Legislative Document (1966) No. 28

STATE OF NEW YORK

FIFTH INTERIM REPORT

OF THE

STATE OF NEW YORK

TEMPORARY COMMISSION ON REVISION

OF THE

PENAL LAW AND CRIMINAL CODE

FEBRUARY 1, 1966

LETTER OF TRANSMITTAL

February 1, 1966

To: Hon. Nelson A. Rockefeller, *Governor of the State of New York:*

The Legislature of the State of New York:

Pursuant to the provisions of Chapter 346 of the Laws of 1961 as amended by Chapter 548 of the Laws of 1962, Chapter 210 of the Laws of 1963, Chapter 251 of the Laws of 1964 and Chapter 489 of the Laws of 1965, submitted herewith is a report of the activities of this Commission for the period of February 1, 1965 to January 31, 1966.

Richard J. Bartlett,
Chairman.

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INTRODUCTORY COMMENTS

The substance of the Commission's plans and accomplishments from its inception in 1961 through early 1965 are detailed in four previous interim reports.* Without extensive review of those reports, it is sufficient here to recall the following.

The Commission's principal assignments were, from the outset, revision of the Penal Law and the Code of Criminal Procedure. In accordance with an initial decision to devote the major share of its earlier effort to the Penal Law, the Commission, while doing work upon the Criminal Code and upon legislative projects collateral to the main tasks, completed a proposed new Penal Law in early 1964, which was submitted at the 1964 legislative session as a study bill. Following a series of public hearings upon that study bill in the fall of 1964, the proposed Penal Law was changed in a number of respects and the final product was introduced at the 1965 legislative session in the form of a bill for passage.

Since the issuance of the Commission's 1965 interim report, that bill has been passed by the Legislature and it became law on July 20, 1965, when it was approved by the Governor. The law, however, bears an effective date of September 1, 1967, and the existing Penal Law is and will be exclusively operative until then.

The instant report deals with (1) certain amendatory activity being undertaken by the Commission with respect to the new Penal Law, and (2) the nature and status of its revisional work upon the Code of Criminal Procedure.

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* See Leg. Doc. (1962) No. 41; Leg. Doc. (1963) No. 8; Leg. Doc. (1964) No. 14; Leg. Doc. (1965) No. 25.

I

CONCERNING THE NEW PENAL LAW

The Commission is by no means of the view that the new Penal Law represents perfection because it has been enacted into law. The task of ironing out flaws and eliminating weaknesses which are inevitably discoverable in a project of this magnitude is continuing.

Accordingly, the Commission is preparing for submission to the Legislature (at the 1967 session) an omnibus bill which, if enacted, would amend the new Penal Law in a number of respects. Most of the proposals, together with brief explanatory staff comments, are set forth in the Appendix of this report.

Some of the proposed changes stem from self-critical analysis by the Commission and its staff; some from criticisms and suggestions of other agencies and groups; and some from a "saving clause" appearing in the new Penal Law (§ 500.00[2]).

In effect, this "saving clause" is a blanket incorporation by reference in the new Penal Law of every 1965 amendment to the existing Penal Law. The theory of it is that these provisions, representing the recent will of the Legislature, should not be lost in the transition from the old Penal Law to the new one.

It is apparent, however, that this "saving clause" is merely a temporary, make-shift device to preserve the indicated legislation and should not permanently serve as a method of defining crimes and propounding legal principles in the new Penal Law. The substance of the 1965 amendments to the existing Penal Law must be analyzed and meshed into the new Penal Law in the form of individual statutes, placed in proper context and rephrased to conform to the new Penal Law pattern.

Some of the proposed amendments under preparation deal with this problem. One, for example, would explicitly limit the kinds of murder for which the death penalty may be imposed in order to conform the new Penal Law to the 1965 amendment to the existing Penal Law relating to abolition of capital punishment.

Other of the proposed amendments under preparation, as indicated, derive from suggestions advanced by public and private groups and agencies which have been examining the new Penal Law since its enactment. The Commission and its staff have been meeting and conferring with Bar Association committees, judicial groups, including the County Judges Association and a Committee of the Association of Supreme Court Justices, and representatives of religious groups, commercial corporations and others. A number of the amendments are designed to eliminate gremlins and close gaps pointed out by these organizations.

An illustration of such "gremlin elimination" and "gap closing" is provided by reference to a provision (§ 165.15 [6]) making it a crime to obtain or attempt to obtain gas, electricity, water, steam

or telephone service without the supplier's consent by tampering with equipment "of the supplier" (including pipes, meters, etc., located in buildings). It was aptly pointed out by one of the public utilities that this provision, while adequately protecting water, steam and telephone companies which own all the equipment supplying such service to and in buildings, does not protect suppliers of gas and electricity who do not own most of the inside equipment. Accordingly, the Commission is proposing to amend the specified provision to penalize all tampering of this nature regardless of whether the equipment in question belongs to "the supplier" of the service or to the owner of the building.

Although the Commission intends to address itself chiefly to the Code of Criminal Procedure during the remainder of its tenure, it will continue efforts of the foregoing nature to keep improving the new Penal Law by legislative amendment.

II

CONCERNING THE CODE OF CRIMINAL PROCEDURE

Prior to the passage of the new Penal Law in the summer of 1965, that project had clear priority in the Commission's work, and revision of the Code of Criminal Procedure was necessarily regarded more as a task of the future than as one of immediate urgency. With the Penal Law assignment virtually completed, however, the Commission is addressing most of its time and effort to the Criminal Code.

Its progress thus far consists of, first, staff drafts of the major portion of a proposed new Criminal Code; second, examination, discussion and section-by-section analysis by the Commission of a substantial part of that material during a series of meetings held in late 1965 and early 1966; and, third, further staff revision of some of the original material to conform it to the Commissioners' criticisms and directions. It is expected that, by the summer of 1966, an appreciable portion of the proposed Code revision will be available for circulation to legislators, the bench, bar and other interested groups, agencies and organizations. The Commission then plans to hold public hearings upon the Code proposals in the fall of 1966, much in the nature of those held with respect to the proposed Penal Law in the fall of 1964.

It is apparent from the foregoing that, while a great deal of the initial drafting has been completed, it is currently of the intra-office variety which cannot be published or discussed in fine detail.

It is here appropriate, however, to treat in general terms some of the prospective structural characteristics, some of the substantive changes to be anticipated and some of the more important and controversial areas posing especially difficult problems.

A. General Observations

While the existing Criminal Code may not have all the structural and formal weaknesses of the present Penal Law, it exhibits other defects of the latter to a sometimes more marked degree. To an even greater extent than the Penal Law, for example, it appears rooted in antiquated concepts, institutions and terminology which have somehow survived a century or more of sporadic amendment. There are mysterious references to the "testing" of a writ of process (§ 24), to an "undertaking to keep the peace" (§ 94) and to "overseers of the poor" (§ 926). There are series of provisions devoted to defunct or all but forgotten and probably unconstitutional procedures, including "habitual criminal" adjudication (§§ 510–514-a) and disposition of "disorderly persons" such as "tipplers" and "mountebanks" (§§ 899–913). There are sections requiring district

attorneys to issue "precepts" concerning approaching Supreme Court terms to sheriffs who, in the manner of town criers, must issue "proclamations" of the same (§§ 222-a–222-c); and there are provisions requiring magistrates and "aldermen" to go out on the streets to quell riots (§§ 106, 107).

In some respects, the Code's obsolescence results in over-simplification leaving huge gaps. Many of its provisions, for example, apparently proceeding upon the assumption that every indictment charges but one crime and against but one defendant—which may have been largely true fifty or a hundred years ago—prescribe procedural rules governing pleas, verdicts and sentencing adapted to such simple instruments. Since most of the difficult problems arise in connection with multiple-count and multiple-defendant indictments, the existing provisions furnish little or no guidance in the areas where it is needed most.

Apart from the above-indicated kinds of archaism and deficiency, the Code needs thorough re-examination with respect to certain basic principles and concepts which, in the scheme of contemporary thinking, are deemed fundamental in the administration of criminal justice.

As was the case with the Penal Law task, the first major decision confronting the Commission with respect to the Code assignment was whether the condition of the existing Code is such as to permit adequate revision by a renovating process that would accept the present foundation and merely repair within that framework, or whether the Code should in effect be scrapped and a complete reconstruction job undertaken. As in its Penal Law task, the Commission decided upon the latter approach and, hence, this revisional endeavor also has been commenced from scratch.

One of many good reasons favoring the complete reconstruction approach is the necessity of gearing the prospective revised Code to the new Penal Law. These companion bodies of law must inevitably be, as they presently are, interwoven and permeated with cross-references to each other. The immense differences between the new Penal Law and the old one, involving thoroughgoing changes of structure, substance and overall pattern, seem alone sufficient to demand a complete reconstruction of the existing Criminal Code, designed as it originally was to mesh with the old Penal Law but certainly not with the new one. For an illustration of this, one need only peruse the Code's provisions with respect to sentencing, which implement the old Penal Law's sentencing provisions. Since the new Penal Law has drastically revised the whole sentencing structure, many of the Code provisions of this field will become meaningless on September 1, 1967, and will have to be replaced by a new group of statutes. On a broader base, moreover, the Code does not jibe with the changed terminology and lexicography of the Penal Law, and even apparently simple words like "crime" and "offense" frequently have one meaning in one body and another in the other.

B. Structure and Form

The basic structure of the proposed Criminal Code will be similar to that of the existing one. It will be in three, or possibly four, "Parts":

1. General Provisions
2. The Principal Proceedings
3. Special and Miscellaneous Proceedings
(4. Forms)

The "General Provisions" of "Part One" will not be voluminous. While the entire content of this "Part" has not yet been fully determined, it will present, *inter alia*, a number of term definitions of general use throughout the chapter and a summary of the "criminal courts" with descriptions of the jurisdiction of each.

