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STATE OF NEW YORK

FOURTH INTERIM REPORT

of the

STATE OF NEW YORK

TEMPORARY COMMISSION ON REVISION

of the

PENAL LAW and CRIMINAL CODE

February 1, 1965

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Staff

RICHARD G. DENZER, *Counsel*
PETER J. MCQUILLAN, *Chief Assistant Counsel*
ARNOLD D. HECHTMAN, *Assistant Counsel*
CHARLES E. TORCIA, *Assistant Counsel*
PETER PREISER, *Associate Counsel*
FRANK S. ROSETTI, *Associate Counsel*
ROBERT S. STEWART, *Associate Counsel*
ANNE M. DALY, *Administrative Assistant*

First, during the intervening period, the Commission will submit to the Legislature a proposed revision of the Code of Criminal Procedure and necessary conforming changes in other bodies of law, such as the Correction Law. All of these would be designed to mesh with the new Penal Law and all would become effective September 1, 1967.

Secondly, the proposed hiatus of more than two years makes it possible for the Legislature, at both the 1966 and 1967 sessions, to make any corrective amendments to the new Penal Law which it might deem desirable.

An incidental benefit of this delay is the fact that the revision would be on the statute books for two years before becoming effective, and would, therefore, provide ample opportunity for the Bench, Bar, prosecutors, and the general public to become familiar with the new provisions, thus promoting a smooth transition to the revised law.

The staff notes on the following pages of this report detail the changes from the study bill to the current proposed revision. The Commissioners themselves have not reviewed nor passed upon these notes. To facilitate comparison between the two formulations, two tables are included herewith. Table I lists each section of the 1965 proposed revision and indicates where each appeared in the 1964 study bill (Appendix A). Table II shows the disposition of each section of the 1964 study bill (Appendix B).

The Commission and its staff are most grateful to the many public officials and private citizens and organizations who found time to examine the 1964 study bill and to offer constructive comments and suggestions, which were invaluable in drafting the current proposal.

Along with the proposed Penal Law revision, the Commission is also submitting for passage at the 1965 session a companion bill which proposes the relocation of all or part of 373 sections of the Penal Law among some twenty-eight other and more appropriate bodies of law. These transferred provisions are of limited scope and applicability and the criminal sanctions contained therein are merely incidental to their primarily regulatory functions.

Additionally, the Commission is also sponsoring for passage at the 1965 session, a separate bill to replace the McNaghten Rule by a modern standard for predicating the defense of insanity. This bill, though identical with the formulation contained in the 1965 proposed Penal Law (§ 30.05), is being separately introduced because the proposed effective date of the Penal Law revision is September 1, 1967, whereas it is desired to have the new insanity defense, if enacted, become immediately effective.

During the past year, the Commission's staff has also been progressing on the other main objective, the Code of Criminal Procedure. In some areas, preliminary drafts have already been prepared, while in others extensive research and investigation is being conducted preparatory to drafting. For the balance of this year, the Commission expects to concentrate its efforts on revision of the Code.

STAFF COMMENTS ON CHANGES IN THE PROPOSED PENAL LAW

The proposed Penal Law being submitted for passage at the 1965 legislative session differs in a number of respects from the study bill submitted at the 1964 session. There are some important changes of substance, many minor changes of substance, some structural changes and literally hundreds of purely phraseological changes made for purposes of clarity and conformity. The ensuing comments do not, in the main, explain alterations of mere form and language but are largely addressed to changes of substance.

These comments will be more comprehensible to the reader if he has before him both the 1964 study bill and the 1965 "passage" bill. For purposes of brevity, the comments refer to the 1964 bill as the "old bill," and to the 1965 bill as the "new bill." Section and article citations of the "old bill" are designated by the letter "O" (*e.g.*, O § 10.20, and O Art. 10), and those of the new bill by the letter "N" (*e.g.*, N § 10.20, and N Art. 10).

One over-all structural change should be noted at the outset. The old bill is divided into three "Parts":

Part One: General Provisions
Part Two: Specific Offenses
Part Three: Administrative and Civil Provisions

The new bill contains a fourth "Part." This results simply from the extraction of virtually the entire Title B ("Offenses and Sentences") from the old bill's "Part One" or "General Provisions" and the relocation thereof in a new "Part Two" entitled "Sentences" and devoted exclusively to that subject (N Tit. E., Arts. 55–80).

The new "Part" structure, therefore, is as follows:

Part One: General Provisions
Part Two: Sentences
Part Three: Specific Offenses
Part Four: Administrative Provisions

PART ONE:
GENERAL PROVISIONS

Title A: General Purposes, Rules of Construction, and Definitions

Article 1: General purposes

No changes have been made in this article.

Article 5: General rules of construction and application

No substantial changes have been made in this article.

Article 10: Definitions

§ *10.00 Definitions of terms of general use in this chapter*

This solitary section of Article 10 has been revised in several respects.

(1) As previously stated, nearly all of old Title B, labeled "Offenses and Sentences" (O Arts. 15–40), is, in the new bill, removed from the "General Provisions" and transferred to a new and separate "Part" (N Part Two, Tit. E). The only portion retained in the "General Provisions" consists of those phases of the Title's first article (O Art. 15) containing definitions of the terms "offense," "violation," "misdemeanor," "felony" and "crime" (O §§ 15.00–15.15). With some clarifying changes of language, these definitions are placed in the new general definitions section (N § 10.00[1–5]).

(2) The definition of a "deadly weapon" is materially changed. In the old section, it is defined in general terms as an instrument designed as a weapon the primary function of which is the infliction of death or serious physical injury (O § 10.00[6]). The new section abandons this definition as too vague and expressly enumerates the kinds of weapons deemed "deadly" (N § 10.00[11]). The list includes loaded guns and most of the other weapons designated *per se* contraband (possession thereof, without more, being criminal) in the article dealing with "firearms and other dangerous weapons" (O Art. 270, § 270.05[1, 2, 3]; N Art. 265, § 265.05[1, 2, 3]).

(3) The term "dangerous weapon" (O § 10.00[7]) is relabeled "dangerous instrument" and redefined (N § 10.00[12]). The old definition is in terms of an instrument or substance "readily capable of being used to produce death or serious physical injury" (O subd. 7), which encompasses virtually every tangible item on earth. The new definition is in terms of an instrument having such a potential "under the circumstances in which it is used, attempted to be used or threatened to be used" (N subd. 12). As so defined, "dangerous instrument" is not a meaningful term with respect to offenses of mere *possession* but has utility only in connection with offenses involving *use* or attempted or threatened *use* thereof (see N §§ 120.00[3], 120.05[2], 120.10[1], 160.15[3]).

A "dangerous instrument" is further and expressly declared to include a "vehicle" (N subd. 12); and an added subdivision of the new section defines a "vehicle" as a Vehicle and Traffic Law version of a "motor vehicle," plus aircraft and certain vessels (N subd. 13).

(4) Another new definition is that of the term "benefit" (N § 10.00[16]). This definition is useful in that it permits simpler and clearer drafting of several sections defining specific offenses in which the word "benefit" is used (see *e.g.*, N §§ 180.00, 200.00, 200.30).

Title B: (formerly Title C): Principles of Criminal Liability

Article 15: (formerly Art. 45): Culpability

This article has been somewhat revised with respect to structure, form and phraseology, but has undergone little substantive change. Only two items seem worthy of comment.

(1) Some of the provisions have been recast to clarify the proposition that a person acts "recklessly" not only when he is aware of and consciously disregards certain specified risks, but also when he fails to perceive or to be aware of such risks by reason of voluntary intoxication (compare N § 15.05[3] with O §§ 45.00[6], 45.10[2]).

(2) The old "sex offenses" article (O Art. 135) contains a provision declaring that, where the fact of the victim being under a specified age is an element of an offense defined in such article, lack of knowledge by the defendant of the victim's age does not constitute a defense to any prosecution for such offense (O § 135.10[2]). The new "Culpability" article, in a new subdivision of its section dealing with the "effect of ignorance or mistake upon liability" (N § 15.20[3]), extends this "no defense" principle to prosecutions for any offense defined in the entire proposed Penal Law which involves the age of the victim as an element (see, *e.g.*, N §§ 220.40, 230.30[2], 260.10).

Article 20: (formerly Art. 50): Parties to offenses and liability through accessorial conduct

This article, though rephrased to a considerable extent, has undergone no material substantive change.

The old article's provision defining the defense of renunciation as it applies to prosecutions for consummated offenses based upon conduct of an accessorial nature (O § 50.10[2]), is deleted from the new article (Art. 20) and removed to the comprehensive section of the "General Provisions" defining all ramifications of the defense of "renunciation" (N § 35.45[1]).

Title C: Defenses (formerly Title D: Exemptions from Criminal Liability)

For reasons partially indicated immediately below, old Title C has been relabeled, restructured and reduced from five articles to three:

Article 25: Defenses in general.
Article 30: Defenses involving lack of criminal responsibility.
Article 35: Defenses involving lack of culpability.

Article 25: Defenses in general (formerly Art. 55: "Affirmative defense")

This article's solitary section, newly labeled "defenses; burden of proof" (N § 25.00), is a most important one.

The corresponding section of the old bill defines an "affirmative defense" as one which, when raised, places upon the People the burden of disproving it beyond a reasonable doubt (O § 55.00[2]). All the defenses postulated in the "General Provisions" (infancy, mental disease or defect, justification, duress, etc.) are then classified as "affirmative defenses" (O § 55.00[3]), as are most of those predicated in connection with the "Specific Offenses" (see, *e.g.*, O §§ 140.30, 140.60, 155.10[2], 160.15, 170.75[3]). With one exception (O § 195.20[2]), no attention is paid to another kind of defense: that which the defendant has the burden of proving by a preponderance of the evidence.

Attaching importance to the latter concept, the new bill does considerable redefining and relabeling in this area. The defense which the People have the burden of disproving beyond a reasonable doubt—the old bill's "affirmative defense" (O § 55.00[2]) is renamed a plain "defense" (N § 25.00[1]); and that which the defendant has the burden of proving by a preponderance of the evidence is termed an "affirmative defense" (*id.*, subd. [2]).

With this new foundation, every "defense" provision has been re-examined and expressly designated in the new bill either an ordinary "defense" or an "affirmative defense" as the equities seem to dictate.

This re-examination reveals that three of the so-called "Exemptions from criminal liability" defined in the old bill (O Tit. D) are not actually "defenses" within the true meaning of that term. Contentions of "immunity" (O §§ 70.00–70.20), "previous prosecution," or double jeopardy (O § 75.10), and "untimely prosecution," or the statute of limitations (O § 75.15), are not trial "defenses" and are never presented to or determined by a jury. Rather, they involve legal impediments to prosecution which are collateral to the issue of guilt or innocence and which are litigated and determined upon pre-trial motions. These contentions or "exemptions" are comparable to the grounds which support demurrers or motions to dismiss indictments for alleged insufficiency of grand jury evidence or lack of a speedy trial; and, like the latter, they are more appropriately defined in the Code of Criminal Procedure than in the Penal Law. Accordingly, they are excised from the new proposed Penal Law bill to await inclusion in the prospective proposed Code of Criminal Procedure.

Article 30: Defenses involving lack of criminal responsibility (formerly Art. 60)

Important changes have been made in each of the defenses (infancy and mental disease or defect) defined in this article.

Infancy (N § 30.00; O § 60.00)

Under existing Penal Law § 2186, a child less than sixteen years old is not deemed criminally responsible for conduct, with one exception: a fifteen year old child may be tried and convicted in

the same manner as an adult for any crime (other than one punishable by a "one-day-to-life" sentence) punishable by death or life imprisonment. However, an indictment against a fifteen year old child charging such a crime may, in the discretion of the court, be removed to the Family Court. These rules are carried over and restated in the old proposed bill (O § 60.00).

The new "infancy" section keeps the general "responsibility" age of sixteen years but omits the excepting provisions lowering it to fifteen in capital cases with the option of removal to the Family Court (N § 30.00[1]). This exception of the existing law appears illogical in that, if a child of fifteen is not deemed sufficiently mature to be responsible for robbery, burglary or assault, he can hardly be deemed mature enough to be responsible for murder or kidnapping.

Infancy is designated an ordinary "defense" (N § 30.00[2]).

Mental disease or defect (N § 30.05; O § 60.05)

The insanity defense contained in the old bill (O § 60.05) has been significantly revised. The study bill proposed adoption of the American Law Institute's Model Penal Code standard, to replace the McNaghten Rule, now employed as the test of criminal insanity in the present Penal Law (§ 1120). The section in the old bill provided:

> "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:
>
> "(a) To know or to appreciate the wrongfulness of his conduct; or
>
> "(b) To conform his conduct to the requirements of law.
>
> "2. As used in this section, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."

This formulation was vigorously opposed by the district attorneys of the state on the ground that subdivision 1(b) was too broad and would tend to exempt from criminal liability the so-called sociopath or psychopath. The prosecutors were not sufficiently reassured by the exclusion provided in subdivision 2 of the section.

After a lengthy discussion with the prosecutors and consultation with a number of leading psychiatrists, a majority of the commission approved the new section, which rewords subdivision 1(a) of the old provision and eliminates subdivisions 1(b) and 2 altogether. Lack of criminal responsibility by reason of mental disease or defect is made an ordinary "defense."

This formula, while perhaps more limited than that of the old bill, considerably expands the McNaghten Rule presently in vogue in New York. Lack of "substantial capacity" is a more realistic measure than the total impairment required for exculpation under the existing statute. Further, by relating the test to the defendant's

mental "capacity", the standard is clarified, for, indeed, it is the defendant's power or capacity to know or appreciate about which the psychiatric witness actually testifies.

A new dimension is accorded the word "know" by following it with "or appreciate." This is designed to permit the defendant possessed of mere surface knowledge or cognition to be excused, and to require that he have some understanding of the legal and moral import of the conduct involved if he is to be held criminally responsible.

It should be noted that a bill is being introduced at the current session of the Legislature to amend the present Penal Law in this respect and to amend the Code of Criminal Procedure to permit wider latitude in psychiatric testimony on the question of responsibility. That bill carries an immediate effective date.

Article 35: Defense involving lack of culpability

This article, new in structure if not in general content, defines four separate defenses:

(1) Justification (N §§ 35.00–35.30)
(2) Duress (N § 35.35)
(3) Entrapment (N § 35.40)
(4) Renunciation (N § 35.45)

Justification (O §§ 65.00–65.30; N §§ 35.00–35.30)

Several significant changes have been made in the "justification" provisions.

(1) A provision of the first "justification" section of the old bill, entitled "justification generally," accords a defense to a person who engages in proscribed conduct under circumstances in which such "conduct is necessary to avoid a public or private injury or evil greater than that sought to be prevented by the law defining the offense charged" (O § 65.00[2]). This provision is intended to apply only to limited and unusual types of situations (*e. g.*, assaulting a person who has a contagious disease in order to prevent him from going out and starting an epidemic; breaking into an unoccupied rural house to make a telephone call vital to a person's life, and the like). The fear has been expressed, however, that the clause in issue might be construed too broadly and thereby give effect to defense contentions beyond its intended scope. In order to confine this form of justification within its proper boundaries, the new provision has been tightened by the use of such terms as "emergency measure," "urgency," etc.; and a sentence has been added to assure that the trial court may preliminarily rule upon the admissibility of such evidence and exclude proof of this nature which does not or would not constitute a valid defense even if the asserted facts were accepted as true (N § 35.05[2]).

(2) The old section defining when and to what extent physical force is justifiable "in defense of a person" (O § 65.10) has been substantially rephrased (N § 35.15), partially for purposes of clarification. One of the points clarified is that such justification exists not only when the physical force to be repelled is in fact "unlawful" but also when it is in fact lawful but the actor "reasonably believes" it to be unlawful (compare O § 65.10[1] with N § 35.15[1]).

(3) The same section has been expanded to permit the use of "deadly physical force" in defense of a person not only to repel "deadly physical force" by the assailant and to prevent the commission of a "kidnapping, robbery, forcible rape or forcible sodomy" (O § 65.10[2]), but also to prevent a person's "use of physical force against an occupant of a dwelling while committing or attempting to commit a burglary of such dwelling" (N § 35.15–[1(b)]).

(4) The same section, in its new form (N § 35.15), makes an important change with respect to a provision contained in another section of the old bill declaring that the use of physical force to resist an arrest is justifiable when the resister "believes the arrest is unlawful and the arrest in fact is unlawful" (O § 65.25). In line with the view adopted in the American Law Institute's Model Penal Code (§ 3.04[2(a)(i)]), the rule is here changed to render *unjustifiable* the resistance by physical force of *any* arrest which the resister "knows is being made or attempted by a peace officer" (N § 35.15[2]). It is preferable, the Commission belives, to require a person to submit to official police action and to pursue his civil remedies later if such action turns out to be unauthorized, rather than to permit him to engage the police in combat on the basis of his opinion, or even his knowledge, that an arrest is invalid.

(5) The justification section dealing with "use of physical force in making an arrest or in preventing an escape" has in some respects been substantially revised (compare O § 65.30 with N § 35.30).

The old section does not distinguish between the principles applicable to an arrest by a peace officer and the quite different principles applicable to an arrest by a private person assisting a peace officer at the latter's direction (O § 65.30 [1, 2]). The new section devotes its first three subdivisions to the peace officer and the next two to the the private person assisting him (N §35.30 [1–5]).

With respect to an arrest by a peace officer, the new section, in general, justifies the use of physical force which is not of the "deadly" variety when the officer "reasonably believes" that the arrested person has "committed an offense" (N § 35.30[1(a)]). This may be somewhat more liberal toward the officer than is the comparable provision of the old section, which speaks in cloudy terms of an arrest which the officer "reasonably believes to be lawful" (O § 65.30[1(a)]). In some instances, an arrest may not be "lawful," it may be noted, even though the officer has rea-

sonable grounds for believing that an offense has been committed (see Code Crim. Proc., § 177).

The new provisions dealing with a private person assisting a peace officer are not drafted in similar terms of reasonable belief of the commission of an offense (*cf.* O § 65.30[1, 2]). In consonance with the predicament of a legally unsophisticated private citizen ordered to assist in an arrest—a command which the law ordinarily requires him to obey (N § 195.10)—the new section justifies his use of physical force when, generally speaking, he acts within the limits of the officer's directions, whether they be authorized or unauthorized (N § 35.30[4, 5]).

(6) The new bill designates "justification" as an ordinary "defense" (N § 35.00).

Duress (O § 75.00; N § 35.35) and Entrapment (O § 75.05; N § 35.40)

No substantial changes have been made in the definitions of either "duress" or "entrapment." Each is designated an "affirmative defense" (N §§ 35.35[1], 35.40).

Renunciation (N § 35.45)

This section collates and condenses in one statute of the "General Provisions" a series of "renunciation" defenses which, in the old bill, are scattered and defined in various articles dealing with the particular offenses and kinds of criminal conduct to which they attach: Criminal liability for the conduct of another (O § 50.10[2]), criminal solicitation (O § 100.20[2]), conspiracy (O § 105.35) and attempt to commit a crime (O § 110.15).

In addition, the new comprehensive section renders the defense of renunciation applicable to the crime of "criminal facilitation" (N § 35.45[2]), which is not the case under the old bill (O Art. 115).

"Renunciation" is designated an "affirmative defense" (N § 35.45).

PART TWO

SENTENCES

Title E (formerly Title B): Sentences

Very few substantive changes have been made in the sentencing provisions (O Tit. B). Most of the changes are mechanical in nature and relate to the fact that some of the provisions which were in old Title B have been relocated in new § 10.00.

The provisions that have been transferred to new § 10.00 set forth the definition of the term "offense," the classification of offenses (O § 15.00), and the definitions of the terms "felony" (O 15.05[1]), "misdemeanor" (O 15.10[1]) and "violation" (O 15.15[1]). These provisions are basic to an understanding of the entire Penal Law and the logical place for them is with the other basic provisions in Part I of the bill.

Article 55 (formerly Art. 15): Classification and designation of offenses

Offense; exclusion of traffic infraction (N § 55.00)

This section is completely new but makes no substantive change. The old § 15.00 excluded the "traffic infraction" from the definition of the term "offense". This achieved the desirable aim of excluding traffic infractions from the proposed uniform sentencing system (see staff notes to study bill, p. 253). However, it also had the undesirable effect of excluding traffic infractions from all the other principles of general applicability set forth in the proposed Penal Law, because the provisions defining these principles utilize the term "offense" and do not make special mention of the "traffic infraction" (See, *e.g.*, N. Arts. 35, 205).

Therefore, the definition of the term "offense" has been changed so that it now includes the "traffic infraction" (N § 10.00[1]), and the "traffic infraction" is specifically excluded from the operations of the sentencing structure (N § 55.00). For sentencing purposes, the result is the same as that achieved under old § 15.00.

It might be noted that in order to complete the change it was deemed desirable, for the purpose of clarity, to also amend the definitions of the terms "misdemeanor" and "violation" so as to specifically exclude the "traffic infraction" (compare O §§ 15.10 [1], 15.15[1] with N § 10.00[2, 3]).

Classifications of felonies and misdemeanors (N § 55.05; O §§ 15.05 [2], 15.10[2])

The provisions of this section are identical to those of the old §§ 15.05[2] and 15.10[2].

Designation of offenses (N § 55.10; O §§ 15.05[3], 15.10[3], [4], 15.15[2])

The provisions of new § 55.10 correspond to the following provisions of the old bill: §§ 15.05[3], 15.10[3], [4], 15.15[2]. There have been several changes in language but no change in substance is intended.

The cross references to the definitions of the terms felony, misdemeanor and violation, used in the designation provisions of the old sections, have been replaced by specific guidelines for ascertaining the designation of the various offenses defined outside the Penal Law (see N § 55.10[1], [2(c)], [3(a) (b)]). These guidelines achieve the same result as the former cross references. The sole reason for the change is that the definition provisions are now in new § 10.00 and cross referencing would be impracticable.

Paragraph (d) of subdivision 2 now contains the substance of the provision that formerly was set forth as subdivision 4 of old § 15.15. This provision has been redrafted for purposes of clarity but serves precisely the same function as it did under the old bill. It creates an exception to the rule set forth in the provision that designates unclassified misdemeanors (paragraph [c]) and, thereby, saves the non-criminal offenses defined outside the Penal Law that presently carry terms of imprisonment in excess of fifteen days from falling into the "unclassified misdemeanor" category.

The offenses covered by the aforesaid exception are designated as "violations" under subdivision 3(b) of new § 55.10 (see staff notes to study bill, pp. 255–257).

Article 65 (formerly Art. 25): Sentences of probation, conditional discharge and unconditional discharge

Sentence of probation (N § 65.00; O § 25.00)

A slight change has been made in subdivision 1 of this section. The old section prohibits the court from imposing a sentence of probation in *any* case where the defendant is, at the time of sentence, under a previously imposed indeterminate or reformatory sentence of imprisonment (O § 25.00[1]). The rationale behind this sort of prohibition is that persons who are serving state prison and state reformatory sentences cannot receive probation supervision in an institution and will be under parole supervision when released (see staff notes to study bill, p. 262). However, it was correctly pointed out to the Commission, at its public hearings, that an absolute prohibition goes too far, because it prohibits the use of a sentence of probation in a situation where the sentence of imprisonment has only a short time left to run.

Therefore, the Commission created an exception that would be applicable where a person is, at the time of sentence, under an indeterminate or a reformatory sentence that has one year or less to run. In such a case probation could be a useful disposition and would not be in substantial conflict with the sentence the defendant is serving.

Sentence of conditional discharge (N § 65.05; O § 25.05)

Subdivision 3 of new § 65.05 has been changed so as to provide that a court may extend the period of conditional discharge by imposing an additional period in any case where restitution or reparation is a condition of the sentence and the condition has not been satisfied. The length of the additional period would be fixed by the court but could not exceed two years. All of the incidents of the original sentence would continue to apply and the court could, at any time prior to expiration of the additional period, modify or enlarge the conditions of the sentence.

The reason for this change is that where large sums are involved, or where the defendant's means are slender, the standard periods

of conditional discharge set forth—*i.e.*, three years in the case of a felony and one year in the case of a misdemeanor or a violation—may not afford adequate time for the defendant to make any meaningful restitution or reparation, or to cure defaults in making payment. The additional period will provide the necessary time in these cases.

Conditions of probation and of conditional discharge (N § 65.10; O § 25.10)

Paragraph (f) of subdivision 2 of new § 65.10 has been amended so as to provide that, in any case where the court directs restitution or reparation, the court must specify the amount and the manner of performance.

The provision requiring the court to fix the amount restates existing law (Code Crim. Proc., § 483[2]), and the provision requiring the court to fix the manner of performance is new. These two items are essential elements of any direction to make restitution or reparation. Therefore, they should be determined by the court and imposed on the defendant along with the basic direction.

Calculation of periods of probation and of conditional discharge (N § 65.15; O § 25.15)

Subdivision 1 of new § 65.15 has been changed so as to provide a method of calculating the new two year additional period of conditional discharge, discussed in the comments to new § 65.05, *supra*.

Subdivision 3 of new § 65.15 has been amended by the addition of an exception, which is set forth at the end of the paragraph. The sole purpose of this amendment is to accommodate the change in new § 65.00, discussed *supra*.

Sentence of unconditional discharge (N § 65.20; O § 25.20)

The name of this disposition has been changed from "absolute discharge" to "unconditional discharge" and no other change has been made in the section.

Article 70 (formerly Art. 30): Sentences of imprisonment

Concurrent and consecutive terms of imprisonment (N § 70.25; O § 30.25)

Subdivision 2 of this section has been revised. The standard used in the old bill (O § 30.25[2]) consists of the double jeopardy principles set forth in old § 75.10. However, the Commission deleted the double jeopardy provisions from the Penal Law and will deal with the subject in its forthcoming revision of the Code of Criminal Procedure. This left the instant provision without a standard.

The standard adopted consists of a restatement of the consecutive sentence restriction in existing Penal Law § 1938, as interpreted by the Court of Appeals in *People ex rel. Maurer* v. *Jackson*, 2 N. Y.

2d 259, 264, 159 N. Y. S. 2d 203 (1957). In the event the Commission decides to adopt a broader standard, for double jeopardy purposes, it will reconsider the standard set forth in the instant provision.

Release on parole; conditional release (N § 70.40; O § 30.40)

Subdivisions 1 and 2 of new § 70.40 have been rewritten. However, the revisions were primarily made for the purpose of clarity and the substantive changes are relatively minor.

The only substantive change in subdivision 1 is a change in the minimum period of supervision prescribed in paragraph (b). Under the old bill (O § 30.40[1(b)]), an indeterminate sentence prisoner who is conditionally released would have had to accept parole supervision for a period equal to the unserved portion of his maximum term, *or three years*, whichever is longer. Under the new bill, the period of supervision is a period equal to the unserved portion of the maximum term, *or one year*, whichever is longer.

The reduction in the minimum period of supervision from three years to one year is based upon experience under the existing mandatory "good time" parole statute (Correction Law, § 230[4]). Reasoning from this experience, it appears that a large number of prisoners would have only a few months left to serve at the time they become eligible for conditional release under the proposed law. It would be unrealistic to expect such prisoners to elect to take three years of parole supervision in lieu of three or six months additional incarceration. (Three or six months seems a relatively short time when a prisoner has already served five or six years.)

As is the case with subdivision 1 of this section, the major change in subdivision two relates to the authorized period of supervision. Under the old bill, the period is two years in every case (O § 30.40-[2]). The new bill provides that the period of supervision shall be one year, if the prisoner has one hundred and twenty days or less to serve, and two years in any other case. In calculating the one hundred and twenty days, all credits against the sentence would be deducted.

The purpose of this change is basically the same as the purpose set forth in connection with the change in subdivision 1: to make conditional release a practical device in a broad base of cases. With the authorized period of supervision fixed at one year, conditional release will be a more feasible alternative for persons who have only a short time left to serve.

