STATE OF NEW YORK

INTERIM REPORT

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TEMPORARY COMMISSION on REVISION

of the PENAL LAW and CRIMINAL CODE

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THE ACT OF CREATING THE COMMISSION

The Act creating this temporary Commission, effective July 1, 1961, provides for a nine-man commission, three members to be appointed by the Governor, three by the Temporary President of the Senate, and three by the Speaker of the Assembly. The Commission is empowered to employ counsel, consultants and other personnel; "to undertake any studies, inquiries, surveys and analyses it may deem relevant through its own personnel, or in cooperation with public and private agencies;" to obtain testimony and evidence by means of legal process; "to hold public and private hearings and otherwise have all of the powers of a legislative committee under the legislative law."

The extensive purposes, functions and duties of the Commission are outlined in the second section of the Act, as follows:

> "§ 2. The commission shall make a study of existing provisions of the penal law and the code of criminal procedure and shall prepare, for submission to the legislature, a revised, simplified body of substantive laws relating to crimes and offenses in the state as well as a revised, simplified code of rules and procedures relating to criminal and quasi-criminal actions and proceedings in or connected with the courts, departments and institutions of the state, affecting the rights and remedies of the people. More specifically, the commission shall make such changes and revisions as will:
>
> "a. restate, enumerate and accurately define substantive provisions of law relating to crimes and offenses by adding or amending language where necessary so as to improve substantive content and remove ambiguity and duplication;
>
> "b. eliminate existing substantive provisions of law which are no longer useful or necessary;
>
> "c. rearrange and regroup, topically, substantive provisions of law so as to make for orderly and logical grouping of related subject matter;
>
> "d. reappraise, in the light of current knowledge and thinking, existing substantive provisions relating to sentencing, the imposing of penalties and the theory of punishment relating to crime;
>
> "e. provide for equality of treatment of all persons accused of crime regardless of their financial means;
>
> "f. simplify and improve court procedure so as to shorten the time now spent between arrest and disposition in criminal cases and to facilitate the processes of arraignment, indictment, trial and/or sentence;
>
> "g. establish greater uniformity of procedure in the various criminal courts in the state;

"h. improve existing trial procedures for the determination of factual issues relating to guilty or innocence, sanity or insanity, or any other defenses known to criminal law;

"i. reduce costs of trials and appeals;

"j. regulate existing procedures for commitment of persons to the various state institutions;

"k. improve the quality and efficiency of police and court personnel and the various services which they provide."

Among other requirements, the Commission is directed to make an interim report to the Governor and the Legislature not later than February 1, 1962, and the report herein is submitted in compliance with that mandate.

INTRODUCTORY COMMENTS

In view of the brief period of time elapsing since the creation and organization of the Commission and its staff, and in view of other factors outlined below, the Commission has not as yet submitted any bills to the Legislature and, with one exception mentioned hereinafter, does not plan to submit any during the current year of 1962. The primary purpose of this interim report is to present a picture of the assignment being undertaken and to explain the approaches and techniques by which the Commission plans to carry out that assignment.

Some indication of the magnitude of the project is demonstrated by the above-quoted section of the creating Act, which, in defining the Commission's functions with respect to the Penal Law and the Criminal Code, speaks of study, revision, restatement, simplification, elimination, removal of ambiguity and duplication, rearrangement, regrouping, reappraisal of sentencing procedure and philosophy, uniformity of procedure, and, in brief, almost every concept of change.

Implicit in the Act and in the tenor of these provisions, is a recognition that, apart from a need for thorough overhauling with respect to form, structure and many substantive phases of the existing law, these two codes, which have not been subjected to any real revision for some eighty years, require re-examination in a more fundamental sense.

The past eighty years, of course, represent a period of fabulous development in which many nineteenth and early twentieth century standards have been discarded in favor of more enlightened concepts essential to industrial, economic, scientific, political and cultural growth. Generally speaking, there has arisen a national consciousness that the increasing complexities of modern existence cannot be met with a static set of principles, but that new approaches are required to cope with the progress being made in every phase of human endavor. Of necessity, this broadening of thought has been reflected in legislative action. With a drastic change of attitude in the field of labor relations, for example, the entire pattern and philosophy of our labor laws have changed, and the same is true of virtually every other category of legislation.