"Part Two," or "The Principal Proceedings," which is near completion in first draft form, will be the lengthiest and most important portion of the proposed Code. It will commence with the inception of a criminal action in the lower criminal courts and continue with the principal proceedings in all courts through arraignment, early motions, pleas, trials, verdicts, sentences, post-judgment motions and appeals.

"Part Three," comparable to a portion of the existing Code (§§ 773–952-y), will present "Special and Miscellaneous Proceedings" which are somewhat outside of the main procedural stream or which require such extensive individual treatment as to render them unsuitable for inclusion in "Part Two." Among the subjects to be dealt with in this "Part" are extradition, bail, youthful offender treatment, commitment of mentally ill defendants and search warrants.

The Commission is further considering a prospective "Part Four," which would contain "Forms" for many of the process papers, accusatory documents and other official written instruments referred to in the three prior "Parts." These forms would be an official and integral part of the Code. Each form would constitute a separate statute with its own section number. Thus, whenever it might be deemed appropriate to present a model form for an instrument mentioned in a statute in another "Part" of the Code, such could be accomplished by having that statute expressly refer to the particular form in "Part Four" by its section number (*e.g.*, "A warrant of arrest must be substantially in the form indicated in section six hundred eighty").

The format of the proposed Code will closely resemble that of the new Penal Law. The "Parts" will be divided into "Titles" and the "Titles" into "Articles," each containing a series of "sections" geared to the Article by a decimal numbering system.

C. Excision and Relocation

As explained in previous interim reports, one substantial phase of the revision work on the Penal Law entailed excision of many

existing provisions which have become obsolete or have otherwise lost their utility, and relocation in other and more appropriate bodies of law of numerous other old Penal Law provisions which are of a highly specialized or regulatory nature and do not really belong in the Penal Law. This rather difficult and time-consuming "relocation" project was finally consummated by submission to the Legislature and passage of a huge "transfer bill" which (as of September 1, 1967) shifts more than three hundred existing Penal Law provisions to various other chapters of the Consolidated Laws.

Somewhat similar conditions inhere in the Code revision task. A vast number of outmoded or unnecessary provisions will be eliminated by omission. Although the Code does not present nearly as many "relocation" problems as did the Penal Law, several of its articles or groups of sections more properly belong in other bodies of law. Among other matters, the Commission plans to transfer to the Judiciary Law a Code article or "title" dealing with that non-criminal tribunal labeled "the court for the trial of impeachments" (§§ 12–20), and to transfer a series of Code provisions concerning administrative procedures with respect to animals (§§ 117-a–117-f) to the Agriculture and Markets Law where they will join a group of provisions defining "animal" offenses which have recently been transferred thereto from the old Penal Law.

D. The Lower Criminal Courts

Some of the most unsatisfactory portions of the existing Code are those dealing with the functions and procedural operation of the lower criminal courts, which constitute the foundation of the entire system of criminal justice in New York State. While it is impossible in this report to paint a full picture of the lower court labyrinth with all its complexities, perplexities and hiatuses, the flavor may be caught by the ensuing observations.

The reference herein to the "lower" criminal courts is to all courts other than the Supreme Court and the County Courts which possess criminal jurisdiction. The list includes:

1. Police justices, or village police courts (having village-wide jurisdiction);
2. Justices of the peace, or justice courts (having town-wide jurisdiction);
3. Some city courts, municipal courts, and the like (having city-wide jursdiction);
4. Police courts (having city-wide jurisdiction);
5. A few Recorder's Courts (an ancient form of criminal court of city-wide jurisdiction);
6. The New York City Criminal Court (the only lower criminal court in New York City); and
7. The District Courts (a comparatively recent creation having county-wide jurisdiction in Nassau County and having jurisdiction in part of Suffolk County).

All these courts have virtually the same functions, which are quite varied. It is in these courts where most criminal actions are initiated by the filing of "informations" or "complaints" and where warrants of arrest and summonses are issued. These lower courts conduct preliminary proceedings with respect to every kind of criminal charge and, generally speaking, have trial jurisdiction of all offenses except felonies. Their jurisdiction over felonies is limited to preliminary examination of such charges, which must be transmitted to a grand jury if any further or dispositive action is to be taken.

When a lower court judge conducts any preliminary proceeding, and when he tries or disposes of a so-called "non-criminal" offense of less than misdemeanor grade, he is, according to the Code's terminology, sitting as a "magistrate." When he tries or disposes of a misdemeanor charge, however, he is said to be "holding a court of special sessions." These vestigial terms, which pervade the Code, are rather perplexing in that there is no such thing as a magistrate's "court" or a special sessions "court"; the labels of "magistrate" and "special sessions" merely signify mantles or hats which, for reasons more traditional than practical, a judge is deemed to don and doff at certain stages of a criminal action. Nevertheless, the Code is replete with provisions applicable to "courts of special sessions" (*e.g.*, §§ 56–63, 699–772). Despite the prolific use of that term, it is not defined, and precisely what courts or judges are included within its scope is largely a matter of conjecture. One might surmise that the term encompasses all the lower criminal courts if the Code provisions and the hazy case law on the subject did not indicate a possible restriction to justice (town) and police justice (village) courts. Indeed, there is even some doubt about the latter, for one important statute—limiting the trial jurisdiction of "courts of special sessions" to a series of specified offenses (§ 56)—is construed to apply only to justice courts. How many, if any, of the other lower courts might for some purposes conceivably be classified as "courts of special sessions" and, hence, subject to the statutes applicable to the same is highly speculative.

Also left largely unexplained is the precise territorial jurisdiction or geographical autonomy of some of these courts, with emphasis upon the justice and village police courts. Among the manifold unanswered questions are whether a justice of the peace of one town may entertain a complaint charging an offense committed in another town of the same county; whether he may make a warrant of arrest issued by him returnable before another justice; to what particular judge or court a defendant arrested without a warrant must be taken; and whether a District Court jurisdictionally preempts other lower courts located in its county.

While the Code legislation in this area appears confusing, the difficulties and uncertainties are compounded by other "Acts" dealing specifically, if somewhat sparsely, with particular classifications of lower courts. Recently superimposed upon the Code are a "Uniform City Court Act" (applicable to all city courts outside of New York City) and a "Uniform District Court Act," each of which contains a criminal procedure portion. Some of the provisions are

in conflict with and some repetitious of, Code provisions dealing with the same subject matter. To complete this picture, a proposed "Uniform Justice Court Act" of the same nature (applicable to justice and village police courts) is currently being considered by the Legislature. With the addition of these three Acts, any one seeking guidance with respect to lower court procedure outside of New York City must examine both the Code and the uniform act applicable to the particular court involved, and, in case of conflicting provisions, must determine which is controlling.

As to New York City, there are complications of a different nature. By and large, the New York City Criminal Court, operating under its own "New York City Criminal Court Act," stands apart from the other lower criminal courts. There is, however, a certain reliance upon the Code in connection with those functions involving the conduct of preliminary proceedings which, to use traditional terminology, fall into the category of "magistrate" activity. Thus, the New York City act declares that all the judges of the court "are magistrates and shall have and exercise all the jurisdiction and powers, not inconsistent with this act, which are conferred by law upon magistrates and police justices under the provisions of the code of criminal procedure . . ." (§ 30). Presumably, this means that most of the Code provisions dealing with the lodging of informations, the issuance of warrants of arrest, preliminary examinations and other "magistrate" functions of the non-New York City courts are controlling upon the New York City Criminal Court. In practice, however, the latter does not seem to lean very heavily upon the Code, both because of some "inconsistent" provisions in its own act and because of much judicial improvising designed to meet the peculiar intricacies of the New York City situation.

In its trial or "special sessions" phases, where the variations from non-New York City procedure are greater, the New York City Criminal Court operates exclusively under its own act and completely independently of the Code provisions regulating lower court trial procedure outside of New York City (§§ 699–740-d). In fact, the Code explicitly declares its legislation of this area to be inapplicable to the New York City Criminal Court (§ 740-d).

The lower criminal court labyrinth poses one of the most serious and difficult problems of the Code revision task. The Commission is attacking that problem with an attempt to establish in the Code of Criminal Procedure, and there alone, a uniform system of lower criminal court procedure for the entire state, including New York City. Although this project is conducted within the existing lower court framework, the first step consists of more precise classification and labeling of these courts. Under the new scheme, they fall into five categories:

1. Village courts (now known as village police courts or police justices);
2. Town courts (now known as justice courts or justices of the peace);

3. City courts (meaning every lower court outside of New York City having criminal jurisdiction in a city, whether officially designated a city court, municipal court, police court, recorder's court or by any other name or title);
4. New York City Criminal Court;
5. District Courts.

All these courts are then blanketed under a new, comprehensive term, namely, "local criminal courts." Since their general functions, jurisdiction and powers are basically the same, it is possible to draft most of the controlling procedural provisions in terms of what "local criminal court," must or may do in given situations without distinguishing between the individual classifications thereof. In any instance where variations in their operation are unavoidable, the particular statute makes the necessary classification distinctions and establishes appropriate separate procedures. In this fashion, the proposed Code, proceeding with a fair degree of uniformity and continuity, and making many significant innovations along the way, will carry a criminal action from the commencement thereof in a "local criminal court" to the point where such court either finally disposes of it or transmits it to a higher court.

In this scheme, it may be observed, the traditional terms "magistrate" and "special sessions," around which the existing Code pattern is woven, are completely abandoned. The proposed formulations are concerned only with establishing the functions and procedural operations of the "local criminal courts." Whether any particular function thereof might, according to existing terminology, be classified as "magistrate" or "special sessions" activity seems immaterial, and the continued use of those terms in the proposed formulations would serve no purpose other than perpetuation of an outmoded lexicography.