Two other significant changes in subdivision 2 should be noted. These relate to eligibility for conditional release. Under the new bill, conditional release would only be available where the term or aggregate term is *in excess of* sixty days, rather than sixty days or more; and in calculating the period that must be served, before the offender is eligible for conditional release, no credit is included for "jail time" or "good time". The purpose of the first change is to eliminate the large number of sentences that are precisely sixty days. Persons with such sentences are unlikely to elect conditional release after having served thirty days, and exclusion of the group will facilitate efficient and economic planning and supervision. The purpose of the other change is merely to make it clear that thirty days of the sentence must actually be served (see discussion in staff notes to study bill, pp. 303–304).

Subdivision 2 of old § 30.40 employs the term "institution's conditional release board". Notwithstanding the description in the staff notes of the proposed composition of such boards (p. 303), some persons interpreted the term as indicating that the Commission intended to recommend that the conditional release board be part of the institution's administration. The Commission had no such intention and, in order to allay all doubts, changed the term to read "county or regional conditional release commission."

Article 75 (formerly Art. 35): Reformatory sentences of imprisonment for young adults

A new alternative local reformatory sentence has been added to Article 75 (N § 75.20). This is designed for use in a city or county that elects to maintain special local facilities for rehabilitation of convicted male young adults. The primary reason for adding it to the sentencing structure is to enable the City of New York to continue its well developed programs for institutional training and parole supervision of males in the sixteen to twenty-one year age group. However, the sentence could be used by courts in any community that elects to establish similar facilities and programs on an individual or a regional basis (see discussion with respect to regional institutions in staff notes to study bill, p. 290).

Basically, the alternative local reformatory sentence parallels the state reformatory sentence provided in new §§ 75.00–75.15. The significant differences are: (1) that the local reformatory sentence can be used only by a court in a city or county that has established an institution with adequate facilities for rehabilitation of young adults and a local parole commission (N § 75.20[1]); (2) that commitment would be to a local institution and parole supervision would be administered by a local commission as it is under existing Article 7-A of the Correction Law (*id.*, [3], [9]); and (3) that the maximum duration of the period of the sentence would be three years, rather than the four years provided in the case of a state reformatory sentence (compare N § 75.10[1] with N § 75.20[4]).

Where the alternative local reformatory sentence is in effect, parole under such sentence and conditional release under a definite sentence (see N § 70.40[2] and discussion in staff notes to study bill, pp. 303–304) would be administered by the same local or regional commission. The provisions to implement this, as well as the provisions setting forth the procedure for establishing and certifying reformatories, will be in recommendations to be made by the Commission in connection with its work on the Correction Law.

Article 80 (formerly Art. 40): Fines

Fine for felony (N § 80.00; O § 40.00)

This section has been rewritten but there is only one real change. A new provision has been added that specifies the manner of calculating the amount of the defendant's gain from the crime. The old section (O § 40.00[2]) merely stated that the fine could be an amount not exceeding double the amount gained by the defendant from the crime. This left a question as to whether the term "gain" meant immediate gain or ultimate gain. Subdivision 3 of new § 80.00 clarifies this matter. The standard set forth in this provision is the amount derived by the defendant from the commission of the crime, less the amount returned prior to sentencing.

The above standard is still fairly broad and leaves some matters open for judicial resolution, but this is one area where the details must be tailored on a case by case basis.

Fines for misdemeanors and violation (N § 80.05; O § 40.05)

This section has been changed by the addition of a new subdivision (subd. 5) which authorizes the court to apply the criterion of pecuniary gain in lieu of the specific fines authorized for misdemeanors and violations. The purpose of the change is simply to give the court additional flexibility when sentencing for these categories.

Fines for corporations (N § 80.10; O § 40.10)

Three minor changes have been made in this section. The first two changes are in paragraphs (e) of subdivision 1 and (b) of subdivision 2, where the term "equal to" has been changed to "not exceeding". The use of the term "equal to" in that context does not express the idea that the fine could be fixed in any amount up to a particular sum. The third change is in subdivision 3. The method of calculating pecuniary gain has been changed to the one used for felonies, and the subdivision incorporates that standard by reference.

Multiple offenses (N § 80.15)

This section is new. It sets forth the prohibition against double punishment for a single act presently contained in existing Penal Law, § 1938. The old bill covers this principle as it applies to sentences of imprisonment (O § 30.25[2]) but does not have a provision to cover fines. In principle, new § 80.15 is the same as new § 70.25 [2], discussed *supra*.

PART THREE
(formerly Part Two)

SPECIFIC OFFENSES

Title G: Anticipatory Offenses

Article 100: Criminal solicitation

This article has, for clarification purposes, been materially rearranged with respect to structure and form, and makes a few relatively minor changes of substance.

The old bill's punishment section (O § 100.10) has been replaced by a degree structure (N §§ 100.00–100.10) which, with one exception, leaves the penalties the same as before. Under the old bill solicitation to commit a class D or class E felony is a class A misdemeanor; and solicitation to commit a class B or class C felony is a class E felony (O § 100.10). The new degree scheme condenses these two gradations into one. Solicitation to commit *any* felony constitutes second degree criminal solicitation, a class A misdemeanor (N § 100.05).

Under the new arrangement, criminal solicitation is repeatedly defined in the degree sections themselves (N §§ 100.00–100.10) rather than in an individual definitive statute (O § 100.05). The definition has been elaborated by the addition of certain indicated *mens rea* requirements in order to assure that the crime does not encompass an insincere or facetious exhortation to crime, such as "Kill the umpire" (compare O § 100.05 with N §§ 100.00–100.10).

The "no defense" section (§ 100.15) has been extended to assure that infancy and insanity, as well as lack of culpability (see, O § 100.15), of the person solicited do not constitute defenses to a prosecution for criminal solicitation.

The defense of renunciation as it applies to criminal solicitation has been transplanted from this article (O § 100.20[2]) to the comprehensive section of the General Provisions defining and prescribing that defense as it applies to a variety of offenses (N § 35.45 [4]).

Article 105: Conspiracy

This article has also undergone formal renovation without major substantive changes.

The definition of conspiracy, as contained in the degree statutes, has been made more precise by the addition of language specifying that conspiracy requires intent by the actor that the object crime be committed (compare O §§ 105.05–105.20 with N §§ 105.00–105.15).

Conspiracy in the first degree has been raised from a class D to a class C felony (compare O § 105.20 with N § 105.15).

A new "no defense" section has been added (N § 105.30), providing that lack of criminal responsibility or lack of culpability on the part of a person or persons with whom a defendant "agrees" or

"conspires" do not absolve the defendant from liability for conspiracy.

The old provision prescribing the defense of renunciation as applied to a conspiracy prosecution (O § 105.35) has been transplanted to the new comprehensive "renunciation" defense section of the General Provisions (N § 35.45[4]).

Article 110: Attempt

The only noteworthy change in this article is a language change in the definition of "attempt to commit a crime." The old bill defines "attempt" in terms of "conduct which constitutes a substantial step toward the execution or commission" of the crime intended (O § 110.00). This definition was not designed materially to change the existing concept of "attempt," which is defined in the existing Penal Law (§ 2, last par.) as an act "tending but failing to effect" the commission of the crime intended. Since no material change was intended, a return substantially to the existing standard was deemed desirable so that prior judicial construction of an "attempt" would remain applicable. The return to the existing standard—of "tending but failing to effect" the commission of a crime (existing P. L. § 2)—is not, however, complete, for the words "but failing" have been omitted. The effect of those words is to preclude a conviction for attempt in any case where it appears that the attempted crime has been consummated. That principle is not deemed salutary and is here rejected.

The old provision prescribing the defense of renunciation as applied to a prosecution for attempt (O § 110.15) has been transplanted to the new comprehensive "renunciation" defense section of the General Provisions (N § 35.45[3]).

Article 115: Criminal facilitation

The old bill contains a lengthy and rather complex definition of the phrase "facilitate the commission of a crime" (O § 115.00[2]) and then, using that phrase to define the offense of "criminal facilitation," creates three degrees thereof, distinguished largely by the seriousness of the crime facilitated: (1) a "crime," (2) a "class B or class C felony," and (3) "murder or kidnapping" (O §§ 115.05–115.15).

The new bill divides the crime into only two degrees (N §§ 115.00, 115.05) which, without the aid of prior definitions, define "criminal facilitation" in simpler language built right into the degree sections themselves. Facilitation of a misdemeanor is no longer made criminal; the lower or second degree offense is facilitation of a "felony" (N § 115.00) and the higher or first degree offense is facilitation of "murder or kidnapping" (N § 115.05). It is felt that, in view of the relatively low kind of culpability required for "criminal facilitation" (in effect, *scienter* without intent to commit the crime facilitated), criminal sanctions against the facilitation of misdemeanors are not desirable.

Title H: Offenses Against the Person Involving Physical Injury, Sexual Conduct, Restraint and Intimidation

Article 120 (formerly Art. 125): Assault and related offenses

The crime of "assault" (N §§ 120.00–120.10; O §§ 125.00–125.10) has been appreciably altered with respect to the forms of that crime contained within its three-degree structure.

Assault in the third degree (N § 120.00; O § 125.00)

Third degree assault remains much as before except for certain largely technical changes in the third subdivision. This deals with physical injury caused by "criminal negligence" in the use of a "deadly weapon" or—in the language of the old bill—"a motor vehicle or a vessel equipped for propulsion by mechanical means" (O § 125.00). The new bill deletes the latter language involving motor vehicles and vessels, and substitutes therefor "a dangerous instrument" (N § 120.00). The altered definition of the term "dangerous instrument" (N § 10.00[12]) now includes motor vehicles and vessels. The net result of all this is that the third degree assault provision in question (N § 120.00[3]) is expanded to cover criminally negligent infliction of physical injury not only by means of a "deadly weapon," motor vehicle or vessel—as under the old bill (O § 125.00[3])—but, in addition, by means of *any* "dangerous instrument" (*e.g.*, baseball bats, knives, wrenches, etc.).

Assault in the second degree (N § 120.05; O § 125.05)

Assault in the second degree has undergone four changes.

First, subdivision 2, proscribing intentional infliction of physical injury "by means of a deadly weapon" (O § 125.05[2]) has been expanded by the addition of the words, "or a dangerous instrument" (N § 120.05[2]), thus including assaults committed with knives, crowbars, etc., as well as those committed with firearms, blackjacks, metal knuckles, etc. (see, N § 10.00[6, 7, 8]).

Second, a new subdivision 3 has been added (old subd. 3 is renumbered subd. 5) making it second degree assault to inflict ordinary "physical injury" upon a peace officer with intent to prevent him from performing an official duty (*cf.* existing P.L. § 242[5]).

Third, old subdivision 5, proscribing reckless causing of "serious physical injury," has been narrowed by the requirement that such injury be caused by "a deadly weapon or a dangerous instrument" (N § 120.05[4]). Under the old bill, intentional and reckless causing of serious physical injury are on a par (O § 125.05[1, 5]), despite the greater culpability of the former. Accordingly, the indicated increase of culpability requirements (use of a weapon) for the *reckless* crime seems logical.

Finally, subdivision 4 of the old second degree section (O § 125.05) has been deleted for reasons, described immediately below, relating to a change in the first degree section.

Assault in the first degree (N § 120.10; O § 125.10)

The most striking first degree assault crime in the old bill (O § 125.10) appears in its first subdivision, proscribing the infliction of serious physical injury with intent to kill. This includes but goes beyond attempted murder, which requires intent to kill but no physical injury, serious or otherwise (N §§ 110.00, 125.25[1]). Because of the seriousness of this assault offense, first degree assault is graded in the old bill as high as practicably possible, namely a class B felony (the same as the less serious offense of attempted murder).

The various incongruities inherent in this scheme dictated elimination in the new bill of the crime and subdivision in question. Under the new bill, assault with intent to kill, with or without actual physical injury, is not necessarily first degree assault but is prosecutable as attempted murder, which carries the same extremely severe class B felony penalty.

Since the old assault subdivision under discussion was responsible for the grading of first degree assault as a class B felony, its elimination prompted a downgrading of first degree assault to a class C felony in the new bill (N § 120.10). Another effect of its elimination is the concomitant deletion of a second degree assault provision of the old bill (O § 125.05[4]) which, following the pattern of certain homicide provisions (see, O §§ 130.20[2], 130.25 [1(a)]), reduced first degree assault of the homicidal intent variety to the second degree when committed "under the influence of extreme emotional disturbance." Since there is no longer any such assault crime to reduce, the old second degree reducing provision becomes meaningless.

The deleted first degree crime of old subdivision 1 is replaced by a new offense: intentionally causing serious physical injury by means of a deadly weapon or a dangerous instrument (N § 120.10 [1]).

Finally, the last offense of the old first degree statute–intentionally or recklessly causing serious physical injury "by means of a deadly or dangerous weapon" in the course of a felony or felony attempt (O § 125.10[4])—has been changed by deletion of the weapon requirement (N § 120.10[4]). The two aggravating factors of (a) "*serious* physical injury" and (b) infliction thereof *during a felony* or felony attempt, seem ample bases for attaching first degree liability without the addition of the weapon requirement, especially in view of the downgrading of the first degree crime from a class B to a class C felony.

Article 125 (formerly Art. 130): Homicide, abortion and related offenses

This article has undergone several changes of form and a few changes of substance.

Abortion and abortion-homicide

The "definitions of terms" section (N § 125.05; O § 130.05), dealing almost entirely with the abortion and abortion-homicide area, has been substantially revised.

The key terms of the old section are "abortional act" and "unlawful abortional act" (O § 130.05[3, 4]), and all the crimes involving abortion are defined in the old article in terms of committing an "unlawful abortional act" (O §§ 130.15[2], 130.20[3], 130.40, 130.45, 130.50, 130.55). This places an unfair and frequently impossible burden upon the People of proving in each instance that the abortion was not lawful or justifiable pursuant to the stipulated standards. That defect is cured in the new article by: (a) defining a new term, "*justifiable* abortional act," in place of "*unlawful* abortional act" (N § 125.05[3]); (b) defining the substantive crimes in terms of a plain "abortional act"; and (c) adding in each instance the clause, "unless such abortional act is justifiable pursuant to "the earlier specified standards (N §§ 125.15[2], 125.20[3], 125.40, 125.45, 125.50, 125.55).

The old definition of an "abortional act" (O § 130.05[3]) is deemed unsatisfactory in several respects and has been substantially revised (N § 125.05[2]). The principal change involves a definition in terms of an act done "*with intent* to cause a miscarriage," rather than in terms of one which the actor "*believes is calculated* to" cause such. Also, the new definition of a "justifiable abortional act" (N § 125.05[3]) is, in its reverse fashion, more precise than the old definition of an "unlawful abortional act" (O § 130.05[4]).

The old article defines an "unborn child" as " a child with which a female has been pregnant for more than twenty-six weeks" (O § 130.05[2]), and then uses the term "unborn child" in the ensuing criminal sections wherever a pregnancy of twenty-six weeks or more is an element of the offense (O §§ 130.20[3], 130.45, 130.55). The new article eliminates the term "unborn child" (N § 125.05) and, instead, expressly mentions the period of pregnancy in each criminal section where such is an element of the offense; the only substantive change in this respect is that the pregnancy period in question—which is always an aggravating factor raising the degree of the crime involved—is reduced from twenty-six to twenty-four weeks (N §§ 125.20[3], 125.45, 125.55).

With the elimination of the term "unborn child," the titles of the old crimes of "Killing an unborn child" (O § 130.45) and "Filicide of an unborn child" (O § 130.55) have been changed. Since these crimes are really higher degrees of, respectively, "Abortion" (O § 130.40) and "Self-abortion" (O § 130.50), they are realistically labeled in the new article, "Abortion in the first degree" (N § 125.45) and "Self-abortion in the first degree" (N § 125.55), and second degree labels are attached to the basic Abortion and Self-abortion offenses (N §§ 125.40 and 125.50).

Murder mitigated to manslaughter in the first degree (N §§ 125.20 [2], 125.25[1(a)]; O §§ 130.20[2], 130.25[1(a)])

The old murder and first degree manslaughter sections collectively pronounce the doctrine that intentional killing is reduced from murder to manslaughter in the first degree when committed

"under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse" (O §§ 130.20[2], 130.25[1(a)]). Without any real substantive change, the corresponding new provisions are rephrased in order to clarify this proposition, to point out where the burden of proof lies in a murder prosecution with respect to "extreme emotional disturbance," and to assure that such "disturbance" is neither an element of first degree manslaughter nor a defense thereto and need not be alleged by the People or proved by either party in a prosecution therefor (N §§ 125.20[2], 125.25[1(a)]).

Felony murder (N § 125.25[3]; O § 130.25[3])

Under existing law, felony murder includes any killing, whether culpable in itself or accidental, committed in the course of *any* felony or felony attempt (existing P. L. § 1044[2]).

The old proposed felony murder section modifies that doctrine in two respects: first, it limits the underlying crimes to a list of specified felonies of an inherently violent or dangerous nature; and, second, it requires that the killing itself be caused by "an act inherently dangerous to human life" (O § 130.25[3]).

The latter element is eliminated in the new section by deletion of the last quoted words (N § 125.25[3]). It is believed that the harshness of the existing doctrine is sufficiently alleviated by the requirement that the underlying crime be one of the dangerous offenses enumerated without a further requirement that the particular homicidal conduct also be of an "inherently dangerous" nature.

Article 130 (formerly Art. 135): Sex offenses

The principal changes in this article relate to the offense of "sexual abuse" (N §§ 130.55, 130.60, 130.65; O §§ 135.60, 135.65).

In the old article, "sexual abuse" is defined in two degrees: the lower offense (O § 135.60), a class A misdemeanor, consists of any non-consensual "sexual contact"—a salacious "touching" of a person's "sexual or other intimate parts" (O § 135.00[3])—and the higher offense, a class D felony, requires, in addition, either forcible compulsion, or physical helplessness of the victim, or a victim less than eleven years old (O § 135.65).

The old second degree offense (O § 135.60), a class A misdemeanor, proscribes a number of relatively trivial acts. The new article limits the second degree with its class A misdemeanor penalty to more serious cases where the "victim" is "less than fourteen years old" or incapable of consent by virtue of some other factor, such as incompetency (N § 130.60); and it leaves the less serious residue to a new "third degree," a class B misdemeanor, which thereby becomes the lowest and basic offense of "sexual abuse" (N § 130.55).

The latter, moreover, is qualified by an exception excluding from criminality a certain form of comparative trivia, namely, the

"heavy necking party" between a fourteen, fifteen or sixteen year old "victim" and another young though criminally responsible person of sixteen years or slightly greater age. Under the stated exception, a person cannot commit "sexual abuse" upon an acquiescent "victim" of the age of fourteen, fifteen or sixteen unless he (the actor) is at least five years older than such "victim" (N § 130.55).

In general, much of the conduct covered by third degree sexual abuse is of a sort that can be testimonially established only by the "victim." In view of the difficulty of obtaining corroborative evidence in such cases, and of the low penalty for this offense, the requirement of corroboration is dispensed with in prosecutions under this section (N § 130.15).

Finally, it may be noted that the provision rendering it "no defense" to a prosecution under this article, in which the victim's age is an element of the offense charged, that the defendant did not know his age (O § 135.10[2]), is deleted; this is covered in the new bill by an across-the-board provision of the General Provisions which applies the principle in issue not only to this article but to every offense in the entire code where the victim's age is an element (N § 15.20[3]); see comments upon (N Art. 15).

Article 135 (formerly Art. 140): Kidnapping, Coercion and related offenses

This article has been substantially revised.

The kidnapping area (N §§ 135.00–135.50; O §§ 140.00–140.40)

The kidnapping area is one of the most troublesome of the entire criminal law because of the wide variety of factors involved in so-called "kidnapping" situations.

"Kidnapping" cases vary greatly in such respects as the purpose of the abduction or confinement, the duration thereof, the removal distance, the fate of the victim, and the relationship between abductor and victim. These factors and diverse combinations thereof produce a host of "kidnapping" cases differing immensely in many respects, including culpability. The principal difficulty with the existing law is that the entire spectrum of "kidnapping" conduct is blanketed under a single "kidnapping" offense carrying the severest penalties and making little distinction between conduct of the most heinous nature and that involving relatively minor culpability.

The old bill, seeking to rectify this situation, presents a "kidnapping" statute designed to limit that crime to its more serious forms (O § 140.15), and flanks it with two lesser crimes (of two degrees each) entitled "false imprisonment" (O §§ 140.05, 140.10) and "custodial interference" (O §§ 140.35, 140.40), intended to cover less serious conduct of this general character. Dissatisfied with the result, however, the Commission, though retaining the indicated structure, has overhauled this article in the new bill (N §§ 135.00–135.50) in an effort to attain greater equity and precision.

The new scheme is founded upon two defined terms: "restrain" and "abduct" (N § 135.00[1, 2]). The word "restrain" is defined much as in the old article (O § 140.00[3]), as an unlawful, non-consensual removal or confinement of a person of a sort "to interfere substantially with his liberty" (N § 135.00[1]). As such, it is a broad term covering everything from the most serious cases down to removals and confinements not involving a high degree of isolation, disappearance or violence.

The term "abduct" is new and represents an important innovation. To "abduct means to restrain a person with intent to prevent his liberation by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly physical force" (N § 135.00[2]). Thus, *abduction* is a very serious form of *restraint,* savoring strongly of the substantial removal, isolation and/or violence usually associated with genuine kidnapping. In the new scheme, restraint constitutes the crime of "unlawful imprisonment" (N §§ 135.05, 135.10)—the title being changed from "false imprisonment" (O §§ 145.05, 145.10)—and abduction constitutes "kidnapping" (N §§ 135.20, 135.25).

With this foundation the new article first presents the relatively mild crime of "unlawful imprisonment"—simply *restraining* a person pursuant to the definition thereof—which, as before (O §§ 145.05, 145.10), is a class A misdemeanor in its basic or second degree form (N § 135.05) and is raised to the first degree (a class E felony) when the victim is restrained "under circumstances which expose" him "to a risk of serious physical injury" (N § 135.10). The article then proceeds to "kidnapping", which, as indicated, consists of *abduction.* Because of wide variations in the culpability involved in different kinds of abductions, kidnapping is divided into two degrees.

Second degree kidnapping is the basic, all-inclusive offense, being committed simply when the culprit "abducts another person" (N § 135.20). This includes all abductions—except those of a custodial nature (see *infra*)—regardless of the length of confinement and the fate of the victim, and regardless of whether the purpose is ransom, child stealing, physical injury, terrorizing or any other objective.

Kidnapping in the first degree is, of course, reserved for the most reprehensible kinds of abduction and is predicated in three situations only (N § 135.25). The first (subd. 1) is abduction for the familiar and vicious purpose of compelling a third person to pay ransom, "or to engage in other particular conduct, or to refrain from engaging in particular conduct" (*e.g.,* abducting a sheriff's son with intent to compel the sheriff to release a prisoner or to refrain from arresting a criminal).

The second kind of first degree kidnapping (N § 135.25[2]) is based upon a combination of unsavory purpose and the duration of the abduction. Abductions with intent to inflict physical injury or sexual abuse upon the victim, to terrorize him or a third person, to accomplish or advance the commission of a felony, or to interfere with the performance of a governmental or political function, do not *a fortiori* constitute more than second degree kidnapping; but in such instances the crime is raised to the first degree if the abduction endures for more than twelve hours.

The third kind of first degree kidnapping (N § 135.25[2]) rests upon a single, significant aggravating factor: death of the victim (which is presumed if he is not returned alive or has not been seen or heard from before trial). This is made sufficient for first degree liability no matter what the purpose or duration of the abduction.

One of the seemingly incongruous features of the existing crime of kidnapping is its application to the parent who, having lost legal custody of a child, takes or entices it from the other parent or person having legal custody (existing P. L. § 1250 [A(2)]). Despite the basically civil nature of these "custody battle" cases, they constitute "kidnapping"; and the harshness of the situation is hardly eradicated by reduction of the penalty from death or life imprisonment to a sentence carrying a ten year maximum term in the case of a "parent" (*id.,* last par.)—a concession made only to a "parent," it may be noted, and not to a grandparent, aunt or other close relative.

The old bill excludes these cases from the kidnapping ambit and transfers most of them to a crime entitled "custodial interference," a class A misdemeanor in its basic or second degree form and a class E felony in its first degree form, which involves a substantial risk of impairment of the child's health or safety (O §§ 140.30, 140.35, 140.40). Moreover, this exemption from kidnapping is extended not only to a "parent" but to a "relative"—defined as a parent, ancestor, aunt or uncle (O § 140.00[4]).

Retaining this general scheme, the new bill makes certain changes, largely concerning the age of the child taken, restrained or abducted. Without analyzing the old bill in this respect (see, O §§ 140.00 [5(b)], 140.35), the new article, making *sixteen* years the key age applies as follows to a "relative" who takes, entices, restrains or abducts a "child" without his parents' or lawful guardians' consent, solely for the purpose of assuming control over him:

(1) Under no circumstances is such "relative" guilty of "kidnapping" in either degree (N § 135.30).

(2) If the child is less than sixteen years old, the "relative" is guilty of "custodial interference" (N §§ 135.45[1]; 135.50), whether or not the child acquiesces in the conduct.

(3) If the child is sixteen years old or more and acquiesces or consents (as he is capable of doing), the "relative" is not guilty of any offense.

(4) If the child is sixteen years old or more and is restrained or abducted (in short, taken against his will), the "relative" is guilty of "unlawful imprisonment" (N §§ 135.05, 135.10), but not of "custodial interference" (N §§ 135.45, 135.50).

Coercion; no defense (N § 135.70)

This section has been added as part of a statutory scheme in the new bill which eliminates the existing mutual exclusiveness of

crimes of extortion and coercion, on the one hand, and certain crimes of bribe receiving, on the other hand. A full explanation of this and the other new sections forming a part of the indicated scheme is contained in the comments to new Article 200, *infra*.

Title I: Offenses Involving Damage to and Intrusion Upon Property

Article 140 (formerly Art. 145): Burglary and related offenses

Definition of "Enter or remain unlawfully" (N § 140.00[5]; O § 145.00[5])

The definition of this phrase, which is basic to the concepts of "criminal trespass" and "burglary," is amended in the new section by the addition of two sentences (N § 140.00[5]), each having a different purpose.

The first of these slightly qualifies the stated proposition that one who "enters or remains in or upon premises which are at the time open to the public does so with license and privilege" unless he is authoritatively directed not to do so (*id.*). The qualification is that a privilege to enter or remain in a building partly open to the public does not include a privilege to enter or remain in that part not open to the public (*id.*). This assures that one who, for example, properly enters the public portion of a department store is not exempted from criminal trespass or burglary sanctions when he unauthorizedly intrudes in a stock room or other part of the building closed to the public.

Under the old article, the bare unauthorized entry upon any "premises" constitutes criminal trespass in the third degree, even if the "premises" consist merely of wild forest land indicating no apparent prohibition against intrusion (O §§ 145.00[1, 5], 145.05). The second sentence added to the "definitions" section at hand alleviates this situation by, in effect, exempting from criminal trespass one who intrudes "upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders," unless the intruder is warned against trespass either personally or by conspicuously posted notice (N § 140.00[5]).

Burglary—forms and degrees thereof (N §§ 140.20–140.30; O §§ 145.20–145.35)

The old article defines burglary in four degrees, the crime being raised in degree by aggravating factors of "dwelling," "night," "explosives or a deadly weapon," and assault (O §§ 145.20–145.35). Though retaining this general pattern, the new article restructures the offense in three degrees, making certain changes with respect to the nature and combinations of the aggravating factors (N §§ 140.20–140.30).

The lowest or third degree, like the old fourth degree, presents the basic burglary offense of entering or remaining unlawfully in a building with intent to commit a crime therein, but raises it from a class E to a class D felony (N § 140.20; O § 145.20).

The new second degree, a class C felony, is committed either by a burglary of a *dwelling at night*, or by a burglary of *any building by day or night* when the actor or a confederate is armed with explosives or a deadly weapon or causes physical injury (N § 140.25; *cf.* O §§ 145.20, 145.25).