There is no legislative activity more vital to moral security than that which seeks to regulate human behavior by the imposition of criminal sanctions. By the same token, there is no more important legislative obligation upon New York State than that of making its two criminal codes conform to contemporary standards of fairness and efficiency. If individuals are prosecuted, judged and punished pursuant to outmoded formulae, if our system is inadequate to bring prime offenders to prompt justice, and if the general intellectual advancement has not included a more enlightened

system of treating transgressors, then government is in danger of losing the confidence and respect of its citizenry.

It is primarily with these thoughts in mind, and with the knowledge that eight decades have passed without any full-scale examination by New York State of its criminal laws, that the Commission approaches its assignment. Under the circumstances, it is felt, there must surely be an urgent need not only for formal, procedural and substantive amendment of the usual revisional sort, but for reappraisal of certain fundamental concepts and philosophies lying at the very roots of our penal system.

This by no means imports that the defects of the Penal Law and Criminal Code are confined to fundamental theory or that all may be cured by appraisal and revision along such lines. These two codes, with emphasis on the Penal Law, suffer from a plethora of structural, formal and substantive deficiencies which in themselves present a most formidable task of over-all revision.

It should be noted that, owing to manpower limitations, the Commission's staff cannot conduct full-scale studies of both codes simultaneously, and that the intention is to devote the major share of its earlier effort to the body most in need of thorough revision, namely the Penal Law. Accordingly, this report, though in some measure treating the Criminal Code, focuses mainly on the Penal Law.

THE PENAL LAW AND THE CRIMINAL CODE AS OF 1962

In order to understand fully the revisional approaches planned by the Commission, it is essential to examine the two codes as they presently exist.

The Penal Law

In 1881, many of New York's criminal provisions were codified in a body of law known as the "Penal Code." The structural arrangement was largely categorical, a substantial portion of the crimes being grouped under broad classifications such as "Crimes against property," "Crimes against the person," and the like. The organization was poorly conceived, however, and proved unsatisfactory.

In 1909, the "Penal Code" was superseded by the "Penal Law," which, without much change of substance, abandoned the *category* structure and presented a rearrangement of the Penal Code on an alphabetical basis.

Careful scrutiny of this code, as it has developed to its present state, discloses many archaic aspects and leaves the impression that, in numerous respects, it has not been kept up to date and languishes in the nineteenth century. While there has been constant amendment of individual sections seeking to conform provisions to a variety of changing factual conditions, there has been no examination of the over-all philosophy of the criminal law in the light of twentieth century experience.

Over the past many decades, for example, there has been a growing realization that the sentencing and confinement of convicted persons is not a simple matter of making the guilty pay for their offenses or of deterring those inclined toward criminal activity. Perceptive thinking has led many to the conclusion that the subject is an extremely complex one inextricably interwoven with considerations of correction, education, medical and psychiatric treatment, and rehabilitation. Culpability and degrees thereof should, perhaps, be measured by standards other than those laid down many years ago. Yet, the Penal Law shows little change in general sentencing theory from that presented by the old Penal Code at its inception in 1881.

The principal legislative activity with respect to sentencing has taken the form of multiplication of the kinds of sentences imposable for different crimes until the varieties number in the dozens. While there have been some important sentencing amendments—such as those substituting indeterminate for fixed terms, and the so-called Baumes laws with their more severe penalties for recidivists—there appears to have been no such thorough evaluation of the entire sentencing structure and theory as might produce significant alteration consistent with modern thinking.

In somewhat the same vein, the Penal Law has been subject to criticism with respect to its narcotic laws, its concept of criminal responsibility and its definitions of homicide, larceny, burglary and other crimes.

But apart from its substantive aspects, the Penal Law bears considerable scrutiny with respect to form and structure.

