, the required additional elements encompass two situations--one testimonial, the other which may be testimonial or may be a written false statement: (1) False testimony given in a testimonial proceeding, but not as to a material matter; and (2) the false statement concerns a material matter not made in a testimonial proceeding, but rather made with intent to deceive a public official. Finally, the highest,

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[20]It would include, for example, examinations before trial taken before a notary public (Civil Practice Act §301; Civil Practice Law and Rules §3113(a)(1)) and testimony before arbitrators (Civil Practice Act §1456; Civil Practice Law and Rules §7505).

or first degree, covers only the situation where false testimony as to a material matter is given in a testimonial proceeding.

The proposed formulation, unlike the present law, does not cover the false private oath. Under Penal Law §1620(1), perjury may be committed"....on any occasion in which an oath....may lawfully be administered.... ." This would include an affidavit given in a private transaction. A party injured by his reliance on another's false statement in such a situation generally has adequate civil remedies to protect his interests. In many instances, in other articles of the Penal Law, sanctions are presently imposed for acquisition of property by fraudulent misrepresentation.[21] No high public purpose is served by also subjecting such behavior to prosecution for perjury. As the MPC reporter points out, the imposition of criminal liability for falsification in private matters may lead to abuse.[22] Of course, if a false private oath leads to litigation or arbitration, the proposed perjury provisions will apply to sworn falsifications in that "testimonial proceeding."

§2. Perjury in the Third Degree

As previously stated, this lowest degree of the crime includes within it both of the higher degrees. Simply, if one intentionally makes a false statement under oath, he commits third degree perjury. There is the condition, however, built into the definition of swearing falsely, that the actor swore to the truth of the statement under compulsion of law. The effect of this condition is to exclude from the application

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[21] *E.g.*: P. L. §§926, 926-a, 932, 939, 947, 1293-b.

[22] MPC Tent. Draft No. 6, p. 141 and Proposed Official Draft, note p. 206.

of the criminal law, false statements under oath made in purely private transactions, i.e., where the actor made the statement under oath because he agreed to do so, not because the law required him to swear to it. The reasons for withholding criminal sanctions from the private false oath situation were indicated above.[23] This section is the same in substance, though not in language, as MPC §241.2(2).

§3. Perjury in the Second Degree

The second degree encompasses two situations. The first omits the element of materiality and bears precisely the same relation to the higher degree that present Penal Law §1620-b bears to §1620-a. Also, it is substantially the same as MPC §241.2(1)(a). Since, however, this first subsection deals only with perjury committed in a "testimonial proceeding," the second situation is added. Here the perjury may or may not be material but is not committed by way of testimony in a proceeding. If the false statement is made to a public official with intent to mislead or deceive him, the crime is committed. This situation will include sworn falsifications, oral or written, such as the filing with a judicial or administrative official of sworn reports or affidavits.[24] This provision, too, parallels MPC §241.2(1)(b).

§4. Perjury in the First Degree

Scope

The major difference between the present first degree

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[23]See, supra, p. 12.

[24]E.g.: False affidavit of justification on posting of bail for a friend (People v. Davis, 122 App. Div. 569); False statement re prior criminal record in application for pistol permit (People v. Joseph, 173 Misc. 410); False verified account of receiver of rents of foreclosed premises (People v. Faber, 257 App. Div. 473).

perjury (Penal Law §1620-a) and the proposed section, is one of scope. Under present law any false material statement under oath--be it oral or written, made in the course of testimony or in an affidavit, whether required or merely permitted to be sworn to, may be subject to first degree prosecution. The scope of the proposed section, however, is not so broad.

From the point of view of the people of this State, the most dangerous type of perjury is that committed in trials and hearings because perjury's greatest potential for mischief lies in the fact that its prevalence tends to undermine the effective administration of justice. For this reason it is proposed here to reserve the highest degree of the crime for the perjury which occurs in the course of testimony in a judicial or quasi-judicial situation.

This is not to say that perjury committed on other occasions or by means other than false testimony, is not a serious problem. It is that and is made subject to stringent penal sanctions. The point, however, is that these other situations in which perjury occurs are not of like danger to the body politic. They should, therefore, constitute lesser degrees of the crime. The present first degree perjury provision makes no such distinction so that its broad reach perhaps blunts the thrust of the law in precisely that area where its application is most vital.

Materiality

This section, as does the first degree perjury provision of Penal Law §1620-a, requires that the falsification be of a "material matter." No aspect of the law of perjury has been more troublesome or created more controversy among courts and scholars than this element. The decision to effect no change in this respect from the existing statutory requirement

was arrived at only after extensive examination into the antecedents and judicial history of "materiality." A brief account of this background may be helpful in evaluating this decision.[25]

The requirement of materiality seems to have originated with the posthumous writings of Lord Coke. In setting forth the elements of the crime of perjury, he says, with respect to a false statement, that it must be "in a matter material to the issue, or cause in question. For if it be not material, than though it be false, yet it is no perjury, because it concerneth not the point in suit, and therefore in effect it is extrajudicial."[26] Coke cites Bracton as his authority for this statement but, as legal historians point out, a close examination of Bracton might indicate that Coke was misinterpreting him. However, from that time forward courts invariably cited, and continue to cite, Coke on this point.

In New York, although at various times from 1665 to 1801, statutes were adopted concerning perjury, it was not until the revised statute of 1829 that materiality was specifically mentioned in defining the crime.[27] The revisors' notes fail to explain the reason for the inclusion, but it may reasonably be assumed to be a codification of existing law. From then on, materiality remained an element of the statutory crime until the revision of 1935. In that year, materiality was deleted from the definition of perjury in Penal Law §1620 and, in two newly added sections (dividing the crime into two degrees) materiality became an element of first degree perjury (§1620-a), but not of the second degree crime (§1620-b). Such

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[25]For a fuller exposition, see: N. Y. Law Rev. Comm. Rep. (1935) pp. 235-251, 255-284; N. Y. Law Rev. Comm. Rep. (1939), Leg. Doc. (1939) No. 65 (G), pp. 13-22.

[26]Coke, Third Institutes (1644), p. 167.

[27]N. Y. Rev. Stat., 1829, Tit. IV, Art. First, §1.

is the present status.

Of more interest and pertinency, is the judicial interpretation given to the doctrine of materiality. The first statement on the subject in the Court of Appeals was made in Wood v. People, 59 N. Y. 117 (1874). The court there announced a fairly broad interpretation of materiality, saying at p. 123:

> "It is not necessary that the false statements should tend directly to prove the issue in order to sustain an indictment. If the matter falsely sworn to is circumstantially material or tends to support and give credit to the witness in respect to the main fact, it is perjury."

Ten years later the question was again considered in People v. Courtney, 94 N. Y. 490 (1884). Defendant, in a prior trial for forgery, had testified that he never used any other name or served time in any prison. On this perjury trial it was proved that defendant had served time in prison under another name. The court, rejecting defendant's claim that these false statements were immaterial in the prior trial, said, at p. 494:

> "....there is no just reason for refusing to treat false swearing as perjury whenever the testimony is relevant to the case, although it may not directly bear upon the issue to be found."

Twenty-five years passed before the Court of Appeals again had occasion to examine the question. In the interim, two Appellate Division cases followed the broad interpretation of materiality expressed in the Wood and Courtney cases.[28] Then, in 1909, two cases came before the Court of Appeals. The first, People ex rel. Hegeman v. Corrigan, 195 N. Y. 1, presented no particular difficulty with respect to materiality, following the tenor of the reasoning in Wood and Courtney. The second case, however, People v. Teal, 196 N. Y. 372, is

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[28] People v. Root, 87 N. Y. S. 962 (App. Div. 4th Dept. 1904); People v. Davis, 107 N. Y. S. 426 (App. Div. 1st Dept. 1907).

another matter. As a leading case, it has proved a very controversial one and the opinion of the majority of the court (three justices dissented) has been severely criticized.

The Teal case involved a conviction for attempted subornation of perjury. In a pending divorce action wherein the complaint alleged a single specific act of adultery, Teal attempted to induce a witness to testify falsely that the defendant husband had committed another act of adultery. Reversing a unanimous affirmance by the Appellate Division of Teal's conviction, the Court of Appeals held that the alleged perjurious testimony did not relate to a matter material to the issue. The majority stated that the single issue in the divorce action was the one specified adulterous act and that evidence concerning another act was (incompetent, irrelevant and) immaterial. One must conclude that the majority made no distinction between the materiality of the statement and its admissibility under the state of the pleadings at the time of Teal's attempt.

In a vigorous opinion, the dissenting justices stated the view that the thing to which the testimony must be material is not "the issues" in a narrow sense, but the results sought to be obtained in the action, i.e., the divorce.

Since 1909 the Court of Appeals has not dealt directly with the interpretation of materiality, but a number of Appellate Division decisions have spoken on the subject. With the Teal decision before them, most of these appeals have resulted in reversals of convictions on the ground that the false statement involved was not material.[29]

The problem of materiality does not lend itself to an

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[29] E.g., People v. Peck, 146 App. Div. 266 (4th Dept. 1911); People v. Moris, 155 App. Div. 711 (4th Dept. 1913); People v. Barbuti, 207 App. Div. 285 (2nd Dept. 1923).

easy or quick solution. Among the possible approaches, the two foremost ones are the surgical and the therapeutic. The suggestion that materiality be excised entirely as an element of perjury is not new. In 1935, the Law Revision Commission stated: "It is here proposed, therefore, that there be but one degree of the offense; that materiality be eliminated from it entirely;.... ."[30] More recently, the Model Act promulgated by the Commissioners on Uniform State Laws in 1952 provided that: "Lack of materiality of the statement is not a defense...."[31] In five states, today, materiality is not an element of perjury.[32]

The second approach is the one adopted by the MPC, which includes a definition of materiality in their perjury section (§241.1(2)), as follows:

> "Falsification is material, regardless of the admissibility of the statement under rules of evidence, if it could have affected the course or outcome of the proceeding."

Its commentary states the expected result of this definition to be: "The Teal case would be overruled, since the falsehood there could plainly have affected the course, if not the outcome, of the proceeding...."[33]

The proposed section rejects both these approaches. No compelling reason exists for eliminating materiality. The difficulty, at least in New York, is not created by the doctrine itself, but by its application on a case by case basis. Neither does the MPC solution, which is to define materiality in a very broad frame of reference, recommend itself. Their

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[30] Law Revision Commission Report, 1935, p. 319.

[31] See Appendix D, §4(2).

[32] Alaska, Kentucky, New Hampshire, New Jersey, Rhode Island (See Appendix E).

[33] MPC Tent. Draft No. 6, p. 111.

commentary claims that the definition does not differ substantially from prevailing law.[34] In the broad context of prevailing law throughout the United States and England, that undoubtedly is true, but with reference to New York law alone, it is doubtful. Beyond that, the MPC's test for determining materiality: "....if it (the false statement) could have affected the course or outcome of the proceeding." is so vague that it furnishes no real standard to guide courts, counsel or juries.

Therefore, what this draft does is to leave the doctrine where it finds it today--still in the process of evolution. It is submitted, that including a definition of materiality, be it as restrictive as the rule in the Teal case, as broad as the one in the MPC, or any formulation between these extremes, would serve no useful purpose.

A subsidiary problem associated with the doctrine of materiality has also proved to be highly controversial. Who has the legal duty to determine what testimony is material--the court, as a matter of law or the jury as one of fact? Prior to the revision of 1935 which split perjury into a two degree crime, the generally accepted and oft-quoted authority was People ex rel. Hegeman v. Corrigan, supra, wherein the court said, at p. 9:

> "Whether in a prosecution for perjury the testimony, the falsity of which is charged, is material or not is a question of law for the court."

But, clear as this statement may be, in the years between its enunciation (1909) and 1935, it was not always followed; three decisions expressed three different shades of opinion. In one, the court, carefully distinguishing Corrigan, stated

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[34] Id., p. 109.

that the question of materiality was for the jury to decide.[35] On the other hand, in a second case, the court stated: "Now I have held, as a matter of law,....that the denial made by the defendant here was not material in the issue involved...."[36] In a third case, the court strode a middle line, saying: "Ordinarily, materiality is a question of law for the court....; but, under certain peculiar facts, the question as to whether the false testimony in issue is material may become a question for the jury...."[37]

The latest and most important statement on the subject was made recently in People v. Clemente.[38] The majority (3-2) of the Appellate Division justices, after stating that one of the purposes of the 1935 amendment was to give juries a choice of finding materiality and convicting of first degree perjury or of finding lack of materiality and convicting of the second degree, concluded that: "....the purpose can be served and the law carried out only by submitting to the jury the question of materiality." The court did add, however, that the question of materiality need not be posed nakedly for the jury's determination--the trial court should, "under an appropriate instruction," make the jury understand that it must determine the question of materiality as an essential element of the crime.

The MPC disagrees specifically with the holding of the Clemente case and therefore states flatly, in §241.1(2): "Whether a falsification is material in a given factual situation is a question of law." In like manner, the Uniform Model

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[35] People v. Redmond, 179 App. Div. 127 (2nd Dept. 1917).

[36] People v. Kresel, 147 Misc. 241 (Sup. Ct. N. Y. Co. 1932).

[37] People v. Miro, 151 Misc. 164 (Gen. Sess. N. Y. Co. 1934).

[38] 285 App. Div. 258, 136 N. Y. S. 2d 202 (1st Dept. 1955) affirmed without opinion, 309 N. Y. 890.

Code on Perjury, §4(2), says that materiality "....is a question of law to be determined by the court."

In this draft no statement is made concerning whose obligation it is to find materiality. As in the case of the doctrine of materiality itself, it is considered that this problem, which is still in a state of development by the courts of New York, should not now be disturbed by legislative fiat. If future developments indicate an urgent need for a positive statutory statement, further amendment of the law could then be considered.

§5. Subornation of Perjury

This section is derived from present Penal Law §§1632 and 1632-a, without substantive change, except that the scope of the section is extended to cover also third degree perjury. It is interesting to note the way in which this area is handled in the MPC. There, no specific subornation provision is included. After admitting that every jurisdiction treats the crime of subornation of perjury separately, the MPC reporter dismisses it all with the comment that it "....appears to be only a superfluous restatement of accomplice liability."[39] From a strictly technical point of view, that is probably a correct appraisal. New York, however, has always specifically stated the crime of subornation in its statutes, and there is no strong reason to omit it now. On the contrary, if the MPC theory were followed, it could jeopardize the finding of an attempt to suborn perjury.

§6. Inconsistent Statements

This section is derived from present Penal Law §§1627 and

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[39]MPC Tent. Draft No. 6, p. 140.

1627-a, which refer to "contradictory statements." The term "inconsistent statements" is preferred because "....statements may be rationally incompatible without literal contradiction."[40] This proposed section differs in a number of ways from the present Penal Law provision and, in some respects, is influenced by the counterpart MPC provision (§241.1(5)).

The scope of Penal Law §§1627 and 1627-a is not readily apparent from a reading of the sections, but a glance at their legislative history and judicial interpretation may shed some light. Prior to 1936, Penal Law §1627 required that a contradictory statement which presumptively established the falsity of the false statement set forth in the indictment, must be in a sworn writing.[41] In 1936 this section was amended to permit the contradictory statement to be contained also "....in any testimony given in any action or special proceeding." At the same time Penal Law §1627-a was added. These sections were interpreted recently in People v. Lillis, 3 A. D. 2nd 44 (4th Dept. 1956). The court, after a bit of difficulty in reconciling §§1627 and 1627-a, concluded, with respect to §1627-a, that:

> "Legislative recognition of the dangers inherent in the 'contradictory statements' technique appears in two ways: (1) Its use is limited to cases of perjury in the second degree---: (2) Section 1627-a is expressly limited to 'occasions in which an oath is required by law.'"

The section proposed in this draft is both broader than §1627-a as interpreted above and more limited. This draft does not limit the application of the provision only to the lower degrees of perjury, so that conviction for making inconsistent

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[40] Id., p. 134.

[41] See: People v. Glass, 191 App. Div. 483 (2nd Dept. 1920).

statements, depending on their intrinsic qualities, would subject the offender to punishment for first, second or third degree perjury, as the case might be.

The provision is, however, more limited in scope because it is restricted to inconsistent statements (1) "both having been made within the period of the statute of limitations"; and (2) "within the jurisdiction of this State." The first of these is suggested by the like provision in MPC §241.1(5). As their commentary points out: "There is disturbing opportunity for abuse in conducting inquiries into ancient misdeeds of the witness, with the object of eliciting a denial that can then be charged as perjury, thus indirectly punishing for an old offense."[42]

The second restriction, requiring both statements to have been made within the jurisdiction of this State, is new. Its purpose can best be shown by the following hypothetical situation: Assume that X testified as a witness in a trial in Florida, then subsequently appeared before a grand jury in New York and testified in a manner inconsistent with his Florida testimony. Absent Penal Law §§1627 and 1627-a, if the New York testimony were false, presumably, X could be indicted for perjury in New York, but if such testimony were true, no crime has been committed in New York. However, X could be prosecuted and convicted under Penal Law §1627-a since the People are not required to prove which, if any, statement was true. Neither does the MPC formulation solve the problem since it is there necessary for the prosecution to prove "only that one or the other was false." If it is thus proved that the Florida statement was false, the New York one presumably was true and no perjury was actually committed in New York.

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[42]MPC Tent. Draft No. 6, p. 121.

By requiring that both inconsistent statements be made in New York, it then becomes unimportant which one was true and which was false--one of them was false and since it was made in New York, the crime was committed in this State.

§7. Retraction

This section codifies a rule of law in New York with respect to perjury prosecutions. Our courts usually refer to the doctrine as "recantation," but the term "retraction" is preferred in this draft because recantation suggests an ecclesiastical connotation.

The question presented by this defense is as the U. S. Supreme Court has put it: "Does retraction neutralize false testimony previously given and exculpate the witness of perjury?"[43] For many years the opinion of the Appellate Division, First Department, in People v. Gillette, 126 App. Div. 665 (1908) represented the New York rule. There, the defendant, testifying before a grand jury, first made one statement, then later, but while still on the witness stand, retracted it and made a contrary statement. Reversing a conviction for perjury, the court said that inducements should be held out to witnesses to tell the truth by penalizing those who do not do so. The inducement would be destroyed if a witness could not correct a false statement except by running the risk of a perjury conviction. This holding was generally followed and relied on.[44]

Then, in 1937, came the U. S. Supreme Court decision in

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[43] U. S. v. Norris, 300 U. S. 564 (1937).

[44] In People v. Markan, 206 N. Y. S. 197 (Ct. of Gen. Sess. N. Y. Co. 1924) the court, although citing the doctrine with approval, distinguished the Gillette case and refused to apply it where defendant retracted a false statement four months later, but before the action was decided.

U. S. v. Norris, 300 U. S. 564. The defendant, a U. S. Senator from Nebraska, testified before a Congressional committee that he had received no money for the conduct of his primary campaign. The next day, after hearing another witness testify to the contrary, defendant, at his request, again took the stand and admitted receiving money. On appeal from a perjury conviction, defendant argued that permitting the defense of retraction promotes the discovery of truth and, if made before the proceeding is concluded, can do no harm. The Supreme Court, affirming the conviction, rejected this argument, saying, at p. 574:

> "The argument overlooks the tendency of such a view to encourage false swearing in the belief that if the falsity be not discovered before the end of the hearing it will have its intended effect, but, if discovered, the witness may purge himself of crime by resuming his role as witness and substituting the truth for his previous falsehood."

Then, reviewing the authorities--of which there were very few--the court sloughed off the holding of the Gillette case, remarking that the New York Court of Appeals had not yet spoken.

Since then, the Court of Appeals has spoken. In 1957, in People v. Ezaugi, 2 N. Y. 2d 439, it considered the availability of retraction as a defense to a prosecution for first degree perjury. Defendant, a New York City detective, testified falsely before a grand jury concerning the substance of his conversation with an informer. Unbeknownst to the defendant, the district attorney possessed a tape recording of this conversation. Before leaving the stand, defendant was given an opportunity to change his story, but he persisted in his fabrication. After leaving the grand jury, defendant discovered that the truth was known. Receiving permission he reappeared before the grand jury a few days later and retracted. He was convicted of perjury although he pleaded the defense of

retraction and relied on the Gillette case.

Affirming the conviction, the majority of the Court of Appeals (5 to 2) held that the rule of the Gillette case was not of universal applicability for to so apply it would encourage perjury, especially when a witness doesn't retract until he becomes convinced that his perjury no longer deceives. The court then set down the following rule:

> "Accordingly we hold that recantation as a defense is primarily designed to correct knowingly false testimony only if and when it is done promptly before the body conducting the inquiry has been deceived or misled to the harm and prejudice of its investigation, and when no reasonable likelihood exists that the witness has learned that his perjury is known or may become known to the authorities." (p. 443)

This, then, is the rule on retraction in New York today; stricter than the Gillette doctrine was thought to be, but more liberal than the Federal rule as enunciated in the Norris case.[45] The proposed section, like the counterpart MPC provision (§241.1(4)), is based on the above-quoted holding of the Ezaugi case. In place, however, of the court's requirement that the retraction be "done promptly," the draft permits retraction "in the course of the proceeding." If there is a temporal difference between the two, it is submitted that the purposes of justice are equally well served if the retraction is something less than "promptly" made, so long as, at the time when the false statement is retracted, it has not affected the proceedings and has not been or was not then likely to be exposed.

So far as the law of other states is concerned, almost all deal with retraction outside the statutory scheme. Two

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[45]For the latest case on the subject, which rejects Gillette and follows Ezaugi, see: People v. Ashby, 17 Misc. 2d 413 (Sup. Ct. Ulster Co. 1959), rev'd on other grounds, 9 App. Div. 2d 464, rev'd and conviction reinstated, 8 N. Y. 2d 238.

states--the two latest to revise their penal laws--do have statutory provisions. Wisconsin unequivocally rejects retraction as a defense,[46] while Illinois permits it in a limited situation.[47]

Before leaving this subject, it may be interesting to note the ancient Hebrew law on retraction:

> "No witness may withdraw or change any part of his testimony two seconds after the examination is concluded, except when his additional testimony further explains it; but if the withdrawal or change is made on the same second of uttering or before another witness testifying immediately after him to the same facts stops or completes his testimony, then the first may make a change or withdraw it (Shevues 36)."[48]

§8. Matters Not Constituting Defense

The three subsections herein are derived, respectively, from Penal Law §§1621, 1623 and 1624. They have been grouped into one section because each of them is concerned with a situation which does not constitute a valid defense to a perjury prosecution. For the most part, the changes are formal and not intended to affect the substance of these sections.

(a) New York has long recognized that technical irregularities in the administration of an oath should not be seized upon as a defense to a perjury prosecution, and Penal Law §1621 so provides. The language of subdivision (1) of that

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[46]Wis. Stat. §946.31(2) provides "It is not a defense to a prosecution--that the perjured testimony was corrected or retracted."

[47]Ill. Rev. Stat. c. 38, §32-2(c) provides, following a provision for proof of falsity by contradictory statements, "Where the contradictory statements are made in the same continuous trial, an admission by the offender in that same continuous trial of the falsity of a contradictory statement shall bar prosecution therefor under any provisions of this Code."

[48]1 Jewish Code of Jurisprudence, p. 49 (5th Ed., Kadushin, J. L., translator, 1928).

section is continued in this draft. In 1958 Penal Law §1621 was amended to add subdivision (2) concerning certain defects in the authority of notaries public. This resulted from amendment of the Executive Law to validate, prospectively, acts of notaries, notwithstanding certain specified defects. The Law Revision Commission, which drafted these changes, deemed it necessary to make this conforming change in Penal Law §1621.[49] The substance of that subdivision is expressed in this draft by the phrase "....that the authority or jurisdiction of the notary public or commissioner of deeds was defective, if such defect was excusable under any statute or rule of law."

It should be noted that, although a defense to a perjury prosecution may not be predicated on irregularity of the oath, the defense that the person administering the oath had no authority to do so is a good one.[50]

Basic to the crime of perjury is the requirement that the falsification was made under oath or such other formality as the law recognizes. Its purpose is to impress the declarant with the solemnity of the occasion and to stress the necessity for truthfulness. Much criticism has been leveled at the unimpressive manner in which oaths are generally administered and suggestions have been advanced for enhancing their impact and efficacy.[51] Legislation probably is not the most appropriate

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[49] Law Revision Commission Report, 1958, pp. 457, 463-464 (Leg. Doc. No. 65 E).

[50] E.g.: People v. Siegel, 102 NYS 2nd 551 (Kings Co. Ct. 1950), which held that where the New York City Administrative Code authorized only the Comptroller or Deputy Comptroller to administer an oath, a witness sworn by the Chief Examiner in the Comptroller's office was not duly sworn; People v. Gade, 6 NYS 2nd 1018 (Rochester City Ct. 1938), which held that an affidavit in support of an information, which was sworn to before a commissioner of deeds, was invalid because the oath was not administered by the court or by one authorized by the court.

[51] See: Report of New York State Commission on Administration of Justice, 1934, p. 838; and Law Revision Commission Report, 1935, p. 323.

vehicle for alleviating this condition, but judicial authorities could well consider the advisability of promulgating court rules requiring the consequences of false testimony to be brought home to each witness at the time he takes the oath.

(b) This subsection, the substance of which is also included in MPC §241.1(3), states the rule that although a person is not a legal or competent witness in a case, if he was actually admitted by the court and he testifies, then he commits perjury if his testimony is wilfully false.[52] The predecessor to Penal Law §1623 was enacted on recommendation of the Field Commission, whose note on this subject cites Van Steenburgh v. Kortz, 10 Johns. 166 (1813). In that case a judge had erroneously issued an attachment against plaintiff based only on the sworn testimony of defendant, which was false. The court held that "perjury may be assigned in the oath so erroneously taken" (p. 169). In Chamberlain v. People, 23 N. Y. 85 (1861), defendant was convicted of perjury because in a prior divorce action he had testified falsely to non-access to his wife after marriage. Such evidence was clearly inadmissible but the court held that perjury could be predicated on it. So, too, in People v. Trumpbour, 19 N. Y. S. 33, affd 135 N. Y. 639 (1892), where defendant verified a report under oath but was not one of the persons required to do so by statute, his action was not extrajudicial, and he could properly be convicted of perjury for falsification thereof. The effect of this rule is salutary and its retention is therefore recommended.

(c) This subsection continues the provision found in the first part of Penal Law §1624 and adopted in MPC §241.1(2). Its effect is to subject to perjury prosecution people who lie

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[52] Bishop on Criminal Law, (9th Ed. 1923) §1019; accord, People v. Bowe, 34 Hun. 528 (1885).

about matters they believe to be unimportant.[53] As a practical matter, permitting a defense of mistake probably would prevent convictions except where the significance (materiality) of the testimony was very obvious to the jury. The balance of Penal Law §1624 is omitted from this draft because, apparently, it is "peculiar"[54] and certainly is ambiguous.

§9. Corroboration and Presumptions

This section contains three rather unrelated provisions which have been brought together to avoid unnecessary proliferation of the number of sections.

(a) This provision on corroboration, like the retraction provision in §7, represents a codification of a rule of law in perjury cases in this State. It has variously been described as the "two witness rule" or the "oath against oath" principle, and represents another controversial area in the law of perjury. Generally, in criminal prosecutions, no restrictions are imposed on the degree of proof necessary to convict, beyond the "reasonable doubt" provision (Code of Criminal Procedure, §§389, 390).[55] In the proof of perjury, however, by prevailing case law "....where one oath is placed against another, there must be two witnesses to prove the charge, or in case only one witness is produced, there must be independent corroborating circumstances..." People v. Doody, 172 N. Y. 165, 172 (1902).

This rule became part of the common law about 200 years ago. Before then, the Court of Star Chamber, wherein perjury

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[53]MPC Tent. Draft No. 6, p. 112.

[54]Id., p. 108, note 13.

[55]In a few instances there are statutory requirements of corroboration. E.g.: C. C. P. §396 in the case of treason; Penal Law §§71, 103, 2013, 2177 in the case of certain sex crimes.

was almost exclusively tried, was conducted according to the rules of procedure of the ecclesiastical courts. One of these was the "two witness rule." King's Bench, taking over the jurisdiction of Star Chamber, adopted also the tradition of the two witness rule. In addition, in criminal cases other than perjury, since the accused was not permitted to testify, the oath of only a single witness against him was at least something against nothing. In perjury cases, however, the defendant's oath was always, in effect, in evidence, so that if the prosecution relied on the oath of a single witness, it became a situation merely of oath against oath. The common law, therefore, retained the rule.[56]

In New York, though it was considered in numerous cases in the lower courts,[57] the rule has been stated in the Court of Appeals only in People v. Doody, supra.[58] Almost invariably, when the rule is applied, it results in reversals of convictions by the Appellate Division or in acquittals in the lower courts. Undoubtedly, the holding of the U. S. Supreme Court in Weiler v. United States, 323 U. S. 606 (1945) has strengthened the application of the rule in New York. This leading case squarely

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[56]It is now a statutory requirement in England under the Perjury Act of 1911, 1 and 2 Geo. 5, c. 6, §13. In this country, four states mention corroboration in their statutes. The rule is included in the statutes of Ohio, Oregon, and Texas; New Jersey specifically rejects the rule.

[57]E.g., People v. Henry, 187 N. Y. S. 673 (App. Div. 1st Dept. 1921); People v. Quinn, 240 N. Y. S. 231 (App. Div. 2nd Dept. 1930); People v. Batt, 1 N. Y. S. 2nd 55, affd no opinion, 1 N. Y. S. 2nd 58 (App. Div. 1st Dept. 1937); People v. Gleason, 136 N. Y. S. 2nd 220 (App. Div. 1st Dept. 1954); People v. Hicks, 206 N. Y. S. 2nd 641 (App. Div. 2nd Dept. 1960); People v. Smith, 216 N. Y. S. 2nd 892 (App. Div. 2nd Dept. 1961); People v. Rosenburg, 114 N. Y. S. 2nd 131 (Kings Co. Ct. 1952); People v. Frost, 120 N. Y. S. 2nd 911 (Schenectady Co. Ct. 1953); People v. Phillips, 177 N. Y. S. 2nd 804 (Sup. Ct. Suffolk Co. 1958); People v. Wright, 214 N. Y. S. 2nd 461 (Schenectady Co. Ct. 1961); People v. Vellella, 216 N. Y. S. 2nd 488 (Ct. of Gen. Sess. N. Y. Co. 1961).

[58]In the Doody case the rule was found inapplicable because there were no witnesses to swear to defendant's perjury, but proof thereof was based only on circumstantial evidence.

presented the issues involved in the two witness rule. Defendant, in his trial for perjury under the Federal statute, requested the court to charge the two witness rule. The request was refused, conviction ensued and reversible error was claimed on appeal. The Circuit Court, affirming the conviction, said it was for the trial court to determine whether the quantitative rule of evidence in perjury had been satisfied. Thus, the question was presented to the Supreme Court. The rule had previously been clearly stated in Hammer v. United States, 271 U. S. 620, which the government, in this case, asked the Supreme Court to reexamine and abandon. The grounds advanced (and still widely clung to by many) were that the rule may have suited the needs of the 18th century but that it had long since outlived its usefulness; that it was an incongruity in the modern system of jurisprudence; and, that it raised an unjustifiable barrier to perjury convictions.

The unanimous Supreme Court, reversing the conviction on the ground that failure to charge the two witness rule was error, said, at page 608:

> "The special rule which bars conviction for perjury solely upon the evidence of a single witness is deeply rooted in past centuries. That it renders successful perjury prosecutions more difficult than it otherwise would be is obvious, and most criticism of the rule has stemmed from this result. It is argued that since effective administration of justice is largely dependent upon truthful testimony, society is ill-served by an 'anachronistic' rule which tends to burden and discourage prosecutions for perjury. Proponents of the rule, on the other hand, contend that society is well-served by such consequence. Lawsuits frequently engender in defeated litigants, sharp resentments and hostilities against adverse witnesses, and it is argued, not without persuasiveness, that rules of law must be so fashioned as to protect honest witnesses from hasty and spiteful retaliation in the form of unfounded perjury prosecutions."

and further, at page 609:

> "Since equally honest witnesses may well have differing recollections of the same event, we cannot reject as wholly unreasonable the notion

> that a conviction for perjury ought not to rest entirely upon an 'oath against an oath.' The rule may originally have stemmed from quite different reasoning, but implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted."

In New York, twice within the past two years, perjury convictions have been reversed on the law for failure of the trial judge to charge the two witness rule.[59] Echoing the Weiler case and pretty well summing up the sentiment of the New York courts, is the statement in People v. Gleason, 136 N. Y. S. 2nd 220 (App. Div. 1st Dept. 1954) which, describing the purpose of the two witness rule, said that it "....was designed to make convictions for perjury more difficult to obtain than in the case of other crimes."

As indicated above, this is a controversial area. Committees studying the problem in the last quarter century have disagreed and some of their reports show a marked ambivalency of feeling. The 1935 Law Revision Commission Report (p. 322) found merit on both sides and then reluctantly decided that the rule ought to be retained. The Commissioners on Uniform State Laws in their 1952 Model Act on Perjury, also noting some favorable aspects of the rule, concluded that it has no place in modern practice.[60] The draftsmen of the Model Penal Code also wrestled mightily with the problem. The Advisory Committee recommended elimination of the rule and was supported by the Council, while the Reporter favored retention

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[59] People v. Hicks, 206 N. Y. S. 2nd 641 (App. Div. 2nd Dept. 1960), People v. Smith, 216 N. Y. S. 2nd 892 (App. Div. 2nd Dept. 1961). In the Hicks case, defendant had not requested the charge or even excepted to the court's failure so to charge.

[60] Section 4(1) of the Model Act on Perjury provides that proof of guilt beyond a reasonable doubt is sufficient "....and it shall not be necessary also that proof be by a particular number of witnesses or by documentary or other type of evidence." (See Appendix E).

of some safeguards. Tentative Draft No. 6, therefore, contained alternative provisions, but in the final draft the Reporter's position prevailed.[61]

The provision proposed in this draft adopts the two witness rule in language modeled upon that of MPC §241.1(6). Recognizing, as did the Supreme Court in the Weiler decision, that cogent arguments exist for abandoning the rule, yet it is believed that, on balance, its retention is advisable. Particularly impressive is the argument, referred to in Weiler, that the absence of the rule would foster unfounded perjury prosecutions based on the complaints of defeated litigants and made in retaliation against honest witnesses. At the very least, prosecuting officials would be hard put to sift the legitimate complaints from those grounded in spite and malice.

(b) This provision, Penal Law §1625, was first enacted in 1881 and had been recommended by the Field Commission (without comment). A similar provision appears in the Model Penal Code at §241.1(3). Our courts have held that it is immaterial whether or not the deposition is actually used, so long as it was delivered with intent that it be used. (People v. Browne, 184 Misc. 764 (Broome Co. Ct. 1945)). It has also been held that it must be shown that the deposition was actually delivered with intent that it be published as true. "Proof of delivery was a necessary part of the People's case." (People v. Kammerer, 240 App. Div. 852 (2nd Dept. 1933)).

(c) This subsection, derived almost verbatim from Penal Law §1626, has been stated to be a declaration of the common law. (Hoormann v. Climax Cycle Co., 9 App. Div. 579 (1896)). The courts had early declared the rule that a person who

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[61]See: MPC Tent. Draft No. 6, §208.20(6) at p. 97 and comments thereon at p. 137; and MPC §241.1(6).

testifies to a fact which, although true, he does not know to be true, is guilty of perjury.[62] In the most recent case, however, the court avoided applying the rule. In People v. Redmond, 189 App. Div. 96 (2nd Dept. 1919), the court felt that a mere showing that a person made a statement which he did not know to be true, while it was equivalent to a statement of that which he knew to be false, was not enough to constitute perjury because to be perjury the statement must be made with criminal intent. As to intent, the court said:

> "Our experience in the trial of cases teaches us that witnesses often honestly testify to facts that on cross-examination turn out to be not within their personal knowledge, but based on statements of others, or on conclusions that they drew from other facts." (p. 124)

The Model Penal Code does not have a parallel provision and, in fact, looks with disfavor on Penal Law §1626.[63] Theirs is a rather pragmatic approach--if the statement made is objectively true, the fact that the declarant believed it to be false does not obstruct justice and no good can come of applying the criminal law to one who is only morally a liar. Yet, it must be considered that dropping this provision from our statutes may well give rise to the unwarranted assumption that now moral lying is sanctioned or, at least, not greatly frowned upon.

§10. Punishment

The draft does not, at this time, assign punishments to the various degrees of perjury that have been set forth. However, as a guide to future consideration of these provisions,

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[62] People v. McKinney, 3 Park. Crim. 510 (1857). Cf. Byrnes v. Byrnes, 102 N. Y. 4, 9 (1886).

[63] MPC Tent. Draft No. 6, p. 116 and note 21, pp. 117, 118.

the following comments on the subject are set forth.

The range of punishment for perjury today is wider than it has ever been--from under one year's imprisonment to death. In ancient codes, such as Hammurabi's and the Roman, death was the penalty for one whose false testimony procured another's conviction for a capital offense. That same provision is even now the law in nine of these United States;[64] in ten states, statutes provide for life imprisonment.[65] In Europe, within the past few hundred years, exotic punishments such as scourging, burning the cheek, boring the tongue with a hot iron and banishment from the realm, were inflicted. In colonial New York, the laws of 1683 provided that a convicted perjurer be set on the pillory in a public place "and there to be branded with the letter P in ye foreheade." (Shades of Hester Pryne!)

In more modern times, from 1801 to 1935, New York statutes generally provided a maximum term of 10 years imprisonment for perjury not committed in a felony prosecution, but in the latter instance, the maximum term of imprisonment was generally 20 years. Since 1936 the maximum punishment for first degree perjury has been 5 years imprisonment.

Nationally, today, the maximum terms of imprisonment for perjury range from a low of one year to a high of 20 years,[66] with a mathematical average of 12 years. New York, as well as a number of other states, also provides punishment by way of monetary fines. For these and other details of prescribed punishments, including disqualifications of convicted perjurers

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[64]Arizona, California, Colorado, Georgia, Idaho, Kansas, Missouri, Montana, and Nevada.

[65]Connecticut, Georgia, Iowa, Maine, Massachusetts, Michigan, Mississippi, Nevada, North Dakota, and Utah.

[66]By numbers of states, the following is the breakdown of imprisonment maxima: 1 year--1 state; 5 years--7 states; 7 years--4 states; 10 years--15 states; 14 years--9 states; 15 years--5 states; 20 years--9 states. For individual statistics, see Appendix E hereof.

and separate punishments for attempted subornation of perjury, see comparative chart, Appendix E.

In the Model Penal Code provisions on perjury and false swearing, the highest degree is made a third degree felony (one to two year minimum, five year maximum); false swearing is either a misdemeanor (not to exceed one year) or a petty misdemeanor (not to exceed thirty days). In the three latest criminal law revisions, the maximum imprisonments for perjury are: Louisiana, 10 years; Illinois, 14 years; and Wisconsin, 5 years.

§11. Statements "Under Penalty"

This section, which is the only provision in the draft that deals with unsworn statements, is borrowed from MPC §241.3(2). It constitutes a device useful as an alternative to requiring oaths before notaries, which are inconvenient and, because of their ubiquity and the generally offhand manner of their administration, tend to dilute the effectiveness of the oath and reduce it to a mechanical formula. This provision could, with good effect, apply to many administrative agency forms that call for a variety of information now required to be sworn to before a notary.

Provisions of Present Law, Omitted from this Draft

The following provisions of Penal Law Article 158 are not specifically included in this draft. A number of them deal with particular limited situations which have been tacked on to the basic perjury statutes from time to time. Where the substance of such a provision falls within the scope of a general provision of the draft, its omission here effects no change in the law. If such specific provision is not readily includable within a general provision of the draft,

consideration might be given to relocating it in that chapter of the Consolidated Laws that deals with the specific subject matter.

1) Penal Law §1620(2)--This subdivision, dealing with sworn writings relating to the title to property, was added in 1927 for reasons not readily apparent. If the false writing is one required by law to be sworn to, it is third degree perjury under this draft and if made with intent to mislead a public official, it is second degree perjury. If, however, the writing is part of a purely private transaction and not required to be sworn to, it does not come within the scope of this proposed article. It would appear, however, that such false writing "upon which reliance is placed" might well constitute a larceny or criminal fraud or cheat.

2) Penal Law §1620(3)--This subdivision deals with false swearing by interpreters and was added in 1929.[67] Before that time, false interpreting was a crime only when committed by interpreters in the City Court. This subsection was intended to extend the scope of the crime to interpreters generally. It is recommended that this provision be shifted from the perjury article to a more appropriate slot such as the article which will cover the suppression and destruction of evidence or the one which will concern the misdeeds of official personnel.

3) Penal Law §1620(4)-- This subdivision, concerning false statements in civil service applications, was added in 1957. Prior to that time the Civil Service Law contained its own built-in penalty for such false statements. In revising parts of that law, the penal sanction was transferred to Penal

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[67]Recommended in the Report of the Crime Commission, 1929, at pp. 54 and 105 (Leg. Doc. No. 99).

Law §1620.[68] The statements "under penalty" provision of §11 of this draft seem ideal for handling the problem. It would, of course, require enabling legislation in the Civil Service Law but would advance the purposes of that law since each application form would bear a notice that false statements were punishable.

4) Penal Law §1622--This section, concerning the form of an oath, is unnecessary, both in view of the broad interpretation of oaths by the courts and the fact that, under §1(c) and (d) of this draft, "oath" includes equivalent affirmations. Note, too, the provision of the new Civil Practice Law and Rules (effective September, 1963) which states in §2309(b): "An oath or affirmation shall be administered in a form calculated to awaken the conscience and impress the mind of the person taking it in accordance with his religious or ethical beliefs."

5) Penal Law §§1628, 1629 and 1630--These three sections make up the provisions on summary committal by the court of witnesses who have probably committed flagrant perjury before it. Although, in one form or another, they have been part of the statutory criminal law of New York since 1788, it seems time for them to depart. The base section, §1628, is permissive, not mandatory, and judges have been extremely reluctant to exercise their power because to do so would be tantamount to proclaiming a witness' guilt. They prefer that independent authority inquire into the truth of what the witness said.[69]

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[68]Civil Service Law §14, referred to in this subsection, was amended by Laws of 1958 and re-numbered Civil Service Law §50(3). It provides: "The application shall be subscribed by the applicant and shall contain a declaration that the statements therein are made subject to the penalties of perjury."

[69]Report of Commission on Administration of Justice, 1934, pp. 837, 838. See also, id. p. 841, wherein this commission stated: "It is believed that the provision of this section
(Continued on page 40.)

Only a few cases--none in almost 50 years--have dealt with these sections. In Lindsay v. People, 67 Barb. 550 (1875), affd. 63 N. Y. 143, the appellate court said it had no power to interfere with the exercise of a trial judge's discretion in committing a witness for palpable perjury. Again, in People v. Hayes, 140 N. Y. 484 (1894), the court found no question of legal error in a trial judge's action in committing a defense witness for perjury in the presence of the jury. The latest case, however, challenges the holding of the Hayes case. In People v. Criscuoli, 164 App. Div. 119 (2nd Dept. 1914) the same fact situation occurred--a trial judge committed a defense witness in the presence of the jury. The Appellate Division, paying lip service to the Hayes decision, "distinguished" the present case, and said, at page 822:

> "Even though the witness had committed perjury, and although his summary commitment by the trial judge was within both his power and discretion, so that his action in that regard presented no legal error, we desire to place outselves upon record as expressing the opinion that this power should rarely, if ever, be exercised in the presence of the jury. As a rule, the necessity does not exist for this drastic treatment. The witness may be detained in court until the jury has retired before the official rebuke is administered."

The Model Penal Code contains no similar provision. Only eight states other than New York have summary committal provisions; none of these among the ones that have recently revised their criminal laws (see Appendix E). It is therefore recommended that the subject sections be omitted.

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69 (Continued from page 39.)
should be mandatory." But note the contrary position taken by the successor Law Revision Commission at p. 324 of its 1935 report. Their suggestion that Penal Law §1628 be amended to require testimony suspected of being perjurious to be turned over to the district attorney for investigation and action, seems unnecessary. A judge, under the inherent power of his office, could do so when the occasion warranted it, but a direction that he is required to do so could, and probably would, be ignored.

6) Penal Law §1634--This section, relating to a very limited situation in the Lien Law, was added in 1959. It was part of an overall revision of provisions in the Lien Law dealing with certain specified trust funds. Prior to that revision, Lien Law §36-d(7) (now Lien Law §76) provided that the making of a certain false statement was a misdemeanor. The revisors wanted to separate the penal provisions and transfer them to the Penal Code and Code of Criminal Procedure, but feared that the proscribed act might be first degree perjury.[70] Section 1634, therefore, makes it certain that the act is only second degree perjury, a misdemeanor. Under the provisions of this draft, this false swearing could only be, at worst, second degree perjury, so that the contingency sought to be prevented by Penal Law §1634 cannot occur. The section may, therefore, be dropped without prejudice to its intent. In the event that its retention is deemed necessary, it is recommended that it be relocated in Lien Law Art. 3A.

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[70] Law Revision Commission Report, 1959 (Leg. Doc. No. 65F, p. 62). See also Penal Law §1302-c dealing with larceny and C.C.P. §§138 and 56(1-a).

A. D. Hechtman:rc
November 1962

APPENDICES

APPENDIX A

PROPOSED DRAFT

of

Article___: PERJURY, SUBORNATION OF PERJURY, AND FALSE STATEMENTS

§1. Definitions:

When used in this article:

a) "Swear falsely" means intentionally to make, under oath, where an oath is required by law, a false statement which the maker does not believe to be true.

b) "Testimonial proceeding" means a proceeding in which duly sworn testimony is heard before any body, agency, public official or other person authorized by law to conduct such proceeding.

c) "Oath" includes equivalent affirmation.

d) "Swear" includes affirm.

§2. Perjury in the Third Degree

A person who swears falsely is guilty of perjury in the third degree.

§3. Perjury in the Second Degree

A person is guilty of perjury in the second degree when he swears falsely:

a) In a testimonial proceeding; or

b) With intent to mislead a public official in the performance of his official functions.

§4. Perjury in the First Degree

A person who swears falsely as to any material matter in

a testimonial proceeding is guilty of perjury in the first degree.

§5. Subornation of Perjury

A person who intentionally procures or induces another to commit perjury in any degree, is guilty of subornation of perjury in that degree.

§6. Inconsistent Statements

In a prosecution for perjury, where the defendant has made inconsistent statements under oath, both having been made within the period of the statute of limitations and within the jurisdiction of this State, the indictment or information may set forth the inconsistent statements without alleging which one is false, and the perjury may be established by proof of the intentional making of the inconsistent statements without proof as to which one is false.

§7. Retraction

It is a defense to a prosecution for perjury that the defendant retracted his false statement in the course of the proceeding in which it was made, before it substantially affected the proceeding and before it became manifest that the false statement was or would be exposed.

§8. Matters Not Constituting Defense

It is no defense to a prosecution for perjury:

a) That the oath was administered or taken in an irregular manner or that the authority or jurisdiction of the notary public or commissioner of deeds who administered the oath was defective, if such defect was excusable under any statute or rule of law; or

b) That the declarant was not competent to make the false statement alleged; it is sufficient that he actually was permitted to make it; or

c) That the declarant mistakenly believed the false statement to be immaterial.

§9. Corroboration and Presumptions

a) Proof of falsity of a statement may not rest solely upon contradiction by testimony of a single witness other than the defendant.

b) The making of a document is deemed to be complete from the time when it is delivered by the maker to any other person with intent that it be uttered or published as true.

c) An unqualified statement of that which a declarant does not know to be true is equivalent to a statement of that which he knows to be false.

§10. Punishment

[To be inserted at a later date.]

§11. Statements "Under Penalty"

A person who makes, or procures or induces another to make, a written false statement which he does not believe to be true, on or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable, is guilty of a [insert nature of the offense].

APPENDIX B

NEW YORK PENAL LAW (ART. 158)

§ 1620. Perjury defined.

A person is guilty of perjury who
1. Swears or affirms that he will truly testify, declare, depose or certify, or that any testimony, declaration, deposition, certificate, affidavit or other writing by him subscribed is true, in, or in connection with, any action or special proceeding, hearing or inquiry, or on any occasion in which an oath is required by law or is necessary for the prosecution or defense of a private right or for the ends of public justice or may lawfully be administered, and who in such action or proceeding or on such hearing, inquiry or other occasion wilfully and knowingly testifies, declares, deposes or certifies falsely, or states in his testimony, declaration, deposition, affidavit or certificate any matter to be true which he knows to be false; or
2. Swears or affirms that any deposition, certificate, affidavit or other writing by him subscribed, is true, and which contains any matter which he knows to be false affecting the title to any real or personal property, including the assignment or satisfaction of a mortgage, and upon which reliance is placed; or
3. Having been appointed or designated to be an interpreter in any judicial action or proceeding knowingly and wilfully falsely interprets any evidence, matter or thing between a witness and the court or a justice thereof in the course of an action or special proceeding. (Am. L. 1939 ch. 186, in effect April 1.)
4. Knowingly and willfully makes a false statement, or gives information which he knows to be false, in any application for a civil service examination filed in accordance with section fourteen of the civil service law.

§ 1620-a. Perjury in the first degree.

A person is guilty of perjury in the first degree who commits perjury as to any material matter in or in connection with any action or special proceeding, civil or criminal, or any hearing or inquiry involving the ends of public justice or on an occasion in which an oath or affirmation is required or may lawfully be administered.

§ 1620-b. Perjury in the second degree.

A person is guilty of perjury in the second degree who commits perjury under circumstances not amounting to perjury in the first degree.

§ 1621. Irregularities in the mode of administering oaths and certain defects in authority or jurisdiction of person administering oath no defense.

1. It is no defense to a prosecution for perjury that an oath was administered or taken in an irregular manner.

2. A defect in the authority or jurisdiction of the notary public or commissioner of deeds who administered the oath is not a defense to a prosecution for perjury in any case where the defect is one described in subdivision two of section one hundred forty-two-a of the executive law and the notary public or commissioner of deeds had been appointed or commissioned as such prior to the administration of the oath or in any case where the act of the notary public or commissioner of deeds is valid or deemed valid under any other statute or rule of law.

3. The term "oath" includes an affirmation, and every other mode authorized by law of attesting the truth of that which is stated.

§ 1622. Swearing falsely in any form, perjury.

A person swearing, affirming or declaring, in any form, where an oath is authorized by law, is lawfully sworn, and is guilty of perjury, in a case where he would be guilty of the same crime, if he had sworn by laying his hand upon the Gospels.

§ 1623. Incompetency of witness no defense for perjury.

It is no defense to a prosecution for perjury that the defendant was not competent to give the testimony, deposition or certificate of which falsehood is alleged. It is sufficient that he actually was permitted to give such testimony or make such deposition or certificate.

§ 1624. Witness' knowledge of materiality of his testimony not necessary.

It is no defense to a prosecution for perjury that the defendant did not know the materiality of the false statement made by him; or that it did not in fact affect the proceeding in or for which it was made. It is sufficient that it was material, and might have affected such proceeding.

§ 1625. Making of deposition or certificate, when deemed complete.

The making of a deposition or certificate is deemed to be complete, within the provisions of this article, from the time when it is delivered by the defendant to any other person with intent that it be uttered or published as true.

§ 1626. Statement of that which one does not know to be true.

An unqualified statement of that which one does not know to be true is equivalent to a statement of that which he knows to be false.

§ 1627. Contradictory testimony or statements under oath.

In any prosecution for perjury the falsity of the testimony or statement set forth in the indictment or information shall be presumptively established by proof that the defendant has testified, declared, deposed or certified under oath to the contrary thereof on any occasion in which an oath is required by law in any other written testimony, declaration, deposition, certificate, affidavit or other writing by him subscribed or in any testimony given in any action or special proceeding.

§ 1627-a. Pleading of contradictory statements.

An indictment or information for perjury in the second degree may allege the making of contradictory testimony or statements under oath on occasions in which an oath is required by law, without specification of which thereof is true; and the perjury may be established by proof of the wilful giving or making of such contradictory testimony or statements, without proof as to which thereof is true.

§ 1628. Summary committal of witnesses who have committed perjury.

Where it appears probable to a court of record that a person, who has testified before it in an action or proceeding in that court, has committed perjury in any testimony so given, the court may immediately commit him, by an order or process for that purpose, to prison, to take a recognizance, with sureties, for his appearing and answering to an indictment for perjury.

§ 1629. Witnesses necessary to prove the perjury may be bound over to appear.

In a case specified in the last section, the court may bind over witnesses to establish the perjury, to appear at the proper court to testify before a grand jury, and also upon the trial, in case an indictment is found for the perjury. It must cause immediate notice of any such commitment or recognizance, with the names of the witnesses so bound over, to be given to the district attorney of the county.

§ 1630. Documents necessary to prove such perjury may be detained.

In such a case, if a paper or document, produced by either party, is deemed by the court necessary to be used in the prosecution for the perjury, the court may detain the same, and direct it to be delivered to the district attorney.

§ 1631. Witnesses' testimony.

(Repealed by L. 1953 ch. 891, effective Sept. 1.)

§ 1632. Subornation of perjury in the first degree.

A person who wilfully procures or induces another to commit perjury in the first degree is guilty of subornation of perjury in the first degree.

§ 1632-a. Subornation of perjury in the second degree.

A person who wilfully procures or induces another to commit perjury in the second degree is guilty of subornation of perjury in the second degree.

§ 1633. Punishment of perjury and subornation of perjury.

1. Perjury in the first degree and subornation of perjury in the first degree are felonies and are punishable by imprisonment for a term not exceeding five years, or by a fine of not more than five thousand dollars, or by both.
2. Perjury in the second degree and subornation of perjury in the second degree are each misdemeanors and are punishable by imprisonment for not more than one year or by a fine of not more than five hundred dollars, or by both.

§ 1634. Punishment of perjury in certain cases.

Notwithstanding section sixteen hundred twenty-a of this chapter, a trustee of a trust defined in article three-a of the lien law, or an officer, director or agent of such trustee, who shall, upon his oath, verify a statement made pursuant to section seventy-six of the lien law, which statement is known to him to be false, shall be guilty of perjury in the second degree.

APPENDIX C

A. L. I. MODEL PENAL CODE

"Section 240.0. Definitions.

In Articles 240-243, unless a different meaning plainly is required:

* * * * *

(4) 'official proceeding' means a proceeding heard or which may be heard before any legislative, judicial, administrative or other governmental agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary or other person taking testimony or deposition in connection with any such proceeding;"

* * * * *

"ARTICLE 241. PERJURY AND OTHER FALSIFICATION IN OFFICIAL MATTERS

Section 241.0. Definitions.

In this Article, unless a different meaning plainly is required:

(1) the definitions given in Section 240.0 apply; and

(2) 'statement' means any representation, but includes a representation of opinion, belief or other state of mind only if the representation clearly relates to state of mind apart from or in addition to any facts which are the subject of the representation.

Section 241.1. Perjury.

(1) Offense Defined. A person is guilty of perjury, a felony of the third degree, if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true.

(2) Materiality. Falsification is material, regardless of the admissibility of the statement under rules of evidence, if it could have affected the course or outcome of the proceeding. It is no defense that the declarant mistakenly believed the falsification to be immaterial. Whether a falsification is material in a given factual situation is a question of law.

(3) Irregularities No Defense. It is not a defense to prosecution under this Section that the oath or

affirmation was administered or taken in an irregular manner or that the declarant was not competent to make the statement. A document purporting to be made upon oath or affirmation at any time when the actor presents it as being so verified shall be deemed to have been duly sworn or affirmed.

(4) Retraction. No person shall be guilty of an offense under this Section if he retracted the falsification in the course of the proceeding in which it was made before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding.

(5) Inconsistent Statements. Where the defendant made inconsistent statements under oath or equivalent affirmation, both having been made within the period of the statute of limitations, the prosecution may proceed by setting forth the inconsistent statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant. In such case it shall not be necessary for the prosecution to prove which statement was false but only that one or the other was false and not believed by the defendant to be true.

(6) Corroboration. No person shall be convicted of an offense under this Section where proof of falsity rests solely upon contradiction by testimony of a single person other than the defendant.

Section 241.2. False Swearing.

(1) False Swearing in Official Matters. A person who makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of such a statement previously made, when he does not believe the statement to be true, is guilty of a misdemeanor if:

(a) the falsification occurs in an official proceeding; or

(b) the falsification is intended to mislead a public servant in performing his official function.

(2) Other False Swearing. A person who makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of such a statement previously made, when he does not believe the statement to be true, is guilty of a petty misdemeanor, if the statement is one which is required by law to be sworn or affirmed before a notary or other person authorized to administer oaths.

(3) Perjury Provisions Applicable. Subsections (3) to (6) of Section 241.1 apply to the present Section.

Section 241.3. Unsworn Falsification to Authorities.

(1) In General. A person commits a misdemeanor if, with purpose to mislead a public servant in performing his official function, he:

(a) makes any written false statement which he

does not believe to be true; or

(b) purposely creates a false impression in a written application for any pecuniary or other benefit, by omitting information necessary to prevent statements therein from being misleading; or

(c) submits or invites reliance on any writing which he knows to be forged, altered or otherwise lacking in authenticity; or

(d) submits or invites reliance on any sample, specimen, map, boundary-mark, or other object which he knows to be false.

(2) Statements 'Under Penalty.' A person commits a petty misdemeanor if he makes a written false statement which he does not believe to be true, on or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable.

(3) Perjury Provisions Applicable. Subsections (3) to (6) of Section 241.1 apply to the present section."

APPENDIX D

MODEL ACT ON PERJURY

Drafted by

National Conference of Commissioners

on

Uniform State Laws

Section 1. Perjury by single statement.

Whoever, in a trial, hearing, investigation, deposition, certification or declaration, in which the making or subscribing of a statement is required or authorized by law, makes or subscribes a [material] statement under oath, affirmation or other legally binding assertion that the statement is true, when in fact the witness or declarant does not believe that the statement is true or knows that it is not true or intends thereby to avoid or obstruct the ascertainment of the truth, is guilty of perjury. It shall be a defense to the charge of perjury as defined in this section that the statement is true.

Section 2. Perjury by contradictory statements.

Whoever, in one or more trials, hearings, investigations, depositions, certifications, or declarations, in which the making or subscribing of statements is required or authorized by law, makes or subscribes two or more [material] statements under oath, affirmation or other legally binding assertion that the statements are true, when in fact two or more of the statements contradict each other, is guilty of perjury. It shall be a defense to the charge of perjury by contradictory statements as defined in this section that the accused at the time when he made each statement believed the statement was true.

Section 3. Perjury by subornation.

Whoever procures another to commit perjury is guilty of perjury by subornation. Whoever does any act with the specific intent to commit perjury by subornation but fails to complete that offense is guilty of attempted perjury by subornation.

Section 4. Proof.

(1) Proof required under Act. Proof of guilt beyond a reasonable doubt is sufficient for conviction under this Act, and it shall not be necessary also that proof be by a particular number of witnesses or by documentary or other type of evidence.

[(2) Proof of Materiality under Act.* The question whether a statement was material shall include only whether the statement might affect some phase or detail of the trial, hearing, investigation, deposition, certification or declaration, and is a question of law to be determined by the court.]

(2) Proof of Materiality under Act.** Lack of materiality of the statement is not a defense [but the degree to which a perjured statement might have affected some phase or detail of the trial, hearing, investigation, deposition, certification or declaration shall be considered by the court, together with the other evidence or circumstances, in imposing sentence].

(3) Proof of Untruth Unnecessary under Section 2. In a prosecution for perjury by contradictory statements, as defined in Section 2, it is unnecessary to prove which, if any, of the statements is not true.