The new first degree, a class B felony, requires collective rather than alternative existence of the second degree factors; in brief, a dwelling at night *plus* (rather than "or") explosives or a deadly weapon or physical injury (N § 140.30). Although this is roughly equivalent to the old first degree offense (§ 145.35), it is more serious in that, whereas the old section is satisfied by an armed or assaultive burglary of any building at any time, the new section requires that such occur in a dwelling at night.

It is to be noted that those phases of the two new higher degrees based upon explosives, weapons and physical injury do not require that, in a multiple offender burglary, the actor himself be armed or commit the assault, but are satisfied by such conduct on the part of any of his confederates (N §§ 140.25[1], 140.30).

Possession of burglar's tools (N § 140.35; O § 145.40)

The old "burglar's tools" section is limited to possession of tools and instruments commonly used for breaking into premises, safes, etc. (O § 145.40). The new section, by reference to instruments "involving larceny" and certain "theft of services" offenses (N § 140.35), expands the crime to include possession of numerous other tools, such as those used for breaking into motor vehicles, stealing from public telephone coin boxes, tampering with gas and electric meters, and the like.

Article 145 (formerly Art. 150): Criminal mischief and related offenses

The old article (O Art. 150) contains but three sections, of two subdivisions each, defining three degrees of "criminal mischief" (O §§ 150.00, 150.05, 150.10). The three "subdivision 1's" present a degree structure of "criminal mischief" in its traditional concept of damage to property, the degrees being differentiated largely by the pecuniary amount of property damage. The three "subdivision 2's" predicate three miscellaneous offenses of "tampering with" (but not necessarily damaging) property, with resultant risks of property damage or impairment of public utility service.

The new article, while retaining the three degrees of "criminal mischief," limits that offense to its pure property damage forms (N §§ 145.00, 145.05, 145.10) and, extracting the "tampering" provisions (O §§ 150.00[2], 150.05[2], 150.10[2]), separately defines certain "tampering" offenses (N §§ 145.15, 145.20; see, also, § 145.25).

Thus, the new "criminal mischief" sections simply proscribe intentional damage to property or reckless damage also, as applied

to the third degree (N § 145.00). As in the old article, the crime is raised to the second degree upon damage of more than $250 (N § 145.05) and to the first degree upon damage of more than $1,500 (N § 145.10[1]). By virtue of a new provision, however, first degree liability also attaches when the damage, regardless of its pecuniary amount, is caused by means of explosives (N § 145.10 [2]). While the arson provisions cover such damage to a "building" (N §§ 150.05–150.15), it may be noted, they do not cover damage by explosives to personal property or many kinds of real property (*e.g.*, statutes, monuments, equipment, highways, etc.).

The "tampering" area is covered in the new article largely by a new offense of "criminal tampering," defined in two degrees (N §§ 145.15, 145.20).

The second or lowest degree, graded a class B misdemeanor, contains two subdivisions, the first of which proscribes tampering with property "with intent to cause substantial inconvenience" to the owner or another (N § 145.15[1]). Among the kinds of conduct included therein is malicious strewing about or disarrangement of papers, files, etc., which take hours to rearrange.

The second subdivision of this section is addressed to unauthorized tampering with gas, electric, telephone and certain other public utility equipment (N § 145.15[2]). This is an important and useful inclusive section covering a host of offenses against public utility property which are now separately defined in exhaustive and unnecessary detail in the existing Penal Law (see §§ 1423 [6, 7, 8], 1423-a, 1423-b, 1424, 1431, 1432, 1432-a). In order to exclude innocent and trivial cases of such "tampering," the provision supplies an "affirmative defense" to one who acts without "larcenous or otherwise unlawful or wrongful purpose" (N § 145.15 [2]).

"Criminal tampering in the first degree" (N § 145.20) is, for the most part, the same offense (and carries the same class D felony penalty) as that proscribed in the second subdivision of the old first degree "criminal mischief" section (O §150.10[2]), namely damaging or tampering with public utility property with intent to cause a substantial interruption or impairment of the service involved. The new offense, however, contains an additional element: that the intended interruption or impairment of service actually occur (N § 145.20).

Another offense of a "tampering" nature added in the new article is "reckless endangerment of property," a class B misdemeanor, which is committed by reckless conduct creating a substantial risk of property damage in an amount exceeding $250 (N § 145.25). This is in the nature of a corollary to the crime of "reckless endangerment" of a person (N § 120.20; O § 125.20).

Finally, the new article adds a further offense (a violation), entitled "unlawfully posting advertisements" (N § 145.30), which deals with the unauthorized affixing of commercial and other forms of advertising material upon another's property. This section, not included in the old proposed bill, substantially restates an existing Penal Law offense (§ 2036-a) which has been useful in

connection with the promiscuous posting of such matter on telephone poles.

Article 150 (formerly Art. 155): Arson

Two changes in this article merit comment.

(1) In defining a "building" for purposes of the arson article, the old "definitions" section repeats the definition of "building" in the burglary article (O § 145.00[2]) and, as does the latter, specifies that, "where a building consists of two or more units separately secured or occupied [*e.g.*, an apartment house], each unit [apartment] shall be deemed a separate building" (O § 155.00). The difficulty with this proposition in the arson setting lies in its application to arson in the first degree, which requires the presence of another person in the damaged "building" at the time of the crime (N § 150.15; O § 155.15). Under the indicated definition, one who starts a fire in an individual apartment is not guilty of first degree arson if such apartment (the "building" by definition) is unoccupied at the time even though the apartment house as a whole (the "building" in a realistic sense) is teeming with humanity. Accordingly, the definition of a "building" for arson purposes is changed in this respect so that each individual unit "shall *not* be deemed a separate building" (N § 150.00).

(2) The old article's offense of "reckless burning" (O § 155.20), involving reckless endangerment of a building by the intentional starting of a fire, is omitted from the new bill because it is adequately covered by the "criminal mischief" article's new offense of "reckless endangerment of property" (N § 145.25).

Title J: Offenses Involving Theft

Article 155 (formerly Art. 160): Larceny

Larceny by false promise (N § 155.05[2(d)]; O § 160.05[2(d)])

The old proposed section, "Larceny; defined," extends the existing concept of larceny of the fraudulent misrepresentation brand to thefts committed by fraudulent promises as well as to those committed by misrepresentation of existing fact (false pretenses) (O § 160.05[2(d)]). In order to tighten the definition of this new and rather controversial form of larceny, the new section requires that the acquisition of property by "false promise" be "pursuant to a scheme to defraud" (N § 155.05[2(d)]).

Larceny; no defense (N § 155.10; O § 160.10)

In 1942, the larceny article of the existing Penal Law was revised to eliminate the distinctions between the old common law forms, to define larceny broadly enough to cover all such offenses, and to simplify the pleading and proof of larceny accordingly. In this process, provisions were inserted to assure that fine technical distinctions between the old common law forms of theft—relating to whether title or possession passed or was intended to pass with

the transfer of the property, whether possession was obtained in the first instance lawfully or with the owner's consent, etc.—were immaterial and constituted no defense to a larceny prosecution (existing P. L. § 1290[last 4 pars.]).

These provisions are carried over into the old proposed article (O § 160.10) but are omitted in the new one. As under the existing law (P. L. § 1290[1st par.]), there is nothing in the new bill's broad definition of larceny (N § 155.05[1]) which even intimates that the indicated factors relating to title, possession, consent, etc., constitute a defense to any larceny charge. While in 1942 these provisions may have been deemed appropriate, if not vital, to emphasize the drastic change of law then enacted, the propositions expounded are now deemed elementary and are taken for granted; and, if any doubt could remain concerning their continued applicability under the new bill, it is conclusively removed by the section dealing with "pleading and proof" of larceny (N § 155.45). Thus, their omission does not change the law but merely excises superfluous matter.

The aforementioned content of the old "no defense" section (O § 160.10) has been replaced by new "no defense" matter (N § 155.10), dealing with the elimination of the mutual exclusiveness of larceny by extortion and bribe receiving (see comment N Art. 200, *infra*).

Larceny; pleading and proof (N § 155.45; O § 160.20)

The old proposed section (O § 160.20) is substantially taken from an existing Penal Law section (P. L. § 1290-a), which greatly simplifies the pre-1942 method of pleading and proving larceny. Its phraseology, however, while appropriate to the existing Penal Law's definition and general pattern of larceny (see existing P. L. §§ 1290, 1294), does not fit the proposed Penal Law's larceny formulations precisely enough, especially with respect to the pleading and proof of larceny "by extortion," which is not a form of larceny but a separate crime under the existing Penal Law.

Out of these considerations, the section in question (O § 160.20) has been substantially revised, and, in addition, its location in the new larceny article has been changed (N § 155.45). Broadly speaking, the extremely simplified pleading and proof has been retained for all larceny cases except those committed or allegedly committed by extortion. Where extortion is the theory of the prosecution, the indictment must so specify; and an indictment for larceny by extortion is not supported by proof of larceny committed by some other means or theory.

Grand larceny in the third degree (N § 155.30; O § 160.35)

In 1964, the existing second degree grand larceny statute was amended by the addition of a subdivision expanding that crime to include larceny of tangible property, regardless of its value,

constituting or reflecting secret scientific processes, formulae, etc. (existing P. L. § 1296[4]). This provision, not included in the old proposed bill, is included virtually *verbatim* in the new one as a new subdivision of the section defining grand larceny in the third degree (N § 155.30[3]), which is roughly the counterpart of the existing Penal Law's grand larceny in the second degree (P. L. § 1296).

Article 160 (formerly Art. 165): Robbery

Robbery; defined (N § 160.00; O § 165.05)

The old proposed section (O § 165.05) substantially retains the existing Penal Law's definition of robbery (existing P. L. §§ 2120–2123). Both contain certain unrealistic limitations emanating from old common law principles, chief of which is the requirement that the property be taken "from the person or in the presence of" the owner or victim (existing P. L. § 2120; O § 165.05). This appears to exclude from the robbery ambit a variety of forcible thefts, such as the following:

(1) Intending to steal property from a farm house, the defendant, coming upon the farmer-owner in a field a mile from the house, knocks him unconscious and then proceeds to the house and consummates the larceny.

(2) At gunpoint, the defendant forces the victim to telephone his office and direct an employee to take money from his safe and deliver it at an appointed time and place to an agent of the defendant.

The new section (N § 160.00), eliminating "from the person" and "in the presence" requirements, rephrases and expands the definition of robbery to cover the above-illustrated types of cases and other forcible larcenies which, though robberies in spirit, are not presently classified as such owing to the indicated technical restrictions of language.

Robbery in the first degree (N § 160.15; O § 165.20)

The old proposed section (O § 165.20) raises robbery to the first degree on the basis of either of two aggravating factors: causing serious physical injury or being armed with a deadly weapon, during and in furtherance of the commission of the crime. The new section adds a third subdivision attaching first degree liability when the robbery is accomplished by the use or threatened use of a "dangerous instrument" (N § 160.15[3]). It is noteworthy that, while *bare possession* of a "deadly weapon" (*e.g.*, a pistol, blackjack, metal knuckles, etc.) is sufficient for this crime (subd. 2), *use or threatened use* of a "dangerous instrument" (*e.g.*, a knife, wrench, club, etc.) is required.

The new section makes two other changes in the structure and scope of first degree robbery.

The old section applies, or appears to apply in most instances, only when the actor himself causes serious physical injury or carries a deadly weapon, and not to multiple-offender situations where not he but one or more of his confederates is so armed or causes such injury (O § 165.20). The new section extends liability to the latter situation throughout (N § 160.15).

Also, while the old section requires that the infliction of injury and the armed condition occur in the course of the robbery (O § 165.20), the new section is satisfied if such occurs during either the robbery or "immediate flight therefrom" (N § 160.15).

Article 165 (formerly Art. 170): Other offenses relating to theft

The only substantial changes in this article involve the addition of two offenses and the deletion of another.

Jostling (N § 165.25) and fraudulent accosting (N § 165.30)

The old section defining "harassment," contained in another article (N Art. 240; O Art. 250), lists several types of conduct, which if performed with a *harassing* intent, constitute "harassment" (N § 240.25; O § 250.10). Among the types of conduct enumerated in the old "harassment" section are jostling a person or placing one's hand near his pocket, handbag, etc., in a public place (O § 250.10[6]), and accosting a person in a public place for the purpose of obtaining money or property from him by confidence game methods. (*id.* [7]).

Those offenses are substantially carried over to the old bill from the existing Penal Law's "disorderly conduct" statute (§ 722[6]), where they have been of great utility, in New York City at least, as the principal weapons against pickpockets and certain kinds of confidence men. As "disorderly conduct," these offenses are punishable under the existing Penal Law by a term of imprisonment of up to six months (existing P. L. § 723); but, as "harassment" in the old proposed bill (O § 250.10)—an offense graded a violation—the maximum prison term imposable is fifteen days. This is regarded as grossly inadequate by many judges, prosecutors and police officers familiar with the problems involved in apprehending, prosecuting and protecting society from the professional pickpocket and confidence man.

Upon the premise that these are basically "theft" offenses requiring fairly severe penalties, the new bill removes them from the "harassment" section (O § 250.10[6, 7]); defines them in similar phraseology as individual offenses entitled "jostling" (N § 165.25) and "fraudulent accosting" (N § 165.30); places them in the Article, "Other offenses relating to theft" (N Art. 165); and grades each a class A misdemeanor.

Obscuring identity of a machine (O §§ 170.65–170.75)

This crime, defined in two degrees, appears in the old bill as a substantial restatement of an existing Penal Law offense penalizing the defacing, removal, etc., of serial numbers and other distinguishing marks upon motor vehicles and other machines,

and the possession, sale, etc., of machines so tampered with (existing P. L. § 436-a). In both the existing Penal Law and the old proposed bill (O §§ 170.65, 170.70), the crime is a felony as applied to motor vehicles and a misdemeanor as applied to other kinds of machines.

This crime and all the sections pertaining to it (O §§ 170.65–170.75) are omitted in the new bill. In their application to machines other than motor vehicles (the misdemeanor phases), the provisions are difficult of application and of little or no utility or consequence. The important felony phases of the offense, applying solely to motor vehicles, are fully covered by comparable criminal sanctions in the Vehicle and Traffic Law (§§ 421, 422).

Title K: Offenses Involving Fraud

Article 180 (formerly Art. 185): Bribery not involving public servants and related offenses

The only material changes in this article appear in the addition of two new sections: "Bribing a labor official; defense" (N § 180.20) and "Bribe receiving by a labor official; no defense (N § 180.30). These sections are part of the aforementioned statutory scheme of the new bill which abolishes the mutual exclusiveness of certain crimes of bribe receiving, on the one hand, and larceny by extortion and coercion on the other. The statutory scheme is fully explained in the comment upon new Article 200, *infra*.

Article 185 (formerly Art. 190): Frauds on creditors

No substantial changes have been made in this article.

Article 190 (formerly Art. 195): Other frauds

No substantial changes have been made in this article.

Title L: Offenses Against Public Administration

Article 200 (formerly Art. 205): Bribery involving public servants and related offenses

Elimination of mutual exclusiveness of bribe receiving and extortion

The most important changes in this article relate to two added sections (N §§ 200.05, 200.15) forming part of a scheme in the new bill to eliminate what is, under existing case law, mutual exclusiveness of (a) bribe receiving and (b) extortion (larceny by extortion in the proposed Penal Law) and coercion.

When a public servant receives or solicits money from a private citizen for performing or omitting to perform some official act, or for a promise to perform or to omit to perform the same, diffi-

cult questions often arise as to whether the crime is bribe receiving or extortion (or attempted extortion). A license commissioner who demands and receives $1,000 for issuing a license to a person whom he knows is clearly entitled to it is doubtless guilty of extortion. If he knows that the person is not entitled to the license but he issues it anyway in return for a $1,000 gratuity, the commissioner is doubtless guilty of bribe receiving. Between these and other fairly clear examples of extortion and bribe receiving, however, there is an extensive gray area of cases which, especially in view of the lack of a precise distinction between the two crimes, are difficult if not impossible to pinpoint as bribe receiving or as extortion.

The troublesome feature of this situation lies in the case law doctrine that bribe receiving and extortion are mutually exclusive crimes; that it is a defense to a bribe receiving prosecution that the defendant is guilty of extortion, and *vice versa*, [*People* v. *Dioguardi*, 8 N. Y. 2d 260, 273–274 (1960); *People* v. *Feld*, 262 App. Div. 90 (2d Dept. 1941)]. This frequently places prosecutor and court in the precarious position of being forced to choose between two crimes having the finest of distinctions, and permits highly technical but possibly effective defense argumentation that the wrong offense was prosecuted or submitted to the jury.

This state of affairs would probably have to be deemed unavoidable if the two crimes are indeed mutually exclusive by definition or are inconsistent in law. Upon analysis, however, such does not appear to be the case, at least under the formulations of the new proposed bill. Examination of the appropriate sections discloses that a public servant who obtains money or property upon representations or threats of using his official position in a particular manner is always guilty of bribe receiving and sometimes of extortion (larceny by extortion) as well; in short, that extortion of this nature is always bribe receiving also, although bribe receiving does not always amount to extortion.

Thus, the license commissioner who obtains money from an applicant clearly entitled to a license upon a threat not to issue a license to him, though clearly guilty of larceny by extortion under the new bill (N § 155.05[2(e)(viii)]), is equally guilty of bribe receiving; for, regardless of the extortionate means employed, he "accepts" a "benefit from another person upon an agreement or understanding that his . . . action, decision or exercise of discretion as a public servant will thereby be influenced" (N § 200.10).

The same rationale applies as between bribe receiving and "coercion" (N §§ 135.60, 135.65) where the "benefit" obtained by the public servant is not money or property but some other boon, such as a political favor. Where the "benefit" is coercively *solicited*, though not actually obtained by the public servant, the concomitantly committed crime is either attempted larceny by extortion or attempted coercion. And all the foregoing principles apply with equal force when the bribe offense is bribe receiving by a labor official (N § 180.25) rather than by a public official.

Since both logic and practicality dictate erasure of the mutual exclusiveness principle, the new bill does so: by a series of new "no defense" provisions located in the appropriate bribery, extortion and coercion areas (N § 135.70, 155.10, 180.30, 200.15).

One further facet of this new scheme requires discussion, namely that relating to the position of the bribe *giver*. Under existing law, a *giver* who is a victim of extortion by a public servant or a labor official enjoys the perfect defense that, since the *receiver* is guilty of extortion and not of bribe receiving, he (the giver) cannot be guilty of bribe giving (*People* v. *Dioguardi*, 8 N. Y. 2d 260, 274 *supra*). Under the above-treated provisions of the new bill without more, however, he is deprived of that defense by the erasure of the mutual exclusiveness doctrine. Even though the victim of an extortion, he is still guilty of bribery by virtue of conferring a benefit upon a public servant or a labor official "upon an agreement or understanding that" the latter's decision or action "will thereby be influenced" (N §§ 180.15, 200.00). Out of obvious equitable considerations, the new bill arbitrarily restores the coerced "bribe giver's" defense (N §§ 180.20, 200.05).

Giving and receiving unlawful gratuities (N §§ 200.30, 200.35; O §§ 205.25, 205.30)

Both the old and new proposed articles penalize as a felony the conferring of a benefit upon a public servant and the receipt of a benefit by a public servant "for having violated his duty as a public servant" ("Rewarding" and "Receiving reward for official misconduct": N §§ 200.20, 200.25, O §§ 205.15, 205.20). The old article penalizes as a misdemeanor the same kind of conduct when the benefit is conferred upon or received by the public servant "for performing or having performed an official service which his duties required him to perform without special or additional compensation" ("Giving" and "Receiving unlawful gratuities": O §§ 205.25, 205.30).

These sections cover all cases of reward for (a) *improper* conduct and (b) *proper* conduct which the public servant is "required" to perform. Left uncovered is reward for *proper* conduct which he is *not "required"* to perform but which, as a matter of discretion, he is *authorized* to perform. This gap is plugged in the new bill by adding the words "or authorized" after the word "required" in the sections defining the crimes of "giving" and "receiving unlawful gratuities" (N §§ 200.30, 200.35).

Article 205 (formerly Art. 210): Escape and other offenses relating to custody

This article has undergone several changes of form and a few changes of substance.

Escape (N §§ 205.05–205.15; O §§ 210.05–210.15)

As in the old bill, the three degrees of escape are distinguished by the seriousness of the underlying offense with which the prisoner was charged or for which he was committed. The new bill deletes subdivisions 2 and 3 from each of the old three escape sections, since this conduct is proscribed by the bill's broad accessoryship provision (N § 20.00).

Harboring an escapee (O §§ 210.20–210.25)

This crime, defined in two degrees, appears in the old bill as a substantial restatement of existing Penal Law § 1698. This crime is omitted in the new bill since the act of "harboring an escapee" is adequately proscribed by the new "hindering prosecution" provisions (N §§ 205.50–205.65).

Hindering prosecution (N §§ 205.50–205.65; O §§ 120.00–120.20)

This crime is treated in the old bill as an accessorial offense (O Art. 120 "Accessory after the fact"). In the new bill it is dealt with as a substantive offense, in three degrees. The conduct proscribed is somewhat similar to that in the old bill (compare N § 205.50 with O § 120.00). There are two significant changes. Under the old bill the actor was required to know or believe that the fugitive had committed the specific crime which he had in fact committed. Under the new bill it is enough, insofar as the two lower degrees are concerned, that the actor know or believe that the fugitive is being sought by law enforcement officials for the commission of some crime. Under the new bill, the offense of hindering prosecutions in the case of misdemeanors is eliminated. This is similar to existing Penal Law § 2.

Article 210 (formerly Art. 215): Perjury and related offenses

The only substantial change in this article consists of the elimination of "subornation of perjury," a crime defined in the existing Penal Law (§§ 1632, 1632-a) which the old bill carries over and presents in three degrees (O §§ 215.55, 215.60, 215.65).

Since one who *suborns* or procures another to commit perjury is, by virtue of principles of accessorial liability, guilty of the actual perjury committed, the crime of "subornation" is largely superfluous. Its only utility under existing law lies in a case where the person solicited refuses or fails for one reason or another to commit the suggested perjury. Here, the unsuccessful importuner, while not guilty of perjury nor, ordinarily, of attempted perjury (though possibly of conspiracy), is guilty of *attempted* "subornation of perjury."

The fact that such cases would be prosecutable under the proposed Penal Law as "criminal solicitation" (N §§ 100.00, 100.05)—an offense not included in the existing Penal Law—deprives the subornation crime of its solitary and limited function and dictates its omission.

Article 215 (formerly Art. 220): Other offenses relating to judicial and other proceedings

The only changes in this article worthy of mention are the upgrading of the crimes of "Criminal contempt" and "Criminal contempt of the legislature" from class B to class A misdemeanors (N §§ 215.50, 215.60; O §§ 220.50, 220.60).

Title M: Offenses Against Public Health and Morals

Article 220 (formerly Art. 225): Dangerous drug offenses

Article 166 of the existing Penal Law, entitled "Public Health," contains thirty-one sections, most of which deal with drugs, labeling, etc., and are of a highly specialized and regulatory nature (existing P. L. §§ 1740–1764). The old bill omits some of these sections, proposes the transfer of most of the others to the Public Health Law, Agriculture and Markets Law and Education Law, and retains or carries over in a revised form only the principal sections dealing with narcotics (existing P. L. §§ 1751, 1751-a). These are collated in the old bill in an article entitled "Narcotics offenses" (O Art. 225, §§ 225.00–225.30).

Upon the recommendations of prosecutors and police, the criminal portions of three sections slated for transfer to the Public Health Law are, in the new bill, returned to the Penal Law in a revised form. These are the sections making it a misdemeanor to sell or possess barbiturate drugs (existing P. L. § 1747-b), the drug known as "amphetamine" (*id.*, § 1747-c) and hypodermic syringes and needles (*id.*, § 1747-d).

The hypodermic needle crime (existing P. L. §1747-d) is merely added to the new article in the form of an individual statute couched in simplified language (N § 220.45). The "barbiturate" and "amphetamine" crimes, however, are not defined in individual statutes but are woven into the new scheme of "Dangerous drug offenses," which is the altered label of the new article (N Art. 220; formerly Art. 225, entitled "Narcotics offenses").

The innovations of the new scheme commence with certain changes in the "definitions" section (N § 220.00; O § 225.00). The terms "barbiturate" and "amphetamine," in addition to "narcotic drug," are there defined, followed by a definition of "dangerous drug," which "means any narcotic drug, barbiturate or amphetamine" (N § 220.00[1–4]). The "criminal possession" and "criminally selling" degree crimes, formerly limited to narcotics (O §§ 225.05–225.15, 225.25, 225.30), are then expanded to cover possession and sale of any "dangerous drug" (N §§ 220.05–220.20, 220.30–220.40).

The "possession" crimes are presented in four degrees instead of the three found in the old article. The two highest degrees deal solely with narcotics and are precisely the same in substance and penalty as those of the old article (compare N §§ 220.15, 220.20 with O §§ 225.10, 225.15). The lowest or fourth degree offense—the misdemeanor *addict* crime covering possession of *any* quantity

of a "dangerous drug" (N § 220.05)—corresponds to the old third degree section (O § 225.05), the only difference being that possession of barbiturates and amphetamine as well as of narcotics is included within its proscription.

The new third degree offense, covering possession of "a dangerous drug with intent to sell" (N § 220.10), has no counterpart in the old article. Its main application is not to narcotics—possession of narcotics with intent to sell is still a second degree offense of class D felony status (N § 220.15)—but to barbiturates and amphetamine. The net result of this new section it to make possession of barbiturates or amphetamine "with intent to sell" a class E felony (N § 220.10) instead of a misdemeanor as it ordinarily is under the existing Penal Law (§§ 1747-b, 1747-c).

The same technique has been employed with respect to the "selling" crimes, which are defined in three degrees in the new "dangerous drug" article instead of in the two degrees of the old "narcotics" article. Again, the two highest degrees pertain only to narcotics and are identical in substance and penalty with the old "selling" sections (compare N §§ 220.35, 220.40 with O §§ 225.25, 225.30). And again the new third degree section applies mainly to barbiturates and amphetamine. The effect of the latter section is to raise the existing Penal Law's misdemeanor penalties for these "selling" offenses (existing P. L. §§ 1747-b, 1747-c) to class D felony grade (N § 220.30).

One of the over-all advantages of the new "dangerous drug" scheme, it may be observed, is its flexibility with respect to future legislation. Under the existing Penal Law pattern, a new penal statute has to be enacted every time a new drug (such as barbiturates or amphetamine) deemed "dangerous" to health appears on the scene. Under the new proposed article, possession and sale of a new drug can be brought within the criminal orbit by the simple process of expanding the definition of the term "dangerous drug" to include the new contraband item (N § 220.00[4]).

Article 225 (formerly Art. 230): Gambling offenses

The significant changes in this article relate to the crime of "possession of gambling records," which, as defined, are limited to records and instruments used in the operation of (a) bookmaking enterprises and (b) lottery and policy schemes (N §§ 225.15, 225.20; O § 230.15). The new article divides the offense into two degrees, the higher of which is a class E felony (N § 225.20) and the lower of which is—like the single, degreeless crime of the old article (O § 230.15)—a class A misdemeanor (N § 225.15).

With respect to the basic misdemeanor offense, the new (second degree) section, unlike the old degreeless section (O § 230.15), treats bookmaking records, on the one hand, and lottery and policy records on the other, in two separate subdivisions (N § 225.15). The greatest substantive change here concerns possession of bookmaking records.

In the old article, a "bookmaking record" is defined, much as in the existing Penal Law (§ 986-b), as a record or instrument "made by a person engaged in bookmaking activity" and in effect constituting a record of his business wagers (O § 230.00 [11]). With that definition, the crime of "possession of gambling records" as applied to "bookmaking records" has little or no utility, for if the prosecution can prove, as it must, that the defendant was "a person engaged in bookmaking activity" (O § 230.00 [11]), it can also prove him guilty of the basic crime of "promoting gambling" (N § 225.05; O § 230.05) and does not need the "records" offense.