Structurally, as indicated, it purports to present an alphabetical as distinguished from a category format. Actually, it is a hybrid arrangement, attempting to combine the alphabetical and category systems. Thus, while it commences alphabetically enough with crimes or Articles such as "Abduction," "Abortion," "Anarchy," "Arson" and "Assault," one soon comes upon extremely broad Articles like "Business and Trade," "Children," "Frauds and Cheats," "Public Safety," etc., each of which constitutes a category covering a varied multitude of prohibitions. The "Business and Trade" Article (Art. 40), for example, includes such diverse proscriptions as misleading advertising (§ 421), commercial bribery (§ 439) and illegal sale of hack stands (§ 444). In the "Public Safety" Article (Art. 172), penal liability ranges from the dangerous weapon crimes (§§ 1894–1899) to offenses of overloading passenger vessels (§ 1890), riding bicycles on sidewalks (§ 1909) and failing to cover abandoned cesspools (§ 1904-a).

Under its pseudo-alphabetical system, the Penal Law has proliferated and acquired a sprawling, disorganized content. The reasons for this are many. From the standpoint of sheer volume, the greatest difficulty lies in the insertion of hosts of provisions which now appear out of place in the Penal Law.

The chief problem here lies in a huge category of statutes which are only superficially criminal in nature. In its entirety, the Penal Law is not, as some vaguely consider it, a compilation of familiar

offenses with emphasis upon the common law crimes of homicide, arson, robbery, larceny, rape, and the like. These form a relatively small portion and seem lost among the many narrow sections defining highly specialized and seldom prosecuted offenses.

Realistically, these sections are merely regulatory provisions to which criminal sanctions have been attached. While it would be impractical here to describe fully their limited character and the extent to which they pervade this code, the flavor may be caught by scanning "Articles" such as those entitled "Animals," "Banking," "Billiard and Pocket Billiard Rooms," "Bills of Lading, Receipts and Vouchers," "Budget Planning," "Business and Trade," "Canals," "Corporations," "Elective Franchise," "Ferries," "Ice," "Indians," "Insurance," "Labor," "Military," "Navigation," "Oysters," "Passage Tickets," "Pawnbrokers," "Platinum Stamping," "Portable Kerosene Heaters," "Quarantine," "Railroads," "Real Property," "Sepulture," "Societies and Orders," "Trade Marks," "Trading Stamps," "Weights and Measures," and "Wrecks."

Exploration into some of these Articles leads to discovery that it is criminal to sell or give away "baby chicks, ducklings, or other fowl under two months of age in any quantity less than six" (§ 185-a); to post an incorrect schedule of ferry rates in a ferry house if the ferry operates to or from a city of a half million or more inhabitants (§ 871); and to operate a billiard parlor with interior rooms the doors to which do not have sections of clear glass permitting unobstructed views (§ 349). For the scientifically minded, there are offenses like illegal platinum stamping, the criminality of which appears to rest upon whether stamped articles consist of 750, 950 or 985 thousandths parts of "platinum, iridium, palladium, ruthenium, rhodium and/or osmium," the mathematics of the situation being complicated by different standards when solder is used (§ 639). And those with localized geographical interests will find that it is criminal for an Indian to chop down a tree on the Onondaga reservation "except on the written permission of a majority of the chiefs of the Onondaga tribe" (§ 1161).

Multiplied into the hundreds, these have diluted the basic material of the Penal Law and destroyed any semblance of orderly arrangement. Especially in the context of the prevailing alphabetical format, they produce an incongruous effect as one progresses from "Extortion" to "Ferries" to "Forgery," or from "Homicide" to an archaic "Horse Racing" Article to "Ice"—containing a lone section penalizing the cutting of ice in bodies of water in front of privately owned land with certain exceptions including the Hudson and Mohawk Rivers and the tidewaters of Rondout and Catskill Creeks (§ 1100).