Section 5. Penalties.

Whoever is convicted of any offense as defined in this Act shall be imprisoned not more than.....[months or years], or fined not more than.....[dollars], or both.

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*This alternative is to be used if the word "material" is inserted in Sections 1 and 2.

**This alternative is to be used if the word "material" is not inserted in Sections 1 and 2.

APPENDIX E

PERJURY AND FALSE SWEARING--MAJOR STATUTORY PROVISIONS (1)

State	Number of Degrees (Perjury and False Swearing) (2)	Perjury (3)			False Swearing (5)		Attempt	Other Provisions			
		Materiality Necessary Element (4)	Punishment (8) Prison Max. (yrs.) (9)	Capital Crime	Materiality Necessary Element	Punishment (11) Prison Max. (yrs.)	Sub. of Perjury — Punishment Max. (yrs.)	Contradictory Statements (12)	Summary Committal (13)	Corroboration (14)	Retraction (15)
Alabama	3	✓	20	—	✓	5	—	—	—	—	—
Alaska	3	no	10	—	no	—	3	—	—	—	—
Arizona	1	✓	14	✓	—	—	—	✓	—	—	—
Arkansas	3	✓	15	—	no	1	½	✓	—	—	—
California	1	✓	14	✓	—	—	—	—	—	—	—
Colorado	1	✓	14	✓	—	—	—	—	—	—	—
Connecticut	1	✓	5	✓	—	—	—	—	—	—	—
Delaware	2	✓	10 (10)	—	no	3	—	—	—	—	—
Florida	1	✓	20	—	—	—	5	—	—	—	—
Georgia	2	✓	10	✓	no	10	—	—	—	—	—
Hawaii	1	✓	20	—	—	—	—	—	—	—	—
Idaho	1	✓	14	✓	—	—	—	—	—	—	—
Illinois	1	✓	14	—	—	—	—	—	—	—	✓
Indiana	1	✓	10	—	—	—	—	—	—	—	—
Iowa	2	✓	10	✓	—	—	5	—	—	—	—
Kansas	3	✓	7	✓	—	—	5	—	—	—	—
Kentucky	1	no	5	—	—	—	—	—	—	—	—
Louisiana	3	✓	10	—	no	1	—	✓	—	—	—
Maine	2	✓	10	✓	—	—	5	—	✓	—	—
Maryland	1	✓	10	—	—	—	—	✓	—	—	—
Massachusetts	2	✓	20	✓	—	—	5	—	✓	—	—
Michigan	2	✓	15	✓	—	—	5	—	✓	—	—
Minnesota	2	✓	10	—	—	—	—	—	✓	—	—
Mississippi	2	✓	10	✓	—	—	5	—	—	—	—
Missouri	4	✓	7	✓	no	1	5	—	—	—	—
Montana	2	✓	14	✓	—	—	—	—	—	—	—
Nebraska	1	✓	14	—	—	—	—	—	—	—	—
New Hampshire	1	no	5	—	—	—	—	—	—	—	—
New Jersey	2	no	1	—	no	1	—	—	—	no	—
New Mexico	2	✓	15	—	—	—	3	—	—	—	—
New York	2	✓	5	—	no	1	—	✓	✓	—	—
Nevada	2	✓	14	✓	—	—	1	—	—	—	—
North Carolina	1	✓	10	—	—	—	—	—	—	—	—
North Dakota	3	✓	10	✓	—	—	—	—	✓	—	—
Ohio	1	✓	10	—	—	—	—	—	—	✓	—
Oklahoma	3	✓	20	—	—	—	—	—	✓	—	—
Oregon	4	✓	20	—	no	1	3	—	—	✓	—
Pennsylvania	1	✓	7	—	—	—	—	—	—	—	—
Rhode Island	2	no	20	—	yes (6)	—	10	—	—	—	—
South Carolina	1	✓	7	—	—	—	—	—	—	—	—
South Dakota	3	✓	20	—	—	—	—	—	—	—	—
Tennessee	2	✓	20	—	—	—	1	✓	—	—	—
Texas	1	✓	5	—	—	—	—	—	—	✓	—
Utah	3	✓	5	✓	no	1	—	✓	✓	—	—
Vermont	2	✓	15	—	—	—	5	—	—	—	—
Virginia	1	✓	10	—	—	—	—	✓	—	—	—
Washington	2	✓	15	—	no (7)	5	1	—	✓	—	—
West Virginia	2	✓	10	—	yes	1	—	—	—	—	—
Wisconsin	2	✓	5	—	no	3	—	—	—	—	✓
Wyoming	2	✓	14	—	no	5	—	—	—	—	—

FOOTNOTES

(1) This chart was compiled in July, 1961 and reflects the statutes of the various states as of the close of 1961. Statute citations are not given in these footnotes, but are available in the Commission's files.

(2) With few exceptions (Arkansas, New York, Utah, Washington) degrees of perjury and false swearing are not formally set forth in the statutes. The breakdown here is based, for the most part, on the punishments assigned to aggravations of the offense.

(3) Perjury generally refers to all types of false statements under oath. In seven states (Georgia, Iowa, Kentucky, Louisiana, Maine, West Virginia, Wisconsin) perjury refers to only "testimonial" false statements.

(4) A ✓ mark indicates that materiality of the false statement is a necessary element of the crime. This is a requirement in 45 states. In 35 states, it is a statutory requirement; in 10 states (Delaware, Maryland, Michigan, Nebraska, New Mexico, North Carolina, Pennsylvania, South Carolina, Texas, Vermont) the statute is silent, but materiality is required by decisional law. In South Carolina materiality is required only in a "testimonial" situation.

(5) False swearing generally represents swearing in a non-testimonia situation (e.g. Missouri, Rhode Island) or swearing to an immaterial matter.

(6) Limited to false swearing concerning a material fact relating to a contract of sale or conveyance of property.

(7) Materiality is not an element of false swearing committed on the trial of a felony; it is an element on occasion other than a felony trial.

(8) In addition to imprisonment, 14 states provide for fines rangin from maxima of $1,000 to $5,000. Also, 7 states provide for disqualification of a convicted perjurer; Virginia and West Virginia disqualify him from holding public office or serving as a juror, the other states disqualify him from being a witnes except that Vermont permits him to be a witness for himself.

(9) Imprisonment for subornation of perjury is the same as that for perjury, except that it is less in Alaska (5 years), Illinois (5 years), Nebraska (10 years).

(10) One convicted of perjury also "...may be whipped with 40 lashes

(11) In addition to imprisonment, 10 states provide for fines rangin from maxima of $100 (Rhode Island) to $5,000 (Oregon); most are $500 maximum.

(12) Provisions substantially similar to New York's Penal Law §§ 162 1627-a.

(13) Provisions substantially similar to New York's Penal Law §§ 162 1629, 1630.

(14) The statutes of Ohio, Oregon, and Texas specifically include th "two-witness rule." New Jersey specifically rejects that rule.

(15) Illinois permits the defense of retraction when it is made in the "same continuous trial"; Wisconsin specifically rejects it as a defense.

MEMORANDUM EXPLAINING PROPOSED "GAMBLING" ARTICLE

This memorandum explains a proposed Article, entitled "Gambling," which is designed to replace the present "Gambling" and "Lotteries" Articles of the Penal Law. Full and satisfactory explanation thereof is not possible without a picture of the Penal Law Articles and provisions as they now exist.

The Current Gambling Provisions

The general field of gambling in the Penal Law is covered by two separate Articles entitled "Gambling" (Art. 88) and "Lotteries" (Art. 130). Why they should be so separate and separated is not readily apparent, especially since the "Gambling" Article contains criminal sanctions involving lotteries and "lottery policies" (§§970, 974, 975) and devotes considerable attention to "policy" or "the numbers game" (§§974, 974-a, 975), which is merely a form of lottery and has been prosecuted as such [§1372; People v. Hines (1940) 284 N.Y. 93].

At any rate, this is the arrangement. The two Articles collectively contain 54 sections, 35 in the "Gambling" Article and 19 in the "Lotteries" Article. Many of these are of a civil and administrative character, dealing with civil aspects of money bet or gambled, with the seizure and destruction of gambling apparatus, etc.

With respect to the actual crimes proscribed, the "Gambling" Article is most confusing and disorganized. Among other difficulties, it suffers from some inconsistency of substance and over-all philosophy because of a peculiar conglomeration of antiquated provisions and recent amendments of a more enlightened approach. Thus, while one of the basic and older statutes broadly stamps the "player" a "common gambler" and a criminal (§970), the tenor of the more modern legislation is to exempt the player and to penalize the promoter or entrepreneur only (see §§974, 974-a, 975, 986-b, 986-c). To its

credit, the latter is the dominant theme of the Article.

One of its confusing aspects is that no attempt is made to define the term "gambling." At times, "gambling" seems to have the limited meaning of "gaming" in its purest sense of playing games of chance for stakes, while betting, lottery and policy playing, slot machine playing, etc. appear to be regarded as closely related but slightly different kinds of activities (see e.g., §§970, 973, 975, 986).

In line with these thoughts, the Article presents no statute of an all-inclusive sort but separately and individually approaches each kind or category of game or device of a gambling nature: (1) the usual games of chance (§§970, 973); (2) policy (§§974, 974-a, 975); (3) betting activity on the outcome of future contingent events (§§986, 986-b, 986-c); (4) slot machines and other mechanical devices (§§970-a, 982); and--later in the "Lotteries" Article-- (5) lotteries (§1370 et seq.). By and large, the approach is to penalize the entrepreneurs--the professional exploiters and their assistants--of each type of game or operation: gaming house operators, policy operators, bookmakers, maintainers of gambling machines, operators of lottery enterprises, etc. The organization is rather fuzzy, however, with considerable overlapping and repetition, and with various provisions slurring into each other, the result being that prosecutors, in framing informations, sometimes have difficulty in selecting the sections or crimes legally appropriate to their facts [People v. Farone (1955) 308 N.Y. 305].

The two sections addressed to ordinary gambling houses, for example, also throw in sanctions against lotteries, in one instance (§970), and against bookmaking in the other (§973). The main bookmaking section (§986) describes a long series of bookmaking crimes (facets of bookmaking), but, in view of the prior "gambling house" section which covers the maintenance of premises used for bookmaking

973 embraces only cases not specifically provided for by 986.

as well as for gaming (§973), it is not clear whether the latter is the exclusive remedy for prosecution of bookmaking when keeping premises is involved [see People v. Reed (1937) 276 N.Y. 5, 8; People v. Stedeher (1903) 175 N.Y. 57, 62-63; People v. Bruno (4th Dept. 1953) 281 App. Div. 941]. Two of the three policy sections (§§974, 975) contain sanctions relating to the broader crime of lottery, in which the game of policy is included.

973 + 986 mutually exclusive

The policy and bookmaking provisions, owing to recent amendments, disclose laudable attempts to exempt the mere player or bettor, to confine criminal responsibility to professional bookmakers and policy operators, and to impose heavier penalties upon the larger and more highly organized of these entrepreneurs. Until quite recently, the mere playing of policy and the possession of policy slips representing one's own plays were criminal [People v. Marra (2nd Dept. 1941) 262 App. Div. 1039]. By amendments in 1960, the main policy crime was limited to activity "other than as a player or bettor" (§974), and the section penalizing possession of policy slips and records was changed so as to exclude from its purview a person whose slips or records reflect "not more than ten of his own bets, wagers, or plays" (§975).

altho evidence warranted new def. was a collector

Two new sections enacted in the same year were designed to impose felony rather than misdemeanor sanctions upon large-scale policy and bookmaking operators. One of these renders guilty of a felony the policy offender who receives money not directly from the player but from other persons (presumably his lieutenants and employees), or more than $500 in one day, or written records reflecting more than 100 plays (§974-a). The other section, aimed at the high-powered bookmaker, makes it a felony to accept in one day more than 5 bets totaling over $5,000 (§986-c).

There are two sections dealing with slot machines and related types of gambling devices (§§970-a, 982). In general, these

make it a misdemeanor to manufacture, sell, lease, rent, place or engage in any transaction with respect to such devices. One of the defects of this legislation, as shown more fully below, is that it fails to distinguish clearly between devices of a pure "slot machine" type, which are and should be criminal per se, and other machines involving elements of chance which can be and frequently are maintained and played purely for amusement purposes and without any gambling features.

Pv. Fallon 31 N.Y.S. 2d 867 : lottery : pure chance; no other element

The "Lotteries" Article (Art. 130) is a rather antique one presenting few modern amendments. Following an adequate definition of the term "lottery" (§1370), it establishes the main crime--a felony--of "contriving, drawing, and assisting in a lottery" (§1372). This, it would seem, was designed to apply only to the chief entrepreneurs or executives, although the words "assisting in," connoting employees and participants of lesser stature, create some doubt on that point, which doubt is accentuated by the actual context of the section [see People v. Hines (Sup. Ct. N.Y. Co. 1939) 12 N.Y.S. (2d) 454, 459-460]. It is also to be noted that, apart from the broad words "assist in," the terms contrive and draw are rather vague. It might be difficult in many factual situations to decide how high up one must be in the hierarchy of a particular lottery operation to be designated a contriver thereof.

At any rate, after thus loosely stamping the contriver a felon, the Article proceeds to proscribe a series of partially overlapping and repetitious crimes of misdemeanor grade, consisting of the performance of various specific acts or types of activity constituting different phases or functions of the usual lottery operation: selling lottery tickets (§1373), advertising lotteries (§§1374, 1375), disposing of property by lottery (§1376), keeping a lottery office (§1377), insuring lottery tickets (§1378), permitting a building to be used for lottery purposes (§1381) and operating

bingo games (§§1387, 1388).

While every Penal Law section relating to gambling has not been here treated, the foregoing depicts the principal crimes and the pattern of the legislation in that area.

The Proposed Article

In contrast to the 54 sections contained in the Penal Law's "Gambling" and "Lotteries" Articles, this proposed bill consists of one Article, entitled "Gambling," containing 6 sections which, it is believed, cover the field.

The bill does not attempt drastic changes of substance but, partly through an unusual organizational approach, seeks to bring clarity, logic and condensation to a muddled area of legislation.

One facet of this new approach is found in the first section, containing a series of definitions of gambling terms. The Penal Law's failure to define words used throughout its gambling statutes is partly responsible for much of the existing confusion. By defining terms such as "gambling," "lottery," "policy," "player," "gambling machine," etc., a consistent language is created which leads to clarity and to brevity in the drafting of the four ensuing sections proscribing criminal offenses (§§2-5).

Perhaps the most basic definition is that of the word "gambling," which, as seen, is not defined in the existing Articles and, hence, is left with an uncertain scope. One of the corner-stones of the present Article is a definition of "gambling" broad enough to encompass not only the playing of games of chance for stakes, but betting on future, contingent events, buying chances in a lottery, playing policy, playing slot machines and every other activity in which money or property is risked in a game or device of chance in the hope that the Gods will turn the risk into a profit.

Though considerably obscured by poor organization and

draftsmanship, the main theme of the Penal Law's "Gambling" and "Lotteries" Articles is, as already indicated, that "gambling" itself is not criminal and the mere "player" not guilty of any offense, but that anyone who has anything to do with establishing, promoting or maintaining a game, scheme, device or operation dedicated to any form of "gambling" is guilty of a crime--usually a misdemeanor. This seems a salutary proposition, and one representing a more enlightened approach than is generally found in other American jurisdictions, most of which attach criminal liability to the player as well as to the entrepreneur or promoter.

The very simplicity of the indicated proposition suggests the possibility and desirability of a simple, basic crime penalizing those who promote or engage in the operation of any form of gambling project--a crime, of course, not applicable to the mere player. The Penal Law, however, presents no such all-inclusive offense. With no definition of "gambling," and with an over-refined consciousness of the distinctions between different types of "gambling," it addresses itself to each form separately as if there were little or no common denominator. Thus, some sections deal with gaming houses, others with policy, with bookmaking, with slot machines, and, as seen, an entire separate Article is devoted exclusively to lottery. The lack of over-all perspective, moreover, is manifest from the internal composition of some of these sections. Instead of defining the particular form of gambling scheme and penalizing anyone who in any way promotes or maintains it, the statute is likely to detail and stamp criminal a number of kinds of specific acts constituting various phases or functions of such an operation [e.g., §986 (bookmaking)]. One result of all this is that, in each case, the prosecutor must make sure that he has precisely the right section and precisely the right clause thereof to fit his particular facts, and fatal mistakes are sometimes made in that regard [see People v. Farone, supra, 308 N.Y. 305,

P. v. Di Manno (1959) 182 S2 937 - 15 Misc 684

310-312; People v. Reed, supra, 276 N.Y. 5, 8; People v. Bloom (1928) 248 N.Y. 582; People v. Edelstein (1st Dept. 1931) 231 App. Div. 459, 461, aff'd. 256 N.Y. 660; People v. Bruno, supra, 281 App. Div. 941; Reilly v. Gray (Sup. Ct. 4th Dept. 1894) 77 Hun 402, 407-410]. If the facts or the game involved are a bit unusual, there may be difficulty in finding an appropriate section or clause; and if a new kind of game or scheme appears on the scene, it may be even more difficult to classify it and wedge it into one of the existing sections.

Section 2--"Promoting gambling activity."

The principal feature of the present bill is a simple, basic statute proscribing a single basic crime covering every kind of promotional conduct with respect to every kind of gambling game, scheme, device or project (§2). Founded upon a series of definitions set forth in the previous section (§1), this statute tersely makes guilty of a misdemeanor "a person who promotes any gambling activity" (§2).

The key terms of the "Definitions" section (§1) are the first four: "Contest of chance," "Gambling," "Player" and "Promoting gambling activity." Collectively, these (1) define "gambling" in a broad, realistic sense; (2) depict a mere "player" (contestant or bettor) as a person who does nothing more than "gamble," and who takes no material part in any promotional phase of the particular game, scheme or device; and (3) define a person who "promotes" gambling activity broadly enough to cover anyone who performs acts, other than those of a mere "player," which in any way aid or advance the establishment, conduct or operation of any gambling game, scheme or project, who shares in the proceeds thereof other than as a successful "player," or who bets professionally with members of the public in a bookmaking manner.

This last definition embodies and crystalizes the basic

Discussion of Pari-mutuel policy P. v. Davis 252 A D 591
Accommodation collectors P. v. Johnson 296 NY 723

crime, penalizing "a person who promotes any gambling activity" (§2). Analysis of these two sections (§§1, 2) will prove persuasive that the latter, while exempting the mere "player," contestant or bettor--as the Penal Law now clearly intends--covers all persons in the promoter or entrepreneur class whom the Penal Law so laboriously strives to reach through hosts of statutes dealing with specific kinds of gambling operations. It covers the gaming house operator and his assistants; those who maintain and profit from gambling machines; lottery contrivers and their henchmen and assistants; policy bankers, controllers, collectors and runners; and every sort of promotional activity, major or minor, with respect to every type of "gambling" scheme which ever has been or ever can be devised. More specifically, this section encompasses what are presently defined as a variety of different crimes contained in 14 separate sections of the Penal Law (§§970, 973, 974, 980, 982, 986, 987, 1372, 1373, 1374, 1376, 1377, 1378, 1388). It has the added advantage of covering promotional activity in connection with other possible "gambling" games or schemes which may be devised in the future and which conceivably might not be covered by any of the numerous and relatively narrow sections now contained in the Penal Law.

It is possible that prosecutors, accustomed to framing informations under, and in the language of, these various specific statutes and clauses thereof, might have a bit of early difficulty in getting used to this single statute idea. Actually, however, the task should be simplified. The information would accuse the defendant of "the crime of promoting gambling activity." The explanatory or factual portion would then proceed with the assertion that "the defendant, on such and such a date, in the county of X, promoted gambling activity in that he "___

"acted as manager of an establishment where persons were invited to gamble and did gamble at card games and other contests of chance," or

Promoting, subd. 3

even tho a "player"!

> "kept and maintained a gambling machine at which members of the public gambled by invitation," or
>
> "maintained premises for the purpose of conducting a lottery entitled 'The American Sweepstakes,'" or
>
> "assisted in the operation of a lottery entitled 'The American Sweepstakes' by selling lottery tickets therein to members of the public," or
>
> "assisted in the conduct of a policy game by collecting numbers and chances representing plays therein by members of the public and receiving money from such persons as consideration for such chances or plays," or
>
> "engaged in bookmaking by betting with members of the public on the outcomes of horse racing contests to occur in the future, and by receiving money from such persons constituting their bets," or
>
> "assisted in the conduct of a bookmaking operation by recording bets made with members of the public upon the outcomes of horse racing contests to occur in the future," etc.

Thus, a prosecutor with any valid case of "promoting gambling activity" merely writes in his facts. This seems far simpler and more logical than rummaging through the existing statutes for the particular section and the particular clause fitting a particular kind of promotional activity in a particular kind of gambling scheme.

The basic statute in question, however, does not cover all the Penal Law's "Gambling" crimes. Some of the sections not covered represent desirable legislation, and the crimes involved are included here also, with little change of substance though with some change of form.

Section 3--"Possession of gambling records."

Section 975 of the Penal Law makes it a misdemeanor merely to possess policy slips and other policy records and articles commonly used in the playing and operation of policy, as well as records amounting to lottery tickets, adding--with a view to exemption of the mere player--"that a person possessing only records of not more than ten of his own bets, wagers, or plays shall not be

so guilty."

In a similar vein, section 986-b of the Penal Law makes it a misdemeanor to possess a record, "made by a person engaged in bookmaking or pool-selling," of a bet upon the outcome of a future, contingent event. cf. policy record section: "records used in the operation of policy."

Essentially, these "possession" crimes, which are of recent origin, have a presumptive flavor, for the decree of criminality is obviously predicated upon the strong probability, as distinguished from direct proof, that anyone possessing such records is engaged in a bookmaking, lottery or policy operation. By the same token, these crimes are easier to establish than the series of offenses--here condensed into the single crime of "promoting gambling activity"--requiring somewhat more proof of the existence of a lottery or policy (not bookmaking) enterprise and of the defendant's promotional connection therewith.

There seems nothing inherently unjust about these "possession" crimes, and they are of great practical value. Accordingly, they are carried over into this bill. The two Penal Law sections--one dealing with bookmaking records (§986-b) and the other with policy and lottery records (§975)--are easily and logically combinable, and are here condensed into one section entitled "Possession of gambling records" (§3). players, with less than 10 plays, are excepted.

(follow §2?)

Section 4--"Feloniously promoting gambling activity."

As previously shown, two recently enacted Penal Law sections (§§974-a, 986-c) impose felony sanctions upon promotional bookmaking and policy activity of a sort indicating large-scale or well-organized operations. One felonizes the bookmaker who accepts in one day more than five bets totaling more than $5,000 (§986-c); the other, the policy operator who receives more than $500 in one day, or slips and records from persons other than players, or records of more than 100 plays (§974-a).

This seems to be desirable legislation, and, with one added feature, the two crimes are here combined and presented in a single revised and simplified section, entitled "Feloniously promoting gambling activity" (§4).

The added feature includes and couples substantial "lottery" offenders along with "policy" entrepreneurs. In brief, it felonizes the lottery operator who receives more than $5,000 in one day, etc. This appears logical, and it compensates for the partial abandonment of the old lottery section rendering "Contriving, drawing and assisting in a lottery" a felony (§1372). While the criminal conduct enunciated in that section is necessarily covered by our basic crime of "Promoting gambling activity" (§2), the latter is only a misdemeanor. The old felony or contriving section, as already seen, is vague and unsatisfactory. Its purpose of felonizing big lottery promoters is amply effectuated in the new section at hand (§4).

Section 5--"Illegal slot machine conduct." International Mutoscope Reel Co v. Valentine 271 NY 622

Two confusing Penal Law sections devoted to slot machines (§§970-a, 982) do considerably more than penalize persons involved in maintaining them for gambling purposes. Treating these devices as contraband, the statutes make it a misdemeanor not only to keep or possess them for gambling purposes but to manufacture, sell, lease, etc., and to enter into any kind of transaction or negotiations with respect to them. Thus, these sections, reaching beyond those persons responsible for the maintenance of a specific gambling or slot machine enterprise, also penalize persons connected therewith so remotely or indirectly as not to fall within the legal purview of our basic provision against "Promoting gambling activity" (§2). They cover, for example, a slot machine manufacturer who has not as yet made any sale or other deal calculated to place his machines in operation, or in the hands of anyone who plans to maintain them for

gambling purposes.

This is all proper enough--or would be proper enough if this contraband or per se criminal device (the "slot machine") were defined with sufficient precision to distinguish it clearly from other devices or machines susceptible of gambling use but not necessarily dedicated thereto. Unfortunately, such is not the case.

The typical "slot machine" is, of course, a familiar device. As in the two Penal Law sections, however, there is an inclination to define it too broadly as a machine constructed "for use in such a way that, as a result of the insertion of any piece of money or coin or other object such machine or device is caused to operate or may be operated, and by reason of any element of chance xxx, the user may receive or become entitled to receive any piece of money, credit," etc. (§982; see, also, §970-a).

The difficulty here is that, unless the machine itself ejects something of value on the basis of chance, the question of whether "the user may receive or become entitled to receive" something in the way of gambling winnings depends upon whether there is an agreement to that effect with the person in control of it. There are many types of machines--for example, those of a bagatelle and similar nature often found in amusement centers--which require coin insertion for operation and which are primarily games of chance, but which do not eject anything of value as a reward for success. Such a machine may, of course, be maintained as a "gambling" device if its custodian offers to pay off the player in the event of certain outcomes. If, however, it is played purely for amusement purposes and with no "pay-off" agreement, it is not a "gambling" machine or device, much less a "slot machine." (In N.Y.C., it must, nonetheless, be licensed)

It is apparent, therefore, that these machines in general are of two types: one, the true "slot machine," which itself ejects something of value; the other, the machine which ejects nothing and

People v. Mills (1936) 290 NYS 48

may or may not "pay off" depending upon extraneous human agreement. The first is or should be criminal per se. The criminality of the second depends upon the manner in which it is maintained and used, and under no circumstances should it be deemed inherently a contraband article.

Whether the Penal Law sections make this distinction is difficult to discern because of their extremely confusing phraseology and organization [§§970-a, 982; see People v. Mills (N.Y.C. Mag. Ct. 1936) 160 Misc. 730, 732-733]. At any rate, the distinction is clearly noted in this Article in its adoption of the "slot machine" sanctions of the Penal Law.

This is largely accomplished in the "Definitions" section (§1), where, in essence, a "gambling machine" is broadly defined to cover all types of devices treated above when either a mechanical or a human "pay-off" is involved, and a "slot machine" is defined as a "gambling machine" of a sort that itself ejects something of value. Thus, all "slot machines" are "gambling machines," but all "gambling machines" are not "slot machines."

The broad, inclusive criminal sanction of the Penal Law is here imposed only with respect to the true "slot machine," in a section entitled "Illegal slot machine conduct" (§5). The result of all this is (1) that all "slot machine" activity (manufacture, sale, possession, leasing and other transactions, as well as actual maintenance for gambling purposes) may be prosecuted under this section; (2) that actual maintenance of a "slot machine" for gambling purposes may also be prosecuted as "Promoting gambling activity" (§2); (3) that maintenance of any other type of "gambling machine"--a non-ejecting type when a "pay-off" agreement is involved--may be prosecuted as "Promoting gambling activity" (§2), though not as "Illegal slot machine conduct" (§5); and (4) that the latter type of machine, when not operated under a "pay-off" agreement, gives rise to no crime whatever.

why not "all slot machine activity"?

1. all slot machine activity §5
2. actual maintenance §5 or §2
3. non-ejecting type §2 (not 5)
4. non-ejecting type and no "pay-off" agreement: no crime

Section 6--"Presumptions."

This section includes two self-explanatory presumptions taken from current Penal Law sections (§§975, 986-a). The first presumption--presuming scienter with respect to possession of certain policy and lottery records (§975)--is here broadened to apply to possession of "any gambling record, slip or instrument mentioned in this Article" (§6, subd. 1).

Concerning present Penal Law sections here omitted or not carried over

As previously noted, many of the present Penal Law sections are of a civil and administrative nature, dealing with the civil aspects of gambling, the seizure and destruction of gambling implements, and the like (§§976, 977, 978, 979, 983, 984, 985, 985-a, 989, 990, 991, 992, 993, 994, 995, 997, 1380, 1383, 1384, 1385, 1386). It is felt that these sections, most of which are of ancient vintage, should be re-examined, and that whatever legislation of this sort is retained, altered or improved should be transferred to other and more appropriate bodies of law.

The substance of four other sections (§§971, 972, 1371, 1382) is not included here because they are regarded as archaic or meaningless or both.

The immunity statute relating to gambling proceedings (§996) is not included here because of an intention to re-examine the whole immunity statute pattern and, perhaps, either propose one blanket immunity provision covering all criminal proceedings or condense and re-locate the existing provisions.

A crime proscribed in another section, entitled "Cheating at gambling" (§988), is not included here because it is planned to place it in another prospective Article devoted to frauds in the nature of larceny.

RGD:rc
4/25/62

§1 Definitions

Proposed	Draft
Contest of chance	Contest of chance
Something of value	value, machine, lottery Gambling
Gambling machine	gambling Player
Slot machine	bookmaker Promoting G. Activity
~~Gambling~~	Something of value
~~Player~~	Gambling machine
Bookmaking	Slot machine
Lottery	Bookmaking
Policy	Lottery
Bookmaking Record	Policy
Lottery ticket	Bookmaking record
Lottery & policy instruments	Lottery ticket
Gambling Player	Lottery & policy instruments
Promoting gambling activity	

(1) very important
Wholesale index of cum. laws (compile a list of felonies in other chapters)

(2) Felony: don't transfer any felony
note every felony

(3) -Wechsler-
Segregate those only under gen'l provisions
Not deposit them if they can be
treated in P.L. — repeal them.

(4) Staff comment to be included: do we think it can be
covered under a gen'l
P.L. provision? Staff comment should answer this question?
on the relocation project report

July 19th, meeting —

~~Gambling in general~~:

(1) 42 J. Crim. L. 205 (1951) Proposed Uniform State Antigambling Statute poor!

(2) 60 Yale 1396 (1951)

p. 1396 Mac Dougall, Speculation & Gambling 22 (1936)

"Gambling is a betting or wagering, by agreement between two or more persons, whereby the money, property or other thing of value of one or more of the parties to the agreement becomes the property of the other party or parties to the agreement, without legal consideration, upon the happening of an uncertain, future event designated for that purpose."

Gambling Laws 18 B.U.L. Rev. 210 (1938)

269 Annals 11, 8 (1950)

Slot - P. v. Haverhorst 32 S2 760 (1942)

General Construction Law § 35: "Words in the singular number include the plural, & in the plural number include the singular." But not always: must give true intent of the legislature. Only if it appears to be a fair & reasonable construction.

ARTICLE X

Gambling

Illinois defines a "gambling place".

1. Definitions

Contest of Chance. A "contest of chance" is any contest, game, gaming scheme or gaming device in which the outcome (or outcomes) depend in a material degree upon an element of chance, notwithstanding the circumstance that skill of the contestants may also be a material factor therein.

no crime, of course

Gambling (activity). A person engages in "gambling" (activity) when he stakes or risks something of value in or upon the outcome of a contest of chance or upon the outcome of a future contingent event [in no way under his control or influence,] upon an agreement or understanding that he will receive or become entitled to receive something of value in the event of a certain outcome. For the most part, "gambling" is of four general types or categories: (1) playing against other persons for stakes in (a contest) games of chance, (2) playing gambling machines, (3) betting upon the outcome of future, contingent events, and (4) participating in (contests in the nature of) a lottery. Any activity constituting "gambling" as defined in this section, however, is no less such because it may not readily fall within one of these four categories.

the "outcome" or the "event"?

who may be promoting? or may not

or risking something of value

e.g., an unknown contingent event (186)

no crime (players)

Player. A "player" is a person who participates in any form of gambling (activity) (purely) as a contestant or bettor, without receiving or becoming entitled to receive any profit therefrom other than (ordinary gambling winnings) (thing of value agreed upon) and without otherwise rendering any material assistance to the establishment, conduct or operation of the particular (game, contest, scheme, device or) (gambling) activity. (A person who (participates in a gambling contest) gambles at a (game of chance) (contest) on equal terms with the other participants therein does not otherwise render "material assistance" to the establishment, conduct or operation thereof by performing, without fee or remuneration, acts directed toward the arrangement and

in a casual or personal fashion

does this include promoters as well as players.

bookie - 10,000 users, bookie then "laying off" = "player"?

~~acts~~ transfer to ~~per~~ ~~deb~~ ~~promoting~~ shall not be ~~to play~~ game activity

facilitation of the game, such as inviting persons to play, extending or permitting the use of premises therefor and supplying cards or other equipment used therein.

Promoting gambling activity. A person promotes gambling activity who (1) knowingly shares in, receives or becomes entitled to share in or receive any proceeds thereof other than those constituting his personal winnings as a player, or in any material way assists another person to do so; (2) knowingly performs any act other than that of a player which materially aids or advances any form of gambling activity, whether such act be directed toward the creation or establishment of the particular gambling game, contest, scheme, device or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of the playing phases thereof, toward the arrangement of any of its financial or recording phases, or toward any other phase of its operation; (3) having substantial proprietary or other authoritative control over premises or place? (or vessel etc. see 986, 971(4), 973, 974, 974a) being used with his knowledge for purposes of gambling activity, permits such gambling activity to occur or continue, or makes no effort to prevent its occurrence or continuation; or (4) bets with members of the public as a bookmaker, or knowingly (e.g. Tel. Co.) engages in or materially aids or advances any form of bookmaking activity, project or operation, or any phase thereof.

Something of value. The terms "something of value" and "a consideration of value" mean any money, any property of intrinsic value, any object or article exchangeable for money or property of intrinsic value, and any form of credit or promise directly or indirectly contemplating transfer of money or property of intrinsic value or of any interest therein. Misc. uses civil law "advantage to promoter", "disadvantage to a participant"

#1: profit

#2: Management of profit.

#3: bar - card games for money. Note bar owner "promotes" gambling activity. "a gambling for business" See Misc. - pinball machine

all sequence in "contest of chance"

Used in gam'ling definition

"or readily adaptable or convertible to such use"?

Gambling machine. A "gambling machine" is a mechanical device which is so constructed that it constitutes a game or activity of chance when operated by a player, and which is so maintained that either the machine itself or someone in control of it requires a consideration of value for the privilege of playing it and gives or offers the player something of value in the event of a certain outcome or outcomes of play which are achieved or occur through an element of chance.

Slot machine. A "slot machine" is a gambling machine which, as a result of the insertion of a coin or other object, operates, either completely automatically or with the aid of some physical act by the player, in such fashion that, depending upon elements of chance, it may eject something of value. A machine or device so designed and constructed, or readily adaptable or convertible to such use, is no less a slot machine because it is not in working order or because some mechanical act of manipulation or repair is required to accomplish its adaption, conversion or workability. Nor is it any less a slot machine because, apart from its use or adaptability as such, it may also sell or deliver something of value on a basis other than chance.

Bookmaking. "Bookmaking" consists of betting with persons or members of the public as a business or in a professional capacity, rather than in a casual or personal fashion, upon the outcomes of future contingent events.

Lottery. A "lottery" is a gambling scheme in which (1) the player or contestant pay or agree to pay a consideration of value for chances, represented and differentiated by numbers or by combinations of numbers, or by some other media, one or more of which chances are ultimately designated or to be designated the winning ones; (2) the winning number, combinations thereof or other media

Repeal Ellison v. Tavin 179 N.Y. 164. Cigar buyers guessed number of cigars to be taped in a certain nth. Person closest won. Def. contended that the estimate would be affected by the exercise of judgment. Held, the dominant element is chance. A lottery does not cease to be such because its result may be affected, to some slight extent, by the exercise of judgment."

representing such chances are determined by a drawing or by some other method based upon the element of chance; and (3) the holder(s) of the winning chance(s) thereby receive(s) or become(s) entitled to receive something of value.

Policy. "Policy" or "the numbers game" is a form of lottery in which the winning number(s), combination of numbers or other media employed are not determined upon the basis of a drawing or other act on the part of the person(s) conducting or connected with the game or scheme, but upon the basis of the outcome (or outcomes) of a future, contingent event (or events) otherwise unrelated to the particular game or scheme.

paraphernalia

e.g., adding machine, several telephones, headsets, cash boxes or drawers. See P. v. Wilson 4 S2d 592 946: books, papers, apparatus or paraphernalia for the purpose of recording bets."

Bookmaking record. A "Bookmaking record" is a writing, paper, document or instrument made by a person engaged in bookmaking activity constituting a record of a bet (or bets) upon the outcome of a future, contingent event (or events).

cf.

Lottery ticket. A "lottery ticket" is a writing, paper, document or instrument constituting a record of a chance in a lottery or a record by means of which a chance in a lottery may be created, sold or transferred.

cf.

merge these 2 sections

Lottery and policy instruments. "Lottery instruments" and "policy instruments" are writings, records or articles of any kind commonly used in carrying on or promoting games or schemes of "lottery" or "policy," as the case may be.

2. Promoting gambling activity.

A person who promotes any gambling activity is guilty of a misdemeanor.

In bookmaking, you have scratch sheets or racing results: possession of these is not a crime & should not be (might be used within confines of a track)

shift 4 to 3, & 3 to 4 so that felonious possession follows the misd. possession.

3. Possession of gambling records.

A person who, with knowledge of its content, meaning and purpose, possesses any bookmaking record, lottery ticket, lottery instrument, policy slip or policy instrument, is guilty of a misdemeanor, except that possession of lottery and policy records constituting, reflecting or representing plays or bets of the possessor himself in a number not exceeding ten is not a crime.

players excepted

Query: "accomodation collector" with 1 play?

4. Feloniously promoting gambling activity. ~~will this~~

Will a Hines situation be covered? Hines was assisted in continuing etc. S, Alan'A, assist, and etc. be in here? See misd.

A person feloniously promotes gambling activity who:

physically?

"under principal" theory!

1. Engages in book-making to the extent that he receives or accepts in any one day more than five bets totaling more than five thousand dollars upon the outcome or outcomes of a future, contingent event or events; or

promoting

does this refer to premises + not (a) (b) (c)? Yes!

2. In connection with a lottery or policy game or scheme, either receives, or keeps, occupies or uses premises (vessel etc) for the purpose of receiving, or (a) money or written records from a person (or persons) other than players whose plays or chances are represented by such money or records, or (b) more than five hundred dollars in any one day of money played in such game or scheme, or (c) written records of more than one hundred such plays or chances made or taken over any period of time. (~~other than his own~~; ~~a player may keep his numbers for his own record~~)

or other gambling activity

Player gives to A, a friend A places it with B, a small-time collector. Felony?

The crime of feloniously promoting gambling activity is a felony punishable by _____

A lottery will be a misd. unless it gets $ ≠ 10,000 daily ∴ a misd under 1373. Felony only if jury finds he acted in concert with others

See Hines: A sells

~~974-a (c) (shall be guilty of a misd. if he sells plays)~~

5. Illegal slot machine conduct.

A person who manufactures, sells, places, keeps or possesses a slot machine, or who conducts or negotiates any transaction designed to affect ownership, custody or use thereof or any right, title or interest therein, is guilty of a misdemeanor.

only §3?

6. Presumptions.

bookmaking record etc - see §3

1. Proof of possession of any gambling record, slip or instrument mentioned in this Article is presumptive evidence of possession thereof with knowledge of its content, meaning and purpose.

2. In any prosecution under this Article in which it is necessary to prove the occurrence of a sporting event, a published report of its occurrence in any daily newspaper, magazine or other periodically printed publication of general circulation shall be admissible in evidence and shall constitute presumptive proof of the occurrence of such event.

986-a added in 1956

RGD/pjc:4/25/62

April 11, 1963

PROPOSED CRIMINAL MISCHIEF ARTICLE

This memorandum briefly reviews the New York law on malicious mischief and explains the proposed criminal mischief article. The present malicious mischief article of the Penal Law is set forth as "Appendix A." The proposed criminal mischief article, designed to replace the multiplicity of detail found in the present malicious mischief article, is set forth as "Appendix B." The pertinent A. L. I. Model Penal Code provisions are set forth as "Appendix C."

Background

Malicious mischief, as generally defined, is the intentional destruction of or damage to the tangible property of another without honest claim of privilege. Penal Law Article 134, "Malicious Mischief," consists of 25 sections, some with numerous subdivisions (See Appendix A). The structure of the article is disorganized and many provisions are redundant and confusing. Most of these sections do no more than penalize the unjustified and intentional physical destruction of or damage to the tangible property of another.

The detailed enumeration in this article of particular kinds of property and of particular methods of destruction or damage is the result, in part, of legislative effort to provide different penalties for different kinds of criminal mischief. However, it is difficult, if not impossible, to rationalize the varying kinds of punishment authorized by this article. Furthermore, the minute particularization creates the erroneous impression that property not specially listed does not fall within the protection of the article.

The historical development of legislation punishing malicious mischief is set forth briefly in Clark and Marshall, Crimes (6th ed. 1958) p. 866:

> "Beginning with the statute of Westminster I., 13 Edw. 1, §46 (1275), and up to 24 and 25 Vict. c. 97 (1861), statutes have been enacted in England from time to time punishing, either as a felony or as a misdemeanor, malicious injuries to various kinds of property, as buildings, manufactures and materials; machinery; trees, shrubs, vegetables, fences; mines, and mining apparatus and machinery; sea or river banks, walls, wharves, and similar works;

> railways and telegraphs; books and manuscripts in libraries and museums; cattle and other animals; and vessels. And there is a general section in the statute punishing malicious injury to 'any real or personal property whatsoever, either of a public or private nature,' for which no punishment is otherwise provided. * In this country, perhaps, there is no state in which the subject is so minutely and specifically covered by the statutes, but, no doubt, in all states there are statutes resembling the English statutes, or particular sections of the statute of 24 and 25 Vict. c. 97 (1861), punishing, in some cases as a felony, and in others as a misdemeanor only, willful and malicious injury to private and public property."

The Penal Code of 1881 continued the enumeration of specific kinds of malicious mischief found in the earlier New York criminal laws despite the presence of a catchall provision, i. e., what is now Penal Law §1433. The reason for continuing the redundancy is found in the report issued by the Penal Code Commissioners in 1864:

> "... the Commissioners have, in many instances, refrained from omitting a special prohibition of a particular species of act, even though they thought the provision needless for the reason that all acts of that class were embraced in a more general prohibition found elsewhere. Where a statute forbidding a particular species of acts has for years existed along with a general provision impliedly embracing the same cases, there is danger in omitting the special provision, however needless it may be, lest an inference should be drawn from the omission, that the act was designed to be made no longer punishable. Where provisions of existing statutes have been thought unobjectionable in themselves, but useless because embraced in effect in other provisions of a more general character, they have, therefore, in many cases been retained by the Commissioners, in the belief that the omission of them may more safely be made in the ultimate revision of the work by the Legislature, then at present." Draft of a Penal Code for the State of New York, vi, (1864).

Larceny and Malicious Mischief Distinguished

Larceny, as generally defined, consists of the taking and carrying away of the personal property of another with the intent permanently to deprive such person of his property. Scattered throughout the malicious mischief article of the Penal Law are a variety of "asportation" terms:

(1) removes: §§1423, 1425 (1-a), 1425 (10)

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* Such "general section" in the New York statute is Penal Law §1433, discussed infra.

(2) removes or assists in removing: §1427 (1)

(3) remove or carry away: §1423-b

(4) carries away: §1425(2)

(5) takes away: §1429

(6) takes or carries away: §1425 (4), (8)

(7) takes or attempts to take: §1425 (12)

(8) seizes or carries away: §1435 (7)

Whatever may have been the historical basis for including such language in the malicious mischief article it is clear, based on the over-all purpose of the article, that the statute is directed at an actor with a destructive intent. The Model Penal Code draftsmen, in commenting on this point, wrote:

> "Where the purpose is purely destructive, an interim assumption of control should not lead to a theft conviction. For example, one who picks up another's vase in order to dash it to pieces against a wall ought to be subject to the same penal consequences as if he had dropped a brick on the vase, although in the first case, but not in the second, it could be said that he had 'taken and carried away' with intent permanently to 'deprive'." Tentative Draft No. 2, p. 63.

Concepts of Culpability

The variety and disparity of the culpability requirement in the present malicious mischief article of the Penal Law has occasionally engendered confusion. [See Hewitt v. Newburger 141 N. Y. 538 (1894); People v. Raeder 161 Misc. 557, 561 (Co. Ct. Del. Co. 1937).] Some of the culpability terms used in this article are:

(1) willfully: §§1423-a, 1425, 1429, 1431, 1432, and 1438

(2) willfully and without authority: §§1427 (2), 1430

(3) maliciously: §1426 [see Penal Law §3, subd. 3]

(4) willfully or maliciously: §§1423, 1428 and 1435

(5) unlawfully and maliciously: §§1420, 1420-a

(6) unlawfully and willfully: §1433

(7) unlawfully or wrongfully: §1422 (1)

It would appear that, by definition, malicious mischief is not committed unless the actor inflicts the mischief "maliciously." In some jurisdictions there is a requirement that the actor harbor ill-will or resentment toward the owner or the one in possession of the property. Early New York case law required that the offense be committed secretly or in the night time or be accompanied by a breach of the peace, but it is enough today, however, that the destruction or damage be intentionally inflicted and be done without honest claim of privilege.

In Wass v. Stephens 128 N. Y. 123, 128-129, (1891) the Court of Appeals interpreted the word "willfully" in what is now Penal Law §1423 to mean "something more than a voluntary act, and more also than an intentional act which in fact is wrongful. It includes the idea of an act intentionally done with a wrongful purpose, or with a design to injure another, or one committed out of mere wantonness or lawlessness."

In People v. Kane 131 N. Y. 111, 114 (1892), the court discussed the meaning of the terms "unlawfully and willfully" contained in what is now Penal Law §1433:

> "Under this section, in order to establish the offense charged, the elements of an unlawful and of a willful destruction of property must exist and be proved. Though a destruction of property may have been willful, whether it was unlawful may be a question which should be decided by the jury, upon the evidence showing the cause or motive. If it was intended that the act alone should constitute the crime, irrespective of the motive, then I do not think the legislature would, in enacting the section, have used the expression 'unlawfully.' It would have been sufficient to have said 'wilfully'. To the presence of the word 'unlawfully' in the section, I think we must give some importance and significance."

The revised Penal Law will define, of course, the various kinds of culpability. The proposed draft of the Criminal Mischief Article uses, provisionally, the terms "intentionally" and "recklessly." See Model Penal Code Article 2, "General Principles of Liability"; for commentary, see Tentative Draft No. 4, pp. 119-155.

Penal Law Section 1433

Penal Law §1433 refers to a person "who unlawfully and wilfully destroys or injures any real or personal property of another ...in a case where the punishment is not specially prescribed by statute." Since more than 200 kinds of mischief are "specially prescribed" in other sections of the Penal Law,* the utility of §1433 as a catchall provision is largely nullified. Prosecutors from time to time erroneously frame an information for malicious mischief under §1433, when some other section of the Penal Law specifically proscribes the act committed. This technical error in draftsmanship can be fatal to a prosecution.

In People v. Knatt, 156 N. Y. 302 (1898) the defendant was convicted under what is now §1433. However, the act charged to have been committed (poisoning cattle) was proscribed specially by what is now §190. In setting aside the judgment, the court held that §1433 by its own terms is limited to cases where the punishment is not specially prescribed by statute:

> "A statute so sweeping and general as this is could by a liberal construction be extended to cases that were not within the purpose of the legislature. Almost every crime against property involves, in some sense, its destruction or injury. The crime of arson for instance involves nearly always the willful and unlawful destruction of the property of another, but it cannot be supposed for a moment that such an offense is included within the scope of the section. That provision of the [Penal] Code was manifestly intended to cover cases that had not been provided for by any other law. Its purpose is expressed in clear language, and, therefore, if we can find any other statute that provides for the punishment of the offense of poisoning cattle, the conclusion that it does not fall within this section is irresistible." 156 N. Y. at 305.

In People v. Costello, 305 N. Y. 63 (1953), the defendant was convicted under §1433. The act charged to have been committed (deflating the tires on complainant's automobile) was proscribed specially by §1425, subd. 11-a, which provides that a person

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* The only exception to this statement is a provision respecting tampering with railroad property, which was inserted (perhaps inadvertently) in the body of §1433 after its original enactment.

who willfully and intentionally "damages in any manner an automobile or other motor vehicle" is guilty of a misdemeanor, regardless of the amount of the damage.* In setting aside the conviction the Court of Appeals again observed that §1433 was "manifestly intended to cover cases not provided for by any other law. If then another statutory provision prescribed punishment for the offense of injuring motor vehicles, this case did not fall within section 1433." 305 N. Y. at 65. [Cf. People v. Edwards 282 N. Y. 413 (1940) and People v. Horie 258 App. Div. 246 (1st Dept. 1939). See also People v. Edstrom 15 Misc. 2d 567 (Co. Ct. Nass. Co. 1958); People v. Wozniak 14 Misc. 2d 909 (Co. Ct. Orange Co., 1958)]

Treble Damages under Section 1433

Penal Law §1433 provides, in part, that a person who commits malicious mischief "in a case where the punishment is not specially prescribed by statute, is punishable as follows:...3. And in addition to the punishment prescribed therefor he is liable in treble damages for the injury done, to be recovered in a civil action by the owner of such property, or the public officer having charge thereof." In Hazak v. Robertson Goetz Building Co. 289 N. Y. 478 (1943) plaintiff had a verdict against defendant for damages arising from the cutting down of part of plaintiff's land. Although defendant's conduct violated the specific provisions of Penal Law §1425, subd. 4, the trial court nonetheless trebled the amount of the verdict under the supposed authority of §1433. The Court of Appeals held this to be error, noting that §1433 is inapplicable since the suit involved conduct for which criminal punishment is specially prescribed by statute:

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* A bill was introduced in the Senate on February 21, 1963, amending §1425 and adding new §1433-a, to make it a felony to damage an automobile if the damage exceeds $250., and a misdemeanor if less than this sum. S. Intro. 3172, S. Pr. 3381.

"The whole scheme of article 134, including the separate treatment of numerous offenses in various sections, as well as the inclusion generally of other such wrongs and specifically of railroad damage in section 1433, leads us to the conclusion that section 1433, as to treble damages as well as to criminal punishment (People v. Knatt, supra), means just what it says, that it is not applicable to cases categorically dealt with elsewhere in the law. It can, of course, be demonstrated that this results sometimes in the trebling of civil damages in cases of minor injury, and in lack of authority for such trebling in more aggravated cases. But the whole problem is for the Legislature, and there is no reason to doubt that the Legislature has deliberately prescribed, for the several malicious mischiefs, such various punishments as seem to it appropriate." 289 N.Y. at 481. [See Golding v. Golding 4 A.D. 2d 65, 66 (1st Dept., 1957).]

Besides §1433, the Penal Law contains four other provisions relating to multiple damages: §273 (treble damages for misconduct of attorney); §1383 (recovery of double money paid for lottery tickets); §1438(treble damages for willful injuries to bridges in New York City); §1875 (treble damages against sheriff for violation of certain provisions). The Law Revision Commission pointed out some years ago that the ancient rule awarding treble damages in waste cases, dating back to an English statute enacted in 1278, was out of keeping with the general rule of damages for actions for injury to property [Leg. Doc. (1935) No. 60G]. In 1943, the Commission made a study of other provisions in which multiple damage awards are authorized, with a view to eliminating such provisions, where they appear to be inappropriate or are the cause of injustice. The following comment was made:

"One of the most glaring defects in the present law growing out of the award of multiple damages, results from the provision of section 1433 of the Penal Law. This section, among other things, provides treble damages for the unlawful and wilful destruction of, or injury to, property in all cases where punishment for such act is not specially prescribed by statute. In many cases, the statute prohibiting certain acts, or defining particular crimes, provides that a person violating the statute is guilty of a misdemeanor, or of a felony, or is punishable in a specified manner. Since under section 1433 of the Penal Law treble damages are denied in all these cases, the measure of recovery in a civil action is made to depend on the existence of a penal statute, prescribing the criminal punishment for the particular act which caused the injury.

The difficulties resulting from this state of the law are revealed in the case of Hazak v. Robertson Goetz Building Co. ... In that case the Court denied the plaintiff's claim

to treble damages under section 1433 because the defendant's conduct was a violation of section 1425 of the Penal Law which specially prescribes the punishment. The Court stated that section 1433 might result 'in the trebling of civil damages in cases of minor injury, and in lack of authority for such trebling in more aggravated cases,' and declared that this situation could be remedied only by the Legislature.

These inconsistencies in the present law might be eliminated in one of two ways:

First, the treble damages provision of section 1433 might be broadened to include cases of wilful injury to property now excluded by the provisions of this section.

Second, the treble damages provision of section 1433 might be repealed, thus restricting the award of multiple damages to those cases in which such damages are expressly prescribed in the statute creating the offense.

The Commission believes that the second method is preferable. An award of multiple damages in a civil action for injury to property, if justifiable at all, should be restricted to those cases in which the Legislature has considered the matter and expressly provided for such damages. A statute of general application, such as the present section 1433 of the Penal Law, may result in an award of multiple damages in cases where the Legislature in fact had no such intention. The repeal of subdivision 3 of section 1433 would keep the award of multiple damages within the bounds of express legislative intent, and at the same time avoid unjust discriminations between offenders, which are possible under the present law, as pointed out by the Court of Appeals in the Hazak case, supra.

Whether the award of multiple damages is justifiable in all cases in which the existing statutes expressly so provide, is a matter which the Commission now has under consideration. It is not prepared to recommend any change in the law in such cases at this time, other than the amendment of Domestic Relations Law, section 83, and the amendment of Penal Law, section 1433." [Leg. Doc. (1944) No. 65J, pp. 5-6.]

The bill repealing subdivision 3 of §1433 failed to pass either the Senate or Assembly at the 1944 legislative session. The Law Revision Commission advised us in a recent communication that no further studies or recommendations were made respecting multiple damages.

It is suggested that all multiple damage provisions presently in the Penal Law be repealed and not continued in the revised Penal Law.

Property Protected

As noted above, the various sections in the malicious mischief article of the Penal Law are distinguishable from each other mainly

by the type of property destroyed or damaged. Penal Law §1433 refers in broad terms to "any real or personal property of another." Personal property, as defined in General Construction Law §39, includes intangible as well as tangible property. In Polychrome Corp. v. Lithotech Corp. 4 A.D. 2d 968, 969 (2d Dept., 1957), the court held, however, that only tangible property comes within the purview of the malicious mischief article:

> "Mere breaches of contract or interference with contract rights or acts which do not constitute a crime under the statute do not give rise to a cause of action for treble damages under the statute [Penal Law §1433]....The statute is intended to apply to actual physical damage to property, in the nature of malicious mischief, and is not intended to apply to violations of incorporeal rights."

Another requirement in §1433 is that the tangible property be that "of another." Actual legal title need not be in the person injured. In People v. Reade 247 A.D. 376 (1st Dept., 1936) possession of certain realty was awarded to receivers by a court order of appointment during the pendency of an action to foreclose a mortgage. The Appellate Division held that this possession constitutes in the receivers special property in the realty and fixtures, which possession and special property is that "of another" under Penal Law §1433. [See also People v. Rader 140 Misc. 707 (City Mag. Cts., 1931).]

The Model Penal Code provides in the Arson formulation: "Property is that of another, for the purposes of this section, if anyone other than the actor has a possessory or proprietory interest therein." Section 220.1 (4); cf. Section 223.0 (7).

Meters and Coin-box Telephones

Section 1431, a prolix provision, refers to the tampering with or destruction of gas and electric meters as well as steam valves. Section 1431-a provides that the existence of any of the conditions with reference to meters or steam valves as described in §1431 is presumptive evidence that the person to whom such service is at the time being furnished through such meters has caused such condition.

Section 1432 (similiar in scope to §1431, but without a presumption comparable to §1431-a) refers to water meters, pipes and connections. Section 1432-a refers to the tampering with coin-box telephones.

The presumption provision in §1431-a presents a separate problem. This section was added to the Penal Law in 1926. In 1935 the Legislature passed a bill (A. Int. 101, A. Pr. 101) repealing §1431-a, but this bill was vetoed by the Governor. [Public Papers of Governor Herbert H. Lehman, (1935) p. 207].

In Eff-Ess, Inc. v. New York Edison Co. 237 App. Div. 315 (1st Dept., 1932), the court noted that the presumption created by §1431-a permits the inference that the subscriber interfered with the meter:

> "It seems to us that this is an inevitable inference resulting from the fact that the subscriber is the only party who could possibly benefit from tampering with the meter. The subscriber is in effect the receiver of the stolen current. At common law an inference of guilt attached to the possession of stolen goods without explanation....There is no difference in principle in charging a man with guilty possession in whose custody one's property is found a short time after a robbery from similarly charging a subscriber who has consumed current which concededly has been stolen and not paid for." 237 App. Div. at 317-318.

Mr. Justice Martin dissented (237 App. Div. at 318-319):

> "If this section is to be taken literally, a person to whom gas, electricity, water or steam is furnished through a meter which has been tampered with, when the meter erroneously records too small an amount, is presumed to be guilty of fraud. The consumer to whom the gas or other commodity is being furnished, may have no incentive to tamper with the meter for the reason that he may be paid for such service by a tenant or other person who would be the only one having an incentive to alter the condition of the meter. The meter in this case was not in the basement or cellar, but was in a public hallway where any one might have tampered with it. There are many conditions here present which make this presumption unreasonable."

The staff recommends that the provisions of §1431-a not be carried over into the revised Penal Law. See Model Penal Code §1.12 (Presumptions); for commentary, see Tentative Draft. No. 4, pp. 114-118.

Miscellaneous Provisions

The following provisions in the present malicious mischief

article of the Penal Law require special comment:

(1) §§1420, 1420-a refer to the damage or destruction of structures by the use of explosives, and provide for increased punishment if "the life or safety of a human being is endangered." This type of conduct is covered in the proposed Arson Article which formulates the highest grade of arson in terms of a person being present in the structure at the time of the arsonous behavior.

(2) §1423, subd. 6 relates to annoying telephone calls and §1423-a relates to party lines. These subjects will be covered in another article of the revised Penal Law. (See, e. g., related subject matter in Penal Law Article 50, "Communication," and Article 73, "Eavesdropping.")

(3) §1424 proscribes false alarms of fire. This type of conduct is covered in the proposed Offenses Against Public Order Article.

(4) §1425, subds. 5, 9 and 14, prohibit trespass. This type of conduct is covered in the proposed Burglary and Trespass Article.

(5) §1425, subd. 16 is substantially similar to the Uniform Flag Act. The conduct proscribed by this subdivision will be covered by a formulation such as Model Penal Code §250.9 (Desecration of Venerated Objects).

(6) §1429 relates to interference with election returns. It is proposed that this section (along with all the provisions in Penal Law Article 74, "Elective Franchise") be transferred to the Election Law.

(7) §1435-1437 relate to damaging military equipment or supplies. The New York State Division of Military and Naval Affairs has drafted a bill to relocate these sections, without substantive change, in the Military Law.

The Proposed Article

The proposed Criminal Mischief Article (see Appendix B) is designed to punish persons who intentionally or recklessly damage

or tamper with tangible property of another. The term "tangible property of another," as used in the draft, is intended to have the same meaning given to it by New York Courts in such cases as Polychrome Corp. v. Lithotech Corp. and People v. Reade, supra, i. e., if anyone other than the actor has a possessory or proprietory interest therein, it is deemed "property of another." The terms "damage" and "tamper," as used in the draft, are intended to connote their common usage. "Damage" as a verb implies an injury or harm to property that lowers its value or involves loss of efficiency, and includes conduct ranging from defacement to destruction. As a noun "damage" implies a reduction in the value of property as measured by cost of repair or replacement or some other standard. "Tamper" implies meddling or interfering with or displacing property. Where the damage is effectuated by fire or explosives, the proposed Arson Article will be applicable.