In view of that factor, the new article abandons the old definition of a "bookmaking record" (O § 230.00[11]). This phase of the possession offense is no longer defined in terms of a record "made by" a bookmaker but in terms of a record "of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise" (N § 225.15[1]).

The same type of phraseology is used in the second subdivision of this section, relating to lottery and policy records (N § 225.15 [2]), and also in both subdivisions of the first degree section (N § 225.20). Since the requirements of proof are thus relaxed to a showing that the records possessed are of "a kind commonly used in" bookmaking, lottery and policy enterprises, a "defense" section is added for the protection of defendants who, though possessing such contraband, might be able to demonstrate innocent intent or motives. This section renders it a defense to any prosecution for possession of gambling records that, "in fact," the records possessed were neither used nor intended to be used for the indicated criminal purposes (N § 225.25).

The new first degree section raises the crime to a class E felony when the records possessed are of a kind that persuasively depict the possessor as a substantial bookmaking, lottery or policy operator (N § 225.20); in short, bookmaking records reflecting "more than five bets totaling more than five thousand dollars" (*id.*, subd. 1), or lottery or policy records reflecting "more than five hundred plays or chances" (*id.*, subd. 2).

Article 230 (formerly Art. 235): Prostitution offenses

The most important change in this article is the addition of a new offense: "Patronizing a prostitute."

Patronizing a prostitute (N § 230.05)

In substance, this section makes it a violation for a person to hire or attempt to hire a prostitute or anyone else to engage in sexual conduct with him.

Though not presently an offense in New York, such "patronizing" conduct is proscribed in various forms by the penal codes of several other jurisdictions, including the recently revised codes of Illinois and Wisconsin and it is included as an offense in the American Law Institute's Model Penal Code (§ 251.1[5]).

At the public hearings held by the Commission with respect to the proposed Penal Law, and in conferences and correspondence with the Commission and its staff, a number of persons and organizations have strongly urged the inclusion of a "patronizing" offense. The reasons most vigorously advanced are: (1) that criminal sanctions against the patron as well as the prostitute should aid in the curtailment of prostitution; and (2) that to penalize the prostitute and exempt the equally culpable patron is inherently unjust.

After consideration of these contentions, the Commission decided to include the indicated patronizing offense in the new bill (N § 230.05) as a proper corollary to "prostitution" (N § 230.00).

Following these two sections, it may be observed, a "no defense" provision has been added (N § 230.10): this makes it perfectly clear that both the "prostitution" and the "patronizing" offenses apply not only to the usual situation where a female is hired by a male, but also to those where a male is hired by a male, a female by a female, and male by a female.

Promoting prostitution (N §§ 230.20–230.30; O §§ 235.10–235.20)

Each of the three sections defining the three degrees of the crime of "promoting prostitution" has been changed in one respect.

The third and lowest degree, constituting the basic crime, has been downgraded from a class E felony to a class A misdemeanor (N § 230.20; O § 235.10).

The second degree offense, a class D felony, has been somewhat expanded. The old section predicates second degree liability only when the promotional conduct involves advancement or exploitation of prostitution activity by two or more prostitutes (O § 235.15). The new section adds an alternative aggravating factor: advancement or exploitation of prostitution "of a person less than nineteen years old" (N § 230.25).

First degree liability under the old section (a class C felony) is based upon either (1) compulsion of prostitution by force or intimidation or (2) advancement or exploitation of prostitution "of a person less than seventeen years old" (O § 235.20. The new section changes the latter by lowering the age of the exploited prostitute to "less than sixteen years old" (N § 230.30[2]).

The result of these "age" changes is to raise the exploitation of seventeen and eighteen-year-olds from a third degree to a second degree offense; to lower the exploitation of a sixteen-year-old from the first to the second degree; and to limit the first degree sanction in this respect to the exploitation of fifteen-year-olds and under.

Article 235 (formerly Art. 240): Obscenity and related offenses

The only substantive change in this article is the elimination of a provision making it an "affirmative defense" to an obscenity prosecution "that the persons to whom allegedly obscene material was disseminated were personal associates of the defendant and that such dissemination was not commercial in character" (N § 235.15; O § 240.15[2]).

Title N: Offenses Against Public Order, Public Sensibilities and the Right to Privacy

This "Title" has undergone substantial change. Labeled "Offenses Against Public Order" in the old bill, it included three articles:

Art. 245: Riot, unlawful assembly and criminal anarchy.
Art. 250: Disorderly conduct, harassment and related offenses.
Art. 255: Offenses against privacy of communications.

With the re-labeling of the Title (Title N) in the new bill ("Offenses Against Public Order, Public Sensibilities and the Right to Privacy"), the included articles have been re-structured and re-labeled, as follows:

Art. 240: Offenses against public order.
Art. 245: Offenses against public sensibilities.
Art. 250: Offenses against the right to privacy.

Article 240: Offenses against public order

This article includes most of the offenses contained in the first two articles of Title N of the old bill (O Arts. 245,250).

Riot (N § 240.05; O § 245.00) and Unlawful assembly (N § 240.10; O § 245.05)

The old "riot" section defines that crime largely in terms of three or more persons engaging in "disorderly conduct" with intent to commit a crime or crimes of violence (O § 245.00). The new section materially reformulates this definition. Seeking to express the popular conception of "riot," it defines the crime in terms of *five* or more persons wrongfully engaging in "*tumultuous* and *violent* conduct and thereby intentionally or recklessly" causing or creating "a grave risk of causing *public alarm*" (N § 240.05).

The crime of "unlawful assembly," which is defined in both bills in terms of assembling for the purpose of committing riot, is changed in the new bill to conform to the new "riot" requirement of *five* or more rather than *three* or more persons; in short, the defendant must assemble with "*four* or more other persons" (N § 240.10) rather than with "*two* or more" (O § 245.05).

Disorderly conduct (N § 240.20; O § 250.05)

The old section contains eight subdivisions enumerating eight types of conduct which, when perfomed with the *mens rea* specified in the preamble, constitute "disorderly conduct" (O § 250.05). Two of these subdivisions are eliminated in the new bill and a new one is added.

Eliminated are the subdivisions relating to indecent exposure (O § 250.05[4]) and circulation of false fire alarms, bomb scares, etc. (*id.*,[7]), each of which is newly defined as an individual

offense of higher grade than disorderly conduct and, in that form, shifted to another spot (N §§ 245.00, 240.50[1]).

The newly added subdivision brings into the disorderly conduct ambit one who, with the indicated *mens rea*, "obstructs vehicular or pedestrian traffic" (N § 240.20[5]).

Harassment (N § 240.25; O § 250.10) and Aggravated harassment (N § 240.30)

Seven of the eleven subdivisions of the old "harassment" statute (N § 240.25), defining various forms of that offense, have been extracted. One of these, involving annoying "taunts or challenges" (O § 250.10[1]), has simply been abandoned because of triviality. Conversely, the other six (*id.*, [4, 6, 7, 8, 9, 10]) are deemed to proscribe conduct too serious for "harassment's" limited penalty (a violation) and have been redefined as individual offenses of higher grade and placed in other locations in this bill.

The old indecent exposure subdivision (O § 250.10[4]), for example, like its old "disorderly conduct" counterpart (O § 250.05 [4]), is now covered by a new "public lewdness" offense, a class B misdemeanor (N § 245.00).

The "jostling" and confidence game subdivisions (O § 250.10 [6, 7]) are removed and defined as separate offenses of a class A misdemeanor grade in the article entitled "Other offenses relating to theft" (N Art. 165, §§ 165.25, 165.30; see comment upon Art. 165, *supra*).

The two subdivisions dealing with threatening, alarming and annoying communications and telephone calls (O § 250.10[8, 9]) are extracted and relocated in an immediately ensuing section defining a new offense of "aggravated harassment," a class A misdemeanor (N § 240.30).

The subdivision proscribing false reports to law enforcement authorities of crimes and other incidents (O § 250.10 [10]) is removed and incorporated as one phase of a new class B misdemeanor offense entitled "Falsely reporting an incident" (N § 240.50 [3]), which also includes the aforementioned false fire alarm and bomb scare provision transplanted from the old disorderly conduct provision (O § 250.05 [7]) and another offense of similar character (N § 240.50 [1, 2]).

One new subdivision has been added to the "harassment" section, covering repeated commission of "acts which alarm or seriously annoy . . . [another] person and which serve no legitimate purpose" (N § 240.25 [5]). This provision, like its catchall counterpart in the disorderly conduct section (N § 240.20 [7]), is deemed necessary because of the impossibility of compiling a comprehensive list of the numerous specific kinds of conduct logically falling within the proscriptions of the "harassment" offense.

Article 245: Offenses against public sensibilities

This new article of restructured Title N includes three offenses: (1) "public lewdness" (N § 245.00), a new crime which, however, merely provides a higher penalty (class B misdemeanor) for indecent exposure conduct formerly proscribed as "disorderly conduct" and "harassment" (O §§ 250.05 [4], 250.10 [4]); (2) the old bill's "offensive exhibition" (O § 250.30; N § 245.05); and (3) a revised version of the "cruelty to animals" offense (O § 250.35; N §§ 245.10–245.20).

Largely by means of a new "definitions" section (N § 245.10), the last crime is defined in greater detail than in the old bill (O § 250.35) with respect to the kinds of conduct which do or may constitute "cruelty to animals." Also, the new bill, unlike the old one, expressly designates the *mens rea* by requiring that the mistreatment be committed "intentionally or recklessly" (N § 245.15).

Article 250 (formerly Art. 255 with slightly different label): Offenses against the right of privacy

This article has undergone a number of language changes as well as minor changes of substance and structure, most of which require no comment.

Among the substantive changes are: (1) restriction of the application of the crime of "Failure to report wiretapping," to the remiss telephone or telegraph *corporation*, with employees and representatives thereof excluded from the criminal sanctions (compare O § 255.15 with N § 250.15); and (2) limitation of the crime of "tampering with private communications," as it applies to opening, reading and publicizing sealed documents, to letters and other written *communications*, with private papers and other *non-communication* kinds of instruments excluded (compare O § 255.25 [1, 2] with N § 250.25 [1, 2]).

One new offense has been added to the article. Entitled "Unlawfully obtaining communications information" (N § 250.30), it penalizes (as a class B misdemeanor) the unauthorized acquisition from a telephone or telegraph corporation of information relating to its wires, cables, terminals, etc., and concerning records of communications passing over its lines. This section is derived from an existing Penal Law statute (P. L. § 743[2]) defining, *inter alia*, substantially the same offenses.

Article 260 (formerly Art. 265): Offenses relating to children and incompetents

Endangering the welfare of a child; defense (N § 260.15)

This section has been added to provide an affirmative defense to adherents of religious groups which rely on prayer for the treatment of illness, if they are prosecuted for endangering the welfare of a child by failing to provide medical treatment for him (see, N § 265.10; O § 260.10). The provision is derived from existing Penal Law § 295. Although, under the old bill such a situation would probably be covered by the fact that the requisite culpable

mental state would not be present, it was decided to state this proposition positively rather than leave it to construction of the statute.

Unlawfully dealing with a child (N § 260.20; O § 265.15)

New subdivision 1 refers specifically to the kinds of places from which an unaccompanied child is barred, rather than the broad descriptive phrase "place of entertainment or amusement" used in old subdivision 1.

Whereas, old subdivision 4 limited the proscribed conduct to *selling* alcoholic beverages to a child, the new subdivision 4 also forbids *giving* it to a child. This restores the scope of forbidden conduct to that of existing Penal Law § 484(3). However, to avoid the possibility of prosecution of a parent who gives his own 17-year-old child a glass of beer, the new subdivision specifically excludes a parent or guardian from the application of this provision.

Article 265 (formerly Art. 270): Firearms and other dangerous weapons

No changes have been made in this article.

Article 270 (formerly Art. 265): Other offenses relating to public safety

No changes have been made in this article.

PART FOUR

(formerly Part Three)

ADMINISTRATIVE PROVISIONS

A number of sections in Part Three of the old bill have not been carried over into the new bill. Old Article 400, seizure and destruction of gambling implements, will be dealt with in the revised Code of Criminal Procedure. Old Article 430, dealing with gambling contracts, has been transferred to the General Obligations Law.

APPENDIX A

TABLE 1

The left hand column of this table lists each section of the 1965 proposed revision. The right hand column shows the corresponding section of the 1964 study bill covering the same subject matter. The word "new" indicates that there was no counterpart in the 1964 study bill.

Penal Law Sec. (1965 Revision)	Penal Law Sec. (1964 Study Bill)
1.00	1.00
1.05	1.05
5.00	5.00
5.05	5.05
5.10	5.10
10.00(1)	15.00(1)
10.00(2)	15.00(3), 15.15(1)
10.00(3)	15.10(1)
10.00(4)	15.05(1)
10.00(5)	15.00(2)
10.00(6)	10.00(1)
10.00(7)	10.00(2)
10.00(8)	10.00(3)
10.00(9)	10.00(4)
10.00(10)	10.00(5)
10.00(11)	10.00(6)
10.00(12)	10.00(7)
10.00(13)	new
10.00(14)	10.00(8)
10.00(15)	10.00(9)
10.00(16)	new
15.00	45.00(1), (2), (3)
15.05	45.00(4), (5), (6), (7)
15.10	45.05
15.15	45.05
15.20(1)	45.15(1)
15.20(2)	45.15(2)
15.20(3)	new
15.25	45.10
20.00	50.00
20.05	50.05
20.10	50.10(1)
20.15	50.15
20.20	50.20
20.25	50.25
25.00	new; see, 55.00
30.00	60.00
30.05	60.05
35.00	new
35.05	65.00
35.10	65.05
35.15	65.10
35.20	65.15
35.25	65.20
35.30	65.30
35.35	75.00
35.40	75.05
35.45	see, 50.10(2), 100.20(2), 105.35, 110.15
55.00	see, 15.00(1)
55.05(1)	15.05(2)
55.05(2)	15.10(2)
55.10(1)	15.05(3)
55.10(2)	15.10(3)
55.10(3)	15.15(2)
60.00	20.00
65.00	25.00
65.05	25.05
65.10	25.10
65.15	25.15
65.20	25.20
70.00	30.00
70.05	30.05
70.10	30.10
70.15	30.15
70.20	30.20
70.25	30.25
70.30	30.30
70.35	30.35
70.40	30.40
75.00	35.00
75.05	35.05
75.10	35.10
75.15	35.15
80.00	40.00
80.05	40.05

Penal Law Sec. (1965 Revision)	Penal Law Sec. (1964 Study Bill)
80.10	40.10
80.15	new
100.00	100.00, 100.05, 100.10(4)
100.05	100.00, 100.05, 100.10(2), (3)
100.10	100.00, 100.05, 100.10(1)
100.15	100.15
100.20	100.20(1)
105.00	105.05
105.05	105.10
105.10	105.15
105.15	105.20
105.20	105.25
105.25	105.30
105.30	new
110.00	110.00
110.05	110.05
110.10	110.10
115.00	115.00(2), 115.10
115.05	115.00(2), 115.15
115.10	115.20
115.15	115.30
120.00	125.00
120.05(1)	125.05(1)
120.05(2)	125.05(2)
120.05(3)	new
120.05(4)	120.05(5)
120.05(5)	120.05(3)
120.10(1)	new
120.10(2)	125.10(2)
120.10(3)	125.10(3)
120.10(4)	125.10(4)
120.15	125.15
120.20	125.20
120.25	125.25
120.30	125.30
120.35	125.35
125.00	130.00
125.05	130.05
125.10	130.10
125.15	130.15
125.20	130.20
125.25	130.25
125.30	130.30
125.35	130.35
125.40	130.40
125.45	130.45
125.50	130.50
125.55	130.55
125.60	130.60
130.00	135.00
130.05	135.05
130.10	135.10(1)
130.15	135.15
130.20(1)	135.20(1)
130.20(2)	135.20(2)
130.20(3)	135.55
130.25	135.25
130.30	135.30
130.35	135.35
130.40	135.40
130.45	135.45
130.50	135.50
130.55	new
130.60	130.60
130.65	130.65
135.00	140.00
135.05	140.05
135.10	140.10
135.15	140.30
135.20	new
135.25	140.15
135.30	140.30
135.35	140.20
135.40	140.25
135.45	140.35
135.50	140.40
135.55	140.45
135.60	140.50
135.65	140.55
135.70	new
135.75	140.60
140.00	145.00
140.05	145.05
140.10	145.10
140.15	145.15
140.20	145.20
140.25	145.25, 145.30
140.30	145.35
140.35	145.40
145.00	150.00
145.05	150.05(1)
145.10(1)	150.10(1)
145.10(2)	new
145.15(1)	new
145.15(2)	150.05(2)
145.20	150.10(2)
145.25	new; but see, 155.20
150.00	155.00
150.05	155.05
150.10	155.10
150.15	155.15
155.00	160.00
155.05	160.05
155.10	160.10
155.15	160.15
155.20	160.25
155.25	160.30
155.30	160.35
155.35	160.40
155.40	160.45
155.45	160.20

Penal Law Sec. (1965 Revision)	Penal Law Sec. (1964 Study Bill)
160.00	165.05
160.05	165.10
160.10	165.15
160.15(1)	165.20(1)
160.15(2)	165.20(2)
160.15(3)	new
165.00	170.00
165.05	170.10
165.10	170.15
165.15	170.20
165.20	170.25
165.25	250.10(6)
165.30	250.10(7)
165.35	170.30
165.40	170.40
165.45	170.45
165.50	170.50
165.55	170.55
165.60(1)	170.60(1)
165.60(2)	170.60(2)
165.60(3)	see, 170.40, 170.45, 170.50
165.65(1)	170.60(3)
165.65(2)	170.60(4)
170.00	175.00
170.05	175.05
170.10	175.10
170.15	175.15
170.20	175.20
170.25	175.25
170.30	175.30
170.35	175.35
170.40	175.40
170.45	175.45
170.50	175.50
170.55	175.55
170.60	175.60
175.00	180.00
175.05	180.05
175.10	180.10
175.15	180.15
175.20	180.20
175.25	180.25
175.30	180.30
175.35	180.35
175.40	180.40
175.45	180.50
175.50	180.55
180.00	185.00
180.05	185.05
180.10	185.10
180.15	185.15
180.20	new
180.25	185.20
180.30	new
180.35	185.25
180.40	185.30
180.45	185.35
180.50	185.40
180.55	185.45
185.00	190.00
185.05	190.05
185.10	190.10
185.15	190.15
190.00	195.00
190.05	195.05
190.10	195.10
190.15	195.15
190.20	195.20
190.25	195.25
190.30	195.30
190.35	195.35
195.00	200.00
195.05	200.05
195.10	200.10
195.15	200.15
200.00	205.00
200.05	new
200.10	205.05
200.15	new
200.20	205.15
200.25	205.20
200.30	205.25
200.35	205.30
200.40	205.35
200.45	205.40
200.50	205.45
205.00	210.00
205.05	210.05(1)
205.10(1)	new
205.10(2)	210.10(1)
205.15	210.15(1)
205.20	210.30
205.25	210.35
205.30	210.40
205.35	210.50
205.40	210.55
205.45	210.50, 210.55
205.50	120.00
205.55	120.10
205.60	120.15
205.65	120.20
210.00	215.00
210.05	215.05
210.10	215.10
210.15	215.15
210.20	215.20
210.25	215.25
210.30	215.30
210.35	215.35
210.40	215.40
210.45	215.45
210.50	215.50

Penal Law Sec. (1965 Revision)	Penal Law Sec. (1964 Study Bill)
215.00	220.00
215.05	220.05
215.10	220.10
215.15	220.15
215.20	220.20
215.25	220.25
215.30	220.30
215.35	220.35
215.40	220.40
215.45	220.45
215.50	220.50
215.55	220.55
215.60	220.60
215.65	220.65
215.70	220.70
215.75	220.75
220.00(1)	225.00(1)
220.00(2)	new
220.00(3)	new
220.00(4)	new
220.00(5)	225.00(2)
220.00(6)	225.00(3)
220.00(7)	225.00(4)
220.05	225.05
220.10	225.10(1)
220.15(1)	225.10(1)
220.15(2)	225.10(2)
220.20	225.15
220.25	225.20
220.30	225.25
220.35	225.25
220.40	225.30
220.45	new
225.00	230.00
225.05	230.05
225.10	230.10
225.15	230.15
225.20	230.15
225.25	new
225.30	230.20
225.35	230.30
225.40	230.25
230.00	235.00
230.05	new
230.10(1)	235.00
230.10(2)	new
230.15	235.05
230.20	235.10
230.25(1)	235.15
230.25(2)	new
230.30	235.20
230.35	new
230.40	235.25
235.00	240.00
235.05	240.05
235.10	240.10
235.15	240.15(1)
235.20	240.20
235.25	240.25
235.30	240.30
240.00(1)	250.00(2)
240.00(2)	250.00(3)
240.05	245.00
240.10	245.05
240.15	245.10
240.20(1)	250.05(1)
240 20(2)	250.05(2)
240.20(3)	250.05(3)
240.20(4)	250.05(5)
240.20(5)	new
240.20(6)	250.05(6)
240.20(7)	250.05(8)
240.25(1)	250.10(2)
240.25(2)	250.10(3)
240.25(3)	250.10(5)
240.25(4)	250.10(11)
240.25(5)	new
240.30(1)	250.10(8)
240.30(2)	250.10(9)
240.35(1)	250.15(1)
240.35(2)	250.15(2)
240.35(3)	250.15(3)
240.35(4)	250.15(4)
240.35(5)	250.15(5)
240.35(6)	250.15(6)
240.35(7)	250.15(7)
240.35(8)	250.15(8)
240.35(9)	new
240.40	250.20
240.45	250.25
240.50	250.05(7), 250.10(10)
245.00	250.05(4), 250.10(4)
245.05	250.30
245.10	250.35
245.15	250.35
245.20	250.35
250.00	255.00
250.05	255.05
250.10	255.10
250.15	255.15
250.20	255.20
250.25	255.25
250.30	new
250.35	255.35
255.00	260.00
255.05	260.05
255.10	260.10
255.15	260.15
255.20	260.20
255.25	260.25
255.30	260.30
260.00	265.00
260.05	265.05
260.10	265.10
260.15	new

Penal Law Sec. (1965 Revision)	Penal Law Sec. (1964 Study Bill)
260.20	265.15
260.25	265.20
265.00	270.00
265.05	270.05
265.10	270.10
265.15	270.15
265.20	270.20
265.25	270.25
265.30	270.30
265.35	270.35
270.00	275.00
270.05	275.05
270.10	275.10
270.15	275.15
400.00	420.00
400.05	410.00
405.00	425.00
405.05	415.00
410.00	405.05
500.00	500.00
500.05	500.05

APPENDIX B

TABLE II

The left hand column of this table lists each section of the 1964 study bill; the right hand column shows the appropriate section of the 1965 proposed revision covering the same subject matter. The word "omitted" indicates that the particular section has not been included in the 1965 proposed revision; and the word "transferred" indicates that the particular section has been relocated in the designated body of law.

Penal Law Sec. (1964 Study Bill)	Penal Law Sec. (1965 Revision)
1.00	1.00
1.05	1.05
5.00	5.00
5.05	5.05
5.10	5.10
10.00(1)	10.00(6)
10.00(2)	10.00(7)
10.00(3)	10.00(8)
10.00(4)	10.00(9)
10.00(5)	10.00(10)
10.00(6)	10.00(11)
10.00(7)	10.00(12)
10.00(8)	10.00(14)
10.00(9)	10.00(15)
15.00(1)	10.00(1), 55.00
15.00(2)	10.00(5)
15.00(3)	10.00(2)
15.05(1)	10.00(4)
15.05(2)	55.05(1)
15.05(3)	55.10(1)
15.10(1)	10.00(3)
15.10(2)	55.05(2)
15.10(3)	55.10(2)
15.15(1)	10.00(2)
15.15(2)	55.10(3)
20.00	60.00
25.00	65.00
25.05	65.05
25.10	65.10
25.15	65.15
25.20	65.20
30.00	70.00
30.05	70.05
30.10	70.10
30.15	70.15
30.20	70.20
30.25	70.25
30.30	70.30
30.35	70.35
30.40	70.40
35.00	75.00
35.05	75.05
35.10	75.10
35.15	75.15
40.00	80.00
40.05	80.05
40.10	80.10
45.00(1)	15.00
45.00(2)	15.00
45.00(3)	15.00
45.00(4)	15.05
45.00(5)	15.05
45.00(6)	15.05
45.00(7)	15.05
45.05(1), (2)	15.10
45.05(3), (4)	15.15
45.10	15.25
45.15(1)	15.20(1)
45.15(2)	15.20(2)
50.00	20.00
50.05	20.05
50.10(1)	20.10
50.10(2)	35.45(1)
50.15	20.15
50.20	20.20
50.25	20.25
55.00	see, 25.00
60.00	30.00
60.05	30.05
65.00	35.05
65.05	35.10
65.10	35.15
65.15	35.20
65.20	35.25
65.25	omitted
65.30	35.30
70.00	omitted; to be treated in Code Crim. Proc.
70.05	omitted; to be treated in Code Crim. Proc.