Further contributing to the Penal Law's inflated condition are numerous misplaced provisions that do not proscribe criminal offenses, many bearing a most indirect relation to the Criminal Law. Among these are directory statutes stipulating in exhaustive detail how licenses and certificates may be issued and obtained for various

kinds of premises, businesses and weapons, where such certificates must be posted or kept, what fees must be paid, when and how they may be refunded, and the like (see, *e.g.*, §§ 344–347, 440, 1897 subds. 7–12). There are minute directions concerning the seizure, disposition and destruction of gambling instruments, equipment used in the production of pornographic material, and dangerous weapons (§§ 977–999, 983–985-a, 1141-c, 1899), and there are statutes extensively defining civil remedies and exemptions in connection with gambling transactions and other matters (§§ 512-b, 976, 989, 991–995). Even in the purely criminal field, the Penal Law is permeated with provisions patently belonging in the Code of Criminal Procedure, dealing, as they do, with procedural matters such as the jurisdiction of the Children's Court and resentencing procedure (§§ 487, 610, 1943, 2213). Conversely, it may be noted in passing, the Code of Criminal Procedure contains considerable material belonging in the Penal Law, one example being a series of sections defining offenses of vagrancy and disorderly conduct (C.C.P., §§ 887, 887-a, 888, 891, 891-a, 898-a, 899, 901; see, also, Wayward Minor adjudications, § 913-b *et seq.*).

A third major cause of the Penal Law's overweight condition appears in numerous sections of a distinctly archaic character which have somehow survived the transition from crinoline days to modern times (see, *e.g.*, §§ 484, 987, 1020, 1081–1082, 1650, 1710, 1907–1908, 1987, 2370–2371). Some prescribe such quaint violations as heating railroad cars by stoves and furnaces, and driving cattle and sheep on sidewalks (§§ 1907, 1908, 1987). Others, though dealing with ancient crimes which possibly should remain on the books in some form, treat them at undue length and fail to conform them to intervening developments which have all but sterilized them. While it may be debatable whether a criminal sanction against dueling is still necessary (§ 731), no one could reasonably assert a present need for several ancillary provisions, possibly of significance in the era of Alexander Hamilton and Aaron Burr, attaching criminality to dueling challenges, attempts to challenge, publicly reproaching a person for not challenging or accepting a challenge, and leaving the state for the purpose of evading the provisions of the Article in question (Art. 72, §§ 732–735). In the same vein is an Article rendering criminal all prize-fighting and various facets thereof, which was doubtless appropriate in the colorful days when Sullivan and Corbett jousted illegally on barges beyond the arm of the law (Art. 164, §§ 1710–1715). About the only factor not mentioned is the all-important one that, since the passage in 1920 of the Act known as the Walker Law (Unconsol. Laws, § 8901 *et seq.*), prize-fighting conducted under the auspices of a then created State Athletic Commission is legal.

Apart from the above-described structural and inflationary defects, thorough examination of the Penal Law discloses that many basic statutes are not definitively phrased; that related crimes are not necessarily grouped but are often scattered from cover to cover; and, indeed, that identical offenses are sometimes found or repeated in widely separated locations.

In the last connection, it often occurs that a newly enacted provision bears some relationship to two or more "Articles" rather than just one, and hence is susceptible of placement in any of several locations. In many instances, the spot selected has not been the most appropriate one from the standpoint of grouping crimes of a basically similar nature. This has produced a separation of homogeneous provisions and not infrequent cases of repetition in different portions of the Penal Law.

So-called "forgery" statutes, for example, are by no means collated in one "Forgery" Article but are spread throughout the Penal Law, and the same is true of statutes defining larceny and other offenses. One area especially subject to this criticism is that of disorderly conduct and vagrancy. Sections of this type sprout up all over the Penal Law (§§ 348, 710, 720–727, 1140, 1221, 1321, 1470, 1530, 1990-a, 2071–2072, 2090, 2092, 2370–2371) and in the Code of Criminal Procedure as well (§§ 887 *et seq.*, 899 *et seq.*).

The field of bribery is, perhaps, as illustrative as any. Insofar as public officials are concerned—whether they be termed "public," "executive," "judicial," "legislative," or "administrative" officers—it would seem that two or three carefully phrased provisions would suffice to define and penalize the crimes of bribe giving and bribe receiving. Actually, the Penal Law presents no less than six scattered sections collectively and repetitiously enunciating the substance of these offenses in varying language (§§ 372, 378, 1822, 1823, 1826, 1837). In addition, there are provisions—superfluous in the light of the general sections—penalizing bribery, bribe receiving and unlawful fee taking specifically in connection with judicial officers, legislators, sheriffs, canal officers, etc., as well as further miscellaneous and equally scattered sections also proscribing bribery crimes of a sort that fall or should fall within one or two comprehensive statutes (see §§ 371, 372, 374, 465, 1327, 1328, 1831, 1833, 1839, 2320).