The actor, of course, must be aware that he is damaging or tampering with tangible property of another and that he is doing this without consent of the owner or without lawful excuse. The burden is upon the actor to come forward with some evidence to show that he was privileged to harm the property.

The draft grades the crime into three categories of relative seriousness. The following factors are given significance in the grading scheme:

(1) All reckless behavior resulting in damage to tangible property of another is treated as Criminal Mischief in the Third Degree, regardless of the amount of harm [§1 (a)].

(2) Tampering with tangible property of another (intentionally or recklessly), in a manner which endangers property, is treated as Criminal Mischief in the Third Degree [§1 (b)]. The Model Penal Code cites in its commentary an example of tampering conduct: "... when an unauthorized person moves a railroad switch or sets a control lever in an industrial plant in such a way as to slow down

operation," Tentative draft No. 2, p. 127. If such conduct endangers property, it would be included in §1(b) of the draft. And when an actor tampers with property intending to damage property or reckless of such harm, and damage ensues, such conduct would be included in §1(a) of the draft. And when an actor tampers with property intending to damage property, and damage in excess of $100 [or $500] ensues, such conduct would be included in §2(a) [or §3(a)] of the draft.

(3) The traditional kind of malicious mischief is treated in §§1(a), 2(a) and 3(a) of the draft. These sections grade the crime by the amount of damage. When the damage resulting from the actor's conduct exceeds $100. he is guilty of Criminal Mischief in the Second Degree [§2(a)]; when the damage exceeds $500, he is guilty of Criminal Mischief in the First Degree [§3 (a)]; and, when the damage is less than $100, he is guilty of Criminal Mischief in the Third Degree [§1(a)]. The amount of damage in individual cases can be measured by any reasonable standard [cf. Model Penal Code, Section 223.1 (2) (c)]. It is envisaged that the revised Penal Law will contain some general provision to determine value in cases involving theft, criminal mischief, etc.

The Model Penal Code defines criminal mischief in a form somewhat similar to Section 1 of the draft [Section 220.3 (1); see Appendix C]. The Code grades the offense according to the amount of harm into four categories: violation, petty misdemeanor, misdemeanor, and felony of the third degree. In the felony and misdemeanor classifications, the actor must purposely cause pecuniary loss in excess of $5,000* and $100, respectively; in the petty misdemeanor category, he must purposely or recklessly cause pecuniary loss in excess of $25; all other criminal mischief is a

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* In addition, criminal mischief is a felony of the third degree if the actor causes a substantial interruption or impairment of some public service.

violation. Hence, purposely causing a specified result is a material element for the two highest grades of the offense. The problem of causal relationship between conduct and result is considered in Model Penal Code §2.03; for commentary, see Tentative Draft No. 4, pp. 132-135.

Under §2(a) and §3(a) of the draft, however, intentionally causing the resultant harm is not a material element of the crime, i. e., the actual pecuniary loss need not be intended by nor be within the contemplation of an actor who intentionally damages tangible property. It is enough that the actor intend to cause "any damage." A similar approach is taken in the Proposed Minnesota **Criminal Code** (1962) p. 164:

> "It is believed that the gravity of the crime should turn upon the extent of the property damaged. This is the policy which underlies the crime of theft. In a sense, the destruction of property from a social point of view is more serious than theft for it terminates the possibility of recovering the property either at all or in its original form."

(4) Damaging or tampering with property of a public utility is treated in §2(b) and §3(b) of the draft, independent of the amount of pecuniary damage done by the actor. Damaging or tampering with such property with intent to cause an interruption or impairment of service rendered to the public or to obtain service which the actor knows is available only for compensation, is treated as Criminal Mischief in the Second Degree [§2(b)]. The draft does not require that there be in fact such interruption or impairment or that the actor in fact obtain such service. Section 2(b) of the draft is designed to cover conduct now proscribed by Penal Law §§1431, 1432 and 1432-a. When a subscriber tampers with, for example, an electric meter and obtains "stolen current," it is contemplated that the theft provisions of the revised Penal Law will punish such larceny. [See Model Penal Code §223.7]

Damaging or tampering with such property with intent to

cause a substantial interruption or impairment of service rendered to the public, is treated as Criminal Mischief in the First Degree [§3(b)]. The draft does not require that there be in fact an interruption or impairment of service.

The draft includes the following enterprises (defined in Public Service Law §2) furnishing a public service: a gas, electric, steam or water-works corporation, telephone or telegraph corporation, common carrier, or public utility operated by a municipality.

PJMcQuillan /pjc; cd
April 11, 1963

APPENDIX A

NEW YORK PENAL LAW

ARTICLE 134, "MALICIOUS MISCHIEF," §§1420-1438

§1420. Damaging building or vessel by explosion

A person who unlawfully and maliciously, by the explosion of gunpowder, or any other explosive substance, destroys or damages any building or vessel, except a building used for religious purposes, is punishable as follows:

1. If thereby the life or safety of a human being is endangered, by imprisonment for not more than twenty-five years;

2. In every other case by imprisonment for not more than ten years.

§1420-a. Damaging building or property used for religious or cemetery purposes

A person who unlawfully and maliciously, by the explosion of gunpowder, or any other explosive substance, destroys or damages any building or any property used for religious or cemetery purposes, is punishable as follows:

1. If thereby the life or safety of a human being is endangered, by imprisonment for not more than fifty years.

2. In every other case by imprisonment for not more than twenty years.

§1421. Burning crops or timber, how punished

A person who, under circumstances not amounting to arson in any of its degrees:

1. Wilfully burns or sets fire to any grain, grass or growing crop, or standing timber, or to any building, fixtures or appurtenances to real property of another; or

2. Wilfully sets fire to, or assist [So in original. Probably should read "assists."] another to set fire to any wild, waste or forest lands, belonging to the state or to another person whereby such forests are injured or endangered;

Is guilty of felony and is punishable by imprisonment for not more than ten years or by a fine of not more than two thousand dollars, or by both.

§1422. Altering signal or light for railroad or vessel

A person who, with intent to bring a vessel, railway engine, or railway train into danger:

1. Unlawfully or wrongfully shows, masks, extinguishes, alters, or removes a light or other signal; or,

2. Exhibits any false light or signal,

Is punishable by imprisonment for not more than ten years.

§1423. Injuring highway boundary, pier, sea-wall, dock, rock, buoy, landmark, mile-board, pipe, main, sewer, machine, telegraph, or other property

A person who wilfully or maliciously displaces, removes, injures, or destroys:

1. A public highway or bridge, or a private way laid out by authority of law, or a bridge upon such public or private way; or,

2. A pier, boom, or dam, lawfully erected or maintained upon any water within the state, or hoists any gate in or about such dam; or

3. A pile, or other material, fixed in the ground and used for securing any sea-bank or sea-walls or the bank or dam of any river or other water, or any dock, quay, jetty, or lock; or

4. Repealed.

5. A tree, rock, post, or other monument, which has been either erected or marked for the purpose of designating a point in the boundary of the state, or of a county, city, town, or village, or of a farm, tract, or lot of land, or any monument erected or marked for the purpose of permanent reference by a state, county, city, town, or village, or any mark or inscription thereon; or,

6. A line of telegraph or telephone, wire or cable, pier or abutment, or the material or property belonging thereto, without lawful authority, or shall unlawfully and wilfully cut, break, or make connection with any telegraph or telephone line, wire, cable or instrument; or who shall wilfully prevent, obstruct or delay, by any means or contrivance whatsoever, the sending, transmission, conveyance or delivery, in this state of any authorized message, communication or report by or through any telegraph or telephone line, wire or cable, under the control of any telegraph or telephone company doing business in this state; or who shall use any such telephone line to make calls to a place of business for the purpose of keeping busy the telephone line or lines thereto in an effort to injure such business by preventing, obstructing or delaying bona fide business calls; or who shall aid, agree with, employ or conspire with any person or persons to unlawfully do, or permit or cause to be done, any of the acts hereinbefore mentioned, or who shall occupy, use a line, or shall knowingly permit another to occupy, use a line, a room, table, establishment or apparatus to unlawfully do or cause to be done any of the acts hereinbefore mentioned; or,

7. A pipe or main for conducting gas or water, or any works erected for supplying buildings with gas or water, or any appurtenance or appendage connected therewith; or,

8. A sewer plant, sewer or drain, or a pipe or main

connected therewith or forming part thereof; or,

9. Destroys or damages with intent to destroy or render useless any engine, machine, tool or implement intended for use in trade or husbandry, is punishable by imprisonment for not more than two years.

10. Any person who shall without authority of the corporation owning the same open any fire-hydrant, except for the purpose of extinguishing a fire, or who shall wantonly injure or impair the same, or who shall wilfully or maliciously displace, remove, injure or destroy any fire hose or appliances or fire extinguishers, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of ten dollars or by imprisonment in a county jail for the term of ten days; and it shall be the duty of all policemen, deputy sheriffs or constables to arrest any person found violating this subdivision.

11. A person who wilfully or maliciously displaces, removes, injures or destroys a mile-board, mile-stone, danger sign or signal, or guide sign or post, or any inscription thereon, lawfully within a public highway; or who, in any manner paints, prints, places, puts or affixes, or causes to be painted, printed, placed or affixed, any business or commercial advertisement on or to any stone, tree, fence, stump, pole, building or other object, which is the property of another, without first obtaining the written consent of such owner thereof, or who in any manner paints, prints, places, puts or affixes, or causes to be painted, printed, placed or affixed, such an advertisement on or to any stone, tree, fence, stump, pole, mile-board, mile-stone, danger-sign, danger-signal, guide-sign, guide-post, bill-board, building or other object within the limits of a public highway is punishable by a fine of not less than five dollars nor more than twenty-five dollars, or by imprisonment for not more than ten days, or by both such fine and imprisonment. Any advertisement in or upon a public highway in violation of the provisions of this subdivision may be taken down, removed or destroyed by anyone.

12. A person who wilfully or maliciously removes or destroys a buoy or beacon, lawfully placed on or along any waters within the state, is punishable by imprisonment for not more than two years.

12-a. A person who wilfully or maliciously causes a buoy or beacon lawfully placed in or along the waters within the state, to break away from its moorings, or to become upset, or to have its light extinguished, is punishable by a fine of not less than five dollars nor more than twenty-five dollars, or by imprisonment for not more than ten days, or by both such fine and imprisonment.

§1423-a. Unlawful interference with pipe lines of pipe line corporations

Any person who shall wilfully cut, break, tap or make connection with or otherwise tamper, meddle or interfere with any part of a pipe line owned or maintained by a pipe line corporation pursuant to article seven of the transportation corporations law or with any appurtenance or

appendage connected therewith or who shall wilfully prevent, obstruct or delay, by any means or contrivance whatsoever, the transportation through any such line of any petroleum, gas, liquids or any other property, substance or product being transported thereby, is guilty of a misdemeanor.

§1423-b. Removal of lamp-posts or electric light poles in the city of New York

Any person who, in the city of New York, shall take up, remove, break, deface, take down, carry away or interfere with any lamp-post or electric light pole or lamp or electric light apparatus or any part thereof which shall be fixed or hung in any street, or extinguish any light therein, without permission of the proper authority, shall be guilty of a misdemeanor and, after conviction therefor, shall be punished by a fine of not more than one hundred dollars, or by imprisonment for not more than thirty days, or both.

§1424. False alarms of fire; interference with fire-alarm systems

1. Any person who shall wilfully give any false alarm of fire, or who shall wilfully tamper, meddle or interfere with any station or signal box of any telegraph, telephone or radio fire alarm system, or any auxiliary fire appliance, or who shall wilfully break, injure, deface or remove any such box or station, or who shall wilfully break, injure, destroy, or disturb any of the wires, cables, ducts, poles, towers or other supports and appliances connected with or forming a part of any telegraph, telephone or radio fire alarm system, or any auxiliary fire appliance, shall be guilty of a misdemeanor, punishable by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment.

2. Any person aiding or abetting in the commission of any of the acts described in subdivision one of this section shall be guilty of a misdemeanor, punishable by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment.

3. The provisions of this section shall supersede the provisions of any special or local law, or ordinance, of the same subject matter as subdivisions one and two of this section if the violation thereof would not constitute a misdemeanor and if the punishment for a violation thereof could be less than the maximum punishment provided for in subdivisions one and two of this section.

§1424-a. Party line: refusal to yield in emergency

1. Any person who shall wilfully refuse to immediately relinquish a party line when informed that such line is needed for an emergency call to a fire department or police department or for medical aid or ambulance service, or any person who shall secure the use of a party line by falsely stating that such line is needed for an emergency call, shall be guilty of a misdemeanor.

2. "Party line" as used in this section means a subscribers line telephone circuit, consisting of two or more main telephone stations connected therewith, each station with a distinctive ring or telephone number. "Emergency" as used in this section means a situation in which property or human life are in jeopardy and the prompt summoning of aid is essential.

3. Every telephone directory hereafter distributed to the members of the general public in this state or in any portion thereof which lists the calling numbers of telephones of any telephone exchange located in this state shall contain a notice which explains the offense provided for in this section, such notice to be printed in type which is not smaller than any other type on the same page and to be preceded by the word "warning" printed in type at least as large as the largest type on the same page: provided, that the provisions of this section shall not apply to those directories distributed solely for business advertising purposes, commonly known as classified directories, nor to any telephone directory heretofore distributed to the general public. Any person, firm or corporation providing telephone service which distributes or causes to be distributed in this state copies of a telephone directory which is subject to the provisions of this section and which do not contain the notice herein provided for shall be guilty of a misdemeanor.

§1425. Malicious injury to and destruction of property

A person who wilfully:

1. Cuts down, destroys or injures any wood or timber standing or growing, or which has been cut down and is lying on lands of another, or of the people of the state; or,

1-a. Without the written consent of the record owner of the mortgage, cuts down or removes, for other than domestic use thereon, any wood or timber standing upon premises covered by a duly recorded mortgage which contains a clause forbidding such cutting and removal of wood and timber; or,

2. Cuts down, girdles or otherwise injures or destroys, a fruit, shade or ornamental tree standing on the lands of another, or takes, picks, plucks, severs, carries away, removes, or injures, in a manner to kill or cause to die, or destroys any plant, shrub, tree or vine, of any wild or cultivated trailing arbutus (epigaea repens), lotus flower (nelumbo lutea), flowering dogwood (cornus florida), mountain laurel (kalmia latifolia) or pink lady's slipper or any of the moccasin flowers including cypripedium acaule, cypripedium pubescens, cypripedium parviflorium, cypripedium regina or either gentian crinata or gentian andrewsia or ferns of any kind growing on the lands of the people of the state, or in any street, highway, public place or park belonging to or under the control of any country, city, town or village; or wilfully digs up, takes or carries away the hart's tongue fern (scolopendrium vulgare) from any location in Onondaga or Madison counties; or wilfully picks, destroys, digs up, takes or carries away the white lady's slipper (cypripedium candidum) from any location in Genesee county; or,

3. Severs from the freehold of another, or of the people of the state, any produce thereof, or any thing attached thereto; or,

4. Digs, takes or carries away without lawful authority or consent from any lot of land in any city or incorporated village, or from any lands included within the limits of a street or avenue laid down on the map of such city or village, or otherwise recognized or established, any earth, soil or stone; or,

5. Enters without the consent of the owner or occupant any orchard, fruit garden, vineyard or ground whereon is cultivated any fruit, with intent to take, injure or destroy any thing there growing or grown; or,

6. Cuts down, destroys or in any way injures any shrub, tree or vine being or growing within any such orchard, garden, vineyard or upon any such ground, or any building, frame work or erection thereon; or,

7. Maliciously injures any ice upon any water from which ice is taken as an article of merchandise with intent to injure the owner thereof, or enters or skates upon any pond or body of water not navigable, kept and used for the purpose of taking ice therefrom as an article of merchandise, and upon or adjoining which a notice has been placed in a conspicuous position forbidding such entry, and stating the purpose for which said body of water is kept or used, or puts or throws upon or into any such pond or body of water any stick, stone or other substance to the injury of the ice or water; or,

8. Unlawfully takes or carries away or interferes with or disturbs by any means the oysters or other shellfish of another, legally planted or cultivated upon the bed or [So in original. Probably should read "of."] any river, bay, sound or water of this state, or removes, pulls up, sinks or destroys any stake or buoy designated or marking out any legally planted or cultivated oyster or other shellfish bed of another, is guilty of a misdemeanor; and any oysters or other shellfish planted or cultivated upon any beds owned or held under franchise or lease made by authority of any laws of this state or held under leases made by any town or its board of trustees or by any city of the state shall be deemed legally planted or cultivated, and any such bed shall be deemed legally marked or defined when the owner, lessee or holder thereof shall prove on the trial of any offense herein defined, that one or more stakes or buoys stood on or near each corner of the bed embracing the planted or cultivated oysters or shellfish within ninety days before the offense on trial was committed; such stakes or buoys may but need not necessarily embrace more than the actual planted or cultivated bed. Evidence that any boat or vessel has been used for the purpose of taking, carrying away or interfering with such oysters shall be presumptive evidence of guilt as against the owner, master or crew of such vessel; or

9. Intrudes or places any hovel, shanty or building upon, or within the limits of any lot or piece of land within any incorporated city or village, without the consent of the owner, or within the boundaries of any street or avenue within such city or village; or,

10. Kills, wounds or traps any bird, deer, squirrel, rabbit or other animal within the limits of any cemetery or public burying ground, or of any public park or pleasure ground, or removes the young of any such animal, or the eggs of any such bird, from any cemetery, park or pleasure ground, or exposes for sale, or knowingly buys or sells any bird or animal so killed or taken; or,

11. Drives or leads along a public highway a wild and dangerous animal, or a vehicle or engine propelled by steam, except upon a railroad, along a public highway, or causes or directs such animal, vehicle or engine to be so driven, led or to be made to pass, unless a person of mature age shall precede such animal, vehicle or engine by at least one-eighth of a mile, carrying a red light, if in the night time, and gives warning to all persons whom he meets traveling such highway, of the approach of such animal, vehicle or engine; or,

11-a. With intent so to do, damages in any manner an automobile or other motor vehicle; or,

12. Takes or attempts to take, without the consent of the owner of any lake or pond, any fish from the waters thereof, provided such lake or pond is so situated that fish can not pass thereinto from the waters of any other lake, pond or stream, either public or owned by other persons; or, without the consent of the owner of any such lake or pond, places therein any piscivorous fish or any poison or other substance injurious to the health of fish, or lets the waters out of any such lake or pond, with intent to take fish therefrom or to harm fish therein; or,

13. Injures any arsenal or armory, or its fixtures, or any uniforms, arms or equipments, or other property therein deposited; or,

14. Trespasses upon any rifle range lawfully used by or in connection with the national guard of the state, or any organization, division or district thereof, or injures any target or other property situate thereon, or wilfully violates thereon any regulation established to maintain order, preserve property or prevent accident upon such range, or removes, mutilates or destroys a battle flag, book, placard, relic or record deposited or kept in the state military bureau; or,

14-a. Injures, damages or defaces an elevator or escalator, or any part thereof or appurtenance thereto, in the city of New York, except in an emergency apparently dangerous to persons or property, or meddles or interferes with or obstructs the use or operation of the same, shall, upon conviction therefor, be punished by a fine of not more than one hundred dollars, or by imprisonment for not exceeding thirty days, or by both; or,

15. Cuts, spoils or destroys any cordage, cable, buoys, buoy-rope, head-fast or other fast fixed to the anchor or moorings belonging to any vessel, or who shall, with intent to injure, tamper in any way with the lines or cables by which any vessel is moored or made fast, or who shall, with intent to injure, tamper in any manner with the steering-gear, bell-gear, engines, machinery, lights or any other equipments of any vessel,

Shall be deemed guilty of a misdemeanor.

15-a. The conservation commission and the state council of parks, within their respective jurisdiction, their several employees, the state police and all peace officers, are charged with the duty of enforcing subdivision two of this section. Possession by any person of the whole or part of a plant which subdivision two of this section is intended to protect shall be presumptive evidence that the same was unlawfully taken by the possessor.

15-b. Breaks or defaces any public urinal, glass, window, porch, knocker or other fixture in the city of New York.

16. Any person, who

a. In any manner, for exhibition or display, shall place or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement, of any nature upon any flag, standard, color, shield or ensign of the United States of America, or the state of any such flag, standard, color, shield or ensign, upon which after the first day of September, nineteen hundred and five, shall have been printed, painted or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word, figure, mark, picture, design or drawing or any advertisement of any nature, or

b. Shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose, any article, or substance, being an article of merchandise, or a receptacle of merchandise or article or thing for carrying or transporting merchandise, upon which after the first day of September, nineteen hundred and five, shall have been printed, painted, attached, or otherwise placed, a representation of any such flag, standard, color, shield or ensign, to advertise, call attention to, decorate, mark, or distinguish, the article or substance on which so placed, or

c. Shall print, engrave, or otherwise place or cause to be printed, engraved or otherwise placed on any blank check, bill head, letter head, envelope or other business stationery, a representation of any such flag, standard, color, shield or ensign, or shall use any such blank check, bill head, letter head, envelope or other stationery for business purposes or correspondence, or

d. Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act, or

e. Shall raffle or place in pawn any such flag, standard, color, shield or ensign, or

f. Shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act, upon the flag of the United State of America, or

g. Shall publicly use or cause any such flag, standard, color, shield or ensign, to be publicly used as a receptacle for the placing, deposition or collecting of money or any other article or thing,

Shall be deemed guilty of a misdemeanor; and shall also

forfeit a penalty of fifty dollars for each such offense, to be recovered with costs in a civil action, or suit, in any court having jurisdiction, and such action or suit may be brought by or in the name of any citizen of this state, and such penalty when collected less the reasonable cost and expense of action or suit and recovery to be certified by the district attorney of the county in which the offense is committed shall be paid into the treasury of this state; and two or more penalties may be sued for and recovered in the same action or suit.

The words flag, standard, color, shield or ensign, as used in this subdivision or section, shall include any flag, standard, color, shield or ensign, or any picture or representation, of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color, shield or ensign, of the United States of America, or of the state of New York, or a picture or a representation, of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America, or of the state of New York.

This subdivision shall not apply to any act expressly permitted by the statutes of the United States of America, or by the United States army and navy regulations, nor shall it be construed to apply to a certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, stationery for use in private correspondence, or newspaper or periodical, on any of which shall be printed, painted or placed, said flag, standard, color, shield or ensign disconnected and apart from any advertisement.

The possession by any person, other than a public officer, as such, of any such flag, standard, color, shield or ensign, on which shall be anything made unlawful at any time by this section, or of any article or substance or thing on which shall be anything made unlawful at any time by this section, shall be presumptive evidence that the same is in violation of this section, and was made, done or created after the first day of September, nineteen hundred and five, and that such flag, standard, color, shield, ensign, or article, substance or thing, did not exist on the first day of September, nineteen hundred and five.

§1425-a. Sale or use of missiles or bean-shooters in the city of New York; stone-throwing in such city

In the city of New York it shall be unlawful for any person to:

1. Sell or offer for sale a bean-shooter or other instrument for throwing bullets, stones or beans; or,

2. Use any bean-shooter or other such instrument for throwing bullets, stones or other missiles, or carry the same with the intention of so using; or,

3. Cast any stone, stick or other missile in, from or to any street or public place.

A violation of any provision of this section shall be punished by a fine of not more than ten dollars, or imprisonment for not exceeding ten days, or both.

§1426. Malicious injury to standing crops, when a misdemeanor

A person, who maliciously injures or destroys any standing crops, grain, cultivated fruits, or vegetables, the property of another, in any case for which punishment is not otherwise prescribed by this chapter or by some other statute, is guilty of a misdemeanor.

§1427. Removal of books and works of art from library; wilful injury to works of art, ornamental trees or other improvements

Any person who:

1. Removes or assists in removing any book, manuscript, map, print, coin, medal, printing or other literary article or work of art from the library building of any reference library company, except for its preservation or repair or for the purpose of its deposit in some other building of the company, or, being a trustee or officer of such company, consents to the removal thereof; or, upon such removal refuses to permit the same to be restored; or,

2. Not being the owner thereof, and without lawful authority, wilfully injures, disfigures, removes or destroys a gravestone, monument, work of art, or useful or ornamental improvement, or any shade tree or ornamental plant, whether situated upon private grounds or upon the street, road or sidewalk, cemetery or public park or place, or removes from any grave in a cemetery any flowers, memorials or other tokens of affection, or other thing connected with them,

Is guilty of a misdemeanor.

§1428. Wilful or malicious injury to certain articles in libraries, galleries, museums or exhibitions

A person who wilfully or maliciously cuts, tears, defaces, disfigures, soils, obliterates, breaks or destroys, a book, map, chart, picture, engraving, statue, coin, model, apparatus, specimen, or other work of literature or object of art, or curiosity, deposited in a public library, gallery, museum, collection, fair, or exhibition, or in a library, gallery, museum, collection or exhibition belonging to any incorporated college or university, or to any other incorporated institution devoted to educational, scientific, literary, artistic, historical or charitable purposes, is punishable by imprisonment for not more than one year, or by a fine of not more than one hundred dollars, or by both such fine and imprisonment.

§1429. Destroying or delaying election returns

A messenger appointed by authority of law to receive and carry a report, certificate or certified copy of any statement relating to the result of any election, who wilfully mutilates, tears, defaces, obliterates or destroys the same, or does any other act which prevents the delivery of it as required by law; and a person who takes away from such messenger any such report, certificate or certified copy, with intent to prevent its delivery, or who wilfully does any injury or other act in this section specified, is punishable by imprisonment in a state prison not exceeding five years.

§1430. Malicious injury to buildings, places of religious worship and instruction and cemeteries.

A person, who wilfully and without authority, destroys, defiles, defaces or otherwise injures religious vestments, any building or structure used or designed for use as a place of religious worship or instruction, or any part thereof, or appurtenance thereto, or a cemetery duly and lawfully maintained, or who breaks, defaces or otherwise injures any book, furniture, ornament, musical instrument, article of silver or plated ware, or other chattel or property kept therein for use in connection with religious worship or instruction, is guilty of a felony, punishable by imprisonment for a term not to exceed three years.

§1431. Interference with gas or electric meters or steam valves.

A person who wilfully with intent to injure or defraud:

1. Connects a tube, pipe, wire or other instrument or contrivance with a pipe or wire used for the conducting or supplying illuminating gas, fuel, natural gas or electricity in such a manner as to supply such gas or electricity to any burner, orifice, lamp or motor where the same is or can be burned or used without passing through the meter or instrument provided for registering the quantity consumed, or uses such gas or electricity obtained by reason of the making of such connection; or,

2. Obstructs, alters, injures or prevents the action of a meter or other instrument used to measure or register the quantity of illuminating fuel, natural gas or electricity consumed in a house or apartment, or at an orifice or burner, lamp or motor, or by a consumer or other person or a person other than a state inspector or deputy inspector of gas meters or an employee of the company owning any gas or electric meter, who wilfully shall detach or disconnect such meter, or make or report any test of, or examine for the purpose of testing any such meter so detached or disconnected; or,

3. In any manner whatever, changes, extends or alters any service or other pipe, wire or attachment of any kind, connecting or through which natural or artificial gas or electricity is furnished from the gas mains or pipes or wires of any person, company or corporation without first

procuring from said person, company or corporation written permission to make such change, extension or alterations, or uses gas or electricity obtained by reason of such changes, extensions or alterations without first procuring the written permission aforesaid; or,

4. Makes any connection or re-connection with the gas mains, service pipes or wires of any person, company or corporation furnishing to consumers natural or artificial gas or electricity, or turns on or off or in any manner interferes with any valve or stopcock or other appliances belonging to such person, company or corporation and connected with its service or other pipes or wires, or enlarges the orifice of mixers, or uses natural gas for heating purposes except through mixers, or uses electricity or artificial gas for any purpose before it has passed through an instrument for measuring the quantity consumed, without first procuring from such person, company or corporation a written permit to turn on or off such stopcock or valve, or to make such connections or re-connections, or to enlarge the orifice of mixers or to use for heating purposes without mixers, or to interfere with the valves, stopcocks, wires, or other appliances of such person, company or corporation as the case may be; or,

5. Retains possession of or refuses to delivery any mixer or mixers, meter or meters, lamp or lamps, or other appliances which may be or may have been loaned or rented to them by any person, company or corporation for the purpose of furnishing gas, electricity or power through the same, or who sells, loans or in any manner disposes of the same to any person or persons other than the said person, company or corporation entitled to the possession of the same; or,

6. Sets on fire any gas escaping from wells, broken or leaking mains, pipes, valves or other appliances used by any person, company or corporation, in conveying gas to consumers, or interferes in any manner with the wells, pipes, mains, gateboxes, valves, stopcocks, wires, cables, conduits, or any other appliances, machinery or property of any person, company or corporation engaged in furnishing gas to consumers unless employed by or acting under the authority and direction of such person, company or corporation; or,

7. Opens or causes to be opened or re-connects or causes to be re-connected any valve lawfully closed or disconnected by a district steam corporation; or,

8. Turns on steam or causes it to be turned on, or to re-enter any premises when the same has been lawfully stopped from entering such premises,

Is guilty of a misdemeanor.

<u>§1431-a. Presumptive evidence.</u>

The existence of any of the conditions with reference to meters, or attachments described in section fourteen hundred and thirty-one of this article is presumptive evidence that the person to whom gas, electricity, water or steam is at the time being furnished by or through such meters or

attachments has, with intent to defraud created or caused to be created with reference to such meters or attachments, the condition so existing.

§1432. Unlawful interference with water meters, water service pipes and their connections.

A person who, wilfully, with intent to injure or defraud:

1. Breaks or defaces, or causes to be broken or defaced, the seal of a water meter; or,

2. Obstructs, alters, injures or prevents, or causes to be obstructed, altered, injured or prevented, the action of any such meter or other instrument used to measure or register the quantity of water supplied to or consumed by any person, corporation or company; or,

3. Makes or causes to be made any connection by means of pipe, conduit or otherwise with the water main or service pipe of any person, corporation or company furnishing water to consumers, in such manner as to take water from said main or service pipe without its passing through the meter or other instrument provided for registering or measuring the amount or quantity of water taken from said main or service pipe; or,

4. Makes any connection or re-connection with the water main or service pipe of any person, corporation or company furnishing water to consumers, or turns on or off, or in any manner interferes with any valve, stopcock or other appliance belonging to said person, corporation or company, without obtaining from such person, corporation or company a written permit to make such connection or re-connection or to turn or otherwise interfere with said valve, stopcock or other appliance; or,

5. Prevents, by the erection of any device or construction, or by any other means, free access to any such meter by the person, company or corporation furnishing such water; or interferes, obstructs or prevents, by any means, the reading or inspection of such meter,

Is guilty of a misdemeanor.

§1432-a. Unlawful interference with coin-box telephones.

1. A person who, without lawful authority, shall place or insert any paper, cloth, wadding or any other article, object, material, substance, instrument or contrivance within the return coin chute or in any other part of a coin-box telephone under the control of any telegraph or telephone company doing business in this state in such manner as to prevent, interfere with or obstruct the return of coins to the users of such coin-box telephone, or in such manner as to cause such coins to be unlawfully returned, or who shall by any such or other means or device whatsoever prevent or contrive to prevent the return of coins to such users or who shall be any device or contrivance or in any manner whatsoever obstruct, alter, injure, or interfere with the action or operation of such coin-box telephone, or who shall place

or insert in any part of said coin-box telephone any such article, substance, contrivance or device in such manner as will obstruct, alter, injure, or interfere with the action or operation of such coin-box telephone, shall be guilty of a misdemeanor.

§1433. Injury to property; how punished.

A person who unlawfully and wilfully destroys or injures any real or personal property of another, or who without authority or permission from a person who has the right to give such authority or permission, loosens any brake or blocking of any car standing on any railroad track in this state, or without like authority or permission, puts upon or runs any handcar, or other car, on any railroad track in this state, or without like authority or permission, interferes or meddles with any brake or coupling of any car while standing or moving on any railroad track in this state, or takes any part therein, in a case where the punishment is not specially prescribed by statute, is punishable as follows:

1. If the value of the property destroyed, or the diminution in the value of the property by the injury is more than two hundred and fifty dollars, by imprisonment for not more than four years.

2. In any other case, by imprisonment for not more than six months, or by a fine of not more than two hundred and fifty dollars, or by both such fine and imprisonment.

3. And in addition to the punishment prescribed therefor, he is liable in treble damages for the injury done, to be recovered in a civil action by the owner of such property, or the public officer having charge thereof.

§1435. Damaging military or naval equipment supplies or stores.

A person who, wilfully or maliciously:

1. Injures or destroys any article of equipment or supplies or military or naval stores of or for the military or naval forces of the United States or of or for the state of New York or of or for any foreign government with which the United States maintains diplomatic relations, or any article used or intended for use in the production or manufacture of any such article; or

2. Injures or destroys any building, structure, or vessel used or occupied by the military or naval forces of the United States or of the state of New York or of any foreign government with which the United States maintains diplomatic relations, or any article used or intended for use in the construction or operation of any such building, structure or vessel; or

3. Injures or destroys any building, structure, or vessel used or occupied in the production of any article mentioned in subdivision one of this section or any article used or intended for use in the construction or operation of any such building, structure, or vessel; or

4. Injures or destroys any machine, tool, implement, plan, fuel, fuel line, power line, generator or transformer used or intended for use in the production of any article mentioned in subdivisions one, two, or three of this section or used or intended to be used in the construction or operation of any building, structure, or vessel mentioned in subdivision two or three of this section; or tampers with any such machine, tool, implement, plan, fuel, fuel line, power line, generator or transformer with intent to lessen its efficiency in the production of any such article; or

5. Injures or destroys any railroad engine or car, or any vehicle, or any vessel used or intended for use in the transportation of any article or machine mentioned in subdivision one, two, three or four of this section, or tampers with any such engine, car, vehicle, or vessel with intent to lessen its efficiency in the transportation of any such article, or with intent to hinder, delay, or obstruct any military or naval operation or defense preparation of the United States or of the state of New York or of any foreign government with which the United States maintains diplomatic relations; or

6. Injures, destroys, obstructs, or tampers with any railroad, highway, bridge, canal or river with intent to interfere with or delay the transportation of any article or machine mentioned in subdivisions one, two, three, four or five of this section, or with intent to hinder, obstruct, or delay any military or naval operation or defense preparation of the United States or of the state of New York or of any foreign government with which the United States maintains diplomatic relations; or

7. Unlawfully seizes or carries away or injures or destroys or tampers with any property with intent to hinder, obstruct, or delay any military or naval operation or defense preparation of the United States or of the state of New York or of any foreign government with which the United States maintains diplomatic relations;

8. Injures, alters, defaces, mutilates or in any manner or by any means changes any plans, drawings, designs or specifications intended to be used or useful in constructing, manufacturing or assembling ordnance, instruments, equipment, implements, devices or any material needed for or intended to be used in the defense of the United States or this state by the military or naval forces of the United States or any foreign government with which the United States maintains diplomatic relations, with intent to hinder, delay, obstruct, impair, destroy or interfere with the use of such ordnance, instruments, equipment, implements, devices or material or the efficiency or effectiveness thereof;

Is guilty of a felony and whoever attempts to commit any of the crimes defined by this section shall be guilty of a felony and shall be liable to one-half the maximum punishment prescribed for the completed crime.

9. In any criminal proceeding before any court, magistrate, or grand jury for a violation of this section or section fourteen hundred thirty-six of this chapter or attempt to commit such violation, the court, magistrate or grand jury may confer immunity in accordance with the provisions of section two

thousand four hundred forty-seven of this chapter.

§1436. Conspiracy to violate the foregoing section.

If two or more persons conspire to commit any of the acts made punishable by the foregoing section, each of such persons is guilty of felony.

§1437. Penalties for violations of the two foregoing sections.

The violation of either of the two foregoing sections is punishable by imprisonment for a term of not less than five nor more than twenty-five years.

§1438. Certain acts declared to be misdemeanors in the city of New York; penalties for

Any person wilfully doing any injury to any bridge in the city of New York or any appurtenance thereof shall forfeit and pay to such city three times the amount of such injury, and shall be deemed guilty of a misdemeanor, and be punished by a fine of not more than five hundred dollars, or by imprisonment for not more than six months, or by both.

APPENDIX B

CRIMINAL MISCHIEF ARTICLE

1. Criminal Mischief Third Degree

A person is guilty of criminal mischief in the third degree when he intentionally or recklessly:

(a) damages tangible property of another; or

(b) tampers with tangible property of another and thereby causes ~~property to be placed in danger of damage,~~ a situation whereby property may be endangered or persons may be substantially inconvenienced.

2. Criminal Mischief Second Degree

A person is guilty of criminal mischief in the second degree when:

(a) with intent to cause any damage to tangible property of another, he damages property in an amount exceeding $100; or

(b) with intent to cause an interruption or impairment of service rendered to the public or to obtain service which he knows is available only for compensation, he damages or tampers with tangible property of a gas, electric steam or water-works corporation, telephone or telegraph corporation, common carrier, or public utility operated by a municipality. public transportation

3. Criminal Mischief First Degree

A person is guilty of criminal mischief in the first degree when:

(a) with intent to cause any damage to tangible property of another, he damages property in an amount exceeding $500; or

(b) with intent to cause a (substantial) interruption or impairment of service rendered to the public, he damages or tampers with tangible property of a gas, electric, steam or water-works corporation, telephone or telegraph corporation, common carrier, or public utility operated by a municipality. [and a substantial interruption or impairment ensues.]

APPENDIX C

THE AMERICAN LAW INSTITUTE

MODEL PENAL CODE

Proposed Official Draft

May 4, 1962

Section 220.3. Criminal Mischief.

(1) Offense Defined. A person is guilty of criminal mischief if he:

(a) damages tangible property of another purposely, recklessly, or by negligence in the employment of fire, explosives, or other dangerous means listed in Section 220.2(1); or

(b) purposely or recklessly tampers with tangible property of another so as to endanger person or property; or

(c) purposely or recklessly causes another to suffer pecuniary loss by deception or threat.

(2) Grading. Criminal mischief is a felony of the third degree if the actor purposely causes pecuniary loss in excess of $5,000, or a substantial interruption or impairment of public communication, transportation, supply of water, gas or power, or other public service. It is a misdemeanor if the actor purposely causes pecuniary loss in excess of $100, or a petty misdemeanor if he purposely or recklessly causes pecuniary loss in excess of $25. Otherwise criminal mischief is a violation.

11/25/62

MEMORANDUM

ARSON AND RELATED OFFENSES ARTICLE

This memorandum contains a review of common law arson, the current New York provisions, the Model Penal Code sections and discusses a proposed arson article.

An Appendix sets out for comparison the proposed article, the New York statute and related provisions, the Model Penal Code sections, the Louisiana statute, the Model Arson law upon which many arson statutes are based* and the revised Illinois and Wisconsin statutes.

BACKGROUND

Common law arson is defined as the willful and malicious burning of another's dwelling house. It also included the burning of outbuildings which were within the curtilage of the dwelling. Outbuildings within the curtilage were those which were adjacent to the dwelling, that is within the yard which in England was usually enclosed by a fence. The theory was the burning of buildings so situated would endanger the inhabitants of the dwelling. There was no night and day distinction, nor was it necessary for a person to be present in the dwelling for the crime to be committed. While the crime, of course, was directed toward protecting real property, the gist of the offense was against the security of the habitation. An owner in possession of his dwelling could not commit arson, but a landlord who burned the dwelling his tenant inhabited was held to have committed the crime. Further, the owner in possession was not guilty of arson although he burned his dwelling with intent to defraud an insurer. However, if the dwelling burned was so situated as to endanger a nearby house without burning it, the crime was a high misdemeanor, and if as a consequence of such a burning the fire spread to a contiguous dwelling the offender committed arson.

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* For a find criticism of the Model Arson Law, see, Model Penal Code Comments, Tentative Draft No. 11, pp. 34-35.

Although a blaze was not necessary at common law, part of the dwelling must have been consumed to constitute arson. Thus, where the boards of a floor were charred in a trifling way having been at a red heat, but not a blaze, it was held to be a burning. Where the boards of a floor were scorched black but not burnt and no part of the floor was consumed, it was only sufficient to constitute an attempt. Preparation for arson which fell short of the final effort to set fire was not punishable at all.

In New York it is not necessary that the building be totally consumed. So held, People v. Butler, 16 Johns. R. (Sup. Ct. N.Y. (1819) where two or three stairs were partially consumed before the inhabitants were aroused. It appears, therefore, that New York would follow the "slightest burning" criterion of the common law.

Intent at common law imported the elements of willfulness and malice. The act must have been willful rather than accidental, however, malice was usually inferred from the burning. The New York statute requires only a willful burning, otherwise the intent is the same now as it was at common law. A specific intent to destroy or burn a dwelling is not necessary for arson. Therefore, a lodger who starts a fire in his own room to burn personal property on which he hopes to collect insurance is guilty of arson because he set the dwelling on fire. People v. Fanshawe, 137 N.Y. 68 (1893). This result was reached by applying the common law and holding that New York Penal Law section 225 which provides: "The burning of a building under circumstances which show beyond a reasonable doubt that there was no intent to destroy it is not arson" is to be applicable only to third degree arson. In light of the dangerousness of the act of setting fire to a dwelling, the specific intent to destroy is dispensed with. The "act alone evidenced such moral depravity and such reckless disregard of human life as to constitute the offense, irrespective of actual motive

from which the act proceeds." People v. Fanshawe, supra, p. 73.

The present law appears to be that a use of fire in a reckless manner with some other intent in mind constitutes arson if it causes the burning of a building. An example of the opposite result is found in People v. Cotteral 18 Johns. R. 115, (Sup. Ct. N.Y. 1819), when a prisoner who burnt a hole in the wall of a jail which contained living quarters in an effort to escape was not guilty of arson of a dwelling because the fire spread contrary to his intention. It appears that this would constitute arson under the present law.

Current Arson Provisions

Arson is covered in Article 18 of the New York Penal Law. Related provisions are sections 1900, Negligently managing and refusing to extinguish a fire, and section 1421, Burning crops or timber. As a pertinent commentary of the Model Penal Code has observed

> "[Article 18] classifies the offense in relation to the types of property involved, but introduces additional criteria designed to discriminate between burnings which are more or less likely to endanger life Thus, the fact that the burning occurs at night or while a person is in the building aggravates the offense. The fact, whether or not known to the actor, that a person entered or left the building while he was burning it may determine whether the actor can receive a maximum sentence of 15, 25, or 40 years. Similar discriminations turn on the exact moment of the burning, since the statute defines nighttime as the period between sunset and sunrise." Model Penal Code Comments, Tentative Draft No. 11, p. 36, footnotes omitted; hereinafter cited as "Tent. Draft No."

Although it is true that any classification and grading of arson is at best artificial, the present article constitutes an illogical and inconsistant formulation.

Section 220, Definitions, defines building, inhabited building, dwelling house, nighttime and attempt to burn. There is no need to define three different types of building. A broad definition of a dwelling would be sufficient. Further, these definitions do not lead to clarity or brevity in the sections which prescribe the crime. The building definitions are supplemented by two cases holding that an incomplete

building is not subject to arson, McGary v. People, 45 N.Y. 153 (1871) and a burning within an apartment house when it is confined to one apartment is a burning of a dwelling. Levy v. People, 80 N.Y. 327 (1880). The definition of attempt to burn, which is necessary because preparation for arson was not punishable at common law, will be superfluous since the revision will contain a general definition of attempt to commit a crime.

Section 221, Arson in the first degree, is the burning of a dwelling at night with a person present, or the burning of a non-dwelling at night when the offender has knowledge that a person is present. A building with a person present is the basis of Arson in the first degree. When a dwelling is burned, the state of mind of the offender as to the person's presence is ignored because the burning of this type of property is such a reckless act. The state of mind of the offender as to a person's presence becomes an element of the crime when a non-dwelling is burned. New York requires that a person must be present in the building at the time it catches fire. Presence of a person within a dwelling under circumstances even when the person had ample warning of the fire and had an opportunity to leave before the dwelling caught fire was held to be sufficient. Woodford v. People, 62 N.Y. 117 (1875).

Section 222, Arson in the second degree, wtih five separate provisions, points up the grading inconsistency: (1) Arson in the first degree situations in the day time; (2) the burning of a dwelling in the nighttime when a person is not present; (3) the burning of a non-dwelling in the nighttime ordinarily occupied at night by a person although no person is present (therefore, a burning at night without a person present is equated with a burning during the day with a person present); (4) the burning in the nighttime of a building not inhabited but adjoining or within the curtilage of an inhabited building with a person present so that the inhabited building is endangered although is is not injured by the burning (basically the theory is sound as there is a distinct difference made between a burning in a

populated area and an isolated one. However, the use of the curtilage theory is unrealistic because a burning building which does not adjoin or come within the curtilage of a building may very well endanger it. Hence, the basis of the offense ought to be whether a building is endangered. The subsection also limits a burning which endangers by the specific situation which it prescribes); (5) the burning of a non-dwelling or property therein with the intent to defraud the insurer--the language of the section appears to be broad enough to include a dwelling--(the intent to defraud is necessary element of the crime. The gist of the crime is a form of theft. Burning to defraud which is not arson is dealt with in section 1201, and the burning of a vessel or its cargo with intent to defraud covered in section 1506. The punishment for these acts is not more than five years. Grand larceny in the first degree is punishable by a term not exceeding ten years while the punishment for Arson in the second degree is not more than twenty-five years.)

Section 223, Arson in the third degree, is the burning of a non-dwelling or dwelling (under circumstances not amounting to Arson in the first or second degree) or the burning of personal property valued at twenty-five dollars or over. This covers a dwelling without a person present in the daytime, a non-dwelling without a person present day or night, and a non-dwelling with a person present day or night where the offender has no knowledge of this fact. According to People v. Fanshawe, section 225 requires an intent to destroy the building for Arson in the third degree. The personal property provision leads to confusion. The impact of the provisions appears to be that when personal property of a value of twenty-five dollars or over is burned in, or in close proximity to a building, and the building is not burned, the district attorney would be in a position to present facts warranting an indictment for Arson in the third degree. Nevertheless, the language of the section is broad enough to include the burning of personal property in a vacant lot.

Section 226, Contiguous buildings, states that where an appurtenance to a building or a building is burned and is so situated as to endanger another building the burning of one is deemed the burning of the other the moment the fire is actually communicated. This section does no more than state the common law position. III Co. Inst. 67. In Woodford v. People, 62 N.Y. 117 (1875), a person set fire to a house and he was properly indicted for setting fire to the thirty-five houses to which the fire spread.

Section 227, Ownership of building, states that it is not necessary that another person than the defendant should have ownership of the building set on fire to be arson. It was enacted in 1881 ch. 676, and was probably the result of Shepard v. People, 19 N.Y. 537 (1859), which held a person could commit Arson in the first degree by burning his dwelling if a person other than he were present. This case specifically overruled authority to the contrary. At this time, the crimes of Arson in the first and second degrees were aimed at acts more or less dangerous to human life as the present statutes are, but they did not contain the language the "property of another." The statutes concerned with the burning of non-dwellings,insured property, ships and certain personal property did have this language. The rationale of the court was where the legislature intended to make the "property of another" an essential to the crime, the description did so, and where it was not intended it was omitted. Section 227 is referable to all the degrees of arson.

Section 1421, Burning crops or timber, is willfully burning or setting fire to any grain, grass or growing crop, or standing timber or to any building fixtures or appurtenances to real property of another and the willful burning of woods or forests. Subsection (2) is the same as section 1900 (1) except that it covers willful burnings while section 1900 (1) covers willful and negligent burnings. A violation of section 1421 is a felony.

Section 1900, Negligently managing and refusing to extinguish fires, covers both willful and negligent burnings in the forests and woodlands. Subdivision (3) which is negligently allowing a fire to extend beyond the limit of one's land is not limited to woods and forests. Subdivision (4) requires a person to go into the woods to assist in fighting a fire if lawfully ordered to do so if he has no lawful excuse. A violation of the section is a misdemeanor.

It should also be noted that the crime of conspiracy to commit arson is complete with the agreement, no overt act being necessary, N.Y. Pen. Law §583, ~~and murder when perpetrated by Arson in the first degree is murder in the first degree. N. Y. Pen. Law §1044-3.~~

THE MODEL PENAL CODE FORMULATION

The comments to §220.1, Arson and Related Offenses, state that the formulation "follows a course intermediate between the New York and Louisana approaches to arson." Tent. Draft No. 11, p. 37. Louisana arson legislation makes danger the explicit criterion in grading arson. It defines aggravated arson as "the intentional damaging by any explosive substance or the setting fire to any structure, water craft or movable, wherein it is foreseeable that a human life might be endangered." La. Rev. Stat. Ann. §14:51 (1951). The general approach is best summed up by the comments:

> We grade the offense partly according to the kind of property destroyed or imperiled and partly according to the danger to the person. We are reluctant to rest entirely on danger to the person in view of the fact that almost any illegal or careless burning endangers life to some extent, as fire fighters and onlookers are drawn to the scene. To make any dangerous burning a second degree felony would be inconsistant with our proposals in Sections 211.1 and 211.2, reserving felony sanctions for cases where 'reckless' behavior results in actual serious bodily injury. On the other hand, we do not think it is useful to go as far as New York does in grading arson.... Instead we define a single class of more serious burnings, viz. of a 'building or occupied structure.' Within this broad catergory, the treatment agencies can do better than the legislature in proportioning punishment to the actor's demonstrated indifference to human life and other variables in his personality and behavior.

> We have followed the example of recent codes which enlarge the concept of arson to include exploding as well as burning. The criminologic considerations are quite similar: likelihood of extensive property destruction accompanied by danger to life. Also explosions frequently lead to fires, just as fires sometimes cause explosions. Tent. Draft No. 11, pp. 37-38, footnotes omitted.

The result is that this broad category does not offer grades of the crime proportioning punishment but allows the treatment agency to perform this function. As a second degree felony, arson has a maximum sentence of ten years which is extended to fifteen years for professional, psychopathic, mutiple and repeating offenders. If the arsonous behavior results in serious bodily injury and the circumstances manifest "extreme indifference to human life" section 211.1 (2), Aggravated Assault applies. A person found guilty of arson and aggravated assualt resulting from one act would be a mutiple offender subject to an extended sentence.

"Starts a Fire;" Attempt and Preparation

Similar to other arson legislation that is formulated in terms of "setting fire to" and "burning" another's property or one's own property to defraud an insurer, section 220.1 reads "if he starts a fire or causes an explosion." Therefore, it is not necessary that there be a "slight burning" to convict the actor of arson. However, a difficult problem remained as preparation for arson was not an attempt at common law.

"The Model Arson Act and many present laws have partially corrected this situation by extending the definition of attempt, in relation to arson, to include assembling of combustible materials near the property to be burned, but they preserve an extraordinary disparity of sentence between preparation and the completed offense signalized by the first tiny flame." Tent. Draft. No. 11, p. 38, footnotes omitted. The Model Penal Code solves this problem by its broad attempt provisions, section 5.01 and by penalizing attempts equally with completed offenses section 5.05. However, section 5.05 (2)

provides for mitigation of the penalty if circumstances exist that warrant it. See generally, Tent. Draft. No. 10, pp. 178-179.

Purpose to Destroy

The Code also requires a purpose to destroy in clause (a) of subsection (1). "[This] makes it clear that the mere employment of fire with more limited purposes, e.g., use of an acetylene torch to detach metal fixtures from a structure, or to gain entry to a building or safe does not fall within the second degree felony defined by subsection (1), althought it may very well lead to liability for reckless burning under subsection (2)." Tent. Draft. No. 11, p. 39, footnotes omitted. This is quite different from the common law approach which New York follows, as illustrated by People v. Fanshawe.

"Building or Occupied Structure"

The Code does not differenciate between a dwelling and a non-dwelling in grading the crime. There is no requirement that a person be present to aggravate the crime as "the probability that a 'building' is used by human beings in ways that make it dangerous to burn or explode is so high that it seems pointless to require the prosecution to charge and prove occupancy in every case." Tent. Draft. No. 11, p. 39. The statute reads "occupied structure or building." Hence in addition to the burning of buildings in accordance with normal usuage of the term, it includes all structures in which people live or do business.

Property "of Another"

The Code requires that the property be the property "'of another,' except where the culpability of the behavior rests on other factors, e.g., intent to defraud in clause (b) of subsection (1), or recklessness of the safety of persons in clause (a) of subsection (2)." Tent. Draft No. 11, p. 40. In support of this postion the commentary states:

> To burn down a structure owned and occupied by the actor may or may not be reckless in relation to other people's safety or valued property, depending on the isolation of the premises and the degree of care taken, but the actor's poor choice of means to get rid of his own property does not mark him as the same kind of dangerous character as one who burns his building to defraud an insurer or another's building to wreak vengenance. Tent. Draft. No. 11, p. 40.

Burning to Defraud

The Code includes burning to defraud an insurer and notes that it is perhaps the most frequent and dangerous behavior in the field. The statute covers the burning of property as well as an "occupied structure or building" because often the object of the burning is merchandise, and any incidental burning of a building or structure would not be purposeful as required by clause (a). However, burning to defraud will be arson only if the conduct recklessly endangers a building of another or places a person in danger of death or bodily injury. As the comments observed:

> There is no reason to penalize the burning of an insured camera in a furnace more severely than any other form of destruction or concealment incidental to filing of a fraudulent claim. (A part of the footnote keyed to this part provides: Cf. N.Y. Pen. Law §§ 225 [5], 224.) On the other hand where the fraudulent burning of one's own property entails the dangers typical of other arson, we believe it is properly graded in the most severely punished catagory of arson. Tent. Draft No. 11, p. 41.

Reckless Burning: Negligence: Fire Regulations

Subsection (2), a violation of which is a felony in the third degree, requires that the actor purposely start a fire or cause an explosion whether on his own property or another's which in turn recklessly endangers another person or the building of another. The section applies to fires or explosions where there is no specific intent to destroy as required in subsection (1), whether the reckless act results in actual damage or the building is merely endangered. Presumably, if a person is injured, section 211.1 (2) Aggravated Assualt, would apply if the circumstances manifest "extreme indifference to human life."

In connection with reckless burning, three situations must be considered which are dealt with differently under prevailing legislation:

> (a) burning of one's own property in circumstances where there is a high risk that the fire will spread to property of others -- usually treated as severly as setting fire to the other's property; (a part of the footnote keyed to this part provides: Cf. N. Y. Pen. Law §§221, 222); (b) burning of lesser forms of property in proximity to the specially valued categories likewise frequently treated as first degree arson; (a part of the footnote keyed to this part provides: Cf. Model Arson Law, Burning of a Dwelling; N. Y. Pen. Law § 223 [3]) and (c) other recklessness in relation to special categories of highly regarded property, e.g., setting fire to a haystack or a pile of trash near a dwelling, where no burning of the dwelling itself occurs --a situation rarely covered by the arson legislation except as third degree arson deals with burning any property of another valued at more than $25. Tent. Draft. No. 11, p. 41.

The Code covers negligent burning in section 220.3, Criminal Mischief, which has miminal penalties where no substantial harm is done. This was necessary because "reckless burning" or "exploding" requires "conscious disregard" of risk involving " a gross deviation from proper standards of conduct." Model Penal Code §2.02 (2) (c).

The Code does not deal with the innumerable special statutes and fire regulations. The general standards of the Code limit section 220.1 to behavior condemned by the common conscience of the community.

Failure to Control or Report Fire

> In general, the Model Penal Code, adhering to traditional Anglo-American law, does not penalize omissions. The need for a change, at least in relation to highly dangerous situations with which the actor is peculiarly associated, is evidenced by occasional legislation providing penalties for failure to control a fire originating on defendant's premises, whether or not he had any culpable connection with starting the fire. (A part of the footnote keyed to this part provides: e.g., N.Y. Pen. Law §1900 [3].) Subsection (3) proposes a more comprehensive obligation, especially in clause (c), which was not approved by the Council. The Reporter favors clause (c) not only on general principle, but also because it would facilitate prosecution where defendant, who may well have set the fire purposely, contends that he set fire accidentally or merely discovered a blaze started by another. Tent. Draft No. 11, p. 42, footnotes omitted.

THE PROPOSED ARTICLE

The proposed article formulates a substantive definition of the crime while discarding with the illogical and inconsistant scheme of Article 18. Explosions are included in the article in agreement with the Model Code's position. The article covers three situations: (1) "reckless destruction" of a building by fire or explosion, (2) starting a fire or causing an explosion with the intent to destroy or damage a building, and (3) starting a fire or causing an explosion with the intent to destroy or damage a building when a person is present therein.

Building

The article does not grade the crime in accordance with the type of property destroyed. The term, building, in addition to its ordinary meaning will include all structures in which people live and do business in. This conforms to the Draft of the Criminal Trespass and Burglary Article.

Preparation and Attempt

Preparation for arson short of starting the fire will be an attempt as the revision will contain a general attempt provision. The words "starts a fire or causes an explosion" make it unnecessary for the "slightest burning" criterion to be satisfied to constitute the crime of arson.

Intent of Destroy or Damage

For purposes of liability the article distinguishes between an intentional and a "reckless destruction." An actor must have an intent to destroy or damage the building when he starts the fire or causes the explosion for Arson in the first and second degree. This is a rejection of the common law which did not require a specific intent to destroy. A "reckless destruction" actually means an intentional starting of a fire or causing an explosion which under certain

circumstances results in the destruction of a building. The article, therefore, takes cognisance of the state of mind of the offender and does not define the crime by the resultant burning.

Arson in the First Degree

Arson in the first degree is the starting of a fire or causing an explosion with the intent to destroy or damage a building when a person is present in the building at the time of the act, and the actor must either be aware of that fact or circumstances must be such as to render the presence of a person in the building a reasonable possibility to complete the crime.

Thus, absent actual knowledge that a person is present, the liability under the section will turn on whether or not there is a lack of diligence on the part of the actor in ascertaining the presence of a person under circumstances when he should have known of the presence.

While the defense of lack of knowledge will have greater application in the burning of non-dwellings, its use is justified in the burning of a dwelling as the following examples demonstrate: (1) A dwelling is burned in a summer colony in the winter and a tramp or trespasser happens to be present or the owner may be present unexpectedly, or (2) a situation where the offender explicitly obtains information that no one will be home and further checks the house and a person enters as he starts the fire. Merely to define the crime as a building with a person present imposes a strict liability on the actor regardless of his state of mind. Of course, where the occupant is killed or injured other criminal santions may be available.

Arson in the Second Degree

Arson in the second degree is the starting of a fire or explosion with the intent to destroy or damage a building. The destruction or damage of the building by arsonous

behavior is not a crime when the actor has the sole possessory or proprietory interest in the building; and he demolished the building for a lawful purpose; and the circumstances of the starting of the fire or explosion or the fire or explosion itself were such that there was no reasonable possibility of endangering another person or the building of another. Therefore, destruction or damage to one's own building is only permitted under safe conditions for other people or buildings of others and for a lawful purpose.

Arson in the Third Degree

Arson in the third degree is when the actor intentionally starts a fire or causes an explosion under circumstances which involve a substantial risk of destruction or damage to a building and as a result of the fire or explosion such destruction or damage is "recklessly" brought about. The work "recklessly" in the statute refers to the definition in the Proposed Homicide Article. The actor is aware of the substantial risk of destruction or damage to a building and by his conscious disregard of that risk the destruction takes place. Arson in the third degree is consistant with Arson in the second degree in allowing no criminal liability to attach where the actor's own building is destroyed. However, if the actor destroys his own building and in turn the building of another is destroyed or damaged and the act meets the "reckless" requirement, he is liable under the statute.