Penal Law Sec. (1964 Study Bill)	Penal Law Sec. (1965 Revision)
70.10	omitted; to be treated in Code Crim. Proc.
70.15	omitted; to be treated in Code Crim. Proc.
70.20	omitted; to be treated in Code Crim. Proc.
75.00	35.35
75.05	35.40
75.10	omitted; to be treated in Code Crim. Proc.
75.15	omitted; to be treated in Code Crim. Proc.
100.00	100.00, 100.05, 100.10
100.05	100.00, 100.05, 100.10
100.10(1)	100.10
100.10(2)	100.05
100.10(3)	100.05
100.10(4)	100.00
100.15	100.15
100.20(1)	100.20
100.20(2)	35.45
105.00	omitted
105.05	105.00
105.10	105.05
105.15	105.10
105.20	105.15
105.25	105.20
105.30	105.25
105.35	35.45
110.00	110.00
110.05	110.05
110.10	110.10
110.15	35.45
115.00(1)	omitted
115.00(2)	115.00, 115.05
115.05	omitted
115.10	115.00
115.15	115.05
115.20	115.10
115.25	omitted; see, 35.35
115.30	115.15
120.00	205.50
120.05	omitted
120.10	205.55
120.15	205.60
120.20	205.65
125.00	120.00
125.05(1)	120.05(1)
125.05(2)	120.05(2)
125.05(3)	120.05(5)
125.05(4)	omitted
125.05(5)	120.05(4)
125.10(1)	omitted
125.10(2)	120.10(2)
125.10(3)	120.10(3)
125.10(4)	120.10(4)
125.15	120.15
125.20	120.20
125.25	120.25
125.30	120.30
125.35	120.35
130.00	125.00
130.05	125.05
130.10	125.10
130.15	125.15
130.20	125.20
130.25	125.25
130.30	125.30
130.35	125.35
130.40	125.40
130.45	125.45
130.50	125.50
130.55	125.55
130.60	125.60
135.00(1)	130.00(1)
135.00(2)	130.00(2)
135.00(3)	130.00(3)
135.00(4)	130.00(4)
135.00(5)	130.00(5)
135.00(6)	130.00(6)
135.00(7)	130.00(7)
135.00(8)	omitted
135.00(9)	130.00(9)
135.05	130.05
135.10(1)	130.10
135.10(2)	see, 15.20(3)
135.15	130.15
135.20	130.20
135.25	130.25
135.30	130.30
135.35	130.35
135.40	130.40
135.45	130.45
135.50	130.50
135.55	130.20(3)
135.60	130.60
135.65	130.65
140.00	135.00
140.05	135.05
140.10	135.10
140.15	135.25
140.20	135.35
140.25	135.40
140.30	135.15, 135.30
140.35	145.45
140.40	135.50
140.45	135.55
140.50	135.60
140.55	135.65
140.60	135.75
145.00	140.00
145.05	140.05
145.10	140.10

Penal Law Sec. (1964 Study Bill)	Penal Law Sec. (1965 Revision)
145.15	140.15
145.20	140.20
145.25	140.25
145.30	140.25
145.35	140.30
145.40	140.35
150.00	145.00
150.05(1)	145.05
150.05(2)	145.15(2)
150.10(1)	145.10(1)
150.10(2)	145.20
155.00	150.00
155.05	150.05
155.10	150.10
155.15	150.15
155.20	145.25
160.00	155.00
160.05	155.05
160.10	155.10
160.15	155.15
160.20	155.45
160.25	155.20
160.30	155.25
160.35	155.30
160.40	155.35
160.45	155.40
165.00	see, 155.00
165.05	160.05
165.10	160.05
165.15	160.10
165.20	160.15(1), (2)
170.00	165.00
170.05	see, 10.00(13)
170.10	165.05
170.15	165.10
170.20	165.15
170.25	165.20
170.30	165.35
170.35	omitted; see 165.45(2)
170.40	165.40, 165.60(3)
170.45	165.45, 165.60(3)
170.50	165.50, 165.60(3)
170.55	165.55
170.60(1)	165.60(1)
170.60(2)	165.60(2)
170.60(3)	165.65(1)
170.60(4)	165.65(2)
170.65	omitted
170.70	omitted
170.75	omitted
175.00	170.00
175.05	170.05
175.10	170.10
175.15	170.15
175.20	170.20
175.25	170.25
175.30	170.30
175.35	170.35
175.40	170.40
175.45	170.45
175.50	170.50
175.55	170.55
175.60	170.60
180.00	175.00
180.05	175.05
180.10	175.10
180.15	175.15
180.20	175.20
180.25	175.25
180.30	175.30
180.35	175.35
180.40	175.40
180.45	omitted; see 175.45
180.50	175.45
180.55	175.50
185.00	180.00
185.05	180.05
185.10	180.10
185.15	180.15
185.20	180.25
185.25	180.35
185.30	180.40
185.35	180.45
185.40	180.50
185.45	180.55
190.00	185.00
190.05	185.05
190.10	185.10
190.15	185.15
195.00	190.00
195.05	190.05
195.10	190.10
195.15	190.15
195.20	190.20
195.25	190.25
195.30	190.30
195.35	190.35
195.40	omitted
200.00	195.00
200.05	195.05
200.10	195.10
200.15	195.15
205.00	200.00
205.00	200.10
205.10	omitted
205.15	200.20
205.20	200.25
205.25	200.30
205.30	200.35
205.35	200.40
205.40	200.45
205.45	200.50

Penal Law Sec. (1964 Study Bill)	Penal Law Sec. (1965 Revision)
210.00	205.00
210.05(1)	205.05
210.05(2)	omitted; see, 20.00
210.05(3)	omitted; see, 20.00
210.05(4)	omitted; see, 20.00
210.10(1)	205.10(2)
210.10(2)	omitted; see, 20.00
210.10(3)	omitted; see, 20.00
210.10(4)	omitted; see, 20.00
210.15(1)	205.15
210.15(2)	omitted; see, 20.00
210.15(3)	omitted; see, 20.00
210.15(4)	omitted; see, 20.00
210.20	omitted; see, 205.50
210.25	omitted; see, 205.50
210.30	205.20
210.35	205.25
210.40	205.30
210.45	omitted
210.50	205.35, 205.45
210.55	205.40, 205.45
215.00	210.00
215.05	210.05
215.10	210.10
215.15	210.15
215.20	210.20
215.25	210.25
215.30	210.30
215.35	210.35
215.40	210.40
215.45	210.45
215.50	210.50
215.55	omitted; see, 20.00, Art. 100
215.60	omitted; see, 20.00, Art. 100
215.65	omitted; see, 20.00, Art. 100
220.00	215.00
220.05	215.05
220.10	215.10
220.15	215.15
220.20	215.20
220.25	215.25
220.30	215.30
220.35	215.35
220.40	215.40
220.45	215.45
220.50	215.50
220.55	215.55
220.60	215.60
220.65	215.65
220.70	215.70
220.75	220.70
225.00(1)	220.00(1)
225.00(2)	220.00(5)
225.00(3)	220.00(6)
225.00(4)	220.00(7)
225.05	220.05
225.10(1)	220.10, 220.15(1)
225.10(2)	220.15(2)
225.15	220.20
225.20	220.25
225.25	220.30, 220.35
225.30	220.40
230.00	225.00
230.05	225.05
230.10	225.10
230.15	225.15, 225.20
230.20	225.30
230.25	225.40
230.30	225.35
235.00	230.00, 230.10(1)
235.05	230.15
235.10	230.20
235.15	230.25(1)
235.20	230.30
235.25	230.40
240.00	235.00
240.05	235.05
240.10	235.10
240.15(1)	235.15
240.15(2)	omitted
240.20	235.20
240.25	235.25
240.30	235.30
245.00	240.05
245.05	240.10
245.10	240.15
250.00(1)	omitted
250.00(2)	240.00(1)
250.00(3)	240.00(2)
250.05(1)	240.20(1)
250.05(2)	240.20(2)
250.05(3)	240.20(3)
250.05(4)	245.00
250.05(5)	240.20(4)
250.05(6)	240.20(6)
250.05(7)	240.50
250.05(8)	240.20(7)
250.10(1)	omitted
250.10(2)	240.25(1)
250.10(3)	240.25(2)
250.10(4)	245.00
250.10(5)	240.25(3)
250.10(6)	165.25
250.10(7)	165.30
250.10(8)	240.30(1)
250.10(9)	240.30(2)
250.10(10)	240.50
250.10(11)	240.25(4)
250.15	240.35(1)–(8)
250.20	240.40
250.25	240.45
250.30	245.05
250.35	245.10 245.15, 245.20

Penal Law Sec. (1964 Study Bill)	Penal Law Sec. (1965 Revision)
255.00	250.00
255.05	250.05
255.10	250.10
255.15	250.15
255.20	250.20
255.25	250.25
255.30	omitted
255.35	250.35
260.00	255.00
260.05	255.05
260.10	255.10
260.15	255.15
260.20	255.20
260.25	255.25
260.30	255.30
265.00	260.00
265.05	260.05
265.10	260.10
265.15	260.20
265.20	260.25
270.00	265.00
270.05	265.05
270.10	265.10
270.15	265.15
270.20	265.20
270.25	265.25
270.30	265.30
270.35	265.35
275.00	270.00
275.05	270.05
275.10	270.10
275.15	270.15
400.00	omitted; to be treated in Code Crim. Proc.
400.05	omitted; to be treated in Code Crim. Proc.
400.10	omitted; to be treated in Code Crim. Proc.
400.15	omitted; to be treated in Code Crim. Proc.
400.20	omitted; to be treated in Code Crim.Proc.
400.25	omitted; to be treated in Code Crim. Proc.
400.30	omitted; to be treated in Code Crim. Proc.
405.00	omitted
405.05	410.00
410.00	400.05
415.00	405.05
420.00	400.00
425.00	405.00
430.00	transferred — General Obligations Law
430.05	transferred — General Obligations Law
430.10	transferred — General Obligations Law
430.15	transferred — General Obligations Law
430.20	transferred — General Obligations Law
430.25	transferred — General Obligations Law
430.30	transferred — General Obligations Law
430.35	transferred — General Obligations Law
430.40	omitted; to be treated in Code Crim. Proc.
430.45	omitted
435.00	omitted
500.00	500.00
500.05	500.05

STATE OF NEW YORK

TEMPORARY COMMISSION ON REVISION

of the

PENAL LAW and CRIMINAL CODE

Special Report

on

CAPITAL PUNISHMENT

LETTER OF TRANSMITTAL

March 19, 1965

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 and chapter 251 of the Laws of 1964, submitted herewith is a special report by the Commission concerning its study and recommendation with respect to capital punishment and the question of whether it should be abolished or retained in the State of New York. This report includes both a majority and a minority statement, as well as a staff study on the subject prepared for the Commission's use.

Richard J. Bartlett,
Chairman

MEMBERS OF THE COMMISSION

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TIMOTHY N. PFEIFFER, *Vice Chairman*
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Staff

RICHARD G. DENZER, *Counsel*
PETER J. MCQUILLAN, *Chief Assistant Counsel*
ARNOLD D. HECHTMAN, *Assistant Counsel*
CHARLES E. TORCIA, *Assistant Counsel*
PETER PREISER, *Associate Counsel*
FRANK S. ROSETTI, *Associate Counsel*
ROBERT S. STEWART, *Associate Counsel*
ANNE M. DALY, *Administrative Assistant*

COMMISSION RECOMMENDATION

At a meeting of the Commission held at the State Capitol on March 19, 1965, the following resolution was offered by Commissioner Kapelman:

Resolved, that the Commission recommend to the Governor and to the Legislature that capital punishment in the State of New York be abolished by appropriate legislation with an immediately effective date.

Commissioner Jones offered the following substitute resolution:

Resolved, that the Commission postpone any recommendation to the Governor and to the Legislature on the abolition or retention of capital punishment pending further study.

A vote was taken on the substitute resolution offered by Commissioner Jones, and this substitute resolution was defeated 8–4.

A vote was then taken on the resolution offered by Commissioner Kapelman, and this resolution was adopted 8–4.

STATEMENT OF THE MAJORITY OF THE COMMISSION

The question whether the Commission should recommend the abolition or the retention of capital punishment in New York State presents the gravest problem our commissions call on us to face. As is the case with most great issues in the field of law and government, there are arguments on both sides of the question. Those arguments are fairly marshaled in the Staff Study, which also fairly summarizes such information as there is to aid our judgment. In the end, we are obliged to choose between competing values on the basis of imperfect data and our choice, on balance, is to vote for recommending abolition.

Our reasons are as follows:

First: The execution of the penalty of death calls inescapably upon the agents of the State to perpetrate an act of supreme violence under circumstances of the greatest cruelty to the individual involved. Only the clearest conviction that such action is essential to the public welfare possibly can justify a measure of this kind. We see no basis for holding that conviction. The social need for the grievous condemnation of the gravest crimes can be met, as it is met in abolition states, without resort to barbarism of this kind.

Second: The retention of the death penalty has a seriously baneful effect on the administration of criminal justice. The very fact that life is at stake introduces a morbid and sensational factor in the trial of the accused and increases the danger that public sympathy will be aroused for the defendant, regardless of his guilt of the crime charged. This morbid factor carries through the period preceding execution, and public sentiment, which should support the law and its administration, is often marshaled on the other side.

Third: Some erroneous convictions are inevitable in the course of the enforcement of the penal law and error sometimes cannot be established until time has passed. Such errors cannot be corrected after execution. An injustice of this kind destroys the moral force of the entire penal law. The danger that such an injustice may occur adds weight to claims of error in the trial, produces technical reversals on appeal and more than any other single factor has produced the endless protraction of post-conviction remedies developed by the courts in recent years. Cases that should and would have moved swiftly to life sentence on a plea of guilty have been carried on for years.

Fourth: Experience has shown that the death penalty cannot be administered in the United States with even rough equality. All states have found it necessary that the penalty be one that is discretionary with the court or jury; even if the sentence is imposed, the Chief Executive must wrestle with demands for clemency and

clemency is often granted. The number of executions is, in consequence, extremely small. No one can be confident that there is basis for a rational distinction between the few cases where the sentence is imposed and executed and the thousands of cases which result in sentence of imprisonment. Especially in a matter of life or death, equality is a prime constituent of justice.

Fifth: The considerations we have stated would lead us to favor abolition, whether or not the threat of death has a greater deterrent efficacy than the threat of long imprisonment. There may, indeed, be cases in which such unique deterrent power has in fact been exerted. Such data as we have carries assurance that this factor has no major quantitative significance. There will be cruel and repulsive murders in New York whether the penalty of death is abolished or retained. The important point is that their number never will be greatly influenced by abolition. We may be confident, therefore, that in proposing action that is right upon so many grounds we shall not jeopardize the safety of the people of New York.

NICHOLAS ATLAS
RICHARD J. BARTLETT, *Chairman*
JOHN H. HUGHES
WILLIAM KAPELMAN, *Secretary*
WHITMAN KNAPP
WILLIAM B. MAHONEY
TIMOTHY N. PFEIFFER, *Vice-Chairman*
HERBERT WECHSLER

March 19, 1965

MINORITY REPORT
of the
TEMPORARY STATE COMMISSION ON REVISION
of the
PENAL LAW and CRIMINAL CODE

CAPITAL PUNISHMENT

For reasons enumerated below, the undersigned members of the Temporary State Commission on Revision of the Penal Law and Criminal Code do not join with the majority of the members of the Commission in their recommendation that capital punishment be entirely abolished in the State of New York at this time. The undersigned recommend instead that the entire question continue to receive careful consideration by the Commission, as well as by the Legislature before whom various proposals aimed at outright abolition of capital punishment are presently pending, and that action be deferred until a wider cross-section and a fairer sampling of public opinion on the matter can be obtained.

The undersigned particularly urge that final action on these proposals not be taken until there has been a more direct expression of the views and opinions of law enforcement groups and agencies directly concerned with the everyday problems of the constant war against crime, upon whose shoulders, primarily, rests the awesome burden of protecting society against the rapacity of criminal conduct, and until the State has had further experience with recent legislation affecting trials and procedures in capital cases, and until many of the other considerations referred to herein have been more fully explored. It may well be that when these views are fully aired and this new experience fully evaluated, there will be less precipitous haste in pressing for outright and immediate abolition of capital punishment. It may also develop that upon fuller exposure as suggested herein, the undersigned may be persuaded to the views now held by the majority of the Commission.

The nature of the issue before us is such as to encourage public expression by the abolitionists, many of whom find added boldness as well as sanctuary in the obvious humanitarianism of the cause which they espouse. At the same time, however, the issue is so delicate as to discourage similar expression by so-called retentionists because of the fear that by so doing they may be publicly characterized as less humanitarian in their views, or more callous, or totally indifferent to human life, or possibly worse. With full

awareness of the possibility that this minority report may be thus misconstrued, and aware also that taking an apparently unpopular position on such an emotionally-charged issue as capital punishment may have serious consequences for us in our future professional lives, the undersigned nevertheless recommend the following considerations for further study and attention by the Commission, the Legislature and the Chief Executive.

Capital punishment is presently the law in this state with respect to crimes of murder committed under certain circumstances. In order to justify any proposed abandonment of that law, proponents of abolition have the burden of showing that it has failed or is totally undesirable as an instrument of punishment in our penal system. This they have failed to do. In an effort to sustain their burden, abolitionists contend that:

> (a) "Capital punishment does not act as a deterrent to crimes of murder." . . .

The deterrent effect of capital punishment is not susceptible of accurate measurement, certainly not in terms of statistics treating of homicide rates in capital punishment jurisdictions. To argue that homicides still occur in capital punishment jurisdictions, therefore capital punishment is not an effective deterrent, therefore it should be abolished, is to argue that armed robberies or kidnappings still occur in jurisdictions that have severe penalties for these crimes, therefore such penalties are ineffective as deterrents, therefore they too should be abolished. The net result of carrying such faulty logic to its extreme would be anarchy. The actual number of homicides that are prevented each year because of the fear of death on the part of the would-be perpetrators can be, at best, merely a matter of surmise or conjecture. We prefer to hold to the existing view, in the absence of any convincing showing to the contrary, that capital punishment *is* a deterrent and that if a case is to be made at all against capital punishment, it must be made on a basis other than the absence of any deterrent effect.

Capital punishment is as harsh a punishment as murder is heinous a crime. Because wanton murder is so extremely morally wrong, the punishment therefor must remain proportionately extremely severe to emphasize to other would-be murderers the high outrage that society feels against the commission of such crimes. The same observations hold true for the crimes of kidnapping committed under certain circumstances and treason against the state. Conversely, any unjustified lessening of the severity of punishment for these crimes in appropriate situations could be taken by the offenders and by others as an indication that our society no longer regards such crimes as most heinous. Every unpunished murder takes away something from the sanctity of life and the security of man's existence; the unwarranted lessening of punishment, even in the most outrageous cases of murder, accomplishes the same mischief.

> (b) "Other forms of severe punishment for murder are available which are not so inhumane, barbaric and morally wrong, for example, life imprisonment." . . .

This contention proceeds on the questionable premise that it is more humane, less barbaric and less morally wrong to imprison a man for life than it is to kill him for the inexcusable, unjustifiable and deliberate crime of taking another's life, or for flagrant acts of treason against the state. Whatever force or effect this contention may once have had, has now been vitiated, if not nullified, by the fact that under our present penal system there is no longer any true sentence of "life imprisonment," as that term originally connoted, and persons serving such sentences are now eligible for parole after time off for good behavior the same as they are for any other crime. One can well imagine the cries of "heresy" that would be raised were we now to suggest that the rule allowing parole on life sentences be abolished, if abolition of capital punishment should presently prevail. Thus, were there to be no room in our system for sentences any more severe than the presently understood "life sentence," even for the most bizarre and outrageously heinous crimes of murder, kidnapping, and treason, there would, in time, be further erosion of the concept of the dignity of human life and a corresponding weakening of faith in and respect for the law on the part of the preponderant majority of law-abiding citizens. Human nature, being what it is, must be understood to demand, on occasion, a reversion to earlier penal concepts of retaliation, vengeance, and the placation of an outraged community. The experiences of other states that have, over the years, abolished capital punishment and later returned to it because of the occurrence of some particular murder or other horrible crime, should serve as a significant warning to New York that abolition should not be entered upon either lightly or on grounds that do not fully take into account the frailties of human nature, the complexities of the society and the disturbances of the times in which we live in this state, and the exceptionally outrageous situations that might justifiably warrant the death penalty.

> (c) "The death penalty, with its finality, is inconsistent with the fallibility of the criminal judicial process, which occasionally finds itself in error after an innocent life has been snuffed out." . . .

In the same breath, abolitionists also urge and cite statistics to prove that the death penalty has effectively been abandoned in this state, as reflected by the extremely small number of executions that have been carried out over the past several years. This circumstance obviously disproves the stated contention. The cited statistics provide no basis for any meaningful support of the scare raised by abolitionists that "innocent" lives are being snuffed out in this state; rather, they emphasize that whatever may be the weaknesses or "fallibility" of the criminal judicial process in

capital cases, the diligent attention given to such cases by the Chief Executive, on his clemency reviews, has in fact *prevented* many possible innocent lives from being "snuffed out." As long as there remains in this state the present ample opportunity for cautious judicial review, at both state and federal levels in all capital cases, followed by exhaustive, humanitarian, non-legal review by the Chief Executive, New Yorkers need have no immediate fear that any "innocent" lives are in danger of extinction by the imagined inexorable crush of some imagined heartless execution machinery.

> (d) "In its actual operation in the United States, the death penalty falls unequally on different segments of the population, with discrimination occurring on the basis of economic status, race and even sex.". . .

Prior to 1963, in this state, there *was* undoubtedly some validity to this contention. The two-stage procedure in capital cases, adopted in that year, was designed, among other things, to ameliorate that condition or rather, to determine whether juries, given details of a defendant's background and personal circumstances, which hitherto they were not permitted to have unless a defendant himself took the witness stand, would possibly react more impartially and "humanely" in arriving at their verdicts in capital cases. The results to date have been quite revealing and undoubtedly quite surprising to the abolitionists. Far from supporting the opinion that the majority of citizens in this state presently favor abolition, the results of the two-stage procedure so far seem to indicate, on the contrary, that the majority sentiment may well be still in favor of retaining at least certain vestiges of capital punishment to fit some of the real "hard" cases that come before the courts day by day. The Commission and the Legislature should make it their business to conduct further inquiries along these lines before moving for abolition. Our two-stage trial procedure in capital cases simply has not yet been given a fair trial.

> (e) "The sensationalism attending the trial of capital cases disrupts the orderliness of normal judicial proceedings and exerts unsavory pressures and influences on courts and juries.". . .

This sensationalism, it is argued, comes about because of the specter of the death-house and men going to the electric chair. Obviously the same sensationalism and alleged disruption could well occur in any case involving a bizarre murder, a ruthless kidnapping or atrocious treason, even if the death penalty for such crimes were abolished. This contention, therefore, is hardly worthy of further serious comment. In the main, these have been the contentions in support of abolition of capital punishment. Ancillary arguments and amplifications have been treated in detail in the staff report to the Commission soon to be made public. We

believe the above comments accompanying these contentions raise sufficient question as to the timeliness of the movement for abolition at this session of the Legislature.

In addition to the foregoing observations, however, we would urge, separately, these further considerations for future study and attention by the Commission as well as the legislative committees that are scheduled soon to conduct hearings on this serious subject:

—Abolition of capital punishment in the state at this time would have greatest impact in the City of New York and similar cosmopolitan centers. It is therefore unwise to legislate in this broad area without benefit of the opinions, based on practical experience and the specific recommendations of law enforcement officials, particularly the New York City Police Department. The opinions of all other law enforcement personalities in the state should also be expressly solicited and carefully weighed before any action is taken. It is an extremely significant part of our observations in this matter that despite the fact that sixty-three persons testified at the public hearings conducted by the Commission, only *two* New York State law enforcement officials appeared in their official capacity, and they spoke *against* abolition. The other three law enforcement personalities that appeared were either from outside jurisdictions or else were careful to emphasize that they were speaking only for themselves, not for their respective organizations, regardless of the positions pro or con which they took in the matter. At a time when, by all accounts, the state is constantly losing ground in the war against crime in the streets, it would seem not only wise but absolutely necessary to focus our concern not so much on the criminal who refuses to recognize the sanctity of human life but on the law enforcement officials whose duty it is to protect that life and on the overriding question of the protection of society itself.

—New York was the last jurisdiction in the United States to abolish the mandatory death penalty for certain types of murder. Today, New York is simply one of forty-two jurisdictions in the United States—the overwhelming majority—that maintain the death penalty for some form of murder or other serious crimes. There is more crime in the State of New York than anywhere else in the world. The historical reasons and justifications that have kept the death penalty for certain crimes in this state to the present time, should not be suddenly and summarily invalidated or nullified by untested and unproven claims of the humanitarianism of other methods of punishment or the ineffectiveness of the old ones. Nor should the Legislature be swayed by clever semantics pretending to show that the state now has the burden of proving to the abolitionists that capital punishment is a deterrent to crime. Rather, let the proponents of change show, by convincing and compelling arguments, that such change is not only desirable for the greater protection of the criminal offender but in fact also necessary for the greater protection of society. To date, no showing has been made why New York must be among the first few states to

abolish capital punishment in its entirety. Rather, with its myriad problems and complexities, with its heterogeneous populations, and the marring effect upon outside statistics of its extreme variables of backgrounds and cultures, all of which combine to make it the most perplexing society on earth and render invalid all comparisons and analogies with respect to other jurisdictions, New York should indeed be among the last to surrender to such change, so that the statistics and experiences compiled elsewhere can be more properly assimilated and more validly interpreted in terms of arriving at our own conclusions.

—As referred to earlier, the two-stage procedure in capital cases, enacted in 1963, has had too brief a life in this state for any meaningful conclusions to be drawn from it with respect to the efficacy of capital punishment. It may well be that the present system already contains the ultimate solution to this question; for if it be a fact, as the abolitionists contend, that majority sentiment in the state is presently in favor of abolition, there would seem to be no reason why this attitude would not soon show itself in the verdicts of our trial juries. On the basis of experience under the two-stage system to date, rabid retentionists could easily claim that there is enough proof that the contrary is true. We are not rabid retentionists. We say merely that given more time, the truth, like murder, will out. We will soon *really* know how the majority of New Yorkers actually feel on this question. At the moment, we see little or no validity or purpose in pushing for abolition if the experience of other jurisdictions is likely to be repeated here and if the pendulum is likely to swing the other way immediately upon the heels of the next new atrocity. The majority seem to feel that if this be the possible case, then let it be; we prefer to feel that it will be an awful price to have to pay for the nebulous good it will allegedly accomplish.

—If the recommendations of the majority of this Commission should be adopted at this time, the Legislature should give serious consideration to the possibility of creating appropriate exceptions to the rule against capital punishment, tailored to fit the need for such punishment in justifiable situations. Such a compromise has found favor in certain other states and as far as we know the experience in those states under such an arrangement has not been unpleasant. Perhaps, also, under the existing framework of our present two-stage procedure a similar statutory compromise could be worked out whereby trial juries would be required to receive more pointed instructions to the effect that unless they specifically recommend the death penalty, the sentence in appropriate cases even after the second stage will be life imprisonment.

In the same manner that the Chief Executive can commute death sentences, based on humanitarian considerations, the conscientious trial judge, under the present two-stage system, can impose a sentence of life imprisonment at the end of the first stage and thereby prevent possible miscarriages of justice that may be unwittingly

perpetrated by the trial jury—a circumstance as to which we share the great concern of the majority. Moreover, with the new possibility of a plea of guilty to first degree murder in appropriate situations, it is extremely unlikely that such miscarriages will at all occur. Thus, ample safeguards for the protection of the accused now exist in capital cases. Further immediate haste in the same direction seems unnecessary at this time.

—If the will of the majority of the Commission should prevail at this time, the Legislature should give serious consideration to the repeal of present provisions in the law mandating the assignment of private counsel in murder cases and the payment by the court of counsel fees, now amounting to $2,000 in each case. Once the extreme penalty is removed from such cases, there would seem to be no reason why payments of such counsel fees should continue to be required. As a matter of fact, retention of these provisions in the face of abolition, would seem to provide unwitting basis for attack against this humanitarian proposal on possible claims of "pork barrel" legislation, and thus bring into question the motives of the conscientious supporters of the various proposals for abolition.

—Similarly, adoption of the recommendations of the majority of the Commission would seem to signal the end of the need for blue ribbon jury panels in murder cases in the state, and the Legislature would also have to give serious consideration to repeal of these provisions in the law. Justification for the continued use of special jury panels in the state has traditionally been defended and upheld in the courts on the ground that the exacting by the state of the extreme penalty of death or the existence of other compelling reasons in a criminal case, required the close attention, at trial, of jurors whose minds and concerns are not normally subject to annoyance, distraction, and disruption by their being called away from home, business or occupation to perform jury duty. Repeal of the death penalty in murder cases would seem to obviate the need for continuation of this practice. The effect of these and many other ramifications of abolition, in our view, have not been sufficiently explored.

—The report of the staff to the Commission, relating to capital punishment, indicates that there is some support for the view that the threat of capital punishment does act as a deterrent to certain aspects of the present felony murder situations. The robber's frequent tactic of arming himself only with a toy pistol or embarking on such a crime with no weapon at all, has frequently been adverted to at trial as an indication that the defendant had no actual intention to kill or even to inflict any degree of bodily harm. Frequently, this circumstance has prevented an armed robbery or burglary from developing into a homicide, particularly where the victim offers resistance to the perpetrated assault. Removal of the threat of the death penalty in such cases may well signal the end of this "considerate restraint" on the part of would-be robbers.

burglars and other felons, who might hereafter see nothing aggravating in the fact of arming themselves with loaded weapons and a willingness to use them in the commission of such crimes.

—Finally, the undersigned offer this thought for consideration. In our society, crime is generally punished not so much as an offense against morality but as prejudicial to society itself. The greater the affront to society, the wider should be the disparity between the sentences imposed for such crimes and those meted out for lesser offenses. The nature and complex makeup of our population, the ugly moods and attitudes which now appear to prevail among varying ethnic and social groups in this state, the boldness with which atrocious crimes are committed, with less and less effort at concealment, the frequently appalling lack of regard for the rights and sensitivities of others, make it entirely possible that movement toward abolition of capital punishment in the state at this time may be taken by the lawless masses as a signal for even further outbreaks of lawlessness—despite what statistics in *other* jurisdictions tend to show. New York is different enough from other jurisdictions to warrant making our approach to this problem radically different from others.