Somewhat in line with this characteristic is a general verbosity that blurs the outlines and obscures the substantive essence of many offenses. Statutes often fail to define crimes or fields of crime by inclusively covering the types of conduct to be punished, the classes of persons within their purview, or the kinds of property involved. The Penal Law, as often, fails to pursue the technique of laying the groundwork for a criminal sanction by appropriate defintions and following with a clear and simple punitive provision. A notion seems to have persisted that many a crime is incapable of adequate definition without detailed specification of every way or device by which it can be committed as well as by enumeration of specific persons and property affected. This *itemization* has had unfortunate results.

Thus, in framing legislation dealing with bribery of public officials, as already seen, it was evidently not deemed sufficient to enact inclusive provisions covering all public officials (see §§ 378, 1822, 1823, 1826, 1837). Additional sections had to be inserted applying to judges, legislators, sheriffs, canal officers and others (§§ 371, 372, 374, 1327, 1328, 1831, 1839, 2320). Similarly, the

forgery sections (Art. 84) make little or no effort at definitive summary or general classification of the kinds of instruments and documents involved, but, instead, list instrument after instrument (wills, certificates, indorsements, judgment rolls, etc.) in a series of protracted and unclear subdivisions (§§ 884, 885, 887).

Possibly the most glaring illustration of unnecessary *itemization* is presented by the "Malicious Mischief" Article (Art. 134). A substantial portion of its many sections do no more than penalize malicious damage to property, real or personal, by way of destruction, mutilation and other forms of injury (§ 1420 *et seq.*). These crimes, it would appear, could readily be covered by a comprehensive statute to that effect, and, in the end, that point seems to have been recognized (see § 1433). Yet, the "Article" labors through page after page of lengthy sections with dozens of subdivisions devoted chiefly to explicit designation of items of real and personal property which are the subjects of malicious mischief. In encyclopedic style, these provisions list bridges, piers, dams, trees, rocks, posts, buildings, cables, machines, telegraph poles, grain, grass, crops, sewers, pipes, flowers—including several kinds of flowers—and so on *ad infinitum* (see §§ 1420, 1421, 1423, 1425, 1435). Understandably, this enumeration created an impression in some quarters that items not explicitly mentioned do not fall within the purview of the statutes. Accordingly, certain public utilities, cultural entities and religious organizations, quite evidently apprehensive lest the failure to specify certain of their property and equipment exclude them from the protection of the Malicious Mischief Article, obtained further and even narrower legislation. Compounding the situation, a number of special statutes were enacted punishing malicious injury to electric light poles, lamp posts, gas, electric and water meters, steam valves, water pipes, telephone coin boxes, pipelines of pipeline corporations, books and *objects d'art* of libraries, museums and art galleries, and certain property in churches and cemeteries, including vestments, silverware and musical instruments (§§ 1423-a, 1423-b, 1427, 1428, 1430, 1431, 1432, 1432-a).

The Articles and sections noted above are presented largely as illustrative and by no means constitute an exhaustive list of the Penal Law's deficiencies. They do give some indication, however, of the formidability of the task envisioned by the Legislature in the Act defining the Commission's broad responsibility for recommending reformulation of the Penal Law and Criminal Code.

The Code of Criminal Procedure

Since a full-scale revision of the Code of Criminal Procedure will not be attempted until the Penal Law work has progressed to a more developed stage, this report does not present a detailed analysis of the Code but merely offers a few general observations thereon.

The larger part of the Code deals with procedural rules relating to all phases of a criminal case from inception to completion. Accordingly, in contrast to the complex structural problems inher-

ent in the compilation of the Penal Law, the Code readily lends itself to a simple over-all arrangement of a chronological sort, which, to a great extent, has been employed. For the most part, it progresses logically from provisions concerning arrests and the commencement of actions to the subjects of grand juries and indictments, arraignments and pleas, trial matters, judgments, post-judgment motions, appeals, and so on. Thus, its format, at least, is superior to that of the Penal Law.