Concerning What is Omitted

There is no retention of the curtilage theory. (See N.Y. Pen. Law §222-3.) Since the article requires an intent to destroy and a burning of a second building as a result of an intentional burning of the first will be a "reckless burning," the article could not make a burning which endangers a higher degree of the crime.

Section 222 (5), burning of a building or property therein with intent to defraud an insurer is not defined because it

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is felt that it does not belong in an arson classification. The crime requires a specific intent to defraud. It is a theft situation which is singled out because of the means used to effect its commission. The article covers the burning of a building whether or not it is done with the intent to defraud.

The burning of personal property is not covered. The use of fire to destroy it does not justify placing it in an arson statute. It belongs in a general category of destruction of personal property similar to Penal Law section 1433 in the Malicious Mischief Article.

Section 226, Contigious buildings, will be repealed. The result of requiring an intent to destroy, as noted above, is that the burning of a second building as a result of the purposeful burning is a reckless burning. Therefore, the section, as well as the common law which it codified, reaches a different result.

Not Considered At This Time

Section 1900, Negligently managing and refusing to extinguish fires which is concerned with forests and woodlands, is covered in nearly all respects in section 51 (14), 54 (3) of the Conservation Law which has penal sanctions (§65 [1], [5]). Subdivision 4 of section 1900 which provides for a penalty if a person does not go into the woods and fight a fire when lawfully ordered to is not covered by the above. It would appear that the only time this would be used would be under the authority of section 54 (14) of the Conservation Law so that if this subsection is repealed it can be relocated in the Conservation Law.

Section 220.1 (3), Failure to Control or Report Fire of the Model Penal Code is related to section 1900 and it will be reserved for study with it.

Section 1421, Burning crops or timber, will be studied with the Malicious Mischief Article.

APPENDIX

PROPOSED ARSON ARTICLE

Pertinent Definitions of General Provisions

Recklessly. A person who commits an act which creates a substantial and unjustifiable risk of human fatality, physical injury, property damage, public catastrophe or public disorder, does so "recklessly" when, though aware of that risk, he consciously disregards it. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, his desregard thereof involves a gross deviation from the standard of care that a reasonable person would observe in his situation.*

ARSON

§1. Definitions

In this Article, "building," in addition to its ordinary meaning, shall include any structure, vehicle or watercraft used for overnight lodging of persons, or for carrying on business therein.

§2. Arson in the Third Degree

A person is guilty of arson in the third degree when, under circumstances involving a substantial risk of destruction or damage to a building, he intentionally starts a fire or causes an explosion, and thereby recklessly brings about such destruction or damage. This section shall not apply when no person other than the actor had a possessory or proprietory interest in the building.

§3. Arson in the Second Degree

A person is guilty of arson in the second degree when, with the intent to destroy or damage a building, he

* Proposed Homocide Article, Appendix Code2, p. 1.

starts a fire or causes an explosion.

This section shall not apply when:

(a) the circumstances were such that there was no reasonable possibility of placing another person in danger of death or bodily injury or placing the building of another in danger or damage of destruction; and

(b) no person other than the actor had a possessory or proprietory interest in the building; and

(c) the actor's sole intent was to demolish the building for a lawful purpose.

§4. Arson in the First Degree

A person is guilty of arson in the first degree when, with intent to destroy or damage a building, he starts a fire or causes an explosion; and

(a) a person is present in such building at the time of the act; and

(b) the actor is either aware of that fact or the circumstances are such as to render the presence of a person therein a reasonable possibility.

NEW YORK PENAL LAW ARTICLE 18, "ARSON"

"§ 220. Definitions.

Building. Any house, vessel, or other structure, capable of affording shelter for human beings, or appurtenant to, or connected with a structure so adapted, is a "building" within the meaning of this article.

Inhabited building. A building is deemed an "inhabited building" within the meaning of this article, any part of which has usually been occupied by a person lodging therein at night.

Night time. The words "night time," as used in this article include the period between sunset and sunrise, and every building or structure, which shall have been usually occupied by persons lodging therein at night, is a dwelling-house within the meaning of this article.

Attempt to burn. The placing of any inflammable material or substance in or about any building, not commonly used for the storage of such materials and substances, or the placing of any device or contrivance, capable of producing fire, either of itself or by electrical, mechanical or chemical means or otherwise, or the placing of any candle, torch or other instrument capable of being lighted or ignited, for the purpose or intent of causing a fire then, or at some later time, or the inducing of another to set fire to any building or any personal property of himself or of another, shall constitute an attempt to burn within the meaning of this section.

§221. Arson in first degree.

A person who wilfully burns, or sets on fire, in the night time:

1. A dwelling-house in which there is, at the time, a human being; or,

2. A car, vessel, or other vehicle, or a structure or building other than a dwelling-house, wherein, to the knowledge of the offender, there is, at the time, a human being,

Is guilty of arson in the first degree.

§222. Arson in second degree.

A person who:

1. Commits an act of burning in the day time, which, if committed in the night time, would be arson in the first degree; or,

2. Wilfully burns, or sets on fire, in the night time, a dwelling house, wherein, at the time, there is no human being; or

3. Wilfully burns, or sets on fire, in the night time, a building not inhabited, but adjoining or within the curtilage of an inhabited building, in which there is, at the time, a human being, so that the inhabited building is endangered, even though it is not in fact injured by the burning; or,

4. Wilfully burns, or sets on fire, in the night time, a car, vessel or other vehicle, or a structure or

building, ordinarily occupied at night by a human being, although no person is within it at the time; or,

5. Wilfully burns, or sets on fire, a vessel, car, or other vehicle, or a building, structure, or other erection, which is at the time insured against loss or damage by fire, with intent to prejudice or defraud the insurer thereof, or the insurer of any articles of property therein,

Is guilty of arson in the second degree.

§223. Arson in third degree.

A person who wilfully burns, or sets on fire a vessel, car, or other vehicle, or a building, structure, or other erection, or who wilfully and maliciously burns or sets on fire any personal property of another person, such personal property being of a value of twenty-five dollars or over, under circumstances not amounting to arson in the first or second degree, is guilty of arson in the third degree.

§224. Punishment for arson.

Arson is punishable as follows:

1. In the first degree, by imprisonment for a term not exceeding forty years.

2. In the second degree, by imprisonemnt for a term not exceeding twenty-five years.

3. In the third degree, by imprisonment for a term not exceeding fifteen years.

§225. Intent to destroy building requisite.

The burning of a building under circumstances which show beyond a reasonable doubt that there was no intent to destroy it, is not arson.

§226. Contiguous buildings.

Where an appurtenance to a building is so situated with reference to such building, or where any building is so situated with reference to another building that the burning of the one will manifestly endanger the other, a burning of the one is deemed a burning of the other, within the foregoing provisions, against any person actually participating in the original setting on fire, as of the moment when the fire from the one communicates to and sets on fire the other.

§227. Ownership of building.

To constitute arson it is not necessary that another person than the defendant should have had ownership in the building set on fire.

§1421. Burning crops or timber, how punished.

A person who, under circumstances not amounting to arson in any of its degrees:

1. Wilfully burns or sets fire to any grain, grass or growing crop, or standing timber, or to any building, fixtures or appurtenances to real property of another; or

2. Wilfully sets fire to, or assist [sic] another to set fire to any wild, waste or forest lands, belonging to the state or to another person whereby such forests are injured or endangered;

Is guilty of felony and is punishable by imprisonment for not more than ten years or by a fine of not more than two thousand dollars, or both.

§1900. Negligently managing and refusing to extinguish fires.

A person who:

1. Wilfully or negligently sets fire to, or assists another to set fire to any marsh, waste or forest lands belonging to the state or to another person whereby such marsh, waste or forest lands are injured or endangered; or,

2. Negligently sets fire to his own woods, by means whereof the property of another is endangered; or,

3. Negligently suffers any fire upon his own land to extend beyond the limits thereof; or,

4. Having been lawfully ordered to repair to a place of a fire in the woods, and to assist in extinguishing it, omits without lawful excuse to comply with the order,

Is guilty of a misdemeanor.

AMERICAN LAW INSTITUTE,
MODEL PENAL CODE

"Section 220.1. Arson and Related Offenses.

(1) Arson. A person is guilty of arson, a felony of the second degree, if he starts a fire or casues an explosion with the purpose of:

(a) destroying a building or occupied structure of another; or

(b) destroying or damaging any property, whether his own or another's, to collect insurance for such loss. It shall be an affirmative defense to prosecution for an offense under this clause that the behavior did not recklessly endanger any building or occupied structure of another, or place any person in danger of death or bodily injury.

(2) Reckless Burning or Exploding. A person commits a felony of the third degree if he purposely starts a fire or causes an explosion, whether on his own property or another's, and thereby recklessly:

(a) places another person in danger of death or bodily injury; or

(b) places a building or occupied structure of another in danger of damage or destruction.

(3) Failure to Control or Report Dangerous Fire. A person who knows that a fire is endangering life or a substantial amount of property of another and fails to take reasonable measures to put out or control the fire, when he can do so without substantial risk to himself, or to give a prompt fire alarm, commits a misdemeanor if:

(a) he knows that he is under an official, contractual, or other legal duty to prevent or combat the fire; or

(b) the fire was started, albeit lawfully, by him or with his assent, or on property in his custody or control; or

[(c) he knows that he is in a peculiarly favorable position to take such measures, without substantial risk or inconvenience.]*

Section 221.0. Definitions.

In this Article, unless a different meaning plainly is required:

(1) "occupied structure" means any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present.

* Subsection (3) not approved by Council in Proposed Official Draft, May 4, 1962.

LOUISIANA CRIMINAL CODE OF 1951

"§ 14:51. Aggravated arson.

Aggravated arson is the intentional damaging by any explosive substance or the setting fire to any structure, water craft, or movable, wherein it is foreseeable that human life might be endangered.

Whoever commits the crime of aggravated arson shall be imprisoned at hard labor for not less than two nor more than twenty years.

§ 14:52. Simple arson.

Simple arson is the intentional damaging by any explosive substance or the setting fire to any property of another, without the consent of the owner and except as provided in Article 51 (aggravated arson).

Whoever commits the crime of simple arson, where the damage done amounts to five hundred dollars or more, shall be fined not more than five thousand dollars, and imprisoned at hard labor for not more than ten years.

Where the damage is less than five hundred dollars, the offender shall be fined not more than one thousand dollars, or imprisoned for not more than one year or both.

§ 14:53. Arson with intent to defraud.

Arson with intent to defruad is the setting fire to, or damaging by any explosive substance, any property, with intent to defraud.

Whoever commits the crime of arson with intent to defraud shall be fined not more than two thousand dollars, or imprisoned, with or without hard labor, for not more than five years, or both.

§ 14:54. Placing combustible materials.

The placing of any combustible or explosive material in or near any structure, water craft, or movable, with the specific intent eventually to set fire to such structure, water craft, or movable, shall constitute an attempt to commit arson within the meaning of the attempt article of this Code, and the court shall look to Articles 51 through 53 of this Code in order to determine which type of arson was attempted.

§ 14:204. Fire-raising on lands of another by criminal negligence; penalty.

Fire-raising on lands of another by criminal negligence is the performance of any of the following acts:

(1) The setting fire to any grass, leaves, brush or debris on lands by the owner, or by the owner's agent or lessee, and allowing the fire to spread or pass to lands of another.

(2) The starting of fire with wood or other fuel on lands of another without malice, for camping or other purposes, with failure to exercise sufficient precautions so as

to prevent the fire from spreading to grass, leaves, brush or other debris on the lands.

(3) The setting fire to grass, leaves, brush or other debris on lands of another by means of casting aside a lighted match or lighted cigar or cigarette stub.

(4) The burning over or causing burning over to be done on any land which adjoins woodlands of another within the boundaries of any parish of this state wherein an organized fire protection unit is maintained by the state or federal government, or both, without first giving the protecting agency written notice of intention to burn over the lands, giving a description of the property which will reasonably describe the location where the burning shall begin, and the date on which the lands are to be burned over. For the purpose of this Section, an "organized fire protection unit" is defined to be any area in which an organized system of fire prevention and control is in effect.

Whoever commits the crime of fire-raising on lands of another by criminal negligence shall be fined not more than three hundred dollars or imprisoned for not more than thirty days, or both.

§ 14:205. Fire-raising on lands of another with malice; penalty.

Fire-raising on lands of another with malice is the malicious setting fire to any grass, leaves, brush or debris on lands of another, or the procuring same to be done.

Whoever commits the crime of fire-raising on lands of another with malice shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both.

§ 14:206. Fire prevention interference; penalty.

Fire prevention interference is the intentional performance of any of the following acts:

(1) Defacing or destroying fire warning notices or posters.

(2) Injuring, destroying, removing or in any manner interfering with the use of any tools, equipment, towers, buildings or telephone lines used in the detection, reporting or suppression of fire.

Whoever commits the crime of fire prevention interference shall be fined not more than five hundred dollars or imprisoned for a period of not more than six months, or both."

MODEL ARSON LAW

(Quoted from SUGGESTIONS FOR ARSON INVESTIGATORS, NATIONAL BOARD OF FIRE UNDERWRITERS, 1956, pp. 45-46)

"ARSON--First degree

Burning of Dwellings.

Any person who wilfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any dwelling house, whether occupied, unoccupied or vacant, or any kitchen, shop, barn, stable or other outhouse that is parcel thereof, or belonging to or adjoining thereto, whether the property of himself or of another, shall be guilty of Arson in the first degree, and upon conviction thereof, be sentenced to the penitentiary for not less than two nor more than twenty years.

ARSON--Second degree

Burning of Buildings, Etc., Other Than Dwellings.

Any person who wilfully and maliciously sets fire to or burns or causes to be burned, or who aids, counsels or procures the burning of any building or structure of whatsoever class or character, whether the property of himself or of another, not included or described in the preceding section, shall be guilty of Arson in the second degree, and upon conviction thereof, be sentenced to the penitentiary for not less than one nor more than ten years.

ARSON--Third degree

Burning of Other Property.

Any person who wilfully and maliciously sets fire to or burns or causes to be burbed or who aids, counsels or procures the burning of any personal property of whatsoever class or character; (such property being of the value of twenty-five dollars and the property of another person), shall be guilty of Arson in the third degree and upon conviction thereof, be sentenced to the penitentiary for not less than one nor more than three years.

ARSON--Fourth degree

Attempt to Burn Buildings or Property.

(a) Any person who willfully and maliciously attempts to set fire to or attempts to burn or to aid, counsel or procure the burning of any of the buildings or porperty mentioned in the foregoing sections, or who commits any act preliminary thereto, or in furtherance thereof, shall be guilty of Arson in the fourth degree and upon conviction thereof, be sentenced to the penitentiary for not less than one nor more than two years or fined not to exceed one thousand dollars.

Definition of An Attempt to Burn.

(b) The placing or distributing of any flammable, exposive or combustivle material or substance, or any device in any building or property mentioned in the foregoing sections

in an arrangement or preparation with intent to eventually wilfully and maliciously set fire to or burn same, or to procure the setting fire to or burning of same shall, for the purposes of this act, constitute an attempt to burn such building or property.

Burning to Defraud Insurer.

Any person who willfully and with intent to injure or defraud the insurer sets fire to or burns or attempts to to do or who causes to be burned or who aids, counsels or procures the burning of any building, structure or personal property, of whatsoever class or character, whether the property of himself or of another, which shall at the time be insured by any person, company of corporation against loss or damage by fire, shall be guilty of a felony and upon conviction thereof, be sentenced to the penitentiary for not less than one nor more than five years."

WISCONSIN CRIMINAL CODE OF 1955

"943.01 Criminal damage to property

(1) Whoever intentionally causes damage to any physical property of another without his consent may be fined not more than $200 or imprisioned not more than six months or both....

(3) If the total property damaged in violation of this section is reduced in value by more than $1,000, the person may be fined not more than $1,000, or imprisoned not more than five years or both. For the purposes of this subsection, property is reduced in value by the amount which it would cost either to repair or replace it, whichever is less....

943.02 Arson of buildings; damage of property by explosives.

(1) Whoever does any of the following may be imprisoned not more than fifteen years:

(a) By means of fire, intentionally damages any building of another without his consent; or
(b) By means of fire, intentionally damages any building of another with intent to defraud an insurer of that building; or
(c) By means of explosives intentionally damages any property of another without his consent.

(2) In this section "building of another" means a building in which a person other than the actor has a legal or equitable interest which the actor has no right to defeat or impair, even tho the actor may also have a legal or equitable interest in the building. Proof that the actor recovered or attempted to recover on a policy of insurance by reason of the fire is relevant but not essential to establish his intent to defraud the insured.

943.03 Arson of property other than building.

Whoever, by means of fire, intentionally damages any property (other than a building) of another without his consent, may, if the property is of the value of $100 or more, be fined not more than $1,000 or imprisoned not more than three years or both.

943.04 Arson with intent to defraud.

Whoever, by means of fire, damages any property (other than a building) with intent to defraud an insurer of the property may be fined not more than $1,000 or imprisoned not more than five years or both. Proof that the actor recovered or attempted to recover on a policy of insurance by reason of the fire is relevant but not essential to establish his intent to defraud the insured.

943.05 Placing of combustible materials an attempt.

Whoever places any combustible or explosive material or device in or near any property with intent to set fire to or blow up such property is guilty of an attempt to violate either §§ 943.01, 943.02, 943.03, or 943.04 depending on the facts of the perticular case.

941.10 Negligent handling of burning material.

(1) Whoever handles burning material in a highly negligent manner may be fined not more than $200 or imprisioned not more than six months or both.

(2) Burning material is handled in a highly negligent manner if, under the circumstances, the person should realize that he creates an unreasonable risk and high probability of death or great bodily harm to another or serious damage to another's property.

941.11

Whoever does wither of the following may be imprisioned not more than five years.

(1) Intentionally burns his own building under circumstances, in which he should realize he is creating an unreasonable risk of death or great bodily harm to another or serious damage to another's property.

(2) Intentionally burns a building of one who has consented to the destruction thereof but does so under circumstances in which he should realize he is creating an unreasonable risk of death or great bodily harm to another or serious damages to a third person or party.

941.12 Interfering with or failing to assist in fire fighting.

Whoever does any of the following may be fined not more than $50 or imprisoned not more than 30 days or both.

(1) Without reasonable excuse, fails or refuses to render assistance when lawfully called upon to do so by a person known by him to be an officer of an organization established for the purpose of extinguishing fires or preventing fire hazards or refuses to obey a lawful order of anyone whom he knows to be connected with such organization.

(2) Interferes with accessability to a fire hydrant by piling or dumping material near it without first obtaining permission from the appropriate muniipal authority. Every day during which such interference continues shall be a separate offense.

ILLINOIS CRIMINAL CODE OF 1961

"§ 20-1. Arson.

A person commits arson when:

(a) By means of fire or explosive, he knowingly:

(1) Damages any building of another without his consent; or

(2) Damages any vehicle, aircraft, or watercraft of another designed for use as a dwelling without his consent; or

(3) With intent to defraud an insurer, damages any building, vehicle, aircraft or watercraft designed for use as a dwelling.

(b) By means of explosives, he knowingly damages any property of another without his consent.

A building or property "of another" means a building or property in which a person other than the offender has an interest which the offender has no authority to defeat or impair, even though the offender may also have an interest in the building or property.

Penalty.

A person convicted of arson shall be imprisoned in the penitentiary for any indeterminate term with a minimum of not less than one year.

§ 21-1. Criminal Damage to Property.

Whoever commits any of the following acts shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both:

(a) Knowingly damages any property of another without his consent; or

(b) Recklessly by means of fire or explosive damages property of another; or

(c) Knowingly starts a fire on the land of another without his consent; or

(d) Knowingly injures a domestic animal of another without his consent; or

(e) Knowingly deposits on the land or in the building of another, without his consent, any stink bomb or any offensive smelling compund and thereby intends to interfere with the use by another of the land or building.

(f) Damages any property other than property described in Subsection 20-1 (3), with intent to defraud an insurer."

10/3/62

MEMORANDUM

BURGLARY AND CRIMINAL TRESPASS ARTICLE

This memorandum briefly reviews the law of burglary and criminal trespass, and discusses the proposed draft. An Appendix contains the proposed draft, the New York burglary article and Penal Law sections relating to a trespassory entry, the burglary and criminal trespass formulations of the Model Penal Code, and the recent Illinois and Wisconsin provisions.

Background

At common law, burglary was classified as a crime against the security of the habitation, and not as an offense against the property *qua* property. The malignity of the offense, observed Blackstone, was "not only because of the abundant terror that it naturally carries with it, but also as it is a forcible invasion and disturbance of that right of habitation which every individual might acquire even in a state of nature." Burglary was concisely defined as the breaking and entering of a dwelling house of another, by night, with intent to commit a felony therein. There were no degrees of burglary at common law, because when all felonies were punishable by death, degrees of heinousness of course, were unnecessary. Each element of the definition was subjected to many decisional and statutory refinements during the course of its development.

There is no precise account of the genesis of burglary. This offense, by hypothesis, partakes of the character of an attempt to commit some other crime since the evil deed intended by the actor at the time of entry need not be consummated. Like all inchoate crimes, the definition of burglary is expressed in terms of conduct preparatory to and in anticipation of the commission of another crime. The law of attempt, therefore, has an important relation to the crime of burglary.

Commentators have suggested that two defects in the

Trespassing on water: People v. Kraemer 7 Misc. 2d 373; People v. Johnson 7 Misc. 2d 385 (1957). Private rights in submerged land must yield to a reasonable exercise of the dominant right of navigation.

early law of attempt played a part in the birth of burglary: (1) immunity from prosecution for conduct short of the last act before completion of the crime, and (2) the relatively minor penalty imposed for an attempt (it being a common law misdemeanor) vis-à-vis the completed offense. The common law considered the breaking and entry of a dwelling at night prepatory conduct sufficiently harmful to be penalized as an independent felony. Burglary, therefore, is an artificial substantive crime, designed to circumvent the difficulties posed by the law of attempt.

The scope of the attempt concept was gradually enlarged to remedy these early defects. Today, a person who breaks and enters a building with the required intent is probably, at that point, deep enough in the zone of perpetration to be guilty of an attempt to commit the crime intended. And, generally today, the punishment for an attempt is fixed at a level sufficiently related to that prescribed for the completed crime (See e. g., N. Y. Penal Law §261). Admittedly, however, if the actor is apprehended immediately upon entering, a successful prosecution for an attempt to commit the crime intended may be difficult. Model Penal Code §5.01 provides that unlawful entry of a structure in which it is contemplated that the crime will be committed is an instance in which "attempt" may be found if other requirements of liability are met:

> "Unlawful entry for a criminal purpose is in many instances punishable under burglary statutes and related laws. Analytically, however, such conduct may also constitute an attempt, and the inclusion here of unlawful entry as a basis for finding a substantial step serves two functions. First, it covers situations not within the technical terms of burglary and related laws. Second, by eliminating the need for using the burglary laws to cover the entire area of attempts by unlawful entry, one of the significant stresses upon the definition of that offense is removed, making possible, it is hoped, a more rational law of burglary." Wechsler, Jones, Korn, The Treatment of Inchoate Crimes in the Model Penal Code, 61 Col. L. Rev. 571,599 (1961); Tentative Draft No. 10, p. 53.

Although burglary is a form of attempt, the severity of the statutory sentence does not depend on what crime was intended by the actor; and although attempt merges in the completed crime, burglary is deemed nevertheless, a separate offense so that consecutive sentences may be imposed when the actor completes the crime intended. Suggestions have been made that a burglary prosecution is initiated at times as a means of imposing substantially enhanced penalties for conduct which other penal sanctions were properly designed to cover. Is there, then, justification for retaining this artificial substantive crime in a revised Penal Law?

Breaking and entering a dwelling at night does require special recognition by the criminal law, notwithstanding that adequate provisions exist for attempts, because this behavior usually excites terror in the occupants and because of the great probability that personal injuries might ensue. In Quinn v. People (1878) 71 N. Y. 561, 567 the court observed that "the essence of the crime of burglary at common law is the midnight terror excited, and the liability created by it out of danger to human life, growing out of the attempt to defend property from depradation." The object of punishing burglary, Holmes wrote, "is not to prevent trespasses even when committed by night, but only such trespasses as are the first step to wrongs of greater magnitude, like robbery or murder." The Common Law, 74.

~~Query: whether the breaking and entering of any building should be deemed a separate offense.~~

The reportorial staff of the Model Penal Code project suggested making a burglarious intrusion simply an element of aggravation in the grading of theft, observing that only theft requires such special provision for aggravation since other crimes generally perpetrated in a burglary

(e. g., arson, kidnapping, rape) already carry grave sanctions (Tentative Draft No. 11, p. 57).[1] The following comment was then made:

> "If we were writing on a clean slate, the best solution might be to eliminate burglary as a distinct offense, as suggested above. But we are not writing on a clean slate. Centuries of history and a deeply embedded Anglo-American conception like burglary cannot easily be discarded. The needed reform must therefore take the direction of narrowing the offense to something like the distinctive situation for which it was originally devised: invasion of premises under circumstances specially likely to terrorize occupants."

Statutes today generally divide burglary into various degrees, differentiating them according to place, time and other circumstances. In New York, burglary (a felony) is divided into three degrees. The two highest degrees (Penal Law §§402-403) are applicable only to a dwelling in which a person is actually present, and in this sense are narrower than the common law definition. This scheme suggests a special concern for the protection of the person, rather than the common law rationale of the protection of the security of the habitation during the night time. Burglary in the first degree is defined as the breaking and entering of a dwelling house of another in which there is at the time a human being, at night, with intent to commit some crime therein, providing the actor is armed, or arms himself therein, or is assisted by a confederate, or

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1. Cf. Fifth Report of the English Commissioners on Criminal Law (1840) p. 9: "In the French law, and in most of the modern codes of Europe, breaking an inhabited house is treated as an aggravation of theft. This is an imperfect means of classification, for as the breaking may be attended with the commission or intention to commit other offences, we see no reason why it should be considered as an aggravation of theft alone. The proper course, as it appears to us, would be to consider breaking a dwelling-house as in all cases the simple offence; and then to classify the circumstances of stealing or committing any other offence therein, of night-time, and of alarm or injury to inmates as so many aggravations, to each of which, when added to the crime of house-breaking, an appropriate place in the scale of punishment should be assigned."

assaults some person therein. It is punishable by an indeterminate term of not less than ten years to not more than thirty years (§407). Burglary in the second degree is defined as the breaking and entering of a dwelling house of another in which there is at the time a human being, with the requisite intent, under circumstances not constituting burglary in the first degree. It is punishable by a term of not more than fifteen years (§407). Burglary in the third degree is applicable to a non-dwelling structure, whether a person is present or not, and to a dwelling in which a person is not present (§404), and is punishable by a term of not more than ten years (§407). The misdemeanor of unlawful entry is defined as the entering of a building under circumstances not constituting burglary (i. e., absent the "break" element) with intent to commit a crime (§405).

Night-time is, as noted, an essential element of the crime of burglary in the first degree (§402). The Model Penal Code commentary pointed out "that darkness facilitates commission of the offense, increases the alarm of the victims, and hampers identification of suspects." Proposed Official Draft, p. 156. "Night-time" is defined in New York as that period between sunset and sunrise (General Construction Law §51). But by common understanding, night does not begin at sunset and end at sunrise, but includes twilight at the one end and dawn at the other. Vehicle and Traffic Law §375, sub. 2, recognizing this phenomenon, requires a motor vehicle driven upon a public highway to have lighted lamps "during the period from one-half hour after sunset to one-half hour before sunrise." For burglary purposes, "night" in England is the period between 9:00 P. M. and 6:00 A. M.; in Massachusetts, one hour after sunset and one hour before sunrise; in Texas, one-half hour is the measurement.[2]

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2. See Annotation 82 A. L. R. 2d 643 (1962): Sufficiency of showing that burglary was committed at night. A criticism of the "night" element appears in Morrow, The Louisiana Criminal Code of 1942, 17 Tul. L. Rev. 1, 20-21 (1942).

One felony provision in the Penal Law applies to a structure, the contents of which are considered to require special protection (§1483, unlawfully entering an arsenal with intent to steal military supplies). Penal Law §1425, subd. 9, and §2036 relate to intrusion upon any lot or piece of land within the bounds of a city or village without authority from the owner thereof. A town, for no apparent reason, is not included in these two criminal trespass provisions, although by ordinance a town may prohibit trespass to public or private property (Town Law §130, subd. 19). In commenting on §2036, the court in People v. Stevens (1888) 109 N. Y. 159, 162, wrote that "the legislature had primarily in view lawless intrusions, especially on vacant lands in cities and villages, without the knowledge of the owner. Intrusion on any lands in cities and villages, vacant or not, is doubtless within the statute." Prosecutions for unlawful intrusions into a building, without an intent to commit a crime therein, are sometimes initiated under this section. People v. Killorin (S. Ct. Jeff Co. 1953) 123 N. Y. S. 2d 612. Section 2042, added to the Penal Law by Laws 1941, ch. 869, provided that defense plants may petition the State "for authority to post any part or all of its property whether enclosed or not with a sign or signs reading 'No Entry Without Permission...' which sign or signs shall be placed in such locations and in such manner as the New York State council of defense shall approve as reasonably to place the public on notice that such premises so posted are not to be entered without permission." Other provisions in the Penal Law expressly prohibit trespass in certain places, e. g., §466 (canal lands), §1100 and §1425, subd. 7 (ice-cutting in front of posted lands), §1425, subd. 14 (a National Guard rifle range), and §1990, subd. 4 (a railroad right of way).

Conservation Law §§365-368 contain detailed provisions on what lands may be posted, the method of posting, service of notice against the trespass, and the effect of posting or

serving notice, e. g., §368 provides that it "shall be unlawful for any person engaged in hunting, trapping or fishing without permission upon the lands of another, whether or not posted as provided in Section 366, not to leave such lands immediately when requested to do so by the owner, lessee or lawful occupant."

Structures Protected

At common law close discriminations were made between what was and what was not a dwelling. The character of a structure as a dwelling was not dependent upon proof that someone was within it at the time of the crime: it was deemed a dwelling if people customarily slept there. The term was used in a somewhat technical sense, and included in addition to the dwelling proper, the cluster of structures which are generally denoted outbuildings. It was often required that the outbuilding be physically inclosed by the same wall which inclosed the dwelling. People v. Parker (1809) 4 Johns. 424. Some courts adopted a view that an outbuilding could be within the curtilage although no wall inclosed the property, e. g., if the outbuilding was upon the same plot as the dwelling-house. This approach was concerned with location and distance. Another theory examined the nature of the outbuilding and its use with reference to the dwelling. See Annotation 43 A. L. R. 2d 831 (1955): Burglary: outbuildings or the like as part of "dwelling house."

Some buildings serve a double purpose, i. e., they are partly used as a dwelling and partly for other purposes. The common law rule applicable to such structures is stated in People v. McCloskey (1860) 5 Parker Cr. R. 57, 60: "if I hire a shop, parcel of another man's house and work or trade in it, but never lie there, it is no dwelling house, and by the common law, no burglary can be committed therein; for, by the

lease, it is reserved from the rest of the house, and therefore is not the dwelling house of him who occupies the other part." Accord, People v. Haupt (3rd Dept. 1926) 218 App. Div. 251; Quinn v. People (1878) 71 N. Y. 561. Some buildings are, of course, multiple residences: "Wherever a building is severed by lease into distinct habitations, each becomes the mansion or dwelling house of the lesee thereof, and is entitled to all the privileges of an individual dwelling." Mason v. People (1863) 26 N. Y. 200, 203. This rule, which recognizes that the unit rather than the structure must be protected, is embodied in Penal Law §401.

A vast legislative development has variously modified the common law definition of burglary, extending the scope beyond that of the habitation itself, i. e., further into the area of property protection. Many states include an exhaustive list of structures subject to burglary.[3] The New York statute

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3. See Note, Statutory Burglary--The Magic of Four Walls and a Roof, 100 U. Pa. L. Rev. 411, 417-418 (1951): "In nineteen jurisdictions the dwelling is no longer of any significance whatever, being merely one item in a comprehensive list of buildings and structures. The Nebraska statute provides that breaking and entering any 'dwelling house, kitchen, smokehouse, slaughterhouse, shop, office, storehouse, mill, pottery, factory, watercraft, schoolhouse, church or meeting house, barn, chicken house, stable, warehouse, malthouse, stillhouse, public building, or other private building, railroad car factory, station house, railroad car, public or private telephone pay station or booth' with intent to commit a felony is punishable by from one to ten years in prison. Similar provisions are present in thirty-eight jurisdictions, and in ten other virtually the same result is reached by condemning burglary in "any building,' 'any structure,' or 'any house.' Besides listing fixed structures, the same jurisdictions generally include vessels, railroad cars, and in a few cases airplanes, or movables in general. A few jurisdictions include automobiles specifically. To guard against narrow construction, twelve jurisdictions include rooms within buildings, or parts of any structures thereinbefore mentioned. Courts have differed in their treatment of these provisions. Some have taken the statutes to represent a legislative policy to include all structures of whatever kind, and have interpreted them liberally. Others have sought to restrict the scope of the statutes to the objects named or their like, utilizing the doctrine of ejusdem generis. In any case, however, the sweeping scope of the statutes cannot be denied. These provisions are not universal. South Carolina limits burglary to dwellings only, although the statute contains a

provides that the term building "includes a railway car, vessel, house trailer, inclosed motor truck, inclosed motor trailer, booth, tent, shop, inclosed ginseng garden, or other erection or inclosure." (Penal Law §400). The "motor truck and trailer" provision was added as recently as 1953. One commentator suggested that an "inclosed ginseng garden" is included because years ago the root of the ginseng plant was held in such high esteem as a medicine that gardens devoted to cultivating the root required special protection. Entering a fruit garden without consent of the owner, with intent to take or injure any thing there growing is a misdemeanor (Penal Law §1425, subd. 5). Entering a railway freight car without authority or permission is an offense punishable by a five dollar fine (Penal Law §1990, subd. 1).

The word "building" in its legal sense is ambiguous and is susceptible of being construed, without violence, as including a limitless variety of structures. Caddy v. Interborough Rapid Transit Co. (1909) 195 N. Y. 415. Indeed, the burglary article of the Penal Law makes no attempt to define the term. A building in its ordinary and popular signification, is a structure which may be entered and utilized by persons for business, public use, lodging, the shelter of animals or storage of goods. California and Colorado courts have interpreted the word "building" to include an outdoor public telephone

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3. (continued)
special provision defining a dwelling as any place whatever in which a person customarily sleeps, including watchmen in stores, and all outhouses within two hundred yards and appurtenant thereto. Other states have limited lists of buildings which may be burglarized, also lacking any general words from which further extensions may be inferred. Georgia lists 'dwelling, storehouse, or other place of business'; Kentucky includes dwellings, warehouses, and shops; Maryland includes dwellings, outhouses, storehouses, and warehouses. Even in these states, however, the inclusion of buildings other than dwellings represents a significant departure from the common law definition of burglary."

booth.[4] See Annotation 78 A. L. R. 2d 778 (1961): What is a "building" or "house" within burglary statutes. New York courts, on the other hand, have avoided such results. In People v. Richards (1888) 108 N. Y. 137, 150, construing language essentially similar to the present Penal Law §400, a mausoleum was held not to be a building:

> "[W]e think that the phrase 'other erection or inclosure,' is to be interpreted as including things of a similar nature to those already described by the specific words found in the statute. If this be so then under the phrase in question the erection or inclosure included in burglary in the third degree was to be of that character which mankind used for the purpose of sheltering property, or for the purpose of transporting the same, or the purpose of trade or commercial intercourse."

Similarly, in People v. Lamphere (4th Dept 1927) 219 A. D. 422, 424-425, the court held that a gasoline pump "is not a structure that may be entered and utilized by human beings, and intended to be thus utilized, as a dwelling or for business, recreational or other practical purposes. Nor is it suitable for transporting or housing personal property. It is nothing more than an appliance, a mechanical device, erected and used for drawing gasoline from a storage tank beneath or near it. If 'structures' such as the one entered in the instant case are to be suceptible of being burglarized, the Legislature must so declare. It has not done so thus far." In People v. Hagan (1891) 14 N. Y. Supp. 233, an outdoor fruit stand, five feet high and five feet in length, having a window and a door, was held to be a "booth" and therefore within the list of structures protected by the burglary article.

Breaking

At common law, "breaking" was an essential element of the crime, and in its early stage of development probably

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4. In these jurisdictions, entry into a building open to the public does not preclude a prosecution for burglary.

contemplated violence. In time, the application of any force, however minimal, was sufficient, so that the requirement became more symbolic than real. Breaking could be "in" or "out," "actual" or "constructive." An actual breaking was defined as any violation of the mode of security which the occupant had adopted as protection against intrusion. Within the meaning of an actual break is the opening of a door with a key, removal of a pane of glass or a wire screen, and even the boring of a hole in the floor of a grannary to cause the grain to flow into a sack. "There is no requirement that violence must be shown .... Nor is there any requirement that the door must be tightly closed. If it is closed to such an extent, or in such a manner, so that some effort must be made to open it far enough to admit the body of a person, and it is opened for that purpos the element of breaking is present." People v. Viola (3rd Dept. 1942) 264 App. Div. 38, 40. Cf. Rosenthal v. American Bonding Co. (1912) 207 N. Y. 162 (evidence of visible violence required by burglary insurance policy). Constructive breaking was defined as an entrance through a door or window, obtained by trickery, fraud, or intimidation. A breaking out was defined as the perpetration of a crime in a building, and a subsequent departure by opening a door or window. In the seventeenth century it was doubtful whether this act constituted burglary. In 1713 Parliament declared this to be burglarious conduct. In nineteen jurisdictions, including New York, "breaking out" may substitute for "breaking in." The New York statute provides that a person who "being in any building, commits a crime therein and breaks out of the same is guilty of burglary in the third degree." (Penal Law §404, subd. 2). In People v. Toland (1916) 217 N. Y. 187, defendants entered a barn through an open door for the purpose of stealing. Afte entering, they closed the door through which they came. They

then stole some property, opened the same door, and left the barn. Holding that the defendants were guilty of burglary, the court quipped that "it is both their misfortune and their fault that they did not leave the door open." 217 N. Y. at 191.

The rationale for the "breaking in" requirement, according to Blackstone, is that "if a person leaves his doors and windows open it is his own folly and negligence," i. e., the criminal law will not undertake to protect a man who is contributorily negligent. But this, of course, is not the rule in other areas of the criminal law. There appears to be no rationale for the "breaking out" rule. Indeed, the Model Penal Code commentary labeled it "the ultimate absurdity." Tentative Draft No. 11, p. 56. In 1840, the English Commissioners on the Criminal Law, in reviewing this rule wrote:

> "By [statute]...the crime of burglary was extended to the case of an offender who having committed a felony in a dwelling-house, or having entered therein with intent to commit a felony, afterwards broke out of such dwelling-house in the night-time. This extension does not, we think, rest upon any just principle. After a felony has been committed within the dwelling-house, the offense is not in reality aggravated by lifting the latch of a door or the sash of a window in the night-time, in order to enable the offender to escape. A breaking out may indeed be an innocent act, as it may be committed by one desirous of retiring from the further prosecution of a crime; and the extension of the law of burglary to such a case is not warranted by the principles on which the law is founded, inasmuch as a circumstance not essential to the guilt of the offender, or the mischief of the act, is made legally essential to the crime. It is ineffectual even with a view to the object proposed; the pretext for conviction fails in the absence of a breaking out, which is a casual and uncertain circumstance...."

Thirteen jursidictions in the United States have abolished the "break" requirement; seven of these, however, require the entry to be in the nature of a trespass. Two jurisdictions require a breaking or an entering. Twenty-four jurisdictions have mixed burglary statutes, i. e., some sections require both a breaking and entering while others require a

breaking of an entering. The remaining eleven jurisdictions, including New York, require both breaking and entering for a sentence of more than one year to be imposed.

The "breaking" requirement has caused a rash of litigation in New York in the habitual offender area and in parole violation matters under Correction Law §219 where the predicate for increased punishment or for the violation is a foreign burglary conviction. People v. Kronick (1955) 308 N. Y. 866; People ex rel Gold v. Jackson (1959) 5 N. Y. 2d 243; People ex rel Hadley v. State Department of Correction (4th Dept. 1960) 11 A. D. 2d 92.

Trespassory Entry

The essence of burglary is intrusion into a building without license or privlege. When a person enters a building at a time and in an outward manner which is authorized, but with intent to commit a crime therein, there is a conflict of authority as to whether he is guilty of burglary. See Note, 15 St. Louis L. Rev. 92 (1930). A literal interpretation of the usual burglary statute can justify such result. The question can arise in a variety of ways: the dishonest employee entering his place of employment at the usual hour; the corrupt municipal building inspector bent on extortion; a witness entering a courthouse with intent to commit perjury. In People v. Barry (Calif. 1892) 29 Pac. 1026, a shoplifter entered a grocery store during business hours. The court held that a person who enters with the intention to commit a crime, enters without invitation, i. e., he is not one of the public invited:

> "The meaning is patent upon the face of the statute. No words are found in the statute, qualifying the character, kind, time or manner of the entry, save that such entry must be accompanied with a certain intent; and it would be judicial legislation for this court to interpolate other conditions into the section of the code."

In People v. Sine (2nd Dept. 1950) 277 App. Div. 908,

the court affirmed, without opinion, one justicedissenting, a conviction for two counts of burglary (breaking "in" and "out") and one count of petit larceny. Leave to appeal was granted, 277 App. Div. 935, but the defendant died before the appeal was perfected. The record shows that defendant opened a closed door at the public entrance to Macy's department store during business hours, shoplifted, and then opened the door to leave. Implicit in the court's affirmance is the holding that one who enters a building at the time open to the public, with criminal intent, enters without license or privilege. Justice Nolan, in his dissenting opinion wrote the following:

> "The breaking contemplated by the statute, whether it be to gain entrance or exit, is not committed when the person who enters or leaves does so with the consent, express or implied, of the occupant of the premises. Here there was an express invitation to the general public to enter the store, by the street entrance, during business hours, and to leave by the same means. Neither the entry by the defendant nor his exit was against the will of the occupant, but, on the contrary, was with its express consent. The door, while actually closed was constructively open to appellant on both occasions."

See comment, 36 Cornell L. Q. 565 (1951). Cf. People v. Kelley (3rd Dept. 1938) 253 App. Div. 430; People v. Seymour (Jeff. Co. Ct. 1961) 210 N. Y. S. 2d 215, 218.

Criminal Intent

The common law of burglary required that the intrusion into a dwelling be made with intent to commit a felony therein. The New York statute, on the other hand, is satisfied if the actor's intent, existing at the time of the breaking and entering, is to commit any crime. People ex rel Stevens v. Jackson (3rd Dept. 1953) 283 App. Div. 3; cf. People v. Elhage (4th Dept. 1961) 14 A. D. 2d 986. The following comment appears in Model Penal Code, Tentative Draft No. 11, pps. 59-60:

> "To specify 'any crime' comports better with the realities of law enforcement. The burglar is often apprehended, if at all, in the process of

> entering, when it may be difficult to know more than that he is up to some mischief. Recognition of this is reflected in the rule that the specific criminal purpose need not be pleaded or proved with the same particularity in prosecuting burglary as in prosecuting the crime which the burglar had in mind. Some statutes and judicial decisions go so far as to create a presumption that an unexplained breaking and entering is made with intent to commit a crime. We believe it unnecessary to create a statutory presumption here."

It is not necessary, of course, that the intended crime be committed. Perpetration of the further crime is relevant for evidentiary purposes, since intent, being a state of mind, absent a confession or admission, is rarely susceptible of direct proof:

> "Whether the criminal intent existed in the mind of a person accused of crime at the time of the commission of the alleged criminal act, must of necessity be inferred and found from other facts which in their nature are the subject of specific proof; and for this reason it is, that the other constituents of the crime being proved, it must, ordinarily, be left to the jury to determine, from all the circumstances, whether the criminal intent existed. In some cases the inference is irrestible, and in others it may be, and often is, a matter of great difficulty to determine whether the accused committed the act charged with a criminal purpose. But there are usually found in connection with an act done, which is charged to be criminal, attending circumstances which characterize it, and if these are absent, or the circumstances proved are consistent with innocence, a conviction cannot be safely allowed." McCourt v. People (1876) 64 N. Y. 583, 586-587.

Merger

As a general rule, "attempt" merges in the completed crime that is its object, with the result that punishment for both is barred. Under Penal Law §406 it is expressly provided that a person may be punished for both the burglary and the further crime perpetrated, although in reality burglary is a form of attempt. In People v. Snyder 241 N. Y. 81 (1925) the defendant burglarized a chicken coop. He was initially prosecuted only for the theft of the chickens and convicted of petit larceny. ~~Thereafter he was indicted for and convicted of~~

~~petit larceny.~~ Thereafter he was indicted for and convicted of burglary in the third degree. In holding that there is no barrier to double punishment, the Court of Appeals wrote:

> "Authority may be cited for the view that at common law a conviction could not be had under an indictment upon a charge of burglary after a previous conviction for the larceny which represents the consummation of the felonious intent, which constitutes an element of the alleged burglary. People v. Smith, 57 Barb. 46, and case there cited. If those cases are correctly decided, they establish only that at common law the offense of burglary includes as an element the offense of larceny, when committed in connection therewith, and that punishment for the burglary therefore also includes punishment for the larceny as the greater includes the less. The Legislature has now defined criminal offenses and their punishment, and the question of whether a charge of larceny is included in an indictment for burglary and whether punishment for burglary includes punishment for larceny as part of the same offense depends solely upon the legislative intent. Question may hardly be raised that there can be no double jeopardy if the Legislature has seen fit to provide that up to a particular point the acts of the defendant constitute one crime, and that the acts of the defendant committed thereafter, constitute a second crime, and that each series of acts constituting a separate crime are subject to separate punishment.
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> The provisions of our statutes are not open to other construction. [The Penal Law]...makes criminal the act of breaking and entering a building with intent to commit a second crime. When the act is done, the crime of burglary is complete; if the intent to commit a second crime is effectuated by overt acts thereafter, a separate crime is committed, which the Legislature may declare should be separately punished. Its declaration that there shall be separate punishment for separate crime is clear and unequivocal." 241 N. Y, at 83-84.

Accord, People ex rel Cannata v. Jackson (3rd Dept. 1958) 6 A. D. 2d 919. But cf. People v. Oliver (3rd Dept. 1957) 4 A. D. 2d 28 (a conviction for burglary in the first degree bars separate punishment for an assault committed therein when such assault constitutes an essential element of this highest degree of burglary).

In condemning cumulative punishment, the Model Penal Code commentators observed that "since the severe penalties for burglary are devised largely to provide aggravated penalties for theft committed by lawless intrusion, it is irrational to cumulate theft and burglary penalties." (Tentative Draft No. 11, p. 61).

COMMENTS ON DRAFT

1. The draft integrates three degrees of criminal trespass and three degrees of burglary, adopting an "ascent" method, i.e., each degree is a step in the series. Thus, one committing first degree burglary involving a dwelling, also commits the two lower degrees of burglary, and all three degrees of criminal trespass. Similarly, one committing first degree criminal trespass, also commits the two lower offenses.

2. Section 1 (a) describes "premises" as any real property, including the term "building"as defined in the article. In People v. Leiby (City Ct. Utica 1945) 184 Misc. 21, the words "lot or piece of land" in Penal Law §2036 (criminal trespass) and the term "real property" were held to be equivalent.

3. No effort is made to define "building" because a definition could only adopt the ordinary and well-understood signification of the word. New York courts have not indulged in strained interpretations of the word, and it is used in the draft in subservience to the meaning given to it by such decisions as People v. Richards and People v. Lamphere, supra, page 10. The drafters intend to exclude from the term "building" a vacant structure in such a deteriorated condition as to require substantial repairs in order to be tenantable. The draft does not require that a person be present in a building or dwelling at the time of the crime: the presence or absence of a person is often a matter of chance as far as the intruder is concerned. (A similar approach and rationale have been taken by the Model Penal Code.)

4. Section 1 (b) provides, as a formulation of convenience, that "building" shall include, in addition to its ordinary meaning, "any structure, vehicle or watercraft used

for overnight lodging of persons, or for carrying on business therein," e. g., a house trailer, a mobile field office, a house boat or a vessel (other than small watercraft). See Real Property Tax Law §102, subd. 12-g (trailer or mobile homes classified as "real property" for tax purposes). Railway cars, inclosed motor trucks and inclosed motor truck trailers (which along with "inclosed ginseng gardens," are deemed, under Penal Law §400, included within the term "building") are intended to be excluded. Theft from these vehicles should properly be punished by theft sanctions. It would clearly be unwise to characterize such conduct as burglary, since it is unlikely to create that terrorization which is aroused in occupants of a building by an intruder. Futhermore, community attitudes with respect to what constitutes burglary should also be considered: the average person would not deem the theft of property from a vehicle to be burglary.

5. The second sentence in Section 1 (b), relating to separately secured or occupied parts of a building, adopts in essence the language of Penal Law §401, and covers hotels, apartment houses, office and loft buildings with multiple tenants, ships with many private cabins, and the like, and the double-purpose structures involved in such cases as People v. McCloskey, People v. Haupt, Quinn v. People, and Mason v. People, supra, pages 7-8.

6. The definition of "dwelling" in Section 1 (c) restates the present formulation in Penal Law §400. The drafters intend to exclude from the definition of "dwelling" any building within the curtilage which is "separately secured" and not used for the overnight lodging of persons. A building is separately secured if, for example, there is no internal communication with the dwelling. This position involves a

departure from existing case law which includes within the term "dwelling" certain outbuildings, whether separately secured or not.

7. Section 2 provides that a person who unlawfully enters or remains in or upon premises is guilty of criminal trespass in the third degree. If, however, the premises are a building, or real property which is fenced or otherwise inclosed in a manner designed to exclude intruders, then such conduct constitutes criminal trespass in the second degree (Section 3). If the premises are a dwelling, then such intrustion (by night or day) is criminal trespass in the first degree (Section 4). The special trespass provisions of the Conservation Law, relating to posted lands, will, of course, continue to be in force.

8. Section 5 defines burglary in the third degree as unlawfully entering or remaining in a building with intent to commit a crime therein. If the offense is perpetrated in a dwelling at night, it is burglary in the second degree (Section 6). If in the course of committing what would otherwise be burglary in the second or burglary in the third degree, the actor is armed with explosives or a deadly weapon, or assaults a person, then such aggravating factor increases the grade of the offense to burglary in the first degree (Section 7). The draft provides that burglary may be committed by a person who, regardless of the lawfulness of his initial entry, remains in a building without license or privilege, with intent to commit a crime therein. For example, if a person enters a department store during business hours, and then, with criminal purpose, secretes himself therein until the store closes, he commits burglary in the third degree.

9. The burglary provisions of the draft (Sections 5-7) require that the actor unlawfully enter or remain in a building with intent to commit a crime therein. A problem may arise as to whether a crime "therein" might be that form of criminal trespass which consists of unlawfully remaining within a building. Since it would be awkward to obviate this by express language in the draft, the result can be achieved by reviser's notes indicating that the crime intended must be one other than criminal trespass.

10. The necessity for proving a "break" oft times needlessly complicates a prosecution for burglary. See e. g., Sullivan v. People (1882) 27 Hun 35; People v. Krevoff (2nd Dept. 1960) 11 A. D. 2nd 1053. Under the New York burglary article one who enters a dwelling at night with intent to commit a crime therein, and assaults an occupant, is guilty of a misdemeanor (Penal Law §405). If, however, the technical "break" element were present, such conduct would constitute burglary in the first degree (§402). Hence, essentially similar conduct is subject to substantially different penalties The absence of a "break" should not confer immunity from felony sanctions for conduct which in substance produces the same kind of terrorization. The draft seeks to obviate these complications and paradoxical results, by not requiring the relatively non-significant element of a break. This scheme will have the incidental effect, of course, of abolishing the indefensible "breaking out" rule.

11. Section 1 (e) requires that the entry be without license or privilege. This requirement would be referable to employees and the like, who enter a building with permission but with intent to commit a crime therein.

12. The second sentence of Section 1 (e) provides that a person who, regardless of his intent, enters a building which is at the time open to the public, does so with license and privilege. This will have the effect of rejecting decisions such as People v. Sine which hold that a non-trespassory entry may constitute burglary. In State v. Stephens (La. 1922) 91 So. 349, 350 the court wrote: "It is against all reason ... that a person entering one of the large department stores of this city with the intention of shoplifting should be punished as for burglary." Where a building is open to the public, and the proprietor posts a notice at the door prohibiting access during business hours to those entering with a criminal purpose, the drafters do not intent that by such act of posting the burglary provisions will apply. See Model Penal Code, Proposed Official Draft, Comments, page 157,

13. Section 1 (e) provides that the owner of premises which are at the time open to the public, may order a person not to enter or remain, provided the order is lawful and is personally communicated to such person by the owner or other authorized person. If the actor defies such an order, he commits criminal trespass.

14. Model Penal Code §221.1 (3) provides that a person may not be convicted for both burlgary and the intended crime unless the latter constitutes a felony of the first or second degree. Since the sentence structure is being dealt with separately by the Commission, it is sufficient to note in this memorandum that it is unreasonable to impose consecutive sentences for the burglary and the crime intended, at least where the latter constitutes a form of theft. It may well be that other crimes, e. g., rape, ought to permit of greater punishment where such crimes are perpetrated in the setting

which most persons regard as their haven -- the dwelling house.

15. Section 8 essentially restates the present definition of possession of burglar's tools in Penal Law §408. Like burglary, this offense is a form of attempt which has been made a substantive crime. The gist of the crime is the intent with which the tools are possessed. The present §408 and the draft require an intent to use the tools in the commission of crime. Since the intent is not limited to burglary, there may be a verbal problem in calling an instrument "burglar's tools," which is, for example, designed and commonly used for the commission of auto larceny. However, the term "burglar's tools" is used in the catch-line merely for convenience. Cf. Model Penal Code §5.06 (1), "Criminal Instruments Generally"

APPENDIX

DRAFT OF CRIMINAL TRESPASS AND BURGLARY ARTICLE

1. Definitions.

In this Article:

(a) "Premises" shall include the term "building" as defined herein, and any real property.

(b) "Building" in addition to its ordinary meaning, shall include any structure, vehicle or watercraft used for overnight lodging of persons, or for carrying on business therein. Where a building consists of two or more units separately secured or occupied, each unit shall be deemed a separate building.

(c) "Dwelling" means a building which is usually occupied by a person lodging therein at night, whether or not a person is actually present.

(d) "Night" means the period between thirty minutes after sunset and thirty minutes before sunrise.

(e) A person "unlawfully enters or remains" when he enters or remains in or upon premises knowing that he is not licensed or privileged to do so. A person who, regardless of his intent, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless he defies a lawful order not to enter or remain, personally communicated to him by the owner of such premises or other authorized person.

2. Criminal trespass, third degree. A person is guilty of criminal trespass in the third degree if he unlawfully enters or remains in or upon premises.

3. Criminal trespass, second degree. A person is guilty of criminal trespass in the second degree if he unlawfully enters or remains in a building, or upon real property which is fenced or otherwise inclosed in a manner designed to exclude intruders.

4. Criminal trespass, first degree. A person is guilty of criminal trespass in the first degree if he unlawfully enters or remains in a dwelling.

5. Burglary, third degree. A person is guilty of burglary in the third degree if he unlawfully enters or remains in a building with intent to commit a crime therein.

10/23 Dick Denzer suggest merger of these 2 degrees

6. Burglary, second degree. A person is guilty of burglary in the second degree if he unlawfully enters or remains in a dwelling at night with intent to commit a crime therein.

7. Burglary, first degree. A person is guilty of burglary in the first degree if he unlawfully enters or remains in a building with intent to commit a crime therein and

   (a) he is armed with explosives or a deadly weapon; or

   (b) he assaults a person in effecting an entry, or while in the building, or in flight therefrom.

8. Burglar's tools. A person is guilty of a [misdemeanor] if he has in his possession any tool, instrument or other thing adapted, designed or commonly used for the

commission of crime, under circumstances evincing an intent to use the same in the commission of crime or knowing that the same is intended to be so used.

NEW YORK PENAL LAW ARTICLE 38, "BURGLARY"

"§ 400. Definitions.

Break. The word "break," as used in this article, means and includes:

1. Breaking or violently detaching any part, internal or external, of a building; or,

2. Opening, for the purpose of entering therein, by any means whatever, any outer door of a building, or of any apartment or set of apartments therein separately used or occupied, or any window, shutter, scuttle, or other thing, used for covering or closing an opening thereto or therein, or which gives passage from one part thereof to another; or,

3. Obtaining an entrance into such a building or apartment, by any threat or artifice used for that purpose, or by collusion with any person therein; or,

4. Entering such a building or apartment by or through any pipe, chimney, or other opening, or by excavating, digging, or breaking through or under the building, or the walls or foundation thereof.

Building. The term "building," as used in this article, includes a railway car, vessel, house trailer, inclosed motor truck, inclosed motor truck trailer, booth, tent, shop, inclosed ginseng garden, or other erection or inclosure.

Dwelling-house. A building, any part of which is usually occupied by a person lodging therein at night, is, for the purposes of this article deemed a dwelling-house.

Enter. The word "enter," as used in this article, includes the entrance of the offender into such building or apartment, or the insertion therein of any part of his body or of any instrument or weapon held in his hand, and used, or intended to be used, to threaten or intimidate the inmates, or to detach or remove property.

§ 401. Dwelling-houses, when deemed separate.

If a building is so constructed as to consist of two or more parts, intended to be occupied by different tenants usually lodging therein at night, each part is deemed the separate dwelling-house of a tenant occupying the same. If a building is so constructed as to consist of two or more parts occupied by different tenants separately for any purpose each part or apartment is considered a separate building within the meaning of this article.

§ 402. Burglary in first degree.

A person who, with intent to commit some crime therein, breaks and enters, in the night time, the dwelling-house of another, in which there is at the time a human being:

1. Being armed with a dangerous weapon; or,

2. Arming himself therein with such a weapon; or,

3. Being assisted by a confederate actually present; or,

4. Who, while engaged in the night time in effecting such entrance or in committing any crime in such a building, or in escaping therefrom, assaults any person,

Is guilty of burglary in the first degree.

§ 403. Burglary in second degree.

A person who, with intent to commit some crime therein, breaks and enters the dwelling-house of another in which there is a human being, under circumstances not amounting to burglary in the first degree, is guilty of burglary in the second degree.

§ 404. Burglary in third degree.

A person who:

1. With intent to commit a crime therein, breaks and enters a building, or a room, or any part of a building; or,
2. Being in any building, commits a crime therein and breaks out of the same,

Is guilty of burglary in the third degree.

§ 405. Unlawfully entering building.

A person who, under circumstances or in a manner not amounting to a burglary, enters a building, or any part thereof, with intent to commit a crime, is guilty of a misdemeanor.

§ 406. Punishment for separate crime committed in building by burglar.

A person who, having entered a building under such circumstances as to constitute burglary in any degree, commits any crime therein, is punishable therefor, as well as for the burglary; and may be prosecuted for each crime, separately, or in the same indictment.

§ 407. Punishment for burglary.

Burglary is punishable by imprisonment in a state prison as follows:

1. Burglary in the first degree, for an indeterminate term the minimum of which shall not be less than ten years and the maximum of which shall be not more than thirty years.
2. Burglary in the second degree, for a term not exceeding fifteen years.
3. Burglary in the third degree, for a term not exceeding ten years.

§ 408. Burglar's instruments.

A person who makes or mends, or causes to be made or mended, or has in his possession in the day or night time, any engine, machine, tool, false key, picklock, bit, nippers or implements adapted, designed or commonly used for the commission of burglary, larceny or other crime, under circumstances, evincing an intent to use or employ, or allow the same to be used or employed, in the commission of a crime, or knowing that the same are intended to be so used, shall be guilty of a misdemeanor, and if he has been previously convicted of any crime, he is guilty of a felony."