One of the most difficult problems inherent in the indicated unification endeavor involves the meshing in one Code of New York City Criminal court procedure and that of the other "local criminal courts."

Apart from the fact that the New York City court now functions largely under its own separate act, some of its administrative and operational features are unique owing to volume factors well beyond those of any non-New York City court. Upon analysis, however, its basic functions and operational features do not appear nearly as unique as some would believe.

For one thing, with respect to procedure controlling preliminary or "magistrate" functions, the New York City act, as already noted, does not offer many different rules but, on the contrary, largely refers the reader to those portions of the Code of Criminal Procedure governing the non-New York City courts (N.Y.C.Crim. Ct.Act, § 30). Thus, while there are some differences in this area, New York City and non-New York City "magistrate" procedures are quite similar in their basic features and fundamental concepts.

More marked variations, it is true, are to be found at the trial or "special sessions" level, but even these appreciably diminish

upon closer scrutiny. The greatest single difference lies in the alternative to a non-jury trial before a single judge, which is the basic trial both inside and outside of New York City. Outside of New York City, the alternative is a trial before a judge presiding over a six-man jury, while in the New York City Criminal Court it is a juryless trial before a bench of three judges. Here, of course, as in some other places, the proposed Code provisions must set forth separate procedures for different courts.

The above described scheme, by condensing all lower or "local criminal court" procedure in the Code, would obviously entail repeal of the basic criminal procedure portions of the New York City Criminal Court Act and of the three "uniform" acts applicable to non-New York City courts. This, it is submitted, would be one of its virtues.

E. The "Appearance Ticket"

The proposed Code will lay considerable stress upon an instrument of process bearing the new label of "appearance ticket." The necessity for this term springs partly from the existing law's misleading use of the word "summons."

In its true and generic meaning, a "summons" is a process issued by a court commanding a person accused of an offense, by an information previously filed with the court, to appear before such court at a future time to answer the charge. Two features of a "summons" to be kept in mind are that it is issued only by a *court* and only upon the basis of an information or complaint which has been lodged with such court. In this sense, it is comparable to a warrant of arrest and, indeed, its function is the same: to compel the court apearance of a person against whom a formal charge has been filed. Being a milder and slightly less certain means of compulsion, a summons may be used in lieu of a warrant only in cases involving offenses of less than felony grade (C.C.P. § 150).

Partly owing to loose legislative employment of the word, a "summons" is popularly deemed also to embrace the police *ticket* type of process commonly associated with traffic violations. This leads to much confusion because, from a legal and procedural standpoint, the "ticket" and the genuine "summons" are entirely different. The ticket—here labeled an "appearance ticket"—is not issued by a court and requires no underlying information in a court. Under special authorization, it is issued and served by a peace officer or other public official who has observed the commission of a minor offense, and it requires the offender to appear in a designated court upon a designated return date to answer a charge which the issuer of the ticket will formally file in the court some time after his issuance of the ticket. In terms of basic function, an appearance ticket is used in some minor cases as a compassionate substitute for an arrest without a warrant, which is also employed to require or compel the court appearance of an offender against whom no formal charges have as yet been lodged.

On a state-wide basis, the use of appearance tickets is at present largely confined to traffic infraction cases (see Vehicle and Traffic Law § 207). In New York City, however, numerous non-police public officials and employees, such as those of the Sanitation, Fire, Building and Markets Departments, are authorized to issue and serve such tickets in cases involving offenses peculiarly within their ambits (violations of the Sanitary Code, Building regulations, etc.; see N.Y.C. Crim. Ct. Act § 58).

In the Commission's opinion, the virtues and practical advantages of the appearance ticket have not been sufficiently exploited. The proposed Code will probably contain a blanket authorization permitting any police officer to issue and serve an appearance ticket, in lieu of making an arrest, for any offense other than a felony. Such an innovation should prove salutary from the standpoints of the police, the accused and the public in general.

The advantages to the police may be partly appreciated by picturing the predicament of a police officer who observes the commission of a misdemeanor or some lesser offense by a person whom he either knows as a resident of the community or whom he finds to have solid roots therein. Absent the appearance ticket device, two very awkward and unsatisfactory courses of action are available to the officer. Normal procedure requires him to arrest the defendant and, dropping his regular duties, take him to the station house to book him, and then take him to a local criminal court where a formal information must be filed, the defendant arraigned, bail set, and so on. The even less appealing and equally time consuming alternative entails the officer first going to the court himself, filing an information against the defendant, obtaining a summons or a warrant of arrest and then returning to find the defendant and serve or execute such process; and all this in a case in which the simple issuance of an appearance ticket would almost certainly accomplish the same end result.

From the standpoint of the kind of defendant who would unquestionably honor an appearance ticket, use of the ominous, humiliating and frequently expensive arrest procedure for a relatively minor offense seems both unnecessary and unfair.

Beyond these considerations, moreover, expanded utility of the appearance ticket woud undoubtedly be of substantial assistance in the current attempt to find a way of reducing to an absolute minimum that portion of our prison population consisting of unconvicted persons awaiting trial or other disposition of criminal charges. While the solution to that problem may lie largely in improved bail procedures, it is manifest that much is to be gained by installation of a system which in many instances would eliminate the necessity of incarceration or bail in the initial stages of a criminal action.

Virtually the only criticism thus far voiced with respect to the expanded appearance ticket proposal is that injudicious use thereof by the police might permit many accused persons to evade criminal prosecution by failing to honor the ticket and then disappearing in order to avoid execution of a subsequently issued warrant of arrest.

That contention does not seem persuasive. Use of an appearance ticket is not, of course, mandatory in any case but a permissive alternative to arrest, and it may be assumed that the police in general would not issue them foolishly or promiscuously to drifters and hardened criminals. Any tendency toward abuse of that nature within a particular police force or department doubtless would be quickly rectified.

Upon this subject, it is pertinent to note an experiment conducted by the New York City Police Department in conjunction with the Vera Foundation. Commencing in 1964, police officers assigned to two selected New York City police precincts were, under certain circumstances, authorized to issue such tickets, in lieu of making arrests, for the offenses of third degree assault, petit larceny and disorderly conduct. From all available evidence, this project has been highly successful in every respect, including the saving of many thousands of police man-hours.

F. Omnibus Motions

One of the principal defects of the Criminal Code and of New York criminal procedure in general is the great number and wide variety of motions which serve as vehicles for diverse defense attacks upon indictments, informations and judgments of conviction. The plethora of motions, the necessity of selecting the appropriate one for advacing a particular contention, and the different procedural ramifications attending each kind of motion, frequently add to the burdens of defendants, prosecutors and judges.

Illustrative is the area of pre-trial motion practice. If a defendant wishes to attack an indictment as insufficient on its face, as defective in form, or as failing to charge a valid crime, he must do so by "demurrer" (C.C.P. §§ 321–331). If his contention is that the indictment was not properly "indorsed and presented," however, or that certain irregularities occurred in the grand jury room, he must make another type of motion (§ 313). A claim that an indictment is not supported by legally sufficient grand jury evidence must be advanced by other types of motions which, though not mentioned in the Code, find sanction in case law. Still other pre-trial contentions asserting impediments to prosecution, such as former jeopardy, immunity and the statute of limitations, must be advanced by still other kinds of motions or procedural devices.

The same motion complexity is found in portions of the Code dealing with other stages of a criminal action, and is especially prominent in the post-judgment area.

The technique being employed in the proposed Code to simplify motion practice is that of the "omnibus motion"; a single all-inclusive defense motion seeking a particular kind of relief at a particular stage of the proceedings, under which any ground justifying such relief may be raised. The principal omnibus motions being formulated are motions (1) to dismiss an indictment, (2) to dismiss an information, (3) to set aside a verdict, (4) to vacate a judgment and (5) to set aside a sentence.

Thus, a defendant seeking pre-trial dismissal of an indictment upon any basis whatever—whether upon a contention of the kind now cognizable only upon demurrer, or by reason of insufficiency of grand jury evidence, or upon any other recognized ground—may do so by simply making a motion to dismiss the indictment under the appropriate section without worrying whether he has selected the correct one of many motions and procedural remedies currently provided. And a similiar motion "to dismiss an information" will be available to a defendant charged with an offense in a local criminal court.

Another cloudy field of motion practice calling for the omnibus remedy appears in connection with the period between verdict and sentence. Here, the Code offers two motions. One, a "motion in arrest of judgment" (§ 467), is an ancient, seldom employed form apparently confined to contentions of formal defect in the indictment. The other, a motion for a "new trial" (§§ 462–466), permits a wide range of defense contentions, including certain kinds of jury misconduct, misstatements of law by the court, legal insufficiency and factual inadequacy of trial evidence, and newly discovered evidence.

The proposed Code will eliminate these two motions and replace them with a single "motion to set aside a verdict." This will state more precise grounds but will be broad enough to accommodate any contention of legal error or defect which would require a reversal upon appeal of the prospective judgment of conviction.

The greatest need for the omnibus motion is probably in the area of post-judgment proceedings. Under existing law, a convicted defendant desiring to attack the judgment of conviction is confronted with the problem of deciding which of several kinds of motions or remedies is appropriate to his particular contention; and his problem is further complicated by the circumstances that the substantive demarcation lines between some of these motions are often blurred and that the court in which the attack is to be made depends upon and varies with the label of the motion. Thus, a defendant who advances under motion A a contention which is ultimately determined to be cognizable only under motion B may find not only that he is pursuing the wrong remedy but that he is in the wrong court.