Within that superstructure, however, it displays many of the Penal Law's defects. As with the latter, there appears to be a need to study controversial subjects and to re-examine fundamental areas, some of which are mentioned below in another section of this report. Also, as with the Penal Law, amendment has extended statutes to undue length, confused and obscured their meaning, and scattered homogeneous provisions. Many sections of ancient vintage are not only phrased in archaic language, but plainly need amendatory action to conform them to the realities of modern times.

THE TASKS AT HAND AND THE METHODS AND APPROACHES BEING EMPLOYED TO MEET THEM

Passing over the later project of thoroughly overhauling the Criminal Code, the Commission's tasks and functions fall mainly into three classifications, which may be broadly stated as (1) re-examination and possible alteration of laws of both codes dealing with fundamental areas, (2) over-all revision of the Penal Law, and (3) current legislation.

I. Re-examination of Both Codes with Respect to Fundamental Areas

Sufficient has been written in earlier portions of this report stressing the Commission's belief that one of its vital assignments consists of thorough re-examination of fundamental, controversial areas of both substance and procedure.

A precise description of this field of endeavor is difficult, and the line separating deep-seated or so-called *fundamental* matters from those not deemed deep-seated or *fundamental* is not always clear. Generally, however, the subjects falling into this category may be illustrated—though by no means covered—by the following aspects of Penal Law and Criminal Code legislation to which the Commission intends, *inter alia*, to address itself.

With respect to the Penal Law, the field of sentencing, as already noted, clearly merits assiduous study and attention; and it is to be observed that the Act creating the Commission explicitly directs it to "reappraise, in the light of current knowledge and thinking, existing provisions relating to sentencing, the imposing of penalties and the theory of punishment relating to crime" (§ 2-d). This constitutes a vast area for study, and one which is inherently bound up with other related fields, such as parole and probation. It is also a matter requiring early and vigorous effort by the Commission

since any thoroughgoing change of the sentencing structure would necessarily affect almost every penal provision.

Obviously related to the general sentencing problem is the more specific question of capital punishment. Its highly controversial nature, as evidenced by the storms which have raged about it in many jurisdictions, plainly demands the careful attention of any revision agency dealing with the criminal law.

Of like importance are the familiar issue and controversy revolving about the definition of insanity as a defense to criminal charges, and the validity of the McNaughton rule prevailing in New York.

Other major phases of Penal Law legislation which suggest a need for thorough analysis and re-examination include our laws of homicide with their various degrees of murder and manslaughter, considered by some to be outmoded in certain important respects; our narcotic laws, which, according to some, are misguided in their approaches toward criminal responsibility, punishment and rehabilitation; and our immunity statutes, which, in seeking to compel testimony from frequently reluctant witnesses, reach into intricate realms of constitutionality.

Turning to the Criminal Code, one also finds numerous major subjects of controversy and fundamental significance which demand appraisal.

Among these are the Article concerning New York's grand jury system, a highly traditional one from which the majority of other jurisdictions have considerably diverged; the provisions concerning examination of defendants to determine their mental competency to stand trial; the entire group of statutes providing for and regulating bail; the laws relating to search warrants and arrest; those pertaining to the privilege against self-incrimination and the prohibition against comment upon the defendant's failure to testify; and the New York statutory rule precluding conviction upon accomplice testimony without substantial corroborative evidence.

It is apparent that the work involved in projects of this nature is of a sort that requires both intensive studies and thorough canvassing of public opinion. It is more than doubtful that the Commission's staff, with its limited manpower, would alone be able to execute these assignments adequately in addition to the other immense tasks confronting it. Quite evidently, the Legislature had largely this in mind when, in the creating Act, it authorized the Commission (1) "to undertake any studies, inquiries, surveys and analyses it may deem relevant through its own personnel, or in cooperation with public and private agencies" such as Bar Associations and law schools (§ 2); and (2) to hold public and private hearings (§ 3). In any event, the Commission intends to employ these tools by engaging the assistance of outside agencies and individuals to conduct studies, and by holding hearings to obtain expert and representative opinion. In this connection, it is essential that the views of all groups and individuals concerned with the administration of justice be fairly considered. It is the Commission's intention to solicit such opinions in the hope that the end products will represent a synthesis of the best thinking available in this State.