It is refreshing to consider that there are those among us who because they themselves are incapable of great crimes are often backward to suspect it in others.

RAYMOND C. BARATTA
JOHN J. CONWAY, JR.
HOWARD A. JONES
JULIUS VOLKER

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STATE OF NEW YORK

TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE

155 Leonard Street

New York, New York 10013

STAFF STUDY RESPECTING CAPITAL PUNISHMENT

Introduction

The enabling act of 1961 which created this Commission mandated it to revise the Penal Law and the Code of Criminal Procedure and, in so doing, to direct itself "more specifically" to certain designated areas of the criminal law. One of these specified areas appears in a direction:

> "to 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."

This, the Commission has done. The principal results of that reappraisal are to be found in a new or materially revised sentencing structure, appearing as an integral part of the Proposed Penal Law submitted by the Commission to the 1964 Legislature as a study bill and to the 1965 Legislature as a bill for passage.

There is, of course, no phase of the sentencing and punishment field more important than that relating to the death penalty and to the controversial issue of whether it should be abolished. Its importance is such that many states have seen fit to establish legislative committees or commissions on capital punishment with the exclusive functions of making studies of and recommendations upon that subject.

Though not a commission on capital punishment, this Commission has always deemed the death penalty question a cardinal issue which must be confronted in its revisional study of the sentencing and punishment area. Because of the significance and the highly controversial character of this problem, the Commission, at an early stage, decided to treat it individually rather than as one of many matters involved in its general revision work on the Penal Law. Thus, as with reformulation of the insanity defense, it has been studied separately from the main project.

The Commission began its consideration of the capital punishment issue early in 1962. In November and December of that year, it held public hearings on the subject in Albany, Rochester and New York City. During the four days of those hearings, 63 per-

sons, some representing interested groups and organizations and some expressing purely personal views, appeared and testified.

In the course of its ensuing study, the Commission felt that resolution of the capital punishment issue, both in terms of its own collective opinion and, more importantly, in terms of ultimate legislative action, might conceivably be remote. The Commission members also were of the opinion that, wholly apart from the question and possibility of eventual abolition, there were certain flagrant defects in the then existing law governing imposition of the death penalty. Chief among these, it was believed, were the mandatory feature of the death sentence as applied to certain kinds of murder (New York being the only American jurisdiction with a mandatory penalty); inadequate procedural machinery for proper jury determination of the penalty issue in those cases where a jury recommendation was authorized; and the fact that the jury's recommendation was not binding upon the court.

Accordingly, at the 1963 legislative session, the Commission submitted legislation designed to cure these apparent flaws. In its principal features, the bill (1) completely eliminated the mandatory death feature and authorized a jury recommendation of life imprisonment in any first degree murder case; (2) made the jury's recommendation binding on the court; (3) permitted a plea of guilty, under certain circumstances, to a first degree murder charge, with a sentence of life imprisonment; and (4) provided a "two-stage" trial procedure, comparable to those employed in California and Pennsylvania, entailing jury consideration and determination of the guilt issue and the punishment issue separately from one another.

These amendments were passed by the Legislature and became law on July 1, 1963. The Commission has, of course, been observing with great interest the operation of these procedural and sentencing innovations, although they have been in effect for too brief a period to permit any sound conclusions concerning their impact.

The primary purpose of this report is to summarize the arguments for and against capital punishment, in the setting of its background and legislative history, in order to provide members of this Commission with information which they may deem necessary for a sound determination of the issue.

I. Background and Legislative History of Capital Punishment

In virtually every nation, manifold kinds of wrongdoing of both a public and private nature are regarded as crimes against the state and are punishable by the state. In the early phases of adoption and pursuit of that philosophy and policy, governmental punishment was deemed purely retributive in nature and purpose. The main thrust was retaliation, vengeance and placation of the outraged community, and the almost axiomatic thinking that the criminal simply deserves to be punished.

A. England and the world in general

The vengeful character of the state's retribution prior to the eighteenth century manifested itself in cruel forms of corporal punishment and in indiscriminate imposition of the death penalty for hosts of crimes ranging from murder down to petty thefts and other minor offenses. In eighteenth century England, for example, three hundred crimes were punishable by death.

During the eighteenth century, however, European thought in this area began to awaken, to analyze the purpose of punishment and to conclude that deterrence to crime and protection of the community are more cogent considerations than retribution. This re-evaluation initiated movements of progressive curtailment of capital punishment in many nations.

Thus, England's three hundred capital offenses of the eighteenth century were, by 1861, reduced to four: murder, treason, piracy and setting fire to a dockyard or arsenal. And of these, murder is the only one for which the death penalty has been imposed in peace time. In the ensuing hundred years, moreover, sentences and executions for murder were greatly reduced through prolific commutation and—by virtue of the Homicide Act of 1957—through subdivision of murder into numerous classifications some of which do not carry the death penalty. By 1961, death sentences in England and Wales had fallen to six and executions to four,[1] and in the current year of 1965, the House of Commons appears to be on the verge of promulgating legislation which may well result in complete abolition.

While England has not yet abolished capital punishment, thirty other nations have done so over the last century and still others have in effect achieved the same result by total disuse of the death penalty. The abolition nations include most of those in western Europe (though not France, England, the Irish Republic or Spain) and most of those in South and Central America. Capital punishment still prevails in most of Africa, Asia, eastern Europe and Australia, as well as in Canada.

B. The United States

The history of capital punishment in the United States roughly parallels that of England and many other nations with respect to trends and directions: promiscuous employment of the death penalty in colonial times; drastic limitation, commencing early in the nineteenth century, of the number of capital offenses; and, in general, progressive reduction of capital punishment culminating in a modern period in which the number of executions greatly dwindled.[2]

American federalism, as distinguished from the centralized governmental structure of most other nations, has, of course, produced

[1] See Royal Commission on Capital Punishment, *1949–1953 Report*, CMD. No. 8932, at 298–301 (1953); Criminal Statistics, England and Wales, *Sec'y of State Reports to Parliament* (1950–1961).

[2] See Appendix A, Table 1, *infra*.

considerable divergence within the United States itself. Abolition may be said to have first appeared officially in 1846 when Michigan eliminated the death penalty for all crimes except treason, for which it has never been imposed. In addition to Michigan and two other states which also accord but token or nominal recognition thereto, seven of the fifty states, plus Puerto Rico and the Virgin Islands, have totally abolished the death penalty over the past one hundred and twelve years, beginning with Wisconsin in 1853 and concluding with Oregon in 1964 and Iowa in 1965. At least four other states currently are giving serious consideration to the abolition issue. Ten others, it may be noted, have at various stages abolished or in effect abolished capital punishment only to restore it, usually within a relatively short time.[3]

The other side of the coin discloses that forty-two jurisdictions (including the Federal Government and the District of Columbia) currently authorize capital punishment for, collectively, about thirty different offenses. These harsh figures, however, are tempered by three factors.

In the first place, despite the thirty odd capital offenses, death penalty legislation is largely concentrated in murder, which is a capital offense in all forty-two jurisdictions, kidnapping (in thirty-seven jurisdictions) and treason (in twenty-six). From there the list tails off with rape (twenty) and seldom prosecuted crimes such as dueling (eighteen), train-wrecking (fifteen), and the like. From 1930 to 1962, only seven of the crimes on the list resulted in executions, with the emphasis, of course, upon murder, which led to executions in all forty-four "capital" jurisdictions of that period. The only other significant crimes in this respect were rape, which was capitally punished in nineteen jurisdictions, kidnapping (seven) and armed robbery (seven).[4]

Secondly, it is to be observed that, while the specified crimes carry or *authorize* capital punishment, they do not *require* it. In every capital punishment jurisdiction, discretion is lodged with the court or the jury, or both, to impose either the death penalty or a term of imprisonment. The last jurisdiction to abandon the *mandatory* death penalty was New York, which required it for premeditated murder but changed to a permissive rule in 1963 by virtue of legislation sponsored by this Commission.[5]

Finally, whatever be the legislative scope of capital punishment, imposition thereof has emphatically and progressively decreased in the United States over the past two decades. Statistics covering a thirty-three year period from 1930 through 1962 reveal a "high" of one hundred and ninety-nine executions in 1935 and a relentless if occasionally wavering downward trend to a "low" of twenty-one in 1963.[6]

[3] See Appendix A, Table 6, *infra*.

[4] See McCafferty, *Major Trends in the Use of Capital Punishment*, 25 Fed. Prob. 15, 16–17 (1961).

[5] N. Y. Sess. Laws 1963, ch. 994.

[6] See Appendix A, Table 1, *infra;* N. Y. Times, at 10 E (Feb. 28, 1965).

While probably indicating an increasing legislative, judicial and executive distaste for the death penalty, these figures do not necessarily indicate that the American public generally favors abolition thereof. A Gallup poll taken in 1953 shows 68 per cent favoring capital punishment and 25 per cent opposed (7 per cent not responding).[7] The results of a quite recent Gallup poll, however, were 45 per cent in favor and 43 per cent opposed (12 per cent not responding).[8] Assuming these polls to be a valid reflection of American sentiment, one would have to conclude that, currently, the population is about equally divided on the subject but that there is a marked trend in the direction of abolition.

C. New York State

The legislative history of capital punishment in New York State follows the Anglo-American theme. Its indiscriminate use in the seventeenth century and its status among the colonial brutalities is aptly illustrated by an "Ordinance of New Netherlands" promulgated in 1655, commanding the populace:

> ". . . not to strip any Gardens, sowed or planted Lands of Posts, Rails, Clapboards or other Fences, on pain, if any one be discovered to have taken them away, in whole or in part, that he who will be found first to have violated this law, shall be whipped and branded; and for the second offence, punished with the halter until Death ensue. . . ."

Significant curtailment of the appalling list of capital offenses appears to have commenced in 1788 when they were restricted to murder, treason, rape, buggery, burglary, larceny from a church, arson, mayhem, and certain kinds of forgery and counterfeiting.[9] In 1796, the list was sharply reduced to two: murder and treason;[10] and, in 1813, burning of an inhabited dwelling, later known as arson in the first degree, was added.[11]

During the next fifty years, the list of capital crimes remained small and fairly constant. In 1862, murder—which had been expanded by definition to include felony murder and killing by a depraved kind of recklessness—was divided into two degrees with only the first degree carrying the death penalty, and arson was dropped from the capital category.[12] This left only first degree murder and treason, which remained the sole capital offenses until 1933, when kidnapping was added.[13]

It is interesting to note that, during most of the mid-nineteenth century period when the number of capital crimes was being drastically reduced, sentiment in favor of complete abolition was forming and gaining strength. Between 1832 and 1860, no less than

[7] See N. Y. Times, at 10 E (Feb. 28, 1965).

[8] *Ibid.*

[9] N. Y. Sess. Laws 1788, ch. 37.

[10] N. Y. Sess. Laws 1796, ch. 30.

[11] N. Y. Sess. Laws 1813, ch. 29.

[12] N. Y. Sess. Laws 1862, ch. 197.

[13] N .Y. Sess. Laws 1933, ch. 773.

thirteen legislative committees considered and reported upon the question.[14] About half recommended abolition and some of the abolition bills submitted by them were defeated by the narrowest of margins.

With the waning of this abolition movement, New York proceeded through the last part of the nineteenth century and the early part of the twentieth without significant change in the capital punishment area. Despite its mere pair of capital crimes (first degree murder and treason), New York law was harsh in the sense that, unlike the situation in many jurisdictions, imposition of the death penalty upon conviction was mandatory, with no power or discretion lodged in either court or jury to substitute life imprisonment. This rigid rule was partially relaxed in 1937 by legislation permitting the jury to recommend life imprisonment in lieu of death as part of a verdict of conviction for first degree murder of the felony murder or depraved recklessness variety[15] or for the then recently "capitalized" crime of kidnapping.[16]

The 1937 amendment, however, not only left the death penalty mandatory for all premeditated first degree murder (and treason), but, even with respect to the other forms of murder (and kidnapping) a jury recommendation of leniency was not made binding upon the court; and the court could—as it did in at least three instances—reject such a recommendation and impose the death penalty notwithstanding.

Each of those features was removed by the aforementioned 1963 amendment sponsored by this Commission.[17] In addition to establishing a "two-stage" trial for separate jury consideration of the guilt and penalty issues, this legislation, eliminating the mandatory feature of the death penalty with respect to all capital murder and kidnapping offenses, authorized a jury recommendation of life imprisonment in *any* such case and made the recommendation binding on the court. What effect, if any, this legislation has had or may have upon use of the death penalty in New York, it is too early to say, for the law has been on the books for little more than a year and a half and statistics relating thereto are too sketchy to be of any value.

Though not thoroughly equatable to the legislative history of capital punishment, statistics concerning the number of executions occurring annually in New York State over the past three-quarters of a century prove highly interesting. While occasionally fluctuating sharply and unexplainably from one year to the next, these indicate, in general, (1) a relatively low number of executions from 1890 to 1908; (2) a marked increase from 1909 through

[14] See N. Y. Assembly Documents, Assembly No. 378 at 1 (1839); *Id.*, Assembly No. 293 (1838); *Id.*, Assembly No. 378 at 12 (1839); *Id.*, Assembly No. 363 (1840); *Id.*, Assembly No. 249 (1841); *Id.*, Assembly No. 249 (1845); *Id.*, Assembly No. 213 (1846); *Id.*, Assembly No. 95 (1847); *Id.*, Assembly No. 133 (1848); *Id.*, Assembly No. 109 at 1–9 (1851); *Id.*, Assembly No. 170 (1857); *Id.*, Assembly No. 42 at 1, 4 (1859); *Id.*, Assembly No. 82 at 2, 15–17 (1860).

[15] N. Y. Sess. Laws 1937, ch. 67.

[16] N. Y. Sess. Laws 1933, ch. 773.

[17] N. Y. Sess. Laws 1963, ch. 994.

1944, with a high of twenty-two in 1912; and (3) an impressive downward trend commencing in 1945, and enduring through 1964 and into 1965. The last decade or so of this period appears especially significant, commencing with a high of nine in 1954 and showing an almost unbroken descent culminating in two executions in the year 1961, none in 1962, two in 1963, and none since that time[18].

Whether the latter figures reflect a significant recent change of attitude toward capital punishment may be conjectural. There can be no doubt, however, that, for the past several years at least, there has been a resurgence of abolition sentiment in New York. This is partially evident from the number of abolition bills annually submitted to the Legislature and from the positions publicly taken by a number of respected organizations and individuals. It seems further evident from the public hearings conducted by this Commission throughout the state in November and December of 1962. With sixty-three speakers voicing their views, many representing groups and organizations, opinion was overwhelmingly in favor of abolition.

The last item, while of some significance, should not be deemed conclusive of overwhelming public sentiment in favor of abolition; and, indeed, the most recent national poll, as seen, discloses an approximately even division of public opinion. The nature of the issue is such as to encourage public expression by the abolitionist, who thereby creates an image of humanitarianism, and to discourage the same by the retentionist who, sincere and civic-minded as he may be, may fear that his views will publicly characterize him as callously indifferent to human life.

II. The Cases for and Against Capital Punishment

So many millions of words have been written and spoken with respect to capital punishment that it would be fruitless to attempt to summarize every contention and every alleged fact and statistic advanced in support of the abolitionist position on the one hand and the retentionist position on the other. The basic battle lines of the controversy are fairly clear.

A. The contentions in general

Invariably, the argument for abolition begins with the premise that it is inhumane, barbaric and morally wrong for the State to punish a person by killing him, especially since other forms of severe punishment are available.

The morality argument is ordinarily augmented by ancillary contentions of a more limited and concrete nature, chief of which are the following:

(1) The death penalty, with its finality, is inconsistent with the fallibility of the criminal judicial process, which occasionally

[18] See Appendix A, Table 2, *infra*.

finds itself in error after an innocent life has been snuffed out.

(2) In its actual operation in the United States, the death penalty falls unequally upon different segments of the population, with discrimination occurring upon the basis of economic status, race and even sex.

(3) The emotional and sensational atmosphere and the undue publicity frequently attending capital trials exert unsavory pressures and influences upon courts and juries, and the various ramifications of capital cases are generally disruptive of orderly and expeditious legal process at many levels.

All of these contentions are disputed in varying degrees by the retentionists, whose principal points are the following:

(1) Capital punishment is the only truly effective deterrent to murder and constitutes the greatest bulwark in the protection of society in that respect.

(2) The penalty of life imprisonment, with its parole features, fails fully to protect the community from the killers so sentenced, for, especially in jurisdictions where parole eligibility occurs at a relatively early time, there is grave danger that convicted murderers will return to society and again engage in homicidal conduct.

(3) A few retentionists further argue that not only is there no immorality in the philosophy of complete retribution, but moral and religious principles affirmatively dictate state punishment by the taking of a life for a life.

By far the most important and most vigorously advanced of these contentions is that of general deterrence. That capital punishment, through its unique deterrent effect, saves many innocent lives at the expense of a comparatively few guilty ones, the retentionists urge, is the decisive factor which justifies it in the face of and apart from every other consideration, placing an entirely different light upon the morality issue and overriding all other abolitionist contentions.

The equally vigorous abolitionist rejoinder is simply that the latter postulate is factually incorrect. As a weapon of deterrence against homicide, it is urged, the death penalty is of such minimal consequence as to leave unsheathed the basic propositions militating against its use by a civilized society. Any contention of material deterrent effectiveness, the contention asserts, is unsupported and controverted by the best available data.

Thus, the main issue is joined.

B. Capital punishment as a deterrent

The basic position of those who advance capital punishment as the only really effective deterrent to murder is that, as a matter of common sense, the severer the punishment the greater its deterrent effect, and that the severest penalty of all obviously constitutes the most efficacious means of preventing crime.

This, according to the abolitionists, represents superficial reasoning the defects of which are readily exposed upon analysis.

In the first place, the question of deterrence to murder, some contend, cannot be rationally discussed without distinguishing between different kinds of murder, and especially between those which vary greatly with respect to the killer's intent, motive and mental condition.

Voluntary homicide is committed by roughly three types of persons, or for three different reasons or motives: (1) by reason of mental abnormality; (2) through emotionalism; and (3) for gain. Without indulging in psychiatric analysis of the thought processes, reactions and behavior patterns of the mentally ill, and of those who kill out of deep or sudden rage, hatred, jealousy and other powerful emotions, it may be said that, according to a substantial and knowledgeable school of thought, the first two categories of "killers" are largely undeterrable and, in the main, not swerved from homicidal action by any lurking fear of the death penalty. Some of the mentally ill, indeed, are believed to act out of motives of self-destruction in the subconscious hope that their conduct will lead to their own demise. These thoughts were crystallized in simple language by the Honorable Charles D. Breitel, a justice of the Appellate Division for the First Department with extensive experience as a public prosecutor and as counsel to the Governor. Recognizing that there are some whose fear of death is much greater than any other fear, he further declared:

> "I think there are other men, to whom the fear of death is relatively unimportant, and I am quite confident that the psychiatrists are quite correct when they say there are many men, among criminals, too, who actually have a death wish."[10]

The third group mentioned, which murders for "gain," includes the usual felony-murderer seeking economic benefit, the husband who coldly murders his wife to obtain marital freedom, the racketeer who disposes of an underworld rival, and others who calculatingly liquidate for some material advantage, financial or otherwise. This category is concededly more receptive to punitive threats and appreciably more deterrable by severe penalties. It is designated by some, however, as the smallest group of murderers; and it is further urged that life imprisonment is virtually as effective a deterrent to this particular genus of criminal as is the death penalty.

In addition to these three broad groups, there is what might be termed a fourth though very limited category to which life imprisonment is not calculated to pose a serious deterrent threat. A prisoner serving a life sentence—at least a genuine "life sentence"—is hardly likely to refrain from killing a guard or a fellow prisoner through fear of another life sentence.

It is true that most "life" sentences are such only from the standpoint of the maximum terms, and carry minimum terms involving parole eligibility after a given period of time. The aver-

[10] State of N. Y. Temporary Commission on Revision of the Penal Law and Criminal Code, Public Hearing on Capital Punishment in New York, Minutes at 201 (1962).

age parole eligibility period is about fourteen years for the United States as a whole,[20] but almost twenty-seven years for New York State.[21]

The shorter the parole eligibility period and the closer a prisoner approaches it, of course, the greater deterrent to murder is another "life sentence" and the less is the need for the death penalty in this situation. Even with a relatively long period like that of New York, another "life sentence" might be deemed an adequate deterrent to those with many years of prison service behind them, though perhaps not to those in the early years of their terms.

Out of these considerations, North Dakota[22] and Rhode Island,[23] though abolishing capital punishment for murder in general, have retained it for the "lifer" alone; and a Maryland legislative committee has recently recommended such a rule.[24] Whether this would be necessary or desirable in New York were the death penalty otherwise eliminated is a debatable question. In view of the very limited application which the "lifer" exception would have, however, most abolitionists probably would not interpose vigorous opposition to the North Dakota-Rhode Island type of "compromise" even though, in a technical sense, one hundred per cent abolition would not thereby be attained.

The abolitionists advance a more general principle that the greatest deterrent value of punishment lies not in its *severity* but in its *certainty*. The theory is that, while each is a factor, the certain prospect of substantial punishment is a far greater deterrent to crime than is a vague or remote prospect of extremely severe punishment. This explains, it is said, why in early England, when crimes carrying the death penalty were prolific but detection facilities grossly inadequate, the pockets of spectators were freely picked while pickpockets were being hanged. Doubtless, pickpocketing could have been effectively curbed by efficient police work coupled with an expeditious judicial process producing numerous short term prison sentences.

If the foregoing theory be sound, and if certainty of application of some penalty is a more significant factor of deterrence than is its severity, there can be no doubt that capital punishment's deterrent value is seriously weakened here by virtue of the operation of the criminal administrative and judicial processes of the United States in general and of New York State in particular. This is not

[20] This has been computed on the basis of data set forth in Model Penal Code Art. 201, appendices E and F at 127–131 (Tent. Draft No. 9, 1959).

[21] For the purpose of computing eligibility for parole, a sentence of life imprisonment is deemed the equivalent of an indeterminate sentence of 40 years to life. See N. Y. Penal Law § 1945 (6). If, by reason of "good conduct," the prisoner's minimum term is reduced at the rate of four months per year, he will become eligible for release on parole after serving 26.6 years. See N. Y. Correction Law § 230 (2).

[22] North Dakota Code, § 12-27-13.

[23] Rhode Island General Laws, § 11-23-2.

[24] See Maryland Legislative Council Committee on Capital Punishment, *Report*, at 38 (1962).

due to ineffective police work, but rather to the plain fact that, whatever the reasons, the chance of a person arrested, or even indicted, for murder running the entire gamut of legal proceedings to execution is slim indeed.

Although the statistics supporting this statement are not precise in many respects, they disclose that, from 1956 through 1961 in New York, there were 3,145 homicides of an aggressive or assaultive character (presumably of the sort that might, in many instances, conceivably result in first degree murder charges); that 2,213 indictments for murder and non-negligent manslaughter were filed; that there were 92 convictions for murder in the first degree; that 49 death sentences were imposed; and that 26 persons were executed.[25] Granted the blurred character of these figures, they do serve to emphasize the fact that, even in the several years immediately prior to 1962, in which year not a single execution occurred, one who fatally assaulted another in New York State would be extremely unlikely to suffer the death penalty.

It is to be noted that whatever fear a death *sentence*, as such, might ordinarily inspire is diluted by the assurance that there is many a slip and many a day between the pronouncement of judgment and the electric chair. Even with knowledge that sentence may well lead to execution, the time interval between the two is invariably extensive. American post-judgment procedures, involving diverse appeals, writs and stays in both state and federal courts, tend to prolong this period, sometimes to shocking lengths as is illustrated by California's notorious Caryl Chessman case. The median period for the United States in 1961 was 16.2 months[26] and, in 1962, 20.5 months.[27] This is in sharp contrast to certain English figures (for the year 1950), showing a period of but five weeks.[28]

The abolitionist claim that the uncertainty and remoteness of actual execution in the United States in itself destroys the deterrent effect of the death penalty might be countered by a retentionist argument that, if such be the case, the remedy lies in elimination of the cumbersome legal processes responsible therefor; in brief, that, while immediate execution may not be feasible because of the need for reasonable review, appellate justice can, as in England, be achieved in a small fraction of the time currently employed in the United States.

One of the most significant considerations relating to the general issue at hand, according to the retentionists, is the collective opinion of the vast majority of police officers that the death penalty is the only effective deterrent to homicide in general and to the killing of police in particular. It is the main reason, the police

[25] See Appendix A, Table 5, *infra*.

[26] U. S. Dep't. of Justice, Bureau of Prisons, Bull. No. 28, National Prisoner Statistics, Executions 1961 (April 1962).

[27] U. S. Dep't. of Justice, Bureau of Prisons, Bull. No. 32, National Prisoner Statistics, Executions 1962 (April 1963).

[28] Royal Commission on Capital Punishment, *1949–1953 Report*, CMD. No. 8932, at 264 (1953).

claim, why many robbers carry unloaded or toy guns and why many other felons travel unarmed in plying their trades. Some support for this view is supplied by other law enforcement officials and by judges who relate—as did Supreme Court Justice Samuel S. Leibowitz at this Commission's public hearing—occasional statements of professional criminals to the effect that they never carry loaded firearms because of a fear that use thereof might result in the death penalty[29]. In the same vein, H. Richard Uviller, an assistant district attorney of New York County, testifying at the public hearings, declared:

> "I can report to you that those who have had actual contact with homicides and potential homicides do believe that there is a deterrent effect, and they don't base this on any statistical consideration at all. They base it purely on private interviews with criminals and potential criminals who have reported this to them."[30]

At the same public hearing, a dissenting note from the law enforcement group was struck by the Honorable George Edwards, the then Police Commissioner of Detroit, a former judge of the Michigan Supreme Court, who, on the basis of his experience in an abolition state, discounted the death penalty as a police safeguard, and testified:

> "There is no proof that abolition of capital punishment makes the police officer's job any more difficult nor any more hazardous."[31]

Though a minority police position, this represents the thinking of abolitionists in general, who characterize the average police officer's contrary "feeling" as nothing more than that. To this, the retentionists counter that, even though this "feeling" may be partially instinctive, the firm convictions of professional law enforcement officers daily dealing with the criminal element are meaningful and worthy of serious consideration. Beyond that, the very fact that the police, justifiably or otherwise, do "feel" more secure with the death penalty may in itself be a factor which should not be ignored. Partly in deference to such police sentiment, perhaps, the 1957 British Parliament, in separating murder into various capital and non-capital classifications, made every murder of a police officer acting in the course of his duties a capital offense.

One abolitionist response to this argument is that it is more appropriately advanced in England where sentences for most offenses are relatively short and the severity differential between the death penalty and an average prison sentence so great as to

[29] See State of N. Y. Temporary Commission on Revision of the Penal Law and Criminal Code, Public Hearing on Capital Punishment in New York, Minutes at 16–17 (1962).

[30] *Id.*, Public Hearing on Capital Punishment in New York, Minutes at 274 (1962).

[31] *Id.*, Public Hearing on Capital Punishment in New York, Minutes at 158 (1962).

discourage killing the policeman to avoid capture for criminal activity. The comparatively lengthy American prison sentences, it is argued, narrow the punishment differential to a point where a felon on the verge of apprehension prefers to risk the death penalty by shooting a police officer rather than submit to certain imprisonment of extensive duration.