NEW YORK PENAL LAW PROVISIONS RELATING TO CRIMINAL TRESPASS

"§ 466. Trespass on canal lands.

A person who, without authority, cuts, removes, causes to be removed or aids in removing from any lands belonging to this state for canal purposes, any tree, timber or growing hay, or removes or causes to be removed from such lands, any rock, stone, sand or gravel or any materials found in natural deposit, or who, without authority, erects, or enters upon such land for the purpose of erecting, any house, shed, building or structures of any kind or nature on such canal lands, is guilty of a misdemeanor.

§ 1100. Cutting ice in front of premises of another.

1. A person who takes possession of or cuts ice in front of the lands of another on any water except lakes, ponds, the Hudson and Mohawk rivers and the tide waters or Rondout and Catskill creeks, between the center of such body of water and such lands, after the owner or occupant has posted in a conspicuous manner upon such lands, near the banks of such waters a written or printed notice of his desire to cut ice in front of such lands; or,

2. Trespasses upon or takes such ice or any part thereof for commercial purposes; or,

3. Wilfully removes any such notice,

Is guilty of a misdemeanor.

§1425. Wilful or malicious injury to and taking, injuring or destroying property, and desecration of the flag.

A person who wilfully:

5. Enters without the consent of the owner or occupant any orchard, fruit garden, vineyard or ground whereon is cultivated any fruit, with intent to take, injure or destroy any thing there growing or grown; or,

7. Maliciously injures any ice upon any water from which ice is taken as an article of merchandise with intent to injure the owner thereof, or enters or skates upon any pond or body of water not navigable, kept and used for the purpose of taking ice therefrom as an article of merchandise, and upon or adjoining which a notice has been placed in a conspicuous position forbidding such entry, and stating the purpose for which said body of water is kept or used, or puts or throws upon or into any such pond or body of water any stick, stone or other substance to the injury of the ice or water; or,

9. Intrudes or places any hovel, shanty or building upon, or within the limits of any lot or piece of land within any incorporated city or village, without the consent of the owner, or within the boundaries of any street or avenue within such city or village; or,

14. Trespasses upon any rifle range lawfully used by or in connection with the National Guard of the state, or any organization, division or district thereof, or injures any target or other property situated thereon, or wilfully violates thereon any regulation established to maintain order

preserve property or prevent accident upon such range, or removes, mutilates or destroys a battle flag, book, placard, relic or record deposited or kept in the state military bureau;

Shall be deemed guilty of a misdemeanor.

§ 1483. Seizing military stores belonging to the state.

A person who enters any fort, magazine, arsenal, armory, arsenal yard or encampment, and seizes or takes away any arms, ammunition, military stores or supplies belonging to the people of this state; and a person who enters any such place with intent so to do, is punishable by imprisonment in a state prison not exceeding ten years.

§ 1990. Riding on railway cars; boarding cars in motion; obstructing passage of car; trespassing upon railway tracks.

1. A person who rides on any engine or any passenger car, baggage car, express car, freight car, wood car or any other car of any railway company, without authority or permission of the proper officers of the company or of the person in charge of said car or engine; or, with intention of not paying therefor; or,

2. Who gets on any car or train while in motion, for the purpose of obtaining transportation thereon as a passenger; or,

3. Who wilfully obstructs, hinders or delays the passage of any car lawfully running upon any steam, or horse, or street railway; or,

4. Who, not being connected with or employed upon the railroad, shall walk upon or along any railroad track or tracks, or right of way, except where and when necessary to cross the track or tracks or right of way where they shall be laid across or along the streets or highways,

Is guilty of an offense and punishable by a fine of not less than one dollar, nor more than five dollars.

§ 2036. Unlawful intrusion on real property.

A person, who intrudes upon any lot or piece of land within the bounds of a city or village, without authority from the owner thereof, or who erects or occupies thereon any hut, or other structure whatever without such authority; and a person who places, erects, or occupies within the bounds of any street or avenue of a city or village, any hut, or other structure, without lawful authority, is guilty of a misdemeanor."

AMERICAN LAW INSTITUTE,
MODEL PENAL CODE

"Section 221.0. Definitions.

In this Article, unless a different meaning plainly is required:

(1) "occupied structure" means any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present.

(2) "night" means the period between thirty minutes past sunset and thirty minutes before sunrise.

Section 221.1. Burglary.

(1) Burglary Defined. A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter. It is an affirmative defense to prosecution for burglary that the building or structure was abandoned. (i.e., derelict)

(2) Grading. Burglary is a felony of the second degree if it is perpetrated in the dwelling of another at night, or if, in the course of committing the offense, the actor:

(a) purposely, knowingly or recklessly inflicts or attempts to inflict bodily injury on anyone; or

(b) is armed with explosives or a deadly weapon.

Otherwise, burglary is a felony of the third degree. An act shall be deemed "in the course of committing" an offense if it occurs in an attempt to commit the offense or in flight after the attempt or commission.

(3) Multiple Convictions. A person may not be convicted both for burglary and for the offense which it was his purpose to commit after the burglarious entry or for an attempt to commit that offense, unless the additional offense constitutes a felony of the first or second degree.

Section 221.2. Criminal Trespass.

(1) Buildings and Occupied Structures. A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or surreptitiously remains in any building or occupied structure, or separately secured or occupied portion thereof. An offense under this Subsection is a misdemeanor if it is committed in a dwelling at night. Otherwise it is a petty misdemeanor.

(2) Defiant Trespasser. A person commits an offense if, knowing that he is not licensed or privileged to do so,

he enters or remains in any place as to which notice against trespass is given by:

(a) actual communication to the actor; or

(b) posting in a manner prescribed by law or reasonably likely to come to the attention of intruders; or

(c) fencing or other enclosure manifestly designed to exclude intruders.

An offense under this Subsection constitutes a petty misdemeanor if the offender defies an order to leave personally communicated to him by the owner of the premises or other authorized person. Otherwise it is a violation.

(3) Defenses. It is an affirmative defense to prosecution under this Section that:

(a) a building or occupied structure involved in an offense under Subsection (1) was abandoned; or

(b) the premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises; or

(c) the actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him to enter or remain."

ILLINOIS CRIMINAL CODE OF 1961

"§ 19-1. Burglary.

(a) A person commits burglary when without authority he knowingly enters into, or without authority remains within a building, housetrailer, watercraft, aircraft, railroad car, or any part thereof, with intent to commit therein a felony or theft.

(b) Penalty.

A person convicted of burglary shall be imprisoned in the penitentiary for any indeterminate term with a minimum of not less than one year.

§ 19-2. Possession of Burglary Tools.

Whoever possesses any key, tool, instrument, device, or any explosive, suitable for use in breaking into a building, housetrailer, watercraft, aircraft, railroad car, or any depository designed for the safekeeping of property, or any part thereof, with intent to enter any such place and with intent to commit therein a felony or theft shall be imprisoned in the penitentiary from one to 2 years.

§ 21-2. Criminal Trespass to Vehicles.

Whoever knowingly and without authority enters any vehicle, aircraft or watercraft or any part thereof of another without his consent shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both.

§ 21-3. Criminal Trespass to Land.

(a) Whoever enters upon the land or any part thereof of another, after receiving, immediately prior to such entry, notice from the owner or occupant that such entry is forbidden, or remains upon the land of another after receiving notice from the owner or occupant to depart, shall be fined not to exceed $100 or imprisoned in a penal institution other than the penitentiary not to exceed 10 days.

(b) A person has received notice from the owner or occupant within the meaning of Subsection (a) if he has been notified personally, either orally or in writing, or if a printed or written notice forbidding such entry has been conspicuously posted or exhibited at the main entrance to such land or the forbidden part thereof."

WISCONSIN STATUTES ANNOTATED

"§ 943.10. Burglary.

(1) Whoever intentionally enters any of the following places without the consent of the person in lawful possession, and with intent to steal or commit a felony therein, may be imprisoned not more than 10 years:

(a) Any building or dwelling; or

(b) An enclosed railroad car; or

(c) An enclosed portion of any ship or vessel; or

(d) A locked, enclosed cargo portion of a truck or trailer; or

(e) A room within any of the above.

(2) Whoever violates sub. (1) under any of the following circumstances may be imprisoned not more than 20 years:

(a) While armed with a dangerous weapon; or

(b) While unarmed, but arms himself with a dangerous weapon while still in the burglarized enclosure; or

(c) While in the burglarized enclosure opens, or attempts to open, any depository by use of an explosive; or

(d) While in the burglarized enclosure commits a battery upon a person lawfully therein.

(3) For the purpose of this section, entry into a place during the time when it is open to the general public is with consent.

§ 943.11. Entry into Locked Vehicle.

Whoever intentionally enters the locked and enclosed portion or compartment of the vehicle of another, without consent and with intent to steal therefrom, may be fined not more than $1,000 or imprisoned not more than one year in county jail or both.

§ 943.12. Possession of Burglarious Tools.

Whoever has in his possession any device or instrumentality designed and adapted for use in breaking into any depository designed for the safekeeping of any valuables or into any building or room, with intent to use such device or instrumentality to break into a depository, building or room, and to steal therefrom, may be fined not more than $1,000 or imprisoned not more than 10 years or both.

§ 943.13. Criminal Trespass to Land.

(1) Whoever does any of the following may be fined not more than $50 and in default of payment thereof shall be imprisoned not more than 30 days:

(a) Enters any enclosed or cultivated land of another with intent to catch or kill any birds, animals, or fish on such land or gather any products of the soil without the express or implied consent of the owner or occupant to engage in any of those activities; or

(b) Enters or remains on any land of another with intent to catch or kill any birds, animals or fish on such land or gather any product of the soil after having been notified by the owner or occupant not to engage in any of those activities; or

(c) Hunts or shoots on the premises of another after having been notified by the owner or occupant not to do so.

(2) A person has received notice from the owner or occupant within the meaning of this section if he has been notified personally, either orally or in writing, or if the land is posted. For land to be posted, a sign at least one foot square must be placed in at least two conspicuous places for every forty acres to be protected. The sign must carry an appropriate notice and the name of the person giving the notice followed by the word "owner" if the person giving the notice is the holder of legal title to the land and by the word "occupant" if the person giving the notice is not the holder of legal title but is a lawful occupant of the land.

(3) Whoever erects on the land of another signs which are the same as or similar to those described in sub. (2) without obtaining the express consent of the lawful occupant of or holder of legal title to such land may be fined not more than $100.

§ 943.14. Criminal Trespass to Dwellings.

Whoever intentionally enters the dwelling of another without the consent of some person lawfully upon the premises, under circumstances tending to create or provoke a breach of the peace, may be fined not more than $200 or imprisoned not more than 6 months or both."

SENTENCING

Preliminary Survey of Sentencing and Sentences

I. The Various Types of Sentences

A. State Prison

Offenses Punishable by Imprisonment in State Prison

In New York State the answer to whether a crime is punishable by imprisonment in a state prison depends upon the length of the term of imprisonment the court is authorized to impose for the crime. Crimes are characterized as either felonies or misdemeanors and the term "felony" is used to describe a crime punishable by death or by a term of imprisonment that can be inflicted in a state prison. Penal Law, §2; People v. Kaminsky, 208 N. Y. 389, 394 (1913). Thus in order to understand whether a crime is punishable by imprisonment in a state prison or, indeed, to understand anything about the sentencing procedure in New York, it is important that one be familiar with the length of the term that forms the dividing line between felony and misdemeanor.

The starting point in understanding the felony-misdemeanor system of classification as it is used in this state lies in our constitutional principle that infamous punishment cannot be inflicted unless the accused has been prosecuted in a proceeding that includes indictment (N. Y. Const., Art. 1, §6) and the right to a common law jury (id., Art. 1, §2). However, except for a reference in Article 1, section 6 to "capital or otherwise infamous crime" -- which establishes the obvious: that a capital crime is an infamous crime -- the definition of infamous crime is not found in the Constitution. The definition must be sought in the manner in which this concept has been interpreted throughout the history of our state. In this connection, the Court of Appeals has pointed out that during the years of our statehood it has been fairly well-understood that a crime is infamous if the punishment which might be inflicted is death, imprisonment in a state prison or imprisonment in any prison for a term longer than one year. People v. Erickson, 302 N. Y. 461, 466 (1951); People v. Bellinger, 269 N. Y. 265 (1935); People ex rel. Cosgriff v. Craig, 195 N. Y. 190, 196 (1909).

The present statutory outline of the dividing line between felony and misdemeanor indicates that this system of classification represents the legislature's manner of distinguishing between

infamous and petty crimes.

The initial point of reference in this outline is Section 2 of the Penal Law which provides in pertinent part:

> "Division of crime. A crime is:
>
> 1. A felony; or
> 2. A misdemeanor
>
> Felony. A 'felony' is a crime which is or may be punishable by:
>
> 1. Death; or
>
> 2. Imprisonment in a state prison.
>
> Misdemeanor. Any other crime is a 'misdemeanor.' "

However, section 2 does not provide any information as to when a crime is punishable by imprisonment in a state prison. Much of this information can be found in Article 196 of the Penal Law, but, as we shall see, there still are some areas of doubt.

Section 2183 of the Penal Law provides that imprisonment in a state prison is mandatory if the term imposed exceeds one year and section 2182 subd. 2 prohibits imprisonment in a state prison if the term or minimum term is less than one year.[1] Thus it appears

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[1] Section 2183 contains an exception applicable "where special provision is made by statute as to the punishment for any particular offense or class of offenses," which might suggest the existence of offenses punishable by imprisonment for a term exceeding one year with the place of incarcertation limited to a place other than a state prison and therefore, create a doubt as to whether sentences for terms exceeding one year always must be to a state prison. But this exception is followed by a string of others which all relate to reformatory terms (and seem unnecessary, because reformatory sentences cannot be for a term that must exceed one year [Penal Law, §2195; Correction Law, §288]). In view of this and of the fact that a search of the consolidated and unconsolidated laws has revealed only one offense punishable by imprisonment for a minimum term of one year where the place of confinement is limited to a place other than a state prison (Intoxication in a public place [Penal Law, §1221, subd. h.]: "Penitentiary for a period of not less than one year nor more than three years" under certain circumstances), it is submitted that the above exception does not alter the general rule.

It might also be noted that section 2182 subd. 2, prohibiting a sentence of imprisonment in a state prison where the minimum term is less than one year does not apply to indeterminate sentences of one day to life. People ex rel Schapp v. Martin, 6 N. Y. 2d 371 (1959). Since such a sentence is only an alternate sentence for crimes otherwise punishable as felonies it does not affect the definition.

that crimes punishable by imprisonment for a term exceeding one year are punishable by terms long enough to make them felonies and crimes punishable by imprisonment for a maximum term of less than one year are misdemeanors.

Crimes punishable by imprisonment for a maximum term of exactly one year present a more difficult problem. Subdivision 1 of section 2182 provides:

> "1. Where a person is convicted of a crime for which the punishment inflicted is imprisonment for a term of one year, he may be sentenced to and the imprisonment may be inflicted by, confinement either in a county jail, or in a penitentiary or state prison." (Emphasis supplied.)

This section, on its face, appears to permit punishment for such crimes to be inflicted by imprisonment in a state prison. Thus crimes punishable by imprisonment for not more than one year seem to come within the definition of "felony" in Penal Law, section 2 and there is at least one crime in the Penal Law which the legislature has characterized as a felony and made punishable by imprisonment for not more than one year (see Penal Law, §954).[1A]

Of course, in a case where a crime is punishable by imprisonment for not more than one year and the legislature has specified that such imprisonment be in a penitentiary or county jail, then the crime is a misdemeanor and there is no problem. Also, it has been held that where the legislature has not specified the place of imprisonment but labeled a crime punishable by imprisonment for not more than one year as a misdemeanor, the crime is not punishable by imprisonment in a state prison. People ex rel. Jaffe v. Henderson, 245 App. Div. 169 (4th Dept. 1935) aff'd mem. 270 N. Y. 638. The Appellate Division dealt with the possibility of imprisonment in a state prison by drawing attention to the provision requiring

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[1A] Also, the Uniform Criminal Extradition Act contains a crime characterized as a "felony" which is punishable by "imprisonment in a state prison or penitentiary for the term of one year" (Code of Cr. Proc., §839).

that certain sentences to state prison be indeterminate (Penal Law, §2189), and stated (245 App. Div. 172-173):[2]

> "It should be noted that the salutory provisions of the law with reference to indeterminate sentences by its terms exclude the imposition of a sentence to imprisonment in a state prison for a violation of this statute. To make up such a sentence there must be a maximum and minimum. The minimum cannot be less than one year, and although the law does not prescribe the shortest period that may be between the maximum and minimum of an indeterminate sentence, it is obvious that it must be at least more than an instant, else the purpose of the statute would be impossible of attainment. Nowhere in the Penal Law can there be found a crime designated as a felony for which the maximum penalty presecribed is one year [The Court evidently overlooked section 954]. The only sentence that could be pronounced in this case would be one of not less than one year nor more than one year. Validity of such a sentence is excluded by a contemplation of the objects of the statute as well as by its terms."

The above reasoning might well be applied to offenses not specifically labeled as felony or misdemeanor and punishable by imprisonment not exceeding one year with no place of imprisonment specified, but no case has been found in which a court has done so. However, the First Department has had occasion to pass upon the question of whether such an offense is punishable by imprisonment in a state prison and hence a felony. Mairs v. Baltimore & Ohio R. R. Co., 73 App. Div. 265, 272-273 (1902). The court held that the crime was a felony and upon appeal, the Court of Appeals -- although able to decide the case without passing on the question -- indicated that an offense so punishable may well be a felony (175 N. Y. 409, 413).

It is interesting to note that the section under consideration in the Mairs case (then Penal Code, §633 and presently Penal Law, §365) was then as it is now, one of a number of sections dealing

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[2] It is interesting to note that the Court, although dealing with a crime the legislature had specifically labeled "misdemeanor," stated that "the case turns upon the question of whether a violation of the section...is a felony" (245 App. Div.170).

with bills of lading and that one of these sections (then Penal Code, §629, now Penal Law, §360) provided that a violation would be a misdemeanor while the others (then Penal Code, §§631, 632, 633, now Penal Law, §§363, 364, 365, respectively) did not specify the character of the offense and each of these sections was and is "punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars or by both." The Appellate Division stated that the legislature's "omission to define the grade of the offense in this section [present Penal Law, §365] is peculiarly significant," and evidently took this as an expression of the legislature's intention to make the offense punishable by imprisonment in a state prison.

In another case dealing with this question (People v. Kelly, 97 N. Y. 212 [1884]), the Court of Appeals had under consideration the statute prescribing the punishment for assault in the third degree (then Penal Code §222, now Penal Law, §245). Assault in the third degree has never been labeled by the legislature as either felony or misdemeanor and was then, as it is now, "punishable by imprisonment for not more than one year or by a fine of not more than five hundred dollars, or both." The relator in the Kelly case had been convicted of this offense and sentenced to imprisonment in a state prison for the term of one year. Although there was no majority opinion in the Court below (3rd Dept., 32 Hun 536), all concurred in the view that assault in the third degree is not punishable by imprisonment in a state prison. But neither of the two justices who wrote opinions in the court below was willing to say that the relator could be sentenced at all under the aforesaid section. Mr. Justice Bockes remarked that the punishment specified for assault in the third degree is identical with the punishment specified in the catch-all section of the Penal Law (then Penal Code, §15, now Penal Law, §1937) applicable to misdemeanors for which no other punishment is expressly prescribed; noted that this section provides for imprisonment only in a penitentiary or county jail; and held that sentence should have been

pronounced under that section (32 Hun 540). The Court of Appeals had only this to say (97 N. Y. 215):

> " The court below was of the opinion that the sentence was without authority of law and void, that the offense was a misdemeanor and punishable by imprisonment in a penitentiary or county jail for not more than one year or by a fine of not more than $500, or by both, as provided by section 15 of the Penal Code [now Penal Law, §1937]. In this conclusion we concur."

It is submitted that if the punishment for assault in the third degree had included a fine in an amount exceeding $500 (see e. g., Penal Law, §1960), or a fine of less than $500 (see e. g., Penal Law, §1428), or had not included a fine at all (see e. g., Penal Law, §773), the Court might not have been able to bypass section 222 (now Penal Law, §245).

In sum then, while it is rather hazardous to venture a generalization in this area, it appears that felony is an offense punishable by death, or by imprisonment pursuant to a sentence for a term exceeding one year and may be an offense punishable by imprisonment for not more than one year.

Term of Sentence; First Offenders

The length of the sentence that may be imposed for a felony is either specifically prescribed in the section defining or article dealing with the crime, or left to the catch-all section dealing with the punishment of felonies for which no other punishment is specifically prescribed (Penal Law, §1935). Although there is little or no uniformity in the language of the various sections prescribing felony punishment the sentences they prescribe fall into six basic categories:[2A]

(1) The death penalty (Murder 1, Penal Law, §1045; Kidnapping, id., §1250; Treason, id., §2382);

[2A] Penal Law, §2191 prescribes instructions for sentencing under a seventh category, which seems to be no longer in existence. The section provides that where a crime is punishable by imprisonment for not less than a specified number of years with no maximum, the court may impose sentence to imprisonment for life or for any number of years not less than the amount prescribed.

or depraved mind situation

(2) Imprisonment for the term of the offender's natural life (Murder 1 [felony murder] on jury recommendation, Penal Law, §1045-a);

(3) Imprisonment for an indeterminate term with a minimum of not less than a specified number of years and a maximum which shall be the offender's natural life (Murder 2, Penal Law, §1048; Kidnapping, under certain circumstances, id., §1250; Lynching, id., §1391);

(4) Imprisonment for an indeterminate term with a minimum of one day and a maximum of the offender's natural life (Carnal abuse of a child, Penal Law, §483-a; Sodomy 1, id., §690; Rape 1, id., §2010; Assault 2 with intent to commit any of the foregoing; or Rape 2 or Sodomy 2, id., §243; Sexual abuse while committing a felony, id., §1944-a);

(5) Imprisonment for a term of not more than or not exceeding a specified number of years (see e. g., Forgery 1, Penal Law, §886);

(6) Imprisonment for an indeterminate term the minimum of which shall be not less than a certain number of years and the maximum of which shall be not more than a certain number of years (Robbery 1, Penal Law, §2125). see e.g.)

The categories of sentence to a state prison appear at first glance to be divers; however, there is an overriding statutory network and all offenders now sentenced to state prison (except those sentenced to terms of one day to life, as in category [4] above) are confined pursuant to indeterminate terms with fixed minimums and maximums or fixed minimums and a maximum of life imprisonment. The significance of a minimum and maximum term is, of course, that the offender may be paroled after he has served the minimum sentence[3] (Correction Law, §212). This is a substantial benefit because it means that he is free to live and remain at liberty so long as he observes the terms and conditions of his parole. The offender, while on parole, however, is still in the legal custody of the warden and will remain so until the expiration of the maximum term specified in his sentence (id., §213) unless sooner discharged from parole by the Board (id., §220)[4].

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[3] Offenders serving terms of one day to life are considered for parole within six months after conviction and at least once every two years thereafter (Correction Law, §214 subd. 3).

[4] A more complete discussion of parole appears, infra.

Under our statutory setup, the sentencing court determines and fixes the actual sentence within the limits prescribed by the legislature (Penal Law, §1931). However, the limits are usually such that the court has very broad discretion.

With respect to the minimum, in most cases, the legislature has not specifically prescribed one (as in [5] above). Where no minimum has been specifically prescribed, the court -- if it sentences the offender to a state prison -- fixes the minimum anywhere between the shortest period for any state prison sentence; viz., one year, and a period of one-half the maximum prescribed by the legislature for the crime involved (Penal Law, §2189). It should also be noted that in these cases the court has discretion to sentence a male offender to imprisonment in a penitentiary for a term of one year or less (Penal Law, §2186) and a female offender to imprisonment in a penitentiary for less than one year (Penal Law, §2187)[5] rather than to imprisonment in a state prison.

In cases where the legislature has prescribed the minimum, the court's discretion is narrower and the sentence must be to a state prison for an indeterminate term of at least the minimum number of years prescribed by the legislature for the crime.[5A]

With respect to the maximum, the court may make it any period within the maximum prescribed by the legislature (Penal Law, §2192) unless a minimum is specifically prescribed for the crime, in which case the maximum would have to be more than the minimum.

Cases involving life imprisonment are somewhat different. Where an offense is punishable by an indeterminate term consisting of a minimum of not less than a specified number of years and a maximum which shall be life -- as in category (3) above -- the court determines a minimum term of the specified number of years,

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[5] These sections state that imprisonment may be either in a penitentiary or a county jail. However, Correction Law Section 500-a prohibits the use of a county jail as a place where convicted felons may be imprisoned.

5A. P.L. 2186 seems to vest the court with authority to sentence a male between the ages of 16 & 21 years to a penitentiary upon conviction of a crime for which a minimum of more than one year has been specifically prescribed by statute.

or more, but must fix the maximum of life. McHugh v. Joyce, 2 App. Div. 2d 976 (2d Dept. 1956). When no minimum is prescribed and the sentence in the statute is imprisonment for the term of the offender's natural life -- as in category (2) above -- the court sentences the offender to life imprisonment. But, in such a case, the offender is considered to be serving an indeterminate sentence with a minimum of 40 years and a maximum of life (Penal Law, §1945 subd. 6).[6]

Another important point to bear in mind in connection with the length of any indeterminate sentence is that every offender sintenced to serve a minimum term of more than 30 years is eligigle for parole as if his sentence had been for a minimum of thirty years (Penal Law, §1945 subd. 7).

A detailed analysis of the sentences prescribed by statute for the various crimes will be included in another part of this study but for present purposes the following table showing the prison sentences prescribed by statute for some of the better-known crimes and some crimes that are not so well-known but carry heavy penalties, should help to set the text in perspective.

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[6] Statutes prescribing life imprisonment as a maximum (except for those prescribing imprisonment for a minimum of one day and a maximum of life) are mandatory and exclusive. Such terms cannot be suspended (Penal Law, §2188) and are specifically excluded from the multiple offender laws. This does not mean, however, that the court cannot add time to the minimum it would otherwise impose if the defendant was armed as provided in Penal Law, §1944. People v. Obrietes, 269 App. Div. 960 (2d Dept. 1945), aff'd. mem. 295 N. Y. 670.

CRIME & PENAL LAW §	TERM PRESCRIBED	
	MINIMUM	MAXIMUM
Abduction - §70	None *	10 years
Arson 1 - §§221, 224	None	40 years
Arson 2 - §§222, 224	None	25 years
Arson 3 - §§223, 224	None	15 years
Assault 1 - §§240, 241	None	10 years
Assault 2 - §§242, 243	None or One day (if with intent to commit a sex crime)	5 years Life
Bribery - §§371, 372, 374	None	10 years
Bribery (sporting contests)- §382 subd. 1	1 year	10 years
Bribery (accepting a bribe)- §382 subd. 2	1 year	5 years
Burglary 1 - §§402, 407	10 years	30 years
Burglary 2 - §§403, 407	None	15 years
Burglary 3 - §§404, 407	None	10 years
Carnal abuse of a child (child 10 years old or under, defendant 18 or over) - §483-a	None or One day	10 years Life
Sodomy 1 - §690	None or One day	20 years Life
Sodomy 2 - §690	None	10 years
Extortion - §852	None	15 years
Extortion by threat to kidnap or to injure with weapon - §852	5 years	20 years
Blackmail - §856	None	15 years
Forgery 1 - §§884, 885, 886	None	20 years
Forgery 2 - §§887, 888	None	10 years
Forgery 3 - §§889, 893	None	5 years
Operating a policy business - §974-a	None	5 years

* None= specifically prescribed

CRIME & PENAL LAW §	TERM PRESCRIBED	
	MINIMUM	MAXIMUM
Book-making as a felony - §986-c	None	5 years
Murder 1 (felony murder) - §§1044 subd. 2, 1045, 1045-a	None	Life (on recommendation of jury)
Murder 2 - §§1046, 1047, 1048	20 years	Life
Manslaughter 1-§§1049,1050,1051	None	20 years
Manslaughter 2 - §§1052, 1053	None	15 years
Criminal negligence resulting in death (vehicle, vessel, hunting) - §1053-a-f	None	5 years
Incest - §1110	None	10 years
Kidnapping - §1250. If offender is parent of person kidnapped	None	10 years
Otherwise	20 years	Life
	(If person kidnapped is returned unharmed before the trial; or upon recommendation of jury.)	
Grand Larceny 1 - §§1294, 1295	None	10 years
Grand Larceny 2 - §§1296, 1297	None	5 years
Contriving a lottery - §1372	None	2 years
Lynching - §1391	20 years	Life
Maiming - §1400	None	15 years
Damaging a building or vessel by explosion - §1420	None	10 years
and		
If life or safety of human being endangered	None	25 years
Damaging a building or property used for religious or cemetary purposes by explosion - §1420-a	None	20 years
and		
If life or safety of a human being is endangered	None	50 years (highest maximum number of years prescribed for any crime)
Damaging military or naval equipment or stores (wilfully or maliciously) - §§1435, 1436, 1437	5 years	25 years
Perjury 1 and subornation of perjury 1 - §§1620-a, 1632, 1633	None	5 years

CRIME & PENAL LAW §	TERM PRESCRIBED	
	MINIMUM	MAXIMUM
Violations of Public Health Law with respect to narcotics - §1751		
Subd. 1 - sale, gift or offer of narcotic to person under 21 years	7 years	15 years
and in any other case	5 years	15 years
Subd. 2 - possession of narcotic with intent to sell	5 years	15 years
Subd. 3 - possession of certain quantities of narcotics	3 years	10 years
Endangering life by maliciously placing explosive near building, car, vessel, although no damage is done - §1895	None	25 years
Wilfully discharging a loaded firearm at an aircraft on ground or aloft - §1919	None	5 years
and If safety of any person endangered	None	20 years
Injuring RR property and appurtenances; obstructing tracks - §1991	None	5 years
and If safety of any person endangered	None	20 years
Rape 1 - §2010	None or One day	20 years or Life
Rape 2 - §2010	None	10 years
Robbery 1 - §§2124, 2125	10 years	30 years
Robbery 2 - §§2126, 2127	None	15 years
Robbery 3 - §§2128, 2129	None	10 years
Compulsory prostitution of women - §2460		
Subds. 1 - 5, 7, 8 (Importing and exporting women for prostitution; compulsory prostitution)	2 years	20 years
Subd. 6 - (Receiving money or other valuable consideration for procuring and placing)	3 years	25 years
Any felony (where no other punishment is prescribed by statute) - §1935	None	7 years

Additional Sentence if Armed

Section 1944 of the Penal Law vests the court with authority to tack on to the punishment elsewhere prescribed by law an additional term of not less than 5 nor more than 10 years:

(1) If the offender while in the act of committing or attempting to commit the crime was an occupant of a stolen automobile or an automobile carrying fictitious license plates or an automobile which has been used in the commission of a crime or in an attempt to commit a crime; or

(2) If the offender while in the act of committing, attempting to commit, or leaving the scene of the crime was armed with any one of the dangerous weapons specified in Penal Law sections 1896, 1897 or 1897-a.

Prior to 1936, the increased punishment was mandatory where one of the above circumstances was present. People v. Krennen, 264 N. Y. 108, 109 (1934)[7]. But in 1936, the section was amended (Ch. 53 L. 1936) and imposition of the additional punishment is now discretionary. See e.g., People v. Kent, 10 App. Div. 2d 662 (4th Dept. 1960).

Although the additional punishment is not in the nature of punishment for a separate ~~or prior~~ crime the factors set forth in section 1944 do not necessarily have to be elements of the crime charged: they merely are aggrevating circumstances calling for additional punishment. See, e. g.: People v. Griffin, 7 N. Y. 2d 511, 514-515 (1960); People v. Krennen, 264 N. Y. 108, 110 (1934); People ex rel. Bryan v. Jackson, 5 App. Div. 2d 273 (3rd Dept. 1957).

Where the increased punishment is imposed it seems that the proper method is to add it as an indeterminate term to the indeterminate term imposed for the felony charged and the result is simply an increase in the minimum and maximum term imposed for the

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[7] The reported cases seem to deal only with the circumstances outlined in category (2) above; i. e., committing a crime while armed, and indeed that is the caption of the section. No case has been found dealing with the circumstances outlined in category (1).

crime. People ex rel. Markov v. Brophy, 284 N. Y. 323; People v. Procito, 261 N. Y. 376 (1933). However, the increased punishment does not merge completely with the punishment for the substantive crime : if properly imposed it is severable and will not invalidate the entire sentence. Matter of Lyons v. Robinson, 293 N. Y. 191 (1944).

One further point might be noted about section 1944 and that is its effect upon and relation to the court's power to suspend sentence or the execution of sentence[8]. If the court imposes the increased punishment it cannot suspend sentence or execution on the increased punishment (this is written into the section). And even if the court does not impose the increased punishment, neither sentence nor execution can be suspended if the defendant is convicted of a felony while armed as provided in section 1944. Penal Law, §2188(c); People ex rel. Bennett v. Merritt, 173 Misc. 355 (S. Ct. Orange Co. 1940), aff'd mem. 286 N. Y. 647.

Term of Sentence: Second and Third Offenders

Penal Law section 1941 prescribes a mandatory increase in the length of the sentence to be imposed upon a person convicted of a felony not punishable by a term of life imprisonment, if the offender has "been once or twice convicted within this state of a felony, of an attempt to commit a felony, or, under the laws of any other state, government, or country of a crime which if committed within this state, would be a felony...." The increased punishment is not additional punishment for prior crimes, these being merely elements in its determination. In other words, the punishment is only for the new crime but the prior convictions mandate the imposition of a heavier sentence. People ex rel. Carollo v. Brophy, 294 N. Y. 540 (1945).

Where an offender comes within the provisions of this section,

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[8] The topic of suspended sentences is covered more thoroughly, infra.

the court must impose "an indeterminate term, the minimum of which shall be not less than one-half of the longest term prescribed upon a first conviction and the maximum of which shall be not longer than twice such longest term." Thus, for example, a defendant who previously has been convicted of either one or two felonies and presently stands convicted of Forgery in the first degree (Penal Law, §884) which is punishable as a first offense by imprisonment for a term not exceeding 20 years (id., §886) would have to be sentenced as a second or third offender, as the case may be, to an indeterminate term with a minimum of 10 years and a maximum anywhere between the minimum and 40 years.

Significantly, the minimum the court can set, in the above example, is now 10 years whereas, if the defendant had been a first offender the court could have set the minimum anywhere between 1 and 10 years or could have fixed a term of one year or less and sentenced the defendant to a penitentiary.

It should be noted that although the statute provides that the court must sentence the offender as therein provided, the court still has the power to suspend sentence or the execution thereof. Penal Law, §2188; People v. Webster, 279 App. Div. 944 (2d Dept. 1952); see Matter of Hogan v. Bohan, 305 N. Y. 110, 113 (1953).

For the purposes of this section, where sentence or the execution of sentence has been suspended on a prior felony, the prior felony counts as a conviction for sentencing the defendant as a second felony offender (Code of Cr. Proc., §470-b)[9] but does not count as a conviction for sentencing the defendant as a third felony offender. People v. Shaw, 1 N. Y. 2d 30 (1956); People ex rel. Lozzi v. Fay, 6 App. Div. 2d 18 (2d Dept. 1958) aff'd mem. 5 N. Y. 2d 890. And this appears to be the rule even where the

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[9] This is so even though upon a literal reading, section 470-b appears to require that the previous conviction be alleged in the indictment: a procedure prohibited by §275-b of the Code of Criminal Procedure. People v. Hunter, 3 App. Div. 2d 926 (2d Dept. 1957) aff'd mem., 4 N. Y. 2d 692.

suspension was on a conviction that occurred in another jurisdiction. People ex rel Goldman v. Denno, 9 App. Div. 2d 955 (2d Dept. 1959), rev'd on other grounds, 9 N. Y. 2d 138[9A].

The section also provides that where two or more crimes are charged in separate counts of one indictment or information or in two or more indictments or informations consolidated for trial, they are deemed to be one conviction for the purpose of the increased punishment prescribed.

Term of Sentence: Third Narcotic Offenders

Subdivision 2 of Penal Law section 1941 provides that upon conviction of a third felony[10] under any law relating to narcotics the offender shall be sentenced to imprisonment for an indeterminate term with a minimum of not less than 15 years and a maximum which must be for his natural life.

The minimum sentence prescribed by this section is more than double the minimum that could be imposed upon a first offender for the most serious narcotic crime (sale to a minor, Penal Law, §1751 subd. 1), it is triple the minimum for selling narcotics, and five times the minimum for possession with intent to sell. The maximum is a mandatory life sentence (see McHugh v. Joyce, 2 App. Div. 2d 976 [2d Dept. 1956]).

Except for the fact that the court has no discretion with respect to the maximum and the fact that sentence and the execution thereof cannot be suspended (Penal Law, §2188) all of the provisions discussed, supra, with respect to the application of Penal Law

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[9A] It also should be noted that none of the felonies in Article 162 (bail jumping, parole jumping, escape, unlawful communications with prisoners, etc.) count as prior felony convictions for the purposes of this section or section 1942 (Penal Law, §1699).

[10] The prior convictions include attempts to commit felonies and convictions under the laws of other jurisdictions for narcotic crimes which would be felonies if committed in this state.

section 1941 apply to the sentencing of third narcotic offenders.

Term of Sentence; Second and Third Conviction for Committing Crime While Armed, etc.

In addition to the punishment prescribed in section 1941 for second and third felony offenders the court may impose an extra term of not less than 10 nor more than 15 years if it appears that the offender committed the crime under the circumstances set forth in Penal Law, §1944 (armed with a weapon, etc.) and previously has been convicted of a felony so committed. Upon a third conviction of a felony so committed the court may impose an extra term of not less than 15 nor more than 25 years.

Naturally, everything stated, with respect to the additional term under section 1944 for first offenders would apply to the second and third conviction.

Term of Sentence: Fourth and Subsequent Offenders

Penal Law section 1942 prescribes a mandatory increase in the length of the sentence to be imposed upon a person convicted of a felony - "other than murder, first or second degree, or treason" - [11] if the offender has "been three times convicted within this state, of felonies or attempts to commit felonies or under the law of any other state government or country of crimes which if committed within this state would be felonious... ."

When an offender comes within the provisions of this section, the court must impose an indeterminate sentence with a minimum term equal to the maximum that could be imposed upon a first offender or 15 years whichever is greater and a maximum term which shall be life imprisonment. The court has no power to suspend this sentence or the execution thereof (Penal Law, §2188).

Thus, for example, a defendant who previously has been

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[11] The quoted language was added to section ~~1944~~ 1942 in the year 1932 (Ch. 617, §1) and the crimes it covers are those punishable by death or maximum of life imprisonment. However, the language does not cover Kidnapping which was made punishable by death or maximum of life imprisonment in 1933 (Ch. 773, §1).

convicted of three felonies and presently stands convicted of Grand Larceny in the first degree (Penal Law, §1294), which is punishable as a first offense by imprisonment for a term not exceeding 10 years, (id., §1295), would have to be sentenced as a fourth offender to an indeterminate term of 15 years to life. And the Forgery 1 defendant (discussed, supra, in connection with second and third offenders) if convicted as a fourth felony offender would have to be sentenced to an indeterminate term of 20 years to life.

For the purposes of this section, where sentence or the execution of sentence has been suspended on a prior felony, the prior felony does not count as a conviction. People ex rel Marcley v. Lawes, 254 N. Y. 249 (1930).

Also, and as with second and third offenders, where two or more crimes are charged in separate counts of one indictment or information or in two or more indictments consolidated for trial, they are deemed to be one conviction for the purpose of the increased punishment prescribed.

Term of Sentence; Sex Offenders and Multiple Sex Offenders

In 1950 the legislature added to the law a new method of dealing with sex offenders convicted of crimes involving violence or the abuse of children (Ch. 525). Under this procedure the court, in lieu of any other sentence, can impose upon such an offender an indeterminate sentence with a minimum of one day and a maximum which shall be the duration of the offender's natural life.

The procedure was designed to vest the courts with the greatest possible flexibility in the sentencing of such offenders and "to give equal flexibility to the Departments of Correction and Mental Hygiene and the Division of Parole in treating them." (Gov. Dewey's mem. of approval, NEW YORK STATE LEGISLATIVE ANNUAL 353-354). A sentence of one day to life is not mandatory in any case but where authorized and imposed it cuts across and is used in lieu of any other punishment for a first or multiple offender.

Although infliction of this punishment is within the discretion of the trial court no court may impose it until the court has received a complete written report of a psychiatric examination of the defendant (Penal Law, §2189-a).

While an offender sentenced to a term of one day to life could be subjected to imprisonment for his entire life the sentence is not really one of life imprisonment as that type sentence is generally understood. The clearest expression of the legislature's intent in this connection is found in subdivision 10 of Penal Law section 3, which provides that:

> "The terms 'life imprisonment' or 'imprisonment for life' shall not include imprisonment for an indeterminate term having a minimum of one day and a maximum of natural life."

Significant differences between a one day to life sentence and an ordinary life sentence are found in the fact that a one day to life sentence may be imposed with execution suspended (Penal Law, §2188), does not result in civil death (id., §511 subd. 2), does not preclude the offender from being restored to certain civil rights after he has been paroled (id., §510), and is not the type of life sentence that would deprive a child between the ages of 15 and 16 of automatic juvenile delinquency treatment (id., §2186). Differences also exist with respect to parole. An offender serving a one day to life sentence is eligible to be considered for parole within six months after conviction and once every two years thereafter (Correction Law, §214). Also, the Board has absolute discretion to discharge the offender from parole and thereby terminate the sentence (id., §220).

Correction Law section 149 provides for mandatory clinical treatment of one day to life prisoners[12]. This subject will be treated in a subsequent report.

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[12] Notwithstanding the provisions of Penal Law section 2182 subd. 2 a sentence of one day to life is inflicted by sentence of imprisonment in a state prison. People ex rel Schapp v. Martin, 6 N. Y. 2d 371 (1959).

See Department of Correction: Research Project for the Study and Treatment of Persons Convicted of Crimes Involving Sexual Aberrations. Final Report, June 1950 to June 1955 1958 401 pps.

PENAL LAW SECTIONS AUTHORIZING ONE DAY TO LIFE SENTENCES

FIRST OFFENDERS

Assault 2 - §§242, 243 with intent to commit:

Rape 1 or 2;

Sodomy 1 or 2; or

Carnal abuse (under §483-a ONLY. See Tesseyman v. State, 21 Misc. 2d 534 [Ct. Claims 1960]).

Carnal abuse of a child 10 or under by a person 18 or over - §483-a.

Sodomy 1 - §690

Rape 1 - §2010

Sexual Abuse while committing a felony - §1944-a:

Applies to any felony (except Murder 1) where offender carnally abuses child 16 or under or engages in immoral practice with sexual parts or organs of any person and wounds or inflicts grievous bodily harm upon that person or uses weapon, drug or gas.

MULTIPLE OFFENDERS

Carnal abuse of a child of over 10 and less than 16 years of age after prior conviction of a sex crime - §483-b.

The first offense under this section is a misdemeanor if the offender has not previously been convicted within or without the state of a similar crime or of the crime of, or an attempt to commit:

- Rape 1 or 2;
- Abduction;
- Sodomy;
- Incest;
- Endangering morals (§483);
- Carnal abuse (§483-a) or
- Assault 2 (as defined above; except this section adds abduction to the crimes therein enumerated).

GENERAL MULTIPLE SEX OFFENDER STATUTE;
Applies to Second or Subsequent Offense-
§1940. *

If person previously convicted in this state or elsewhere of the crime of or an attempt to commit:

Rape 1 or 2;
Sodomy;
Sodomy 1;
Carnal Abuse (483-a, 483-b); or
Assault 2, with intent to commit

Rape 1 or 2;
Sodomy;
Sodomy 1, or
Carnal abuse

commits or attempts to commit "a felony."

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* The language of this section appears to make it literally applicable if the second or subsequent conviction is a conviction for any felony. However, this does not seem to have been the intention of the legislature. It also should be noted that the statute is applicable even if the first offense was a misdemeanor, such as carnal abuse under section 483-b or some cases of sodomy. No case construing this section has been found.

P. Preiser/pjc
June 22, 1962

Calculating Terms of Imprisonment

Every convict has an absolute right to receive credit against the sentence imposed by the court for any time spent by him in confinement "in a state institution for defective delinquents or insane criminals, county or city psychiatric institution, prison or jail[13] prior to his conviction and before sentence has been pronounced upon him." (Penal Law, §2193). This credit usually is called "jail time" and applies against a prisoner's minimum term to advance the date of his eligibility for parole and against a convict's maximum term to terminate the sentence sooner.

Curiously, the legislature has not provided any credit for time in confinement after conviction but before the prisoner's arrival at the institution in which the sentence is to be served, and there is a conflict of authority as to whether such time can be credited. The Third Department has held that no credit can be allowed. People ex rel. Jackson v. Weaver, 279 App. Div. 88 (3d Dept. 1951). The Supreme Court for Bronx County (Chimera, J.) has held--without reference to the Third Department's decision--that credit for this time should at least be allowed in a case where the transfer is between two institutions under the jurisdiction of the New York City Department of Correction (People ex rel. Manekos v. Noble, 26 Misc. 2d 460 [S. Ct. Bronx 1960]). And the Supreme Court for Oneida County (Lockwood, J.) has held--relying solely upon the Bronx County case--that credit for this time should be allowed where the transfer is from a county jail to a state reformatory (the same type of transfer as the one that was

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[13]Confinement does not actually have to be in a real jail. The word jail has been construed to mean any place where a prisoner happens to be, if the prisoner is under arrest. Thus, it may be confinement en route from another jurisdiction or confinement under police surveillance in a hospital that has no prison ward. People ex rel. Broderick v. Noble, 26 Misc. 2d 903 (S. Ct. Bronx 1960); People ex rel. Higgins v. Close, 12 Misc. 2d 903 (Dutch Co. Ct. 1958); People ex rel. Cohalan v. Warden of City Prison, 96 N. Y. S. 2d 749 (S. Ct. Bronx 1950)

the subject of the Third Department's opinion). Bretti v. Eastman, 219 N. Y. S. 2d 73 (S. Ct. Oneida Co. 1961). Reversed June 27, 1962 4th Dept.

In addition to the automatic reduction for jail time, a convict may be granted a reduction in the minimum and maximum terms of his sentence as a reward for good behavior. Correction Law, §230, as amended, L. 1962, Ch. 826. The Correction Law provides that every prison (and penitentiary) is to have a board which must meet every month and determine the amount of good behavior time (within the limits prescribed by statute) to be allowed to each prisoner (id., §235).[14] The board's decision is made within the framework of rules formulated by the Commissioner of Correction (id., §234) and the board has statutory authority to grant the allowance in full or in part, to withhold the allowance for the month in question, or to revoke allowances granted in prior months (id., §235). The action of the board in granting or withholding these allowances is not reviewable if done according to law; but in all cases where the board withholds or revokes the allowance, it must forward a written report of its reasons for such action to the Commissioner of Correction (id., §235).

The amount of reduction that may be allowed on the minimum term is 10 days per month, not to exceed four months per year (Correction Law, §230, subd. 2). The effect of this allowance is to accelerate the date when the prisoner is eligible to be considered for parole and it cannot be applied for any purpose (even if parole is denied) against the maximum of an indeterminate term. People ex rel. Clemente v. Warden of Auburn Prison, 9 N. Y. 2d 216 (1961).[15] In other words, if an offender is sentenced to an indeterminate term of not less than 15 nor more than 30 years and is credited with all the good behavior time he can earn, he is eligible to be considered for parole after

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[14]Prisoners serving terms of one day to life are not eligible. Prisoners serving terms with maximum of life are eligible for reduction in minimum only. Correction Law, §230.

[15]The reduction can, however, be granted to a prisoner serving a definite sentence (Correction Law, §230), and when such a prisoner has served his time as so reduced, he is automatically released. However, until the expiration of his term, he has the same status as a parolee.

serving approximately 11 years and 3 months of his sentence (assuming no jail time) and this--although a very important benefit--is the only benefit of the 10-day per month allowance.

Commencing July 1, 1962, a prisoner serving an indeterminate term also can earn a reduction of his maximum term (Correction Law, §230, subd. 4, as amend., L. 1962, Ch. 826). The idea behind this is to leave the prisoner with some reward for his good behavior if the Parole Board has refused to release him.[16]

The new law provides that every prisoner confined in a state prison or penitentiary for an indeterminate term (except a term of one day to life), may receive a 2-day per month reduction in his maximum term for good conduct, and a 3-day per month reduction in his maximum term "for meritorious progress and achievement in a treatment program to which he has been assigned." The reduction allowable on the maximum term is not to exceed two months per year. Prisoners will be released automatically and will remain under the supervision of the Board of Parole until the expiration of their maximum sentences, as in the case of reductions on definite sentences (see footnote 15, supra). Also, all the above-described provisions with respect to determination of the time actually to be allowed on minimum sentences will apply to determination of the time actually to be allowed on maximum sentences.

Time-off for good behavior cannot be allowed on jail time, but only on time actually spent in the state prison (or penitentiary). Correction Law, §231. Good behavior time allowed on the maximum sentence cannot be used to reduce it below the minimum imposed by the

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[16]In approving this bill, Governor Rockefeller stated (Mem. April 24, 1962):

> "The entire question of sentencing and punishment of criminal offenders continues to be the subject of review by the Temporary State Commission on revision of the Penal Law and the Criminal Code. The Commission can appropriately consider experience under the provisions of this bill."

court, and good behavior time allowed on the minimum sentence cannot be used to reduce the minimum in a state prison to less than one year, exclusive of jail time.[17]

Place of Confinement

Section 70 of the Correction Law provides that there shall continue to be maintained for the security and reformation of prisoners of this state, six prisons for men. And section 90 of that chapter provides that there shall be one state prison for women. Dannemora S.H. Matteawan S.H.

In connection with the sentencing of women, it is important to note that when a woman is convicted of a felony and sentenced to a term of one year (or more), the sentence must be to a state prison (Penal Law, §2187). Thus, it would seem that Penal Law, section 2182, subd. 1, permitting imprisonment for a term of one year to be in a county jail (which cannot be used for the confinement of convicted felons anyway [Correction Law, §500-a]), penitentiary or state prison does not apply to women.

The names and locations of the various state prisons are as follows (Correction Law, §§70, 90):

Name of Prison	Location
Attica Prison	Attica, Wyoming County
Auburn Prison	Auburn, Cayuga County
Clinton Prison	Dannemora, Clinton County
Sing Sing Prison	Ossining, Westchester County
Wallkill Prison	Wallkill, Ulster County
Green Haven Prison	Green Haven, Dutchess County
State Prison for Women	Bedford Hills, Westchester County

[17]There seems to be no authority either way on the question of whether jail time itself can reduce the term that must be served within the walls of a state prison to less than one year. One can easily envision a sentence with a minimum of 1 year and 3 months where the offender has 4 months jail time to his credit and thus is eligible to be considered for parole after 11 months in prison. Perhaps the reason there is no authority is that, in 1934 and 1953, the Attorneys General expressed opinions that jail time can reduce the minimum to be served within a state prison to less than one year. (1934 Ops. N. Y. Att'y Gen., 450-451; 1953 Ops. N. Y. Att'y Gen., 154).

The judgment and sentence of the court must specify the place of imprisonment (Penal Law, §2180), and if the sentence is to be inflicted by imprisonment in a state prison, the place specified is the prison designated as a receiving and classification institution for the judicial district in which the court is located (Penal Law, §2198). An exception is made in the case of males between 16 and 21 years of age; and males between 15 and 16 years of age convicted pursuant to indictments charging crimes punishable by death or life imprisonment. When such persons are sentenced to a state prison term, they must be committed to the Department of Correction's Reception Center at Elmira, New York, rather than to the prison that serves as a reception center for the court's judicial district (Correction Law, §61; Penal Law, §2186). It should be noted that the Commissioner of Correction is not bound to retain the prisoner at the place of commitment specified in the judgment and sentence: the Commissioner has the power to transfer inmates from one state correctional institution to another (id., §6-a).[18]

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[18]It is contemplated that a complete analysis of correction facilities will be made and incorporated as part of this study.

B. State Reformatory

Reformatory Terms for Persons Convicted of Felony

A defendant convicted of a felony and sentenced between his or her 16th and 30th birthdays may, under certain circumstances, be sentenced to a reformatory term; i.e., a sentence to imprisonment for an indefinite period (not to exceed five years) during which the defendant may be paroled at any time and discharged at any time.

More specifically, a male between the ages of 16 and 21 years[19] convicted of a felony, including a felony punishable by a term of one day to life, but excluding a felony punishable by death or life imprisonment (Penal Law, §2184-a); a male between the ages of 21 and 30 years, convicted of a felony and not previously convicted of a crime punishable by imprisonment in a state prison (id., §2185); and a female between the ages of 16 and 30 years, convicted of a felony, and not previously convicted of a crime punishable by imprisonment in a state prison (id., §2187-a) may--in the discretion of the court and in lieu of any other punishment--be sentenced to a reformatory term.

A comparison of the provisions applicable to the three groups (males between 16 and 21, males between 21 and 30, and females between 16 and 30) reveals that the legislature has specified that a reformatory term is not available in the case of a male between the ages of 16 and 21, convicted of a crime punishable by death or life imprisonment (Penal Law, §2184-a), and it has omitted this limitation in the statutes authorizing reformatory terms for the other two groups (Penal Law, §§2185, 2187-a). Although no case has been found that deals with this issue, it is difficult to believe that there should be such a distinction. Moreover, it well may be that statutes prescribing death or life imprisonment are mandatory and exclusive (see McHugh v. Joyce, 2 App. Div. 2d 976 [2d Dept. 1956]) and, thus, outside the

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[19]The term "between the ages" as used in reformatory sections means between those birthdays on the date sentence is imposed. People v. Schneider, 276 App. Div. 781 (2d Dept. 1949); see also 1955 Ops. N. Y. Att'y Gen., 192-193.

scope of Penal Law, sections 2185 and 2187-a.[20] Another distinction between the statute authorizing a reformatory term for males between 16 and 21 and the statutes dealing with the two other groups, is that the latter are applicable only if the person "has not theretofore been convicted of a crime punishable by imprisonment in a state prison" (Penal Law, §§2185, 2187, 2187-a) while the former contains no such limitation (id., §2184-a).

When the Court imposes a reformatory term, it has no power to fix or limit the duration of that term (Penal Law, §2195). The prisoner is sentenced to the reformatory or reception center (see infra), as the case may be, and thereafter, is confined under a standard reformatory term for persons convicted of felonies (Correction Law, §288).

The reformatory term for a felony is an indefinite term which may be terminated by the Board of Parole. Although it has neither a minimum nor maximum as such, it cannot exceed five years (including jail time). Penal Law, §§2184-a, 2185, 2187-a; Correction Law, §288. The Board of Parole determines fitness for release and may at any time grant parole, conditional release or absolute release and discharge.

Parole or conditional release does not effect a termination of the sentence. The person paroled or conditionally released remains under the supervision of the Board of Parole (Correction Law, §282), and in the legal custody of the Department of Correction (id., §281) subject to being retaken for a parole violation (id., §283) at any time before

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[20]Prior to 1932 there still were crimes punishable by imprisonment for not less than a certain number of years with no maximum prescribed, and in such cases the court could sentence the offender to life imprisonment (Penal Law, §2191). In fact, even if the court sentenced the offender to a reformatory term for such a crime, he could be confined indefinitely, which might mean for life. See People ex rel. Guariglia v. Foster, 275 App. Div. 893 (4th Dept. 1949), aff'd mem. 301 N. Y. 515. In 1932 the legislature established maximums for these crimes (L. 1932, Ch. 275) and it also was in that year that Penal Law, §2184-a was added (L. 1932, Ch. 414, §2). Prior to 1932 there may have been reluctance to include a limitation with respect to life imprisonment in Penal Law, §§2185 and 2187 because of the possibility that they might be interpreted as not applicable to crimes with no maximum. Since the possibility of any such danger was obviated in the same year that section 2184-a was added, it is not surprising that the limitation was included in that section.

expiration of the five-year maximum or until absolute release, whichever is sooner (id., §281). Absolute release truncates the term before the expiration of the five-year maximum and is granted to a person when the Board believes "there is a strong or reasonable probability that if discharged, he will remain at liberty without violating the law and that his release is not incompatible with the welfare of society." (id., §281, subd. 3).

Reformatory Terms; Commitments for Offenses Less Than Felony

A reformatory term for a male or female committed for an offense less than felony is an indefinite term not to exceed three years. And, except for the fact that the maximum duration of this term is three years instead of five years, the term is precisely the same in every respect as a reformatory term for a felony. Correction Law, §§281, 288, 291, 311(e); Penal Law, §§2184-a, 2187-a; Code of Cr. Proc., §§891-a, 913-c, 913-m; Family Court Act, §758(c) [L. 1962, Ch. 686, as amend. L. 1962, Chs. 687, 700, 702, 703, effective September 1, 1962]; New York City Criminal Court Act, §82(3) [L. 1962, Ch. 697, as amend. L. 1962, Ch. 703, effective September 1, 1962].

1. Offenses Less Than Felony; Males

when act occurred before 16th birthday?

Penal Law, section 2184-a provides that where a male between the ages of 16 and 21 years is adjudicated a juvenile delinquent, or found to be a disorderly person or vagrant, or adjudged a wayward minor or youthful offender, or found guilty of any offense or of a misdemeanor, the court--in lieu of any other sentence--may sentence him to a reformatory term. (The actual commitment of a male between the ages of 16 and 21 years, who is sentenced to a reformatory term, must be to the Department of Correction's reception center [see, infra, pp. 36-7]). Thus, in almost every case where a male between the ages of 16 and 21 is convicted in a criminal proceeding of something less than felony[21]

[21] Infractions do not seem to be included. There also are other things that would not be included, e.g., an adjudication that a person is a tramp (Code of Cr. Proc., §889; Penal Law, §2370) or a determination on a charge against a person under 18 years for purchasing an alcoholic beverage through fraudulent means (Penal Law, §496).

or adjudicated in a quasi criminal proceeding because of having committed any criminal act, the court has discretion to sentence him to a state reformatory term.

With respect to juvenile delinquents, Penal Law, section 2184-a applies only to cases where the delinquent is adjudicated[22] after his 16th birthday. However, Family Court Act, section 758(b) (L. 1962, Ch. 686, as amend. L. 1962, Chs. 687, 700, 702, 703) effective September 1, 1962 provides that the family court has authority to commit, for a state reformatory term, a juvenile delinquent who was 15 years of age at the time he committed an act which would be any one of a number of specified felonies had it been committed by an adult, and this section does not limit the Family Court to cases where the delinquent is adjudicated after his 16th birthday.[23]

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[22]It is not clear whether this means adjudicated or actually committed (see Family Court Act, §753). It probably means committed (Cf. 1955 Ops. N. Y. Att'y Gen., 192-193).

[23]Paragraph (a) of section 758 gives the Family Court authority to commit any juvenile delinquent to "an institution suitable for the commitment of a delinquent child maintained by the state or any subdivision thereof...." It is submitted that this is ambiguous, as it may or may not mean that the Family Court has the power to commit any juvenile delinquent to a state reformatory (or the reception center in the case of a male). Paragraph (b) [discussed in the text] does not contain a limitation to the effect that only the delinquents therein described can be committed to a reformatory and paragraph (a) does not state that no delinquent shall be committed to a reformatory except as provided in paragraph (b). Moreover, paragraph (b) is not as broad as the provision in Penal Law, §2184-a which covers all male juvenile delinquents who are over 16 when adjudicated and, therefore, if paragraph (a) does not mean that the Family Court can commit any juvenile delinquent to a state reformatory, then section 758 does not define the full committing powers of the Family Court. If paragraph (a) does mean that the Family Court can commit any juvenile delinquent to a state reformatory, then why the specific language in paragraph (b)?