II. Over-all Revision of the Penal Law

An earlier portion of this report has been devoted to historical and descriptive analysis of the Penal Law for the purpose of depicting and explaining its present condition. With that picture in mind, some of the Commission's tasks and aims become almost self-evident. In terms of the ultimate, the plan is to reduce the size of the Penal Law; to mold it into a clear, concise and basically comprehensive body of law under a suitable *category* type of arrangement; and to make numerous substantive changes of both major and minor importance. The first logical step in this process is that of excision.

A. Excision and Relocation

As already seen, the Penal Law is permeated with provisions which, for one reason or another, either definitely do not belong there or are subject to strong argument on that score.

In the first category are the numerous statutes of a civil, directory, procedural and administrative character, and those criminal provisions which have no utility because they have become archaic or for other reasons. All these should be culled out and excised, either by flat repeal or by relocation in other consolidated bodies of law when such is feasible and desirable.

The larger and more troublesome category is that immense group of narrow *regulatory* sections with criminal sanctions, involving ice, Indians, portable kerosene heaters, etc. Examination of various other New York statutory codifications discloses that most of these provisions could find natural homes in one or another dealing with the same or similar subject matter. As a matter of fact, these other compilations frequently contain penal as well as directory provisions in the same narrow areas, and, in some instances, the Penal Law includes only a smattering of the totality. It is often a hindrance, therefore, rather than an aid to one canvassing criminal sanctions in a specialized field, for he must search at least two bodies of law rather than one. The answer to this situation is either that all of these Penal Law regulatory sections should be transferred to other sites, or that every New York criminal provision should be in the Penal Law.

There are some who advocate the latter on the theory that it would be orderly and helpful to have every penal section in one code. The other school of thought on this subject views a proper penal code as one making no endeavor to cover the entire field of criminality but comprising the more fundamental and familiar offenses. That, generally, has been the approach in other jurisdictions, including Illinois and Wisconsin, which have recently enacted penal codes a small fraction of our Penal Law size. That, also, is the approach of this Commission.

The excision and relocation tasks involved are most formidable. The first of these is a process designed to wring the Penal Law dry of its misplaced provisions. While most of these are clearly marked

as such, there are a number in the debatable class which must be analyzed in the light of several factors before any decision is made as to excision or retention. Upon a determination to excise, it must be decided whether repeal, on the one hand, or relocation, on the other, is in order. And, if the latter be the case, the problem of finding a suitable body of law and a suitable place therein must be resolved.

Intelligent excision should reduce this code to perhaps half its present size, leaving a residue of basic material still in need of revision.

B. Internal Revision of Basic Material

The kind of revisional endeavor required to bring internal order and clarity to the Penal Law's basic material involves, broadly speaking, problems of collation, condensation, clarification, correction and substantive alteration.

One important line of attack must be addressed to the scattered condition of homogeneous provisions and the consequent repetition, conflict and confusion. A word concerning the method is in order. An appropriate illustration is again provided by the field of bribery of public officials, now covered by a group of widely disseminated provisions. These must first be gathered together and analyzed in perspective with a view to determining both their collective scope and the desirability of changing that scope by increase or reduction of the totality of conduct within the criminal orbit. With those determinations made, a relatively few brief sections, including at least one devoted to term definitions, may be drafted, concisely summarizing the substance of the field. The end result should be drastic condensation, clarification, and elimination of repetition and ambiguity. Similar approaches, are, of course, appropriate to numerous other areas, including forgery, larceny, disorderly conduct and sex crimes, to name a few.

Apart from these particular collation problems, considerable clarification and condensation is necessary in connection with many statutes and groups of statutes which are in need of phraseological repair. Without attempting to classify the types of defects, one of the main weaknesses, as seen, is *itemization*. Among other tasks, it is planned to remodel a number of these sections and Articles by a general technique of employing careful definitions and inclusive language instead of enumeration and specificity.