Seeking to break the shackles of pure surmise and speculation in this field, Thorsten Sellin, in preparing a 1959 report for the American Law Institute's Model Penal Code project, sent questionnaires to the police departments of 593 cities having populations of more than 10,000, such cities being distributed among six abolition states and eleven death penalty states. The only usable results consisted of figures from 266 cities showing the number of policemen annually killed in each such city during a period of from 1919 to 1954. The tabulations for that period show a percentage police death rate of 1.2 for the abolition state cities, and of 1.3 for the capital punishment state cities. In view of this insignificant statistical difference, Sellin ultimately wrote, it is obviously "impossible to conclude" that by abolishing capital punishment, the six states in question "thereby made the policeman's lot more hazardous."[32]

Whether that negative conclusion has any real impact on the question appears highly debatable. Among other matters, the underlying statistics, it might be argued, are not of the most convincing sort. Although woundings as well as killings of police seem highly pertinent, adequate statistics concerning the former were not available. Only about half of the cities contacted responded to the questionnaire, and these did not include New York, Detroit, Cleveland, Boston or Minneapolis. One startling item is that the Chicago data, which were not used, purportedly showed that more policemen had been killed in Chicago than in all the other 265 cities combined (which included such metropolises as Milwaukee, Cincinnati and Buffalo).[33]

The foregoing represents but a minor phase of the Sellin statistical exploration of the deterrent value of the death penalty. On a much broader scale, he has sought factual enlightenment with respect to the whole deterrence issue by gathering and comparing masses of statistics concerning "wilful criminal homicides" occurring in selected American jurisdictions over a period of from 1920 to 1955, such figures being in terms of the homicide rate per 100,000 of population.

His principal premise is that, if the death penalty is in truth a uniquely effective deterrent to murder: (1) murder should, other things being equal, be less frequent in death penalty states than in abolition states; and (2) murder should increase upon aboli-

[32] See Sellin, *The Death Penalty*, A Report for the Model Penal Code Project of the American Law Institute, Model Penal Code 52–59 (Tent. Draft No. 9, 1959); see also State of N. Y. Temporary Commission on Revision of the Penal Law and Criminal Code, Public Hearing on Capital Punishment in New York, Minutes at 158, 170 (1962).

[33] See Sellin, *supra* note 32, at 55.

tion of the death penalty in any particular jurisdiction and decrease upon restoration thereof. He then uses his data to test those propositions.

In comparing the homicide rates of capital punishment and abolition states, Sellin is mindful that sharp contrasts may result from many factors other than differences in the murder penalty: more important than the latter are differences in social, economic, geographical and population-density conditions. Because of such variables, it would be pointless to compare, for example, New York with Montana, Texas with Rhode Island, the east with the west, the north with the south or Philadelphia, Pennsylvania, with Philadelphia, Mississippi. Accordingly the comparative analyses are largely restricted to groups of contiguous and neighboring states having populations generally similar from economic, social and cultural standpoints. Five of these groups are the following:

Group	*Abolition*
(1) The six New England States	Maine, Rhode Island
(2) Michigan, Ohio, Indiana	Michigan
(3) Minnesota, Iowa, Wisconsin	Minnesota, Wisconsin
(4) North Dakota, South Dakota, Nebraska	North Dakota, South Dakota (prior to 1939)
(5) Colorado, Kansas, Missouri	Kansas (prior to 1935)

With respect to these groups, the tables and figures used show, first, a rough similarity in the homicide rates of the states within each group; and second, no significant differences between the rates of death penalty and abolition states within each group.[34]

The second phase of the Sellin study deals with a number of states (notably Arizona, Colorado, Iowa, Kansas, Missouri, Tennessee, Oregon, South Dakota, Washington and Delaware) which once abolished the death penalty and later restored it. Comparative figures of the homicide rates for these individual jurisdictions before, during and after abolition were deemed of special interest for two reasons: first, such comparisons, involving the same state in each instance, do not entail the marring variables present in comparative studies of different populations; and second, such examination is pertinent to a retentionist contention that the very fact of restoration by these erstwhile abolition jurisdictions indicates a belief by their restoring legislatures that abolition had failed and that the death penalty is essential as a deterrent to murder.

The abolitionist answer to the latter argument, it may be noted in passing, is that restoration in these instances was doubtless the product of public outcry on the heels of a particularly shocking murder rather than of objective judgment. This position finds support in the Sellin figures, which show no material fluctua-

[34] *Id.* at 21–34

tions in the homicide rates of these restoration states during their pre-abolition, abolition and post-abolition periods.[35]

Sellin's conclusion from all the foregoing and other data and analysis is that "the death penalty, as we use it, exercises no influence on the extent or fluctuating rates of capital crimes," and that "it has failed as a deterrent."[36]

The retentionist response to this conclusion consists partly of skeptical comment upon the validity of its statistical foundation. The "homicide rates" and figures used, it is pointed out, refer to all types of homicides and doubtless include relatively few *murders*, which are the only homicides having any real bearing on the subject. The whole project proceeds upon the assumption that the percentage of murders among the reported "homicides" was and remained reasonably similar from state to state, and was and remained reasonably constant from year to year within each individual state.

Concerning the figures used to compare different periods in the histories of the ten previously mentioned states which abolished and then restored the death penalty, the main difficulty is that, in all but two instances (Kansas and South Dakota), the abolition periods involved were very brief (from two to six years).[37] From these inadequate samplings, the retentionists claim, it is impossible to draw any inference concerning the impact of abolition and restoration.

Apart from statistical frailties, it is further urged, the mass of Sellin figures and comparisons are inherently unpersuasive and do not have any realistic impact upon the deterrence issue. They do not show how many people in capital punishment states *did not* kill because of the death penalty; how many people in abolition states *did not* kill because of life imprisonment penalties; or how many murderers in abolition states *would not have* killed had the death penalty prevailed. As stated in the 1961 "Report of the Joint Legislative Committee on Capital Punishment" of Pennsylvania:

> "The plain fact is that it can never be known how many persons are actually deterred by threat of punishment, whether capital or otherwise".[38]

It is most important to observe that a failure to resolve the crucial issue of deterrence does not necessarily foreclose a sound resolution of the ultimate issue of whether capital punishment should be abolished. It simply shifts the battle to another arena and another issue, namely, whether the burden of proving great deterrent value rests upon the retentionists or the burden of proving small deterrent value rests upon the abolitionists. If it be assumed that the deterrence question is insoluble, the burden of proof issue becomes decisive, for he upon whom the burden falls can never sustain it.

[35] *Id.* at 34–38.
[36] *Id.* at 63.
[37] See Appendix A, Table 6, *infra*.
[38] Penn. Joint Legislative Committee on Capital Punishment, *Report*, at 19 (1961).

Upon this subject, the proponents of the death penalty assert that the very existence of the law bespeaks its justification and that those who would disturb the status quo should have the burden of demonstrating the need for a change. The abolitionist position is based upon the premise that capital punishment is indefensible in the absence of some strong factor of justification. Assuming that effective deterrence to murder would constitute such justification, they conclude, the burden of establishing that justification naturally rests upon those who claim its existence.[39]

C. The "moral issue"

For the vast majority of both abolitionists and retentionists, the issue of the "morality" or "immorality" of capital punishment does not exist in a philosophical vacuum but is inextricably interwoven with the deterrence question. If convinced that the death penalty were a unique and vital deterrent to murder, many abolitionists doubtless would change from disapproval to approval.[40] Whether their declared position would then be that capital punishment is thereby justified despite a basic conceptual immorality or that it is not immoral at all under such circumstances, is largely a matter of semantics.

By the same token, most retentionists, if suddenly persuaded that capital punishment were valueless or inconsequential as a deterrent and served no useful purpose in the protection of society, would probably agree that its use is "immoral."

There are, however, some in each group who rest their opinions upon absolute moral or religious principles to the exclusion of almost every other consideration. Some abolitionists take the position that the immorality of the death penalty invalidates it no matter how salutary it might be deemed from the standpoint of the protection of society. Thus, the Reverend Robert C. Moulton, a clergyman of the Protestant Episcopal Church, when asked at the Commission's public hearings whether conclusive proof of great deterrent value of the death penalty would change his abolitionist position, replied:

> "No, because I think my views are based more on theological grounds than they are . . . on the practical grounds."[41]

And, upon the same inquiry, Rabbi Abraham J. Karp answered:

> "It would not change my position because then I would be buying safety for myself at the expense of the individual, what I consider a very basic theological and moral good, namely the preservation of a human life at all costs."[42]

[39] State of N. Y. Temporary Commission on Revision of the Penal Law and Criminal Code, Public Hearing on Capital Punishment in New York, Minutes at 60–63 (1962).

[40] *Id.*, Public Hearing on Capital Punishment in New York, Minutes at 53; in Rochester, Minutes at 112 (1962).

[41] *Id.*, Public Hearing on Capital Punishment in Rochester, Minutes at 20 (1962).

[42] *Id.*, Public Hearing on Capital Punishment in Rochester, Minutes at 28 (1962).

Conversely, some retentionists maintain that full retribution for the most heinous of all crimes is an elementary, sound and desirable policy which should be effectuated for its own sake regardless of its deterrent value or any other factors.

In this area, the abolitionist group argues that rehabilitation and societal improvement are recognized as more worthy objectives of punishment than is sheer retribution; and each faction, indulging in theological analysis, seeks support from the Bible. It would serve no purpose in this report to treat, much less seek to resolve, issues of this character, which are essentially problems of personal and religious morality to be determined by each person in accordance with his own principles and conscience.

D. The possibility of error

The abolitionist contention that the finality of the death penalty precludes beyond recall rectification of subsequently discovered error in the judicial process is, in one sense, an extension of the "morality" argument. In other words, even assuming some controversy with respect to the humanitarian aspects of liquidating the guilty, it is undisputable that execution of the innocent is a moral atrocity.

This position is sporadically highlighted by publicized instances of indictment, conviction and, occasionally, execution for murder, followed by proof of innocence. Such error seems to occur chiefly in cases resting entirely or primarily upon identification testimony or upon confessions. New York can point to an apparent illustration of the former in the first degree murder conviction and death sentence of one Edward Larkman in 1926,[43] and to an apparent illustration of the latter in the recent first degree murder indictment of James Whitmore. The lesson of those mistakes, the abolitionists declare, is not diluted by the fact that in each instance proof of innocence fortunately came in time to avert execution or possible execution. Nor does the relative paucity of such discoveries negate the possibility that some persons of actual but as yet unproven innocence may have gone or may go to the electric chair. Even standing by itself, it is urged, this feature of the death penalty cries out for abolition. To this, the retentionists retort, first, that the immense publicity attending every such discovered miscarriage of justice distorts the true picture, which is undoubtedly one of infinitesimal error percentage-wise; second, that the few tragedies of this nature are insignificant in contrast to the potential tragedies averted by reason of the death penalty's deterrent effect; and third, that the situation in general represents merely one of many in which unavoidable imperfections in the operation of governmental institutions regrettably but necessarily require some sacrifice of the individual for the benefit of society as a whole.

[43] See State of N. Y., Public Papers of Herbert H. Lehman, Forty-Ninth Governor 430–433 (1934).

E. Inequality of application

Another oft expressed abolition contention is, as indicated, that, at both the judicial and executive levels, the death penalty is applied in an unequal and discriminatory fashion. The principal inequalities are said to favor:

(1) the rich over the poor;
(2) racial majorities over minorities; and
(3) women over men.

As to the first category, it is claimed that the vast majority of persons who suffer the death penalty come from the lower income echelons; and that, whether because of their ability to retain effective counsel or for other reasons, people of financial substance rarely are convicted of, and hardly ever executed for, murder.[44]

This partially conceded proposition is discounted by many as a natural consequence of the fact that most homicides, like most other crimes, are committed by the indigent, the impoverished and others of unfortunate economic and social background. If caliber of counsel is a factor, it is further asserted, the remedy lies in improvement of public defender and similar facilities—a movement which appears to be well under way throughout the nation.

The same "economic" answer, for the most part, is claimed by some to apply to the protest of racial discrimination. In short, Negroes, for example, suffer a disproportionate brunt of the death penalty not because they are Negroes but because a high percentage of Negroes are at the lowest income strata whence most criminals emanate. This answer, however, is not completely satisfactory to some. Included among the dissidents is the Pennsylvania Joint Legislative Committee on Capital Punishment which, in its 1961 report, quotes statistics tending to show that, especially in the southern states, economic factors alone cannot account for the heavy disproportion of Negro death sentences and executions.[45]

With respect to discrimination on the basis of sex, the same report recites that, "out of 3,724 persons executed in the United States during 1930–1960, only 31 were women, less than one per cent."[46] This type of "discrimination" is probably not of a sort to incur great resentment.

The broad retentionist replies to the entire "inequality" argument are (1) that it does not criticize the *principle* of capital punishment but merely points out curable operational defects; and (2) that it would be illogical to scrap a basically sound system which properly punishes many murderers simply because it does not reach all.

[44] See generally, State of N. Y. Temporary Commission on Revision of the Penal Law and Criminal Code, Public Hearing on Capital Punishment in New York, Minutes at 38–46, 77–80, 99–100, 144; in Rochester, Minutes at 9 (1962).

[45] See Penn. Joint Legislative Committee on Capital Punishment, *Report*, at 14–15 (1961).

[46] *Id.* at 15.

F. Pressures and litigation complexities involved in capital cases

There is no doubt that emotions and publicity are apt to run high in capital cases and to create pressures upon judges and jurors capable of affecting the judgment of some. There is also no doubt that, owing to their importance, capital cases take longer to litigate at the trial level and obstruct the general administration of criminal justice accordingly; that the appellate ramifications are intricate and extensive; that the pursuit of other post-judgment remedies leads to many courts, both state and federal, involving substantial segments of the judiciary; that the battle to save the "doomed" man reaches into the executive branch of the government; and, in general, that capital cases are disruptive of the orderly process of criminal justice.

Whether any particular person would deem these factors cogent reasons for abolishing the death penalty would depend to a great extent, of course, upon his appraisal of the advantages of capital punishment to society. To the abolitionist, they add fuel to an overall argument that, whatever aspect of the death penalty one examines, one finds nothing but obstruction, confusion and waste.

G. Danger of further homicide by convicted murderers released from prison

Apart from the contention of deterrence, the argument most aggressively advanced by proponents of capital punishment is that it guarantees that the convicted murderer will never repeat his crime. Life imprisonment, on the other hand, offers no such protection, for the term is a misnomer. The majority of "lifers" are paroled or commuted, usually in middle age, thus loosing upon the community a substantial group with homicidal propensities. This contention, it is noteworthy, is in apt corollary of the deterrence argument; in short, execution of murderers A, B and C provides the double protection of deterring X, Y, Z and many other potential murderers and of concomitantly guaranteeing that A, B and C themselves will never kill again.

The argument attains added significance, it is asserted, from the fact that the number of years served by "lifers" in the Anglo-American world before parole or commutation is, at least to those unfamiliar with "life sentences," surprisingly low. In England, the average period is less than ten years,[47] and in New York State, about twenty-three years.[48] The average period in the United States before parole eligibility is about fourteen years.[49]

The obvious factual question presented upon this issue is whether the convicted murderer does in fact represent a homicidal menace upon his release from prison. This subject has been statistically explored with respect to England by the Royal Commission on

[47] See Royal Commission on Capital Punishment, *1949–1953 Report*, CMD. No. 8932, at 226–227 (1953).

[48] See Appendix B, *infra*.

[49] See note 20 *supra*.

Capital Punishment;[50] with respect to the United States in general, by various state and other governmental agencies and individual researchers;[51] and with respect to New York State, by the New York State Division of Parole which, at the request of this Commission, prepared a study dealing with the parole experiences of released murderers.[52] Each of these studies centered chiefly upon the recorded criminal activity of groups of convicted murderers following their release from prison.

The English study discloses, *inter alia*, that of 112 life-sentence prisoners released over a twenty-year period terminating in 1948, only five, up to that date, had been convicted of serious crimes committed after release, one of these being a murder. The Royal Commission's conclusion from these and many other facts and statistics was "that released murderers rarely commit fresh crimes of violence."[53]

A similar conclusion concerning paroled murderers in the United States might be reached on the basis of the statistics examined. Recidivist murders were found to be rare and the rate of other crimes low. Typical are the Ohio figures: Of 169 prisoners convicted of first degree murder and paroled during the period from 1945 to 1960, two were convicted of felonies (armed robbery and felonious assault), and eight were returned to prison for technical parole violations or because of general failure of adjustment. Interestingly enough, the success ratio of the paroled murderers was much higher than that of the paroled non-murderers collectively.[54] This situation also prevailed in California[55] and Pennsylvania,[56] two other states having statistics on the subject.

The most pertinent figures resulting from the New York study show that, during a period of from 1930 through 1961, sixty-three first degree murder prisoners were released on parole; that three of these were returned as "effective delinquents;" that two were found guilty of technical parole violations; and that one was convicted of burglary.[57] Oddly, comparable statistics concerning *second degree* murder parolees disclose a substantially higher crime

[50] See Royal Commission on Capital Punishment, *1949–1953 Report*, CMD. No. 8932, at 216–217, 228 (1953).

[51] See Sellin, *supra* note 32, at 77; Wechsler, in *Symposium—Capital Punishment*, 7 N. Y. L. F. 254–255 (1961); Mass. Comm'n on Capital Punishment, *Report*, House No. 2575, at 29–32 (1958); Maryland Legislative Council Committee on Capital Punishment, *Report*, at 14–15 (1962); Oregon Legislative Interim Committee on Criminal Law, *Report*, at 46 (1961); Ohio Legislative Service Comm'n, *Staff Research Report No. 46*, Capital Punishment, at 81–82 (1961); Penn. Joint Legislative Committee on Capital Punishment, *Report*, at 13–14 (1961).

[52] See Appendix B, *infra*.

[53] See Royal Commission on Capital Punishment, *1949–1953 Report*, CMD. No. 8932, at 228 (1953).

[54] See Ohio Legislative Service Comm'n, *Staff Research Report No. 46*, Capital Punishment, at 81–82 (1961).

[55] See Sellin, *supra* note 32, at 77; Wechsler, in *Symposium—Capital Punishment*, 7 N. Y. L. F. 254–255 (1961); Mass. Comm'n on Capital Punishment, *Report*, House No. 2575, at 30–31 (1958).

[56] See Mass. Comm'n on Capital Punishment, *Report*, House No. 2575, at 31–32 (1958).

[57] See Appendix B, *infra*.

conviction rate, including two first degree murders for which the perpetrators were subsequently executed.[58]

In line with other large states previously mentioned (California, Ohio and Pennsylvania), New York's murder parolees were found to have a much lower crime conviction rate, as well as much lower "delinquency" rate, than non-murder parolees. During a period of from 1948 to 1957, 7.2 per cent of the first and second degree murder prisoners paroled were convicted of crimes after release. The figure for the non-murder group was 20.3 per cent.[59]

The foregoing figures would appear to justify the New York State Parole Division's conclusion "that those convicted of Murder First Degree and Murder Second Degree are significantly better parole risks than those convicted of all other offenses."[60]

Some dissent might be registered on the ground that, as indicated by a surprisingly low percentage of prior felony convictions, the specified group of murder parolees may have comprised a hyper-select group among the totality of New York's convicted murderers of the fifteen year period in question. In the absence of figures concerning the criminal records of the executed murderers, however, there appears to be little logic in the inference that these probably posed a greater homicidal threat than the parolees and might have been a significant danger to the community had they escaped the death penalty. As indicated by the aforementioned Thorsten Sellin, in his study, it is highly doubtful that the average jury's verdict with respect to life imprisonment **or** the death penalty is reached on the basis of the defendant's potential as a peril to society many years hence.

Presumably, some retentionists would urge that any recidivist murders following prison release, no matter how few, are too many, and that salvation of even a few innocent lives is a worthy reason for liquidating many proven murderers. Especially in view of the comparative figures with respect to murder and non-murder parolees, this practical approach might, pursued to its logical conclusion, call for wholesale execution of all convicted criminals as the most effective method of preventing killings by released prisoners.

SUMMARY

The case mainly advanced in favor of capital punishment is that it is necessary, moral and fully justifiable because it protects society from murder. This protection comes primarily from the unique deterrent effect which inheres in the death penalty and which, even if not accepted as a fact by some, must be presumed in the absence of any persuasive evidence to the contrary. Additional protection is supplied by its guarantee that executed murderers will never repeat their crimes.

[58] *Ibid.*

[59] *Ibid.*

[60] *Ibid.*

The case mainly advanced against capital punishment is that it is basically and conceptually immoral for the state to take a human life for punitive purposes; that its immoral character is accentuated by the fact that it not only takes guilty lives but also some innocent ones; that it is employed unequally and discriminatorily against lower economic classes and minority racial groups; that it is disruptive of the legal process at all judicial levels and at the executive level as well; that it cannot be justified as a unique deterrent to murder; that all available data bearing upon that subject indicate the contrary; that, at the very least, its proponents bear an unsustainable burden of proving that it has consequential deterrent value; and that whatever value it has in protecting the community against recidivist murders is insignificant in the light of the statistically established proposition that murderer parolees as a group do not represent a serious homicidal threat.

The factual data and other material contained in this report may, it is hoped, be of some assistance to the members of the Commission in determining the validity of the various foregoing contentions.

APPENDIX A

TABLE 1

UNITED STATES EXECUTIONS (1930–1962)

Year	Executions	Year	Executions
1930	155	1947	153
1931	153	1948	119
1932	140	1949	119
1933	160	1950	82
1934	168	1951	105
1935	199 (high)	1952	83
1936	195	1953	62
1937	147	1954	81
1938	190	1955	76
1939	159	1956	65
1940	124	1957	65
1941	123	1958	49
1942	147	1959	49
1943	131	1960	56
1944	120	1961	42 (low)
1945	117	1962	47
1946	131	Total	3,812

Source: U. S. Department of Justice, Bureau of Prisons, Bull. No. 32, National Prisoner Statistics, Executions 1962 (April 1963).

TABLE 2

NEW YORK EXECUTIONS (1890–1965)

Year	Executions	Year	Executions
1890	1	1928	14
1891	5	1929	4
1892	5	1930	15
1893	10	1931	12
1894	2	1932	20
1895	6	1933	18
1896	5	1934	15
1897	8	1935	16
1898	2	1936	21
1899	7	1937	14
1900	3	1938	7
1901	7	1939	15
1902	3	1940	13
1903	13	1941	15
1904	8	1942	18
1905	7	1943	12
1906	0	1944	20
1907	8	1945	0
1908	6	1946	4
1909	11	1947	12
1910	12	1948	6
1911	14	1949	14
1912	22	1950	3
1913	13	1951	8
1914	11	1952	3
1915	19	1953	7
1916	14	1954	9
1917	6	1955	7
1918	8	1956	6
1919	2	1957	4
1920	16	1958	4
1921	11	1959	4
1922	17	1960	6
1923	16	1961	2
1924	4	1962	0
1925	15	1963	2
1926	14	1964	0
1927	14	1965	0

Source: New York State Department of Correction, Division of Research.

TABLE 3

UNITED STATES, ANNUAL AVERAGE NUMBER OF EXECUTIONS (1930–1962)

Period	Annual Average Number of Executions
1930–1934	155
1935–1939	178
1940–1944	129
1945–1949	128
1950–1954	83
1955–1959	61
1960–1962 (3 years)	49

Source: Computed from data obtained from U. S. Department of Justice, Bureau of Prisons, Bull. No. 32, National Prisoner Statistics, Executions 1962 (April 1963).

TABLE 4

NEW YORK, ANNUAL AVERAGE NUMBER OF EXECUTIONS (1930–1962)

Period	Annual Average Number of Executions
1930–1934	16
1935–1939	15
1940–1944	16
1945–1949	7
1950–1954	6
1955–1959	5
1960–1962 (3 years)	3

Source: Computed from data supplied by New York State Department of Correction, Division of Research.

TABLE 5

NEW YORK (1956–1961)

Homicides (murder and non-negligent manslaughter) reported	3,145
Indictments for murder in the first and second degrees	1,317
Indictments for non-negligent manslaughter	896
Convictions of murder in the first degree	92
Convictions of murder in the second degree	187
Convictions of non-negligent manslaughter	1,001
Persons sentenced to death	49
Death sentences commuted	5
Executions	26

Source: Computed from data supplied by New York State Department of Correction, Division of Research.

TABLE 6

PRIOR ABOLITION STATES

State	Date of Abolition	Date of Restoration
Iowa	1872	1878
Kansas	1887	1935
Colorado	1897	1901
Washington	1913	1919
Oregon	1915	1920
South Dakota	1915	1939
Tennessee	1915 (for all crimes except rape)	1919
Arizona	1916 (for all crimes except treason)	1918
Missouri	1917	1919
Delaware	1958	1961

APPENDIX B

The following study has been prepared by the New York State Division of Parole pursuant to this Commission's request, and is set forth verbatim with such Parole Division's permission:

PAROLE EXPERIENCES OF MURDERERS

Introduction

Many statements have been made by those in the correctional field to the effect that paroled murderers are among the safest parole risks. A recent research report of the state of Ohio[1] states among other things: "the 169 first-degree life-sentence murderers paroled since 1945 have compiled the highest parole success rate of any offense group. . . ." It has been for years the observation of practitioners in the New York State Division of Parole that paroled murderers are relatively safe parole risks and surveys of limited scope have corroborated this observation. The purpose of this study is to make an extensive survey of paroled murderers in New York State and to compare their delinquency rates with paroled non-murderers.

Because most of those convicted of murder first degree were originally sentenced to be executed whereas those convicted of murder second degree were not, the statistical data and tables will be presented separately in the Appendix for each group. One may, thereby, learn what happened to those individuals whose lives were spared by the commutations of sentence of the Governors and who later were released on parole to the community.

Murder First Degree

From the inception of the Division of Parole in the Executive Department in July, 1930 until December 31, 1961 a total of 63 individuals convicted of murder first degree have been released from New York State correctional institutions to original parole supervision. Forty-five were released to parole supervision as a result of commutation action by Governors of New York State. Eight were released subsequent to September, 1960 by action of the Parole Board under the provisions of chapter 292 of the Laws of 1960. Under the provisions of chapter 292 a person serving a term of natural life may be released on parole as though the sentence is one of 40 years minimum and natural life maximum. Prior to the enactment of chapter 292 only the action of the Governor could provide for the release on parole of persons

[1] Capital Punishment. Staff Research Report No. 46. Ohio Legislative Service Commission, January, 1961.

convicted of murder first degree. Of the 63 persons convicted of murder first degree and released to parole supervision, 61 had been originally sentenced by the courts to be executed but the executions had been commuted to natural life sentences by action of the Governors.

Age

The age distribution at the time of release on parole of the 63 persons convicted of murder first degree is presented in Table 1 in the Appendix. The mean age of the 63 persons at the time of their release was 51 years.

The educational attainment prior to reception in prison of the 63 persons is given in Table 2. Five of the 63 were reported to have completed high school and of these, three attended college and one was a graduate of a University in Japan. There were 30 of the 63 who were reported to have not completed the eighth grade of elementary school.

Marital Status

The marital status of the 63 individuals is presented in Table 3. There were 32, or over half of the group, who were single, i.e., never married. Of the 26 who had been married, five were separated and six were divorced from their wives at the time of their release from prison.

Color and Sex

As revealed in Table 4, 50 of the 63 persons were white males; nine were Negro males; one was a white female; one was a Negro female; one was a Chinese male; and one was a Japanese male.

Previous Felony Convictions

There were, as revealed in Table 5, 56 of the 63 persons who had no previous felony conviction, six who had one felony conviction and one who had three felony convictions prior to the murder conviction.

Time Spent in Institution

Table 6 presents data on the number of years spent in New York State correctional institutions by the 63 paroled murderers before their release on parole. None of them spent less than nine years; seven spent more than 30 years; and the mean number of years spent by the 63 persons in custody before release on parole was 23 years.

Year of Release

In Table 7 may be found the year of release to parole supervision of the 63 paroled murderers. The greatest number of releases, viz., eight, occurred in 1961 when two were released by action of the Governor and six were released by action of the Board of Parole.

Effective Delinquents

Of the 63 paroled murderers three became effective delinquents in the period from date of release to December 31, 1962. By effective delinquent is meant one who was declared delinquent by the Parole Board and whose delinquency was not cancelled by the Parole Board. One was returned to prison with a new sentence after spending one and one-half years on parole and after being convicted of burglary third degree. Another was returned to prison by the Parole Board as a technical parole violator after spending 16 months on parole and as of December 31, 1962 was still in prison. The third delinquent was returned to prison by the Parole Board as a technical parole violator after spending two years on parole, was later reparoled by the Parole Board and as of December 31, 1962 was under parole supervision.