Apart from appeals, the principal existing post-judgment motions and proceedings by which the validity of a judgment of conviction may be attacked are:

1. Coram nobis (a motion always brought in the court of conviction and covering, *inter alia,* contentions of fraudulent conduct by the prosecution, deprivation of the right to counsel, and incompetency of the defendant during trial);
2. Motion for a new trial on the ground of newly discovered evidence (a motion which is always brought in the court of conviction and which is restricted by a one year statute of limitations);

3. Habeas corpus under the Civil Practice Law and Rules (a civil remedy concerned primarily with jurisdictional issues and ordinarily litigated at a term of the Supreme Court held in the county of the defendant's confinement); and
4. Federal habeas corpus (a very broad remedy encompassing all contentions of violation of the federal constitution and initiated by application to a federal District Court for a writ).

The main omnibus motion proposed for this field is entitled a "motion to vacate a judgment," and a secondary one is labeled a "motion to set aside a sentence." Under these two motions, to be made only in the court of conviction, a defendant would be able to assail a judgment of conviction upon any of the grounds now distributed among the several current motions and proceedings enumerated above. In order to prevent these remedies from being used as a substitute for appeal, however, certain limitations are predicated which would render them unavailable in instances where the issue involved has been, or may readily be, determined upon an appeal from the judgment of conviction.

It is to be noted that the proposed motions, while embracing all grounds which may now be raised upon state habeas corpus, do not eliminate that civil remedy; and that a convicted defendant having appropriate grounds would enjoy a choice of proceeding either in the court of conviction under one of the omnibus motions or at a Supreme Court term in the county of incarceration by way of habeas corpus. Although elimination of habeas corpus as a vehicle for attacking the validity of a judgment appears desirable in the indicated setting, such a project might encounter constitutional difficulties. It may be feasible, however, to provide procedural machinery whereby a Supreme Court justice confronted with a habeas corpus action of this nature may transfer the case to the court of conviction for determination by the latter under one of the proposed motions.

Although these omnibus motions seem fully justified on the basis of procedural simplification alone, the advantages thereof might reach well beyond that consideration.

Of recent years, there has been an increasing resort to the federal courts by convicted defendants claiming that state judgments of conviction were procured in violation of their rights under the federal constitution, and in increasing number of federal decisions sustaining such contentions, sometimes with implications that New York's post-judgment remedies are not adequate to permit or provide the relief warranted. In broadening and clarifying the scope of New York's post-judgment procedural machinery these omnibus motions might materially reduce the number of instances in which the federal courts assume jurisdiction because of apparent inadequacy of state remedies.

G. Sentencing

The sentencing provisions of the Code, although basically limited to the mechanics of bringing the offender before the court for sentence and imposing sentence, involve several difficult policy questions currently under study by the Commission.

One such question concerns the types of cases in which a pre-sentence report to the court should be required. Under existing law it is clear that the court cannot use certain dispositions unless it has a pre-sentence report. (*E.g.*, probation or, where the charge is a felony, suspended sentence. Penal Law, § 2188.) However, the law is not clear on the question of whether a pre-sentence report is required as a general rule (Code of Cr. Proc., §§ 482 subd. 2, 931, 943). Under existing practice most Supreme and County Courts have pre-sentence investigations for almost every case, but the vast majority of lower criminal courts do not receive the benefit of any professional, objective pre-sentence information. In view of the fact that these lower criminal courts are authorized to impose sentences of imprisonment for terms up to one year, to impose consecutive sentences that can aggregate up to two years (see new Penal Lew, § 70.30 subd. 2) and to impose reformatory sentences that can last four years (*id.*, Article 75), substantial consideration is being given to the problem of whether and to what extent the new Code should intervene to mandate change in the existing practice. This is more than a question of sentencing policy, because, if the existing practices are to be changed, provision must be made to supply the necessary additional services and in many cases to organize and set up probation services for courts that presently have none at all available.

Another important question in the pre-sentence area is the issue of whether the defendant or his counsel should be permitted to inspect the court's pre-sentence report. Under present New York practice the report to the court is completely confidential. Many professionals in the field of probation believe that confidentiality is essential to their information-gathering function and that persons would not be willing to disclose valuable information about the offender's background if they felt that he would learn of the disclosure. The proponents of disclosure, however, argue that the confidential aspect is an invitation to misinformation and that a person might be sentenced upon erroneous information or information furnished through malice. The arguments for disclosure would be quite compelling if sentencing were based primarily upon the information furnished in the pre-sentence report; but the report is only one of many factors the court must consider when sentencing. A possible solution under consideration by the Commission's staff is to make it clear, by statute, that the defendant or his counsel has the right to furnish his own report to the court. This would be a major improvement over the brief oral pre-sentencing statement usually made by the defendant or counsel and would alert the court, in advance of sentencing, to any significant discrepancies. Where information in the court's report and the defendant's report is significantly different the court would be in a position to order further investigation or even a brief hearing.

In drafting the new Penal Law the Commission left open—for discussion when drafting the Code—the question of the extent of

the hearing that the Court should be required to conduct before it can impose the persistent felony offender sentence authorized by section 70.10 of the new Penal Code. The court will, of course, be required under any view to have proof of the prior convictions and proof that the offender is the person named in the record of prior convictions. However, the difficult question is whether the Code should require the court to afford the offender an opportunity for a hearing with respect to his general "history and character . . . and the nature and circumstances of his criminal conduct" (New Penal Law § 70.10 subd. 2). Under existing law, the increased sentences for multiple felony offenders are mandatory and are imposed in a mechanical fashion (existing Penal Law §§ 1941, 1942, 1943). The new Penal Law (§ 70.10 vests the court with discretion in this area and the exercise of this discretion will have an effect significantly different from the effect of its discretionary function when imposing ordinary felony sentences. The ordinary authorized sentences for felonies bear a relationship to the gravity of the particular crime for which the offender is to be sentenced and are structured so as to permit the parole board and correctional authorities to exercise broad discretion. The persistent felony offender sentence does not bear a relationship to the gravity of the crime: it is based upon the theory that the offender's previous conduct and demonstrated inability to reform have shown him to be a serious and persistent threat to the public security. The sentence's concept of "extended incarceration [15 to 25 years minimum period of imprisonment] and life-time supervision" represents an ultimate disposition and deprives both the parole board and the correctional authorities of any effective measure of discretion. Therefore, the court's rule where the persistent felony offender sentence is concerned becomes all important, and the question of whether an opportunity for a hearing should be granted takes on concomitant significance. The Commission is studying various methods of solving this problem and will incorporate its proposed solution in the forthcoming draft of its proposed Code.

Reference should also be made to one other important policy question. This relates to the manner in which fines are to be collected. Under existing law, the Court usually imposes an alternative number of days to be served if the fine cannot be paid. (Not more than one day for each dollar of unpaid fine. Code of Cr. Proc., §§ 484, 718.) This means, for example, that a person who is convicted of a misdemeanor could receive a sentence of one year imprisonment plus a $500. dollar fine and, if unable to pay the fine, can be forced to serve 500 days in addition to the one year term. Moreover, existing New York Law does not contain any machinery—apart from the aforesaid coercive imprisonment—for enforcing the judgment where the fine is imposed upon an indivdual (*cf.*, Code of Cr. Proc., § 682 relating to corporations). It seems clear that an effective method of collecting fines through a process akin to civil execution, coupled with a procedure for resentencing persons who are demonstrably unable to pay, would be fairer to indigent defendants, would encourage more careful consideration in the sentencing

process and would arm the State with an effective method of carrying out the sentence actually intended by the court. The Commission is considering the feasibility of such a procedure and its findings will be incorporated in appropriate provisions of the proposed Code.

H. Fundamental Areas

There are several phases of criminal procedure which may be characterized as especially important and difficult because they involve issues relating to fundamental rights of accused persons and because they have in recent years provoked vigorous controversy in the courts and among persons and groups greatly concerned with the administration of criminal justice. Included within these "fundamental" problems are those dealing with pre-arraignment law enforcement procedures and the admissibility of confessions obtained during the pre-arraignment period; with the question of whether our bail procedures should be drastically revised with a view to achieving substantial reduction of incarcerations prior to the trial or disposition stages of a criminal case; with the issue of whether there shoud be an expansion of defendants' rights of pre-trial discovery in criminal cases; with the issue of whether our "youthful offender" act should be altered along more enlightened lines; and with the question of whether our laws regulating the field of privilege and immunity need overhauling.

From the standpoint of drafting concrete proposals, the Commission has been treading more slowly in these premises than in the more routine areas. For one thing, the very intricacy and importance of the indicated problems dictate thorough and careful study before putting pen to paper. For another, some of these areas are currently the subjects of heated and as yet undetermined appellate court litigation, and of as yet uncompleted special studies and projects being undertaken by certain official agencies, Bar groups and other types of organizations. Thus, for example, before drafting proposed legislation in connection with bail, the Commission would like to examine as much material as possible issued by the Vera Foundation, which has been studying and experimenting in this field for some time, and by the Executive Board of the National Conference on Bail and Criminal Justice, which is expected to issue a report presenting the results of its bail studies.

An especially awkward problem is presented with respect to procedural revision in the pre-arraignment realm. There has been much recent appellate litigation of a constitutional nature concerning the kinds of advice or warnings which the police should be required to give arrested defendants before obtaining statements from them; concerning the precise stage at which an arrested defendant has a right to counsel; concerning the period of time which may properly be allowed to elapse between arrest and arraignment; and concerning the admissibility of statments made during that period under varying circumstances. Controversies upon these subjects are rife in the intermediate appellate courts of the federal jurisdiction,

which in some instances have issued conflicting decisions and opinions. These and several other cases dealing with issues of the aforementioned nature are currently pending in or knocking at the door of the Supreme Court of the United States.

In this setting, the highly respected American Law Institute, which in 1962 completed and published a most laudable "Model Penal Code," is conducting an extensive study of the entire pre-arraignment area and is expected, at its annual meeting in May of 1966, to pass upon a tentative draft of its Model Code of Pre-Arraignment Procedure.