In this connection, it might be noted that Article 7 of the Social Welfare Law (§411 et seq.) provides a complete plan for the commitment of juvenile delinquents to state training schools. However, there does not seem to be any requirement in this Article that where a juvenile delinquent is committed "to an institution maintained by the state" (Family Court Act, §758[a]) he must be committed to a state training school. And, in any event, if there were such a requirement, it would have to be subject to the limitations in Family Court Act, §758(b) and Penal Law, §2184-a.

Concerning vagrants, it seems that while Penal Law, §2184-a limits reformatory treatment for male vagrants to those between the ages of 16 and 21 years, section 891-a of the Code of Criminal Procedure (prescribing special punishment for vagrants convicted of acts relating to prostitution [id., §887, subd. 4]) contains no such limitation. This is particularly significant when one considers that the legislature included, in section 891-a, an age limitation for the commitment of females to a reformatory.

Wayward minors are persons between the ages of 16 and 21 who are adjudicated to be, or in danger of becoming, morally depraved (Code of Cr. Proc., §913-a). As to this class of persons, it should be noted that the court's discretion to commit to a reformatory is limited by a legislative direction that insofar as practicable, the minor should first be placed on probation, and commitment to a reformatory may be made only "if such minor, by reason of delinquency or other adequate reason, is not a fit subject for probation" (id., §913-c).

There do not seem to be any problems with respect to the statutes that deal directly with the other classes of offenders mentioned in Penal Law, section 2184-a; viz., youthful offenders (Code of Cr. Proc., §913-m); disorderly persons (Code of Cr. Proc., §899, 911);[24] and persons convicted of offenses or misdemeanors.

It might be noted, that although there is statutory authorization for a state reformatory commitment in the case of a male between 16 and 21 years convicted of a felony or an offense less than felony (Penal Law, §2184-a); a male between 21 and 30 years convicted of a felony (id., §2185); and a female between 16 and 30 years convicted of a felony or an offense less than felony (id., §2187-a), there is no

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[24]In passing, it is of interest to note that under the provisions of section 910 of the Code of Criminal Procedure (last amended in 1944 [Ch. 58]) a person adjudicated to be a disorderly person may be bound out in some lawful calling as a servant, apprentice, mariner or otherwise until he be of age, if a minor; otherwise, for one year. This binding out has "the same effect as the indenture of an apprentice."

provision authorizing a state reformatory commitment in the case of a male between 21 and 30 years convicted of an offense less than felony.

It also might be noted that there may be a question as to whether the Criminal Court of the City of New York (to be established on September 1, 1962 under the New York City Criminal Court Act, L. 1962, Ch. 697, as amend., L. 1962, Ch. 703) will have jurisdiction to sentence males convicted of the offense of disorderly conduct (see Penal Law, §§722, 722-a, 722-b, 723) or of vagrancy (Code of Cr. Proc., §887) to a state reformatory. Section 83 of the New York City Criminal Court Act provides that the court may dispose of such cases in one of six specified ways, and commitment to a state reformatory is not enumerated therein.

2. Offenses Less Than Felony; Females

Penal Law, §2187-a vests the court with discretionary authority to impose a reformatory term in lieu of any other sentence where a female between the ages of 16 and 30 years has been convicted of any one of a number of specified things, or adjudicated a wayward minor or youthful offender.[25]

Turning to the categories of offenses for which a reformatory term may be imposed upon a female under this section, the first non-felony category, which is category "(2)" of the section, covers women:

> "(2) convicted by any court or magistrate of petit larceny or vagrancy under subdivision three or four of section eight hundred eighty-seven of the code of criminal procedure, of habitual drunkenness, of being a common prostitute or frequenting disorderly houses or houses of prostitution."

With respect to "petit larceny," misdemeanors are mentioned as a class in category "(3)" of this section, and in view of the recent vintage of the section (L. 1954, Ch. 803, §47), it is surprising that this crime is singled out. As for vagrancy (the long description of specific

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[25]This section does not mention juvenile delinquents, or persons convicted of an offense. However, note that Family Court Act, §758 is applicable to females as well as males (see page 30 and footnote 23, supra).

acts, in category "(2)," may or may not be simply an enumeration of some of the things set forth in subdivisions 3 and 4 of section 887 of the Code of Criminal Procedure), it is interesting to note that category "(2)" authorizes reformatory treatment for women convicted of acts specified in subdivisions 3 and 4 of section 887 of the Code of Criminal Procedure, and section 891-a of the Code, which deals specifically with reformatory terms for vagrants, merely prescribes a reformatory term for a female "convicted of a violation of subdivision four" of section 887. Also, it seems that there is no provision at all authorizing a reformatory term for a female convicted of vagrancy under any of the other subdivisions of section 887 of the Code (except for a female over 16 years of age committed as a vagrant, by a court in New York City, or Nassau or Suffolk County, to a private incorporated charitable institution and rejected by that institution [Correction Law, §311]).

Category "(3)" of Penal Law, §2187-a, covers women: "(3) convicted of a misdemeanor," and there seems to be no problem with respect to this.

Category "(4)" of Penal Law, §2187-a, covers women:

> "(4) committed under the provisions of section one-hundred twenty-two of the New York city criminal courts act, chapter six hundred fifty-nine of the laws of nineteen hundred ten, as renumbered by chapter seven hundred and forty-six of the laws of nineteen hundred thirty-three, and as amended."

The quoted language refers to a provision in the New York City Criminal Courts Act (§122) authorizing the New York City Magistrates' Courts to impose a state reformatory sentence upon persons arrested in the City and convicted of offenses paralleling the vagrancy offenses enumerated in category "(2)" discussed, supra. The New York City Criminal Courts Act was repealed by the 1962 Legislature, and some of the provisions of section 122, including the reformatory provision, are now in section 82 of the new act. However, the legislature has not changed the reference in Penal Law, section 2187-a, and, consequently, after September 1, 1962, this reference will be obsolete.

Category "(5)" of Penal Law, section 2187-a, applies to women: "(5) convicted and committed under the provisions of section eight hundred ninety-one-a of the code of criminal procedure." As pointed out in connection with category "(2)," supra, section 891-a of the Code is the section that specifically authorizes reformatory punishment for vagrants convicted under subdivision 4 of section 887 of the Code. In view of the fact that category "(2)" specifically refers to subdivision 4 of section 887 of the Code, there seems to be no need for category "(5)."

Category "(6)" of Penal Law, section 2187-a, covers wayward minors and youthful offenders.

Category "(7)" of Penal Law, section 2187-a, covers women "(7) committed under the provisions of section seventeen of chapter seven hundred sixteen of the laws of nineteen hundred fifty-one." This reference is to the Girls' Term Court Act for the Magistrates' Courts in the City of New York, which was repealed by the 1962 Legislature, effective September 1, 1962 (L. 1962, Ch. 705, §3). The Legislature does not appear to have deleted or changed the reference.

Category "(8)," the last category listed in Penal Law, section 2187-a, applies to females: "(8) committed under the provisions of section three hundred and eleven-c of the correction law." Section 311 of the Correction Law is limited to courts in the five counties of the city of New York and Nassau and Suffolk Counties. Essentially, it authorizes these courts to commit dissolute females including vagrants to certain incorporated charitable reformatories. Paragraph (e) of that section (and not paragraph (c) as specified in Penal Law, §2187-a) provides these courts with authority to re-commit a female to a state reformatory if she is rejected by the charitable institution as "unfitted to benefit by the discipline and training of such institution."

Place of Confinement

The fact that a person is committed to a reformatory or to the reception center (Correction Law, §61) for a reformatory term does not

necessarily mean that he or she will be confined in a reformatory. The Commissioner of Correction has the authority to transfer reformatory prisoners to any institution under the jurisdiction of his department or (in the case of a person under 21 years of age) to an institution under the jurisdiction of the Department of Social Welfare. Correction Law, §§6-a, 63, 279-a.[26] Section 63 of the Correction Law provides a limitation on this power, to the effect that "only persons convicted of a felony may be confined in a state prison." This section, however, is in Article 3-A which deals with the commitment and transfer of males between 16 and 21 years of age, and there is no similar statutory limitation directly applicable to females.[27]

When a prisoner sentenced to a reformatory term is transferred to another institution, such as a state prison, his confinement is governed by the laws applicable to that institution but his parole and discharge still are governed by the laws applicable to reformatory terms (Correction Law, §§63, 279-a, 288; People ex rel. Ward v. Jackson, 286 App. Div. 942 (3d Dept. 1955), aff'd mem. 3 N. Y. 2d 1020).

It should be noted that the transfer of a reformatory term prisoner to a state prison could result in the prisoner's confinement in that prison--subject to state prison rules and discipline--for a longer period than the maximum period he could have been forced to serve had he been sentenced directly to a state prison. Thus, a prisoner convicted of attempted Grand Larceny in the second degree (Penal Law, §1296), punishable by a maximum term of 2½ years (id., §261, subd. 2, §1297) could be sentenced to an indefinite term with a maximum of five years and kept in a state prison for the entire five

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[26]The Commissioner of Correction also has authority to transfer prisoners from a state prison to a reformatory and in such a case, the prisoner will be confined in the reformatory but still will be subject to all the terms and conditions of his state prison sentence. Correction Law, §293.

[27]None is needed for males between the ages of 21 and 30 years, because males between these ages cannot be sentenced to a reformatory term for an offense less than felony.

years. Cf., People ex rel. Ward v. Jackson, supra.

The names of the various reformatories and the directions with respect to direct commitments are as follows (Correction Law, §270):

Name of Reformatory	Location	Commitment
Elmira Reformatory	Elmira	Males between 21 and 30, committed pursuant to Penal Law, §2185.
Westfield State Farm	Bedford Hills	Females between 16 and 30, committed pursuant to Penal Law, §2187-a.
Western Reformatory for Women	Albion	"
New York State Vocational Institution	West Coxsackie	By transfer only.
Great Meadow Correctional Institution	Comstock, Washington county	"
Woodbourne Correctional Institution	Woodbourne	"
The Youth Rehabilitation Facility[28]		"

All males between the ages of 16 and 21 years (except mental defectives) who are committed to an institution under the jurisdiction of the Department of Correction must be committed to the Department's reception center at Elmira for classification, program-planning and transfer (Correction Law, §61, subd. 1). Prisoners so committed are not deemed permanent inmates of the reception center: they are confined there only until transfer (id., subd. 3). Thus, a male between these ages who is sentenced to a reformatory term is committed by the court to the same place as he would be committed if he were sentenced to a state prison term and his place of confinement

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[28]This reformatory consists of such conservation work camps as the Commissioner of Correction shall from time to time establish for males who were between the ages of 16 and 21 at the time of the commission of the act for which they were committed. The Commissioner has the authority to transfer males between the ages of 21 and 25 years to this facility but the number of such transferees cannot exceed 20 per cent of the total inmate population in any one camp. Correction Law, §314. Curiously, there seems to be no authority for the treatment of juvenile delinquents in this facility, or in a resident parole facility (Correction Law, §315).

is assigned later. Although the commitments are the same, a reformatory sentence can be told apart from a state prison sentence by the fact that when the court imposes a reformatory sentence, it does not determine or fix the term of the sentence (id., §61, subd. 2). When the Court does fix the term of the sentence (as a prison term), the prisoner must be confined in accordance therewith (id., §61, subd. 2, §64).

Males between the ages of 21 and 30 years who are given reformatory terms are sentenced and committed to the Elmira Reformatory (Penal Law, §2185; Correction Law, §270) and females who are given reformatory terms are sentenced and committed either to the Westfield State Farm at Bedford Hills or to the Western Reformatory for Women located at Albion. Penal Law, §2187-a; Correction Law, §270.

It is of interest to note that the superintendent of each of the direct commitment reformatories has the authority to make a determination that a person committed to his reformatory is mentally or physically incapable of participating in, or being materially benefited by, the treatment of the reformatory and the superintendent can--after the expiration of 60 days subsequent to admission of that person to the reformatory--return the person to the sentencing court to be resentenced and dealt with in all respects as though he had not been so committed (Correction Law, §279). It also might be noted that whenever the Commissioner of Correction is satisfied that a direct commitment reformatory is over-crowded, he may advise the committing court of that fact and the court thereupon resentences the offender (id., §278).

As for the reception center, the director only has authority to return persons "not properly committed," and the Commissioner of Correction may return persons where the facilities to care for them are over-crowded. In such a case, the court may resentence to an institution outside the jurisdiction of the Department of Correction, or make any other disposition in accordance with law (Correction Law, §61, subds. 5, 6).

C. City Reformatory

Article 7-A of the Correction Law (§200 et seq.), which is the successor to the Parole Commission Law (L. 1915, Ch. 579) provides authority for a separate sentencing setup in cities of the first class. Since the purpose of this Article is primarily to provide for reformatory-type sentences in such cities, it is relevant to consider it at this point, rather than after all the state-wide procedures have been discussed.

If a city of the first class has a department of correction with jurisdiction over a workhouse, penitentiary and a reformatory, the city may create its own parole commission (Correction Law, §§200, 201, 202). Once the parole commission has been established, any person who is convicted within the city of a crime or an offense and sentenced to an institution under the jurisdiction of the city's department of correction must be sentenced to either the penitentiary, the workhouse or the reformatory (id., §203).

If the court sentences the offender to the penitentiary or reformatory, it cannot fix or limit the term of imprisonment. And, if the court sentences the offender to the workhouse, the sentence must be for a fixed period not to exceed six months, unless the charge involved is: (1) vagrancy; (2) disorderly conduct; (3) public prostitution; (4) soliciting on streets or in public places for the purposes of prostitution; or, (5) a violation of section 150 of the Tenement House Law or section 350 of the Multiple Dwelling Law (Correction Law, §203[c]).[29] When a defendant is convicted of one of these charges and has twice been convicted during the preceding 24 months or three or more times convicted during any period, of any of the specified charges, the court--if it sentences the offender to the workhouse--cannot fix or limit the term of imprisonment.

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[29]Except for the offense of disorderly conduct and some forms of vagrancy, all of these offenses and sections deal with prostitution. It should be noted that the Tenement House Law, specified in category "(5)," was repealed in 1952 (L. 1952, Ch. 798).

It should be noted that the provisions of Article 7-A do not apply in the case of a commitment in default of payment of a fine or a commitment for failure to furnish surety or sureties upon a conviction of disorderly conduct (Correction Law, §203[e]). Where such commitments are made, the offender may be committed as otherwise provided by law to any institution under the jurisdiction of the city's department of correction; but cannot be committed to the penitentiary (id., §203[f]). Moreover, no person can be sentenced to a penitentiary, workhouse or reformatory under the jurisdiction of the city's department of correction if the court imposes a fine in addition to imprisonment (ibid.; People v. DeLeen, 290 N. Y. 310 [1943]).

Article 7-A also does not apply to the sentencing of any person who is "insane, or mentally or physically incapable of being substantially benefited by being committed to a reformatory institution." Correction Law, §203(e)3. However, since the provisions of the Article are mandatory, in cases where it does apply, appellate courts have often had to deal with the problem of whether the sentencing court must make an express finding of incorrigibility before it can sentence an offender to a definite, fixed term in an institution under the jurisdiction of the city's department of correction; and, conversely, whether comments by the sentencing court, to the effect that it considers the offender incorrigible, will divest that court of the authority to sentence the offender to a reformatory-type term in such an institution.

It now seems to be well settled that the sentence itself creates a presumption that the court found the offender incorrigible (in the case of a definite sentence) or capable of being benefited by reformatory treatment (in the case of a reformatory-type sentence). People v. Thompson, 251 N. Y. 428 (1929). And this presumption applies even where the court makes ambiguous or conflicting statements respecting the defendant's reformability. But, where the court states, unequivocally, that the offender can or cannot reform, it must sentence the offender in accordance with that determination and it cannot, for example, sentence the offender under Article 7-A after it has made

an unequivocal affirmative finding that the offender is incorrigible. (See dissenting opinion of FROESSEL, J. in People ex rel. Kern v. Silberglitt, 4 N. Y. 2d 59, 62-70 [1958].) The views expressed by Judge Froessel were later unanimously adopted by the Court, when the same facts were squarely presented to it in a proper proceeding. People v. Gross, 5 N. Y. 2d 131 [1959]).

The reformatory-type sentences, provided for in Article 7-A, are similar in nature to state reformatory sentences but are called "indeterminate" sentences (which is somewhat confusing since the word "indeterminate" also is used to describe state prison sentences). Correction Law, §§202(c), 203(c), 204. As in the case of state-reformatory sentences, a court imposing an "indeterminate" sentence cannot fix a minimum or maximum term and the sentence can only be terminated by a board of parole (in this case the city's parole commission). However, "indeterminate" sentences to a penitentiary cannot exceed three years (id., §230[b])and "indeterminate" sentences to a workhouse cannot exceed two years, including jail time (id., §§203[c], 204[b]). There is no provision in Article 7-A imposing a limitation on the duration of the term of an "indeterminate" sentence to a city reformatory (Correction Law, §203[d]).[30]

Also, as in the case of state-reformatory sentences, the parole commission may parole, conditionally release, discharge, retake or reimprison persons committed for a reformatory-type term (Correction Law, §204) and the sentencing court has no authority to recommend the length of imprisonment (People v. Tower, 308 N. Y. 123 [1954]).

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[30]It should be noted that although the City of New York comes under the provisions of Article 7-A, the old New York City Criminal Courts Act (repealed, effective September 1, 1962) provided (§122) that males between 16 and 30 years of age who are convicted of an offense less than felony and are first offenders may be committed to the New York City Reformatory for Misdemeanants under a reformatory-type sentence which "shall not exceed the term of three years." The section also seemedto provide for a special parole commission for the reformatory. The new act, effective September 1, 1962 (L. 1962, Ch. 697, as amend. L. 1962, Ch. 703), also authorizes sentences to the New York City Reformatory for Misdemeanants when males between the ages of 16 and 30 are convicted of an offense less than felony and are first offenders. But the new act does not contain any provision limiting the duration of the sentence or any provision for a parole commission (New York City Cr. Ct. Act, §81).

But, unlike a state reformatory sentence, the parole commission cannot conditionally parole, release or discharge a penitentiary prisoner before the expiration of the maximum of the "indeterminate" term, unless such action has been approved in writing by the sentencing court or judge (Correction Law, §204[a][2]; see People v. Tower, supra).[31]

The commissioner of correction of the city has the authority to transfer inmates, serving "indeterminate" sentences, from any institution under his jurisdiction to any other institution under his jurisdiction (Correction Law, §206[a]) but the act does not seem to furnish him with the authority to reject persons committed for reformatory-type treatment.

The authority to impose a reformatory-type "indeterminate" sentence in any case where the court could sentence an offender to a penitentiary, workhouse, city prison, county jail or similar institution has an interesting effect upon the variety of sentences available to the court. In the case of a felony, we have already seen that where the legislature has not specifically prescribed a minimum term, the court may sentence a first offender to a penitentiary. Thus, where Article 7-A is applicable, and where the offender is between the ages of 16 and 30 years, the court has two types of reformatory sentence available. It can sentence to a state reformatory, in which event the term will be subject to a 5-year limitation, or it can sentence to a penitentiary, and the term will be subject to a 3-year limitation (see e.g., People ex rel. Quinn v. Schleth, 180 App. Div. 319 [1st Dept. 1917]). If the felony offender is more than 30 years of age, Article 7-A furnishes authority for a reformatory-type sentence where there would otherwise be none. As for an offense that is less than felony, it was previously noted there is no provision authorizing state reformatory treatment for a male over 21 years of age convicted of such an offense. Nor is there any provision authorizing state reformatory treatment for a male or female over 30 years of age convicted of such an offense. Article 7-A authorizes reformatory-type treatment in these cases, too.

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[31]No such approval is needed for parole, conditional release or discharge of a workhouse or reformatory prisoner (Correction Law, §204[a][1]).

P. Preiser/rc
July 2, 1962

Errata: Pages 1-21

Page 3 Paragraph 2, line 2, should read: "ment for not more than one year and the legislature has specified that such im-"

Page 7 Category (6), the citation should be: "(see e.g., Robbery 1, Penal Law, §2125)."

Page 7 Paragraph 1, line 6, should read: "minimums and maximums or fixed minimums and a maximum of life imprisonment. The significance of a minimum and maximum"

Page 8 Add footnote 5A at the end of paragraph 3, as follows:

"[5A]Penal Law, §2186 seems to vest the court with authority to sentence a male between the ages of 16 and 21 years to a penitentiary upon conviction of a crime for which a minimum of more than one year has been specifically prescribed by statute."

Page 13 Paragraph 3, line 2: the words "or prior" should be deleted.

Page 14 Line 4 should read: "crime: if improperly imposed it is severable and will not invali-"

Page 17 Paragraph 3, line 5, should read: "this state, of felonies or attempts to commit felonies, or under the law of any other state"

Page 17 Footnote 11, line 1: the section mentioned should be "1942" and not 1944.

Errata and Additions: Pages 1-41

Page 2 The first paragraph in footnote 1 should read:

1. Section 2183 contains an exception applicable "where special provision is made by statute as to the punishment for any particular offense or class of offenses or offenders." This exception appears to cover cases where penitentiary imprisonment for more than one year is authorized as an alternative to state prison imprisonment (discussed, infra, part "D" of this study, pp. 42-58). Since the penitentiary imprisonment is an alternative, this exception does not alter the rule as to when crimes may be punishable by imprisonment in a state prison (A search of the consolidated and unconsolidated laws has revealed only one offense punishable by imprisonment for a term of more than one year where the place of imprisonment is limited to a place other than a state prison [Intoxication in a public place, Penal Law, §1221,subd.h.]).

Pages 22-23 The case of Bretti v. Eastman, 219 N. Y. S. 2d 73 (S. Ct. Oneida Co. 1961) was reversed by the Fourth Department on June 27, 1962 (230 N. Y. S. 2d 53, official citation not yet available). Therefore, the Fourth Department now agrees with the Third Department that no "jail time" credit can be allowed for time spent in confinement after conviction but before the prisoner's arrival at the institution in which the sentence is to be served.

Page 39 Add footnote 29A at the end of the first paragraph, as follows:

29A. Article 7-A does not apply to crimes punishable by a mandatory definite fixed sentence. Thus, where the law provides that a narcotic misdemeanant must be sentenced upon conviction of a second or other multiple offence to a definite fixed term of not less than 6 months and not more than one year (Penal Law, §1751-a), it is improper to sentence the offender to an "indeterminate" term in the city penitentiary. People v. Bonano, 11 App. Div. 2d 384 (1st Dept. 1960), aff'd mem. 9 N. Y. 2d 689.

Page 41 Add the following additional paragraph after the first full paragraph:

"Indeterminate" sentences for offenses less than felony have been attacked because they can result in penitentiary or workhouse imprisonment for more than one year (infamous punishment) without indictment or trial by jury and, hence, are unconstitutional. However, the courts have sustained such sentences, and where opinions have been written (none seem to have been written by the Court of Appeals), they indicate that such sentences can be justified on the theory that they are correctional in nature rather than penal and have as their object moral reformation rather than punishment. People ex rel. Brewer v. Levy, 267 N. Y. 596 (1935) [no opinion]; People ex rel. Kipnis v. McCann, 199 App. Div. 30 (1st Dept. 1921), aff'd mem. 234 N. Y. 502; People ex rel. St. Clair v. Davis, 143 App. Div. 579 (2d Dept. 1911); see also People v. Bellinger, 269 N. Y. 265, 271-272.

D. County Penal Institution

County penal institutions consist of county jails, penitentiaries and workhouses. Because of the somewhat confusing maze of statutes that deal with sentencing to these institutions some knowledge about their evolution is necessary for an understanding of the present setup.

Background

In colonial New York and during the early years of our statehood sentences usually called for corporal punishment or posting of a bond to keep the peace, or both and it was not the custom to impose sentences of long-term imprisonment. Imprisonment was relied upon primarily where the offender was unable to post a bond, and county jails were the only institutions for the confinement of persons convicted of crime (see Goebel & Naughton, Law Enforcement in Colonial New York, pg. 515). Due to the fact that there were few long-term prisoners and the fact that county jails were used for a multitude of other purposes (detention of witnesses, civil prisoners and persons awaiting trial on criminal charges [They still are used for these purposes, see Correction Law, §500-a]) there were no facilities for the segregation and employment of convicts. Thus, when corporal punishment was abolished (except in the case of a few felonies) and long-term imprisonment substituted as punishment for most felonies, the state built special institutions for the purpose, and state prisons came into existence (L. 1796, ch. 30).

By 1830 it was recognized that county jails were totally unsuited for use as penal institutions for short as well as long-term prisoners; but, since state prisons were not useful or convenient for confinement of prisoners sentenced to less than two years imprisonment (the minimum state prison sentence was reduced to one year in 1862 [Ch. 417]), the legislature retained

county jails as places for imprisonment of not more than one year and designed the sentencing structure (contained in the Revised Statutes of 1830) to provide for sentences to county jails of not more than one year, and to state prisons for terms of two years or more (Revised Statutes, Part IV, Chap. I, Title VII, §12). The reluctance to permit imprisonment for more than one year in a county jail was so great that in many cases where crimes previously had been punishable by imprisonment in a county jail for terms up to three years, they were made punishable by imprisonment in the alternative, of not more than one year in a county jail or not more than a number of years in a state prison. (Vestiges of this still can be found in our Penal Law. See §§80, 711, 932, 943, 1082.)[32]

The lack of facilities at the county level for proper segregation and employment of convicts also led to the construc-

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32. The Revisers' notes explain the situation as follows:

"It will be perceived that imprisonment in a state prison for two years, is prescribed in some cases. We learn from one of the keepers of our prisons, that there will be no difficulty experienced by receiving convicts for that term, and that at Mount-Pleasant they can be usefully employed. It is believed the same remark is applicable to the Prison at Auburn. It seemed indispensable to allow imprisonment for such a term, in a large class of cases, which are now punishable by confinement in a county jail for a term not exceeding three years. The condition of those jails, and their total unfitness for such a confinement, must be known to every member of the legislature. If the prisoner is secluded in a solitary cell, the punishment is more severe than imprisonment for double the term in a state prison. If he is not secluded, he corrupts, or becomes more corrupted; he cannot be employed in useful labor, and he remains an expense to the county. Impressed by these and various other considerations, the Revisers have supposed that no imprisonment in a county jail should exceed one year. It is believed that in most cases, this is more severe than the same term in a state prison. If the offence be such as to justify greater severity, a discretion is allowed to the courts, to imprison in a state prison for two years. Between the alternatives, of an imprisonment in a county jail more than one year, and allowing a confinement in a state prison two years, there appears no reason for hesitation."

tion, in some counties, of special county penal institutions -- penitentiaries and workhouses-- to be used instead of county jails for the confinement of short-term convicts. Thus, penitentiaries were authorized and built for the safe keeping of prisoners "sentenced to confinement at hard labor or to solitary imprisonment" (see e. g., L. 1814, Ch. 176["The Penitentiary of the City of New York"]; L. 1830, Ch. 214 [Kings County Penitentiary]; L. 1847, Ch. 183 [Albany County Penitentiary]). And workhouses were authorized as adjuncts to all county jails (L. 1891, Ch. 277, presently Correction Law, §500-i). In addition, certain counties that did not have penitentiaries were authorized to contract with other counties that did, to receive and keep their convicts (see e. g., L. 1859, Ch. 289). And this has been carried forward to the present day; so that now, any county may contract with any other county having a penitentiary to receive and keep prisoners sentenced to not less than thirty days imprisonment (Correction Law, §480).

In time the legislature authorized the use of penitentiaries as a supplement to the state prison system as well as the county jail system. For example, courts were authorized to sentence male felons between the ages of 16 and 21 years to serve any term of imprisonment in a penitentiary instead of a state prison (L. 1856, Ch. 158); all females sentenced to state prison terms were incarcerated in penitentiaries instead of state prison (L. 1877, Ch. 172, §3); and penitentiary sentences in lieu of state prison sentences of the same length were discretionary for terms up to ten years in Kings County (L. 1875, Ch. 529), up to five years in certain upstate counties (L. 1869, Ch. 574, §3) and up to three years in other judicial districts where there were penitentiaries (L. 1875, Ch. 571, §1).

The foregoing concepts with respect to the use of the various penal institutions were carried forward into the

sentencing structure of the Penal Code of 1881. And, since our present statutory structure is essentially the same as the one set forth in that Code, an analysis of the Code's provisions sheds an important and interesting light upon the current provisions of the sentencing article of the Penal Law (Article 196).

The Penal Code of 1881 set forth the general rules presently found in Penal Law sections 2181, 2182 and 2183 requiring imprisonment for less than one year to be in a county jail; imprisonment for exactly one year to be either in a county jail, or in a penitentiary, or state prison; and imprisonment for more than one year to be in a state prison.[33] However, these

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[33] The text of these provisions as they appeared in the Penal Code of 1881 is as follows:

> "§702. Imprisonment in county jail. Where a person is convicted of a crime, for which the punishment inflicted is imprisonment for a term less than one year, the imprisonment must be inflicted by confinement in the county jail, or place of confinement designated by law to be used as the jail of the county, except when otherwise specially prescribed by statute.
>
> §703. Id.: in county jail or state prison. Where a person is convicted of a crime, for which the punishment inflicted is imprisonment for a term of one year, he may be sentenced to, and the imprisonment may be inflicted by, confinement either in a county jail, or in a penitentiary or state prison. No person shall be sentenced to imprisonment in a state prison for less than one year.
>
> §704. Id.: in state prison. Where a person is convicted of a crime for which the punishment inflicted is imprisonment for a term exceeding one year, or is sentenced to imprisonment for such a term, the imprisonment must be inflicted by confinement at hard labor in a state prison. But this and the two last sections shall not apply to a case where special provision is made by statute as to the punishment for any particular offense or class of offenses or offenders, nor to the cases specified in sections 698, 699, 700 and 701."

provisions were not mandatory where special provision was made by statute for penitentiary or reformatory imprisonment.

With respect to imprisonment for less than one year, although Penal Code section 702 provided, as Penal Law section 2181 presently does, that such imprisonment must be inflicted in a county jail,[34] the section was and is not applicable "when otherwise specially prescribed by statute," and the purpose of this exception appears to have been to exempt a county that has a penitentiary or has a contract with a county that does. In this connection it might be noted that each of the penitentiaries in the state was created pursuant to a special provision made by statute and, while it is true that the various statutes authorizing penitentiaries do not specify the lengths of the terms that may be served therein, these special county penal institutions were created primarily for the confinement of short-term prisoners. Also, there existed, in 1881, and still exists (Penal Law, §2196) special statutory authority for courts in a county without a penitentiary to sentence non felons to the penitentiary of another county "for any term not less than sixty days" (L. 1874, Ch. 209, as amend., L. 1876, Ch. 108 [The present provision is "not less than thirty days."]). Moreover, a note in the 1879 report of the Senate's Special Committee on revision of the statutes (pg. 13) furnishes a fairly clear indication of the legislature's intention. This note, which is appended to the section that ultimately became section 704 reads as follows:

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34. This section actually read and still reads "county jail, or place of confinement designated by law to be used as the jail of the county." In at least one county the county jail and the county penitentiary were merged and thus, the penitentiary was the "place of confinement designated by law to be used as the jail of the county" (Onondaga Co. [L. 1851, Ch. 32]).

> "It admits of no doubt that county jails, as now constructed and administered, are not fit for any other purpose than the temporary detention of criminals. Yet persons sentenced for minor offenses and for short terms ought not to be placed in the State prisons. Until suitable penitentiaries under suitable discipline are provided, there seems to be no other safe and proper rule than that indicated by this and the last two sections."

As for sentences of more than one year, section 704 of the Penal Code provided and the Penal Law still provides (§2183) that such "imprisonment must be inflicted by confinement at hard labor in a state prison." But the legislature did not draft this section so as to preclude a sentence to a penitentiary for more than one year and this is obvious because section 704 contained (and Penal Law, section 2183 contains, in substance) the following exceptions:

> "But this and the two last sections shall not apply to a case where special provision is made by statute as to the punishment for any particular offense or class of offenses or offenders, nor to the cases specified in sections 698, 699, 700 and 701."

Special provision was made by statute for penitentiary imprisonment in excess of one year as an alternative to state prison imprisonment for the same term in the case of a few particular offenses, and since the above exception and these special provisions are still in effect, there are crimes which still are "punishable by imprisonment in a penitentiary or state prison for a term not exceeding five years" (Assault in the second degree, Penal Law, §243; see also, e. g., Bigamy, id., §340; Contamination of salt wells, id., §1758).[35]

35. Special provision also was made by certain statutes (not included in the Penal Code) permitting imprisonment in a penitentiary for a term in excess of one year. Most of these were repealed in 1899 (Ch. 600); but one, permitting imprisonment for five years or less in the Albany and Syracuse County penitentiaries (L. 1893, Ch. 114) remained in force until 1909 when it was consolidated as section 2197 of the Penal Law and repealed at the same session (L. 1909, Ch. 467).

It also should be noted that, under certain circumstances, a person who is found guilty of intoxication in a public place can be sentenced to a penitentiary for not less than one year nor more than three years (Penal Law, §1221, subd. h).

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The exceptions in section 704 also include "the cases specified in sections 698, 699, 700 and 701." Section 698 provided that a female convicted of a felony must be sentenced to a penitentiary instead of a state prison and section 699 provided for discretionary penitentiary imprisonment of male felons in the 16 to 21 year age group, and discretionary penitentiary imprisonment of adult males sentenced to three years imprisonment or less (this was raised to five years or less in 1892 [Ch. 496]).[36] In 1896 sections 698 and 699 of the Code were amended to provide that females could be sentenced to a penitentiary only where the term imposed was less than one year (longer terms were to be to state prison) and males over 21 years of age could be sentenced to a penitentiary only where the term imposed was one year or less (L. 1896, Chs. 374, 553). However, the provision that males between the ages of 16 and 21 years, convicted of felony, could be sentenced to a penitentiary instead of a state prison, irrespective of the term, was allowed to stand. These provisions may presently be found in Penal Law sections 2186 and 2187.

Present Provisions

Sentence to County Penal Institution Upon Conviction of Felony.

Today felons may be sentenced to a county penal institution under the following circumstances:

(1) Males between the ages of 16 and 21 years, convicted of felony, may be sentenced to a penitentiary instead of a state prison irrespective of the term (Penal Law, §2186);

(2) Where the term imposed upon a male convicted of felony is one year or less the imprisonment

36. Sections 700 and 701 dealt with the reformatory and the house of refuge.

may be inflicted in a penitentiary (ibid.);

(3) Where a sentence of less than one year is imposed upon a female, convicted of felony, she may be imprisoned in a penitentiary (id., §2187);

(4) Where a person is convicted of a crime for which the punishment inflicted is imprisonment for a term of one year he may be sentenced to a penitentiary (id., §2182, subd. 1); and

(5) Certain felonies are punishable by imprisonment in a penitentiary for more than one year (see e. g., Assault in the second degree, id., §243; Bigamy, id., §340; Contamination of salt wells, id., §1758).

Curiously, the statutes are in conflict as to whether a convicted felon can be imprisoned in a county jail. The aforesaid statutes mentioned in items 1 to 4, supra, furnishing the authority for imprisoning a felon in a penitentiary also permit that imprisonment to be in the county jail of the county where the sentence is imposed (Penal Law, §2182, subd. 1, §§2186, 2187) But the Correction Law prohibits the use of county jails for imprisonment or detention of a person sentenced for a felony. It provides:

> "§500-a. Use of jails.
> Each county jail shall be used:
> * * * * * * * *
> 4. For the confinement of persons convicted of any offense, other than a felony, and sentenced to imprisonment therein, or awaiting transportation under sentence to imprisonment in another county;" (Emphasis supplied.)

There is no specific statutory authority covering the question of whether a court in a county that does not have a penitentiary can sentence a felon to a penitentiary in another county (there is such authority in the case of a non felon

[Penal Law, §2196]) and, although the statute which allows a county that has no penitentiary to contract with another that does maintain such an institution is broad enought to cover a contract for the imprisonment of felons (Correction Law, §480), there is nothing to show that such a contract would be a prerequisite to a court's authority to sentence a felon to the penitentiary of another county.

When a felon is confined in a penitentiary the cost of the prisoner's maintenance is paid by the state (not exceeding $5 per day, per capita [Penal Law, §2182, subd. 3]).

Sentence to County Penal Institution Upon Conviction of Offense Less than Felony.

Except in the case of a reformatory term, sentences for offenses less than felony may not be for more than one year and, hence, must be inflicted by imprisonment in a county penal institution. This may be a county jail, penitentiary or workhouse.

With respect to county jails, the County Law provides that "Each county shall continue to maintain a county jail as prescribed by law." (§217). And the Penal Law provides that sentences of less than one year must, and sentences of one year may be inflicted by imprisonment in a county jail (Penal Law, §2181, §2182 subd. 1).

In addition, any county may build and maintain a workhouse:

> "for the confinement of persons convicted within the county of crimes and criminal offenses the punishment for which is imprisonment in the county jail, and may provide for the imprisonment and employment therein of all persons sentenced thereto, and any court or judicial officer may sentence such person to such workhouse instead of to the county jail." (Correction Law, §500-i).

As indicated, supra (pp. 46-47) imprisonment for less than one year also can be inflicted in a penitentiary

and this applies to non felons as well as felons.[37] However, while it is clear that offenses and infractions are punishable by imprisonment in a county jail or workhouse, there is nothing in the law to indicate that these transgressions are among those punishable by imprisonment in a penitentiary. No statute has been found that specifically authorizes the use of a penitentiary as a place of imprisonment for persons convicted of any particular offense or infraction. Moreover, Penal Law, section 2196--which furnishes authority for imprisonment in a penitentiary of another county--is applicable only where a person has been convicted of a "crime or misdemeanor."

The sentence prescribed by statute in the case of many misdemeanors simply is imprisonment for not more than one year. In addition, however, there are numerous sections specifying a wide variety of sentences that may be imposed for particular misdemeanors and offenses. And the severity of the various punishments set forth in these statutes has little or no relationship to whether the defendant has been convicted of an offense or a misdemeanor. The following list

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37. In this connection it also might be noted that Penal Law, §1937 (which prescribes the punishment for misdemeanors where no other punishment is specifically prescribed) provides for punishment "by imprisonment in a penitentiary, or county jail, for not more than one year" and that there are other sections specifically authorizing imprisonment in a penitentiary or county jail, for not more than six months (Penal Law, §102-Adultery; Code of Cr. Proc., §892-Vagrancy). Disorderly persons are punishable, in some counties, by imprisonment only in a penitentiary for not more than six months (Code of Cr. Proc., §903) and tramps are punishable "by imprisonment at hard labor in the nearest penitentiary for not more than six months;" the expense to be paid by the state (Penal Law, §2370).

furnishes some examples:

OFFENSE & PENAL LAW §	TERM PRESCRIBED
Adultery (M)* §§101, 102	Not more than 6 months
Peddling on air and bus terminal property (O) §150	Not more than 30 days
Instigating fights between animals (M) §182	Not less than 10 days nor more than 1 year
Selling disabled horses (auctioneer) (U) §188-a	Not more than 6 months
Dog stealing (U) §194-b	Not more than 10 days
Budget Planning (M) §412	Not more than 6 months
Unauthorized use of marks of N. Y. Worlds Fair 1964-5 Corp. (O) §440-b	Not more than 10 days
Violation of section relating to second hand watches (M) §447	Not more than 100 days
Failure to state true location of cemetery in ad (M) §449	Not more than 6 months
Drawing water from canals (U) §464	Not less than 1 year in county jail
Conducting a maternity hospital without a license (M) §482 subd. 2	Not more than 60 days
Procuring alcoholic beverages for persons under the age of 18 years (O) §484-d	Not more than 5 days
Coercion by employers (M) §531	Not more than 6 months
Unlawful discrimination (M) §§700, 701	Not less than 30 days nor more than 90 days
Disorderly conduct (O) §723	Not more than 6 months
Disgraceful practices offending health and decency (M) §834	Not more than 1 year or less than 3 months
Agreements or contracts for privileges to deal with occupants of tenements, apartment houses or bungalow colonies (M) §861	Not less than 30 days nor more than 1 year

* (M) designates misdemeanor
(O) designates offense
(U) designates acts not specifically characterized as misdemeanor or offense.

OFFENSE & PENAL LAW §	TERM PRESCRIBED
Mock auction (M) §943	Imprisonment for 30 days
Unlawful possession or use of an identification card issued by United Nations (M) §966	Not more than 10 days
Second and third convictions of gambling as misdemeanor §998	Not less than 10 days nor more than 1 year and not less than 30 days nor more than 1 year, respectively (first conviction no minimum and maximum of one year)
Hazing (M) §1030	Not less than 30 days nor more than 1 year
Obscene prints and articles (M) §1141 subd. 2.	
First Offense	Not less than 10 days nor more than 1 year
Second offense	Not less than 30 days nor more than 1 year
Third offense	"An indeterminate term of not less than 6 months nor more than 3 years" 38
Employment of minor in connection with obscene prints and articles (M) §1141 subd. 3	
First offense	Not less than 30 days nor more than 1 year
Second or subsequent offense	"An indeterminate term of not less than 6 months nor more than 3 years" 38
Refusal to admit inspector to mines, tunnels and quarries; failure to comply with requirements of inspector (M) §1270	Not less than 30 days

38 A sentence to an indeterminate term of not less than 6 months nor more than 3 years raises the degree of the crime to a felony. Moreover, such a sentence cannot be served in a county penal institution or a state prison. Sentences to county penal institutions are not for indeterminate terms, and, except where specifically authorized, cannot be for more than 1 year (Penal Law, §2183). Sentences to state prison cannot be for less than 1 year (Penal Law, §2182 subd. 2, §2183). It seems that the only way this provision can lawfully be used is by sentencing the convict to not less than 1 year nor more than 3 years (or some lesser period) in a state prison.

OFFENSE & PENAL LAW §	TERM PRESCRIBED
Violations of provisions of labor law; etc. (M) §1275	
Second offense	Not more than 30 days
Subsequent offense	Not more than 60 days
	(first offense punishable by fine only)
Fraudulent representation in labor organization (M) §1278	Not less than 10 days nor more than 30 days
Obtaining property or the use of property by fraudulently operating a slot machine, coin-box telephone or other coin receptacle (O) §1293-c	Not more than 6 months
Malicious Mischief- tampering with fire equipment (M) §1423 subd. 10	"Imprisonment in a county jail for the term of 10 days"
Malicious Mischief- tampering with signs (U) §1423 subd. 11	Not more than 10 days
Purchasing or selling partially used non-transferable railroad tickets (M) §1573	Not more than 10 days
Unlawful use of portable kerosene heaters (M) §1673	Not more than 90 days
Omitting to label drugs or labelling them wrongly (M) §1742	
Second conviction	Not less than 10 days nor more than one year
	(first offense punishable by not more than 1 year)
Violations as misdemeanors with respect to narcotic drugs §1751-a	
Second or subsequent conviction	"definite fixed period which shall be not less than 6 months and not more than 1 year"
	(first offense punishable by not more than 1 year)
Putting noisome or unwholesome substances or maintaining noisome business near highway (M) §1754	Not less than 3 nor more than 6 months
Selling beverages containing wood alcohol (M) §1760-a	Not less than 1 year

OFFENSE & PENAL LAW §	TERM PRESCRIBED
Sale or distribution of fireworks (M) §1894-a subd. 8	Not more than 90 days
Riding bicycle on sidewalk or footpath (M) §1909	Not more than 20 days
Peddling, unauthorized soliciting of business or trade, begging or loitering on certain railway property (O) §1990-a	Not more than 30 days
Wilful violation of the terms of a lease (O) §2040	Not more than 6 months
Sabbath breaking (M) §2142	
First offense	Not more than 5 days
Second or subsequent offense	Not less than 5 nor more than 20 days

Calculating Terms of Imprisonment.

The provision with respect to "jail time" (Penal Law, §2193 [discussed, supra, pp.22-3]) applies to county penal institutions in much the same manner as it applies to state institutions.[39] Good behavior time also applies, but differs with the type of institution involved. Penitentiary prisoners have the same opportunity to earn good behavior time as definite sentence prisoners in a state prison (see discussion, supra, 23-4 and footnote 15), and most of the provisions of Article 9 of the Correction law, specifying the procedure to be followed

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39 Courts have refused to recognize "jail time" as applicable to sentences under article 7-A of the Correction Law (see e.g., People ex rel. Stein v. McCann, 225 App. Div. 623 [1st Dept. 1929]), but this article was amended in 1961 (Ch. 258) and section 204 (b) now specifically provides that "jail time" must be calculated as part of the term of a sentence under article 7-A. There is, too, one case holding that notwithstanding the broad language of Penal Law, §2193 "jail time" should not be calculated as part of the term of a county jail sentence (People ex rel. Murphy v. Holcomb, 111 Misc. 460 [S. Ct. Broome Co. 1921]) But the statutory language has been made even broader since this case was decided and the issue does not seem to have been raised again. It therefore seems safe to conclude that the case does not express the present state of the law.

by state prisons, are applicable tp penitentiaries. However, good behavior time cannot be used to reduce the term of a penitentiary prisoner to less than three months, exclusive of jail time (Correction Law, §230 subd. 3).

County jail prisoners (presumably this would include workhouse prisoners) sentenced to definite terms, and not imprisoned for failure to pay or as an alternative to a fine, may receive discretionary reductions of their sentences of 5 days per month for efficient and willing performance of duties assigned to them (Correction Law; §250).[40] In calculating the reduction for a person sentenced to two or more individual terms the reduction is based upon the aggregate term of such sentences (id., §251).[41]

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40 Although one might think that this section is applicable only to persons sentenced upon conviction of a criminal act, it recently has been held applicable to a civil prisoner committed for a term of six months for failure to obey a support order, People ex rel. Foley v. Dros, 24 Misc. 2d 44 (S. Ct. Bronx Co. 1960).

41 The purpose of section 251 is not entirely clear. One explanation could be that it reduces the possibility of losing the reduction on a fractional part of a month where a prisoner has to serve another term commencing immediately thereafter. In this connection it seems that the reduction allowed under the preceding section (§250) of 5 days per month cannot be apportioned for a fractional part of a month (see 1959 Ops. N. Y. Att'y Gen., 240) and where the prisoner has been sentenced to consecutive terms (he would not ommence serving the second until the first had expired) section 251 would allow him to have the benefit of the reduction on his second term for any fractional part of a month needed to complete the first term. However, it well may be that the section was put into the law in error. Prior to the time that sections 250 and 251 came into the Correction Law (L. 1918, Ch. 550) there was no reduction at all allowable for county jail terms. Commutation was allowable on state prison and penitentiary terms and the amount of commutation varied with the length of the sentence; i. e., 5 days per month of a period of less than 1 year, two months per year for the first and second years; 4 months per year for the 3rd and 4th years and 5 months for each subsequent year (see L. 1916, Ch. 358). For the purpose of computing commutation on consecutive sentences the several terms could be construed as one continuing term and this furnished the prisoner with a real advantage because he was eligible for a higher amount of commutation during the first four years of his second term (former Prison Law, §231 [originally derived from L. 1886, Ch. 21, §2]). Sections 250 and 251 of the Correction Law made the

One other fact that might be noted about sentences to county penal institutions is that, except in cities with a population of one million or more, a court imposing a sentence of not more than sixty days may impose an interrupted or intermittent sentence; that is, the court may suspend the execution of the judgment of imprisonment on certain specified days or parts of days (Penal Law, §2189).

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41 (continued)
concept of commutation applicable to county jail sentences and section 250 borrowed the 5 day per month provision applicable to sentences of less than 1 year in the statute dealing with sentences to a state prison or penitentiary. Thus, since the period of commutation or reduction (as it is now called) for county jail sentences always has been a constant 5 days, it is possible that the legislature erroneously borrowed the provision that provides for construing consecutive sentences as one term when it enacted section 251. In any event, when the provision dealing with commutation on state prison and penitentiary terms was changedto provide for a discretionary reduction of a constant period of up to 10 days per month irrespective of the length of the sentence, the provision for construing consecutive sentences as one term was repealed (L. 1935, Ch. 902, §§2, 3). Although Correction Law sections 250 and 251 were amended at that time to change the word "commutation" to read "reduction" section 251 remained in the law (id., §13).

P. Preiser/pjc
September 4, 1962

E. Concurrent and Consecutive Sentences

In General

In the absence of a mandatory statute,[42] when a person is sentenced for two or more crimes at the same time, or sentenced for a crime while under a previously imposed sentence for another crime, the court has discretionary power to direct that the second or subsequent sentence either be served concurrently with or commence after the expiration of (i. e., be consecutive) the other term or terms of imprisonment. See People v. Ingber, 248 N. Y. 302 (1928).

Presumptions

Where the court has discretion and specifies that the second or subsequent sentence is to run concurrently or consecutively that direction will, of course, govern. However, if the court does not specify, certain rules will automatically apply If the sentences are pronounced at the same time by the same judge, there is a presumption that the terms of imprisonment are to be concurrent (see People v. Ingber, supra, 248 N. Y. 302, 305). If the sentences are pronounced at different times, in different courts, for completely unrelated crimes, or in courts of different sovereignties for offenses involving the same basic facts, they will be presumed to be consecutive. Matter of Browne v. New York State Board of Parole, 10 N. Y. 2d 116 (1961); People ex rel. Winelander v. Denno,[43] 9 App. Div. 2d 898 (2d Dept. 1959).

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42. New York State has such a statute (Penal Law, §2190) which is applicable in two situations (see, infra, pp. 59-62 and footnote 44).

43. Prior to the decision in Matter of Browne v. New York State Board of Parole (cited in the text) there seemed to be some confusion as to whether sentences imposed by different courts of the same jurisdiction or sovereignty would be presumed to be concurrent (see opinion in the Browne case, 10 N. Y. 2d 116, 120-121). Courts, relying upon a statement in People v. Ingber (cited in the text) to the effect that sentences pronounced at the same time by the same judge would be presumed to be concurrent, seemed to be extending the presumption to cases where the sentences were imposed at different times by different judges (see People ex rel Gerbino v. Ashworth, 267 App. Div. 579 (1st Dept. 1944). In the Browne case the Court of Appeals held that, where a defendant who is under sentence imposed by a New

Mandatory Consecutive Sentences

In this state, there are two situations in which the court has been deprived, by statute (Penal Law, §2190), of discretion to choose between concurrent and consecutive sentences. In these situations the sentences must be consecutive, and even if the court fails to include this direction in the sentence, the statute will serve as "a direction to the jailer as to the term of the imprisonment" (People v. Ingber, supra, 248 N. Y. 302, 305). The first situation is where a person is convicted of two or more offenses before sentence has been pronounced upon him for either (Penal Law, §2190, subd. 1); provided, however, that the offenses were not charged in the same indictment or information or in separate indictments or informations consolidated for trial (id., subd. 4). The second situation is where a person, under sentence for a felony, afterward commits another felony and is sentenced to another term of imprisonment (id., subd. 2).[44]

43. (Continued from p. 58)
York court is sentenced by another New York court for a completely unrelated crime, the presumption of concurrence does not apply and the sentences are consecutive. The Court stated that "the 'so-called presumption of concurrence' is not applicable to sentences imposed at different times in different courts, for completely unrelated crimes" (p. 120) and, although it did not expressly confine the rule set forth in Ingber to the narrow fact situation covered by the language of that rule, its treatment of the Ingber case can easily be interpreted as an intention to so confine the rule.

44. The full text of Penal Law, §2190 is as follows:

" Sentence on two or more convictions of two or more offenses.

"1. Where a person is convicted of two or more offenses before a sentence has been pronounced upon him for either offense, the imprisonment to which he is sentenced upon the second or other subsequent conviction, must commence at the termination of the first or other prior term or terms of imprisonment, to which he is sentenced.

"2. Where a person, under sentence for a felony, afterward commits any other felony, and is thereof convicted and sentenced to another term of imprisonment, the latter term shall not begin until the expiration of all the terms of imprisonment, to which he is already sentenced.

"3. Where a person is convicted of two or more crimes and is sentenced to more than one term of imprisonment to be served consecutively, if such person is paroled after serving the minimum term of either such sentence, he shall be subject to the jurisdiction of the board of parole until the expiration of the maximum terms of all such consecutive sentences.
(Statute continued on p. 60)

It seems that the first of the two aforesaid rules, making consecutive sentences mandatory, had its genesis in the Revised Statutes of 1830 (2 R. S. 700, §11) and was enacted as a method of overcoming the presumption of concurrence that applied when the court imposed two sentences at the same time and failed to specify whether they were to run concurrently or consecutively. The Revisers believed that consecutive sentences were customarily imposed when the defendant was sentenced for two crimes at the same time and that when the court neglected to specify that the sentences were to be consecutive, the omission was through inadvertence and was not evidence of an intention that the sentences were to be concurrent (see opinion of Chief Judge Cardozo in People v. Ingber, supra, 248 N. Y. 302, 305). Obviously, though, the statute went further than merely negating any presumption of concurrence; for, where applicable, it stripped the courts of power to impose concurrent sentences.

The other situation in which consecutive sentences were mandatory; i. e., where a person, under sentence for a felony, afterward commits another felony and is sentenced to another term of imprisonment, does not seem to have been enacted to cope with a presumption of concurrence. The situation covered by this rule merely was "singled out and subjected to a rule whereby discretion is excluded" (People v. Ingber, supra, 248 N. Y. 302, 305).

Apart from the foregoing, research has not disclosed any reason as to why these two situations have been "singled out," and, it is submitted, the application of these rules can result in some senseless distinctions. For example, the first rule--

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44. (continued)

"4. Where a person is convicted of two or more offenses constituting different crimes set forth in separate counts of one indictment or information, or in separate indictments or informations consolidated for the purposes of trial, the court may impose a separate sentence for each offense of which he is so convicted, and the court may order such sentences or any of them, if imprisonment is imposed, to be served concurrently or consecutively."

making consecutive sentences mandatory when the defendant is convicted of two or more offenses before sentence has been pronounced upon him for either offense (Penal Law, §2190, subd. 1)--seems to make the issue of whether the second or subsequent sentence must be consecutive depend upon when the trials are had or the pleas are taken. If a defendant pleads guilty to or is found guilty of two separate crimes before he is sentenced for either, the sentences must be consecutive (provided the crimes were not charged in the same indictment or information or in separate indictments or informations consolidated for the purposes of trial [id., subd. 4]). However, if the defendant is convicted and sentenced for a crime and is subsequently convicted and sentenced for another crime (committed prior to the time the first sentence was imposed) the court has discretion to make the second sentence run concurrently. Compare People ex rel DiMaggio v. Morhous, 282 App. Div. 991 (3d Dept. 1953), aff'd mem. 307 N.Y. 644, with People ex rel Gendelman v. Snyder, 259 App. Div. 939 (3d Dept. 1940). Of course the effect of this rule can be softened in many cases through the use of a suspended sentence.

The second rule--making consecutive sentences mandatory when a person commits a felony while under sentence for a previous felony and is sentenced to another term of imprisonment--applies only to two or more felonies. If a person under sentence for a felony commits a misdemeanor of an offense, or if a person under sentence for a misdemeanor commits another crime (any grade) the court has discretion to make the second sentence run concurrently.

Acts Punishable Under Different Provisions of Law

Where a single act or omission is made criminal and punishable under more than one section of the law the perpetrator may be indicted and convicted of several crimes. In such a case, although he may be punished for any one of the crimes he cannot be punished for more than one (Penal Law, §1938).

Thus, "if there were merely a single inseparable act violative of more than one statute, or if there were an act which itself violated one statute and was a material element of the violation of another, there would have to be single punishment" and consecutive sentences could not be imposed, even though separate crimes are involved. See e. g., People ex rel Maurer v. Jackson, 2 N. Y. 2d 259, 264 (1957). However, in such a case it is entirely proper to impose concurrent sentences, because what is forbidden is "multiple punishment not multiple convictions, or sentences that do not spell punishment. When concurrent sentences are imposed, there is no double punishment--there is a single punishment measured by the sentence for the highest grade offense into which all concurrent sentences merge." (id., 2 N. Y. 2d 259, 269-270).

As pointed out by the Court in the Maurer case, if concurrent sentences were not allowed, the defendant could not be prosecuted to a final judgment for several related crimes in a single indictment. And, apart from this, the imposition of concurrent sentences has a practical effect because it "insures that the defendant will not go unpunished if there is an error in his conviction for the highest degree of offense resulting in an acquittal as to that count." (ibid.)

Reformatory (Indefinite) Sentences and Sentences Under Article 7-A of the Correction Law ("Indeterminate" Sentences)

There does not appear to be any authority indicating whether a court, when sentencing a defendant for two or more crimes simultaneously, can impose consecutive state reformatory terms (i. e., indefinite sentences).[45]

Inasmuch as the court has no power to fix or limit the

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45. It will be recalled that an indefinite sentence has neither a minimum nor maximum: release from confinement and termination of the sentence lies in the discretion of the Board of Parole (provided that the term cannot exceed 5 years in the case of a felony and 3 years in the case of a misdemeanor [see, supra, pp. 28-9]).

duration of a reformatory term and since such a term has no minimum, the effect of consecutive reformatory terms--if they can be imposed--would be to subject the offender to the jurisdiction of the Board of Parole for a longer period of time and this, of course, would be accompanied by the possibility that the offender could be confined in an institution for that length of time, or be released after a short stay and returned to the institution at any time during that period (e. g., 6 years in the case of two misdemeanors or 10 years in the case of two felonies). However, in view of the fact that the reformatory term was not designed for the infliction of punishment befitting the specific crime committed (robbers, burglars, forgers and rapists, etc. all receive equal reformatory terms; and a reformatory term for a misdemeanor is three times as long as the maximum punishment that could be inflicted), but was designed as a reasonable period of time for the reformation of a young offender, a reasonable argument could be made that it is anomalous to allow consecutive reformatory sentences to be imposed simultaneously and before the offender has commenced his treatment.

In this connection, however, it should be noted that there is at least implied authority for imposing a reformatory term to run consecutively with a reformatory term previously imposed. In Matter of Browne v. New York State Board of Parole, supra, the Court of Appeals was dealing with a situation where a defendant, serving a reformatory term for a misdemeanor (3 year maximum) was convicted of a felony and sentenced to a reformatory term (5 year maximum). The court held that the presumption of concurrence would not apply to these sentences and accepted, without discussion, the proposition that a court can impose a reformatory term which does not start to run until the expiration of a prior reformatory term.[46]

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46. Respondent was sentenced for the misdemeanor on September 2, 1954, and for the felony on May 18, 1955; paroled
(Continued on page 64)

With respect to a city reformatory-type sentence under article 7-A of the Correction Law (described, supra, pp. 38-41), which is similar in nature to the indefinite state reformatory sentence, the Court of Appeals has held that it is improper to impose consecutive sentences if both are imposed at the same time.[47] People ex rel Gordon v. Ashworth, 290 N. Y. 285 (1943).