Upon the subject of definitions, difficulty is encountered in connection with issues of intent and *scienter* because of the absence of well conceived definitions of adverbs like "knowingly," "intentionally," "maliciously" and "recklessly," and because of a failure to employ such words throughout in a uniform pattern. While there are some definitions along these lines (§ 3), they are neither adequate in themselves nor consistently applied to the ensuing substantive provisions. The importance of this phase of code compilation is stressed in the Model Penal Code of the American Law Institute, which offers a carefully analyzed set of definitions of this sort and then uses them consciously and effectively in enunciation

of its criminal offenses. A similar endeavor will be made in the present project.

The kind of revision under discussion will enevitably suggest, and occasionally compel, substantive changes of varying importance. Ideas concerning amendments of substance not only will occur to the Commission in the course of its work but unquestionably will be urged upon it by other agencies, associations and individuals. The tasks of evaluating them and incorporating those adopted are interwoven with the tasks of formal revision.

C. Structural Regrouping—A New Format

With the Penal Law stripped to its essentials, condensed, clarified and substantively altered by these excisional and revisional operations, the Commission contemplates a structural change which will replace the present unsatisfactory alphabetical arrangement with a *category* type of format.

This, of course, will entail much careful study and a more difficult kind of regrouping activity than the internal sort referred to immediately above. Since a new scheme has not yet been fully formulated, no purpose would be served here by discussion of prospective categories and orders of arrangement. Suffice it to remark that, although this may prove to be the last operation from the standpoint of proposed legislation, the job of erecting a superstructure is being begun early.

III. Current Legislation

Every year, of course, hosts of bills proposing amendments to the Penal Law and the Criminal Code are prepared by public and private agencies, associations and organizations, and submitted to the Legislature. The proposals range from lengthy ones seeking intricate procedural and substantive changes in major areas, to those seeking minor amendments of very limited scope and significance.

The Commission is naturally interested in all current bills and proposals to amend these two codes, and especially in those of major importance. It cannot, however, lose sight of the fact that its primary function is the long-range task of overhauling two huge bodies of law which require fundamental revisional effort. To expend a substantial proportion of its limited manpower and energy in formulating and assisting in the formulation of current legislation, would be to drain its resources in a secondary kind of endeavor at the expense of the main objective.

This observation becomes especially pertinent in the light of what appears to be a misapprehension on the part of some agencies and individuals to the effect that a moratorium against such activity by others has been declared. Clearly, that unrealistic thought was neither voiced nor intended by the Legislature.

There are and will be, of course, some current legislative projects of sufficient urgency, or of sufficient importance and relevancy to the Commission's work, that it will feel compelled to study the

matters and to prepare and sponsor bills, either alone or in cooperation with other entities. One such bill, in fact, has already been drafted by the Commission and will be introduced in the Legislature this year.

This proposed bill was prepared in response to an urgent procedural need created by the recent United States Supreme Court decision of *Mapp* v. *Ohio*, 367 U. S. 643, decided on June 19, 1961. Prior to that date, the law of New York had been that property, papers and other physical items were not to be excluded from evidence at trial by virtue of the fact that they had been illegally obtained. A contrary rule has long prevailed in the Federal jurisdiction—eventually adopted by many states—excluding from evidence property obtained through an unlawful search and seizure in violation of the Fourth Amendment to the Federal Constitution. Although this doctrine had not been regarded as binding upon those states which, like New York, did not wish to follow it, the *Mapp* decision changed that situation by flatly imposing the so-called exclusionary rule upon the courts of every American jurisdiction.

The Federal and other "exclusionary rule" jurisdictions necessarily possess procedure, statutory and otherwise, for attacking the admissibility of unlawfully seized evidence or property, the most important facet thereof being a pre-trial motion for return of the property or for its suppression as evidence. Since such evidence had not been legally assailable in the courts of this State, however, New York had no need for such procedure. Upon the *Mapp* mandate, therefore, it suddenly found itself operating under the exclusionary rule, but with no procedural machinery for handling the situation. This resulted in considerable confusion for all concerned, including the judiciary, and the creation of statutory procedure in this field is generally regarded as one of New York's most urgent legislative needs. The aforementioned proposed bill was drafted by the Commission in the hope that it will ultimately fill that need.