Upon receiving the benefit of the aforementionad prospective decisions of the United States Supreme Court and of the recommendations of the American Law Institute, the Commission will draft its proposals in this field.

APPENDIX

The following amendments to the revised Penal Law (Laws 1965, Chapter 1030, as amended by Laws 1965, Chapter 1037, 1039, 1046 and 1047) are proposed for introduction at the 1967 session of the Legislature. The explanatory notes following each section were prepared by the Commission's staff.

Suggestions, comments and criticisms concerning these proposed amendments are earnestly invited and should be sent to:

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

155 Leonard Street (Room 654)
New York, N. Y. 10013

§ 10.00 Definitions of terms of general use in this chapter

Except where different meanings are expressly specified in subsequent provisions of this chapter, the following terms have the following meanings:

1. "Offense" means conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law, local law or ordinance of a political subdivision of this state.

2. "Traffic infraction" means an offense defined by the vehicle and traffic law or by any local law, ordinance, order, rule or regulation regulating traffic, which is not expressly declared to be a violation, a misdemeanor or a felony.

[2.] *3.* "Violation" means an offense, other than a "traffic infraction," for which a sentence to a term of imprisonment [not] in excess of fifteen days is not authorized by this chapter. [or for which no sentence of imprisonment can be imposed.]

[3.] *4.* "Misdemeanor" means an offense, rather than a "traffic infraction," for which a sentence to a term of imprisonment in excess of fifteen days [but not in excess of one year] is authorized by this chapter[,] *but for which a sentence to a term of imprisonment in excess of one year is not authorized by this chapter.*

[4.] *5.* "Felony" means an offense for which a sentence to a term of imprisonment in excess of one year is authorized by this chapter.

[5.] *6.* "Crime" means a misdemeanor or a felony.

[6.] *7.* "Person" means a human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality.

[7.] *8.* "Possess" means to have physical possession or otherwise to exercise dominion or control over tangible property.

[8.] *9.* "Physical injury" means [impairment of physical condition or] substantial pain[.] *or impairment of physical condition,*

including stupor or unconsciousness resulting from some factor other than natural sleep.

[9.] *10.* "Serious physical injury" means physical injury which creates a substantial risk of death, or which causes serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.

[10.] *11.* "Deadly physical force" means physical force which, under the circumstances in which it is used, is readily capable of causing death or serious physical injury.

[11.] *12.* "Deadly weapon" means any loaded weapon from which a shot may be discharged by gunpowder, or a switchblade knife, gravity knife, billy, blackjack, [bludgeon,] or metal knuckles. [or slungshot.]

[12.] *13.* "Dangerous instrument" means any instrument, article or substance, *including a "vehicle" as that term is defined in this section,* which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or serious physical injury[, and includes a "vehicle" as that term is defined in this section.].

[13.] *14.* "Vehicle" means a "motor vehicle" as defined in the vehicle and traffic law, any aircraft, or any vessel equipped for propulsion by mechanical means or by sail.

[14.] *15.* "Public servant" means (a) any public officer or employee of the state or of any political subdivision thereof or of any governmental instrumentality within the state, or (b) any person exercising the functions of any such public officer or employee. The term public servant includes a person who has been elected or designated to become a public servant.

[15.] *16.* "Juror" means any person who is a member of any jury, including a grand jury, impaneled by any court in this state in any action or proceeding or by any public servant authorized by law to impanel a jury in any action or proceeding. The term juror also includes a person who has been drawn or summoned to attend as a prospective juror.

[16.] *17.* "Benefit" means any gain or advantage to the beneficiary and includes any gain or advantage to a third person pursuant to the desire or consent of the beneficiary.

Note: A proposed new subdivision 2, defining "traffic infraction" has been added to clarify the sentencing structure (Part Two). In subdivision 9, defining "physical injury," it is proposed to add the *italic* material in order to clarify the scope of the phrase "impairment of physical condition." The proposed change in subdivision 13, defining "dangerous instrument," is intended to clarify the definition, without substantive change.

§ 20.00 Criminal liability for conduct of another

When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission [thereof,] *of such offense,* he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.

Note: This proposed amendment is intended to clarify the provision, without substantive change.

§ 20.05 Criminal liability for conduct of another; no defense

1. Such other person is not guilty of [the] *such* offense [in question] owing to (*a*) criminal irresponsibility or other legal incapacity, [or] exemption[,] or [to unawareness of the criminal nature of the conduct in question or of the defendant's criminal purpose or to other factors precluding the mental state required for the commission of the offense in question; or] *defense not negating the fact that he engaged in the conduct constituting the offense, or (b) factors, such as unawareness of the criminal nature of the acts committed or of the defendant's criminal purpose, negating the mental state required for the commission of such offense; or*

Note: This proposed amendment is intended to clarify the provision, without substantive change.

§ 30.05 Mental disease or defect

1. A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity to know or appreciate either:

(a) The nature and consequences of such conduct; or
(b) That such conduct [was] *is* wrong.

Note: This proposed amendment is intended only to correct a grammatical error.

§ 60.00 Authorized dispositions

* * *

2. Class A felony. Every person convicted of a class A felony shall be sentenced to imprisonment in accordance with section 70.00 unless such person is sentenced to death in accordance with section 125.35 [or section 135.40.].

Note: Since the death penalty is no longer applicable to kidnapping, the reference to section 135.40 (kidnapping in the first degree) is deleted. Similar changes have been made in subsequent sections to reflect the abolition of the death penalty in the area of kidnapping. See: §§ 100.10, 105.15, 110.05.

§ 100.10 Criminal solicitation in the first degree

A person is guilty of criminal solicitation in the first degree when, with intent that another person engage in conduct constituting [murder or kidnapping in the first degree,] *a class A felony,* he solicits, requests, commands, importunes or otherwise attempts to cause such other person to engage in such conduct.

Criminal solicitation in the first degree is a class D felony.

Note: See note to § 60.00, *supra.*

§ 100.15 Criminal solicitation; no defense

It is no defense to a prosecution for criminal solicitation that:

1. The person solicited did not engage in the conduct solicited; or

2. The object crime was factually or legally impossible of commission under the attendant circumstances, if such crime could have been committed had the attendant circumstances been as the defendant believed, expected or hoped them to be; or

3. Owing to infancy or other manifest criminal irresponsibility or exemption, the person solicited would not or could not have been convicted of the object crime even if he had engaged in the conduct solicited; or

4. The person solicited, though he did engage in the conduct solicited, has not been prosecuted therefor or convicted thereof, or has previously been acquitted thereof, or can not be convicted of the object crime owing to the availability of some defense not negating the fact that he engaged in the conduct constituting such crime.

Note: The "no defense" aspects of the inchoate crimes have been recast in order to promote greater clarity and precision.

§ 105.00 Conspiracy in the fourth degree

A person is guilty of conspiracy in the fourth degree when[, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.] *he agrees with one or more other persons to engage in or cause the performance of conduct constituting a crime, and when he and one or more of such other persons act with the mental state required for the commission of such crime.*

Conspiracy in the fourth degree is a class B misdemeanor.

Note: This amendment is intended to clarify this section, without substantive change.

§ 105.05 Conspiracy in the third degree

A person is guilty of conspiracy in the third degree when[, with intent that conduct constituting a felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.] *he agrees with one or more other persons to engage in or cause the performance of conduct constituting a felony, and when he and one or more of such other persons act with the mental state required for the commission of such crime.*

Conspiracy in the third degree is a class A misdemeanor.

Note: See note to § 105.00, *supra*.

§ 105.10 Conspiracy in the second degree

A person is guilty of conspiracy in the second degree when[, with intent that conduct constituting a class B or class C felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.] *he agrees with one or more other persons to engage in or cause the performance of conduct constituting a class B or class C felony, and when he and one or more of such other persons act with the mental state required for the commission of such crime.*

Conspiracy in the second degree is a class E felony.

Note: See note to § 105.00, *supra*.

§ 105.15 Conspiracy in the first degree

A person is guilty of conspiracy in the first degree when[, with intent that conduct constituting murder or kidnapping in the first degree be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.] *he agrees with one or more other persons to engage in or cause the performance of conduct constituting a class A felony, and when he and one or more of such other persons act with the mental state required for the commission of such crime.*

Conspiracy in the first degree is a class C felony.

Note: See notes to §§ 60.00 and 105.00, *supra*.

§ 105.30 Conspiracy; no defense

It is no defense to a prosecution for conspiracy that:

1. One or more or each of the defendant's co-conspirators:

(a) Are not guilty of the conspiracy charged owing to criminal irresponsibility or other legal incapacity or exemption; or

(b) Were not prosecuted therefor or convicted thereof, or were acquitted thereof; or

2. The object crime was, under the attendant circumstances, legally or factually impossible of commission, if such crime could have been committed had the attendant circumstances been as the defendant believed, expected or hoped them to be; or

3. The co-conspirator or co-conspirators or other person or persons delegated pursuant to the conspiracy to perform the conduct in question could not be guilty of the object crime, owing to criminal irresponsibility or other legal incapacity or exemption.

Note: See note to § 100.15, *supra*.

§ 110.05 Attempt to commit a crime; punishment

An attempt to commit a crime is a:

1. Class B felony when the crime attempted is [murder or kidnapping in the first degree;] *a class A felony;*

Note: See note to § 60.00, *supra*.

§ 110.10 Attempt to commit a crime; no defense

Conduct may "tend to effect the commission of a crime" within the meaning of section 110.00 even though the crime intended happens to be factually or legally impossible of commission under the attendant circumstances, and such impossibility of commission does not constitute a defense to a prosecution for attempt to commit a crime if the crime intended could have been committed had the attendant circumstances been as the defendant believed, expected or hoped them to be.