Neither the majority opinion in the Court of Appeals nor the unanimous opinion of the First Department (264 App. Div. 201) explained the rationale behind this conclusion; but the dissenting opinion of the three judge minority, by Chief Judge Lehman (who did not dissent on this particular point) sheds some light on the Court's reasoning. This reasoning is interesting, not only because of its bearing upon the article 7-A sentence, but also because of the lack of authority on the question of whether a court can simultaneously impose consecutive state reformatory sentences. The Chief Judge stated (290 N. Y. 285, 292):

> "Before such indeterminate sentences to be served consecutively could be imposed, the court would be compelled to decide that at the end of the first term of imprisonment three years later the offender would still be capable of being 'substantially benefitted by being committed to a correctional and reformatory institution'; though discharge of the offender in accordance with section 204 before the end of three years would, it seems, indicate that, in the opinion of the Parole

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46. (Continued from page 63)
on December 11, 1957, and apparently delinquent for approximately 6 months. The Court stated (10 N. Y. 2d 116, 119-120):

> "Following his recommitment, appellants [the Board of Parole] computed the maximum expiration date of respondent's term to be February 1, 1963. In arriving at this date, appellants regarded the two sentences (of September 2, 1954 and May 18, 1955 as 'consecutive', adding the maximum of the second to the maximum of the first."

47. It also is improper to impose an article 7-A sentence in combination with a definite sentence, because this involves simultaneous opposite findings on the issue of corrigibility. People ex rel Nally v. Noble, 22 Misc. 2d 394 (S. Ct. Bronx Co. 1960).

> Commission and the trial court, longer imprisonment would not accord with the public interest; and conversely failure to terminate the imprisonment during the longest term of imprisonment permitted by the statute would, it seems, indicate that corrective and reformatory treatment failed to achieve its purpose. Such construction would thwart the purpose of the Parole Commission Law that correctional and reformatory institutions should be established in which offenders who are not incapable of moral improvement might be imprisoned until the desired improvement has been noted by the Parole Commission and the court or until three years of imprisonment had been served." 48

It is interesting to note that in the Gordon case the relator was seeking release from custody after having served his term under the first commitment and the Court--although holding that the sentencing court should not have imposed the two sentences at the same time--held (4 to 3) that the proper procedure was to remand the relator for sentencing on the second conviction. This would seem to imply approval of a practice of deferring sentence on one of the convictions until the conclusion of the first article 7-A term. However, it subsequently has been made quite clear that it is improper to defer sentence indefinitely, and that "where a defendant at the same time is convicted of two crimes for each of which separately he might be committed for an indeterminate term under section 203 of the Correction Law [article 7-A], sentence or the operation of sentence must be suspended upon one, if he is to be sentenced pursuant to section 203 under either conviction unless indeterminate sentences upon both run concurrently." Dictum in People v. Cioffi, 1 N. Y. 2d

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48. The above reasoning could easily be applied to the sentencing of an offender who is currently serving an article 7-A sentence imposed by another court for a different crime because here, as well as in the case of consecutive sentences imposed simultaneously, the second court would "be compelled to decide [in advance] that at the end of the first term of imprisonment . . . the offender would still be capable of being 'substantially benefitted' " by an article 7-A sentence. Courts have expressed opinions going both ways on this point. (Compare People ex rel. Bernard v. Ashworth, 43 N. Y. S. 2d 366 [S. Ct. Bronx Co. 1943] with People ex rel. Bergman v. Ashworth, 186 Misc. 500 [S. Ct. Bronx Co. 1945].)

70, 72 (1956); see also Matter of Hogan v. Bohan, 305 N. Y. 110 (1953). Thus, if the sentencing court follows the proper procedure, it must dispose of all the convictions at the same time, and there should be no occasion to remand for sentence on the second conviction after the first term has been served as set forth in the Gordon decision.[49]

Although, as shown above, this part of the Gordon holding has little, if any, current practical significance, the difference of opinion on this point between the majority (who held only that the two sentences could not be imposed simultaneously) and the three judge minority (who thought the article 7-A sentence should serve as a complete disposition of all the convictions before the court at that time) is important, because it goes right to the basic nature of any reformatory sentence.

In rejecting the contention that an article 7-A sentence exhausts the court's sentencing power the majority emphasized the punishment aspect, stating (290 N. Y. 285, 289):

> "If we adopt the construction of the Parole Commission Law, that the imposition of an indeterminate sentence forbids any sentence upon pleas of guilty to unrelated misdemeanors, then we reach the unrealistic conclusion that the punishment for one misdemeanor is made the only punishment possible, not only for two unrelated crimes but for as many misdemeanors as the prisoner may recall and wish to plead guilty to. It is submitted that such a construction, by providing for one punishment to become a satisfaction for any number of unrelated crimes, removes any deterrent to their commission and, therefore, weighs against this

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49. In the Cioffi case the Court of Appeals was not confronted with, and, therefore, did not decide the question of whether a sentencing court would lose jurisdiction to sentence on one of the two convictions if it imposed an article 7-A sentence on one conviction and deferred sentence on the other until the article 7-A sentence had terminated. In view of the fact that the only decision in this State depriving a court of jurisdiction to sentence is a recent decision, which was specifically limited to "extremely long [6 years] and unreasonable delays" it is difficult to predict that the court would hold. See People ex rel Harty v. Fay, 10 N. Y. 2d 374 (1961). In any event the offender could compel the court to impose sentence on the second conviction and thus get the benefit of a suspended or concurrent sentence. Matter of Hogan v. Bohan, 305 N. Y. 110 (1953).

> construction being in accord with the intention of the Legislature."

The minority, however, mindful that article 7-A does not prescribe punishment, as such, and provides for a sentence with a 3-year maximum, although the maximum punishment for a misdemeanor is imprisonment for not more than 1 year, stated as follows (p.293):

> "The punitive purpose of imprisonment [under article 7-A] is subordinated to its reformatory purposes. Where a statute expressly provides that sentences must be imposed which shall not be proportioned to an offender's guilt, there is little if any basis for reading into the statute an implied power to impose cumulative punishment for several offenses."

Sentences Where More Than One Institution is Involved

One of the more difficult, and apparently unresolved, problems is whether a court can make a sentence to one institution run concurrently with a sentence being served or to be served in a different institution.

1. The Same Sovereignty

Turning first to a situation involving two sentences by courts of the same sovereignty, a person could--as an example--be convicted of a felony in the Westchester County Court, for which he might be sentenced to a state prison and, while serving that term of before commencing to serve it, be convicted in the New York City Criminal Court of a misdemeanor and sentenced to 9 months in the City Penitentiary. If the New York City Court is aware of the state prison term it might wish to direct that the penitentiary term, run concurrently with it. Obviously, the prisoner would hardly be the one to complain (and this, perhaps, explains the dearth of authority on the question). However, it would seem to be somewhat of a paradox if a judgment ordering imprisonment in a county penitentiary ("the place of imprisonment must be specified in the judgment and sentence of the court" [Penal Law, §2180]) could be satisfied by imprisonment in a

state prison or, in other words, merge with a state prison sentence:[50] especially in view of the fact that a misdemeanor is not punishable by imprisonment in a state prison.

Perhaps the answer to this type of problem can best be reached by determining whether it is possible for a term of imprisonment to commence prior to the time the prisoner is committed to the custody of the "place of imprisonment. . . specified in the judgment and sentence of the court" (Penal Law, §2190). Because, as a rule, once a term commences it continues to run -- irrespective of the place of confinement--until it expires (unless the prisoner does something to interrupt it). See e. g., People ex rel. Rainone v. Murphy, 1 N. Y. 2d 367 (1956).

With respect to a state prison or reformatory, the available criteria seem to point to the conclusion that a sentence to a state institution cannot begin to run until the prisoner is received in the institution. Although there is no statute directly applicable to the situation, there is a statute specifying that for the purpose of the good behavior allowance applicable to state prison and penitentiary prisoners "the term of imprisonment of each prisoner shall begin on the date of his actual incarceration in a state prison or penitentiary," or in the Department of Correction's reception center (Correction Law, §231). This has been interpreted--in cases dealing with post conviction "jail time" --as authority for the proposition that the sentence, as such,

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50. The chance of the converse of this situation occurring (i. e., a prisoner serving a term in a county jail being sentenced to a state prison term to run concurrently) seems so unlikely as not to warrant discussion. However, it should be noted that in the case of People ex rel DeSantis v. Warden of New York City Penitentiary, 176 Misc. 844, aff'd mem. 262 App. Div. 1003 the Supreme Court (Bronx County 1941-Eder, J.) stated that a state prison sentence can be served concurrently with an article 7-A New York City Penitentiary sentence. The court held, however, that because the subsequently imposed state prison sentence was executed first (and the Court thought this was irregular) it could not run concurrently with the first sentence. In other words, the court held that a second sentence can run concurrently with the first, but the first cannot run concurrently with the second.

cannot commence until the prisoner actually has been delivered into the custody of the proper official of the institution named in the judgment. See People ex rel. Jackson v. Weaver, 279 App. Div. 88 (3d Dept. 1951); People ex rel. Uebelmesser v. Carter, 176 App. Div. 804 (2d Dept. 1917); Janosko v. Kross, 27 Misc. 2d 210 (S. Ct. N. Y. Co. 1960). Moreover, the Governor, in 1960 and 1961, vetoed bills designed to make the term of a sentence commence as soon as it is pronounced (see N. Y. S. Legislative Annual, 1960, p. 602; 1961, p. 567).

With respect to a county penal institution, it is well to bear in mind that the above cases all deal with sentences to a state institution, and, although the statute they rely upon mentions county penitentiaries also, this section does not deal directly with the problem of when the term, as such, commences. These factors are significant, because five years before this statute was enacted (L. 1886, Ch. 21, §3), the Fourth Department held that where a person was sentenced to a penitentiary the sentence began to run at the time the prisoner was committed to the county jail and not at the time the prisoner was received in the penitentiary; and that Court thought there was a distinction, for this purpose, between a penitentiary and a state prison sentence. People v. Lincoln, 25 Hun 306 (4th Dept. 1881). The Court stated (p. 307):

> " In the case in hand we are of the opinion that the sentence began to run from the date it was pronounced, and that all the time the respondent was in custody after that day is to be credited upon her sentence. Being thus credited, it appears to the special county judge that she had been imprisoned six months. The conviction was not for a felony, and the imprisonment in jail was as much of a punishment in theory of law as in the Monroe County Penitentiary.
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> The case is therefore not within the reasoning of Attorney-General Schoonmaker, stated in his letter of March 14th, 1879, to the clerk of Auburn prison: He was considering cases of felony punishable by imprisonment in a State's prison, by becoming 'an inmate of a State's prison' ".

Therefore, it appears that a state prison or state reformatory sentence cannot start to run prior to the date of actual incarceration in an institution under the jurisdiction of the State Department of Correction, while a penitentiary or county jail sentence might start to run as soon as the prisoner is incarcerated in any institution pursuant to the judgment (but not before incarceration, People ex rel. King v. McEwen, 62 How. Pr. 226 [Albany Recorder's Court 1881]). This could very well lead to the conclusion that a state prison or reformatory sentence cannot be served concurrently with a sentence being served in another institution; and, to a strong argument that a county jail or penitentiary sentence can.

2. More Than One Sovereignty

Turning now to sentences imposed by courts of different sovereignties, one would have to add to the question of when the New York sentence begins to run the additional question of whether service in the prison of another state or in a federal prison can "expiate an offense against the dignity of this state" (see dictum of Cardozo, Ch. J. in People v. Ingber, 248 N. Y. 302, 306 [1928]).

Two New York Supreme Court justices have considered the problem of whether a New York Court can make a sentence to a state prison run concurrently with a federal sentence and have concluded--without finding it necessary to hold--that this is possible. People ex rel. Winelander v. Ruthazer, 17 Misc. 2d 720 (S. Ct. Queens Co. 1959); People ex rel. Bove v. McDonnell, 128 N. Y. S. 2d 643, 649 (S. Ct. Bronx Co. 1953).

The Second Department, however, when considering the questio of whether there was a presumption of concurrence applicable to a state sentence imposed subsequent to a federal sentence (but before the latter had commenced) in a case where, both convictions involved the same basic facts, drew a distinction between

two sentences imposed by courts of the same sovereignty and two sentences imposed by courts of different sovereignties. People ex rel. Winelander v. Denno, 9 App. Div. 2d 898 (2d Dept. 1959). The Court stated:

> "The common-law presumption that two sentences, imposed by one court or by different courts of the same jurisdiction or sovereignty, are concurrent, in the absence of a direction to the contrary by the second sentencing judge, [51] is not applicable when the sentences are imposed under the laws and by the courts of separate sovereignties, such as the State of New York and the United States, and when the two places of confinement are entirely different. The provisions of section 2190 of the Penal Law and the common-law presumption mentioned above have reference, and are applicable, only to those offenses recognized and punishable as crimes by the State of New York." (Citations omitted.)

An opinion of the Fourth Department (in the case of People ex rel. Rainone v. Murphy, 1 App. Div. 2d 754 [1955]) also sheds some light upon this question. In the Rainone case the relator who had been on parole from a state prison, was arrested pursuant to a New York State Parole Board warrant for an act of delinquenc The delinquency consisted of committing a federal crime and the relator was turned over to the federal authorities for trial. After he was sentenced by the federal court he was returned to the custody of the New York Parole Board. But, instead of sendir the relator back to state prison, the Board redelivered him to the federal authorities so that he could serve his federal sente When released from the federal penitentiary after serving the federal sentence, he was once again returned to the custody of the New York Parole Board and this time was sent to state prison to complete his term. He then claimed that the time he served in the federal penitentiary should be credited against the state

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51. This decision was written before the Court of Appeals decided Matter of Browne v. New York State Board of Parole, 10 N. Y. 2d 116 (1961) which clarified--to some extent--the scope of this presumption even where two sentences are imposed by courts of the same sovereignty (see discussion, supra, p. 58).

prison term and that, as a result, his state prison term had expired. The Fourth Department held against this contention and stated: "State and federal sentences, being sentences of confinement to two different places, do not run concurrently." The Court of Appeals reversed, but did so because the State Parole Board, through taking custody of the relator, had started his sentence running again (it had stopped running on the date he was declared delinquent [Correction Law, §218]) and thereafter had no power to stop it (1 N. Y. 2d 367).

Thus we have a significant statement by the Fourth Department that, in its opinion, "state and federal sentences do not run concurrently" : and the opinion of the Court of Appeals does not detract from this particular statement because it was based upon the fact that the Board had no power to stop the running of the state sentence and, for the purpose of this analysis, merely means that when a prisoner over whom the Board has complete and unconditional jurisdiction is surrendered by the Board, his sentence continues to run in the same manner as it would if the Board had paroled him (in which case he also would be serving his sentence outside the confines of the state prison).[52]

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52. A further explanation of the point made in the Rainone case might be helpful at this point. When a prisoner is in complete and unconditional custody serving a sentence, the state can do nothing to stop that sentence from running: it can be stopped only if the prisoner escapes or becomes delinquent. Thus if the state simply delivers the prisoner to another sovereign, to serve another sentence, the first sentence continues to run while he is serving the other (see People ex rel Reynolds v. Martin, 3 N. Y. 2d 217 [1957]).

When a person is released on parole, he still is in the legal custody of the state; but this custody terminates if he commits a crime under the laws of another sovereign--for example under federal law-- and his state sentence stops running at that point (see opinion of Halpern, J. in Perillo v. New York State Board of Parole, 4 App. Div. 2d 355 [4th Dept. 1957], aff'd per curiam, 4 N. Y. 2d 1013). Thereafter, the matter of which sovereign will have custody depends entirely upon which sovereign gets custody first. If the State Parole Board takes custody first by having the person arrested pursuant to a delinquency warrant, the sentence will start to run again * and, although the state can and should deliver the prisoner to the federal authorities for trial and sentencing, the first sentence continues to run irrespective of whether the federal authorities return (Continued on page 73).

In sum then, the question of whether a state court can validly direct that its sentence is to run concurrently with a term the prisoner is serving in another jurisidction does not seem to have been authoritatively resolved in this state. However, the authorities stating that a state prison or reformatory sentence cannot commence prior to the date of actual incarceration in an institution under the jurisdiction of the State Department of Correction and the appellate authorities dealing with cases involving sentences by courts of different sovereignties furnish strong evidence that if the question were squarely presented, it would be answered in the negative.[53]

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52. (Continued from p. 72)
the prisoner to the state before he serves the federal sentence. In this situation, therefore, the prisoner should be returned to the state before he serves his federal sentence, so that the state can fully perform its duty.

However, if the federal authorities take custody of the offender before the Parole Board regains custody, the federal government has complete and unconditional custody and can execute its sentence without waiting for the state to finish. In such a case, the Board of Parole can compel the prisoner to serve the balance of his term (calculated from the date of delinquency) after the federal term. This is so even if the prisoner is admitted to bail, pending prosecution on the federal charge, and arrested for parole delinquency before the federal sentence is imposed, because the state has acquired only conditional custody; that is, its custody is subject to the prior right of the federal government. Perillo v. New York State Board of Parole, supra. (If the state authorities take custody while the prisoner is at liberty on bail, he would, of course, be entitled to credit for the length of that custody [Correction Law, §218; Penal Law, §2193, subd. 2].).

* In the Rainone case the Court of Appeals placed emphasis upon the fact that the prisoner was in the custody of the Parole Board, and said: "Regardless, however, of what the Parole Board does with the prisoner, after it has regained custody of him, his State sentence continues to run" (id. , p. 373). However, in 1960 section 218 of the Correction Law was amended so as to provide that the sentence does not begin to run again until the prisoner is returned to an institution under the jurisdiction of the Commissioner of Correction. Thus, if the Board regained custody and kept the prisoner in a city prison or county jail instead of returning him to state prison (which is what happened in the Rainone case [see fols. 50-4 rec. on appeal]), the state might still get complete and unconditional custody and the right to keep the prisoner until his state prison sentence has terminated; but, if it delivered the prisoner to the federal authorities--to serve a federal term-- before returning him to an institution under the jurisdiction of the Department of Correction, a strong argument could be made that the state prison sentence will not run concurrently with the federal sentence, because, under the new language of section 218, the sentence never started to run again.

53.

Whether that answer would also apply to a sentence to a county penal institution is a more difficult question.

In this connection it is interesting to note that there seems to be a difference of opinion among federal judges on the question of whether a federal court can validly impose a sentence that will run concurrently with a state prison sentence.[54]

The United States Code, unlike New York law, provides that a federal sentence "shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence" (18 U. S. C., §3568). But the federal courts (unlike the New York courts) do not name the place of imprisonment: they merely commit the prisoner to the custody of the Attorney General, who has exclusive power to designate the place of confinement where the sentence may be served and who "may designate any available, suitable and appropriate institutions, whether maintained by the Federal Government or otherwise, or whether within or without the judicial district in which the person was convicted" (id., §4082; 18 U. S. C., Form 25).

The federal court, however, may recommend the place of imprisonment (there is space for this on the official form of commitment) and if the court recommends that the offender serve his federal sentence in a state prison where he happens to be serving a previously imposed state court sentence, this recommendation, though not binding, will be followed. (See discussion by Judge James N. Carter [Dist. Judge S. D. Cal.] at Pilot Institute on Sentencing 26 F. R. D. 231, 355-365.). And this is the source of confusion.

Applying the above procedure it has been held that where a federal court recommends a state prison as the place of confinement, and the recommendation is followed, the federal court has made its sentence run and its sentence does run concurrently

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54. Compare Werntz v. Looney, 208 F. 2d 102 (10th Cir. 1953) with Lunsford v. Hudspeth, 126 F. 2d 653 (10th Cir. 1942) and United States v. Hough, 157 F. Supp. 771 (S. D. Cal. 1957).

with a previously imposed state prison sentence being served in that prison. See Werntz v. Looney, 208 F. 2d 102 (10th Cir. 1953). But it also has been held that a federal court cannot make its sentence run concurrently with a state court sentence, and that the aforesaid procedure cannot affect the sentence. If it could, stated the Court, it would either deprive the Attorney General of his exclusive right to designate a place of imprisonment--which the court cannot do--or result in "a sentence which is so uncertain as to leave to the Attorney General the decision as to whether the intent of the Court shall be effectuated"--which the court also, and obviously, cannot do. United States v. Hough, 157 F. Supp. 771 (S. D. Cal. 1957).

The position taken by the federal courts on this issue can have an important effect upon the administration of state criminal procedures. For example, if a person commits a crime under the laws of New York and also commits a crime under federal law (both crimes could involve the same act),[55] the sovereignty that apprehends or takes custody of him first will have the right to follow through to completion of its judgment and sentence (see footnote 52). Thus, if New York State apprehends the offender before the federal authorities and if the federal court sentences the offender in accordance with the procedure used in Werntz v. Looney, supra, the federal sentence can run concurrently with the state sentence. However, if the federal authorities apprehend the offender first (and. if it be assumed that under New York law the New York court cannot make its sentence run concurrently with the federal sentence), the offender cannot receive concurrent sentences. Therefore, the question of whether the offender receives concurrent or consecutive sentences could depend entirely upon

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55. The Second Department has recently held (two justices dissenting) that section 33 of the Penal Law and section 139 of the Code of Criminal Procedure which bar a second prosecution for the same act if there has been a conviction or acquittal in "another state, territory or country" do not apply to crimes tried by the federal government, because "the Federal Government does not fall into any of those categories." People v. LoCicero, July 9, 1962 (citation not yet available).

the fortuitous circumstance of who arrests him first.[56]

Calculating Terms of Imprisonment

1. "Jail Time"

Where a person is arrested on two or more charges or is arrested on one charge and, while in custody, a warrant is filed because of another charge, there seems to be some confusion as to the method of calculating the "jail time" to be credited on the various charges. Penal Law section 2193 provides that "Any time spent by a person . . . convicted of a crime in a . . . jail prior to his conviction and before sentence has been pronounced upon him shall become and be calculated as part of the term of the sentence imposed upon him..." but does not furnish any guidance as to whether the prisoner is entitled to receive credit on each sentence for the "jail time".

Thus, if a person is arrested and charged at the same time with three separate crimes and sentenced to consecutive sentences, the sheriff or the New York City Department of Correction can certify the same "jail time" to be applied against each of the three sentences (see Matter of Donohue v. Brown, 3 Misc. 2d 969 [S. Ct. West. Co. 1956]) or take the position that the prisoner should not be credited more than once for the same jail time and credit the "jail time" against only one of the sentences. Also, in a case where a prisoner is being held pending trial on one crime and a warrant is received to hold him for a different crime, the sheriff or the New York City Department of Correction can take the position that he should receive "jail time" credit on the sentence for the second crime dating from the time the warrant was filed to the time the prisoner is sentenced on that crime, even though, during all of that time, he was in custody pending disposition

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56. For discussions of this problem and citations supporting the text, see, "The Offender Who Violates Both State and Federal Law.", Pilot Institute on Sentencing, 26 F. R. D. 231, 359-361; "Sentencing Methods and Techniques in the United States," June 1962 issue of "Federal Probation".

of the first charge (see Janosko v. Kross, 27 Misc. 2d 210 [S. Ct. N. Y. Co. 1960]) or, it seems, with equal validity, take the position that the prisoner is not entitled to any "jail time" at all on the sentence for the second crime.

2. Parole

If a person is sentenced to consecutive indeterminate state prison sentences, or to an additional and consecutive indeterminate sentence while serving the minimum of a prior sentence, the Board of Parole will aggregate the minima of the sentences in order to determine when the prisoner will be eligible for parole. (Of course, if a prisoner is sentenced to a new and consecutive term after he has served the minimum of a prior term, he is eligible for parole when he has served the minimum of the new term.) Thus, for example, a person sentenced to two consecutive terms is not compelled to serve the maximum of the first term and the minimum of the second term before he is eligible for parole: he is eligible after serving the aggregate of the minima. However, the practice of aggregating the minima, or, as it is sometimes called, paroling the prisoner (within the prison walls) on the first term so that he can begin serving the minimum of the second term, does not affect the maximum duration of the terms, and the second term does not actually begin to run when the prisoner is "paroled on his first term," because, for the purpose of calculating the expiration dates of consecutive sentences, the second term does not begin to run until the expiration of the maximum of the first term. In other words, the prisoner receives no credit against the maximum of his second term until the expiration of the maximum of the first term. Penal Law, §2190 subds. 1-3;[57] Siraguso v. Moore, 273 N. Y. 59 (1937); People ex rel. Di Vito v. Fay, 3 App. Div. 2d 926 (2d Dept. 1957), aff'd mem.

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57. Penal Law section 2190 is not very clear on this matter and there is nothing in the Correction Law to cover it.

4 N. Y. 2d 864; People ex rel. Merrill v. Jackson, 7 App. Div. 2d 166 (3d Dept. 1958).

If a parolee is sentenced to a state prison or reformatory for a crime or offense committed while on parole from a state institution, the Board of Parole may compel the prisoner to serve the portion, or any part of the portion, remaining of the maximum term of the sentence on which he was released on parole (calculated from the date of delinquency) before he begins to serve the new term (Correction Law, §219).

For parole purposes this is similar to consecutive indeterminate terms that are imposed simultaneously. The portion of the old sentence designated by the Board of Parole becomes a new minimum term - imposed by the Board instead of a court - and the Board adds that portion to the minimum of the new sentence imposed by the court to determine when the prisoner will again be eligible for parole. But here the similarity ends, because in this situation, the action taken by the Board of Parole can control the expiration date of the maximum of the second sentence. This is so because when the prisoner begins serving the minimum of the second sentence he begins serving the second sentence, as such, and if the Board has not compelled him to finish serving the maximum of his first term, before he commences his second term he will be serving both sentences concurrently; i. e. he will finish serving the remainder of his first sentence while he actually is serving the second sentence.[58]

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[58]. This seems contrary to the language of Penal Law, §2190, subd. 2 and the intent of subd. 3 (reproduced, supra, footnote 44, Page 60) but was accepted - without comment - by the Court of Appeals in People ex rel. Kenny v. Jackson, 4 N. Y. 2d 229 (1958) where it was conceded to be so by the Attorney General (id., p. 235). The Attorney General had raised this point in a prior habeas corpus involving this prisoner and the Supreme Court had rejected it. (People ex rel. Mahon v. Warden, 1 Misc. 2d 267 [S. Ct. Bronx Co. 1955], aff'd mem. 2 App. Div. 2d 876). He did not raise it again in his brief in the Kenny case.

In addition to the power to decide whether and when the second sentence will run concurrently with the first, the Board also has the power to revoke its determination on this issue after the second sentence has started to run. For example, if a parolee who has 7 years left on the maximum of his term ("A" term is sentenced, for a crime committed while on parole, to a term of not less than 2 nor more than 5 years) (term "B"), the Board might compel him to serve 3 years more of term "A" before commencing to serve term "B". He might then be paroled on term "B", after serving an additional 2 years (the term "B" minimum). At this point (having served 5 years) he would be released on parole. If he happens to be declared delinquent and returned to prison after being on parole for 1 year, the Board then can stop term "B" from running, and compel the prisoner to serve the remaining 1 year of term "A" before beginning to serve the remaining 2 years of term "B". People ex rel. Kenny v. Jackson, 4 N. Y. 2d 229 (1958).

One other aspect of the interplay between parole and consecutive sentences might be noted. As pointed out on page 9, supra, Penal Law section 1945 provides that a person sentenced to life imprisonment is eligible for parole in the same manner as a person serving an indeterminate term with a minimum of 40 years (subd. 6) and a person sentenced to an indeterminate term with a minimum in excess of 30 years is eligible for parole as though he had been sentenced to an indeterminate term with a minimum of 30 years (subd. 7). But this section does not seem to apply to the aggregate minima of consecutive sentences, and hence, if a person is sentenced at the same time to two or more consecutive terms and the aggregate minimum of the terms is more than 40 years, he must be held in prison until he has served the aggregate minimum, even though this would be longer than a person sentenced to life imprisonment (see 1960 Ops. N. Y. Att'y Gen.).

F. Suspended Sentence; Suspended Execution of Judgment; Probation

It is, of course, obvious that a plea or verdict of guilty is not the judgment of the court: the sentence is its judgment. See e. g., People v. Cioffi, 1 N.Y. 2d 70 (1956). And it is well established that the court must, within a reasonable time after a plea or verdict of guilty, pronounce its sentence. Matter of Hogan v. Bohan, 305 N.Y. 110 (1953). Where the sentence of the court is a term of imprisonment or a fine, judgment has been imposed and this, by and large, disposes of the matter insofar as the court is concerned. However, where the court pronounces a suspended sentence or pronounces sentence and suspends execution of the judgment, the matter of judgment remains sub judice and there is no judgment. People v. Shaw, 1 N.Y. 2d 30 (1956); People v. Harcq, 292 N.Y. 321 (1944); People ex rel. Marcley v. Lawes, 254 N.Y. 249 (1930); People ex rel. Lozzi v. Fay, 6 App. Div. 2d 18 (2d Dept. 1958), aff'd mem., 5 N.Y. 2d 890. The fact that the judgment is sub judice not only prolongs the court's responsibility in the matter and allows the offender to escape the immediate infliction of punishment, but also means there is a question as to whether the offender is subject to the disabilities, disqualifications and forfeitures that apply to a person who has been "convicted." People v. Fabian, 192 N.Y. 443 (1908); and these are the sources of the problems surrounding the subject of suspended sentences.

The Court's Inherent Power Under Common Law to Suspend Sentence or Execution of Sentence

There seems to be no question about the fact that the power to suspend sentence or the execution of sentence

dates back to the early days of the common law and was inherent in any court that had jurisdiction to sentence (see People ex rel. Forsyth v. Court of Sessions, 141 N.Y. 228 [1894]).[59]

However, the authorities reflect a sharp difference of opinion as to the nature and scope of this power. The United States Supreme Court has stated that the inherent power to suspend sentence was exercised at common law only in case of error or miscarriage of justice affecting the legality of the conviction, or as a temporary measure for the purpose of enabling a pardon to be sought and that a court does not have inherent power to suspend sentence if it bases its refusal to sentence upon considerations extraneous to the legality of the conviction: i.e., mitigating circumstances connected with the crime; previous good character; age of the offender; etc. Ex Parte United States, 242 U.S. 27 (1916). In contrast, the New York Court of Appeals (in an opinion written 22 years before Ex Parte United States was decided) clearly indicated that the inherent power to suspend sentence meant the power to permanently suspend sentence for any reason that appeals to the judicial discretion. People ex rel. Forsyth v. Court of Sessions, supra.

The Court of Appeals, in the Forsyth case, stated that the practice of suspending sentence "had its origin in the hardships resulting from peculiar rules of criminal procedure, when the court had no power to grant a new

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59. The opinion in the Forsyth case only mentions the power of a court of record but it has been held that the power also belongs to a court that is not a court of record. People ex rel. Dunnigan v. Webster, 14 Misc. 617 (S. Ct. Monroe Co. 1895), aff'd mem. 1 App. Div. 631; Cf., Matter of Hogan v. N.Y. Supreme Court, 295 N.Y. 92 (1946).

trial, either upon the same or additional evidence, and the verdict was not reviewable on the facts by any higher court" (id., p. 293), and the United States Supreme Court agreed with this. However, the Court of Appeals, quoting from Hale's Pleas of the Crown, where (according to the Court) it is stated that the practice also was employed "when favorable or extenuating circumstances appear and when youths are convicted of their first offense" reached the conclusion that the common law power to suspend sentence included the power to permanently suspend when the court found "favorable or extenuating circumstances" not necessarily connected with the legality of the conviction.

The United States Supreme Court (in Ex Parte United States) claimed that the quotation from Hale's Pleas of the Crown relied upon by the New York Court of Appeals was not accurate, and that the above quoted language does not appear therein. The Supreme Court stated, that in its opinion, the origin of the practice and the history of its use in England proved that suspension of sentence or suspension of the execution of judgment was employed for only two reasons: (1) "on grounds of error or miscarriage of justice which, under our system, would be corrected either by new trials or by the exercise of the power to review;" and (2) as a temporary measure to grant time for the purpose of enabling a pardon to be sought or bestowed (id., p. 44). The Court then said:

> "But neither of these conditions serve to convert the mere exercise of a judicial discretion to temporarily suspend for the accomplishment of a purpose contemplated by law into the existence of an arbitrary judicial power to permanently refuse to enforce the law." (ibid.)

It is interesting to note that while the Supreme Court discussed the power to suspend sentence or the

execution of sentence (the case actually involved suspended execution), the Court of Appeals discussed only the power to suspend sentence. This is significant, because the Second Department has held that the broad inherent power mentioned in the Forsyth decision does not extend to suspension of execution. People ex rel. Hirshberg v. Seeger, 179 App. Div. 792 (2d Dept. 1917), appeal dismissed, 223 N.Y. 659. However, the two powers have now become so commingled that courts no longer seem to recognize any distinction between them. See People v. Oskroba, 305 N.Y. 113, 117 (1953); Ex Parte Kuney, 168 Misc. 285 (S. Ct. N.Y. Co. 1938), aff'd mem., 280 N.Y. 794.

The Constitutional Problem

The United States Supreme Court's decision that the federal courts do not have inherent power to base a suspended sentence or suspended execution upon considerations extraneous to the legality of the conviction was not, however, based upon its interpretation of the powers of courts under the common law of England: it was based upon the distribution of powers under the United States Constitution. The Court held that any power of the federal judiciary to permanently suspend sentence or the execution thereof (i.e., to permanently refuse to impose punishment) upon considerations extraneous to the legality of the conviction would infringe upon the power of the legislative branch of the federal government to define and fix the punishment for crime "which includes the right in advance to bring within judicial discretion for the purpose of executing the statute elements of consideration which would be otherwise beyond the scope of judicial authority" (id., p. 42). Moreover, since Congress had not provided the federal courts with the

right to exercise judicial discretion to permanently relieve from punishment based upon elements extraneous to the legality of the conviction, the Supreme Court held that the judicial exercise of this power would also infringe upon the powers of the executive department; because, as stated by the Court, "the right to relieve from punishment fixed by law and ascertained according to the methods by it [the legislative branch] provided, belongs to the executive department" (ibid.). It might be noted, in this connection, that the Supreme Court recommended that Congress consider the problem and deal with it by appropriate legislation.

With respect to the New York State Constitution, since the New York Court of Appeals has stated (in the Forsyth case) that the power to suspend sentence on any ground that appeals to the judicial discretion is part of the inherent power of the judiciary, it seems clear that the exercise of the power, when based upon considerations extraneous to the legality of the conviction would not infringe upon the power of the legislative branch to set the standards for punishment; or, as a result, infringe upon the power of the executive branch to relieve from punishment fixed by law.

However, it should be noted, that the Court of Appeals did not have to rule on this question. The issue before the Court was whether a statute which "confirmed" the judiciary's right to base a suspended sentence upon considerations extraneous to the legality of the conviction was an unconstitutional invasion of the pardoning power of the executive. And the Court's remarks were made in the course of upholding this statute. (The appeal for legislation by the United States Supreme Court in Ex Parte United States is a clear indication that the Supreme Court would have arrived at the same conclusion.)

The Forsyth opinion also contained a word of caution to the legislature about its power to deal with suspended sentences. The statute therein involved (L. 1893, Ch. 279) provided that the court "may, in its descretion, suspend sentence, during the good behavior of the person convicted, where the maximum term of imprisonment prescribed by law does not exceed ten years, and such person has never before been convicted of a felony." Although the Court did not seem troubled by the fact that the legislature was limiting the number of situations in which this inherent power of the judiciary could be exercised, it was troubled by fact that the legislature had said that sentence could be suspended "during the good behavior of the person convicted". The Court was concerned that this language might be read as expressing a condition which, if complied with, would preclude the trial court from revoking the suspension. The Court wanted it to be clearly understood that the legislature lacked the power to tie the hands of the judiciary in this fashion and stated (p. 296):

> "The power to suspend judgment during good behavior, if understood as expressing a condition, upon the compliance with which the offender would be absolutely relieved from all punishment and freed from the power of the court to pass sentence, is open to more doubt. The legislature cannot authorize the courts to abdicate their own powers and duties or to tie their own hands in such a way that after sentence has been suspended they cannot, when deemed proper, and in the interest of justice, inflict the proper punishment in the exercise of a sound discretion. Nor can the free and untrammeled exercise of this power or the right to pass sentence according to the discretion of the court be made dependent upon compliance with some condition that would require the court to try a question of fact before it could render the judgment which the law prescribes. The statute must not be understood as conferring any new power. The court may suspend sentence as before, but it can do nothing to preclude itself or its successor from passing the proper sentence whenever such a course appears to be proper."

Statutory Power to Suspend Sentence or the Execution of Judgment

Penal Law section 2188 presently provides that any court authorized to impose sentence may suspend sentence or impose sentence and suspend the execution of judgment.[60] But this power to suspend does not extend to all cases. The statute specifies the following situations in which the court cannot do so:

(a) Where the offender is convicted of a crime punishable by death or life imprisonment. This includes crimes punishable by an indeterminate term having a minimum of not less than a specified number of years and a maximum of life (see pp. 8-9 and footnote 6, supra); but does not include crimes punishable by an indeterminate term of one day to life;

(b) Where the defendant is a fourth felony offender under Penal Law section 1942;

(c) Where the defendant is convicted of a felony committed while armed with a weapon, as provided in Penal Law section 1944. And this applies even where the court does not impose the additional

Can't sentence to Clinics & then suspend execution

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60. There is no indication in any of the statutes as to whether the court can impose a twofold judgment (fine and imprisonment) for one crime and then suspend execution of one part (either the fine or the imprisonment). However, in view of the fact that in the year 1925 Penal Law §2188 was amended (L. 1925, Ch. 276) to eliminate the words "of the whole or a part" from the declaration of the court's power to suspend execution of judgment, it seems fairly clear that such action would be improper.

punishment prescribed by section 1944 (see p. 14, supra);

(d). Where the defendant is convicted of a third narcotic felony under Penal Law section 1941, subd. 2.

Although section 2188 does not prescribe any standards for the exercise of the discretionary power to suspend sentence or execution of judgment, the section does set up certain procedural prerequisites where a felony is involved. In such a case, before the court suspends sentence or the execution of judgment, it must obtain, consider and file a written report containing details of the circumstances of the crime; the prior criminal record of the offender; the offender's social history; and, "a physical, mental or psychiatric examination if any." Also, the district attorney must be given an opportunity to be heard and the court "shall enter in the minutes the reasons for such action." In addition, if the defendant has been found guilty of one of the violent sex crimes punishable by a term of one day to life (see pp. 20-21, supra) the court must obtain, consider and file a special psychiatric report, made in accordance with a specified procedure, before suspending sentence or the execution of judgment.

Where the court suspends sentence or execution of judgment, it may do so with or without a condition attached. For example, the court may simply grant the favor and suspend sentence or execution of judgment, or it may impose sentence and suspend execution upon condition that the offender perform some act (which condition the offender is free to accept or reject). Code of Cr. Proc., §483; People ex rel. Woodin v. Ottaway, 247 N.Y. 493 (1928).

Time When Power May Be Exercised

The court may suspend sentence or execution of judgment at any time. But where the court has pronounced a judgment prescribing a term of imprisonment, the imprisonment directed by that judgment cannot be suspended or interrupted after it has commenced. Penal Law, §2188; Code of Cr. Proc., §470-a.

Thus, the court cannot change the judgment or suspend execution of it after the convict has been delivered to the place of imprisonment, and has commenced service of the term, specified therein. Nor can the court reserve the power to change the judgment, or provide in advance that execution of the judgment will be suspended, after the offender has served a certain number of years under it. People ex rel. Paris v. Hunt, 201 App. Div. 573 (3d Dept. 1922), aff'd mem., 234 N.Y. 558; People ex rel. Holton v. Hunt, 217 App. Div. 428 (3d Dept. 1926). Moreover, even where the judgment subsequently is vacated because the offender was not sentenced in compliance with the multiple offender statutes (Penal Law, §1943), the court cannot suspend the new sentence or execution of the new judgment if the offender has served time under the old one. (People v. Von Glahn, 308 N.Y. 662 [1954]; Matter of Moore v. Thorn, 245 App. Div. 180 [4th Dept. 1935], aff'd mem., 270 N.Y. 502): and the rationale behind this rule could well cover any case where an invalid judgment is vacated.[61]

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61. In Matter of Moore v. Thorn (cited in text) the Appellate Division based its holding upon the fact that Penal Law, §1943, which governs the procedure for resentencing a person as a multiple offender, requires the court to deduct "from the new sentence all time actually served on the sentence so vacated." The Court reasoned that this required it "to consider the prior confinement... to which the prisoner was subjected under his original
(Continued on p. 89)

However, where consecutive sentences are imposed, the court can suspend execution of any term of imprisonment that has not yet commenced, notwithstanding the fact that the offender is incarcerated and serving a prior term. People v. Flynn, 33 Misc. 2d 157 (Gen. Sess. 1962); People v. Thuna, 266 App. Div. 223 (2d Dept. 1943) (dictum).

Sentence also can be suspended by an intermediate appellate court (but not the Court of Appeals) on an appeal from a judgment. These courts have discretionary power to reduce the sentence to the lightest term the trial court might have imposed (Code of Cr. Proc., §543) and this includes the power to suspend sentence or the execution of judgment (also the power to place the offender on probation) even where the offender has started to serve the term. People v. Zuckerman, 5 N.Y. 2d 401 (1959); People v. Silver, 10 App. Div. 2d 274 (1st Dept. 1960).

Probation

In New York State probation is primarily a local court function which is coordinated, supervised and aided (financially and otherwise) by the state government. In other words, the individual courts employ and supervise their own probation officers and the Division of Probation in the State Department of Correction oversees the whole

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61. (Continued from p. 88)
sentence, as a part of his imprisonment under the corrected sentence" (245 App. Div. 180, 183-184) and, hence, the prisoner already had commenced service of the corrected sentence. In 1960 the legislature added an additional provision making it mandatory, in any case "where a judgment of conviction is vacated and a new sentence is thereafter imposed with respect to the same crime," to deduct from and credit to the term of the sentence subsequently imposed, "any time spent by a person under the original sentence" (Penal Law, §2193, subd. 4). Although there do not seem to be any cases in point, it seems quite possible that this new statute opens the door to applying the rationale of the Thorn case in situations that do not involve multiple offenders.

system (Correction Law, §§14-14f; Code of Cr. Proc., Title 9, Part 6, §927 et seq.)[62]

The functions of a probation officer are twofold: (1) to make a pre-sentencing investigation and report for the court as to the circumstances of the crime, and the background and physical and mental condition of the offender; and (2) to supervise persons who are granted a suspended sentence or suspended execution of judgment and placed on probation.

When the court suspends sentence or execution of judgment, it is not compelled to place the offender on probation: it may just suspend sentence or execution and let the matter go at that. See Ex Parte Kuney, 168 Misc. 285 (S. Ct. N.Y. Co. 1938), aff'd mem., 280 N.Y. 794. However, where the court believes the offender can benefit from supervision by a probation officer, or wants to keep close track of him, the court--when it suspends sentence or execution of judgment--can place the offender on probation; i.e., under the supervision of a probation officer. Penal Law, §2188; Code of Cr. Proc., §483. (Before placing a non felon on probation, the court must have and file a pre-sentencing report, similar to the one required in the case of a suspended sentence on a felony [described, supra, p. 87]).

When the court places the offender on probation, it determines the terms and conditions of probation--which it can subsequently modify or expand (Code of Cr. Proc., §932)--and, thereafter, the probation officer assumes supervision (id., §936).

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62. It is anticipated that a complete study of the probation system will be made shortly.

The period of probation is fixed by the court, but is subject to certain limitations. Code of Cr. Proc., §933, N.Y.C. Cr. Ct. Act, §44. In the case of an offense less than felony, the period cannot exceed 3 years. (The offense of Disorderly Conduct is subject to a special limitation of 2 years [Penal Law, §723].) In the case of a felony, probation cannot extend beyond the maximum time for which the offender might have been sentenced (except for abandonment, where the probation may continue until the 17th birthday of the youngest child). If the offender is a minor, the probation cannot extend beyond his minority (Code of Cr. Proc., §933) and where juvenile delinquency is involved, the probation cannot exceed 2 years (1 year in the case of a person "adjudicated in need of supervision"), but can be extended for an additional year under "exceptional circumstances " (Family Court Act, §757). Where the court does not specifically fix the period of probation, it will be assumed that the probation continues for the maximum period. See People ex rel. Valiant v. Patton, 221 N.Y. 409 (1917).

If the court fixes a period of probation which is less than the maximum, the court can, at any time during that period, expand it to the maximum (Code of Cr. Proc., §932; Penal Law, §2188);[63] and, if a probationer absconds, or is convicted and incarcerated for a crime during the probation

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63. There may be some question as to whether the court can do this in the case of an offense less than felony, at a time which is within the 3 year period, but not within the longest term for which the defendant might have been sentenced. Section 932 of the Code states that "the court may at any time...enlarge the...period of probation as to any probationer." But Penal Law, §2188 states: "The court from time to time while the defendant is on probation, may extend the period of probation to a date fixed in the order, but within the longest period for which the defendant might have been sentenced upon conviction."

period, the time which he remains away or the time he is incarcerated may be added to the period of probation. The court may also, and at any time, terminate the probation and discharge the probationer.

It might be noted that where the judgment of the court is that the offender pay a fine and be imprisoned until it is paid, if the court suspends execution of the judgment and places the offender on probation, the judgment is considered satisfied and the probation terminates when the fine is paid. (Code of Cr. Proc., §483, subd. 2)

Revocation

Where the offender is not on probation the court may, at any time during the longest period for which the offender could have been sentenced, revoke a suspended sentence or revoke the suspension of execution, and "impose any sentence or make any commitment which might have been imposed at the time of the conviction" (Code of Cr. Proc., §470-a; Penal Law, §2188). After the expiration of the longest period for which the offender could have been sentenced, the court is powerless to revoke the suspension, even if proceedings to do so were commenced prior to the expiration of the period. See People ex rel. Berman v. Marsden, 3 App. Div. 2d 980 (4th Dept. 1957); People v. Kastel, 172 Misc. 784 (Co. Ct. Mont. Co. 1939). However, if the offender is convicted of another crime before the period expires, the suspension may be revoked after the expiration of the period. Code of Cr. Proc., §470-a (the statute does not say how long after the expiration).

Where the offender is on probation, revocation of the suspension can be made at any time during the period of probation (ibid.). Hence, if the period of probation exceeds the longest term for which the defendant might have been

sentenced (as it could in the case of a misdemeanor), the defendant can be sentenced during the period of probation, notwithstanding the fact that the longest term for which he could have been sentenced has expired (Code of Cr. Proc., §470-a). And if the period of probation (including any extension) is less than the longest term for which the defendant might have been sentenced, the defendant cannot be sentenced after probation has terminated, even though the longest term for which he could have been sentenced has not expired (Code of Cr. Proc., §483; People ex rel. Spiegel v. McCann, 236 App. Div. 146 [1st Dept. 1932], aff'd mem., 261 N.Y. 606).

When the court imposes the sentence it is not compelled to take into account any time the offender has spent on probation, or the lapse of time between the date sentence was suspended and the date it is imposed: the court can impose any sentence it could have imposed at the time of the conviction. See e.g., People ex rel. Schurman v. Ashworth, 9 Misc. 2d 448 (S. Ct. Bronx Co. 1945); People ex rel. Pringle v. Livingston, 135 Misc. 475 (S. Ct. Onondaga Co. 1930). Moreover, the court, if it has imposed sentence and suspended the execution of judgment, is not bound by the previous sentence, but may revoke it and impose a different sentence. Code of Cr. Proc., §470-a; Nunz v. Monroe County Court, 5 Misc. 2d 592 (Monroe Co. Ct. 1956).

In the case of an offender on probation, the probation must, of course, be revoked before the new sentence can be imposed. However, before the court can revoke probation, it must arraign the offender on the probation violation and give him an opportunity to be heard (Code of Cr. Proc., §935). This does not mean the probationer is entitled to a full scale trial, or that any formal procedure

must be followed; it merely means "notice to the probationer of the violation charged, with an opportunity to attack or deny the charge." People v. Oskroba, 305 N.Y. 113 (1953). The court is not accountable as it would be if it had to try a question of fact (People ex rel. Forsyth v. Court of Sessions, supra); but only for an abuse of discretion (People v. Oskroba, supra).

There does not seem to be any statute granting a non probationer a chance to be heard before suspension is revoked; but it has been held that a hearing, in such a case, is "in keeping with our traditional spirit of fair play which the law reflects" (People ex rel. Goldberg v. Sheriff of Suffolk Co., 206 Misc. 820 [Co. Ct. Suffolk Co. 1954]) and, prior to the statute that imposed the requirement for a hearing on revocation of probation (L. 1928, Ch. 640), it was held that denial of a hearing on revocation "violates elementary principles of criminal jurisprudence, and makes the statutory provision designed to be humane and reformatory authority for arbitrary imprisonment unknown to our laws, and can only leave a rankling injustice in the mind of the defendant" (People ex rel. Stumpf v. Craig, 79 Misc. 98, (S. Ct. Monroe Co. 1913).

Suspended Sentence or Suspended Execution of Judgment as a Conviction

When a person is "convicted" of a crime, he becomes subject to certain indirect consequences; such as disabilities, disqualifications, forfeitures and exposure to increased punishment upon a subsequent conviction. However, the term "conviction" has more than one meaning in the criminal law: it sometimes is used to mean the verdict and sometimes used to mean the adjudication of guilt that is embodied in the judgment of the court. See People v.

Fabian, 192 N.Y. 443 (1908). Now it certainly would not seem right to say that a person has been "convicted" and should suffer the indirect consequences that follow upon "conviction" merely because a jury has found him guilty, if the court never has pronounced a judgment adjudicating his guilt. Because until there is an adjudication by the court, the defendant has no right of appeal (People v. Cioffi, 1 N.Y. 2d 70 [1956]) and because there are ways in which the verdict or the legality of the entire proceeding can be attacked before, or at the time, the defendant appears for judgment (Cf. Matter of Richetti v. New York State Board of Parole, 300 N.Y. 357 [1950]; and see list of remedies in footnote 65 [infra, p.96]). Therefore, where indirect consequences are involved, the meaning of the word convicted ought to presuppose a judgment of conviction. But, it usually is said that the sentence is the judgment of the court, and that where sentence or the execution of judgment is suspended there is no judgment (see e.g. People v. Shaw, 1 N.Y. 2d 30 [1956]). Thus, there is a problem as to whether a suspended sentence or suspended execution of judgment--which today is no different from a judgment insofar as the offender's legal remedies are concerned, but is not a judgment in the true sense of the word--means that the person has been "convicted" within the meaning of the statutes that impose the aforesaid indirect consequences.

It seems anachronous and not in keeping with the present state of the law to say that where there is a suspended sentence or suspended execution, there has been no judgment: especially if it is said in an attempt to show that the defendant's guilt has not been finally adjudicated. This would clearly be a carryover from the days when the only way to correct an error or miscarriage of justice was to

suspend sentence or execution of judgment.[64] In those days a suspended sentence meant that the defendant had not had a fair trial or that there was a legal defect in the proceedings, and it was quite logical to say that there was no judgment of conviction, and, ergo, no adjudication of guilt. Also, even if the Court of Appeals' interpretation of the common law practice of suspending sentence or execution of judgment (Matter of Forsyth v. Court of Sessions, supra) be accepted in preference to the narrower interpretation by the United States Supreme Court (Ex Parte United States, supra), it still would be logical to say that there was no judgment of conviction, because one could not tell whether the suspension stemmed from a legal error or a miscarriage of justice, or stemmed from extenuating circumstances that warranted relief from punishment.

Today, however, when the defendant has an arsenal of remedies for legal errors and miscarriages of justice[65] and the sole reason for suspending sentence or judgment is some factor extraneous to the legality of the conviction, there seems to be no justification for saying that there is no judgment of conviction and, ergo, no adjudication of guilt in a case where sentence or execution has been suspended. This becomes even clearer when one realizes that the sentencing procedure is precisely the same--including the right to appeal (Code of Cr. Proc., §517, subd. 3)--

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64. The opinions in Matter of Forsyth v. Court of Sessions and Ex Parte United States discussed, supra (pp. 81-83) contain detailed explanations of the origin of the practice of suspending sentence or execution of judgment.

65. For example: motion for a new trial (Code of Cr. Proc., §§462-466); motion in arrest of judgment (id., §§467-470); opportunity to show cause against the judgment (id., §§480-481); certificate of reasonable doubt (id., §§527-528); and, appeal (id., §517).

whether the court pronounces sentence, suspends sentence, or pronounces sentence and suspends execution, and that "it is incumbent upon the Court...to pronounce judgment, either to sentence the defendant to a term in prison or to suspend sentence or to impose a sentence and suspend its execution" (emphasis supplied). Matter of Hogan v. Bohan, 305 N.Y. 110, 113 (1953)[66]

Moreover, this principle long ago received statutory recognition in the provision which makes a suspended sentence or suspended execution of sentence "a conviction for the purpose of affecting theweight of the defendant's testimony in any action or proceeding, civil or criminal." (Code of Cr. Proc., §470-b).

Thus, it seems that it is more logical to regard the suspended sentence or execution of sentence as at least an adjudication of guilt, and, for this purpose, as a judgment of conviction. In this connection, it might be noted that the judgment itself actually enbraces two things: "the judgment enbraces the adjudication of guilt of the crime charged and the penalty imposed or sentence" People ex rel. Emanuel v. McMann, 7 N. Y. 2d 342 (1960); People v. Sullivan, 3 N. Y. 2d 196, 198 (1957).

Therefore, it is only natural to find that today - although courts still say and in some cases hold that a suspended sentence or suspended execution of judgment is not a judgment of conviction - courts are quite willing, in many situations, to hold that a person who has received a suspended sentence

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66. The deferred sentence (which is improper) is now roughly analogous to what a suspended sentence was before the suspended sentence was considered as a judgment for the purpose of the various methods of correcting error. Thus it is revealing that the Court of Appeals has refused to recognize a deferred sentence as a conviction in a situation where it would recognize a suspended sentence as a conviction. Matter of Richetti v. New York State Board of Parole, 300 N. Y. 357 (1950).

or suspended execution of judgment has been "convicted" and must suffer the indirect consequences thereof (see, <u>infra,</u> pp. 99-100).

One of the germinal opinions in this area was written by the Court of Appeals in <u>People</u> v. <u>Fabian</u>, 192 N. Y. 443 (1908). The opinion in that case first pointed out that the words "conviction" and "convicted" have a dual meaning and may be employed to refer to either the verdict or the judgment. The Court then reasoned that since the term "conviction"has "varying meanings," the answer to the question of whether a conviction presupposes a sentence - or, in other words, a judgment - must be ascertained by an inquiry, in each instance, as to what was intended by the legislature when it used the term "conviction."

But the Court did not then hold that a suspended sentence was a conviction for the purpose therein involved. The Court held that in the case of a statute mandating disfranchisement upon conviction of a felony, the legislature meant only "a conviction in the more comprehensive sense of the term... a judgment based on a verdict of guilty, and that a person is not convicted within the meaning of the Constitution [disfranchisement provision] or the statutes enacted in pursuance thereof against whom sentence has been suspended after verdict" (<u>id.</u>, p. 453). In so holding, the Court relied heavily upon old precedents, reflecting the aforesaid reasons for not considering a suspended sentence a conviction, and revealed that its concern centered on whether a suspended sentence would afford the defendant an opportunity to attack the legality of the proceedings. In this connection the Court stated: "It would hardly be reasonable to authorize the disfranchisement of a voter

simply because a verdict had been found against him (upon which judgment might have been or might yet be arrested)." (id., p. 448; emphasis supplied).

Since the reasoning in the Fabian case seems to be based, to some extent, upon the Court's reluctance to consider a suspended sentence a final adjudication of guilt, it is understandable that courts today reach a different result when considering other disabilities. Thus, although the language of the Court, with respect to the necessity of a search for legislative intent, became the established rule governing decisions to this day, the judicial presumption adopted by the Court as a guide for interpreting that intent does not seem to have been followed. This presumption, which the Court quoted with approval, from the dissenting opinion below is as follows (id., pp. 449-450):

> "where disabilities, disqualifications and forfeitures are to follow upon a conviction, in the eye of the law, it is that condition [sic] which is evidenced by sentence and judgment; and where sentence is suspended, and so the direct consequences of fine and imprisonment are suspended or postponed temporarily or indefinitely, so, also, the indirect consequences are likewise postponed."

The rule today, when interpreting a statute that imposes a disability, disqualification, or forfeiture upon a person convicted of a crime or offense seems to be to regard a suspended sentence as a conviction. Thus, for example, it has been held that a suspended sentence is a conviction: for the purpose of automatic revocation of the motor vehicle operator's license of a person convicted of a third or subsequent traffic offense (Jones v. Kelly, 9 App. Div. 2d 395 [4th Dept. 1959]); for the purpose of automatically barring from waterfront union positions persons convicted of felony (De Veau v. Braistead, 5 N. Y. 2d 236 [1959]); for the purpose of automatic revocation of a license as a

practitioner of medicine, because of a conviction of felony (Robinson v. Board of Regents of University of N.Y., 4 App. Div. 2d 359 [3d Dept. 1957]); for the purpose of automatic forfeiture of a license to practice dentistry, upon conviction of felony (Matter of Weinrib v. Beier, 294 N. Y. 628 [1945]); and, for the purpose of automatic disbarment, upon conviction of felony (Matter of Sugarman, 237 App. Div. 346 [1st Dept. 1932]).

Additionally, where the degree of a crime is raised to felony because the offender has previously been convicted of the same or another crime, a suspended sentence or suspended execution will count as a conviction. Code of Cr. Proc., §470-b; People v. Goho, 265 App. Div. 1030 (4th Dept. 1943); People v. Duff, 137 Misc. 352 (Gen. Sess. 1930).

With respect to the multiple offender laws, which provide extended prison terms for persons who previously have been convicted, the holdings follow the classic rationale. A prior suspended sentence or suspended execution of judgment is, by statute, declared to be a conviction for the purpose of sentencing a second offender (Code of Cr. Proc., § 470-b, subd. 1). But, apart from this, it does not count as a conviction because it is not a judgment and, thus, cannot be used to sentence someone as a third or fourth offender. People v. Shaw, 1 N. Y. 2d 30 (1956); People ex rel. Marcley v. Lawes, 254 N. Y. 249 (1930); People ex rel. Lozzi v. Fay, 6 App. Div. 2d 18 (2d Dept. 1958), aff'd mem. 5 N. Y. 2d 890.

P. Preiser/pjc/rc/cd
October 12, 1962

G. Fines

A number of the felonies[67] and most of the misdemeanors and offenses in the Penal Law are punishable by a fine which may be imposed in addition to or in lieu of a term of imprisonment. The amounts of the fines vary over a wide range but do not vary in proportion to the grade of the offense or the prison term prescribed (see pp. 104-109, infra). This seems to be the result of two factors: (1) the fines were established at different times and, therefore, reflect different dollar values; and (2) the Legislature seems to have relied to a greater extent upon large fines as a deterrent for crimes that may occur in the operation of an otherwise legitimate business (usually misdemeanors, or felonies punishable by relatively short sentences) than it has for other crimes.

Amount of the Fine

The amount of the fine that can be prescribed by the Legislature and imposed by a court is limited by the New York constitutional provision that (Art. 1, §5):

> "Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishment be inflicted, nor shall witnesses be unreasonably detained."