Time Spent on Parole

Table 8 gives the period of completed parole of the 60 convicted murderers who did not become effective delinquents on parole. Of the 47 still on parole as of December 31, 1962 there were 12 who had been deported to foreign countries and who were not under active parole supervision. The remaining 35 were under active supervision in the United States. There were nine who had died while on parole and four who had been discharged from parole supervision by the Parole Board.

Murder Second Degree

From January, 1945 to December 31, 1961 a total of 514 individuals convicted of murder second degree have been released from New York State correctional institutions to original parole supervision by the Board of Parole. Those convicted of murder second degree and released prior to 1945 were not included in this survey because statistical data on them were not readily available.

Age

The age distribution at the time of release on parole of the 514 persons convicted of murder second degree is presented in Table 1 of the Appendix. There were 18 under 26 years of age and 22 over 64 years of age at the time of their release on parole. The mean age of the 514 persons at the time of their release was 46 years.

Education

The educational attainment prior to reception in prison of the 514 persons is given in Table II. Fourteen, or 2.8 per cent, of the 514 were reported to have completed high school. There were 295, or 57.3 per cent of the 514, who were reported to have not completed the eighth grade of elementary school.

Marital Status

The marital status of the 514 individuals is presented in Table III. There were 237, or 46.2 per cent of the 514, who were single,

i.e., never married. Of the 242 who had been married, 69 were separated and 33 were divorced from their wives at the time of their release on parole.

Color and Sex

As revealed in Table IV, 343, or 66.7 per cent, of the 514 persons were white males; 148, or 28.2 per cent, were Negro males; 11 were white females; seven were Negro females; and five were males other than white or Negro.

Previous Felony Convictions

There were as revealed in Table V, 417, or 81.1 per cent, of the 514 murderers who had no previous felony conviction; 77, or 15.0 per cent, who had one previous felony conviction; and 20 who had two or three felony convictions prior to the murder conviction.

Time Spent in Institution

Table VI presents data on the number of years spent in New York State correctional institutions by the 514 paroled murderers before their release on parole. Five, or 1.0 per cent of the 514 persons, spent two years and two, or 0.4 per cent, spent 31 years or more before release on parole. There were 197, or 38.2 per cent, of the 514 persons who spent 13 to 14 years in the institution before release on parole. The mean number of years spent in the institution before release on original parole by the 514 murderers was 15 years.

Year of Release

In Table VII may be found the year of release to original parole supervision of the 514 paroled murderers. The greatest number of releases, viz., 49, occurred in 1953 and the smallest number, viz., 16, occurred in 1956.

Effective Delinquents

As revealed in Table VIII there was a total of 115, or 22.4 per cent, of the 514 paroled murderers who became effective delinquents. Of the 115, there were 17 who were convicted of felonies, 33 who were convicted of misdemeanors or lesser offenses and 65 who were technical parole violators. Of the 17 convicted of felonies, two, or 0.4 per cent of the 514, were convicted of murder first degree. One of the two convicted murderers had been paroled after spending 17 years in prison. The other had been paroled after spending 13 years in prison. One committed two murders within one month of his release on parole and he was executed in Sing Sing Prison in March of 1963. The other was on parole for a little over a year when he was involved in the murder which eventually resulted in his conviction of murder first degree and he was executed in Sing Sing Prison in July 1955.

Time Spent on Parole

Table IX presents data on the length of parole supervision as of December 31, 1962 of 399 paroled murderers who did not become effective delinquents while under parole supervision. As of December 31, 1962 there were 164 individuals still on parole, 27 of these being in foreign countries and not under active parole supervision. There were 81 who had died and an additional 154 who had been discharged from parole supervision either by the Parole Board or for other reasons.

Dispositions of Effective Delinquents

Table X gives the disposition made of the 115 paroled murderers who became effective delinquents on parole. Fifty of them were convicted of felonies, misdemeanors and lesser offenses; 42 of these having been returned to institutions in New York State and eight having been imprisoned in other states or jurisdictions. Of the 53 paroled murderers who were returned to institutions in New York State by the Parole Board as technical parole violators there were 15 still in the institution as of December 31, 1962; eight who had been discharged from the institution by death or for other reason; 20 who were reparoled and were still on parole as of December 31, 1962; and 10 who were reparoled and later discharged from parole by death or other reason. There were an additional 12 technical parole violators who had been declared delinquent because of absconding and as of December 31, 1962 these 12 were still in absconder status and unapprehended.

Comparison of Delinquency Rates

Delinquency rates of paroled murderers and paroled non-murderers will be compared on the basis of two criteria. One criterion will be the over-all delinquency rate which is based on all the effective delinquencies which occur during a calender year. The other criterion will be the new convictions rate which is based on the total number of convictions of felonies, misdemeanors and lesser offenses which occur from date of release to the end of the observation period. The procedures, populations, periods of observation, etc. used to arrive at the two rates used for comparison purposes are explained in the two following sections.

Over-all Delinquency Rates

The parolee population used for comparing the over-all parole delinquency rates of those convicted of murder first degree and murder second degree and of those convicted of all other offenses was all males released from New York State correctional institutions to original parole supervision during 1958 and 1959 exclusive of those released to warrants or to deportation. Altogether in 1958 and 1959 there were 7,626 males released to original parole but 61 of these were released to deportation and 195 were released to warrants. Exclusive of the 256 released to deportation and

warrants there were 7,370 males released on original parole and these 7,370 are the subjects of this study on over-all delinquency rates.

Parolees released to deportation were not included in the population to be studied because there is little chance of parolees living in foreign countries being declared delinquent. Parolees released to warrants were not included because these individuals are kept in custody in other jurisdictions for varying periods of time and during this time there is little chance of their violating parole conditions.

Parolees released on reparole in 1958 and 1959 were not included in this study because they comprise a different population of parolees, i.e., all of those reparoled had previously been released on original parole but later were returned to correctional institutions as parole violators. Including reparoled individuals would have impaired the homogeneity of the original parole population since none of this population had violated parole or their present sentence and all of them were paroled on their present sentence for the first time.

The period of observation for delinquent parolee behavior for those released in 1958 were the years 1958, 1959 and 1960 and for those released in 1959 were the years 1959, 1960 and 1961. The length of the observation period, which averages 30 months for the subjects of this study, is considered an adequate one since the greater majority of parolees who are declared delinquent violate within 30 months after the date of their release. For example, of the 2,420 parolees declared delinquent in 1960, 2,252, or 93 per cent, were declared delinquent within 30 months of the date they were released on parole.

For purposes of this study delinquent parolee behavior is equated with the presence of an effective delinquency, i.e., any delinquency declared during a calendar year which is not cancelled during the same year. The greater majority of effective delinquencies which may be divided into those declared delinquent because of technical violations and those declared delinquent because of new arrests, result in return to the institution for parole violation. It may be noted that almost 90 per cent of the parole violators returned to institutions in New York State are returned at the discretion of the Parole Board and the remainder are returned by the courts with new commitments.

During 1958 and 1959 there were eight males released to parole supervision who had been convicted of murder first degree and 57 males who had been convicted of murder second degree. During the same two year period 7,305 males were released to parole supervision who had been convicted of all offenses other than murder. During the three year observation periods nine, or 13.8 per cent, of the 65 murderers became delinquent whereas 2,996, or 41.0 per cent, of the 7,305 non-murderers became delinquent. The following table presents a breakdown of the effective delinquencies of the 65 males convicted of murder first degree and murder second degree and of the 7,305 males convicted of all other crimes who were released to

original parole supervision during 1958 and 1959. As explained under procedure the period of observation for effective delinquencies was 1958, 1959 and 1960 for the 1958 releases and 1959, 1960 and 1961 for the 1959 releases.

Crime of Conviction	Released	Effective Delinquencies: Technical Violations No.	%	New Arrests No.	%	Total No.	%
Murder First Degree and Murder Second Degree..	65	5	7.7	4	6.1	9	13.8
All other Offenses.....	7,305	1,667	22.8	1,329	18.2	2,996	41.0

As may be noted the total delinquency rate of the non-murderers was almost three times as great as that of the murderers and approximately the same ratio applies to delinquencies because of new arrests and to technical violations. The chi square of the difference between the number of effective delinquencies among those convicted of murder and the number of effective delinquencies among those convicted of all other offenses was found to be a very significant one, or stated simply, one most unlikely to occur through chance factors.

New Convictions Rate

Starting with the parole releases of 1934 the Division of Parole instituted the program of following through, for at least five calendar years the parole experiences of the original releases to parole supervision of each year. During the 10-year period 1948 through 1957 a total of 28,788 individuals convicted of crimes other than murder were released to original parole supervision and these individuals were observed for periods of time which varied from a few months up to five years. Inasmuch as the dates of releases were scattered through the calendar year, it may be assumed that by the end of the fifth calendar year following release the group still under supervision as of the end of the fifth calendar year had been under observation for a mean period of approximately four and one-half years.

During the same 10-year period 1948 through 1957 a total of 336 individuals convicted of murder first degree and murder second degree were released to original parole supervision and these individuals were likewise observed while under parole supervision for five calendar years. The following table presents the percentages of those convicted of felonies and misdemeanors or lesser offenses among the murderers and non-murderers during the five calendar year observation periods.

Crime of Conviction	Released	Per Cent of New Convictions: Felony	Misdemeanor or Lesser Offense	Total
Murder First Degree and Murder Second Degree.....	336	2.4%	4.8%	7.2%
All Other Offenses.....	28,788	8.2%	12.1%	20.3%

As may be observed in the above table there were 7.2 per cent of the 336 murderers who were convicted of felonies, misdemeanors or lesser offenses during the five year calendar period following their release to parole whereas there were 20.3 per cent of the 28,788 non-murderers who were convicted of similar crimes during the same observation periods. In brief, as the above data reveal, the paroled non-murderers were convicted while under parole supervision of almost three times as many offenses as were the murderers. The chi square of the difference between the number of those convicted of new crimes among the murderers and the number of those convicted of new crimes among all non-murderers was found to be statistically a very significant one.

Conclusion

Based on the findings presented above it may be stated that both from the viewpoint of the over-all delinquency rate and from the viewpoint of the new convictions rate those convicted of murder are better parole risks than those convicted of all other offenses.

Discussion of Findings

As the findings reveal, the 63 paroled individuals who had been convicted of murder first degree made exceptionally good parole risks. None of them were involved in seriously assaultive behavior while under parole supervision and as of the end of 1962 just one was returned to prison after conviction of a new felony. It should, of course, be noted that individuals convicted of murder first degree, whose sentences were commuted and who are eventually paroled, are a select group. For example, during the period 1930 through 1961 when the 63 individuals convicted of murder first degree were paroled, there were 327 individuals convicted of murder first degree who were executed in New York State. Also, as of June 30, 1956, there were in New York State prisons 176 individuals serving life sentences who had been convicted of murder first degree and who had not been released on parole. It is, therefore, obvious that the 63 individuals whose parole experiences were observed in this study were a select sample of a group comprised of all individuals convicted of murder first degree. Keeping in mind that individuals convicted of murder first degree and later paroled are a select group, it is, nonetheless, true that such individuals in New York State have proven themselves to be exceptionally good parole risks.

Individuals convicted of murder second degree also make good parole risks but, apparently, not as good risks as those convicted of murder first degree. One of the reasons for this is probably due to the fact that they are not as select a group. For example, all individuals convicted of murder second degree are, eventually, eligible for parole whereas those convicted of murder first degree and sentenced to be executed are not eligible to be paroled unless their sentences have been commuted by the Governor. There are

other possible reasons such as greater age and less extensive previous criminal record which may, partially, explain the better parole experiences of those convicted of murder first degree but that shall not be gone into here.

Although the 514 individuals convicted of murder second degree had relatively good parole records, it is a fact that two of them committed crimes while on parole which resulted in their being convicted of murder first degree and later executed. One was involved in an armed hold-up and while he did not actually do the killing he was convicted of murder first degree. The other killed two drinking companions shortly after his release on parole.

The fact that paroled non-murderers were found to be approximately three times as delinquent while under parole supervision as paroled murderers leaves no doubt that paroled murderers are better parole risks than the non-murderers. The question now arises as to why murderers are better parole risks. It is not one of the objectives of this study to determine the reasons why murderers are better parole risks than non-murderers but some observations will be offered as possible explanations as to why they make better parole risks.

It was found in a previous study[2] that delinquency rates of parolees are at their highest in the age groups under 41 years of age and as the ages of the groups increase, the delinquency rates, more or less, regularly decrease. The median age of all parolees released to original parole supervision in 1958 and 1959 was 26 years of age. The mean age of the 577 paroled murderers observed in this study was 46 years of age. Because of this age factor alone one would expect that the paroled murderers as a group would make better parole risks than the younger non-murderers. It was also found in the above cited study[2] that the lowest delinquency rate was maintained by those who before their parole spent the longest time in the institution. The median period of institutional treatment of all parolees released to original supervision in 1958 and 1959 was 28 months whereas the mean period of institutional treatment of the paroled murderers was 16 years. Although it is most probable that this factor of length of institutional treatment is closely correlated to the age factor, one could, nonetheless, state that on the basis of their greater length of institutional confinement paroled murderers would be expected to do better on parole than all other offenders.

Regardless of what the reasons are as to why paroled murderers make better parole risks than non-murderers it has been demonstrated in this study that, using both the over-all delinquency rate and the new convictions rate as the criteria, paroled murderers in New York State commit fewer delinquencies on parole than other offenders to a degree that it is statistically very significant.

[2]Stanton, J. Some Factors Associated with Delinquent Parolee Behavior. Thirty-Second Annual Report of the Division of Parole. Legislative Document 1962, No. 112.

Summary

During period July, 1930 through December, 1961 a total of 63 persons convicted of murder first degree were released to parole supervision. As of the end of 1962 one of the 63 had been convicted of burglary third degree and two had become technical parole violators but were not involved in any new crime.

During the period 1945 through 1961, a total of 514 persons convicted of murder second degree were released to parole supervision. As of the end of 1962, two of the 514 had been convicted of murder first degree and were executed; 15 had been convicted of other felonious offenses; 33 had been convicted of misdemeanors or lesser offenses; and 65 had become technical parole violators.

In order to determine whether those convicted of murder were better or poorer parole risks than those convicted of all other offenses, the delinquency rates of large groups of non-murderers were compared with those of the murderers. Using the criterion of the over-all delinquency rate the non-murderers were found to have committed about three times as many delinquencies on parole as did the murderers, and the difference between the delinquency rates of the two groups was found to be statistically very significant. Using the criterion of new convictions while under parole supervision the non-murderers were found to have been convicted of almost three times as many crimes as the murderers and here too the difference between the conviction rates of the two groups was found to be statistically very significant. On the basis of the findings enumerated the conclusion was drawn that those convicted of murder first degree and murder second degree are significantly better parole risks than those convicted of all other offenses.

April 15, 1963

JOHN M. STANTON, Ph.D.,
Director of Research

TABLE 1

AGE DISTRIBUTION AT TIME OF RELEASE ON ORIGINAL PAROLE OF 63 PERSONS CONVICTED OF MURDER 1ST DEGREE AND RELEASED TO ORIGINAL PAROLE SUPERVISION DURING PERIOD JULY, 1930 TO DECEMBER, 1961

Ages	Number
From 31 to 35 Years	4
From 36 to 40 Years	8
From 41 to 45 Years	9
From 46 to 50 Years	12
From 51 to 55 Years	10
From 56 to 60 Years	7
From 61 to 65 Years	7
From 66 to 70 Years	3
Over 70 Years	3
Total	63
Mean age	51 years

TABLE 2

EDUCATION BASED ON THEIR STATEMENTS OF 63 PERSONS CONVICTED OF MURDER 1ST DEGREE AND RELEASED TO ORIGINAL PAROLE SUPERVISION DURING PERIOD JULY, 1930 TO DECEMBER, 1961

Grade Attained	Number
Never attended school	4
Under fifth grade	8
Fifth grade	6
Sixth grade	4
Seventh grade	8
Eighth grade	15
Part high school	11
Completed high school	1
Part college	3
Completed college	1
Not given	2
Total	63

TABLE 3

MARITAL STATUS OF 63 PERSONS CONVICTED OF MURDER 1ST DEGREE AND RELEASED TO ORIGINAL PAROLE SUPERVISION DURING PERIOD JULY, 1930 TO DECEMBER, 1961

Status	Number
Single	32
Married	9
Separated	5
Widowed	6
Divorced	6
Living in common-law relationship	4
Not given	1
Total	63

TABLE 4

COLOR AND SEX OF 63 PERSONS CONVICTED OF MURDER 1ST DEGREE AND RELEASED TO ORIGINAL PAROLE SUPERVISION DURING PERIOD JULY, 1930 TO DECEMBER, 1961

Color and Sex	Number
White male	50
Negro male	9
White female	1
Negro female	1
Chinese male	1
Japanese male	1
Total	63

TABLE 5

PRIOR FELONY CONVICTION RECORD OF 63 PERSONS CONVICTED OF MURDER 1ST DEGREE AND RELEASED TO ORIGINAL PAROLE SUPERVISION DURING PERIOD JULY, 1930 TO DECEMBER, 1961

Prior Felony Convictions	Number
None	56
One	6
Three	1
Total	63

TABLE 6

LENGTH OF INSTITUTIONAL TREATMENT OF 63 PERSONS CONVICTED OF MURDER 1ST DEGREE AND RELEASED TO ORIGINAL PAROLE SUPERVISION DURING PERIOD JULY, 1930 TO DECEMBER, 1961

Length of Treatment	Number
9 years to 10 years	2
11 years to 12 years	1
13 years to 14 years	4
15 years to 16 years	7
17 years to 18 years	5
19 years to 20 years	6
21 years to 22 years	6
23 years to 24 years	8
25 years to 26 years	6
27 years to 28 years	6
29 years to 30 years	5
31 years and over	7
Total	63
Mean number of years of treatment	23

TABLE 7

YEAR OF RELEASE ON PAROLE OF 63 PERSONS CONVICTED OF MURDER 1ST DEGREE AND RELEASED TO ORIGINAL PAROLE SUPERVISION DURING PERIOD JULY, 1930 TO DECEMBER, 1961

Year of Release	Number	Year of Release	Number
1930	1	1948	1
1931	1	1949	3
1932	2	1950	1
1933	2	1951	4
1935	1	1952	3
1936	1	1953	1
1937	1	1954	2
1938	1	1956	4
1942	3	1957	3
1943	1	1958	5
1944	2	1959	3
1945	1	1960	3
1946	4	1961	8
1947	1	Total	63

TABLE 8

PERIOD OF COMPLETED PAROLE OF 60 PERSONS CONVICTED OF MURDER 1ST DEGREE RELEASED TO ORIGINAL PAROLE SUPERVISION DURING PERIOD JULY, 1930 TO DECEMBER, 1961 AND NOT SUBSEQUENTLY BECOMING EFFECTIVE DELINQUENTS

Period of Completed Parole	Still on Parole	Discharged from Parole By Death	Discharged from Parole Other Reasons
Less than 6 months	....	4	....
6 months but less than 1 year	....	1	....
1 year but less than 2 years	8	....	....
2 years but less than 3 years	3	1	....
3 years but less than 4 years	2	1	....
4 years but less than 5 years	2	....	....
5 years but less than 10 years	8	1	1
10 years but less than 20 years	15	1	22
20 years but less than 30 years	7	....	1
30 years and over	2	....	....
Total	47*	9	4

* Twelve of these had been deported to foreign countries and were not under active parole supervision. In addition to 47 still on parole there was one parolee who had been returned to prison as a technical parole violator, was later reparoled and was under parole supervision as of 12/31/62.

TABLE I

AGE DISTRIBUTION AT TIME OF RELEASE ON PAROLE OF 514 PERSONS CONVICTED OF MURDER 2ND DEGREE AND RELEASED TO PAROLE SUPERVISION DURING PERIOD JANUARY, 1945 TO DECEMBER, 1961

Ages	Number	Per Cent
20 years and under	7	1.4
From 21 to 25 years	11	2.1
From 26 to 30 years	17	3.3
From 31 to 35 years	56	10.9
From 36 to 40 years	91	17.7
From 41 to 45 years	89	17.3
From 46 to 50 years	79	15.4
From 51 to 55 years	68	13.2
From 56 to 60 years	45	8.8
From 61 to 65 years	29	5.6
From 66 to 70 years	16	3.1
Over 70 years	6	1.2
Total	514	100.0
Mean age in years	46	

TABLE II

EDUCATION BASED ON THEIR STATEMENTS OF 514 PERSONS CONVICTED OF MURDER 2ND DEGREE AND RELEASED TO PAROLE SUPERVISION DURING PERIOD JANUARY, 1945 TO DECEMBER, 1961

Grade Attained	Number	Per Cent
Never attended school	31	6.0
Ungraded	7	1.4
Under fifth grade	88	17.1
Fifth grade	28	5.4
Sixth grade	65	12.6
Seventh grade	76	14.8
Eighth grade	89	17.3
Part high school	108	21.0
Completed high school	9	1.8
Part college	4	0.8
Completed college	1	0.2
Not given	8	1.6
Total	514	100.0

TABLE III

MARITAL STATUS OF 514 PERSONS CONVICTED OF MURDER 2ND DEGREE AND RELEASED TO PAROLE SUPERVISION DURING PERIOD JANUARY, 1945 TO DECEMBER, 1961

Status	Number	Per Cent
Single	237	46.2
Married	84	16.3
Separated	69	13.4
Widowed	56	10.9
Divorced	33	6.4
Living in common-law relationship	35	6.8
Total	514	100.0

TABLE IV

COLOR AND SEX OF 514 PERSONS CONVICTED OF MURDER 2ND DEGREE AND RELEASED TO PAROLE SUPERVISION DURING PERIOD JANUARY, 1945 TO DECEMBER, 1961

Color and Sex	Number	Per Cent
White male	343	66.7
Negro male	148	28.8
White female	11	2.1
Negro female	7	1.4
Other male	5	1.0
Total	514	100.0

TABLE V

PRIOR FELONY CONVICTION RECORD OF 514 PERSONS CONVICTED OF MURDER 2ND DEGREE AND RELEASED TO PAROLE SUPERVISION DURING PERIOD JANUARY, 1945 TO DECEMBER, 1961

Prior Felony Convictions	Number	Per Cent
None	417	81.1
One	77	15.0
Two	15	2.9
Three	5	1.0
Total	514	100.0

TABLE VI

LENGTH OF INSTITUTIONAL TREATMENT OF 514 PERSONS CONVICTED OF MURDER 2ND DEGREE AND RELEASED TO PAROLE SUPERVISION DURING PERIOD JANUARY, 1945 TO DECEMBER, 1961

Length of Treatment	Number	Per Cent
2 years	5	1.0
3 years to 4 years	7	1.4
5 years to 6 years	6	1.2
7 years to 8 years	6	1.2
9 years to 10 years	4	0.8
11 years to 12 years	57	11.1
13 years to 14 years	197	38.2
15 years to 16 years	86	16.7
17 years to 18 years	40	7.8
19 years to 20 years	50	9.7
21 years to 22 years	19	3.7
23 years to 24 years	12	2.3
25 years to 26 years	15	2.9
27 years to 28 years	7	1.4
29 years to 30 years	1	0.2
31 years and over	2	0.4
Total	514	100.0
Mean number of Years of Treatment	15	

TABLE VII

YEAR OF RELEASE ON PAROLE OF 514 PERSONS CONVICTED OF MURDER 2ND DEGREE AND RELEASED TO ORIGINAL PAROLE SUPERVISION DURING PERIOD JANUARY, 1945 TO DECEMBER, 1961

Year of Release	Number	Year of Release	Number
1945	25	1954	32
1946	26	1955	33
1947	33	1956	16
1948	25	1957	20
1949	34	1958	25
1950	31	1959	36
1951	34	1960	27
1952	40	1961	28
1953	49		
		Total	514

TABLE VIII

PERIOD OF COMPLETED PAROLE OF 115 PERSONS CONVICTED OF MURDER 2ND DEGREE, RELEASED TO PAROLE SUPERVISION DURING PERIOD JANUARY, 1945 TO DECEMBER, 1961 AND SUBSEQUENTLY BECOMING EFFECTIVE DELINQUENTS

(Period of Observation for Effective Delinquency Extends from Date of Release to December, 1962)

Period of Completed Parole	Felony Conviction Homicide	Felony Conviction Other	Effective Delinquents Misdemeanor or Lesser Offense Convictions	Effective Delinquents Technical Violations	Total
Less than 6 months	1	1	5	16	23
6 months but less than 1 year	....	2	....	6	8
1 year but less than 2 years	1	2	10	11	24
2 years but less than 3 years	....	2	8	7	17
3 years but less than 4 years	....	2	2	8	12
4 years but less than 5 years	....	1	....	5	6
5 years but less than 10 years	....	5	8	9	22
10 years but less than 20 years	....	....	....	3	3
20 years but less than 30 years	....	....	....	....	....
Total	2	15	33	65	115

TABLE IX

PERIOD OF COMPLETED PAROLE OF 399 PERSONS CONVICTED OF MURDER 2ND DEGREE, RELEASED TO PAROLE SUPERVISION DURING PERIOD JANUARY, 1945 TO DECEMBER, 1961 AND NOT SUBSEQUENTLY BECOMING EFFECTIVE DELINQUENTS

(Period of Observation for Effective Delinquency Extends From Date of Release to December, 1962)

Period of Completed Parole	Still on Parole Reported	Still on Parole Active	Discharged from Parole By Death	Discharged from Parole Other Reason
Less than 6 months	....	....	6	2
6 months but less than 1 year	....	....	2	3
1 year but less than 2 years	2	23	12	1
2 years but less than 3 years	....	19	13	5
3 years but less than 4 years	3	28	6	3
4 years but less than 5 years	....	12	5	1
5 years but less than 10 years	12	31	26	69
10 years but less than 20 years	10	24	11	70
20 years but less than 30 years	....	....	....	....
Total	27	137	81	154

TABLE X

DISPOSITIONS OF 115 PERSONS CONVICTED OF MURDER 2ND DEGREE RELEASED TO PAROLE SUPERVISION DURING PERIOD JANUARY, 1945 TO DECEMBER, 1961 AND SUBSEQUENTLY BECOMING EFFECTIVE DELINQUENTS

1. Convicted of Felony, misdemeanor or lesser offense.	
a) Returned to institution in New York State	42
b) Imprisoned in another state or jurisdiction	8
2. Returned to institution in New York State by Parole Board as a technical parole violator.	
a) Still in institution	15
b) Discharged by death or other reason from institution	8
c) Reparoled and still on parole	20
d) Reparoled and discharged from parole by death or other reason	10
3. Declared delinquent because of absconding, unapprehended and disposition still pending	12
Total	115

TABLE XI

EFFECTIVE DELINQUENCIES OF 65 MALES CONVICTED OF MURDER 1ST DEGREE AND MURDER 2ND DEGREE AND OF 7,305 MALES CONVICTED OF ALL OTHER CRIMES WHO WERE RELEASED ON ORIGINAL PAROLE DURING 1958 AND 1959

(Period of Observation for Effective Delinquencies was 1958, 1959 and 1960 for 1958 Releases and 1959, 1960 and 1961 for 1959 Releases)

Offenses	Released	Technical Violations No.	Technical Violations %	Declared Delinquent New Arrests No.	New Arrests %	Total No.	Total %
Murder I	8	1	12.5	....	....	1	12.5
Murder II	57	4	7.0	4	7.0	8	14.0
Murder I and II	65	5	7.7	4	6.1	9	13.8
All other Offenses	7,305	1,667	22.8	1,329	18.2	2,996	41.0
Total	7,370	1,672	22.7	1,333	18.1	3,005	40.8