Note: See note to § 100.05, *supra*.

§ 115.05 Criminal facilitation in the first degree

A person is guilty of criminal facilitation in the first degree when, believing it probable that he is rendering aid to a person who intends to commit [murder or kidnapping in the first degree,] *a class A felony,* he engages in conduct which provides such person with means or opportunity for the commission thereof and which in fact aids such person to commit [murder or kidnapping in the first degree.] *such felony.*

Criminal facilitation in the first degree is a class C felony.

Note: See note to § 60.00, *supra*.

§ 115.10 Criminal facilitation; no defense

It is no defense to a prosecution for criminal facilitation that:

1. The person facilitated [was] *is* not guilty of the underlying felony owing to criminal irresponsibility or *some* other legal incapacity or exemption [or to unawareness of the criminal nature of the conduct in question or to other factors precluding the mental state required for the commission of such felony; or] *or cannot be convicted of such felony owing to the availability of some defense not negating the fact that he engaged in the conduct constituting such felony; or*

2. The person facilitated has not been prosecuted for or convicted of the underlying felony, or has previously been acquitted thereof; or

3. The defendant himself is not guilty, *pursuant to section 20.00,* of the felony which he facilitated because he did not act with the intent or other culpable mental state required for the commission thereof.

Note: See note to § 100.15, *supra.*

§ 120.00 Assault in the fourth degree

A person is guilty of assault in the fourth degree when:

1. He recklessly causes physical injury to another person; or

2. With criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.

Assault in the fourth degree is a class B misdemeanor.

Note: This proposed section is new. It is proposed to expand the crime of "assault" from three to four degrees in order to achieve a better balanced and more equitable degree structure, particularly in the lower degrees. Under § 120.00 as it now reads, reckless behavior is simply equated with intentional behavior. On balance, it would appear that the latter is more grievous than the former and the penalty imposed should reflect this distinction. Therefore, this new fourth degree, which carries a class B misdemeanor penalty, is directed to non-intentional assaults only.

§ 120.02 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 a third person; or

2. He recklessly causes physical injury to another person by means of a deadly weapon or a dangerous instrument; or

3. With criminal negligence, he causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument.

Assault in the third degree is a class A misdemeanor.

Note: This new proposed third degree assault would contain the intentional crime and new, higher degrees of reckless and negligent assaults. See note to § 120.00, *supra.*

§ 120.05 Assault in the second degree

A person is guilty of assault in the second degree when:

* * *

5. For a purpose other than lawful medical or therapeutic treatment, he intentionally causes [stupor, unconsciousness or other] physical [impairment or] injury to another person by administering to him, without his consent, a drug, substance or preparation capable of producing the same; *or*

Note: The proposed deletions reflect the revision of the definition of "physical injury" proposed in § 10.00(9), *supra.*

§ 120.05 Assault in the second degree

A person is guilty of assault in the second degree when:

* * *

6. In the course of and in furtherance of the commission or attempted commission of a felony or of immediate flight therefrom, he, or another participant if there be any, causes physical injury to a person other than one of the participants.

Note: This proposed "felony-assault" provision, wherein "physical injury" is caused, is intended to be a lesser degree of the "felony-assault" provision in the first degree crime [§ 120.10(4)], which requires that "serious physical injury" be caused. It also encompasses the conduct proscribed by a new second degree assault crime added to existing P.L. § 242(6) [chapter 328, Laws 1965] dealing with assaults with intent to collect a usurious loan. Specific inclusion of this type of assault is thereby obviated.

§ 120.10 Assault in the first degree

* * *

4. In the course of and in furtherance of the commission or attempted commission of a felony or of immediate flight therefrom, he [intentionally or recklessly], *or another participant if there be any,* causes serious physical injury to [another] *a* person[.] *other than one of the participants.*

Note: This proposed amendment is intended to parallel the language of this provision with that of § 120.05(6), *supra* and felony-murder (§ 125.25, *infra*).

§ 22. Such law is hereby amended by inserting therein a new section, to be section 120.12, to read as follows:

§ 120.12 Assault, corroboration

A person shall not be convicted of assault in the second degree as defined in subdivision six of section 120.05, or assault in the first degree as defined in subdivision four of section 120.10, if the felony or attempted felony alleged to be the underlying crime is a crime defined in article one hundred thirty, solely on the uncorroborated testimony of the alleged victim.

Note: This proposed new section extends the corroboration requirement in sex offenses (§ 130.15) to assaults committed in the course of the commission or attempted commission of a felonious sex crime.

§ 125.25 Murder

A person is guilty of murder when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide; or

2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person; or

3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants, except that in any prosecution under this subdivision, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

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

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

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

Murder is a class A felony.

Note: This proposed amendment is necessitated by the enactment of the qualified death penalty abolition law (chapter 321, Laws of 1965).

§ 125.30 Murder; sentence

1. When a defendant has been convicted by a jury verdict of murder as defined in subdivision one of section 125.25, the court shall, as promptly as practicable, conduct a further proceeding, pursuant to section 125.35, in order to determine whether the defendant shall be sentenced to death in lieu of being sentenced to the term of imprisonment for a class A felony prescribed in section 70.00, if it is satisfied that:

(a) Either:

(i) the victim of the crime was a peace officer who was killed in the course of performing his official duties, or

(ii) at the time of the commission of the crime the defendant was confined in a state prison or was otherwise in custody upon a sentence for the term of his natural life, or upon a sentence commuted to one of natural life, or upon a sentence for an indeterminate term the minimum of which was at least fifteen years and the maximum of which was natural life, or having escaped from such confinement or custody the defendant was in immediate flight therefrom; and

(b) The defendant was more than eighteen years old at the time of the commission of the crime; and

(c) There are no substantial mitigating circumstances which render sentence of death unwarranted.

2. If the court conducts such a further proceeding with respect to a sentence, the jury verdict of murder recorded upon the minutes shall not be subject to jury reconsideration therein.

Note: See note to § 125.25, *supra*.

§ 125.35 Murder; proceeding to determine sentence; appeal

1. [When a defendant has been found guilty after trial of murder, and such verdict has been recorded upon the minutes, it shall not thereafter be subject to jury reconsideration.] *Any further proceeding authorized by section 125.30 with respect to a sentence for murder shall be conducted in the manner provided in this section.*

2. [Unless the court sentences the defendant as for a class A felony as provided in subdivision two or three of section 125.30, it shall, as promptly as practicable, conduct a proceeding to determine whether defendant should be sentenced as for a class A felony 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 that 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 maximum and possible minimum terms of imprisonment and to the possible release on parole of a person sentenced [as] *to a term of imprisonment* for a class A felony.

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 [class A felony] sentence[.] *of imprisonment,* the court shall discharge the jury and shall impose such sentence. 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 [for a class A felony.] *of 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 [for a class A felony.] *of imprisonment.*

Note: See note to § 125.25, *supra.*

§ 130.05 Sex offenses; lack of consent

* * *

1. Whether or not specifically stated, it is an element of every offense defined in this article, except the offense of [consensual sodomy] *sexual misconduct in the second degree,* that the sexual act was committed without consent of the victim.

Note: The proposed change constitutes a change in the title of the crime only. See § 130.18(1), *infra,* and note thereto.

§ 130.18 Sexual misconduct in the second degree

A person is guilty of sexual misconduct in the second degree when:

1. He engages in deviate sexual intercourse with another person; or

2. He engages in sexual conduct with a mammal, a bird or a dead human body.

Sexual misconduct in the second degree is a class B misdemeanor.

Note: It is proposed, by the addition of this section, to create five degrees of the crime of "sexual misconduct." Subdivision (1) proposes to change the title of the crime of "consensual sodomy" (§ 130.38) to a more accurate one. The "consensual sodomy" label implies that the crime cannot constitute a degree of a non-consensual sodomy situation. Such implication is not intended. Subdivision (2) is substantially § 130.20(3). In place of the ambiguous category "animal," it is proposed that the statute designate specifically, the "animals" which, as a practical matter, fall within the proscription, *i.e.,* mammals and birds. The effect of transplanting this provision from § 130.20(3) to this section is to reduce the offense from a class A to a class B misdemeanor.

§ 130.20 Sexual misconduct *in the first degree*

A person is guilty of sexual misconduct *in the first degree* when:

1. Being a male, he engages in sexual intercourse with a female without her consent; or

2. He engages in deviate sexual intercourse with another person without the latter's consent[; or

3. He engages in sexual conduct with an animal or a dead human body].

Sexual misconduct *in the first degree* is a class A misdemeanor.

Note: This section would now become the first degree crime and, except for the transfer of the animal sodomy provision to § 130.18 *supra,* would remain the same.

§ 130.25 Rape in the third degree

A male is guilty of rape in the third degree when[: 1. He] *he* engages in sexual intercourse with a female [who] *and when:*

1. Such female is incapable of consent by reason of some factor other than being less than seventeen years old; or

2. [Being] *He is* twenty-one years old or more[, he engages in sexual intercourse with a] *and such* female *is* less than seventeen years old.

Rape in the third degree is a class E felony.

Note: The proposed amendments are formal only and intended to clarify both the crime itself and its place within the degree structure.

§ 130.30 Rape in the second degree

A male is guilty of rape in the second degree when[, being eighteen years old or more,] he engages in sexual intercourse with a female *and when such male is eighteen years old or more and such female is* less than fourteen years old.

Rape in the second degree is a class D felony.

Note: See note to § 130.25, *supra.*

§ 130.35 Rape in the first degree

A male is guilty of rape in the first degree when he engages in sexual intercourse with a female *and when:*

1. [By] *He engages in such conduct by* forcible compulsion; or

2. [Who] *Such female* is incapable of consent by reason of being physically helpless; or

3. [Who] *Such female* is less than eleven years old.