But there seems to be a paucity of precedent in this State on the subject of what is or is not an "excessive"

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67. It is interesting to note thst many felonies are not punishable by fine. E.g., Abortion (§§80, 81); Arson (§224); Assault, 1st Deg. (§241); Bigamy (§340); Burglary (§407); Carnal abuse of a child (§483-a); Sodomy (§690); Dueling (§731); Eavesdropping (§740); Illegal voting (§765); Extortion (§852); Forgery (§§886, 888, 893); Operating a policy business (§974-a); Murder, 1st Deg. (§§1045, 1045-a); Murder, 2d Deg. (§1048); Manslaughter, 1st Deg. (§1051); Compulsory prostitution of wife (§1090); Incest (§1110); Kidnapping (§1250); Grand Larceny (§§1295, 1297); Lynching and Mob Violence (§§1391, 1392); Maiming (§1400); Certain types of Malicious Mischief (§§1420, 1420-a, 1422); Narcotic violations (§1751); Rape (§2010); Robbery (§§2125, 2127, 2129).

fine. And, according to Corpus Juris Secundum, courts generally are circumspect in their treatment of the subject (24B C.J.S., p. 557):

> "The courts are reluctant to say that the legislature has exceeded its power in authorizing excessive fines, and as a general rule will not do so except in a very clear case; and, therefore, the widest latitude should be given to the discretion and judgment of the legislature in determining the amount necessary to accomplish the object and purpose it has in view.
>
> In determining whether a fine authorized by statute is excessive in the constitutional sense, due regard must be had to the object designed to be accomplished, to the importance and magnitude of the public interest sought to be protected, to the circumstances and the nature of the act for which it is imposed, and in some instances to the ability of the accused to pay, although the mere fact that in a particular case accused is unable to pay the fine required to be assessed does not render the statute unconstitutional."[68]

Under our present statutory structure the court's discretion as to the amount of the fine to be imposed is limited by legislatively prescribed standards which have been separately provided for individual crimes. These standards fall into four basic categories:

(a) Those that merely prescribe the dollar amount of the maximum fine that can be imposed (e.g., Penal Law, §1935);

(b) Those that prescribe only the dollar amount of the minimum fine that can be imposed (e.g., Penal Law, §1275 [3d offenders]);

(c) Those that prescribe the dollar amounts of both the minimum and the maximum fine

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68. This latter proposition; i.e., that the inability of the accused to pay the fine does not mean that the fine is excessive or the statute unconstitutional, is supported by authority in this State. People v. Watson, 204 Misc. 467 (Gen. Sess. 1953); In re Baker, 183 Misc. 113 (Schoharie Co. Ct. 1944); People v. Kelly, 32 Misc. 319 (Gen. Sess. 1900).

that can be imposed (e.g., Penal Law, §§1141, 1867, 2142); and

(d) Those that prescribe fines geared to the value of the fruits of the crime: i.e., a multiple of the value of the fruits of the crime (e.g., Penal Law, §§460, 932, 934, 1864).

The fines range anywhere from a maximum of five dollars (offenses against railroad property, Penal Law, §1990) to a maximum of ten thousand dollars (e.g., Bribery of participants in sporting contests, Penal Law, §382 [felony]; Failing to pay wages of employees, id., §1272 [misdemeanor]). And, where corporations are convicted, a maximum of twenty thousand dollars (Conspiracies to prevent competitive bidding on public contracts, id., §581-a [misdemeanor]).[69]

Although, as indicated above, the Legislature generally has prescribed separate standards for each of the crimes punishable by a fine, there are certain catchall standards applicable to crimes for which no other punishment is specifically prescribed. Thus, a person convicted of a felony for which no other punishment is specially prescribed may (in addition to or in lieu of imprisonment) be fined not more than one thousand dollars. Penal Law, §1935. A person convicted of a misdemeanor for which no other punishment is specially prescribed may (in addition to or in lieu of imprisonment) be fined not more than five hundred dollars. Id., §1937. A person convicted as an accessory to a felony

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69. There also are some substantial fines prescribed in other chapters of the Consolidated Laws. For example, violation of the state anti-trust law--a misdemeanor--is punishable by a maximum fine of twenty thousand dollars, for individuals, and fifty thousand dollars for corporations (General Business Law, §341).

may be fined not more than five hundred dollars (in addition to or in lieu of imprisonment). Id., §1934. Where a person is convicted of a crime punishable by an unspecified fine, a fine of not more than five hundred dollars may be imposed. Id., §36.[70] And, attempts are punishable by a fine not more than one-half the largest sum prescribed upon a conviction for the offense attempted (in addition to or in lieu of imprisonment). Id., §261. Where "a corporation is convicted of an offense for the commission of which a natural person would be punishable with imprisonment, as for a felony, such corporation is punishable by a fine of not more than five thousand dollars." Id., §1932.

The following list provides a sampling of the present schedule of fines for the various crimes and an indication--for the purpose of comparison--of the maximum prison or jail term applicable to each. Unless otherwise indicated the fines may be imposed in addition to or in lieu of the prison or jail term.

Crime and Maximum Prison or Jail Term	Fine	
	Maximum	Minimum
Abduction (§70) - 10 years	$1,000	None*
Adultery (§102) - 6 months	$250	None
Instigating fights between animals (§182) 10 days (min.) 1 year (max.)	$1,000	$10

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70. This section could well be interpreted as providing a limitation on the maximum amount of the fine that can be imposed in a case where the Legislature has merely provided for the minimum fine (as in category "(b)", supra, p. 102). The section reads:

> "§36 Limit of fine where statute does not specify amount.
>
> "Where in this chapter, or in any other statute making any crime punishable by a fine, the amount of the fine is not specified, a fine of not more than five hundred dollars may be imposed."

*None = none specifically prescribed; i.e., any amount less than stated maximum

Crime and Maximum Prison or Jail Term (Continued)	Fine Maximum	Fine Minimum
Auctioneer selling disabled horses - 6 months (§188-a)	$100	$5
Assault 2d Deg. - 5 years (§243)	$1,000	None
Corporations and voluntary associations practicing law (§280). Officers, etc., punishable as for a misdemeanor	$5,000 (corporation)	None
Receiving deposits over $25 in insolvent bank (§295) 1 year (min.) 5 years (max.)	$3,000	$500
False statements or rumors as to banking institutions (§303 - misdemeanor) - 1 year	$1,000	None
Bribery of a judicial officer (§371) - 10 years	$5,000	None
Bribery of participants in sports contests (§382) 1 year (min.) 10 years (max.)	$10,000	None
Participant in sports contest who solicits or accepts bribe (§382) 1 year (min.) 5 years (max.)	$10,000	None
Coercion by employers - 6 months (§531)	$200	None
Conspiracies to prevent competitive bidding on public contracts - 1 year (§581-a)	$5,000 (natural person)	None
	$20,000 (corporation)	None
Fraudulent issue of stocks and bonds (§662) - 7 years	$3,000	None
Officer or director of a corporation who issues stock beyond amount authorized or sells shares he does not own (§664, subds. 6, 7) 6 months (min.) 1 year (max.)	$5,000	None
Misconduct of officers and agents of pipe-line corporations - 6 months (§669)	$1,000	None
Violation of election law by public officer or employee (§763) - 3 years	$3,000	None
Election misdemeanors (§782) - 1 year	$500	$100

Crime and Maximum Prison or Jail Term (Continued)	Fine Maximum	Fine Minimum
Agreements or contracts for privileges to deal with occupants of tenements, apartment houses or bungalow colonies (§861) 30 days (min.) 1 year (max.)	$100 (natural person)	$10
	$1,000 (corporation)	$50
Having possession of counterfeit coin (§894) - 5 years	$500	None
Advertising counterfeit money and stamps (§895) 1 year (min.) 5 years (max.)	$1,000	$100
Using false name or address in connection with advertising counterfeit money or stamps (§895) 1 year (min.) 5 years (max.)	$2,000	$100
False rumors as to stocks, bonds or public funds (§926) - 3 years	$5,000	None
Reproduction or forgery of archeological objects (§959) - 90 days	$200	$25
Fraudulent disposition of property subject to lease or hire - 1 year (§960 - misd.)	$1,000	None
Punishment for second and third convictions of gambling (§998) - misdemeanors 10 days (min.) 1 year (max.) - 2d offense	$500	None
30 days (min.) 1 year max.) - subsequent	$1,000	None
Hazing (§1030 - misd.) 30 days (min.) 1 year (max.)	$100	$10
Manslaughter, 2d deg. - 15 years (§1053)	$1,000	None
Criminal negligence resulting in death (§§1053a - 1053f) - 5 years	$1,000	None
Obscene prints and articles (§1141, subds. 1, 2) -		
1st offense 10 days (min.) 1 year (max.)	$2,000	$150
2nd offense 30 days (min.) 1 year (max.)	$3,000	$250
3rd offense 6 months (min.) 3 years (max.)	$5,000	None
Advertisements relating to certain diseases (§1142-a) - 6 months	$500	$50
Destroying property insured - 5 years (§1201)	$500	None

Crime and Maximum Prison or Jail Term (Continued)	Fine Maximum	Fine Minimum
Refusal to admit inspector to mines, etc., or failure to comply with requirements of inspector (§1270 - misd.) 30 days (min.) 1 year (max.)	None (see footnote 70, *supra*)	$50
Failure to pay wages of employees in accordance with provisions of labor law (§1272 - misd.) - 1 year	$10,000	$100
Violations of provisions of labor law; industrial code; etc. (§1275 - misd.)		
1st offense - no jail term	$100	None
2nd offense - 30 days	$500	$100
Subsequent - 60 days	None (see footnote 70, *supra*)	$300
Bribery of members of the Legislature (§1327) - 10 years	$5,000	None
Perjury 1st deg. & subornation of perjury 1st deg. (§1633) - 5 years	$5,000	None
Wilful violation of health laws (§1740, subd. 2) - 1 year	$2,000	None
Re-confining persons discharged upon writ (§1788) - 6 months	$1,000	None
Taking unlawful fees - 10 years (§1826)	$4,000	None
Auditing and paying fraudulent claims upon the state or a municipal corporation - 5 years (§1863)	$5,000	None
Misappropriation by county treasurer (§1867) 1 year (min.) 5 years (max.)	$10,000	$500
Injury to public record - 5 years (§2050)	$500	None
Stealing, destruction, mutilation or concealment of testamentary instrument (§2052) - 5 years	$1,000	None
Seduction (§2175) - 5 years	$1,000	None
Prostitution of women (§2460) 2 years (min.) 20 years (max.)	$5,000	None
Receiving proceeds of prostitution of women (§2460, subd. 8) 2 years (min.) 20 years (max.)	$1,000	None

Crime and Maximum Prison or Jail Term (Continued)	Fine Maximum	Fine Minimum
Peddling, begging or loitering on air and bus terminal property (§150 - offense) - 30 days	$10	None
Unauthorized use of marks of New York World's Fair 1964-1965 Corp. (§440-b - offense) - 10 days (alternative, not in addition to fine)	$50	None
Conducting maternity hospital without license (§482, subd. 2 - misd.) - 60 days	$50 (for each day violation continues)	None
Procuring alcoholic beverages for persons under the age of 18 - 5 days (§484-d - offense)	$50	None
Disorderly conduct - 6 months (§723 - offense)	$50	None
Unlawful possession or use of an identification card issued by United Nations (§966 - misd.) - 10 days	$50	None
Unapproved portable kerosene heaters (§1673 - misd.) - 90 days	$100	None
Riding on railway cars; boarding cars in motion, obstructing passage of car; trespassing upon railway tracks (§1990 - offense) no jail term	$5	$1
Peddling, begging or loitering on railway property (§1990-a - offense) - 30 days	$10	None
Wilful violation of the terms of a lease (§2040 - offense) - 6 months	$50	None
Discrimination against children in dwelling houses (§2041 - misd.) no jail term	$100	$50
Sabbath breaking (§2142 - misd.) 1st offense - 5 days	$10	$5
Subsequent offense 5 days (min.) 20 days (max.)	$20	$10
Delivering false bill of lading to canal collector (§460) - 2 years	Fine not exceeding three times the value of the property omitte in such bill.	
Obtaining property by false pretenses (§932) - 3 years	Fine not more than three times the value of the money or proper affected or obtained.	

Crime and Maximum Prison or Jail Term (Continued)	Fine Maximum	Fine Minimum
Fraudulently obtaining property for charitable purposes (§934) 1 year (min.) 3 years (max.)	Fine not exceeding the value of the money or property obtained.	
Conversion of property held in trust or by virtue of office (§1302) punishable as for larceny, plus fine appearing opposite column	Fine not exceeding the value of the property misappropriated or stolen with interest and 20% in addition.	
Obtaining proceeds of fraudulent audit or payment (§1864) 3 years (min.) 5 years (max.)	Fine not exceeding five times the amount or value.	

Enforcement

A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied. Code of Cr. Proc., §§484, 718. The court may merely order that the defendant be imprisoned until the fine is paid, in which case he will remain incarcerated one day for each one dollar of the fine. Or, the court may order that the defendant be imprisoned for a specified time (not to exceed one day for each one dollar of the fine) unless the fine is sooner paid.[71] This period is in addition to any sentence of imprisonment that may be imposed: it commences at the expiration of the prison sentence and the incarceration simply continues at the same prison or jail until the fine is paid or the judgment satisfied. People ex rel. Gately v. Sage, 13 App. Div. 135 (2d Dept. 1897).

The additional period for failure to pay a fine is not the same as a sentence of imprisonment, because duration of

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71. There is an exception to this general rule in Penal Law, §1302 where it is provided that the court can direct that the defendant be imprisoned "for not more than five years in addition to the term of his sentence...unless the fine is sooner paid." In such a case the duration of the enforcement term would not depend upon the amount of the fine.

the confinement is within the prisoner's own control. Thus, for example, the fact that a person might possibly stand committed for more than 27 years if he failed to pay the $10,000 maximum fine prescribed for the misdemeanor set forth in section 1272 of the Penal Law does not mean that this crime is, in fact, a felony: the 27 year period would not be the sentence of the court, but only a method of enforcing the sentence. Matter of McKinney v. Hamilton, 282 N.Y. 393 (1940). Also, although the imprisonment might last for more than one year the prisoner will not be confined in a state prison (unless confinement is to follow upon a state prison term [People ex rel. Gately v. Sage, supra]). Code of Cr. Proc., §488; see Matter of McKinney v. Hamilton, supra.

A commitment to enforce payment of a fine is within the discretion of the court and does not have to be imposed merely because the fine has been imposed. The sentence is valid without the commitment (People ex rel. Sedotto v. Jackson, 307 N.Y. 291 [1954]) and unless the sentence contains a direction for commitment this method of enforcement cannot be employed. People ex rel. Wright v. Redman, 27 Misc. 2d 984 (Sup. Ct. Erie Co. 1960).

However, apart from commitment for nonpayment there does not seem to be any statutory procedure for enforcing a judgment that an individual is to pay a fine. Where corporations are convicted the fine may be collected in the same manner as a judgment in a civil action--i.e., execution (Code of Cr. Proc., §682)--but there is no parallel procedure applicable to individuals.[72] Moreover, there seems to be

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[72]. Article 20 of the Judiciary Law (§§792-796) provides a procedure for execution to collect a fine "imposed by a court of record, upon a grand or trial juror, or upon any officer or other person" but this does not seem to apply to fines imposed in a judgment of conviction. The provisions of Article 20 are substantially the same as the ones adopted in the revised (Continued on page 111)

a conflict among the authorities in this State as to whether the courts have inherent common law power to issue a writ for body (capias pro fine) or property (levari facias) execution to collect a fine imposed in a criminal judgment. Compare Kane v. People, 8 Wend. 203, 215 (Ct. of Errors 1831) with People ex rel. Gately v. Sage, 13 App. Div. 135, 136-137 (2d Dept. 1897) and Conlon v. Lisk, 13 App. Div. 195, 204-205 (2d Dept. 1897).

It might be noted that a court can impose a fine, direct that the defendant be imprisoned until it is paid, and suspend execution of the judgment of imprisonment "on such terms and conditions as it shall determine" (Code of Cr. Proc., §483, subd. 2). This procedure can be used as a device for having the defendant pay the fine at a future date or pay it in installments, while the court retains power to commit him if the conditions are not met.

Additionally, the Criminal Court of the City of New York has the power "to extend time to pay any fine imposed upon a plea of guilty to or a conviction on any charge of a grade less than a misdemeanor." If the defendant does not pay within the extended time, the court may order his arrest (N.Y.C. Cr. Ct. Act, §62).

Power to Remit

Any court of record, except an inferior court of local jurisdiction, which has imposed a fine for any criminal offense, has the power to remit all or part of a fine imposed by it or imposed by an inferior court of local jurisdiction (in the same county). Code of Cr. Proc., §484. In addition,

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(Continued from page 110)
statutes (2 R.S. 484, §22 et seq.) and the revisers' notes indicate that they had submitted a similar procedure to be applied where a fine is imposed in a judgment of conviction. This procedure was not enacted by the Legislature (see 3 R.S. 850 [2d Ed.]).

There is no judicial authority, either way, on the applicability of Article 20 to criminal judgments.

the New York City Criminal Court has the power "to remit a fine imposed by it and in place thereof to substitute in its discretion imprisonment." N.Y.C. Cr. Ct. Act, §33(2).

The power to remit fines is discretionary, but will not be exercised unless it is shown that the fine was arbitrary, unreasonable or excessive; or, unless there are compelling circumstances arising subsequent to the imposition of the fine which convince the court that the remission of the fine will serve the ends of justice. See People v. Watson, 204 Misc. 467 (Gen. Sess. 1953); In re Hershey Farms, Inc., 175 Misc. 641 (Gen. Sess. 1941).

Penalties and Forfeitures

In addition to a term of imprisonment and a fine, some crimes also are punishable by a penalty or forfeiture to be recovered in a civil action. Thus, for example, an attorney who commits an act of misconduct defined by section 273 of the Penal Law forfeits to the party injured treble damages to be recovered in a civil action (in addition to the punishment prescribed for a misdemeanor). Similarly, an embraceor, besides being subject to the punishment prescribed by law, forfeits ten times the sum or ten times the value of that which was taken plus the actual damages sustained to the party aggrieved. Penal Law, §377. Also, in addition to the punishment prescribed for discrimination, every offender is liable to a penalty of not less than $100 nor more than $500, to be recovered by the person aggrieved. Id., §701. A tenant who has purchased products from a dealer that has paid the landlord for the privilege of selling to tenants "may recover of such seller or dealer for his benefit a penalty" of $250 and the seller also is liable to prescribed criminal punishment. Id., §870, subd. 3. A person who knowingly re-commits, for the same cause, any person who has

been discharged upon a writ is liable to specified punishment and, in addition, forfeits to the party aggrieved $1250. Id., §1788. One who persuades another to visit a gambling establishment is guilty of a misdemeanor and in addition to the punishment prescribed therefor, is liable to the other person for losses suffered at play therein. Id., §980. For exacting payment of money won at gambling, the law imposes a forfeiture of five times the value of the payment exacted "to be recovered in a civil action, by the persons charged with the support of the poor"--no other punishment is prescribed. Id., §989. A railroad that refuses to redeem an unused passage ticket forfeits to the aggrieved party $50 to be recovered in a civil action. Id., §1562. A sheriff who violates certain provisions with respect to the care and custody of prisoners "forfeits to the person aggrieved treble damages" and also may be punished for a misdemeanor. Id. §1875. And, a corporation that sends messenger boys to certain prohibited places "is guilty of a misdemeanor, and incurs a penalty of fifty dollars to be recovered by the district attorney"--no other punishment is prescribed. Id., §488.

Most of the penalties and forfeitures prescribed by the Penal Law are recoverable by the persons injured, through a separate civil action. This differs somewhat from the practice with respect to fines, because no separate action or judgment is necessary for a fine: it is imposed as part of the judgment of conviction, and does not, as a rule, redound to the benefit of the person injured by the crime.

However, it should be noted that in certain cases fines can be used for the benefit of or paid by the State to the person injured by the crime.

Thus, a fine imposed upon conviction for abandonment

of a child "may be applied in the discretion of the court to the support of the child." Penal Law, §480. A fine imposed upon a conviction for conversion of property held in trust (a fine not exceeding the value of the property stolen, with interest, plus 20%) must be turned over to the party injured: i.e., the party injured is entitled to receive so much of the fine as does not exceed the value of the property stolen with interest from the date of the commission of the offense, and a reasonable sum to defray the expense of collecting same. Id., §1302. And, a public body injured by a fraudulent audit or payment is entitled to receive the fine imposed upon a public officer who is convicted of the crime. Id., §1864.

H. Special Commitments

In certain cases criminal courts can dispose of charges by committing offenders to special institutions. Such commitments cannot really be called "sentences" but, since the resulting confinement often disposes of the criminal charge, these commitments are relevant to this survey.

Mental Defectives

If a person over the age of 16 is "convicted of a criminal offense" (any grade)[73] and it is determined that he or she is a mental defective, the court, instead of passing sentence in the usual form, may commit the offender to an institution for defective delinquents under the

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[73] This includes a felony, misdemeanor (see e.g., People ex rel. Gaudino v. Superintendent, 263 App. Div. 1042 [3d Dept. 1942]), offense and a charge such as vagrancy (People ex rel. Stolofsky v. Superintendent, 259 N.Y. 115 [1932]).

jurisdiction of the Department of Correction.[74] Correction Law, §§438, 451. This commitment is for an indefinite period of time and continues until the defective is discharged by the superintendent of the institution. Correction Law, §441-a. It is a judgment of conviction[75] and is deemed a final disposition of the offense charged (unless the superintendent of the institution rejects the inmate). Correction Law, §438; People ex rel. Vischi v. Martin, 8 N.Y. 2d 63 (1960).

At first glance, an indefinite commitment that could mean life imprisonment might seem to be an unduly severe method of dealing with a person convicted of a misdemeanor or an offense or even a minor felony. However, it should be noted that the commitment is more in the nature of an involuntary insanity commitment than a sentence. It must be based upon a certificate of mental defect by two examining physicians (or an examining physician and a certified psychologist) showing facts and circumstances to support a conclusion that the defendant is a mental defective and that the defect is of such a nature that commitment is for the offender's own welfare and the welfare of others. Correction

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74. There are two such institutions: one for males and one for females. The institution for male defective delinquents is the "Eastern Correctional Institution" at Napanoch. Correction Law, §430. The institution for female defective delinquents is the "Albion State Training School" at Albion. Id., §450.

75. The statute (Correction Law, §438) provides for the commitment of a person who has been "convicted." Since the commitment itself is the judgment of conviction, the word "convicted" as used in the statute must mean only the plea or verdict (see People ex rel. Vischi v. Martin [cited in text]). However, one court recently has stated that the commitment can only follow upon a sentence and that a person who has not been sentenced cannot be committed under Correction Law §438 because he has not been "convicted" (see People ex rel. Ascencio v. Warden of Women's House of Detention, 28 Misc. 2d 460 [S. Ct. N.Y. Co. 1960]). This decision seems to be erroneous.

Also, the fact that the statute provides for the commitment of a person who has been "convicted" leaves some doubt about whether a wayward minor or youthful offender can be committed to an institution for defective delinquents.

Law, §§438, 444. In addition, habeas corpus is available, at any time, to test the fact of mental defectiveness. Id., §446; see People ex rel. Gaudino v. Supt. etc., 263 App. Div. 1042 (3d Dept. 1942); People ex rel. Romano v. Thayer, 229 App. Div. 687 (3d Dept. 1930).

A person charged with a crime[76] but found to be unable (because of mental defect) to stand trial also may be committed to an institution for defective delinquents. Such a commitment would be under the provisions dealing with insanity and is one of a number of alternatives available to the court in a case where the defendant cannot stand trial. Code of Cr. Proc., §§662-b, 872; Correction Law, §§438, 451. As in the case of a convicted offender, this commitment is for an indefinite time. (A more detailed discussion of insanity commitments is set forth, infra, pp. 122-129.)

The institutions for defective delinquents also receive--by transfer--persons sentenced or committed to other penal or correctional institutions[77] and subsequently found to be mental defectives. Correction Law, §§438, 438-a, 438-b, 439, 451. Thus, a misdemeanant or felon (but not one who has been convicted of murder in the first degree) sentenced to a State or local penal or correctional institution and subsequently found to be a mental defective can be transferred

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76. The term "crime" as used herein does not include an offense and, outside the City of New York, it does not include a misdemeanor cognizable by the local courts of special sessions. Code of Cr. Proc., §873.

77. It might be noted that a patient in a State school for mental defectives (under the jurisdiction of the Department of Mental Hygiene) can be transferred to an institution for defective delinquents if he has committed or is liable to commit a dangerous act. This transfer is upon court order after a proceeding before three commissioners. Certification by this procedure is not a conviction, but the person so transferred is held under the same terms and conditions as persons directly committed. Mental Hygiene Law, §134-a; Correction Law, §438.

from that institution to an institution for defective delinquents. Correction Law, §§438-a, 439, 451. And an offender committed to the Reception Center (see pp. 36-37, supra), whether misdemeanant, felon, juvenile delinquent, youthful offender, wayward minor, petty offender or vagrant also may be transferred to an institution for defective delinquents.[78] Id., §438-b. These transfers are administrative transfers, without court order, but must be based upon a certificate of mental defect as in the case of a direct commitment. The transfer does not affect the term of the sentence, as such.

A person of "borderline normal" or "low normal" intelligence confined in a State correctional institution can be transferred to an institution for defective delinquents, too. This type of transfer is similar to the transfer of a mental defective in that it is an administrative transfer, but different in that it only can be effected from a State institution and it is not based upon a certificate of mental defect. The transfer is pursuant to rules made by the Commissioner of Correction and based upon "appropriate psychometric testing and clinical observation." Transfer does not affect the term of imprisonment in any way. Correction Law, §439-b.

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78. It is interesting to note that the transfer provisions are not coterminous with the commitment provisions. Direct commitment is available without regard to the grade of the offense. Transfer is available only in the case of a crime (excluding murder 1), unless the transfer is from the Reception Center in which case it is available for any offense. (The Reception Center is only for males between the ages of 16 and 21 years and, therefore, the transfer provisions for females are not as broad as the provisions for males.)

It might also be noted that where a male is adjudicated a juvenile delinquent, youthful offender or wayward minor and found to be a mental defective before commitment, he cannot be committed to the Reception Center (Correction Law, §61) and, since he has not been "convicted" of a crime, it seems doubtful that he can be committed to an institution for defective delinquents (see footnote 75, supra). The same reasoning would be applicable in the case of a female. However, if the male is committed to the Reception Center and then found to be a mental defective, there would seem to be no problem.

In connection with administrative transfers to special institutions, it might be noted that in a recent case dealing with the administrative transfer of an allegedly insane prisoner from Attica State Prison to Dannemora State Hospital (for insane prisoners), the Court of Appeals held that habeas corpus was available to challenge the transfer, even though the prisoner's term had not expired. People ex rel. Brown v. Johnston, 9 N.Y. 2d 482 (1961). The Court acknowledged that ordinarily "a prisoner has no standing to choose the place in which he is to be confined" but held that "courts should not sanction, without question, removals in cases of alleged insane prisoners, which can conceivably be uncontrolled and arbitrary." In so holding, the Court expressed concern about the possibility that the prisoner "may be confined with deranged persons who are liable to harm and/or adversely affect him."[78A] Thus, by analogy, it would seem that a prisoner transferred to an institution for defective delinquents pursuant to an administrative order has the right to judicial review of the basis for the transfer.

If, before the expiration of the term for which an inmate received from another institution was sentenced it be found that his confinement in an institution for defective delinquents is unsuitable for any reason, the inmate will be returned to the institution from which he came. Correction Law, §442.

Inmates of an institution for defective delinquents may be released on parole and, although the Board of Parole must be given an opportunity to investigate the inmate's case and is charged with supervision of these persons, parole

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78A. In 1962 the procedure for transfer to Dannemora State Hospital was changed. The new procedure requires a court order, after notice and an opportunity to be heard. Correction Law, §383 (L. 1962, ch. 393).

eligibility is determined (within certain limitations) by the officials of the institution. Correction Law, §445.

Subject to two exceptions parole may be granted at any time. The exceptions are as follows (Correction Law, §445):

> "[1] An inmate shall not be paroled before he might have been paroled from another institution, if any, to which he was originally committed or [2] before he would have been paroled if he had been committed to a reformatory or correctional institution under a similar charge."

These exceptions seem somewhat confusing. The first exception clearly means that an inmate originally sentenced to an indeterminate term and then transferred cannot be paroled before the expiration of the minimum imposed by the court.[79] But it also could mean that a person sentenced to one year in a penitentiary and then transferred is not eligible for parole while he is held under that sentence. The second exception (i.e., "or before he would have been paroled if he had been committed to a reformatory or correctional institution under a similar charge") is even more troublesome. Certainly there is no way to tell when an inmate would have been paroled if he had been committed to a reformatory (indefinite term) or if he had been sentenced to a State prison (indeterminate term with minimum fixed by court) instead of being committed to an institution for defective delinquents on the same charge, much less "under a similar charge." The only situations that might be covered by this provision are cases where offenders have been convicted of crimes punishable by mandatory minima or are multiple offenders punishable under one of the multiple offender sections.

Discharge from an institution for defective delinquents depends upon the type of commitment that serves as authority for holding the inmate. Where the inmate was directly

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79. There is no credit for good conduct ("good time") applicable to time served in an institution for defective delinquents.

committed by judgment of conviction, the superintendent of the institution, with the approval of the Commissioner of Correction, may discharge him "if it be found that his further confinement therein is unsuitable." Correction Law, §441-a. This also would apply to an inmate committed by transfer from an institution under the jurisdiction of the Department of Mental Hygiene (see footnote 77, supra). And the rule is substantially the same in the case of an inmate committed pursuant to the procedure applicable to persons found unable to stand trial, except that in this case, if an indictment or information is pending and the inmate becomes able to stand trial, he must be returned for that purpose.[80] Code of Cr. Proc., §662-b; Correction Law, §441-a.

Where the inmate is under a specific sentence and has been transferred to an institution for defective delinquents, he is not eligible for discharge until his term expires. If he was transferred to the institution pursuant to the provision applicable to persons of "borderline normal" or "low normal" intelligence, he has an absolute right to be discharged when his term expires. Correction Law, §439-b. But, if the inmate was transferred pursuant to a certificate of mental defect, then he will be discharged at the expiration of his term only if the superintendent of the institution

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[80]. Section 441-a of the Correction Law provides that the superintendent's right to discharge inmates is subject to the provisions of section 662-b of the Code of Cr. Proc. That section (§662-b) provides that a person found unable to stand trial must be returned to face a pending indictment if he regains his faculties. However, Correction Law section 438 provides that a commitment to an institution for defective delinquents "by a court of competent jurisdiction shall be deemed a final disposition of the indictment or criminal offense charged and shall wholly divest the said court of its jurisdiction over the prisoner under said commitment or by reason of said offense...." Therefore, the proviso in Correction Law, §441-a seems inconsistent with §438 of the Correction Law.

finds that it is reasonably safe for him to be at large and that his friends or relatives are able and willing to comfortably maintain him without further public charge. (Approval of the Commissioner of Correction is a prerequisite to discharge.) Correction Law, §441. If the superintendent is of the opinion that the inmate (transferred pursuant to a certificate of mental defect) is a mental defective who should not be discharged, the superintendent may apply to a court for an order of retention, which will be issued upon a new certificate of mental defect. Thereafter, the inmate will be held under the same terms and conditions as a person who has been directly committed to the institution. Id., §§440, 441. It might be noted that although there is no statutory requirement for notice and an opportunity to be heard in the procedure for procuring an order of retention (§440), this protection has been read into the statute by the Court of Appeals. People ex rel. Morriale v. Branham, 291 N.Y. 312 (1943).

Inmates also may be discharged while on parole. A direct commitment inmate may be discharged upon recommendation of the Board of Parole and the approval of the Commissioner of Correction. A transferree may be discharged upon completion of the maximum sentence imposed by the court.

In addition to parole and discharge, inmates also may be released from an institution for defective delinquents by transfer to an institution under the jurisdiction of the Department of Mental Hygiene. (This requires consent of the Commissioner of Mental Hygiene.) Provisions for transfer are applicable to persons under 21 years of age (Correction Law, §439-a); persons over 21 years of age not in confinement pursuant to a judgment of conviction (id., §439-c); persons over 21 years of age committed pursuant to a judgment of

conviction and confined for five years or more (ibid.); and, persons held after the expiration of their term (id., §441). In the case of a person under 21 years of age, transfer does not alter the rules relating to parole and discharge. All other transferrees are henceforth governed by the rules of the Department of Mental Hygiene with respect to all matters including convalescent status and release. These transfers are revocable.

Insane Persons

A person charged with a crime or an offense and found to be "in such state of idiocy, imbecility or insanity as to be incapable of understanding the charge against him or the proceedings or of making his defense" may be committed to an appropriate institution of the Department of Correction (Matteawan State Hospital at Beacon[81]) or to any appropriate institution of the Department of Mental Hygiene. The procedure employed and the choice of institution depends upon the grade of the charge; whether the crime was committed in or out of the City of New York; and the stage of the proceedings.

Thus, where the defendant is charged with an offense which is not a crime or outside the City of New York with a misdemeanor of which courts of special sessions have exclusive jurisdiction (see Code of Cr. Proc., §§56, 56-a, 56-b) and it appears to the court or magistrate that he is unable to stand trial, the court or magistrate may order a psychiatric examination. If the psychiatrists conclude that the defendant is unable to stand trial and able to benefit from immediate care and treatment, a separate civil proceeding will be instituted for his commitment as provided in the

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[81]Of course, and as discussed, supra (p. 116), such a person also can be committed to an institution for defective delinquents.

Mental Hygiene Law for the commitment of a person not in confinement on a criminal charge. In this case, commitment is to an institution under the jurisdiction of the Department of Mental Hygiene and is deemed a final disposition of the offense or misdemeanor charged. If the defendant is found to be unable to stand trial but is not committed, the court before which the criminal charge is pending may dismiss the charge "or may make such order as may be appropriate and within...[its] powers." Code of Cr. Proc., §873.

Where the charge is a felony or an indictable misdemeanor (i.e., a crime not cognizable by a court of special sessions) or in the City of New York a felony or any misdemeanor, and no indictment or information has been filed, the same basic procedure is applicable. Here, however, the court may commit the defendant to either a Department of Correction institution (Matteawan State Hospital) or to an institution under the jurisdiction of the Department of Mental Hygiene and the defendant may be transferred--with the consent of the respective department heads and without court order--from an institution under the jurisdiction of one department to an institution under the jurisdiction of the other, or to a veterans administration institution. Although a determination (in the civil commitment proceeding) that the defendant is unable to stand trial terminates the criminal proceeding, the district attorney may obtain an indictment or file an information at any time. When he does so, a warrant will be lodged with the director of the institution in which the defendant is confined and all further proceedings are had as if the defendant had been indicted prior to his commitment (see, infra, pp. 124-125). But, if the district attorney does not present evidence to a grand

jury or file an information (in the City of New York) within six months from the date of the commitment and makes a written statement that he does not intend to reopen the matter, it cannot be reopened. Code of Cr. Proc., §872.

If the defendant has been indicted (anywhere), or if in the City of New York an information has been filed against him, the procedure is different: there is no separate civil commitment proceeding under the Mental Hygiene Law (unless one already has been instituted). The court in which the indictment or information is pending can at any time before final judgment order the psychiatric examination (or receive the report of a psychiatric examination ordered by another court or a magistrate before the indictment or information was filed); hold a hearing, if requested, on the issue of the defendant's sanity; and, if it finds the defendant unable to stand trial or continue with the proceedings, make the commitment, which must be to an institution under the jurisdiction of the Department of Correction (Matteawan State Hospital). A defendant so committed may at any time be transferred--with the consent of the respective department heads and without court order--to an institution under the jurisdiction of the Department of Mental Hygiene. Commitment, whether it occurs before or after the filing of an indictment or information, merely suspends further proceedings until the defendant is able to continue. However, the indictment or information may be dismissed upon consent of the district attorney if the defendant is a resident of another state or country and may be removed thereto, or after the defendant has been in continuous confinement under the commitment for more than two years. Code of Cr. Proc., §662-b, 871, 875.

A defendant confined in Matteawan when the indictment

or information is dismissed (under the two year provision) can be retained therein without further court order and will not be discharged until he has recovered or until the superintendent is of the opinion that it is reasonably safe for him to be delivered to the custody of his relatives or friends. Code of Cr. Proc., §662-b; Correction Law, §§409, 410. But a defendant who happens to be confined in an institution under the jurisdiction of the Department of Mental Hygiene when the indictment or information is dismissed cannot be retained without a further court order. This involves a separate civil proceeding for the certification of a person not in confinement on a criminal charge. Code of Cr. Proc., §662-b.[82]

A person who is able to stand trial, but is acquitted on the ground that he was insane at the time of the crime must be committed to the custody of the Commissioner of Mental Hygiene. This commitment is automatic and is made without regard to the defendant's present condition. Anyone so committed may be placed in any institution under the jurisdiction of the Department of Mental Hygiene or transferred--without court order--to an institution under the jurisdiction of the Department of Correction. However, if the Commissioner of Mental Hygiene is at any time of the

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82. The statute is not clear as to whether an additional civil proceeding is necessary in the case of a person indicted <u>after</u> commitment to an institution under the jurisdiction of the Department of Mental Hygiene (commitment prior to indictment would have been based upon a civil proceeding). Nor is it clear as to whether a separate civil proceeding is necessary to transfer a person from Matteawan to a Department of Mental Hygiene institution <u>after</u> the indictment is dismissed.

It should be noted that the statute authorizing retention of an inmate in Matteawan (without court order) after dismissal of the indictment or information mentions that institution by name and, therefore, might not be applicable to a person confined in an institution for defective delinquents. Thus, there does not appear to be any statutory provision applicable to defective delinquents.

opinion that such person may be conditionally released or discharged without danger to himself or others, he may commence a proceeding for conditional release or discharge in the court that committed the defendant. Also, the defendant, himself, may make application for discharge or release to the court by which he was committed and, if after receiving a report from the Commissioner of Mental Hygiene the court considers there may be merit in the application, it will proceed as it would in a case where the application was made by the Commissioner. Code of Cr. Proc., §454.

A prisoner serving a sentence in any State or local penal or correctional institution and found to be insane can be transferred to a Department of Correction institution for insane prisoners. Such transfer is pursuant to a commitment made by a court after notice and an opportunity to be heard. Correction Law, §§383, 408.

The Department of Correction maintains two institutions for insane prisoners: Matteawan State Hospital and Dannemora State Hospital. Commitment will be to Matteawan in the case of any person undergoing a sentence of one year or less or convicted of a misdemeanor, or adjudicated to be a youthful offender, wayward minor or juvenile delinquent. Also, all insane female prisoners are committed to Matteawan. Correction Law, §408. Commitment will be to Dannemora in the case of any male person convicted of a felony and confined in any one of the State prisons or correctional institutions or in a penitentiary. Also, any inmate of the Eastern Correctional Institution (i.e., the institution for male defective delinquents) who was committed on a judgment of conviction for any crime or offense or transferred thereto while under sentence for any crime or offense (including a juvenile delinquent, youthful offender or wayward minor)

and who is insane will be committed to Dannemora. Correction Law, §383.[83]

If the prisoner recovers before the expiration of his sentence, he is transferred, without court order, to the institution from which he came. Correction Law, §§386, 410. If the prisoner continues to be insane at the expiration of his term, the procedure depends upon whether he is confined at Matteawan or Dannemora.

A prisoner confined at Matteawan who continues to be insane at the expiration of his term may be retained therein (or transferred to an institution under the jurisdiction of the Department of Mental Hygiene) until he has recovered or is otherwise legally discharged. No court order is necessary for retention or transfer. Correction Law, §409.

A prisoner confined at Dannemora who continues to be insane at the expiration of his term cannot be retained without a new commitment. More specifically, if the director of the Dannemora State Hospital believes the prisoner is still insane at the expiration of his term, he may apply "for the certification of such person as provided in the mental hygiene law for the certification of a person not in confinement on a criminal charge." This means a separate civil proceeding, after which an order may be issued committing the insane person to the custody of the Commissioner of Mental Hygiene. A person so committed may be placed in an institution under the jurisdiction of the Department of Correction or the Department of Mental Hygiene and can be

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83. Because of the wording of certain provisions prescribing the procedure applicable in the case of a person confined in a New York City Department of Correction institution, it is difficult to determine whether a male person under sentence for a felony and confined in a New York City institution would be committed to Dannemora or Matteawan: the law seems to permit commitment to either. (Compare Correction Law, §§383, subd. 1-a and 408, subd. 1-a.)

transferred from one to the other and back again. Correction Law, §384.

It might be noted that the Correction Law provides the Commissioner of Mental Hygiene with general authority to transfer certain patients from State hospitals under his jurisdiction to Matteawan (§412). This is an administrative transfer, without court order, and the patients that may be transferred fall into three categories: (1) inmates held under any other than a civil process; (2) any patient who has previously been sentenced to a term of imprisonment in any correctional institution, and who still manifests criminal tendencies; or (3) any such patient who has previously been an inmate of Matteawan.[84] Also, the Mental Hygiene Law (§85) provides that the Commissioner of Mental Hygiene may authorize the director of any State hospital to commence a proceeding to certify any dangerous inmate of a State mental hospital to Matteawan. After a proceeding, during which the allegedly dangerous inmate may be represented

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84. In 1961 the United States Court of Appeals for the Second Circuit held that the provision of §412, authorizing administrative transfer to Matteawan of an ex-convict who manifests criminal tendencies, is unconstitutional because no requirement for a hearing can be read into it. The Court based its decision upon the fact that a hearing is necessary in other cases of transfer and relied heavily upon the fact that a hearing is required for transfer of a dangerous insane inmate who is not an ex-convict. (See Mental Hygiene Law, §85.) It stated that there is "nothing to demonstrate that ex-convicts who, after expiration of their sentences, become mentally ill, are inherently more dangerous than those mentally ill who are not ex-convicts" and that "a state must guard against classifications which are so arbitrary that they are repugnant to the equal protection clause of the Fourteenth Amendment." United States ex rel. Carroll v. McNeill, 294 F. 2d 117 (2d Cir. 1961). Certiorari was granted (368 U.S. 951) but during the pendency of the appeal the relator died and the Supreme Court directed that the judgment be vacated as moot (369 U.S. 149). Subsequently, another transferree under §412 raised the same question on a writ of habeas corpus in the Dutchess County Supreme Court. This Court refused to accept the reasoning of the United States Court of Appeals. The Court acknowledged that there is no implied right to a hearing on a §412 transfer but stated that it is for the Legislature to determine the mechanics and proceedings for transfer, and that the transferree is protected against capricious administrative action because he can seek review of the transfer by habeas corpus. The Court did not discuss the issue of whether the Legislature had made arbitrary classifications in setting up the mechanics of transfer. People ex rel. Brown v. McNeill, 35 Misc. 2d 53 (Sup.Ct.Dutchess Co. 1962).

by counsel, if the court agrees that the inmate is dangerous, the court orders the transfer to Matteawan. Persons transferred under Correction Law, §412 or Mental Hygiene Law, §85 may be transferred back to a civil institution, when conditions permit, without court order.

The foregoing discussion of the provisions relating to commitment of defective delinquents and insane persons accused or convicted of crime is merely a skeletal outline designed to serve as a basis for an understanding of the manner in which the procedures applicable to such persons fit into the sentencing structure.[85] It should be noted that the statutes governing these matters are not arranged in any sort of logical order and are permeated with patchwork, ambiguities, conflicting provisions and unjustifiable distinctions.

Arrested Narcotic Addicts

"The Arrested Narcotic Addict Commitment Act," effective January 1, 1963 provides procedures for detoxification of narcotic addicts immediately after arrest and voluntary civil commitment for treatment in lieu of prosecution. Mental Hygiene Law, §§208-215. In view of the fact that voluntary civil commitment can lead to abatement of the criminal charges, it is relevant to note certain portions of the Act.

Briefly, persons arrested for certain narcotic crimes, and persons arrested for other crimes and offenses who show symptoms of addiction, are informed upon arraignment before the committing magistrate that they may request consideration

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85. A recent report by a special committee of the Association of the Bar of the City of New York in cooperation with Cornell Law School contains a thorough analysis, including recommendations, of the procedures applicable to commitment, retention and discharge of insane persons. This report, which covers both civil and criminal commitments, is entitled "Mental Illness and Due Process" (Cornell University Press, 1962).

for civil commitment to a hospital facility. If this request is made and the defendant is found to be a narcotic addict, the court may order that the defendant be civilly committed. Before commitment, the court must obtain certification from the Commissioner of Mental Hygiene that he is agreeable to the acceptance of the defendant in a designated facility having a special unit for the care and treatment of drug addicts.

In the case of persons charged with specified narcotic crimes the court cannot make a civil commitment if: (a) there is an undisposed prior felony charge pending or an uncompleted sentence on such charge, or parole time owing (except upon request of the Board of Parole); or (b) the defendant has been convicted of two prior felonies; or (c) the defendant has been civilly committed under this Act on three or more prior occasions; or (d) the amount of drugs involved in the instant charge is substantially greater than would be necessary to support the defendant's own habit; or (e) facilities are not available at the time the commitment is sought; or (f) it is not in the interest of justice to commit the defendant civilly. Mental Hygiene Law, §211.

In the case of persons charged with other crimes or offenses the court's power to make a civil commitment is limited by additional restrictions. These additional restrictions prohibit civil commitment if: (1) the defendant has been previously convicted of a capital crime; or (2) the present charge involves a felony punishable by a mandatory minimum term; or (3) the defendant is charged with a felony and, if convicted, would have to receive a statutory mandatory minimum term because of a prior felony conviction;[86] or

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[86]. Limitation "(b)" in this section (§212) bars commitment if the defendant has been convicted on two or more prior occasions of a felony (i.e., third offenders). The additional limitation prohibiting civil commitment where the defendant would have to receive a statutory minimum term because of a prior felony conviction makes limitation "(b)" meaningless, because all second felony offenders must receive a statutory mandatory minimum term (see Penal Law, §1941).

(4) the district attorney refuses to consent. Mental Hygiene Law, §212.

The civilly committed narcotic addict receives inpatient care and treatment and aftercare supervision. He is not released from inpatient care until the Commissioner is satisfied that he has received the maximum benefit from such care. After release from inpatient care, he is required to report periodically to an aftercare facility and is subject to reasonable regulation of his conduct. The total time spent by an addict in inpatient treatment and aftercare supervision as a result of a single arrest cannot exceed thirty-six months. Mental Hygiene Law, §213.

During care and treatment the criminal charge that led to the arrest of the addict is held in abeyance. The charge is dismissed and the commitment terminated if the Commissioner of Mental Hygiene certifies that discharge from aftercare in advance of the maximum expiration date is warranted. Apart from this, if the charge is a misdemeanor and the defendant has not previously been convicted of a felony and has not previously been committed on a separate arrest under the provisions of this Act, the criminal charge is dismissed upon certification of one year of inpatient care or aftercare supervision. Such dismissal in no way lessens the power of the Commissioner of Mental Hygiene to exercise continuous supervision to the extent of the thirty-six month period. In all other cases the charge is automatically dismissed three years after the initial commitment if the Commissioner certifies that the defendant has been subject to inpatient or aftercare supervision throughout the period. Mental Hygiene Law, §213.

The addict can be recommitted by the Commissioner for inpatient care at any time during the aftercare period. Also,

if the addict escapes or disappears from aftercare supervision or proves unfit for treatment or supervision within the thirty-six month period, he can be returned to the court and the criminal proceedings are reactivated. In this event, the addict is entitled to "jail time" credit against his sentence for time spent in confinement prior to and during his civil commitment but not for time spent under aftercare supervision. Mental Hygiene Law, §213.

Young Offenders and Females Convicted of Certain Offenses: Charitable Institutions

There are certain situations where the law provides that a court may, if it chooses, commit an offender to a private incorporated institution (approved by the Department of Social Welfare) rather than to a State or local penal or correctional institution.

The court has this discretionary authority in the case of a juvenile delinquent (Family Court Act, §758), wayward minor (Code of Cr. Proc., §913-c), or youthful offender (id., §913-m). Commitment in each of these cases is for a period not to exceed three years. A juvenile delinquent is committed to a charitable institution "subject to the further orders of the court," but in no event for more than three years (Family Court Act, §758). A wayward minor is committed to a charitable institution for "an indeterminate period not to exceed three years" (Code of Cr. Proc., §913-c) and "may be released or paroled in the manner provided by law with respect to adult and other offenders" (id., §913-d) and also may be returned to the court for other disposition (e.g., State reformatory) if he does not behave (ibid.). A youthful offender commitment to a charitable institution "shall be for a period not to exceed three years" and the statute does not mention parole,

release or return (id., §913-m).

Courts in New York City and Nassau and Suffolk counties have discretionary authority to commit to a charitable institution when sentencing women found guilty of certain offenses. Correction Law, §311; N.Y.C. Cr. Ct. Act, §§80, 82, 83, 84.

Correction Law section 311 provides that a court in New York City or in Nassau or Suffolk counties is authorized to commit females over the age of 16, who are found guilty of certain offenses,[87] to specified charitable institutions. These commitments are for an indefinite term, not to exceed three years. Females so committed may be released or paroled at any time by the authorities of the institution, but cannot be released within six months after commitment without the written consent of the committing court. If a female proves unfit for the institution, she may be returned to the court for other disposition. Expenses of commitment to and care and maintenance in such an institution are charged to the county from which the commitment was made. Correction Law, §311.

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[87] The offenses specified are as follows:

"1. Being found in a reputed house of prostitution or assignation, or

2. Being found in company with or frequenting the company of thieves or prostitutes, or

3. Associating with vicious or dissolute persons, or

4. Being wilfully disobedient to her parent or guardian, and is in danger of becoming morally depraved, or

5. Being a prostitute or of intemperate habits and has not been an inmate of a state prison or penitentiary, or

6. Being a vagrant, or

7. Petit larceny, and has not been an inmate of a state prison or penitentiary..."

The New York City Criminal Court Act contains provisions dealing with the same subject matter as Correction Law section 311. These provisions are broader than and in some respects conflict with the Correction Law provision. The Act provides that a court may make a commitment to a charitable institution in the case of any female over the age of 16 who is convicted of:

(1) a misdemeanor, provided she has not theretofore been an inmate of a State prison or penitentiary (§80);

(2) any one of a number of offenses relating primarily to prostitution (§82); or

(3) the offense of disorderly conduct, or vagrancy (other than prostitution or being a diseased person) (§83).

In the first situation (the misdemeanor) commitment is for an indefinite term not to exceed three years and the parole, release and re-commitment provisions are similar to those in Correction Law section 311. N.Y.C. Cr. Ct. Act, §80. In the second situation (prostitution) commitment is for a term of three years and in the third situation (disorderly conduct and non-prostitution vagrancy) commitment is not to exceed one year. Id., §§82, 83. There is no provision for parole applicable to commitments under situations 2 and 3 but a person so committed may be released before the expiration of the term, under a procedure substantially similar to the one in Correction Law 311. N.Y.C. Cr. Ct. Act, §84. The Act provides that the expenses of commitment and care under the misdemeanor section (§80) shall be a City charge, but the Act does not seem to contain a similar provision applicable to commitment under the prostitution or disorderly conduct sections (§§82, 83).

THIS CONCLUDES THE PRELIMINARY SURVEY OF THE PRESENT SENTENCING STRUCTURE.

Errata and Addenda

Pages 23-24

In the discussion of the good conduct allowance under Article 9 of the Correction Law (§230 et seq.) an inaccurate example was used. It was stated that:

> "If an offender is sentenced to an indeterminate term of not less than 15 nor more than 30 years and is credited with all the good behavior time he can earn, he is eligible to be considered for parole after serving approximately 11 years and 3 months of his sentence (assuming no jail time)...."

This was based upon the mistaken assumption that the good conduct allowance is computed on the basis of 10 days for each month actually served. However, the statute provides that the good conduct allowance is to be computed on the basis of the term of the sentence less jail time. Correction Law, §230, subd. 3. Application of the correct method of computing the reduction results in parole eligibility in 10 years on a 15 year minimum term (i.e., 10 days per month or 4 months per year, times 15 years, equals a 60 month or 5 year reduction).

It might be noted that under Sections 230 and 235 of the Correction Law each prisoner is credited immediately upon his reception with the maximum amount of reduction allowed by the statute in his case, and the credit stands as reduction allowed, unless forfeited, or withheld wholly or partly, as punishment. This also applies to the recently enacted provision allowing prisoners to earn a reduction of the maximum term of an indeterminate sentence. Correction Law, §230, subd. 4. (The Department of Correction has applied the new law retroactively to prisoners received prior to its effective date: these prisoners have received

the allowance computed upon the entire sentence and not just upon the portion to be served subsequent to the effective date of the statute.)

The provision allowing prisoners to earn a reduction of the maximum term of an indeterminate sentence calls for automatic parole when time served, plus time earned in reduction of the maximum term, equals the maximum term. This has been in effect less than one year and already has been the subject of conflicting judicial and administrative interpretation. Two basic questions have arisen: (1) whether the new provision mandates the re-parole of a parole violator who has earned sufficient "good time" in reduction of his maximum term to permit his re-parole, but who, at the time, is being held pursuant to a determination of the Parole Board following his violation of parole; and (2) whether the Commissioner of Correction was acting within the scope of his authority when he promulgated a rule that automatically deprives a parole violator of "good time" credited against the maximum term prior to release on parole. The text of this rule is as follows (Rule III [8], 7 N.Y.C.R.R., §60.3):

> "Prisoners who have been paroled, declared delinquent and returned to prison, may receive the benefits of the maximum reduction credit computed on the delinquent time only."

The first question involves the problem of reading the new provision in the context of the provisions of Section 218 of the Correction Law. Section 218 provides that the Parole Board may require a delinquent parolee "to serve out... the balance of the maximum term...or such part thereof as it may determine before again releasing such prisoner on parole." If reduction of the maximum term mandates a second parole, then the Parole Board cannot literally compel the parole violator "to serve out...the balance of the maximum

term." This problem must be resolved before the second question can be reached; because, if one concludes that a parole violator is not entitled to mandatory re-parole and must serve the portion of the maximum term prescribed by the Parole Board, then it makes no difference whether parole violation means automatic forfeiture of previously earned "good time."

Upon reaching the second question, one is confronted with a rule whereby "good time" earned in reduction of the maximum term for conduct within the walls of the prison is automatically forfeited because of some violation of parole committed outside the prison. The problem here is whether the Legislsture intended this "good time" allowance to relate solely to conduct within the prison walls. And, in this connection, it is relevant to note that §235 of the Correction Law provides that the prison boards (i.e., the bodies charged with the responsibility of crediting and withholding "good time") "shall have full discretion to withhold the allowance of reduction of sentence for good conduct and for efficient and willing performance of duties assigned, or of a part thereof as a punishment for offenses against the discipline of the prison or penitentiary...." (Emphasis supplied.) This section, therefore, authorizes the withholding of "good time" as punishment for offenses against the discipline of the prison, but neither this nor any other section authorizes the withholding of "good time" for any other reason.

If the new "good time" credit against the maximum term is construed so as to mandate automatic re-parole and the Commissioner's rule providing that returned parole violators forfeit pre-parole "good time" is held invalid, then the provision for parole of prisoners released due to "good

time" credit in reduction of the maximum term is meaningless, because such parolees will always have sufficient "good time" credit to require automatic release and never can be returned to prison for parole violation.

The Cayuga County Court has held that the new provision calls for mandatory re-parole and that a returned parolee does not automatically forfeit previously earned "good time." People ex rel. Brown v. Murphy, - Misc. 2d - , 236 N.Y.S. 2d 201 (Cayuga Co. Ct. 8/14/62). This Court reached its decision without discussing Section 218 of the Correction Law. It assumed the validity of an analogy between the new "good time" credit and certain enactments during the years 1916 to 1926, which allowed a sentence reduction as "compensation" for labor performed in prison. This furnished apparent justification for applying the Court of Appeals' holding in People ex rel. Vanilla v. Denno, 7 N.Y. 2d 29 (1959). There the Court sustained an order directing the mandatory discharge of a definite sentence parole violator because of "compensation" earned prior to parole. (Vanilla had been paroled due to "compensation" and other "good time.") However, the County Court seemed to overlook a basic difference between the two provisions: the "compensation" provision applicable in the Vanilla case called for absolute discharge or, as stated by the Court of Appeals, "had the same effect as if the sentence had been pronounced for a lesser term" (7 N.Y. 2d 34); while the effect of the new "good time" provision is not to reduce the term of the sentence, because it provides that the released prisoner remains "under the supervision of the board of parole for the full term of the maximum sentence imposed by the court and [is] otherwise subject to the jurisdiction of the board under the terms and conditions set forth in article eight of the correction law"

(Correction Law, §230, subd. 4). The County Court did not, however, rest its decision solely upon the Vanilla case. The Court also interpreted legislative intent. It stated that the Legislature intended the "good time" allowance "to apply to an inmate during the time of his actual incarceration and to his conduct during his period of imprisonment rather than govern his conduct while on parole." Therefore, according to this Court, the Commissioner's rule "is capricious and is directly in violation of the Legislature's intent and the wording of Correction Law Section 230(4) [no particular wording is cited] and accordingly should be discredited" (236 N.Y.S. 2d 205). The Court ordered that the prisoner be released "under the jurisdiction of the Board of Parole" and this seems in conflict with the rationale of its opinion; because, as stated, supra, if "good time" earned in reduction of the maximum term is not forfeited by parole violation and mandates automatic re-parole, the Board can never return this convict to prison for any period of time. Thus, it has no way to enforce its jurisdiction and parole supervision is merely an advisory service.

The Supreme Court in the same County arrived at a different conclusion in another case. People ex rel. Roy v. Murphy, - Misc. 2d -, 233 N.Y.S. 2d 282 (S. Ct. Cayuga Co. 10/29/62). This Court concluded that "the only mandatory release provided by Section 230(4) is of prisoners who have not been paroled and who by earned 'good time' have by its provisions become entitled to release prior to the expiration of the maximum sentence." It reached this conclusion by reading the new provision in the context of Section 218 of the Correction Law. As for the Commissioner's rule, the Court noted that it affords a very practical vehicle for effectuating an incentive for good behavior, but stated that it appears to

be "a punishment for the prisoner's conduct outside the prison rather than 'a punishment for offenses against the discipline of the prison or penitentiary' as provided by Section 235 of the Correction Law." However, in view of the Court's conclusion that a parole violator is not entitled to mandatory re-parole and the fact that the subject of "good time" earned after parole was not directly before it, the Court did not deem it necessary to answer this question.

In a third case, the Supreme Court for Washington County held that a returned parolee is not entitled to credit for "good time" earned prior to parole, citing both the Commissioner's rule and Section 218 of the Correction Law as authority. People ex rel. Falco v. Conboy, - Misc. 2d - , 236 N.Y.S. 2d 334 (S. Ct. Wash. Co. 1/10/63).

If the provision for "good time" credit against the maximum term is to fulfill the purpose for which it was designed; that is, if it is to provide a prisoner with a concrete incentive for good conduct at all times, then certain provisions of Article 8 of the Correction Law should be amended so that they are in complete harmony with the Commissioner's rule. This rule preserves the absolute right to re-parole, and also maintains the proportion between the amount of "good time" that can be applied and the time to be served after each reception at the prison.

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In the amended footnote 1, reference is made to a Penal Law provision (§1221, subd. h) which provides that intoxication in a public place is punishable by imprisonment in a penitentiary for a period of not less than one nor more than three years. This Penal Law provision further provides that the aforesaid sentence only can be imposed if the defendant has previously been committed to the custody of a board

of inebriety and the board has applied to be released of its custodial duties, as provided in General Municipal Law.Section 139-a. It should be noted that Section 139-a of the General Municipal Law was repealed in 1952 as obsolete (L. 1952, ch. 133). Therefore, the prerequisite for the penitentiary sentence of not less than one nor more than three years cannot be met.

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Footnote 29-A states that Article 7-A of the Correction Law does not apply to crimes punishable by a mendatory definite fixed sentence and this, it would seem, is still the rule. However, the law relating to the particular situation cited as an illustration of this principle was changed by the Legislature in 1962 (i.e., narcotic misdemeanors: People v. Bonano, 11 App. Div. 2d 384 [1st Dept. 1960], aff'd mem. 9 N.Y. 2d 689). A new subdivision was added to Penal Law, §1751-a, providing that the term of imprisonment specified in that section (a definite fixed period of not less than 6 months and not more than 1 year) is not to be construed so as to limit the operation of Article 7-A (L. 1962, ch. 113).

P. Preiser/rc
March 4, 1963