Rape in the first degree is a class B felony.

Note: See note to § 130.25, *supra.*

§ 130.38 Consensual sodomy

Note: It is proposed to shift the provisions of this section, without substantive change, to § 130.18(1). See note thereunder, *supra.*

§ 130.40 Sodomy in the third degree

A person is guilty of sodomy in the third degree when[: 1. He] *he* engages in deviate sexual intercourse with [a] *another* person [who] *and when:*

1. *Such other person* is incapable of consent by reason of some factor other than being less than seventeen years old; or

2. [Being] *He is* twenty-one years old or more[, he engages in deviate sexual intercourse with a] *and such other* person *is* less than seventeen years old.

Sodomy in the third degree is a class E felony.

Note: See note to § 130.25, *supra*.

§ 130.45 Sodomy in the second degree

A person is guilty of sodomy in the second degree when[, being eighteen years old or more,] he engages in deviate sexual intercourse with another person *and when he is eighteen years old or more and such other person is* less than fourteen years old.

Sodomy in the second degree is a class D felony.

Note: See note to § 130.25, *supra*.

§ 130.50 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 *and when:*

1. [By] *He engages in such conduct by forcible compulsion; or*

2. [Who] *Such other person* is incapable of consent by reason of being physically helpless; or

3. [Who] *Such other person* is less than eleven years old.

Sodomy in the first degree is a class B felony.

Note: See note to § 130.25, *supra*.

§ 135.25 Kidnapping in the first degree

A person is guilty of kidnapping in the first degree when he abducts another person and when:

1. His intent is to compel a third person to pay or deliver money or property as ransom, or to engage in other particular conduct, or to refrain from engaging in particular conduct; or

2. He restrains the person abducted for a period of more than twelve hours with intent to:

(a) Inflict physical injury upon him or violate or abuse him sexually; or

(b) Accomplish or advance the commission of a felony; or

(c) Terrorize him or a third person; or

(d) Interfere with the performance of a governmental or political function; or

3. The person abducted dies during the abduction or before he is able to return or to be returned to safety. Such death shall be presumed, in a case where such person was less than sixteen years old or an incompetent person at the time of the abduction, from evidence that his parents, guardians or other lawful custodians did not see or hear from him following the termination of the abduction and prior to trial and received no reliable information during such period persuasively indicating that he was alive. In all other cases, such death shall be presumed from evidence that a person

whom the person abducted would have been extremely likely to visit or communicate with during the specified period were he alive and free to do so did not see or hear from him during such period and received no reliable information during such period persuasively indicating that he was alive.

Kidnapping in the first degree is a class A felony.

Note: This amendment is necessitated by the abolition of the death penalty as it affected the crime of kidnapping. See chapter 321, Laws of 1965.

§ 135.35 Kidnapping in the first degree; punishment; plea of guilty

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

Note: In view of the abolition of the death penalty as it affected kidnapping, these sections are no longer necessary and may be repealed.

§ 140.25 Burglary in the second degree

A person is guilty of burglary in the second degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein, and when:

1. In effecting entry or while in the building or in immediate flight therefrom, he or another participant in the crime:

(a) Is armed with explosives or a deadly weapon; or

(b) Causes physical injury to any person who is not a participant in the crime; or

(c) Uses or threatens the immediate use of a dangerous instrument; or

2. The building is a dwelling and the entering or remaining occurs at night.

Burglary in the second degree is a class C felony.

Note: The proposed addition of paragraph 1 (c) is intended to cover a fact situation often present in burglary and which should constitute a higher degree of the basic crime. See also § 140.30, *infra*.

§ 140.30 Burglary in the first degree

A person is guilty of burglary in the first degree when he knowingly enters or remains unlawfully in a dwelling at night with intent to commit a crime therein, and when, in effecting entry or while in the dwelling or in immediate flight therefrom, he or another participant in the crime:

1. Is armed with explosives or a deadly weapon; or

2. Causes physical injury to any person who is not a participant in the crime[.] *; or*

3. Uses or threatens the immediate use of a dangerous instrument.

Burglary in the first degree is a class B felony.

Note: See note to § 140.25, *supra*.

§ 145.00 Criminal mischief in the third degree

A person is guilty of criminal mischief in the third degree when, having no right to do so nor any reasonable ground to believe that

he has such right, he [intentionally or recklessly damages property of another person.] :

1. *Intentionally damages property of another person; or*

2. *Recklessly damages property of another person in an amount exceeding two hundred fifty dollars.*

Criminal mischief in the third degree is a class A misdemeanor.

Note: As indicated in the note to § 120.00, *supra*, the simple equation of reckless conduct with intentional conduct introduces an imbalance which this proposed amendment seeks to cure by requiring that recklessness result in damage exceeding $250.

§ 145.20 Criminal tampering in the first degree

A person is guilty of criminal tampering in the first degree when, [with intent to cause a substantial interruption or impairment of a service rendered to the public, and] having no right to do so nor any reasonable ground to believe that he has such right, he [damages or tampers] *intentionally causes substantial interruption of a service rendered to the public by damaging or tampering* with property of a gas, electric, steam or water-works corporation, telephone or telegraph corporation, common carrier, or public utility operated by a municipality[, and thereby causes such substantial interruption or impairment of service].

Criminal tampering in the first degree is a class D felony.

Note: This proposed amendment is intended to clarify the section, without substantive change.

§ 155.00 Larceny; definitions of terms

1. "Property" means any money, personal property, real property, thing in action, evidence of debt or contract, or *any* article, *substance or thing* of value [of any kind. Commodities of a public utility nature such as gas, electricity, steam and water constitute property, but the supplying of such a commodity to premises from an outside source by means of wires, pipes, conduits or other equipment shall be deemed a rendition of a service rather than a sale or delivery of property.].

Note: "Commodities of a public utility nature," presently specifically included under "property," actually fall within "article, substance or thing of value." It is proposed to shift the clause concerning the supplying of such commodities to the definition of "service." See § 105.10(1), *infra*.

§ 155.30 Grand Larceny in the third degree

* * *

4. The property[, regardless of its nature and value,] is taken from the person of another; or

5. The property[, regardless of its nature and value,] is obtained by extortion.

Note: It is proposed to delete the bracketed phrase in each subdivision as unnecessary.

§ 155.40 Grand larceny in the first degree

A person is guilty of grand larceny in the first degree when he steals property and when the property[, regardless of its nature

and value,] is obtained by extortion committed by instilling in the victim a fear that the actor or another person will (a) cause physical injury to some person in the future, or (b) cause damage to property, or (c) use or abuse his position as a public servant by engaging in conduct within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely.

Grand larceny in the first degree is a class C felony.

Note: It is proposed to delete the bracketed phrase as unnecessary.

§ 160.15 Robbery in the first degree

* * *

3. [Is armed with and uses] *Uses* or threatens the immediate use of a dangerous instrument.

Note: This proposed amendment is intended to promote greater precision and clarity, and to conform the language to the proposed amendment of §§ 140.25 and 140.30, *supra*.

§ 165.10 Theft of services; definitions of terms

1. "Service" includes, but is not limited to, labor, professional service, [public utility and] transportation service, the supplying of hotel accommodations, restaurant services, entertainment, [and] the supplying of equipment for use[.], *and the supplying of commodities of a public utility nature such as gas, electricity, steam and water.*

Note: See note to § 155.00, *supra*.

§ 165.15 Theft of services

* * *

5. With intent to avoid payment by himself or another person for a prospective or already rendered service the charge or compensation for which is measured by a meter or other mechanical device [provided by the supplier of the service], he tampers with such device or with other equipment related thereto, or in any manner attempts to prevent the meter or device from performing its measuring function, without the consent of the supplier of the service. A person who tampers with such a device or equipment without the consent of the supplier of the service is presumed to do so with intent to avoid, or to enable another to avoid, payment for the service involved; or

6. With intent to obtain, without the consent of the supplier thereof, gas, electricity, water, steam or telephone service, he tampers with any equipment [of the supplier thereof] designed to supply or to prevent the supply of such service either to the community in general or to particular premises; or

Note: This proposed amendment is intended to meet the problem posed by public utilities which supply electric power. Meters and equipment, such as cables, which conduct electricity from the trunk line into each individual house often belong to the owner of the building, not to the utility company.

§ 170.00 **Forgery; definitions of terms**

* * *

4. "Falsely make." A person "falsely makes" a written instrument when he makes or draws a complete written instrument in its entirety, or an incomplete written instrument, which purports to be an authentic creation of its ostensible maker or drawer, but which is not such either because the ostensible maker or drawer is fictitious or because, if real, he did not *make or* authorize the making or drawing thereof. *When a written instrument does not purport to be the act of a person other than the actual maker or drawer thereof but is made or drawn by the latter not in his true name but in a fabricated or assumed name, the "ostensible maker" thereof is "fictitious" and is no less so because some other person rightfully bearing that name happens to be in existence.*

Note: This proposed amendment is intended to clarify the definition of "falsely make."

§ 170.10 **Forgery in the second degree**

* * *

5. A prescription of a duly licensed physician or other person authorized to issue the same for any drug [or any instrument or device used in the taking or administering of drugs] for which a prescription is required by law[.], *or for any hypodermic syringe or hypodermic needle.*

Note: This proposed amendment is intended to clarify the provision, without substantive change.

§ 180.00 **Commercial bribing**

A person is guilty of commercial bribing when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, *upon an agreement or understanding,* or with intent, [to influence] *that* [his] *the* conduct *of such employee, agent or fiduciary* in relation to his employer's or principal's affairs [.] *will thereby be influenced.*

Commercial bribing is a class B misdemeanor.

Note: The proposed amendment is intended to parallel the language of all the "bribe giving" provisions. See, *e.g.*, §§ 200.00, 200.45, *infra*.

§ 180.05 **Commercial bribe receiving**

An employee, agent or fiduciary is guilty of commercial bribe receiving when, without the consent of his employer or principal, he solicits, accepts or agrees to accept any benefit from another person upon agreement [or], understanding *or offer* that [such benefit will influence] his conduct in relation to his employer's or principal's affairs[.] *will thereby be influenced.*

Commercial bribe receiving is a class B misdemeanor.

Note: The proposed amendment is intended to parallel the language of all the "bribe receiving" provisions. See, *e.g.*, §§ 180.25, 180.45, 200.10, 200.50, *infra*.

§ 180.25 **Bribe receiving by a labor official**

A labor official is guilty of bribe receiving by a labor official when he solicits, accepts or agrees to accept any benefit from another person upon an agreement [or], understanding *or offer* that [such benefit will influence him in respect to] any of his acts, decisions, or duties as such labor official[.] *will thereby be influenced.*

Bribe receiving by a labor official is a class D felony.

Note: See note to § 180.05, *supra*.

§ 180.45 **Sports bribe receiving**

A person is guilty of sports bribe receiving when:

1. Being a sports participant, he solicits, accepts or agrees to accept any benefit from another person upon agreement [or], understanding *or offer* that he will [thereby be influenced] not [to] give his best efforts in a sports contest; or

2. Being a sports official, he solicits, accepts or agrees to accept any benefit from another person upon an agreement [or], understanding *or offer* that he will perform his duties improperly.

Sports bribe receiving is a class E felony.

Note: See note to § 180.05, *supra*.

§ *190.40* ***Criminal usury***

A person is guilty of criminal usury when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on the loan or forebearance of any money or other property, at a rate exceeding twenty-five percentum per annum or the equivalent rate for a longer or shorter period.

Criminal usury is a class E felony.

Note: This proposed section is new. The substance thereof was added to the existing Penal Law as § 2401, by chapter 328, Laws of 1965. This revision omits the second unnumbered paragraph of § 2401, since it constitutes a statement of legislative intent which need not be included in the statute, but may be indicated by a revisor's note.

§ *190.45* ***Possession of usurious loan records***

A person is guilty of possession of usurious loan records when, with knowledge of the contents thereof, he possesses any writing, paper, instrument or article used to record criminally usurious transactions prohibited by section 190.40.

Possession of usurious loan records is a class A misdemeanor.

Note: This proposed section is new. The substance thereof was added to the existing Penal Law as § 2403, by Chapter 328, Laws of 1965.

§ 200.00 **Bribery**

A person is guilty of bribery when he confers, or offers or agrees to confer, any benefit upon a public servant upon an agreement or understanding, *or with intent,* that such public servant's vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced.

Bribery is a class D felony.

Note: See note to § 180.00, *supra*.

§ 200.10 **Bribe receiving**

A public servant is guilty of bribe receiving when he solicits, accepts or agrees to accept any benefit from another person upon an agreement [or], understanding *or offer* that his vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced.

Bribe receiving is a class D felony.

Note: See note to § 180.05, *supra*.

§ 200.45 **Bribe giving for public office**

A person is guilty of bribe giving for public office when he confers, or offers or agrees to confer, any money or other property upon a public servant or a party officer upon an agreement or understanding, *or with intent*, that some person will or may be appointed to a public office or designated or nominated as a candidate for public office.

Bribe giving for public office is a class D felony.

Note: See note to § 180.00, *supra*.

§ 200.50 **Bribe receiving for public office**

A public servant or a party officer is guilty of bribe receiving for public office when he solicits, accepts or agrees to accept any money or other property from another person upon an agreement [or], understanding *or offer* that some person will or may be appointed to a public office or designated or nominated as a candidate for public office.

Bribe receiving for public office is a class D felony.

Note: See note to § 180.05, *supra*.

§ 205.65 **Hindering prosecution in the first degree**

A person is guilty of hindering prosecution of the first degree when he renders criminal assistance to a person who has committed [murder or kidnapping in the first degree] *a class A felony*, knowing or believing that such person has engaged in the conduct constituting such [murder or kidnapping in the first degree] *class A felony*.

Hindering prosecution in the first degree is a class D felony.

Note: See note to § 60.00, *supra*.

§ 215.50 **Criminal contempt**

* * *

6. Intentional failure to obey any mandate, process or notice, issued pursuant to articles sixteen, seventeen, eighteen, *or* eighteen-a [or eighteen-b] of the judiciary law, or to rules adopted pursuant to any such statute or to any special statute establishing commissioners of jurors and prescribing their duties or who refuses to be sworn as provided therein; or

Note: This proposed amendment is necessitated by the repeal of article eighteen-b of the Judiciary Law by Chapter 778, Laws of 1965.

§ 225.00 **Gambling offenses; definitions of terms**

* * *

4. "Advance gambling activity." A person "advances gambling activity" when, acting other than as a player, he engages in conduct which materially aids any form of gambling activity. Such conduct includes but is not limited to conduct directed toward the creation or establishment of the particular 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[,] *and* toward the arrangement of any of its financial or recording phases[, or toward any other phase of its operation]. One advances gambling activity when, having substantial proprietary or other authoritative control over premises being used with his knowledge for purposes of gambling activity, he permits such to occur or continue or makes no effort to prevent its occurrence or continuation.

* * *

10. "Lottery" means [an unlawful] *a* gambling scheme in which (a) the players pay or agree to pay something 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 to be designated the winning ones; and (b) the winning chances are to be determined by a drawing or by some other method based upon the element of chance; and (c) the holders of the winning chances are to receive something of value.

Note: These proposed amendments are intended to clarify these provisions, without substantive change.

§ 225.05 **Promoting gambling in the second degree**

A person is guilty of promoting gambling in the second degree when he knowingly *and unlawfully* advances or profits from [unlawful] gambling activity.

Promoting gambling in the second degree is a class A misdemeanor.

Note: See note to § 225.00, *supra*.

§ 225.10 **Promoting gambling in the first degree**

A person is guilty of promoting gambling in the first degree when he knowingly *and unlawfully* advances or profits from [unlawful] gambling activity by:

1. Engaging in bookmaking to the extent that he receives or accepts in any one day more than five bets totaling more than five thousand dollars; or

2. Receiving, in connection with [a] *an unlawful* lottery or policy scheme or enterprise, (a) money or written records from a person other than a player whose chances or plays are presented

by such money or records, or (b) more than five hundred dollars in any one day of money played in such scheme or enterprise.

Promoting gambling in the first degree is a class E felony.

Note: See note to § 225.00, *supra.*

§ 225.15 Possession of gambling records in the second degree

* * *

2. Of a kind commonly used in the operation, promotion or playing of [a] *an unlawful* lottery or policy scheme or enterprise; except that in any prosecution under this subdivision, it is a defense that the writing, paper, instrument or article possessed by the defendant constituted, reflected or represented plays, bets or chances of the defendant himself in a number not exceeding ten.

Note: See note to § 225.00, *supra.*

§ 225.20 Possession of gambling records in the first degree

* * *

2. Of a kind commonly used in the operation, promotion or playing of [a] *an unlawful* lottery or policy scheme or enterprise, and constituting, reflecting or representing more than five hundred plays or chances therein.

Note: See note to § 225.00, *supra.*

§ 225.25 Possession of gambling records; defense

In any prosecution for possession of gambling records, it is a defense that the writing, paper, instrument or article possessed by the defendant was neither used nor intended to be used in the operation or promotion of a bookmaking scheme or enterprise, or in the operation, promotion or playing of [a] *an unlawful* lottery or policy scheme or enterprise.

Note: See note to § 225.00, *supra.*

§ 225.30 Possession of a gambling device

* * *

2. Any other gambling device, believing that the same is to be used in the *unlawful* advancement of [unlawful] gambling activity.

Note: See note to § 225.00, *supra.*

§ 255.20 Unlawfully procuring a marriage license, bigamy, adultery; defense

In any prosecution for unlawfully procuring a marriage license, bigamy, or adultery, it is an affirmative defense that the defendant acted under a reasonable belief that both he and the other [person] *party* to the marriage or prospective marriage or to the sexual intercourse, as the case may be, were unmarried.

Note: See note to § 225.00, *supra.*

§ 255.30 *Adultery and* [Incest] *incest;* corroboration

A person shall not be convicted of adultery or incest or of an attempt to commit [incest] *either such crime* upon the uncorroborated testimony of the [person with whom the offense is alleged to have been committed.] *other party to the adulterous or incestous act or attempted act.*

Note: This proposed amendment was necessitated by the enactment of § 225.17, reinstating the crime of adultery. See Chapter 1037, Laws of 1965.

§ 260.15 Endangering the welfare of a child; defense

In any prosecution for endangering the welfare of a child, pursuant to section 260.10, based upon an alleged failure or refusal to provide proper medical care or treatment to an ill child, it is an affirmative defense that the defendant (a) is a parent, guardian or other person legally charged with the care or custody of such child; and (b) is a member or adherent of an organized church or religious group the tenets of which prescribe prayer as the principal treatment for illness; and (c) treated or caused such ill child to be treated in accordance with such tenets[; provided that the defendant may not avail himself of this defense when he has violated the laws, rules or regulations relating to communicable or reportable diseases and to sanitary matters.].

Note: This proposed deletion of the exception clause is predicated on the argument that it is irrelevant to a defense on a charge of endangering a child's health, that the defendant violated a health regulation aimed at protecting the public. If, in fact, such regulation was violated, he may be prosecuted therefor and this section would be no defense to such prosecution. The substance of the clause proposed to be deleted is contained in existing Penal Law § 495. However, that section is cast in terms of a statement of principle, not as an affirmative defense. In that context it may have relevance.